

**BEFORE the HEARING EXAMINER of the  
CITY of SULTAN**

**RECOMMENDATION**

**FILE NUMBERS:** RAFPPUD05-006 and SMP06-001

**APPLICANT:** Dan Ramirez

**TYPE OF CASE:** Consolidated: 1) Preliminary Planned Unit Development subdivision (*Twin Rivers Ranch Estates*); and 2) Shoreline Management Act Substantial Development Permit for the subdivision

**STAFF RECOMMENDATION:** Approve subject to conditions

**SUMMARY OF RECOMMENDATION:** DENY PUD application; RETURN preliminary subdivision application for revision; and DENY Substantial Development Permit WITHOUT PREJUDICE

**DATE OF RECOMMENDATION:** December 27, 2006

**INTRODUCTION**

Dan Ramirez (Ramirez), P.O. Box 623, Sultan, Washington 98294, seeks preliminary approval for *Twin Rivers Ranch Estates*, a 22 lot Planned Unit Development (PUD) subdivision for single-family residential development located along the Skykomish River. Ramirez filed a preliminary PUD subdivision application on October 7, 2005.<sup>1</sup> (Exhibit 1.1<sup>2</sup>) Ramirez filed a revised preliminary PUD subdivision application on September 29, 2006. (Exhibit 29) DCD deemed the revised preliminary PUD subdivision application complete on October 20, 2006. (Exhibit 30)

Ramirez filed a Shoreline Management Act of 1971 (SMA) Substantial Development Permit (SDP) application on September 14, 2006. (Exhibit 25) The Sultan Department of Community Development (DCD) deemed the SDP application complete on September 15, 2006. (Exhibit 26)

<sup>1</sup> See Finding 1, below, for a brief history of this application.

<sup>2</sup> Exhibit citations are provided for the reader's benefit and indicate: 1) The source of a quote or specific fact; and/or 2) The major document(s) upon which a stated fact is based. While the Examiner considers all relevant documents in the record, typically only major documents are cited. The Examiner's Recommendation is based upon all documents in the record.

The subject property is located at 210 Foundry Road, between the Burlington Northern Santa Fe (BNSF) tracks and the Skykomish River.

The Sultan Hearing Examiner (Examiner) viewed the subject property on May 18, 2006.

The Examiner held an open record hearing on November 30, 2006. DCD and Ramirez gave notice of the hearing as required by the Sultan Municipal Code (SMC). (Exhibit 40) The Examiner held the hearing record open through December 14, 2006, for submittal by DCD of specified additional information, subsequently catalogued as Exhibit 57.

The action taken herein and the requirements, limitations and/or conditions recommended for imposition by this recommendation are, to the best of the Examiner's knowledge or belief, only such as are lawful and within the authority of the Examiner to take and recommend pursuant to applicable law and policy.

### ISSUES

Does the revised application meet applicable criteria for preliminary subdivision, preliminary PUD, and SDP approval? Does the application meet concurrency requirements of Chapter 16.108 SMC?

### FINDINGS OF FACT

1. The *Twin Rivers Ranch Estates* preliminary PUD subdivision application was originally filed on October 7, 2005, under file number FPPUD05-006.<sup>3</sup> (Exhibit 1.1 *et seq.*) The Examiner held an open record hearing on that application on May 18, 2006. On June 19, 2006, the Examiner issued a

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<sup>3</sup> The relationship between the original application and the Council's former PUD moratorium is explained in detail in Exhibit 21 at Footnote 2.

In Exhibit 29.4, a letter dated August 9, 2006, the Public Works Director implies that it was proper to accept and process the original application during the moratorium. It was not. The water availability letters issued prior to the effective date of the moratorium expressly required the application to be "complete" before the expiration of the utility commitment period. As the documents in the record, cited in Footnote 2 in Exhibit 21, clearly show, the original application was not complete before those utility commitment letters expired. Therefore, the Examiner stands by the conclusion reached in that footnote: The original application was accepted and processed during the term of the moratorium in violation of that moratorium.

The moratorium is completely irrelevant to the present application package. The moratorium expired on February 18, 2006. The revised application is so changed that DCD assigned a new "completeness" date when it was submitted in the Fall of 2006. The moratorium had expired months before that occurrence.

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Recommendation that the PUD portion of the application be denied and that the preliminary subdivision portion of the application be returned to Ramirez for correction, citing seven reasons: 1) An SDP was required but had not been sought; 2) The PUD portion failed to meet the PUD transit facilitation requirement; 3) The PUD portion failed to meet the PUD pedestrian and bicycle circulation requirement; 4) The subdivision lacked current water and sewer service commitments; 5) The subdivision design would have created an unacceptable intersection with Skywall Drive and Foundry Road; 6) The subdivision did not comply with concurrency requirements for police services; and 7) The proposed area to be dedicated for public park would have created an attractive nuisance. (Exhibit 21)

On August 30, 2006, Ramirez submitted a letter to the City asking the Council to remand the application. (Exhibit 22) On September 14, 2006, the Council passed Resolution No. 06-14 remanding *Twin Rivers Ranch Estates* to the Examiner "so that the Applicant can modify the Application and respond to the issues raised by the Hearing Examiner." (Exhibit 24, ¶ 2) Paragraph 3 of that Resolution provides the following guidance to the Examiner:

The City Council request [*sic*] the Hearing Examiner to consider their previous actions and interpretations with regards to (1) Police Level of Service (LOS) and (2) Location criteria for Transit as provide [*sic*] for in their Decision on the Skoglund Estates Preliminary Plat and Planned Unit Development.

(Exhibit 24, p. 1) Ramirez formally resubmitted a revised preliminary PUD application on September 29, 2006. (Exhibit 29) The revised application was assigned file number RAFPPUD05-006 and became vested on October 30, 2006. (Exhibit 30) This Recommendation addresses the resubmitted application and the newly submitted SDP application.

2. The *Twin Rivers Ranch Estates* site is a nearly rectangular property composed of four acreage lots created through the short subdivision process in 1994 encompassing 8.56 acres. At the time of the short subdivision, the northerly 60 feet of the site was dedicated to the City for right-of-way as part of Skywall Drive. The BNSF mainline tracks abut and parallel Skywall Drive to the north. (Exhibit 29.1)

The site extends between 600 to 800 feet south from Skywall Drive to the north shore of the Skykomish River. The northerly 460± feet of the site is essentially flat; the remainder of the property drops off to the river. The southerly 60 – 120 feet of the property lies below the Ordinary High Water Mark (OHWM) of the Skykomish. A drainage swale parallels the east property line. The Skykomish River's flood plain for the "base flood" (the so-called 100 year flood) covers essentially that portion of the site south of the 120 foot contour. (Exhibits 1.14, 18, 29.1, 35.6, and 56 and testimony)

The site currently contains one single-family home and associated accessory buildings (a detached garage and detached outbuildings) on the eastern portion of the property. (Exhibits 29.1 and 41)

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3. The adopted Comprehensive Plan (Plan) designates the site and the properties to the east and west between the BNSF tracks and the Skykomish for residential development; property north of the tracks is designated for Economic Development. (Plan, p. 23) The Comprehensive Plan calls for an interconnection between Skywall Drive and Dyer Road to the west. (Plan, p.35) In addition, the Plan calls for sewerage of the area south of the tracks, with a pump station located on Dyer Road at 10<sup>th</sup> Street. (Plan, p. 51)
4. The site is currently zoned Low/Moderate Density Residential (LMD). (Exhibit 41) The area to the north is zoned Economic Development (ED) and the area to both the east and west is zoned Moderate Density (MD). (Official notice)
5. The Skykomish River is classified as a Type 1 Stream. The required buffer for a Type 1 Stream is 100 feet wide, measured from the OHWM. (Exhibit 41) This reach of the Skykomish River is a popular fishing area. (Testimony)
6. The SMA became part of the Laws of Washington in 1971. The Skykomish River is classified as a "Shoreline of Statewide Significance" under the SMA. SMA jurisdiction extends 200-foot landward from the OHWM of the Skykomish River. All of two open space tracts (Tracts 998 and 999), a portion of Drainage Tract 997, and portions of seven lots (Proposed Lots 15 – 21) lie within the jurisdictional area of the SMA. (Exhibit 29.1)

The SMA requires each political jurisdiction which has water bodies subject to the SMA to adopt a Master Program containing regulations to implement the SMA locally. Snohomish County prepared its Master Program (the SCSMP) for unincorporated lands within the county as well as on behalf of 10 incorporated cities, one of which was Sultan. (Exhibit 57, p. A-1) Snohomish County adopted the SCSMP in September, 1974. The SCSMP was approved by the Washington State Department of Ecology (DOE) in December, 1974. (Exhibit 57, inside Title Page) Subsequent to approval of the SCSMP by DOE, all substantial developments proposed within areas subject to the SMA and within the area covered by the SCSMP have been required to comply with the provisions of the SCSMP.<sup>4</sup>

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<sup>4</sup> The Staff Report discusses a 300 foot wide Riparian Management Zone (RMZ). (Exhibit 41, p. 8) The SMC has no requirement for an RMZ. Ramirez's Wetland Delineation Report mentions an RMZ requirement, based on Snohomish County regulations. (Exhibit 1.6, p. 2) According to the DCD Director's testimony and to the best of the Examiner's knowledge, Sultan has not adopted any Snohomish County land use regulations relating to an RMZ. Therefore, the RMZ discussion is not applicable.

The only reference to the SMA within the SMC is SMC 16.96.010: "The city of Sultan shall adopt Snohomish County's Shoreline Management Master Program."<sup>5</sup> That one sentence section was adopted as part of Ordinance No. 630 in 1995. Ordinance No. 630 converted various provisions within the City's then-existing code into a "Unified Development Code." Ordinance No. 630 itself contains no specific reference to the SCSMP. (Exhibit 57) In fact, many if not most of the Unified Development Code's provisions existed within the SMC in a different organizational format. DCD has not been able to find documentation of the original adoption of the SCSMP by the City. (Exhibit 57) DCD does not know when the City first adopted the SCSMP nor whether the City adopted the SCSMP as it existed on the date of City adoption (whenever that was), or whether the City adopted the SCSMP as it then existed and as it may thereafter have been amended. The copy of the SCSMP which DCD provided to the Examiner, and which it stated it routinely used, contains Snohomish County amendments through 1984. (Exhibit 42) The record indicates that Snohomish County amended the SCSMP several times through 1993. The record does not indicate whether Snohomish County amended the SCSMP subsequent to 1993. (Exhibit 57)

Although not of record in this proceeding, it is highly probable that Sultan adopted the SCSMP for use within the City in 1974 – 75, shortly after DOE approval. It is completely unrealistic to believe that Sultan never adopted the SCSMP until mid-1995 (20 years after its approval by DOE), especially in view of the fact that the version routinely used by DCD contains amendments through 1984, but not those enacted after 1984. The Staff's use of an SCSMP containing 1984 amendments suggests that Staff believed(es) that it should use the most current version of the SCSMP. No justification has been presented to support use of a 1984 version: Sultan's adoption of the SCSMP probably occurred some 10 years prior to 1984.

The Examiner will review this application against the most current version of the SCSMP (containing amendments through June, 1993) contained within the record. (Exhibit 57) (As it happens, amendments between 1984 and 1993 to the residential Development section of the SCSMP have scant effect upon the current proposal.) All SCSMP page references are to the 1993 printed version as represented by Exhibit 57.

7. The SCSMP does not place the subject property within one of the five Shoreline Planning Environments. The *Twin Rivers* subdivision to the east is designated as a Rural Environment<sup>6</sup>; the Dyer Road area to the west, like the subject property, is not designated. (Exhibit 57, Designation

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<sup>5</sup> The word "shall" is an auxiliary verb which denotes future time. This provision, read literally, means that at some future time the City would adopt the SCSMP. Such a reading makes absolutely no sense for reasons explained within the text of the recommendation. At best it represents a classic case of inartful code drafting.

<sup>6</sup> The SCSMP contains no explanation for that seemingly incongruous designation.

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Map 43) The reason for the omission is unknown to the hearing participants.<sup>7</sup> DCD has applied the Environment Designation Criteria within Section E of the SCSMP and concluded that the property best fits the Suburban Environment designation. (Exhibits 41 and 57 and testimony)

Residential subdivisions are permitted within the Suburban Environment subject to compliance with 11 General regulations and two Environment-specific regulations, one of which requires a 25 foot setback from the OHWM. (Exhibit 57, SCSMP, pp. F-59 – F-62)

8. The *Twin Rivers Ranch Estates* site is bordered on the north, as noted, by Skywall Drive. Immediately north of Skywall Drive is the BNSF main line. Immediately north of the BNSF main line is Romac Industries, a heavy industrial operation. (Exhibits 11, 29.1, and 41)

The *Twin Rivers* subdivision, containing 35 single-family residences on 48 lots, lies to the east. Skywall Drive via Foundry Drive is the sole access to *Twin Rivers* and *Twin Rivers Ranch Estates*. (Exhibit 29.1 and testimony)

An acreage tract borders the west side of the site, to the west of which is Dyer Road and a small-lot residential area containing approximately 80 lots served by Dyer Road and 10<sup>th</sup> Street. The acreage tract is served by Dyer Road on the west and Skywall Drive on the east. (Exhibits 1.4, 1.8 {Fig. 1}, and 29.1 and testimony) The acreage parcel has recently received preliminary short subdivision approval. The terms of that approval allow the development to go forward using on-site sewage disposal (septic tanks and drainfields), but requires connection to public sewers should such become available. (Testimony)

9. Access to the industrial area north of the BNSF tracks and to the subject property and the *Twin Rivers* subdivision south of the BNSF tracks is via Cascade View Drive-Cemetery Road and Foundry Drive. Cascade View Drive-Cemetery Road is a two lane road which runs roughly parallel with and south of SR 2 from the old Sultan Basin Road/SR 2 intersection easterly for about one-half mile. Foundry Drive is a relatively short (less than ¼ mile) and narrow (approximately 17 feet wide), two lane road constructed within a 60 foot right-of-way which extends south from Cascade View Drive-Cemetery Road to serve the industrial area north of the BNSF tracks, crosses the BNSF at a substandard grade crossing, and intersects Skywall Drive immediately south of the BNSF right-of-way. The pavement runs along the west edge of the right-of-way at the BNSF crossing. (Exhibits 1.7, 1.8 {Fig. 1}, 10, 17, 29.1, 46, and 54)

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<sup>7</sup> The Examiner was employed by Snohomish County during the time the SCSMP was under development and actively participated in its preparation. (Exhibit 57, p. A-4) The Examiner has no recollection as to why no Planning Environment designation was applied to this short segment of Skykomish River shoreline. Frankly, it would appear to have been an oversight or scrivener's error.

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Neither SR 2, Cascade View Drive-Cemetery Road, nor Foundry Drive have sidewalks or improved pedestrian facilities. The BNSF crossing is in very poor condition. (Exhibits 10, 46, 53, and 54 and testimony)

The Cascade View Drive/SR 2 intersection has been affected by the Sultan Basin Road/SR 2 realignment and signalization project which, as of November 30, 2006, DCD expected to be substantially complete sometime in December, 2006. Cascade View Drive formerly formed the fourth leg of the unsignalized Sultan Basin Road/SR 2 intersection. The project shifted the Sultan Basin Road intersection several hundred feet to the east. The Cascade View Drive/SR 2 intersection has become right-turn-in/right-turn-out only. Motorists wishing to travel west on SR 2 either have to turn east at the Cascade View Drive intersection and then find somewhere to make a U-turn, or travel east on Cemetery Road and make a left turn at its unsignalized intersection with SR 2. The ultimate plan (sometimes referred to as Phase III of the realignment project) is to extend the realigned Sultan Basin Road south to intersect Cemetery Road, thus providing a signalized intersection with SR 2 for this area south of SR 2. Funding, design, and timing of that extension are not firm according to testimony by City staff. (Exhibit 1.7 and testimony)

10. As with the original application, Ramirez proposes to subdivide the site into 22 lots for single-family residences. The current design responds to the Foundry Road/Skywall Drive intersection concern raised in the Examiner's June 19, 2006, Recommendation.

Eight of the lots (up from seven in the original proposal) would front on Skywall Drive (Proposed Lots 1 – 8). The remainder of the lots would front on a reconfigured "T"-shaped internal cul-de-sac street which would intersect Skywall Drive opposite the Foundry Road/Skywall Drive intersection. The internal right-of-way is configured such that its east edge aligns with the east edge of the Foundry Road right-of-way. There would still be some off-set in driving surfaces (although much less than in the prior proposal) as the pavement in the internal street right-of-way would be centered within its right-of-way while Foundry Road's pavement hugs the west edge of its right-of-way. If Foundry Road were to be improved within its existing right-of-way, the paved travel lanes could be perfectly aligned.

The proposed lots range in size from 5,023 SF up to 7,340 SF (little changed from the prior proposal); the average lot size would be 5,655 SF (slightly smaller than the prior proposal). The existing residence would be preserved on Proposed Lot 22 (the largest lot); the accessory buildings would be removed. None of the proposed lots would lie within the regulatory flood plain. (Exhibit 29.1 and testimony) Ramirez has agreed to adjust the east line of Proposed Lot 22 to meet the required minimum setback from the existing house. (Exhibit 47) The proposed density is 2.57 lots per acre. (Exhibit 29.1)

Four open space tracts (up from three in the prior proposal) are proposed. Tract 996, containing 5,083 SF, would provide a tot lot at the west end of the cul-de-sac. Tract 997, containing 1.58 acres,

would encompass the swale along the east border and be set aside as a drainage conveyance channel for the benefit of the City to carry runoff water from north of the BNSF tracks south to the Skykomish River. Tract 998, containing slightly over an acre, would back Proposed Lots 15 – 21, would be accessed by a 10 foot wide panhandle extending north to the internal street, and would contain a trail and picnic facilities. Tract 999, containing approximately 1.56 acres set aside as conservation open space, would encompass the area between Tract 998 and the bank of the Skykomish. (Exhibit 29.1)

The rear lot lines of Proposed Lots 15 – 21 will be 140 or more feet north of the OHWM which is itself 60 to 170 feet north of the river bank. (Exhibit 29.1)

A variety of two-story, 1,600 – 2,200 SF houses are proposed for the residential lots. All have gable roof lines and exhibit traditional or neo-craftsman designs. (Exhibit 2)

11. Ramirez proposes to improve the Foundry Road railroad crossing to reduce the abrupt grades on either side of the railroad tracks and to widen the pavement. The City has received a \$20,000.00 grant from the Grade Crossing Protection Grant program through the Utilities and Transportation Commission to assist in improving the crossing. Skywall Drive will be upgraded with new paving, curb, gutter, and sidewalk along the south side. Skywall Drive will not be extended westerly to connect to Dyer Road as part of this proposal. (Exhibits 10, 29.1, and 41 and testimony)

Sultan Design Standards require a 60-foot right-of-way, two travel lanes, parking on both sides, five-foot sidewalks on both sides, and street trees planted one tree per 20 lineal feet for Local Access streets. Section 16.10.120(B)(4)(a) SMC provides for deviation from the street standards in PUDs: "Standards of design and construction for roadways within residential PUDs may be modified as is deemed appropriate by the planning director and city engineer with the concurrence of the city council, following a recommendation by the hearing examiner." Ramirez proposes that the cul-de-sac have a 50-foot right-of-way, two 12-foot travel lanes, two 6-foot parking zones, vertical curb and 5-foot sidewalk on each side, and a 1.5 foot wide planning strip on each side behind the sidewalk due to its short length and because it will not be extended beyond the plat. The reduction of the right-of-way width is supported by the Community Development Director and City Engineer. (Exhibits 29.1 and 41)

12. The City's consulting engineer (Reinart) believes that the proposed "measures will greatly enhance and improve the current (and future) geometric conditions of this intersection." (Exhibit 36) Reinart opposed the previously proposed intersection offset. (Exhibit 8)

As noted in my original comments I would not recommend all-way stop control for an intersection with limited traffic volumes, except under unusual conditions. The revisions that have been proposed to the railroad crossing will change the grade of the crossing approaches, which should provide improved sight distance. The highest

volume leg of the intersection will continue to be the north leg, followed by the east, (future) south, and west legs, with the north and south legs having the highest combined volumes. As such, my inclination is to assign the right-of-way to the north/south movement at this time, with the east and west legs required to stop. I would also like to avoid having to stop southbound traffic due to the closeness to the railroad crossing/limited queuing space, and the fact that it essentially functions as a collector/arterial.

(Exhibit 36, p. 2)

13. The SMC requires recreation areas in the amount of 75 SF per person in any residential development [SMC 16.72.040]; in developments with 21 to 50 dwelling units, two recreation areas each with a minimum of 2,000 SF are required [SMC 16.72.040(C) and .050]. *Twin Rivers Ranch Estates*, as proposed with 22 three-bedroom dwelling units, would require two recreation areas totaling 6,600 SF. Ramirez proposes two recreation facilities that exceed the area required by SMC 16.72.040: A tot lot and picnic area (Tract 996) and a trail connecting picnic areas (Tract 998). Total recreational area as proposed is 49,929 SF. (Exhibit 29.1)

All PUDs are required to provide open space in the amount of 20% of the gross land area of the site. [SMC 16.10.140] A minimum of 15% of the gross area must be "useable open space." The percentage of gross area counted toward the open space requirement is limited for "buffer open space" (2%), "constrained open space" (2%), and "unusable detention open space" (5%). Any amount of "conservation open space" may also be used to meet the minimum required open space. *Twin Rivers Ranch Estates* is required to have 74,672 SF of open space, of which 55,923 SF must be usable. Ramirez proposes to reserve 187,300 SF (25.8%) of the site for open space of which 49,929 SF will be useable. (Exhibit 29.1)

14. DCD recommends that Proposed Tracts 998 and 999 be dedicated to the City "to provide public access to the Skykomish River and maintain the Parks and Recreation Level of Service of .0426 acres per capita." (Exhibit 41, Recommended Condition 7<sup>8</sup>) The proposed design provides 12 – 13 diagonal public parking spaces along the north side of Skywall Drive west of Foundry Road to support the requested public shoreline access area. (Exhibit 29.1)
15. The maximum cul-de-sac length allowed under the adopted Design Standards is 300 feet. [Design Standards, § 1.09] The proposed cul-de-sac will be approximately 391 feet long, measured from centerline intersection with Skywall Drive to the cul-de-sac bulb radius point. (Exhibit 29.1) Design Standards § 1.06 allows the Council to grant modifications to the adopted standards. Streets within

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<sup>8</sup> The Staff Report as written requests only that Tract 998 be dedicated to the City. (Exhibit 41, p. 13, § VI.c, and p. 17, Recommended Condition 7) DCD testified that it also intended to request dedication of Tract 999.

subdivisions must conform to the adopted Design Standards. [SMC 16.28.230(B)(4)] Section 16.28.240 also allows the Council to approve modification of subdivision standards.<sup>9</sup> The proposed cul-de-sac length is supported by the Community Development Director and City Engineer. (Exhibit 41; see Finding 11, ¶ 2, above.)

16. *Twin Rivers Ranch Estates* now has a valid commitment for public water and sewer service. (Exhibit 29.4)
17. Section 16.10.110 SMC contains criteria for location of residential PUDs: “A preliminary residential PUD shall only be approved if, with reasonable modification and/or conditions, the city finds that the proposed preliminary PUD complies with the following criteria for location, use, and design, for each of the identified types of PUDs.” [SMC 16.10.110, emphasis added]

The criteria for single-family residential PUDs (PUD-SFs) are contained in SMC 16.10.110(B). Subsection (2) sets forth “Other Location Criteria.” That Subsection in turn contains six subsections which set locational criteria for single-family residential PUDs: Subsection (2)(a) requires PUDs of more than 10 acres or 40 dwelling units to be located on an arterial or collector street; Subsection (2)(b) requires the total site area to be at least two acres; Subsection (2)(c) requires the PUD site to be “located such that it can connect to an existing off-site pedestrian and bicycle circulation system to facilitate non-motor vehicle access to the PUD-SF”; Subsection (2)(d) reads as follows: “Transit is available in sufficient proximity to the site to facilitate transit access to the PUD-SF”; Subsection (2)(e) requires the PUD location to not necessitate any extraordinary expenditure of public funds for infrastructure; Subsection (2)(f) simply requires equity with non-PUD developments in access to schools, parks, etc..

No established sidewalk or bicycle systems exist in the area. Ramirez has offered to construct a five foot wide paved shoulder along the east side of Foundry Road to provide a pedestrian/bicycle path to SR 2. “This will provide a connection to the improvements that are being planned as part of the Foundry Drive/Sultan Basin Road Interchange.” (Exhibit 29, p. 1)

Community Transit (CT) runs bus service along SR 2 to Gold Bar. The nearest CT park and ride lot/bus stop is on the south side of SR 2 between 10<sup>th</sup> and 11<sup>th</sup> Streets, about 1,200 feet west of the old Sultan Basin Road/SR 2 intersection. (Comprehensive Plan, pp. 201 and 202, and official notice) *Twin Rivers Ranch Estates* residents interested in using CT’s bus service would have to drive north

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<sup>9</sup> Sections 16.28.230 and .240 are located within Article I of Chapter 16.28 SMC. Article I establishes requirements and standards for short subdivisions. Article II establishes requirements and standards for subdivisions. However, Article II contains no street standards whatsoever. The wording within the Article I standards makes it clear that the intent is that they apply to both short subdivisions and subdivisions. Their location within the short subdivision section is the result of inartful code drafting.

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on Foundry Road and west on SR 2, or walk or bicycle that same route. SR 2 crosses a bridge which lacks pedestrian facilities between the park and ride lot and Cascade View Drive. (Exhibit 53)

18. Traffic and park impact fees “shall be determined and paid to the designated city of Sultan official at the time of issuance of a building permit for the development.” [SMC 16.112.020(B)] School impact fees “shall be paid to the city prior to building permit issuance, based on the fee schedule in place at the time of building permit application.” [SMC 16.116.030(B)] Therefore, all three fees are based on fee schedules in effect when building permit applications are filed, not the fee schedules now in effect.
19. Sultan’s State Environmental Policy Act (SEPA) Responsible Official issued a threshold Mitigated Determination of Nonsignificance (MDNS) for *Twin Rivers Ranch Estates* on April 7, 2006.<sup>10</sup> (Exhibit 5) No appeal was filed in response to issuance of the MDNS. (Exhibit 1)

The MDNS contains two mitigation measures. One requires BNSF review and approval of the crossing upgrade and sewer line plans, the other requires that Tracts 998 and 999 “be available for public access along the Skykomish River.” (Exhibit 5)

The Responsible Official determined that no additional review was required for the resubmitted application. (Exhibit 41, p. 14, and testimony)

20. DCD recommends approval of *Twin Rivers Ranch Estates* subject to 34 conditions. (Exhibit 41, pp. 16 - 20) DCD amended its recommendation verbally at the hearing as follows: The plans referenced in Recommended Condition 1 are Exhibits 2, 29.1 (as amended by Exhibit 47), and 46; the correct rear setback for Lot 22 in Recommended Condition 3 is 20, not 25 feet; Recommended Condition 7 should also require dedication of Tract 999 as well as Tract 998. In addition, DCD orally corrected scrivener’s errors on pages 6, 13, and 15.<sup>11</sup> (Testimony)

Concurrency

21. Gerry Gibson (Gibson), a Dyer Road resident, Josie Fallgatter (Fallgatter), and Stan Heydrick (Heydrick) all challenge the application’s compliance with Chapter 16.108 SMC, Concurrency Management System. Specifically, they argued that adopted Level of Service (LOS) standards for police services and parks, recreation, and open space would be violated by development of *Twin Rivers Ranch Estates*. Fallgatter also argues that proportionate impact mitigation fees under RCW 82.02.050 *et seq.* cannot be charged for police services given that police services are not listed as “public facilities” in RCW 82.02.090(7). (Exhibits 50 - 52 and Testimony)

<sup>10</sup> The document is entitled “Determination of Nonsignificance.” However, since it contains specific mitigation measures, it is in fact an MDNS.

<sup>11</sup> Those corrections will not be detailed here. The interested reader is referred to the audio recording of the hearing.

Police Services

22. The currently adopted LOS standard is 2.6 uniformed officers per 1,000 population. (Exhibit 9; See also 2004 Comprehensive Plan, Appendix B, p. 2.74) (The LOS standard in the prior 1994 Comprehensive Plan was two police vehicles per 1,000 population. (2004 Comprehensive Plan, Appendix B, pp. 2.74 and 2.75))
23. The City conducted the inventory which formed the basis of the currently adopted LOS standard in 2003. It used an estimated 2003 population of 3,814 to develop that standard.<sup>12</sup> (2004 Comprehensive Plan, Appendix B, p. 2.75) The City had 10 full-time uniformed officers in 2003. (2004 Comprehensive Plan, Appendix F, pp. 214 – 215) The ratio of uniformed officers to population in 2003 when the LOS inventory was conducted, based on the population number used, was 2.6 officers per 1,000 population. (2004 Comprehensive Plan, Appendix B, p. 2.74)
24. The City's July 1, 2006, estimated population is 4,440. (Exhibit 39) The City presently has seven (7) full-time uniformed officers with one newly budgeted position vacant. (*Id.*<sup>13</sup>) The current police services LOS based on the July, 2006, population estimate, is thus 1.8 uniformed officers per 1,000 population (2.0 if the ninth position is filled.). The City needs 12 (11.54) uniformed officers to meet the established LOS for its 2006 estimated population.

A significant number of residential developments have been approved by the City Council but not yet built. Among those "pipeline" developments are: *Vodnick Lane* with 23 single-family dwellings, *AJ's Place* with 40 single family dwellings, *Skoglund Estates* with 48 single family lots, *Steen Park* with 18 single family lots, *Cascade breeze Estates* with 30 single family lots, *Timber Ridge Estates* with 85 single family lots, and *Denali Ridge* with 15 single family lots. Those seven pipeline developments, when built out, will add 259 single family residences to the City. (Testimony and official notice) If each new dwelling had an average population of 2.7 persons,<sup>14</sup> those developments would add 699 residents to the City.

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<sup>12</sup> The basis for that 2003 population estimate is not in the record before the Examiner. According to Exhibit 9, the Washington State Office of Financial Management, Forecasting Division, (OFM), estimated Sultan's April 1, 2003, population to be 4,095. The LOS standard, being a legislatively adopted policy decision by the Council, may not be reconsidered, altered, or challenged in the context of this project permit application. [See RCW 36.70B.030, quoted in part in the Principles of Law section, below.]

<sup>13</sup> According to testimony in a previous case (*AJ's Place*), the Council held the first reading on April 13, 2006, and the second reading on April 27, 2006, of an ordinance to budget an additional uniformed police officer. The ordinance was adopted on April 27, 2006. The DCD Director testified in that hearing that the new position was not subject to any hiring freezes that may be in effect.

<sup>14</sup> 2.7 persons per household is the number used by Ramirez in his "Developer Agreements to Establish Concurrency." (Exhibits 29.5 and 29.6) Since DCD supports acceptance of those Agreements, it is appropriate to accept that number as representing a reasonable average per household population figure for Sultan.

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25. DCD issued a Certificate of Concurrency (the Certificate) on November 17, 2006, for *Twin Rivers Ranch Estates*. (Exhibit 39) The Certificate states that the "current deficit is 2.54 Uniformed Officers", based on the July 1, 2006, population estimate". (Exhibit 39, p. 2)

The City Council, in the plat of Skoglund Estates, has determined that if the applicant for a subdivision enters into a Developer Agreement to Establish Concurrency, the application can be deemed concurrent as it relates to Police Services. The applicant has provided such an Agreement, committing to pay \$23,506 to the City of Sultan to mitigate their impacts on the Police Level of Service.

(Exhibit 39, p. 2)<sup>15</sup>

26. The Certificate states that "Police service improvements scheduled to maintain the City's adopted LOS concurrent with development are planned under the adopted 6-year Capital Facilities Plan." (Exhibit 39, p. 2) The latest adopted Capital Facilities Plan (CFP) is Appendix D to the 2004 Comprehensive Plan, dated November 22, 2004. (Official notice) The discussion of the Police Department in the CFP mentions a new station, but does not address staffing (not unexpected since staffing is not a capital facility). (2004 Comprehensive Plan, Appendix D, p. VIII-19) The Certificate mis-characterizes the CFP.

The City placed a levy on the November, 2006, ballot to raise funds to hire additional police officers. The levy was defeated. (Testimony)

27. Ramirez presented a draft "Developer Agreement to Establish Concurrency" (the Police Services Agreement).<sup>16</sup> The Police Services Agreement is predicated on an estimated population within *Twin Rivers Ranch Estates* of 60 and an annual cost to the City for a police officer of \$110,878. Based on the adopted police services LOS of 2.6 uniformed officers per 1,000 population, the Police Services Agreement calculates that 0.16 of a uniformed police officer would be needed to provide 2.6 police officers per 1,000 population for the 60 residents of *Twin Rivers Ranch Estates*. Ramirez then offers to contribute \$17,741.00 (16% of the first year's cost of a uniformed officer) plus \$5,765.00 "as a contribution to a reserve for future years of service." (Exhibit 29.5)

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<sup>15</sup> DCD states in the following paragraph in the Certificate that in "Resolution No. 06-12" the Council requested that the Examiner consider its actions in the "Steen Park, Cascade Breeze, Skoglund Estates and AJ's Place" applications. (Exhibit 39, p. 2) This statement in the Certificate contains two errors. First, Resolution No. 06-12 pertains to *Vodnick Lane*, not to *Twin Rivers Ranch Estates*. The correct resolution is Resolution No. 06-14. Second, Resolution No. 06-14 Mentions only *Skoglund Estates*, not any of the other projects listed by DCD in the Certificate. The Certificate implies a breadth of Council action not supported by the documents enacted by the Council.

<sup>16</sup> The Police Services Agreement is identical to that offered by the *Skoglund Estates* applicant on April 25, 2006.

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The *Twin Rivers Ranch Estates* Police Services Agreement proposes that the fee be paid on a lot-by-lot basis when building permits are issued. The Police Services Agreement also provides that: if the Council lowers the police services LOS standard before payments are made, the obligation shall be commensurately lowered; if the Council raises the police services LOS standard before payments are made, the obligation shall not be raised; and if the Council lowers or eliminates the police services LOS standard after payments are made, no refund(s) shall be required. (Exhibit 29.5)

Parks, Recreation, and Open Space

28. The currently adopted LOS standard is 42.6 acres of parks, recreation, and open space facilities per 1,000 population. (Exhibit 9; see also 2004 Comprehensive Plan, Appendix B, p. 2.75) (The LOS standard in the prior 1994 Comprehensive Plan was 5.0 acres of City park land per 1,000 population. (2004 Comprehensive Plan, Appendix B, p. 2.75))
29. The City conducted the inventory which formed the basis of the currently adopted LOS standard in 2003. It used an estimated 2003 population of 3,814 to develop that standard. <sup>17</sup> (2004 Comprehensive Plan, Appendix B, p. 2.75) The City had 162.4 acres of qualifying “[a]cres devoted to recreational or open space activities within the urban growth area” in 2003. (2004 Comprehensive Plan, Appendix F, pp. 248) That acreage was composed of City-owned property, Sultan School District-owned property, and Washington State Department of Fish and Wildlife-owned property. The ratio of park, recreation, and open space land to population in 2003 when the LOS inventory was conducted, based on the population number used, was 42.6 acres per 1,000 population. (2004 Comprehensive Plan, Appendix B, p. 2.75)
30. The City’s July 1, 2006, estimated population is 4,440. (Exhibit 39) The Certificate states that the current LOS ratio is 44.6 acres per 1,000 population. (Exhibit 39, p. 3)

During the May 8, 2006, *AJ’s Place* hearing, the DCD Director submitted a tally sheet showing that 35.69 acres of qualifying land had been added to the inventory since 2003. <sup>18</sup> The added lands consist of 0.41 acres adjacent to Osprey Park dedicated in September, 2002, by Boucher, 0.28 acres acquired in 2005 at the northwest corner of 1<sup>st</sup> Street and Main for a new skateboard park, and the 35 acre Water Treatment Plant property annexed effective May 6, 2006, which the Council’s annexation ordinance (Ordinance No. 923-06) declares is to be used “for Municipal purposes including Water Treatment Plant and related facilities, Open Space, and Public Parks.” The Water Treatment Plant site is fenced and posted “No Trespassing.” (Exhibits 50 and 51) Mayor Tolson reportedly told a *Monroe Monitor* reporter that the Water Treatment Plant site “was never actually intended to serve

<sup>17</sup> See Footnote 12, above.

<sup>18</sup> The DCD Director had testified on April 25, 2006, during the *Skoglund Estates* open record hearing that only 10,000 square feet (0.23 acres) of additional parks, recreation, or open space acreage (property for a skateboard park) had been added to the inventory since 2003.

as open space easily accessible to the public, ... Rather it was a way for the city to meet a level of service for open space required by the city's own law, a level of service that is unrealistically high".<sup>19</sup> (Exhibit 51)

Therefore, the current acreage of parks, recreation, and open space lands stands at 198.16 and the current ratio of parks, recreation, and open space lands to population stands at 44.6 acres per 1,000 population based on the July population estimate. (Exhibit 39) The City has 9.02 excess acres of park, recreation, and open space lands above the established LOS for its 2006 estimated population. (Exhibit 39)

DCD testified that if all the residential developments listed in Finding 24, above, were developed, the Parks and Recreation LOS would have fallen below the established level unless additional park lands are acquired. ( $42.6 \times .699 = 29.78$  acres required. Since the "surplus" based on July, 2006, population estimate is only 9.02 acres, development of the approved "pipeline" projects would generate a 20.76 acre deficit.)

31. Ramirez has offered to enter into a second "Developer Agreement to Establish Concurrency" (the Park Agreement). The Park Agreement is predicated on an estimated population within *Twin Rivers Ranch Estates* of 60. Based on the adopted park LOS of 42.6 acres per 1,000 population, the Park Agreement calculates that 2.56 acres of park land would be needed to provide 42.6 acres of park land per 1,000 population for the 60 residents of *Twin Rivers Ranch Estates*. Ramirez then offers to contribute 4.18 acres, more or less (Tracts 997, 998, and 999) to the City as park land. (Exhibit 29.6)

The Park Agreement proposes that the land be conveyed to the City when the final plat is approved. The Park Agreement also provides that: if the Council lowers the park LOS standard before the conveyance, the obligation shall be commensurately lowered; if the Council raises the park LOS standard before the conveyance, the obligation shall not be raised; and if the Council lowers or eliminates the park LOS standard after the conveyance, no return of any portion of the conveyed property shall be required. (Exhibit 29.6)

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<sup>19</sup> Fallgatter testified during the *AJ's Place* hearing that when Ordinance No. 923-06 was before the Council for first reading on April 13, 2006, it contained nothing about a parks/open space designation. Fallgatter stated that the reference to parks/open space designation occurred at the last minute before adoption on April 27, 2006. Fallgatter and Gibson argued in the current hearing that land which is fenced and marked "No Trespassing" should not be counted as Parks and Recreation land for the purpose of meeting the LOS standard. They believe the Council's actions make a mockery of the concurrency provisions in the SMC. (Testimony)

Whenever or however the designation of the acreage as parks/open space occurred is beyond the scope of the Examiner's authority as such a designation is a legislative, not a quasi-judicial act. This proceeding is not a forum in which challenges to Ordinance No. 923-06 may be raised.

Recent Council Actions

32. On June 8, 2006, the Council passed Resolution Nos. 06-06 and 06-07, approving the *Steen Park* and *Cascade Breeze Estates* applications, respectively. Both Resolutions contain identical language regarding the police services LOS issue:
4. The City's existing Level of Service for police is below the adopted LOS in the Comprehensive Plan. The LOS failure for police, however, was not caused by this proposed Development, and the further reduction in the LOS caused by this proposed Development is modest by comparison to the existing deficiency.
  5. The Council takes notice of the Recommendations in the Prothman Report accepted by the Council and Ordinance 900-06. The City has adopted a utility tax applicable to its municipal utilities and has received Recommendations for additional tax adoptions, including a utility tax on cable television service, an increased real estate excise tax, and a B & O tax. Other funding sources could include potential developer loans to advance the receipt of payment of needed funds, and monies contributed by proposed development for their impacts on the LOS. A combination of developer agreements and public funds will put in place the required public services for police concurrent with the development impacts, and provide appropriate strategies for the six years from the time of development to achieve the necessary police LOS as now established or as subsequently revised.
  6. The Council takes notice of the Applicant's offer at the Closed Record Hearing to deliver to the City a Developer Agreement to pay Applicant's incremental share for a police officer for one year.
  7. Based upon the foregoing, this proposed Development is deemed concurrent.
33. On June 29, 2006, the Council passed Resolution No. 06-09A approving the *Skoglund Estates* PUD subdivision. That Resolution states as follows regarding PUD locational criteria and police services LOS:
2. ... Based upon the evidence in the record and judicial notice the Council makes the following additional Findings of Fact:

18. Community Transit routes 270, 271 and 271 service the Sultan Park & Ride on US 2 east of 10<sup>th</sup> Street approximately 1.0 mile from the site.<sup>20</sup> Service is provided through the City and to and from Everett via Snohomish and Monroe. Development of the type herein will facilitate and increase the prospect of a direct route along Sultan Basin Road. The Council finds that the site is in sufficient proximity in light of these facts to be approved as a PUD.

...

20. Applicant offered at the open record hearing a developer agreement to pay the developer's pro rata share for one year of the cost of a police officer to mitigate the impacts of this development. Thereafter, the revenues from real estate taxes on the increased value of the property will be available to the City's general fund.

3. ... The Council ... makes the following Conclusions of Law and Conditions:

Conclusions of Law and Conditions:

3. The City's existing level of service for police is below the adopted LOS in the comprehensive plan. The LOS failure for police, however, was not caused by this proposed development, and further reduction in the LOS caused by this proposed development is modest by comparison to the existing deficiency.

4. The Council takes notice of the recommendations in the Prothman Report accepted by the Council and Ordinance 900-06. The City has adopted a utility tax applicable to its municipal utilities and has received recommendations for additional tax options, including a utility tax on cable television service, an increased real estate excise tax, and a B & O tax. Other funding sources include potential developer loans to advance the receipt of payment of needed funds, and monies contributed by proposed development for their impacts on the LOS. A combination of developer agreements and

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<sup>20</sup> Examiner's note: According to scale maps contained within the Comprehensive Plan, the southern end of the body of the *Skoglund Estates* site, which is to be connected to 138<sup>th</sup> Street SE only by a pedestrian path, is 1.3 road miles from the park and ride lot, following the new Sultan Basin Road alignment. Street mileage will be slightly over 1.5 miles along Sultan Basin Road and 132<sup>nd</sup> Street SE.

public funds will put in place the required public services for police concurrent with development impacts, and provide appropriate strategies for the six years from the time of development to achieve the necessary police LOS as now established or as subsequently revised.

5. The Council takes notice of the Applicant's offer at the open record hearing to deliver to the City a Developer Agreement to pay Applicant's incremental share for a police officer for one year.

6. Based upon the foregoing, this proposed development is deemed concurrent.

Based upon finding of fact 18, this application satisfies the locational requirements for a PUD.

Resolution No. 06-09A does not require submittal of an executed Police Services Agreement. (Exhibit 32)

Other Matters

34. Hearing participants raised objections to various aspects of the proposal:
- A. Dyer Road residents believe that the proposed lot sizes are out of character with the existing lots in the area. They fear that public access over Tracts 998 and 999 will lead to trespassing all up and down the river. They oppose any action which would connect Dyer Road with Skywall Drive and also oppose the possible sewer connection. A petition asking the Council to delete those two items from the Comprehensive Plan has been submitted to the City. (Exhibit 12 and testimony)
  - B. *Twin Rivers* residents share many of the same concerns as the Dyer Road residents. They, too, believe that the proposed lot sizes are out of character with the existing lots in the area and that public access over Tracts 998 and 999 will lead to trespassing all up and down the river. They are concerned that people using the access will have nowhere to park and will end up parking in front of or on their properties. They are also concerned that the public access point will lead to people trying to use their subdivision's private park area. (Testimony)
  - C. Romac Industries, located immediately north of the BNSF on the west side of Foundry Road, is concerned that future residents in *Twin Rivers Ranch Estates* will find the noise from its activities objectionable and cause problems. Romac believes that it is operating within established noise limits. (Exhibit 11)
  - D. Gibson, in addition to challenging concurrency, has many objections to the process and proposal. (Exhibits 33 and 35 and testimony) Gibson argues that: The application should not

be approved because it was initially accepted during the term of the PUD moratorium (The current version of the application was submitted long after the moratorium expired. It is so substantially different from the original version that DCD assigned it a new vesting date. The moratorium is moot with respect to the current version of the application.); pedestrian/bicycle facilities as required by the PUD standards are absent in the area; water and sewer service commitments have expired (The original commitments did expire. New commitments, which are still valid, were issued. This argument is moot.); the City should have issued a new SEPA threshold determination after the SDP application became a part of the package (SEPA rules expressly allow an existing document to be used for the same or a different proposal than that originally evaluated. [WAC 197-11-600(1) and (2)] The trigger for requiring a new threshold determination is changed environmental impacts, not changed permits resulting in the same environmental impact. [WAC 197-11-600(3)] The addition of the SDP to the permit mix did not alter the environmental impacts, it simply added another permit which had to be obtained for *Twin Rivers Ranch Estates*. This argument is without merit.); the SEPA checklist contains errors (Accuracy of the SEPA checklist is irrelevant. The checklist is only one item used by the Responsible Official in the threshold determination process. The responsible Official independently evaluates the accuracy of the checklist. [WAC 197-11-330(1)(a)(i)] The checklist is not a product in the SEPA process; it may not be appealed. [WAC 197-11-680(3)(a)(ii) and (iii)] This argument is without merit.); the application should be denied because it was not processed in a timely fashion as required by RCW 36.70B.080 (Section 36.70B.080 RCW does establish a 120 day general goal for processing permit applications. However, absolutely nothing in that section or anywhere else in the RCWs requires denial (or approval) of an application whose processing is not completed within a 120 day period. This argument is without merit.); the Examiner's June 19, 2006, "decision" should have been final and dispositive (The Examiner issues a recommendation on preliminary PUD subdivisions and on SDPs. The Council, not the Examiner, makes the final decision. [SMC 16.120.050] This argument is based upon a misunderstanding of the process and the Examiner's authority. It is, therefore, without merit.); the property lies within the "100 year floodplain" according to the Comprehensive Plan (The Comprehensive Plan, regardless of what may be depicted on one of its maps, is not the definitive source for determining whether a property lies within the regulatory floodplain for the base flood, the so-called 100-year flood. The record contains copies of federally-adopted flood plain delineation maps which clearly show that the portion of the property which is to be divided into residential lots and on which, therefore, homes will be built, lies outside the regulatory floodplain. (Exhibits 1.14 and 56) This argument is without foundation in fact.); the Washington State Department of Fish and Wildlife (WDFW) recommends 250 foot wide riparian buffers which *Twin Rivers Ranch Estates* does not provide (The reality is that WDFW has no regulatory authority over buffer widths. It may recommend anything it wants to, but an application in Sultan is required to comply with adopted Sultan standards, not WDFW's recommendations. This argument is based upon a misunderstanding of the law and is, therefore, without merit.); this application does not incorporate "Best Available Science" (BAS) as determined by the

WDFW (The BAS requirement is found in RCW 36.70A.172(1): the City “shall include the best available science in developing policies and development regulations to protect the functions and values of critical areas.” That requirement pertains to the formulation of development regulations, not to the review of individual development applications. BAS must be used to develop local critical areas regulations; the adopted local critical areas regulations are used in the review of development applications. This argument is based upon a misunderstanding of the law and is, therefore, without merit.); Ramirez has presented no evidence to show that BNSF will allow the sewer line to be installed under its tracks (The absence of legal authorization from BNSF is not a bar to preliminary subdivision approval. If *Twin Rivers Ranch Estates* is granted preliminary approval, then Ramirez must take all legal and practical steps required to develop the property, one of which would be to obtain BNSF approval for running a sewer line beneath its track. This argument seeks to impose a burden which is not appropriate at the preliminary subdivision review stage and is, therefore, without merit.).

- E. Fallgatter, in addition to challenging concurrency: questions the SEPA process (See Subsection D, above.); questions which version of the SCSMP should be used in the review of the proposal; argues that the proposal fails to meet PUD transit facilitation and pedestrian/bicycle circulation requirements; believes that SR 2 in its present state (See Exhibit 53) does not provide a safe walking environment; and believes that the development could adversely affect Romac by placing residents nearby who would complain about the noise. (Testimony)
- F. Stan Heydrick argues that the proposal does not conform to the Comprehensive Plan, lacks adequate infrastructure, is not appropriate for its site, and would not serve the public use and interest. He believes that the lots “encroach within the 200-foot shoreline buffer” and that such encroachment is inappropriate. (Exhibits 20 and 52 {quote from Exhibit 52} and testimony)
- G. Loretta Storm (Storm) echoes many of Fallgatter’s concerns. She is especially concerned that placing 22 residences directly across the BNSF track from Romac will result in a development “with substantial quality of life flaws”. (Exhibit 55)

35. Any Conclusion deemed to be a Finding of Fact is hereby adopted as such.

## PRINCIPLES OF LAW

### Authority

Preliminary subdivision and preliminary PUD applications require a pre-decision open record hearing before the Examiner who forwards a recommendation to the Sultan City Council (Council) for final action. [SMC 16.10.080, 16.28.320 - .340, and 16.120.050]

### Review Criteria

The review criteria for preliminary subdivisions are set forth within SMC 16.28.330(A):

- A. The Hearing Examiner shall ... consider and review the proposed plat with regard to:
1. Its conformance to the general purposes of the Comprehensive Plan and Planning Standards and Specifications as adopted by the laws of the State of Washington and the City of Sultan;
  2. Whether appropriate provisions are made ... for: drainage ways, streets, alleys, other public ways, water supplies and sanitary wastes, transit stops, parks and recreation, playgrounds, schools and schoolgrounds;
  3. The physical characteristics of the subdivision site and may disapprove because of flood, inundation or swamp conditions. It may require construction of protective improvements as a Condition of Approval; and
  4. all other relevant facts to determine whether the public use and interest will be served by the ... subdivision.

“The [PUD] district is an alternative to conventional land use regulations, combining use, density and site plan considerations into a single process.” [SMC 16.10.010(A)] The PUD is an “overlay zone”, applied “only after a site-specific and project-specific review.” [SMC 16.10.020 and .010(A), respectively]

The SMC provides for both Retail Center PUDs and several types of Residential PUDs. [SMC 16.10.030]  
The general review criteria for PUDs are set forth at SMC 16.10.090(B):

The hearing examiner recommendation shall include, at a minimum, findings and conclusions regarding the preliminary PUD’s compliance with the criteria for location and approval for the particular type of preliminary PUD listed in SMC 16.10.100 (retail PUDs), SMC 16.10.110 (residential PUDs). A preliminary PUD shall be recommended for approval if, together with reasonable modifications or conditions, the project is determined to comply with the requirements of these sections. A preliminary PUD shall be recommended for denial if, even with reasonable modifications or conditions, the project is determined to not comply with the requirements of these sections.

The SMC does not in and of itself establish review criteria for SDPs. [SMC 16.96.010] The SCSMP, however, does contain a specific “Development Evaluation Process” which sets forth the factual and substantive decisions required during the SDP review process. [SCSMP, Section C]

The Local Project Review Act [Chapter 36.70B RCW] establishes a mandatory “consistency” review for “project permits”, a term defined by the Act to include “building permits, subdivisions, binding site plans, planned unit developments, conditional uses, shoreline substantial development permits, site plan review, permits or approvals required by critical area ordinances, site-specific rezones authorized by a comprehensive plan or subarea plan”. [RCW 36.70B.020(4)]

- (1) Fundamental land use planning choices made in adopted comprehensive plans and development regulations shall serve as the foundation for project review. The review of a proposed project’s consistency with applicable development regulations or, in the absence of applicable regulations the adopted comprehensive plan, under RCW 36.70B.040 shall incorporate the determinations under this section.
- (2) During project review, a local government or any subsequent reviewing body shall determine whether the items listed in this subsection are defined in the development regulations applicable to the proposed project or, in the absence of applicable regulations the adopted comprehensive plan. At a minimum, such applicable regulations or plans shall be determinative of the:
  - (a) Type of land use permitted at the site, including uses that may be allowed under certain circumstances, such as planned unit developments and conditional and special uses, if the criteria for their approval have been satisfied;
  - (b) Density of residential development in urban growth areas; and
  - (c) Availability and adequacy of public facilities identified in the comprehensive plan, if the plan or development regulations provide for funding of these facilities as required by [the Growth Management Act].

[RCW 36.70B.030]

Chapter 16.108 SMC, Concurrency Management System

Chapter 16.108 SMC was adopted by Ordinance No. 630 in 1995. It has not been amended since its adoption. The following sections within Chapter 16.108 SMC are particularly relevant to the present case:

**16.108.010 Purpose.**

The purpose and intent of this chapter of the unified development code is to provide a regulatory mechanism to ensure that a property owner meets the concurrency provisions of the comprehensive plan for development purposes as required in RCW 36.70A.070. This regulatory mechanism will ensure that adequate public facilities at acceptable levels of service are available to support the development’s impact.

**16.108.020 Exemptions.**

Any development categorically exempt from threshold determination and EIS requirements as stated in the State Environmental Policy Act (SEPA), Chapter 197-11 WAC.

**16.108.040 Nonbinding determinations.**

A. A nonbinding concurrency determination shall be made at the time of a request for a land use amendment or rezone. Any nonbinding concurrency determination, whether requested as part of an application for development, is a determination of what public facilities and services are available at the date of inquiry, but does not reserve capacity for that development.

B. An applicant requesting a development action by the city shall provide all information required by the city in order for a nonbinding concurrency determination to be made on the proposed project. Such required information shall include any additional information required by the building and zoning official in order to make a concurrency determination. The concurrency determination shall become a part of the staff recommendation regarding the requested development action.

C. A nonbinding concurrency determination may be received prior to a request for development action or approval by submitting a request and any applicable fee to the building and zoning official. Information required to make this determination is the same as that cited in SMC 16.108.030(B).

**16.108.050 Certificate of concurrency.**

A. A certificate of concurrency shall be issued for a development approval, and remain in effect for the same period of time as the development approval with which it is issued. If the development approval does not have an expiration date, the certificate of concurrency shall be valid for 12 months.

B. A certificate of concurrency may be accorded the same terms and conditions as the underlying development approval. If a development approval shall be extended, the certificate of concurrency shall also be extended.

C. A certificate of concurrency may be extended to remain in effect for the life of each subsequent development approval for the same parcel, as long as the applicant obtains a subsequent development approval prior to the expiration of the earlier development approval.

D. A certificate of concurrency runs with the land, is valid only for the subsequent development approvals for the same parcel, and is transferable to new owners of the original parcel for which it was issued.

E. A certificate of concurrency shall expire if the underlying development approval expires or is revoked by the city.

**16.108.060 Standards for concurrency.**

The city of Sultan shall review applications for development, and a development approval will be issued only if the proposed development does not lower the existing level of service

(LOS) of public facilities and services below the adopted LOS in the comprehensive plan. A project shall be deemed concurrent if one of the following standards is met:

A. The necessary public facilities and services are in place at the time the development approval is issued; or

B. The development permit is issued subject to the condition that the necessary public facilities and services will be in place concurrent with the impacts of development; or

C. The necessary public facilities and services are guaranteed in an enforceable development agreement to be in place concurrent with the development.

“Concurrent with the development” shall mean that improvements or strategy are in place at the time of the development or that a financial commitment is in place to complete the improvements or strategies within six years of the time of the development.

**16.108.070 Facilities and services subject to concurrency.**

A concurrency test shall be made of the following public facilities and services for which level of service standards have been established in the comprehensive plan:

- A. Roadways;
- B. Potable water;
- C. Wastewater;
- D. Police protection;
- E. Parks and recreation.

**16.108.120 Concurrency determination – Police protection.**

A. The city of Sultan will provide level of service (LOS) information as set forth in the city of Sultan comprehensive plan.

B. If the LOS information indicates that the proposed project would not result in a LOS failure, the concurrency determination would be that adequate facility capacity at acceptable LOSs was available at the date of application or inquiry.

C. If the LOS information indicates that the proposed project would result in a LOS failure, the concurrency determination would be that adequate facility capacity at acceptable levels of service was not available at the date of application or inquiry.

**16.108.130 Concurrency determination – Parks and recreation.**

A. The city of Sultan will provide level of service (LOS) information as set forth in the city of Sultan comprehensive plan.

B. If the LOS information indicates that the proposed project would not result in a LOS failure, the concurrency determination would be that adequate facility capacity at acceptable LOSs was available at the date of application or inquiry.

C. If the LOS information indicates that the proposed project would result in a LOS failure, the concurrency determination would be that adequate facility capacity at acceptable levels of service was not available at the date of application or inquiry.

### Vested Rights

Subdivision and short subdivision applications are governed by a statutory vesting rule: such applications “shall be considered under the subdivision or short subdivision ordinance, and zoning or other land use control ordinances, in effect on the land at the time a fully completed application ... has been submitted ....” [RCW 58.17.033; see also SMC 16.28.480] A PRD application is vested along with its associated preliminary subdivision application. [*Rural Residents v. Kitsap Cy.*, 141 Wn.2d 185 (2000)] Therefore, the preliminary PUD subdivision application is vested to the regulations as they existed on October 30, 2006, the date the revised PUD subdivision application was deemed complete.

The vested rights doctrine applies to various types of land use applications:

Washington does adhere to the minority rule that a landowner obtains a vested right to develop land when he or she makes a timely and complete building permit application that complies with the applicable zoning and building ordinances in effect on the date of the application. Our vested rights rule also has been applied to building permits, conditional use permits, a grading permit, and a [shoreline management] substantial development permit.

[*Norco Construction v. King County*, 97 Wn.2d 680, 684, 649 P.2d 103 (1982), citations omitted] Therefore, this SDP application is vested to the regulations as they existed on September 15, 2006, the date the SDP application was deemed complete.

### Standard of Review

The standard of review is preponderance of the evidence. The applicant has the burden of proof.

### Scope of Consideration

The Examiner has considered: all of the evidence and testimony; applicable adopted laws, ordinances, plans, and policies; and the pleadings, positions, and arguments of the parties of record.

## CONCLUSIONS

1. *Twin Rivers Ranch Estates* presents multiple issues requiring resolution: merits of the proposal, including compliance with the SMA; compliance with the codified concurrency management system; adequacy of the recommended conditions (assuming a favorable recommendation were possible); and, to the extent not addressed elsewhere, the citizen objections. Each major topic will be addressed separately in the following Conclusions.
2. In summary, *Twin Rivers Ranch Estates* still does not meet a fair reading of two of the PUD locational criteria, fails to meet the PUD usable open space requirement, and fails to meet two SCSMP Regulations for Recreational uses and three Public Access Element policies. Therefore, the PUD and SDP cannot be approved. Without the PUD, the preliminary subdivision cannot be

approved. But a subdivision which did not rely upon the PUD provisions could be approved. And such a subdivision could be designed to comply with SCSMP requirements for approval of a SDP. Further, a condition could be crafted to assure compliance with the requirements of the Concurrency Management System. Therefore, outright denial of those elements of the application other than the PUD would be inappropriate.

3. Each major topic will be addressed separately in the following Conclusions. The Conclusions will focus on those criteria which have been challenged, but will nevertheless address all issues relevant to eventual approval. The Conclusions in this decision are grouped by topic only for the reader's convenience. Such groupings do not indicate any limitation of applicability to the decision as a whole.

#### Preliminary Subdivision and PUD Requirements

4. One of the PUD-SF locational criteria under challenge in this application is that relating to transit facilitation. [SMC 16.10.110(B)(2)(d)] The location criteria of SMC 16.10.110(B)(2) are designed (for the most part) to help limit the places within the City which are eligible for PUDs. Had the Council intended that PUDs could be located anywhere in the City, it would not have enacted restrictive location criteria. Those criteria must be given meaning.<sup>21</sup>

This same issue arose during the *Skoglund Estates* case. The Examiner's Recommendation in that case includes the following Conclusions:

18. The locational criteria of SMC 16.10.110 are mandatory: A PUD which does not meet all criteria applicable to its type of PUD can not be approved.
19. Compliance with the transit facilitation criterion of SMC 16.10.110(B)(2)(d) is mandatory for single-family residential PUDs. *Skoglund Estates* is a single-family residential PUD proposal.
20. The transit facilitation criterion of SMC 16.10.110(B)(2)(d) is subjective in nature. It does not establish a measurable "bright line" for what constitutes "sufficient proximity" to "facilitate transit access".
21. What is "sufficient proximity" to "facilitate transit access"? *Skoglund Estates* is at least 1.5 miles from the nearest transit line (using existing and/or

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<sup>21</sup> Locational criterion (B)(2)(f) offers an instructive contrast. It was expressly written so as to not limit potential PUD sites: So long as a site has access to public services equal to that of a standard development, the criterion is met. The language of Subsection (B)(2)(f) clearly demonstrates a difference of intent on the part of the Council. It wrote that criterion to be non-limiting while all the others in Subsection (B)(2) are intended to limit.

proposed streets and pedestrian paths – not as the crow flies). Is that “sufficient proximity”?

Two aspects of transit access must be considered. First is pedestrian access to a transit stop. Common sense dictates that Americans will not walk 1.5 miles through the rain to reach a bus stop – not if they have any other choice. A PUD located 1.5 miles from the nearest transit line does not have “sufficient proximity” to “facilitate transit access” for pedestrians.

The second aspect is vehicular travel to a park-and-ride location. If the standard is read to include this aspect, it becomes totally meaningless and would not provide locational discrimination for any site in Sultan: One can drive from anywhere in Sultan to a transit park-and-ride lot. Thus, every site in Sultan would meet the criterion. But if the Council intended that every site in Sultan would be eligible for a single-family PUD, why would it even establish the criterion? One must conclude that the Council did not intend for every site in Sultan to be eligible for a single-family PUD and that this criterion was established to filter out unacceptable sites.

22. A site which is 1.5 miles from the nearest transit line does not have “sufficient proximity” to “facilitate transit access” and does not meet the criterion of SMC 16.10.110(B)(2)(d). No PUD approval may be granted for such a site.<sup>22</sup>

#### Summary

23. The *Skoglund Estates* site does not meet the mandatory locational criterion of SMC 16.10.110(B)(2)(d). No condition can be imposed which would alleviate the problem: The site can not be physically moved closer to the transit facilities; O’Brien is in no position to direct Community Transit to establish a bus line on Sultan Basin Road. Therefore, *Skoglund Estates* may

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<sup>22</sup> (This footnote was in the *Skoglund Estates* Recommendation and is simply repeated here to make the quote complete.) This is the third PUD application considered since the Council adopted new PUD standards and procedures in 2002. The first was *Stratford Place* (PUD04-001, Recommendation issued February 1, 2005). The nearest transit route to *Stratford Place* was on High Street, approximately 200 feet from the site. Such close proximity unquestionably met the transit facilitation criterion.

The second was *Timber Ridge Estates* (FPPUD04-002, Recommendation Revised after Reconsideration issued May 23, 2005), approved by the Council in mid-2005 (Resolution No. 05-17). *Timber Ridge* is located on the east side of Sultan Basin Road approximately one-quarter mile north of SR 2. Although the transit facilitation criterion was not an issue in that application, the Examiner would have concluded that one-quarter mile was close enough to meet the criterion.

not be approved as a single-family PUD; that portion of the application must be denied.

5. The Council disagreed with the portion of the Examiner's *Skoglund Estates* Recommendation quoted above. Basically, the Council concluded that being located one mile from the nearest transit route or park and ride lot met the code criterion even where no pedestrian walkway or sidewalk existed between the development site and the transit facilities. (Official notice, Resolution No. 06-09A)

Unfortunately, the Council's *Skoglund Estates* Resolution offers little explanatory rationale for its decision. (See Conclusion 14, ¶ 2, below.) And the distance it cites is incorrect. Therefore, the *Skoglund Estates* Resolution cannot easily be applied to other applications, nor is it legally binding in any event.

6. In a Recommendation dated November 17, 2006, the Examiner considered the Council's *Skoglund Estates* decision when considering the remanded *Vodnick Lane* application, RAFPPUD05-004, a single family residential PUD subdivision located less than three-fifths of a mile north of SR 2 on the Sultan Basin Road. The Examiner concluded as follows:

The location of *Vodnick Lane* presents a somewhat similar set of circumstances to the *Skoglund Estates* site, but with a few important differences. *Vodnick Lane* is about three-fifths of a mile from the nearest transit stop, rather than over a mile. The walking route to that transit stop will be along the now-under-construction pedestrian pathway along the shoulder of Sultan Basin Road. This pedestrian path is a major changed circumstance since the first hearing. The Examiner is willing to concede that a site located three-fifths of a mile from a transit stop, connected to the transit stop by a pedestrian pathway, minimally meets the "sufficient proximity" to "facilitate transit access" test. *Vodnick Lane* now meets the criterion of SMC 16.10.110(B)(2)(d).

(*Vodnick Lane* Recommendation, November 17, 2006, Conclusion 7)

7. The location of *Twin Rivers Ranch Estates* presents a slightly different set of circumstances than either the *Skoglund Estates* or *Vodnick Lane* sites. *Twin Rivers Ranch Estates* is probably about one-half mile from the nearest transit stop. Were distance alone the determining factor, the site would meet the criterion given the Council's interpretation. However, the walking route to that transit stop is along the presently unimproved shoulder of an industrial road of substandard width and condition after which one must cross a bridge on SR 2 which lacks pedestrian facilities. *Twin Rivers Ranch Estates* does not "facilitate transit access" and does not meet the criterion of SMC 16.10.110(B)(2)(d) given current conditions.

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Ramirez's offer to construct a five foot wide paved pathway along Foundry Road will provide a safe access from the subdivision to Cemetery Road. The route from that point on along SR 2 to the transit stop lacks safe walking conditions. Without a safe means of accessing the transit facilities, one simply cannot conclude that the proposed PUD facilitates transit usage. To so conclude would be tantamount to encouraging people to walk along SR 2, which the evidence in this hearing record shows to be an unsafe practice.

The Examiner recognizes that this conclusion differs from that reached by the Examiner in the remanded *Vodnick Lane* where transit users will also have to walk along SR 2 to reach the transit stop. More evidence of the poor walking conditions along SR 2 exists in the present record: No pedestrian path exists along SR 2. (Exhibit 53 and testimony) That additional evidence supports a different conclusion. If it were to be argued that the Examiner should have taken official notice in *Vodnick Lane* of the obvious poor walking conditions along SR 2, then the Examiner admits to not having done so and concludes that he is not compelled to make the same error again.

8. The other PUD locational criterion under challenge in this case is compliance with SMC 16.10.110(B)(2)(c). The location criteria of SMC 16.10.110(B)(2) are designed (for the most part) to help limit the places within the City which are eligible for PUDs. Had the Council intended that PUDs could be located anywhere in the City, it would not have enacted restrictive location criteria. Those criteria must be given meaning.<sup>23</sup>

The criterion in SMC 16.10.110(B)(2)(c) contains three key elements. First, a site must be able to connect to a pedestrian and bicycle system. Second, that system must be in existence when the evaluation is performed; a proposed or potential system will not meet the "existing" restriction of the criterion. Third, the connection must be to a "circulation system," a term which is undefined in the code. DCD's Director testified during open record hearing that even an unimproved street shoulder would meet the criterion. Were that in fact the case, the criterion would be meaningless: Every site with any public street access connects to at least an unimproved shoulder. Thus, every site in the City would meet the criterion, rendering the criterion useless. The Council included the criterion to limit potential PUD sites; that purpose must be preserved in any interpretation of the criterion. The idea that an unimproved shoulder would qualify as a pedestrian and bicycle circulation system stretches the meaning of "system" beyond the breaking point.

*Twin Rivers Ranch Estates* does not meet the Subsection (B)(2)(c) criterion. Its sidewalks, even with the offered paved pathway along Foundry Road, will provide no direct connection to any sidewalks or established bicycle system. No PUD approval may be granted for such a site.

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<sup>23</sup> See Footnote 21, above.

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9. The usable open space does not meet the areal requirement of SMC 16.10.140: 49,929 SF is less than 55,923 SF. The proposal cannot be approved until the usable open space has been increased to meet the PUD standard.
10. If *Twin Rivers Ranch Estates* were otherwise approvable, the Examiner would recommend approval of a modification to the cul-de-sac length standards for development of this site. The right-of-way for the proposed cul-de-sac intersection with Skywall Drive as now designed would align with the Foundry Road right-of-way. The pavement would be slightly offset, but eventual improvements to Foundry Road will have to occur to the east and would reduce or eliminate any offset.
11. The proposal would neither encourage nor thwart the interconnection of Skywall Drive with Dyer Road. The Skywall Drive right-of-way was dedicated to the west property line at the time of the 1994 short subdivision. *Twin Rivers Ranch Estates* is not altering that dedicated right-of-way, it is only using and improving it to serve some of its proposed lots. The proposal is neutral with respect to this issue.

The same holds true for the Dyer Road sewer concern: *Twin Rivers Ranch Estates* will not force nor prevent sewers from coming to the Dyer Road area.

12. The only noise regulations within the SMC relate to "public disturbance noise." [Chapter 8.10 SMC] Therefore, the state's basic decibel-based noise regulations, authorized by Chapter 70.107 RCW and contained in Chapter 173-60 WAC, would apply. (Numerous excerpts from which are contained in Exhibit 55.) Those regulations establish noise limits based on the nature (residential, industrial, etc.) of the source property and receiving property. [WAC 173-60-030 and -040] Noise levels are to be measured at the boundary of the receiving property. [WAC 173-60-040(1)] Generally speaking, the permissible noise level is higher where the source property is industrial and the receiving property is residential than where both the source and receiving properties are residential. [WAC 173-60-040(2)]

Fallgatter and Storm seem to believe that developing residentially zoned land adjacent to industrially zoned land would somehow infringe on the rights of the industrial uses. This belief is erroneous. An industrial operator, like any land user, is required under Chapter 173-60 WAC to meet the noise regulations which apply to its property. Residents within *Twin Rivers Ranch Estates* would have to meet the applicable noise limits for residential uses and Romac must meet the applicable noise limits for industrial uses. If either were to violate applicable noise limits, the one exceeding the noise limits would be in the wrong, not the adjacent, receiving neighbor.

Staff has now dropped its former request that Ramirez be required to build a noise wall. Given that the evidence fails to even begin to demonstrate that *Twin Rivers Ranch Estates* would generate noise levels which would violate applicable standards, that change in position is sound.

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13. The proposed density is consistent with the Comprehensive Plan and the lot sizes are allowed by the SMC. That said, the small lots will be far out of character with the *Twin Rivers* lots to the east or the Dyer Road lots one parcel removed to the west. The swale provides a decent buffer on the east, and the new plan provides increased rear yard setbacks from the adjacent short-subdivided acreage tract on the west.

SDP Requirements

14. DCD's "evaluation" of compliance with the SCSMP "Development Evaluation Process" is wholly inadequate as a matter of law. DCD's "evaluation" consists of the following single sentence:

City's Staff evaluation of the Permit Application concluded the permit is consistent with the Master Shoreline Program and compiles with Use Regulations for Suburban Environment, Environment Management Polices, is consistent with Shoreline Use Element Policies and the Use activity Policies and Consistent with Natural Systems considerations.

(Exhibit 41, p. 9) That sentence is simply a cursory restatement of the regulations and policies with which an SDP application must be found consistent. It offers no analysis, no explanation as to how or why the application complies with those requirements.

The Findings and Conclusions in a land use recommendation/decision must be sufficiently detailed so as to provide the reader with an understanding of the decision maker's thought process. [See, for example, *Citizens Alliance v. Auburn*, 126 Wn.2d 356, 369, 894 P.2d 1300 (1995); *Weyerhaeuser v. Pierce Cy.*, 124 Wn.2d 26, 36 – 37, 873 P.2d 498 (1994)]

15. DCD's decision to treat the *Twin Rivers Ranch Estates* site as a Suburban Environment for SCSMP compliance purposes is justified. The Suburban Environment is intended "to protect, maintain and enhance low and medium-density shoreline residential areas." [SCSMP, p. E-5] This area, with all the subdivision housing to the east and west certainly fits that description.<sup>24</sup> Further, the site meets Designation Criteria 1 (*Twin Rivers* and the Dyer Road lots represent extensive amounts of low to medium-density residential development), 4 (the entire site could be developed for recreational uses), 5 (Sultan's Comprehensive Plan and zoning envision low to medium-density residential development of this area), and 6 (public water and sewer service can be made available to the area).

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<sup>24</sup> The objective of the Rural Environment, on the other hand, is to protect farm land, restrict intense development along undeveloped shorelines, function as a buffer between urban areas, and maintain open spaces compatible with agricultural activities. [SCSMP, p. E-7] Those objectives simply do not fit within this incorporated area.

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16. *Twin Rivers Ranch Estates*, especially that portion lying within the SMA's jurisdictional area,<sup>25</sup> comprises residential development, some utility work, and public access areas. The remainder of the development also includes street construction. Each of those components of the development is the subject of separate provisions within the SCSMP; all provisions relevant to the proposal must be evaluated. Given that the Staff Report does not contain any evaluation of compliance with the SCSMP, this Recommendation will be more thorough than typical. The steps in the SCSMP review process are set forth on page C-3 in the SCSMP.

Four of the evaluation steps require judgmental determinations of compliance with policies. In evaluating compliance with policies, it helps to keep the project's basics firmly in mind: A single family residential subdivision located between other single family residential subdivisions along the shoreline in which: The density is consistent with adopted City plans, the entire shoreline frontage is to be commonly owned (in one fashion or another), no lots are located within the flood plain of the base, regulatory flood, and full public utilities will be provided.

17. Since the Skykomish River is a Shoreline of Statewide Significance, the first step is to evaluate compliance with the policies for such shorelines. [SCSMP, p. C-3) Significant review of this application by state agencies and others has occurred. Although at least one state agency (WDFW) would apparently prefer larger stream-side buffers than have been adopted by the City, state law requires the City to enforce its duly adopted regulations and bars it from enforcing conflicting state agency desires. The proposed design preserves essentially untouched the first 200+ feet of the site shoreward of the river bank (which preserves over 140+ feet upland from the OHWM). Such a design preserves the natural character and resources of the shoreline, preserves long-term use options, and provides the opportunity for recreational use of the shoreline *per se*. The proposal fulfills the policies set forth at pages H-1 and H-2 of the SCSMP.
18. The second step is to determine compliance with applicable use regulations. [SCSMP, p. C-3] Use regulations are contained in Section F of the SCSMP. Residential Development, Utilities, Recreation, and Roads are all permitted within the Suburban Environment. [SCSMP, p. F-2]

No over-water nor fill construction is involved in this proposal. Neither flood control nor shoreline protection measures are proposed or required: The residential lots are not within the flood plain of the base regulatory flood. Utility lines within the subdivision are proposed to be underground and public water and sewer services will be used. The 25 foot OHWM setback required in the Suburban

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<sup>25</sup> The SMA legally applies to all lands within 200 feet of the OHWM of certain water bodies, one of which is the Skykomish River. The 200 foot jurisdictional area is not a shoreline buffer, it is an area within which most land use activities must obtain a SDP before being undertaken. The perception of some that the 200 foot area is a sacrosanct buffer is completely mistaken and not supported by the law.

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Environment is easily met as the nearest part of any lot will be some 140+ feet from the OHWM. The proposal meets the Residential Development regulations on SCSMP pages F-60 – F-62.

Utility lines will be underground and, for the most part, beneath the proposed street system. The underground lines will not cross through any water body. The proposal meets the Utilities regulations on SCSMP pages F-71 – F-73.

The proposed open space takes maximum advantage of the site's shoreline location: Tracts 997, 998, and 999 encompass the site's entire river frontage. The proposal meets the sole Recreation regulation (General Regulation 1) which is applicable. (SCSMP, p. F-57)

Most of the regulations pertaining to roads simply are not applicable as they refer to road construction projects *per se*, not to streets within a subdivision. The location of the parking for the public shoreline access parcels does not comply with General Regulations 10 and 11: The record contains no evidence that the parking area is to be landscaped; the "path" from the parking area to the shoreline would not be particularly safe or convenient. A visitor to the proposed public park would park his/her vehicle along Skywall Drive, walk across Skywall Drive, walk along the sidewalk of the internal plat street for some 260 feet, and then along a 10 foot wide path between Proposed Lots 18 and 19 to reach Tract 998. This is not a good plan; it offers too many opportunities for park visitors to disturb the tranquility of the *Twin Rivers Ranch Estates* residents. This problem is not so much Ramirez's as it is a problem with the MDNS. To develop a decent public park along the shoreline of the Skykomish River, a sufficiently sized parking area would be required within or immediately adjacent to the park land. Yet to do so here would require Ramirez to drop at least two if not more of the proposed lots. One can easily imagine that the economics of the project would begin to fail at that point. Unfortunately, the MDNS mitigation measure requires a public park along the shoreline, the MDNS was not appealed, and the mitigation measure is now binding on all participants in this proceeding. That binding SEPA requirement, however, does not eliminate the need for safe and effective parking for the required park. The proposal meets all Roads regulations except as noted above.

19. The third review step requires a judgmental decision regarding compliance with Environment Management Policies. [SCSMP, p. C-3] The nine Environment Management Policies for the Suburban Environment are set forth at pages E-4 – E-5 of the SCSMP. Policies 6, 7, and 9 address topics which are not applicable to this proposal. The proposal would not meet Policy 4 (linking the public park with bicycle and pedestrian pathways), but compliance is not mandatory: The policy says "where practical." It clearly would not be practical here. The proposal represents a low to medium density project as allowed by the current zoning, it provides for City ownership of the major open space tracts along the river, and it is a PUD. Thus, the proposal would fulfill Policies 1 - 3, 5, and 8.
20. The fourth review step requires consistency with the applicable Shoreline Use Element Policies. [SCSMP, p. C-3] The Shoreline Use Element Policies are contained in Section D of the SCSMP.

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They cover a wide range of topics. Many of the 66 policies contained in that Section simply don't apply to this type of development. However, compliance with three of the Public Access Element Policies is dubious. The design, size, and location of this proposed public access does not seem to properly reflect Policies 1 (protect private rights of adjacent owners), 3 (assure public safety in the design of public access), and 5 (the type of access should be appropriate to its location). The MDNS requirement that Tracts 997, 998, and 999 be dedicated to the City as park land has not been followed up with any planning as to how to properly develop that land for safe, effective park use.

21. The fifth review step requires consistency with applicable Use Activity Policies. [SCSMP, p. C-3] The Use Activity Policies are contained in Section F of the SCSMP. The policies for Residential Development, Utilities, Recreation, and Roads would all apply. The proposal complies with all seven Residential Development policies through its use of the PUD and its extensive shoreline access provisions in the design. Only two of the Utility policies apply (restore areas after utility installation and place utilities underground); the remainder relate to transmission facilities. The Recreation Policies in large measure do not apply to this proposal. The record does not indicate that much thought was provided regarding Policies 3 (consider the effect of a park on its surroundings) or 5 (provide safe walking paths between parking areas and the shoreline) when the MDNS mitigation measure was imposed. None of the Roads Policies are particularly germane. Those few that are would be fulfilled by compliance with the General Regulations during site development.
22. The sixth (and final) review step requires consistency with Natural Systems Considerations. [SCSMP, p. C-3] The Natural Systems Considerations are contained in Section G of the SCSMP. The applicable considerations are those within the Rivers, Streams, and Creeks discussion. [SCSMP, p. G-5] Most of that section provides a short overview of river morphology. Nothing in the proposal would adversely affect "the natural hydraulic functioning of the" Skykomish River. [SCSMP, p. G-5, ¶ 5]
23. Except as noted in Conclusions 17 – 22, above, *Twin Rivers Ranch Estates* complies with applicable provisions of the SCSMP.

Concurrency<sup>26</sup>

24. Subdivision PUD applications are development permits. [SMC 16.120.050] *Twin Rivers Ranch Estates* is not categorically exempt from SEPA threshold determination requirements. (Exhibit 5)

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<sup>26</sup> The Examiner concludes that Resolution Nos. 06-06, 06-07, and 06-09A do not establish precedent for this or future cases. The analysis which follows has benefited from the Council's holdings in those Resolutions and is somewhat different from the Examiner's prior analyses on this issue, but does not agree in full with the Resolutions' holdings. Those Resolutions imposed no concurrency conditions on either development. (Conclusion 6 in each Resolution "takes notice" of an applicant offer to provide a developer agreement for an "incremental share for a police officer for one year." None of the three Resolution, however, imposes any such requirement on the application.)

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Therefore, *Twin Rivers Ranch Estates* is subject to the concurrency requirements of Chapter 16.108 SMC. [SMC 16.108.020]

25. DCD's concurrency determination is to be considered part of its recommendation to the Examiner. [SMC 16.108.040(B)] The Examiner can not recommend and the Council can not approve a development application which does not demonstrate compliance with the concurrency requirements of Chapter 16.108 SMC. [SMC 16.108.060]
26. Section 16.108.060 SMC states that development approval is to be granted "only if the proposed development does not lower the existing level of service (LOS) of public facilities and services below the adopted LOS in the comprehensive plan." But what happens where the existing LOS is already below the established standard? Or where the LOS may fall below the standard when previously approved residential projects are developed? May a development be approved because it is not the one which "broke" the LOS standard?

Common sense must be applied in interpreting the quoted code language. One could argue that the section holds that only the one project which would "break" the standard could not be approved, but that all subsequent proposals could be approved since they were not the project which lowered the LOS below the established standard – they simply made it even lower.

Such an interpretation makes no sense. The only reasonable interpretation of the quoted language is that developments may not be approved either if they would themselves cause the LOS to fall below the established standard or if the LOS is already below that standard.

27. The concurrency process of Chapter 16.108 SMC is wholly separate from and independent of the impact fee process of Chapter 16.112 SMC. The former seeks to assure that established LOSs are maintained; the latter requires developers to pay a share of the costs of facilities required by new development. The latter is a Growth Management Act (GMA) impact fee program adopted by the City pursuant to Chapter 36.70A RCW, GMA, and "RCW 82.02.050 et sequitur". [SMC 16.112.010, ¶ 1] The latter is not subject to the fee limitations associated with RCW 82.02.020; but it is subject to the definitional limitations of RCW 82.02.090: No impact fess may be collected for police services as such services are not defined as "public facilities."
28. Chapter 16.108 SMC does not impose an impermissible cost on developers. In fact, it doesn't necessarily impose any cost on developers. Rather, it establishes a threshold condition which must now exist in the community, be conditioned to exist concurrent with the impacts of the development, or be funded to exist concurrent with the impacts of the development in order for any development approval to be granted. If that threshold condition (LOS at or above the established level) exists

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when the development approval is granted, then SMC 16.108.060(A) is met and the development is deemed concurrent.<sup>27</sup> If the required LOS is not present, then SMC 16.108.060 provides two alternative mechanisms by which a development may still be found to be concurrent.

Subsection (B) addresses the situation where the LOS standard would not be met but a condition is imposed requiring that the LOS standard be met at the time development impacts occur. Such a condition would not necessarily mean that a developer would have to make any financial contribution towards solving the LOS deficiency. Rather, it would simply not allow development impacts until the standards were met.

For residential subdivisions, significant development impacts really begin to occur when houses are completed and occupied. Therefore, a condition requiring that the LOS standard be met when each residence is approved for occupancy (every residential building permit is subject to a Final Inspection before occupancy may legally occur) would fulfill Subsection (B). This requirement would have to appear on the face of the final plat as a legal notification to prospective purchasers (since one could build a house and be unable to occupy it if the LOS standard were not met at that time). The LOS standard to be met should be that in existence at the time the development is occurring, not that in existence currently. (This is analogous to impact fees which do not vest.)

Subsection (C) addresses the situation where the LOS standard would not be met but the developer enters into a binding agreement with the City to provide the necessary resources to raise the LOS to meet or exceed the established LOS within six years. This is an option in which the typical developer would likely be committing more than his/her fair share. But "latecomers" agreements are available for just such situations.<sup>28</sup> And, the developer always has the option to wait until the City makes the necessary commitments to raise the LOS.

29. According to SMC 16.108.070, .120, and .130, the LOS standards for police services and parks, recreation, and open space are the standards as set in the 2004 Comprehensive Plan: 2.6 uniformed officers per 1,000 population and 42.6 acres per 1,000 population, respectively.

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<sup>27</sup> To read this subsection as one prior applicant has suggested (the LOS must meet the standard for only the one day on which the Council will act on the proposal) is simply illogical and makes a mockery of the entire concurrency system chapter. If such was the true intent of the Council when it enacted Chapter 16.108 SMC, the Council will have to so declare on its own initiative: The Examiner declines to even suggest that such an interpretation might have been intended.

<sup>28</sup> In fact, developers frequently extend water and sewer lines to serve a development. The cost of getting those lines to the development site often is above and beyond a roughly proportional cost. But the developer usually does not want to await the extension of those lines by the City, so it offers to fund them now and enter into a "latecomers" agreement by which, over time, at least some of its excess investment costs may be returned when others connect to the lines for which it has paid.

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The Council in adopting the LOS standards in the 2004 Comprehensive Plan without exception used the 2003 actual LOS ratios/levels as the standards that have to be met in the future. The text in Appendix B of the 2004 Comprehensive Plan does not explain why the 2003 actual levels were chosen as the standards for the future. As adopted, those standards effectively mean that any reduction in police staffing below that in place in 2003 would drop (actually has dropped) the City below its established LOS. As the City has grown, additional officers would have of necessity been needed to maintain the LOS above the standard: Even 1 additional resident would have lowered the LOS below the standard. The same holds true for park, recreation, and open space lands.

Whether that was the Council's intent when it adopted the 2004 Comprehensive Plan is unknown. (Legislative intent is not relevant where the enactment is clear and unambiguous on its face.) Whether the Council even realized the effect of the standards it was adopting is equally unknown. Even if the Council were to change the standards now, new standards could not legally be applied in the review of *Twin Rivers Ranch Estates* because of the vested rights doctrine: The application must be reviewed against the regulations which existed on October 30, 2006, the date the revised application was deemed complete. Further, an applicant may not "selectively waive" some old regulations while retaining a vested right to others. [*East County Reclamation Co. v. Bjornsen*, 125 Wn. App. 432, 105 P.3d 94 (2005)]

30. A concurrency recommendation or certificate must be based upon facts. Those facts must include the (estimated) population of the City at the time of the application for which concurrency is sought, the number of residents expected to be added by the proposed development, and the amount of the affected service then available in the community (For example, the number of uniformed officers in the police department; the total acreage of parks, recreation, and open space using the same methodology as used in the 2003 inventory.) Given those facts, LOS for each required service area may be calculated. Without those facts, LOS cannot be calculated. If the LOS cannot be calculated, then no favorable conclusion is possible regarding concurrency.
31. DCD's position on Concurrency has ebbed and flowed throughout the series of subdivision hearings this year. For example, in the *Hammer PUD* hearing held on May 10, 2006, DCD argued that a developer agreement was necessary in order to insure that the police service LOS was met. It abandoned that position during the first *Vodnick Lane* hearing on May 15, 2006. However, three days later on May 18, 2006, DCD again argued that a developer agreement was necessary during the first *Twin Rivers Ranch Estates* open record hearing. Such inconsistency demonstrates why the Examiner has not been able to rely on the staff for guidance during these contentious hearings.

Police Services

32. The present LOS for police services is far below the standard established within the 2004 Comprehensive Plan. Additional residential development within the City will only serve to further lower the LOS.

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33. DCD erred in concluding that *Twin Rivers Ranch Estates* meets the concurrency standard for police services.
34. The Police Services Agreement simply does not guarantee that the police services LOS will meet the established standard when the development occurs – or even six years later. The concept underlying the offered agreement suffers from several shortcomings. First, even if fully funded all at once, the Police Services Agreement would fund only 16% of the cost of one police officer for one year. The City cannot hire 16% of a person. Even if it could, the LOS would still be woefully below the established standard – and would fall back again after the one year of funding ended.

Second, the Police Services Agreement calls for the funds to be paid as each building permit is issued. Based on the proposed 21 new dwelling units and the total offered mitigation of \$23,506.00, the City would receive \$1,119.33 each time a residential building permit was issued for *Twin Rivers Ranch Estates*. Such a small stream of cash would not allow even 16% of a police officer to be hired.

Even if all the offered funds were paid at one time, it would take slightly more than six *Twin Rivers Ranch Estates*-sized developments to fund just one police officer ( $16\% \times 6 = 96\%$ ), and that one officer would not raise the police services LOS to the established standard. In fact, it would take 24 *Twin Rivers ranch Estates*-sized subdivisions, all developed at essentially the same time, to raise the LOS to the established standard. But that simple equation (1 officer funded by the fees from 6 subdivisions yields 4 officers after 24 subdivisions) fails to account for the fact that those 24 *Twin Rivers Ranch Estates*-sized subdivisions would themselves raise the City's population by some 1,490 people (2.7 persons per household, the number stated in the Police Services Agreement), thus lowering the LOS again. In fact, all a program such as offered by Ramirez does is hold the LOS at its current level as new houses are added to the community – and then only if development occurs fast enough that the payments for fractional officers can be combined to actually hire a police officer.

This concept simply is not what the SMC requires. The Council may certainly change the SMC requirement if it wishes. But in the meantime, the code is what controls – and even if the code were changed today, that change would not apply to any subdivision application filed in a complete fashion before the change became effective.

Furthermore, such incremental funding arguably would run afoul of the RCW 82.02.090 prohibition against collecting impact fees for police services. If Chapter 16.108 SMC is read as the Examiner believes it has to be, no such conflict would exist as the chapter would not be charging an impact fee.

35. The City has no “strategy in place” to increase police staffing. The electorate defeated its latest proposed strategy. The discussion in Conclusion 5 of Resolution Nos. 06-06 and 06-07 and Conclusion 4 of resolution No. 06-09A regarding possible additional taxes that could or might be adopted to raise revenue is a strategy, but it is not in place. However, that Council discussion (that

additional tax revenues coupled with developer funds could raise the LOS to meet the standard) could be converted into a condition which could read as follows:

Prior to approval of the Final plat, a combination of developer agreements and public funds, including additional tax adoptions (such as a utility tax on cable television service, an increased real estate excise tax, and a B & O tax), other funding sources (such as potential developer loans to advance the receipt of payment of needed funds), and monies contributed by the proposed development for its impacts on the LOS, shall put in place the required public services for police concurrent with the development impacts, and provide appropriate strategies for the six years from the time of development to achieve the necessary police LOS as now established or as subsequently revised.

Such a condition would meet the requirement of SMC 16.108.060(C).

36. Approval could also be conditioned such that the police services LOS in existence at the time of final building permit inspections had to be met before approval for occupancy could be granted. Such a condition would meet the requirement of SMC 16.108.060(B).
37. Under the present circumstances, the best Concurrency solution would be to impose an "either - or" condition: Require compliance with a condition as suggested in Conclusion 35, above, or compliance with a condition as suggested in Conclusion 36, above.

#### Parks, Recreation, and Open Space

38. The City is presently concurrent with respect to parks, recreation, and open space based upon the evidence in this hearing record. Regardless of whether the Water Treatment Plant site is designated as parks/open space on the adopted Comprehensive Plan, the reality is that when the Council annexed that property, it did so designate it. Any challenge to such designation must occur in another forum, not as a part of this project permit review process.
39. The Park Services Agreement suffers from exactly the same problems as have been spelled out in the previous Police Services Section (except that impact fees are not barred for parks). While the Parks LOS may presently meet the standard, development of even some of the already approved residential subdivisions will tip the scales and break the standard. Parks LOS should be resolved in the same fashion as suggested in Conclusions 35 – 37, above.
40. Tracts 998 and 999 still should not be accepted for dedication to the City. While the SEPA MDNS requires dedication, while the SMA encourages public access to public bodies of water, and while statewide interests are to prevail in the cases of Shorelines of Statewide Interest, the fact remains that this proposal would create a very desirable river access area without providing decent parking reasonably related to the access for the public attracted to it. That situation would effectively create an

attractive nuisance – a nuisance which would affect not only the residents of *Twin Rivers Ranch Estates*, but also all those to the east. Provision of adequate parking for public access here cannot be an afterthought as it is in the present proposal. Great care would have to be shown in the design and planning for such an access. That has not occurred to date.

The fact that dedication of Tracts 998 and 999 is a mitigation measure within the MDNS does not force the City to accept dedication absent adequate parking/infrastructure to support it. While it is too late for anyone to challenge the MDNS's mitigation measure, the City need not accept dedication for which inadequate parking and access control are provided.

#### Conditions

41. Because of the serious and partially fatal deficiencies identified in the preceding Conclusions, the recommended conditions as set forth in Exhibit 41 need not be analyzed in detail. DCD has corrected the three items listed by the Examiner in his June 19, 2006, Recommendation. (Exhibit 21, p. 31, Conclusion 32) Were it possible to recommend approval at this time, the Examiner would recommend the following further changes:
- A. Recommended Condition 1 (adopting the approved plans) would need to specifically identify those hearing exhibits which are being approved; as written, it does not do so. Exhibit 29.1, modified by Exhibits 46 and 47, is the basic preliminary plat, PUD site plan, and SDP plan. Exhibit 2 provides the required PUD house plans. All would need to be listed as approved plans.
  - B. Land use permits and approvals run with the land: An approved permit is valid regardless of who owns the land. It is thus possible that the eventual developer of a project will be someone other than the applicant who applied for the approval. It is for that reason and to avoid potential misunderstanding in the future that the Examiner would substitute the word "developer" for the word "applicant" in all conditions. That change would affect Recommended Conditions 2 – 5, 7 – 9, 15, 17, 19, 21, 23, 24, 26, 28 – 30, 33, and 34.
  - C. The rear setback number in Recommended Condition 3 is supposed to be 20 feet, not 25 feet.
  - D. Recommended Condition 7 contains a grammatical error ("developed" should be "develop") and an omission ("Tracts 998 and shall" should be "Tracts 998 and 999 shall"). Both would need to be corrected.
  - E. Recommended Condition 9 contains a grammatical error which would need to be corrected ("rear Lots" should be "rear of Lots").
  - F. Recommended Condition 9 would need to state that Exhibit 29.1 is the location of the referenced plan.

- G. Recommended Condition 12 would need to state that Exhibit 1.5 is the location of the referenced report.
  - H. Recommended Condition 16 contains a grammatical error which would need to be corrected (“as controlled” should be “as a controlled”).
  - I. Recommended Condition 17 contains a grammatical error which would need to be corrected (“BNSF;. and” should be “BNSF.”)
42. The SMA no longer mandates a special SDP format; the local jurisdiction’s standard permit format is sufficient so long as a required warning against development prior to expiration of the statutory review period is included. [WAC 173-27-190(1) and (2)] That warning would need to be added to the DCD-recommended permit conditions in order to comply with state law.

Citizen Concerns

43. Those citizen concerns which need to be addressed at this time have been addressed in previous Conclusions. The remaining concerns need not be addressed now given the nature of the Recommendation.

Summary

44. The *Twin Rivers Ranch Estates* site does not meet the mandatory locational criterion of SMC 16.10.110(B)(2)(c) or (d) nor the usable open space requirement of SMC 16.10.140. No condition can be imposed which would alleviate the locational deficiencies. Therefore, *Twin Rivers Ranch Estates* may not be approved as a single-family PUD; that portion of the application must be denied.
45. The City may take one of three actions on a preliminary subdivision application: Approve it with or without conditions; return it to the applicant for modification to correct identified shortcomings; or deny it. [SMC 16.28.330(C)] Since *Twin Rivers Ranch Estates* could be refiled as a standard subdivision, the fairest solution is to return the preliminary subdivision application to Ramirez for modification.
46. The SMC does not expressly provide for denials without prejudice. A denial without prejudice is essentially an interim denial (albeit final unless subsequent action is taken).<sup>29</sup> It’s purpose is to allow an applicant to correct an otherwise fatal defect without having to wait for the 120 day reapplication time period of SMC 16.120.030(B) to run. Where the problem which prevents approval is not the result of a totally unacceptable proposal, the “without prejudice” denial action is appropriate. Since

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<sup>29</sup> It is analogous to the “return to the applicant for correction” option which is available for subdivision applications. [SMC 16.28.330(C)(2)]

the SDP for *Twin Rivers Ranch Estates* might be able to be altered to meet applicable SCSMP requirements, the fairest solution is a denial without prejudice

46. Any Finding of Fact deemed to be a Conclusion is hereby adopted as such.

### RECOMMENDATION

Based upon the preceding Findings of Fact and Conclusions, the testimony and evidence submitted at the open record hearing, and the Examiner's site view, the Examiner **RECOMMENDS** that the *Twin Rivers Ranch Estates* Planned Unit Development be **DENIED**, that the *Twin Rivers Ranch Estates* preliminary subdivision be **RETURNED TO THE APPLICANT FOR MODIFICATION** as necessary to meet approval criteria and to demonstrate compliance with Chapter 16.108 SMC, Concurrency Management System, regarding police services and parks and recreation, and that the Substantial development Permit for *Twin Rivers Ranch Estates* be **DENIED WITHOUT PREJUDICE..**

Recommendation issued December 27, 2006.

\\s\ John E. Galt (Signed original in official file)

John E. Galt,  
Hearing Examiner

### NOTICE OF RIGHT OF RECONSIDERATION

This Recommendation, dated December 27, 2006, is subject to the right of reconsideration pursuant to SMC 2.26.120(D). Reconsideration may be requested by the applicant, a party of record, or the City. Reconsideration requests must be filed in writing with the City Clerk/Treasurer not later than 5:00 p.m., local time, on January 8, 2009, (which is the first working day after the tenth calendar day after the date of mailing of this Decision). Any reconsideration request shall specify the error of law or fact, procedural error, or new evidence which could not have been reasonably available at the time of the hearing conducted by the Examiner which forms the basis of the request. Any reconsideration request shall also specify the relief requested. See SMC 2.26.120(D) and 16.120.110 for additional information and requirements regarding reconsideration.

### NOTICE OF COUNCIL CONSIDERATION

This Recommendation becomes final as of the eleventh calendar day after the date of mailing of the Recommendation unless reconsideration is timely requested. If reconsideration is timely requested, the

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Examiner's order granting or denying reconsideration becomes the Examiner's final recommendation. The Examiner's final recommendation will be considered by the Sultan City Council in accordance with the procedures of SMC 2.26.120(D) and Title 16 SMC. Please contact the Department of Community Development for information regarding the scheduling of Council consideration of this Recommendation. Please have the applicant's name and City file number available when you contact the city.

The following statement is provided pursuant to RCW 36.70B.130: "Affected property owners may request a change in valuation for property tax purposes notwithstanding any program of revaluation."