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Attachment 3

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January 4, 2007

City Administrator  
City of Sultan  
319 Main Street, Suite 200  
Sultan, WA 98294

Re: Twin River Ranch Estates (File No. FAFPPUD-05-006/SMP-06-001)/Notice of  
Appeal

Dear City Administrator:

I represent the Applicant in the above-referenced matter. Please allow this to serve as the Applicant's Notice of Appeal of the Recommendation of the Hearing Examiner dated December 27, 2006.

This project consists of joint applications for a Shoreline Substantial Development Permit and a Preliminary Planned Unit Development subdivision. While the recommendation of the Examiner automatically goes to the Council for a decision under SMC 16.10.090(C), in an abundance of caution the Applicant is concurrently filing this appeal under SMC 2.26.140.

The Applicant believes that the Examiner's recommendation to deny the PUD application and to deny the substantial development permit was erroneous, in that the Examiner committed errors of law and misinterpreted the applicable zoning ordinances, the comprehensive plan, provisions of the City's code and State law, and the Examiner's findings and conclusions are not supported by the record. Specifically, the Examiner erred in concluding that the site does not meet the mandatory locational criterion of SMC 16.10.110(B)2(c) or (d), and that the site does not meet the usable open space requirement of SMC 16.10.140. The Examiner further erred in concluding that the application fails to meet the SCSMP Regulations for Recreational Uses and three Public Access Element policies.

This application was previously before the Council following an initial recommendation by the Examiner. At that time the Applicant requested to have his project remanded to Staff, so that the project could be revised in accordance with the Staff's direction to satisfy the issues raised in the Examiner's initial recommendation. That was done. The Applicant and City Staff both felt that all of the issues originally identified by the Examiner had been addressed when the project went up for a second hearing.

In addition, following the initial remand of this project the Council considered and approved the development application for Vodnick Lane (RAFPPUD05-004). The Vodnick Lane development presented several issues that are also present in the Applicant's project (specifically, the issue of whether the site has "sufficient proximity" to "facilitate transit access.") In this case, the subject site is closer to the nearest transit stop than was the site in Vodnick Lane. The disparate treatment of similarly situated parties raises the potential for an Equal Protection violation.

In addition, the Examiner failed to properly consider the evidence in the record indicating that the walking route to the transit stop will have an improved bike lane for pedestrian access and that the SR 2 bridge also has pedestrian access. The Applicant will be paving a 5' wide trail from Skywall drive, across the railroad crossing (which is being widened) along the east edge of Foundry Drive to Cascade View Drive. The intention is to pave over the area that will be disturbed as the sewer line is placed along Foundry Drive. This will produce a connection to the improvements that are being planned as part of the Foundry Drive/Sultan Basin interchange, achieving both short term and long term connection to the local transit system. Rather than acknowledging the existence of this connectivity, the Examiner made the subjective determination that the connection was somehow inadequate. However, he failed to identify any objective basis for his opinion. It was error for the Examiner to substitute his personal judgment for the professional expertise of City Staff on this issue.

Furthermore, the Examiner erred in relation to the locational requirements for PUDs, which can be located anywhere within the City (as confirmed by the Director of Community Development). The Examiner's failure to accept the interpretation of the Director of Community Development is clear error. Likewise the Examiner failed to properly assess the evidence in the record relating to the useable open space requirement and the substantial evidence that the project satisfies SDP requirements and the parks LOS standards. (The assertion that the project would create an "attractive nuisance" is pure conjecture and fails to recognize the legal definition of an attractive nuisance under Washington law, and there is no objective indication that the proposed parking arrangement is inadequate.) Finally, with regard to police services, the Examiner failed to follow the Council's prior direction on the acceptance of mitigation under a Police Services Agreement (the proposed Agreement uses the same facts and calculations as the agreement that was approved as part of Skoglund Estates, again raising the question of equal treatment).

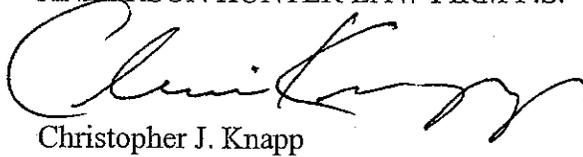
The Applicant respectfully requests that the Council place this matter on for a closed record appeal hearing. At the conclusion of that hearing the Council should adopt the Examiners findings and conclusions that support approval of this project, reverse the Examiner's decision to the extent that it calls for denial or remand of the project, and approve the PUD and SDP applications for Twin River Ranch Estates.

Notice of Appeal  
January 4, 2007  
Page 3

Thank you for your consideration of this matter.

Very truly yours,

ANDERSON HUNTER LAW FIRM P.S.



Christopher J. Knapp

CJK:kk

cc: Mr. Dan Ramirez  
Mr. David Gipson  
✓Mr. Rick Cisar  
Mr. Thom Graafstra

**CITY OF SULTAN  
Sultan, Washington**

**RESOLUTION NO. 06-09A**

**A RESOLUTION OF THE CITY OF SULTAN  
REJECTING THE HEARING EXAMINER'S  
RECOMMENDATION AND APPROVING THE  
SKOGLUND ESTATES PRELIMINARY PLAT  
AND PLANNED UNIT DEVELOPMENT AND  
PRELIMINARY PLAT APPLICATION**

**WHEREAS** Sultan 144 LLC filed an application for approval of the Skoglund Estates Preliminary Plat and Planned Unit Development and Preliminary Plat Application;

**WHEREAS** an open record hearing occurred before the City's Hearing Examiner on April 25, 2006;

**WHEREAS** the Hearing Examiner made a recommendation dated May 2, 2006;

**WHEREAS** Sultan 144 LLC sought reconsideration of the Hearing Examiner's decision as it pertains to issues relating to concurrency;

**WHEREAS** the Hearing Examiner denied reconsideration on May 15, 2006;

**WHEREAS** Sultan City Staff by Memorandum dated May 18, 2006 advised the City Council that the Staff did not agree with the Hearing Examiner's interpretation of SMC 16.10.110(B)(2.)(d.);

**WHEREAS** Applicant, Sultan 144 LLC, filed an Appeal of the Hearing Examiner's Decision Denying Motion for Reconsideration to the City Council dated May 25, 2006,

**WHEREAS** the application came before the City Council for a closed record hearing on June 15, 2006;

**WHEREAS** the City Council has determined based upon the law and the facts to accept the Hearing Examiner's findings of fact in part, to reject the Hearing Examiner's Conclusions of Law, and to reject the Hearing Examiner's recommendation and approve the application;

**NOW, THEREFORE:**

1. The City Council rejects the recommendation of the Hearing Examiner and approves the Preliminary Plat and Planned Unit Development of Skoglund Estates With Conditions as set out in the Staff Report dated April 17, 2006, pages 11-17, and as modified below.

2. Commencing at page 3 of the Hearing Examiner's Recommendation, the Hearing Examiner made 20 Findings of Fact. The Council adopts the Hearing Examiner's Findings of Fact 1-17. Finding of Fact 18 is rejected. 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. 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.

19. Subsequent to the open record hearing in this matter on April 25, 2006, the City Council enacted Ordinance 922-06 annexing 35 acres adjoining the City's water treatment plant to the City and designating said property for public use, including public parks. This property is suitable for public park use, and should be counted in the land available as public park in the City. The addition of this acreage provides sufficient additional public park facilities in the City so that the City's level of service for parks is still met, notwithstanding this application.

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. Beginning at page 13 of the Hearing Examiner's Recommendation are 25 Conclusions of Law. The Council rejects all 25 Conclusions of Law and makes the following Conclusions of Law and Conditions:

Conclusions of Law and Conditions:

1. The proposed Preliminary PUD and Plat is found to be in conformance with 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. Based upon Finding of Fact 19 above, this proposed development does not lower the existing level of service for parks below the adopted LOS in the comprehensive plan.
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 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.
7. Based upon finding of fact 18, this application satisfies the locational requirements for a PUD.
8. The Council accepts Conditions 1 through 40 beginning at page 11 of the Staff Report, with the following modifications:
  - a. The word "shall" will replace the word "should" in Conditions 15, 17, and 19.
  - b. The word "shall will replace the word "may" in Condition 20.
  - c. Condition 30 is amended to include the word "frontage" between the words "subdivision" and "and".
  - d. Condition 35 is deleted.

**PASSED BY THE** Sultan City Council and **APPROVED** by the Mayor this 29<sup>th</sup> day of June, 2006.

**CITY OF SULTAN**

By \_\_\_\_\_  
Ben Tolson, Mayor

Attest:

By \_\_\_\_\_  
Laura Koenig, City Clerk

RECEIVED  
FEB 01 2007

BY: AK

January 31, 2007  
Sultan City Council  
319 Main Street  
Sultan, Washington  
98294

Dear Sultan City Council,

Please take these comments into the record regarding the "APPEAL MEETING AND CLOSED RECORD HEARING TWIN RIVERS RANCH ESTATES". And the "RESCHEDULED APPEAL MEETING and CLOSED RECORD HEARING for the VODNICK LANE PLANNED UNIT DEVELOPMENT". Pursuant to SMC 2.26.150(A) The council shall consider "any written comments received by the council before closure of the city clerk/treasurer's office seven days prior to the public meeting date set for council consideration".

It will become clear in the following discussion that city staff has misapplied SMC 2.26 in accommodating these appeal meeting requests. Both of these appeal meetings center around the misrepresentation of the actions of the Hearing Examiner in regard to the review of Planned Unit Development applications within the City of Sultan. The point of contention in these appeal meetings differs. One of the appeals incorrectly challenges an Examiners decision when in fact a *recommendation* not a decision has been rendered. The other improperly challenges Examiners recommendations by attempting to use an appeal process that is not applicable. Based upon the reasons cited below I ask that this proceeding be canceled in the hope of saving the applicant and the Sultan Taxpayer both time and money in continued appeal costs

#### Ramirez Notice Summary

"The City of Sultan City Council will conduct a public meeting on February 8, 2007 at 6:00 PM or soon thereafter to consider an Appeal of the Hearing Examiners recommendations (pursuant to Sultan Municipal Code 2.26.140)...and a Closed Record Hearing (pursuant to SMC 16.10.090) of the Hearings Examiners December 27, 2006 recommendation..."

#### Vodnick Notice Summary

"The City of Sultan City Council will conduct a public meeting on February 8, 2007 at 6:30 PM or soon thereafter to consider an Appeal of the Hearing Examiner November 17, 2006 decision for the Vodnick Lane Planned Unit Development."

#### Issues

1. The Sultan Municipal Code 2.26.140 delegates to the city council no authority to hear an appeal of an Examiner recommendation. The controlling text does not reference recommendations only decisions.

2. Recommendations from the Examiner are not decisions and are not final and conclusive, pursuant to SMC 2.26.140. Decisions must be final and conclusive to establish right of appeal. Right of appeal to the council or to superior court is not established in the record. Such right must be established pursuant to SMC 2.26.140 B. 1 and 2.26.140 D.

3. Sultan Municipal Code prohibits the Hearing Examiner from rendering decisions regarding Planned Unit Developments. Only the City Council is vested with such authority pursuant to SMC 16.10.020, SMC 16.128.030 and 16.10.090. Pursuant to SMC 2.26.140 no final and conclusive decision exists and consequently nor does any right of appeal.

4. The applicants appeal statement is inadmissible for consideration in this closed record hearing pursuant to SMC 16.10.090 C. The advertised closed record hearing pursuant to SMC 16.10.090 and public meeting pursuant to SMC 2.26.140 cannot be conducted concurrently with respect to the same PUD. To do so would create incompatible procedural criteria, considerational criteria, and decisional criteria resulting in an unlawful record before the council.

5. Under RCW 35A.63.170 the city council has no authority to concurrently review this Hearing Examiners recommendation as though it were (1) a final and conclusive administrative decision with right of appeal to the city council and (2) as a recommendation to the council who must then render a decision based upon the recommendation and record before the examiner.

6. Procedures for appeal not provided to participants pursuant to RCW 36.70B.130. Notice of decision not provided to participants. A local government shall provide a notice of decision that includes procedures for administrative appeal if any, to those who submitted substantive comments on the application.

#### **Discussion Issue 1**

The implication of this notice is that Sultan Municipal Code 2.26.140 in some way has legal authority with respect to the appeal of recommendations issued by Sultan's Hearing Examiner. It does not. The word recommendation is not scribed within the statute. The statute applies only to appeal from examiner's decision(s). A thorough review of SMC 2.26 reveals the word recommendation is not found in the referenced and controlling code 2.26.140. Contrastingly the word decision is utilized on multiple occasions within the code. Words have meanings; no reasonable person would conclude that there could have been any intent by the authors of the section titled "Appeal from examiner's decision" for it to apply to recommendations. Had that been the authors intent, they would have likely titled it "Appeal from examiners recommendations", they did not. The intent is clear and unambiguous, 2.26.140 applies only to decisions, not recommendations of the Hearing Examiner.

#### **Discussion Issue 2**

*The examiners recommendations or decisions in these matters are not final and conclusive.* If they were, city staff would not have scheduled for February Eighth the closed record hearing to consider the Examiners Recommendations pursuant to SMC 16.10.090.

The notice does not indicate which statute or authority was utilized to establish that the city council has the legal authority to consider this matter. The code cited by the city to be the controlling statute in this matter contemplates two options for the consideration of appeals of hearing examiner decisions. The appeals of decisions made by the Sultan Hearing Examiner may be heard by Snohomish County Superior Court or by the Sultan City Council. (As noted above the notice for one of these matters advertises "an Appeal of the hearing examiners

recommendations" inconsistent with verbiage of the cited controlling statute). The two possible alternatives are cited below.

SMC 2.26.140 B. 1. *Where the examiner's decision is final and conclusive* with right of appeal to the council, any such appeal shall be filed by the applicant, a department of the city, or other aggrieved person or agency with the city clerk/treasurer within 10 calendar days following the rendering of the examiner's decision pursuant to SMC 2.26.120

Or

2.26.140 D. *Where the examiner's decision is final and conclusive*, with right of appeal to court, the procedures for appeal are as set out in the underlying ordinance or statute governing the land use permit or other quasi-judicial hearing. (Ord. 550, 1990)

### Discussion Issue 3.

The Examiner cannot issue a decision regarding a PUD application due to the requirements imposed by SMC 16.128.030(A). Any PUD approval triggers a zoning map change pursuant to SMC 16.10.020. Therefore it is impossible for the Examiners decision or recommendation to the council in this matter to be considered a final and conclusive decision, there can be no decision until such time that the council decides upon the proposed zoning map change. Per SMC 16.128.030(A). Every proposed amendment to the unified development code, including changes in the zoning district maps or boundaries, shall be referred to the city council. Per SMC 16.10.020 The PUD, once approved, shall constitute an "overlay" zone and shall be labeled as such on the official zoning map of the city of Sultan. For each property that receives a PUD approval, the zoning map shall also identify a "fallback" underlying zone,....The overlay PUD shall be identified within parentheses "( )" on the official zoning map of the city of Sultan.

### Discussion Issue 4

The applicants appeal statement cannot be considered in the closed record hearing nor should the appeal statement impact the council's decision pursuant to SMC 16.10.090 C. The scheduled Closed Record Hearing (pursuant to SMC 16.10.090) in this matter imposes upon the council very specific requirements with respect to what criteria they may consider and what conclusions they may reach. Those criteria and conclusions are very different than those required of the public meeting (pursuant to SMC 2.26.140) regarding the appeal. The public meeting (pursuant to SMC 2.26.150 B) will require the council to consider (1) the matter based upon the record before the examiner, (2) the examiner's decision, (3) the written appeal statement and (4) any written comments received by the council before closure of the city clerk/treasurer's office seven days prior to the public meeting. The council's decision shall then result in one of the following three options (1) affirm the examiners decision, (2) remand the matter back to the examiner, or (3) hear the appeal at public hearing at a later date pursuant to notice requirements of SMC 2.26.150(C).

In stark contrast the "Closed Record Hearing (pursuant to SMC 16.10.090)" will require of the Council to conduct a closed record hearing at which it shall consider the (1) findings, (2) conclusions, and (3) recommendation of the hearing examiner. The hearing examiner recommendation notwithstanding, the city council shall have the right and ability, based exclusively on the record that was presented before the hearing examiner to (1) agree or (2) disagree with the findings, conclusions and recommendation of the hearing examiner and (3)

shall further have the right and ability, based upon the record that was presented to the hearing examiner, to make such additional or different findings and conclusions that the city council believes are supported by evidence in that record.

The *meeting* provides for an open record meeting. In contrast the *hearing* requires a closed record hearing. The *meeting* requires the council to affirm or remand the examiner's "decision" or schedule an appeal hearing. In contrast the *hearing* requires the council to agree or disagree with the examiner's findings, conclusions and "recommendation" or based exclusively on the record before the examiner reach different findings and conclusions. Both result in binding decisions by the council with right of appeal to superior court.

The caveat here is that the PUD code does require consideration of the examiners recommendation pursuant to SMC 16.10.090 C. The problem is the city has processed the examiners recommendation as though it were a decision pursuant to 2.26.140. In doing so the council now cannot properly consider and process the recommendation pursuant to SMC 16.10.090. The corrupted appeal process as enacted by the city in this matter has resulted in a procedural impossibility inherently corrupting the record and process beyond the point of legality should the advertised appeal meeting take place.

**SMC 16.10.090 C.** After receipt of a hearing examiner recommendation on the preliminary PUD pursuant to Chapter 2.26 SMC, the city council shall conduct a closed record hearing at which it shall consider the findings, conclusions, and recommendation of the hearing examiner. The hearing examiner recommendation notwithstanding, the city council shall have the right and ability, based exclusively on the record that was presented before the hearing examiner, to agree or disagree with the findings, conclusions and recommendation of the hearing examiner and shall further have the right and ability, based upon the record that was presented to the hearing examiner, to make such additional or different findings and conclusions that the city council believes are supported by evidence in that record.

#### Discussion Issue 5

Under RCW 35A.63.170 The City must elect whether it reviews a hearing examiner's decision as a recommendation or whether it considers the hearing examiner's decision as an appellate body . A similar scheme applies to counties under RCW 36.70.970. Under that provision if a county legislative body elects to review the examiner's findings for evidence in an appellate capacity, it may not make factual findings.

See State ex rel. Lige & Wm.B. Dickson Co. v. Pierce County, 65 Wn. App. 614, 618, 829 P.2d 217, review denied, 120 Wn.2d 1008 (1992).

Hearing Examiner's Decision - Review by Council - Hybrid Review - Validity. A county legislative authority may not define its powers in such a way as to incorporate aspects of both alternatives set forth in former 36.70.970 for reviewing a hearing examiner's decision in a land use dispute (i.e., as a recommended decision or as an administrative decision appealable to the legislative authority).

See 92 Wn. App. 838, EAST FORK HILLS v. CLARK COUNTY[No. 22072-5-II. Division Two. October 23, 1998.]

Hearing Examiner's Decision - Review by Council - Scope. When a county, under RCW 36.70.970, has adopted the hearing examiner system for deciding land use disputes whereby a hearing examiner's decision is given the effect of an administrative decision appealable within a specified time to the county's legislative authority, the legislative authority's review of a hearing examiner's decision is confined solely to the record that was made before the hearing examiner. Under such system, the legislative authority must sustain the hearing examiner's findings of fact that are supported by substantial evidence in tile record.

See 92 Wn. App. 838, EAST FORK HILLS v. CLARK COUNTY[No. 22072-5-II. Division Two. October 23, 1998.]

#### Discussion Issue 6

In the Examiners Notice of Recommendation to the council there is no reference to a process by which the Examiners Recommendation may be appealed. There is however reference to a "Right of Reconsideration" and to "Council Consideration". In the section titled "Notice of Right of Reconsideration" the Examiner issues advisement regarding SMC 16.120.110 as a source for additional information and requirements regarding reconsideration. SMC 16.120.110 C explains that each decision or notice shall contain a statement concerning rights to contest or appeal the decision or notice. The Recommendation issued by the examiner does provide a method by which it may be contested, that method is explained as the *right of reconsideration*.

Clearly there is no explanation by the Examiner of a process by which to appeal the recommendation to the council as though it were a decision. It is not a decision. Since there was no decision issued by the Examiner pursuant to SMC 2.26.140 B. 1 and 2.26.140 D, there is no requirement to define an appeal process pursuant to RCW 36.70B.130 in the Examiners Recommendation; as I have explained ad nauseam, no such process exists nor is it allowable. The City is in error in its decision to allow an appeal of an Examiners recommendation

Please note that the city's notice of appeal meeting for Vodnick indicates that consideration of an appeal of an Examiner's decision will occur.

If it is still the city's position that a decision was issued by the Examiner, please provide now the "Notice of Decision" and "procedures for administrative appeal, if any" that the city failed to provide for Vodnick pursuant to RCW 36.70B.130.

#### Conclusion

The city has clearly misapplied its code. Failure to prevent the appeal meetings in these matters will result in the corruption of the record before the council. Should the scheduled appeal meetings take place before the council irreparable damage will occur.

Thank you,

Ron Kraut

1303 9 Street



Sultan Wa

98294

## References

### Chapter 2.26

### HEARING EXAMINER

#### Sections:

2.26.010 Purpose.

2.26.020 Creation of hearing examiner position.

2.26.030 Appointment.

2.26.040 Qualifications.

2.26.050 Removal.

2.26.060 Freedom from improper influence.

2.26.070 Conflict of interest.

2.26.080 Rules.

2.26.090 Duties of the examiner – Applications.

2.26.100 Reports of city departments.

2.26.110 Public hearing.

2.26.120 Examiner's decision.

2.26.130 Notice of examiner's decision.

2.26.140 Appeal from examiner's decision.

2.26.150 Council consideration.

2.26.160 Effect of council action.

2.26.180 Local improvement district assessment roll hearings.

2.26.010 Purpose.

The purpose of this chapter is to establish a system of land use regulatory hearings which will satisfy the following basic needs:

A. A more prompt opportunity for a hearing and decision on alleged violations of land use regulations, and such other regulations as may be assigned to the hearing examiner;

B. To provide an efficient and effective system for deciding variances and appeals from administrative decisions;

C. To help ensure procedural due process and appearance of fairness by holding such hearings before a neutral party, competent in the fields of land use and procedural requirements. (Ord. 550, 1990)

2.26.020 Creation of hearing examiner position.

Pursuant to Chapter 35A.63 RCW, the office of hearing examiner, hereinafter referred to as examiner, is created. All land use matters of a quasi-judicial nature, not requiring a modification of any ordinance or legislation shall be referred to the examiner who shall interpret, review and implement land use regulations in accordance with the procedures set forth herein. (Ord. 701, 1999; Ord. 550, 1990)

2.26.030 Appointment.

The hearing examiner shall be appointed by the mayor from a list of qualified persons approved by the council. The compensation of the hearing examiner shall be approved by the council as with other professional and consultant positions. (Ord. 701, 1999; Ord. 550, 1990)

#### 2.26.040 Qualifications.

Examiners shall be appointed solely with regard to their qualifications for the duties of their office and will have such training and experience as will qualify them to conduct administrative or quasi-judicial hearings on regulatory enactments and to discharge the other functions conferred upon them. Examiners shall hold no other elective or appointive office or position in the city of Sultan. (Ord. 550, 1990)

#### 2.26.050 Removal.

An examiner may be removed from office for cause by the mayor with concurrent majority vote of the city council. (Ord. 550, 1990)

#### 2.26.060 Freedom from improper influence.

No person, including city officials, elected or appointed, shall attempt to influence an examiner in any matter pending before him, except at a public hearing duly called for such purpose, or to interfere with an examiner in the performance of his duties in any other way; provided, that this section shall not prohibit the city's attorney from rendering legal service to the examiner upon request. (Ord. 550, 1990)

#### 2.26.070 Conflict of interest.

No examiner shall conduct or participate in any hearing, decision or recommendation in which the examiner has a direct or indirect substantial financial or familial interest or concerning which the examiner has had substantial prehearing contacts with proponents or opponents. Nor, on appeal from an examiner's decision, shall any member of the council who has such an interest or has had such contacts participate in consideration thereof. (Ord. 550, 1990)

#### 2.26.080 Rules.

The examiner shall have the power to prescribe rules for the scheduling and conduct of hearings and other procedural matters related to the duties of his office. Such rules may provide for cross-examination of witnesses. (Ord. 550, 1990)

#### 2.26.090 Duties of the examiner – Applications.

The examiner shall receive and examine available information, conduct public hearings, prepare a record thereof, and enter findings of fact and conclusions based upon those facts, which conclusions shall represent the final action on the application unless appeal, as specified in this section, for the following types of applications:

A. Denials of conditional use permits;

B. Denials of variance;

C. Appeals on short plats and subdivisions;

D. Appeals from administrative determination of the city's land use regulation codes;

E. The examiner is empowered to act in lieu of the board of adjustment, and such other officials, boards or commissions as may be assigned. Whenever existing ordinances, codes or policies authorize or direct the board of adjustment, or other officials, boards or commissions to undertake certain activities which the examiner has been assigned, such ordinances, codes or policies shall be construed to refer to the examiner.

F. The hearing examiner is empowered consistent with SMC 2.26.120(D) and rules adopted by the hearing examiner to reconsider decisions or recommendations of the hearing examiner. (Ord. 764-01; Ord. 550, 1990)

2.26.100 Reports of city departments.

On any land use issue coming before the examiner, the building official shall coordinate and assemble the reviews of other city's departments, governmental agencies, and other interested parties and shall prepare a report summarizing the factors involved and the planning commission/city council findings and recommendations. At least seven calendar days prior to the scheduled hearing, the report shall be filed with the examiner and copies thereof shall be mailed to the applicant and made available for public inspection. Copies thereof shall be provided to interested parties upon payment of reproduction costs. In the event that information to be provided by the applicant or other parties outside of city control has not been provided in sufficient time for filing seven days in advance of the hearing, the examiner may reschedule the hearing and notify interested parties. (Ord. 550, 1990)

2.26.110 Public hearing.

A. Before rendering a decision or recommendation on any application, the examiner shall hold at least one public hearing thereon.

B. Notice of the time and place of the public hearing shall be given as provided in the ordinance governing the application. If none is specifically set forth, such notice shall be given no less than 10 days before the public hearing.

C. The examiner shall have the power to prescribe rules and regulations for the conduct of hearings under this chapter and also to administer oaths, and preserve order. (Ord. 821-03 § 1; Ord. 550, 1990)

2.26.120 Examiner's decision.

The examiner shall render a written decision within 10 working days of the conclusion of a hearing, unless a longer period is agreed to in writing by the applicant. The decision shall include at least the following:

A. Findings of fact and conclusions of law based upon and supported by the record;

B. A decision on the applicant to grant, deny or grant with such conditions, modification and restrictions as the examiner finds reasonable to make the application compatible with its environment, zoning ordinance, comprehensive plan, other official policies and objectives, and land use regulatory enactments. Examples of the kinds of conditions, modifications and restrictions which may be imposed include, but are not limited to, additional setbacks, screenings in the form of fencing or landscaping, easements, dedications or additional right-of-way and performance bonds;

C. No application for a variance shall be granted unless the examiner finds:

1. The variance shall not constitute a grant of special privilege inconsistent with the limitation upon uses of other properties in the vicinity and zone in which the property on behalf of which their application was filed is located; and

2. That the granting of such variance will not be materially detrimental to the public welfare or injurious to the property or improvements in the vicinity and zone in which the subject property is situated; and

3. That such variance is necessary:

a. Because of special circumstances set forth in the findings relating to size, shape, topography, location or surroundings of the subject property, to provide it with use rights and privileges permitted to other properties in the vicinity and in the zone in which the subject property is located; and

b. Because for reasons set forth in the findings, the variance as approved would contribute significantly to the improvement of environmental conditions, either existing or potentially arising from the proposed improvement;

D. All decisions or recommendations of the hearing examiner are subject to reconsideration, unless reconsideration is waived. Reconsideration is waived unless within seven calendar days of the date of mailing of the decision or recommendation, the applicant, the city or a party of record submits a written request for reconsideration in accordance with rules issued by the hearing examiner. Pending reconsideration by the hearing examiner, a decision or recommendation shall not be deemed final for the purpose of commencement of the period of time in which to commence an appeal. If reconsideration is waived because no timely request for reconsideration is made, the initial decision or recommendation of the hearing examiner, subject to any right of appeal, shall be deemed final as of the eighth calendar day after the date of mailing of the decision or recommendation. If a timely request for reconsideration is made, the hearing examiner shall grant or deny reconsideration within 10 calendar days of the date of receipt of the request for reconsideration. All periods of time provided for in this code for filing an appeal of a hearing examiner's decision, or for council consideration of a hearing examiner's recommendation, shall commence to run from the later of the eighth calendar day after mailing of the hearing examiner's decision or recommendation or the date of the hearing examiner's order granting or denying reconsideration.

E. All fees associated with the reconsideration shall be set by council resolution.

F. A statement of the date the decision will become final unless appealed, together with a description of the appeal procedure. (Ord. 764-01; Ord. 550, 1990)

#### 2.26.130 Notice of examiner's decision.

Not later than three working days following the rendering of a written decision, copies thereof shall be mailed to the applicant and to other parties of record in the case. "Parties of record" shall include the applicant and all other persons who specifically request notice of decision by signing a register provided for such purpose at the public hearing, or otherwise provide written request for such notice. (Ord. 550, 1990)

#### 2.26.140 Appeal from examiner's decision.

A. The grounds for filing an appeal of an examiner's decision shall be limited to the following:

1. Newly discovered evidence which is material to the examiner's decision and which could not reasonably have been produced at the examiner's hearing;
2. The examiner exceeded his jurisdiction;
3. The examiner failed to follow the applicable procedure in reaching his decision;
4. The examiner committed an error of law or misinterpreted the applicable zoning ordinance, comprehensive plan, provisions of the city's code or other city or state law or regulation; or
5. The examiner's findings and conclusions are not supported by the record.

B. 1. Where the examiner's decision is final and conclusive with right of appeal to the council, any such appeal shall be filed by the applicant, a department of the city, or other aggrieved person or agency with the city clerk/treasurer within 10 calendar days following the rendering of the examiner's decision pursuant to SMC 2.26.120. In computing the time in which to file an appeal with the council, the date the examiner's decision is rendered shall not be included. The last day of the period so computed shall be included unless it is a Saturday, a Sunday or a legal holiday, in which event the period runs until the end of the next day which is neither a Saturday, Sunday or a legal holiday.

2. Appeals filed with the city clerk/treasurer shall be in writing, shall contain a detailed statement of grounds for appeal and the facts upon which the appeal is based, and shall be

accompanied by a fee of \$50.00; provided, that such appeal fee shall not be charged to a department of the city or to other than the first appellant. All council proceedings shall be limited to those matters expressly raised in a timely written appeal or appeals.

3. The timely filing of an appeal shall stay the effective date of the examiner's decision until such time as the appeal is adjudicated by the council or withdrawn.

C. 1. If the appeal is to the council, the timely filing of an appeal shall stay the effective date of the examiner's decision until such time as the appeal is adjudicated or withdrawn.

2. Within seven calendar days following the timely filing of an appeal with the city clerk/treasurer, notice thereof and of the date, time and place for council consideration shall be mailed by the clerk's office to the applicant, to the examiner and to all other parties of record. Such notice shall additionally indicate the deadline for submittal of written comments as prescribed in SMC 2.26.150.

D. Where the examiner's decision is final and conclusive, with right of appeal to court, the procedures for appeal are as set out in the underlying ordinance or statute governing the land use permit or other quasi-judicial hearing. (Ord. 550, 1990)

#### 2.26.150 Council consideration.

A. An examiner's decision which has been timely appealed pursuant to SMC 2.26.140 shall come on for council consideration in open public meeting no sooner than 21 nor longer than 35 calendar days from the date the appeal was filed. The council shall consider the matter based upon the record before the examiner, the examiner's decision, the written appeal statement and any written comments received by the council before closure of the city clerk/treasurer's office seven days prior to the public meeting date set for council consideration.

B. At the public meeting, the council may concur with the findings and conclusions of the examiner and affirm the examiner's decision; remand the matter to the examiner for further proceedings in accordance with the council's findings and conclusions; or the council may determine to hear the appeal at public hearing. In those instances in which the council affirms the examiner's decision or remands the matter to the examiner, the council's decision shall be reduced to writing and entered into the record of the proceeding within 15 days of the public meeting. Copies of the decision shall be mailed to all parties of record.

C. In those instances in which the council determines to conduct a public hearing, notice of the hearing shall be given by publication in the city newspaper no less than 10 days prior to the date set for the hearing and written notice shall also be given by the council by mail to all parties of record before the hearing examiner.

D. All council hearings conducted pursuant to this section shall be de novo and shall be limited to those matters raised in the appeal. The council shall consider the appeal based upon the record before the examiner and all written and oral testimony presented at the council hearing. All testimony at any public hearing shall be taken under oath.

E. At the conclusion of the public hearing, the council shall enter its decision which shall set forth the findings and conclusions of the council in support of its decision. The council may adopt any or all of the findings or conclusions of the examiner which support the council's decision. The council may affirm the decision of the examiner, reverse the decision of the examiner either wholly or in part, or may remand the matter to the examiner for further proceedings in accordance with the council's findings and conclusions.

F. The council's decision shall be reduced to writing and entered into the record of the proceedings within 15 days of the conclusion of the hearing. Copies of the decision shall be mailed to all parties of record. (Ord. 550, 1990)

#### 2.26.160 Effect of council action.

The council's decision to affirm an examiner's decision or remand a matter to the examiner pursuant to SMC 2.26.150(B), or the council's decision after public hearing on an appeal, shall be final and conclusive with right of appeal to the Superior Court of Snohomish County by writ of certiorari, writ of prohibition or writ of mandamus within 15 calendar days of the council's decision. The cost of transcription of all records ordered certified by the court for such review shall be borne by the applicant for the writ. (Ord. 550, 1990)

2.26.180 Local improvement district assessment roll hearings.

A. As authorized by RCW 35.44.070, the city council hereby provides for delegating, whenever directed by majority vote of the city council, the duty of conducting public hearings for the purpose of considering and making recommendations on final assessment rolls and the individual assessments upon property within local improvement districts to a hearing examiner appointed under this section, and the hearing examiner is directed to conduct such hearings and make those recommendations when thus authorized by the city council.

B. All objections to the confirmation of the assessment roll shall be in writing and identify the property, be signed by the owners and clearly state the grounds of the objection. Objections not made within the time and in the manner prescribed and as required by law shall be conclusively presumed to have been waived.

C. The hearing examiner shall conduct the hearing to be commenced at the time and place designated by the city council, cause an adequate record to be made of the proceedings, and make written findings, conclusions and recommendations to the city council following the completion of such hearings, which may be continued and recontinued as provided by law whenever deemed proper by the hearing examiner, and the city council shall either adopt or reject the recommendations of the hearing examiner.

D. The recommendations of the hearing examiner shall be that the city council correct, revise, lower, change or modify the roll or any part thereof, or set aside the roll in order for the assessment to be made de novo, or that the city council adopt or correct the roll or take other action on the roll as appropriate, including confirmation of the roll without change. The recommendations of the hearing examiner shall be filed with the city clerk and be open to public inspection. All persons whose names appear upon the recommended assessment roll who timely filed written objections to their assessments shall receive mailed written notification of their recommended assessments.

E. Any persons who shall have timely filed objections to their assessments may appeal the recommendations of the hearing examiner regarding their properties to the city council by filing written notice of such appeal with the city clerk within 10 calendar days after the date of mailing of the hearing examiner's recommendations.

F. The appeal shall be based exclusively upon the record made before the hearing examiner and shall be considered by the city council at a public meeting. No new evidence may be presented. Arguments on appeal shall be either oral or written as the city council may order.

G. The city council shall adopt or reject the recommendations of the hearing examiner at a public meeting, after considering any appeals, and shall act by ordinance in confirming the final assessment roll.

H. Any appeal from a decision of the city council regarding any assessment may be made to the superior court within the time and in the manner provided by law.

I. The procedures set forth in this section are independent of and alternative to any other hearing or review processes heretofore or hereafter established by the city, and shall govern the conduct and review of final assessment hearings conducted before hearing examiners and related proceedings when authorized by the city council. (Ord. 775-01 § 1)

**16.10.020 PUD as an overlay zone.**

The PUD, once approved, shall constitute an “ overlay” zone and shall be labeled as such on the official zoning map of the city of Sultan. For each property that receives a PUD approval, the zoning map shall also identify a “ fallback” underlying zone, which in most cases shall be the existing zoning designation of the property at the time of PUD application. This fallback underlying zoning shall govern development of the site in the event the approved PUD expires without development of the approved project. The overlay PUD shall be identified within parentheses “ ( )” on the official zoning map of the city of Sultan. At such time as the approved PUD is completely developed, the fallback zoning designation shall be removed from the official zoning map and the property shall be principally zoned one of the type of PUD zones listed in SMC 16.10.030. (Ord. 793-02 § 1)

**16.10.090 Authority to approve, condition or deny preliminary PUD.**

A. The hearing examiner may recommend approval, denial or approval with modifications or conditions deemed reasonable and necessary to protect the public interest, mitigate impacts of the proposed development, and to ensure compliance with the standards and criteria of this chapter and the policies of the comprehensive plan.

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.

C. After receipt of a hearing examiner recommendation on the preliminary PUD pursuant to Chapter 2.26 SMC, the city council shall conduct a closed record hearing at which it shall consider the findings, conclusions, and recommendation of the hearing examiner. The hearing examiner recommendation notwithstanding, the city council shall

have the right and ability, based exclusively on the record that was presented before the hearing examiner, to agree or disagree with the findings, conclusions and recommendation of the hearing examiner and shall further have the right and ability, based upon the record that was presented to the hearing examiner, to make such additional or different findings and conclusions that the city council believes are supported by evidence in that record.

D. Any decision of the city council on the preliminary PUD shall be final and no further local administrative appeal shall be permitted. This preliminary PUD decision of the city council may be appealed to superior court, pursuant to the requirements of Chapter 36.70C RCW and SMC 16.120.050. (Ord. 793-02 § 1)

**16.120.110 Calculation of time – Delivery – Notice to parties – Filing with the hearing examiner.**

A. Whenever this title states that an action or notice must be given in a certain number of calendar days, if the last calendar day for the action or notice is a weekend day or a federally recognized holiday, then the last calendar day shall be construed to include the first working day after the weekend or holiday, and the deadline shall be 5:00 p.m. current local time of that first working day.

B. Whenever this title states that an action or notice must be given “within” a period of time from a decision, action or notice, the first calendar day for the counting of the calendar days shall be as follows:

1. If the number of days involved is less than 15 calendar days, the first day shall be:
  - a. If the notice or decision is personally served on the party, then the day after service; and
  - b. If the notice or decision is mailed, then the third day after the date the notice or decision is deposited into the United States mail properly addressed with required postage;
2. If the number of days involved is 15 calendar days or more, the first day shall be:
  - a. If the notice or decision is personally served on the party, the day after service; and
  - b. If the notice or decision is mailed, then the day after the notice or decision is deposited into the United States mail properly addressed with required postage.

C. Each decision or notice shall contain a statement

concerning rights to contest or appeal the decision or notice, and among other information the statement shall state the date of the notice or decision, the date the appeal, contest or appeal period is expected to begin, the last date and time to file an appeal or notice when the party to whom the notice must go is open for business, and the location to file an appeal or notice.

D. In the event the statement specified in subsection C of this section contains an error, the party relying on the statement shall be entitled to the longer time. Therefore, if the "last date" in the statement is earlier than the time as calculated under this section, the party shall be entitled to the time provided by this section. But if the "last date" in the statement is later than the date that would be calculated under this section, the party shall be entitled to, and the actual time shall be extended to the date and time set out in the statement; provided, however, that if the error is in the statement of the year, the correct year shall apply.

E. Whenever this title states that something must be filed with the hearing examiner, filing shall be accomplished by filing with the clerk/treasurer of the city. The date of filing shall be the date of actual delivery to, or receipt of mail by, the city clerk/treasurer. (Ord. 790-02)

**16.128.030 Authority of the city council to amend the unified development code.**

A. Every proposed amendment to the unified development code, including changes in the zoning district maps or boundaries, shall be referred to the city council.

B. The city council shall schedule a public hearing no later than 60 calendar days from the date it is officially notified of a request for an amendment to this unified development code.

C. Upon submission of a petition for a unified development code amendment, the city council shall give due public notice and conduct a public hearing, wherein the parties in interest and citizens shall have the opportunity to be heard, under the requirements contained in this unified development code in Chapter 16.124 SMC.

D. If the unified development code amendment request is one that would call for a revision to the zoning map(s), the city council shall first examine

the adopted 20-year land use plan to determine if the request is consistent with the long-range land use plan for the city of Sultan.

E. Additionally, the city council shall contact, in writing, and receive, in writing, statements from the relevant city of Sultan departments and authorities to inform them as to the availability and capacity of the roadway, water, sewer, and electrical power systems to accommodate the level of development that could occur if the unified development code amendment were to be granted. If statements are not available at the time of the public hearing, those city departments shall have an opportunity to make oral statements at said hearing. If no statement, written or oral, is given by any city department, it shall be assumed that they concur with the requested amendment.

F. Having taken into account the conditions and requirements set forth in subsections (C) and (D) of this section, the city of Sultan shall render a decision on the zoning amendment request.

G. If a request to amend the unified development code is made to the city council that goes beyond what is shown on the adopted 20-year land use plan (e.g., the land is currently shown as being in the LMD zoning district, the land use plan shows the area ultimately being designated in the MD zoning district, but the applicant is requesting that his property be rezoned to the HD zoning district), the city council shall refer the matter to the planning commission to review concurrency requirements. (Ord. 630 § 2[16.11.030], 1995)

#### **RCW 35A.63.170**

#### **Hearing examiner system — Adoption authorized — Alternative — Functions — Procedures.**

(1) As an alternative to those provisions of this chapter relating to powers or duties of the planning commission to hear and report on any proposal to amend a zoning ordinance, the legislative body of a city may adopt a hearing examiner system under which a hearing examiner or hearing examiners may hear and decide applications for amending the zoning ordinance when the amendment which is applied for is not of general applicability. In addition, the legislative body may vest in a hearing examiner the power to hear and decide those issues it believes should be reviewed and decided by a hearing examiner, including but not limited to:

(a) Applications for conditional uses, variances, subdivisions, shoreline permits, or any other class of applications for or pertaining to development of land or land use;

(b) Appeals of administrative decisions or determinations; and

(c) Appeals of administrative decisions or determinations pursuant to chapter 43.21C RCW.

The legislative body shall prescribe procedures to be followed by a hearing examiner. If the legislative authority vests in a hearing examiner the authority to hear and decide variances, then the provisions of RCW 35A.63.110 shall not apply to the city.

(2) Each city legislative body electing to use a hearing examiner pursuant to this section shall by ordinance specify the legal effect of the decisions made by the examiner. The legal effect of such decisions may vary for the different classes of applications decided by the examiner but shall include one of the following:

(a) The decision may be given the effect of a recommendation to the legislative body;

(b) The decision may be given the effect of an administrative decision appealable within a specified time limit to the legislative body; or

(c) Except in the case of a rezone, the decision may be given the effect of a final decision of the legislative body.

(3) Each final decision of a hearing examiner shall be in writing and shall include findings and conclusions, based on the record, to support the decision. Such findings and conclusions shall also set forth the manner in which the decision would carry out and conform to the city's comprehensive plan and the city's development regulations. Each final decision of a hearing examiner, unless a longer period is mutually agreed to in writing by the applicant and the hearing examiner, shall be rendered within ten working days following conclusion of all testimony and hearings.

[1995 c 347 § 424; 1994 c 257 § 7; 1977 ex.s. c 213 § 2.]

**RCW 36.70B.130**

**Notice of decision — Distribution.**

A local government planning under RCW 36.70A.040 shall provide a notice of decision that also includes a statement of any threshold determination made under chapter 43.21C RCW and the procedures for administrative appeal, if any. The notice of decision may be a copy of the report or decision on the project permit application. The notice shall be provided to the applicant and to any person who, prior to the rendering of the decision, requested notice of the decision or submitted substantive comments on the application. The local government shall provide for notice of its decision as provided in RCW 36.70B.110(4), which shall also state that affected property owners may request a change in valuation for property tax purposes notwithstanding any program of revaluation. The local government shall provide notice of decision to the county assessor's office of the county or counties in which the property is situated.

ORIGINAL  
RECEIVED  
JAN 31 2007  
BY: *[Signature]*

Attachment 5-2

BEFORE THE SULTAN CITY COUNCIL

8 Subdivision of 9 <b>TWIN RIVERS RANCH ESTATES</b> 10 11 _____	) ) ) ) )	RAFPPUD05-006 and SMP06-001  APPLICANT'S BRIEF ON CLOSED RECORD APPEAL HEARING
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I. RELIEF REQUESTED

The Applicant/Appellant asks the Council to adopt the Examiners findings and conclusions that support approval of this project, reverse the Examiner's decision to the extent that it calls for denial or remand of the project, and approve the PUD and SDP applications for Twin River Ranch Estates.

II. PROJECT SUMMARY

This project consists of joint applications for a Shoreline Substantial Development Permit and a Preliminary Planned Unit Development subdivision. Twin Rivers Ranch Estates will be a 22 lot Planned Unit Development (PUD) subdivision for single-family residential homes. The project site consists of 8.56 acres on Skywall Drive. Less than half of the site will be developed, and all of the area to be developed is above the flood plane (with separation from the base flood line of over 100 feet).

Substantial mis-information has circulated about this project, and the Applicant would like to highlight the "real" facts. The evidence in the record shows that the project will extend sanitary sewer service to an area currently plagued by less desirable septic systems; construction of the PUD will also involve correction of a currently-substandard railroad crossing -- both at the Applicant's cost. The project has been re-designed to have

1 public parking along Skywall Drive, with a more direct access to the required public open  
2 space near the river. The quality of homes (projected in the \$275,000--\$325,000 range)  
3 will benefit the public by adding tax revenue in excess of LOS requirements.

4 This project will be fully accountable for the expense of all of the impacts generated  
5 by the project, and it should be approved as other projects (e.g. Steen Park, Cascade Breeze,  
6 Scogland Estates, Vodnick Lane) have been approved.

### 7 III. STANDARD OF REVIEW

8 This matter comes before the Council as a closed record appeal under SMC  
9 16.10.090(C). That section states, in relevant part:

10 The hearing examiner recommendation notwithstanding, the city council  
11 shall have the right and ability, based exclusively on the record that was  
12 presented before the hearing examiner, to agree or disagree with the  
13 findings, conclusions and recommendation of the hearing examiner and shall  
14 further have the right and ability, based upon the record that was presented  
15 to the hearing examiner, to make such additional or different findings and  
16 conclusions that the city council believes are supported by the evidence in  
17 that record.

18 The Council has final decision-making authority on this matter. When considering  
19 the PUD application, the Council can consider the analysis of the City Staff as well as the  
20 recommendation of the Hearing Examiner. Moreover, under Washington law *substantial*  
21 *weight* should be given to the Staff recommendation because the City Staff is responsible  
22 for interpretation of the ordinances that it administers and Staff has practical expertise in  
23 interpreting those ordinances. Manke Lumber v. Diehl, 91 Wn. App. 793, 801-02, 959 P.2d  
24 1173 (1998); *see, also*, McTavish v. City of Bellevue, 89 Wn. App. 561, 564, 949 P.2d 837  
25 (1998) (if there is any ambiguity in an ordinance, great weight must be given to the  
26 interpretation of the city staff responsible for applying the ordinance).

1 IV. ARGUMENT.

2 The Examiner's recommendation to deny the PUD application and to deny the  
3 substantial development permit was erroneous, in that the Examiner committed errors of  
4 law and misinterpreted the applicable zoning ordinances, the comprehensive plan,  
5 provisions of the City's code and State law, and the Examiner's findings and conclusions are  
6 not supported by the record. Specifically, the Examiner erred in concluding that the site  
7 does not meet the mandatory locational criterion of SMC 16.10.110(B)2)(c) or (d), and that  
8 the site does not meet the usable open space requirement of SMC 16.10.140. The Examiner  
9 further erred in concluding that the application fails to meet the SCSMP Regulations for  
Recreational Uses and three Public Access Element policies.

10 This application was previously before the Council following an initial  
11 recommendation by the Examiner. At that time the Applicant requested to have his project  
12 remanded to Staff, so that the project could be revised in accordance with the Staff's  
13 direction to satisfy the issues raised in the Examiner's initial recommendation. That was  
14 done. The Applicant and City Staff both felt that all of the issues originally identified by  
the Examiner had been addressed when the project went up for a second hearing.

15 In addition, following the initial remand of this project the Council considered and  
16 approved the development application for Vodnick Lane (RAFPPUD05-004). The  
17 Vodnick Lane development presented several issues that are also present in the Applicant's  
18 project (specifically, the issue of whether the site has "sufficient proximity" to "facilitate  
19 transit access.") In this case, the subject site is closer to the nearest transit stop than was the  
20 site in Vodnick Lane. The disparate treatment of similarly situated parties raises the  
potential for an Equal Protection violation.

21 In addition, the Examiner failed to properly consider the evidence in the record  
22 indicating that the walking route to the transit stop will have an improved bike lane for  
23 pedestrian access and that the SR 2 bridge also has pedestrian access. The Applicant will  
24 be paving a 5' wide trail from Skywall drive, across the railroad crossing (which is being  
25 widened) along the east edge of Foundry Drive to Cascade View Drive. The intention is to  
26 pave over the area that will be disturbed as the sewer line is placed along Foundry Drive.  
This will produce a connection to the improvements that are being planned as part of the

1 Foundry Drive/Sultan Basin interchange, achieving both short term and long term  
2 connection to the local transit system. Rather than acknowledging the existence of this  
3 connectivity, the Examiner made the subjective determination that the connection was  
4 somehow inadequate. However, he failed to identify any objective basis for his opinion. It  
5 was error for the Examiner to substitute his personal judgment for the professional expertise  
6 of City Staff on this issue.

7 The Examiner also erred in relation to the locational requirements for PUDs, which  
8 can be located anywhere within the City (as confirmed by the Director of Community  
9 Development). The Examiner's failure to accept the interpretation of the Director of  
10 Community Development is clear error. Likewise the Examiner failed to properly assess  
11 the evidence in the record relating to the useable open space requirement and the substantial  
12 evidence that the project satisfies SDP requirements and the parks LOS standards. (The  
13 assertion that the project would create an "attractive nuisance" is pure conjecture and fails  
14 to recognize the legal definition of an attractive nuisance under Washington law, and there  
15 is no objective indication that the proposed parking arrangement is inadequate.) Finally,  
16 with regard to police services, the Examiner failed to follow the Council's prior direction on  
17 the acceptance of mitigation under a Police Services Agreement (the proposed Agreement  
18 uses the same facts and calculations as the agreement that was approved as part of  
19 Skoglund Estates, again raising the question of equal treatment).

20 The Applicant respectfully requests that the Council place this matter on for a  
21 closed record appeal hearing. At the conclusion of that hearing the Council should adopt  
22 the Examiners findings and conclusions that support approval of this project, reverse the  
23 Examiner's decision to the extent that it calls for denial or remand of the project, and  
24 approve the PUD and SDP applications for Twin River Ranch Estates.

## 25 V. APPLICANT'S PROPOSED CORRECTED FINDINGS & CONCLUSIONS

26 Corrected Finding of Fact 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. The first named road is a two  
lane roach which runs roughly parallel with and south of SR 2 from the old Sultan Basin

1 Road/SR 2 intersection easterly for about one-half mile. Foundry Drive is a 60 foot right of  
2 way, approximately ¼ mile long and its improvements area about 17 feet wide. It serves the  
3 industrial area north of the BNSF tracks, crosses those tracks at a substandard grade  
4 crossing, and intersects Skywall Drive immediately south of the BNSF right of way. The  
5 pavement runs along the west edge of the right of way at the BNSF crossing. Neither road  
6 currently has sidewalks or improved pedestrian facilities. There are pedestrian facilities on  
7 the SR 2 Bridge. (Exhibits 1.7, 1.8)

8 The City's Sultan Basin Road project has shifted the Sultan Basin Road intersection  
9 several hundred feet to the east. Cascade View Drive/Cemetery Road as it intersects SR 2  
10 is now right turn in/right turn out. Motorists exiting via Cascade View Drive and wishing  
11 to head west bound on SR 2 must go east, and connect to SR 2 at a stop sign intersection.  
12 Another option is to take Cemetery Road, and turn left onto SR 2 at an unsignalized  
13 intersection. Phase III of the Sultan Basin Road realignment will provide a signalized  
14 intersection with Cemetery Road.

15 Corrected Finding of Fact 13: Under SMC 16.72.040 the project being proposed  
16 (22 three-bedroom dwelling units) requires two recreation areas totaling 6,600 SF. The  
17 Applicant proposes two recreation facilities that exceed the area required by SMC  
18 16.72.040: a tot lot and picnic area (Tract 996) and a trail connecting picnic areas (Tract  
19 998). Total recreational area as proposed is 49,020 SF.

20 Under SMC 16.10.140 PUDs are required to provide open space in the amount of  
21 20% of the gross land area of the site. A minimum of 15% of the gross area must be  
22 "useable open space." The percentage of gross area counted toward the open space  
23 requirement is limited for "buffer open space" (2%), "constrained open space" (2%), and  
24 "unusable open detention space" (5%). SMC 16.10.140(A)(4) states that buffer open space  
25 may contain useable open space. "Useable open space" is defined as "areas . . . for  
26 development as active and passive recreation . . . ." Therefore, areas may be counted

1 toward usable open space if they include improvements to support active or passive  
2 recreation.

3 In this case the Applicant has identified 67,811 SF as "Conservation Open Space"  
4 by measurement from the 50' top-of-bank setback.<sup>1</sup> Twin Rivers Ranch Estates is required  
5 to have 74,672 SF of open space, of which 55,923 SF must be usable. The Applicant  
6 proposed to reserve 187,300 SF (25.8%) of the site for open space, of which 116,831 is  
7 useable open space.

8 Corrected Finding of Fact 17: Section 16.10.110 SMC establishes certain locational  
9 criteria for residential PUDs. One criterion is location on an arterial if the PUD is ten acres  
10 or for 40 units. That is inapplicable here. Another criterion, of a minimum size of 2 acres  
11 is satisfied by this application. Another criterion is location "such that it can be connected  
12 to an existing off-site pedestrian and bicycle circulation system to facilitate non-motor  
13 vehicle access to the PUD." A final criterion requires that transit is available in sufficient  
14 proximity to the site to facilitate transit access

15 The Applicant has proposed paving a 5' wide trail from Skywall Drive, across the  
16 upgraded railroad crossing, along the east edge of Foundry Drive to Cascade View Drive.  
17 This will connect to the City's Phase III improvements. These improvements, combined  
18 with the existing pedestrian passage on the SR 2 bridge, connectivity to an existing off-site  
19 pedestrian and bicycle circulation system and render the site, being approximately a half  
20 mile away, of sufficient proximity to facilitate transit access.

21 Corrected Findings of Fact 21-24 and 26: The City's existing level of service for  
22 police is below the adopted LOS in the comprehensive plan. The LOS failure for police,  
23 however, was not caused by this proposed development, and further reduction in the LOS  
24 caused by this proposed development is modest by comparison to the existing deficiency.

25  
26 <sup>1</sup> Conservation Open Space is not "buffer" open space. The Hearing Examiner may have  
been confused on this point.

1 The Council takes notice of the recommendation in the Prothman Report accepted  
2 by the Council in Ordinance 900-06. The City has adopted a utility tax applicable to its  
3 municipal utilities and a utility tax on cable television service. Other funding sources  
4 include potential developer loans to advance the receipt of payment of needed funds, and  
5 monies contributed by proposed development for their impacts on the LOS. The proposed  
6 development also will increase the assessed value of the property, bringing more real  
7 property tax revenues to the City. A combination of developer agreements and public funds  
8 will put in place the required public services for police concurrent with development  
9 impacts, and provide appropriate strategies for the six years from the time of development  
10 to achieve the necessary police LOS as not established or as subsequently revised.

11 The Council takes notice of the Applicant's offer at the open record hearing to  
12 deliver to the City a Developer Agreement to pay Applicant's increment share for a police  
13 officer for one year. Based upon the foregoing, this proposed development is deemed  
14 concurrent for police.

15 Corrected Finding of Fact 30: The City's current LOS for Parks is 42.6 acres of  
16 parks, recreation and open space facilities per 1000 population. The City's July 1, 2006  
17 population is estimated at 4,440, and based upon facilities then inventoried the LOS was  
18 44.6 acres per 1000 population. Additional developments, previously approved, will both  
19 lower the existing LOS but provide through impact fees and increased taxation through  
20 increased valuation funds to acquire parks in the City.

21 Corrected Conclusion of Law 2: As subsequent conclusions will establish, Twin  
22 Rivers Ranch Estates satisfies the location criteria for a PUD, satisfies the open space  
23 requirements for a PUD, and satisfies the City's shorelines regulations and should receive  
24 preliminary PUD plat approval and issuance of a shorelines substantial development permit.

25 Corrected Conclusions of Law 7-9: Twin Rivers Ranch Estates is about one-half  
26 mile from the nearest transit stop. Though the walking route is currently unimproved, the

1 Applicant proposes improvements prior to final plat acceptance as set out in the Council's  
2 findings. These improvements, together with the existing pedestrian crossing on the SR 2  
3 bridge, and the proximity of the site meet the criterion of SMC 16.10.110(B)(2)(d).

4 As to connection to a pedestrian and bicycle system, the improvements proposed to  
5 be completed prior to final plat acceptance as set out in the Council's findings will provide  
6 the required connection.

7 The useable open space meets the area requirement of SMC 16.10.140. The  
8 Applicant proposed to reserve 187,300 SF (25.8%) of the site for open space, of which  
9 116,831 is useable open space, which is in excess of the standard required for a PUD on the  
10 subject property.

11 Corrected Conclusion of Law 14: The Hearing Examiner should give reasonable  
12 deference to findings and evaluations made by the Director of Community Development.  
13 The DCD found the application to satisfy the criteria of the City's Master Shoreline  
14 Program.

15 Corrected Conclusion of Law 18: The application complies with the use regulations  
16 contained in Section F of the SCSMP. No over-water fill construction is involved. Neither  
17 flood control nor shoreline protection measures are required. No lot will be within the  
18 flood plain of the base regulatory flood zone. Utility lines will be underground and public  
19 water and sewer services will be used. No lot will be within 25 feet of the OHWM. The  
20 proposed open space takes maximum advantage of the site's shorelines location. Given the  
21 nature of the site, it provides suitable parking and a means of access that is safe and  
22 convenient.

23 Corrected Conclusion of Law 20: The proposed park and access protect the rights  
24 of adjacent lot owners, provide reasonable public safety, and provide access that is  
25 appropriate to the location.  
26



February 1, 2006

Laura Koenig, City Clerk  
City of Sultan  
319 Main Street  
Sultan, WA 98294

RECEIVED  
FEB 01 2007  
CITY OF SULTAN  
FINANCE DEPT.

Laura,

This letter concerns the appeal meeting/closed record hearing for the Twin Rivers Ranch Estates PUD development application, which is scheduled for Thursday, February 8, 2007.

This Appeal Meeting is once again misplaced, and contrary to both the Sultan Municipal Code and State law. This Appeal Meeting should be cancelled in order for the City Council to follow the City's adopted procedures and conduct the required closed record hearing and render a proper decision on the application.

Additionally, I still seek an answer from the City as to why it continues to allow City Staff to violate the City's adopted procedures by 1) failing to identify proper processes and procedures to development applicants, and 2) erroneously submitting appeals of hearing examiner recommendations regarding subdivision and PUD applications to the City Council. Please submit into the record for this appeal request my letter of August 3, 2006 regarding the first improper appeal of the Hearing Examiner's first recommendation on the Vodnick Lane PUD application and my letter of January 3, 2006 regarding the second improper appeal of the Vodnick Lane PUD application which raised these very same concerns.

**A. APPEAL IS UNTIMELY:**

1. This is the second development application this year for which the City has allowed the applicant to disregard adopted procedure, and appeal the Hearing Examiner's recommendation to the City Council. The applicant's desire to exhaust all local administrative procedures in order to preserve his rights under LUPA is understandable. However, this does not include or require creating additional steps in the development application review process. The process is clear after a proper reading of the appropriate sections of the Sultan Municipal Code.

An appeal is untimely until a final decision has been made. The applicant in his Notice of Appeal dated January 4, 2007 states, "Please allow this to serve as the

Applicant's Notice of Appeal of the Recommendation of the Hearing Examiner dated December 27, 2006." [Emphasis added]. There has been no decision to date.

SMC 2.26.140 cited in the City's notice of appeal meeting is an incorrect citation. It is the wrong citation for two reasons. Firstly, it pertains to decisions which are final. And, secondly, it applies to final decisions which are conclusive with right of appeal to council. This section does not apply to the hearing examiner's subdivision or PUD recommendations. SMC 2.26.090 lists the types of applications for which the hearing examiner's decisions constitute final actions, subdivisions and PUD applications are not among them. SMC 2.26.140(B):

B. 1. Where the examiner's decision is final and conclusive with right of appeal to the council, any such appeal shall be filed by the applicant, a department of the city, or other aggrieved person or agency with the city clerk/treasurer within 10 calendar days following the rendering of the examiner's decision pursuant to SMC 2.26.120. In computing the time in which to file an appeal with the council, the date the examiner's decision is rendered shall not be included. The last day of the period so computed shall be included unless it is a Saturday, a Sunday or a legal holiday, in which event the period runs until the end of the next day which is neither a Saturday, Sunday or a legal holiday.

The correct citation for the appropriate Closed Record Hearing should be SMC 2.26.120(D) as well SMC 16. In Hearing Examiner John Galt's 2<sup>nd</sup> Ramirez Recommendation, dated December 27, 2006, on pages 42, 43 he provides a NOTICE OF RIGHT OF RECONSIDERATION and a NOTICE OF COUNCIL CONSIDERATION. The notice of reconsideration does not apply as none was filed for this application. The notice of council consideration states:

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 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.

SMC 2.26.120(D) provides the timeframe for when decisions or recommendations become final. It must also be looked at in light of SMC 16 as Galt indicates. It appears neither SMC 2.26 or SMC 16 can stand

alone in terms of completely defining the development application process. (It also appears Galt has cited the wrong number of days for when a recommendation becomes final, it is the eighth day rather than the eleventh, per Sultan's code. Perhaps he is relying on a state statute or has confused another jurisdiction's requirement). SMC 2.26.120(D):

D. All decisions or recommendations of the hearing examiner are subject to reconsideration, unless reconsideration is waived. Reconsideration is waived unless within seven calendar days of the date of mailing of the decision or recommendation, the applicant, the city or a party of record submits a written request for reconsideration in accordance with rules issued by the hearing examiner. Pending reconsideration by the hearing examiner, a decision or recommendation shall not be deemed final for the purpose of commencement of the period of time in which to commence an appeal. If reconsideration is waived because no timely request for reconsideration is made, the initial decision or recommendation of the hearing examiner, subject to any right of appeal, shall be deemed final as of the eighth calendar day after the date of mailing of the decision or recommendation. If a timely request for reconsideration is made, the hearing examiner shall grant or deny reconsideration within 10 calendar days of the date of receipt of the request for reconsideration. All periods of time provided for in this code for filing an appeal of a hearing examiner's decision, or for council consideration of a hearing examiner's recommendation, shall commence to run from the later of the eighth calendar day after mailing of the hearing examiner's decision or recommendation or the date of the hearing examiner's order granting or denying reconsideration.

The hearing examiner's recommendation becomes a final recommendation after 8 days, it does not somehow become a final decision at that point. Consequently, it is not subject to a right of appeal to the Council. SMC 2.26.140(B) is for a hearing examiner's decision which has become a final decision. There is no right of appeal until after the Council has considered the matter and rendered a final decision. SMC 2.26.140 is under the specific heading, "Appeal from examiner's decision." Nowhere does it say anything about appealing a recommendation. In fact, .140 anticipates two types of appeal, one to Council [.140(B)] and one to the courts [.140(D)], but both for final decisions.

SMC 2.26 taken together with the provisions of SMC 16 makes it clear that the process for subdivisions and PUD's is unambiguous, the hearing examiner makes a recommendation, which is accepted or not, by the Council. This final decision by Council is then appealable to Superior Court. SMC 16.120.050 &.080 outline the criteria for a subdivision application. SMC 16.120.050:

Permits	Administrative	Public	Hearing	Council	Appeals
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	Approval	Required	Action	
Formal Plat (5+lots)		Hearing Examiner	X	Sno. Co. Sup. Court

**16.120.080 Criteria for approval of an application and issuance of a permit.**

A. A land use development permit, following the process identified in SMC 16.120.050, shall be granted by the city planner, or the city council upon acceptance of the recommendation of the hearing examiner, as the case may be; provided, that it is found, based upon substantial evidence in the record, that the development complies with each of the following criteria:

PUD's, which are governed by SMC 16.10 follow the same procedural steps as subdivisions. That is, an open record hearing is held before the hearing examiner who makes a recommendation to the Council. The Council holds a closed record hearing at which they may accept or reject the hearing examiner's recommendation. The Council's decision is final and subject to appeal to superior court.

**16.10.080 Preliminary PUD process review.**

A. The preliminary PUD application shall be reviewed by the hearing examiner with a recommendation to the city council pursuant to the provisions of Chapter 2.26 SMC. All procedures for completeness, for administrative, hearing examiner and city council review and for notices of application, hearing, and decision shall be governed by those provisions of the municipal code.

B. SEPA review shall be conducted concurrently with the PUD application as provided in Chapter 17.04 SMC. (Ord. 793-02 § 1)

**16.10.090 Authority to approve, condition or deny preliminary PUD.**

A. The hearing examiner may recommend approval, denial or approval with modifications or conditions deemed reasonable and necessary to protect the public interest, mitigate impacts of the proposed development, and to ensure compliance with the standards and criteria of this chapter and the policies of the comprehensive plan.

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.

C. After receipt of a hearing examiner recommendation on the preliminary PUD pursuant to Chapter 2.26 SMC, the city council shall conduct a closed record hearing at which it shall consider the findings, conclusions, and recommendation of the hearing examiner. The hearing examiner recommendation notwithstanding, the city council shall have the right and ability, based exclusively on the record that was presented before the hearing examiner, to agree or disagree with the findings, conclusions and recommendation of the hearing examiner and shall further have the right and ability, based upon the record that was presented to the hearing examiner, to make such additional or different findings and conclusions that the city council believes are supported by evidence in that record.

D. Any decision of the city council on the preliminary PUD shall be final and no further local administrative appeal shall be permitted. This preliminary PUD decision of the city council may be appealed to superior court, pursuant to the requirements of Chapter 36.70C RCW and SMC 16.120.050. (Ord. 793-02 § 1)

This process is consistent with the information provided in the City of Sultan's original Notice of Application dated January 12, 2006, which states, "This project will be reviewed for conformance with the Sultan Comprehensive Plan, and planning standards and specifications adopted by the State of Washington and the City of Sultan. Following the public comment periods, project and environmental reviews, the City Planner will schedule an Open Record Public Hearing before the Hearing Examiner. Staff reports and recommendations will be available 7 days in advance of the Open Record Hearing. The Examiner's recommendation will thereafter be presented to the City of Sultan City Council at a Closed Record Hearing for final action. Notice of Public Hearing will provide for as required under SMC 16.124."

#### B. PROCEDURAL DUE PROCESS QUAGMIRE:

The City's allowance for simultaneously holding both an appeal meeting and a Closed Record Hearing creates an impossible procedural situation and a legal quagmire putting the City at risk for potential litigation. This corrupted process taints the record upon which the Council is required to make its decision and violates the due process rights of all parties of interest.

1. The procedures for Council consideration of a hearing examiner's decision outlined in SMC 2.26.150 conflict with the procedures outlined in SMC 16.10.090. As cited immediately above, SMC 16.10.090 outlines the review process for PUD applications. Per SMC 16.10.090C., "After receipt of a hearing examiner

recommendation on the preliminary PUD pursuant to Chapter 2.26 SMC, the city council shall conduct a closed record hearing at which it shall consider the findings, conclusions, and recommendation of the hearing examiner. The hearing examiner recommendation notwithstanding, the city council shall have the right and ability, based exclusively on the record that was presented before the hearing examiner, to agree or disagree with the findings, conclusions and recommendation of the hearing examiner and shall further have the right and ability, based upon the record that was presented to the hearing examiner, to make such additional or different findings and conclusions that the city council believes are supported by evidence in that record."

#### **2.26.150 Council consideration.**

A. An examiner's decision which has been timely appealed pursuant to SMC 2.26.140 shall come on for council consideration in open public meeting no sooner than 21 nor longer than 35 calendar days from the date the appeal was filed. The council shall consider the matter based upon the record before the examiner, the examiner's decision, the written appeal statement and any written comments received by the council before closure of the city clerk/treasurer's office seven days prior to the public meeting date set for council consideration.

B. At the public meeting, the council may concur with the findings and conclusions of the examiner and affirm the examiner's decision; remand the matter to the examiner for further proceedings in accordance with the council's findings and conclusions; or the council may determine to hear the appeal at public hearing. In those instances in which the council affirms the examiner's decision or remands the matter to the examiner, the council's decision shall be reduced to writing and entered into the record of the proceeding within 15 days of the public meeting. Copies of the decision shall be mailed to all parties of record.

C. In those instances in which the council determines to conduct a public hearing, notice of the hearing shall be given by publication in the city newspaper no less than 10 days prior to the date set for the hearing and written notice shall also be given by the council by mail to all parties of record before the hearing examiner.

D. All council hearings conducted pursuant to this section shall be de novo and shall be limited to those matters raised in the appeal. The council shall consider the appeal based upon the record before the examiner and all written and oral testimony presented at the council hearing. All testimony at any public hearing shall be taken under oath.

E. At the conclusion of the public hearing, the council shall enter its decision which shall set forth the findings and conclusions of the council in support of its decision. The council may adopt any or all of the findings or conclusions of the examiner which support the council's decision. The council may affirm the decision of the examiner, reverse the decision of the examiner either wholly or in part, or may remand the matter to the

examiner for further proceedings in accordance with the council's findings and conclusions.

F. The council's decision shall be reduced to writing and entered into the record of the proceedings within 15 days of the conclusion of the hearing. Copies of the decision shall be mailed to all parties of record. (Ord. 550, 1990)

2. How can the Council hold a public meeting at which it considers matters which may be beyond the scope of the record created before the hearing examiner and simultaneously hold a closed record hearing based exclusively on the record presented to the hearing examiner?

3. How can the Council hold a closed record hearing after which it makes a final decision while simultaneously holding an appeal meeting at which it may determine to hear the appeal at public hearing without foreclosing on that option?

4. How can the notice requirement of SMC 2.26.150(C) be met if the public hearing is held simultaneously with the same open public meeting in which the decision of whether or not to hold a public hearing is to be made? Did the Council or City Staff decide to hold the Closed Record Hearing prior to holding the appeal meeting in which the Council considers the options allowed it regarding appeal requests?

5. How do parties of interest know which procedures to follow, those of the appeal meeting or those for a closed record hearing?

#### C. APPEAL REQUEST LACKS MERIT:

1. If the attempted Appeal Request was not fatally flawed for all the procedural reasons previously enumerated, it would still fail on its merits. The hearing examiner has been clear that the City's attempts to circumvent the City's adopted Concurrency Management System do not satisfy the requirements codified in SMC 16.108. This is set forth in great detail on pages 34-39 of the Hearing Examiner's Recommendation of December 27, 2006 in Conclusions 24-37. Among the conclusions of the hearing examiner is Conclusion 25 which contains the definitive statement, "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]" and Conclusion 33 which states, "DCD erred in concluding that *Twin Rivers Ranch Estates* meets the concurrency standard for police services."

Based on the evidence in the record established before the hearing examiner, the concept proposed in the Police Services Agreement, to fund a portion of a police

officer for one year simply does not satisfy the requirements of the City's Concurrency Management System ordinance. The shortcomings of this scheme are explained in the Hearing Examiner's Conclusion 34.

2. The Council's erroneous approval of previous development applications does not establish precedence for approval of subsequent development applications. Case law is clear on this point. In *Chelan County v. Nykreim* the court, citing *Mercer Island v. Steinmann* stated:

"The governmental zoning power may not be forfeited by the action of local officers in disregard of the statute and the ordinance. The public has an interest in zoning that cannot thus be set at naught. The plaintiff landowner is presumed to have known of the invalidity of the exception and to have acted at his peril."

Id. at 483 (quoting *V.F. Zahodiakin Eng'g Corp. v. Zoning Bd.*, 8 N.J. 386, 396, 86 A.2d 127 (1952)). In short, the court concluded that the doctrine of equitable estoppel "will not be applied where its application would interfere with the discharge of governmental duties or where the officials on whose conduct estoppel is sought to be predicated acted beyond their power." *City of Mercer Island*, 9 Wn. App. at 481.

The City cannot abdicate its duty to enforce its own development regulations because it has failed to do so in the past, or because the Director of Community Development has acted beyond his power.

The Mayor and Council have expressed the fear that developers will sue if they do not adhere to the same decision they made before. It is not an arbitrary or capricious act to refuse to make the same decision as before, when the evidence is clear that to do so would be erroneous. To his credit the Hearing Examiner, understanding this concept, declined to repeat the mistake regarding the locational criteria concerning proximity to transit stops. This is verified in Conclusion No.7 on pages 28, 29 of his Recommendation when he stated, "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."

3. On page 2 of the Applicant's Notice of Appeal dated January 4, 2007 the attorney for the applicant makes the following statement, "In, addition, following the initial remand of this project the Council considered and approved the development application for Vodnick Lane (RAFPPUD05-004)." This statement is completely without merit and is manifestly false. The Vodnick Lane appeal meeting/Closed Record Hearing is scheduled for the same night as this appeal meeting/Closed Record Hearing. No decision has been made in Vodnick Lane, however, a recommendation has been made by the Hearing Examiner to deny the application.

#### D. CONCLUSION:

For all of the reasons articulated above, it is clear that this Appeal Request is improper and should not be allowed to proceed to the City Council in this manner. This second appeal of the Hearing Examiner's second recommendation for denial of the Twin Rivers Ranch Estates development proposal is a glaring example of the break down that has occurred in the City's planning and development department. This is as great a source of frustration to the public as it seems to be to the Hearing Examiner and as it must be to the developers, none of whom can find coherency in the City's processes or in the enforcement of the City's codes.

As this is not the first time the City has failed to follow its legally adopted project review procedures, it must once again be asked why the City has not corrected the problem which is causing or allowing the City and/or applicants to circumvent due process. Again, why has the City Staff once again been allowed to blatantly ignore the City code in the processing of this application?

Thank you,

Josie Fallgatter  
13231 Trout Farm Rd.  
Sultan, WA 98294

Attachment 5-4

Laura Koenig

RECEIVED

From: judystan@speakeasy.net

Sent: Thursday, February 01, 2007 1:21 PM

To: laura.koenig@ci.sultan.wa.us

FEB 01 2007

CITY OF SULTAN  
FINANCE DEPT.

Subject: Notice of Appeal and Closed Record Hearing- Twin River Ranch Estates

February 1, 2007

Sultan City Council

RE: Notice of Appeal and Closed Record  
Hearing Twin River Ranch Estates

Council Members;

We attended both public Hearings for the subject plat review. We heard the testimony and read the Hearing Examiner's Recommendations as well as Mr. Ramirez's Attorney's written comments. To further enable us to comment on this proposed plat, we compared the Hearing Examiner's and the Attorney's comments with applicable Sultan Municipal Codes.

Issue #1 Attorney's contention that the Hearing Examiner erred in his conclusion and findings that the site does not meet the mandatory locational criterion of the code.

Sultan Code 16.10.110(B)2)(c). *The site is 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*

The Hearing Examiner reviewed the applicable code and methodically broke it down into three components. (Hearing Examiner Recommendation, Twin River Ranch Estates, December 27, 2006, Page 29, #8)

*. The criterion in SMC 16.10.110(B)(2)(c) contains three key elements.*

1. *First, a site must be able to connect to a pedestrian and bicycle system.*
2. *Second, that system must be in existence when evaluation is performed; a proposed or potential system will not meet the "existing" restriction of the criterion.*
3. *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.***

Discussion: The Applicant proposes to construct a 5' wide bike path along Foudry Road, from the development to Cascade. From that point northward there is no sidewalk or pedestrian facilities and certainly none on SR 2 where the road is constrained. **The proposed bike path does not connect to an existing bike or pedestrian circulation system, creating a perilous segment for pedestrians on their walk to or from the park and ride along SR 2.** In fact, a female pedestrian was killed on this same path along SR 2 just a year ago and there have been other pedestrian fatalities in the same vicinity. Chief Walser can certainly confirm these tragic incidents. Pictures of the unimproved area are part of the record and clearly indicate the inherent dangers of the shoulder. **We strongly disagree with DCD's assertion that the shoulder of an unimproved roadway is adequate for pedestrian circulation. The Hearing Examiner applied the code exactly as it was written. He did not substitute his personal judgment for the objective basis of his recommendation.** The Applicant's proposal clearly does not meet the locational requirements of the code.

Issue #2 Attorney's contention that the Hearing Examiner misinterpreted the City's transit code.

*Sultan Code 16.10.110 (B)2)(d). **Transit is available in sufficient proximity to the site to facilitate transit access to the PUD-SF***

Hearing Examiner agrees that the proximity to transit is not the issue, but safety and accessibility are. (Hearing Examiner Recommendation, Twin River Ranch Estates, December 27, 2006, Pages 28, 29, #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 onehalf 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.***

*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*

Discussion: The Hearing Examiner points out the risks associated with accessing the transit center by foot under unsafe conditions. If a pedestrian has to risk his or her life getting to the bus stop, the conditions don’t facilitate a safe passage. It is the City’s responsibility to keep people out of harms way. DCD doesn’t seem to pay heed to the transit accessibility element of the code.

Issue #3 In conjunction with SMC 16.10.110(B)(2)(d) the Attorney raises the issue of disparate treatment with Vodnick, citing a potential Equal Protection violation.

Hearing Examiner Recommendation, Twin Rivers Ranch Estates, December 27, 2006, Page 29, #7

***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.***

Discussion: The Hearing Examiner explains the reason for coming to a different conclusion in Twin Estates, based on additional evidence in the record supporting the unsafe walking conditions along SR 2. He states that he would not compound his Vodnick error. He also notes that the Council’s disregard of the locational code in Skoglund Estates

Hearing Examiner Recommendation, Twin River Ranch Estates, December 27, 2006, Page 28, #5

***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.***

Issue #4 Attorney's contention that the Hearing Examiner failed to properly assess the usable space requirement.

Sultan Code 16.10.140 A 2" Useable open space" means areas which have appropriate topography, soils, drainage, and size to be considered for development as active and passive recreational areas for all residents or users of the PUD. Detention area may be considered under this category providing all the usable standards are met. [Open space percent of gross category land area – Useable- 15 % minimum.]

Hearing Examiner Recommendation, Twin River Ranch Estates, December 27, 2006, Page 9, #13

*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)***

Discussion: The Hearing Examiner performed the code- required useable space calculation based on site dimensions provided by Ramirez. He determined that Twin River Ranch Estates requires 55,923 square feet of useable open space. The proposed plat at 49,929 square feet is insufficient by 6,000 square feet. We fail to see how the Hearing Examiner can be faulted for not following the code.

Issue #5 The Attorney claims that the Examiner erred in relation to the locational requirements for PUD's, which can be located anywhere within the City.

Hearing Examiner Recommendation, Twin River Ranch Estates, December 27, 2006 directly addresses this issue. Page 29, #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.***

Issue #6 The Attorney claims that the Hearing Examiner's assertion that the project would create an attractive nuisance is pure conjecture.

Hearing Examiner Recommendation, Twin River Ranch Estates, December 27, 2006, page 39, # 40 explains

*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.*

Discussion: In addition to parking concerns, Dyer/Skywall neighbors emphatically testified at both public hearings that they do not want trespassing fishermen leaving behind litter and human waste on their properties. They feel that Twin River Ranch Estates would draw more people and cars and they don't want to deal with the unpleasant consequences of an attractive nuisance.

Issue #7 The Attorney claims that the Hearing Examiner failed to follow the Council's prior direction with respect to police services specifically mentioning Skoglund Estates.

Hearing Examiner Skoglund Estates Recommendation May 2, 2006, Page 13

*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 16.108.06]*

Discussion: Council must follow the City code and should not overturn the Hearing Examiner Recommendation merely because it is inconvenient for the City's development plans. In Skoglund Estates, the Council approved a plat that clearly did not meet the City's Concurrency Codes or Comprehensive Plan. The Hearing Examiner would be derelict in his duties if he followed the Council's erroneous lead. He can't be faulted for recommending code compliance.

Issue #8 The Attorney maintains that the Hearing Examiner erred in concluding that the Application fails to meet the Snohomish County Shoreline Master Plan (SCSMP) Regulations for Recreational Uses and three Public Access Element Policies.

After reviewing the most recent SCSMP Regulations, the Hearing Examiner determined in Hearing Examiner Recommendation, Twin River Ranch Estates, December 27, 2006 page 34, #20 and #21 that the plat proposal does not meet all the requirements of the SCSMP Regulations.

*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 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.*

## CONCLUSION

The City of Sultan is fortunate to have a very experienced and capable Hearing Examiner who believes in the plain interpretation of City codes. He has stated repeatedly that it is the **written legal document that controls**. In Hammer, Page 47 #6, the Hearing Examiner wrote, "**a clear unambiguous requirement of the code cannot simply be ignored or wished away**. The Councils legislative intent must be applied as written, not as some may wish it had been written."

It is the Council's primary responsibility to uphold the laws, ordinances and resolutions that form the legal foundation of this community. The Hearing Examiner has repeatedly asserted that he and the Council cannot approve development projects, which do not satisfy the requirements of the City's legal codes. In Twin River Ranch Estates he made reasoned and well articulated findings and conclusions, something the Council failed to do when it reached its decision in Skoglund Estates.

Mr. Ramirez' Attorney challenged the Hearing Examiner's interpretation in several instances. But if you compare the applicable City codes with the Hearing Examiner's recommendations, you will find that they are in total compliance. That being the record, you have no basis for reversal.

The Hearing Examiner twice concluded that Twin River Ranch Estates does not meet several key Sultan code requirements nor applicable provisions of the County's Shoreline Master Plan. We urge you to compare the record for yourself and DENY Twin River Ranch Estates on the same legal basis. Council does not have the option to approve non-compliant development projects.

Sincerely,

Heydricks  
Sultan, Wa.