

February 1, 2006

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

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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 2nd 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,

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