

BEFORE the HEARING EXAMINER of the  
CITY of SULTAN

RECOMMENDATION -  
REVISED ON REMAND <sup>1</sup>

FILE NUMBER: FPPUD05-002

APPLICANT: Barry A. Hammer Bankruptcy Estate, Peter H. Arkison,  
Trustee

TYPE OF CASE: Preliminary Planned Unit Development subdivision  
(*Hammer PUD*)

STAFF RECOMMENDATION: Approve subject to conditions

SUMMARY OF RECOMMENDATION: APPROVE subject to conditions (revised) <sup>2</sup>

DATE OF REVISED RECOMMENDATION: August 2, 2007

INTRODUCTION

Barry A. Hammer Bankruptcy Estate, Peter H. Arkison, Trustee (Hammer), 103 E. Holly Street, Suite 502, Bellingham, Washington 98225, seeks preliminary approval for *Hammer PUD*, a 72 lot Planned Unit Development (PUD) subdivision for single family residential development plus six (6) tracts for future economic development. Hammer filed the preliminary PUD subdivision application on September 23, 2005.

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<sup>1</sup> This Recommendation has been substantially revised as a result of the remand process. Most of the Introduction, Issues, Findings of Fact, and Principles of Law sections are identical with the Examiner's 2006 Recommendation; many of the Conclusions are likewise similar to the 2006 Recommendation. Paragraphs which have been added or revised through the remand process are identified by footnotes. Paragraph numbers in the Findings of Fact and Conclusions sections have been altered due to additions and deletions. Those numbering changes are not specifically identified.

<sup>2</sup> Recommendation revised on Remand.

Attachment 1

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The Sultan Hearing Examiner (Examiner) viewed the subject property on May 10, 2006.

The Examiner held an open record hearing on May 10, 2006. DCD and Hammer gave notice of the hearing as required by the Sultan Municipal Code (SMC). (Exhibits 1.8 and 1.9) At the hearing, Hammer extended the time period in which the Examiner must issue his recommendation to June 1, 2006, in anticipation that the Sultan City Council (Council) would, before that date, issue its rulings on the Examiner's *Steen Park* and *Cascade Breeze Estates* recommendations, both of which presented some similar issues (Concurrency compliance problems). By letter dated May 25, 2006, Hammer further extended the issuance date to not later than June 15, 2006. (Exhibit 4)<sup>5</sup>

On June 15, 2006, the Examiner issued a Recommendation to Deny the PUD without prejudice and Return the preliminary subdivision application for correction. (Exhibit 12) Hammer requested Reconsideration by letter dated June 26, 2006. (Exhibit 5) The Examiner denied Reconsideration by Order issued June 27, 2006. (Exhibit 13) By letter dated November 10, 2006, Hammer asked the Council to remand the application. Resolution No. 06-016, enacted by the Council on November 11, 2006, remanded the application. (Exhibits 14 and 29)<sup>6</sup>

The Examiner held an open record remand hearing on July 24, 2007. DCD and Hammer gave notice of the remand hearing as required by the SMC. (Exhibits 27 and 28)<sup>7</sup>

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

### ISSUES

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

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<sup>5</sup> Exhibit citation added on remand.

<sup>6</sup> Paragraph added on Remand.

<sup>7</sup> Paragraph added on Remand.

*Interior street network concerns*

Hammer has agreed to provide reasonable access across Tract D to the adjacent parcel. Access to Tract J was discussed extensively at hearing and is the subject to a special condition. Construction of the North Connector is also addressed in a condition. Street network concerns have now been adequately addressed.

*Police concurrency*

The applicant-Staff proposal still doesn't comply with the requirements of Chapter 16.108 SMC. But, as with all recent residential applications, the evidence allows for alternative conditions which will comply with the presently adopted code.

*Problems with a number of the Staff-recommended conditions*

Those problems have either been corrected by Staff or are resolved herein.

NEW ISSUES

*Traffic effects on the Sky Harbor subdivision*

While the *Sky Harbor* residents' objection to access through their subdivision is understandable (They presently have short, dead-end, low volume streets which function as if they were cul-de-sacs.), the facts are that those streets were designed and built to serve the Hammer property and are capable of doing so. Their objection should not deter approval of *Hammer PUD*.

*Future development of the north-south road*

The concept of a north-south road through the commercial/industrial portion of the proposed subdivision complies with all applicable policies. Whether it should eventually be built up the hill and opened for general traffic use is a question which need not be resolved now.

*Location of the bollards on the north-south road*

Hammer disagrees with DCD's recommendation regarding temporary use of the north-south road. Given the testimony and evidence, the Examiner concludes that the road should be blocked off as recommended by DCD unless Hammer agrees to build it to full City standard as a commercial/industrial street. Then and only then should normal vehicular use of it be allowed as far north as Tract J.

**FINDINGS OF FACT**

Project Merits

1. The subject property is a reverse, inverted "L"-shaped tract. The northern "foot" of the "L" (Parcels B and C, collectively referred to as Parcel B/C) contains 18.18 acres, is approximately 350 feet in north-south dimension, is approximately 2,075 feet in east-west dimension, and is the site of the "Sky Harbor Airport," a private grass air strip. The southern "leg" of the "L" (Parcel A) contains

6. <sup>14</sup> To the north of the site lies the *Steen Park* subdivision (the west 120 feet of the *Hammer PUD* site), the developed *Sky Harbor* subdivision which provides two public street stubs, Cedar Court and Dogwood Court (the central 1,300 feet), and two acreage parcels, one of which contains a house located on or very close to the common property line. That parcel appears to be legally landlocked (unless a right of access exists legally which is not visible on the record documents).

To the west of Parcel B/C lies an undeveloped acreage parcel.

To the south and west of Parcel B/C and one parcel removed to the west of Parcel A lies the *Timber Ridge Estates* site, separated from Parcel B/C by the stream corridor, the steep slopes, and undeveloped acreage tracts.

The property to the east is also undeveloped.

Terrain on the adjoining properties is not well depicted on record documents, although it is known that the ravine within which the Parcel B/C stream flows prevents any reasonable access to the west, southwest, or northwest. (Exhibits 1, 1.1.8, and 1.2.1 and testimony)

7. <sup>15</sup> The Comprehensive Plan designation and zoning of Parcel B/C is Moderate Density Residential (MD) while the designation and zoning of Parcel A is Economic Development (ED). (Exhibit 1)

The site lies entirely within the outer boundaries of the Sultan Industrial Park Master Plan element of the Comprehensive Plan (IP Plan). The above-mentioned land use designations are reflected in the IP Plan. (IP Plan, p. 2.3) The IP Plan envisions an east-west "North Connector Street" running from Sultan Basin Road on the west to Rice Road on the east. The IP Plan's proposed North Connector alignment passes through Parcel A. (IP Plan, p. 2.11) The North Connector is to be funded through "Developer contributions or construction and/or local improvement district". (IP Plan, p. 2.18) The IP Plan encourages "common driveways or frontage roads" to serve large projects located between SR 2 and the North Connector. Specific locations for SR 2 intersections are not included in the IP Plan. (IP Plan, pp. 2.13 and 2.14)

The IP Plan also calls for the establishment of a "Wagley's Creek habitat corridor." (IP Plan, p. 2.11) The corridor is to be "±100" feet wide. (IP Plan, p. 2.12) "[S]pecific site plan review and approval procedures for projects within 150'-200' of the ordinary high water of [Wagley's] creek" are called for. (IP Plan, p. 3.7)

<sup>14</sup> Finding revised on Remand.

<sup>15</sup> Two sentences and citation added on Remand at the end of the second paragraph.

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(approximately 650 feet north of SR 2) would prevent routine vehicular use north of that point. A 60 foot wide, east-west right-of-way for the North Connector is reserved through the center of Parcel A. Other than replacing the extremely substandard bridge over Wagley's Creek with an open-bottom box culvert, building the pedestrian trail, and installing bollards on the trail, no other development is proposed within Parcel A. (Exhibits 18.1 and 18.2 and testimony) Hammer expects that any development within Parcel A would be subject to an entirely separate review process. (Testimony)

- 9.<sup>19</sup> Cedar Court presently provides access to 15 single family lots; Dogwood Court presently provides access to 22 single family lots. Both streets were designed and built to provide through access to the Hammer property. (Exhibit 18.2)

Traffic from the 72 proposed *Hammer PUD* lots will be split between those two City streets. Cedar and Dogwood Courts fit the City's Design Standards and Specifications (City Standards) definition of collector streets: "Principal traffic arteries between local access streets and higher-traffic secondary and principal arterial. Collector streets have a combined function of moving traffic and serving land uses within their neighborhood." [City Standards, § 1.09, ¶ 4] "Proposed subdivisions shall provide street connections to all street stub-ends that abut the boundary of the subdivision." [City Standards, § 1.10(A)]

*Hammer PUD* is projected to generate approximately 704 average daily vehicular trips (9.78 trips per household), of which 74 (10.5%), 46 (62%) inbound and 28 (38%) outbound, would occur in the P.M. peak traffic hour.<sup>20</sup> (Exhibit 1.1.10, p. 2) Applying the same trip generation rates to the existing residences along Cedar and Dogwood Courts, the estimated current trip figures for those streets would be: Cedar Court = 147 average daily trips with 15 P.M. peak hour trips of which 9 would be inbound; Dogwood Court = 215 average daily trips with 23 P.M. peak hour trips of which 14 would be inbound. (Calculated)

The Traffic Analysis (Exhibit 1.1.10) does not divide *Hammer PUD* trips between Cedar and Dogwood Courts. For estimating purposes, it is reasonable to predict that traffic to and from lots fronting on the southerly extension of Dogwood Court and lots to its east will use Dogwood Court as the shortest route and that the remaining lots will use Cedar Court as the shortest route to reach 138<sup>th</sup> Street SE. On that basis, *Hammer PUD* will add approximately 479 average daily trips to Cedar Court with 50 occurring during the P.M. peak hour (31 inbound and 19 outbound) and approximately 225 average daily trips to Dogwood Court with 24 occurring during the P.M. peak hour (15 inbound and 9 outbound). (Calculated)

<sup>19</sup> Finding added on Remand.

<sup>20</sup> The P.M. peak hour is predicted to see a higher traffic count than the A.M. peak hour: 72 v. 55 average daily peak hour trips. (Exhibit 1.1.10, Table 1) It thus represents the worst case scenario.

stream protection and preservation in a creative manner. As a result, an approved innovative design may deviate from the standards of SMC 16.80.080(C).

(Council Resolution No. 05-17, p. 4, ¶ 22) The Council reiterated that view two paragraphs later: "The innovative design process is an alternative to buffer width reduction or averaging, and so long as its criteria are satisfied, standards described in SMC 16.80.080(C) for buffer width reduction do not need to be satisfied." (Council Resolution No. 05-17, p. 4, ¶ 24<sup>22</sup>)

- 12.<sup>23</sup> Hammer's proposal for Parcel B/C relies on the Innovative Development Design process: The additional 25 feet of wetland buffer is not proposed. (Exhibit 18.1) Hammer proposes to plant 556 tree saplings on the south-facing steep slopes to enhance species diversity on the slope. In addition, 234 tree saplings are proposed to be planted on the north-facing slope adjacent to a large wetland located mostly within *Sky Harbor*. Hammer's consultant believes that these plantings will result in a net improvement of the wetland buffers. (Exhibits 1.2.5, 1.2.6, and 16 and testimony)

The City's independent peer review consultant, Graham-Bunting Associates (GBA), concurs in that assessment. (Exhibit 17)

No state agency has jurisdiction over the treatment of the wetland buffer in this project. The Washington State Department of Fish and Wildlife (WDFW) has jurisdiction over the Wagley's Creek bridge replacement, but not over the wetland. The Wagley's Creek bridge replacement proposal meets all City standards; the Innovative Development Design process does not encompass that part of the proposal. (Testimony)

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<sup>22</sup> Council decisions made in the context of a quasi-judicial proceeding on a particular application establish the "law of the case" but do not establish legal precedent for any other cases. (The same holds true for Examiner Decisions and Superior Court judgments. Legal precedent for other cases is established only by published appellate court opinions.)

However, when the Council rules in a general, broad fashion regarding the meaning, interpretation, and/or implementation of one of its enactments, where the enactment is amenable of more than one reasonable interpretation, and where the Council's ruling is a rational interpretation of the enactment, it is prudent for the Examiner to consider that ruling as a statement of the Council's intent and to follow it in future cases.

Such is the nature of this portion of the Council's *Timber Ridge Estates* decision regarding the Innovative Development Design process.

<sup>23</sup> Second paragraph added and third paragraph revised on Remand.

available in sufficient proximity to the site to facilitate transit access to the PUD-SF"; Subsection (2)(e) requires the PUD location to not necessitate any extraordinary expenditure of public funds for infrastructure; Subsection (2)(f) simply requires equity with non-PUD developments in access to schools, parks, etc..

*Sky Harbor* contains both sidewalks and a trail system.

Community Transit (CT) runs bus service along SR 2 to Gold Bar. The nearest CT park and ride lot/bus stop is on the south side of SR 2 between 10<sup>th</sup> and 11<sup>th</sup> Streets, a little over one-half mile west of Parcel A's SR 2 frontage. (Comprehensive Plan, pp. 201 and 202) *Hammer PUD* residents interested in using CT's bus service could drive north through *Sky Harbor* to 138<sup>th</sup> Street SE and thence to Sultan Basin Road and SR 2, walk or bicycle that same route, or walk or bicycle south through Parcel A to SR 2 and thence to the bus stop. (Exhibit 1.2.1 and testimony)

The DCD Director testified in the 2006 hearing that several years ago the City had asked CT to expand its bus service to include a run up Sultan Basin Road. CT reportedly replied that the area had insufficient development to warrant service. He further testified that the City had repeated its request some three months ago.<sup>27</sup> He also stated that he had talked to CT during the week prior to the *Hammer PUD* hearing but had yet to receive a response. (Testimony)

During the 2006 hearing, Josie Fallgatter (Fallgatter) questioned *Hammer PUD*'s compliance with PUD locational criterion (B)(2)(d). (Testimony)

- 16.<sup>28</sup> In 2003 (the latest date for which the record contains any data), SR 2 carried some 14,400 vehicles per day on the segment between Sultan Basin Road and 4<sup>th</sup> Street. (Exhibit 1.1.11, pp. 1 and 2) Fallgatter and Loretta Storm (Storm) both testified during the 2006 hearing that SR 2 is a dangerous highway for pedestrians. They also alleged that Sultan Basin Road, which has no defined pedestrian facilities for most of the segment between SR 2 and 138<sup>th</sup> Street SE, is equally dangerous.
17. The hearing record contains some discussion as to the correct amount of mitigation fees for traffic, school, and park impacts. That discussion is immaterial at this point in the review process. Traffic and park impact fees "shall be determined and paid to the designated city of Sultan official at the time of issuance of a building permit for the development." [SMC 16.112.020(B)] School impact fees "shall be paid to the city prior to building permit issuance, based on the fee schedule in place at the time of building permit application." [SMC 16.116.030(B)] Therefore, all three fees are based on

<sup>27</sup> Neither of these statements were offered during any of the prior hearings this Spring (all held within the past 45 days) where this same issue was a central factor. Therefore, this information is new to this case.

<sup>28</sup> Minor changes made on Remand.

DCD 2006 Condition	DCD 2007 Condition
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31	34

GBA recommends ten conditions of approval. (Exhibit 17, pp. 3 and 4) Six of those ten have been expressly incorporated into DCD's list of Recommended Conditions:

GBA Condition	DCD 2007 Condition
1	10
2	9
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4	11
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7	14
8	12
9	15
10	

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Comprehensive Plan, Appendix B, p. 2.75) The City had 10 full-time uniformed officers in 2003. (2004 Comprehensive Plan, Appendix F, pp. 214 – 215) The ratio of uniformed officers to population in 2003 when the LOS inventory was conducted, based on the population number used, was 2.6 officers per 1,000 population. (2004 Comprehensive Plan, Appendix B, p. 2.74)

- 25.<sup>36</sup> The City's April 1, 2007, estimated population is 4,530. (Testimony) The City presently has six (6) full-time uniformed officers (two of which have reportedly tendered their resignations) with two or three budgeted positions vacant.<sup>37</sup> (Testimony) The current police services LOS is thus 1.32 uniformed officers per 1,000 population (based on present staff) or 1.77 – 1.99 uniformed officers per 1,000 population based on the range of budgeted positions as stated in the record. The City needs 12 uniformed officers to meet the established LOS for its 2007 estimated population.
- 26.<sup>38</sup> DCD incorporated a Certificate of Concurrency (the Certificate) in its June 15, 2007, Staff Report, for *Hammer PUD*. (Exhibit 29, pp. 24 - 26)

... The current deficit is 3 Uniform Officers which is based on the City of Sultan's Office of Financial Management (OFM) [2005] population of 4,225. The City is currently updating the Comprehensive Plan and intends to modify this LOS.

Police Services are funded through the City's General Fund and other sources. Increased tax revenue associated with the development will work towards offsetting incremental increases of police services as needed to accommodate the City's population. Police service improvements scheduled to maintain the City's adopted LOS concurrent with development are planned under the adopted 6-year Capital Facilities Plan. In order to maintain an acceptable level of service for police the developer should provide a development agreement to guarantee the LOS for police services.

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<sup>36</sup> Finding updated on Remand. Applications vest to regulations, not to facts. Therefore, current population and staffing figures must be used, not those from 2005 – 2006.

<sup>37</sup> Storm testified under oath at the 2007 hearing that the present budget has eight or nine budgeted uniformed officer positions, six of which are filled, and two of those have tendered resignations. Storm further testified that the City's draft 2008 budget would reduce budgeted uniformed officer positions to five and contract with the Snohomish County Sheriff for additional police services.

No City representative present at the 2007 hearing could (or would) testify regarding Storm's information, including her statement as to the number of currently budgeted positions.

<sup>38</sup> Finding revised on Remand.

which would require that a standard "Developer Agreement" include a provision for "payment of pro-rata share of police officer costs". (Exhibit 29, pp. 27 – 30, quote from p. 27)

- 29.<sup>40</sup> During the 2006 hearing, Hammer verbally offered to enter into an agreement for police services matching that offered by the applicant in the *Skoglund Estates* case. A proposed agreement was not offered during either of the Examiner's hearings.

The *Skoglund Estates* applicant presented a draft agreement which offered to enter into a "Developer Agreement to Establish Concurrency" (the Police Services Agreement). The Police Services Agreement was predicated on an estimated population within *Skoglund Estates* of 127 and an annual cost to the City for a police officer of \$110,878. Based on the adopted police services LOS of 2.6 uniformed officers per 1,000 population, the Police Services Agreement calculated that 0.33 of a uniformed police officer would be needed to provide 2.6 police officers per 1,000 population for the 127 residents of *Skoglund Estates*. The applicant then offered to contribute \$36,612.00 (33% of the first year's cost of a uniformed officer) plus \$9,964.00 "as a contribution to a reserve for future years of service." (Official notice)

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

- 30.<sup>41</sup> The City placed a levy on the November, 2006, ballot to raise funds to hire additional police officers. The levy was defeated. (Testimony)

Parks, Recreation, and Open Space

31. The currently adopted LOS standard is 42.6 acres of parks, recreation, and open space facilities per 1,000 population. (Exhibit 1.11; see also 2004 Comprehensive Plan, Appendix B, p. 2.75) (The LOS standard in the prior 1994 Comprehensive Plan was 5.0 acres of City park land per 1,000 population. (2004 Comprehensive Plan, Appendix B, p. 2.75))
32. The City conducted the inventory which formed the basis of the currently adopted LOS standard in 2003. It used an estimated 2003 population of 3,814 to develop that standard.<sup>42</sup> (2004

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<sup>40</sup> First paragraph revised on Remand.  
<sup>41</sup> Finding added on Remand.  
<sup>42</sup> See Footnote 35, above.

Recent Council Actions

35. <sup>45</sup> On June 8, 2006, the Council passed Resolution Nos. 06-06 and 06-07, approving the *Steen Park* and *Cascade Breeze Estates* applications, respectively. Both Resolutions contain identical language regarding the police services LOS issue:

4. The City's existing Level of Service for police is below the adopted LOS in the Comprehensive Plan. The LOS failure for police, however, was not caused by this proposed Development, and the further reduction in the LOS caused by this proposed Development is modest by comparison to the existing deficiency.
5. The Council takes notice of the Recommendations in the Prothman Report accepted by the Council and Ordinance 900-06. The City has adopted a utility tax applicable to its municipal utilities and has received Recommendations for additional tax adoptions, including a utility tax on cable television service, an increased real estate excise tax, and a B & O tax. Other funding sources could include potential developer loans to advance the receipt of payment of needed funds, and monies contributed by proposed development for their impacts on the LOS. A combination of developer agreements and public funds will put in place the required public services for police concurrent with the development impacts, and provide appropriate strategies for the six years from the time of development to achieve the necessary police LOS as now established or as subsequently revised.
6. The Council takes notice of the Applicant's offer at the Closed Record Hearing to deliver to the City a Developer Agreement to pay Applicant's incremental share for a police officer for one year.
7. Based upon the foregoing, this proposed Development is deemed concurrent.

(Exhibits 19 and 20)

36. <sup>46</sup> On June 29, 2006, the Council passed Resolution No. 06-09A approving the *Skoglund Estates* Planned Unit Development application. Council Conclusions of Law in that Resolution are

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<sup>45</sup> Citation added on Remand.

<sup>46</sup> Finding added on Remand.

The Fire District also believes that a 12 foot wide paved surface would be inadequate for effective emergency equipment operations. Therefore, the District suggests that the north-south street, if allowed, be barred by bollards at its south end to prevent any usage. (Testimony)

- 42.<sup>53</sup> The Sky Harbor Homeowners Association (SHHOA) worries about the added traffic that *Hammer PUD* will place on Cedar and Dogwood Courts. They are also concerned about children's safety during construction of the subdivision. The SHHOA would prefer that the north-south street be opened for general traffic so that drivers would not be as likely to travel through *Sky Harbor*. (Testimony)
43. Any Conclusion deemed to be a Finding of Fact is hereby adopted as such.

### PRINCIPLES OF LAW

#### Authority

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

#### Review Criteria

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

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

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<sup>53</sup> Finding added on Remand.

(c) Availability and adequacy of public facilities identified in the comprehensive plan, if the plan or development regulations provide for funding of these facilities as required by [the Growth Management Act].

[RCW 36.70B.030]

Chapter 16.108 SMC, Concurrency Management System

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

**16.108.010 Purpose.**

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

**16.108.020 Exemptions.**

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

**16.108.040 Nonbinding determinations.**

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

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

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

1.12

**16.108.120 Concurrency determination – Police protection.**

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

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

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

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

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

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

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

Vested Rights

Subdivision and short subdivision applications are governed by a statutory vesting rule: such applications “shall be considered under the subdivision or short subdivision ordinance, and zoning or other land use control ordinances, in effect on the land at the time a fully completed application ... has been submitted ....” [RCW 58.17.033; see also SMC 16.28.480] the *Hammer PUD* is vested to the regulatory system in effect on September 23, 2005.

Standard of Review

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

Scope of Consideration

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

**CONCLUSIONS**

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*Hammer PUD* complies with SMC 16.68.060(B): The re-grading needed to stabilize the old swale fills will not destabilize the slope nor create erosion problems if performed in accordance with the geotechnical recommendations contained in the hearing record.

Therefore, *Hammer PUD* now complies with all applicable requirements of Chapter 16.68 SMC.

- 5.<sup>59</sup> The record now demonstrates compliance with the requirements for approval of an Innovative Development Design under SMC 16.80.100. The previously identified two shortcomings have been resolved. First, adopted code requires state agency approval before local approval of an Innovative Development Design. However, the Innovative Development Design proposal relates to the wetland and steep slope buffers. No state agency has jurisdiction over those elements of the proposal. The proposal does not rely on any aspect of the Wagley's Creek corridor treatment. Therefore, the requirement for state agency approval is moot.

Second, massive slope re-working is not necessary. The preponderance of the evidence shows that with proper revegetation of the disturbed areas at the top of the slope and extensive supplemental vegetation across the breadth of the slope, the result would be a better, more functional wetland buffer.

The evidence now shows that: The proposal will provide a net improvement in wetland buffer function; no state resource agency has any jurisdiction over this aspect of the project; revegetation of the hillside will further the objectives of Chapter 16.80 SMC; revegetation will not harm water quality, damage fish or wildlife habitat, have any effect upon the stormwater control system, or create unstable soil conditions; slope alterations are proposed to be kept to a minimum; and the proposal will not harm any adjacent properties. The proposal thus meets the approval criteria at SMC 16.80.100(B).

- 6.<sup>60</sup> Four public use and interest questions regarding the proposed interior street network can now be answered in the affirmative. First, evidence supports a conclusion that extension of the east-west street to the west or northwest boundary would serve no purpose: The adjacent terrain makes extension of a street in that direction impractical.

Second, evidence supports a street stub to the apparently landlocked parcel adjacent to Tract D near the northeast corner of the site. The best available evidence seems to suggest that a modest buildable area exists across the property line, but that the property may be legally landlocked. That property, like Parcel B/C, is zoned MD which means that the Council desires it to be developed at a moderate

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<sup>59</sup> Conclusion revised on Remand.

<sup>60</sup> Conclusion revised on Remand.

industrial traffic as a part of the subdivision's infrastructure development process. Not only is such construction obviously necessary to provide access to the Tracts, but it is necessary in order to conclude that the proposed subdivision complies with the adopted Comprehensive Plan.<sup>61</sup>

Hammer's perception that future development within Parcel A will be subject to some type of separate review is not a proposal. In fact, the Examiner knows of no review procedure within the SMC which would mandatorily apply to future development in Parcel A. The Conditional Use Permit process would not apply unless a use proposed for one of the Future Development Tracts was a listed conditional use in the ED zone. The Binding Site Plan process would not apply as all the lots would have been legally created through this subdivision process. The reality is that no review process exists in code to accomplish what Hammer and DCD seem to want.

Three choices exist: Either fully develop the infrastructure within Parcel A during the development of this subdivision; or place a restriction on the face of the final plat restricting development within Parcel A until the north-south and North Connector streets are fully constructed; or record the subdivision in two phases with the Parcel A phase delayed until Hammer (or its successor) is prepared to make the necessary infrastructure improvements. If the latter option were chosen, the north-south and North Connector rights-of-way would have to be dedicated with the first phase.

- 7.<sup>62</sup> Hammer requests a PUD overlay for only Parcel B/C, the northerly 18.18 acres. PUD criteria compliance has been evaluated for only that portion of the property, and only for a single-family residential PUD. The conditions must clearly indicate that the PUD overlay is a PUD-SF and that it applies only to Parcel B/C. The recommended Conditions still do not make that critical point clear at all.
8. The only PUD-SF locational criteria under challenge in this application is that relating to transit facilitation. [SMC 16.10.110(B)(2)(d)] This same issue arose during the *Skoglund Estates* case. The Examiner's Recommendation in that case included the following Conclusions:
  18. The locational criteria of SMC 16.10.110 are mandatory: A PUD which does not meet all criteria applicable to its type of PUD can not be approved.
  19. Compliance with the transit facilitation criterion of SMC 16.10.110(B)(2)(d) is mandatory for single-family residential PUDs. *Skoglund Estates* is a single-family residential PUD proposal.

<sup>61</sup> The situation here is different than in *Timber Ridge Estates*: The section of the North Connector which crossed the southeast corner of the *Timber Ridge Estates* site provided access to no lots within the proposed subdivision.

<sup>62</sup> Minor change made on Remand.

Summary

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

(Official notice) The Council concluded that *Skoglund Estates* met the transit facilitation requirement. (Exhibit 21, p. 2)

9. The location of the *Hammer PUD* presents a different set of circumstances than did the *Skoglund Estates* site. The present site has frontage on an established bus line: SR 2. The less than half-mile walk from Parcel B/C through Parcel A on the proposed 12 foot paved trail is not an unreasonable distance to walk to get to a bus stop.

The criterion requires only transit facilitation. Were the developer to provide a widened shoulder along the frontage of the site on SR 2 for establishment of a bus stop, it would most definitely be facilitating transit use. The City's so far unsuccessful contacts with CT do not fulfill the requirement, but the site's proximity to a transit line and the developer's offer do fulfill the requirement.

- 10.<sup>64</sup> Although not challenged in this case, compliance with SMC 16.10.110(B)(2)(c) needs to be addressed as it did become an issue in the *Twin Rivers Ranch Estates* case. The location criteria of SMC 16.10.110(B)(2) are designed (for the most part) to help limit the places within the City which are eligible for PUDs. Had the Council intended that PUDs could be located anywhere in the City, it would not have enacted restrictive location criteria. Those criteria must be given meaning.<sup>65</sup>

The criterion in SMC 16.10.110(B)(2)(c) contains three key elements. First, a site must be able to connect to a pedestrian and bicycle system. Second, that system must be in existence when the

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Basin Road approximately one-quarter mile north of SR 2. Although the transit facilitation criterion was not an issue in that application, the Examiner would have concluded that one-quarter mile was close enough to meet the criterion.

<sup>64</sup> Minor revision on Remand.

<sup>65</sup> Locational criterion (B)(2)(f) offers an instructive contrast. It was expressly written so as to not limit potential PUD sites: So long as a site has access to public services equal to that of a standard development, the criterion is met. The language of Subsection (B)(2)(f) clearly demonstrates a difference of intent on the part of the Council. It wrote that criterion to be non-limiting while all the others in Subsection (B)(2) are intended to limit.

Whether the City wants to eventually do so is another matter. Such a connection may be desirable if and when the Industrial Park actually develops. No decision is needed now. The alignment is to be preserved and be available for pedestrian usage.

Concurrency<sup>68</sup>

13. Subdivision PUD applications are development permits. [SMC 16.120.050] *Hammer PUD* is not categorically exempt from SEPA threshold determination requirements. (Exhibit 1.4) Therefore, *Hammer PUD* is subject to the concurrency requirements of Chapter 16.108 SMC. [SMC 16.108.020]
14. DCD's concurrency determination is to be considered part of its recommendation to the Examiner. [SMC 16.108.040(B)] The Examiner can not recommend and the Council can not approve a development application which does not demonstrate compliance with the concurrency requirements of Chapter 16.108 SMC. [SMC 16.108.060]
15. Section 16.108.060 SMC states that development approval is to be granted "only if the proposed development does not lower the existing level of service (LOS) of public facilities and services below the adopted LOS in the comprehensive plan." But what happens where the existing LOS is already below the established standard? May a development be approved because it is not the one which "broke" the LOS standard?

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

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

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<sup>68</sup> The Examiner concludes that Resolution Nos. 06-06 and 06-07 and the series of subsequent Resolutions which essentially repeated the content of those Resolutions do not establish precedent for this or future cases. The analysis which follows has benefited from the Council's holdings in those Resolutions, but does not agree in full with the Resolutions' holdings. Those Resolutions imposed no concurrency conditions on either development. (Conclusion 6 in each Resolution "takes notice" of an applicant offer to provide a developer agreement for an "incremental share for a police officer for one year." Neither Resolution, however, imposes any such requirement on the application.) (Footnote revised on Remand.)

Subsection (C) addresses the situation where the LOS standard would not be met but the developer enters into a binding agreement with the City to provide the necessary resources to raise the LOS to meet or exceed the established LOS within six years. This is an option in which the typical developer would likely be committing more than his/her fair share. But "latecomers" agreements are available for just such situations.<sup>71</sup> And, the developer always has the option to wait until the City makes the necessary commitments to raise the LOS.

- 18.<sup>72</sup> According to SMC 16.108.070, .120, and .130, the LOS standards for police services and parks, recreation, and open space are the standards as set in the 2004 Comprehensive Plan: 2.6 uniformed officers per 1,000 population and 42.6 acres per 1,000 population, respectively. The City currently meets its parks, recreation, and open space standard but does not meet its police services standard. The remainder of this section will address police services LOS only.

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

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

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<sup>71</sup> In fact, developers frequently extend water and sewer lines to serve a development. The cost of getting those lines to the development site often is above and beyond a roughly proportional cost. But the developer usually does not want to await the extension of those lines by the City, so it offers to fund them now and enter into a "latecomers" agreement by which, over time, at least some of its excess investment costs may be returned when others connect to the lines for which it has paid.

<sup>72</sup> Conclusion revised on Remand.

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standard. It would take many, many developments, all developed at essentially the same time, to raise the LOS to the established standard. But that simple equation (1 officer funded by the fees based on the previously offered schedule yields 2.54 officers after approximately 381 dwelling units) fails to account for the fact that those 381 dwelling units would themselves raise the City's population by some 1,029 people (2.7 persons per household, the number stated in the previously offered Police Services Agreements), thus lowering the LOS again. In fact, all a program such as offered by Hammer does is hold the LOS at its current level as new houses are added to the community – and then only if development occurs fast enough that the payments for fractional officers can be combined to actually hire a police officer.

This concept simply is not what Chapter 16.108 SMC requires. The Council may certainly change the SMC requirement if it wishes. But in the meantime, the code is what controls – and even if the code were changed today, that change would not apply to any subdivision application filed in a complete fashion before the change became effective.

Finally, such incremental funding arguably would run afoul of the RCW 82.02.090 prohibition against collecting impact fees for police services. The Police Services Agreement concept is essentially a *pro rata* share payment system for police services. (In fact, that is exactly the term used by DCD in Exhibit 29, Recommended Condition 2, to describe it.) Such a system is not allowed under State law. If Chapter 16.108 SMC is read as the Examiner believes it has to be, no such conflict would exist as the chapter would not be charging an impact fee.

- 23.<sup>74</sup> The City has no “strategy in place” to increase police staffing. The electorate defeated its latest proposed strategy. The discussion in Resolution Nos. 06-06, 06-07, 06-09A, 06-11A, 07-01A, and 07-02A regarding possible additional taxes that could or might be adopted to raise revenue is a strategy, but it is not in place. Utility and cable taxes have been adopted. But the record is devoid of any data that would support the notion that those taxes will enable the City to raise the Police Level of Service to meet the adopted standard. However, that Council discussion (that additional tax revenues coupled with developer funds could raise the LOS to meet the standard) could be converted into a condition which could read as follows:

Prior to approval of the Final plat, a combination of developer agreements and public funds, including additional tax adoptions (such as a utility tax on cable television service, an increased real estate excise tax, and a B & O tax), other funding sources (such as potential developer loans to advance the receipt of payment of needed funds), and monies contributed by the proposed development for its impacts on the

- D. Recommended Condition (7) 6. This condition has not been corrected. Like former Recommended Condition 5, the second sentence in this condition is not a condition, it is a summary of an applicant statement. As such, it should not be in a condition.
- E. Recommended Condition (8). This condition was superfluous and has been omitted.
- F. Recommended Conditions (10) 7 and (21). These two conditions related to the Concurrency Management System issues and required the developer to dedicate land for parks (10) and to present a "Development Agreement to guarantee the LOS for Police Services" (21). These conditions were presumably justified by SMC 16.108.060(C). Recommended Condition (10) has been slightly revised to become Recommended Condition 7; Recommended Condition 21 has been replaced by a nine word clause in Recommended Condition 2: "payment of pro-rata share of police officer costs." As previously noted, that clause violates state law and must be deleted.

Recommended Condition 7 still suffers from the fact that the agreement mentioned in that condition is one which must be offered voluntarily by an applicant, not something the City can force on an applicant. If an applicant has presented a proposed agreement (which Hammer as of this date has not), then the City may accept it (assuming that it fulfills the SMC requirement) and memorialize that acceptance through a condition. Until a written offer is made, nothing exists to be memorialized.

More importantly, DCD has offered a new, different justification for dedication of Tracts G, L, N, and O which does not rely on Chapter 16.108 SMC. Therefore, all reference to that chapter should simply be eliminated from the condition.

Conversion of Tract N from Future Development to Native Growth Protection is justified. That tract is simply too small for safe, effective use as commercial/industrial property. In the first place, Tract N doesn't meet the ED zone's minimum lot width, depth, and area requirements for virtually every permissible use. Second, with a front setback of 25 feet and a rear setback of 35 feet for most permitted ED uses, no room would be left for a building. [SMC 16.12.060(E)]

- G. Recommended Condition (16) 19. This condition has been corrected.
- H. Recommended Condition 18. This condition has been corrected.

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**RECOMMENDATION**

Based upon the preceding Findings of Fact and Conclusions, the testimony and evidence submitted at the open record hearing, and the Examiner's site view, the Examiner **RECOMMENDS APPROVAL** of the proposed preliminary subdivision and planned unit development of *Hammer PUD* **SUBJECT TO THE ATTACHED CONDITIONS.**

Revised Recommendation issued August 2, 2007.

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

John E. Galt,  
Hearing Examiner

**RECOMMENDED CONDITIONS OF APPROVAL**  
**FPPUD05-002**  
***Hammer PUD***

This Preliminary Subdivision and Planned Unit Development are subject to compliance with all applicable provisions, requirements, and standards of the Sultan Municipal Code, standards adopted pursuant thereto, and the following special conditions:

**Preliminary Plat and General PUD Design—**

1. The general configuration, lot shapes and sizes, setbacks, site density, and areas of open space shall be as indicated on the resubmitted site plan (Exhibit 18) dated March 1, 2007, subject to these Conditions of Approval. Preliminary subdivision approval is granted to the entirety of the property as depicted on Exhibit 18. Preliminary Planned Unit Development – Single Family approval is granted only to Parcel B/C, comprised of Proposed Lots 1 – 72 and Proposed Tracts A – F as depicted on Exhibit 18. Exhibit 1.1.19 represents approved typical house plans for the Planned Unit Development. Revisions to approved preliminary Planned Unit Developments are regulated by SMC 16.10.160(D) and (E); revisions to approved preliminary subdivisions are regulated by SMC 16.28.360. The Final PUD map shall be recorded as an amendment to the underlying zoning following Final PUD approval. All subsequent conditions apply to the entire subdivision unless expressly stated to the contrary.

This subdivision may be recorded in phases or divisions. Recordation of any portion of Parcel B/C shall require simultaneous dedication of the north-south street and the North Connector rights-of-way through Parcel A to SR 2.

2. In accordance with SMC 16.28.340, the Developer shall prepare a Developer Agreement subject to Approval of the City. The agreement shall specify the requirements for construction of all infrastructure improvements, including plan submittals, inspections, bonding, private improvements, right-of-way improvements and facilities associated with the PUD, including improvements to all common areas. The Developer Agreement shall also include commitments for payment of impact fees; dedication of native growth protection tracts; and monitoring guarantees for wetland, stream, and steep slope enhancements. Site construction drawings shall be designed consistent with the conditions of approval. Site work shall not begin until City approval of the Site Development Agreement.
3. Prior to issuance of a certificate of occupancy and/or occupancy of any residence within the subdivision, a combination of developer agreements and public funds, including additional tax adoptions (such as an increased real estate excise tax and a B & O tax), other funding sources (such as potential developer loans to advance the receipt of payment of needed funds), and monies

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the edge of construction and protect the slopes from sediment runoff, on-site monitoring, required slope setbacks, and inspections during construction. All disturbed slope areas shall be revegetated as soon as feasible to minimize erosion potential.

12. The setback recommendations within the Geotechnical Report Dated 2-6-07 shall be followed for the 10-foot minimum setback from top of slope provided the foundations are extended in depth to satisfy the "Effective Setback recommendations".
13. Any work performed during wet weather shall protect exposed soils with approved coverings.
14. Prior to occupancy, the Developer shall install fencing on the edge of residential lots (5-24 and 29-34) adjacent to wetlands, streams, their buffers, or buffer average areas.
15. Prior to occupancy of the residence on each affected lot, one sign, at the minimum, per lot shall be placed adjacent to critical area buffers denoting habitat conditions.
16. Prior to final plat approval, a new culvert shall be installed or bonded for installation at Wagley's Creek in accordance with approval of a Hydraulic Project Approval by the state Department of Fish and Wildlife.
17. All recommendations within Exhibit 17 which have not been expressly incorporated herein are hereby incorporated by reference as if set forth in full.

**Water –**

18. The Developer/Owner is responsible for any necessary improvements to the City's water system in order to provide adequate water to the site. Construction and materials shall conform to the City of Sultan 2004 Water and Sewer Engineering Standards.

**Sewer –**

19. The Developer/Owner is responsible for any necessary improvements to the City's sewer system in order to provide sewer service to the site. Construction and materials shall conform to the City of Sultan 2004 Water and Sewer Engineering Standards.

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31. All site improvements, including streets, sidewalks, bicycle lanes, frontage improvements, drainage improvements, open space landscaping and improvements, and other common area improvements shall be completed prior to Final Plat, with the exception of the final paving of streets. Alternatively, the City may approve a financial bond or assurance for items not completed prior to Final Plat. All site improvements, not including individual homes, must be installed prior to final inspection of the first home.
32. The existing house and structures shall be moved, demolished, or otherwise modified so that they are in compliance with the Sultan Municipal Code prior to the issuance of plat engineering permits.
33. Traffic, Parks and Recreation, and School Impact Fees and their administrative processing costs shall be paid in accordance with Chapters 16.112 and 16.116 SMC.
34. The Developer shall deactivate the Emergency Airstrip prior to any construction activity on or around the existing runway.
35. Development of the emergency/maintenance road from the PUD to SR 2 through Parcel A shall include the dedications and all construction activities required by the City on Sheet 3, Conceptual Roadway and Utilities dated March 1, 2007 (Exhibit 18.2). Lockable, removable bollards shall be constructed at the northern and southern ends of the emergency/maintenance road and keys shall be provided to the Police and Fire Departments. In addition, the frontage along SR 2 shall be widened to provide for a bus stop in conjunction with the pedestrian trail. The face of the final plat shall contain a notation that no development is allowed within Tracts H, I, J, K, and M until such time as the north-south road has been constructed to full commercial/industrial street standards from SR 2 north sufficient to provide access to Tract H.

**OR**

35. Development of the emergency/maintenance road from the PUD to SR 2 through Parcel A shall include the dedications and all construction activities required by the City on Sheet 3, Conceptual Roadway and Utilities dated March 1, 2007 (Exhibit 18.2). The north-south road and that portion of the North Connector which crosses the subject property shall be constructed to full commercial/industrial street standards from SR 2 north sufficient to provide access to Tract H. The remainder of the north-south road on the steep slope shall be considered as an emergency/maintenance road. Lockable, removable bollards shall be constructed at the northern and southern ends of the emergency/maintenance road and keys shall be provided to the Police and Fire Departments. In addition, the frontage along SR 2 shall be widened to provide for a bus stop in conjunction with the pedestrian trail.

1-24