

SULTAN CITY COUNCIL

AGENDA ITEM COVER SHEET

ITEM NUMBER: A-1
Greens Estates Preliminary Subdivision and Planned Unit Development

DATE: February 28, 2008

SUBJECT: Conduct a Closed Record Hearing and Public Appeal Meeting for the Greens Estate Preliminary Planned Unit Development Subdivision to consider the Hearing Examiner's Recommendation

CONTACT PERSON: Erin Martindale, Perteet Inc.

ISSUE:

The issue before the City Council is to conduct a Closed Record Hearing and Public Appeal Meeting to consider the Hearing Examiner's Recommendation dated September 19, 2007 (Exhibit 1) for the Greens Estate Preliminary Planned Unit Development Subdivision and the Appeal from Sultan 144, LLC (Exhibit 3) in accordance with SMC 2.26.150(C), (D), (E), and (F) (Exhibit 4).

The Hearing Examiner recommended denial of the Planned Unit Development and returning for modification of the Preliminary Subdivision (see Resolution 08-03A in Attachment 5), based on the application not meeting the locational criterion for transit under SMC 16.10.110(B)(2)(d). The Hearing Examiner recommendation includes revised conditions of approval in case the Council does not concur with the reasons for denial of the Planned Unit Development (see Resolution 08-03B in Attachment 5).

The Hearing Examiner also raised four (4) other issues that should be discussed by Council, but were not reasons to deny the application. These issues are outlined below, and are more fully discussed in the Discussion section of this staff report.

The following issues were raised by the Hearing Examiner:

1. The Greens Estates Preliminary Subdivision and PUD cannot meet the requirement under SMC 16.10.110(B)(2)(d) that "transit is available in sufficient proximity to the site to facilitate transit access to the PUD-SF". (SUBJECT OF APPEAL)
2. The Greens Estates Preliminary Subdivision and PUD has a total of twelve (12) lots that use panhandles which flare out. They have street frontage of twenty (20)

feet, as required by SMC 16.150.010(3), and then decrease the width of the panhandle to fifteen (15) feet for the remainder of the panhandle portion of the lots. The Code does not have a provision to allow or prohibit this.

3. The Greens Estates Preliminary Subdivision and PUD reduced the total right-of-way width by including five (5) foot sidewalks easements on both sides of the roadway on private property. A PUD allows approval of reduced right-of-way width where separation of vehicular and pedestrian traffic is proposed and where adequate off-street parking is provided [SMC 16.10.120(B)(4)(b)]. Here, the right-of-way width reduction is not coupled with separation of vehicular and pedestrian traffic or off-street parking areas. While the street section meets the City's Design Standards, the right-of-way is reduced by placing the required sidewalks in easements on each side of the street on private property, which is not one of the provisions in the Code for allowing reduced right-of-way.
4. The Greens Estates Preliminary Subdivision and PUD property includes an undefined Puget Sound Energy (PSE) aerial transmission easement. The Hearing Examiner recommended that the location of this easement be defined and the uses of the easement be approved by PSE prior to Council approval. PSE has submitted a letter and a follow up email to the Applicants outlining the restrictions on use of the easement. That letter is attached to this staff report in Attachment 7.
5. The Greens Estates Preliminary Subdivision and PUD does not meet the requirements for police concurrency under the City's concurrency management system in SMC 16.108. The Hearing Examiner recommends a condition be placed on the project that requires that the Police LOS be met prior to occupancy of the units of this development. The Applicant has agreed to this condition.

ACTIONS FOR COUNCIL TO TAKE:

1. Conduct the Closed Record Hearing on the Greens Estate PUD and the Public Appeal Meeting on the Appeal of the Hearing Examiner's Recommendation by Sultan 144, LLC, Inc. that Greens Estates project cannot meet the transit criteria in SMC 16.10.110(B)(2).
2. Discuss the issues outlined in the Issues section and detailed in the Discussion section of this staff report.
3. At the conclusion of the Closed Record Hearing and Public Appeal Meeting, consider under Action Item 1-A one of the following options:
 - a. Resolution Number 08-03A, which accepts the Recommendation of the Hearing Examiner denying the PUD Application and returning the Preliminary Subdivision Application to the Applicant for modification; or

- b. Resolution 08-03B, which rejects the Recommendation of the Hearing Examiner, accepts the Hearing Examiner's finding of fact, some conclusions of law, makes other differing conclusions of law, and grants approval of the Application subject to the Hearing Examiners revised conditions of approval; or
- c. Request a new Resolution that incorporates the policy discussions within this staff report, and either Approve, Deny or Remand the application based on conclusions of the policy discussions. This Resolution will include increased clarity on the policy discussions to guide future development applications, and may revise some conditions of approval recommended by the Hearing Examiner. The new resolution could be available for Council action at the Council's March 13, 2008 meeting.

APPLICANT APPEAL:

The Hearing Examiner recommends denial of the PUD due to the project's failure to meet the location criteria in SMC 16.10.110(B)(2)(d) that "transit is available in sufficient proximity to the site to facilitate transit access to the PUD-SF".

The Applicant filed an appeal with the City on October 12, 2007 appealing the Hearing Examiner's Recommendation to deny the PUD based on the locational criteria in SMC 16.10.110(B)(2)(d) that "transit is available in sufficient proximity to the site to facilitate transit access to the PUD-SF".

In their appeal filing, the Applicant requests that the City Council find that the requirements of SMC 16.10.110(B)(2)(d) are met based on the Council's previous approvals and interpretations by staff for other developments adjacent to Greens.

SUMMARY OF COUNCIL ACTIONS:

The actions the City Council may take at the Public Appeal Meeting and Closed Record Hearing are:

1. Affirm the Recommendation of the Hearing Examiner to deny the Planned Unit Development and return Preliminary Subdivision to the Applicant for modification (Resolution 08-03A)
2. Reject the Hearing Examiner's Recommendation, make new findings and conclusions, and Approve the Application with Conditions of Approval (Resolution 08-03B)
3. Remand the development back to the Hearing Examiner for further proceedings in accordance with the City's Council's findings and conclusions (New Resolution drafted for future Council consideration)

Potential actions taken by the City Council on the development have been formalized in Resolution, Numbers 08-03 A and 08-03 B.

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'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.

BACKGROUND:

The Hearing Examiner conducted an Open Record Hearing on September 11, 2007 for the Greens Estate Preliminary Subdivision and Planned Unit Development located south of 132nd Street S.E. and east of Sultan Basin Road. The Hearing Examiner's Report and Recommendation, dated September 19, 2007, DENIED the Planned Unit Development; RETURN Preliminary Subdivision for Modification. The Hearing Examiner's Recommendation, on page 29 of 36, included revised conditions of approval in case the Council disagrees with the reason for denial of the Planned Unit Development (Exhibit 1 starting on page 31).

The Applicant filed an appeal with the City on October 12, 2007 appealing the Hearing Examiner's Recommendation to deny the PUD based on the locational criteria in SMC 16.10.110(B)(2)(d) that "transit is available in sufficient proximity to the site to facilitate transit access to the PUD-SF". The appeal is heard by the Sultan City Council, as part of tonight's proceedings.

SMC 2.26.150 requires scheduling an Open Public Meeting for the City Council to consider the Appeal no sooner than 21-days nor longer than 35-calendar days from the date the Appeal was filed. The City Council scheduled this Appeal for an Open Public Meeting on November 8, 2007.

On November 8, 2007 the City Council conducted the Public Meeting on the Appeal and thereafter by Motion, set December 13, 2007 at 6:00 p.m. to conduct the Closed Record Hearing and Public Meeting on the Appeal for the Greens Estate Planned Unit Development.

At the December 13, 2007 meeting, the Closed Record Hearing for the Preliminary Subdivision and PUD, and the Public Meeting for the Appeal was postponed until January 10, 2008. Prior to the January 10, 2008 meeting date, the Applicant requested a postponement to the January 24, 2008 Council meeting. Prior to the January 24, 2008 Council meeting, the Applicant requested a postponement, and the hearing was cancelled. A public hearing was scheduled and noticed for February 28, 2008.

Consolidated Appeal Meeting & Closed Record Hearing

SMC 2.26.150, Council Consideration, pre-dates regulatory reform adopted by State Law in 1995 which allows one Open Record Hearing in front of the Hearing Examiner and one Closed Record Hearing in front of the City Council. Due to regulatory reform, the only legally defensible action was to consolidate the Appeal with the Hearing Examiner's Recommendation.

State Law prohibits more than two hearings, one of which must be an Open Record Hearing. The second permitted meeting may be a Closed Record Hearing.

The Closed Record Hearing Schedule for Thursday, February 28, 2008 provides the City Council with the one Closed Record Hearing as permitted by State Law.

DISCUSSION:

The Recommendation of the Hearing Examiner includes two alternatives:

1. DENY the requested preliminary Planned Unit Development; and RETURN the proposed Preliminary Subdivision for modification (Resolution 08-03A)
2. If the Council concludes that the proposal meets all requirements for approval, then the Hearing Examiner would recommend that approval be SUBJECT TO THE ATTACHED CONDITIONS and NOT be granted unless and until the Applicant has submitted to the Council a written statement from Puget Sound Energy accepting the proposed layout as properly recognizing and preserving its aerial high voltage transmission easement across the property (Resolution 08-03B)

Recommendation of Denial:

The Hearing Examiner Recommends that the application for a Planned Unit Development be denied because it does not meet the locational criterion in SMC 16.10.110(B)(2)(d) which states that "transit is available in sufficient proximity to the site to facilitate transit access to the PUD-SF".

The Hearing Examiners interpretation of the language of the locational criteria in SMC 16.10.110(B) is that transit must be no more than three-fifths (3/5) of a mile from a transit stop, *and* have pedestrian access between the development and that stop, in order to meet the criteria, which requires that transit be available to the site in sufficient proximity to facilitate transit access, not that the site be designed to facilitate transit access. This minimum access requirement was outlined by the Hearing Examiner in the Vodnick Lane PUD project. While the Greens Estate project mostly has pedestrian access between the property and a bus stop, it is approximately one mile from the nearest stop, which exceeds the threshold that the Hearing Examiner has laid out.

The Hearing Examiner recognizes that Council has previously overruled his interpretation of that provision in the Code, most pertinently with Skoglund Estates, which is directly adjacent to this property and has the same distance to transit. His recommendation also states that previously, these overrulings have not had sufficient explanation to change his interpretation of the locational criterion in the code.

Staff Response:

The Hearing Examiner's Recommendation is inconsistent with City Council's previous action in approving the Skoglund Estates Preliminary Planned Unit Development on June 29, 2006. The Council, in Resolution No. 06-09A found that the proximity requirement was met by stating that "Community Transit Routes 270, 271, and 275 service the Sultan Park and Ride on US 2 East of 10th Street, approximately 1.0 mile from the site. Service is provided through the City and to and from Everett via Snohomish and Monroe".

The reason that the Hearing Examiner has not followed Council's direction on this issue is, as he says, that he has not received sufficient explanation from Council on how Council interprets the PUD locational criteria.

An administrative interpretation was generated in May 2006 that stated that the purpose of the transit locational criteria is that the PUD must provide for transit service to the site. It also references another section of the PUD Code, SMC 16.10.120(B)(4)(c)(i), which provides standards for streets in PUDs, and requires that transit and school bus stops be provided by PUD's.

This application will provide a bus pullout and turnaround on Sultan Basin Road. It conforms to the Street provisions under SMC 16.10.120. The administrative interpretation ties the street provisions to the locational criteria in SMC 16.10.110 and states that as long as transit and school bus facilities are provided, PUD applications are considered compliant with the locational criteria.

This interpretation generally matches the Council's direction on the transit criteria. As a step towards bringing the Hearing Examiner and the Council on the same page regarding this requirement, Council could adopt language in a resolution that explains fully how this Code requirement is interpreted. This language could include the following explanation:

- SMC 16.10.110(B)(2)(d) requires that transit be available in sufficient proximity to the site to facilitate transit access to the PUD-SF.
- SMC 16.10.120(B)(4)(c)(i) requires that PUD-SF's provide transit and school bus routes and school bus stops be provided either within the development or on the perimeter streets.
- Council policy states that as long as the provisions for transit stops in SMC 16.10.120(B)(4)(c)(i) has been met, then the locational criteria for siting PUD's under SMC 16.10.110(B)(2)(d) has is also found to have been met.

- Greens Estates proposes a bus pullout and bus turnaround off of Sultan Basin Road, meeting the requirements of SMC 16.10.120(B)(4)(c)(i).
- Consistent with past interpretations, Council finds that the Greens Estates meets the locational criteria under SMC 16.10.110(B)(2)(d) regarding access to transit.

Council should be aware that the Hearing Examiner might not accept this explanation from Council and then continue to interpret the transit locational criteria differently from Council policy. If that is the case, Council may need to consider a code amendment to this criteria in the PUD Code so that the Hearing Examiner can find future PUD applications in compliance with the Code and interpret the Code the same way that Council does.

Other Issues Raised in Recommendation by the Hearing Examiner:

The Hearing Examiner recognizes that the Council may overrule his recommendation of denial, and consequently outlined other issues that the Council should be aware of in making their decision. He included a lengthy discussion of several issues that were outlined above, including the following:

Panhandle widths

The Greens Estates Preliminary Subdivision and PUD has a total of twelve (12) lots that use panhandles which flare out. They each have a street frontage of twenty (20) feet, as required by SMC 16.150.010(3), and then decrease the width of the panhandle to fifteen (15) feet for the remainder of the panhandle portion of the lots, which is approximately seventy-five (75) feet. Lots 5, 11, 20, 21, 29, 30, 38, 41, 42, 45, 46 and 61 all use this approach.

The benefit to this approach is that it increases the lot area for those lots that are adjacent to the panhandle lots. In this case, a total of eight (8) lots have increased lot sizes by between five (5) and ten (10) feet in width, which increases the total lot size from 3,800 – 4,275 square feet to 4,750 square feet. The concept is another way to increase yield: A typical 20-foot wide panhandle is reduced to 15-feet for most of its length. Given that most of the panhandles are about 75-feet long, the design “saves” about 350-feet for every panhandle. The twelve (12) panhandles in the plat “save” the equivalent of about two lots.

However, there are concerns with this approach. The Hearing Examiner's Recommendation states that:

Most people, rightly or wrongly, expect their property lines to be straight-line segments. Since the driveways in these panhandles will likely not be flared to match the property lines, abutting owners may well believe that their property lines run straight to the street. Property line disputes could result and/or the panhandles could end up to be effectively only 15 feet wide all the way to the street. **The Examiner asks the Council to carefully consider this issue and include within its action a ruling on acceptability of the concept and guidance for its future application: If it is approved here, it will**

likely reappear in many future applications because of its ability to increase lot yield with no other apparent public benefit or private cost. (Emphasis added)

Staff Response:

The use of panhandles is generally used where access to properties is restricted do to the configuration and depth of the property which would not support a public or private street, cul-de-sac, eyebrow, or bubble. Similar situations occur in the City where private streets as well as driveways abut each other with landscaping and or fencing separating the properties. The flag lot concept has been used in the downtown area to create additional lots/housing in the rear of long narrow pieces of property where public and private streets are not an option. The flag lots, as indicated by the Hearing Examiner create, in this situation, additional lots and density within the project. However, the concept can create disputes between the property owners unless adequately addressed in the Protective Covenants and administered by the Homeowner's Association.

The Sultan Municipal Code does require, in the definition of access, that all lots have a twenty (20) foot frontage to a public or private road at the street frontage. It does not allow or prohibit panhandle width from being reduced once it moves away from the street frontage. This is a council policy issue that requires a choice to be made. The policy choice for this and future applications may include one of the following. These options are meant to be a starting point to begin discussions on these issues between Council members. They include:

1. Require the twenty (20) foot width for the entire panhandle.
2. Allow the fifteen (15) foot width for a majority of the panhandle, with the required twenty (20) feet of street frontage achieved with a "flare" at the property line.
3. Discuss making greater use of private roads.

1 – Require the twenty (20) foot panhandle width for the entire panhandle.

This would reduce the available buildable area for adjacent lots, which includes Lots 4, 12, 39, 40, 43, 44, 47 and 62. These lots would lose between 475 and 950 square feet per lot, or there would be a reduction in the number of lots.

The Applicant's appeal filing and supporting documentation states that the Council has stated their preference for the larger lot sizes. Reducing the width of the panhandles is one way to increase the lot sizes while still allowing the density on this property.

2 – Allow the fifteen (15) foot width for a majority of the panhandle, with the required twenty (20) feet of street frontage, achieved with a "flare" at the property line.

Approving this design for Greens Estates would lead to future applications attempting to use this same approach to increase lot yield. The Applicant's appeal filing states that the Skoglund PUD has some panhandle lots with the flared street frontages. However,

the number of lots that this applies to is only five (5) for the Skoglund project, compared to twelve (12) for Greens Estates. This project will set the tone for future PUD applications that are submitted to the City.

The concern with allowing the smaller fifteen (15) foot width is that the Code does not have a specific provision to allow that flexibility. Without that provision, the authority may not be there for staff to administratively approve it. Again, this is a Council policy decision that is being decided for this project, but also has larger implications for future PUD's in Sultan.

While the Fire District did not provide comment on this project, the Applicant has been in contact with the Fire District to determine whether these panhandles meet the Fire Code Standards. Their initial discussions implied that the fifteen (15) foot width access would meet the Fire Code. If it does meet the Fire Code, it does not address the issue of whether the City would like to see this design in the City.

As the Hearing Examiner stated, another issue with the flared panhandles is disputes between property owners. This is a likely event. While these disputes can be somewhat reduced by clear Homeowners Association rules, the City cannot enforce those agreements. These disputes would undoubtedly involve the City. Prohibiting the use of flared panhandles would avoid these disputes.

3 – Discuss making greater use of private roads.

The Sultan Design Standards and Specifications allow the use of private roads for up to four (4) dwelling units. However, they have not been preferred due to the reduced public benefit and issues with maintenance responsibility.

Private roads are regulated by the City's Design Standards and Specifications. They include a thirty (30) foot easement or tract including two (2) 12-foot travel lanes and one (1) 5-foot sidewalk. No parking is allowed on private roads and no planter strip is provided. A turnaround is required for some private roads; this is regulated by the Fire Code. Typically, a private road over 150 feet in length would require a turnaround.

Using private roads would eliminate most of the panhandle lots on this project. For example, the access to lots 40 through 43 could be consolidated into one private road; it would be approximately 100 feet long. This would allow one driveway to access onto Road A, decreasing vehicle conflicts and providing more on-street parking. For one section of roadway on Road A, between Lots 38 and Lot 47, there is no on-street parking provided due to the number of driveways.

A condition of approval should be added to the project that expresses how the Council would like to see the project address the Hearing Examiner's concern of the panhandle widths.

Reduced Right-of-Way Widths

The Greens Estates Preliminary Subdivision and PUD reduced the total right-of-way width by placing both five (5) foot sidewalks in easements.

A PUD allows approval of reduced right-of-way width where separation of vehicular and pedestrian traffic is proposed and where adequate off-street parking is provided [SMC 16.10.120(B)(4)(b)]. This means that in order to approve reduced right-of-way, the Applicant will have to show that moving vehicles and pedestrian traffic are separated by planter strips and parked cars, *and* that enough off-street parking is provided so that the loss of on-street parking is compensated for.

Here, the right-of-way width reduction is not offset by separating vehicles and pedestrian beyond the minimum required, or by providing additional off-street parking areas.

While the street section meets the City's Design Standards, the right-of-way is reduced by placing the required sidewalks in easement on each side of the street, which is not one of the provisions in the Code for allowing reduced right-of-way. Setbacks for houses are measured from the property line, and would mean much smaller distances between the homes and the sidewalk (i.e. small yards).

Staff Response:

There are two (2) issues with this modification to the requirements of the Code and Design Standards.

1 – Off-Street Parking: The first is in regards to the lack of off-street parking provided. The off-street parking provided by the project meets the parking requirements in SMC 16.60.140, which requires two (2) parking spaces per single-family dwelling unit. However, the provision in the PUD Code may require additional parking that would compensate for the loss of on-street parking be provided. It is likely that this project provides more than the minimum requirements. No analysis has been completed to determine if the requirement for adequate off-street parking has been provided.

2 – Driveway Length: The second issue is driveway length. This project requires twenty (20) foot setbacks for the houses measured from the front property line. Because the sidewalks are being constructed within easements on private property, there is the potential for driveways to be less than twenty (20) feet in length, which could result in vehicles overhanging the sidewalks and block pedestrian access.

The Hearing Examiner recommends eighteen (18) foot setbacks for the garages from the back of the sidewalk, which the Applicant supported at the public hearing for the PUD. However, if the sidewalk is built within the full limits of the easement, this would not lead to a driveway length of eighteen (18) feet. Staff recommends that the driveway length and garage setbacks be required to be either eighteen (18) feet measured from the back of the sidewalk easement, or a total of twenty (20) feet measured from the back of the sidewalk.

The Applicant has expressed that they would agree to a twenty (20) foot setback for garages measured from the front property line. The setback for the front of the houses would remain at twenty (20) feet measured from the front property line.

A condition of approval should be added to the project that expresses how the Council would like to see the project address the Hearing Examiner's concern with reduced right-of-way widths.

Puget Sound Energy Easement

The Greens Estates Preliminary Subdivision and PUD property includes an undefined Puget Sound Energy (PSE) aerial transmission easement. The Hearing Examiner recommended that the location of this easement be defined prior to Council approval. PSE has submitted a letter and follow up email to the Applicants outlining the restrictions on use of the easement.

The letter from PSE dated December 12, 2007, states that Puget Sound Energy intends to use this easement for a future transmission line corridor. Within this easement, the roads, and street trees no taller than fifteen (15) feet in height will be allowed. Street lights and fire hydrants, as well as all structures, are prohibited. An email dated February 13, 2008 from PSE allows the recreation structures proposed by the Applicant to be installed within the easement, as long as they do not represent a present or future hazard to the operation of any facilities that would be placed in the easement.

Staff Response:

The PSE letter and Use Agreement requires that no structures of any kind, nor other infrastructure be placed within the easement. It also requests access to the easement and a note be placed on the face of the plat. The follow up email adequately addresses any concern with locating the recreational equipment within the easement.

The issues regarding the location of street lights and fire hydrants, and the height of street trees, need not prohibit approval of the PUD. The locations and types of these improvements can be determined through the permitting phase of the project.

Staff also recommends that the note referenced in the PSE letter be placed on the face of the final plat stating the PSE intends to use this easement. **Two conditions of approval should be added to the project approval:**

- 1. A condition stating that the design of the PUD and Plat will conform to the requirements of the PSE Use Agreement, and the Applicant will show compliance with the December 12, 2007 letter from PSE and the Use Agreement prior to permit issuance.**
- 2. A condition stating that the note within the December 12, 2007 letter requested by PSE be added to the face of the Final Plat.**

Police LOS Concurrency

The Greens Estates Preliminary Plat and PUD does not meet the requirements for police concurrency under SMC 16.108. The Hearing Examiner recommends a condition (Condition #3) be placed on the project that requires that the Police LOS be met prior to occupancy of the units of this development.

Staff Response:

The Developer/Applicant agreed during the Open Record Hearing that the Police Services LOS in existence at the time of final building permit inspection would be met before approval of occupancy could be granted. The Applicant accepted this condition, and is not appealing it, because they anticipate that the Police LOS requirements will be revised in the time it would take to develop the plat, obtain final approval, and start building residences.

No further action is requested of or by the Applicant. The Council should be aware that accepting this condition of approval on three applications (Hammer, Twin Rivers and Greens Estates), will further set the policy that this condition will be applied to all future applications that are subject to this Code provision.

RECOMMENDED ACTION:

1. Conduct the Closed Record Hearing and Public Appeal Meeting on the Greens Estates Planned Unit Development..
2. Discuss the issues regarding the panhandle widths, the off-street parking provided, front yard setbacks from the sidewalks, the Puget Sound Energy easement, and police concurrency.
3. Direct staff on how to proceed with these policy issues. Staff will come back to Council with a Resolution at the March 13, 2008 Council meeting.

ATTACHMENTS:

1. Hearing Examiner's Recommendation, dated September 19, 2007
2. City Staff Report, dated August 27, 2007
3. Appeal Notice from Sultan 144 LLC, dated October 12, 2007
4. SMC Code Section 2.26.150 (C, D, E, and F)
5. Resolution 08-03A and 08-03B
6. Greens Estates Preliminary Plat PUD Maps with revision date December 19, 2007
7. Puget Sound Energy Letter to Mark Villwock, PE, dated December 12, 2007 and email dated February 13, 2008 from Faye Ryan at Puget Sound Energy
8. Interpretation of SMC 16.10.110(B)(2)(d) dated May 18, 2006
9. Sultan 144 LLC's Comments for Closed Record Appeal received February 21, 2008

BEFORE the HEARING EXAMINER of the
CITY of SULTAN

RECOMMENDATION

FILE NUMBER: FPPUD05-001

APPLICANT: Sultan 144, LLC ¹

TYPE OF CASE: Preliminary Planned Unit Development subdivision (*Greens Estates*)

STAFF RECOMMENDATION: Approve subject to conditions

SUMMARY OF RECOMMENDATION: DENY Planned Unit Development; RETURN preliminary subdivision for modification (Recommendation includes revised conditions of approval in case the Council disagrees with the reason for denial of the Planned Unit Development)

DATE OF RECOMMENDATION: September 19, 2007

INTRODUCTION

Sultan 144, LLC (Sultan 144), 15 Bellevue Drive, Suite 102, Bellevue, Washington 98005, seeks preliminary approval of *Greens Estates*, a 63 lot single-family residential Planned Unit Development (PUD) subdivision of a 18.06 acre site zoned Low-Moderate Density Residential (LMD).

L43-1 Greens, LLC (The Greens), C/o Barclays North, Inc., 10515 20th Street SE, Suite 100, Everett, Washington 98205, initially filed the application on August 4, 2005, and supplemented that filing with additional materials on September 2, 2005. (Exhibits 3 {Finding 2} and 4B ²) The application at that time sought approval of a 107 lot single family residential PUD development of 23.88 acres. (Exhibit 3, Finding 1) The Greens challenged the Sultan Department of Community Development's (DCD's) determination that its September 2, 2005, application submittals were incomplete. The Greens' appeal was assigned file number

¹ See Introduction section, below, for an explanation of the change in applicant which occurred prior to hearing.
² Exhibit citations are provided for the reader's benefit and indicate: 1) The source of a quote or specific fact; and/or 2) The major document(s) upon which a stated fact is based. While the Examiner considers all relevant documents in the record, typically only major documents are cited. The Examiner's Recommendation is based upon all documents in the record.

Exhibit 1

HEARING EXAMINER RECOMMENDATION

RE: FPPUD05-001 (*Greens Estates*)

September 19, 2007

Page 2 of 36

AP05-001. Following an October 19, 2005, appeal hearing, the Sultan Hearing Examiner (Examiner) ruled on October 21, 2005, that the application was complete as of September 2, 2005.³ (Exhibit 3)

Sometime between October 19, 2005, and December 6, 2006, The Greens transferred all its interest in both the application and the subject property to Sultan 144. Sultan 144 filed a revised application (acreage reduced approximately 5.82 acres and number of lots reduced by 44) on December 6, 2006. (Exhibit 4B. Exhibit 11, Sheet EX-01, depicts the old and the current development configuration.) DCD determined that the revisions did not change the application's "completeness date." (Testimony)

The subject property is located in the southeast quadrant of the Sultan Basin Road (SBR)/132nd Street SE intersection.

The Examiner viewed the subject property on September 11, 2007.

The Examiner held an open record hearing on September 11, 2007. DCD gave notice of the hearing as required by the Sultan Municipal Code (SMC). (Exhibit 12)

The following exhibits were entered into the hearing record during the hearing:

- Exhibit 1: Departmental Staff Report⁴
- Exhibit 2: Location Map
- Exhibit 3: Examiner Decision, AP05-001, October 21, 2005
- Exhibit 4: Application binders (2) containing Exhibits 4A – 4Y.⁵
- Exhibit 5: Revised water availability letter, December 13, 2006
- Exhibit 6: Revised sewer availability letter, December 13, 2006
- Exhibit 7: Determination of Nonsignificance
- Exhibit 8: Developer Agreement to Establish Concurrency, Police Services
- Exhibit 9: Wetland peer review letter by Graham-Bunting, March 19, 2007

³ *Greens Estates* was not subject to Ordinance No. 884-05, enacted on August 10, 2005, by the Sultan City Council (Council), which imposed "a moratorium ... from and after the first day after the effective date of this Ordinance" on PUD applications "[e]xcept for those with issued sewer/water commitment letters and except for those with issued sewer/water commitment letters and have a right to sewer/water connections by preliminary injunction ...". [sic] On or about August 3, 2005, the Superior Court granted a Preliminary Injunction against the City requiring that it "hold in reserve a total of 114 ... sewer and water connections for the Greens property development application." (Exhibit 4O, Order ¶ 3) This application was thus exempted from the moratorium by virtue of the Court Injunction.

⁴ The exhibit list on page 29 of the Staff Report is incorrect and should not be used.

⁵ Items 4X and 4Z, although listed in the Table of Contents within the binders, were not submitted and are not part of the hearing record. In fact, Item 4X, Design Variance request, was never officially submitted and is not before the City at this time. (Testimony)

Page numbers top left

HEARING EXAMINER RECOMMENDATION

RE: FPPUD05-001 (*Greens Estates*)

September 19, 2007

Page 3 of 36

- Exhibit 10: Council Resolution No. 07-17, accepting property donation from Sultan 144, August 23, 2007
- Exhibit 11: Applicant's hearing presentation boards (4, reduced scale)
- Exhibit 12: Public hearing notice documentation
- Exhibit 13: Alternative language for recommended Condition 17
- Exhibit 14: Stan Heydrick hearing submittal
- Exhibit 15: Gerry Gibson hearing submittal

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? Do the "flared" panhandle lot lines serve the public use and interest? Does the proposed sidewalk easement and reduced right-of-way require special front setback consideration? Does the proposal conflict with an old, underlying Puget Sound Energy (PSE) easement? Does the proposal provide sufficient access and parking to dedicated public open space?

FINDINGS OF FACT

1. *Greens Estates* is a PUD for a detached single-family development of 63 homes. The site is comprised of four parcels, totaling 18.06 acres. The site contained four wetlands and one stream. One wetland has been separated from the subject property through the Boundary Line Adjustment process and was dedicated to and accepted by the City as an open space tract on August 23, 2007. Two existing single-family residences, with associated garages, exist on-site at this time. All existing structures that do not meet the City's development standards will be removed, which includes the existing home on Proposed Lots 1 and 2, and (possibly) the detached garage on Proposed Lot 54. Sultan 144 has stated that the single-family residence on Lot 55 will remain. (Exhibits 1, 4, 10, and 11)
2. The site addresses are 32326, 32400, and 32522 132nd Street SE. The irregularly shaped assemblage of properties is located in the southeast quadrant of the SBR/132nd Street SE intersection, approximately one mile north of U.S. Highway 2 (SR 2). (Exhibits 1 and 11) 132nd Street SE forms the northern boundary of the City in this area. (Official notice)

HEARING EXAMINER RECOMMENDATION

RE: FPPUD05-001 (*Greens Estates*)

September 19, 2007

Page 4 of 36

The site's frontage on 132nd Street SE is interrupted by two exceptions: A relatively small parcel near the intersection and a larger parcel to its east. (The larger parcel was originally included in the application.) Both exceptions contain single family residences. (Exhibits 4Y and 11)

The site is bordered on its east by an undeveloped, wooded parcel and by the *Skoglund Estates*, an approved 48 dwelling unit single-family PUD, site. (Exhibit 11) *Skoglund Estates* is presently under development. Water, sewer, and storm water systems have been installed; street construction will soon commence. (Testimony)

The site is bordered on its south by an acreage parcel bordering SBR and the aforementioned open space tract recently dedicated to the City. (Exhibit 11)

The site is bordered on its west across SBR by a small, small-lot subdivision and acreage property. (Exhibit 11)

Other recent single-family residential developments which lie in close proximity to *Greens Estates* include *Denali Ridge*, *Sky Harbor Estates*, *Hammer PUD*, *Timber Ridge*, *Vodnick Lane*, and *Cascade Breeze*. (Exhibit 11. All but *Cascade Breeze* are delineated on the second sheet of Exhibit 11. *Cascade Breeze* is located just west of the area labeled "Bethany Terrace". (Official notice))

3. The site generally measures 980 feet by 1,300 feet in its widest area. The site is generally flat, sloping from the northwest to southeast, with the steepest slope being approximately 6%. The site contained four wetlands and a stream before dedication of one wetland to the City. The northern portion of the site is primarily pasture; the southern portion is wooded. The site's soils have a high moisture content; special construction requirements are, therefore, necessary. (Exhibits 4J, 4K, 4M, 4Y, and 11)

The City's wetland consultant has confirmed the wetland and stream delineations. (Exhibit 9)

4. All but nine of the proposed lots take access from an internal public street system which intersects 132nd Street SE. Three proposed lots will access a short, private road (Tract 980) which will, in turn, access onto the internal public street system. The remaining six lots are located in the northwest corner of the site and will access onto a public cul-de-sac which will access SBR. That cul-de-sac has been designed to provide access to the western portion of the smaller exception parcel along 132nd Street SE. The internal street system has been designed to interconnect with the *Skoglund Estates* street system and to provide stubs for future development of the larger northern exception and the acreage to the south. (Exhibits 4Y and 11)

The proposed lots range in size from 4,648 square feet (SF) to 8,728 SF and average 5,663 SF. Twelve panhandle lots are proposed (Proposed Lots 5, 11, 20, 21, 29, 30, 38, 41, 42, 45, 46, and 61),

HEARING EXAMINER RECOMMENDATION

RE: FPPUD05-001 (*Greens Estates*)

September 19, 2007

Page 5 of 36

in most of which the panhandle is 15 feet wide but flares to 20 feet at the right-of-way line (to meet the minimum lot frontage requirement).

The wetlands, other than the one dedicated to the City, and their proposed buffers, including the buffer around the northern edge of the wetland parcel dedicated to the City, are to be set aside as private, commonly owned open space. Those areas will total 3.9 acres. In addition, Sultan 144 calculates that 2.72 acres of active open space will be provided within the development.⁶ (Exhibits 4Y and 11)

Exhibit 4Y does not depict any public access to the recently dedicated wetland tract. The commonly owned buffer around that tract has about 60 feet of frontage on the west side of the Road D right-of-way. (Exhibit 4Y, Sheet 2 of 14) Sultan 144 verbally offered to provide a 20 foot wide easement across that portion of the buffer to create a public access to the publicly owned tract. (Testimony) No public parking has been proposed specifically associated with the dedicated wetland.

5. PUD provisions allow deviation from normal development standards. [SMC 16.10.120(B)] *Greens Estates* includes relaxation of minimum lot area, setbacks, public street right-of-way width, and on-street parking requirements.

The proposed internal public streets will have a 50 foot right-of-way with a five foot sidewalk easement on each side (except that the two short cul-de-sacs, Roads D and F, will not have sidewalk easements). A standard street section is proposed: two 12-foot travel lanes, two 8-foot parking lanes (only one 8-foot parking lane on the two cul-de-sacs), two 3-foot planter strips, and two 5-foot sidewalks. The sidewalks will extend to within 1.5 feet of the back edge of the easements. (Exhibit 4Y, Sheet 7 of 14) The City Engineer and DCD Director have reviewed and approved this street section and right-of-way width. (Testimony)

The front setback request, as set forth in hearing documents, is for a 20 foot setback, relaxed to 15 feet for porches. (Exhibit 1, p. 5) Setbacks are measured from property lines, not easement lines. [SMC 16.150.190(14)] Therefore, the net minimum front setback from the back edge of the sidewalk would be 16.5 feet, relaxed to 11.5 feet for porches. Sultan 144 offered during the hearing to maintain at least an 18 foot setback between the back edge of any sidewalk and any garage.⁷ (Testimony)

⁶ Sultan 144 calculates usable open space to be 15.01% of site area; DCD calculates it to be 14.8%. (Exhibit 1, p. 7, and testimony) The SMC requires that 15% of the site be usable open space. [SMC 16.10.140] The difference is *de minimis* at the preliminary approval stage of development: A preliminary plat is only an "approximate drawing" of the proposed subdivision. [SMC 16.150.160(16)] The difference can and must be resolved during review of the final plat.

⁷ Sultan 144's offer arose after the Examiner pointed out that large cars or trucks parked in driveways could well partially block the sidewalk with the setbacks as proposed.

HEARING EXAMINER RECOMMENDATION

RE: FPPUD05-001 (*Greens Estates*)

September 19, 2007

Page 6 of 36

The reduced on-street parking will occur on the two short cul-de-sacs, each of which will serve six lots. (Exhibit 4Y)

6. The subject property is encumbered by an undefined, unlocated PSE aerial transmission easement. (Exhibit 3, Finding 4) Sultan 144, whose principals are also the developers of *Skoglund Estates*, is working with PSE to resolve the easement situation as it also affects that development. PSE has approved the layout of *Skoglund Estates*. The current *Greens Estates* design presumes a straight line extension of the easement through the site and has designed the layout such that the easement would encumber only open space and streets. (Exhibit 4Y) Sultan 144 is confident that it can obtain written approval of the proposed layout within 30 days of the Examiner's hearing date. (Testimony)
7. The proposed treatment of the on-site wetlands depends upon the Innovative Development Design provisions of former SMC 16.80.100.⁸ Wetland and stream protections may be waived under the former Innovative Development Design procedure. In its decision approving the *Timber Ridge Estates* PUD subdivision (FP-PUD 04-002), the Council held that

There is no need to consider the criteria of buffer width averaging or reduction, since the proposal seeks approval of an innovative design, which addresses wetland and 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, ¶ 24⁹)

⁸ *Greens Estates* is not subject to the current Critical Areas Regulations due to vested rights considerations.

⁹ 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.

HEARING EXAMINER RECOMMENDATION

RE: FPPUD05-001 (*Greens Estates*)

September 19, 2007

Page 7 of 36

Sultan 144 proposes to mitigate reduced wetland buffer widths by extensive buffer enhancement plantings. (Exhibit 4J) The City's wetland consultant has evaluated the proposal and concludes that it meets the criteria for approval as an Innovative Development Design.¹⁰ (Exhibit 9)

8. Sultan 144 has submitted substantial documentation to support approval of its application. (Exhibits 4A – 4W and 4Y)
9. DCD's Staff Report and Recommendation contains a very thorough, detailed, item-by-item evaluation of application compliance with all applicable review criteria. (Exhibit 1, pp. 1 – 15) The record contains no challenge to that analysis with but one exception. Therefore, in the interest of economy, the Examiner incorporates the analysis within the Staff Report by reference as if set forth in full with the following exceptions:
 - A. Application compliance with the concurrency requirements of Chapter 16.108 SMC regarding police services has been challenged by two hearing participants. Therefore, the concurrency discussion of that topic on pages 12 and 13 as well as the one paragraph Certificate of Concurrency which follows that discussion are not incorporated by reference.
 - B. The file number in the header on page 1 contains a scrivener's error: The second character in the number is "P", not "F".
 - C. Page 2, § I.h, and p. 7, § III.b, ¶ 1: The wetland area has already been dedicated to the City.
 - D. Page 3, § I.j: *Skoglund Estates* lies east, not west, of *Greens Estates*.
 - E. Page 7, § III.b, ¶ 1, l. 3: The word "street" should be "stream."
 - F. Page 10, § V.e: The SBR/SR 2 intersection relocation project has been completed. (Testimony)
 - G. Page 12, *Potable Water* and *Wastewater* sections: The initial utility commitments date from the Preliminary Injunction dated August 3, 2005. The December 13, 2006, letters (Exhibits 5 and 6) reduced the number of connection commitments based upon the reduced scope of Sultan 144's December 6, 2006, supplemental submittal.

¹⁰

One of the requirements is that the Innovative Development Design be approved by state agencies with jurisdiction. The proposal here seeks relief only from wetland buffer requirements. As the Examiner noted in the recent *Hammer PUD* Recommendation, adopted by the Council through Resolution No. 07-19, no state agency has jurisdiction over wetland impacts, making that requirement moot. (*Hammer PUD* Recommendation, FPPUD05-002, August 2, 2007, Finding 12 and Conclusion 5)

HEARING EXAMINER RECOMMENDATION

RE: FPPUD05-001 (*Greens Estates*)

September 19, 2007

Page 8 of 36

H. Page 13, § VII: Sultan 144 submitted a "Supplemental" SEPA checklist on December 6, 2006. (Testimony)

10. Section 16.10.110 SMC contains criteria for location of residential PUDs: "A preliminary residential PUD shall only be approved if, with reasonable modification and/or conditions, the city finds that the proposed preliminary PUD complies with the following criteria for location, use, and design, for each of the identified types of PUDs." [SMC 16.10.110, emphasis added]

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

- A. SBR is a designated Secondary Arterial street; 132nd Street SE is a designated Neighborhood Collector. (Exhibit 1, p. 9) The proposal meets criterion (2)(a).
- B. The *Greens Estates* site contains well more than two acres. (Exhibit 4Y) The proposal meets criterion (2)(b).
- C. *Skoglund Estates* will contain a pedestrian and bicycle network. While *Skoglund Estates* is not yet fully developed and recorded, it is far enough along the way to be considered as an "existing" system. As the Examiner noted in his November 17, 2006, Recommendation on *Vodnick Lane*, nothing in the criterion requires that the system to which a new development connects has to go anywhere in particular. [RAFPUD5-006, Conclusion 8] The proposal meets criterion (2)(c).
- D. Criterion (2)(d) has been at issue in a number of prior PUD applications, both located north and south of SR 2. The nearest bus service is along SR 2. The nearest current bus stop is west of the SBR intersection on SR 2. (Exhibits 1, p. 10, and 11) Sultan 144 proposes to provide a bus pull-out at the southwest corner of the site along SBR. Community Transit (CT) has stated that the cul-de-sac in the northwest corner of the site (Road F) has a sufficient radius to allow busses to turn around, provided no parking is allowed around the cul-de-sac bulb. CT

HEARING EXAMINER RECOMMENDATION

RE: FPPUD05-001 (*Greens Estates*)

September 19, 2007

Page 9 of 36

has thus far declined to commit to expand its routes to include the residential developments north of SR 2 along SBR. (Exhibits 1 and 4Y and testimony)

The Examiner concluded in his *Skoglund Estates* Recommendation that it did not meet criterion (2)(d). [FPPUD05-005, Conclusions 21 and 22] The Council disagreed (without elaboration) and approved that application. In the subsequent *Vodnick Lane* Recommendation, the Examiner considered the Council's *Skoglund Estates* action and concluded that

Vodnick Lane is about three-fifths of a mile from the nearest transit stop, rather than over a mile. The walking route to that transit stop will be along the now-under-construction pedestrian pathway along the shoulder of Sultan Basin Road. This pedestrian path is a major changed circumstance since the first hearing. The Examiner is willing to concede that a site located three-fifths of a mile from a transit stop, connected to the transit stop by a pedestrian pathway, minimally meets the "sufficient proximity" to "facilitate transit access" test.

[RAFPUD05-004 Recommendation, November 17, 2006, Conclusion 7] *Vodnick Lane* was subsequently approved.

Compliance with this criterion arose next in *Twin Rivers Ranch Estates*. During the Examiner's hearing on that application on November 30, 2006, the Examiner was provided a photograph which was said to show that a bridge along SR 2 between that site and the park and ride lot lacked any pedestrian facilities. [RAFPUD05-006, Finding 17, citing Exhibit 53] No one present refuted that testimony. Based at least in part on that evidence and testimony, the Examiner concluded that

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

[RAFPUD05-006 Recommendation, December 27, 2006, Conclusion 7] Testimony in the current hearing record contradicts the testimony received in the *Twin Rivers Ranch Estates* hearing: The SR 2 bridge at issue does, in fact, have a raised concrete sidewalk on both sides

of the highway, each approximately two feet wide. (Testimony) Thus, the Examiner's *Twin Rivers Ranch Estates* conclusion was unknowingly based, in part, on false information.

Compliance with this criterion most recently arose in the latest *Hammer PUD* proceedings. *Hammer PUD* has frontage on SR 2 and included a bus stop along that frontage. The Examiner concluded that those facts met the transit facilitation criterion. [FPPUD05-002 Recommendation, August 2, 2007, Conclusion 9] The Council accepted that Conclusion without comment. [Resolution No. 07-19]

The sidewalk/walkway along SBR has some gaps, some of which will be filled by developments now under construction. (Exhibit 11) The relocated SBR/SR 2 intersection is controlled by a traffic light. (Exhibit 4L, November 28, 2006, report, p. 2) By law crosswalks exist on each leg at every intersection of two or more streets, whether marked or not. [RCW 47.04.010(10) and (12)]

- E. Any required water and sewer extensions will be the financial responsibility of the *Greens Estates* developer. (Exhibits 5 and 6) The proposal meets criterion (2)(e).
 - F. *Greens Estates* residents will have the same access to public facilities as will any other residents of the City. The proposal meets criterion (2)(f).
11. Stan Heydrick (Heydrick) and Gerry Gibson (Gibson) challenge the application's compliance with Chapter 16.108 SMC, Concurrency Management System. Specifically, they argue that the adopted Level of Service (LOS) standard for police services is not met. They note that the electorate recently defeated a levy for police services. They provide evidence that the City is in a fiscal crisis which is not expected to be resolved for at least a couple of years and that the Council reduced the number of uniformed police officers to five (four patrol officers plus the chief) on August 23, 2007. They argue that the population increase represented by the future residents of *Greens Estates* would further tax the City's resources. They conclude that the City has no plan in place to raise the police LOS to meet the adopted standard. Heydrick concludes that the application should be denied for failure to meet concurrency. Gibson concludes that developer agreements to fund police officers violate state law. (Exhibits 14 and 15 and testimony)
12. DCD incorporated a Certificate of Concurrency (the Certificate) into its August 27, 2007, Staff Report, for *Greens Estates*. (Exhibit 1, pp. 11 - 13) The Certificate says the following about Police Services LOS:

The 2004 Comprehensive Plan LOS is 2.6 Uniformed Officers per 1,000 residents. The City has eight (8) uniformed officers (one of which is a newly funded position that was recently approved by the City Council. The current deficit is 3.78 Uniformed Officers, which is based on the City of Sultan's Office of Financial Management

HEARING EXAMINER RECOMMENDATION

RE: FPPUD05-001 (*Greens Estates*)

September 19, 2007

Page 11 of 36

(OFM) July 1, 2007 population of 4,530. 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 applicant is providing a development agreement to guarantee the LOS for police services.

The City Council, in the Plat of Skoglund Estates, has determined that if the applicant for a subdivision enters into a Developer Agreement to establish Concurrency, the application can be deemed Concurrent as it relates to Police Services. The Applicant has provided such an agreement, committing to pay to the City of Sultan to mitigate their impacts on the Police Level of Service.

The City Council in Resolution No. 06-12 requested the Hearing Examiner to consider their previous actions and interpretations with regards to Police Level of Service (LOS). Previous actions have involved: Steen Park, Cascade Breeze, Skoglund Estates and AJ's Place.

...

Certificate of Concurrency

The proposed Greens Estates Preliminary PUD and Plat will not lower the existing Level of Service (LOS) of public facilities and services or the impacts of the development will be mitigated by payment of mitigation fees as noted above. Consequently, Staff has determined that this application is concurrent and further, that this Staff Report shall serve as the Certificate of Concurrency.

(Exhibit 1, pp. 12 and 13, italics in original)

13. The currently adopted LOS standard is 2.6 uniformed officers per 1,000 population. (2004 Comprehensive Plan, Appendix B, p. 2.74) (The LOS standard in the prior 1994 Comprehensive Plan was two police vehicles per 1,000 population. (2004 Comprehensive Plan, Appendix B, pp. 2.74 and 2.75))

HEARING EXAMINER RECOMMENDATION

RE: FPPUD05-001 (*Greens Estates*)

September 19, 2007

Page 12 of 36

14. 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.¹¹ (2004 Comprehensive Plan, Appendix B, p. 2.75) The City had 10 full-time uniformed officers in 2003. (2004 Comprehensive Plan, Appendix F, pp. 214 – 215) The ratio of uniformed officers to population in 2003 when the LOS inventory was conducted, based on the population number used, was 2.6 officers per 1,000 population. (2004 Comprehensive Plan, Appendix B, p. 2.74)
15. The City's July 1, 2007, estimated population is 4,530. (Exhibit 1, p. 12) The City presently has five (5) full-time uniformed officers (including the chief), not the eight stated by DCD in the Certificate. No uniformed officer positions have been recently added; rather, positions have been eliminated due to financial constraints. (Exhibit 14) The current police services LOS is thus 1.11 uniformed officers per 1,000 population (based on presently authorized staff). The City needs 12 uniformed officers to meet the established LOS for its 2007 estimated population.
16. The latest adopted Capital Facilities Plan (CFP) is Appendix D to the 2004 Comprehensive Plan, dated November 22, 2004. (Official notice) The discussion of the Police Department in the CFP mentions a new station, but does not address staffing (not unexpected since staffing is not a capital facility). (2004 Comprehensive Plan, Appendix D, p. VIII-19)
17. Police services LOS concurrency first was challenged and became an issue in the *Cascade Breeze Estates* and *Steen Park* applications in the Spring of 2006. [FPCUP05-002 and FPCUP05-003, respectively] It remained a sticking point through the *Skoglund Estates*, *Vodnick Lane*, *AJ's Place* [BSP05-001], *Twin Rivers Ranch Estates*, George 6-plex [CUP06-004], and *Hammer PUD* applications. In each of those cases the Examiner held that Chapter 16.108 SMC did not establish a proportionate mitigation payment system. (Official notice)

Beginning with *Skoglund Estates*, each applicant/developer offered a "Developer Agreement to Establish Concurrency" for Police Services. Those Agreements offered a proportionate payment to offset police costs; none would have raised the LOS anywhere near the established standard. In fact, all the Agreements would do is maintain whatever LOS existed when the payments were made. In each case, the Examiner held that such a system conflicted with the requirements of Chapter 16.108 SMC. Beginning with the July 12, 2006, Recommendation in *AJ's Place*, the Examiner included in

¹¹ The basis for that 2003 population estimate is not in the record before the Examiner. The Washington State Office of Financial Management, Forecasting Division, (OFM), estimated Sultan's April 1, 2003, population to be 4,095. The LOS standard, being a legislatively adopted policy decision by the Council, may not be reconsidered, altered, or challenged in the context of this project permit application. [See RCW 36.70B.030, quoted in part in the Principles of Law section, below.]

HEARING EXAMINER RECOMMENDATION

RE: FPPUD05-001 (*Greens Estates*)

September 19, 2007

Page 13 of 36

his Recommendations a proposed condition, based upon language in Council resolutions, which would comply with the requirements of Chapter 16.108 SMC.¹² (Official notice)

In each of the above-listed cases, except for the Council's recent *Hammer PUD* decision, the Council disagreed with the Examiner and included language in its approval resolutions essentially as follows:

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.

(This language is taken from Resolution Nos. 06-06 and 06-07, approving *Steen Park* and *Cascade Breeze*, respectively. It was repeated nearly verbatim in subsequent Council Resolutions.) The Council did not actually require execution of any of the offered Developer Agreements. (Official notice)

¹²

The Examiner actually presented the theory behind the LOS condition in his first *Hammer PUD* Recommendation, dated June 15, 2006. However, that Recommendation did not include recommended conditions as it did not recommend approval of the application. (Official notice)

HEARING EXAMINER RECOMMENDATION

RE: FPPUD05-001 (*Greens Estates*)

September 19, 2007

Page 14 of 36

18. On August 2, 2007, the Examiner issued a recommendation to approve *Hammer PUD*. That Recommendation, as had those preceding it, included a detailed exposition of Findings and Conclusions regarding Police Services LOS. That Recommendation, as had all since *AJ's Place*, included a condition to fulfill the concurrency requirement. The Council approved *Hammer PUD* by Resolution No. 07-19 on August 23, 2007. The Council adopted, without comment, reservation, or exception, all Findings and Conclusions within the Examiner's recommendation. (Official notice)
19. The present hearing record includes a Developer Agreement for Concurrency patterned after the *Skoglund Estates* Agreement.¹³ (Exhibit 8) However, Sultan 144 testified that it was willing to accept the condition recommended by the Examiner and imposed by the Council on *Hammer PUD* and was not seeking acceptance of Exhibit 8. (Testimony)
20. Sultan's State Environmental Policy Act (SEPA) Responsible Official issued a threshold Determination of Nonsignificance (DNS) for *Greens Estates* on April 16, 2007. (Exhibit 7) No comments or appeals were submitted in response to issuance of the DNS. (Exhibit 1)
21. DCD recommends approval of the requested CUP subject to 32 special conditions: Recommended Conditions 1, 2, 5, 15 (less subsections c and d), 17, 21, 22, 25, 27, 35, 36, 41 – 43, 64, 66 – 69, 71, 75, 77 – 80, 83, 87 (less subsections d, e, and j), 89, 96, 101, 107, and 111.¹⁴ (Exhibit 1 and testimony) DCD suggested changes to several of the Recommended Conditions:
 - A. Recommended Condition 2: The "House Plans" are Exhibit 4S.
 - B. Recommended Condition 5: The text "PUD &" should be deleted in the first sentence. Final PUD approval may occur before all infrastructure has been completed whereas final plat approval may not (unless bonded for completion).

¹³ The offered Agreement contains an apparent calculation error. The Agreement states that the development upon completion will be responsible for 0.44 (44%) of one police officer, but then offers to pay for only 33% of one police officer for one year. (Exhibit 8) If for some reason the Council were to return to its prior position, it should not accept an agreement which does not even fund the proper percentage of one police officer for one year.

¹⁴ The written Staff Report and Recommendation contains 112 Recommended Conditions, not 32. (Exhibit 1, pp. 15 – 28) Most of the 112 re-state minimum requirements of adopted code and/or standards. The Staff Report was prepared for DCD by a consultant whose style is to list such items as conditions. (Testimony) Historically, Sultan has not followed that style: Sultan has listed only special, project-unique items as conditions of approval; the preamble to the list of conditions makes clear that all provisions of adopted code and standards apply, whether listed or not. The Examiner offered DCD the opportunity to declare that it wished to adopt the consultant's style for this and all future applications. Staff declined and instead worked with the consultant to eliminate all but the unique conditions from the recommendation.

HEARING EXAMINER RECOMMENDATION

RE: FPPUD05-001 (*Greens Estates*)

September 19, 2007

Page 15 of 36

- C. Recommended Condition 15: The phrase “ten (1) feet shall provide a 6-foot fence and landscaping” in the second sentence should read “ten (10) feet shall provide a 6-foot fence or landscaping”.
 - D. Recommended Condition 17: An alternate version was presented. (Exhibit 13)
 - E. Recommended Condition 96: The phrase “US 2 and 5th Street, US 2/Sultan Basin Road, and” in the second sentence should be eliminated. Those two projects have been completed.
22. Sultan 144 has no objection to any of the recommended conditions, as amended. (Testimony)
23. In addition to his concurrency challenge, Heydrick also argues that the proposal does not comply with the 2004 Comprehensive Plan by allowing growth when the City is in a fiscal crisis, that the proposal does not comply with PUD locational criteria regarding pedestrian/bicycle circulation and transit facilitation, and that the City cannot maintain its existing parks. (Exhibit 14 and testimony) David Gipson (Gipson) challenged the acceptability of a plat design which does not provide parking for visitors to the recently dedicated public open space land.¹⁵
24. 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;

¹⁵

By way of context, Gipson represented applicant Dan Ramirez during the *Twin Rivers Ranch Estates* hearings. One of the issues which arose in that case was whether the public interest would be served by creation of a public park along the property's Skykomish River frontage without sufficient access or parking for the public. (Official notice)

HEARING EXAMINER RECOMMENDATION

RE: FPPUD05-001 (*Greens Estates*)

September 19, 2007

Page 16 of 36

2. Whether appropriate provisions are made ... for: drainage ways, streets, alleys, other public ways, water supplies and sanitary wastes, transit stops, parks and recreation, playgrounds, schools and schoolgrounds;
3. The physical characteristics of the subdivision site and may disapprove because of flood, inundation or swamp conditions. It may require construction of protective improvements as a Condition of Approval; and
4. all other relevant facts to determine whether the public use and interest will be served by the ... subdivision.

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

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

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

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

(1) Fundamental land use planning choices made in adopted comprehensive plans and development regulations shall serve as the foundation for project review. The review of a proposed project’s consistency with applicable development regulations or, in the absence of applicable regulations the adopted comprehensive plan, under RCW 36.70B.040 shall incorporate the determinations under this section.

(2) During project review, a local government or any subsequent reviewing body shall determine whether the items listed in this subsection are defined in the development regulations applicable to the proposed project or, in the absence of applicable regulations the

adopted comprehensive plan. At a minimum, such applicable regulations or plans shall be determinative of the:

- (a) Type of land use permitted at the site, including uses that may be allowed under certain circumstances, such as planned unit developments and conditional and special uses, if the criteria for their approval have been satisfied;
- (b) Density of residential development in urban growth areas; and
- (c) Availability and adequacy of public facilities identified in the comprehensive plan, if the plan or development regulations provide for funding of these facilities as required by [the Growth Management Act].

[RCW 36.70B.030]

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] *Greens Estates* is vested to the regulations in effect on September 2, 2005; subsequently enacted regulations or amendments may not be used in the review of this application.

Standard of Review

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

Scope of Consideration

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

CONCLUSIONS

1. This application involves two components, each with different review criteria. In addition, concurrency compliance is a significant issue. The necessary conclusions will be most easily understood if they are grouped by topic. Since a PUD subdivision cannot, almost by definition, be approved unless the PUD “overlay” is approved, the analysis most logically begins with consideration of the PUD element of the application.
2. In summary, the Conclusions which follow demonstrate that *Greens Estates* meets all but one PUD approval criteria, meets preliminary subdivision approval criteria, and could be conditioned to comply with the requirements of Chapter 16.108 SMC, Concurrency. None of the other challenges raised by citizen participants reveal any defects requiring denial of the application. The revised

HEARING EXAMINER RECOMMENDATION

RE: FPPUD05-001 (*Greens Estates*)

September 19, 2007

Page 18 of 36

condition list, with minor changes and additions, is justified and would serve the public use and interest.

3. The Conclusions in this decision are grouped by topic only for the reader's convenience. Such groupings do not indicate any limitation of applicability to the decision as a whole.

PUD Analysis

4. Finding 10, above, demonstrates compliance with all locational criteria within SMC 16.10.110(2) except subsection (d), the "transit facilitation" criterion.
5. *Greens Estates* is as far distant from the nearest public transit as is *Skoglund Estates*. Its situation is markedly different from that of *Hammer PUD* or even *Vodnick Lane*. The distance from the southwest corner of the site along SBR south to SR 2 is approximately 0.8 miles; the distance from the new SBR/SR 2 intersection to the existing park and ride lot (which is incorrectly located on Exhibit 11: The location arrow points to the west end of the block while the park and ride is clearly visible at the east end of the block) is an additional 0.24 miles. (Scaled from Exhibit 11) While a crosswalk legally exists at the signalized SBR/SR 2 intersection which will allow safe crossing of SR 2, and while the short bridge on SR 2 between that intersection and the park and ride lot does have raised concrete sidewalks which will allow reasonably safe access across the bridge, the fact remains that the site is more than a mile distant from the nearest transit stop.

Criterion (2)(d) requires more than that a PUD applicant show that he/she/it has facilitated transit use within the design. Were that all the criterion required, *Greens Estates* would most certainly meet the criterion with its bus pull-out on SBR and bus turnaround capability in Road F.

The "facilitate" clause must be read in context: "Transit is available in sufficient proximity to the site to facilitate transit access to the PUD-SF". (Emphasis added) Under the criterion, it is the "sufficient proximity to the site" of an existing transit route which facilitates transit access. Putting a transit stop in a subdivision located miles from the nearest transit line would not meet the criterion unless the transit provider were on record agreeing to extend transit to the new subdivision by the time the project developed.

The Council has never explained how a more than one mile walk supposedly facilitates transit usage. As the Examiner has said before, few Americans are likely to walk over a mile just to get to a transit stop. Some may be willing to drive a mile to the park and ride, but if that is the test of compliance with the criterion, then the criterion is meaningless as virtually every bit of Sultan is located within one mile of the park and ride. Had the Council intended that PUDs could be located anywhere in the

HEARING EXAMINER RECOMMENDATION

RE: FPPUD05-001 (*Greens Estates*)

September 19, 2007

Page 19 of 36

City, it would not have enacted restrictive location criteria. The enacted criteria must be given meaning.¹⁶

6. *Hammer PUD* is in a different situation: It has direct frontage on an existing CT bus route: SR 2. *Vodnick Lane*'s distance from the park and ride is about one-half that of *Greens Estates*. (See Exhibit 11)
7. The Examiner simply cannot in good conscience conclude that a site more than a mile from the nearest transit stop is sufficiently proximate to transit to facilitate transit usage. The Examiner recognizes that the Council may well disagree, given its prior approval of *Skoglund Estates*. Given that possibility, the Examiner will provide recommendations regarding conditions of approval.
8. The Examiner questions compliance with one of the PUD development standards as well. Right-of-way width reduction in a PUD is available where separation of vehicular and pedestrian traffic is proposed and where adequate off-street parking is provided. [SMC 16.10.120(B)(4)(b)] Here, right-of-way width reduction is not coupled with reduced street sections or off-street parking areas, but rather is offset by a sidewalk easement on each side of the street. What is actually happening is that Sultan 144 is proposing to construct standard width streets and sidewalks within rights-of-way which are too narrow to contain them. The "left over" parts of the sidewalk are then placed within easements encumbering the front five feet of each frontage lot. The end result is an increased lot yield: With the typical lot in *Greens Estates* being 50 feet wide, the sidewalk easement design saves the applicant about 250 SF for every lot which fronts directly on a street. Those savings equal more than two lots.

This concept does not seem to be what SMC 16. 10.120(B)(4)(b) is all about. The Examiner asks the Council to carefully consider this issue and include within its action a ruling on acceptability of the concept and guidance for its future application: If it is approved here, it will likely reappear in many future applications because of its ability to increase lot yield with no other apparent public benefit or private cost.

Preliminary Subdivision Analysis

9. *Greens Estates* conforms with the principles of the 2004 Comprehensive Plan. The type of land use and proposed density are consistent with the Plan. The two provisions cited by Heydrick in Exhibit 14 are from the "Implementation tasks" section of the Plan. The preamble to that section describes its

¹⁶

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.

content as “potential implementing measures and projects”. Taken literally, the contents of that section are, at best, a list of possible actions the City could take.

More importantly, adopted regulations “trump” adopted plans and/or policies. The state Supreme Court in *Citizens v. Mount Vernon* [133 Wn.2d 861, 947 P.2d 1208 (1997), *reconsideration denied*] has ruled that “[RCW 36.70B.030(1)] suggests ... a comprehensive plan can be used to make a specific land use decision. Our cases hold otherwise.” [at 873]

Since a comprehensive plan is a guide and not a document designed for making specific land use decisions, conflicts surrounding the appropriate use are resolved in favor of the more specific regulations, usually zoning regulations. A specific zoning ordinance will prevail over an inconsistent comprehensive plan. If a comprehensive plan prohibits a particular use but the zoning code permits it, the use would be permitted. These rules require that conflicts between a general comprehensive plan and a specific zoning code be resolved in the zoning code’s favor.

[*Mount Vernon* at 873-74, citations omitted] If the City wants to stop residential development for any legitimate reason, it will have to adopt an appropriate moratorium. Unless and until such time, property owners have the right to file applications and have them considered under the regulations in place when the application is filed in a complete fashion.

10. *Greens Estates* complies with adopted regulations with the sole exception of the PUD transit facilitation requirement, discussed above.
11. The evidence shows that appropriate provisions have been made for most all the items listed in SMC 16.28.330(A)(2), including transit stops. The Examiner nevertheless has doubts about the wisdom of the flared panhandles and the reduced width rights-of-way.

The SMC requires that every lot abut a street by not less than 20 feet. [SMC 16.150.010(3)] Sultan 144 has met that requirement for its panhandle lots by flaring a 15 foot wide panhandle out to 20 feet where it touches the right-of-way. (Exhibit 4Y) In other words, the panhandle is 20 feet wide only at the precise point of intersection with the street; the side lot lines abutting the panhandle have a “jog” or “dog leg” in them. This is a new concept to this Examiner.¹⁷ The concept is another way to increase yield: A typical 20 foot wide panhandle is reduced to 15 feet for most of its length. Given that most of the panhandles are about 75 feet long, the design “saves” about 350 feet for every panhandle. The 30+ panhandles in the plat “save” the equivalent of about two lots.

¹⁷ Sultan 144 testified that a few lots in *Skoglund Estates* also have this configuration. The Examiner does not remember that detail being apparent or drawing any attention during application review.

HEARING EXAMINER RECOMMENDATION

RE: FPPUD05-001 (*Greens Estates*)

September 19, 2007

Page 21 of 36

A further question is whether the “jog” or “dog leg” in the lot lines will serve the public use and interest. Most people, rightly or wrongly, expect their property lines to be straight line segments. Since the driveways in these panhandles will likely not be flared to match the property lines, abutting owners may well believe that their property lines run straight to the street. Property line disputes could result and/or the panhandles could end up to be effectively only 15 feet wide all the way to the street. The Examiner asks the Council to carefully consider this issue and include within its action a ruling on acceptability of the concept and guidance for its future application: If it is approved here, it will likely reappear in many future applications because of its ability to increase lot yield with no other apparent public benefit or private cost.

12. The property is not located within any regulatory flood plain. The on-site wetlands have been avoided through subdivision design. The proposal need not be denied for either of those reasons.
13. *Greens Estates* would meet the public use and interest if the above concerns could be resolved in the affirmative. However, given that the Examiner cannot recommend approval of the PUD, and given that the plat depends upon approval of the PUD, the proposed preliminary subdivision cannot be approved. Outright denial would be inappropriate as a standard plat could be designed for the site. Therefore, the Examiner will recommend that the application be returned for modification as allowed by SMC 16.28.290(A).

Concurrency Analysis

14. Subdivision PUD applications are development permits. [SMC 16.120.050] *Greens Estates* is not categorically exempt from SEPA threshold determination requirements. (Exhibit 7) Therefore, *Greens Estates* is subject to the concurrency requirements of Chapter 16.108 SMC. [SMC 16.108.020]
15. 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]
16. 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.

17. The concurrency process of Chapter 16.108 SMC is wholly separate from and independent of the impact fee process of Chapter 16.112 SMC. The former seeks to assure that established LOSs are maintained; the latter requires developers to pay a share of the costs of facilities required by new development. The latter is a Growth Management Act (GMA) impact fee program adopted by the City pursuant to Chapter 36.70A RCW, GMA, and "RCW 82.02.050 et sequitur". [SMC 16.112.010, ¶ 1] The latter is not subject to the fee limitations associated with RCW 82.02.020; but it is subject to the definitional limitations of RCW 82.02.090: No impact fees may be collected for police services as such services are not defined as "public facilities."
18. Chapter 16.108 SMC does not impose an impermissible cost on developers. In fact, it doesn't necessarily impose any cost on developers. Rather, it establishes a threshold condition which must now exist in the community, be conditioned to exist concurrent with the impacts of the development, or be funded to exist concurrent with the impacts of the development in order for any development approval to be granted. If that threshold condition (LOS at or above the established level) exists when the development approval is granted, then SMC 16.108.060(A) is met and the development is deemed concurrent.¹⁸ If the required LOS is not present, then SMC 16.108.060 provides two alternative mechanisms by which a development may still be found to be concurrent.

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

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

¹⁸ To read this subsection as one prior applicant has suggested (the LOS must meet the standard for only the one day on which the Council will act on the proposal) is simply illogical and makes a mockery of the entire concurrency system chapter. If such was the true intent of the Council when it enacted Chapter 16.108 SMC, the Council will have to so declare on its own initiative: The Examiner declines to even suggest that such an interpretation might have been intended.

time). The LOS standard to be met should be that in existence at the time the development is occurring, not that in existence currently. (This is analogous to impact fees which do not vest.)

Subsection (C) addresses the situation where the LOS standard would not be met but the developer enters into a binding agreement with the City to provide the necessary resources to raise the LOS to meet or exceed the established LOS within six years. This is an option in which the typical developer would likely be committing more than his/her fair share. But "latecomers" agreements are available for just such situations.¹⁹ And, the developer always has the option to wait until the City makes the necessary commitments to raise the LOS.

19. According to SMC 16.108.070, .120, and .130, the LOS standard for police services is the standard as set in the 2004 Comprehensive Plan: 2.6 uniformed officers per 1,000 population. The City 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 *Greens Estates* because of the vested rights doctrine: The application must be reviewed against the regulations which existed on September 2, 2005, 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)]

¹⁹

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.

HEARING EXAMINER RECOMMENDATION

RE: FPPUD05-001 (*Greens Estates*)

September 19, 2007

Page 24 of 36

20. A concurrency recommendation or certificate must be based upon facts. Those facts must include the (estimated) population of the City at the time of the application for which concurrency is sought, the number of residents expected to be added by the proposed development, and the amount of the affected service then available in the community (For example, the number of uniformed officers in the police department; the total acreage of parks, recreation, and open space using the same methodology as used in the 2003 inventory.) Given those facts, LOS for each required service area may be calculated. Without those facts, LOS cannot be calculated. If the LOS cannot be calculated, then no favorable conclusion is possible regarding concurrency.
21. The present LOS for police services is far below the standard established within the 2004 Comprehensive Plan. Additional residential development within the City will only serve to further lower the LOS.
22. DCD erred in concluding that *Hammer PUD* meets the concurrency standard for police services. The police staffing statements contained within DCD's Certificate are factually incorrect and were incorrect when the Certificate was issued on August 27th.
23. Nothing has been presented to convince one that a Police Services Agreement patterned after those offered in several previous cases would guarantee that the police services LOS will meet the established standard when the development occurs – or even six years later. The concept underlying the offered agreements suffers from several shortcomings. First, even if fully funded all at once, the Police Services Agreement would fund only a miniscule fraction of the cost of one police officer for one year. The City cannot hire a tiny fraction of a person. Even if it could, the LOS would still be woefully below the established standard – and would fall back again after the one year of funding ended.

Second, the costs in the previously offered Police Services Agreements have been based on the City's cost to support one uniformed police officer. If, as testimony in a prior hearing suggests, the City may replace its substantially reduced uniformed officer count with contracted police services, the costs of such contracted services may be wholly different from the City's present costs. A carbon copy of prior agreements may or may not represent a fair share of actual costs.

Third, the Police Services Agreement calls for the funds to be paid as each building permit is issued. This provision would result in even a more miniscule revenue stream, making it even more unlikely that a police officer could be hired.

Fourth, even if all the offered funds were paid at one time, it would take many developments to fund just one police officer, and that one officer would not raise the police services LOS to the established 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 such a program 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, Gibson is correct: 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. 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.

24. The City has no “strategy in place” to increase police staffing. The electorate defeated its latest proposed strategy. The discussion in prior Council Resolutions 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 LOS, shall put in place the required public services for police concurrent with the development impacts, and provide appropriate strategies for the six years from the time of development to achieve the necessary police LOS as now established or as subsequently revised.

Such a condition would meet the requirement of SMC 16.108.060(C). The language of such a condition would be based almost word for word on Council statements in previous approval resolutions.

HEARING EXAMINER RECOMMENDATION

RE: FPPUD05-001 (*Greens Estates*)

September 19, 2007

Page 26 of 36

25. Approval could also be conditioned such that the police services LOS in existence at the time of final building permit inspections had to be met before approval for occupancy could be granted. Such a condition would meet the requirement of SMC 16.108.060(B).
26. Under the present circumstances, the best Concurrency solution would be to impose an "either - or" condition: Require compliance with a condition as suggested in Conclusion 24, above, or compliance with a condition as suggested in Conclusion 25, above. Unfortunately, the Police Services Agreement approach does neither.
27. The Council's adoption, without any comment or reservation, of the Examiner's Findings of Fact and Conclusions in the recent *Hammer PUD* case must be accorded some importance, especially in view of the long line of preceding cases in which the Council expressly disagreed with essentially identical Findings of Fact and Conclusions.

The Examiner recognizes that

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.

[*Hammer PUD*, FPPUD05-002 Recommendation, August 2, 2007, Footnote 22] The Examiner Recommendation adopted by the Council contained an extensive analysis and interpretation of the applicable ordinance. The Examiner must conclude that by accepting that Recommendation without comment, reservation, or exception, the Council consciously intended to change its position.²⁰

Other Issues Analysis

²⁰ Staff suggested that the Council meant no such thing and that it would revert to its prior position if an applicant challenged the concurrency requirement. The Examiner declines to believe that the Council would flip-flop on such an important issue.

HEARING EXAMINER RECOMMENDATION

RE: FPPUD05-001 (*Greens Estates*)

September 19, 2007

Page 27 of 36

28. Heydrick's Comprehensive Plan, police services LOS, and PUD locational criteria issues have previously been addressed. Whether or not the City can maintain its existing public parks is irrelevant to this application. Heydrick is presumably referring to the acreage dedicated to the City—the large wetland south of Proposed Lots 20 – 29. The most important factor to consider is that the dedicated land presumably will never be an active use public park. It is a wetland in which, under applicable City regulation, virtually nothing can be done. Nature will maintain the wetland.
29. The *Twin Rivers Ranch Estates* public park access and parking situation is quite distinguishable from the present circumstances. The property to be dedicated to the City in *Twin Rivers Ranch Estates* was prime frontage along the Skykomish River, usable for many active recreational pursuits. That property could be expected to generate substantial citizen recreational interest, requiring an appropriate level of access and parking if the public interest were to be served.

As has been noted, the property dedicated to the City here is a wetland in which no active recreation will be allowed. Any trails that may be built throughout the wetland buffer will not be on City property as the buffer was not dedicated to the City (it remains within the proposed subdivision). Under the circumstances here present, the only access that is needed is for City "maintenance" purposes; a way for City personnel to legally access City property.

30. *Greens Estates* passes the consistency test: Single-family residential development is allowed by the applicable zoning, the proposed density is within the allowed range, and adequate infrastructure is present.

Conditions Analysis

31. The 32 remaining recommended conditions of approval as set forth in Exhibit 1 are reasonable, supported by the evidence, and capable of accomplishment with the following exceptions:
- A. Recommended Condition 1: An exhibit number reference should be added to improve clarity. The plans for which approval is sought are Exhibit 4Y.
 - B. Recommended Condition 2: An exhibit number reference should be added to improve clarity. The house plans for which approval is sought are Exhibit 4S.
 - C. Recommended Condition 5: The "PUD &" text in the first sentence should be eliminated. As written, the condition would require completion of all infrastructure before either final PUD or final plat approval was granted. Preliminary PUD approvals generally expire one year after issuance. [SMC 16.10.150] Preliminary subdivision approvals generally expire five years after issuance. [SMC 16.28.390] The final PUD process involves review of detailed plans based upon the preliminary plans approved with the preliminary approval. [SMC 16.10.160] Construction prior to final PUD approval is not allowed or contemplated. [SMC 16.10.180 and .200] By way of contrast, final plat approval is granted only after all infrastructure has

HEARING EXAMINER RECOMMENDATION

RE: FPPUD05-001 (*Greens Estates*)

September 19, 2007

Page 28 of 36

been installed or bonded for completion. [SMC 16.28.400] The text of the condition applies only to the subdivision process.

- D. Recommended Conditions 15, 87, and 96: The changes listed in Finding 21, above, should be made.
- E. Recommended Condition 17: Neither the original wording (Exhibit 1, p. 17) nor the substitute wording (Exhibit 13) clearly express the intent of this condition. The intent is to not allow an existing garage to become the sole building on a newly established lot. The reason behind the condition is that the SMC treats garages as accessory uses and that accessory uses, by definition, cannot be the sole use on a lot. (Testimony) That intent can be conveyed with better wording.
- F. Recommended Condition 25.c: Parcel A is not part of the land being subdivided. Therefore, it need not be shown on the final plat at all (unless simply as an adjacent parcel). This condition, as written, implies that Parcel A is within the plat. It must be revised to eliminate that implication.
- G. Recommended Condition 36: The Council must decide if reducing established right-of-way widths solely to increase developer yield is a policy which the City wishes to follow. If it answers in the affirmative, then this condition is fine as it is; if it answers in the negative, then this condition should be eliminated (and the project redesigned to provide full-width rights-of-way).
- H. Recommended Condition 107: This condition should be eliminated for the reasons set forth in Conclusions 14 -27, above.
- I. The Council should not under any circumstances grant approval to *Greens Estates* unless it has received written approval from PSE of the easement alignment through the property. The City would be creating an enormous mess were it to approve a plat layout without knowing for sure where an existing high voltage electrical transmission easement lies. Future lot owners could find themselves in the midst of protracted, unpleasant, expensive litigation if PSE had to fight to preserve its easement. Since Sultan 144 believes that it can receive written acceptance of the present design within 30 days of the Examiner's hearing, and since the proposal will most likely not get on the Council's agenda before that period ends, Sultan

HEARING EXAMINER RECOMMENDATION

RE: FPPUD05-001 (*Greens Estates*)

September 19, 2007

Page 29 of 36

144 should be able to submit PSE approval before the Council's consideration. The Examiner will recommend that the Council not grant approval absent such a document.²¹

- J. SBR is an arterial, 132nd Street SE is a collector. All lots which front on either of those streets also have frontage on an internal plat street. (Exhibit 4Y) In order to preserve the integrity of the public arterial/collector street system, a condition should be imposed on the final plat barring any direct vehicular access from any lot to either of those two streets. Approval of the proposal without such a restriction would not make appropriate provisions for public streets, would not serve the public interest, and would not protect public safety.
- K. A properly worded concurrency condition should be added. The language accepted by the Council in the *Hammer PUD* application will be recommended.
- L. If the Council approves the reduced right-of-way width proposal, it should add a condition requiring that garages whose vehicular door(s) face a street with the reduced right-of-way and sidewalk easement must maintain an 18 foot setback between the back edge of the sidewalk and the near face of the garage.
- M. A few minor, non-substantive structure, grammar, and/or punctuation revisions to the Recommended Conditions will improve parallel construction, clarity, and flow within the conditions. Such changes will be made.

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

RECOMMENDATION

Based upon the preceding Findings of Fact and Conclusions, the testimony and evidence submitted at the open record hearing, and the Examiner's site view, the Examiner recommends that the City Council: **DENY** the request preliminary Planned Unit Development; and **RETURN** the proposed preliminary subdivision **FOR MODIFICATION**. If the Council concludes that the proposal meets all requirements for approval, then the Examiner would recommend that approval be **SUBJECT TO THE ATTACHED CONDITIONS** and **NOT** be granted unless and until the applicant has submitted to the Council a written statement from Puget Sound Energy accepting the proposed layout as properly recognizing and preserving its aerial high voltage transmission easement across the property.

²¹

Council consideration of the Examiner's Recommendation is at a closed record hearing. Additional evidence is normally not allowed at a closed record hearing. But where the Recommendation calls for submittal of a certain document prior to approval, submittal of the required document should be a permissible exception to the general rule.

HEARING EXAMINER RECOMMENDATION

RE: FPPUD05-001 (*Greens Estates*)

September 19, 2007

Page 30 of 36

Recommendation issued September 19, 2007.

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

John E. Galt,
Hearing Examiner

NOTICE OF RIGHT OF RECONSIDERATION

This Recommendation, dated September 19, 2007, is subject to the right of reconsideration pursuant to SMC 2.26.120(D). Reconsideration may be requested by the applicant, a party of record, or the City. Reconsideration requests must be filed in writing with the City Clerk/Treasurer not later than 5:00 p.m., local time, on October 1, 2007 (which is the first business day after the tenth calendar day after the date of mailing of this Decision). Any reconsideration request shall specify the error of law or fact, procedural error, or new evidence which could not have been reasonably available at the time of the hearing conducted by the Examiner which forms the basis of the request. Any reconsideration request shall also specify the relief requested. See SMC 2.26.120(D) and 16.120.110 for additional information and requirements regarding reconsideration.

NOTICE OF COUNCIL CONSIDERATION

This Recommendation becomes final as of the eleventh calendar day after the date of mailing of the Recommendation unless reconsideration is timely requested. If reconsideration is timely requested, the Examiner's order granting or denying reconsideration becomes the Examiner's final recommendation. The Examiner's final recommendation will be considered by the Sultan City Council in accordance with the procedures of SMC 2.26.120(D) and Title 16 SMC. Please contact the Department of Community Development for information regarding the scheduling of Council consideration of this Recommendation. Please have the applicant's name and City file number available when you contact the city.

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

RECOMMENDED CONDITIONS OF APPROVAL
FPPUD05-001
GREENS ESTATES

The following conditions are offered in the event the Council determines that the proposal complies with all applicable criteria for approval.

This Preliminary Subdivision and Planned Unit Development are subject to compliance with all applicable provisions, requirements, and standards of the Sultan Municipal Code and standards adopted pursuant thereto. The permittee is responsible to obtain all necessary State and Federal permits and approvals required for completion of the project. In addition, development shall comply with the following special conditions:

1. The general configuration, lot shapes and sizes, setbacks, site density, and areas of open space shall be as indicated on the site plan resubmitted June 27, 2007 (Exhibit 4Y), subject to and as revised by these Conditions of Approval.
2. The application shall generally comply with the House Plans submitted December 6, 2006. (Exhibit 4S) Prior to building permit submittal, house plans that deviate from the submitted House Plans shall be subject to the approval from the Community Development Director.
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 contributed by the proposed development for its impacts on the LOS, shall put in place the required public services for police concurrent with the development impacts, and provide appropriate strategies for the six years from the time of development to achieve the necessary police LOS as now established or as subsequently revised; or, in the alternative, the police services LOS in existence at the time of final building permit inspections shall be met before approval for occupancy is granted.
4. Prior to approval of the Final Plat, all site improvements, including streets, sidewalks, bicycle lanes, frontage improvements, drainage improvements, open space landscaping and improvements, mitigation plantings and other common area improvements shall be installed, inspected and approved by the City of Sultan, with the exception of the final paving of streets. All improvements shall be constructed in accordance with the approved engineering plans, landscaping and recreation plans, mitigation plans, and Preliminary PUD and Plat. Alternatively, the City may approve a financial bond or assurance for items not completed prior to Final Plat, as approved by the City Engineer and/or Community Development Director.
5. The following notes shall appear on the face of the Final Plat:

HEARING EXAMINER RECOMMENDATION

RE: FPPUD05-001 (*Greens Estates*)

September 19, 2007

Page 32 of 36

- a. Pursuant to SMC 16.10.120(B)(1)(a) and (d), those lots where the rear lot lines are adjacent to dedicated open space are permitted to have reduced rear yard setbacks of ten (10) feet. Other lots that apply for a reduced yard setback of up to ten (10) feet shall provide a 6-foot fence or landscaping that provides a full screen within 5 years of planting, in order to meet the privacy requirements of this section of the code. All other lots shall have rear yard setbacks of twenty (20) feet.
 - b. Pursuant to SMC 16.10.120(B)(1)(f), porches may extend into the setback, up to fifteen (15) feet from the front property line. The houses may not extend into the setback – the minimum setback for the houses, including second stories, shall be twenty (20) feet measured from the front lot line.
 - c. No direct vehicular access shall be taken from any lot directly to either Sultan Basin Road or 132nd Street SE. All lots abutting either or both such streets shall take all vehicular access from an internal plat street.
 - d. Garages whose vehicular door(s) face a street with reduced right-of-way and a sidewalk easement must maintain an 18 foot setback between the back edge of the sidewalk and the near face of the garage. ***NOTE: This condition is appropriate only if the Council determines that reduced width rights-of-way serve the public use and interest in this case.***
6. Proposed Lots 54 and 55 shall be sold as one and treated as a single lot for building purposes until such time as the existing garage on Lot 54 is removed or until such time as a building permit is obtained to build a single-family residence on Lot 54.
 7. Private street and stormwater maintenance agreements shall be prepared for review by the City as part of the Final Plat applications and recorded with the Final Plat.
 8. A drainage easement between the *Greens* Property and *Skoglund* Property to the east will be required to be recorded with the Final Plat.
 9. The following revisions shall be made to the Final Plat Map:
 - a. The required setbacks shall be shown.
 - b. Correct square footages for all lots and tracts shall be shown.
 - c. Remove Parcel A from the plat (unless it is shown simply as adjacent property)..
 - d. Label those tracts that contain wetlands and wetland buffer as “Native Growth Protection Areas”.
 - e. The Puget Sound Energy aerial high voltage transmission easement shall be delineated with particularity.

HEARING EXAMINER RECOMMENDATION

RE: FPPUD05-001 (*Greens Estates*)

September 19, 2007

Page 33 of 36

10. Prior to any activity on-site, the NGPA buffers and the property corners of the adjacent lots shall be staked out in the field under the supervision of a professional surveyor licensed in the State of Washington. No clearing activities shall occur until the location of the survey stakes are inspected and accepted by the City of Sultan.
11. In order to enforce SMC 16.10.110(B)(2), final engineering drawings shall show a bus turnout adjacent to Road F on Sultan Basin Road for future bus service to this area. Final design shall comply with Community Transit's design standards, subject to the City Engineer's approval.
12. Roads D and F as shown on the preliminary plans are permitted to deviate from the design standards. Roads D and F have a reduced right-of-way width (50 feet instead of 60 feet), have eliminated one (1) parking lane, and will place the required sidewalks within easement on private property. **NOTE: This condition is appropriate only if the Council determines that reduced width rights-of-way serve the public use and interest in this case.**
13. All public rights-of-way shall be dedicated to the City with road improvements constructed to current City standards, with approved deviations. Roads A through F shall be dedicated to the public. Dedications shall be completed prior to Final Plat approval.
14. Prior to construction, the Developer shall prepare a final Construction Stormwater Pollution Prevention Plan (SWPPP) for approval by the City Engineer and the Department of Ecology. The Developer shall provide a copy of the Department of Ecology, Construction Stormwater General Permit, issued for this project prior to issuance of City permits.
15. Site development shall follow all recommendations of the final stormwater report.
16. All phases of plat development, including drainage and earthwork construction, shall be in accordance with the geotechnical reports prepared for the project, including the Earth Solutions NW, LLC report dated November 27, 2006, and the Terra Associates, Inc. report dated July 27, 2005 (Exhibit 4M); as well as any subsequent addendums as accepted by the City Engineer. A note to this effect shall be placed on the Final Plat.
17. Prior to permit issuance, a final geotechnical report shall be submitted with recommendations on the final design of the plat improvements. The final report shall also state which lots require a separate report to be submitted with building permit application. The required note on the Final Plat under the above condition shall reference the final geotechnical report, and any subsequent addendums as accepted by the City Engineer.
18. A geotechnical addendum shall be submitted with each house design at the time of building permit submittal for those lots that are subject to the requirement. The geotechnical addendum shall address foundations, setbacks, drainage control and any other issues deemed pertinent by the geotechnical

HEARING EXAMINER RECOMMENDATION

RE: FPPUD05-001 (*Greens Estates*)

September 19, 2007

Page 34 of 36

engineer or the City Engineer. A note to this effect shall be placed on the face of the Final Plat, stating which lots are subject to this requirement.

19. All phases of plat development shall be in accordance with the critical area study and mitigation plans prepared for the project by the Jay Group, Inc. revised December 4, 2006 (Exhibit 4J), and any subsequent reports as accepted by the Community Development Director.
20. The critical areas study states that invasive species removal will be undertaken within the wetland buffer by mechanical means. All removal of invasive species shall be done using only handheld equipment. The Community Development Director and City Engineer may approve mechanical equipment under the supervision of a qualified professional. No equipment may be used within any wetland.
21. A 20 foot wide easement shall be established/dedicated through the Final Plat process allowing the City to access from Road D, for mitigation and maintenance purposes, the property dedication accepted under Resolution No. 07-17 (a.k.a. Wetland DT).
22. The conditions recommended by Graham-Bunting Associates, dated March 19, 2007, regarding the wetland and buffer mitigation shall be followed. (Exhibit 9)
23. The final mitigation plan shall be submitted with the following revisions:
 - a. A split rail fence shall be installed on all reduced buffers and adjacent to proposed lots and active open space areas. The fence shall allow for the movement of wildlife in and out of the wetlands and shall protect the critical areas and the newly installed plans from human impacts. The design and location of the fence is subject to the approval of the Community Development Director.
 - b. Increased buffer plantings shall be shown on the north side of Wetland AA to increase the functions and values of that wetland, as it is being used as a mitigation to reduce buffers on the other wetlands and for the wetland fill.
 - c. Show that species compatible with the storm drainage system will be planted within Tracts 986 and 987.
 - d. All trails shown within wetland buffers shall demonstrate compliance with the requirements of former SMC 16.80.080.
24. A Time-Zero/As-Built mitigation planting plan report shall be submitted to the City with Final Plat submittal.
25. The mitigation plantings shall be monitored annually for three (3) years. A monitoring report shall be submitted to the City each year on the anniversary of the completion approval of the mitigation

HEARING EXAMINER RECOMMENDATION

RE: FPPUD05-001 (*Greens Estates*)

September 19, 2007

Page 35 of 36

- plantings. Success of the mitigation plan will depend on adherence to the minimum standards below, the detailed goals in the mitigation report, and the proposed Contingency Plan:
- a. 100% replacement/survival of plants after Year 1
 - b. Minimum 80% survival at end of Year 2
 - c. Minimum 80% survival at end of Year 3.
 - d. Adherence to the proposed Contingency Plan if 80% is not reached.
26. As part of the proposed Covenants, Conditions and Restrictions of the Homeowners Association shall address the potential increase of litter or garbage in the critical areas. Maintenance for these areas shall be the responsibility of the Homeowners Association after the monitoring period.
27. All phases of plat development shall be in accordance with the Vegetation Inventory and Plant Preservation Management Plan prepared the Jay Group, Inc. revised August 4, 2005 (Exhibit 4K), and any subsequent reports as accepted by the Community Development Director.
28. The following revisions to the Recreation Plan shall be made prior to permit issuance:
- a. Correct square footages that also match the square footages shown on the plat maps and on the civil plans.
 - b. Delineate between the general open space areas and those areas that will be designated recreation areas.
 - c. Recalculate the open space areas to include the bus turnaround adjacent to Road F.
 - d. Provide a landscaping plan for each of the recreation areas, per SMC 16.72.040. The landscaping for these areas shall meet the requirements of SMC 16.72.040, Recreation Design Requirements. At a minimum, there shall be a ten (10) foot landscaped perimeter and protective fencing a minimum of four (4) feet in height. All fences require a separate permit under SMC 15.08. This landscaping plan is subject to the approval of the Community Development Director and City Engineer.
 - e. Provide details for the recreation area equipment and amenities.
 - f. Specified the construction details for the trail. Pursuant to the pre-application meeting, a five (5) foot wide path made of 5/8 inch minus gravel is required.
 - g. A pedestrian path is required to be installed within the Plat, in conformance with the 2004 Comprehensive Plan. This trail shall be installed as shown on the approved plans, and shall connect through the property dedicated to the City (Parcel C) through the Boundary Line Adjustment process to the south, at no cost to the City.
29. The latecomers fee due under the Bethany Terrace Ordinance shall be due prior to permit issuance.

HEARING EXAMINER RECOMMENDATION

RE: FPPUD05-001 (*Greens Estates*)

September 19, 2007

Page 36 of 36

30. The development is subject to traffic mitigation measures as assessed by the Washington State Department of Transportation (WSDOT) for impacts upon the State Highway System. The pro-rata share payment for the Sultan WCL West Bound Passing Lane project as determined by WSDOT shall be paid directly to WSDOT and verification of that payment shall be provided to the City prior to issuance of City permits.
31. Prior to permit issuance for plat development, the easement recorded under AFN 9711070477 shall be vacated, and new plans and a new title report shall be submitted to the City showing this easement removed. If this easement cannot be vacated, new plat and civil drawings shall show no buildable area within this easement; a major revision to the plat may be necessary.
32. The developer, contractor, and any geotechnical or wetland specialist required to be on-site during construction, shall attend a pre-construction meeting with City staff to discuss expectations and limitations of the project permit before starting the project.

**City of Sultan
Staff Report and Recommendation
To the Hearing Examiner
August 27, 2007**

**Greens Estates Preliminary PUD and Plat Application
File Number FPUD05-001**

Section	Page #'s
I. Application Information and Process	1
II. Land Use and Zoning	5
III. Wetlands, Streams and Steep Slopes	7
IV. Water, Sewer, and Stormwater Management	8
V. Traffic and Circulation	8
VI. Other Issues	10
VII. SEPA	13
VIII. Public Notice	14
IX. Conclusion	14
X. Staff Recommendation	15
EXHIBITS:	29

I. Application Information and Process

a. Request

The Applicant requests Approval to develop 63-single-family residences on approximately 18.06 acres as a Planned Unit Development (PUD) Single-Family (PUD-SF) overlay. The project is zoned Low-Moderate Density Residential (LMD). Development will include grading, access improvements, landscaping, drainage improvements, and street improvements to Sultan Basin Road and on 132nd Street SE along the property frontages.

b. Applicant

Sultan 144, LLC
15 Bellevue Drive, Suite 102
Bellevue, WA 98005
Phone: 425-869-2020
Attn: Craig Sears

c. Property Owners

Charles T. & Delores B. Green
32326 132nd Street SE
Sultan, WA 98294

Exhibit 2

Patrick M. Green & Continental Inc.
103955-H
601 Union Street E, Suite 2000
Seattle, WA 98101

d. Engineer

Land Development Consultants, Inc.
14201 NE 200th Street #100
Woodinville, WA 98072
Phone: 425-806-1869
Attn: Mark Villwock, PE

e. Surveyor

Group Four, Inc.
16030 Juanita Woodinville Way NE
Bothell, WA 98011
Phone: 425-775-4581
Attn: Steve Anderson

Concept Engineering, Inc.
455 Rainier Boulevard North
Issaquah, WA 98027
Phone: 425-392-8055
Attn: David Hill

f. Wetland Biologist

The Jay Group, Inc.
1927 5th Street
Marysville, WA 98270
Phone: 360-659-8159
Attn: Carolyn Prentice

g. Parcel Numbers

280833-002-004-00
280833-002-006-00
280833-002-006-01
280833-002-006-02
280833-002-006-03
280833-002-007-00

h. Project Description

The proposed project is a Planned Unit Development (PUD) for a detached single-family development of 63-homes. The development is comprised of 4 parcels, totaling 18.06 acres. The site contains 4 wetlands and 1 stream. One wetland has been separated from the subject property through the Boundary Line Adjustment process and will be dedicated to the City. Two existing single-family residence, with associated garages, exist on-site at this time. All

existing structures that do not meet the development standards will be removed, which includes the existing home on proposed Lots 1 and 2, and the detached garage on Lot 54. The Applicant has stated that the single-family residence on Lot 55 will remain.

i. Location

The site addresses are 32326, 32400 and 32522 132nd Street SE, which is located on the southeast intersection of 132nd Street SE and Sultan Basin Road, approximately 1 mile north of U.S. Highway 2. The site is west of and abutting the future Skoglund Estates Plat. The site is located in the northwest quarter of Section 33, Township 28 N, Range 8 E, W.M., in the City of Sultan, Snohomish County, Washington.

j. Existing Site and Surrounding Land Uses

The site generally measures 980 feet by 1,300 feet in its widest area. The site is generally flat, sloping from the north to south, with the steepest slope of approximately 6%. There are two existing single-family residences with detached garages; the residence on Lots 1 and 2 will be required to be removed during construction. The detached garage on Lot 54 will be required to be removed during construction, or Lots 54 and 55 will be required to be combined. The site contains 4 wetlands and a stream, as discussed in the Critical Area Study prepared by the Applicant's wetland biologist, Allison Warner of The Jay Group, Inc., revised December 4, 2006. Immediately abutting this site to the west is the future detached single-family plat of Skoglund Estates.

The surrounding existing land uses/designations include:

- To the north: Single-family residences and vacant land / Snohomish County Designation Urban Low Density Residential (4-6 units per acre)
- To the south: Single-family residences / Low/Moderate Density Development
- To the west: Single-family residences / Low/Moderate Density Development and Moderate Density Development
- To the east: Single-family residences / Low/Moderate Density Development

k. Utilities, Fire, and School Districts

Water Source: City of Sultan

Sewer Service: City of Sultan

Fire District: Snohomish County Fire Protection District No. 5

School District: Sultan School District No. 311

l. Related Permits and Reviews

Development of the site will require building, grading, fill, stormwater, water, sewer, power, telephone, and demolition permits, in addition to PUD and Plat Approval. Permits by other agencies may also be required.

m. Procedure for PUD Approval

The City's regulations for Planned Unit Developments (PUDs), Chapter 16.10 of the Sultan Municipal Code (SMC), require that PUD Approval be processed pursuant to Chapter 2.26, with review done by the City Planner, with input from the City Engineer, Public Works

Director, and the Building Official. In accordance with SMC 16.10.080, PUDs are reviewed by the Hearing Examiner, who then makes a Recommendation to City Council.

After receipt of the Hearing Examiner's Recommendation, the City Council will hold a Closed Record Hearing and make the final decision, in accordance with SMC 16.10.090.

Following Council Preliminary PUD Approval, the Applicant is required to file an application for Final PUD approval within twelve (12) months, in accordance with SMC 16.10.150 and 160.

n. Procedure for Plat Approval

The City's Subdivision Regulations, Chapter 16.28 SMC, provide the standards and process for Preliminary Plat Review. In accordance with SMC 16.28.330, the Hearing Examiner shall hold a Public Hearing, make written findings and make a recommendation to the City Council. The City Council may either, approve, disapprove, or return the proposed subdivision for modification at a closed record hearing following the Hearing Examiner's Recommendation, in accordance with SMC 16.28.340. Council Approval of a Preliminary Plat is valid for up to five (5) years, in accordance with SMC 16.28.350.

o. Review Criteria

The review criteria for preliminary plats are set forth within SMC 16.28.330(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 school grounds;
3. The physical characteristics of the subdivision site; and may disapprove because of flood, inundation or swamp conditions. It may require construction of protective improvements as a Condition of Approval; and
4. All other relevant facts to determine whether the public use and interest will be served by the subdivision.

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

The general review criteria for a PUD are set forth in SMC 16.10.090(B):

"The Hearing Examiner Recommendation shall include, at a minimum, findings and conclusions regarding the preliminary PUD's compliance with the criteria for location and approval for the particular type of preliminary PUD listed in SMC 16.10.100 (retail PUDs) or 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.”

p. Application History

The Application for Preliminary PUD was originally filed with the City of Sultan on August 4, 2005 by a previous Applicant. The project was deemed complete by the Hearing Examiner on September 2, 2005. Subsequently a significantly revised application with a new Applicant was filed with the City of Sultan on December 6, 2006. The Applicant supplied a new set of plans on June 12, 2007 for approval by the Hearing Examiner.

A Determination of Non-Significance (DNS) was issued on April 16, 2007 with a 14 day appeal period. There were no appeals of the DNS.

A Public Hearing Notice was issued on August 30, 2007 in accordance with SMC 16.28.300, SMC 2.26.110 and SMC 16.124.010.

II. Land Use and Zoning

a. Zoning

The site is zoned Low-Moderate Density Residential (LMD). Single-family detached homes and PUDs in the LMD zone are subject to the zoning requirements contained in SMC 16.12.010.

b. Density

Gross density is proposed to be approximately 3.5 dwelling units per acre (63 homes over 18.06 acres). The maximum gross density per SMC 16.12.010 for Planned Unit Developments is 5 dwelling units per acre.

c. Lot Size and Coverage

The Applicant proposes lot sizes that range from 4,656 sf to 10,415 sf, with an average lot size of 5,770 sf. The maximum lot coverage under SMC 16.12.010 is 30% for PUD's. At the time of building permit submittal, the Applicant will be required to show compliance with this section of the code. The proposed minimum lot widths range from 40 feet to 78 feet; panhandle lots have a lot width of 20 feet at the lot line. The above lot sizes, widths, and coverages comply with SMC 16.12.010 and SMC 16.10.120.

d. Front Yard Setbacks

Under SMC 16.10.120(B), porches that do not comprise more than 60% of the front façade of the house may extend into the setback. The Applicant proposes 20 foot setbacks for the structures as required by Ordinance 917-06, with a 15 foot setback for porches. Second stories will not be allowed to extend into the 20 foot setback.

e. Side Yard Setbacks

The Applicant proposes typical side yard setbacks of 5 feet as required under Ordinance 917-06, with the side yard setback on corner lots of 15 feet.

f. Rear Yard Setbacks:

Under Ordinance 917-06, the standard rear yard setback is 20 feet. Under SMC 16.10.120(B)(1)(a) and (d), the minimum rear yard requirement is intended to provide privacy for the outdoor area behind the dwelling unit. Where physical elements such as fences, screens, or open spaces are provided, rear yard setbacks may be reduced to 10 feet. Those lots that abut an open space tract are proposed to have a rear yard setback of 10 feet. Other lots may propose smaller setbacks of no less than 10 feet, with submittal for building permit, if a fence and full landscaping screen is proposed. All other lots will have a 20 foot rear yard setback.

The lots eligible for a 10 foot rear yard setback due to the presence of open space adjacent to the rear yard include: Lots 6-18, 20-26, 27-37, and 54-60. Other lots that seek a reduced rear yard setback will be required to demonstrate compliance with SMC 16.10.120 at the time of building permit submittal

g. Comprehensive Plan Designation

The site is designated "Low/Moderate Density Residential" by the City of Sultan Comprehensive Plan. The proposed use of the site as single-family residential, at a density of approximately 3.5 dwelling units per acre, is consistent with the Comprehensive Plan.

h. Off-Street Parking Requirements

The minimum number of required off-street parking spaces shall be determined by the table in SMC 16.60.140. Single-family dwelling units are required to provide two (2) off-street parking spaces per dwelling unit. At 63 units, this project requires a minimum of 126 off-street parking spaces, to be provided individually on each lot. At the time of building permit issuance, the Applicant will be required to demonstrate compliance with this section of the code.

i. Recreation and Open Space

SMC 16.72.040 requires recreation areas in the amount of 75 square feet per person. The Greens Estates PUD is required to provide 18,900 square feet of recreation area, based on 4 people per residence. The PUD, as proposed, provides 41,184 square feet.

Also, in developments with 63 units, 3 recreation areas, a minimum of 2,000 square feet each, are required (SMC 16.72.050). The project, as proposed, with 63 units, proposes 3 recreation facilities, meeting the SMC mandated minimum. The applicant proposes a multi-purpose court area in Tract 999, a picnic area in Tract 995 and a tot lot in Tract 990.

All PUDs are required to provide open space in the amount of 20% of the gross land area of the site, per SMC 16.10.140. A minimum of 15% of the gross area must be "usable 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. This project is required to have 3.61 acres of open space. The recreation areas can count towards the open space requirement.

The June 12 submittal shows approximately 35% of the site in open space, but 14.8% usable open space. Final plans shall demonstrate that these requirements are met prior to permit issuance.

III. Wetlands, Streams and Steep Slopes

Within the City of Sultan, wetlands and streams are subject to regulations per SMC 16.80 and steep slopes are subject to SMC 16.68.

a. Wetlands

The property has 4 existing wetlands, which are categorized as follows under the DOE Rating System, and subject to the buffers under SMC 16.80.040.

Wetland AA: Category 4 with a 25 foot buffer (Proposed buffer: 25 feet)

Wetland DT: Category 2 with a 75 foot buffer (Proposed buffer: 50 feet) (this wetland was separated by a previously recorded BLA. The buffer for this wetland is on the subject property)

Wetland C: Category 2 with a 75 foot buffer (Proposed buffer: 50 feet)

Wetland K: Category 3 with a 50 foot buffer (Proposed buffer: 25 feet)

Under SMC 16.80.100, Innovative Development Design, the applicant has proposed alternative buffers that vary from the requirements of SMC 16.80.040. A Third Party Review of Wetland, Streams and Buffers, dated March 19, 2007 was completed by Patricia Bunting of Graham-Bunting Associates, the City’s on-call wetland consultant. Her review found that the alternative buffers, subject to conditions outlined in her report, meet the criteria under SMC 16.80.100.

b. Streams

One Type 4 stream is located on the subject property. Per SMC 16.80.040, the standard buffer for this stream is 50 feet. This stream is located within a larger wetland (Wetland DT), and the entire 50 foot street buffer is located within that wetland. The stream and associated wetland have been separated from the subject property through the Boundary Line Adjustment and will be dedicated to the City.

Under SMC 16.28.260(C), an access right-of-way is required to any publicly controlled water body, including streams. With the dedication through the Boundary Line Adjustment process, the stream located on the subject property will be publicly controlled. However, access to the Ordinary High Water Mark in this case would be within a Category 2 wetland. To ensure access, the Applicant has provided a trail system that travels through the wetland buffer near the stream. This trail will be constructed throughout the property. No further public benefit would be gained from requiring additional access directly to the stream.

c. Mitigation

As part of the project, the applicant is proposing to provide buffer enhancement in order to allow smaller buffers for the 4 on-site wetlands. Buffer enhancement shall be completed in accordance with the Mitigation Plan prepared by Allison Warner of the Jay Group, Inc., dated December 4, 2006, and the conditions of Patricia Bunting of Graham-Bunting Associates, dated March 19, 2007. The mitigation plan is also subject to the requirements of SMC 16.80.070.

d. Steep Slopes

There are no steep slopes (in excess of 25%) on-site.

IV. Water, Sewer, and Stormwater Management

a. Water Availability

According to SMC 16.10.070(C)(8), as stated in RCW 19.27.097, new developments must show evidence of adequate water availability. The City of Sultan Public Works Department issued a letter, dated December 13, 2006, stating water is available to the site.

b. Sanitary Sewer Availability

According to SMC 16.10.070(C)(7) new developments must show evidence of sewer availability. The City of Sultan Public Works Department issued a letter, dated December 13, 2006, stating sanitary sewer is available to the site.

c. Stormwater Management

Per SMC 16.92.010, the City of Sultan adopts the most recent Department of Ecology Stormwater Management Manual for the Puget Sound basin. The applicant proposes a conveyance system and water quality treatment in the form of a Bioswale on-site. Stormwater will be detained on the Skoglund Plat to the east. A Final Stormwater Report and Plan will be submitted to the City for approval prior to permit issuance.

V. Traffic and Circulation

a. Lot Access

Access to Lots 7 – 63 will be from 132nd Street SE via the proposed internal roads, consisting of a public street (Roads A – E) and one private road serving Lots 23-25. Road A will connect to the Skoglund Estates Plat to the east. Access to Lots 1 – 6 will be from Sultan Basin Road via a public road, Road F.

b. Street Standards

Internal Public Roads

The Sultan Design Standards and Specifications require, for public local access streets, a 60 foot right-of-way, with two 12 foot travel lanes, parking lanes on each side, curb, gutter, 5 foot sidewalks on each side, and street trees planted every 20 lineal feet.

As submitted, Roads A-F as proposed will provide 50 foot right-of-ways, two 12 foot travel lanes, 5 foot sidewalks on both sides, and two 8 foot parking lanes. The exception to this is Road D and F, which will have parking lanes on only one side of the road. Final plans will show the street trees meeting the 20 lineal feet requirement, or as accepted by the Community Development Director and City Engineer.

Per SMC 16.10.120(B), the City Planner and City Engineer may allow modifications to the street standards through the PUD process. As submitted, this project is consistent with other PUD's within the City.

Internal Private Roads

Per the Sultan Design Standards and Specifications, private roads are required to serve a maximum of 4 lots, have a 30 foot right-of-way, have two 12 foot travel lanes, and have a one 5 foot sidewalk.

The City requires that when 3 or 4 panhandle lots have adjacent street frontage, a private access road will be constructed to serve such lots. For this proposal Lots 23-25 will be served by a private road. Final street plans will meet the requirements for a private road for Lots 23-25.

Sultan Basin Road

Sultan Basin Road is a Secondary Arterial with a specific Road Concept Plan, which requires a 66 foot right-of-way, two 12 foot travel lanes, one 12 foot turn lane, two 3 foot bicycle lane, 5 foot sidewalks on either side with 5 foot planter strips and street trees planted every 20 lineal feet. Currently along the property frontage, Sultan Basin Road does not meet this requirement. The Applicant will be required to dedicate 3 feet along the frontage on Sultan Basin Road to obtain the required right-of-way width, and construct half-street improvements that meet these standards.

132nd Street SE

132nd Street SE is classified as a Neighborhood Collector, which requires a 60 foot right-of-way, with two 12 foot travel lanes, parking on both sides, a 5 foot sidewalk on both sides with 3 foot planter strips, and street trees every 50 lineal feet. In order to meet these standards, the Applicant will be required to dedicate 10 feet on 132nd Street SE, and provide three-quarter street improvements that meet these standards.

c. Non-motorized Access

SMC 16.10.110 states that a PUD-SF must be located to connect to existing off-site pedestrian and bicycle circulation system to facilitate non-motorized access. In addition, the 2004 Comprehensive Plan shows a non-motorized path through the Greens property. The Applicant proposes to provide a trail and sidewalk system that will connect to Sultan Basin Road and 132nd Street SE, as well as to the property to the south.

d. Traffic Impacts

According to SMC 16.112.020, the Owner/Developer is required to pay impact fees and offset impacts to the City's street system. According to the Traffic Analysis Report,

submitted by Gibson Traffic Consultants, dated July 22, 2005 and updated on November 28, 2006, the new development will generate 61 new pm peak hour trips on City streets. The fees will be paid prior to building permit issuance for each lot. Those lots that do not have to pay will be identified on a note on the Final Plat.

Impact fees are also due to WSDOT for one (1) project that this Application will impact: the Sultan WCL West Bound Passing Lane. The impacts fees for these projects are required to be paid prior to permit issuance, and the fee will be calculated at the time of fee payment.

e. Transit

Transit service is currently available at the Park and Ride Lot at the intersection of US 2 and Sultan Basin Road, approximately 1 mile from the site along US 2. The City of Sultan has contacted Community Transit to request development of a route extension north on Sultan Basin Road. At this time, Community Transit has not made any commitment and it is expected that expansion of transit service will be partially dependent on the Sultan Basin Road area having a sufficient population to sustain transit ridership. The relocation and signalization of the intersection of Sultan Basin Road and US 2 is recently completion, and provides a safer and improved access for Community Transit vehicles to neighborhoods located north of US 2. The City Council has previously stated that applications north of US 2, including up to 1 mile away, meet the requirement of "sufficient proximity" to transit.

As part of this project, the Applicant will be required to install a bus turnout adjacent to Road F for future bus service to this area. Community Transit has stated that their development standards require a ten (10) to twelve (12) feet wide pullout, approximately seventy (70) feet in length, with 5:1 tapers at each end, to be constructed. The Public Works Department has indicated that the pullout shall be constructed of re-enforced concrete. This is a recommended condition of project approval.

Under SMC 16.12.110(B)(2), PUD's are required to show sufficient proximity to the site to facilitate transit access. With the addition of a bus turnout as well as improvements to 132nd Street SE and Sultan Basin Road, this development has provided all of the necessary infrastructure to facilitate transit access. No further action is warranted of the applicant.

VI. Other Issues

a. Utilities

All utilities are available at the site to serve the development. The Applicant will install the required services for each lot prior to Final Plat approval.

b. School Impacts

Sultan Elementary, Middle and High schools are located approximately 2-3 miles away from the site by car. Per SMC 16.116.030(A) and (B), the City shall collect School Impact Fees "from any applicant seeking land use permit approval and/or a building permit from the City for any residential development activity within the City limits." School Impact Fees shall be paid to the City in accordance with Chapter 16.116 SMC, for 61 new lots. The fees will be

paid prior to building permit issuance for each lot. Those lots that do not have to pay will be identified on a note on the Final Plat.

c. Park and Recreation Impacts

Per SMC 16.112.020, the Owner/Developer is required to pay Park and Recreation Impact Fees to offset the project's impact on the City's recreation facilities. Park and Recreation Impact Fees shall be paid to the City in accordance with Chapter 16.112 SMC for 61 new lots. The fees will be paid prior to building permit issuance for each lot. Those lots that do not have to pay will be identified on a note on the Final Plat.

d. Fire Hydrants

Hydrants and hydrant spacing shall be in conformance with the City of Sultan 2004 Water and Sewer Engineering Standards per the City's Engineer Recommendations.

e. Concurrency Requirements

SMC section 16.108.010 states that property owners must meet the Concurrency provisions of the Comprehensive Plan as required in RCW 36.70A.70. This ensures that adequate public facilities are available and will be able to support the development's impact. Facilities subject to this review are:

- Roadways
- Potable Water
- Wastewater
- Police Protection
- Parks and Recreation

In accordance with SMC 16.108.050 Certificate of Concurrency, and SMC 16.108.060 Standards for Concurrency, the City of Sultan shall review applications for development and issue a Certificate of Concurrency provided that the development does not lower the existing Level of Service (LOS) of public facilities and services below that adopted by the Comprehensive Plan. A project shall be deemed concurrent if:

1. The necessary public facilities and services are in place at the time the Development Approval is issued;
2. The Development Permit is issued subject to conditions that ensure that the necessary public facilities will be in place concurrent with the impacts of the development; or
3. The necessary public facilities are guaranteed in an enforceable Development Agreement.

“Concurrent with development” means that facilities are in place at the time of development or that a financial commitment is in place to complement needed improvements within six years of the time of development.

Arterial Roadways

The 2004 Comprehensive Plan LOS is B for identified intersections.

In accordance with SMC 16.112, the Applicant is required to pay Traffic Impact Fees to offset traffic impacts associated with the development. Traffic related improvements scheduled to meet and maintain the City's adopted LOS concurrent with development are planned under the adopted 6-year Capital Facilities Plan.

Other Roadways

The 2004 Comprehensive Plan LOS is B for local streets.

In accordance with Chapter 16.112 SMC, the applicant is required to pay Traffic Impact Fees to offset traffic impacts associated with the development. Traffic related improvements scheduled to meet and maintain the City's adopted LOS concurrent with development are planned under the adopted 6-year Capital Facilities Plan.

Potable Water

The 2005 Water System Plan LOS is 350 gallons of supply per equivalent residential unit. The City currently has a 20-year projected surplus of 249,560 gallons supply.

On December 13, 2006, the City issued a letter of Water Availability. System improvements may be required of the Applicant to connect to the City water system; these improvements will be installed at no cost to the City prior to Final Plat approval. Water system improvements scheduled to maintain the City's adopted LOS concurrent with development are planned under the adopted 6-year Capital Facilities Plan.

Wastewater

The 2006 General Sewer Plan LOS is 67 gallons per day per capita. The City currently has wastewater capacity for this plat.

On December 13, 2006, the City issued a letter of Sewer Availability. System improvements may be required of the applicant to connect to the City sewer system; these improvements will be installed at no cost to the City prior to Final Plat approval. Wastewater system improvements scheduled to maintain the City's adopted LOS concurrent with development are planned under the adopted 6-year Capital Facilities Plan.

Police

The 2004 Comprehensive Plan LOS is 2.6 Uniformed Officers per 1,000 residents. The City has eight (8) uniformed officers (one of which is a newly funded position that was recently approved by the City Council). The current deficit is 3.78 Uniformed Officers, which is based on the City of Sultan's Office of Financial Management (OFM) July 1, 2007 population of 4,530. 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 applicant is providing a development agreement to guarantee the LOS for police services.

The City Council, in the Plat of Skoglund Estates, has determined that if the applicant for a subdivision enters into a Developer Agreement to establish Concurrency, the application can be deemed Concurrent as it relates to Police Services. The Applicant has provided such an agreement, committing to pay to the City of Sultan to mitigate their impacts on the Police Level of Service.

The City Council in Resolution No. 06-12 requested the Hearing Examiner to consider their previous actions and interpretations with regards to Police Level of Service (LOS). Previous actions have involved: Steen Park, Cascade Breeze, Skoglund Estates and AJ's Place.

Parks and Recreation

The 2004 Comprehensive Plan LOS is 42.6 acres per 1,000 residents. The City's 2007 estimated population is 4,530. The current acreage of parks, recreation, and open space land stands at 198.98 acres. This results in a ratio of 73.9 acres of parks, recreation, and open space per 1,000 residents, which exceeds the current LOS. The City has 5.18 acres of excess parks, recreation, and open space lands.

In accordance with Chapter 16.112 SMC, the Applicant is required to pay Recreation Impact Fees to offset recreation related impacts associated with this development. Fees will be paid as noted above. Parks and recreation improvements scheduled to maintain the City's adopted LOS concurrent with development are planned under the adopted 6-year Capital Facilities Plan.

Certificate of Concurrency

The proposed Greens Estates Preliminary PUD & Plat will not lower the existing Level of Service (LOS) of public facilities and services or the impacts of the development will be mitigated by payment of mitigation fees as noted above. Consequently, Staff has determined that this application is concurrent and further, that this Staff Report shall serve as the Certificate of Concurrency.

VII. SEPA

SEPA, under RCW 43.21C, requires Governmental Agencies to consider the environmental impacts of a proposal before making decisions. An Environmental Checklist was submitted to the City on December 6, 2006. A Determination of Non-Significance (DNS) was issued on April 16, 2007. No appeals were filed prior to that date and the DNS stands as issued.

VIII. Public Notice

As required by the City's Subdivision and Public Hearing Regulations (SMC 16.28.300 and SMC 16.124.010), Notice of the Preliminary Plat and PUD Application has been posted, published and mailed. Notice of Public Hearing was posted, mailed and published August 30, 2007.

IX. Conclusion

Staff concludes that the proposed Greens Estates Preliminary PUD & Plat, with the Conditions in Section X below, meets the criteria for Preliminary Plats in accordance with SMC 16.28.330(A) and for Preliminary single-family residential PUDs, in accordance with SMC 16.10.110(B).

- a. 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 (RCW 58.17 and 36.70B) and the City of Sultan,
- b. The proposed Preliminary PUD and Plat makes appropriate provisions for public health, safety, and general welfare, and for open spaces, drainage ways, streets, other public ways, water supply and sanitary wastes, transit, parks and recreation, playgrounds, schools and school grounds. Street improvements and utilities should be developed in compliance with the conditions listed below.
- c. The proposed modifications to the development standards, as conditioned herein, are consistent with the provisions of SMC 16.10.120 and 16.12.010.
- d. The location of the preliminary PUD and plat is consistent with the location criteria of SMC 16.10.110(B)(2), including:
 - Being greater than 2 acres.
 - Located on an arterial street such that transportation facilities can provide direct access to the development.
 - Located so that it can connect to the off-site pedestrian and bicycle circulation system.
 - Transit is available in sufficient proximity to the site to facilitate transit access to the PUD.
 - Located in relation to utilities such that the development will not result in higher public costs.
 - Located so that the PUD will have access to schools, parks and open space.
- e. The design of the preliminary PUD and Plat, as conditioned herein, takes into account the relationship of the site to the surrounding areas. The Conditions listed below are essential to ensure that the street frontages and perimeter of the site are designed in a manner compatible with the surrounding neighborhood.

- f. The physical characteristics of the site have been reviewed. Conditions are recommended to ensure that the new structures and improvements are built in compliance with the regulations of the Sultan Municipal Code.
- g. The proposed Preliminary PUD and Plat will serve the public use and interest by developing land consistent with the goals and policies of the Comprehensive Plan and compatible with adjacent land uses, and by providing an extension of public roads and services.

X. Staff Recommendation

Staff recommends that the Hearing Examiner recommend to the City Council APPROVAL WITH CONDITIONS of the Greens Estates Preliminary PUD and Plat with the Conditions listed below:

Final Plat

1. The general configuration, lot shapes and sizes, setbacks, site density, and areas of open space shall be as indicated on the site plan resubmitted June 27, 2007, subject to and as revised by these Conditions of Approval.
2. The application shall generally comply with the House Plans submitted December 6, 2006. Prior to building permit submittal, house plans that deviate from the submitted House Plans shall be subject to the approval from the Community Development Director.
3. Revisions to approved preliminary Planned Unit Developments shall be regulated by SMC 16.10.160(D) and (E); while revisions to approved preliminary subdivisions are regulated by SMC 16.28.360.
4. The final PUD map shall be recorded as an amendment to the underlying zoning following Final PUD approval.
5. Prior to approval of the Final PUD & Plat, all site improvements, including streets, sidewalks, bicycle lanes, frontage improvements, drainage improvements, open space landscaping and improvements, mitigation plantings and other common area improvements shall be installed, inspected and approved by the City of Sultan, with the exception of the final paving of streets. All improvements shall be constructed in accordance with the approved engineering plans, landscaping and recreation plans, mitigation plans, and Preliminary PUD & Plat. Alternatively, the City may approve a financial bond or assurance for items not completed prior to Final Plat, as approved by the City Engineer and/or Community Development Director.
6. All lot corners shall be installed with rod and cap prior to Final Plat approval.
7. The requirements for Survey Monuments under Section 4.05 of the City of Sultan Design Standards and Specifications, and additional survey monumentation as required by the City Engineer, shall be met prior to Final Plat approval.
8. The Applicant shall establish a Homeowners Association to assume responsibility for maintenance of common areas. The Homeowners Association shall be recorded with the plat. The proposed Covenants, Conditions and Restrictions of the Homeowners Association shall be subject to City approval prior to Final Plat approval.

9. The following note shall appear on the face of the Final Plat Map: "The use and development of the property included within this plat shall be governed by the Conditions of Approval imposed through Case Number FPPUD05-001/SEPA07-04 and shall be binding upon the land until that approval is amended, revokes or expires."
10. The following Free Consent Statement shall be acknowledged by property owners and shall be notarized: "We the undersigned, attest that we are the contract purchaser or owners in fee simple of the land represented on this Plat and have no right, title or interest of any kind in any un-plated land contiguous to any part of the land included in this Plat. This Plat is made with our free consent and in accordance with our desire."
11. The following shall be shown on the recording block section of the plat map: "Refer to Auditor Recording Number."
12. The title block on the Final Plat map shall have the names of all the legal owners of the property named on the plat and the name of the surveyor/engineering firm which prepared the Final Plat map.
13. An Auditor's Certificate shall be shown on the Final Plat map.
14. The following are required to be shown on the face of the Final Plat map prior to final approval:
 - Surveyor Certificate;
 - Owners Statement;
 - All new easement(s) over the property, their legal description(s) and associated dedication block(s);
 - Recording block/Certification blocks for City approval;
 - North arrow;
 - Certification of Payment of Taxes and Assessments;
 - Auditor's Certificate;
 - The survey control scheme, monumentation, basis of bearing and references.
15. The following notes shall appear on the face of the Final Plat map:
 - a. Per SMC 16.10.120(B)(1)(a) and (d), those lots where the rear lot lines are adjacent to dedicated open space are permitted to have reduced rear yard setbacks of ten (10) feet. Other lots that apply for a reduced yard setback of up to ten (1) feet shall provide a 6-foot fence and landscaping that provides a full screen within 5 years of planting, in order to meet the privacy requirements of this section of the code. All other lots shall have rear yard setbacks of twenty (20) feet.
 - b. Per SMC 16.10.120(B)(1)(f), porches may extend into the setback, up to fifteen (15) feet from the front property line. The houses may not extend into the setback – the minimum setback for the houses, including second stories, shall be twenty (20) feet measured from the front lot line.
 - c. Building setbacks, height limitations, and lot coverage requirements for the lots contained within this short plat are subject to the approval by the City's Community

Development Department prior to the issuance of a building permit. Applicants should have the dimensional requirements on their site plan verified by the City's Community Development Department prior to submitting plans for a building permit.

- d. In accordance with SMC 16.60.140, the minimum number of required off-street parking spaces for single-family dwelling units is two (2) spaces per unit. Submittal for building permits shall meet this requirement.
16. The existing houses and structures shall be moved, demolished, or otherwise modified so that they are in compliance with the Sultan Municipal Code, prior to City of Sultan acceptance of plat for recording.
17. If the detached garage on proposed Lot 54 will remain, then Lots 54 and 55 shall be combined so that no lot has a garage as the primary use.
18. A notice of planned street extension shall be filed with the Final Plat with Snohomish County with recording of the Final Plat.
19. The following note shall appear on the face of the Final Plat: "The areas designated as street landscaping or open space tracts, although falling within dedicated City right-of-way shall be maintained by the developer and its successor and assigns for plantings: PROVIDED, that such areas or their use for landscaping may be reduced or eliminated by the City of Sultan if deemed necessary for or detrimental to City road purposes".
20. The NGPA shall be placed in a separate tract on which development is prohibited, protected by execution of an easement, dedicated to a conservation organization or land trust or similarly preserved through a permanent protective mechanism acceptable to the City, prior to Final Plat approval. The legal description for each of the NGPA and open space tracts shall be shown on the final plat map with designation of ownership and maintenance responsibilities.
21. Private street and stormwater maintenance agreements shall be prepared for review by the City as part of the Final Plat applications and recorded with the Final Plat.
22. A drainage easement between the Greens Property and Skoglund Property to the east will be required to be recorded with the Final Plat.
23. All existing and proposed easements shall be shown on the Final Plat map.
24. The City must verify that the required street lights are installed and functional prior to Final Plat approval.
25. The following revisions shall be made to the Final Plat Map:
 - a. The required setbacks shall be shown on the Final Plat map.
 - b. Correct square footages for all lots and tracts shall be shown on the Final Plat Map.
 - c. Remove the note on Parcel A showing that the land will be dedicated to the City.
 - d. Show those tracts that contain wetlands and wetland buffer as "Native Growth Protection Areas".

Clearing & Grading

26. A demolition permit for all structures to be removed shall be submitted, reviewed and approved prior to permit issuance. Coordinate with the Snohomish Health District to determine what requirements the District will have for removal of hazardous materials.
27. Prior to any activity on-site, the NGPA buffers and the property corners of the adjacent lots shall be staked out in the field under the supervision of a professional surveyor licensed in the State of Washington. No clearing activities shall occur until the location of the survey stakes are inspected and accepted by the City of Sultan.
28. The significant trees to be retained shall be clearly delineated in the field. Barrier fencing or siltation fencing shall be installed before any site disturbance.
29. The clearing limits of the approved Site Plan shall be clearly delineated in the field. Where such limits are in proximity to property boundaries or associated with site-sensitive areas, barrier fencing or siltation fencing shall be installed before site disturbance in accordance with the approved Temporary Erosion and Soil Control Plan.
30. All clearing and grading activities, including the installation of utilities, storm drainage, ATB, curb, and gutters, shall be installed during the construction season between April 1 and October 1. Construction during the winter season (October 2 – March 31) will require special written permission from the City Engineer. In the case of prolonged bad weather, the City Engineer may amend the start and end date of the construction season as necessary.
31. During construction, in those areas where soil is disturbed, current and best management practices must be used to control erosion. Upon installation of any and all utility lines, the area of construction shall be restored to its natural, pre-existing condition.
32. Soils, which are to be re-used around the site, shall be stored in a manner to minimize the risk of erosion and sedimentation. Protective measures may include, but are not limited to, covering with plastic sheeting, use of low stockpiles in flat areas, or the use of filter fabric fence and/or staked hay bales.

Road & Storm Drainage

33. Final engineering drawings depicting the street improvements and drainage design shall be submitted to the City's City Engineer for final review and approval prior to issuance of any permits. The street and drainage improvements shall be designed in accordance with the City's Development Standards. Minor modifications of the plans submitted may be approved by the City Engineer if the modifications do not change the Findings of Fact or the Conditions of Approval.
34. Final street design shall include paving, sidewalks, frontage improvements, parking, and emergency access.
35. In order to enforce SMC 16.10.110(B)(2), final engineering drawings shall show a bus turnout adjacent to Road F on Sultan Basin Road for future bus service to this area. Final design shall comply with Community Transit's design standards, subject to the City Engineer's approval.

36. Roads D and F as shown on the preliminary plans are permitted to deviate from the design standards. Roads D and F have a reduced right-of-way width (50 feet instead of 60 feet), have eliminated one (1) parking lane, and will place the required sidewalks within easement on private property.
37. A no parking sign shall be added to the road plans for Roads D and F where there will not be a parking area. The no parking sign shall be installed prior to Final Plat approval.
38. Three-quarter improvements to 132nd Street SE are required. The final civil engineering drawings shall include these improvements, consistent with the City's Design Standards and Specifications.
39. Half-street improvements to Sultan Basin Road are required. The final civil engineering drawings shall include these improvements, consistent with the City's Design Standards and Specifications.
40. Prior to permit issuance, the following revisions to the civil plans shall be made:
 - a. Call out the required minimum four (4) foot black chain link fence for the bio-swale with a ten (10) foot service access and gate. The fence must meet the requirements under the adopted International Building Code.
 - b. Call out the required signs (street signs, stops signs), preliminary mailbox locations, bus stops and signs, school stops and signs, street lighting and fire hydrants.
 - c. Call out any rockeries or retaining walls. A separate permit is required for any wall over four (4) feet in height or that carries a surcharge. Any wall requiring a permit must also have a soils report per the City's Design Standards, and be designed by a professional engineer licensed in the State of Washington. A black chain link fence is required on top of any wall over four (4) feet in height. Permits for the walls shall be submitted, reviewed and approved prior to permit issuance.
 - d. Provide a detail for the required street stub ends signs for Road E.
 - e. Show the driveway locations on the road and grading plan. A separate driveway permit is required with the building permit per the Design Standards and Specifications.
41. All public rights-of-way shall be dedicated to the City with road improvements constructed to current City standards, with approved deviations. Roads A through F shall be dedicated to the public. Dedications shall be completed prior to Final Plat approval.
42. Prior to construction, the Applicant shall prepare a final Construction Stormwater Pollution Prevention Plan (SWPPP) for approval by the City Engineer and the Department of Ecology. The Applicant shall provide a copy of the Department of Ecology, Construction Stormwater General Permit, issued for this project prior to issuance of City permits.
43. Site development shall follow all recommendations of the final stormwater report.
44. The stormwater detention design and stormwater discharge shall utilize the Best Management Practices of the adopted Department of Ecology Stormwater Management Manual for the Puget Sound Basin and the current Department of Ecology National Pollutant Discharge Elimination System (NPDES).

45. Street lighting shall be required on all streets and roads within the development. Prior to lighting installation, the Applicant shall submit a detailed lighting plan that depicts continuous street illumination throughout the PUD, to the City Engineer, for review and approval, pursuant to SMC 16.10.120(B)(4)(a). All lighting shall be shielded so that it reflects away from critical areas, the single-family residences, and neighboring properties.
46. Street lighting shall be maintained by the Applicant, its successor(s) or assigns. A maintenance agreement shall be prepared and recorded with the Final Plat, subject to the approval of the City Engineer.
47. The applicant shall have a Registered Professional Engineer prepare and/or supervise the preparation of, and place his/her professional seal on the "as-built" civil drawings to be reviewed, approved and signed by the City Engineer upon satisfactory installation of the required public street and utility improvements. One (1) reproducible, one (1) signed blueline drawing, one (1) 11"x17" reduced copy, and one (1) electronic copy in CAD format of the drawings shall be submitted prior to final approval of the proposed project.
48. All construction equipment, building materials and debris shall be stored on the applicant's property, out of the public right-of-way. In no case shall the access to any private or public property be blocked or impinged upon without prior consent from the affected property owners and the City of Sultan.
49. If at anytime during clearing, grading and construction the streets are not kept clean and clear, all work will stop until the streets are cleaned and maintained in a manner acceptable to the City Engineer.
50. A traffic control plan shall be prepared by the applicant and approved by the City's City Engineer prior to issuance of any permits. The plan shall describe temporary traffic controls in accordance with the Design Standards and Specifications and the US Department of Transportation document "Manual on Uniform Control Devices".

Fire

51. All requirements of the adopted Uniform Fire Code shall be adhered to during construction and completed before occupancy of any structure.
52. One (1) blue, square (Type II) raised grade or permanent marker shall be installed in the roadway to indicate each fire hydrant location. It shall be placed directly across from the hydrant location, off set one (1) foot from the roadway center toward the hydrant.
53. An access route, for fire fighting apparatus, must be provided at the start of construction. Minimum access route requirements include a 20' width, 13'6" vertical height clearance, and the ability to support a load up to 68,000 pounds.
54. Fire hydrants are to be located in accordance with the Uniform Fire Code as adopted by the City and meet the Fire Department standards with regards to distances from structures.
55. Any structure setback from the public way or on private roads shall have their addresses posted as to be visible on the public way, or posted at the intersection of the driveway, or private road, and the public way off of which they are addressed.
56. Fire hydrant locations shall be designated and shown on the plat engineering plans.

57. The Applicant shall demonstrate sufficient water flow from the proposed fire hydrants for review and approval by the City Engineer and Fire District prior to the issuance of permits.

Utilities

58. All water service improvements shall be installed prior to Final Plat approval and required easements shall be provided, in accordance with the City of Sultan standards. Construction and materials shall conform to the City of Sultan 2004 Water and Sewer Engineering Standards. All easements shall be shown on the face of the Final Plat map. Written verification stating that all required improvements have been installed, including water service stubbed to each lot, shall be submitted with application for Final Plat.
59. All waste water improvements shall be installed prior to Final Plat approval and required easements shall be provided, in accordance with City of Sultan standards. Construction and materials shall conform to the City of Sultan 2004 Water and Sewer Engineering Standards. All easements shall be shown on the face of the Final Plat map. Written verification stating that all required improvements have been installed, including waste water service stubbed to each lot, shall be submitted with application for Final Plat.
60. The cost of any work, new or upgrade, to the existing electric system and facilities that is required to connect the project to the Snohomish County PUD electric system shall be in accordance with applicable Snohomish County PUD policies. Written verification stating that all required improvements have been installed, including power service stubbed to each lot, shall be submitted with application for Final Plat.
61. All utilities shall be placed underground unless otherwise approved by the City Engineer.
62. The applicant shall relocate any utilities affected by the construction of the subdivision improvements at no cost to the City of Sultan.
63. Puget Sound Energy is the natural gas provider in this area. To initiate new service orders, contact Puget Sound Energy at 1-888-Call-PSE (225-5773) at least four (4) months prior to the required service date. Any relocation of existing gas facilities for this development will be at the developer's sole expense, and require 90 days minimum notice.

Environmental

64. All phases of plat development, including drainage and earthwork construction shall be in accordance with the geotechnical reports prepared for the project, including the Earth Solutions NW, LLC report dated November 27, 2006 and the Terra Associates, Inc. report dated July 27, 2005; as well as any subsequent addendums as accepted by the City Engineer. A note to this effect shall be placed on the final Plat.
65. Special attention shall be paid to the following geotechnical recommendations recommendations, which shall be noted on the approved Civil Plans:
- The following recommendations are from the Earth Solutions NW, LLC report dated November 27, 2006.
 - a. All grading activity will take place between April 1 and October 1.
 - The following recommendations are from the Terra Associates, Inc. report dated July 27, 2005.

- a. CBR and soil cement strength tests will be conducted on the subgrade.
 - b. A review of the final grading and stormwater detention system will be conducted and an addendum submitted prior to the approval of permits.
 - c. The erosion control BMP's noted in the geotechnical report shall become apart of the TESC plan submitted for permits.
 - d. The single-family residences will employ Class C construction techniques.
 - e. Removal of twelve (12) to thirty-six (36) inches of surficial fill will be required for house construction.
 - f. A geotechnical engineer shall be on-site during excavation, and shall provide any necessary recommendations to the City prior to any fill or house construction.
 - g. Use of wet soil is prohibited. All wet soil must be aerated under the supervision of a geotechnical engineer in accordance with the recommendations of the geotechnical report.
 - h. Tests of all fill materials will be completed by a geotechnical engineer as required by the report.
 - i. Foundations shall be placed a minimum of eighteen (18) inches below the final finished grade. A written confirmation of the appropriate depth shall be provided prior to foundation approval from a geotechnical engineer.
 - j. The foundation and slab-on-grade recommendations shall be adhered to.
 - k. The recommendations regarding pavement and tests shall be completed under the supervision of a geotechnical engineer.
66. Prior to permit issuance, a final geotechnical report shall be submitted with recommendations on the final design of the plat improvements. The final report shall also state which lots require a separate report to be submitted with building permit application. The required note on the Final Plat under the above condition shall reference the final geotechnical report, and any subsequent addendums as accepted by the City Engineer.
67. A geotechnical addendum shall be submitted with each house design at the time of building permit submittal for those lots that are subject to the requirement. The geotechnical addendum shall address foundations, setbacks, drainage control and any other issues deemed pertinent by the geotechnical engineer or the City Engineer. A note to this effect shall be placed on the face of the Final Plat, stating which lots are subject to this requirement.
68. All phases of plat development shall be in accordance with the critical area study and mitigation plans prepared for the project by the Jay Group, Inc. revised December 4, 2006, and any subsequent reports as accepted by the Community Development Director.
69. The critical areas study states that invasive species removal will be undertaken within the wetland buffer by mechanical means. All removal of invasive species shall be done using only handheld equipment. The Community Development Director and City Engineer may approve mechanical equipment under the supervision of a qualified professional. No equipment may be used within any wetland.

70. All Native Growth Protection Areas (NGPA) shall be shown on the development site plans and Final Plat map, and a note shall be attached as follows: "There shall be no clearing, excavation, or fill within a Native Growth Protection Area shown on the face of this site plan/plat, with the exception of required utility installation, removal of dangerous trees, topping of trees, thinning of woodlands for the benefit of the woodlands as approved by the building official, and removal of obstructions on drainage".
71. An easement shall be established allowing the City to access that portion of Wetland DT remaining on the subject property, as identified in the Critical Area Report and Plat maps, for mitigation and maintenance purposes, prior to Final Plat approval.
72. A temporary sign shall be placed every fifty (50) feet at the boundary of all Native Growth Protection Areas during periods of construction, clearing, grading or excavation on adjacent property. The sign shall describe the limitations on site disturbance and development within the Native Growth Protection Area. A permanent sign shall be placed at the boundary of all Native Growth Protection Areas describing the limitations on development prior to Final Plat approval.
73. The Applicant shall comply with the current National Pollution Discharges Elimination System (NPDES) requirements for site disturbances in excess of one (1) acre as regulated by the Washington State Department of Ecology. A copy of the permit shall be submitted to the City prior to permit issuance.
74. If applicable, the Applicant shall obtain a Forest Practices Application (FPA) permit from the Department of Natural Resources (DNR) for commercial resale and hauling of merchantable timber. A copy of the permit shall be submitted to the City prior to permit issuance.
75. The conditions recommended by Graham-Bunting Associates, dated March 19, 2007, regarding the wetland and buffer mitigation shall be followed.
76. A final mitigation plan shall be submitted to the City's Community Development Department for review and approval prior to issuance of any plat development permits. All plantings shall be installed in accordance with the approved mitigation plan. All plantings shall be installed by the applicant, inspected, and approved by the City of Sultan prior to Final Plat approval. Minor modifications of the mitigation plans submitted may be approved by the Community Development Director if the modifications do not change the findings of fact or the conditions of approval.
77. The final mitigation plan shall be submitted with the following revisions:
 - a. A split rail fence shall be installed on all reduced buffers and adjacent to proposed lots and active open space areas. The fence shall allow for the movement of wildlife in and out of the wetlands and shall protect the critical areas and the newly installed plans from human impacts. The design and location of the fence is subject to the approval of the Community Development Director.
 - b. Increased buffer plantings shall be shown on the north side of Wetland AA to increase the functions and values of that wetland, as it is being used as a mitigation to reduce buffers on the other wetlands and for the wetland fill.

- c. Show that species compatible with the stormdrainage system will be planted within Tracts 986 and 987.
 - d. All trails shown within wetland buffers shall demonstrate compliance with the requirements of SMC 16.80.080.
78. A Time-Zero/As-Built mitigation planting plan report shall be submitted to the City with Final Plat submittal.
79. The mitigation plantings shall be monitored annually for three (3) years. A monitoring report shall be submitted to the City each year on the anniversary of the completion approval of the mitigation plantings. Success of the mitigation plan will depend on adherence to the minimum standards below, the detailed goals in the mitigation report, and the proposed Contingency Plan:
- a. 100% replacement/survival of plants after Year 1
 - b. Minimum 80% survival at end of Year 2
 - c. Minimum 80% survival at end of Year 3.
 - d. Adherence to the proposed Contingency Plan if 80% is not reached.
80. As part of the proposed Covenants, Conditions and Restrictions of the Homeowners Association shall address the potential increase of litter or garbage in the critical areas. Maintenance for these areas shall be the responsibility of the Homeowners Association after the monitoring period.

Landscaping and Recreation

81. Per the City of Sultan Design Standards and Specifications, street trees are required every twenty (20) lineal feet on the interior local access roads and on Sultan Basin Road; and every fifty (50) lineal feet on 132nd Street SE. If the twenty (20) lineal foot spacing requirements cannot be met, the location of the street trees will be field located as approved by the Community Development Director and City Engineer.
82. The species for the street trees shall be subject to the approval of the City Engineer and Community Development Director.
83. All phases of plat development shall be in accordance with the Vegetation Inventory and Plant Preservation Management Plan prepared the Jay Group, Inc. revised August 4, 2005, and any subsequent reports as accepted by the Community Development Director.
84. A final landscaping plan for the recreation areas, the trees to be planted on the lots, street trees, and the required buffer enhancement shall be submitted, reviewed and approved prior to issuance of permits. The landscaping shall be installed in accordance with the approved landscaping plan and shall be subject the following.
85. All landscaping shall be maintained in healthy growing condition. A final landscape inspection will be performed at the end of the two (2)-year period and any dead, dying or diseased plant material shall be replaced.
86. The landscaping shall be installed in accordance with the approved landscaping plan. Minor modifications of the landscaping plans submitted may be approved by the

Community Development Director if the modifications do not change the Findings of Fact or the Conditions of Approval.

87. The following revisions to the Recreation Plan shall be made prior to permit issuance:
- a. Correct square footages that also match the square footages shown on the plat maps and on the civil plans.
 - b. Delineate between the general open space areas and those areas that will be designated recreation areas.
 - c. Recalculate the open space areas to include the bus turnaround adjacent to Road F.
 - d. Demonstrate that the open space requirements per SMC 16.10.140 have been met. This includes twenty (20) percent of open space for the property, plus fifteen (15) percent usable open space as defined in the Code.
 - e. Provide ADA access to a minimum of twenty-five (25) percent of the recreation areas (SMC 16.72.040(I)).
 - f. Provide a landscaping plan for each of the recreation areas, per SMC 16.72.040. The landscaping for these areas shall meet the requirements of SMC 16.72.040, Recreation Design Requirements. At a minimum, there shall be a ten (10) foot landscaped perimeter and protective fencing a minimum of four (4) feet in height. All fences require a separate permit under SMC 15.08. This landscaping plan is subject to the approval of the Community Development Director and City Engineer.
 - g. Provide details for the recreation area equipment and amenities.
 - h. Specified the construction details for the trail. Per the pre-application meeting, a five (5) foot wide path made of 5/8 inch minus gravel is required.
 - i. A pedestrian path is required to be installed within the Plat, in conformance with the 2004 Comprehensive Plan. This trail shall be installed as shown on the approved plans, and shall connect through the property dedicated to the City (Parcel C) through the Boundary Line Adjustment process to the south, at no cost to the City.
 - j. Per SMC 16.72.040(J), all recreation areas and facilities and equipment provided and constructed shall meet the minimum requirements of the Consumer Product Safety Guidelines for Public Playgrounds and the American Society for Testing and Materials F1487.
88. The following revisions to the Residential Landscaping Plan shall be made prior to permit issuance:
- a. Seventy-seven (77) trees are required to be planted on the lots, in accordance with SMC 16.104.090. Five different species are required, with a minimum height of seven (7) feet and minimum caliper of 1.5. The trees planted must have a mature crown spread of ten (10) feet minimum. In addition, the trees selected should be native species or species adaptive to the vicinity. A tree planting plan is required, showing the location and types of trees that will be planted on the lots. A preliminary tree planting plan shall be submitted, reviewed and approved prior to permit issuance, and a final tree planting plan shall be submitted, reviewed and approved prior to Final Plat approval.

- b. If the requirement to plant the trees is deferred until building permit submittal or after home construction, a performance bond in the amount of 125% will be required for the required trees.
- c. A reference to the approved tree replanting plan will be added as a note on the face of the Final Plat. All trees planted must be alive one (1) year occupancy is obtained for each single-family residence.

Fees

89. The latecomers fee due under the Bethany Terrace Ordinance shall be due prior to permit issuance
90. The Applicant shall maintain the landscaping, open space improvements, drainage facilities, private streets and other common areas within the site for a two (2) year period following acceptance of installation by the City of Sultan. Such maintenance shall be secured with a surety filed with the City. Subsequent to the two (2) year period, maintenance responsibility shall be passed to the Homeowners Association. The proposed Covenants, Conditions and Restrictions of the Homeowners Association shall address maintenance of the landscaping, open space improvements, drainage facilities, private streets and other common areas.
91. The applicant shall submit an acceptable warranty surety to warrant all required public improvements, installed, against defects in labor and materials for a period of 24 months after acceptance of those improvements by the City. The warranty amount shall be equal to twenty-five (25) percent of the costs of the improvements, as determined by the City Engineer. The surety shall be submitted to and approved by the City of Sultan and executed prior to Final Plat approval.
92. All work performed within City right-of-way shall require a performance surety in the amount of 125% of estimated construction cost. The surety shall be submitted to and approved by the City of Sultan and executed before issuance of any permits.
93. The applicant shall pay recreation facility impact mitigation fees or other forms of negotiated impact mitigation directly to the City of Sultan in accordance with SMC 16.112.030 or similar requirements associated with the Growth Management Act. Payment of the recreation facility impact mitigation shall be made to the City prior to permit issuance. The total fee or mitigation amount shall be based on the mitigation fee established in SMC 16.112.030 in effect at the time of fee payment. When payment is deferred to building permit issuance, a note to this effect shall be affixed to the face of the Final Plat map.
94. The applicant shall pay school impact mitigation fees or other forms of negotiated impact mitigation directly to the City of Sultan in accordance with SMC 16.116 or similar requirements associated with the Growth Management Act. Payment of the school impact mitigation shall be made to the City of Sultan prior to permit issuance. The amount of the fee due shall be based on the fee schedule in effect at the time of permit application. When deferred to building permit issuance, a note to this effect shall be affixed to the face of the Final Plat map.
95. The applicant shall pay traffic impact mitigation fees or other forms of negotiated impact mitigation directly to the City of Sultan in accordance with SMC 16.112.040 or similar

requirements associated with the Growth Management Act. Payment of the traffic impact mitigation shall be made to the City prior to permit issuance. The total fee or mitigation amount shall be based on the mitigation fee established in SMC 16.112.040 in effect at the time of fee payment. When payment is deferred to building permit issuance, a note to this effect shall be affixed to the face of the Final Plat map.

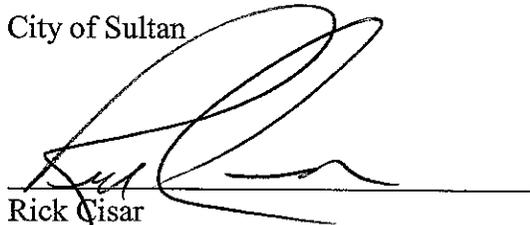
96. The development is subject to traffic mitigation measures as assessed by the Washington State Department of Transportation (WSDOT) for impacts upon the State Highway System. The pro-rata share payment for the US 2 and 5th Street, US-2/Sultan Basin Road, and Sultan WCL, West Bound Passing Lane projects as determined by WSDOT shall be paid directly to WSDOT and verification of that payment shall be provided to the City prior to issuance of City permits.
97. The applicant shall be required to provide a fee to the Community Development Department for the amount established by the City's most recent fee schedule for plan review and inspection costs.
98. A deposit shall be required for the Final Plat processing per Resolution 06-20 for any legal/consultant fees incurred by the City in processing the application. Direct costs for larger projects vary; therefore the City Attorney will provide and estimate for the review of the project. The applicant shall provide an additional deposit as determined by the Community Development Department if the actual cost of the work performed exceeds the initial deposit. The city shall refund any unused monies at the time of recording.
99. The applicant shall submit an acceptable warranty surety to warrant all mitigation plantings for a period the matches the three (3) year monitoring period. The warranty amount shall be equal to twenty-five (25) percent of the costs of the improvements, as determined by the Community Development Director. The surety shall be submitted to and approved by the City of Sultan and executed prior to Final Plat approval.
100. A deposit shall be submitted prior to Final Plat approval with submittal for sureties to cover the estimated City's costs to review the yearly monitoring reports and conduct a site inspection to ensure the performance standards are being met. The applicant shall pay the actual costs to review the reports and conduct inspections. The amount of the deposit shall be based on the hourly fee of the Community Development Director, and shall be calculated at the time the deposit is put into place.

Other

101. Prior to permit issuance for plat development, the easement recorded under AFN 9711070477 shall be vacated, and new plans and a new title report shall be submitted to the City showing this easement removed. If this easement cannot be vacated, new plat and civil drawings shall show no buildable area within this easement.
102. Preliminary Plat approval shall be effective for a maximum time period of five (5) years from the date of City Council approval, upon which a Final Plat that meets all conditions of the Preliminary Plat approval must be submitted, in accordance with SMC 16.10.150.
103. The applicant shall apply to the Snohomish County Auditor at 3000 Rockefeller Avenue, Everett, WA 98201-4060 for a plat name reservation certificate and furnish the City with a copy of the approved reservation certificate at the time of Final Plat submittal.

104. If applicable, at the time of Final Plat submittal the applicant shall submit a group mailbox plan, approved by the U.S. Post Office, to the Community Development Department for final addressing. Contact: Manager, Delivery and Construction, U.S. Post Office, (206) 422-2420.
105. All contractors and subcontractors working on the project described herein shall obtain a business license from the City prior to initiation of any site work.
106. In accordance with SMC 16.28.340, the Applicant 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. Site construction drawings shall be designed consistent with the conditions of approval. Site work shall not begin until City approval of the Developer Agreement has been obtained.
107. In order to maintain an acceptable Level of Service (LOS) for Police Services, the Applicant shall provide a Development Agreement to guarantee the LOS for Police Services.
108. If a model home is proposed to be constructed prior to Final Plat approval, all requirements of SMC 16.28.395 shall be met.
109. All fences shall require a separate permit subject to the requirements of SMC 15.08.
110. Construction noise is not allowed between the hours of ten (10) p.m. to seven (7) a.m. on weekdays, and ten (10) p.m. to nine (9) a.m. on weekends.
111. The applicant, contractor, and any geotechnical or wetland specialist required to be on-site during construction, shall attend a pre-construction meeting with City staff to discuss expectations and limitations of the project permit before starting the project.
112. The location of any signs on approved plans is for illustrative purposes only. Pursuant to SMC Title 22, a sign permit must be obtained for the placement of any non-exempt signage. Application for that sign permit shall include an approved site plan specifying the location of all signs.

City of Sultan


Rick Qisar
Director of Community Development

8-27-07
Date

- A.** Location Map
- B.** Preliminary Plat Map, submitted June 12, 2007
- C.** Application & Project Narrative (Original Binder Section B)
- D.** Water and Sewer Availability Letters, dated December 13, 2006
- E.** DNS and SEPA Checklist
- F.** Critical Area Reports & Conceptual Mitigation Plan revised December 4, 2006 (Original Binder Section J)
- G.** Vegetation Inventory and Plant Preservation Management Plan dated August 4, 2005 (Original Binder Section K)
- H.** Preliminary Drainage Report dated December 6, 2006 (Original Binder Section I)
- I.** Preliminary Geotechnical Report dated July 27, 2005 and reviewed November 27, 2006 (Original Binder Section M)
- J.** Traffic Report, dated July 22, 2005 and revised November 28, 2006 (Original Binder Section L)
- K.** Level of Service Agreement for Police, dated July 17, 2007
- L.** Design Variance Request

RECEIVED
OCT 12 2007

BY:

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26

HEARING EXAMINER FOR THE CITY OF SULTAN

In Re: GREENS ESTATES PUD AND
PRELIMINARY PLAT APPLICATION

FPPUD05-001

SULTAN 144 LLC'S APPEAL OF THE
HEARING EXAMINER'S DENIAL OF
MOTION FOR RECONSIDERATION

I. RELIEF REQUESTED

Applicant, Sultan 144 LLC ("Sultan 144"), respectfully requests that Council reverse the Examiner's recommendation of denial of the Greens Estates PUD based on proximity to transit, as set forth in the Examiner's September 19, 2007 Decision ("HE Decision") and October 4, 2007 Order Denying Request for Reconsideration ("Order").

Specifically, Sultan 144 requests:

1. That the Council find that the requirements of SMC 16.10.110(B)(2)(d) are met based on the Green Estates' proximity to transit, which is virtually identical to the proximity to transit for the Skoglund Estates project that was previously approved by the Council on June 29, 2006, in Resolution No. 06-09A.

APPEAL OF HEARING EXAMINER'S
PUD DECISION - 1

FOSTER PEPPER PLLC
1111 THIRD AVENUE, SUITE 3400
SEATTLE, WASHINGTON 98101-3299
206-447-4400

Exhibit 3

1 **II. EVIDENCE RELIED UPON**

2 This Motion relies upon the Declaration of Mark Villwock, P.E. and the exhibits
3 attached thereto that were provided to the Examiner with Sultan 144's Motion for
4 Reconsideration.

5 **III. ANALYSIS**

6 Appeals of the Examiner's decision are authorized pursuant to SMC 2.26.140.

7 **A. The Greens Estates Project Complies With The Sultan City Council's Prior**
8 **Interpretation of SMC 16.10.110(B)(2)(d).**

9 The Examiner's decision that the Greens Estates project did not have "sufficient
10 proximity" to "facilitate transit access" was based on a finding that the site was more than a
11 mile from the nearest transit stop on SR 2. HE Decision Finding 10(D); Conclusions 4-7.

12 Based on GIS measurement, the Greens Estates is located 0.992 miles from the SR2
13 Park-n-Ride. This distance is virtually identical to the distance between the Skoglund Estates
14 project and the SR-2 Park-n-Ride, which is 0.994 miles as determined by a GIS measurement.
15 Villwock Declaration ¶¶4-5 and Exhibits 1 and 2 attached thereto.

16 The Examiner had no rationale basis for denying the Greens Estates Project for
17 noncompliance with SMC 16.10.110(B)(2)(d), given that the distance is actually slightly less
18 than that for the Skoglund Estates project, which was approved by the Council as being
19 sufficiently proximate to transit. In short, the Examiner should have followed the Council's
20 previous interpretation of SMC 16.10.110(B)(2)(d) and treat like-situated projects similarly.
21 *Castle Homes and Development, Inc. v. City of Brier*, 76 Wn.App. 95, 882 P.2d 1172 (1994)
22 (Hearing Examiner erred in disregarding Council's mandate).

23 In approving Skoglund Estates, the Council found that the proximity requirement was
24 met:

- 25 18. Community Transit Routes 270, 271, and 271 [sic] service the Sultan Park &
26 Ride on Use 2 east of 10th Street approximately 1.0 mile from the site. Service is
provided through the City and to and from Everett via Snohomish and Monroe.

1 ***Development of the type herein will facilitate and increase the prospect of a***
2 ***direct route along Sultan Basin Road. The Council finds that the site is in***
3 ***sufficient proximity in light of these facts to be approved as a PUD.*** (Emphasis
4 added).

5 Land use ordinances should be given a reasonable construction and application in order
6 to serve their purpose and scope. Unreasonable constructions should be rejected. *State ex rel.*
7 *Edmond Meany Hotel, Inc. v. Seattle*, 66 Wn.2d 329, 402 P.2d 486 (1965); *Bartz v. Board of*
8 *Adjustment*, 80 Wn.2d 209, 492 P.2d 1374 (1972). Importantly, as the Washington Supreme
9 Court recently reaffirmed in *Sleasman v. City of Lacey*, 159 Wn.2d 639, 151 P.3d 990 (2007),
10 such ordinances should be strictly construed in favor of the property owner.

11 It must also be remembered that zoning ordinances are in derogation of the
12 common-law right of an owner to use private property so as to realize its highest
13 utility. Such ordinances ***must be strictly construed in favor of property owners***
14 ***and should not be extended by implication to cases not clearly within their***
15 ***scope and purpose.***

16 *Sleasman v. City of Lacey*, 159 Wn.2d 639, 643, 151 P.3d 990 (2007) (fn. 4) (emphasis
17 added).

18 In approving the Skoglund Estates project, the Council endorsed single family PUDs at a
19 distance of 1 mile from the SR-2 bus stop. The same rationale that was the basis for the
20 Skoglund Estates approval applies to the Greens Estates PUD.

21 With all due respect to the Examiner, the Examiner's "good conscience"¹ or opinion on
22 the distance that a majority of Americans are likely to walk² are not legal standards that warrant
23 deviation from the Council's prior interpretation of SMC 16.10.100(B)(2)(d). Moreover, given
24 that the ordinance must be construed in favor of the property owner, the Examiner is not entitled
25 to impose a three-fifth's mile requirement on PUDs when none is found in the Code. *See HE*
26 *Decision*, p. 9 (quoting *Vodnick Lane Decision* that a site three-fifths of a mile from transit
27 "minimally meets the "sufficient proximity" . . . test.")

¹ HE Decision Conclusion 7.

² HE Decision Finding 5.

1 **B. The Intent of SMC 16.10.110(B)(2)(d) Is To Ensure That PUDs Have**
2 **Similar Transit Access As Similar Development In The Underlying Zone.**

3 The purpose of SMC 16.10.110(B)(2)(d) is not to set some arbitrary and unknowable
4 distance between land that can be developed as a PUD and land that cannot. Rather, it is to
5 ensure that transit access to the PUD-SF would be similar to that for other types of
6 development.

7 The Sultan Municipal Code's PUD provisions do not contain a specific requirement for
8 a certain level of, or distance for, pedestrian access to transit facilities and the requirement of
9 "sufficient proximity" must be read in *pari materia* with the other sections of the Code.

10 For example, SMC 16.10.120(B)(4)(c), which is the requirement that PUDs have
11 effective street networks, establishes the following criteria for transit stops:

12 Transit and school bus routes and transit and school bus stops, either within the
13 development or on the collector or arterials that provide the major access to the
14 proposed development, unless such provision is deemed inconsistent with the
15 transit or school bus routing plans.

16 Thus, a PUD must have a bus stop within the development or on a collector or arterial
17 that provides major access, and no specific distance to the transit stop is established. The
18 requirement facilitates—i.e. makes easier—transit use by requiring a bus stop. Moreover, the
19 requirement to provide a bus stop is conditioned by the phrase "unless such provision is deemed
20 inconsistent with the transit or bus routing plans."

21 The Examiner's interpretation of 16.10.110(B)(2)(d) renders SMC 16.10.110 internally
22 inconsistent because on one hand the regulation acknowledges that transit may be unavailable to
23 a PUD-SF and, on the other, under the Examiner's interpretation, requires that transit be
24 available within approximately three-fifths of a mile.

1 SMC 16.10.110(B)(2)(f) provides:

2 The PUD-SF is located with respect to schools, parks, playgrounds, and other
3 public facilities *such that the PUD will have access to these facilities in the*
4 *same degree as would development in a form generally permitted by the*
underlying zoning in the area. (Emphasis added).

5 When read together, the requirements of SMC 16.10.110(B)(2)(d), 16.10.110(B)(2)(f),
6 and 16.10.120(B)(4)(c) evidence an intent for PUD-SFs to 1) make access to transit easier than
7 it otherwise might be under the requirements of the underlying zone; 2) install bus stops unless
8 inconsistent with transit plans; and 3) have access to public facilities in a manner that would be
9 similar to that of a development in the underlying zone. The requirement to facilitate transit
10 access must be read reasonably and take into consideration the realities of transit availability in
11 Sultan. That reality is that 1) there is no bus route currently serving Sultan Basin Road; 2) no
12 bus route will be implemented until there is sufficient population on Sultan Basin Road to
13 support it; and 3) currently the closest transit stop to the Greens Estates project is a parking lot
14 for a Park-n-Ride, which means people will likely be driving there, not walking.

15 **C. The Examiner's Interpretation of SMC 16.10.110(B)(2)(d) Violates**
16 **Constitutional Rights of Substantive Due Process and Equal Protection And**
Renders The Ordinance Unconstitutionally Vague.

17 **1. The Examiner's Interpretation of SMC 16.10.110(B)(2)(d) Renders The**
18 **Regulation Unconstitutionally Vague.**

19 *Anderson v. Issaquah*, 70 Wn. App. 64, 851 P.2d 744 (1993), establishes when a land
20 use ordinance should be declared void for vagueness.³

21 [A] statute which either forbids or requires the doing of an act in terms so vague
22 that men of common intelligence must necessarily guess at its meaning and differ
as to its application, violates the first essential of due process of law. ...

23 In the area of land use, a court looks not only at the face of the ordinance but also
24 at its application to the person who has sought to comply with the ordinance
and/or who is alleged to have failed to comply. ... The purpose of the void for
25 vagueness doctrine is to limit arbitrary and discretionary enforcements of the
law. ...

26 ³ See also, *Burien Bark Supply v. King County*, 106 Wn.2d 868, 725 P.2d 994 (1986).

1 *Anderson v. Issaquah*, at 75 (internal citations omitted).

2 Here, it is clear that no one can determine what distance away from transit constitutes
3 "sufficient proximity." City staff and the City Council apparently agree that one mile is
4 sufficiently proximate, whereas the Examiner believes that three-fifths of a mile is a better
5 number. This type of guesswork is precisely what is prohibited by *Anderson v. Issaquah*.
6 Additionally, it is arbitrary to deny a project that is actually 0.002 miles closer to the transit stop
7 than a project that has been approved.

8 In his Order, the Examiner candidly acknowledges that he is shooting in the dark with
9 his interpretation—noting that he "did his best" but that "the SMC needs measurable standards
10 to determine compliance with the criteria." Order p. 3. The Examiner concluded that he
11 "sincerely hopes that the Council will establish a quantifiable measure by which compliance
12 with SMC 16.10.110(B)(2)(d) may be determined. . . ."

13 Council has established 1.0 mile as a quantifiable measure for compliance. This
14 measure requires approval of the Greens Estates PUD.

15 **2. The Examiner's Interpretation of SMC 16.10.110(B)(2)(d) Violates**
16 **Substantive Due Process.**

17 "Due process requires governments to treat citizens in a fundamentally fair manner."
18 *Valley View Industrial Park v. City of Redmond*, 107 Wn.2d 621, 636, 733 P.2d 182 (1987).
19 In *Presbytery of Seattle v. King County*, the Washington Supreme Court explained the
20 substantive due process doctrine as follows:

21 To determine whether the regulation violates [substantive] due process, the court
22 should engage in the classic 3-prong due process test and ask: (1) whether the
23 regulation is aimed at achieving a legitimate public purpose; (2) whether it uses
24 means that are reasonably necessary to achieve that purpose; and (3) whether it is
25 unduly oppressive on the land owner. "In other words, 1) there must be a public
26 problem or 'evil,' 2) the regulation must tend to solve this problem, and 3) the
27 regulation must not be 'unduly oppressive' upon the person regulated." The
28 third inquiry will usually be the difficult and determinative one.

29 The "unduly oppressive" inquiry lodges wide discretion in the court and implies
30 a balancing of the public's interest against those of the regulated landowner. We
31 have suggested several factors for the court to consider to assist it in determining

1 whether a regulation is overly oppressive, namely: the nature of the harm sought
2 to be avoided; the availability and effectiveness of less drastic protective
measures; and the economic loss suffered by the property owner. ...

3 If the regulation is not aimed at a legitimate public purpose, or uses a means
4 which does not tend to achieve it, or if it unduly oppresses the landowner, then
5 the ordinance will be struck down as violative of due process and the remedy is
invalidation of the regulation. No compensation (which properly belongs with a
"taking" analysis) is warranted in the face of a due process violation.

6 *Presbytery of Seattle v. King County*, 114 Wn.2d 320, 330-332, 787 P.2d 907 (1990) (internal
7 citations omitted).

8 The Examiner's interpretation of SMC 16.10.110(B)(2)(d) does not foster a legitimate
9 public purpose. While it may be a laudable public goal to provide access to public
10 transportation, it is unfair to thwart a development merely because the property is located on a
11 road that is currently not served by public transportation, when there is no Code provision that
12 requires this result. It is also unfair to draw an arbitrary line for where PUDs will be allowed in
13 Sultan when no such line is provided for in the Code.

14 The Examiner's interpretation is unduly oppressive. A regulation is unduly oppressive,
15 in violation of the third prong of substantive due process, when it is more burdensome than
16 necessary to serve its purpose.

17 Here, a property-owner cannot move the land to another location. There is no indication
18 in the Code that the Council ever intended to exclude all land within the City from PUD
19 consideration if it was more than three-fifths of a mile from the SR-2 bus stop.

20 Sultan 144 was entitled to rely upon a reasonable interpretation of the City's PUD
21 regulations, including the staff interpretations for both the Skoglund and Greens projects and the
22 Council's action approving the Skoglund PUD. As a result, Sultan 144 has millions of dollars
23 at risk with its Greens Estates development. By prohibiting otherwise permitted development,
24 the Examiner's interpretation, if adopted by Council, would greatly devalue Sultan 144's
25 property and other similarly situated properties.

1 In short, it was fundamentally unfair, and a violation of equal protection, for the
2 Examiner to recommend denial of the Greens Estates project when it presents the same factual
3 circumstances as the Skoglund Estates project. See also, *Sabin v. Skagit County*, 136 Wn. App.
4 869, 152 P.3d 1034 (2006) (County could not repeatedly reverse the reasonable interpretation of
5 its own ordinance).

6 III. CONCLUSION

7 For the foregoing reasons, Sultan 144 respectfully requests that the Council reject the
8 Examiner's recommendation, find that the Greens Estates project is compliant with
9 SMC 16.10.110(B)(2)(d), and approve the PUD.

10
11 Respectfully submitted this 12th day of October 2007

12
13 FOSTER PEPPER PLLC

14 

15 Patrick J. Mulhane, WSBA No. 2082
16 Attorney for Applicant Sultan 144 LLC

RECEIVED
OCT 12 2007

BY:

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26

HEARING EXAMINER FOR THE CITY OF SULTAN

In Re: GREENS ESTATE PUD AND
PRELIMINARY PLAT APPLICATION

FPPUD05-001

DECLARATION OF MARK
VILLWOCK, P.E. IN SUPPORT OF
SULTAN 144 LLC'S MOTION FOR
RECONSIDERATION

I, MARK VILLWOCK, declare under penalty of perjury and the laws of the State of Washington that the following is true and correct and based upon my own personal knowledge.

1. I am over eighteen years of age and competent to testify in this matter.
2. I am employed as a Project Manager with LDC, Inc. and am a registered professional engineer in the State of Washington. In that capacity, I have been employed on the Greens Estates PUD and Preliminary Plat applications and testified at the recent public hearing on the PUD.
3. Following receipt of the Examiner's decision denying the PUD based upon the proximity to transit criteria (SMC 16.10.110(B)(2)(d)), I calculated the distance from the Greens PUD to the Park-n-Ride bus stop on SR 2 using Graphical Information System ("GIS") software. This program enables very accurate measurements of distance.

DECLARATION OF MARK VILLWOCK - 1

FOSTER PEPPER PLLC
1111 THIRD AVENUE, SUITE 3400
SEATTLE, WASHINGTON 98101-3299
206-447-4400