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BEFORE the HEARING EXAMINER of the  
CITY of SULTAN

RECOMMENDATION  
(and DOCUMENTATION OF APPEAL SETTLEMENT)

FILE NUMBERS: FPPUD05-003 and AP07-002 <sup>1</sup>

APPLICANT: Grandview, Inc.

TYPE OF CASE: Preliminary Planned Unit Development subdivision  
(*Anderson Farm*)

STAFF RECOMMENDATION: Deny

SUMMARY OF RECOMMENDATION: DENY

DATE OF RECOMMENDATION: May 16, 2008

INTRODUCTION

Grandview, Inc. (Grandview), P.O. Box 159, Arlington, Washington 98223, seeks preliminary approval of *Anderson Farm*, a 26 lot single-family residential Planned Unit Development (PUD) subdivision of two legal parcels totaling approximately 6.47 acres zoned Moderate Density (MD).

Grandview filed the application on September 15, 2005. (Exhibit S3 <sup>2</sup>) The Sultan Department of Community Development (DCD) deemed the application complete by letter dated October 11, 2005. (Exhibit S6) On November 13, 2007, Grandview appealed the State Environmental Policy Act (SEPA) Mitigated Determination of Nonsignificance (MDNS) issued for *Anderson Farm* by DCD. (Exhibit S20)

The subject property is located at the intersection of Sultan Basin Road and 135<sup>th</sup> Street SE (aka Bryant Road).

The Sultan Hearing Examiner (Examiner) viewed the subject property on May 5, 2008.

<sup>1</sup> See SEPA Appeal section, below, for explanation of the disposition of case AP07-002.

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

The Examiner convened a consolidated open record hearing on May 5, 2008, which was concluded on May 6, 2008, to consider both the SEPA appeal and the merits of the development application. DCD and Grandview gave notice of the hearing as required by the Sultan Municipal Code (SMC). (Exhibit S23)

The following exhibits were entered into the hearing record during the hearing:<sup>3</sup>

*By the City:*

- S1. Staff Report and Recommendation to the Hearing Examiner
- S2. SEPA Standard of Review
- S3. Original application, received September 15, 2005
  - a) Master Land Use Application Form
  - b) Property Owner Declarations and Property Application Declaration
  - c) Narrative, Statement of Objectives, & Quantitative Data;
  - d) Letter of Water Availability, issued August 12, 2005
  - e) Letter of Sewer Availability, issued August 12, 2005
  - f) Letter of acknowledgement for impact fees
  - g) Anderson Farms Open Space Requirements acknowledgement
  - h) Concurrency application
  - i) Adjacent property information
  - j) Traffic Analysis, Gibson Traffic Consultants, August 12, 2005
  - k) Subsurface Exploration, Geologic Hazard, and Preliminary Geotechnical Engineering Report, Associated Earth Sciences, Inc., September 2, 2005
  - l) Title Report, Stewart Title Company, August 30, 2005
  - m) Minutes from the June 29, 2005 pre-application meeting, September 13, 2005
- S4. Streetscape and Unit Plans, Carl J. Colson, September 7, 2005
- S5. Review of Traffic Impact Analysis for Proposed Anderson Farms Residential Development, Geralyn Reinart, P.E., October 13, 2005
- S6. Letter of Completeness, City of Sultan, October 11, 2005
- S7. Memorandum, Jon R. Stack, PE, City Engineer, October 17, 2005
- S8. Letter from Graham-Bunting requesting additional information, November 9, 2005
- S9. Second Submittal reducing the project scope from 35 lots to 26 lots, May 4, 2006
  - a) Response to preliminary submittal review comments, Higa Burkholder, May 4, 2006
  - b) SEPA Checklist, signed May 5, 2006
  - c) Preliminary Drainage Report, Higa Burkholder, April 28, 2006

<sup>3</sup> The Examiner convened a prehearing conference with the principal parties to the SEPA appeal (Grandview and DCD) on February 20, 2008, to discuss procedural matters associated with the appeal. One result of that conference was establishment of a schedule for pre-filing of documentary evidence for the appeal. (Exhibit A1) All of the exhibits in this proceeding are numbered using the protocol established at that conference.

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- S10. Letter from City acknowledging application resubmittal reducing the project scope from 35 lots to 26 and requesting further information on wetland mitigation, dated June 16, 2006
- S11. Letter to Jake Libaire regarding wetland impacts and mitigations, Graham-Bunting Associates, August 23, 2006
- S12. Notice and Order of City of Sultan Code Violation Order Number 01001, October 15, 2001
- S13. Notice of Appeal of Code Violation and Civil Penalty Order, October 26, 2001
- S14. Hearing Examiner Decision on Appeal of Notice and Order, June 3, 2002
- S15. Settlement Agreement between City of Sultan and Grandview Inc., January 2005
- S16. Critical Area Study and Mitigation Plan, Wetland Resources, Inc., revised December 4, 2006
- S17. Preliminary Plans, submitted January 26, 2007
  - a) Site Plan
  - b) Drainage and Grading Plan
  - c) Existing Conditions
  - d) Landscape Plan
- S18. Letter to Rick Cisar regarding third party review of the December 2006 Critical Area Report/Mitigation Plan and January 2007 Preliminary Plans, Graham-Bunting Associates, March 28, 2007
- S19. Mitigated Determination of Non-Significance, City of Sultan, October 16, 2007
- S20. Notice of Appeal of Mitigated Determination of Nonsignificance, William B. Foster, November 13, 2007
- S21. Letter from City regarding timeliness of appeal, dated November 15, 2007
- S22. SEPA MDNS Appeal Staff Report to the Hearing Examiner, City of Sultan, February 28, 2008
- S23. Hearing notice documentation
- S24. City Council Resolution No. 08-03
- S25. City Ordinance No. 917-06
- S26. City Council Resolution No. 08-05
- S27. City Council Resolution No. 08-12
- S28. Excerpt from Snohomish County Engineering Design and Development Standards 2004 (EDDS 2004), p. 47

*By Grandview:*

Submitted April 28, 2008:

- G1. Memorandum of Authorities with:
  - a) March 2006 SEPA Checklist [Duplicate of S9b]
  - b) October 2007 MDNS [Duplicate of S19]
  - c) June 2006 Letter from City regarding the reduction of lots from 35 to 26 [Duplicate of S10]
  - d) March 2007 Third Party Review from Graham-Bunting and Associates [Duplicate of S18]
  - e) December 2006 Critical Area Study and Mitigation Plan by Wetland Resources [Duplicate of S16]

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Submitted April 29, 2008:<sup>4</sup>

- G2. Residential Street Typology and Injury Accident Frequency prepared by Swift, Painter and Goldstein (no date)
- G3. March 2006 SEPA Checklist [Duplicate of S9b and G1.1]
- G4. December 2006 Critical Area Study and Mitigation Plan by Wetland Resources [Duplicate of S16 and G1.5]
- G5. January 2007 Anderson Farm Site Plan
- G6. Alternative Site Plan for Anderson Farms
- G7. *Stratford Place* Construction Plans

*Administrative and Public:*

- A1 Order Memorializing a Prehearing Conference, February 21, 2008
- A2 Hearing submittal by Ron Kraut
  - a) Letter, May 5, 2008
  - b) Chapter 16.108 SMC
  - c) Excerpt from Exhibit S1: p. 17
  - d) Copy of Exhibits S3d and S3e
  - e) Partial copy (Missing page 3.) of City of Sultan's Response to Central Puget Sound Growth Management Hearings Board (Hearings Board) consolidated cases *Fallgatter V, VIII, and IX*, February 28, 2008

The Examiner has altered the usual structure of a Recommendation for this case. Normally, Findings of Fact and Conclusions of Law are set forth in separate sections separated by a section on Legal Framework. In this Recommendation, Findings of Fact and Conclusions of Law are merged and grouped by topic, preceded by the Legal Framework section. The purpose of this structure is to bring the Findings of Fact and Conclusions of Law for each of the many contentious issues surrounding this application closer together. The Examiner hopes that this organizational structure will facilitate better understanding of the issues.

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.

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<sup>4</sup> The established deadline for document submittal was April 28, 2008. (Exhibit A1, ¶ 3(e)) DCD waived any objection to the late filing of the following six exhibits. (Testimony)

## SEPA APPEAL <sup>5</sup>

On October 16, 2007, DCD issued a SEPA MDNS for *Anderson Farm*. The deadline to appeal the MDNS was November 13, 2007. (Exhibit S19) On November 13, 2007, Grandview filed an appeal from the MDNS. (Exhibit S20) Grandview's appeal was assigned City file number AP07-002. On November 14 and 15, 2007, DCD advised a Grandview representative that Grandview had failed to pay the required appeal filing fee. Grandview paid the appeal fee on November 15, 2007, two days after the end of the appeal filing period. (Exhibit S21)

At the outset of the May 5, 2008, consolidated hearing DCD asked the Examiner to rule on the timeliness of Grandview's appeal. <sup>6</sup> DCD's position was essentially that in order for the appeal to be complete, the appeal fee had to have been paid within the appeal filing period.

Whether untimely payment of an appeal filing fee deprives the hearing body of jurisdiction to consider a timely filed appeal depends upon the relevant language of the local code. [*Graham Thrift Group v. Pierce Cy.*, 75 Wn. App. 263 (Div. 1, 1994)] In the absence of specific code language, Washington appellate courts have historically overlooked untimely payment of an appeal fee if the omission was the result of inadvertent oversight and was corrected promptly. [*Boehm v. City of Vancouver*, 111 Wn. App. 711 (Div. 2, 2002), *State v. Ashbaugh*, 90 Wn. 2d 432 (1978), and *Myers v. Harris*, 82 Wn. 2d 152 (1973)]

SEPA appeals in Sultan are regulated by SMC 17.04.240. Nothing in that code section indicates that an appeal fee is required, let alone that an appeal fee is required to perfect an appeal. Subsection 17.04.240(D) SMC does state that "Appeals shall be governed by the procedures specified in the Sultan Municipal Code and the Unified Development Code." Land use appeals under the Unified Development Code are regulated by SMC 16.120.100. Nothing in that code section indicates that an appeal fee is required, let alone that an appeal fee is required to perfect an appeal. No other sections of the SMC contain any guidance regarding land use appeals. The City Council has adopted a Fee Schedule by Resolution. The adopted Fee Schedule includes a fee for filing an appeal. The Fee Schedule does not state that payment of the fee is jurisdictional. (Testimony)

Neither the SMC nor the adopted Fee Schedule indicate that an appeal fee must be paid in order to perfect a SEPA appeal. Following the lead of our State appellate courts, the Examiner therefore declines to hold that failure to pay the appeal fee is a fatal jurisdictional flaw in a case such as this where the omission was promptly corrected by the appellant when brought to the appellant's attention. (The question of whether

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<sup>5</sup> The City Council has no jurisdiction over Grandview's SEPA appeal. [SMC 17.04.240] The summary contained in this section is for information purposes and serves to document the outcome of the appeal portion of the proceeding. It is not presented for action by the Council.

<sup>6</sup> DCD advised Grandview in a November 15, 2007, letter and in the Staff Report for the hearing that it might challenge timeliness of the appeal. (Exhibits S21 and S1, respectively)

failure to timely pay a required fee could ever be a fatal jurisdictional flaw is not before the Examiner and will not be addressed. This ruling is specific to the facts of this case.) Grandview's SEPA appeal was timely.

Grandview's appeal challenged five MDNS Mitigation Measures: Nos. 1 (Sub-parts A and B only), 2, 3, and (part of) 5. (Exhibit S20, ¶¶ 3.1 – 3.5) Grandview alleged that those Mitigation Measures were unnecessary as they addressed topics covered by SMC provisions. (Exhibit G1) Grandview's appeal also alleged that the MDNS was not timely issued. (Exhibit S20, ¶ 4.12) DCD conceded that the impacts associated with Mitigation Measures 1.A, 1.B, 2, 3, and 5 "can be adequately addressed through the existing provisions in the Code" (meaning the SMC) and were therefore unnecessary. (Exhibit S1 and testimony) Grandview withdrew its challenge to the timeliness of the MDNS. (Statement of counsel)

The Examiner held that Grandview's SEPA appeal was effectively moot as Respondent DCD had conceded all but one of the issues on appeal and Appellant Grandview had withdrawn the remaining issue. No need exists to prepare and issue a wholly separate Decision documenting a result which is essentially a settlement. The MDNS for *Anderson Farm* stands minus Mitigation Measures No. 1.A, 1.B, 2, 3, and 5.

## ISSUES

Does the application meet applicable criteria for preliminary subdivision and preliminary PUD approval?

## LEGAL FRAMEWORK<sup>7</sup>

The Examiner is legally required to decide this case within the framework created by the following principles:

### 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;

<sup>7</sup> Any statement in this section deemed to be either a Finding of Fact or a Conclusion of Law is hereby adopted as such.

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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] A PUD application which is inextricably intertwined with a preliminary subdivision application is vested with the subdivision application. [*Schneider Homes, Inc. v. City of Kent*, 87 Wn. App. 774, 942 P.2d 1096 (1997), rev. denied 134 Wn.2d 1021 (1998); *Rural Residents v. Kitsap Cy.*, 141 Wn.2d 185 (2000)] Therefore, both components of this consolidated application are vested to the regulations as they existed on September 15, 2005.

#### Standard of Review

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

#### Scope of Consideration

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

### FINDINGS OF FACT AND CONCLUSIONS OF LAW

#### A. Overview

1. The subject property (or the *Anderson Farm* site) consists of two separate parcels fronting on the west side of Sultan Basin Road, separated by 135<sup>th</sup> Street SE. They are located approximately one mile north of SR 2 (aka U.S. 2 or the Stevens Pass Highway). (Exhibits S1 and S17)

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The north parcel consists of 3.68 acres located in the northwest quadrant of the Sultan Basin Road/135<sup>th</sup> Street SE intersection. The parcel is essentially a rectangle from which a 148 foot by 151 foot rectangle has been "excepted" from the southeast corner. (The "exception" is owned by others.) The north parcel has the following approximate dimensions: East-west overall = 610 feet; north-south overall = 298 feet; Sultan Basin Road frontage = 147 feet; and 135<sup>th</sup> Street SE frontage = 464 feet. (Exhibits S1 and S17)

The south parcel consists of 2.79 acres occupying the southwest quadrant of the Sultan Basin Road/135<sup>th</sup> Street SE intersection. The parcel is a rectangle whose approximate dimensions are 407 feet east-west and 300 feet north-south. The south parcel thus has approximately 407 feet of frontage on 135<sup>th</sup> Street SE and 300 feet of frontage on Sultan Basin Road. (Exhibits S1 and S17)

The north parcel extends approximately 203 feet further west along 135<sup>th</sup> Street SE than does the south parcel. The 135<sup>th</sup> Street SE right-of-way is 60 feet wide between the two parcels but only 30 feet wide beyond the west edge of the south parcel. (Exhibit S17)

2. Grandview purchased the two parcels in 1999. (Exhibit S14, Finding of Fact 3)
3. On October 15, 2001, the Building Official issued a Notice and Order (the Notice) to Grandview charging it with five violations of City code/Standards on the subject property: Altering wetlands and buffers prior to project approval in violation of former SMC 16.80.070; removing vegetation without a permit in violation of SMC 16.76.030; working within City right-of-way without permission in violation of Standards 7.02.13; clearing/excavating without a stormwater permit in violation of Chapter 16.92 SMC; and clearing/excavating without stormwater erosion controls in violation of Chapter 16.92 SMC. (Exhibit S14, Finding of Fact 1)

Grandview appealed on October 26, 2001. Grandview's appeal alleged that: no work was undertaken within a wetland or its buffer; the activities were agricultural, not development; maintenance of a ditch within City right-of-way does not require a City permit; and all activities are exempt from City permit requirements. At hearing, Grandview also argued that no evidence had been presented that any work actually occurred within a City right-of-way. (Exhibit S14, Finding of Fact 3)

Following a May 21, 2002, hearing, the Examiner issued a Decision on June 3, 2002, (the 2002 Decision) which found Grandview: Guilty as charged of altering wetlands and buffers

prior to project approval in violation of SMC 16.80.070 as to the north parcel;<sup>8</sup> guilty as charged of removing vegetation without a permit in violation of SMC 16.76.030 as to both parcels; guilty of failing to employ erosion and sediment control measures for work within City right-of-way adjacent to the north parcel in violation of Standards 7.02.13; not guilty of clearing/excavating without a stormwater permit in violation of Chapter 16.92 SMC; and not guilty of clearing/excavating without stormwater erosion controls in violation of Chapter 16.92 SMC. (Exhibit S14, Conclusions 1 – 4) The Examiner sustained the Notice in part with revised compliance requirements and vacated the Notice in part. (Exhibit S14, pp. 12 and 13)

Grandview did not comply with the requirements of the Examiner's 2002 Decision. In 2003, the City commenced an action in Snohomish County Superior Court to enforce the Examiner's decision. In or around January, 2005, the City and Grandview entered into a Settlement Agreement. (Exhibit S-15) The Settlement Agreement required:

- a. Grandview to submit a Joint Aquatic Resources Permit Application (JARPA) to the US Army Corps of Engineers and Department of Ecology for activities in the wetlands and buffers.
- b. Grandview to submit a preliminary plat application to the City of Sultan.
- c. Grandview to develop with appropriate speed after all approvals under the preliminary plat application were obtained.
- d. Grandview to make improvements to Sultan Basin Road and pay traffic impact fees. The City is required to apply traffic impact fee credits, determined in accordance with SMC 16.112.080.
- e. Grandview to make a best effort to obtain right-of-way from the "exception" property (Coon) and to make improvements to Sultan Basin Road.
- f. Grandview to reduce any credit in the traffic impact fees by \$10,000 for full satisfaction of all obligations for civil penalties or to reimburse the City for fees or costs incurred.

The Settlement Agreement also required final plat approval prior to December 31, 2006, or the City could then renote the Case in Superior Court. (Exhibit S15) The City has not taken that action as the application process itself has passed that deadline. (Exhibit S1)

4. The City Comprehensive Plan (Plan) designates both parcels Moderate Density. Both parcels lie within the City's MD zone. (Exhibit S1) The MD zone is primarily a residential zone.

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<sup>8</sup> The 2002 hearing record contained no evidence regarding the presence or absence of wetlands on the south parcel. Thus, no violation could be sustained regarding the south parcel.

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5. The north parcel slopes gently towards the south and east. A single family residence, accessed via a driveway from 135<sup>th</sup> Street SE, is situated in the north central portion of the property. The north parcel is encumbered by three wetlands. (Exhibits S1, S14, S16, and S17)

The south parcel also slopes gently towards the south and east. A mobile home, located in the northeast corner of the property, burned to the ground prior to Grandview's purchase of the property. The south parcel is encumbered by five wetlands. (Exhibits S1, S14, S16, and S17)

6. Grandview proposes to subdivide the subject property into 26 lots for single-family detached dwellings.<sup>9</sup> Fifteen of the lots would be located on the south parcel; the remaining 11 lots would be located on the north parcel. The existing residence would be removed/demolished. Grandview's proposal relies upon the PUD provisions of Chapter 16.10 SMC. (Exhibits S3c and S17)

7. Traffic and park impact fees "shall be determined and paid to the designated city of Sultan official at the time of issuance of a building permit for the development." [SMC 16.112.020(B)] School impact fees "shall be paid to the city prior to building permit issuance, based on the fee schedule in place at the time of building permit application." [SMC 16.116.030(B)] Therefore, all three fees are based on fee schedules in effect when building permit applications are filed, not the fee schedules now in effect.

Grandview has offered to pay current mitigation fees for traffic, school, and parks impacts. (Exhibit S3f<sup>10</sup>) However, no one can know whether the fee amounts listed on Exhibit S3f will be current in the future. That reality is irrelevant to the outcome of this case – whether the outcome is approval, denial, or something in between – because the City does not have to set the fee amounts as part of either a preliminary subdivision or PUD action.

8. *Anderson Farm* is not subject to all current City regulations. The Legal Framework, Vested Rights, section, above, explains the vested rights concept. Only those regulations in effect on September 15, 2005, when *Anderson Farm* was filed in a complete fashion may be used in the review of this application.

Title 16 SMC, Unified Development Code (UDC), was added to the SMC by Ordinance No. 630, effective July 18, 1995. The City Council has amended three UDC regulations which

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<sup>9</sup> Grandview's initial submittal contemplated creation of 35 lots. The proposal was subsequently revised. (Exhibit S1, p. 2)

<sup>10</sup> Grandview incorrectly states in Exhibit S3f that "the City of Sultan Hearing Examiner and the City Council have established the impact fees". The Examiner has absolutely nothing to do with setting impact fee amounts.

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are central to this application since *Anderson Farm* became vested: Provisions regarding PUDs, bulk regulations for the MD zone, and critical areas regulations. Chapter 16.10 SMC, Planned Unit Development District, was added to Title 16 SMC by Ordinance No. 793-02 in or around 2002. The only provision within Chapter 16.10 SMC to have been amended since initial adoption of the chapter is SMC 16.10.140(B), Open space requirements, which has been amended twice: Ordinance Nos. 853-04 and 885-05. The amendments made by Ordinance No. 853-04 are irrelevant as that ordinance was invalidated by the Hearings Board. Ordinance No. 885-05 became effective September 24, 2005. Technically, that amendment is also not applicable here as its effective date postdates the application's vesting date (by nine days). However, Ordinance No. 885-05 simply returned the language of SMC 16.10.140(B) back to what it had been before adoption of Ordinance No. 853-05. Therefore, the present code language is the same as that which existed on and before September 15, 2005, and is applicable to *Anderson Farm*.

A second, much more significant UDC change which affects PUDs was enacted by Ordinance No. 917-06, effective April 24, 2006. That ordinance, *inter alia*, amended the MD zone's Table of Dimensional and Density Requirements regarding PUDs. Relevant provisions of the MD zone for PUDs before and after that amendment are as follows:

Code Provision	From 3-9-2004 through 4-23-2006	On and after 4-24-2006
Maximum density	7.0 dwelling units per acre	6.0 dwelling units per acre
Minimum site area	5.0 acres <sup>11</sup>	2.0 acres
Minimum lot width	300 feet <sup>12</sup>	40 feet
Minimum lot depth	300 feet	100 feet
Minimum front setback	20 feet	20 feet
Minimum side setback	10 feet	5 feet
Minimum rear setback	20 feet	20 feet
Maximum building height	30 feet	30 feet
Maximum lot coverage	35%	35%

None of those amendments may be applied to *Anderson Farm* as its vesting date precedes the effective date of Ordinance No. 917-06 by about six months. The applicable Dimensional and Density Requirements for this PUD are those in the second column of the above table.

<sup>11</sup> This provision conflicted with SMC 16.10.110(B)(2)(b), which has always set 2.0 acres as the minimum PUD site size, during this period.

<sup>12</sup> The 300 foot figure for lot width and depth makes absolutely no sense if applied to each individual PUD lot. These two numbers have always been understood to relate to the dimensions of the PUD site, not to each proposed lot within a PUD. Until Ordinance No. 917-06 was enacted, the MD zone established no minimum lot width or depth for PUD lots.

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12. Grandview submitted a copy of the construction plans for *Stratford Place*, city file PUD04-001, to bolster its argument for approval of *Anderson Farm*. *Stratford Place* was the first PUD heard after adoption of the current PUD regulations in 2002. *Stratford Place* is a 20 lot single-family residential PUD located on the north side of Fir Avenue east of 7<sup>th</sup> Street. A reduced width private street system was approved: a 24 foot wide right-of-way containing two 10 foot travel lanes and one four foot sidewalk located along the margin of the street. The developer proposed four parking spaces on each lot (a two-car garage plus two spaces in the driveway) plus 20 guest parking spaces scattered throughout the development. The site contained three unregulated wetlands. The plans submitted for preliminary subdivision/preliminary PUD approval did not disclose location of fire hydrants. The Examiner's Recommendation to the Council did not address in detail the criteria for reduction of street standards. (Official notice)

*Stratford Place* submitted construction drawings in 2005. Those drawings comport with the above description. (Exhibit G7)

13. Each remaining section of this Recommendation addresses one or more of the areas in which DCD and/or one or more members of the public believe *Anderson Farm* is deficient. (The number(s) in parentheses after most of the section titles is(are) the topic number(s) informally assigned to the item(s) during the hearing by the Examiner. The participants referred to those topic numbers throughout the hearing.)
14. The Examiner is not aware of any other pending preliminary PUD subdivision applications which are vested to 2005 code provisions. To the extent that portions of this Recommendation rely on those old code provisions, the decision ultimately reached by the City in this case will set no precedent for any future application.

B. PUD Location Criteria

1. 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." The location criteria of SMC 16.10.110(B)(2) are designed (for the most part) to limit the places within the City which are eligible for PUDs. Had the Council intended that PUDs could be located anywhere

in the City, it would not have enacted restrictive location criteria. Those criteria must be given meaning.<sup>13</sup>

Subsection 16.10.110(B)(2) SMC contains six subsections: 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. Criterion (2)(a) is not applicable as *Anderson Farm* proposes less than 40 dwelling units on less than 10 acres. (Exhibit S17) Nevertheless, Sultan Basin Road is a designated Secondary or Minor Arterial street. (Exhibit S1)
- B. Each segment of the site and the total area of the site contain more than two acres.<sup>14</sup> (Exhibit S17) The proposal meets criterion (2)(b).
- C. DCD incorrectly concludes that *Anderson Farm* meets criterion (2)(c). (Exhibit S1, p. 4) DCD misinterprets the criterion. The criterion in SMC 16.10.110(B)(2)(c) contains three key elements. First, a site must be able to connect to a pedestrian and bicycle system. Second, that system must be in existence when the evaluation is performed; a proposed or potential system will not meet the "existing" restriction of the criterion. Third, the connection must be to a "circulation system," a term which is undefined in the code. DCD's former Director testified during the *Twin Rivers Ranch Estates* hearing on May 18, 2006, that even an unimproved street shoulder would meet the criterion. Were that in fact the case, the criterion would be meaningless: Every site with any public street access connects to at least an unimproved shoulder. Thus, every site in the City would meet the criterion, rendering the criterion useless. The Council included the criterion to limit potential PUD sites; that purpose must be preserved in any interpretation of the criterion. The idea that an unimproved shoulder

<sup>13</sup> Locational criterion (B)(2)(f) offers an instructive contrast. It was expressly written so as to not limit potential PUD sites: So long as a site has access to public services equal to that of a standard development, the criterion is met. The language of Subsection (B)(2)(f) clearly demonstrates a difference of intent on the part of the Council. It wrote that criterion to be non-limiting while all the others in Subsection (B)(2) are intended to limit.

<sup>14</sup> This specific criterion in the PUD chapter takes precedence over the general requirement in former SMC 16.12.020 which set the minimum PUD site size at five acres.

would qualify as a pedestrian and bicycle circulation system stretches the meaning of "system" beyond the breaking point. Nothing in the SMC requires that the circulation system go to the city center.

The evidence in this record indicates that *Anderson Farm* is located in an area not served by any sidewalk system: Some sidewalks are found along Sultan Basin Road, but they are not continuous and they do not reach the subject property. Grandview's frontage improvements would end at the property lines; the sidewalks which would be a part of those improvements would give way at the property line to open ditch road sections devoid of any pedestrian or bicycle facilities. Unlike *Vodnick Lane*, much further to the south along Sultan Basin Road, *Anderson Farm* will not connect to any existing subdivision. The proposal does not meet criterion (2)(c).

- D. DCD concludes that *Anderson Farm* meets Criterion (2)(d) based upon prior Council actions. (Exhibit S1, pp. 4 and 5) 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 Sultan Basin Road intersection on SR 2. (Official notice) The Examiner concluded in his *Skoglund Estates* and *Greens Estates* Recommendations that they did not meet Criterion (2)(d). Those projects are to be located on the east side of Sultan Basin Road in the vicinity of 138<sup>th</sup> Street SE, about three blocks closer to SR 2 than *Anderson Farm*. The Council disagreed in both cases and approved those applications. In its recent action on *Greens Estates*, the Council said "that this provision of the code does not require that transit be available for pedestrians to access transit. Vehicular proximity must also be taken into account." (Exhibit S24, p. 2)

The Examiner recognizes that the Council has decided on more than one occasion that a site some one mile from the nearest transit stop lacking a sidewalk system to the transit stop nevertheless meets this criterion. If that is true, virtually every parcel within the City meets the criterion (the vast majority of the entire city lies within one mile of SR 2) and the criterion becomes a meaningless exercise. The Examiner respectfully declines to adopt that logic – especially for a site which is further removed from the nearest transit facility than any previously approved PUD. The proposal does not meet criterion (2)(d).<sup>15</sup>

- E. Any required water and sewer extensions would be the financial responsibility of the *Anderson Farm* developer. The proposal meets criterion (2)(e).

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<sup>15</sup> This is but a recommendation to the Council. If after considering the evidence in this record the Council finds a basis to conclude otherwise with respect to this criterion, it may do so.

F. *Anderson Farm* residents will have the same access to public facilities as will any other residents of the City. The proposal meets criterion (2)(f).

2. *Anderson Farm* does not meet PUD locational criteria (B)(2)(c) and (B)(2)(d). The PUD may not be approved.

C. Lot Size<sup>16</sup> (Topic 1)

1. The minimum lot size for single-family detached residences in the MD zone is 7,200 square feet (SF). The MD zone does not establish a special minimum lot size of such lots within a PUD. [SMC 16.12.020, Table of Dimensional and Density Requirements]

2. Single-family residential lots within a PUD may be smaller than required by the underlying zone if they meet certain conditions:

The hearing examiner, for the purpose of promoting an integrated project that provides a variety of housing types and additional site amenities, may recommend reductions in the area of individual lots and increases in the lot coverage within a PUD from the required lot area and lot coverage for the zoning district; provided, any such modifications shall be compensated by open space areas elsewhere in the PUD. Open space shall not include areas designated as public or private streets.

[SMC 16.10.120(B)(2)] The criterion uses the conjunctive “and” between its basic elements. Thus, in order to obtain the reduction conditionally allowed by this code provision, all elements must be met. Failure to meet any one element would deny use of the reduction.

3. Grandview proposes lot sizes that range from 2,225 square feet to 31,510 square feet with an average lot size of 5,231 square feet. Twenty-two (22) of the proposed lots would be under the underlying zoning minimum lot size of 7,200 square feet. Most of the area within the largest lots would be encumbered by Native growth Protection Easements and would not realistically be available to the lot owner. (Exhibits S1 and S17)

4. DCD correctly concludes that *Anderson Farm* does not meet the criteria for lot size reduction. (Exhibit S1, pp. 5 and 6)

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<sup>16</sup> To the best of the Examiner’s recollection, compliance with this criterion has never before been challenged. The analysis which follows is thus a matter of first impression.

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- A. *Anderson Farm* does not include a “variety of housing types.” All 26 lots would be developed with single-family detached houses. Grandview has submitted six different house plans. All are three bedroom, two or three story structures. All have two-car garages facing the street. All exhibit Neo-Craftsman style features: Lap siding with shingle accents on gable ends, knee braces, and covered entries supported by substantial columns. (Exhibit S4) Grandview suggests that the varied roof pitches coupled with the mix of shed and gable roofs creates a “variety of housing types.” (Testimony)

Neither the word “type” nor the phrase “housing types” is defined within the SMC. Undefined words may be given their ordinary and customary meaning. A standard dictionary may be used to ascertain that meaning. The first definition of “type” in *Webster’s Encyclopedic Unabridged Dictionary of the English Language*, 19898 Edition, is “a kind, class, or group that is distinguished by some particular characteristic.”

The proposed dwellings all exhibit exactly the same characteristics. They are all of one type. They do not represent a variety of types. Not only are they all of one type, they all exhibit the same design or style.

Having failed to meet this portion of the criterion, lot size reduction is not available.

- B. *Anderson Farm* does not include “additional site amenities.” Recreation requirements will be addressed in a subsequent section. Suffice it to say at this point that the proposal does not demonstrate compliance with even the minimum recreational requirements of code, let alone providing any additional amenities. Grandview suggests that boardwalks proposed to be constructed through two of the on-site wetlands are amenities. As will be shown in a subsequent section, those boardwalks violate SMC provisions and may not be constructed.

Having failed to meet this portion of the criterion, lot size reduction is not available.

- C. *Anderson Farm* does compensate for the small lot sizes with additional open space: The total amount of open space proposed is nearly double the amount required by code. (The open space will also be addressed in detail in a later section.) However, as has been noted, unless all elements are met, lot reduction is not permissible.

5. *Anderson Farm* does not meet SMC 16.10.120(B)(2). The PUD may not be approved.

D. Lot Width<sup>17</sup> (Topic 2)

1. Unless modified pursuant to the authorities within Chapter 16.10 SMC, “development standards found in the underlying residential zoning district” apply within a residential PUD. [SMC 16.10.120(B)] Neither the MD zone nor Chapter 16.10 SMC contained a minimum width standard for lots within a PUD at the time *Anderson Farm* vested. (See ¶ A.8, above.) The 300 foot “lot width” standard in the MD zone at that time obviously related to the PUD site as a whole, not to individual lots within a PUD.

The minimum lot width in the MD zone for single-family detached dwellings is now and was at the time *Anderson Farm* vested 60 feet. [SMC 16.12.020, Table of Dimensional and Density Requirements]

2. The proposed lots in *Anderson Farm* have lot widths which range from 23 to 60 feet. Most of the lots are less than 50 feet wide. (Exhibit S17)
3. DCD believes that

Lot widths are reduced under the same standards as lot sizes. The lot widths proposed meet standard planning principles, except for Lots 10 and 20, which have lot widths of twenty-three (23) and twenty-seven (27) feet respectively. Except for panhandle lots, which are not proposed here, thirty (30) feet is minimum street frontage needed for access and front yard uses.

(Exhibit S1, p. 6, emphasis added)

4. Grandview argues that the underlined portions of the above quote are not based on any SMC provision and, therefore, should not be the basis to evaluate its application. (Testimony)
5. DCD’s statement that “Lot widths are reduced under the same standards as lot sizes” is not supported by a literal reading of the applicable SMC provision. That standard is quoted in ¶ C.2, above. It applies only to “reductions in the area of individual lots and increases in the lot coverage” in PUDs. Reduction of lot area does not necessarily imply or require reduction of minimum lot width.

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<sup>17</sup> To the best of the Examiner’s recollection, compliance with this criterion has never before been challenged. The analysis which follows is thus a matter of first impression.

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6. Grandview correctly argues that "standard planning principles," whatever they may be, are not listed in the SMC as a basis to regulate PUDs.
7. Since the PUD chapter did not establish a standard for minimum lot width at the time relevant to the *Anderson Farm* application (it does now) and since SMC 16.10.120(B)(2) specifically ties reductions to only lot area and lot coverage of the underlying zone, one must conclude that the minimum lot width of the underlying zone applied.
8. The proposed lot widths violate and the code requirement.

E. Front Setback (Topic 3)

1. The MD zone requires a 20 foot front setback in PUDs. (See ¶ A.8, above.) Section 16.10.120(B)(1)(f) allows reduction of front setbacks in PUDs in certain situations:

... Where a developer provides privacy by reducing traffic flow through street layout such as cul-de-sacs, or by screening or planting, or by facing the structure toward open space or a pedestrian way, or through the room layout or location, and access to garages of the home face perpendicular to or are not visible from the street frontage, then it is possible to reduce the front yard setback to 15 feet. Also, if 60 percent of the front facing portion of a structure consists of a front porch, setbacks may also be reduced to 10 feet for the front yard. Front porches and stoops which contain less than 60 percent of the front facade may project into the setback; provided, they do not interfere with minimum vehicular sight distance requirements.

The first quoted sentence appears complex but is actually fairly straightforward. The second part of the sentence (from "then" to "feet.") contains the subject, verb, and predicate. Basically, that part of the sentence provides that the required 20 foot front setback may be reduced to 15 feet. The first part of the sentence (from "Where" to "frontage,") is a complex qualifying clause which limits the conditions under which the front setback may be reduced. That part of the sentence contains a string of four elements (three of which are themselves compound), each separated by "or", followed by an "and" and two more elements separated by an "or." "Or" is a disjunctive connector; "and" is a conjunctive connector.

Thus, in order to qualify for the front yard setback reduction, a proposal must include any one or more of the first four elements and either or both of the last two elements. Merely including one or more of the first four elements does not qualify a proposal for the reduced setback: It must also include at least one of the last two elements.

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2. Grandview proposes 15 foot front setbacks. (Some of the depicted building footprints have setbacks greater than 15 feet. However, the plat clearly depicts 15 foot setbacks as the minimum.) (Exhibit S17)

All of the proposed house plans have two-car garage doors in their front façade. (Exhibit S4)

3. DCD believes that *Anderson Farm* does not meet the requirement for reduced front setbacks as all proposed houses have garages which face the streets. DCD also argues that the short driveways which would result would create safety problems: Vehicles parked in those driveways would likely hang over into the street or sidewalk. (Exhibit S1, pp. 6, 7, and 12)
4. In its recent decision on the *Greens Estates* PUD subdivision, the Council required that each lot provide four off-street parking spaces, each of which had to be at least 18 feet long in order to compensate for a reduced-width street right-of-way. (Exhibit S24, p. 5)
5. Grandview indicates that it could re-orient some of the houses so the garages did not face the streets or revise the house plans so the front doors are located in walls which do not face the street. (Testimony)
6. DCD correctly concludes that *Anderson Farm*, as presently proposed, does not qualify for reduced front setbacks. Every house plan has a garage which faces onto the street system: All garages will be visible from the street; none will be perpendicular to the streets. Some of the houses will not work on their lots if they were forced to comply with the standard 20 foot front setback. Therefore, the solution to this deficiency is more complicated than simply imposing a condition requiring a 20 foot front setback: An unknown number of the lots would have to be altered in ways and to a degree which cannot be foreseen.

DCD also correctly notes that it (and, by extension, the Examiner and the Council) can only review that which is submitted by an applicant. If an applicant wants to revise its plan, then it may do so and the City would review that revised proposal.

7. DCD's argument about the relationship between off-street parking and front setbacks will be addressed later in the section on internal streets.
8. *Anderson Farm* violates front setback requirements and cannot be approved as proposed.

F. Side Setback

1. DCD incorrectly states that the required side setback for *Anderson Farm* is five feet. Prior to April 24, 2006, the required side setback for a PUD in the MD zone was 10 feet, not five feet. (See ¶ A.8, above.) *Anderson Farm* is vested to the regulations as they existed prior to April 24, 2006. An applicant may not "pick and choose" to which regulations an application

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is to be vested: If an applicant wishes to take advantage of a newer, more favorable regulation, then a new application (or substantial revision of the original application) must be filed. [*East County Reclamation Co. v. Bjornsen*, 125 Wn. App. 432, 105 P.3d 94 (2005), rev. denied 155 Wn.2d 1005 (2005)]

2. Section 16.10.120(B)(1)(a) establishes criteria under which side (and rear) setbacks may be reduced:

The minimum side yard requirement is intended to provide privacy within the dwelling unit. Where windows are placed in only one of two side-facing walls, or there are no windows, or where the builder provides adequate screening for windows, or where the windows are at such a height or location to provide adequate privacy, the building side yard spacing may be reduced to a zero lot line; provided, a minimum of five feet is maintained between buildings and structures on the adjacent lot and appropriate easements are provided to maintain spacing and permit maintenance access. 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 space are provided, rear yards may be reduced to 10 feet.

3. The proposed design depicts five foot setbacks. (Exhibit S17) The proposed house plans include windows in all exterior walls of every house design. (Exhibit S4)
4. Required side setbacks may be reduced to zero if any one of the four criteria within the first sentence of SMC 16.10.120(B)(1)(a) is present. Here the house placement and window spacing in the houses' side walls would meet the fourth requirement: "where the windows are at such a height or location to provide adequate privacy." *Anderson Farm* qualifies for reduced side setbacks. Easements on adjoining lots are unnecessary as Grandview proposes a five foot setback: Five feet is adequate to provide for maintenance around each house.

G. Rear Setback (Topic 4)

1. The required rear setback for a PUD in the MD zone is 20 feet. (See ¶ A.8, above.)
2. Section 16.10.120(B)(1)(a) establishes criteria under which rear (and side) setbacks may be reduced. (See ¶ F.2, above.)
3. Grandview proposes 10 foot rear setbacks from rear lot lines. (Some of the depicted building footprints have setbacks greater than 10 feet. However, the plat clearly depicts 10 foot setbacks as the minimum.) Six foot high fences are proposed for the rear lot lines of all lots that do not back up to a critical area except for proposed Lots 25 and 26. (Exhibit S17)

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4. DCD correctly states that unless some privacy element is added to the rear of Proposed Lots 25 and 26, those lots would not qualify for reduced rear setbacks. (Exhibit S1, p. 7)
5. Grandview suggested that the rear setback requirement for Proposed Lots 25 and 26 be deferred. It suggested that a condition be imposed requiring resolution of the setback when a building permit application is filed for those lots. (Argument of counsel)
6. Deferral of rear setback compliance should not be approved. Any plat/PUD plan granted preliminary approval by the City should evidence on its face compliance with all requirements for approval.

This is a relatively simply deficiency to rectify: All Grandview needs to do is note on its plat that a six foot high fence will be erected along the rear lines of Proposed Lots 25 and 26, just as it has done for Proposed Lots 1 – 3, 11 – 15, and 17 – 19.

H. Recreation Area (Topic 5)

1. The SMC requires recreation area in the amount of 75 SF per person in any residential development; three-bedroom dwellings are presumed to house 4.0 persons for the purposes of required recreation area calculations. [SMC 16.72.040(A) and (B)] No recreation area may contain less than 2,000 SF. [SMC 16.72.040(C)] Recreation areas must be “reasonably flat, dry, and capable of serving the purpose intended” and “shall not be placed within environmentally sensitive area buffers.” [SMC 16.72.040(F)] Recreation facilities, chosen from a list in the code, must be provided within the recreation area(s). In developments with 21 to 50 dwelling units, at least two recreation facilities must be provided. [SMC 16.72.050(A)] Table 1 in SMC 16.72.050(A) lists 14 types of acceptable recreation facilities. A multi-purpose court is an acceptable recreation facility; a picnic area is an acceptable recreation facility only if it contains at least five barbeques, picnic benches, and trash containers; a hiking, jogging, and/or biking trail is an acceptable recreation facility only if it is at least one mile long. [SMC 16.72.050(A), Table 1, Rows C, E, and L, respectively]

However, unless it appears through a study prepared by an authorized representative of the developer that less than five percent of the residents of any development are likely to be children under 12, or can be demonstrated that the proposed project will be marketed to age groups unlikely to include children, than [*sic*] at least 15 percent of the required recreation area must be satisfied by the construction of “tot lots” (i.e., areas equipped with imaginative play apparatus oriented to younger children as well as seating accommodations for adult supervision).

[SMC 16.72.040(G)] Grandview has submitted no such study.

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*Anderson Farm*, as proposed with 26 three-bedroom dwelling units, would thus require not less than 7,800 SF of recreation area containing at least two recreation facilities.<sup>18</sup>

2. Grandview states that *Anderson Farm's* recreation areas are Tracts 994 and 998 totaling 7,903 SF. The area of Tract 994 is given as 6,457 SF; the area of Tract 998 is not stated. (Exhibit S17) By subtraction, the area of Tract 998 would be 1,446 SF. However, approximately half of Tract 994 is a wetland buffer; and the boundary of Tract 998 is so unclear that even Grandview was unable at hearing to definitively state what it encompassed. (Exhibit S17 and testimony) The "core" area of Tract 998 forms a rough square 40 feet on a side, encompassing approximately 1,600 SF. (Calculated from Exhibit S17.)

Grandview proposes to provide a multi-purpose court and a picnic area containing three barbeques, picnic benches, and trash containers in Tract 994. Grandview proposes to provide a picnic area containing two barbeques, picnic benches, and trash containers in Tract 998. The location of these facilities is not depicted. (Exhibit S17) Grandview argues that the walkways through the two largest on-site wetlands should be counted as recreation facilities. (Testimony)

3. DCD correctly states that Grandview has not demonstrated compliance with the recreation requirements of Chapter 16.72 SMC. However, portions of its analysis are not entirely correct.

As previously noted, the minimum acceptable recreation area for *Anderson Farm* is 7,800 SF, not 5,580 SF.

Chapter 16.72 SMC refers to both "recreation area" and "recreation facilities." A basic rule of statutory construction is that the use of different terms in an enactment evidences an intent to differentiate between the terms. Here, the code refers both to a minimum amount of land area that must be devoted to recreation ("recreation area") and a minimum number of activities that must be provided within the recreation area ("recreation facilities"). The code prohibits recreation facilities within critical area buffers, but it does not require that such buffers not be included in recreation areas.<sup>19</sup> DCD incorrectly suggests that it does.

<sup>18</sup> DCD has incorrectly calculated the amount of required recreation area. DCD states that a total of at least 5,580 SF of recreation area is required. (Exhibit S1, p. 8) Exhibit S4 indicates that all of the proposed house designs contain three bedrooms. That being the case, the required calculation is 75 SF per person x 4.0 persons per dwelling x 26 dwellings = 7,800 SF. If all the houses were two bedroom units, the calculation would be 75 SF per person x 3.0 persons per dwelling x 26 dwellings = 5,850 SF. It may be that DCD made its calculation based on two-bedroom units and accidentally reversed the middle two digits of the result. Grandview's calculation on Exhibit S17 is correct.

<sup>19</sup> If this is not the Council's intent, then it needs to revise Chapter 16.72.

However, DCD's concern is relevant as the available evidence does not make it possible to determine whether Grandview intends to place any of its proposed recreation facilities within the critical area buffers.

The bioswale area which surrounds Tract 998 on two sides (or which may actually be a part of it) cannot qualify as recreation area: It is not reasonably flat and dry. Every time it rains, that swale will carry water. Common knowledge tells us that it rains a lot in this area. The residual portion of Tract 998 does not meet the minimum size requirement for a recreation area.

Neither proposed picnic area meets the minimum requirements of SMC 16.72.050(A), Table 1: Neither proposes five picnic set-ups.

The two discontinuous boardwalks may not be counted as recreation areas for one simple reason: Even added together, they are well less than one mile long.

*Anderson Farms* requires a tot lot unless Grandview can prove that the development will not attract children. Grandview has not provided any such argument. Given that the proposed houses are all three-bedroom models, it is doubtful that Grandview could successfully make that argument. Therefore, the recreation facilities lack a required element.

Finally, DCD has included an issue within its recreation discussion paragraph that more correctly belongs within its discussion of open space. The requirement that 75% of open space be free of encumbrances applies to open space, not to recreation areas.

4. *Anderson Farm* does not comply with the recreation requirements of Chapter 16.72 SMC. The proposal may not be approved.

I. Useable Open Space (Topic 6)

1. Open space requirements within PUDs are regulated by the provisions of SMC 16.10.140 rather than the more general open space requirements of SMC 16.72.060. [SMC 16.10.120(B)(3)]

All PUDs are required to provide "common open space" in the amount of 20% of the gross land area of the site. [SMC 16.10.140] A minimum of 15% of the gross area must be "useable open space." The percentage of gross area counted toward the open space requirement is limited for "buffer open space" (2%), "constrained open space" (2%), and "unusable detention open space" (5%). Any amount of "conservation open space" may also be used to meet the minimum required open space.

2. The terms in quotations in the above paragraph are defined in the SMC:

1. "Common open space" means a parcel or parcels of land or an area of water or a combination of land and water within the site designated for a PUD which is designed and intended for the use or enjoyment of the residents or owners of the development. Common open space may contain such complementary structures and improvements as are necessary and appropriate for the benefit and enjoyment of the residents or owners of the development.

2. "Usable open space" means areas which have appropriate topography, soils, drainage, and size to be considered for development as active and passive recreation areas for all residents or users of the PUD. Detention areas may be considered under this category providing all the usable standards are met.

3. "Conservation open space" means areas containing special natural or physical amenities or environmentally sensitive features, the conservation of which would benefit surrounding properties or the community as a whole. Such areas may include, but are not limited to, stands of large trees, view corridors or view points, creeks and streams, wetlands and marshes, ponds and lakes, or areas of historical or archaeological importance. Conservation open space and usable open space may be, but are not always, mutually inclusive.

4. "Buffer open space" means areas which are primarily intended to provide separation between properties or between properties and streets. Buffer open space may, but does not always, contain usable open space or conservation open space.

5. "Severely constrained open space" means areas not included in any of the above categories which, due to physical characteristics, are impractical or unsafe for development. Such areas may include but are not limited to steep rock escarpments or areas of unstable soils.

[SMC 16.10.140(A), ¶¶ (1) – (5)]

3. Based upon a gross site area of 6.47 acres (3.68 acres in the north parcel and 2.79 acres in the south parcel) the required open space amounts are as follows:

Requirement	Total Site	North Parcel	South Parcel
Gross site area	281,687	160,279	121,408
Total open space (20% min.)	56,337	32,055	24,282
Useable open space (15% min.)	42,253	24,042	18,211
Buffer open space (2% max.)	5,634	3,206	2,428
Constrained open space (2% max.)	5,634	3,206	2,428
Unusable detention open space (5% max.)	14,084	8,014	6,070

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The above table is not meant to imply that open space amounts must be met individually on each parcel. *Anderson Farm* has been presented as a single, unified development which just happens to be separated into two parcels by an existing public street. Ultimately, the situation is no different from a large PUD whose internal street system separates an initial single parcel into groups of lots. The information is provided so the reader can see what would be required of each parcel were they to be developed separately as PUDs.

4. Grandview states that the proposal provides 96,816 SF of open space of which 43,601 SF is useable open space and 53,215 SF is conservation open space. Grandview states that the useable open space consists of "all proposed trails," Tracts 992, 994, 995, 996, 998, and an unspecified portion of Tract 999. (Exhibit S17)

5. DCD disagrees:

The site plan shows several areas as usable open space. However, only Tracts 998, 996, a portion of 995, and a portion of 994 are unencumbered by critical areas or buffers. Only 7,245 square feet of usable open space is shown on the site plan. The minimum required is 42,253 square feet.

The applicant has proposed using elevated boardwalks to partially comply with the usable open space requirements. However, pedestrian walkways are not permitted within wetland areas, only wetland buffers, under [former] SMC 16.80.080(B) and (D).

(Exhibit S1, p. 8)

6. The differences between Grandview and DCD on this topic are the result of differing interpretations of the SMC. Grandview argues that since SMC 16.10.140(A)(2) provides that useable open space may be for both "active and passive recreation," it should be allowed to count all wetland and wetland buffer areas as useable. DCD, on the other hand, believes that the wetland areas are best considered as conservation open space and, given this site, should be considered as mutually exclusive of useable open space. DCD also argues that the boardwalks are not allowed in wetlands under the applicable version of Chapter 16.80 SMC. (Testimony) (This argument will be addressed in Section L, below.)
7. Roughly half of the open space in *Anderson Farm* occurs in the form of easements protecting on-site wetlands and their buffers. For example, the entire large wetland area in the northeast quarter of the north parcel lies within Proposed Lots 20 – 24 and is protected by easement; roughly half of the large wetland running through the center of the south parcel is likewise within Proposed Lots 5 – 10 and is to be protected by easement.

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Portions of private lots containing critical areas which are protected by easement do not meet the definition of "common open space." Simply put, such easement areas are not "a parcel or parcels of land" set aside for the enjoyment of all the development's residents.

8. It is impossible to determine the useable areas of the several open space tracts for the simple reason that the areas of each tract have not been provided by Grandview.
9. *Anderson Farm* does not meet the useable open space requirement. The application may not be approved.

J. Vegetation Inventory (Topic 7)

1. Chapter 16.76 SMC, Vegetation Protection Standards, was enacted in 1995 and applies "to any new property development". [SMC 16.76.020] When vegetation is to be removed in conjunction with a development requiring a building permit, a vegetation removal permit application must first be filed and must be accompanied by a "generalized vegetation inventory." [SMC 16.76.030(B)(1) and (2)] When vegetation is to be removed in conjunction with a development which does not require a building permit, a vegetation removal permit application must be filed prior to removal of any vegetation and must be accompanied by a "generalized vegetation inventory." [SMC 16.76.030(C)(1) and (2)]
2. Grandview has not submitted a generalized vegetation inventory. (Exhibit S1, p. 9, and testimony)
3. DCD believes that such an inventory is required as part of the PUD application; Grandview takes the opposing view. (Exhibit S1, p. 9, testimony, and argument of counsel)
4. While Chapter 16.76 SMC may not be a model of clarity, it is a stretch to say that a generalized vegetation inventory is required to be submitted as a part of a preliminary subdivision or PUD application. The chapter seems to be geared to construction level analysis: The inventory is not required until just before actual construction is set to begin. If the Council wants submittal of a vegetation inventory to be a requirement with submittal of preliminary subdivision and PUD applications, it will have to amend the code to so require. As presently written, it does not.
5. Grandview is not in violation of Chapter 16.76 SMC.

K. Landscape Plan (Topic 8)

1. Unless modified pursuant to the authorities within Chapter 16.10 SMC, "development standards found in the underlying residential zoning district" apply within a residential PUD. [SMC 16.10.120(B)] Chapter 16.10 SMC contains no special requirements or authorities

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regarding site landscaping. Therefore, the provisions of Chapter 16.104 SMC, Landscaping, apply within residential PUDs.

2. The provisions of Chapter 16.104 SMC apply to all new development in the City. [SMC 16.104.020<sup>20</sup>] Subsection 16.104.090(A)(1) SMC requires that one tree be planted "for every

<sup>20</sup> Section 16.104.020, Enforcement, is completely illogical as written. Chapter 16.104 SMC was initially enacted by Ordinance No. 630 in 1995 and is applicable here. Section 16.104.020 reads in its entirety as follows:

These standards shall be considered as minimum requirements and shall apply to all new development (except a seasonal parking facility, single-family detached dwelling units and duplexes to be built on their own lot and not part of a subdivision) in the city that received preliminary plat approval before the effective date of the ordinance codified in this chapter.

This compound sentence contains two separate thoughts: First, that the provisions of Chapter 16.104 SMC are to be considered as minimum requirements; and second, that the provisions apply to certain development within the City. It is that second thought which is completely illogical as written.

The parenthetical clause contains exceptions to the basic requirement. Leaving that clause out, the second part of the sentence reads as follows: "shall apply to all new development ... in the city that received preliminary plat approval before the effective date of the ordinance codified in this chapter." Further substituting the year in which Chapter 16.104 SMC was enacted for the concluding "effective date" clause at the end of the sentence, yields the following: "shall apply to all new development ... in the city that received preliminary plat approval before [1995]."

Thus, read literally, Chapter 16.104 SMC applies only to lots within subdivisions which received preliminary approval before 1995. Read literally, virtually no new development would be subject to Chapter 16.104 SMC. Read literally, no new subdivision, including *Anderson Farm* would be subject to Chapter 16.104 SMC.

Such a reading makes no common sense: Why would the Council enact an expansive landscaping regulation in 1995 and make it apply only to developments approved before 1995? It is much more likely that the Council intended to restrict application of Chapter 16.104 SMC to developments approved after 1995, not to those approved before 1995.

City ordinances are subject to the same rules of interpretation and construction as apply to statutes. [*Neighbors v. King County*, 88 Wn. App. 773, 778, 946 P.2d 1188 (1997)] One of the basic rules of statutory construction is that ordinances should be read to avoid absurd results. [*State v. Burke*, 92 Wn.2d 474, 478, 598 P.2d 395 (1979)]

In [*State v. Taylor*, 97 Wn.2d 724, 728, 649 P.2d 633 (1982)] our Supreme Court recognized three categories of cases involving deficient legislation. ... In the third, the legislature's error renders the plain reading of the statute absurd or undermines its purposes. *Taylor*, 97 Wn.2d at 730. Our Supreme Court ruled that courts may modify a statute only in cases falling within the third category and only if doing so is "imperatively required to make [the statute] rational." *Taylor*, 97 Wn.2d at 729 (quoting *McKay v. Dept of Labor & Indus.*, 180 Wash. 191, 194, 39 P.2d 997 (1934)).

[*State v. Albright*, \_\_\_ Wn. App. \_\_\_ (Div. II, 2008)] The Examiner does not presume to suggest that he has the authority to modify an ordinance; the Examiner most certainly does not. However, it does seem appropriate that the Examiner employ a logical reading of an ordinance instead of a clearly illogical reading. The Examiner will interpret

(Footnote continued on next page.)

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5,000 square feet of area or fraction thereof of a single-family residential lot.” When 21 to 30 trees are required to be planted, at least three species must be represented in the plantings; when 31 to 40 trees are required to be planted, at least four species must be represented in the plantings. [SMC 16.104.120] Section 16.104.190 SMC requires submittal of a landscape plan “[p]rior to issuance of any building permit for any development other than a single-family or two-family home on its own lot”.<sup>21</sup> The landscape plan must contain certain minimum information. [SMC 16.104.190(B)]

3. Exhibit S17, Sheet 4, is entitled “Landscape Plan.” It indicates that 43 Callery pear trees would be planted: 10 along the interior streets on the north parcel; 9 along the interior streets on the south parcel; 12 along the parcels’ 135<sup>th</sup> Street SE frontages; and 12 along the parcels’ Sultan Basin Road frontages. All of the interior trees are along the edge of the proposed streets; no trees are proposed to be planted on 13 of the proposed lots.
4. DCD concludes that “A total of 28 trees must be installed on the residential lots of three (3) different species. This excludes wetland mitigation requirements and street tree requirements.” (Exhibit S1, p. 9)
5. Grandview acknowledges the deficiencies in its landscape plan, but argues that the plan can be corrected during the administrative review of construction level plans. (Testimony)
6. The City should not be expected to approve a project whose plans do not at least preliminarily demonstrate compliance with code requirements. The landscape plan (Exhibit S17, Sheet 4) lacks some required content for a landscape plan (it lacks the statistical information called for by SMC 16.104.190(B)(6) by which compliance can be measured). The landscape plan depicts an insufficient number and type of trees: Applying the formula in SMC 16.104.090(A)(1) to the lot areas tabulated on Exhibit S17, Sheet 1, Proposed Lots 1 – 4, 8, 9, 11 – 16, 19, 20, 22, 25, and 26 must each contain one tree; Proposed Lots 5 – 7, 17, 18, and 21 must each contain two trees; Proposed Lot 23 must contain three trees; and Proposed Lot 24 must contain four trees. The total number of required trees, exclusive of wetland areas and street trees, is 36. Therefore, at least four species must be represented.

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SMC 16.104.020 as requiring that Chapter 16.104 SMC applies to all new development except that listed within the parenthetical clause of the section.

<sup>21</sup>

This section is also somewhat illogical and/or unclear. The only housing exempted from the landscaping requirements by SMC 16.104.020, quoted in the preceding footnote, are single-family and duplex residences located on lots not within a subdivision. Subsection 16.104.190(A) SMC seems to suggest that no single-family or duplex residential lots are subject to Chapter 16.104 SMC. That notion flies in the face of the provisions of both SMC 16.104.020 and .090. Therefore, the Examiner concludes that a landscape plan is required for new subdivisions but not for single-family and duplex building permit applications for lots not located within a subdivision.

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7. The landscape plan is incomplete and deficient. The proposal should not be approved with inaccurate supporting plans.

L. Wetland Buffers/Innovative Development Design (Topics 9 and 10)

1. Former Chapter 16.80 SMC classified wetlands based on a combination of factors, including "the entire extent of the wetlands, unrelated to property lines or ownership patterns." [SMC 16.80.030(B)]<sup>22</sup> Former Chapter 16.80 SMC classified all wetlands into four categories. An otherwise Category 3 wetland could be a Category 2 wetland if its total area was equal to or larger than five acres and if it contained three wetland classes. All riparian wetlands, all Category 1 wetlands, "[n]onriparian Category 2 and 3 wetlands larger than 5,000 square feet in size," and "[n]onriparian Category 4 wetlands larger than 10,000 square feet in size" were subject to regulation under former Chapter 16.80 SMC. [SMC 16.80.030(C)]
2. The north parcel contains three wetlands (Wetlands A – C) and the south parcel contains five wetlands (Wetlands D – H). "Wetlands D, F, and G are isolated wetlands less than 5,000 square feet in size." (Exhibit S16, p. 2 and Sheet 1/1, and Exhibit S17) Those three wetlands are not regulated under former Chapter 16.80 SMC and will not be addressed further.
3. Grandview's wetlands consultant (WRI) classified all the regulated wetlands as Category 3. (Exhibit S16, p. 2) Wetlands C and H extend off-site as parts of larger wetlands – Wetland C to the north and Wetland H to the south. (Exhibit S17) The overall size of those wetlands is not provided in the record. The City's wetland peer-review consultant (GBA) believes that Wetland E may exceed five acres in area. (Exhibit S18, p. 2) If any of the regulated wetlands exceed five acres in size, they could be Category 2 rather than Category 3 wetlands.
4. Most of the regulated wetlands are significantly degraded, due to the activities of prior and current landowners. (See Paragraph A.3, above, and Exhibit S14) Wetlands A – C (the on-site portion at least) on the north parcel are dominated by pasture grasses and patches of Himalayan blackberry. Wetlands E and H (the on-site portion at least) on the south parcel are covered with alder and Himalayan blackberry. Wetlands A – C (the on-site portion at least) are classified as "Palustrine, Emergent, Seasonally Saturated." Wetlands E and H (the on-site portion at least) are classified as "Palustrine, Forested, Broad-Leaved Deciduous, Seasonally Saturated." (Exhibit S16, p. 3)
5. Former 16.80.040(B) SMC established the required buffer width for each wetland category. Category 3 wetlands required a 50 foot wide buffer; Category 2 wetlands required a 75 foot wide buffer.

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<sup>22</sup> All SMC citations in this section of the Recommendation are to former Chapter 16.80 SMC, not to current Chapter 16.80 SMC.

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Former Chapter 16.80 SMC allowed buffer widths to be averaged if certain requirements were met and “no part of the width of the buffer is less than 50 percent of the required width or 25 feet, whichever is greater.” [SMC 16.80.080(C)(1)(c)] Buffer widths could be reduced if certain requirements were met and the “buffer width is not reduced below 50 percent of the standard buffer width, or 25 feet, whichever is greater, and the total buffer area reduction is not less than 75 percent of the total buffer area before reduction”. [SMC 16.80.080(C)(2)(d)]

6. Former 16.80.080(B) and (D) SMC enumerated those activities which were allowed in wetlands and their buffers, respectively. Among the uses allowed in regulated wetlands were utility lines, roadways, wildlife viewing structures, and limited filling with replacement at certain specified ratios. [SMC 16.80.080(B)(1), (2), (3), and (7), respectively] Among the uses allowed in regulated buffers were pedestrian walkways/trails, wildlife viewing structures, utility lines “where no reasonably feasible location is available outside the buffer,” and roadways “only if no other reasonably feasible access alternative exists”. [SMC 16.80.080(D)(1), (2), (5), and (6), respectively]
7. Any proposal to average or reduce required buffers had to be presented under the “innovative development design” provisions of former SMC 16.80.100.<sup>23</sup> [SMC 16.80.080(C)] The innovative development design process pertained solely to former Chapter 16.80 SMC’s stream and wetlands requirements and allowed “an innovative design which addresses wetland and stream protection and preservation in a creative manner that deviates from the standards set forth in SMC 16.80.040 and 16.80.080.” [SMC 16.80.100, ¶ 1, emphasis added] An innovative development design could be approved only if five criteria were met:
  1. The innovative design will result in a net improvement of the functional values of the stream or wetlands and their buffers;
  2. The innovative design has been approved by the state resource agencies with jurisdiction;
  3. The innovative design is consistent with the purpose and objectives of this chapter [Chapter 16.80 SMC];
  4. The innovative design is consistent with the standards in SMC 16.80.090;
  5. The innovative design will not be materially detrimental to the public welfare or injurious to property or improvements in the vicinity and zone in which the subject property is located.

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<sup>23</sup> The Innovative Development Design process is no more; The Council eliminated it when Chapter 16.80 SMC was rewritten.

[SMC 16.80.100(B)]

8. The Examiner held in his first *Timber Ridge Estates* Recommendation, FPPUD04-002, that the buffer width averaging and buffer width reduction limits of SMC 16.80.080(C)(1)(c) and (C)(2)(d) established minima below which no innovative design could go. The Examiner believed that if those minima did not apply under the Innovative Development Design process, then they would never apply anywhere since one could not seek either averaging or reduction except through the Innovative Development Design process. The Examiner believed that it would be illogical to interpret the code such that clearly articulated minima became meaningless.

However, in its decision approving the *Timber Ridge Estates* PUD subdivision 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, ¶ 24<sup>24</sup>)

9. The Council's sweeping *Timber Ridge Estates* ruling effectively did away with the buffer alteration limitations of former SMC 16.80.080(C) whenever an Innovative Development Design was proposed. The question is: Did it also by implication do away with all the buffer

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<sup>24</sup> Council decisions made in the context of a quasi-judicial proceeding on a particular application establish the "law of the case" but do not establish legal precedent for any other cases. (The same holds true for Examiner Decisions and Superior Court judgments. Legal precedent for other cases is established only by published appellate court opinions.)

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

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

width requirements of former SMC 16.80.040 and all the wetland and buffer use limitations of former SMC 16.80.080?

The Examiner declines to accord the Council's *Timber Ridge Estates* action a greater scope than actually stated within the action. The Council was presented with a buffer averaging/reduction question; it answered a buffer averaging/reduction question. Nothing in the Council's language indicates that it intended to effectively eliminate the wetland and buffer use restrictions contained in former SMC 16.80.080(B) and (D). If the Council wants to also eliminate those regulations whenever an Innovative Development Design is presented under former Chapter 16.80 SMC, then it will have to so rule in this case.

10. *Anderson Farm* relies upon an expansive use of the Innovative Development Design process. (Exhibits S16 and S17) Grandview proposes significant reduction of required wetland buffers and use of a concept commonly called "paper fill."

Wetland	Required Buffer	Proposed Buffer
Wetland A	50	0' (adjacent to Road C and Lots 16-17) to 30'
Wetland B	50	0' to 45'
Wetland C	50	0' (Lots 20-24) to 30'
Wetland E	50	0' (Lots 4, 6-10, detention structure) to 35'
Wetland H	50	0' (Turnaround) to 35'

In those areas without a buffer, Grandview proposes to designate the outer 25 feet of the wetland as buffer. Grandview also proposes to utilize portions of Wetlands A and B as stormwater detention facilities. (See Section N, below, for more on this aspect of the proposal.) Extensive wetland and buffer plantings are proposed. (Exhibit S16 and S17)

The concept of treating actual wetland as if it were buffer is called "paper fill." "Paper fill" "is typically acceptable where an upland buffer is limited or non-existent ... such as, where wetlands are adjacent to existing roads and typically for compensatory mitigation." (Exhibit S18, p. 2) State staffers have told GBA "that the intent of 'paper buffers' was not to allow the elimination of existing upland buffers for new developments but more flexibility with existing roads along degraded wetlands." (*Id.*)

11. WRI believes that "proper implementation of the plan will result in a net improvement of functions and values over those existing on this site." (Exhibit S16, p. 12) GBA disagrees in part: GBA does not believe "that the buffer and wetland functions will be increased without the benefit of upland buffers." (Exhibit S18, p. 2 and testimony) GBA communicated these and other concerns about wetland impacts to Grandview in 2005, 2006, and early 2007. (Exhibits S8, S11, and S18)

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12. Grandview proposes to construct two elevated boardwalks across two of the on-site wetlands. One boardwalk would cross the west side of Wetland A from the west end of Access Road C south to 135<sup>th</sup> Street SE. That boardwalk would include a wildlife viewing platform. The other boardwalk would cross Wetland E from the south end of Access Road B out to Sultan Basin Road. (Exhibit S17)
13. The two proposed stormwater detention ponds serving the south parcel would be located within the required buffers of Wetlands E and H. (Exhibit S17)
14. DCD believes that Grandview's proposal as submitted does not comply with the criteria under SMC 16.80.100(B). DCD believes, as GBA stated in Exhibit S18, that the proposal will not result in a net improvement in the functional values of the wetland and its buffers, because there are no buffers proposed for parts of the wetlands. While SMC allows for reduced buffers, DCD says it does not allow elimination of all buffers. In addition, DCD concludes that the proposed reduced buffer width for the off-site portion of Wetland C is unacceptable: The full buffer width of fifty (50) feet must be applied to Lot 18 as Grandview cannot propose buffer enhancement off-site. DCD wants the northwest corner of the north parcel revised to show the full fifty foot buffer. (Exhibit S1, pp. 9 and 10)
15. The size of Wetlands C and E must be determined to a reasonable level of accuracy before any project evaluation may go forward. If either or both exceed five acres in total size, they may well move up from Category 3 to Category 2 wetlands with a commensurate increase in the minimum required buffer width. Such a change would affect the analysis of before-and-after functions and values.
16. The Examiner concurs with DCD that the proposal does not comply with all of the Innovative Development Design criteria:
  - A. The Examiner would agree with DCD and GBA that it is hard to believe that a net improvement to the functions and values of the wetlands and their buffers can result from the elimination of much of the buffer and the treatment of wetland as buffer. Under the Council's *Timber Ridge Estates* ruling, buffers could theoretically be totally eliminated, contrary to DCD's position, but only if net improvement were clearly demonstrated.

The "paper fill" concept here is being used for a purpose different from that for which state agencies have apparently accepted it. Given that former Chapter 16.80 SMC does not expressly mention the concept, the Examiner recommends that the Council approach the concept very cautiously.

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- B. The Examiner has been told in prior cases that no state agency has regulatory authority over wetlands *per se*. Therefore, as in prior cases, the Examiner concludes that the requirement for prior state agency approval of the Innovative Development Design is moot.
- C. The purpose and objectives of former Chapter 16.80 SMC were set forth in former SMC 16.80.010 and .020. They include "precluding land uses or development that is incompatible with critical areas" and "conservation of resource lands." Unless the proposal results in a net increase in the functions and values of the affected critical areas and their buffers, it cannot be said that the purpose and objectives of former Chapter 16.80 SMC have been met.
- D. The *Anderson Farm* site is admittedly difficult to work with due to the extensive, irregular wetland areas within it. However, while Grandview has obviously tried to design around the wetlands, it has also obviously tried to maximize its yield by minimizing protections to those wetlands. For example, Grandview submitted Exhibit G6 as an indication of what a development fully meeting all adopted standards might look like. The yield is substantially less, but the impacts to critical areas are also less. The existence of Exhibit G6 is an indication that Grandview's first goal was not avoidance or even minimization of impacts.
- E. Nothing in the record suggests that the proposal would be harmful to adjacent properties.

The present proposal meets only Innovative Development design criteria (2) and (5). Therefore, it cannot be approved.

- 17. The restrictions in former Chapter 16.80 SMC on uses within wetlands and their buffers remain in effect for this application. A basic rule of statutory construction is that differences in wording within a statute evidence differences in intent.

Subsection 16.80.080(B)(1) and (D)(5) differ: Utility lines may be placed within wetlands, but may only be placed within wetland buffers if no reasonably feasible alternative exists. Roadways are subject to the same differentiation in former SMC 16.80.080(B)(2) and (D)(6). Wildlife viewing structures are allowed in buffers and wetlands, but walkways are allowed only in buffers. [SMC 16.80.080(B)(3), (D)(2), and (D)(1)] Stormwater detention facilities are not allowed in either wetlands or their buffers. [SMC 16.80.080(B) and (D)]

- 18. The location of the proposed boardwalks through the wetlands violates former SMC 16.80.080. The use of Wetlands A and B for stormwater detention violates former SMC

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16.80.080. The placement of two detention facilities within the Wetlands E and H buffers violates former SMC 16.80.080.

19. *Anderson Farm* as proposed violates former Chapter 16.80 SMC and cannot be approved.

M. Water and Sewer Availability (Topics 11 and 12)

1. Subsections 16.10.070(C)(7) and (8) SMC require that written evidence of sewer and water availability, respectively, be submitted with a PUD application.
2. Grandview submitted with its application "Availability Notification" letters dated August 12, 2005, from the City's Public Works Director. (Exhibits S3d and S3e) Exhibit S3d states that the City's water system is capable of serving the proposed development. The letter includes the following sentence: "Connection to the system must be completed within one year or the Availability Notification is VOID." (Exhibit S3d, ¶ 1, capitalization in original)

Exhibit S3e states that the City's sewer system is capable of serving the proposed development. The letter includes the following sentence: "Connection to the system must be completed within one year or the Availability Notification is VOID." (Exhibit S3e, ¶ 1, capitalization in original)

3. The two Availability Notification letters became void by their own terms on August 12, 2006. Grandview has not requested and the City has not issued an extension or renewal for either Availability Notification. (Exhibit S1, p. 11, and testimony)
4. DCD's position is that *Anderson Farm* does not now comply with SMC 16.10.070(C)(7) and (8) but would comply if extensions were requested. (Exhibit S1, p. 11)
5. Grandview's position is that the Examiner should recommend to the Council that it simply impose a condition on approval requiring acquisition of current water and sewer Availability Notification letters. (Testimony)
6. Kraut argues that one cannot extend that which has become void. Kraut and Fallgatter believe that wholly new Availability Notifications would be necessary, but that such cannot be issued because of the Hearings Board's invalidation of the City's Capital Facilities Plan. (Exhibit A2a - e and testimony)
7. Availability and adequacy of basic utility services to a proposed development is a foundational issue profoundly affecting the ability to grant a land use entitlement. When, as has happened here, an application is in the review process for so long that its utility commitments expire, no PUD approval should be granted within current utility availability commitments.

Further, SMC 16.28.330(A)(2) requires the decision maker to affirmatively find that appropriate provisions have been made for water and sewer service (among many other items) before preliminary subdivision approval may be granted. One simply cannot find that appropriate provisions have been made when the only availability commitments expired nearly two years ago.

8. Grandview's suggestion that approval simply be conditioned on the availability of water and sewer service is inconsistent with the clear requirement of SMC 16.28.330(A)(2). (Whether it is literally inconsistent with SMC 16.10.070(C) is immaterial: The preliminary PUD application may not be approved without its companion preliminary subdivision.)
9. The question of the extent to which the City may be legally unable to issue new Availability Notifications given the Hearings Board's actions is not before the Examiner and need not be answered to resolve the present application. The Examiner declines to comment further on that matter.

N. Stormwater Plan – North Parcel (Topic 13)

1. "The city adopts the most recent Department of Ecology [DOE] Stormwater Management Manual for the Puget Sound Basin. Said manual as it now reads or is hereafter amended is incorporated into the Sultan Municipal Code by this reference." [SMC 16.92.010(D)] The most recent DOE Manual is referred to as the 2005 Stormwater Management Manual for the Puget Sound Basin (2005 Manual). (Exhibits §1, p. 11, and S9c, p. 3) DOE has prepared a Low Impact Development Technical Guideline Manual for Puget Sound (LID Manual), "which is referred to by the 2005 Manual as preferred development guidelines." (Exhibit S9c, p. 3) Sultan has not adopted the LID Manual.<sup>25</sup> (Testimony)
2. Grandview proposes to use portions of Wetlands A and B as detention facilities following the guidelines of the LID Manual. (Exhibits S9c and S17)
3. DCD correctly states that since the City has not adopted the LID Manual, it cannot approve Grandview's proposal for the north parcel. (Exhibit S1, pp. 11 and 12) Further, as has been concluded in Paragraph L.18, above, wetlands may not be used for detention under former Chapter 16.80 SMC.

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<sup>25</sup> Grandview argues that by adopting the 2005 Manual, the City adopted the LID Manual by reference. DCD argues that the Council did not adopt the LID Manual. City staff should know better than an applicant what the City's legislative body adopted or did not adopt.

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4. Grandview's stormwater management plan for the north parcel violates adopted City regulations and cannot be approved.

O. Stormwater Plan – South Parcel (Topic 14)

1. See Paragraph N.1, above.
2. Grandview proposes to use traditional detention ponds to control stormwater runoff on the south parcel. The two proposed ponds would be located within the required buffers of Wetlands E and H. (Exhibits S9c and S17)
3. DCD correctly states that stormwater detention ponds are not generally allowed within wetland buffers and that Grandview has not demonstrated that a buffer location is necessary in this case. Therefore, DCD correctly concludes that Grandview's stormwater management plan for the south parcel also violates adopted City regulations and cannot be approved. (Exhibit S1, pp. 11 and 12)

P. Internal Streets (Topic 15)

1. The standards for streets within subdivisions are contained in SMC 16.28.230(B).<sup>26</sup> Minimum access to the boundary of a land division must generally be by an "opened, constructed and maintained city road or roads". [SMC 16.28.230(B)(1)] Minimum access to the lots within a land division must be by either a public street or a private road whose right-of-way width depends upon the number of lots to be served. A minimum right-of-way width for a street serving four dwelling units is 30 feet; for a street serving five or more dwelling units it is 60 feet. [SMC 16.28.230(B)(2)] No more than four lots may be served by a private road without express Council approval. [SMC 16.28.230(B)(3)] All streets and sidewalks within a land division must comply with the adopted Design Standards and Specifications (Design Standards). [SMC 16.28.230(B)(4) and (B)(5)]

<sup>26</sup>

This section is within Article I of Chapter 16.28 SMC which is entitled "Short Subdivisions." Since subdivisions are the subject of Article II of Chapter 16.28 SMC, one would think at first blush that no provisions within Article I apply to subdivisions. However, close scrutiny of the structure of Chapter 16.28 SMC leads to the inescapable conclusion that nothing could be further from the truth.

Frankly, the chapter is poorly organized. (The Examiner has made this same observation on prior occasions.) The portion on short subdivisions contains very detailed development and improvement requirements as well as procedural requirements; the portion on subdivisions contains only procedural requirements. Some of the procedural requirements within the short subdivision portion relate to matters which, by definition, apply to subdivisions.

The Examiner has concluded previously and concludes again that the division of Chapter 16.28 SMC is the result of inartful drafting and cannot rationally be read to exclude applicability of development standards to subdivisions.

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2. The internal streets would be classified as Local Access Streets, for which the Design Standards state that the normal right-of-way width is 60 feet containing two 12 foot travel lanes, parking on both sides, and five foot sidewalks on both sides with street trees planted every 20 feet on the street edge. [Design Standards, § 1.09]
3. Street standards in PUDs, both right-of-way width and street section standards, may be “modified ... with the concurrence of the city council”. [SMC 16.10.120(B)(4)(a) and (b)] The Design Standards also provide that the Council may modify the adopted standards. [Design Standards, § 1.06] Thus, no matter which authority is relied upon (the SMC or the Design Standards), the Council is the body with authority to modify street standards.
4. The Design Standards state that modifications may be granted “upon evidence that such modifications are in the public interest, that they are based upon sound engineering judgment, and that requirements for safety, function, appearance and maintainability are fully met.” [Design Standards, § 1.06]

PUD provisions state that right-of-way and pavement “widths may also be reduced, especially where it is found that the plan for the PUD provides for the separation of vehicular and pedestrian circulation patterns and provides for adequate off-street parking facilities.” [SMC 16.10.120 (B)(4)(b)]

5. Grandview proposes to serve the 26 proposed lots in *Anderson Farm* with three public or private streets.<sup>27</sup> (Testimony) A T-shaped street with hammerhead turnarounds at each end would serve the 11 lots on the north parcel. A dead-end street with a hammerhead turnaround at its south end would serve the 11 lots on the west half of the south parcel. A short dead-end street with a hammerhead turnaround at its south end would serve the four lots in the northeast corner of the south parcel. The leg of the “T” on the north parcel and the westerly of the two streets on the south parcel would align at their point of intersection with 135<sup>th</sup> Street SE, creating a four-legged intersection. The remaining street (Access Road A) would run roughly parallel with Sultan Basin Road and would intersect 135<sup>th</sup> Street SE approximately 110 feet west of Sultan Basin Road (centerline-to-centerline measurement). (Exhibit S17)
6. All of the internal streets rely upon significant modifications of established standards for local access streets. (Exhibits S1 and S17)

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<sup>27</sup> Grandview’s submittal states that the internal streets will be public. (Exhibit S17, Sheet 1, Note 3) The City reviewed the application under the belief that Grandview was proposing public streets. (Exhibit S1) Grandview testified at hearing first that the internal streets would be private and later that it didn’t care whether they were public or private. (Testimony)

Standard	Requirement	Proposed
Right-of-Way	60' wide	31.5' wide
Travel lanes	2 - 12' lanes	2 - 12' lanes
Parking lanes	2 - 8' lanes	None
Sidewalks	2 - 5' sidewalks	1 - 5' sidewalk
Curb and gutter	On each side	Curb one side only
Street trees	1 per 20 lineal feet	None

Grandview proposes a five-stall off-street parking area on the west side of the north parcel's access road, just north of its intersection with 135<sup>th</sup> Street SE. (Exhibit S17)

7. DCD concludes that Grandview's proposal does not meet the PUD criteria for street reduction.

The proposal does not meet this criteria. As proposed, there is no separation of pedestrian and vehicular traffic. Only one (1) side of the street on each road would have sidewalks, and no planters with street trees or on-street parking areas are proposed. This would place the pedestrians directly adjacent to moving vehicles. Additionally, the pedestrian facilities proposed to be within the wetlands are not permitted under SMC 16.80.

There is also not adequate off-street parking. Under SMC 16.60.020, a parking space is required to be 153 square feet, and a minimum of eighteen (18) feet long. While there are two (2) car garages proposed, sixteen (16) lots would be unable to provide additional parking spaces within the driveway without the vehicles extending into the sidewalk or street. Lots 1-6, 8, 10, 15, 19, 23-24 and 26 have driveway lengths of less than eighteen (18) feet. Lots 1-6, 8, 10, 12-13, 15-16, 19, 23-24 and 26 do not have at least 306 square feet of driveway area to accommodate an additional two (2) spots. Four (4) total spots is the minimum accepted by City to meet this requirement.

(Exhibit 1, p. 12) In addition, DCD stated during the second day of the hearing that the centerline-to-centerline separation (aka "centerline off-set") between Sultan Basin Road and Access Road A was inadequate. DCD stated that although the City did not have an adopted standard for that factor, it would rely on the standard adopted by Snohomish County: The minimum acceptable centerline off-set for intersections on a local access street between parallel roads where one is an arterial is 165 feet.<sup>28</sup> (Exhibit S28)

<sup>28</sup> Based on the record in this hearing, it would appear that City staff had not taken this position prior to the second day of the hearing.

8. Grandview argues that its proposed boardwalks across two of the wetlands (concluded in a previous section to be impermissible) provide substantial pedestrian separation from traffic. It also notes that *Stratford Place* was approved with private, reduced width streets. (Exhibit G7 and testimony)

Grandview also argues that Chapter 16.60 SMC, Off-Street Parking and Loading Standards, does not require guest parking.<sup>29</sup> Grandview notes that the SMC requires two parking spaces on each single-family lot [SMC 16.60.140], that the double-vehicle garage on each lot fulfills that requirement, and that it could adjust building placement so that two additional parking spaces, each meeting the minimum dimensional requirements of SMC 16.60.020, Paragraph 2, could be provided on each lot.

Grandview also submitted a report, based on a study done in Colorado, which suggests that narrower streets are safer. (Exhibit G2)

9. The Council has addressed reduced width streets in two recent PUD applications. In *Greens Estates*, City file FPPUD05-001, the Council accepted a reduced width street proposal:

Under SMC 16.10.120(B)(4)(b), "right-of-way width and street roadway widths may also be reduced, especially where it is found that the plan for the PUD provides for the separation of vehicular and pedestrian circulation patterns and provides for adequate off-street parking facilities."

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. *Greens Estates* is proposing to construct standard width streets and sidewalks within rights-of-way, which are too narrow to contain them (except on Roads D and F).

The "left over" parts of the sidewalk are then placed within public access easements encumbering the front five feet of each frontage lot. On Roads D and F, a reduced right-of-way of fifty feet is coupled with the elimination of one parking lane. The sidewalks will be in public right-of-way on these roads.

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<sup>29</sup> The code citation for this fact given by Grandview during the hearing was Chapter 16.40 SMC. However, Chapter 16.40 SMC, a one section chapter entitled Building Placement, has nothing whatsoever to do with parking. The Examiner concludes that the number stated was an inadvertent slip of the tongue.

The Council concludes that the provision for allowing reduced right-of-way is met. This project provides a pedestrian trail system, providing separation of pedestrian and vehicular traffic patterns, the first criteria for reduced right-of-way. In addition, a project condition has been added [by the Council] that requires each lot in the development to provide four off-street parking spaces. With this condition, the project will meet the second criteria for reduced street right-of-way.

(Exhibit S24, Substitute Conclusion of Law 8)

In *Caleb Court*, City file FPPUD06-001, the Council was presented a reduced right-of-way and street width proposal. The applicant there proposed a 35 foot wide right-of-way which would contain two paved travel lanes, no parking lanes (four parking spaces were proposed adjacent to one lot which would essentially be carved out of the easterly travel lane, reducing the street to approximately 1.5 lanes wide in that area), curbs and gutters, concrete sidewalk, and planter strips. Because of the reduced width right-of-way, all but one foot of the sidewalks and the entirety of the planter strips would have been outside of the right-of-way. The remainder of the sidewalks would have been within a 4 foot wide sidewalk easement; the entirety of the planter strip would have been within the 10 foot wide utility easement paralleling the right-of-way. (Official notice)

The Examiner and Council rejected that proposal. The Council stated:

The Examiner found that the proposed reduction in public right-of-way width for the new Road A, an extension of Salmon Run North, is not justified primarily because the design does not provide for a landscaped separation of vehicles and pedestrians; and does not provide for adequate off-street parking.

The Council believes that a more appropriate design meeting City design standards, and compatible with existing Salmon Run North Rd. would include:

- a minimum fifty foot (50') right of way,
- thirty-two feet (32') of pavement between curbs
- a sidewalk extension similar in design to that existing along Salmon Run North Rd.
- additional on-street guest parking spaces

(Exhibit S26, ¶ B.1) In response, the applicant widened the internal right-of-way to 50 feet, widened the pavement to 32 feet, extended a connecting off-site sidewalk into the

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subdivision, and provided 10 on-street parking spaces on one side of the interior street. (Official notice) The Examiner and Council accepted that concept. (Exhibit S27)

10. The rights-of-way and street sections proposed by Grandview for *Anderson Farm* are narrower and more substandard than anything approved to date under Chapter 16.10 SMC.
11. The proposal has no realistic separation of pedestrian and automotive traffic. The two wetland boardwalks violate applicable critical areas regulations. (See Paragraph L.18, above.) Without those, nothing remains except sidewalks along one side of the interior streets. That is not separation of pedestrians from vehicles. (Even with them, most pedestrian travel would follow the sidewalks rather than the boardwalks as their alignments offer benefits to only certain limited origin and destination points.)
12. The proposal has a woefully inadequate street section. Grandview proposes an unbalanced section with curb and gutter on one side only. The Examiner would ask the Council to carefully consider the future impact of signaling that such a section is allowable in Sultan.
13. The proposal has inadequate parking. The parking standards in Chapter 16.60 SMC essentially assume a standard, suburban development where sufficient space exists between adjacent driveways to allow substantial parking along both sides of access streets. Here the lots are so narrow that no on-street parking is possible on the side of the streets fronted by the houses. With only 24 feet of pavement, no parking at all is possible on-street without reducing the street to one-lane travel. The driveways, as depicted on Exhibit 17, are too short to allow parking in them without vehicles hanging over into the pavement.
14. One code-mandated consideration in reducing street width is the availability of additional parking. Here there is virtually none. The five guest parking spaces are poorly located to serve the majority of the lots.
15. DCD has correctly concluded that the current proposal does not comply with the criteria for reduced street widths. The proposal should be rejected.
16. DCD incorrectly asserts that private streets are not allowed in formal subdivisions. The Council has approved private streets in subdivisions in the past. If it wishes to prohibit them in the future, an appropriate code amendment would be necessary.
17. DCD is correctly concerned about the centerline off-set between Access Road A and Sultan Basin Road. The off-set is substantially less than required under the County's presumably well thought out standard. The functional integrity of intersections on arterials such as Sultan Basin Road must be preserved. The public safety, use, and interest would not be served by approval of the current proposal.

Q. 135<sup>th</sup> Street SE Frontage Improvements (Topic 16)

1. As noted in Paragraph A.1, above, the 135<sup>th</sup> Street SE right-of-way is 60 feet wide between the parcels but only 30 feet wide west of the west boundary of the south parcel. (Exhibit S17) The existing paved travel surface is about 20 feet wide and is located entirely within the 30 feet of right-of-way immediately abutting the north parcel. (Exhibit S17, Sheet 3)
2. 135<sup>th</sup> Street SE is designated as a local access street. (Exhibit S1, p. 13)
3. Frontage improvements are required along 135<sup>th</sup> Street SE. Grandview has an agreement with the "exception" owner by which it can construct frontage improvements in front of that parcel as well.

For the area where Grandview owns and/or has permission to construct in front of the property on both sides of the street (approximately the easterly 407 feet), the following road section is proposed. (Exhibits S1 and S17, Sheet 2)

Standard	Requirement	Proposed
Right-of-Way	60'	60'
Travel lanes	2 - 12' lanes	2 - 12' lanes
Parking lanes	2 - 8' lanes	2 - 8' lanes
Sidewalks	2 - 5' sidewalks	2 - 5' sidewalks
Curb and gutter	On each side	1 - 5' curb
Street trees	1 per 20 lineal feet	1 per 50 lineal feet
Planter	Sufficient for street trees	2 - 3' planters

For that portion of the right-of-way where Grandview does not own the property south of the right-of-way (approximately 203 feet), the following "half-street" section (all of which would be constructed within the existing 30 feet of right-of-way) is proposed. (Exhibits S1 and S17, Sheet 2)

Standard	Requirement	Proposed
Right-of-Way	60'	30' (existing)
Travel lanes	2 - 12' lanes	2 - 10' lanes
Parking lanes	2 - 8' lanes	None
Sidewalks	2 - 5' sidewalks	1 - 5' sidewalk
Curb and gutter	On each side	1 - 5' curb
Street trees	1 per 20 lineal feet	1 per 50 lineal feet
Planter	Sufficient for street trees	1 - 3' planter

4. The City Engineer is of the opinion that constructing only a half-street section for the westerly 203 feet of the frontage improvements will create "a traffic safety hazard." (Exhibit

S7) The concern is with the transition from the half-street improvement on the west to the full-width urban street improvement on the east. Basically, the City believes that because the pavement centerline will not align between the two sections, the eastbound travel lane west of the site will not align properly with the eastbound travel lane of the full width section (it would be to the north of the new pavement centerline), thus creating a situation where westbound traffic could find itself driving straight towards eastbound traffic in what would appear to be the same lane. The City wants Grandview to "propose a creative solution." (Testimony)

5. Grandview disagrees. It argues that the road will widen for eastbound motorists, not constrict. It sees no reason why a proper transition cannot be designed and built. (Testimony) Further, Grandview argues that it cannot be required to make off-site improvements under the guise of "frontage improvements." (Argument of counsel)
6. Grandview is right on this point (except for street tree spacing) for several reasons. First, Grandview correctly argues that the City cannot require it to perform frontage improvements in front of someone else's property. Thus, it cannot be made to construct frontage improvements on the south side of 135<sup>th</sup> Street SE west of the south parcel.

Second, the transition between the two sections can be designed so that the eastbound traffic is not expected to make a radical jump to the south. For example, the travel lanes could be striped so that they angle to the south after exiting the half-street section.

Third, such a discontinuity is not at all uncommon in developing areas, including nearby areas in Sultan. By definition, developers are required to make frontage improvements along the frontage of the property they develop. When under-/un-developed parcels develop piecemeal, as is the norm, then frontage improvements take on a patchwork character – until an entire area becomes fully developed, at which time a full urban standard street finally exists. This would be the case here were Grandview not seeking simultaneous development of the north and south parcels; it would be the case had the owner of the parcel to the west of the south parcel been the first owner along 135<sup>th</sup> Street SE to seek development approval.

Fourth, it is not Grandview's obligation to "propose a creative solution." It is the City's responsibility to inform Grandview how it wishes such transitions to be handled.

Finally, Grandview's street tree spacing does not meet adopted City Design Standards. That part of Grandview's proposal has no justification and should not be accepted.

7. The transition problem appears to be solely a pavement striping problem. (If it is more than that, the record put forth by the City fails to disclose the nature of an additional problem.)

Grandview should correct the street tree spacing as depicted on Exhibit S17. Pavement striping need not be depicted on preliminary plans.

8. The deficiency in Grandview's plans is essentially a drafting issue which could be easily corrected. Were this the only deficiency in the plans, the Examiner would recommend imposition of a condition as the plan changes would have no effect upon the design and layout of the development. However, since this is not the sole deficiency (and clearly not the most important), the frontage improvement depictions on the plans should be corrected before approval is granted.

R. Sultan Basin Road Frontage Improvements (Topic 17)

1. Sultan Basin Road is a designated secondary arterial for which a special street section has been adopted by the City. (Exhibit S1, testimony, and Design Standards, § 1.09)
2. Grandview proposes half-street frontage improvements along the site's entire frontage on Sultan Basin Road, including the frontage along the "exception." The following half-street section is proposed. (Exhibit S1 and S17)

Standard	Half-Street Requirement	Proposed Half-Street
Right-of-Way	33'	33' (3' of dedication)
Travel lanes	1 - 12' lanes	1 - 12' lane
Parking lanes	None	1 - 8' lane
Turning lanes	1 - 12' lane (entire street)	None
Sidewalks	1 - 6' sidewalks	1 - 5' sidewalk
Curb and gutter	On each side	1 - .5' curb
Street trees	1 per 20 lineal feet	1 per 25 lineal feet, not shown on "exception"
Planter	1 - 5'	1 - 3' planter
Bike Lane	1 - 3' lane	1 - 3' lane

3. DCD notes that the offered section does not meet the standard for turning lane, street tree spacing, planter width, and sidewalk width. (Exhibit s1, p. 14)
4. Grandview agrees to comply with the adopted Sultan Basin Road standards. (Testimony)
5. The most critical issue is right-of-way width. Grandview's proposal provides for the special Sultan Basin Road right-of-way width. The deficiencies in Grandview's plans are essentially drafting issues which could be easily corrected. Were this the only deficiency in the plans, the Examiner would recommend imposition of a condition as the plan changes would have no effect upon the design and layout of the development. However, since this is not the sole deficiency (and clearly not the most important), the frontage improvement depictions on the plans should be corrected before approval is granted.

S. Fire Hydrants (Topic 18)

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1. DCD states that "Fire hydrants are required with this project and must be shown in a preliminary manner on plans." (Exhibit S1, p. 15) Grandview submitted no preliminary utility plans; none of the submitted plans show water lines or potential fire hydrant locations. (Exhibit S17)
2. Grandview stated that it would show fire hydrant locations meeting City standards on its construction plans. (Testimony)
3. Neither Chapter 16.10 SMC nor Chapter 16.28 SMC expressly requires submittal of preliminary utility plans with either a preliminary PUD or a preliminary subdivision application, respectively. Hydrant location, as argued by Grandview, is far more a construction level topic than a land use entitlement topic. Grandview is not in violation of any requirement relating to depiction of fire hydrant locations. If the Council wishes such information to be a required part of the preliminary PUD and/or preliminary subdivision application process, then it must amend the appropriate code(s) to so require.

T. Concurrency (Topic 19)

1. Fallgatter and Kraut believe that *Anderson Farm* does not comply with Chapter 16.108 SMC, Concurrency Management System. (Exhibit A2 and testimony)
2. Subdivision applications are development permits. [SMC 16.120.050] *Anderson Farm* is not categorically exempt from SEPA threshold determination requirements. (Exhibit S19) Therefore, *Anderson Farm* is subject to the concurrency requirements of Chapter 16.108 SMC. [SMC 16.108.020] "No development approvals [other than those exempted] will be granted unless the applicant is eligible for a certificate of concurrency." [SMC 16.108.030(C)]
3. 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."
4. 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.<sup>30</sup> If the required LOS is not present, then SMC 16.108.060 provides two alternative mechanisms by which a development may still be found to be concurrent.

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

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

Subsection (C) addresses the situation where the LOS standard would not be met but the developer enters into a binding agreement with the City to provide the necessary resources to raise the LOS to meet or exceed the established LOS within six years. This is an option in which the typical developer would likely be committing more than his/her fair share. But "latecomers" agreements are available for just such situations.<sup>31</sup> And, the developer always has the option to wait until the City makes the necessary commitments to raise the LOS.

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<sup>30</sup> To read this subsection as one prior applicant has suggested (the LOS must meet the standard for only the one day on which the Council will act on the proposal) is simply illogical and makes a mockery of the entire concurrency system chapter. If such was the true intent of the Council when it enacted Chapter 16.108 SMC, the Council will have to declare on its own initiative: The Examiner declines to even suggest that such an interpretation might have been intended.

<sup>31</sup> In fact, developers frequently extend water and sewer lines to serve a development. The cost of getting those lines to the development site often is above and beyond a roughly proportional cost. But the developer usually does not want to await the extension of those lines by the City, so it offers to fund them now and enter into a "latecomers" agreement by which, over time, at least some of its excess investment costs may be returned when others connect to the lines for which it has paid.

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5. DCD has not issued the required Certificate of Concurrency. (Exhibit S1, pp. 15 – 17) “A certificate of concurrency cannot be granted unless there are current water and sewer availability letters.” (Exhibit S1, p. 17)
6. The 2004 Comprehensive Plan LOS for parks and recreation is 42.6 acres per 1,000 residents. In 2007 the City had just under 200 acres of parks and open space lands, serving a population of about 4,530, or 43.7 acres per 1,000 population which exceeds the standard. (Exhibit S1, p. 17)
7. The currently adopted LOS standard for police services is 2.6 uniformed officers per 1,000 population. [2004 Comprehensive Plan, Appendix B, p. 2.74] The City currently has six uniformed officers. (Official notice based on evidence in the *Twin Rivers Ranch Estates*, FPCUP07-001, hearing on December 11, 2007) The current uniformed officer deficit is 5.8 officers based on the Office of Financial Management’s July 1, 2007, City population estimate of 4,530.
8. 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.
9. The City has no “strategy in place” to increase police staffing. The electorate defeated its latest proposed strategy. The discussion in Conclusion 5 of Resolution Nos. 06-06 and 06-07 and Conclusion 4 of resolution No. 06-09A regarding possible additional taxes that could or might be adopted to raise revenue is a strategy, but it is not in place. However, that Council discussion (that additional tax revenues coupled with developer funds could raise the LOS to meet the standard) has been converted into a condition would read as follows:

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 had to be met before approval for occupancy could be granted.

Such an "either - or" condition meets the requirement of both SMC 16.108.060(C) SMC 16.108.060(B) and has been adopted by the Council as policy. (Exhibit S1, pp. 16 and 17)

10. A Certificate of Concurrency cannot be issued for *Anderson Farm* due to the lack of current water and sewer availability statements. Therefore, even with a condition such as that quoted in Paragraph 9, above, *Anderson Farm* may not be approved.

U. Plan Policy Requirement

1. Fallgatter argues that Grandview's application does not fully meet the PUD submittal requirements set out in SMC 16.10.070. In particular, she argues that Grandview has failed to comply with SMC 16.10.070(C)(3) and (C)(10). (Testimony)
2. Section 16.10.070(C)(3) SMC requires a written narrative which must include an analysis of Plan conformance. Grandview submitted a "Narrative" with its initial materials in September, 2005. That document includes sections on Site Description, Proposal Description, Objectives, and Quantitative Data. It does not include an analysis of Plan conformance nor does it include a "detailed statement" of compliance with the requirements of Chapter 16.10 SMC. (Exhibit S3c) The proposal fails to comply with this requirement.
3. Section 16.10.070(C)(10) SMC requires submittal of a "municipal service economic impact assessment" in two situations: "for all residential PUDs over 50 dwelling units and all other PUDs over five acres." Grandview is not required under this provision to provide a municipal service economic impact assessment. This is a proposed residential PUD. Therefore, such an analysis is required only where the number of dwelling units is 51 or more. *Anderson Farm*, at 26 proposed dwelling units, is below that threshold. The "over five acres" threshold applies only to "all other PUDs", meaning other than residential PUDs.

V. Summary

1. *Anderson Farm* does not meet most of the review criteria for approval as a preliminary subdivision:
  - A. Open space. The proposal does not comply with the open space requirements of SMC 16.10.140.
  - B. Drainage ways. The stormwater management facilities rely on a concept not adopted by Sultan and would place facilities within wetlands and their buffers in violation of former Chapter 16.80 SMC.
  - C. Streets and roads. The interior streets do not comply with adopted standards; the development does not meet the criteria to modify those standards as requested.

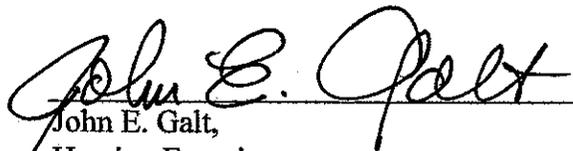
- D. Alleys. The design does not require alleys.
  - E. Other public ways. No need for other public ways within the subdivision exists.
  - F. Transit stops. The record contains no request for transit stops.
  - G. Potable water supply. Grandview has no current water service Availability Notification.
  - H. Sanitary wastes. Grandview has no current sewer service Availability Notification.
  - I. Parks and recreation. The proposal fails to meet the requirements of Chapter 16.72 SMC.
  - J. Playgrounds. See Paragraph V.1.I, above.
  - K. Schools and schoolgrounds. The record contains no comments regarding any need for these facilities.
  - L. Safe walking conditions for students who only walk to and from school. The record lacks evidence against which to judge compliance with this criterion.
2. *Anderson Farm* does not pass the "consistency" test: The use is allowed; the density is within the allowed range; however, evidence of adequate utility services is lacking.
  3. *Anderson Farm* fails to meet numerous specific requirements of applicable codes as noted throughout this Recommendation. Those deficiencies will not be repeated here. The number, type, and magnitude of the shortcomings are such as to make it impossible to merely craft conditions on an approval to correct the problems.
  4. The complete extent to which Grandview was advised by DCD of the many short-comings of its application during the extraordinarily lengthy review process is not evident in the record. It is clear that GBA communicated its concerns on at least several occasions since 2005; its concerns are not new. It is also evident from the record (testimony) that DCD has been represented by more than one person during the lengthy review process.

The question then is whether *Anderson Farm* should be returned for correction or simply denied. This proposal is so far from acceptable that the Examiner recommends that it be denied.

### RECOMMENDATION

Based upon the preceding Findings of Fact and Conclusions of Law, the testimony and evidence submitted at the open record hearing, and the Examiner's site view, the Examiner **RECOMMENDS DENIAL** of the proposed preliminary subdivision and planned unit development of *Anderson Farm*.

Recommendation issued May 16, 2008.

  
John E. Galt,  
Hearing Examiner

### HEARING PARTICIPANTS <sup>32</sup>

John Bissell, consultant for Grandview  
William Foster, counsel for Grandview  
Brad Collins, Interim City Community Dev. Dir.  
Patricia Bunting, consultant for the City  
Ron Kraut  
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James Kresge, engineer for Grandview  
Deborah Knight, City Administrator  
Erin Martindale, City Planner  
Kathy Hardy, City Attorney  
Josie Fallgatter

### NOTICE OF RIGHT OF RECONSIDERATION

This Recommendation, dated May 16, 2008, 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 May 27, 2008, (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

<sup>32</sup> The official Parties of Record register is maintained by the City's Hearing Clerk.