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MEMORANDUM

TO: **Heidi Gudde, Planning & Community Development Director, City of Lynden**

FROM: **Robert Carmichael and Catherine Moore**

DATE: **July 16, 2021**

SUBJECT: **Minimum Density – Combining Lots in Pepin Creek Subarea**

Following the last Community Development Committee meeting of the City Council ("CDC"), you asked us a few questions pertaining to the Pepin Creek Subarea, set forth below in bold. Our answers follow each question.

Question No.1: The CDC had questions about the binding of lots and constructing on bound lots. For example, if a long plat included 8 lots but the developer, who lives next to the long plat, doesn't want 8 neighbors, could he then, through a private covenant require that the lots be sold in pairs and only 4 houses be constructed? This would prevent half of the home construction – maybe for a certain time period? Its important to note that the developer pays TIF at the time of plat – so the City would collect TIF for 8 units but not see the impacts of 8 units – at least not right away.

Answer: We will discuss the risks of allowing this to happen in answer to Question No. 3 below. We do have some concern about allowing developers to bind platted lots in this way. But in direct answer to your above question, unless otherwise prohibited, a developer could employ restrictive covenants to achieve a density within its subdivision that is lower than the minimum density required within the Pepin Creek Subarea. There is nothing in the state subdivision statute (Ch. 58.17 RCW) or in the City's current subdivision ordinance (Title 18 LMC) that would specifically restrain the consolidation or binding together of lots. However, a prohibition on binding together lots in the Pepin Creek Subarea will help the City achieve the intended minimum density in the subarea and preserve its funding base for the necessary transportation improvements to serve the development. Such a prohibition, with the potential for granting exceptions by City Council, may be included in the new zoning ordinance. We added such language in the proposed draft zoning ordinance for the Pepin Creek Subarea at 19.18.010(C)(2). The City may also incorporate minimum density requirement "protections" into the subdivision approval process for development projects within the Pepin Creek Subarea. Whether through restrictions on the face of plats, within the CC&Rs, or within individual deeds for each lot sale, the City has the ability to address and regulate potential developer efforts to circumvent minimum density requirements.

Question No.2: In this same instance, if a property owner bought two lots, can they bind the lots and put their home right in the middle on top of the lot line? I thought that they could not do this but Korene recalled that it may have been done in the past.

Answer: Korene remembers correctly. We are aware of at least two separate covenants which are examples of instances in which the City required a restrictive covenant to be recorded binding two lots together as a condition of issuing a building permit to construct a building spanning both lots. Neither are for a home; one was for a church and one was for a commercial building. We have also seen examples where Bellingham and Whatcom County required the same type of covenant.

Lynden, Bellingham, and Whatcom County must all interpret their own codes as generally prohibiting constructing one building across two lots unless the lots are bound together, even though none of them have an explicit ordinance on it. The closest thing to an explicit prohibition are yard setbacks. For instance, Lynden has a side and rear yard setback of at least 5 feet in every zone, so building across a property line would infringe into the mandatory setbacks. Hence, from a practical standpoint, a property owner will not be allowed to build over a lot line unless the lots are bound together by perpetual covenant or the lot line itself is eliminated at that location.

Just as the City can use an ordinance to enforce minimum density requirements, so too can the City include a prohibition in its zoning ordinance from the granting of a building permit for a building that would cross property lines. Naturally, this would not prevent someone from buying two lots and just using one as their yard (although that might be a good compromise for the City and property owners). We think perhaps the best compromise for the Pepin Creek Subarea, as explained in answer to Question No. 3, is to generally prohibit the binding, consolidation or elimination of lots in the zoning ordinance, except as may be approved by the City Council per standards set forth in the ordinance.

Question No. 3: Finally, is there a risk of a developer coming back to the City and asking for a refund of TIF because they paid for 8 units but only 4 were constructed?

Answer: To answer this question, we must distinguish between the developer who has placed enforceable legal restrictions on his ability to build more units and the developer who simply claims he will not build any more units. Without a legal restriction such as binding the 8 platted lots together into 4 buildable lots, the developer will clearly be responsible for the TIF due for 8 units because there will be no impediment to building out the remaining 4 platted lots at a later date. However, if the developer has entered an enforceable covenant or deed restriction binding the 8 platted lots into 4 buildable lots, the potential claim must be taken more seriously. In this situation where the 8 platted lots are legally restricted or bound into 4 buildable lots, there is risk that the TIF for such property is disproportionate to its impact. In other words, if the developer restricts his property such that he only has 4 buildable lots on the 8 platted lots, he may argue the TIF imposed (calculated for impact of 8 lots) is disproportionate to his development's actual impact (4 lots).

RCW 82.02.050 provides requirements for how impact fees are to be imposed and used. Impact fees "(a) Shall only be imposed for system improvements that are reasonably related to the new development; (b) **Shall not exceed a proportionate share of the costs of system improvements**

that are reasonably related to the [service demands and needs of the] new development [emphasis added]; and (c) Shall be used for system improvements that will reasonably benefit the new development." RCW 82.02.050(4); RCW 82.02.090(5). These use restrictions apply even though the City's ordinances and RCW 58.17.110 permit the City to collect the impact fees on plat approval. If a developer plats 8 lots, but restricts the property such that he may only build 4 homes, he may argue that 8 lots' worth of impact fees could not be charged to him under RCW 82.02.050. He would say that he has been overcharged; i.e., the impact fees for all 8 lots would exceed his proportional share of costs related to the actual impact of construction of 4 homes on 4 buildable lots. This is a serious argument, best avoided if we can.

The City should be able to deal with this by prohibiting binding lots together or eliminating lots in the Pepin Creek Subarea. If each lot could eventually be developed with its own home, even if initially not developed, then the City will need to build the infrastructure to support all 8 lots, and therefore collect the impact fees of all 8 lots. We suggest prohibiting binding together lots and eliminating/consolidating lots in the Pepin Creek Subarea zoning ordinance, and on the face of the recorded plat, to avoid the City losing control over this risk.

There should also, however, be a process to obtain relief from the above prohibition through the City Council. RCW 58.17.212 et seq., already provides a process for vacating or altering a plat or portion thereof. The process requires a public hearing before the legislative authority and a determination that the request will serve "the public use and interest." *Id.* We suggest that the City include the potential for granting relief from the prohibition on binding or consolidating lots in the Pepin Creek Subarea by expressly authorizing an exception be granted by City Council, following a public hearing, where the Council finds that the request will serve "the public use and interest." This is the standard in the RCW for vacating or altering a plat and should serve for this purpose. The request for relief could come in the form of a plat vacation or alteration, a lot line adjustment, or a simple request to bind lots together. The City Council would then retain discretion as to when to grant relief from the prohibition on binding together or consolidating lots. See proposed language at 19.18.010(c)(2).

As additional information related to your question, under RCW 82.02.080(3), a developer "may request and shall receive a refund, including interest earned on the impact fees, when the developer does not proceed with the development activity and no impact has resulted." In our opinion a final plat approval constitutes impactful development activity for the purposes of this statute, and fees may be collected at that time.

"Development activity" is "any construction or expansion of a building, structure, or use, any change in use of a building or structure, or any changes in the use of land, that creates additional demand and need for public facilities." RCW 82.02.090(1). We are comfortable concluding that a plat is a "change in the use of land" that creates additional demand and need for public facilities; the City must plan for all the lots to be developed, regardless of whether they are immediately built on. This is the interpretation Lynden makes in its own code. For the purposes of traffic impact fees, "'Development' or 'development activity' means any final short or long plat approval, any

construction or expansion of a building, structure, or use, or any changes in the use of land, that creates additional demand and need for public facilities." LMC 3.46.015. It is also implied by the statutes on subdivision, which provide that "Dedication of land to any public body, provision of public improvements to serve the subdivision, and/or impact fees imposed under RCW 82.02.050 through 82.02.090 may be required as a condition of subdivision approval." RCW 58.17.110(2).

As you know, the owner of property on which impact fees were collected (be it the developer or a later buyer) can seek a refund of any funds not expended or encumbered within six years of collection. LMC 3.46.100(B). Thus, fees would need to be refunded if not fully committed within the six-year window. The City can avoid such a refund request by fully expending or encumbering all impact fees within six years regardless of how many units are constructed within that time.