

CITY OF TUMWATER
OFFICE OF THE HEARING EXAMINER
REPORT AND DECISION

FILE NOS: TLP #1-05 and PUD #1-05

APPLICANTS: Tumwater Highlands LLC

SUMMARY OF REQUESTS:

Requests for approval of a preliminary plat (TLP #1-05) and planned unit development (PUD #1-05) for a proposed 599-lot residential subdivision of a 126.46-acre parcel of land.

LOCATION:

The property is located west of Old Highway 99 and generally between 88th Avenue SW and 93rd Avenue SW (8835 Old Highway 99, 1600 93rd Avenue SW, and 900 93rd Avenue SW) in Tumwater, WA.

DECISION OF THE EXAMINER:

The requests are approved, subject to conditions.

PUBLIC HEARING:

After reviewing the City of Tumwater Development Services report and viewing the site, the Examiner conducted a public hearing on the application on July 26, 2006.

FINDINGS, CONCLUSIONS AND DECISION:

FINDINGS:

1. Tumwater Highlands (hereinafter “applicant”) is requesting preliminary plat approval (TLP) and planned unit development (PUD) approval for a proposed 599-lot residential subdivision of a 126.46 acre parcel of land located west of Old Highway 99 and generally between 88th Avenue SW and 93rd Avenue SW (8835 Old Highway 99, 1600 93rd Avenue SW, and 900 93rd Avenue SW) in Tumwater, Washington.

2. The proposed residential subdivision would consist of 459 single-family lots and 140 townhome lots. The average lot size would be 4,257 square feet with a minimum lot size of 3,000 square feet. Also, various tracts, designated on the preliminary plat (Exhibit 1 at Attachment B) as Tracts A through N, are proposed for wetlands and wetland buffers, active and passive open space areas, stormwater ponds, habitat preservation areas, and landscaping. Vehicular access to the proposed subdivision would be by way of five access points. One access to Old Highway 99 is proposed at the northeast corner of the subdivision, three accesses are proposed to 93rd Avenue SW, and a street connection to 88th Avenue SW, to a proposed industrial plat to the west, is proposed, as well as a connection to existing Cabot Street north of the plat. This last street connection has been requested by the City in order to satisfy street interconnection policies set forth in the City’s Comprehensive Plan. A grid work of internal public streets would provide access to lots within the subdivision. The overall density of the subdivision would be slightly over 8 dwelling units per acre.

3. The applicant proposes to develop the subdivision in four phases proceeding from north to south, with the last phase being that portion of the subdivision situated west of the wetland within proposed Tract A. The phasing of the development would require close coordination between the applicant and the City to insure the proper sequencing of utility installations, street improvements, and maintenance of emergency access.

4. The subdivision site is relatively flat except for a small hill located near the northeast corner of the property and a large lineal hill running in a north/south direction on the west side of the main wetland on the site (Tract A). A large wetland in proposed Tract A encompasses 3.9 acres and is categorized as a Category III Wetland pursuant to *Tumwater Municipal Code (TMC)* 16.28. A second wetland is .84 acres in size and is situated west of the larger wetland (Tract C). This latter wetland is also a Category III Wetland. Under applicable provisions of *TMC* 16.28, 100-foot buffers are required around these two wetlands. The wetlands and their buffers are depicted on the preliminary plat drawing and no development is proposed in these areas. Currently, the property is used for

grazing of livestock and consists mostly of grass pastureland. Only a few trees are located on the site as it was apparently logged in the 1980's.

5. Mazama Pocket Gophers, a listed "priority species" by the Washington State Department of Fish and Wildlife (WDFW) at the time of application and now a listed "threatened species," occupy portions of the site. A Habitat Protection Plan has been prepared in accordance with *TMC* 16.32. That Plan was developed with guidance from the WDFW and in consultation with that agency. The Plan calls for the establishment of high use habitat areas on site, including various enhancement and protection measures, and the relocation of some of the gopher population to a nearby suitable prairie habitat.

6. Land uses surrounding the proposed subdivision consist of low density single-family development to the east, located within Single-Family Medium Density Residential (SFM) zoning and Multi-family Medium Density Residential (MFM) zoning; low density single-family to the north in Thurston County, and to the southwest is low density single-family also situated in Thurston County, and to the northwest is a planned industrial plat of property zoned Light Industry (LI), and, finally, to the south is found very low density single-family development which is within a City SFM zone.

7. The subdivision site is located within an area lying south of the Olympia Airport, which was annexed by the City approximately one a half years ago. Subsequent to its annexation, the City designated the area as part of the airport neighborhood and applied SFM and MFM land use designations to the property, with the MFM land use designation applied to the northerly portion of the subdivision site and the SFM designation applied to the southerly portion per Exhibit 1 at Attachment F. The preliminary plat submitted conforms to the Comprehensive Plan land use designations with the townhome portions of the development located in the northerly portion of the property and the single-family lots located in the remaining portions.

8. The City's Comprehensive Park Plan for the City does not identify any neighborhood or community parks at the location of the subdivision. The applicant is required to set aside open space within the subdivision for the use of its residents in accordance with applicable City development regulations. This, the applicant has done.

9. Consistent with the site's Comprehensive Plan land use designations for the subject site, a MFM 9 to 15 dwelling units per acre zoning classification has been applied to the northerly portion of the property, and a SFM 6 to 9 dwelling units per acre zone has been applied to the southerly portions. The subdivision, as proposed, conforms to the use and density provisions of the MFM and SFM zones; however, in the instance of lot sizes and building coverage, the townhome lots do not comply with minimum requirements of the MFM zone, and a few single-family home lots do not conform to lot requirements of the SFM zone. The City has also

applied an Aquifer Protection (AP) overlay zone to the property in order to protect the aquifer from which the City obtains its drinking water supply. Residential uses are not restricted in the AP zone and compliance with provisions of the Thurston County Drainage and Erosion Control Manual and connection to the City's sanitary sewer system satisfies applicable requirements of the AP zone.

10. Thus, the applicant is seeking approval of a PUD to allow flexibility in lot size and coverage requirements and setback requirements.

11. PUD's are not intended as a tool to create additional residential densities but are, among other things, intended to encourage flexibility in design and development allowing for more efficient and desirable use of land, and to allow flexibility in design, placement of buildings, use of required open space, and to otherwise allow better utilization of sites characterized by special features such as geography, topography, size, or shape. *TMC 16.36.010*. Here, the proposed subdivision site contains wetlands that must be preserved and protected and areas that must be set aside for Mazama Pocket Gopher habitat. Moreover, the owner-occupied townhome development would be more consistent with the single-family development found in the surrounding area and planned for the south portion of the subdivision than standard apartment units. For these reasons, the proposal meets the intent of the PUD overlay.

12. Further, the PUD development proposed is consistent with the City's Comprehensive Plan (see Finding 7), is in harmony with existing and contemplated surrounding uses (see Finding 6), and is of a size to adequately accommodate the development proposed.

13. The preliminary plat submitted has been developed in accordance with the City's subdivision regulations.

14. All utilities and services necessary to support the proposed residential development are available or can reasonably be made available to the subdivision site. Conditions recommended by reviewing agencies and compliance with the City's development regulations would ensure that adequate services and facilities are provided.

15. The subdivision site is located in an area that, in past years, has been subject to groundwater flooding during severe storm events. Development within this area, subject to compliance with both the requirements of the *Thurston Region Stormwater Drainage and Erosion Control Manual* and the City's High Ground Water Hazard Ordinance (*Tumwater Ordinance No. 2005-003*). Compliance with these requirements, as well as additional mitigating measures identified in the Mitigated Determination of Nonsignificance (MDNS) and additional measures agreed to by the applicant in a stipulated agreement settling a related

SEPA¹ appeal reasonably addresses storm drainage and flooding issues applicable to the proposed development.

16. The City's Public Works Director has issued a Transportation Concurrency ruling. Such ruling, along with mitigating measures identified in the MDNS issued and code-required transportation impact fees, reasonably address the transportation impacts resulting from the proposed residential development. The impacts include impacts to the State highway system, the City of Olympia transportation system, and the City of Tumwater streets.

17. The proposed preliminary plat and PUD have been reviewed by a number of governmental agencies and utility providers and none object to the approval of the application; however, numerous conditions have been recommended. See Exhibit 1 at 11 and 12.

18. The applicant concurs in the conditions recommended, with the exception of recommended condition 10 under "streets" in Exhibit 1 at Attachment AAA at 19, requiring connection of the subdivision to Cabot Street and possible improvement of that street and the provisions for a cul-de-sac for the street proposed to be extended through a proposed industrial plat lying to the west of the subject subdivision.

19. Both the applicant and the City agree that a street connection from the proposed subdivision to 88th Avenue SW is necessary. What is in dispute is how that connection should be accomplished.

The City contends that the preferred route would be by way of Cabot Street, an existing residential street in Thurston County that extends directly from the north boundary of the proposed subdivision to 88th Avenue SW. Such a connection would satisfy City Comprehensive Plan policies regarding connectivity of streets within the City to provide a grid work of interconnecting streets, and would direct residential traffic onto a residential street. Such a connection would likely require improvements to Cabot Street due to its poor existing condition and the additional traffic which would be generated from the proposed subdivision.

The applicant, on the other hand, prefers to provide the connection to 88th Avenue SW by way of a proposed industrial plat that is pending completion of review by the City. The applicant and developer of the proposed industrial plat have been working cooperatively to establish such a street connection, and the design of the street through the industrial plat has taken into consideration this connection between the industrial plat and the subject subdivision. The traffic impact analysis (TIA) prepared for the subject subdivision, predicts that only 5 to 10% of the traffic from the north portion of the proposed subdivision would utilize the street connection to 88th Avenue SW. The applicant has agreed to provide a connection to Cabot Street and that it only be used for emergency access.

¹ RCW 43.21C, State Environmental Policy Act

20. No one appeared at hearing to present testimony in opposition to the proposed preliminary plat and PUD. Appearing in writing and raising objections to or concerns were a number of neighboring residents. Exhibit 1 at 9.

21. A letter in support of the applications was submitted by Vince Cottone, provided the agreed-upon stipulation set forth in the agreement resolving the the SEPA appeal are met. Exhibit 2.

22. In accordance with the *State Environmental Policy Act (SEPA)* of 1971, as amended, and Chapter 16.04 of the *TMC*, the Development Services Department reviewed an Environmental Checklist together with other available information. It was the determination of the department that the proposal can be considered minor to the extent that adverse environmental impacts are not anticipated. Accordingly, the responsible official prepared a Mitigated Determination of Nonsignificance (MDNS). The MDNS was issued on May 9, 2006 with a 15-day comment period that ended on May 24, 2006, and a 6-day appeal period that ended on May 30, 2006. An appeal of the MDNS was settled by agreement between the parties, and the appeal was dismissed with prejudice by an Order entered by the Hearing Examiner. See Stipulation and Agreed Order entered July 26, 2006 appended hereto as Attachment A.

23. The report of the Development Services Department, designated as Exhibit 1, to the extent that it sets forth the issues, general findings of fact, applicable policies and provisions and departmental recommendations of this matter, is incorporated herein by reference as though fully set forth.

24. A Notice of Application was issued for this project on November 9, 2005 and distributed to property owners within 1,320 feet of the project site with a 14-day comment period that ended on November 23, 2005. The *SEPA* threshold determination was distributed to property owners within 1,320 feet of the proposal on May 9, 2006 for review and comment. The 15-day comment period for the *SEPA* determination expired on May 24, 2006 with the appeal period expiring on May 30, 2006. A Notice of Public Hearing was posted on site and distributed to surrounding property owners within 1,320 feet of the project on July 14, 2006. The notice was published in the "*The Olympian*" newspaper on July 16, 2006.

25. Any conclusion hereinafter stated which might be deemed to be a finding herein is hereby adopted as such.

CONCLUSIONS:

1. The Hearing Examiner has jurisdiction in regard to the subject matter of these proceedings. *TMC* 17.14.040 and 18.36.050.

2. RCW 36.70B.030(2) provides the following:

- (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 chapter 36.70A RCW.

- (3) During project review, the local government or any subsequent reviewing body shall not reexamine alternatives to or hear appeals on the items identified in subsection (2) of this section, except for issues of code interpretation. As part of its project review process, a local government shall provide a procedure for obtaining a code interpretation as provided in RCW 36.70B.110.

* * *

RCW 36.70B.030(2)

3. Requests for PUD's are reviewed for consistency with the criteria set forth at *TMC* 18.36.050.

4. The applicant bears the burden of proof in regard to the requested plat and PUD approvals.

5. Findings entered herein, based upon substantial and un rebutted evidence in the hearing record, support a conclusion that the proposed preliminary plat and PUD, as represented at hearing and recommended to be conditioned, satisfies legal standards for approval of preliminary plats and PUD's.

6. The only issue in dispute in these proceedings relates to the access to 88th Avenue SW from the proposed subdivision. The parties agree that a street access from the proposed subdivision through the industrial plat to the west would satisfactorily address the identified traffic impacts² necessitating a connection to 88th Avenue SW, provided such street through the industrial subdivision meets City street design and safety standards. Further, it was agreed that the provision by the applicant of a connection to Cabot Street would satisfy City Comprehensive Plan policies concerning the connectivity of streets, and that it would be up to the City to determine whether bollards be placed on Cabot Street at the north boundary of the subdivision or whether it would be open to through traffic. In either event, the applicant would not have any obligation for improvements to Cabot Street. However, if Cabot Street were to be used as the only direct access between the subdivision and 88th Avenue SW, the applicant would be obligated to pay for any necessary improvements to Cabot Street resulting from the additional traffic generated on that street by the subdivision.

7. Accordingly, the proposed preliminary plat and PUD should be approved, subject to the following conditions:

- A. The conditions of approval, as listed in the letter from the Development Review Committee dated July 18, 2006 shall apply to this project, except as provided in Condition M below.
- B. Recommendations and mitigation as specified in the Mazama Pocket Gopher Habitat Protection Plan dated February 20, 2006, and the agreement executed between the applicant and WDFW shall be implemented.
- C. Signage identifying the wetland will be required in accordance with *TMC* 16.28.214(2)(c). The signage must be approved and field verified by City staff prior to issuance of any development related permits. Temporary construction fencing will be required to protect the wetland and its associated buffer. This fencing must also be field verified by staff prior to permit issuance.
- D. The applicant is required to submit Homeowner Association documents including articles of incorporation, bylaws, and covenants for the new development prior to final plat approval. The

² See, e.g. *Benchmark Land Co. v. Battleground*, 146 Wn.2d 685, 695, 49 P.3d 860 (2002); *Isla Verdi Int'l. v. City of Camas*, 146 Wn.2d 740, 49 P.3d 867 (2002); *Unlimited v. Kitsap County*, 50 WnApp 723, 750 P.2d 651 (1988).

covenants shall address the ownership, maintenance and operations of all community tracts, stormwater facilities and street landscaping within the development.

- E. The land divider shall be responsible for the maintenance and timely repair of all public improvements for a period of 24 months following final certification by the City Council and shall submit a surety for maintenance equal in value to 15 percent of the total value of required public improvements certified by the Public Works Director. (*TMC 17.18*)
- F. If applicable, a National Pollutant Discharge Elimination System (NPDES) permit will be required to be issued by the Department of Ecology. A copy of the permit, if applicable, must be submitted to the Development Services Department prior to issuance of clearing and grading permits.
- G. Any potable water wells within 200 feet of the boundaries of the property shall be shown on the final plat with their associated 100-foot protective radius. If any 100-foot protective radius encroaches onto the property, protective covenants shall be recorded in accordance with Thurston County Health Department requirements.
- H. An Integrated Pest Management Plan must be approved by Thurston County Health Department prior to final plat approval.
- I. Property taxes must be current prior to final plat approval as required by State law.
- J. Conditions listed in the MDNS dated May 9, 2006.
- K. Conditions set forth in the Stipulation and Agreed Order entered on July 26, 2006. See Attachment A.
- L. The required buffer along 93rd Avenue SW shall be constructed at the time phase 3 is constructed.
- M. The following condition replaces and supercedes condition 10 under "streets" in Exhibit 1 at Attachment AAA at 19:

Street:

* * *

10. The applicant shall provide a direct street connection between the proposed subdivision and 88th Avenue SW. The referred-to connection may be through a proposed industrial plat located immediately west of the subject subdivision, provided such access meets City street design and safety standards. In the event the foregoing street connection to the west is made, the applicant shall connect Cabot Street to the subdivision's internal street system but shall not have any obligation to make improvements to the existing portion of Cabot Street, and it shall be solely at the discretion of the City as to whether it wishes to have Cabot Street maintained as a through street or whether bollards are to be placed on Cabot Street at the north terminus of the subject subdivision. If Cabot Street is to be used as the sole street connection between the subdivision and 88th Avenue SW, the applicant shall be responsible for making improvements to said street necessary to handle the additional traffic generated on that street by the subject subdivision.

8. Any finding hereinbefore stated which might be deemed a conclusion herein is hereby adopted as such.

From these Conclusions is made the following:

DECISION:

The requests are hereby approved, subject to conditions listed in Conclusion 7.

DATED this 4th day of August 2006.


RODNEY M. KERSLAKE
HEARING EXAMINER

BEFORE THE HEARING EXAMINER FOR THE CITY OF TUMWATER

VINCE COTTONE, et al.,)	
)	
Appellants,)	TLP #1-05
)	PUD #1-05
vs.)	
)	STIPULATION AND
TUMWATER HIGHLANDS, LLC, Applicant,)	AGREED ORDER
and CITY OF TUMWATER,)	
)	
Respondents.)	
_____)	

I. STIPULATION

Appellants Vince Cottone, Clint Morgan, Jason and Angela Celestine, Scott Parsons, Harry and Char Hawkins, Bill and Kay Fangen, George Gunderson and Scott McGeary and Respondents Tumwater Highlands, L.L.C. (the Applicant), and City of Tumwater, agree and enter into the following stipulation in full settlement of the appeal brought by Appellants under the State Environmental Policy Act in this matter. In this Stipulation and Agreed Order, references to the "Site" are to the approximately 126 acres subject to the preliminary plat and planned unit development applications filed with the City of Tumwater on January 20, 2005 under Case No. TLP #1-05 and PUD #1-05.

1. The Applicant shall construct the bottoms and outlets of all stormwater detention or retention facilities at or above the higher of either (a) the elevation indicated by any methodology or analysis used to comply with the City's Drainage Manual or any other applicable stormwater

ORIGINAL

regulations, or (b) 191.5 feet above sea level.

2. Applicant Tumwater Highlands, L.L.C., shall enter into an agreement with the Washington State Department of Fish and Wildlife (DFW), acceptable to the DFW, for the removal and translocation of Mazama pocket gophers from the Site. This agreement shall be promptly executed and shall be fully carried out at the time prescribed by the DFW, in no case later than the issuance of final subdivision approval for all or part of the subject application.

3. The agreement between DFW and the Applicant shall include the following:

(a) DFW shall make a good faith effort to reach a goal of translocating 75 to 100 Mazama pocket gophers from the Site.

(b) DFW shall translocate such gophers to a location acceptable to DFW and in a manner acceptable to DFW and consistent with customary professional practices for such actions designed to achieve the survival of the gophers. As a part of this, DFW shall also ensure that gopher traps are checked and animals removed at a frequency consistent with customary professional practices designed to achieve their survival.

4. The Applicant shall preserve a habitat area for gophers on the Site which is at least the size as the areas shown as Mitigation Areas A and B in the March 16, 2006 Mazama Pocket Gopher Habitat Protection Plan; provided, that this area may be reduced if necessary to obtain required additional space for the stormwater retention or detention facilities. In any event, the Applicant shall comply with all DFW requirements governing the size of gopher mitigation areas, including meeting the DFW's 1:1 on-site replacement ratio. The Applicant shall carry out the mitigation measures for such mitigation area proposed in its Mazama Pocket Gopher Habitat Protection Plan of March 16, 2005. In addition, the Applicant shall till and loosen the soil of the on-site mitigation area(s) in a manner which will make it appropriate for use by Mazama pocket gophers consistently with customary professional standards. The Applicant shall also plant the on-site mitigation area(s) with native prairie grasses palatable to the Mazama pocket gopher. The

Applicant will carry out the measures in this paragraph 4 under the supervision of a qualified wildlife biologist and in a manner consistent with customary professional standards.

5. The Applicant shall include in covenants running with the land for this subdivision the requirement that the homeowners' association or similar entity maintain and replant the on-site gopher mitigation area(s) with native prairie grasses palatable to the Mazama pocket gopher, as needed to maintain such areas as appropriate gopher habitat. The Applicant shall include in covenants running with the land a prohibition against entering the on-site gopher mitigation area(s), unless engaged in *bona fide* maintenance activities; provided, that if Tumwater ordinances require access to be allowed to the on-site gopher mitigation area(s) due to their status as open space, such access may be allowed to the extent consistent with any DFW rules or requirements concerning the mitigation area(s). These obligations shall be in force unless DFW or successor agency determines that the on-site gopher mitigation area(s) cannot reasonably be expected to be used again by the Mazama pocket gopher.

6. Along lots 126 through 144, the Applicant shall establish a 30-foot wide buffer from the right-of-way line along 93rd Avenue SE, which shall be owned by the homeowners' association or similar entity. Along lots 1 and 78, the Applicant shall establish a 20-foot wide buffer from the right-of-way line along 93rd Avenue SE, which shall be owned by the homeowners' association or similar entity. No structures other than the fence described below may be built or placed in this buffer. The foundation of any residences on lots 126 through 144 shall be no closer than 10 feet to such buffer, and the foundation of any residences along lots 1 and 78 shall be no closer than 5 feet to such buffer. The Applicant shall build a five-foot high earthen berm in this buffer along the entire width of the above described lots. The berm shall have a maximum 3:1 slope on the south side and a maximum 2:1 slope on the north side. The berm shall have a flat area on its top on which the Applicant shall build a six-foot high cedar fence along its entire length. The Applicant shall plant the south side of the berm with fast

growing, dense foliage evergreen trees that will reach a height of at least 30 feet when mature in staggered positions on the berm slope. The Applicant may also install shrubs and groundcover plants.

7. The Applicant shall include in covenants running with the land for this subdivision the requirements that the homeowners' association or similar entity irrigate and maintain all plantings and maintain the fence, described in Section 6 above, as long as this subdivision is occupied in whole or in part.

8. The Appellants shall dismiss their SEPA appeal with prejudice and in its entirety and shall act in good faith and not oppose the granting of preliminary subdivision approval or planned unit development approval for this subdivision. Specifically, the Appellants shall not present testimony, documents or evidence at any public hearing in this matter, including the hearing presently scheduled for July 26, 2006; nor shall the Appellants appeal any permit or approval gained by Applicant pertaining to this project, including but not limited to preliminary plat approval, planned unit development approval and any grading, clearing and building permits; nor shall the Appellants direct any person or entity to engage in such activities at their request or on their behalf. However, nothing in this Section shall prevent the Appellants from exercising any right of appeal or other legal challenge or remedy for noncompliance with this Stipulation and Agreed Order.

9. The requirements of Section 8 above notwithstanding, Appellant Vince Cottone shall write a letter to the Tumwater Hearing Examiner at or before the hearing, supporting the granting of preliminary subdivision approval and planned unit development approval for this subdivision.

10. All duties imposed on the Applicant by this Stipulation shall be included as conditions in any preliminary subdivision approval and planned unit development approval granted for this subdivision. The parties recognize and agree that this Stipulation does not restrict the authority of the City of Tumwater or the Hearing Examiner to conduct further reviews

of the proposed plat and PUD, and to approve, deny or impose conditions in accordance with applicable laws, ordinances and development regulations.

11. Respondent Tumwater Highlands, L.L.C. agrees that the terms of this Stipulation shall bind any other person or entity with any ownership interest in the property subject to this appeal, shall bind any successor or successors to Tumwater Highlands, L.L.C., as applicant, and shall bind the homeowners' association or similar entity or entities created in conjunction with this subdivision. Tumwater Highlands, L.L.C. shall obtain any fully executed legal documents needed to effectuate the provisions of this paragraph.

12. The Appellants agree that the terms of this Stipulation shall bind them, their heirs, agents and successors.

II. AGREED ORDER

On the basis of the above Stipulation, the Hearing Examiner rules as follows:

1. The Applicant shall construct the bottoms and outlets of all stormwater detention or retention facilities at or above the higher of either (a) the elevation indicated by any methodology or analysis used to comply with the City's Drainage Manual or any other applicable stormwater regulations, or (b) 191.5 feet above sea level.

2. Applicant Tumwater Highlands, L.L.C., shall enter into an agreement with the Washington State Department of Fish and Wildlife (DFW), acceptable to the DFW, for the removal and translocation of Mazama pocket gophers from the Site. This agreement shall be promptly executed and shall be fully carried out at the time prescribed by the DFW, in no case later than the issuance of final subdivision approval for all or part of the subject application.

3. The agreement between DFW and the Applicant shall include the following:

(a) DFW shall make a good faith effort to reach a goal of translocating 75 to 100 Mazama pocket gophers from the Site.

(b) DFW shall translocate such gophers to a location acceptable to DFW and in a

manner acceptable to DFW and consistent with customary professional practices for such actions designed to achieve the survival of the gophers. As a part of this, DFW shall also ensure that gopher traps are checked and animals removed at a frequency consistent with customary professional practices designed to achieve their survival.

4. The Applicant shall preserve a habitat area for gophers on the Site which is at least the size as the areas shown as Mitigation Areas A and B in the March 16, 2006 Mazama Pocket Gopher Habitat Protection Plan; provided, that this area may be reduced if necessary to obtain required additional space for the stormwater retention or detention facilities. In any event, the Applicant shall comply with all DFW requirements governing the size of gopher mitigation areas, including meeting the DFW's 1:1 on-site replacement ratio. The Applicant shall carry out the mitigation measures for such mitigation area proposed in its Mazama Pocket Gopher Habitat Protection Plan of March 16, 2005. In addition, the Applicant shall till and loosen the soil of the on-site mitigation area(s) in a manner which will make it appropriate for use by Mazama pocket gophers consistently with customary professional standards. The Applicant shall also plant the on-site mitigation area(s) with native prairie grasses palatable to the Mazama pocket gopher. The Applicant will carry out the measures in this paragraph 4 under the supervision of a qualified wildlife biologist and in a manner consistent with customary professional standards.

5. The Applicant shall include in covenants running with the land for this subdivision the requirement that the homeowners' association or similar entity maintain and replant the on-site gopher mitigation area(s) with native prairie grasses palatable to the Mazama pocket gopher, as needed to maintain such areas as appropriate gopher habitat. The Applicant shall include in covenants running with the land a prohibition against entering the on-site gopher mitigation area(s), unless engaged in *bona fide* maintenance activities; provided, that if Tumwater ordinances require access to be allowed to the on-site gopher mitigation area(s) due to their status as open space, such access may be allowed to the extent consistent with any DFW rules or

requirements concerning the mitigation area(s). These obligations shall be in force unless DFW or successor agency determines that the on-site gopher mitigation area(s) cannot reasonably be expected to be used again by the Mazama pocket gopher.

6. Along lots 126 through 144, the Applicant shall establish a 30-foot wide buffer from the right-of-way line along 93rd Avenue SE, which shall be owned by the homeowners' association or similar entity. Along lots 1 and 78, the Applicant shall establish a 20-foot wide buffer from the right-of-way line along 93rd Avenue SE, which shall be owned by the homeowners' association or similar entity. No structures other than the fence described below may be built or placed in this buffer. The foundation of any residences on lots 126 through 144 shall be no closer than 10 feet to such buffer, and the foundation of any residences along lots 1 and 78 shall be no closer than 5 feet to such buffer. The Applicant shall build a five-foot high earthen berm in this buffer along the entire width of the above described lots. The berm shall have a maximum 3:1 slope on the south side and a maximum 2:1 slope on the north side. The berm shall have a flat area on its top on which the Applicant shall build a six-foot high cedar fence along its entire length. The Applicant shall plant the south side of the berm with fast growing, dense foliage evergreen trees that will reach a height of at least 30 feet when mature in staggered positions on the berm slope. The Applicant may also install shrubs and groundcover plants.


7. The Applicant shall include in covenants running with the land for this subdivision the requirements that the homeowners' association or similar entity irrigate and maintain all plantings and maintain the fence, described in Section 6, above, as long as this subdivision is occupied in whole or in part.

8. The duties imposed on the Applicant by this Agreed Order will also be included as conditions in any preliminary subdivision approval and planned unit development approval granted for this subdivision.

9. The terms of this Stipulation shall bind the Appellants, their heirs, agents and successors, any other person or entity with any ownership interest in the property subject to this appeal, any successor or successors to Tumwater Highlands, L.L.C., as applicant, and the homeowners' association or similar entity or entities created in conjunction with this subdivision. Tumwater Highlands, L.L.C. shall obtain any fully executed legal documents needed to effectuate the provisions of this paragraph.


10. The SEPA appeal in this matter is dismissed with prejudice and in its entirety.

Dated this 26th day of July, 2006.


Rodney M. Kerslake
Tumwater Hearing Examiner

Agreed to, Presented by and Notice of Presentation Waived by:

BJORGEN BAUER PLLC for APPELLANTS

By: 
Thomas R. Bjorgen, WSBA # 10829

DATED this 25th day of July, 2006.

Bjorgen Bauer PLLC
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DATED this 25th day of July, 2006.

LAW, LYMAN, DANIEL, KAMERRER & BOGDANOVICH, P.S. for CITY OF TUMWATER

By: 

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DATED this 25th day of July, 2006.

POST-DECISION PROCEDURES

Reconsideration: A party may request reconsideration by filing a written request with the Department of Development Services within five working days of the Examiner's written decision. The request must state the grounds therefore. The Examiner has ten working days to render a final decision. TMC 2.58.135.

Appeals: The Examiner's decision will become final and conclusive in fourteen days unless appealed to the Tumwater City Council. The appeal must be in writing and contain all grounds on which error is claimed. TMC 2.58.150. TMC 2.58.150 provides in part:

In cases where the examiner's jurisdictional authority is to render a decision (following an open record pre-decision hearing), the decision of the examiner shall be final and conclusive unless within fourteen days following rendering of such decision an appeal there from is filed with the Director of Development Services by the applicant, a department of the city, county, or other agency or a party of record defined in Section 2.58.140. Person not in attendance at the hearing but who submit written information prior to the hearing that becomes a part of the record of the hearing shall also have appeal rights. Such appeal shall be in writing, shall contain all grounds on which error is assigned to the examiner's decision and shall be accompanied by a fee as established by resolution of the city council; provided, that such appeal fee shall not be charged to a department of the city or to other than the first appellant.

The Examiner's decision that is timely appealed comes before the City Council within thirty days after the final day upon which an appeal may be filed. TMC 2.58.160 and 2.58.180 describe the time limits for appeals.