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6 **BEFORE THE HEARING EXAMINER**
7 **IN AND FOR THE CITY OF TUMWATER**

8 In the Matter of the Appeal of:

9 **Copper Ridge, LLC**

10 Of an Administrative Decision
11

NO. TUM-22-1101

**CITY OF TUMWATER'S RESPONSE TO
MOTION FOR SUMMARY JUDGMENT**

12 **I. INTRODUCTION**

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14 This case presents a question of whether the Tumwater development regulations requiring that
15 utility transmission lines be installed underground may be applied to Copper Ridge's new development.
16 Because the new development directly impacts the location of the existing lines, the City may validly
17 apply the undergrounding requirement to the impacted lines. The Examiner should therefore deny the
18 Appellant's motion for summary judgment and grant summary judgment to the City.

19 **II. FACTS**

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21 The appellant, Copper Ridge, LLC is the developer of a new 45 lot, single-family residential
22 development, known as Three Lakes Crossing, which was approved by the Hearing Examiner in a
23 decision issued by the Examiner on July 15, 2022. Myers Decl., Exhibit 1. The property is located at
24 6609 and 6715 Henderson Boulevard. The new development requires construction of 68th Avenue SE
25 through the plat to provide access; and requires street frontage improvements along Henderson
26 Boulevard, including widening of the road and installation of streetlights.

1 The Three Lakes Crossing project requires the construction of additional pavement, curb, gutter,
2 planter strip, sidewalk, streetlights, landscaping, and a new intersection along the Henderson Blvd
3 frontage. Currently there are private utility poles supporting overhead utilities owned by multiple entities
4 along Henderson Blvd. the recent development plans submitted to obtain construction permits showed
5 that the project is proposing to relocate the utility pole and overhead utilities as they will conflict with the
6 required improvements along Henderson Blvd. Crews Decl., at 2.

8 The existing utility pole is located in the middle of future 68th Avenue where it will meet
9 Henderson Blvd. The applicant is proposing to move this pole to a new location just behind the required
10 sidewalk. The proposed relocation will also move the overhead utilities into conflict with the required
11 streetlights along Henderson Blvd. The existing lines are not high enough to provide the 10 feet of
12 separation from the streetlights necessary to meet PSE's requirements. To meet such a requirement would
13 require installation of new poles. Crews Decl. at 2-3.

15 In response to the submittal of plans, the City noted the impacts to the existing lines and
16 commented on the plans that the lines must be undergrounded. The applicant questioned this requirement
17 and requested an administrative interpretation. The City's administrative interpretation confirmed the
18 requirement to install these lines underground as provided by the Tumwater Development Guide and TMC
19 17.12.200.

21 III. ARGUMENT

22 A. TUMWATER'S DEVELOPMENT REGULATIONS REQUIRE UNDERGROUNDING 23 OF ALL UTILITIES THAT ARE PART OF A PROPOSED DEVELOPMENT.

24 1. The Hearing Examiner has required the Applicant to comply with the Tumwater 25 Development Guide as a condition of preliminary plat approval.

26 As an initial matter, the Applicant must comply with the terms of the Tumwater Development
Guide (TDG) under the unappealed conditions set forth in the preliminary plat approval. Having failed to

1 appeal these conditions, it cannot now collaterally attack these requirements, including the
2 undergrounding of utility transmission lines set forth in TDG 3.14(B).

3 The Hearing Examiner's plat approval conditions require installation of certain improvements
4 which directly affect existing utility lines and compel that they be moved. Condition 9 requires:

5 Street frontage improvements including curb and gutter, sidewalk, landscape strip, bike
6 lane, street illumination, and storm drainage facilities complying with the design
7 requirements of the Tumwater Development Guide shall be constructed along the property
8 frontage on Henderson Boulevard. Adequate right-of-way shall be dedicated to contain the
improvements.

9 Similarly, Condition 23 of the plat approval requires all engineering to meet the requirements of
10 the TDG, stating:

11 All engineering designs and construction will need to be in accordance with the City of
12 Tumwater's Development Guide and WSDOT standards

13 The issue now presented is whether the City's plan review comments correctly applied the TDG
14 to the utility transmission facilities impacted by the Three Lakes Crossing project by requiring the lines
15 be installed underground. The proper interpretation of the City's requirements is that the requirement to
16 underground these lines is proper.

17
18 **2. The Tumwater Development Guide requires new and existing utility transmission lines
be installed underground.**

19 Section 3.14(B) of the Tumwater Development Guide is relied upon by Appellants. Appellants
20 point only to the first sentence concerning new overhead power facilities which must be installed
21 underground. That point is not disputed. However, it does not answer whether utility lines that must be
22 moved and replaced due to the applicant's development must install the replaced lines underground to
23 comply with the City's Code. That question requires analysis of the second part of Section 3.14(B).

24 The full language of Section 3.14(B) provides:
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1 All new utilities including services from overhead power facilities to new residential or
2 commercial structures shall be installed underground by the utility owning said facility,
3 and new and existing facilities shall comply with provisions as set forth in TMC 17.12.200,
4 Land Division, and provisions as set forth in franchise agreements between the City and
5 the utility.

6 Utilities converted from overhead to underground on existing roadways may be located
7 within the right-of-way.

8 This provision requires “existing” facilities to comply with TMC 17.12.200, which expressly
9 requires underground installation of utility lines. The Appellant’s interpretation never addresses the
10 language used in the second part of this sentence. Of course, ordinances must be interpreted so as to give
11 effect to all the language used by the Council in adopting the requirement. Additionally, the City’s
12 interpretation of its own code is entitled to deference [I]n any doubtful case, the court should give great
13 weight to the contemporaneous construction of an ordinance by the officials charged with its
14 enforcement.” *Morin v. Johnson*, 49 Wn.2d 275, 279, 300 P.2d 569 (1956); *Milestone Homes, Inc. v. City*
15 *of Bonney Lake*, 145 Wn. App. 118, 127, 186 P.3d 357, 362 (2008); *Citizens to Preserve Pioneer Park,*
16 *LLC v. City of Mercer Island*, 106 Wn.App. 461, 475, 24 P.3d 1079 (2001) (courts generally accord
17 deference to an agency's interpretation of an ambiguous ordinance).

18 Additionally, Section 3.14(B) must be read in conjunction with other parts of the TDG that define
19 how it is applied. TDG Section 3.3 states that the standards in the TDG “shall govern all new construction
20 and upgrading of facilities, both in the right-of-way and on-site.” Thus, the requirements of the TDG
21 presumptively apply both when new construction is conducted, but also when facilities are upgraded.
22 Here, the applicant’s construction requires displacement of the existing lines and reinstallation of new the
23 lines. Even under the applicant’s construction, the existing poles would be inadequate and would need to
24 be upgraded to new taller poles to provide adequate clearance from the newly required streetlights.
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1 Because the replacement of the poles with new taller poles would upgrade these existing facilities, the
2 standards of the TDG requiring undergrounding of “new and existing facilities” would apply.

3 **3. Tumwater’s Municipal Code requires all utility transmission lines be installed**
4 **underground.**

5 Similarly, Appellants interpretation of the City’s municipal code assumes its own preferred
6 conclusion. Appellants reach this result by reading into TMC 17.12.200 language that is not there. The
7 language of TMC 17.12.200 does not use the word “new” despite the applicant’s use of that language in
8 quoted portions of their own appeal. See Motion at 3:7. Appellants then argue that the plain text of TMC
9 17.12.200 requires that new transmission lines must be buried, but not existing lines. Motion at 4:19.
10 This argument reads into the ordinance language that would require that "only" new lines must be installed
11 underground. But the ordinance does not have such limiting language. It requires that utility transmission
12 lines “shall be installed underground”.

14 The appellant’s argument does not address the situation presented here, where the direct impact of
15 the development forces removal of utility facilities and that they be subsequently installed after required
16 construction of new streets and frontage improvements. TMC 17.12.200 specifies how such impacted
17 lines are to be installed: such lines “shall be installed underground”. Thus, the plain language of TMC
18 17.12.200 supports the City’s interpretation.

20 The use of the words “shall be” does not negate the requirement or limit it only to new utilities.
21 Instead, it is the implied insertion of the word “new” that was not used in the City’s ordinance, that the
22 applicant seeks to accomplish. “Shall” merely indicates a mandatory condition, as opposed to a permissive
23 or optional meaning, as in “may”. *Erection Co. v. Dep’t of Labor & Indus.*, 121 Wash.2d 513, 519, 852
24 P.2d 288 (1993).

1 Likewise, the word “install” does not compel the applicant’s desired result. Install means “to set
2 up or fix in position for use or service”. Black’s Law Dictionary, Sixth Edition, 1990. Where a developer
3 must take down an existing pole because it is in the middle of the street, or cannot use existing lines in
4 their present location because they encroach in the required ten feet of separation needed for overhead
5 lines, they must be set up or fixed in a new position so that they can be used or put in service. As such,
6 the relocation of the impacted transmission facilities requires that they be “installed” within the meaning
7 of the language used by the Ordinance.
8

9 The intent to require undergrounding of utility lines is further supported by the legislative history
10 when the undergrounding requirement was adopted by the City Council in 1992. The City Council held
11 a public hearing to discuss the adoption of the Tumwater Development Guide and was asked how it related
12 to undergrounding of wiring. The City’s engineer responded that “undergrounding of utility lines is
13 addressed in the subdivision ordinance. It is required in connection with a long plat.” This colloquy was
14 followed by the statement of Councilmember Kmet, who pointed to TMC 17.12.200 which required that
15 such transmission lines “shall be installed underground.” This demonstrates the long-standing
16 interpretation of both staff and the Council to require undergrounding of utility transmission lines.
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18 **B. THE CITY’S REQUIREMENT FOR UNDERGROUND UTILITY LINES DIRECTLY**
19 **IMPACTED BY THE APPLICANT’S DEVELOPMENT DOES NOT VIOLATE RCW**
20 **82.02.020.**

21 The appellants also argue that the requirement to install the impacted utility lines underground
22 would be an unauthorized tax, fee or charge on development in violation of RCW 82.02.020. Appellants
23 cite *Isla Verde Int’l Holdings, Inc. v. City of Camas*, 146 Wn.2d 740, 753, 49 P.3d 867 (2002) and
24 *Benchmark Land Co. v. City of Battle Ground*, 146 Wn.2d 685, 694-95, 49 P.3d 860 (2002). These cases
25 are distinguishable and do not support finding a violation of RCW 82.02.020 here.
26

1 *Isla Verde* involved two requirements. First the City required a 30% set aside of the undeveloped
2 parcel for open space. Secondly, it required the developer to provide a secondary access to the new
3 development. The first requirement was held unlawful under RCW 82.02.020, however the second
4 requirement was sustained. The former was invalid because it did not qualify under the statutory exception
5 for requirements that are “reasonably necessary as a direct result of the proposed development.” *Isla*
6 *Verde*, 146 Wn.2d at 759-61. However, the secondary access requirement was necessary as a direct result
7 of the proposed development, so the court upheld the requirement finding that it was “reasonably
8 necessary to provide fire protection for the residents of the new Dove Hill subdivision”. *Isla Verde*, 146
9 Wn.2d at 767.

11 *Benchmark* likewise involved imposition of frontage improvements on a portion of an existing
12 exterior roadway, which was not impacted by the new development. The Court found that the existing
13 road did not meet new design standards, so it was a pre-existing deficiency that the City could not require
14 be remedied absent a direct impact from the proposed development. *Benchmark*, 146 Wn.2d at 695.

16 These cases actually support the City’s application of the undergrounding requirement to utility
17 lines directly impacted by new construction. Both *Isla Verde* and *Benchmark* turned on the presence or
18 lack of a direct impact in rejecting the open space requirement *Isla Verde* and the frontage improvements
19 in *Benchmark* where such impact was lacking, but approving the secondary access condition imposed to
20 serve the safety demands necessitated because of the new development. Here, the basis for imposing the
21 undergrounding requirement on the existing lines is supported because the applicant’s development
22 directly impacts the existing lines, forcing them to be removed and relocated. The Tumwater development
23 regulations require that this installation be done underground.

25 This issue came before the Court of Appeals in *Detray v. City of Lacey*, 132 Wn. App. 1008, 2006
26 WL 701938 (2006), an unpublished but similar decision that rejected undergrounding of utility lines

1 whose location was not impacted by the proposed development, but sustained such a requirement if
2 necessary due to the improvements required to accommodate the new development. The Court of Appeals
3 stated, in salient part:

4 But a left turn lane would require additional widening of 37th Avenue Southeast—
5 widening that would not be necessary absent the development. We have held that the City
6 may require DeTray to pay for this widening. To the extent the left turn lane widening
7 adds to the need to move utility poles, the City may require DeTray to pay part of the cost
8 of moving the utility lines underground. We vacate the condition requiring DeTray to pay
all the cost of moving the utility lines underground and remand to the hearing examiner
for further proceedings on this issue.

9 *DeTray v. City of Lacey*, 2006 WL at *8.

10 Thus, the Examiner should deny the motion for summary judgment because the City may validly
11 require a developer to underground utility lines that are directly impacted by the new construction. Here,
12 as demonstrated by the Declaration of Jared Crews, the need to relocate the lines is because the existing
13 pole location is in the middle of the new development's access road (future 38th Ave. SE) and the overhead
14 lines would not have sufficient clearance from required streetlights. Thus, the need to move the lines is
15 directly related to the new development and it is not an unlawful tax fee or charge under RCW 82.02.020.

17 IV. CONCLUSION

18 The City correctly interpreted its development guide and TMC 17.12.200 to require that existing
19 utility transmission lines impacted by a proposed development be installed underground. Its interpretation
20 is entitled to great weight and should be affirmed by the Examiner.

21 DATED this 2nd day of December 2022.

22
23 LAW, LYMAN, DANIEL, KAMERRER
& BOGDANOVICH, P.S.

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25 Jeffrey S. Myers, WSBA #16390
26 Attorney for City of Tumwater

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CERTIFICATE OF SERVICE

I hereby certify, under the penalty of perjury, under the laws of the State of Washington that I have caused a true and correct copy of the attached document to be served upon the below listed party via email and U.S. Mail:

Counsel for Plaintiffs:

Heather L. Burgess
Christopher H. Pierce-Wright
111 – 21st Avenue SW
Olympia, Washington 98501
Telephone: 360.742.3500
Facsimile: 360.742.3519
Email: hburgess@phillipsburgesslaw.com
cpiercewright@phillipsburgesslaw.com

DATED this 17th day of October, 2022 at Tumwater, WA.

/s/ Blake Myers
Blake Myers, Legal Assistant