

**BEFORE THE HEARING EXAMINER
FOR THE CITY OF TUMWATER**

In the Matter of the Application of)	No. TUM-22-0044
)	
Chris Carlson, Hatton Godat Pantier, on)	I-5 Commerce Place Preliminary Plat
behalf of John Kaufman, Kaufman)	Alteration
Real Estate, LLC)	
)	
For Approval of a Preliminary Plat)	FINDINGS, CONCLUSIONS,
<u>Substantial Alteration</u>)	AND DECISION

SUMMARY OF DECISION

The request for a preliminary plat alteration to reduce the minimum number of replacement trees required to be planted on-site from 1,149 to 363, imposed as a condition of the previously approved preliminary plat (No. TUM-20-0220), which allowed for the subdivision of four parcels totaling 40.26 acres into 12 commercial/industrial lots, stormwater tracts, and one tree tract, within the 2700 block of 93rd Avenue SW, is **APPROVED**. Conditions are necessary to address specific impacts of the proposal.

SUMMARY OF RECORD

Hearing Date:

The Hearing Examiner held an open record hearing on the request on March 14, 2022, using remote access technology.

Testimony:

The following individuals provided testimony under oath at the open record hearing:

Tami Merriman, City Permit Manager
Chris Carlson, Applicant Representative

Exhibits:

The following exhibits were admitted into the record:

1. Staff Report, dated March 29, 2022
2. Preliminary Plat Application, dated December 20, 2021, with Project Narrative Summary
3. Site Aerial Photograph Map, dated March 22, 2022
4. Amended Preliminary Plat Map, dated December 20, 2021
5. Certification of Public Notice, dated March 29, 2022
6. Notice of Application, dated February 3, 2022, with Amended Preliminary Plat Map and Project Narrative Summary
7. Comment from Nisqually Indian Tribe, dated February 14, 2022

*Findings, Conclusions, and Decision
City of Tumwater Hearing Examiner
I-5 Commerce Place Preliminary Plat Alteration
No. TUM-22-0044*

8. Tree Plan, Professional Forestry Services, Inc., dated March 18, 2020
9. Revised Tree Plan, Professional Forestry Services, Inc., dated November 23, 2021
10. Revised Tree Tract Landscape Plan, revised November 22, 2021
11. Mitigated Determination of Nonsignificance, dated August 6, 2020
12. Staff Report (No. TUM-20-0220), dated September 21, 2020
13. Hearing Examiner's Findings, Conclusions, and Decision (No. TUM-20-0220), dated October 14, 2020
14. Approved Civil Plans (48 Sheets), approved June 18, 2021

The Hearing Examiner enters the following findings and conclusions based upon the admitted testimony and exhibits:

FINDINGS

Background

1. On October 14, 2020, the Hearing Examiner issued a decision approving the request for a preliminary plat to subdivide four parcels totaling 40.26 acres into 12 commercial/industrial lots, stormwater tracts, and a tree preservation tract, with associated improvements that would include mass grading for a new public roadway, frontage improvements along 93rd Avenue SW, utility extensions, stormwater management systems, and street lighting.¹ In approving the request, the Hearing Examiner concluded that, with conditions, the proposed preliminary plat would comply with all applicable City of Tumwater (City) development regulations and would satisfy all City and state criteria for subdivision approval, including criteria requiring that a preliminary subdivision make appropriate provisions for the public health, safety, and general welfare and for open spaces, drainage ways, streets or roads, alleys, other public ways, transit stops, potable water supplies, sanitary wastes, parks and recreation, playgrounds, and schools and school grounds. *Tumwater Municipal Code (TMC) 17.14.040; Revised Code of Washington (RCW) 58.17.110(2). Exhibit 1, Staff Report, pages 1 and 2; Exhibit 13.*
2. The Hearing Examiner's previous decision included the following finding (Finding 10) related to the City's tree retention and replacement requirements:

When land clearing is performed in conjunction with a specific development proposal, not less than 20 percent of the trees, or not less than 12 trees per acre (whichever is greater), must be retained. *TMC 16.08.070.R.* Professional Forestry Services, Inc., prepared a tree report and plan on behalf of the Applicant, dated March 18, 2020. The report determined that the Applicant would be required to retain 484 trees in conjunction with development of the 40.26-acre site. The report noted

¹ The findings and conclusions set forth in the Hearing Examiner's October 14, 2020, decision are fully incorporated in this decision, as supplemented and/or revised by the findings and conclusions set forth herein. *Exhibit 13.*

that the Applicant would retain 101 trees on-site in the proposed tree preserve Tract C.^[2] Under TMC 16.08.070.R.3, the Applicant would be required to plant at least three trees for each of the remaining 383 trees not retained, for a total of 1,149 replacement trees. The Applicant proposes to plant the 1,149 replacement trees on-site.

Exhibit 1, Staff Report, page 2; Exhibit 8; Exhibit 13.

3. To ensure that the proposed preliminary plat would comply with the City's tree retention and replacement requirements described above, the Hearing Examiner's previous decision imposed the following condition (Condition 38):

In order to comply with the City's Tree Protection and Replacement Standards, a minimum of 1,149 replacement trees must be planted on the site. The replacement trees must be planted in the proposed tree protection open spaces on the project site, tract D, shown on the Preliminary Plat Map. The size of the tree protection open space area(s) associated with the project is required to be a minimum of 5 percent of the buildable area of the site.

Exhibit 1, Staff Report, pages 2 and 5; Exhibit 13.

4. After the Hearing Examiner issued the decision approving the requested preliminary plat, the project proponent determined that the proposed stormwater facilities would need to be relocated due to high groundwater conditions. The project proponent therefore requested to swap the proposed locations of the stormwater facilities and Lot 8, as well as to make minor changes to the individual lot sizes, which the City administratively approved on June 18, 2021. *Exhibit 1, Staff Report, page 2; Exhibit 14.*

5. On November 29, 2021, the project proponent contacted the City and stated that the March 18, 2020, tree report prepared by Professional Forestry Services, Inc., for the approved preliminary plat had incorrectly determined that the project would be required to plant 1,149 replacement trees on-site under the three-to-one replacement ratio requirement of TMC 16.08.070.R.3. As discussed in detail later in this decision, the project proponent now asserts that the project is required to plant only a minimum of 363 replacement trees on-site pursuant to TMC 16.08.070.R4, which provides: "In situations where a parcel of land to be developed does not meet the retention standards above in an undeveloped state, the applicant shall be required to reforest the site to meet the applicable standard outlined above at a 1:1 ratio as a condition of project approval." Site infrastructure associated with the previous preliminary plat approval is currently under construction and is nearly complete. *Exhibit 1, Staff Report, pages 2, 5, and 6; Exhibit 9; Exhibit 10.*

² The proposed tree tract was labeled as Tract C in the original tree report and plan but was later changed to Tract D. *Exhibit 8; Exhibit 9.*

Application and Notice

6. Chris Carlson, of Hatton Godat Pantier, on behalf of John Kaufman, of Kaufman Real Estate, LLC (Applicant), requests approval of a preliminary plat alteration to amend the tree retention and replacement analysis and condition imposed as part of the previous, October 14, 2020, Hearing Examiner's preliminary plat approval decision, as well as to reflect the updated lot configuration changes administratively approved by the City on June 18, 2021. The Applicant does not request any other changes to the previously approved preliminary plat. The property is located within the 2700 block of 93rd Avenue SW.³ *Exhibit 1, Staff Report, page 1; Exhibits 2 through 4; Exhibit 6; Exhibit 7.*
7. The City determined that the application was complete on January 31, 2022. On February 3, 2022, the City provided notice of the application by mailing notice to property owners within 300 feet of the subject property and to reviewing agencies, posting notice at the subject property and on the City website, and publishing notice in *The Olympian*. Notice materials provided that comments on the proposal should be submitted by February 18, 2022. On April 1, 2022, the City provided notice of the open record hearing associated with the application by mailing notice to property owners within 300 feet of the subject property, posting notice at the subject property and on the City website, and publishing notice in *The Olympian*. *Exhibit 1, Staff Report, pages 2 and 3; Exhibit 5; Exhibit 6.*
8. The City did not receive any comments on the proposal from members of the public. The Nisqually Indian Tribe submitted a comment noting that it has no specific concerns about the proposal. *Exhibit 1, Staff Report, page 3; Exhibit 7.*

State Environmental Policy Act

9. As noted in the Hearing Examiner's previous decision, the City Community Development Department (CDD) acted as lead agency and analyzed the environmental impacts of the original preliminary plat proposal under the State Environmental Policy Act (SEPA), Chapter 43.21C Revised Code of Washington (RCW). CDD reviewed the Applicant's environmental checklist, and other information on file, and determined that, with a condition requiring the construction of a roundabout at the intersection of 93rd Avenue SW and Lathrop Industrial Drive, the proposal would not have a probable significant adverse impact on the environment. Accordingly, CDD issued a Mitigated Determination of Nonsignificance (MDNS) on August 6, 2020, which was not appealed. City staff reviewed the current request to amend the previously approved preliminary plat and determined that additional environmental review would not be required and that the findings, conclusions, and mitigation requirement of the August 6, 2020, MDNS remain the same. *Exhibit 1, Staff Report, pages 3 and 6; Exhibit 11; Exhibit 13.*

³ The property is identified by Tax Assessor Parcel Nos. 12716420000, 12716340100, 12716340102, and 12716340101. *Exhibit 1, Staff Report, page 1.* A legal description of the property is included with the amended preliminary plat map. *Exhibit 4.*

Comprehensive Plan and Zoning

10. The property is designated “Light Industrial” under the City Comprehensive Plan and is zoned Light Industrial (LI). The Hearing Examiner’s previous decision included findings and analysis related to the original proposal’s consistency with the Comprehensive Plan and compliance with applicable provisions of the City’s zoning code. Apart from the request to amend the analysis and condition related to the City’s tree retention and replacement requirements, the Applicant does not request any substantial changes to the previously approved preliminary plat that would require the Hearing Examiner to revisit the previous decision’s findings. Accordingly, those findings are fully incorporated herein, as supplemented and/or revised by additional findings addressing the City’s tree retention and replacement requirements. *Exhibit 13.*

Tree Retention and Replacement

11. When land clearing is performed in conjunction with a specific development proposal, not less than 20 percent of the trees, or not less than 12 trees per acre (whichever is greater), must be retained. *TMC 16.08.070.R.* As noted above, Professional Forestry Services, Inc., prepared a tree report and plan for the original proposal, dated March 18, 2020, which determined that the Applicant would be required to retain 484 trees in conjunction with development of the 40.26-acre site. The report noted that the Applicant would retain 101 trees on-site within a proposed tree tract and determined that, under *TMC 16.08.070.R.3*, the Applicant would be required to plant a minimum of three trees for each of the remaining 383 trees not retained, for a total of 1,149 replacement trees.

The March 18, 2020, tree report and plan did not, however, include an analysis of the total number of existing trees on the project site in its undeveloped condition. Professional Forestry Services, Inc., prepared a revised tree report and plan, dated November 23, 2021, which determined that the property contained approximately 351 trees in its undeveloped condition and noted that the Applicant now proposes to retain 121 trees within the proposed tree tract.⁴ Because the total number of trees on the property in its undeveloped condition is less than the 484 trees required to be retained, the revised report determined that the Applicant would be required to replant only 363 replacement trees on-site under *TMC 16.08.070.R.4*, which provides, “In situations where a parcel of land to be developed does not meet the retention standards above in an undeveloped state, the applicant shall be required to reforest the site to meet the

⁴ Of the 121 trees proposed for retention, only 90 have a sufficient diameter size to meet the standard for a retention tree under *TCC 16.08.070.R.1.a*, but the remaining 31 trees have a sufficient diameter size to meet the standard for a replacement tree under *TCC 16.08.070.R.3.a*. City Permit Manager Tami Merriman testified at the hearing that the Applicant and City staff agree that it would not make sense to disturb and require new tree replacement plantings within the proposed tree tract when the existing 31 trees within the proposed tract would meet the replacement tree standard and, therefore, it is appropriate for these 31 trees to count toward the tree retention/replacement requirement. *Exhibit 9; Testimony of Ms. Merriman.*

applicable standard outlined above at a 1:1 ratio as a condition of project approval.” The Applicant proposes to plant a minimum of 363 replacement trees on-site in accord with this requirement. *Exhibit 1, Staff Report, pages 2 through 6; Exhibits 8 through 10; Exhibit 13.*

Testimony

12. City Permit Manager Tami Merriman testified generally about the proposal and how it would meet the criteria for preliminary plat approval. She stated that the Applicant requests preliminary plat approval to amend a condition of the previously approved preliminary plat related to the minimum number of replacement trees that would be required to be planted on-site. Ms. Merriman noted that, after the original preliminary plat proposal was approved, the Applicant determined that the number of existing trees on the project site in its undeveloped condition was less than the number of trees required to be retained on the property under the City code, which triggered a code provision requiring tree retention and replacement at only a one-to-one ratio rather than at a three-to-one ratio. She explained that the Applicant’s request to amend the approved preliminary plat to reflect the correct tree retention and replacement ratio constitutes a substantial alteration requiring resubmission of the preliminary plat request and Hearing Examiner approval. Ms. Merriman stressed, however, that the only substantial change to the previously approved preliminary plat relates to this tree retention and replacement requirement and, therefore, the Hearing Examiner may rely on, and need not revisit, the analysis and conditions of the previous decision as it relates to other aspects of the proposal. *Testimony of Ms. Merriman.*
13. Applicant Representative Chris Carlson testified that the Applicant agrees with City staff’s analysis of the proposal as detailed in the staff report and Ms. Merriman’s testimony. He stated that the Applicant has completed construction of the roundabout at the intersection of 93rd Avenue SW and Lathrop Industrial Drive, as required by the MDNS. Mr. Carlson noted that the City had previously approved a minor alteration to the previously approved preliminary plat to allow relocation of proposed stormwater facilities due to high groundwater conditions. *Testimony of Mr. Carlson*

Staff Recommendation

14. Ms. Merriman testified that City staff recommends approval of the preliminary plat with conditions. Mr. Carlson testified that the Applicant understands and would comply with City staff’s recommendations. *Exhibit 1, Staff Report, pages 6 and 7; Testimony of Ms. Merriman; Testimony of Mr. Carlson.*

CONCLUSIONS

Jurisdiction

The Hearing Examiner has authority to hear and decide applications for preliminary plats. The Hearing Examiner may grant, deny, or grant with such conditions, limitations, modifications, and

restrictions as the Hearing Examiner finds necessary to make the application compatible with applicable laws and regulations, including but not limited to compatibility with the environment, the Comprehensive Plan, other official policies and objectives, and land use regulatory enactments. *TMC 2.58.090.A; TMC 2.58.130.A.2.*

Criteria for Review

TMC 17.14.110 governs proposals that include changes, alterations, or deletions of approved preliminary plats and provides:

Once the preliminary land division map has been approved, it shall not be altered unless approved by both the department of community development and public works department. If the alteration is felt to be of a substantial nature by the community development and public works departments, then the land division shall be resubmitted in accordance with the procedures for preliminary division approval.

Because the City has determined that the proposal would constitute a substantial alteration to a previously approved preliminary plat, the Hearing Examiner must review the request under the criteria governing preliminary plat approval, as described below.

The Hearing Examiner shall inquire into the public use and interest proposed to be served by the establishment of the proposed land division. *TMC 17.14.040.A.* Under TMC 17.14.040.A, the Hearing Examiner shall determine:

if appropriate provisions are made for, but not limited to, the public health, safety and general welfare, for open spaces, drainage ways, streets or roads, alleys, other public ways, other grounds, transit stops, potable water supplies, sanitary wastes, parks and recreation playgrounds, schools and school grounds, fire protection and other public facilities, and shall consider all other relevant facts, including the physical characteristics of the site, and determine whether the public interest will be served by the land division. Further, consideration shall be given for sidewalks and other planning features that assure safe walking conditions for students who only walk to and from school.

If the Hearing Examiner finds that the proposed division of land makes appropriate provisions, and makes written findings to that effect, then it shall be approved. If the Hearing Examiner finds that the proposed land division does not make such appropriate provisions or that the public use and interest will not be served, then the Hearing Examiner shall disapprove the proposed division of land. *TMC 17.14.040.A.*

Dedication of land, provision of public improvements to serve the land division, and/or payment of impact fees allowed by state law, to any public body, may be required as a condition of land division approval. The Hearing Examiner shall not, as a condition of approval, require an

Applicant to obtain a release from damages from other property owners. The Hearing Examiner shall consider the physical characteristics of a proposed land division site, and may disapprove a proposed division because of flood, inundation, or wetland conditions. Construction of protective improvements may be required as a condition of approval. *TMC 17.14.040.B, .040.C, and .040.D.*

The subdivision provisions of the Tumwater Municipal Code are substantially similar to RCW 58.17.110(2), which provides:

A proposed subdivision and dedication shall not be approved unless the city, town, or county legislative body makes written findings that: (a) Appropriate provisions are made for the public health, safety, and general welfare and for such open spaces, drainage ways, streets or roads, alleys, other public ways, transit stops, potable water supplies, sanitary wastes, parks and recreation, playgrounds, schools and schoolgrounds and all other relevant facts, including sidewalks and other planning features that assure safe walking conditions for students who only walk to and from school; and (b) the public use and interest will be served by the platting of such subdivision and dedication. If it finds that the proposed subdivision and dedication make such appropriate provisions and that the public use and interest will be served, then the legislative body shall approve the proposed subdivision and dedication.

The criteria for review adopted by the Tumwater City Council are designed to implement the requirement of Chapter 36.70B RCW to enact the Growth Management Act. In particular, RCW 36.70B.040 mandates that local jurisdictions review proposed development to ensure consistency with City development regulations, considering the type of land use, the level of development, infrastructure, and the characteristics of development. *RCW 36.70B.040.*

Conclusion Based on Findings

With conditions, the requested alteration to the previously approved preliminary plat would meet all applicable City and state criteria for the subdivision of land under TMC 17.14.040.A and RCW 36.70B.040. The Hearing Examiner's previous decision approving the preliminary plat on October 14, 2020, fully addressed and analyzed the original proposal to subdivide four parcels totaling 40.26 acres into 12 commercial/industrial lots, stormwater tracts, and one tree tract and concluded that, with conditions, it would meet all applicable City and state criteria for preliminary plat approval. The City later approved through its administrative process a minor alteration to the approved preliminary plat to allow for the proposed locations of stormwater facilities and Lot 8 to be swapped, due to high groundwater conditions on-site, and to allow for other minor changes to the individual lot sizes.

The current request for an alteration to the previously approved preliminary plat requires only a reanalysis of the City's tree retention and replacement requirements in light of new information

regarding the number of existing trees on the property in its undeveloped condition. Therefore, the Hearing Examiner does not reanalyze the proposal with respect to other applicable requirements for a preliminary plat and, instead, relies on the previous decision to conclude that, with the conditions included therein and incorporated in this decision, the proposed preliminary plat continues to satisfy the subdivision criteria.

Regarding the requirements of the City's tree retention and replacement code, TMC 16.08.070.R.4 provides that project sites containing fewer trees in an undeveloped state than would be required for retention must meet the applicable retention and replacement standards at a one-to-one ratio. Here, the Applicant's arborist consultant determined that the project would be required to retain 484 trees in conjunction with development of the 40.26-acre site. The Applicant's consultant later determined, after the original preliminary plat was approved, that the project site contained approximately 351 trees in its undeveloped condition, less than the 484 trees required to be retained. The Applicant would retain 121 existing trees on-site within a tree tract and would plant a minimum of 363 replacement trees on-site, satisfying the requirements of the City's tree code.

The City provided reasonable notice and opportunity to comment on the proposed preliminary plat revision. The City did not receive any comments on the proposal from members of the public. The City received a comment from the Nisqually Indian Tribe, which noted that it has no specific concerns about the proposal. Environmental impacts of the original preliminary plat proposal were considered, as required by SEPA, and the City Community Development Department issued an MDNS for the proposal that was not appealed. City staff reviewed the current request for a preliminary plat alteration and determined that additional environmental review would not be required. The MDNS requires the Applicant to construct a roundabout at the intersection of 93rd Avenue SW and Lathrop Industrial Drive. Applicant Representative Chris Carlson testified at the hearing that the Applicant has completed construction of the required roundabout.

Conditions, as detailed below, are necessary to ensure that the Applicant complies with the MDNS, complies with the conditions of the previous preliminary plat approval except as modified by this decision, and complies with tree retention and replacement requirements of the City's tree code. *Findings 1 – 14.*

DECISION

Based on the preceding findings and conclusions, the request for a preliminary plat alteration to reduce the minimum number of replacement trees required to be planted on-site from 1,149 to 363, imposed as a condition of the previously approved preliminary plat (No. TUM-20-0220), which allowed the subdivision of four parcels totaling 40.26 acres into 12 commercial/industrial

lots, stormwater tracts, and one tree tract within the 2700 block of 93rd Avenue SW, is **APPROVED**, with the following conditions:⁵

1. The conditions of the Mitigated Determination of Nonsignificance, dated August 6, 2020, are hereby referenced and are considered conditions of this approval.
2. The conditions of the City of Tumwater Hearing Examiner Findings, Conclusions, and Decision I-5 Commerce Place Preliminary Plat No. TUM-20-0220 are hereby referenced and are considered conditions of this approval, with the exception of Finding No. 10, a portion of Conclusion No. 1, and Condition No. 38.
3. In order to comply with the City's Protection of Trees and Vegetation standards, the trees in the wetland buffer, and shown as Tract D on the preliminary plat map shall remain undisturbed.
4. A minimum of 363 replacement trees shall be planted, first on the perimeter of the stormwater tracts, then as part of perimeter landscaping as required for development of the individual parcels.

DECIDED this 26th day of April 2022.



ANDREW M. REEVES
Hearing Examiner
Sound Law Center

⁵ Conditions include legal requirements applicable to all developments as well as requirements designed to mitigate the specific impacts of this development.

HEARING EXAMINER POST-DECISION PROCEDURES

The following sections of the Tumwater Municipal Code outline procedures for requesting reconsideration of a decision by the Tumwater Hearing Examiner and appealing a decision made by the Tumwater Hearing Examiner.

TMC 2.58.135 Reconsideration.

Upon the written request of a party of record filed with the city clerk within five working days of the hearing examiner's written decision, such decision may be reconsidered at the discretion of the hearing examiner. The request for reconsideration must state the grounds upon which the request is made. In the event reconsideration is granted, the hearing examiner shall have an additional 10 working days to render a written final decision.

TMC 2.58.150 Appeal from examiner's decision.

- A. In cases where the examiner's jurisdictional authority is to render a decision, the decision of the examiner shall be final and conclusive unless appealed to superior court within the applicable appeal period as set forth in TMC 2.58.180.
- B. In cases where the hearing examiner decision is appealable to the city council, the decision of the examiner shall be final and conclusive unless appealed within the applicable appeal period as set forth in this section.
- C. Appeals to the city council must be filed with the city clerk by the applicant or other party of record, a department of the city, county or other agency within 14 calendar days following rendering of such decision. Persons not in attendance at the hearing but who submit written information prior to the hearing which 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.
- D. In the event an apparent prevailing party files an appeal to preserve appeal rights and no opposing appeals are filed, said party may, by giving written notice thereof to the city clerk, abandon their appeal and in such event shall be refunded their filing fee.
- E. The timely filing of an appeal shall stay the effective date of the examiner's decision until such time as the appeal is adjudicated by the city council or is withdrawn.
- F. Within five days after the final day upon which an appeal may be filed, notice thereof and of the date, time and place for city council consideration shall be mailed to the applicant, all other parties of record and anyone who submitted written information prior to the hearing. Such notice shall additionally indicate the deadline for submittal of written arguments as prescribed in TMC 2.58.160.

TMC 2.58.180 Judicial appeals.

Final decisions (after exhausting administrative remedies) may be appealed by a party of record with standing to file a land use petition in the Thurston County superior court, except shoreline permit actions which may be appealed to the shoreline hearings board. Such petition must be filed within 21 days of issuance of the decision as provided in Chapter 36.70C RCW.

Updated: June 10, 2013