

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

In the Matter of the Application of)	No. TUM-19-0317
)	
Chul Kim, Sunrise Hills, LLC)	Sunrise Hills Preliminary Plat
)	
)	
)	FINDINGS, CONCLUSIONS,
<u>For Approval of a Preliminary Plat</u>)	AND DECISION

SUMMARY OF DECISION

The request for a preliminary plat to subdivide approximately 10.72 acres into 36 single-family residential lots, with associated improvements, on the northern side of Sapp Road SW, east of Antsen Street SW, is **DENIED**: the proposal does not meet the requirements related to allowable density under the City's zoning ordinances and is not consistent with the Comprehensive Plan designation for the property.

SUMMARY OF RECORD

Hearing Date:

The Hearing Examiner held an open record hearing on the request on September 4, 2019. The record was left open until September 6, 2019, to allow the parties to submit additional information on the proposal.

Testimony:

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

Chris Carlson, City Permit Manager
 Chul Kim, Applicant Representative
 Rod Finkle
 Christine Finkle
 Jim Oberlander
 Carrie Wayno
 Ricky Fryer
 Scott Kincaid
 Jeff Parks
 Eric Trimble
 Darin Rice

Attorney John Ryan represented the Somerset Hills Homeowner's Association at the hearing.

Findings, Conclusions, and Decision
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Sunrise Hills Preliminary Plat
No. TUM-19-0317

Exhibits:

The following exhibits were admitted into the record:

1. Staff Report, dated August 23, 2019
2. Sunrise Hill Preliminary Plat, dated August 23, 2019
3. Preliminary Plat Application, dated March 25, 2019
4. Preliminary Plat Map (Sheets PP1, PP2, and PP3), dated March 15, 2019
5. Certification of Public Notice, dated August 23, 2019
6. SEPA Environmental Checklist, dated March 25, 2019, with Staff Notes
7. Determination of Nonsignificance, dated June 27, 2019
8. Notice of Application, posted May 23, 2019
9. Tree Plan, Professional Forestry Services, Inc., dated September 20, 2018
10. Steep Slope Evaluation, Insight Geologic, Inc., dated September 4, 2018
11. Email from William Halbert to Chris Carlson, dated June 7, 2019
12. Preliminary Drainage Report, Contour Engineering, LLC, dated May 2019
13. Transportation Concurrency – Trip Generation and Distribution, Jake Traffic Engineering, Inc., dated May 3, 2019
14. Memo from Jay Eaton to Chris Carlson, Transportation Concurrency, dated May 8, 2019
15. Letter from Dan Smith to Chul M. Kim, Water and Sewer Availability, dated April 1, 2019
16. Letter from Southwest Regional Office, Department of Ecology, to Chris Carlson, dated June 6, 2019
17. Letter from Southwest Regional Office, Department of Ecology, to Chris Carlson, dated July 11, 2019
18. Email from Rhonda Foster, Squaxin Island Tribe, to Sara Tuomey, dated May 23, 2019
19. Letter from Mel Murray, Tumwater School District, to Chris Carlson, dated August 22, 2019
20. Email from Jim Oberlander to Chris Carlson, dated May 28, 2019, with email string and two photos
21. Email from Amy Gress to Chris Carlson, dated May 28, 2019
22. Letter from Eric Trimble and Sydne Cogburn to Chris Carlson, undated
23. Letter from Geoffrey Scott Provost to Chris Carlson, dated June 5, 2019
24. Email from Janine Meissner-Beaudry to Chris Carlson, dated June 6, 2019
25. Letter from Chul M. Kim to Chris Carlson, dated August 16, 2019, with attachments
26. Applicant's Statement on Comments Submitted by Neighbors, received September 4, 2019
27. Email from Chris Carlson to Janine Meissner-Beaudry, dated September 3, 2019, with email string
28. Letter from Darin & Denise Rice, received September 4, 2019
29. Email from Jeff Parks to Chris Carlson, dated September 5, 2019
30. Memorandum from John Ryan, dated September 5, 2019

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31. Letter from Chul Kim, dated September 6, 2019

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

FINDINGS

Application

1. Chul Kim, on behalf of Sunrise Hills, LLC (Applicant), requests approval of a preliminary plat to subdivide 10.72 acres into 36 single-family residential lots, with associated improvements, including open space tracts, utility tracts, several access tracts, and a stormwater tract. The subdivision would be located on the northern side of Sapp Road SW and east of Antsen Street SW. Access to the proposed plat would be from two access points: the 14 southernmost lots would receive access from a new connection (Road A) to Sapp Road SW that would end in a cul-de-sac; the northern 22 lots take access from Woodland Driveway SW by a new road (Road B), that would also terminate in a cul-de-sac. Due to site topography and constraints, there would be no connectivity for vehicular traffic between these portions of the plat.¹ *Exhibit 1, Staff Report, page 1; Exhibit 2; Exhibit 3; Exhibit 4.*
2. The project site is currently vacant and is forested. The majority of the site is rectangular in shape. Access from the south, however, is provided by a narrower strip of land that connects to the bulk of the parcel further north, giving the overall parcel the look of a flag lot. There are three steep slope areas on the project site. Contour Engineering, LLC, performed an elevation survey of the property and determined that each of these steep slope areas have inclinations greater than 40 percent with vertical relief of 10 or more feet, classifying these areas as “Landslide Hazard Areas” under Tumwater Municipal Code (TMC) 16.20.045.B.8. Site plans indicate that:
 - “Steep Slope A” is located in the center of the project site, toward the eastern property line, and covers approximately 41,132 square feet.
 - “Steep Slope B” is located on the western property boundary, also near the center of the site, and covers 22,115 square feet.
 - “Steep Slope C” is located in the southern portion of the site, in the narrower strip of land providing the connection to Sapp Road SW to the south, and covers 8,975 square feet.*Exhibit 1, Staff Report, pages 1 and 2; Exhibit 4; Exhibit 10.*
3. The property is within a designated Aquifer Protection Overlay (AQP) district, under Chapter 18.39 TMC. The intent of the AQP overlay zone is to “identify, classify, and protect vulnerable and/or critical aquifer recharge areas within the city and urban growth

¹ The property is identified by Tax Assessor Parcel No. 12827330000. *Exhibit 1, Staff Report, page 1.* A legal description of the property is included with the application materials. *Exhibit 4.*

area” through “controlling the use and handling of hazardous substances and uses of land that pose a threat to groundwater.” *TMC 18.39.010*. Residential development is not restricted in the AQP overlay zone, but any future development of the site would require approval of an Integrated Pest Management Plan (IPMP) approved by Thurston County Environmental Health. An IPMP is a written, recorded instrument that outlines prevention, monitoring, and control of pests and noxious plants that seeks to eliminate, or drastically reduce, the use of pesticides and to minimize the toxicity of and exposure to any products used on-site for pest treatment and weed control. *Exhibit 1, Staff Report, page 7.*

Notice

4. The City of Tumwater (City) determined that the application was complete on May 7, 2019. On May 23, 2019, the City posted notice of the application on the property and mailed notice to property owners within 300 feet of the subject property and to reviewing government departments and agencies. The next day, the City published notice of the application in *The Olympian*. On August 23, 2019, the City mailed notice of the open record hearing associated with the application to property owners within 300 feet of the subject property, posted notice on-site, and published notice of the hearing in *The Olympian*. *Exhibit 1, Staff Report, pages 1 and 2; Exhibit 3; Exhibit 5; Exhibit 8.*
5. The City received two comments from reviewing departments and agencies specific to the notice of application. The Washington State Department of Ecology (DOE) noted that, if toxic contamination is suspected, discovered, or occurs during development, the Applicant must test the potential contaminated medium and notify DOE. DOE also provided general comments about the need for erosion control measures during construction and the need for appropriate stormwater and solid waste management on-site. The Squaxin Island Tribe commented that it does not have specific concerns over cultural resources related to the project site but stated that, if the Washington State Department of Archaeology and Historic Preservation (DAHP) recommends a cultural resources survey, the Squaxin Island Tribe would support that recommendation. DAHP did not comment on the proposal. *Exhibit 16; Exhibit 18.*
6. The City also received several written comments from area residents expressing opposition to the proposal. Specifically:
 - Jim Oberlander wrote the City with concerns over sight-distance, traffic, and safety issues related to the intersection of Rural Road and Trosper Road.
 - Amy Gress expressed general concern over the potential impacts the development would have on existing neighborhoods in the vicinity.
 - Eric Trimble wrote that he is especially concerned about the development of proposed lots 20, 21, and 22, which would be sited on the eastern property line on top of a rocky hill, because extensive rock removal, use of heavy machinery, and

blasting would all likely be necessary. He noted that blasting, in particular, would have negative impacts on existing homes in the vicinity.

- Geoffrey Provost commented that the proposed density would have detrimental impacts on wildlife in the vicinity and that the proposal fails to account for the unique nature of the watershed. He also expressed concern over noise, traffic, and impact to property values.
- Janine Meissner-Beaudry wrote that many of the neighbors in the area were misled by former homeowners and realtors into believing the project site was a protected greenspace. She further stressed that traffic would be a concern, especially with Woodland Drive SW serving as the primary entrance to the development.
- Denise and Darin Rice commented that potential flooding from stormwater is a consistent problem in the vicinity and that denuding much of the project site would exacerbate this issue. They also expressed concern over the proposed density of the project and the potential impacts from blasting.

Exhibits 20 through 24; Exhibit 27; Exhibit 28.

7. The Applicant provided a response addressing several of the written comments. Specifically, the Applicant stated: the intersection of Rural Road and Trospen Road is approximately 2.5 miles away and is unrelated to the subject property; the Applicant would ensure no blasting occurs near existing residences and that visual buffers would be maintained for properties to the east; the proposed density is on the “low end compared with many houses in the neighborhood” with smaller lot sizes; the Applicant intends to leave most vegetation “untouched” in steep slope areas “except where it is absolutely necessary”; and the property was approved for development of 34 lots in both 2005 and 2008 and, as such, has not been classified as a protected greenspace. *Exhibit 26.*

State Environmental Policy Act

8. The City Community Development Department (CDD) acted as lead agency and analyzed the environmental impacts of the proposal under the State Environmental Policy Act (SEPA), Chapter 43.21C Revised Code of Washington RCW (RCW). CDD reviewed the Applicant’s environmental checklist and other information on file and determined that the proposal would not have a probable significant adverse impact on the environment. Accordingly, CDD issued a Determination of Nonsignificance (DNS) on June 27, 2019, by publishing, mailing, and posting notice, with a comment deadline of July 11, 2019, and an appeal deadline of July 17, 2019. The City received one comment on its SEPA determination: DOE reiterated the comments it earlier provided in response to the notice of application related to toxic contamination, the need for erosion control measures during construction, and the need for appropriate stormwater and solid waste management on-site. No other comments specific to SEPA were received, and the DNS was not appealed. *Exhibit 1, Staff Report, page 6; Exhibit 5; Exhibit 6; Exhibit 7; Exhibit 17.*

Comprehensive Plan and Zoning

9. The property is within the Tumwater Hill Neighborhood and is designated Residential/Sensitive Resource (RSR), under the City's Comprehensive Plan. The purpose of the designation is to "recognize areas of unique open space character and sensitivity to environmental disturbance such as around stream corridors, lakes, and wetlands" within the city limits and Tumwater's urban growth area (UGA). *City Comprehensive Plan, Land Use Element, page 32.* The Residential/Sensitive Resource designation is "to be used only for exceptional places within the city and its growth area" and applied "to areas that are not protected by the State Shoreline Management Act and are not already built out." *City Comprehensive Plan, Land Use Element, page 32.* The Comprehensive Plan encourages low-density residential development of 2 to 4 dwelling units per acre in Residential/Sensitive Resource areas. In addition, clustering is encouraged. *Clustering* means grouping or "clustering" development onto part of a property so that the remainder can be preserved as un-built open space, further protecting environmentally sensitive areas. *City Comprehensive Plan, Land Use Element, page 32. Exhibit 1, Staff Report, page 2.*
10. The property is located in the Residential/Sensitive Resource (RSR) zoning district, which allows a density of two to four dwelling units per acre. The intent of the RSR zone is to accommodate and establish low-density residential neighborhoods in a manner that is compatible with areas of unique open space character and environmental sensitivity. *TMC 18.08.010.* Single-family detached dwellings are a permitted use in the RSR zone. *TMC 18.08.020.A. Exhibit 1, Staff Report, page 6.*
11. TMC 18.08.050 provides density requirements for the RSR zone. Specifically, TMC 18.08.050.B requires that density calculations be based on "the portion of the site that contains lots devoted to residential and associated uses" such as "dwelling units; private community clubs; [and] stormwater detention, treatment and infiltration." Land that is "required to be dedicated for public use as open space, right-of-way, or land on which development is prohibited by TMC Title 16, Environment," however, is excluded from density calculations. *TMC 18.08.050.B.1. Exhibit 1, Staff Report, pages 6 and 7.*
12. The gross site area of the site is, according to the submitted preliminary plat map (Exhibit 4), approximately 10.72 acres, or 466,977 square feet. After removing square footage associated with the two internal roads and three access tracts, as is required by TMC 18.08.050, then just over 9 acres (or 392,439 square feet) of potentially "buildable" area remains. The Applicant has used this figure to calculate an allowable maximum density of 36 residential lots, accounting for four lots per acre of buildable area. This calculation is incorrect. In addition to excluding areas devoted to right-of-way from the density calculation, TMC 18.08.050 provides that areas that are "required to be dedicated for public use as open space" also be excluded from the density calculation. Here, under

TMC 17.12.210, the “minimum usable open space/park area for residential subdivisions . . . shall be ten percent of the total gross site area.” Accordingly, the required open space for the proposal would be, at a minimum, 46,698 square feet, or approximately 1.07 acres. When further reducing the potential buildable area of the property by this amount, the Applicant is left with approximately 7.93 buildable acres. This would allow for no more than 31 residential lots to be built on-site. As such, the proposal would exceed the maximum allowable density under both the Comprehensive Plan and zoning ordinances. *Exhibit 4.*

13. In addition, there are steep slope areas on-site that have been recognized as landslide hazard areas, as explained above.² The City and the Applicant disagree on whether these steep slope areas should be excluded from the density calculations applicable to the site. The City contends that, under TMC 18.08.050.B.1, the steep slope areas entail “land on which development is prohibited by TMC Title 16” and, as such, should be excluded from the density calculation. Submitted plans indicate that the three steep slope areas on-site occupy 72,222 square feet (or approximately 1.66 acres). If these areas were excluded from the site (without accounting for the open space requirements detailed above) the buildable area of the site would be 7.34 acres and would allow for no more than 29 homes.³ The Applicant contends that, under the performance standards related to landslide hazard areas under TMC 16.20.057, such areas need not be removed from the density calculation. Under TMC 16.20.057.A.8.a, land “that is located wholly within a landslide hazard area or its buffer may not be subdivided” but land that is “located partially within a landslide hazard area or its buffer may be divided; provided that each resulting lot has sufficient buildable area outside of, and will not affect, the landslide hazard or its buffer.” The Applicant argues that this provision means that, so long as sufficient buildable area exists on each lot impacted by the landslide hazard area, development is “not prohibited” and, accordingly, such areas need not be excluded from the density calculation under TMC 18.08.050.B.1. Because the Applicant’s density calculation fails to account for required open space, however, this is a moot point. Regardless of whether steep slope areas should be excluded from the density calculation

² The City’s staff report notes that there are two steep slope areas on-site, and its calculations concerning density appear to only account for two such areas (Steep Slope Areas A and B). The Applicant’s own project plans (Exhibit 4) and submitted Steep Slope Evaluation (Exhibit 10), however, clearly delineate three such areas. Accordingly, the Hearing Examiner’s analysis accounts for all three areas, consistent with the materials submitted by the Applicant.

³ Under TMC 17.12.210, critical areas may be designated as open space/park areas so long as certain requirements are met, including that facilities for active and/or passive recreation be provided, such as walking trails, picnicking facilities, or play areas. Project plans do not indicate that the steep slope areas encumbering the site would provide for such amenities. When excluding these areas from the density calculation *and* excluding required open space, the buildable area would be approximately 6.27 acres and allow for development of no more than 25 homes. *Exhibit 4.*

(as the City contends), the proposal would not meet density requirements under both the Comprehensive Plan and zoning ordinances when open space is appropriately accounted for and excluded from the density calculation. *Exhibit 1, Staff Report, page 3; Exhibit 4; Exhibit 11; Exhibit 25.*

Testimony and Argument⁴

14. City Permit Manager Chris Carlson testified generally about the application review process, explaining that the City reviewed the application for consistency with the Comprehensive Plan, zoning requirements, and critical areas ordinances. He stressed that the Residential/Sensitive Resource designation under the Comprehensive Plan and zoning ordinances is intended to have the lowest residential density of all land use designations in the city. Here, based on the City's interpretation of TMC 18.08.050.B, the proposal would exceed the allowable maximum density under both the Comprehensive Plan and zoning ordinances. Mr. Carlson stated that the City believes that, under TMC 18.08.050.B, land prohibited from development would include areas with slopes greater than 40 percent and, when accounting for such areas and excluding them from required density calculations, the proposal would involve greater density than is allowed in the RSR zone. Mr. Carlson explained that, because of this, the City recommends denial of the proposal as it is inconsistent with the City's Comprehensive Plan and fails to meet density requirements under the zoning code. *Testimony of Mr. Carlson.*
15. Applicant Representative Chul Kim testified that the property was previously approved for the development of 34 lots in 2005, but development never occurred because of the recession that struck the U.S. economy around that time. Mr. Kim acknowledged that the previous approval expired around 2016. He noted that the Applicant would like to develop the property, but grading the site would be very expensive. Because of this, the Applicant does not believe site development would be feasible if density calculations require that fewer homes be built than proposed. Mr. Kim stated that the steep slopes on-site would be protected and, because of this, development should be allowed as proposed. Further, Mr. Kim argued that, as detailed above, under TMC 16.20.057.A.8.a, land that is partially within a landslide hazard area may be subdivided so long as each resulting lot has sufficient buildable area and, accordingly, such land should not be treated as "prohibited" from development under TMC 18.08.050.B for purposes of calculating density. Mr. Kim also argued that the Applicant has researched this matter and has not found instances where the City has excluded critical areas from density calculations in the past. *Testimony of Mr. Kim.*

⁴ Because the proposal would exceed allowable density under both the Comprehensive Plan and zoning ordinances, denial of the proposal is required. Accordingly, no further analysis of other aspects of the preliminary plat—including whether appropriate provisions have been made for the public health, safety and general welfare, and for open spaces, drainage ways, streets, transit stops, potable water supplies, sanitary wastes, parks and recreation, schools, fire protection, and other public facilities, and whether the public interest would be served by allowing the subdivision—are not addressed in this decision.

16. Attorney John Ryan represented the Somerset Hills Homeowner's Association (HOA) at the hearing, the development to the north of the plat, and argued that the proposal would have significant traffic impacts on the neighborhood that have not been adequately addressed. Mr. Ryan also stated that the HOA concurs with the City's density calculations and stressed that having a maximum allowable density of 4 dwelling units per acre (du/acre) in the RSR zone is not merely about protecting property values but also about protecting the Percival Creek Watershed, as required by the Comprehensive Plan. *Argument of Mr. Ryan.*
17. Rod Finkle testified that noise and environmental impacts are concerns that require further analysis. He also noted that there is no connectivity within the plat itself, contrary to normal platting requirements, and that sight distance and traffic are concerns in the area. Mr. Finkle also expressed concern over the potential impacts from blasting that would occur with site development. *Testimony of Mr. Finkle.*
18. Christine Finkle also expressed concern over potential impacts from blasting and noted that, when development has occurred in the vicinity in the past, blasting has had detrimental effects on existing properties. She also stressed that traffic is a concern, especially because the majority of traffic entering the plat would have to travel through the existing Woodland neighborhood to the north. *Testimony of Ms. Finkle.*
19. Jim Oberlander testified that he has resided in the area for almost 50 years, and he reiterated the concerns raised in his written comments. He also noted that, because of the rocky nature of the underlying soil, stormwater runoff in the area is a major problem because infiltration does not work. Mr. Oberlander stressed that no additional development should be allowed until existing traffic hazards in the vicinity of the site are properly addressed. *Testimony of Mr. Oberlander.*
20. Carrie Wayno testified that she is concerned about traffic safety, especially with the increase in vehicle traffic that would occur through the Somerset Hills neighborhood. She also stressed that the Oso Slide was not that long ago and that the Oso event highlighted the need to ensure landslide hazard areas are appropriately protected from development. *Testimony of Ms. Wayno.*
21. Ricky Fryer testified that he moved into the neighborhood recently and shares his neighbors' concerns over traffic and potential impacts from blasting and site development. *Testimony of Mr. Fryer.*
22. Scott Kincaid testified that he is concerned over the proposed density and that, contrary to the Applicant's contentions, does not believe that having more homes on the site would somehow lead to fewer impacts, especially in relation to stormwater impacts. Mr.

Kincaid stressed that the Percival Creek Watershed should be protected. He also expressed concerns over traffic. *Testimony of Mr. Kincaid.*

23. Jeff Parks testified that it is not the City's job to ensure that development is allowed to occur on a property and that, in this instance, it would be best if this property were left undeveloped, especially in light of the wildlife that currently resides on the property. *Testimony of Mr. Parks.*
24. Eric Trimble reiterated the concerns he expressed in his written comments to the City and stressed that much of the site would not be developable without significant blasting and that the potential impacts from blasting have not been adequately addressed. *Testimony of Mr. Trimble.*
25. Darin Rice testified that he is concerned over stormwater impacts from the proposal, especially on adjacent properties. *Testimony of Mr. Rice.*
26. Mr. Kim responded to the received testimony and arguments and stressed that: very little blasting would be necessary based on site design, cut-through traffic would not be an issue because the two sections of the plat would not be connected by a road, stormwater would be appropriately managed on-site and would not impact adjacent properties, and all at-risk trees would be removed that might impact neighboring properties. *Testimony of Mr. Kim.*
27. Mr. Carlson also responded to issues raised by the testimony of Mr. Kim and concerned area residents. Mr. Carlson stressed that the City does not concur with the Applicant's interpretation of TMC 16.20.057.A.8 and continues to maintain that steep slope areas should be excluded from the density calculation. He also noted that the City regulates blasting and that, were development to occur, municipal requirements concerning blasting would need to be followed. Finally, Mr. Carlson noted that the Applicant submitted a traffic impact analysis that determined that concurrency would be met. *Testimony of Mr. Carlson.*
28. At the conclusion of the hearing, the Hearing Examiner ruled that the record would be left open until September 6, 2019, to allow limited additional comment and argument related to the proposal and to allow Mr. Kim to respond, in writing, to submitted comments and testimony. *Oral Ruling of the Hearing Examiner.*

Additional Submittals

29. Jeff Parks submitted an additional written comment, addressing concerns over sight lines between the proposed Sapp Road entrance to the plat and the intersection of Crosby Road and Sapp Road. *Exhibit 29.*

30. Attorney John Ryan submitted additional comments on behalf of the Somerset Hills HOA. He argued that, although the HOA supports the staff's recommendation that the project be denied, the HOA believes the City failed to appropriately address the issues of traffic impacts on the Somerset Hills neighborhood, construction staging, blasting, and erosion control. *Exhibit 30.*
31. Chul Kim submitted additional written comments and stressed that the proposal previously received approval in 2005 and that, during review then, critical areas were not excluded from density calculations even though that portion of the municipal code has not changed. Mr. Kim also noted that sight distance was addressed by the Applicant's traffic engineer and would not be a concern. *Exhibit 31.*

Staff Recommendation

32. As noted above, Mr. Carlson testified that the City recommends denial of the proposal because the proposed plat would not be consistent with the City's Comprehensive Plan and would be contrary to requirements of the City's zoning ordinances. *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

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, 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.*

Conclusions Based on Findings

The proposed subdivision would not be consistent with the City's Comprehensive Plan or with development regulations and standards, as required by the municipal code. The subject property is within an area designated Residential/Sensitive Resource under the Comprehensive Plan, a designation reserved for "exceptional places" that is designed to "recognize areas of unique open space character and sensitivity to environmental disturbance." *City Comprehensive Plan, Land Use Element, page 32.* Because of this, low-density residential development is encouraged and the Comprehensive Plan sets a maximum allowable density of 4 du/acre. Here, the Applicant's plans fail to account for required open space and, because of this, the project would result in density at a higher rate than is allowed by the Comprehensive Plan. For this reason alone, denial of the proposed plat is necessary.

In addition, the property is within the RSR zoning district, which also allows for a maximum density of 4 du/acre. The Applicant and the City disagree on how density should be calculated when critical areas are being considered, under TMC 18.08.050.B.1. Under this provision, however, land that is "required to be dedicated for public use as open space [and] right-of-way" must be excluded from density calculations. When 46,698 feet of open space is properly accounted for, as well as the 74,538 square feet of right-of-way that would be dedicated as roads and access tracts, the "buildable" net area of the site would be approximately 7.93 acres, allowing for development of no more than 31 homes—not the 36 homes proposed by the Applicant.

Furthermore, the Hearing Examiner concurs with the City's assessment of TMC 18.08.050.B.1, i.e., that steep slope areas should be removed from density calculations. The performance standard the Applicant has relied on to exclude such areas from the density calculation (TMC 16.20.057.A.8.a) relates generally to whether a particular property may be subdivided—not to how density should be calculated. Moreover, the Applicant's interpretation runs contrary to the intent of the City's critical areas ordinances generally, which encourage critical areas being set aside in separate tracts and protected in perpetuity. Under the Applicant's interpretation, any critical area (be it a wetland or steep slope area) could be "subdivided" into several parcels so long as each parcel had a buildable area. This, though, would make protecting critical areas difficult and would not allow for maintenance and protection of such areas as separate tracts.

Finally, Chapter 18.08 TMC provides a clear example, in the language following TMC 18.08.080, entitled "Density Calculation Formula for All Residential Zones," which shows that density should be calculated by taking the total lot area and subtracting critical areas, additional dedicated open space, rights-of-way, reserve tracts, and lots devoted to uses other than residential and associated uses to arrive at the "total net developable land" area. Using this formula, the total net developable land area of this site would be approximately 6.27 acres and would allow for development of no more than 25 homes. Accordingly, the Applicant has failed to properly

calculate the allowable density for the site, rendering denial of the proposal necessary.⁵ *Findings 1 – 32.*

DECISION

Based on the preceding findings and conclusions, the request for a preliminary plat to subdivide 10.72 acres into 36 single-family residential lots, with associated improvements, on the northern side of Sapp Road SW and east of Antsen Street SW, is **DENIED**.

DECIDED this 20th day of September 2019.



ANDREW M. REEVES
Hearing Examiner
Sound Law Center

⁵ Mr. Kim has repeatedly stressed that the site was approved for development of 34 lots in 2005. That approval is in no way controlling in the present circumstances. The Hearing Examiner notes that a different hearing officer presided over that 2005 hearing and that there has been significant turnover in the City's planning department since then. Regardless, while mistakes concerning density calculations were made in 2005, they need not be repeated now.

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.

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