

**BEFORE the HEARING EXAMINER for the  
CITY of SULTAN**

**DECISION**

FILE NUMBER: PP19-003

APPLICANT: Land Resources Northwest, LLC  
ATTN: Craig Pierce  
19711 88<sup>th</sup> Avenue NE  
Bothell, WA 98011

TYPE OF CASE: Preliminary subdivision (*Wyndham Highlands*<sup>1</sup>)

STAFF RECOMMENDATION: Approve subject to conditions

EXAMINER DECISION: RETURN for modification

DATE OF DECISION: December 6, 2019

**INTRODUCTION**<sup>2</sup>

Land Resources Northwest, LLC (“Land Resources”) seeks preliminary approval of *Wyndham Highlands*, a 171-lot single family residential subdivision of a 23.41 acre site zoned Moderate Density Residential (“MDR”).

Land Resources filed the application on July 12, 2019, at which time the proposal was for a 146-lot subdivision. (Exhibit 3<sup>3</sup>) The Sultan Department of Community Development (“DCD”) deemed the application complete when filed. (Exhibit 7) On October 3, 2019, Land Resources filed a revised plat which proposed a 171-lot subdivision. (Exhibit 14) DCD issued a Notice of Application on December 3, 2019, for the 146-lot version of the proposal. (Exhibit 10)

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<sup>1</sup> The preliminary plat application itself does not name the proposed plat. (Exhibit 3) The the Applicant’s vicinity map, the proposed preliminary plat, and the proposed preliminary civil plans all name the subdivision *Wyndham Highlands*. (Exhibits 5, 6, and 20, respectively) The Applicant’s “Project Narrative” names the subdivision “Wyndham Highlands 1”. (Exhibit 2) City-generated documents name the subdivision “Wyndham Highlands 1” or “Wyndham Highlands #1”. (Exhibits 1; 7; 10; *et al.*) The Examiner will use the name as shown on the proposed preliminary plat: *Wyndham Highlands*.

<sup>2</sup> Any statement in this section deemed to be either a Finding of Fact or a Conclusion of Law is hereby adopted as such.

<sup>3</sup> Exhibit citations are provided for the reader’s benefit and indicate: 1) The source of a quote or specific fact; and/or 2) The major document(s) upon which a stated fact is based. While the Examiner considers all relevant documents in the record, typically only major documents are cited. The Examiner’s Recommendation is based upon all documents in the record.

The subject property is located on the west side of Sultan Basin Road, northwest of the Sultan Basin Road/132<sup>nd</sup> Street SE intersection. The two houses on the property are addressed as 13018 and 13104 Sultan Basin Road.

The Sultan Hearing Examiner (“Examiner”) viewed the subject property on November 22, 2019.

The Examiner held an open record hearing on November 22, 2019. DCD gave notice of the hearing as required by the Sultan Municipal Code (“SMC”). The hearing notice stated that the proposal was for a 171-lot subdivision. (Exhibit 11)

The following exhibits were entered into the hearing record during the hearing:

- Exhibits 1 - 20: As listed on the prehearing Exhibit List prepared by DCD
- Exhibit 21: Statement, Gerry Gibson, November 21, 2019
- Exhibit 22: Statement, Judy Heydrick, November 21, 2019
- Exhibit 23: Revised Staff Report, November 22, 2019

Preliminary subdivision applications generally are to “be approved, disapproved or returned to the applicant for modification or correction within 90 days [of the date the application is complete], unless the applicant consents to the extension of such time period ....” [SMC 19.08.060(A)] The Examiner’s open record hearing was held beyond the 90<sup>th</sup> day. (Testimony) Land Resources, by and through its representative, Ry McDuffy (“McDuffy”), verbally agreed to waive any timeline irregularities. (Testimony)

The action taken herein and the requirements, limitations and/or conditions recommended for imposition by this recommendation are, to the best of the Examiner’s knowledge or belief, only such as are lawful and within the authority of the Examiner to take and recommend pursuant to applicable law and policy.

### **FINDINGS OF FACT**

1. Two issues require the Examiner to return the *Wyndham Highlands* application to Land resources for modification, both relating to traffic. First is lack of conformance with the arterial plan within the adopted Comprehensive Plan (“Comp Plan”). Second is a question of traffic safety along Sultan Basin Road.

The Examiner could address only those two issues in the Findings of Fact and Conclusions of Law in this Decision, leaving all other preliminary subdivision topics to be discussed in a future decision. Doing that, however, would leave all parties unsure as to what, if any, conclusions the Examiner has reached on other topics involved in the review of the preliminary subdivision.

Therefore, this Decision will focus on the two issues preventing approval at this time while covering remaining preliminary subdivision topics in a somewhat cursory manner.

2. The subject property is a rectangle with approximately 667 feet of frontage on the west side of Sultan Basin Road and a depth of approximately 1,536 feet. The subject property contains 23.41 acres. The subject property was annexed to the City in August, 2018. (Exhibit 23, p. 2) It was zoned MDR upon annexation.<sup>4</sup> (Testimony)
3. Land Resources proposes to subdivide the subject 23.41 acres into 171 single-family residential lots served by six intersecting, grid pattern public streets. Each of the streets is proposed as a 50-foot wide right-of-way within which the street section would consist of 28 feet of pavement (two 10-foot travel lanes and one 8-foot parking lane) with curb and gutter, planter strip, and sidewalk on each side. The seven lots which would front directly on Sultan Basin Road (proposed Lots 165 – 171) would be “alley loaded” and would not take vehicular access from Sultan Basin Road. The westerly 145 feet of the subject property would be set aside as a Critical Area/Open Space preservation tract (Tract 999) to protect the steep down-slope that begins in that area. One proposed street (labelled as 128<sup>th</sup> Place SE on the proposed plat) would extend from Sultan Basin Road westerly to the edge of Tract 999. The westerly-most proposed north-south street (labelled as 314<sup>th</sup> Drive SE on the proposed plat) would connect with a proposed street to the south within the *Daisy Meadows* (Preliminary approval granted December 4, 2019) and *Wyndham Highlands 2* (still under staff review) subdivisions. Land Resources anticipates developing the subdivision in three phases. (Exhibits 6; 20)

McDuffy testified that Land Resources was willing to dedicate to the City all that portion of Tract 999 lying north of the southerly edge of proposed 128<sup>th</sup> Place SE (extended) if the City wanted it for future extension of 128<sup>th</sup> Place SE. (Testimony)

4. The north edge of the subject property is the north edge of the City’s Urban Growth Area (“UGA”) in this area and the current City limit. The land to the north consists of four acreage lots in unincorporated Snohomish County which are zoned R-5. (Exhibits 8; 9) Those four lots are served

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<sup>4</sup> How and why the subject property was zoned MDR was questioned during the hearing. (Exhibit 22; and testimony) The annexation occurred pursuant to Ordinance No. 1292-18. (Exhibit 23, p. 2) Section 3 of that Ordinance states that “Zoning for the Wyndham Highlands Annexation shall have a default zoning designation of Moderate Density, per SMC 16.10.030.” [Official notice: <https://ci.sultan.wa.us/DocumentCenter/View/271/1292-18---Wyndham-Annexation-PDF>, last visited December 4, 2019] Section 16.10.030(A) SMC fundamentally states that “all new territory annexed to the city shall be designated as the city zoning district that closely equates to the permitted county land uses in the annexation area at the time of annexation”. The County zoning of the annexed area was R-7,200, a residential zone allowing a density of up to about six dwelling units per acre. (Exhibit 9) The MDR zone allows six to nine dwelling units per acre. [SMC 16.12.020(A)]

by a private road running adjacent to and roughly parallel with the north edge of the subject property. (Exhibits 6; 17.2, Figure 2) The owner of the fourth lot in (Broughton) testified during the hearing.

The subject property is bordered on the south by *Miller Farms*, *Daisy Meadows*, and *Wyndham Highlands 2* (from east to west). *Miller Farms* is an “alley loaded” subdivision with a central public street (Yew Avenue) and alleys along the north and south edges of the plat to provide access to garages.<sup>5</sup> The boundary between the subject property and *Miller Farms* aligns with the centerline of 132<sup>nd</sup> Street SE across Sultan Basin Road. (Exhibits 6; 17.2, Figure 2)

*Daisy Meadows* and *Wyndham Highlands 2* have both been designed to connect to the south end of 314<sup>th</sup> Drive SE.<sup>6</sup> (Exhibit 6)

The property to the west is owned by the current owners of the subject property (the Van Wyngardens) and exhibits a very steep slope downward to the Sultan River valley floor, the location of the major part of the City. (Exhibit 17.2, Figure 2)

5. “Each proposed subdivision shall be reviewed for its compliance with all of the criteria and standards listed in [SMC 19.08.080(A)].” [SMC 19.08.080(A)] Those criteria and the facts relating to each are as follows:

- “1. The proposal conforms to:  
“a. The goals, policies, criteria and plans set forth in the city of Sultan comprehensive plan;”

Facts: The adopted Comp Plan designates the subject property Moderate Density Residential. (Exhibit 23, p. 2)

The Comp Plan’s Transportation element (Chapter 8) classifies US 2 as a Rural Principal Arterial; Sultan Basin Road and 132<sup>nd</sup> Street SE as Rural Minor Arterials; and Kessler Drive and Main Street as Major/Minor Collector Arterials. [Comp Plan, § 8.6.2, Fig. 8-B] The Comp Plan shows an east-west connector between Sultan Basin Road and the valley portion of the City to the west extending generally westerly from 132<sup>nd</sup> Street SE and then veering northwesterly to connect with Trout Farm Road in the valley; it also depicts a northerly extension of Kessler Drive to the City’s Urban Growth Area boundary. [Comp Plan, Table 8-7]

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<sup>5</sup> The notation “Yew Avenue” on the proposed preliminary plat below proposed Lots 9 and 10 is incorrect: The area notated is one of the private alleys, not Yew Avenue. [Official notice]

<sup>6</sup> McDuffy is the representative for *Daisy Meadows*, *Wyndham Highlands 2*, and *Wyndham Highlands 3*, as well as *Wyndham Highlands*.

The westerly extension of 132<sup>nd</sup> Street SE is designated by the Comp Plan as project T-57. Project T-57's purpose is to create a Minor Arterial from Sultan Basin Road westerly to Trout Farm Road. The new street is to have bike lanes and be capable of use by public transit. [Comp Plan, p. 8-36, Table 8-6; p. 8-40, Figure 8-O] The Comp Plan projects that the Project T-57 connector will handle 6,000 trips on an average day ("ADT") in 2025. [Comp Plan, p. 8-16, Figure 8-F]

"b. Sultan water system plan;"

Facts: The City's water system can provide pressure and flow for the 70 proposed residences without any off-site improvements. (Exhibit 13, p. 2)

"c. Sultan general sewer plan;"

Facts: Prior hydraulic modeling of the City's sewer system shows that the sewer mains under Main Street may have insufficient capacity for existing and projected flows. However, those sewer mains have not been observed to have any surcharging issues in the past. The City is conducting further study to determine if any off-site sewer improvements are actually required to properly handle sewage flows from new developments. [Official notice <sup>7</sup>]

Based on data currently available and the formula used by the City when approving the *SkyRidge* preliminary subdivision, <sup>8</sup> each new lot would be responsible to upgrade 6.6 feet of sewer main at an estimated cost of \$2,640.00. (Exhibit 13, pp. 2 & 3)

Given that information, the City and Land Resources jointly recommend that *Wyndham Highlands* be provided with two options to ensure availability of adequate sewer service: Upgrade 6.6 feet of sewer main per lot; or pay a fee-in-lieu not to exceed \$2,640.00 per lot. Both options are subject to change should continuing study determine that the sewer main is actually not over capacity. (Exhibit 23, pp. 14 & 15)

"d. Sultan critical areas regulations;"

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<sup>7</sup> Events during the overlapping processing of *Daisy Meadows*, *Wyndham Highlands*, *Wyndham Highlands 2*, and *Wyndham Highlands 3* regarding sewer system capacity and traffic impact issues have changed frequently and, in some cases, written reports have not kept up with those changes. This is one such topic. The Examiner is reporting the latest information which is generally known by all participants, since there is a substantial participation overlap among the several applications.

<sup>8</sup> *SkyRidge* is a 206-lot, single-family residential subdivision located on 124<sup>th</sup> Street SE, west of Sultan Basin Road.

Facts: Much of the westerly 145 feet of the subject property lies within either a regulated steep slope or the required buffer for that slope. (Exhibit 17) The proposed plat provides the required buffer and building setback line for that steep slope. (Exhibit 6)

“e. Sultan concurrency management system;”

Facts: A Certificate of Concurrency (the “Certificate”) was issued for *Wyndham Highlands* on November 13, 2019. (Exhibit 13) The Certificate states that the Level of Service (“LOS”) at the US-2/Main Street and US-2/5<sup>th</sup> Street<sup>9</sup> intersections will be below the established standard in 2029. The City’s traffic consultant (TSI) has determined that if left hand turns are restricted during the peak hours at the US-2/Main Street intersection and if the southbound leg of the 5<sup>th</sup> Street/US-2 intersection (the north leg of the intersection) were re-striped to provide an exclusive left-turn and a shared through/right-turn lane, the City’s LOS D standard would be met. (Exhibit 19.2)

Given that information, the City and Land Resources jointly recommend that *Wyndham Highlands* be provided with two options to ensure adequate LOS when the plat is developed: Install the changes described in the previous paragraph plus posting advisory signs along Main Street prior to final plat application; or pay a \$145.00 per lot fee-in-lieu towards a City-designed improvement that would preserve compliant LOS. (Exhibit 23, p. 15)

“f. Sultan stormwater management performance standards;”

Facts: Land Resources proposes to infiltrate most surface water generated from the proposed subdivision. Site soils are generally acceptable for the use of infiltration systems. However, the southeast corner of the site has a high perched water table; a detention tank is proposed for use in that area. (Exhibits 18; 21)

“g. Sultan shoreline master program;”

Facts: The subject property does not lie within the jurisdictional area of the Shoreline Management Act of 1971. (Exhibit 23, p. 8)

“h. Stormwater Management Manual for Western Washington;”

Facts: Land Resources’ engineers prepared the preliminary drainage plans to meet the 2016 Snohomish County Drainage Manual. (Exhibit 18, p. 3) Sections “17.14.040(C)(1) and 19.42.020 SMC require compliance of stormwater designs with the most current

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<sup>9</sup> 5<sup>th</sup> Street is known as Mann Road south of US 2.

Department of Ecology manual. Drainage plans prepared by Omega Engineering have been reviewed and approved by the City at a preliminary detail. Final drainage plans will be prepared prior to construction and approved by the City.” (Exhibit 23, p. 8)

“i. Sultan park recreation and open space plan;”

Facts: Land Resources has chosen to use the in-lieu payment option (SMC 16.62.070) of \$148,000. (Exhibit 23, p. 8

“2. The proposal conforms to the development standards set forth in SMC Title 16, Zoning Code;”

Facts: The proposed lots meet all zoning code standards when lot size averaging provisions are applied. (Exhibits 6; 23, pp. 4 & 5)

“3. The proposal conforms to the requirements of this chapter and Public Works Engineering, Design, and Development Standards (EDDS), and Chapter 19.42 SMC, Public Facility Requirements;”

Facts: The City has adopted the Snohomish County Engineering Design and Development Standards (“EDDS”) as its street standards. [SMC 11.12.010] EDDS Standard Drawing 3-030A states that urban street standards apply where curb and gutter street sections with sidewalks and enclosed drainage will be provided. Those are the standards to which the interior streets and Sultan Basin Road frontage improvements will be built. Therefore, EDDS urban street standards apply here.

Urban standards for a residential street handling up to 2,000 ADT require 51 – 55 feet of right-of-way with two 10-foot travel lanes and one 8-foot parking lane. Urban standards for a collector handling over 2,000 ADT require 59 – 63 feet of right-of-way with two 10-foot travel lanes and two 8-foot parking lanes. [EDDS Standard Drawing 3-065] The minimum width for a bike lane on a street with a curb and gutter section is five (5) feet. [EDDS Standard Drawing 3-030A, Note 10] A bike lane on each side of a street would thus add 10 feet to the pavement width. EDDS standard right-of-way width for an Urban Arterial is 80 feet. [EDDS, § 3-03.A, Table 3-1]

“4. The proposed street system conforms to the Public Works Design and Development (*sic*) Standards (EDDS);”

Facts: See preceding section.

- “5. The proposed subdivision is laid out in such a manner as to provide for the safe, orderly and efficient circulation of traffic;”

Facts: Whether a northbound left-turn lane into the development is needed was questioned during the hearing. No left-turn lane analysis has been conducted.

EDDS § 3-11 provides that left-turn lane analyses are to be conducted using the Washington State Department of Transportation’s (“WSDOT’s”) “Design Manual” (“WSDOT Manual”). The WSDOT Manual does not provide rigid thresholds for left-turn lanes. Rather, it provides a series of curves by which an engineer may determine if further detailed analysis is needed. The curves appear to indicate that for a posted speed of 40 mph and a total volume (both directions) of more than 500 vehicles in a given hour, a left-turn analysis is needed if 17% or more of the vehicles are making the left-turn movement. The WSDOT manual states that the Highway Capacity Manual may be used to guide that analysis. [Official notice: WSDOT Manual, p. 1310-13 and Exhibit 1310-7a]

The only major development along Sultan Basin Road north of *Wyndham Highlands* is *SkyRidge*, a 206-lot subdivision approved in 2018 and now under construction. Using the commonly accepted trip generation figure of one vehicle per single-family residence in the P.M. peak hour, *Wyndham Highlands* would generate about 170 trips and *SkyRidge* would generate about 205 trips. Collectively they would generate about 375 trips in the P.M. peak hour. The Traffic Impact Analysis (“TIA”) in the hearing record does not provide information about general traffic volumes on Sultan Basin Road. (Exhibit 19) Thus, the record contains inadequate evidence upon which a left-turn lane analysis could be performed.

- “6. The proposed subdivision will be adequately served with city-approved water and sewer and other utilities appropriate to the nature of the subdivision;”

Facts: See Items 1.b and 1.c, above.

- “7. The layout of lots and their size and dimensions take into account topography and vegetation on the site in order that buildings may be reasonably sited, to minimize disruption of the site, topography, trees and vegetation;”

Facts: The plat design avoids development on or near the steep western slope. (Exhibit 6)

- “8. Identified hazards and limitations to development have been considered in the design of streets and lot layout to assure street and building sites are on geologically stable soil considering the stress and loads to which the soil may be subjected;”

Facts: Other than the western steep slope, no geologic hazards are found on the subject property. (Exhibit 17)

6. Sultan’s State Environmental Policy Act (“SEPA”) Responsible Official issued a Mitigated Determination of Nonsignificance (“MDNS”) on November 7, 2019. (Exhibit 11) The MDNS was not appealed. (Exhibit 23, p. 4, § C.4) The mitigation measures within the MDNS require compliance with the Wetland Study (Exhibit 16), the July 12, 2018, Geotechnical Report (Exhibit 17.2), the Drainage Report (Exhibit 18), the October, 2019 TIA (Exhibit 19.1), and the SEPA checklist (a part of Exhibit 11). Recommended Condition 4 requires compliance with those mitigation measures. (Exhibit 23, p. 13)
7. One of the four owners of the abutting parcels to the north wants Land Resources to construct a fence along the common boundary to prevent unauthorized use of their private road. McDuffy said that Land Resources would not construct a perimeter fence as City code does not require such a fence.

One neighbor opined that traffic in the area was simply going to get worse over time.

A Startup resident opined that the City’s water and sewer systems are currently inadequate. He also said that school district impact fees are too low.

A former *Miller Farms* resident, currently residing on Bryant Road, said that water ponds on the surface in the southeast corner of the subject property. Another area resident echoed that observation.

One resident argued that the proposed lots are too small and not consistent with the Comp Plan. He opined that the City lacks a vision for the future. He questioned whether a left-turn lane was needed.

One resident spoke about traffic increases.

A member of the City’s Planning Commission suggested that concerned residents should have participated during the planning process before the Planning Commission and City Council.

8. DCD recommends approval of *Wyndham Highlands* subject to 38 conditions. (Exhibit 23, pp. 13 – 18) McDuffy concurred in the DCD report and recommended conditions except for Recommended Condition 36 which he asked be stricken. (Testimony) Recommended Condition 36 is a recitation of the City code provision on construction hours (with an obvious typographical error which turns the meaning of the code provision upside down). (Exhibit 23, p. 18)

9. Any Conclusion of Law deemed to be a Finding of Fact is hereby adopted as such.

### **LEGAL FRAMEWORK**<sup>10</sup>

The Examiner is legally required to decide this case within the framework created by the following principles:

#### Authority

Preliminary subdivisions are subject to a pre-decision open record hearing before the Examiner. The Examiner makes a final decision on the application which is subject to the right of reconsideration and appeal to Superior Court. [SMC 2.26.125, 2.26.140, 19.06.060(A), 19.08.100, and Chapter 19.26 SMC]

#### Review Criteria

The review criteria for preliminary subdivisions as set forth in SMC 19.08.080 have been stated in Finding of Fact 5, above.

The Local Project Review Act [Chapter 36.70B RCW] establishes a mandatory “consistency” review for “project permits”, a term defined by the Act to include “building permits, subdivisions, binding site plans, planned unit developments, conditional uses, shoreline substantial development permits, site plan review, permits or approvals required by critical area ordinances, site-specific rezones authorized by a comprehensive plan or subarea plan”. [RCW 36.70B.020(4)]

(1) Fundamental land use planning choices made in adopted comprehensive plans and development regulations shall serve as the foundation for project review. The review of a proposed project’s consistency with applicable development regulations or, in the absence of applicable regulations the adopted comprehensive plan, under RCW 36.70B.040 shall incorporate the determinations under this section.

(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;

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<sup>10</sup> Any statement in this section deemed to be either a Finding of Fact or a Conclusion of Law is hereby adopted as such.

- (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 [the Growth Management Act].

[RCW 36.70B.030]

#### Vested Rights

Subdivision and short subdivision applications are governed by a statutory vesting rule: such applications “shall be considered under the subdivision or short subdivision ordinance, and zoning or other land use control ordinances, in effect on the land at the time a fully completed application ... has been submitted ....” [RCW 58.17.033; see also SMC 19.08.060]

#### Standard of Review

The standard of review is preponderance of the evidence. The applicant has the burden of proof.

#### Scope of Consideration

The Examiner has considered: all of the evidence and testimony; applicable adopted laws, ordinances, plans, and policies; and the pleadings, positions, and arguments of the parties of record.

### **CONCLUSIONS OF LAW**

1. Comp Plan Project T-57 is, unquestionably, one of the most important civic projects for the future of the City of Sultan. Every hearing for a development served by Sultan Basin Road brings mention of the pressing need to provide an alternative way out of the area other than through the US-2/Sultan Basin Road intersection.

Project T-57 contemplates an extension of 132<sup>nd</sup> Street SE westerly and then northwesterly over the steep slope to connect with Trout Farm Road. As this Examiner has said in recent decisions, the ability to extend 132<sup>nd</sup> Street SE due west was rendered essentially infeasible when *Miller Farms* was platted in or around 2000. A direct westerly extension would wipe out the northern alley in *Miller Farms*, eliminating access to the houses along the north side of Yew Avenue and, quite possibly, also eliminating some of the garages which take access from that alley. Even if the extension turned northwest almost immediately upon crossing Sultan Basin Road, a number of the homes on the north side of the east end of Yew Avenue would be seriously impacted. The Examiner has concluded in prior decisions that such a course of action is highly unlikely.

It might be possible to slide 132<sup>nd</sup> Street slightly north as it approaches Sultan Basin Road from the east such that it could cross Sultan Basin Road north of *Miller Farms*. In the alternative, it might be possible to simply have an off-set at Sultan Basin Road.

But the reality in this application is that Project T-57 somehow has to pass through the entirety of the subject property from east to west. That need has not been considered in the design and review of this plat at all, neither by Land Resources nor by City staff.

Project T-57 is to be an arterial with bike lanes. None of the proposed streets are designed to be arterials, with or without bike lanes. The rights-of-way are too narrow to allow construction of an arterial street, with or without bike lanes. The entire design may be antithetical to an arterial carrying some 6,000 vehicles per day.

Comp Plan Project T-57 must be considered. The public use and interest of the entire city is not served by approving a new subdivision that forever blocks accomplishment of the need represented by Project T-57.

The City must provide a meaningful analysis of how to accomplish Project T-57 while subdividing the subject property. This property represents the only practical route. It must be evaluated and, if the route is feasible, preserved. At the very least, the inadequate 50-foot right-of-way must be widened to accommodate an arterial with bike lanes capable of handling 6,000 ADT. An equally important question is whether a design with upwards of 50 residential driveways entering directly onto such an arterial would serve the public use and interest.

Further information and analysis is required to properly address this situation.

2. There is a three block ( $\pm$ ) left-turn lane at the main entry to *Eagle Ridge* on Sultan Basin Road. *Eagle Ridge* is a single-family development of around 150 homes, located south of Bryant Road, south of *Wyndham Highlands*. *Eagle Ridge* was developed before the undersigned became the City's Examiner in late 1999, so the undersigned has no personal knowledge of its history. Apparently either the applicant volunteered to construct a left-turn lane or the City required the applicant to construct a left-turn lane.

If a left-turn lane was warranted for a 150-lot development accessing Sultan Basin Road prior to 1999, why would one not be required for a 171-lot development accessing Sultan Basin Road in 2019, especially in light of the soon-to-be existence of the 200+ homes in *SkyRidge* located north of *Wyndham Highlands* whose traffic will be driving past *Wyndham Highlands* on Sultan Basin Road to arrive and depart their residences? At the very least this question must be answered with impartial analysis.

The Examiner cannot determine from the sparse evidence in this record whether a left-turn lane is warranted at either or both of the two proposed access points onto Sultan Basin Road. Nobody has evaluated that need. (Or, if they have, their results are not part of the hearing record.)

Preservation of public safety is a criterion of preliminary subdivision approval. So is compliance with the EDDS. No positive conclusion can be reached about either without evaluation of the need for a left-turn lane at the project's entrance(s) onto Sultan Basin Road.

3. The proposal must be returned to its applicant for modification. Specifically, for a thorough analysis of Comp Plan Project T-57 and its impact on the proposed design, and for a rigorous left-turn lane analysis at the project's entrance(s) onto Sultan Basin Road.
4. The Examiner will now turn to other concerns voiced during the hearing process.

The role of a comprehensive plan in development review is different now than it was before enactment of the Growth Management Act (GMA) in 1990 and the Local Project Review Act, Chapter 36.70B RCW, in 1995. The GMA requires localities which are subject to its requirements, which the City is, to enact development regulations to implement their comprehensive plans. [RCW 36.70A.040(3)] The Local Project Review Act establishes a mandatory "consistency" review for "project permits", a term defined by the Act to include subdivisions. [RCW 36.70B.020(4)]

(1) Fundamental land use planning choices made in adopted comprehensive plans and development regulations shall serve as the foundation for project review. The review of a proposed project's consistency with applicable development regulations or, in the absence of applicable regulations the adopted comprehensive plan, under RCW 36.70B.040 shall incorporate the determinations under this section.

(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 [the Growth Management Act].

[RCW 36.70B.030, emphasis added] Thus, state law holds that a comprehensive plan is applicable during project review only where development regulations have not been adopted to address a particular topic. The regulatory assumption is that plans set a framework for subsequent regulations which serve to control development actions.

The content of adopted plans and regulations may not be challenged in the context of considering a project permit application. A wholly separate process is available to challenge adoption of plans and regulations. But, that process must be employed immediately after the local legislative officials have adopted new or amendatory plans and/or regulations. Therefore, adopted plans and regulations must be applied as adopted, not as some may wish they had been adopted. The Examiner is obligated to implement the adopted regulations and may not accord substantial weight to neighborhood opinions if those opinions deviate from the adopted regulations.

5. The state Supreme Court has also addressed this issue. In *Citizens v. Mount Vernon* [133 Wn.2d 861, 947 P.2d 1208 (1997), *reconsideration denied*] the Court ruled that “[RCW 36.70B.030(1)] suggests ... a comprehensive plan can be used to make a specific land use decision. Our cases hold otherwise.” [at 873]

Since a comprehensive plan is a guide and not a document designed for making specific land use decisions, conflicts surrounding the appropriate use are resolved in favor of the more specific regulations, usually zoning regulations. A specific zoning ordinance will prevail over an inconsistent comprehensive plan. If a comprehensive plan prohibits a particular use but the zoning code permits it, the use would be permitted. These rules require that conflicts between a general comprehensive plan and a specific zoning code be resolved in the zoning code’s favor.

[*Mount Vernon* at 873-74, citations omitted] The City has adopted development regulations to implement any Comprehensive Plan policies that might otherwise be applicable in this case (except for a listing of street classifications, the LOS standard, and delineation of future street needs). Therefore, consideration of Comprehensive Plan policies is neither appropriate nor required except for street classifications, the LOS standard, and future street needs.

6. Traffic impact and school overcrowding, although seemingly quite different, are actually quite similar from an analytical perspective. In both cases the City has adopted standards and created financial impact mitigation systems to proportionally assess mitigation costs to developments. In the case of traffic, the City established the LOS standard.

In the case of public schools, the School District calculated the share of its capital needs attributable to new development and the City approved a mitigation fee schedule based on the District's calculation. (The School District calculated the impact fee that it felt was justified. If the fee is inadequate, it is up to the School District to propose and justify an increase to the City.)

7. Given the information presently in the record, the proposed options for traffic impact mitigation affecting US-2/Main Street and sewer system impact are reasonable and (probably) the best that can be expected. By the time this case returns for further hearing, the sewer system situation may have been clarified to the point that a more specific condition could be presented (or no condition at all, if off-site improvements are not warranted).
8. The City code does not require perimeter fencing of residential subdivisions. In the absence of regulations, the undersigned has employed (literally for decades) an analytical construct that seeks to determine if a proposed use is creating an attractive nuisance with respect to a neighboring land use. If it is, the undersigned has imposed a perimeter fence requirement to protect the public health, safety, and welfare.

Generally speaking, the undersigned has not found an attractive nuisance to be created by a new subdivision going in next to other residential land uses, even where the densities differ. It seems to the Examiner that that is the case here. The owners of the lots that will abut the north edge of *Wyndham Highlands* will have no legal right of access onto the adjacent private road. The City testified that it would not grant permits for driveways onto that private road. The Examiner fails to find a public nuisance needing regulation. If there is to be a perimeter fence between *Wyndham Highlands* and the abutting properties to the north, it must be a matter privately arranged by the affected property owners.

9. Any Finding of Fact deemed to be a Conclusion of Law is hereby adopted as such.

### DECISION

Based upon the preceding Findings of Fact and Conclusions of Law, the testimony and evidence submitted at the open record hearing, and the Examiner's site view, the Examiner **RETURNS** the proposed preliminary subdivision **FOR MODIFICATION**, specifically to provide a thorough analysis of Comp Plan Project T-57 and its impact on the proposed design, and to provide a rigorous left-turn lane analysis at the project's entrance(s) onto Sultan Basin Road.

Decision issued December 6, 2019.

\s\ John E. Galt (Signed original in official file)

John E. Galt,  
Hearing Examiner

### **HEARING PARTICIPANTS <sup>11</sup>**

Ry McDuffy  
Toni Broughton  
Jeff Estes  
Bronn Journey  
John Schalo  
Nate Morgan

Andy Galuska  
Bernard Swanson  
Colleen Rupke  
Paul Hawkinson  
Tom Green

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<sup>11</sup> The official Parties of Record register is maintained by the City's Hearing Clerk.

### **NOTICE OF RIGHT OF RECONSIDERATION**

This Decision is subject to the right of reconsideration pursuant to SMC 2.26.125. Reconsideration may be requested by the appellant, a party of record, or the City. Reconsideration requests must be filed in writing with the City Clerk/Treasurer not later than 5:00 p.m., local time, on the seventh calendar day after the date of mailing of this Decision. Any reconsideration request shall specify the error of law or fact, procedural error, or new evidence which could not have been reasonably available at the time of the hearing conducted by the Examiner which forms the basis of the request. Any reconsideration request shall also specify the relief requested. See SMC 2.26.125 for additional information and requirements regarding reconsideration.

### **NOTICE OF RIGHT OF APPEAL**

This Decision becomes final and conclusive as of the eighth calendar day after the date of mailing of the Decision unless reconsideration is timely requested. If reconsideration is timely requested, the Examiner's order granting or denying reconsideration becomes the final and conclusive action for the City. The final action may be reviewed in Superior Court pursuant to the procedures established by Chapter 36.70C RCW, the Land Use Petition Act. Section 36.70C.040 RCW requires that any appeal be properly filed with the Court within 21 days of the issuance of the final action. Please refer to SMC 2.26.140 and Chapter 36.70C RCW for further guidance regarding judicial appeal procedures.

<p>The following statement is provided pursuant to RCW 36.70B.130: "Affected property owners may request a change in valuation for property tax purposes notwithstanding any program of revaluation."</p>
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