BEFORE the HEARING EXAMINER for the
CITY of SULTAN

DECISION

FILE NUMBER:	PP19-003
APPLICANT:	Land Resources Northwest, LLC ATTN: Craig Pierce 19711 88th Avenue NE Bothell, WA 98011
TYPE OF CASE:	Major Adjustment to an approved preliminary subdivision (*Wyndham Highlands*)
STAFF RECOMMENDATION:	Deny in part; Approve in part
EXAMINER DECISION:	DENY in part; APPROVE in part
DATE OF DECISION:	May 5, 2020

INTRODUCTION [1]

Land Resources Northwest, LLC ("Land Resources") seeks approval of two Major Adjustments to the approved preliminary subdivision of *Wyndham Highlands*: 1) an increase in the number of lots from 171 to 185 (a 14 lot or 8.2% increase); and a change in the off-site sewer system impact mitigation requirement.

Land Resources filed the Major Adjustment application on March 18, 2020. (Exhibits 51.2; 52.2 [2]) The Sultan Department of Community Development ("DCD") deemed the application complete when filed. (Exhibit 57, p. 4) DCD issued a Notice of Application on April 1, 2020. (Exhibit 53)

The subject property is located on the west side of Sultan Basin Road, northwest of the Sultan Basin Road/132nd Street SE intersection. The two houses on the property are addressed as 13018 and 13104 Sultan Basin Road. Its Assessor's Parcel Numbers are 28082900401100 and 28082900401400.

The Sultan Hearing Examiner ("Examiner") viewed the subject property on November 22, 2019, prior to the predecision open record hearing for the preliminary subdivision.

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1 Any statement in this section deemed to be either a Finding of Fact or a Conclusion of Law is hereby adopted as such.

2 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 Examiner held a consolidated remote open record hearing on April 16, 2020. [3] DCD gave notice of the hearing as required by the Sultan Municipal Code ("SMC"). (Exhibit 53)

Exhibits 1 - 28 from the preliminary subdivision review process and the following new exhibits were entered into the hearing record during the hearing:

Exhibits 50 [4] - 79: As listed on the Exhibit List prepared by DCD

Because the hearing was conducted remotely, the Examiner held the record open through April 24, 2020, for submittal of written comments from parties of record and attendees, and through May 1, 2020, for responses and closing statements from Acme Homes, Land Resources, and DCD. The following exhibits were entered pursuant to that process:

Exhibit 80:	E-mail from Bronn Journey, April 17, 2020, 4:56 p.m.
Exhibit 81:	Staff Response, dated and filed April 23, 2020
Exhibit 82:	E-mail from Karen McIntosh, April 24, 2020, 9:06 a.m.
Exhibit 83:	Letter, Land Resolutions to City, dated and filed April 24, 2020
Exhibit 83.2:	Revised *Daisy Meadows* plat, dated April 23, 2020, filed April 24, 2020
Exhibit 84:	Applicant Land Resources Northwest, LLC's Post Hearing Memorandum, dated and filed April 24, 2020
Exhibit 84.A:	Revised *Wyndham Highlands* plat, dated April 21, 2020, filed April 24, 2020
Exhibit 84.B:	Letter, Associated Earth Sciences, Inc. to Land Resources NW, LLC, dated April 23, 2020, filed April 24, 2020
Exhibit 85:	Staff Response, dated and filed May 1, 2020

The record closed with receipt of Exhibit 85 on May 1, 2020.

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.

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[3] The consolidated hearing addressed Major Adjustment applications for four abutting preliminary subdivisions: *Daisy Meadows* (PP19-001); *Wyndham Highlands 3* (PP19-002); *Wyndham Highlands* (PP19-003); and *Wyndham Highlands 2* (PP19-004).

[4] Exhibit numbers 29 – 49 were not used so that exhibits submitted for the consolidated Major Adjustments hearing could be assigned common numbers without fear of any numbering overlap.

FINDINGS OF FACT

1. Four adjoining tracts, located near the western edge of the Sultan Basin Road plateau northeast of downtown Sultan (See Exhibit 56), recently received preliminary subdivision [5] approval:

Subdivision Name	City File Number	Vesting Date	Site area (in acres)	Number of Lots Approved
Daisy Meadows	PP19-001	January 31, 2019	14.11	70
Wyndham Highlands	PP19-003	July 12, 2019	23.41	171
Wyndham Highlands 2	PP19-004	November 7, 2019	4.85	30
Wyndham Highlands 3	PP19-002	March 12, 2019	2.26	14

(All data in the preceding table is from Exhibits 50.1 – 50.4.)

Acme Homes, LLC is the applicant of record for *Daisy Meadows*; Land Resources is the applicant of record for all three of the *Wyndham Highlands* subdivisions. (Collectively the "Applicants.") The agent of record for the Applicants for all four applications is Land Resolutions; Ry McDuffy ("McDuffy") has been Land Resolutions' spokesperson throughout all preliminary subdivision proceedings. The Vice President Land Development and Entitlement for Acme Homes, LLC is Kristi Kyle ("Kyle"). Kyle was the City of Sultan Planning Director from November, 2016, to July, 2018. (Exhibits 52.1 – 52.4; 59; Kyle and McDuffy testimony)

2. The Applicants have now filed applications under SMC 19.08.140 for "major adjustments" to each of the four approved preliminary subdivisions. (Exhibits 51.1 – 51.4) The Applicants have requested that separate decisions be issued for each application. (Exhibits 59; 65; 66) This Decision addresses Land Resources' application for major adjustment to the approved *Wyndham Highlands* preliminary subdivision.

3. Land Resources seeks two adjustments to the terms and conditions of *Wyndham Highlands'* preliminary subdivision approval: 1) an increase in the number of lots in the approved preliminary plat from 171 to 185 (a 14 lot or 8.2% increase [6]); and a change in the off-site sewer system impact mitigation requirement. (Exhibits 51.2; 63; 69; 84; 84.A)

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[5] The word "subdivision" "means the division of land into 10 or more lots, tracts, parcels, sites or divisions for the purpose of sale, lease or transfer of ownership and shall include all re-subdivision of land." [SMC 19.04.020(A)(44)] The word "plat" "means a map or graphic representation of a short subdivision, a subdivision, or binding site plan showing thereon the division of a tract or parcel of land into lots, blocks, streets, alleys, easements or other divisions and dedications." [SMC 19.04.020(A)(35)] Many people use the two terms interchangeably although, strictly speaking, a "plat" is the graphic representation of a "subdivision." Except when quoting other documents, the Examiner uses the two terms as defined in the SMC.

[6] 14 ÷ 171 = 0.0818 or 8.2%

4. The increased lot yield as proposed for *Wyndham Highlands* does not alter the required impact mitigation for the traffic impact of the proposed subdivision. (Exhibit 58)

5. The requested major adjustments do not trigger the need for additional State Environmental Policy Act ("SEPA") analysis. (Exhibit 57, p. 4)

6. The Findings of Fact in this decision are grouped by topic only for the reader's convenience. Such groupings do not indicate any limitation of applicability to the decision as a whole.

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

Preliminary plat adjustments

8. The City's land division regulations used to be a component of Title 16 SMC, the City's Unified Development Code. In 2012 the City Council decided to remove all land division regulations from Title 16 SMC and place them in a new, separate Title of the SMC. Ordinance No. 1144-12, effective May 26, 2012, codified that change by creating Title 19 SMC, Land Division Code. (Exhibit 78) One section of new Title 19 SMC was SMC 19.08.140, Adjustments of an Approved Preliminary Plat. (Exhibit 78, Exhibit A, pp. 5 & 6)

   In 2017 the City Council "determined it is necessary to amend the development regulations in order to provide clarification to specific chapters and titles …." (Exhibit 79, Recital #4) On December 21, 2017, the City Council enacted Ordinance No. 1284-17, effective January 2, 2018, to make the changes it desired. Ordinance No. 1284-17 amended Chapter 16.62 SMC, Recreation and Open Space Standards, and Title 19 SMC, Land Division Code. (Exhibit 79) The changes to Title 19 SMC included revisions to SMC 19.08.140, Adjustments of an approved preliminary plat. (Exhibit 79, Exhibit B, pp. 20 & 21) Ordinance No. 1284-17 contains neither a discussion of any of the code changes nor a reference to any supporting legislative history.

9. From May 26, 2012 (the effective date of Ordinance No. 1144-12), through January 1, 2018 (the day before the effective date of Ordinance No. 1284-17), SMC 19.08.140 read as follows:

> **19.08. 140 Adjustments of an Approved Preliminary Plat**.
> A. Minor Adjustments authorized.
> Minor adjustments may be made and approved by the director.
> B. Minor Adjustments defined.
> Minor Adjustments are those which may affect the precise dimensions of the plat but which do not affect the basic character or arrangement of the lots and streets. Minor Adjustments shall be limited to the following:
> 1. Dimensional requirements shall not vary more than 10 percent from the original.
> 2. The adjustments cannot be inconsistent with the requirements of the preliminary plat approval.

3. The adjustments cannot cause the subdivision to be in violation of this title, the zoning ordinance, any other applicable City land use control, Chapter 58.17 RCW, or any other applicable state law or regulation.
4. Minor adjustments shall be reviewed for consistency with this chapter and the regulations of this title, as well as the following criteria:
   a. The adjustment maintains the design intent or purpose of the original approval; and
   b. The adjustment maintains the quality of design or product established by the original approval; and
   c. The adjustment does not cause a significant environmental or land use impact on or beyond the site; and
   d. The adjustment is not precluded by the terms of this title or by state law from being decided administratively; and
   e. Circumstances render it impractical, unfeasible or detrimental to the public interest to accomplish the subject condition or requirement of preliminary plat or short plat approval.

C. Major Adjustments.
1. Major Adjustments Defined
Major adjustments are those that, based on a determination by the director, substantially change the basic design, layout, open space or other requirements of the plat.
2. Reapplication Required
When the director determines a change constitutes a major adjustment, the Applicant may withdraw the request for the adjustment, or may file an application for a new preliminary plat which shall be processed as a new and separate application.

(Exhibit 78, Exhibit A, pp. 5 & 6, Section title bolded in original) This will be referred to as the "2012 Version."

10. From January 2, 2018 (the effective date of Ordinance No. 1284-17), to the present SMC 19.08.140 has read as follows:

19.08.140 Adjustments of an approved preliminary plat.

A. Minor Adjustments Authorized. Minor adjustments may be made and approved by the director.
B. Minor Adjustments Defined. Minor adjustments in plats are permissible with the approval of the director. Such permission may be obtained through written request without a formal application or public hearing, but a payment of any additional fee will be set by resolution. For purposes of this section, adjustments are those that have no substantial impact on neighboring properties, the general public, or those intended to occupy or use the proposed development and do not

exceed 10 percent of the lots, square footage or dimensional requirements. Each time a minor modification or change is approved, a memorandum from the director with findings of fact shall be placed in the file for the permit to which it is was granted. If over time the number of minor modifications or changes cumulatively requested have or will cause such cumulative changes meet the criteria for a major change, the next subsequent minor modification or adjustment shall be treated as a major change and be processed per subsection (D) of this section.

C. Minor adjustments shall be reviewed for consistency with this chapter and the regulations of this title, as well as the following criteria:
   1. The adjustment maintains the design intent or purpose of the original approval; and
   2. The adjustment maintains the quality of design or product established by the original approval; and
   3. The adjustment does not cause a significant environmental or land use impact on or beyond the site; and
   4. The adjustment is not precluded by the terms of this title or by state law from being decided administratively; and
   5. Circumstances render it impractical, unfeasible or detrimental to the public interest to accomplish the subject condition or requirement of preliminary plat or short plat approval.

D. Major Adjustments. Major adjustments in subdivisions are permissible with the approval of the hearing examiner {or the director}. Such permission may be obtained with a formal application and public hearing, if required, and a payment of any additional fee that will be set by resolution. For purposes of this section, major adjustments are those that have a substantial impact on neighboring properties, the general public, or those intended to occupy or use the proposed development and do not exceed 25 percent of the approved lots, square footage or dimensional requirements. Each time a major adjustment is approved, a memorandum from the director with findings of fact shall be placed in the file for the permit to which it is was granted. If over time the number of major amendments or changes cumulatively requested have or will cause such cumulative changes exceed the criteria for a major amendment, the next subsequent major amendment shall be treated as a new application and subject to all platting requirements set forth in this title.

(Exhibit 79, Exhibit B, pp. 20 & 21, Section title bolded in original) This will be referred to as the "2018 Version." [7]

[7] The City's on-line municipal code includes the three words enclosed by the braces ("or the director") in SMC 19.08.140(D), as quoted above. The text of Ordinance No. 1284-17 provided by the City for entry into the record as an exhibit does not include those three words. (Exhibit 79, Exhibit B, p. 21) There is no indication in the on-line code of any

11. The DCD Director determined that Land Resources' request constituted a major adjustment and that the Examiner should make the decision on the requests. (Exhibit 67.1)

12. The *Wyndham Highlands* site is zoned Medium Density Residential (MDR). (Exhibit 50.2, p. 3, Finding of Fact 2) The MDR zone area and dimension regulations are contained in SMC 16.12.020(D). The regulations for single-family detached residential development which are pertinent to the requested major adjustment are:

Maximum dwelling units per acre ("du/ac") [8]	10
Minimum Lot Area (in square feet ("SF"))	4,500
Minimum lot width (in feet)	50
Minimum lot depth (in feet)	80

13. *Wyndham Highlands* was designed as a lot size averaged plat. Chapter 19.44 SMC, Lot averaging, establishes the mechanism and parameters for using lot size averaging in a proposed subdivision.

> Much of the land designated by the Sultan comprehensive plan for residential development is not developable because of extensive wetlands and steep slopes that are protected by critical area regulations. Exclusion of these critical areas results in a net developable area that allows considerably fewer residential units than would be allowed if the entire property could be developed at standard zoning densities.

[SMC 19.44.010(A)] "Lot averaging is an approach to dividing land that allows a parcel to be divided such that some or all of the resulting lots are smaller than the minimum lot size required in the applicable zone to accommodate the presence of extensive wetlands and critical areas." [SMC 19.44.010(D), emphasis added]

> Lot averaging does not assure that the number of lots available to a developer on a particular parcel will be the same as the number available if the property were not encumbered by critical area exclusions. It is provided as a mechanism to achieve full compliance with all critical area regulations while allowing a "safety valve" to allow development densities to get closer to the allowed zoned density on properties that have significant critical areas exclusions.

[SMC 19.44.010(F), emphasis added]

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amendment to SMC 19.08.140 since enactment of Ordinance No. 1284-17. How those three words came to be a part of the on-line municipal code is unknown to the undersigned Examiner. Their existence is irrelevant in this case because DCD assigned the application to the Examiner.

[8] The SMC does not specify whether this is calculated on a gross acre basis or on a net acre basis. DCD has consistently used a gross acre basis calculation. The Examiner finds no reason to not accept that basis.

14. Lot size averaging is not allowed in all preliminary subdivisions. "Lot averaging provisions of this chapter apply to and may be used by developers of land who are dividing land in conformance with the provisions of this title, and who meet the provisions set out in subsections (B) and (C) of this section." [SMC 19.44.020(A), emphasis added] Subsection B lists the zones where lot size averaging may be employed; the MDR zone is in the list. [SMC 19.44.020(B)(2)] Subsection (C) specifies the circumstances where lot size averaging may be used in the permitted zones:

> Lot averaging may be utilized, at the option of the developer, in the following circumstances:
>
> 1. The property proposed for development is documented to contain more than 10 percent of its total land area in critical areas that must be excluded from development under provisions of the city of Sultan critical areas regulations (Chapter 17.10 SMC) and any other applicable environmental codes. Such documentation must be provided in the form of a critical areas study approved by the city community development director to be in conformance with the standards of Chapter 17.10 SMC, Critical Areas Regulations (CAR).

[Emphasis added] Section 19.44.030 SMC establishes limits for lot size averaging. Subsections (C) – (E) are especially relevant in this case.

> C. No single-family lot shall be reduced to less than 65 percent of the minimum single-family lot size required in the applicable zone {(except the High Density Residential Zone)} (maximum reduction of {35} 25 percent from required minimum lot size in the applicable zone).
> D. No single-family lot shall be reduced in width to less than 40 feet (regardless of lot depth).
> E. No single-family lot shall be reduced in depth to less than 70 feet (regardless of lot width).

The text in the first set of braces in subsection (C) appears in Ordinance No. 1284-17, but not in the on-line version of the SMC. That parenthetical clause would conflict with SMC 19.44.020(B) which does not allow lot size averaging in the High Density Residential (HDR) Zone. That clause apparently was removed when the ordinance was codified due to its conflict with SMC 19.44.020(B). [9] It is irrelevant in this case in any event since the HDR zone is not involved in this application.

[9] Section 1.01.030 SMC provides that "regulatory and penal ordinances and certain of the administrative ordinances of the city of Sultan, Washington, [shall be] codified pursuant to the provisions of RCW 35.21.500 through 35.21.570." Subsection 35.21.500(6) RCW states that "codification" includes "[s]triking provisions manifestly obsolete and eliminating conflicts and inconsistencies so as to give effect to the legislative intent."

Subsection (C) contains an internal conflict in the on-line version of the SMC reflected in the second text item in braces in the above quote: The maximum allowed reduction is stated in the on-line code as 25 %, but as 35% in Ordinance No. 1284-17. (Exhibit 79, Exhibit B, p. 100) Not "less than 65 percent of the minimum" is not the same as a "maximum reduction of 25 percent." For example, assume that the required minimum lot size under applicable zoning was 10,000 SF. Sixty-five percent of 10,000 SF is 6,500 SF, [10] but a 25% reduction in minimum lot size would result in a 7,500 SF lot. [11] The Examiner finds and concludes that the "maximum reduction of 25 percent" is a scriveners error in the on-line code which should be corrected. (See also Exhibit 81, p. 3.)

For a development in the MDR zone which meets the threshold condition for use of lot size averaging, the minimum lot dimensions allowed under Chapter 19.44 SMC would be: 2,990 SF lot area, 40 feet lot width, and 70 feet lot depth.

The analysis of lot size averaging up to this point is moot, however, as will be shown in the remainder of the lot size averaging analysis that follows because *Wyndham Highlands* did not and still does not meet the threshold condition for use of lot size averaging.

15. Whether a development meets the threshold requirement for use of lot size averaging ("more than 10 percent of its total land area in critical areas") requires analysis of CAR. CAR regulates and protects critical areas. "'Critical areas' means any of the following areas or ecosystems: critical aquifer recharge areas, fish and wildlife habitat conservation areas, frequently flooded areas, geologically hazardous areas, and wetlands …". [SMC 17.10.320] Geologically hazardous areas include landslide hazard areas. [SMC 17.10.305(A)]

16. Land Resources' geotechnical consultant identified a landslide hazard area on the *Wyndham Highlands* site consisting of a steep slope which starts near the west edge of the site and which descends to the valley floor below. Inclinations on this slope

> generally range from approximately 50 to 55 percent over a maximum height of approximately 125 to 130 feet. In some areas, inclinations on the upper slope exceed 40 percent over heights ranging from approximately 60 to 70 feet, flatten to below 40 percent over heights of approximately 20 to 40 feet, but steepen again to in excess of 40 percent over the lower 20 to 40 feet of the slope.

(Exhibit 17.3, p. 4) The slope is "an area of historic landslide activity." (Exhibit 17.3, p. 2) The geotechnical consultant classified this slope as a landslide hazard area. (Exhibit 17.3, p. 4) It was the geotechnical consultant's "opinion that a minimum buffer width of 65 feet will provide suitable mitigation of landslide hazards". (Exhibit 17.3, p. 6)

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10 10,000 x 0.65 = 6,500

11 10,000 x 0.25 = 2,500; 10,000 – 2,500 = 7,500

On April 24, 2020, during the record-open period after the hearing, the geotechnical consultant submitted an April 23, 2020, letter stating that an increased buffer width would be "more conservative with respect to landslide hazards". [12] (Exhibit 84.B, p. 2)

17. Landslide hazard areas are required to be protected along with a protective buffer at the top, toe, and edges of the landslide hazard area. The standard width of the buffer depends upon the degree and height of the slope, and the geological conditions. [SMC 17.10.330]

> For landslide hazard areas with slopes 40 percent or greater, the minimum buffer shall be equal to the height of the slope or 25 feet, whichever is greater. The buffer may be reduced by 50 percent or to a minimum of 25 feet, whichever is greater, when a qualified professional demonstrates to the director's satisfaction that the reduction will adequately protect the proposed development, adjacent areas and uses, and the subject critical area.

[SMC 17.10.330(A)(4)] Given the 130-foot slope height and inclination of 40% or greater, the standard buffer width would be the height of the slope: 130 feet. The minimum buffer width would be 65 feet (a 50% reduction) based on a qualified professional's analysis.

18. The Examiner finds and concludes that Exhibit 17 constitutes a qualified professional's analysis, based on sound engineering principles. The geotechnical consultant was comfortable recommending a 65-foot buffer (plus a code-required 10-foot building setback) in 2018. All the geotechnical consultant is saying after-the-fact in Exhibit 84.B is that even more width is better if counting all of Tracts 998 and 999 as buffer will help the applicant get a greater lot yield. If a little more width is better, then a great deal more width would be even better. Maybe Tract 999 should be 200 feet wide instead of 161 feet wide as proposed in Exhibit 84.A. (See Finding of Fact 19, below.) The "wider is better" approach is not a geotechnically sound basis on which to set a regulatory slope buffer width. The Examiner sincerely doubts that any developer would want the Examiner to apply the "wider is better" approach in future cases where steep slopes are involved.

19. Every *Wyndham Highlands* plat in the record (except Exhibit 84.A) depicts the top of the steep slope as an irregular line with a 70-foot wide buffer extending easterly from the top of slope. (Exhibits 6; 28; 52.2; 63) The earliest plat (Exhibit 6) encloses the steep slope and its buffer in Tract 999. Tract 999 is a rectangle whose east edge touches the most easterly point of the irregular outer edge of the slope buffer. Tract 999 on Exhibit 6 covers an area of 96,190 SF. The Examiner calculates that the slope and its buffer cover approximately 63,600 SF of Tract 999. [13] The *Wyndham Highlands* gross

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12 Because this letter was filed after the close of the open record hearing, the Examiner had no opportunity to ask any questions about it.

13 The Examiner calculated the slope and buffer area by dividing the remainder of Tract 999 into a series of basic right angle triangles and rectangles, calculating the area of each, summing them, and subtracting that total from 96,190 SF.

site area is 1,019,919 SF. (Exhibit 63) Therefore, the area of the steep slope and its required buffer amounts to about 6.2% of the gross site area. [14]

On April 24, 2020, (during the post-hearing, open record period) Land Resources submitted Exhibit 84.A, another version of the *Wyndham Highlands* major adjustment plat. Exhibit 84.A is different in major regards from Exhibit 63: A specific slope buffer is no longer depicted within Tract 999; and Lot 44 has been relocated to the north side of 128th Place SE, commensurately reducing the size of Tract 998 and increasing the size of Tract 999. Based on the geotechnical consultant's April 23, 2020, letter (Exhibit 84.B), Land Resources now wants to consider the entirety of Tracts 998 and 999 to be the required steep slope buffer. Those two tracts as depicted on Exhibit 84.A have a combined area of 103,114 SF or 10.1% of the total site area. [15]

20. *Wyndham Highlands* did not and still does not meet the threshold requirement for use of lot size averaging: The size of the critical area that has to be protected is substantially less than 10% of the gross site area. It is not the size of the tract within which a regulated critical area and its required buffer are located that determines whether lot size averaging may be employed, it is the size of the regulated critical area and its required buffer. Increasing the size of the tract does not increase the size of the regulated critical area and its required buffer. The plat should not have been approved as presented. [16]

Lot size averaging was not an issue during the hearings for the *Wyndham Highlands* subdivision. McDuffy submitted a letter containing calculations required by SMC 19.44.040(A)(1). [17] (Exhibit 14 or 55) But McDuffy's letter never mentions the threshold requirements of SMC 19.44.020 (with which the proposal never has complied). DCD's staff reports did not raise any issues regarding lot size averaging, nor did they mention the threshold requirements of SMC 19.44.020. (Exhibits 1; 23; 24.4) The Examiner accepted the submittals without putting them through a rigorous evaluation on the mistaken assumption that if there had been a problem, it would have been noted in the staff reports. The Examiner erred in so doing; the Examiner regrets that error. But the fact is that *Wyndham Highlands* has received preliminary plat approval and the Examiner cannot retract that approval.

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14 63,600 ÷ 1,019,919 = 0.0623 or 6.2%

15 103,114 ÷ 1,019,919 = 0.1011 or 10.1%

16 Land Resources wants the Examiner to interpret SMC 19.44.020(C)(1) as applying not only to the actual critical area and its buffer, but the area outside of the buffer within the tract. (Exhibit 84) As has been stated, the Examiner disagrees with that reading of the code. Under Land Resources' reading, one could take a very small critical area, place it in a large tract covering 10% of a site, and then claim the right to apply lot size averaging. That is not what the adopted code says. That interpretation rewards manipulation rather than off-setting environmental conditions over which an applicant has no control which encumber a significant portion of a development parcel.

17 McDuffy's code citation omits (presumably by oversight) the (A).

21. The requested major adjustment to the approved preliminary plat does not materially alter the layout of the proposed *Wyndham Highlands* street system. (Cf. Exhibit 6 with Exhibit 63 or 84.A) Rather, it increases the number of lots by reducing the area and width of most of the lots.

Item	Approved Plat (Exhibit 6)	Proposed Major Adjustment (Exhibit 63/84.A)
Density	7.31 du/ac	7.90 du/ac
Minimum lot area	3,200 SF	3,394 SF
Minimum lot width	40 feet	40 feet
Minimum lot depth	95 feet	85 feet

Only Lots 45, 53, 54, 62, 169, and 178 as adjusted meet all applicable area and dimension regulations set forth in SMC 16.12.020(D). All others have a shortfall in area, width, and/or depth, with most failing to meet both area and width requirements. (Exhibit 63)

22. The Applicants justify the sub-standard area, width, and depth figures based on this portion of SMC 19.08.140(D): "For purposes of this section, major adjustments are those that … do not exceed 25 percent of the approved lots, square footage or dimensional requirements." The Applicants believe that that language allows them to obtain approval of a preliminary subdivision which meets all lot area and dimensional requirements of the zoning code and then to use the major adjustment process to increase the number of lots in the approved preliminary plat by up to 25% and to reduce any area or dimensional requirements of the zoning code by up to 25%. (Exhibits 51.3; 70; 84; and McDuffy testimony)

23. DCD disagrees with The Applicants' interpretation of SMC 19.08.140(D). DCD does not believe that SMC 19.08.140 authorizes modification of zoning regulations. DCD "interprets [SMC 19.08.140(D)] to mean that any proposed Major Adjustment may not make a change which would exceed 25% of the approved lots, square footage, or other dimensional requirements." (Exhibit 57, p. 5) DCD finds nothing the the language of SMC 19.08.140(D) that would allow non-compliance with zoning code standards. DCD believes that its interpretation is buttressed by the last sentence in SMC 19.08.140(D): "If over time the number of major amendments or changes cumulatively requested have or will cause such cumulative changes exceed the criteria for a major amendment, the next subsequent major amendment shall be treated as a new application and subject to all platting requirements set forth in this title." DCD believes that McDuffy's interpretation renders this code provision meaningless. (Exhibit 57, pp. 4 & 5; 85)

24. During her tenure as City Planning Director Kyle approved a "modification" [18] to the approved preliminary plat of *SkyRidge Estates* which increased the number of lots from 206 to 258 (a 25.24%

[18] Kyle's decision repeatedly refers to the application as a "modification," but the authority cited for approving the changes is the "adjustment" provisions of SMC 19.08.140.

increase [19]) and to substitute a fee-in-lieu payment in place of all the approved park and recreation tracts in the approved plat. [20] (Exhibit 72.2)

The *SkyRidge Estates* preliminary subdivision application was filed on September 21, 2017, and became vested on October 10, 2017. The Examiner granted preliminary subdivision approval on May 8, 2018; the Examiner's Decision became final as of May 18, 2018; the judicial appeal period ended on June 8, 2018; the applicant filed the major adjustments request on June 19, 2018; and Kyle approved the requested major adjustments on June 29, 2018. (Exhibit 72.2, p. 3, §§ C.1 & .2, and p. 9 [21])

As approved by the Examiner, all lots in the *SkyRidge Estates* preliminary subdivision met all zoning code area and dimensional requirements. [Official Notice, May 8, 2018, Hearing Examiner Decision, PP2017-001, p. 4, Finding of Fact 7] The *SkyRidge Estates* site contained no regulated critical areas. [Official Notice, May 8, 2018, Hearing Examiner Decision, PP2017-001, p. 4, Finding of Fact 5] The approved preliminary plat included six "Park Tracts" totaling 3.21 acres. [22] [Official Notice, May 8, 2018, Hearing Examiner Decision, PP2017-001, p. 11, Finding of Fact 13]

Kyle now states that "[i]t was the interpretation of the City of Sultan during [her tenure] that applicants are [*sic*] permitted to increase the lot yield up to and not to exceed 25% administratively and allow the zoning code density dimensional requirements to vary by up to 25%." (Exhibit 75)

The document approving the *SkyRidge Estates* adjustments identifies the code-required size and dimensional regulations for the subdivision given its MDR zoning, but does not indicate whether the increased lot yield required any reduction of those regulations. [23] (Exhibit 72.2, p. 4, § D.3)

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19 52 ÷ 206 = 0.2524 or 25.24%)

20 The adjustment document was signed by Kyle as Planning Director and by the City Engineer and the Mayor. (Exhibit 72.2, p. 9) Neither the City Engineer nor the Mayor have any authority to render a decision on applications to adjust an approved preliminary subdivision. [SMC 19.08.140] Why they signed the *SkyRidge Estates* major adjustment approval document is not apparent from this record.

21 The dates that the Examiner's Decision became final and that the judicial appeal period ended are Official Notice, May 8, 2018, Hearing Examiner Decision, PP2017-001, p. 22, Notice of Appeal section.

22 The approved preliminary plat also included 90,804 SF of open space. [Official Notice, May 8, 2018, Hearing Examiner Decision, PP2017-001, p. 11, Finding of Fact 13] There is no indication in this record that any of the open space was eliminated through the adjustment process.

23 The document approving the *SkyRidge Estates* adjustments more or less used the 2012 Version of the review criteria to evaluate the adjustment requests. (Exhibit 72.2, p. 5, § D.6) However, the document includes incorrect code citations and incorrect review criteria text. For example: There is no "SMC section 19.08.140(A)(C)" (*Op. cit.*) in either the 2012 or the 2018 Version of the code. Subsection (A) in both versions simply states that minor adjustments are authorized. Subsection (C) in the 2012 Version addresses major adjustments, but does not include any review criteria; subsection (C) in the 2018 Version sets forth review criteria for minor adjustments. The review criteria for minor adjustments in the 2012 Version are contained in subsection (B). Assuming that the subsection (B) criteria are the ones that were used (and that appears to be the case), criteria (B)(1), (B)(3), and (B)(4)(e) are misquoted. Of those three errors, the most significant is that involving (B)(1) where the 2012 Version says that "Dimensional requirements shall not vary more than 10 percent from the original" while the *SkyRidge Estates* document says "Density and dimensional requirements shall

Acme Homes submitted into the record of this hearing a draft copy of the final plat for Phase I of *SkyRidge Estates* dated October 1, 2019. Of the 117 lots in that draft final plat, only 21 [24] comply with applicable zoning lot area, lot width, and lot depth. (Exhibit 77)

Sewer System Impact Mitigation Condition

25. The second part of the major adjustment request asks that a uniform condition relating to required off-site sewer system impact mitigation be imposed on all four of the Applicants' projects: *Daisy Meadows, Wyndham Highlands, Wyndham Highlands 2,* and *Wyndham Highlands 3*. The condition requested by the Applicants would match (with minor, non-substantive textual changes) the condition imposed on the *Wyndham Highlands* preliminary subdivision approval: a three-option condition with one option being payment of an impact mitigation fee of $526.32 per lot. (Exhibits 59; 69)

Land Resources changed its position regarding off-site sewer system impact mitigation in its Post Hearing Memorandum: Land Resources now argues that there should be no special off-site sewer impact mitigation condition on any of its three subdivisions. [25] (Exhibit 84)

26. DCD concurs with the request for consistency in the off-site sewer system impact mitigation conditions, but disagrees with the Applicants as to the correct amount of the per lot mitigation fee. DCD believes that the $526.32 per lot figure resulted from an error on the Examiner's part and that the correct figure is $2,640.00 per lot. (Exhibits 57; 81; and Galuska testimony)

27. Chapter 16.70 SMC, Concurrency management system, requires issuance of a Certificate of Concurrency ("Certificate") for many types of land use applications, including those seeking preliminary subdivision approval. [SMC 16.70.030] "The certificate of concurrency identifies available capacity based on the information submitted by the applicant and capacity information available to the city at the time the certificate is issued." [SMC 16.70.020(A)] A Certificate must contain nine elements, one of which is a statement of "[A]ny mitigation required by the applicant at the applicant's cost for concurrency." [SMC 16.70.150(A)(2)(h), emphasis added] "A certificate of concurrency shall be issued for a development approval, and remain in effect for the same period of

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not vary more than 25 percent from the original." The 25% figure does not appear anywhere in the 2012 Version, but is prominent in the 2018 Version in the discussion of major adjustments. It is unclear whether Kyle thought the *SkyRidge Estates* approved preliminary subdivision adjustment application retained the 2017 vesting date of the preliminary subdivision application or had its own June 19, 2018, vesting date. What is clear is that she intermingled the provisions of the 2012 and 2018 Versions of the code in her review.

[24] Lots 1 – 5, 22, 23, 49 – 56, 74 – 76, 88, 89, 101, 109, and 110.

[25] Exhibit 84 clearly states that it was prepared on behalf of Land Resources for the three *Wyndham Highlands* applications. (Exhibit 84, p. 1) Acme Homes did not submit a post-hearing memorandum. However, given the unanimity of their positions throughout the major adjustments hearing process, the Examiner expects that Acme Homes currently holds a similar view.

time as the development approval with which it is issued." [SMC 16.70.070(A)] The SMC provides a right of administrative appeal from denial of a Certificate. [SMC 16.70.150(A) & (B)(3)]

28. Wastewater (sewer) system adequacy is a component of the concurrency management system. [SMC 16.70.090(C)] Section 16.70.120 SMC, Concurrency determination – Wastewater, contains guidance for determining whether a proposed development will meet concurrency with respect to impact on the sewer system:

> D. The city of Sultan will provide level of service information as set forth in the city's comprehensive plan. In accordance with WAC 365-195-835 the following procedures are used to determine sewer concurrency:
>
> 1. The building and zoning official or designee will determine whether a proposed development can be accommodated within the existing or programmed capacity of the city's sewer system.
> 2. The city will conduct an analysis of the remaining capacity of the city's sewer treatment facilities and the foreseeable demand. The proposed development will be analyzed with respect to its size and density, quantity of utility service required (average flow and peak periods), special treatment or hazards involved, and compliance with applicable requirements of the Sultan Municipal Code and other codes. Provision of sewer service to the property shall not jeopardize public health or safety.
> 3. The building and zoning official will determine if the capacity of the city's sewer facilities and wastewater treatment plant, less the capacity which is needed, can accommodate the proposed development while allowing city sewer service to remain within the city's level of service standards. If so, the building and zoning official will provide the applicant with a sewer certificate of concurrency.
> 4. The building and zoning official <u>will deny the sewer certificate</u> of concurrency <u>and underlying development application if there is insufficient capacity in the city's sewer system, and improvements</u> or strategies to accommodate the impacts of development and provide the sewer capacity needed by the proposed development <u>are not planned to be constructed concurrent with the development</u>.

(Emphasis added)

29. A Certificate was issued for *SkyRidge Estates* on March 23, 2018. The *SkyRidge Estates* property was not served by the City sewer system; the developer would have to install significant new sewer mains to reach the nearest terminus of the City system. Engineering consultant RH2 evaluated the expected impact of sewage flows from *SkyRidge Estates* on the existing, downstream City sewer system. RH2 found that "three segments of existing sewer mains were … technically inadequate under current conditions. … RH2 suggested that if improvement of those segments is not done in conjunction with development of *SkyRidge Estates*, they should be closely monitored." [Official Notice, May 7, 2018, Decision, PP2017-001, p. 7] The Certificate required "some off-site

improvements" to the City sewer system. [*Op. cit.*, p. 8] That led to *SkyRidge Estates* Condition 11 on the Examiner's May 18, 2018, approval of the preliminary subdivision:

> Prior to Certificate of Occupancy of the first phase of single family residential building permits (61 single family lots), the developer shall complete all off-site improvements required by the Sultan Municipal Code and identified in Title 13 and the RH2 Hydraulic modeling of the City's sewer system as listed below.
>
> a. CIP-WW1-Replace approximately 475 LF of 12-inch-diameter gravity main along US Highway 2 with 24-inch-diameter pipe.
> b. CIP DF1A-Replace approximately 375 LF of 15-inch-diameter gravity main along Main Street with 27-inch-diameter pipe.
> c. CIP DF1C-Replace approximately 1,275 of 15-inch-diameter gravity main along Main Street with 27-inch diameter pipe.
>
> The developer's cost may be off-set by any grant funds obtained by the City for these projects to the extent approved by the City Council.

[*Op. cit.*, p. 25, emphasis added] The total length of those three segments is 2,125 feet. [26]

30. *Daisy Meadows, Wyndham Highlands, Wyndham Highlands 2,* and *Wyndham Highlands 3* each was subject to Chapter 16.70 SMC. A Certificate was issued for each of the four preliminary subdivision applications. Off-site sewer improvements to mitigate impacts of each development were addressed in each Certificate and in each preliminary subdivision decision. The consideration of these four cases overlapped and became intertwined.

A. The Certificate for *Daisy Meadows* was issued on August 16, 2019. The *Daisy Meadows* Certificate stated that sewage flows from *Daisy Meadows* would exacerbate existing deficiencies in the sewer system. The Certificate concluded that some unspecified off-site sewer system improvements might be necessary. [27] (Exhibit 14 and its Attachment B in PP19-001)

B. The first open record hearing for *Daisy Meadows* was held on August 23, 2019. DCD recommended an "open-ended" off-site sewer improvement condition based on the August 16, 2019, Certificate. Acme Homes objected to the imprecise nature of the recommended condition. The Examiner addressed the issue in his September 6, 2019, Decision. The Examiner noted the other pending subdivisions in the area and opined that a collaborative

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26 475 + 375 + 1,275 = 2,125

27 It will be remembered that this came after *SkyRidge Estates* which had specifically identified three sewer main segments with deficiencies.

analysis would benefit all. In the absence of such an analysis and given the evidence in the record the Examiner concluded that he had but two choices: Impose the imprecise condition recommended by DCD or return the application to Acme Homes to specifically identify the off-site improvements needed to off-set *Daisy Meadows'* impact. The Examiner chose the former route and imposed Condition 11. (Exhibit 23 in PP19-001, pp. 17 & 18, Conclusion of Law 10, and p. 24, Condition 11) Acme Homes and DCD each filed requests for reconsideration challenging Conditions 11 and 13. Those requests led the Examiner to reopen the hearing on November 21, 2019, to receive additional evidence. (See subparagraph E, below.)

C. The open record hearing for *Wyndham Highlands 3* was held on September 19, 2019. DCD had yet to issue a Certificate, so the Examiner held the record open for submittal of a Certificate until September 23, 2019. The Certificate for *Wyndham Highlands 3* was issued on September 23, 2019. (Exhibit 50.4, p. 6) The Certificate stated that it relied on an August 5, 2019, analysis by the City's consulting engineer (MurraySmith) which found that off-site sewer improvements might be required; the Certificate deferred specifying those improvements until construction plan review. (Exhibit 26 in PP19-002, p. 2) MurraySmith's analysis was attached to the Certificate as Attachment B. That analysis pinpointed flooding at one sewer manhole in 1st Street as a problem that would be created by the addition of flows from *Wyndham Highlands 3* and recommended that that manhole be sealed. [28]

DCD had not recommended imposition of a specific off-site sewer impact mitigation condition during the hearing. Land Resources objected to a vaguely worded condition that DCD had recommended; the Examiner concurred and instead imposed what became Condition 2.e in the Examiner's October 7, 2019, *Wyndham Highlands 3* Decision:

> Prior to occupancy of any homes in the development, the developer shall have sealed or caused to be sealed the sewer manhole on 1st Street between Ash and Alder Streets.

(Exhibit 50.4, p. 16)

D. The Certificate for *Wyndham Highlands* was issued on November 13, 2019. (Exhibit 13 in PP19-003) The Certificate stated that the sewer system concurrency analysis for *Wyndham Highlands* was based on the concurrency analysis completed in 2017 for *SkyRidge Estates*. The Certificate stated that the *SkyRidge Estates* analysis found that the sewer system would surcharge unless 1,650 feet of pipe (6.6 feet of pipe for each of 249 lots in *SkyRidge Estates*)

[28] That specific manhole was not again mentioned in any of the subsequent documents regarding off-site sewer system impacts.

beneath Main Street between 8th Street and 4th Street was upgraded. [29] The Certificate then created two options for *Wyndham Highlands*: Replace 6.6 feet of sewer main per lot beneath Main Street, which when extended to the nearest manhole came to 1,325 feet of sewer main, on the "upstream" side of the *SkyRidge Estates* segment; or pay $2,640.00 per lot "based on the engineer's estimate of how much it will cost the city to correct the capacity issue for the proposed development." (Exhibit 13 in PP19-003, pp. 2 & 3) $2,640.00 per lot for 171 lots would generate $451,440.00. The Certificate does not provide the cost of the repairs, so the basis for the per lot calculation cannot be verified from this record.

E. The Examiner reopened the *Daisy Meadows* hearing on November 21, 2019, to address Condition 11 (and 13). The evidence presented in that hearing indicated that the City was conducting further evaluation of its sewer system. Exhibit 27.A in that case, which was submitted during the reconsideration process, indicated that, based upon the formula used when off-site sewer impact mitigation fees were set for the *SkyRidge Estates* preliminary subdivision, each lot would be responsible for upgrading 6.6 feet of sewer pipe at an estimated cost of $2,640.00. $2,640.00 per lot for 70 lots would generate $184,800. In his Revised Decision After Reconsideration issued on December 4, 2019, the Examiner substantially revised Condition 11 to reflect the new evidence regarding off-site sewer impact:

> The City has determined that certain improvements may be required to resolve sewer main deficiencies pertaining to this development. Prior to final plat approval, the developer shall decide which of the following options it will choose with respect to off-site sewer improvements. However, if the City updates its sewer model and the City finds that off-site sewer improvements are not necessary or are smaller in scale than currently proposed, the City

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[29] *SkyRidge Estates* was approved as a 206-lot preliminary plat. There were three existing single-family residences on the property when the application was filed, none connected to the City sewer system because the system ended a considerable distance from the *SkyRidge Estates* site. Thus, the Examiner approved 203 new lots, but 206 new sewer system connections. The June 29, 2018, major modification increased the number of lots to 258, for a net total of 255 new lots, but 258 new sewer system connections. The Certificate of Concurrency was based on 206 lots (of which 203 were new), not on either 258 or 255 new lots. The Certificate's analysis seems to have incorrectly accounted for the number of *SkyRidge Estates* lots resulting from the July, 2018, upward adjustment in the number of lots.

The three segments of sewer in the downtown area identified in the *SkyRidge Estates* Certificate as inadequate totaled 2,125 linear feet (not 1,650 feet). [Official Notice: May 8, 2018, Decision, pp. 7, 8, & 25]

The Examiner's approval of *SkyRidge Estates* was subject to 38 conditions. [Official Notice: May 8, 2018, Decision, pp. 23 – 28] DCD's June 29, 2018, *SkyRidge Estates* adjustment was subject to 10 conditions. (Exhibit 72.2, pp. 8 & 9) Some of the 10 major adjustment conditions go well beyond the topic of increasing the number of lots and replacing on-site park tracts with a fee-in-lieu; some topically overlap original approval conditions. Whether DCD intended that they supplement or replace the original conditions is not intuitively obvious from the document. If the intent was to replace, it was not stated and would have gone far beyond the scope of the requested adjustments.

> may reduce or eliminate the amount of sewer pipe or the sewer improvement in-lieu fee in either of the options listed below. In no event shall the options below be increased.
>
> Option 1:
> The developer shall replace sections of the deficient off-site sewer main not to exceed 6.6 feet per lot. Said improvements shall be identified by the City. Installation shall occur prior to final plat approval.
>
> OR
>
> Option 2:
> The developer shall pay a sewer improvement in-lieu fee not to exceed $2,640.00 per lot. The payment in-lieu fee may be deferred by the developer until the 25th building permit has been issued. The 25th building permit shall not be issued until all deferred in-lieu fees have been paid in full.

(Exhibit 50.1) The Certificate was not updated as *Daisy Meadows* worked its way through the reconsideration process.

F. The first hearing for *Wyndham Highlands* was held on November 22, 2019. Based on the *SkyRidge Estates* model, DCD and Land Resources recommended that a condition be imposed requiring upgrade of 6.6 feet of sewer main per lot or payment of an impact mitigation fee of $2,640.00 per lot. (Exhibit 23 in PP19-003, pp. 7 & 8) On December 6, 2019, the Examiner Returned *Wyndham Highlands* for Modification for reasons unrelated to off-site sewer issues. [Official Notice: Hearing Examiner Decision, PP19-003, December 6, 2019] *Wyndham Highlands* came on for a second hearing on March 18, 2020. (See Subsection I, below.)

G. The Certificate for *Wyndham Highlands 2* was issued on January 17, 2020. (Exhibit 14 in PP19-004) That Certificate was based on an analysis by MurraySmith dated December 12, 2019, supplemented by a letter dated January 17, 2020. MurraySmith identified three pipe segments beneath Main Street that required upsizing to handle increased flows:

> These pipe segment deficiencies are noted in the City's General Sewer Plan (2019) and included in the City's Sewer Capital Improvement Plan (CIP) as projects CIP DF1A and DF1C, ….

(Exhibit 50.3, p. 6, quoting from Exhibit 14 in PP19-004, Attachment B, January 17, 2020, letter) MurraySmith noted that *SkyRidge Estates* had previously been conditioned to fix those three segments. It concluded that when those segments were fixed no further sewer system

improvements would be required to handle sewage flows from *Wyndham Highlands 2*. The Certificate did not specify a project cost or per lot share. (Exhibit 50.3, pp. 5 & 6)

H. The open record hearing for *Wyndham Highlands 2* was held on March 5, 2020. DCD recommended, McDuffy agreed to, and the Examiner imposed what became Condition 10 in the Examiner's March 12, 2020, Decision:

> To address the offsite sewer deficiencies, the developer shall do one of the following:
>
> a. The developer may construct improvements to the sewer system, including at least 198 feet (6.6-feet per lot) of 27-inch pipe on the section beneath Main Street. This must be completed or a security accepted for its constructed prior to the recording of the final plat; or
> b. The developer may pay a per lot fee of $3,000 (an equal proportion of the $90,000 improvement cost) prior to issuance of each building permit; or
> c. If the City has established a new general connection charge which collects money for this project prior to application of a building permit, the developer shall pay the new connection fee and no other action is required to address the Main Street Sewer line.

(Exhibit 50.3) $3,000.00 per lot for 30 lots would generate $90,000.00. The origin of the 198-foot pipe segment length, the $3,000 per lot fee, or the $90,000.00 improvement cost is not known to the Examiner.

I. *Wyndham Highlands* came on for a second hearing on March 18, 2020. The Certificate had not been updated. The evidence presented in that hearing indicated that MurraySmith had found sewer main deficiencies beneath a segment of Main Street. Murray Smith again mentioned the *SkyRidge Estates* condition. DCD and McDuffy agreed to a modified version of the condition agreed to in *Wyndham Highlands 2*, but with a vastly different dollar amount. That agreed language became Condition 10:

> To address the offsite sewer deficiencies, the developer shall do one of the following:
>
> a. The developer may construct improvements to the sewer system, including at least 198 feet (6.6-feet per lot) of 27-inch pipe on the section beneath Main Street. This must be completed or a security accepted for its constructed prior to the recording of the final plat; or
> b. The developer may pay a per lot fee of $526.32 (an equal proportion of the $90,000 improvement cost) prior to issuance of each building permit; or

c. If the City has established a new general connection charge which collects money for this project prior to application of a building permit, the developer shall pay the new connection fee and no other action is required to address the Main Street Sewer line.

(Exhibit 50.2) $526.32 per lot for 171 lots would generate $90,000.72. The origin of the $90,000.00 improvement cost is not known to the Examiner. DCD asserts that the $526.32 per lot figure "appears to be an error on the Hearing Examiner's part." (Exhibit 81, p. 2)

31. The total number of currently approved lots in *SkyRidge Estates, Daisy Meadows, Wyndham Highlands, Wyndham Highlands 2, and Wyndham Highlands 3* is 543. [30]

32. The "City of Sultan General Sewer Plan" ("GSP"), prepared by RH2 consultants, was issued in draft form in May, 2018, and in final form in March, 2019. [31] No part of the GSP was entered into the proceedings described in the preceding Findings of Fact, although some of its proposed projects were referred to.

The GSP uses Equivalent Residential Units ("ERUs") "for domestic sewer flow forecasting and planning purposes. One ERU is equivalent to the amount of domestic sewer flow generated by one single-family residence." [GSP, p. 4-9] The average annual flow rate in the City sewer system is 197 gallons per day ("gpd") per ERU. [GSP, p. 4-12, Table 4-10] The GSP projects residential sewer population to increase from 3,882 to 6,040 between 2014 and 2026. [GSP, p. 4-13, Table 4-11] Average annual flow through the wastewater treatment plat is projected to rise from 330,000 gpd in 2014 to 658,000 gpd in 2026. [GSP, p. 4-15, Table 4-13]

The GSP divides the City into "Sewer Drainage Basins." *Daisy Meadows, Wyndham Highlands, Wyndham Highlands 2,* and *Wyndham Highlands 3* are all located in Basin H; *SkyRidge Estates* is located in Basin T. [GSP, Figure 206] The average annual flow from Sewer Drainage Basin H is projected to rise from 48,643 gpd in 2014 to 112,883 gpd in 2026; the GSP did not project any flows from Sewer Basin T until after 2026. [GSP, p. 4-16, Table 4-14]

33. Chapters 6 and 7 of the GSP present a discussion of system deficiencies and improvements needed by 2026 (10-Year Capital Improvements) and by 2036 (Long-Term Planning Capital Improvements). "All of the growth and related improvements for 2026 are necessary to accommodate flow from expected future developments; therefore, they are expected to be developer-funded improvements." [GSP, p. 6-3] The 2026 10-Year Capital Improvements are divided into two categories: Wastewater Treatment Plant Improvements (CIP WW#) and Developer Funded Gravity Sewer Main Improvements (CIP DF#). [GSP, p. 7-1]

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30 258 + 70 + 171 + 30 + 14 = 543

31 The GSP is a public domain document adopted by the City. The Examiner takes official notice of its content.

> The major pipe and facility improvements that will be required when development occurs in those areas are considered to be developer-funded projects, unless over-sizing of the improvements provides benefit to the existing customers. The CIP numbers for developer-funded improvements have a "DF" prefix.

[GSP, p. 7-2] Three GSP CIP projects were cited in the *SkyRidge Estates* case, two of which have also been specifically cited in the four cases whose major adjustment requests were heard on April 16, 2020: CIP WW1, CIP DF1A, and CIP DF1C.

34. Project CIP WW1, Short-term Wastewater Treatment Plant (WWTP) Improvements, includes "WWTP Influent Gravity Sewer Main Replacement". That portion of CIP WW1 is to "[c]onstruct approximately 475 linear feet (LF) of 24-inch gravity sewer pipe per City standards." [32] [GSP, pp. 7-1 & 7-2]

Project CIP DF1A, Main Street Sewer Replacement, is a Developer Funded Existing System Improvement of sewer main between 5th and 6th Streets which is needed because "[a]ccording to the hydraulic model, the capacity of this 15-inch sewer interceptor is currently being exceeded during peak hour flows …." [GSP, pp. 7-2, 7-8 (quotation), and 7-19] Project CIP DF1A is to "[r]eplace approximately 375 LF of existing gravity pipe with 27-inch-diameter gravity pipe per City standards." [GSP, p. 7-8]

Project CIP DF1C, Main Street Sewer Main Replacement, is a Developer Funded 10-Year Capital Improvement from approximately 165 feet east of 3rd Street to 8th Street [33] which is an improvement

> necessary to serve currently undeveloped areas of the City's UGA expansion. The improvements [in this group] include the major pipeline and facility construction that will be required to properly serve those areas. The improvement costs should be borne by the developers, rather than the existing customers, unless over-sizing of the improvements provides benefit to the existing customers.

[GSP, p. 7-8 (quotation) & 7-19] Project CIP DF1C is to "[r]eplace approximately 1,450 LF of existing gravity pipe with 27-inch-diameter gravity pipe per City standards." [GSP, p. 7-10]

35. Cost estimates in the GSP are based on 2017 costs. [GSP, p. 7-17] The estimated costs of Projects CIP DF1A, CIP DF1C, and the sewer main portion of CIP WW1 are:

PROJECT	ESTIMATED COST

[32] The sewer pipe replacement portion of Project CIP WW1 lies west of the Sultan River. It does not overlap the location of Projects CIP DF1A and CIP DF1C. [GSP, Figure 7-1]

[33] Although the described location of Project CIP DF1C overlaps that of Project CIP DF1A, Figures 7-1 and 7-2 show that Project CIP DF1C omits the segment replaced by Project CIP DF1A. [GSP, Figures 7-1 & 7-2] There is no duplication.

CIP DF1A	$262,000.00
CIP DF1C	1,011,000.00
SUBTOTAL	$1,273,000.00
CIP WW1	$315,400.00 [34]
TOTAL	$1,588,400.00

[GSP, p. 7-19] The per lot cost for funding Projects CIP DF1A and CIP DF1C based on 543 contributing lots would be $2,344.38. [35] If the pipe portion of Project CIP WW1 is added, the per lot cost would be $2,925.23. [36]

36. Land Resources argues that the City lacks authority in the present case to impose any sewer fees in excess of the General Facility Charge. (Exhibit 84, pp. 7 & 8, § C)

37. Section 13.08.030(B) SMC [37] provides for establishment by the City Council of a "General Facilities Charge" ("connection fee") by ordinance. The SMC does not explain the purpose of the General Facilities Charge.

"Sewer general facilities charges are collected for each new or upgraded connection to the sewer system. These charges are for the right to connect and make use of the system." [GSP, p. 9-1]

Public comments [38]

38. Bronn Journey ("Journey") and Judy Heydrick ("Heydrick"), both participants in the previous hearings for one or more of the four projects, vigorously oppose the major adjustments for lot number and size. Neither believes they are in the public interest. Both essentially believe that the applicants are employing a "bait and switch" tactic [39] to get a subdivision approved and then increase the number of lots while reducing their size below minima set forth in the zoning code. (Exhibits 67; 71; 80)

Karen McIntosh ("McIntosh") also opposes the requested lot yield increase. She opines that the requested major adjustments seek "only to jam as many homes into a small area as possible."

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34 Project CIP WW1 consists of several sub-parts. The cost of those sub-parts is not broken out in Table 7-8. The total cost for project CIP WW1 is listed as $3,348,000.00. [GSP, Table 7-8] Table 7-7 on page 7-16 lists per foot 2017 sewer main construction costs to install each size of sewer pipe specified in the GSP. The cost per foot to install 24" sewer pipe is listed as $664.00 per foot. $664.00 x 475 feet of 24" pipe = $315,400.

35 $1,273,000.00 ÷ 543 = $2,344.383 or $2,344.38 per lot

36 $1,588,400.00 ÷ 543 = $2,925.230 or $2,925.23 per lot

37 Land Resources' Exhibit 84 inadvertently swapped the position of the chapter and section elements of the relevant code citation: "SMC 13.03.080" should be SMC 13.08.030 as there is no Chapter 13.03 in the SMC.

38 The Examiner has consciously disregarded all *ad hominem* aspects of both the public comments and the Applicants' responses thereto.

39 That term is the Examiner's colloquial characterization of their lengthy objections.

(Exhibit 74) She urges that the applications be returned to the Applicants "to be revised to the proper Lot [*sic.*] size for the planning codes," (Exhibit 82)

39. The Applicants submitted responses to the opponents' comments. Essentially, the Applicants aver that they are simply following the SMC. (Exhibits 68; 73; 84)

LEGAL FRAMEWORK [40]

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

Authority

Major Adjustment applications are not specifically typed. [Chapters 19.22 – 19.28 SMC] They can be either processed by the Hearing Examiner or by the DCD Director at the latter's discretion. [SMC 19.08.140(D)] 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] That same process is appropriate for Major Adjustments to approved preliminary subdivisions which are heard by the Examiner.

Review Criteria

The SMC contains no review criteria for Major Adjustments to an approved preliminary subdivision. The review criteria for Minor Adjustments to an approved preliminary subdivision are set forth in SMC 19.08.140(C):

> Minor adjustments shall be reviewed for consistency with this chapter and the regulations of this title, as well as the following criteria:
>
> 1. The adjustment maintains the design intent or purpose of the original approval; and
> 2. The adjustment maintains the quality of design or product established by the original approval; and
> 3. The adjustment does not cause a significant environmental or land use impact on or beyond the site; and
> 4. The adjustment is not precluded by the terms of this title or by state law from being decided administratively; and
> 5. Circumstances render it impractical, unfeasible or detrimental to the public interest to accomplish the subject condition or requirement of preliminary plat or short plat approval.

Vested Rights

[40] Any statement in this section deemed to be either a Finding of Fact or a Conclusion of Law is hereby adopted as such.

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. Land Resources' major adjustment application for *Wyndham Highlands* seeks two revisions to the preliminary subdivision as approved: 1) an increase in the number of lots in the approved preliminary plat from 171 to 185 (a 14 lot or 8.2% increase); and a change in the off-site sewer system impact mitigation requirement. Those requests are very different and involve substantially different issues. The outcome of one is independent of the outcome of the other. Therefore, they will be addressed separately in the Conclusions of Law which follow.

2. The Conclusions in this decision are grouped by topic only for the reader's convenience. Such groupings do not indicate any limitation of applicability to the Decision as a whole.

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

Preliminary plat adjustments

4. The ability to increase the number of lots from 171 to 185 is dependent upon the Applicants' interpretation of SMC 19.08.140. The Applicants' interpretation of SMC 19.08.140 is neither logical nor reasonable. The Applicants single out one compound clause in a sentence composed of compound clauses and interpret it as if it stood alone. But it doesn't. Not only does it need to be interpreted within the context of the paragraph within which it is located (subsection (D)), but that paragraph must be interpreted within the entire context of SMC 19.08.140. This the Applicants do not do. As a result they reach a logically indefensible interpretation.

   Simply put, SMC 19.08.140 does not now and never has authorized adjustments to approved preliminary subdivisions which would result in lots that do not meet zoning code regulations. Since the requested adjustment to increase the number of lots depends entirely upon the Applicants' erroneous interpretation of SMC 19.08.140, the adjustment request must be denied.

5. Discerning the meaning of SMC 19.08.140 requires an analysis commonly referred to as "statutory construction" or "statutory interpretation." Numerous appellate court decisions have explained and set forth the many principles of statutory interpretation. City ordinances are subject to the same rules of interpretation and construction as apply to statutes. [*Tahoma Audubon Soc. v. Park Junction Partners*, 128 Wn. App. 671, 116 P.3d 1046 (2005); *Neighbors v. King County*, 88 Wn. App. 773, 778, 946 P.2d 1188 (1997)] Courts, and by extension quasi-judicial decision makers, "do not construe a statute that is clear and unambiguous on its face. We assume that the legislature means exactly what it says, and we give words their plain and ordinary meaning. Statutes are construed as a whole, to give effect to all language and to harmonize all provisions." [*Ockerman v. King Cy.*, 102 Wn. App. 212, ___ P.2nd ___ (Div. I, 2000); see also: *Western Petroleum v. Freidt*, 127 Wn.2d 420, 424, 899 P.2d 792 (1995), holding that intent is relevant only if ambiguity exists in the language of the code; *State v. Azpitarte*, 140 Wn.2d 138, 141, 995 P.2d 31 (2000), holding that clear and unambiguous codes are not subject to judicial construction] Legislative history cannot override an unambiguous code provision. [*Kirtley v. State*, 49 Wn. App. 894, 898, 748 P.2d 1148 (1987)]

6. "A statute is ambiguous if it can be reasonably interpreted in more than one way, but it is not ambiguous simply because different interpretations are conceivable." [*Kilian v. Atkinson*, 147 Wn.2d 16, 20-21, 50 P.3d 638 (2002)] Section 19.08.140 SMC is complex and not as clearly written as one might wish, but it is not ambiguous with respect to the issue presented in this case.

7. All four of the Applicants' subdivisions are vested to the 2018 Version of SMC 19.08.140, quoted in Finding of Fact 10, above. All subsequent references, quotations, and citations are to the 2018 Version unless specifically stated otherwise. Section 19.08.140 SMC establishes an incremental structure for review of requests to adjust approved preliminary plats: "Minor" adjustments can be approved administratively. [Subsections (A) and (B), sentence 1] Each approved "minor" adjustment must be documented to keep track of approved adjustments within a subdivision. [Subsection (B), sentence 4] When an approved preliminary subdivision is subjected to more than one "minor" adjustment and the cumulative change of all approved "minor" adjustments reaches the level of a "major" adjustment, then the next "minor" adjustment request must be treated as a "major" adjustment. [Subsection (B), sentence 5] "Major" adjustments are subject to review by the Examiner (or by the DCD Director; see Footnote 7, above). [Subsection (D), sentence 1] Each approved "major" adjustment must be documented to keep track of approved adjustments within a subdivision. [Subsection (D), sentence 4] When an approved preliminary subdivision is subjected to more than one "major" adjustment and the cumulative change of all approved adjustments exceeds the "major" adjustment limit, then the next "major" adjustment request must be treated as a new subdivision application. [Subsection (D), sentence 5] The Applicants' interpretation of SMC 19.08.140 destroys this fundamental structure of the section.

8. "Minor adjustments may be made and approved by the director." [SMC 19.08.140(A)] In other words, they are always administrative procedures. Minor "adjustments are those that have no substantial impact on neighboring properties, the general public, or those intended to occupy or use the proposed development and do not exceed 10 percent of the lots, square footage or dimensional

requirements." [Subsection (B), sentence 3] This is a compound sentence with two primary verb/object clauses, each of which is in turn modified by a compound clause. The first verb/object clause is "have no substantial impact." The object "impact" is modified/limited by the clause which follows: There is to be no substantial impact on neighboring properties, or on the general public, or on those who will occupy or use the subdivision. The second primary verb/object clause in the sentence is "do not exceed 10 percent." The object "10 percent" is modified/limited by the clause which follows: Not more than 10% of the "lots, square footage or dimensional requirements" is to be exceeded. That clause in turn can be simplified by applying the 10% limit to each of the three elements in the clause: "nor exceed 10% of the lots, nor exceed 10% of the square footage nor exceed 10% of the dimensional requirements."

9. "Major adjustments in subdivisions are permissible with the approval of the hearing examiner or the director." [SMC 19.08.120(D), sentence 1, on-line version [41]] In other words, they may be administrative or quasi-judicial procedures. Subsection (D) contains nearly identical text regarding "major" adjustments as found in Subsection (B) regarding minor adjustments. The most important differences are that "major" adjustments DO have a substantial impact and the adjustments limit is 25%, not 10%. [Subsection (D), sentence 3]

   Thus, no single minor adjustment may exceed the 10% limit and the cumulative total of all approved adjustments ("minor" and "major") may not exceed the 25% limit. Anything exceeding the 25% limit triggers the need for an entirely new preliminary subdivision application.

10. When the compound sentences in subsections (B) and (D) are broken down and simplified as explained above, it is abundantly clear that the "10% of the lots" and "25% of the lots" clauses do not pertain at all to the extent to which a given lot in an approved preliminary subdivision may be reduced in size (as the Applicants assert), but rather to the percent of the lots in the subdivision that may be affected by a proposed adjustment. The adjustments cannot affect more than 10% (for "minor" adjustments) or 25% (for "major" adjustments) of the lots in the approved preliminary subdivision. If a requested adjustment or the cumulative total of approved adjustments affects more than 10% of the lots in the approved preliminary subdivision, then the next requested adjustment must be processed as a "major" adjustment. And if a requested adjustment or the cumulative total of approved adjustments affects more than 25% of the lots in the approved preliminary subdivision, then the next requested adjustment must be processed as a wholly new preliminary subdivision application.

11. In addition to the preceding analysis of the proper grammatical structure of subsections (B) and (D), there is absolutely nothing in either subsection that authorizes any adjustment to an approved preliminary subdivision that would violate zoning regulations. The Applicants are inserting words

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41 Land Resources quotes the on-line version of SMC 19.08.140(D), but then asserts that major adjustments always require a public hearing. (Exhibit 84, p. 4, ll. 23 – 25) Based on the on-line version of SMC 19.08.140(D) that assertion is not correct: Action by the director would be administrative and would not require an open record hearing.

and concepts into the adopted text which simply are not there. Zoning regulations cannot be amended or waived by some vague, allegedly inferred meaning in the subdivision ordinance.

12. The Applicants urge the Examiner to accept the *SkyRidge Estates* adjustment decision as precedent. An administrative decision by a staffer is not binding precedent for the Examiner. [42] "[A]n agency interpretation that conflicts with a statute is given no deference." [*Nelson v. Appleway Chevrolet, Inc.*, 160 Wn.2d 173, 184, 157 P.3d 847 (2007)] An agency interpretation or agency policy cannot work to effectively "amend" an ordinance or apply it in a manner that clearly exceeds its intended scope. [*Mall, Inc. v. City of Seattle*, 108 Wn.2d 369, 378, 739 P.2d 668 (1987)] Here the *SkyRidge Estates* adjustment decision conflicts with the 2018 Version of the adjustment regulation (if that was the regulation that Kyle used); if Kyle used the 2012 Version, that regulation is not applicable in the current case under even the most liberal interpretation of subdivision vesting since the *Wyndham Highlands* preliminary subdivision application was vested after the 2012 Version was superseded.

13. The Applicants seem to believe that they are entitled to achieve the maximum density allowed under either the adopted Comprehensive Plan or the adopted zoning regulations. Neither is correct. The densities set out in the Comprehensive Plan and the zoning code are maximums, not guarantees. Whether a given development can achieve the maximum density is determined by the interplay of a whole host of factors including, but not limited to, developer desire, economics, parcel shape, topography, environmental conditions, the nature of adjoining development, zoning regulations, and subdivision regulations.

14. The use of lot size averaging was erroneously allowed in *Wyndham Highlands*. (See Findings of Fact, above.) Subdivision applications vest to regulations, not to erroneous application of those regulations. [43] Land Resources has no vested right to continued erroneous application of vested lot size averaging regulations. It should not be rewarded for past erroneous application of the regulations – whether by Land Resources, DCD, or the Examiner - by permitting even smaller lots through an adjustment. Section 19.08.140 SMC does not allow lots to be created through the adjustment process that do not comply with zoning regulations. The existing lots are already smaller than they should be, but the Examiner cannot change that reality. Any further reduction in lot size or dimension would manifestly violate zoning regulations. And as DCD says, the requested major adjustment should not "be approved to avoid compounding the existing error." (Exhibit 81, p. 2)

15. The proposed *Wyndham Highlands* adjustment (Exhibit 63) affects far more than 25% of the lots in the plat. Only adjusted Lots 45, 53, 54, 62, 169, and 178 meet all applicable zoning code regulations for lot size, width, and/or depth. Furthermore, since the requested changes affect far more than 25% of the lots in the plat, square footage of the plat, and/or dimensions of the lots, the request would require submission of a wholly new preliminary subdivision application. For either or both of those

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42 In fact, an Examiner decision is not legal, binding precedent for future Examiner decisions.

43 Applications also do not vest to facts.

reasons, the adjustment to increase the number of lots while reducing their size cannot be approved. That part of the request must be denied.

Sewer Impact Mitigation Fee

16. The Applicants asked during the hearing that preliminary subdivision conditions regarding off-site sewer system impact mitigation be consistent for *Daisy Meadows, Wyndham Highlands, Wyndham Highlands 2*, and *Wyndham Highlands 3* and proposed a per lot dollar amount that they argued was correct. After the hearing they argued that no basis existed to impose any off-site sewer system impact mitigation condition whatsoever. (Exhibit 84) A response to either of those requests/positions requires evaluation of both the application of the consistency regulation (Chapter 16.70 SMC) and the off-site sewer system impact mitigation conditions as currently imposed.

17. Chapter 16.70 SMC provides the regulatory basis to require mitigation of off-site sewer system impacts. Section 16.70.120(D)(4) SMC requires that concurrency be denied "if there is insufficient capacity in the city's sewer system, and improvements … are not planned to be constructed concurrent with the development." [Emphasis added] If concurrency is denied, then the application with which it is associated must also be denied. [SMC 16.70.100(D)(5) (Transportation concurrency), 16.70.110(D)(3) (Potable water concurrency), 16.70. 120(D)(4) (Wastewater concurrency), and 16.70.140(B)(5) (Parks and recreation concurrency)]

18. If the evidence shows that a proposed development will create an insufficient capacity condition or exacerbate an existing insufficient capacity condition in the City's sewer system (the evidence in this record demonstrates that any or all of the four subdivisions now before the Examiner seeking major adjustments to the off-site sewer system impact mitigation condition on their approvals will exacerbate an existing insufficient capacity condition in three specifically identified segments of the system through which sewage from all four of the developments must flow to reach the wastewater treatment plant), then the developer must make improvements to alleviate the insufficient capacity condition concurrent with the development in order to obtain concurrency. Section 16.70.120(D)(4) SMC does not contemplate payment of a proportionate share in lieu of physical improvements to remedy deficiencies. Rather, it explicitly requires that the improvements be completed with the development.

    This makes sense from a practical perspective: If the sewage from a new development is going to create or exacerbate an inadequacy in the sewer system, then that inadequacy must be corrected before the development comes on line or untreated sewage will exceed the capability of the system. Paying a proportionate share while waiting for the improvement to be built later by someone else would not ensure public health, welfare, or safety: The system capacity would be exceeded while funds were incrementally amassed to pay for needed improvements.

19. The problem is that there may be many developments, known and unknown, which would contribute sewage flows to an identified inadequate segment of the system. It would not be fair to require one

developer to pay the entire cost of the remedial measures when other developers would benefit from those measures (to put it colloquially, "get a free ride").

Unfortunately, the currently codified system does not provide a method for apportioning improvement costs over all known and unknown future new developments. The developer whose application is before the City for approval must show that the needed improvement will be constructed concurrent with its development or that application must be denied. [SMC 16.70.120(D)(4)]

There are ways that costs could be equitably apportioned even in the absence of a codified procedure. For example, one developer (or a group of developers) could "front" the total cost of the needed mitigation through a "late-comer's" arrangement authorized by the City Council. A late-comer's arrangement would get the mitigation accomplished before the first development added flows to the system while allowing the developer(s) who funded that mitigation to be repaid for those costs beyond their fair share over time as new developments are proposed and developed. [44]

Establishment of a late-comer's arrangement is not the duty of the Examiner nor does the Examiner have authority to mandate creation of such an arrangement. The Examiner's only authority is to apply the SMC as written. [*Chaussee v. Snohomish County*, 38 Wn. App. 630, 638, 689 P.2d 1084 (1984), holding that the Examiner must base his/her land use decisions upon duly adopted laws and ordinances, and may not consider equitable defenses.]

20. Of the Certificates and preliminary subdivision conditions associated with *SkyRidge Estates, Daisy Meadows, Wyndham Highlands, Wyndham Highlands 2*, and *Wyndham Highlands 3*, only those for *SkyRidge Estates* fully comply with Chapter 16.70 SMC: [45]

    A. The Certificate issued for *SkyRidge Estates* met the requirements of Chapter 16.70 SMC: Based upon a technical study, it identified a specific inadequacy that would be exacerbated by flows from the development and it identified a specific improvement that had to be completed before sewage began to flow from the development into the City system. The mitigation condition mirrored the Certificate. (See Finding of Fact 29, above.)

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[44] There may be other methods as well.

[45] The Examiner does not "look for trouble" when conducting hearings. The Examiner is not an investigator; he is a judge. He is generally required to rely on the testimony and evidence entered into the record of each hearing. To the extent that compliance with Chapter 16.70 SMC was an issue in the preliminary subdivision hearings, the concern was about the wording of the mitigation conditions. In each case, the applicant and DCD eventually agreed on proposed language for a condition. Thus, the Examiner did not delve deeply into Chapter 16.70 SMC compliance. The current request from the Applicants to adjust those conditions opened up a disagreement between them and DCD which has necessitated a "deep dive" into Chapter 16.70 SMC to resolve the conflicts.

It should be noted that the dollar amounts and per lot bases stated in the Certificates and off-site sewer mitigation conditions seem to be inconsistent and at least partly inexplicable.

B. The Certificate issued for *Daisy Meadows* did not meet the requirements of Chapter 16.70 SMC: It stated that sewage flows from the subdivision would exacerbate an existing deficiency in the sewer system, but it neither specified that deficiency nor identified the actions necessary to mitigate that deficiency. The mitigation condition did not comply with Chapter 16.70 SMC as it required improvement to only 462 feet of sewer main (6.6 FT x 70 lots) when the evidence from *SkyRidge Estates* which was available at that time showed that far more then 462 feet of sewer main would be inadequate to handle additional flows. In addition, the proportionate share payment alternative did not comply with Chapter 16.70 SMC as it, too, would not result in compliance with the adopted standard concurrent with the development. (See Finding of Fact 30.A & .E, above.)

C. The Certificate issued for *Wyndham Highlands* did not meet the requirements of Chapter 16.70 SMC: It specified that 1,650 feet of sewer main would be inadequate, purportedly the same 1,650 feet identified in the *SkyRidge Estates* analysis (but the *SkyRidge Estates* analysis had identified 2,125 feet of inadequate sewer main) and specified mitigation to 1,325 feet of the same pipe to be replaced by *SkyRidge Estates*. It provided a per lot fee-in-lieu option which would not comply with Chapter 16.70 SMC because it, too, would not result in compliance with the adopted standard concurrent with the development. (See Finding of Fact 30.D & .I, above.)

D. The Certificate issued for *Wyndham Highlands 2* did not meet the requirements of Chapter 16.70 SMC: It specifically identified the sewer main segments that would not meet standards with additional flows. It concluded that when *SkyRidge Estates* fixed those segments there would be no problem. However, that position relied on another development fixing the problem without any assurances that that development would be built before *Wyndham Highlands 2* was developed. Thus, the Certificate lacked the required linkage between the proposed development and mitigation of the problem. Like *Daisy Meadows*, the mitigation condition did not comply with Chapter 16.70 SMC as it required improvement to only 198 feet of sewer main (6.6 FT x 14 lots) when the evidence from *SkyRidge Estates* which was available at that time showed that far more then 198 feet of sewer main would be inadequate to handle additional flows. In addition, the proportionate share payment alternative did not comply with Chapter 16.70 SMC as it, too, would not result in compliance with the adopted standard concurrent with the development. (See Finding of Fact 30.G & .H, above.)

E. The Certificate issued for *Wyndham Highlands 3* did not meet the requirements of Chapter 16.70 SMC: The Certificate *per se* identified a deficiency but neither specified its nature nor specified mitigation measures to alleviate it concurrent with the development. An attached analysis from MurraySmith identified the problem as an overflowing manhole in 1st Street. (That is interesting in hindsight because Figure 7-2 in the GSP indicates that flows from the Sultan Basin Road plateau area do not flow through the main beneath 1st Street. Unless the manhole overflow resulted from back-up in the 1st Street main caused by flows in the main

beneath Main Street, there was no rational nexus for the condition.) The related mitigation condition required sealing of the specified manhole. (See Finding of Fact 30.C, above.)

21. Common sense supports standardizing the off-site sewer system impact mitigation requirement for *Daisy Meadows, Wyndham Highlands, Wyndham Highlands 2,* and *Wyndham Highlands 3*. All four of them abut and form a large block of contiguous land; all four are subject to the Certificate requirements of Chapter 16.70 SMC; even though preliminary subdivision approvals were granted over a period of several months, no development activity has commenced and they are all back seeking similar major adjustments at the same time. The off-site sewer system impact mitigation requirement should be consistent for all four.

22. The off-site sewer system impact mitigation requirement for these four subdivisions should reflect the most recent data/facts. Subdivision applications vest to regulations, not to facts; the Applicants have opened the door by asking that the four projects be treated equally in this regard. As summarized in the Findings of Fact, above, the facts regarding needed off-site sewer impact mitigation evolved over time. The evidence presented in each hearing was sparse and inconsistent. For example, the length of sewer main that needed upgrading changed, the cost of the upgrade project was never substantiated with any evidence, the per lot share changed for no apparent reason.

23. Further, the off-site sewer system impact mitigation requirement for these four subdivisions should consider the existence of *SkyRidge Estates*. The sewer main segments that have been identified as requiring mitigation because of flows from these projects are, according to the evidence, the same segments that *SkyRidge Estates* was required to mitigate because of impacts from its flows.

24. The per lot share concept for mitigating off-site sewer system impacts is not consistent with the requirements of Chapter 16.70 SMC as has been explained above. Therefore, the Examiner will not compound previous errors by using it again.

25. The *SkyRidge Estates* off-site sewer system impact mitigation is based on evidence (that was relied on in part when the City issued the Certificates for the four projects currently under review) that reflects needed, developer funded improvements listed in the City's adopted GSP to sewer main segments that will be directly impacted by flows from these developments. The *SkyRidge Estates* condition is consistent with the requirements of Chapter 16.70 SMC; a condition patterned after the *SkyRidge Estates* condition will replace the current off-site sewer impact mitigation condition in *Daisy Meadows, Wyndham Highlands, Wyndham Highlands 2,* and *Wyndham Highlands 3*. It will ensure that the sewer system will remain concurrent as these subdivisions develop.

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:

A. **DENIES** the requested Major Adjustment to increase the number of lots in the preliminary subdivision of *Wyndham Highlands*; Exhibit 6 remains the approved preliminary plat.

B. **APPROVES** a Major Adjustment to Condition 10 which hereafter shall read as follows:

10. Prior to occupancy of the first single family residence in the subdivision, the following improvements to the existing off-site sewer system shall have been completed to ensure concurrency as required by Chapter 16.70 SMC:

    a. CIP-WW1-Replace approximately 475 LF of 12-inch-diameter gravity main along US Highway 2 with 24-inch-diameter pipe.
    b. CIP DF1A-Replace approximately 375 LF of 15-inch-diameter gravity main along Main Street with 27-inch-diameter pipe.
    c. CIP DF1C-Replace approximately 1,275 of 15-inch-diameter gravity main along Main Street with 27-inch diameter pipe.

    This condition does not obligate the developer to fund completion of the required improvements on its own. Costs may be shared with other developers obligated to make the same improvements; a late-comers reimbursement system may be created if approved by the City Council. This condition only requires that the necessary improvements be completed before sewage begins to flow from the development into the City's sewer system.

Decision issued May 5, 2020.

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

HEARING PARTICIPANTS [46]

Duana Kolouškoá, unsworn counsel
Kristi Kyle
Bronn Journey
Ry McDuffy
Andy Galuska

[46] This lists only participants in the Major Adjustment hearing. The official Parties of Record register is maintained by the City's Hearing Clerk.

NOTICE OF RIGHT OF RECONSIDERATION

This Decision, dated May 5, 2020, 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.

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."