

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

DECISION

FILE NUMBER: AP05-001

APPELLANT: L43-1 Greens, LLC

TYPE OF CASE: Appeal from an Administrative Determination holding that the September 2, 2005, submittals for the *L43-1 Greens* Planned Unit Development are incomplete

SUMMARY OF DECISION: Determination REVERSED; the submittals were complete

DATE OF DECISION: October 21, 2005

INTRODUCTION

L43-1 Greens, LLC (The Greens), C/o Barclays North, Inc., 10515 20th Street SE, Suite 100, Everett, Washington 98205, appeals from the September 8, 2005, Administrative Determination (AD) issued by the City Administrator/Planner (Planner) which holds that the September 2, 2005, submittals for the *L43-1 Greens* Planned Unit Development (PUD) are incomplete. (Exhibit S8¹)

The subject property is located in the southeast quadrant of the Sultan Basin Road/132nd Street SE intersection.

The Examiner held an open record appeal hearing on October 19, 2005. The City gave notice of the hearing as required by the Sultan Municipal Code (SMC). (Exhibit S15)

The action taken herein and the requirements, limitations and/or conditions imposed by this decision 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 pursuant to applicable law and policy.

¹ 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.

ISSUES

Is the Planner's AD consistent with the provisions of the SMC? Specifically, does The Greens' submittal meet the requirements of SMC 16.10.070(E)(5) and (7) regarding depiction of access and utility services to Proposed Lot 105? And, does The Greens' submittal meet the requirements of SMC 16.10.070(E)(5), (7), and (9) and of SMC 16.10.070(F) regarding the depiction of a Puget Sound Energy (PSE) easement which encumbers the property?

FINDINGS OF FACT

1. The Greens proposes to develop a PUD subdivision (*L43-1 Greens*) on a 23.88 acre site. The property is zoned Low Moderate Density. The proposal envisions a development of 107 lots for single family residences and approximately 10 acres of open space. All of the proposed lots other than Proposed Lots 104 and 105 would contain between 2,400 and 6,295 square feet (SF); Proposed Lot 104 would contain 9,176 SF and Proposed Lot 105 would contain 111,700 SF. An internal road system would provide connections to Sultan Basin Road and 132nd Street SE, both of which are open and constructed public roads. Public water and sewer service would be extended throughout the subdivision. (Exhibit S6, Preliminary Plat)
2. The Greens held a pre-application meeting with City staff on May 16, 2005. (Exhibit S1, p. 3, ll. 4 – 6) The Greens filed its application on August 4, 2005, which was assigned File Number FPPUD05-001. (Exhibit S3) On August 16, 2005, the Planner issued an AD of incompleteness listing 11 deficiencies. (Exhibit S5) On September 2, 2005, The Greens filed a supplemental submittal with the City. (Exhibit S6) On September 8, 2005, the Planner issued a second AD of incompleteness listing two remaining deficiencies. (Exhibit S8) On September 22, 2005, The Greens filed appeal from the September 8th AD. (Exhibit S1)
3. The September 8, 2005, AD first discusses "Future access and utilities for Lot 105". The AD finds the then-current submittal to be deficient under SMC 16.10.070(E)(5) and (7) and directs The Greens to "submit information that indicates how future utilities and access will be provided to lot 105." (Exhibit S8)
 - A. Proposed Lot 105 would have approximately 134 feet of direct frontage on the south side of 132nd Street SE and would contain two of the existing houses on the subject property. Proposed Lot 105 can be best described as a 390' x 330' rectangle with "exceptions" in its northwest and northeast corners. Proposed Lot 104 occupies the northwest exception; Proposed Lots 106 and 107 occupy the northeast exception. Proposed Lot 105 is bordered on the east by the rear of Proposed Lots 71 – 79; on the south by the rear of Proposed Lots 82 – 92; and on the west by the side of Proposed Lot 97, the rear of Proposed Lots 98 – 100, and

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the end of Tract 993, a 30 foot wide “private road” connecting to Proposed Road C, a public cul-de-sac accessing Sultan Basin Road. (Exhibit S6, Preliminary Plat)

- B. The “conceptual Utilities Plan” indicates that a water main would be installed to the east end of Tract 993 and that a sewer main would be installed through Tract 993 and southerly along the south half of the west side of Proposed Lot 105. (Exhibit S#, Conceptual Roadway, Drainage & Utilities Plan, Sheet 4 of 4)
 - C. The Planner testified that in order to be a complete application, The Greens must indicate how additional access from the west, south, or east would be provided to serve future subdivision of over-sized Proposed Lot 105. Such information was stated to be necessary to forestall the use of a long cul-de-sac if and when Proposed Lot 105 is further subdivided. (Testimony)
 - D. The residence on Proposed Lot 105 belongs to one of the present property owners. That owner intends to remain in that residence and has required, as a condition of his sale of the remainder of the property to The Greens, that he be provided with a lot the size of Proposed Lot 105. (Testimony)
 - E. The Greens have no development intentions for Proposed Lot 105. (Exhibit S1, p. 6, ll. 14 – 16)
4. The September 8, 2005, AD next discusses “Puget Sound Energy (PSE) Easement – Auditor’s File Number 51178”. The AD finds the then-current submittal to be deficient under SMC 16.10.070(E)(5), (7), and (9) and SMC 16.10.070(F) and directs The Greens to “submit revised mapping or other documentation that identifies the location of, proposed uses in, and permission for the proposed uses in the PSE (Puget Sound Energy) easement bisecting the property in the PUD plat.” (Exhibit S8)
- A. The preliminary plat does not contain a graphic depiction of any PSE easement encumbering any portion of the subject property. It does contain the following textual notation: “Note: Puget Sound Energy Easement A.F. No. 51178 unplottable and undetermined width” (Exhibit S6, Preliminary Plat)
 - B. In or around 1932, a previous owner (Kelsey) of some 70 acres lying on the south side of 132nd Street SE east of Sultan Basin Road granted to Puget Sound Power & Light Company (PSPL), of which PSE is the successor in interest, an easement “to construct ... TWO (2) electric transmission and distribution lines, each consisting of a single or double row of steel or wooden poles or towers” The easement is not specifically located on the property, but does provide that “The centerline of each of said transmission lines shall be parallel with,

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and not more than twenty-five (25) feet distant on either side from, a principal center line across said land”. (Exhibit S6, Item 7, A.F. No. 511778) Similar unlocated easements were granted to PSPL by other land owners to the south, east, and southeast of the Kelsey property. (Exhibit S6, Item 7) The subject property is wholly located within the outer boundaries of the former Kelsey property.

- C. No electrical transmission lines have as yet been constructed by PSPL, PSE, or anyone else across the subject property. “While the easement area is currently vacant, this right-of-way is earmarked [by PSE] as a critically important transmission corridor to be developed in the future as an east-west link across the Washington Cascades.” (Exhibit S10, ¶ 1)
- D. PSE states that the easement is 100 feet wide and that “The right-of-way is clearly depicted on survey maps that have been provided to the developer and the City of Sultan.” (Exhibit S10, ¶ 1) In fact, the record in this proceeding contains no survey information about the easement. The easement is depicted as 100 feet wide on the County Assessor’s Map of this section. However, the Assessor’s Map contains a disclaimer which begins: “This is not a survey.” (Exhibit S13) A 100 foot wide easement has been depicted on a proposed preliminary plat submitted on property abutting to the east. (Exhibit S11) A preliminary plat is not a survey. The electrical transmission right-of-way is also noted in the City’s adopted Comprehensive Plan. (Exhibit S12) A Comprehensive Plan figure is not a survey.

The original easement does not specifically locate the easement on the subject property. (Exhibit S6, Item 7) No evidence has been presented of any subsequent formalization of the easement’s location across the subject property.

- E. The Greens acknowledge that the easement location must eventually be resolved and that its resolution could affect the proposed preliminary plat design. However, The Greens argue that location of the easement is a private matter between two private property owners and is not an application completeness issue. The Greens note that the water and sewer availability commitments issued by the City on June 24, 2005, contain an expiration clause (“Failure to submit a complete application within 45 days will result in the cancellation of this commitment letter.”) which effectively prevents The Greens from negotiating a resolution of the easement’s location with PSE as a condition of having a complete application. (Exhibit S3, Commitment Letters, and testimony)

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

PRINCIPLES OF LAW

Authority

The Examiner has authority to hear and decide “[a]ppeals from administrative determination of the city’s land use regulation codes”. [SMC 2.26.090(D)]

Review Criteria

To the extent that an AD is an interpretation of the provisions of the SMC, it is essentially a legal opinion. The Examiner reviews such ADs *de novo*.

The code provisions at issue in this AD are found within SMC 16.10.070:

16.10.070 Preliminary PUD application – Contents and fees.

A. After the preapplication conference, the applicant may file an application for a preliminary PUD with the planning director together with the application fee and documents meeting the requirements set out in subsections B through G of this section. An applicant may submit applications for:

1. Master plan only or simultaneously with the preliminary PUD for the first phase;
2. Preliminary PUD only;
3. Preliminary and final PUD simultaneously, provided all information required under SMC 16.10.160(B) is submitted;
4. Amendment to a PUD.

...

C. Written documents required with a PUD application are as follows:

...

2. Provide legal description of the total site proposed for development, including a statement of present and proposed ownership and present and proposed zoning;

...

E. Site plan and supporting maps necessary to show the major details of the proposed PUD (which may be a single phase of a master plan) are required with a PUD application, containing the following minimum information on one or more drawings:

...

5. The existing and proposed circulation system of arterial, collector and local streets, including off-street parking areas, service areas, loading areas, transit stops existing and proposed and major points of access to public rights-of-way, including major points of ingress and egress to the development. Notations of proposed ownership, public or private, should be included where appropriate (detailed engineering drawings of cross-sections and street standards should be handled in the final development stage);

...

7. The existing and general plans for utility systems, including sanitary sewers, storm sewers and water, electric, gas, cable television, fiber optic conduits, telephone lines, solid waste, and lighting;

...

9. Enough information on land areas adjacent to the proposed PUD to indicate the relationships between the proposed development and existing and proposed adjacent areas, including land uses, zoning classifications, densities, circulation systems, public facilities and unique natural features of the landscape;

...

F. Any additional information, as required by the planning director, necessary to evaluate the proposed preliminary PUDs compliance with the criteria in SMC 16.10.100 (retail PUDs), SMC 16.10.110 (residential PUDs) i.e., tree preservation plan, lighting plan, traffic study, etc.

...

Vested Rights

The vested rights doctrine is not directly applicable to AD appeals. However, an AD specific to a project which is subject to vested rights must be decided by application of the regulations to which the project is vested.

Standard of Review

Deference in interpretation of municipal ordinances is to be accorded the determination of a municipal official charged with the day-to-day implementation of municipal ordinances. The appellant 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.

DISCUSSION

A clear, significant distinction exists between an application which is “complete” for vesting and processing purposes and an application which meets all criteria for approval. The former is a threshold submittal concept which does not involve substantive or subjective evaluation of the application. It is simply a question of whether documents and materials required by code have been filed. If they have, then the application is “complete;” if they have not, then the application is not “complete.” Completeness procedures/standards which are vague and/or discretionary are not proper. [*Friends of the Law v. King Cy.*, 123 Wn.2d 518, 869 P.2d 1056 (1994); *West Main Assocs. v. Bellevue*, 106 Wn.2d 47, 720 P.2d 782 (1986); *Adams v. Thurston Cy.*, 70 Wn. App. 471, 855 P.2d 284 (1993)]

The latter involves subjective evaluation of the submitted materials to determine whether that complete application meets all established criteria for approval. An application may be complete but not meet criteria for approval. For example, assume that submittal requirements for a subdivision required that a preliminary plat be filed and further assume that code limited the length of a cul-de-sac to 500 feet. If an applicant submitted a preliminary plat proposal which included an 800 foot long cul-de-sac, the submittal would be complete (because the required preliminary plat had been submitted) but could not be approved (because the cul-de-sac length exceeded the allowable limit). That a cul-de-sac longer than allowed by code was depicted would not make the application incomplete; it would make it unapprovable. The question of compliance with substantive code provisions “is more properly dealt with in” the decision on the merits of the application, not in the determination of completeness process. [*Friends*, FN 4]

That distinction has been blurred in this case.

CONCLUSIONS

1. The application as of September 2, 2005, met the requirements of SMC 16.10.070(E)(5) and (7) with regard to Proposed Lot 105. Subsection (5) requires depiction on the application of the proposed circulation and utility systems and “major points of ingress and egress to the development”. The documents in Exhibits S3 and S6 meet that requirement. As submitted, Proposed Lot 105 has over 130 feet of frontage on an existing public road, so access to it is not in doubt. The Greens do not propose any streets within Proposed Lot 105 so it is not required under this section to depict some hypothetical street system in order for the application to be complete. The plat includes “major” ingress and egress points into the development – in fact, the preliminary plat/PUD depicts every proposed public street and demonstrates that every proposed lot has access to at least one street. The submittals indicate public water and sewer lines either terminating against Proposed Lot 105 or passing through Proposed Lot 105.

What the City objects to is the lack of provision for a looped circulation system through Proposed Lot 105 to facilitate redivision in the future. While redivision of Proposed Lot 105 is likely given the area’s zoning, consideration of the effect of the current proposal’s design on future redivision is a subjective matter appropriately addressed during review of the application. It is not a completeness issue.

2. The application as of September 2, 2005, also met the requirements of SMC 16.10.070(E)(5), (7), and (9) with regard to the PSE easement. This record is devoid of any credible evidence of the establishment of a specifically located easement across the subject property. The preliminary plat discloses the existence of the undefined easement. The easement note on the face of the preliminary plat is a “Notations of proposed ownership, public or private” as required by Subsection (5).

The Subsection (7) requirement for “existing and general plans for utility systems, including ... electric” cannot reasonably be interpreted to include plans for an electrical transmission line which no one knows when or where it will be built. A reasonable reading of that subsection is that it requires depiction of the general utility systems intended to serve the PUD. The submittals meet that requirement.

While a PSE transmission right-of-way/line is arguably a “public facility” (even though privately owned), to the extent that Subsection (9) requires information which is not known, it becomes a subjective requirement impermissible as a completeness standard.

Were The Greens required to negotiate an easement alignment with PSE as a condition of having a complete application, control over completeness would be in the hands of a third party. The effect of the easement on the acceptability of the proposal is a substantive matter which can (and likely will) be discussed and resolved during the review of the merits of the proposal. It is not a completeness issue.

3. Section 16.10.070(F) SMC refers to “compliance with the criteria in ... SMC 16.10.110 (residential PUDs) i.e., tree preservation plan, lighting plan, traffic study, etc.” It is not an open-ended authority to turn PUD approval issues into completeness criteria. Section 16.10.110 SMC contains criteria for multiple-family, single-family, and manufactured home PUDs. Only those relating to single-family PUDs (Subsection (B)) are applicable to the proposed project. None of the approval criteria within that subsection can reasonably be interpreted to relate to the effect of an unlocated easement on the subject property.
4. The application as it existed on September 2, 2005, met the applicable completeness criteria under the two topics cited by the Planner. Therefore, the completeness AD must be reversed and the application determined to be complete as of that date.

Whether the PUD subdivision application as it existed on September 2, 2005, meets all applicable criteria for preliminary subdivision/PUD approval is not a question presently before the Examiner. This Decision stands only for the application’s completeness, not its compliance with approval criteria.

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

DECISION

Based upon the preceding Findings of Fact, Discussion, and Conclusions, the testimony and evidence submitted at the open record hearing, and the Examiner's site view, the Examiner **GRANTS** the L43-1 Greens, LLC appeal and **REVERSES** the September 8, 2005, Administrative determination. Application FPPUD05-001 was complete as of September 2, 2005.

Decision issued October 21, 2005.

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

NOTICE OF RIGHT OF RECONSIDERATION

This Decision, dated October 21, 2005, is subject to the right of reconsideration pursuant to SMC 2.26.120(D). 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 October 31, 2005 (which is the tenth 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 2.26.120(D) and 16.120.110 for additional information and requirements regarding reconsideration.

NOTICE OF RIGHT OF APPEAL

This Decision becomes final and conclusive as of the eleventh 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 2.26.120(D) 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."
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