

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

**RECOMMENDATION
REVISED AFTER RECONSIDERATION**

FILE NUMBER: FP-PUD-04-002

APPLICANT: RTG Limited Partnership, LLC

TYPE OF CASE: Preliminary Planned Unit Development subdivision (*Timber Ridge Estates*)

STAFF RECOMMENDATION: Approve subject to conditions

SUMMARY OF RECOMMENDATION: DENY Planned Unit Development without prejudice;
RETURN preliminary subdivision for correction

DATE OF RECOMMENDATION: May 23, 2005

INTRODUCTION

RTG Limited Partnership, LLC (RTG), P.O. Box 167, Startup, Washington 98293, seeks preliminary approval for *Timber Ridge Estates*, an 87 lot Planned Unit Development (PUD) subdivision for detached single family residential development. RTG filed the preliminary PUD subdivision application on November 19, 2004, at which time the City assigned file number FP04-001 to it. (Exhibit 1.1 ¹) City staff stated during the March 3, 2005, open record hearing that it subsequently changed the file number to the number noted above. (Testimony) The Sultan Planning Department (Planning) deemed the application complete as of December 10, 2004. (Exhibit 3.1) However, the application in fact was not complete; see Exhibit 11, Findings of Fact and Conclusions 8 – 11, and Findings of Fact and Conclusions 9 and 10, below.

The subject property is located approximately ¼ mile north of SR 2 on the east side of the Sultan Basin Road (SBR).

The Sultan Hearing Examiner (Examiner) viewed the subject property on February 28, 2005.

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.

The Examiner commenced an open record hearing on February 28, 2005, which was continued to and concluded on March 3, 2005. Planning and RTG gave notice of the hearing as required by the Sultan Municipal Code (SMC). (Exhibits 3.14 and 4)

The Examiner issued a Recommendation on March 9, 2005, Denying the PUD without prejudice and Returning the preliminary subdivision for correction. (Exhibit 11) RTG filed a timely Request for Reconsideration seeking the opportunity to respond to identified deficiencies. (Exhibit 12) The Examiner accepted the Request and set the matter for further hearing in an Order issued March 18, 2005. (Exhibit 13) Planning set May 12, 2005, as the date to reopen the hearing and gave the required notice. (Exhibit 16) The hearing was reopened and concluded on May 12, 2005.

As with the March 9, 2005, Recommendation, the Examiner has altered the usual structure of this Revised Recommendation. Normally, Findings of Fact and Conclusions are set forth in separate sections. In this Revised Recommendation, Findings of Fact and Conclusions are consolidated and grouped by topic. The Examiner hopes that this structure will facilitate better understanding of the remaining problems which prevent a favorable recommendation on this application.

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.

PRINCIPLES OF LAW

Authority

Preliminary subdivision and preliminary PUD applications require a pre-decision open record hearing before the Examiner who forwards a recommendation to the Sultan City Council (Council) for final action. [SMC 16.10.080, 16.28.320 - .340, and 16.120.050]

Review Criteria

The review criteria for preliminary subdivisions are set forth within SMC 16.28.330(A):

- A. The Hearing Examiner shall ... consider and review the proposed plat with regard to:
 1. Its conformance to the general purposes of the Comprehensive Plan and Planning Standards and Specifications as adopted by the laws of the State of Washington and the City of Sultan;
 2. Whether appropriate provisions are made ... for: drainage ways, streets, alleys, other public ways, water supplies and sanitary wastes, transit stops, parks and recreation, playgrounds, schools and schoolgrounds;

3. The physical characteristics of the subdivision site and may disapprove because of flood, inundation or swamp conditions. It may require construction of protective improvements as a Condition of Approval; and
4. all other relevant facts to determine whether the public use and interest will be served by the ... subdivision.

“The [PUD] district is an alternative to conventional land use regulations, combining use, density and site plan considerations into a single process.” [SMC 16.10.010(A)] The PUD is an “overlay zone”, applied “only after a site-specific and project-specific review.” [SMC 16.10.020 and .010(A), respectively]

The SMC provides for both Retail Center PUDs and several types of Residential PUDs. [SMC 16.10.030] The general review criteria for PUDs are set forth at SMC 16.10.090(B):

The hearing examiner recommendation shall include, at a minimum, findings and conclusions regarding the preliminary PUD’s compliance with the criteria for location and approval for the particular type of preliminary PUD listed in SMC 16.10.100 (retail PUDs), SMC 16.10.110 (residential PUDs). A preliminary PUD shall be recommended for approval if, together with reasonable modifications or conditions, the project is determined to comply with the requirements of these sections. A preliminary PUD shall be recommended for denial if, even with reasonable modifications or conditions, the project is determined to not comply with the requirements of these sections.

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

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

(2) During project review, a local government or any subsequent reviewing body shall determine whether the items listed in this subsection are defined in the development regulations applicable to the proposed project or, in the absence of applicable regulations the adopted comprehensive plan. At a minimum, such applicable regulations or plans shall be determinative of the:

- (a) Type of land use permitted at the site, including uses that may be allowed under certain circumstances, such as planned unit developments and conditional and special uses, if the criteria for their approval have been satisfied;
- (b) Density of residential development in urban growth areas; and
- (c) Availability and adequacy of public facilities identified in the comprehensive plan, if the plan or development regulations provide for funding of these facilities as required by [the Growth Management Act].

[RCW 36.70B.030]

Vested Rights

Subdivision and short subdivision applications are governed by a statutory vesting rule: such applications “shall be considered under the subdivision or short subdivision ordinance, and zoning or other land use control ordinances. in effect on the land at the time a fully completed application ... has been submitted” [RCW 58.17.033; see also SMC 16.28.480]

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.

ISSUES

Does the application meet applicable criteria for preliminary subdivision and preliminary PUD approval?

The Examiner concluded from the record established during the original hearing process that the *Timber Ridge Estates* application: Was incomplete; was based on incorrect calculation of critical area buffers; had not justified the extent of critical area buffer reduction proposed; involved an unknown amount of grading which might serve to further reduce critical area buffers; lacked evidence to show that all lots could meet the SMC 16.68.060(A)(1)(d) driveway grade limitation; failed to show compliance with the SMC 16.68.060 requirements regarding development on steep slopes; conflicted with the adopted Comprehensive Plan’s proposed alignment for the proposed Industrial Park Connector (a.k.a. Wagley’s Creek Road or North Connector Street); violated the SMC 16.10.110(B)(3)(b) requirement that perimeter buffers be comparable to and compatible with those of adjacent lands, especially along the south edge of the site; should not be granted approval under SMC 16.72.050 to pay a fee-in-lieu instead of providing on-site recreation facilities; contained insufficient information upon which to evaluate whether a partial SMC 16.72.050 fee-in-lieu

payment should be allowed; and apparently utilized an incorrect basis when determining entering sight distance for the northerly plat street intersection with SBR. (Exhibit 11)

This Revised Recommendation focuses on those same issues.

RTG submitted additional materials, including a slightly revised proposal (Exhibit 14A), which were the subject of the May 12th reopened hearing. (Exhibits 14, 14A – 14H, and 17) The preponderance of the evidence in the record now shows that all but two of the above deficiencies have been corrected: Compliance with SMC 16.68.060 and SMC 16.80.100 are still lacking.

For those reasons, the Examiner still cannot recommend approval of *Timber Ridge Estates* as currently proposed. However, since residential development of the general type and density proposed is clearly consistent with the applicable Comprehensive Plan designation and current site zoning (assuming critical areas regulations can be met), a recommendation for outright denial of the proposal would be inappropriate. The Examiner recommends that the Council afford RTG the opportunity to correct the deficiencies without having to file a whole new application (a process which would be a waste of everyone's time and money). Therefore, the Examiner again recommends that the *Timber Ridge Estates* PUD application be denied without prejudice and preliminary subdivision application be returned for correction.

FINDINGS OF FACT and CONCLUSIONS

Overview

1. The *Timber Ridge Estates* site is a nearly rectangular assemblage of parcels containing approximately 33 acres. The site is located on the east side of the SBR approximately ¼ mile north of SR 2. The site measures approximately 970 feet from north to south and 1,500 feet from east to west. (Exhibit 2)
2. The site is situated on a generally south facing slope which descends some 100 feet across the property. Most of the elevation drop occurs in the northerly 650 feet of the site. However, the slope is not uniform. Two easterly flowing streams, which join in the northeast quarter of the site, have incised ravines into the hillside, creating two distinctly separate, essentially parallel, west-east ridges stepping down the hillside. The site has been logged at various times in the past and exists in various stages of regrowth. The southerly third of the site is part of a relatively flat terrace and presently contains two single family residences and two accessory buildings. Other than some old logging roads, the remainder of the site is undeveloped. (Exhibits 1.3, 1.6, and 14A)
3. The site is bordered on its north by a small, private landing strip ("Sky Harbor Airport") and on its south, in part, by a heavy equipment storage yard. (Exhibit 2 and site visit)

4. RTG originally proposed to subdivide the site into 87 lots for detached single family residential development. (Exhibit 2) RTG submitted a slightly revised 85 lot proposal during the reconsideration process. (Exhibit 14A) (Unless stated expressly to the contrary, the evaluation in this Revised Recommendation is based solely upon Exhibit 14A and its associated exhibits, not the original proposal.) The major changes between the original proposal and the current proposal are the replacement of two lots with small recreation tracts, provision of a 20 foot wide buffer along the south property line, and extension/expansion of the proposed trail system.

Eighteen of the lots and one recreation tract would be served by an 800 foot long cul-de-sac located on the northern ridge. The remainder of the lots and the other recreation tract would be accessed via a system consisting of a through street traversing the south side of the southern ridge and terminating at the southeast corner of the site, a 450 foot long cul-de-sac, and a very short cul-de-sac. A loop trail is proposed to be located on the southern terrace portion of the site. Connecting trails would link the upper road with the lower road and the lower road with the loop trail. Approximately 58% of the site would be retained as open space (including the storm drainage detention pond). Average lot size would be 5,112 square feet. RTG estimates that buildings will cover approximately 65% of each lot due to the small size of the lots. (Exhibits 7, 14, 14A, and 14C)

5. The site lies within the area of the Industrial Park Master Plan Subarea Plan portion of the City's Comprehensive Plan (IP Subarea Plan). The IP Subarea Plan has been incorporated into both the 1994 and 2004 editions of the Comprehensive Plan. The IP Subarea Plan designates the site, the area to its north, the area to the immediate east, and the area adjacent to the easterly quarter of the south property line for residential development. The area adjacent to the remainder of the south property line is designated for industrial development. (Exhibit 3 and official notice)
6. The site is zoned Moderate Density residential (MD). (Exhibit 3) The MD zone allows single family detached dwellings as permitted uses and attached, duplex, zero lot line, and multiple family dwellings as conditional uses. [SMC 16.12.020] The MD zone allows a maximum of 6 single-family detached, 8 duplex, or 10 multi-family dwelling units per acre. Bulk regulations for single family detached dwelling lots in the MD zone are 7,200 square feet (SF) minimum lot size, 60 feet minimum lot width, 80 feet minimum lot depth, 20 feet minimum front setback, 5 feet minimum total 15 feet minimum side setback, 20 feet minimum rear setback, 30 feet maximum building height, and 35% maximum lot coverage. [SMC 16.12.020(C), Table] Lot area, dimensions, lot coverage, and setbacks may be relaxed in a PUD. [SMC 16.10.120] The proposed use of this site is consistent with MD zoning, as density is proposed to be approximately 2.6 dwelling units per acre (85 homes over 33.01 acres). (Exhibit 14A)
7. *Timber Ridge Estates* is vigorously opposed by two residents who rely on SBR for access to their properties (Heydrick and Storm). Heydrick and Storm argue that the site's geology is not satisfactory for the proposed development, that critical areas are not being protected as required by the SMC, that

the SBR intersections with the proposed interior streets (especially the northern street) will be unsafe, and that the proposal fails to comply with SMC requirements for PUDs. One resident (Fallgatter) questions application consistency and provisions for recreation facilities. (Exhibits 5, 6, 10, 19, and 20 and testimony)

8. Statutory rules of construction are applied to the interpretation of municipal codes. Statutory rules of construction hold that the legislative body intended to say what it actually said, and that absent ambiguity, the enacted text means exactly what it says. Differences in terms are indicative of differences in meaning. Words and terms which are defined must be used as defined (unless context clearly requires some other meaning). Every effort must be made to accord meaning to each provision of an enacted code; code provisions are to be interpreted to result in a harmonized whole.

Application Completeness

9. Section 16.10.070 SMC establishes the minimum contents for a PUD application. Subsection (E)(3) provides, in part, as follows:

Site plan and supporting maps necessary to show the major details of the proposed PUD ... are required with a PUD application, containing the following minimum information on one or more drawings: ... 3. The location, floor plans and building elevations, floor area size and building envelopes of all existing and proposed buildings, structures and other improvements, including maximum heights, types of dwelling units, typical lot landscaping plans ...;

(Emphasis added)

10. RTG submitted building elevations, floor plans, and typical landscape plans which are consistent with the proposed site design during the reconsideration process. (Exhibits 14D and 14E) The application is now complete.

Critical Area Treatment

11. The northerly 650± feet of the site exhibits very steep slopes associated with the two on-site streams. RTG states only that slopes range from 20% to 40% on the site. (Exhibit 1.6) RTG has provided no slope categorization map. Slopes can be measured from Exhibit 2, Sheet 3, or Exhibit 14A. Slopes along the north side of the north stream's ravine range generally from 25% to 40%; those on the south side of that ravine are rather uniformly in the area of 40%. The ridge between the two streams is rather narrow but relatively flat. That ridge drops off to the south into the southern stream's ravine at slopes of 35% to 40%. The south side of the south ravine exhibits slopes in the 30% range. The southern ridge has no flat top. Rather, it immediately slopes down to the southern terrace at 25% to 30% slopes. (Exhibit 14A)

12. The two on-site streams are tributaries to Wagley's Creek, which flows from east to west between the site and SR 2. The northerly tributary is a Type 3 stream; the southerly tributary joins the northerly tributary near the northeast corner of the site. An improperly placed culvert near the mid-point of the southerly tributary, apparently dating from some of the prior logging, divides that stream into two distinctly different reaches: The portion upstream (west) of the culvert is a Type 5 stream; the downstream portion is a Type 3 stream. Two improperly placed culverts in the northern stream block fish passage: One just upstream of the confluence with the southerly stream; the other just east of a lengthy culvert under SBR. (Exhibits 1.3, 3.12, 14A, and 14F)
13. Anadromous fish inhabit Wagley's Creek and its on-site tributaries. Wagley's Creek is critical habitat for Chinook salmon, a specie protected under the Endangered Species Act (ESA). Coho salmon, a candidate specie under the ESA, inhabit Wagley's Creek and both on-site tributaries. (Exhibits 1.3 and 3.5 and IP Subarea Plan, Stream and Wetland Reconnaissance Report)
14. Two wetlands exist along the toe of the southern slope on the northern edge of the terrace. Wetland A, a large (94,830 SF or 2.2 acre) Category 3 palustrine wetland, generally follows the toe of the slope across the north edge of the terrace. Wetland B, a much smaller (640 SF) Category 3 palustrine wetland, is located to the east of the larger wetland and about 75 feet west of the Type 3 stream, also at the toe of the slope. ² Wetland A is hydrologically associated with Wagley's Creek; nothing in the record clearly states whether Wetland B is hydrologically associated with the off-site portion of the Type 3 stream. (Exhibits 1.3, 3.12, 5.19, and 14F)
15. The site exhibits two different geologic formations. The steep slopes are composed of dense clay formations while the terrace is composed of outwash materials. The evidence indicates some slope instability, particularly in the northern ravine, but it is impossible to determine from the evidence exactly where and to what extent that instability exists. (Exhibits 1.6, 3.7, and 3.9)
16. The SMC regulates development on steep slopes and development affecting wetlands and streams through entirely separate code chapters. Steep slopes (those with a natural gradient in excess of 20%) are regulated under Chapter 16.68 SMC. [SMC 16.68.020] All streams meeting the definition at SMC 16.150.190(50) together with all riparian wetlands ³ (regardless of size), all Category 1

² Wetland B is not Wetland 23 as enumerated in the Comprehensive Plan. Wetland 23 is depicted in the Comprehensive Plan as located immediately west of an existing sewer manhole at the north end of a sewer stub. (Exhibit 5.19) That sewer stub and manhole are clearly denoted on Exhibit 14A as being some 170 feet southwest of Wetland B. There is a wetland immediately adjacent to that sewer manhole: The eastern end of Wetland A. And, just as stated in the Comprehensive Plan, that wetland lobe is connected to the bulk of Wetland A by a narrow band of wetland. Wetland 23 is part of Wetland A. (Exhibits 14A and 14F)

³ Riparian wetlands, by definition, are wetlands either "located within 100 feet of the ordinary high water mark of a river or stream [which are not] hydrologically isolated from the river or stream" or "within or continuous [*sic*] to any 100-year floodplain of a river or stream." [SMC 16.150.180(19)] (The word "continuous" is most likely a typographical error

wetlands, non-riparian Category 2 and 3 wetlands larger than 5,000 SF in area, and non-riparian Category 4 wetlands larger than 10,000 SF are regulated under Chapter 16.80 SMC. [SMC 16.80.030] The requirements within Chapter 16.68 SMC stand wholly separate from those within Chapter 16.80 SMC.

17. Approval of development on regulated steep slopes requires four findings:

1. The site is physically suitable for the design and siting of the proposed development. The proposed development will result in minimum disturbance of sensitive areas.

2. The grading and excavation proposed in connection with the development will not result in soil erosion, silting of lower slopes, slide damage, flooding, severe scarring or any other geological instability or fire hazard that would affect health, safety and general welfare. Disturbed slopes are to be planted with native and self sufficient vegetation.

3. The proposed development retains the visual quality of the site, the aesthetic qualities of the area and the neighborhood characteristics by utilizing proper structural scale and character, varied architectural treatments, and appropriate plant material.

4. The proposed development is in conformance with the adopted comprehensive plan and the zoning district in which it is located.

[SMC 16.68.040(D)]

18. The SMC requires development on steep slopes located on property zoned MD to “result in minimum disturbance of sensitive areas.” [SMC 16.68.060(A)] Roads are required to “follow the natural contours to avoid excessive cut and fill” and to use narrower-than-normal rights-of-way. [SMC 16.68.060(A)(1)⁴] Development design is “to adapt to the natural hillside topography, terrain, and vistas” and “[a]llow for different lot shapes and sizes, with the prime determinant being the natural terrain. Encourage split pads in large development projects.” [SMC 16.68.060(A)(4) and (A)(4)(c)] Driveway grades above 15% are not allowed. [SMC 16.68.060(A)(4)(d)] “Significant hillsides” (“those areas unique to the particular site that deserve special attention and design

which should be “contiguous.” The possible error has no effect on this case since association with floodplains is not at issue.)

⁴ This section also indicates that streets “shall not be parallel to one another to avoid a ‘shelving’ effect.” Heydrick and Storm argue that RTG’s proposed design conflicts with this code requirement. (Exhibits 5 and 6) While the northerly cul-de-sac is generally parallel with the southerly street, such an alignment is essential if the streets are to follow the natural contours of the land. Any significant deviation from the ridge line alignment would require the streets to plow up and down the steep slopes, clearly contrary to the guidance of SMC 16.68.060(A)(1). To the extent that terrain conditions on this site lead to a “Catch 22” code compliance situation, the over-riding intent of the code (to minimize steep slope disruption) must prevail. The street alignment aspect of *Timber Ridge Estates* does not conflict with the SMC.