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December 11, 2014

Phil A. Olbrechts
Olbrechts & Associates, PLLC
18833 – 74th Street Northeast
Granite Falls, WA 98252-9011

Re: The Villages Preliminary Plat Phase 2 Plat C
No. PLN13-0027

Dear Mr. Olbrechts:

Kristen Bryant has asked my firm to briefly comment on a Memorandum dated October 8, 2014, submitted by the Cairncross/Hempelman Law Firm. The Memorandum is Exhibit 43. Ms. Bryant will ask that the record be held open to allow my firm to submit more detailed comments. Five working days is sufficient.

We address three questions: (1) proper definition and application of "adequate provision" standards for plat approval; (2) the correct interplay of Comprehensive Plan policies and applicable development regulations in the context of a project application; and (3) the limits of development agreements in terms of applying required criteria for a plat approval.

ANALYSIS

(1) Adequate Provision:

The Applicant asserts that approval of a preliminary plat without issuance of a water certificate, but merely a condition that - for final plat approval - the applicant must show availability of water is legally sufficient; we disagree.

The Applicant cites to *Knight v. City of Yelm*, 173 Wn.2d 325, 267 P.3d 973 (2011). In that case, after a hearing examiner granted Tahoma Terra preliminary plat approval, JZ Knight, a nearby property owner and senior water rights holder, appealed to the Yelm City Council (City Council), arguing the hearing examiner's conditional approval of the plats erroneously allowed the developers and the City to delay showing adequate water provisions for the subdivision until the building permit stage.

The court reviewed the two step subdivision approval process: preliminary and final plat approval:

[ ]

> At the preliminary plat approval stage, the local legislative body with authority to approve a plat must " inquire into the public use and interest proposed to be served by the establishment of the subdivision" and determine " [i]f appropriate provisions are made for ... the public health, safety, and general welfare ... [and] potable water supplies...." RCW 58.17.110(1). " A proposed subdivision ... *shall not be approved* " unless the legislative body " makes written findings that: (a) Appropriate provisions are made for the public health, safety, and general welfare and for ... potable water supplies ...; and (b) the public use and interest will be served by the platting of such subdivision...." RCW 58.17.110(2) (emphasis added). "When the legislative body ... finds that the subdivision proposed for final plat approval conforms to all terms of the preliminary plat approval, and that said subdivision meets the requirements of this chapter, other applicable state laws, and any local ordinances adopted under this chapter ..., it shall suitably inscribe and execute its written approval on the face of the plat." RCW 58.17.170. Once the local legislative body approves a final plat, the landowner may apply for a building permit

The court continued its analysis stating that "[a] preliminary plat application is meant to give local governments and the public an approximate picture of how the final subdivision will look. It is to be expected that modifications will be made during the give and take of the approval process," quoting *Friends of the Law v. King County,* 123 Wash.2d 518, 528, **869 P.2d 1056** (1994). The applicant must make a threshold showing that the completed development is able to comply with applicable zoning ordinances and health regulations. *See id.; Topping v. Pierce County Bd. of Comm'rs,* **29 Wash.App. 781**, 783, **630 P.2d 1385** (1981).

With due respect to the Applicant, and its counsel, the approach suggested simply begs the question as to compliance with criteria for preliminary plat approval. In this regard, the preliminary plat process "... is not merely an insignificant stage of the proceedings without real consequence." *Loveless v. Yantis,* 82 Wash.2d 754, 759, **513 P.2d 1023** (1973). Any modifications included in a conditional approval of the preliminary plat are binding on the party seeking approval and the local decision-making body granting conditional approval. *Id.* at 761.

A local decision-making body cannot conditionally approve a preliminary plat and then disapprove a final plat application for a project that conforms to the conditions of the preliminary approval. *Id.* ***The failure to challenge environmental issues at the preliminary plat stage could result in decisions by the local land use authority that have a " binding impact" on interested parties without their consent or participation.*** *Id.* at 759 (emphasis added).

The Examiner should take into account the right of the public to meaningfully comment and the right to appeal. Under the Applicant's approach, the Examiner would not make an adequacy finding, but defer it.

As the court noted, "If the decision by the City Council, the body with the sole authority to approve Tahoma Terra's final plat approval application under RCW 58.17.100, forecloses further review of the City's evidence of adequate water supply, then it has denied Knight any opportunity to challenge the evidence and the potential threat to her water rights."

Chapter 17.15 of the Black Diamond Municipal Code is addressed to Preliminary Plat Approval Criteria. This Section does not allow the City to delay inquiry concerning appropriate provision of water until the final plat approval stage.

> **17.15.020 Approval criteria.**
>
> A.
>
> The following criteria must be met to approve any subdivision. The criteria may be met by conditions imposed by the hearing examiner as conditions of approval:
>
> ...
>
> 3. The public use and interest is served by the establishment of the subdivision and dedication. In considering this criteria, ***it shall be determined if appropriate provisions are made for all relevant matters, including, but not limited to***, the public health, safety and general welfare, open spaces, storm drainage ways, streets, alleys, other public ways, ***water supplies***, sanitary wastes, parks, playgrounds, sites for schools and school grounds...

The Examiner can note that the "appropriate provision" requirement is mandatory. Deferring a showing of adequacy is not compliant.

(2) Development Regulations Trump the Comprehensive Plan:

As set forth in RCW 36.70B.030(1), "Project Review–Required elements–Limitations, 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") (emphasis added.) *See also* RCW

36.70B.040(1) (Consistency of a project is controlled by the development regulations as to the type of land use permitted at the site, including conditional and special uses and project density) and Legislative Intent and Findings Notes, RCW 36.70B.030).

RCW 36.70A.030(4) defines a comprehensive plan as a "generalized coordinated land use policy statement of a governing body or municipality." The Comprehensive Plan is intended to establish broad policies and goals from which the community can craft the detailed regulatory framework required by the GMA. See RCW 36.70A.040(3). A comprehensive plan does not replace zoning regulations, RCW 36.70B.030(1).

This is explained in *Woods v. Kittitas County*, 162 Wn.2d 597, 608-09, 174 P.3d 25 (2007):

> The legislature enacted the GMA in 1990 to address concerns related to "uncoordinated and unplanned growth" in the State and "a lack of common goals expressing the public's interest in the conservation and the wise use of our lands." RCW 36.70A.010. The GMA requires counties to develop a "'comprehensive plan,' " which sets out the "generalized coordinated land use policy statement" of the county's governing body. Former RCW 36.70A.030(4) (1997). In essence, "[t]he comprehensive plan is the central nervous system of the GMA. It receives and processes all relevant information and sends policy signals to shape public and private behavior." Richard L. Settle, *Washington's Growth Management Revolution Goes to Court,* 23 Seattle U. L. Rev. 5, 26 (1999).
>
> Along with a comprehensive plan, the GMA requires counties to adopt development regulations that are "consistent with and implement thecomprehensive plan." RCW 36.70A.040(3)(d), (4)(d). " 'Development regulations' " include, but are not limited to, zoning ordinances. Former RCW 36.70A.030(7) (1997). These regulations must be adopted within six months from the time of the comprehensive plan's adoption. WAC 365-195-810(1)
>
> Putting this all together, the *Woods* Court summarized:
>
> Comprehensive plans serve as " 'guide[s]' " or " 'blueprint[s]' " to be used in making land use decisions. *Citizens for Mount Vernon v. City of Mount Vernon,* 133 Wash.2d 861, 873, 947 P.2d 1208 (1997). Thus, a proposed land use decision must only *generally conform,* rather than strictly conform, to
> the comprehensive plan. *Id.* A comprehensive plan does not directly regulate site-specific land use decisions. *Id.; Viking Props.,* 155 Wash.2d at 126, ¶ 31, 118 P.3d 322. Instead, local development regulations, including zoning regulations, directly constrain individual land use decisions. *Viking Props.,* 155 Wash.2d at 126, ¶ 31, 118 P.3d 322. Such regulations must be consistent with the comprehensive plan and be sufficient in scope to

carry out the goals set forth in the comprehensive plan. RCW 36.70A.040(3)(d), (4)(d); WAC 365-195-800(1).

Woods, 162 Wn.2d at 613.

Similarly, the court in *Lakeside Industries v. Thurston County*, 119 Wn. App. 886, 894, 83 P.3d 433 (2004) ruled, a specific zoning ordinance trumps inconsistent provisions of a comprehensive plan. There, compliance with a comprehensive plan was required by the Code, but the court ruled that the County could not "... invoke the [comprehensive] plan's general purpose statements to overrule the specific authority granted by the zoning code to manufacture asphalt as an accessory use to mining." It ruled that the Board's decision "violates the rule that specific zoning laws control over general purpose growth management statements, and fails to provide meaningful standards for review of a county decision to deny a permit. Citing *Sunderland Family Treatment Servs. v. City of Pasco*, 127 Wn.2d 782, 797, 903 P.2d 986 (1995). *See also Chinn v. City of Spokane*, 293 P.3d 401, 404 (Wash.App. Div. 2 2013)("Where one provision treats a subject in general terms and another treats the same subject in a more detailed way, the specific prevails over the general absent a contrary legislative intent").

In summary, the foundation for project review is based on the Zoning Code and other applicable development regulations, not the Comprehensive Plan.

(3) A Development Agreement Cannot Change Applicable Law:

RCW 36.70B.170 states:

> A development agreement shall be consistent with applicable development regulations adopted by a local government planning under chapter 36.70A RCW.

As set out above, we do not believe "adequate provision" can be met by imposing project conditions to the effect that final plat approval will not issue without meeting concurrency and adequate provision requirements. These are requirements for preliminary plat approval that cannot be deferred.

Very truly yours,

DENNIS D. REYNOLDS LAW OFFICE

Dennis D. Reynolds

DDR/klh

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