

1 **BEFORE THE HEARING EXAMINER FOR THE CITY**
2 **OF PORT TOWNSEND**

3 Phil Olbrechts, Hearing Examiner

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RE: Pods at the Vineyard Preliminary Plat/Plat Alteration LUP22-019	FINDINGS OF FACT, CONCLUSIONS OF LAW AND FINAL DECISION
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8 **OVERVIEW**

9 Davos Capital LLC and Steve and Ann Raab have applied for approval of a 16-lot preliminary
10 plat/plat alteration for the single-family residential development of an approximately three-acre
11 site located between 35th and 32nd Streets, west of the Rosewind Planned Unit Development
(PUD). The application is approved subject to conditions.

12 Neighbors have been very active in detailing concerns with the preliminary plat. Some of those
13 concerns were addressed in revisions to the preliminary plat that City staff found necessary to
14 correct application deficiencies. The one outstanding issue of noncompliance was safe walking
15 conditions to and from schools. Such a requirement is specifically called out in state statute as
16 well as the City's preliminary plat requirements. See RCW 58.17.110 and PTMC 18.16.060A
17 (2). A couple commentators raised concerns about poor visibility and inadequate walking areas
18 on 35th Street that were not fully addressed by the Applicant and staff. The Applicants very
likely cannot be legally required to construct any off-site sidewalks to address such deficiencies
if they exist¹. However, the City may have the legal authority to require signage or a widened
shoulder pathway to make the route safer for school children as is commonly required in other
jurisdictions. A condition of approval has been added to require the Applicants to provide a
written assessment of walking conditions along 35th. City staff may impose proportionate
mitigation requirements as consistent with state and federal takings law.

19 A major issue for the Applicant was staff recommended conditions requiring a homeowners
20 association (HOA). At hearing the Applicant and staff came to agreement on avoiding an HOA
21 for some of the recommended conditions. However, some other conditions requiring an HOA
22 were left unaddressed. Since the City and Applicant have shown progress in resolving the need
23 for an HOA, the staff recommended conditions of approval on those outstanding issues have
24 been modified to allow HOA responsibilities to be resolved during site plan review. The
25 division between City and HOA responsibilities for maintenance and repairs is not found to be
26 materially germane to the preliminary plat criteria, which are focused upon appropriate
infrastructure and minimizing impacts.

24 ¹ Under state/federal constitutional provisions and state statute the Applicant cannot be required to fix
25 existing drainage problems, but rather can only be made to prevent creating new problems with its
26 proposed development. See RCW 82.02.020; *Burton v. Clark County*, 91 Wn. App. 505 (1998)
overruled on other grounds, *Yim v. City of Seattle*, 451 P.3d 675 (2019).

1 Some commentators asserted that the proposal should provide for open space and affordable
2 housing. As outlined in the findings and conclusions below, the City is barred by the state and
federal constitution from mandating those amenities for this preliminary plat.

3 The staff report identifies that the Applicant can selectively vest to parking standards adopted
4 after the vesting of the plat application. As outlined in Conclusion of Law No. 5 below, it is
highly legally questionable whether selective vesting should be authorized. The matter can be
5 resolved during site plan review. The proposed lots are large enough to accommodate required
off-street parking if the City determines selective vesting is not legally authorized for this plat.

6 This plat review process is somewhat unique because neighbors were exceptionally diligent in
7 pointing out what they saw to be numerous deficiencies in engineering design. It appears that
those comments led to some project revisions since the continued hearing and may have
8 assisted Public Works in addressing some engineering issues earlier than it would otherwise
have done. However, it should be recognized that this is preliminary plat review. As previously
9 mentioned, the focus of preliminary plat review is to ensure that the plat design provides for
appropriate infrastructure and that impacts to the community and the environment are
10 mitigated. The preliminary stage of review is succeeded by more detailed engineering review,
which then leads to final plat review where the Applicant must demonstrate that the final
11 engineering design is consistent with the City's public works and engineering standards. Given
this process, preliminary plat review is conceptual in nature and the Applicant must establish
12 that the proposed layout of lots and streets is sufficient to accommodate the public works and
engineering standards applicable to the project. Commentators may very well have raised some
13 valid concerns over the depth/gradient of sewer lines and the like, but public works has found
that any such discrepancies can be addressed during final engineering review within the layout
14 of streets and roads proposed by the Applicant. In the absence of any evidence to the contrary,
the plat is found to sufficiently conform to the standards quoted in this decision to move
forward to final plat review.

15 Many of the neighbors' concerns are already addressed by the City's development standards or
16 cannot be addressed due to legislative and constitutional limitations. It should be recognized
that the City of Port Townsend is required to accommodate urban densities by the Washington
17 State Growth Management Act. The City's density standards, to which the proposal conforms,
is a response to that mandate. In addition, the City has adopted a comprehensive set of
18 development standards that address all the concerns typically raised by neighbors to new
development, such as street width, parking and stormwater controls. Those types of standards
19 have evolved over decades amongst the couple hundred cities within Washington State. Given
this context, it should not be surprising that staff's response to many of the concerns raised by
20 neighbors is "the project meets the City's development standards." Finally, as noted
previously, developers can only be made to fix the problems they create and only in a manner
21 that is proportionate to their impact. *See, e.g., Burton v. Clark County*, 91 Wn. App. 505 (1998)
overruled on other grounds, *Yim v. City of Seattle*, 451 P.3d 675 (2019). The City's ability to
22 fix existing alleged deficiencies in Kuhn Street and to require off-site improvements such as
sidewalks for school children is limited because of these constitutional constraints.

23 24 **TESTIMONY**

25 A computer-generated transcript accompanies this decision as Appendix A. The transcript is
provided for informational purposes only.

26 **EXHIBITS**

The August 22, 2024 staff report in addition to attachments A-I identified at page 31 of the staff report were admitted during the hearing as Exhibit 1. The following exhibits were also admitted into the record:

Exhibit J: April 27, 2024 letter from Applicants

Exhibit K: April 29, 2024 email comment from Sarah Stowell

Exhibit L: May 16, 2024 responses to Stowell from Applicant

FINDINGS OF FACT

Procedural:

1. Applicant. The Applicants are Greenpod Development, c/o Anne & Steve Raab, 606 Roosevelt St., Pt. Townsend, WA 98368 and Davos Capital LLC, c/o Dave Holland, PO Box 9150, Santa Fe, NW 87504.

2. Hearing. A virtual and in-person hearing was held on April 29, 2024 in the Port Townsend Council Chambers. The April 29, 2024 is a continuation of the hearing originally scheduled for August 19, 2022, which was continued due to defects in hearing notice. The record was left open through May 2, 2024 to provide an opportunity for Sandra Stowell to provide written comments and a City/Applicant response since Ms. Stowell's hearing testimony was inaudible. The Applicant was permitted to respond through May 18, 2024 at which point the record was closed.

Substantive:

3. Site and Proposal Description. Davos Capital LLC and Steve and Ann Raab have applied for approval of a 16-lot preliminary plat/plat alteration for the single-family residential development of an approximately three-acre site located between 35th and 32nd Streets, west of the Rosewind PUD. The project site is already developed with one single-family residence that will remain after development.

The proposed lots range in size from 5,007 to 10,900 square feet (sf) with most being sized between 7,000 to 7,500 sf. Most lots will gain vehicular access from a new 50' wide right-of-way (ROW) dedication with road improvements for Landes St. New Landes St. runs south from existing 35th St. and the Plat's north boundary to an existing section of Landes St. at the Plat's south boundary. As proposed, newly dedicated Landes St. will be improved with a 16' wide paved road and alternating sides of city standard concrete sidewalk and on-street parking.

Two (2), or as many as three (3), lots will gain vehicular access via Kuhn St. or Kuhn St. in concert with the 33rd St. ROW. Kuhn St. is a city-maintained paved roadway while 33rd St. is considered an unopened ROW. As a corner lot, proposed Lot C3 will be able to gain access via either 35th St. or Kuhn St. Lot C5 and the existing home it contains already gain access via driveways onto both Kuhn and 33rd Sts.

4. Surrounding Uses: The area is currently characterized by single-family, detached residences. 1Zoning for most surrounding lands is also R-II (Medium Density Single Family). There are two (2) nearby residential PUD's; the Rosewind PUD and the EcoVillage PUD.

1 5. Adverse Impacts. As mitigated, there are no discernible adverse impacts that will be
2 created by the proposal. The project is SEPA exempt. Impacts are more specifically addressed
as follows:

- 3 A. Compatibility. The proposal is compatible with surrounding development. The
4 proposal is for single-family detached development, which is the same type of
5 development surrounding the project site. The proposed density conforms to the
zoning designation, which also applies to most surrounding properties. In this regard,
6 the density is also found to be compatible with surrounding uses.
- 7 B. Critical Areas. There are no critical areas at the project site. Staff and applicant have
found no critical areas at the project site and there is no evidence to the contrary.
- 8 C. Tree Preservation. The proposal conforms to the City's tree protection standards and
9 thus is found to make adequate provision for tree preservation. Under the City's tree
10 retention standards, all preliminary plat applications require the concurrent submittal,
11 review and approval of a preliminary Tree Conservation Plan (TCP). Each preliminary
12 TCP must be designed consistent with the city's Tree Conservation code. A TCP was
submitted for this project showing existing trees and those planned for removal (Ex.
13 B). Tree standards for an R-II zone subdivision are 40 tree units per 40,000 square feet
14 of area. Projects can achieve their required tree standard either by retaining on-site
15 trees or by planting new trees. Based on the lot sizes proposed, a minimum of 118 tree
16 unit credits is normally required for the Pods TCP. The Applicants propose 72 tree
17 unit credits as outlined in Ex. B, Sheet A4.

18 The Applicants seeks approval of an Alternative TCP "to maintain and enhance
19 existing prairie landscape..." The city's Tree Conservation code recognizes that some
20 properties and their uses may conflict with the planting of dense tree stands. These
21 may involve areas of town that historically have had few trees or are dependent upon
open space and solar access. In these circumstances, an Alternative TCP that deviates
22 from the code's strict retention and/or replanting standards may be proposed. As an
23 alternative to tree preservation, the Applicants propose a significant amount of prairie
24 preservation along proposed Landes Street and vacated 33rd street.

25 As an alternative to the required 118 trees, staff is recommending that the Examiner
26 accept that a minimum of one (1) tree unit credit (t.u.c.) be planted or retained on each
lot that is <6,000 sf in size and two (2) t.u.c. be retained or planted on each lot that is
>6,000 sf in size as part of the building permit review process. An exception to the
Plat's TCP requirements is warranted for Lot C5 as it is already developed. Future
uses of Lot C5 will remain subject to the city's Tree Conservation or other landscaping
requirements in effect at the time a development permit is sought.

Staff's finding that protection of the prairie grass merits a reduction in required tree
credits isn't entirely clear. Staff asserts in the staff report that the project area has no
critical areas, which would include protected prairie grass. The issue of prairie grass
came up in another land use application, the PT Meditation Center located at the corner
of 32nd and San Juan Avenue, LUP21-034. For that application the Washington State
Department of Fish and Wildlife (WDFW) had advised that it considered the prairie
grass of that area to be protected under the City's critical areas ordinance. Prairie grass
is listed as a "priority habitat" by WDFW and was at the least considered by WDFW
as protected under the City's regulations because of the grass's association at the
project site with the Taylor's Checker Spotted Butterfly. Staff in the LUP21-034

1 application found that the protected status of the prairie grass was ambiguous and
2 requested a condition of approval, which was granted, requiring further assessment.
The results of that assessment are not in the record.

3 It's unknown what conclusions staff has reached as to the protected status of prairie
4 grass and whether or not the subject plat site meets them. As far as can be ascertained
5 from the record of this proceeding, staff does not consider the prairie grass to be
6 protected by its critical areas ordinance but does find that the grass has sufficient value
7 to justify protection in lieu of tree preservation. The area reserved for prairie grass in
8 the Applicant's plat does appear to be sufficient to otherwise accommodate the deficit
9 of 46 tree credits in the Applicant's tree conservation plan. In any event, there is no
evidence contrary to that of the staff's expertise that was exercised in reaching the
conclusion that protecting the prairie grass as proposed by the Applicant provides
aesthetic and environmental benefits that are equal to or greater than the deficit in
compliance with tree retention standards. Given the experience of staff in addressing
prairie grass (as demonstrated in LUP21-034) and tree conservation requirements, the
staff recommendations regarding the Applicant's alternative tree conservation plan is
found determinative in the absence of any evidence to the contrary.

- 10 D. Construction Noise. The proposal is adequately mitigated against the impacts of
11 construction noise by the City's noise and development standards. At hearing, some
12 concerns were raised about construction noise, with the request made that no
13 construction work be authorized during weekends. The City's noise and development
14 standards cover construction noise and there is nothing unique about the project that
15 suggests that the proposal will involve noises not anticipated by those regulations. As
16 testified by staff, for installing the infrastructure, construction hours are limited to
Monday through Friday, seven to seven and prohibited on weekends and holidays,
unless they get written permission from the PCP department to construct and for cause.
6. Infrastructure. The proposal will be served by adequate and appropriate infrastructure.
Infrastructure impacts are specifically addressed as follows:

- 17 A. Water and Sewer. The proposal will be served by adequate and appropriate water and
18 sewer.

- 19 1. Water. New public water mains will be installed south of 35rd St. in the newly
20 aligned Landes St. and eastward in 33rd St. to connect with an existing main
21 in the Kuhn St. ROW. Final water system improvements and design will be
22 determined by Public Works staff during review of the subsequent Street and
23 Utility Development permit (SDP) review. Private service connections and
24 side service lines leading to a meter box will be identified and installed as part
25 of the SDP process. Fire flow is available adjacent to the site via water main
26 extensions within the site. Fire hydrants will be installed in accordance with
the City's EDS.
2. Sewer. Sanitary sewer service can be provided to PAV via low-pressure
improvements in Landes and 33rd Sts. Individual lots will be connected to a
4" force main via individual on-site pumps. The city has agreed to assume
responsibility for the force main but all other sewer-related improvements are
an ongoing responsibility of the individual lot owner(s). Any public ROW
used for private utilities may be required to acknowledge responsibility for
their ongoing maintenance. Final design and responsibilities for the low

pressure sewer infrastructure will be determined as part of the subsequent SDP process and shown on the final Plat.

Douglas Milholland raised several highly detailed concerns and questions about sewer infrastructure design. Mr. Milholland's concerns have been addressed to the extent necessary for the conceptual level of approval involved in preliminary plat review. The Applicant has apparently revised its design in response to Mr. Milholland's comments and the staff report notes that Public Works staff are satisfied with the revisions.

Even if there are remaining problems with the sewer design, the issues raised by Mr. Milholland are only within the scope of preliminary plat review if they are integral to the conceptual plat design under review. Engineering design proposed during preliminary plat review is often revised as necessary during the civil review for final plat approval to conform to unanticipated on-site conditions or to remedy errors in data and/or calculation. It's unclear and there is no evidence that the design issues raised by Mr. Milholland would materially affect the overall design of the plat if any revisions had been necessary, i.e. if any revisions would affect the layout of the lots or proposed locations of streets. For example, the proposed depths and grade of the sewer main are only directly pertinent to preliminary plat review if correction of the errors would potentially require a re-design of lot layout or street location

- B. Drainage. The proposal will be served by adequate and appropriate drainage facilities. No impact from drainage is anticipated. The submittal includes a preliminary engineered drainage plan and report (Ex. D). City stormwater regulations, PTMC 13.32.010, pursuant to state mandate, require the applicant's stormwater plan to establish that post development off-site flows onto adjoining properties (other than Puget Sound) generated by the proposal not exceed those from pre-developed, forested conditions. The stormwater plans have established to the satisfaction of staff that the proposal can meet these types of standards. The design includes rain gardens in ROW to address stormwater flows. Rain gardens have also been conceptually sized for each individual lot based on allowable lot coverage.

During the hearing the Applicant and City staff disagreed over whether an HOA was necessary to assume infrastructure responsibilities as recommended in the staff recommended conditions of approval. City staff and Applicant came to a compromise on rain garden and side sewer responsibility, but did not appear to have covered all of the maintenance responsibilities addressed in the recommended conditions. To the extent that some issues may be unresolved, the conditions have been modified to have them decided during site plan review.

- C. Transportation. The proposal is found to provide for adequate and appropriate streets since the preliminary design is found to conform to the City's street standards as determined by the City's public works staff. More precise assessment and conformance will be required for final plat approval.

Interior access to the proposed lots is provided via a combination of new and existing public roads and 1 private driveway in the 33rd St. ROW. Primary access to most lots will be from a re-aligned Landes St. right of way (ROW), between 35th St. and Woodland Ave. Here, the Applicant proposes a road section that combines various details from the city's Engineering Design Standards (EDS)(Ex. C). Its design

provides on-street parking and 6' wide concrete sidewalk alternating on opposite street sides with a pedestrian crossing at Landes and 33rd Streets.

Public Works staff found the proposal is consistent with the planned housing density for the area. Anticipated traffic volumes are not expected to adversely impact adopted Levels of Service (LOS) on connecting public facilities. With only 16 lots (one of which is already developed), the plat falls below the threshold which requires a Traffic Impact Analysis (TIA), i.e. the City's public works standards find that traffic generated by plats of this size are not significant enough to raise concerns over congestion impacts. Roads will be built to acceptable Public Works standards and, subject to conditions, anticipated non-motorized connections are made.

Final street parking locations will be determined as part of the subsequent Street and Utility Development Permit (SDP) process. Staff discussed with the Applicant and recommended maintaining flexibility with driveway placement to allow occasional parking on either side of the street for traffic calming. Engineered raingardens are proposed for street runoff stormwater along Landes St.

Several existing platted ROW's in Tibbals 2nd Addition which have limited functionality are being vacated through the Plat/Plat Alteration review; however, one area of proposed vacation is mistakenly shown incorporated into the plat. The subject ROW involved is the east ½ of Landes St. lying south of 33rd St., together with the east ½ of Landes St. lying between the centerline of 33rd St. and the south line of 33rd St., as platted within Tibbals 2nd Addition. As noted in the staff report, unless the abutting owner to this portion of platted Landes St. agrees in writing to allowing all the subject Landes St. ROW to accrue to the plat, this portion of the proposed vacation area must be removed from the Plat Alteration request and the Final Plat/Plat Alteration map. If the abutting owner is willing to allow the Applicants' acquisition of all platted Landes St., the owner's authorization must be in a form acceptable to the city attorney. At hearing a representative of the HOA for Rosewind testified that the Rosewind HOA board unanimously agreed to cede the Landes St. ROW to the Applicants. From this testimony it appears that the Applicants will not have much difficulty acquiring the necessary agreement for acquiring the ROW.

At hearing staff questioned whether the street vacation process would be required to vacate the right of way along the Rosewind ownership. RCW 35.79.010 requires 2/3 of abutting property owners to sign a petition for a street vacation. The issue is an open question that has apparently not been addressed by the courts. It would appear that the easiest approach would be to have the form approved by the City Attorney for the Landes vacation include a Rosewind waiver of the street vacation process. If Rosewind is unwilling to sign the waiver, then the City may wish to consider the necessity of doing a City Council initiated street vacation, which would not necessitate a 2/3 abutting owner petition under RCW 35.79.010.

At hearing concerns were raised about Kuhn Street, which one neighbor noted has been developed with a failing chip seal. City staff clarified that only two lots would likely be adding traffic to Kuhn. The Applicants cannot be legally held responsible for making any off-site improvements to Kuhn other than frontage improvements for this small amount of added traffic.

In Ex. F Helen Kolff raised concerns about project created parking along 35th street since it is only 20 feet wide along the project frontage. She noted that design standards authorize no parking signs if access to emergency vehicles becomes restricted. Public

works staff have not found the need to prohibit parking due to restricted emergency access and there is no showing in the record that such access would be materially restricted. Ms. Kolff also advocated for one way traffic, but the proposed two way roads meet the minimum street design standards for two way traffic. In the absence of any unique safety problems, the City's street design standards provide a determinative guide as to acceptable street design.

- D. Schools. As conditioned, the proposal will be served by adequate schools and walking conditions to and from schools.

The record does not establish safe walking conditions to and from school. According to the staff report, walkways will be provided to enhance safe walking conditions to school, the closest of which is roughly ¼ mile to the north. Staff testified at hearing that there would be sidewalks and/or shoulders available for all necessary public school bus stops and walking routes to schools. Staff specifically opined that 35th street would be safe for children due to the presence of shoulders, sidewalks and low traffic. However, Sarah Stowell identified in Exhibit K disagreed with the assessment that there were safe walking conditions along 35th St. which connected to San Juan Street, the path that would be followed for students walking to Blue Heron Middle School. Ms. Stowell identified that there were sections of 35th without a shoulder on one side and that visibility was poor for students that would be crossing to the other side. She also noted that parked cars prevented use of the shoulder along portions of the 35th. Geralynn Racowski raised similar concerns in Exhibit F. Staff did not respond to Ms. Stowell's comments and the Applicants' response, Ex. L, was limited to the position that the proposal would not add much pedestrian traffic to 35th.

Given the above, Ms. Stowell raise some valid and unanswered concerns about the safety of walking conditions to Blue Hearon Middle School along 35th. The only direct response to Ms. Stowell's identification of 35th street deficiencies is that the proposal will not generate any amount of appreciable student traffic. Given the lack of rebuttal evidence on poor visibility and blocked shoulders, this leaves the possibility that students will in fact be crossing 35th or walking on the travelled portion of the road in portions of poor visibility. It is certainly recognized that developers can only be made to pay for their proportionate share of impacts, but safety can often be enhanced at low cost via signage, cross-walks and shoulder widening. Given the lack of evidence on safe walking conditions, a condition of approval requires the Applicants to provide an assessment of walking conditions and reasonable measures that can be taken to ensure safe walking conditions to and from school.

The staff report does not contain any direct information on the adequacy of school buildings and services. The capital facilities element of the City's comprehensive plan identifies that the Port Townsend School District has an elementary, middle and high school to serve the City. In the absence of any other evidence to the contrary, this establishes that the City is served by adequate school facilities.

- E. Open Space. A couple commentators felt that the proposal should provide more open space. The City cannot require open space without demonstrating a need for such an amenity. See RCW 82.02.020 (city must "demonstrate" necessity for dedications of land as condition of project development); *Isla Verde Int'l Holdings, Inc. v. City of Camas*, 146 Wash.2d 740, 755-56 (2002)(City has burden of establishing that open space dedication is reasonably necessary as a direct result of a proposed development). Cities that require open space

dedications typically have ordinances based upon detailed calculations establishing open space demand per residential unit and associated standards for dedication of such areas. Port Townsend does not have any open space standards that mandate any open space from the Applicant. As noted in the staff report, the proposal is consistent with the City's Parks, Recreation and Open Space (PROS) Plan because the proposal is within ½ mile of a formal outdoor space at Blue Heron Middle School.

CONCLUSIONS OF LAW

Procedural:

1. Authority of Hearing Examiner. PTMC 20.01.040 classifies preliminary plats/plat alterations as Type III applications, which requires a hearing before the Hearings Examiner, who must issue a final decision.

Substantive:

2. Zoning Designation. The size is zoned R-II (Medium Density Single-Family).

3. Review Criteria. PTMC 18.16.060(A) governs the criteria for preliminary plat approval. PTMC 20.01.235(D) requires the Examiner to make a specified set of findings for all Type III (quasi-judicial) applications. The PTMC does not appear to identify any review criteria for plat alterations, however RCW 58.17.215 provides that the legislative body shall determine the public use and interest in the proposed alteration. PTMC 19.06.120C governs alternative tree conservation plans. All applicable criteria are quoted below in italics and applied via corresponding conclusions of law.

Subdivision Criteria:

PTMC 18.16.060(A)(1): *The proposed subdivision conforms to all applicable city, state and federal zoning, land use, environmental and health regulations and plans, including, but not limited to, the following:*

- a. *Port Townsend Comprehensive Plan;*
- b. *Port Townsend Zoning Code;*
- c. *Engineering Design Standards;*
- d. *Environmentally Sensitive Areas Ordinance (Chapter 19.05 PTMC);*

4. Criterion met. The criterion is met. City staff have reviewed the proposal for conformance to applicable zoning standards at this stage of review and found it in conformance for the reasons identified at Findings 12-21 of the staff report. Those findings are found to accurately reflect the requirements of the City's zoning code except for Footnote 3, which authorizes the Applicant to selectively vest to parking standards adopted after the vesting of the plat application. Case law prohibits selective the selective waiver of vested rights. *See Reclamation Co. v. Bjornsen*, 125 Wn. App. 432, 436-441 (2005), petition for review denied, 155 Wn.2d 577. As noted in the Bjornsen opinion:

If an applicant wishes to take advantage of a change in the law allowing a previously prohibited land use, it may do so by withdrawing its original application and

submitting another. But it may not select which laws will govern its application. While we agree that East could have resubmitted its application after the 1994 SWMP amendments, it did not. Thus, the hearing examiner was required to evaluate the adequacy of East's proposal under the 1991 regulations in effect when East filed its application.

125 Wn. App. At 439-440.

Ultimately, off-street parking is typically not addressed until building permit review for residential plats. The proposed lots are large enough to accommodate the off-street parking that was required at the time the plat vested. The *Bjornsen* ruling arguably doesn't apply to situations where, as here, the Applicants are willing to comply with all regulations that apply at a given vesting point in time. Following the plain language of the *Bjornsen* ruling as quoted above, however, for on-street parking the plat must conform to the parking standards that applied at the time of plat vesting, i.e. at the time the plat application was technically complete. The staff report did identify the option of selective vesting so the public was put on notice that may be done. Off street parking can be evaluated during building permit review and at that time staff may elect to take a more flexible interpretation of the *Bjornsen* ruling.

The proposal conforms to the comprehensive plan for the reasons identified in Findings No. 30 and 31 of the staff report. There are no critical area or critical area buffers on-site so the critical areas ordinance does not apply. The proposal conforms to the City's public works standards as determined by the City's public works staff and detailed in Finding of Fact No. 6B and 6C.

PTMC 18.16.060(A)(2): *Utilities and other public services necessary to serve the needs of the proposed subdivision shall be made available, including open spaces, drainage ways, streets, alleys, other public ways, potable water, transit facilities, sanitary sewers, parks, playgrounds, schools, sidewalks and other improvements that assure safe walking conditions for students who walk to and from school;*

5. Criterion met. The criterion is met for the reasons identified in Finding of Fact No. 6.

PTMC 18.16.060(A)(3): *Conservation of existing trees, and/or the planting of new trees, shall be provided consistent with Chapter 19.06 PTMC, Article III, Standards For Tree Conservation;*

6. Criterion met. The criterion is met for the reasons identified in Finding of Fact No. 5C and this decision's approval of an alternative tree conservation plan below.

PTMC 18.16.060(A)(4): *The probable significant adverse environmental impacts of the proposed subdivision, together with any practical means of mitigating adverse impacts, have been considered such that the proposal will not have an unacceptable adverse effect upon the quality of environment, in accordance with Chapter 19.04 PTMC and Chapter 43.21C RCW;*

7. Criterion met. As identified in Finding of Fact No. 5, the project is SEPA exempt. Conditions of approval mitigate for all potential adverse impacts. There are no critical areas on site. The project conforms with Chapter 19.04 PTMC and Chapter 43.21C RCW. The review process included the required consideration of probable significant adverse environmental impacts.

1 **PTMC 18.16.060(A)(5):** *Approving the posed subdivision will serve the public use and*
2 *interest and adequate provision has been made for the public health, safety, and general*
3 *welfare.*

4 8. Criterion met. As determined in Finding of Fact No. 5, the proposal creates no significant
5 adverse impacts and as determined in Finding of Fact No. 6 the proposal will be served by
6 adequate infrastructure. Further, the proposal accommodates urban growth in furtherance of
7 the environmental and infrastructure policies of the Growth Management Act. Finally, the
8 proposal fosters economic development and is consistent with the private property rights of
9 property owners. For all these reasons, the proposal serves public use and interest and adequate
10 provision has been made for public health, safety and welfare.

11 At least one commentator asserted the proposal should provide affordable housing, which one
12 could argue is pertinent to whether the proposal serves the general welfare per the criterion
13 quoted above. However, Washington courts have ruled cities cannot require affordable housing
14 of developers. The courts consider such a requirement to be a takings of property without just
15 compensation, because the consider housing unaffordability to be a problem not caused by the
16 developers and therefore must be addressed by the community as a whole. *See San Telmo*
17 *Assocs. v. Seattle*, 108 Wn.2d 20, 25, 735 P.2d 673 (1987). *overruled on other grounds, Yim v.*
18 *City of Seattle*, 451 P.3d 675 (Wash. 2019); *Robinson v. Seattle*, 119 Wn. 2d 34 (1992),
19 *overruled on other grounds, Yim v. City of Seattle*, 451 P.3d 675 (2019). Cities give incentives
20 to developers to provide affordable housing with density bonuses and the like, but avoid
21 making that a requirement.

22 **PTMC 18.16.060(B):** *Notwithstanding approval of criteria set forth in subsection a of this*
23 *section, in accordance with RCW 58.17.120, as now adopted and hereafter amended, the*
24 *proposed subdivision may be denied because of flood, inundation or swamp conditions*

25 9. Criterion met. There is no evidence of flood, inundation or swamp conditions. There are
26 no critical areas on-site, which includes streams, floodplains, shorelines and wetlands. Given
these circumstances, it is reasonable to conclude that the project site is not encumbered with
any flood, inundation or swamp conditions.

27 **Plat Alteration Criteria:**

28 **RCW 58.17.215:** *... The legislative body shall determine the public use and interest in the*
29 *proposed alteration and may deny or approve the application for alteration....*

30 10. Criterion met. The plat alterations proposed by the Applicants are the proposed street re-
31 alignments and vacations. These alterations provide for a safe, efficient and code-compliant
32 transportation system as determined by public works while also enabling the Applicants to
33 maximize the use of the their land at urban densities encouraged and required by the Growth
34 Management Act. For all these reasons, the proposed plat alterations are found to be in the
35 public use and interest.

36 **Alternative Tree Conservation Plan Criteria:**

37 **PTMC 19.06.120C2:** *Alternative tree conservation plans may be approved by the PCD*
38 *director upon a showing to his/her satisfaction that:*

39 *a. Due to the physical characteristics of the site, or those of contiguous properties, and/or due*
40 *to the design goals of a particular development (including but not limited to preserving solar*

access or maintaining the character of open grassland areas), strict adherence to the tree conservation standards set forth in subsections A, B, D through G of this section would be inappropriate or unnecessary to achieve the purposes of this title or would be unreasonably burdensome upon the applicant; and

b. The alternative plan is consistent with the purposes of this chapter expressed in PTMC 19.06.010; and

c. Alternative plans must provide environmental, recreational, agricultural, and/or aesthetic benefits that are equal or greater to the tree retention standards contained in the tables in this section.

11. Criterion met. The criterion is met for the reasons identified in Finding of Fact No. 5C. Strict adherence to the City's tree retention standards would force the developer to choose between either forsaking its density entitlements conferred by the City's zoning code and encouraged by the Growth Management Act, or failing to protect prairie grass that has potential ecological value as outlined in Finding of Fact 5C. Staff have recommended a condition, adopted by this Decision, that ensures that the aesthetic and other objectives of the City's tree retention standards are met. The condition requires dispersal of tree retention throughout the development site that helps promote the aesthetic and habitat objectives of the purpose of the City's tree retention standards as codified in PTMC 19.06.010. Staff's expertise in dealing with Prairie Grass and its tree retention ordinance, coupled with staff's recommendation for approval of the Applicant's alternative tree conservation plan, is found to justify the finding that the Applicant's proposal, as conditioned by staff, provides aesthetic and environmental benefits that are equal to or greater than the Applicant's deficit in conformance to tree retention standards.

Type III General Permitting Criteria:

PTMC 20.01.235(D)(1): *The development is consistent with the Port Townsend Comprehensive Plan and meets the requirements and intent of the Port Townsend Municipal Code;*

12. Criterion met. As previously discussed, the project satisfies all applicable development standards and comprehensive plan policies.

PTMC 20.01.235(D)(2): *The development is not detrimental to the public health, safety and welfare;*

13. Criterion met. The criterion is met because it doesn't create any significant adverse impacts as determined in Finding of Fact No. 5 and provides for appropriate infrastructure as determined in Finding of Fact No. 6.

PTMC 20.01.235(D)(3): *The development adequately mitigates impacts identified under Chapters 19.04 (SEPA) and 19.05 (Environmentally Sensitive Areas) PTMC;*

14. Criterion met. As previously determined, there are no critical areas or buffers on-site. The proposal is SEPA exempt.

PTMC 20.01.235(D)(4): *For subdivision applications, findings and conclusions shall be issued in conformance with PTMC Title 18 and RCW 58.17.110.*

1 15. Criterion met. The findings and conclusions have been issued in conformance with these
2 applicable regulations. The primary focus of PTMC Title 18 and RCW 58.17.110 is adequate
infrastructure, which is met as outlined in Finding of Fact No. 6.

3 **DECISION**

4 The proposed preliminary plat/plat alteration is approved for the reasons identified in the
5 Conclusions of Law, subject to the following conditions:

6 **GENERAL**

- 7 1. Development shall be carried out in substantial conformance with the revised
8 preliminary Plat/Plat Alteration site plans and Stormwater Report (Ex. A - D),
9 including the preliminary Tree Conservation and Landscaping Plan (Ex. B), except
10 where modified by these conditions of approval or by the subsequent Street and
11 Utility Development permit (SDP). The Plat Alteration portion of this approval
12 includes the lots and rights-of-way shown on the preliminary plat map unless
13 superseded by Condition No. 2, below.
- 14 2. As part of the Plat Alteration, the east ½ of Landes St. ROW lying south of 33rd St.,
15 together with the east ½ of Landes St. lying between the centerline of 33rd St. and
16 the south line of 33rd St., does not automatically attach to the PAV site by law.
17 Unless the abutting owner to these portions of platted Landes St. agrees in writing
18 to transferring all of the subject Landes St. ROW to the PAV site, this portion of
19 the proposed vacation area must be removed from the Plat Alteration request and
20 the Final Plat/Plat Alteration map. If the abutting owner is willing to allow PAV
21 to acquire all of platted Landes St., the transfer procedures must be done in a
22 manner acceptable to the city attorney.
- 23 3. The subsequent SDP will determine maintenance responsibilities for sewer
24 infrastructure. Any private maintenance obligation shall be placed into a set of
25 Covenants, Conditions and Restriction (CCR's)..
- 26 4. As agreed at the hearing, the City shall assume maintenance responsibility for
vegetated or grassy swales on City right of way. Individual lot owners are
responsible for the rain garden(s) on their respective home sites. For all sidewalks
within the project, the abutting lot owners are responsible for cleaning of the non-
motorized improvements per PTMC 12.12.030.
5. The Applicant's request for a slightly modified city road standard with sidewalk,
landscaping and on-street parking on alternating sides of the new 50 ft. wide rights
of way is approved in concept as shown on the submitted plans (Ex. C). Final
locations for sidewalks, plantings and on-street parking will be determined as part
of the subsequent SDP process. Staff will work with the Applicant to maintain
flexibility with driveway placement to facilitate these improvements.
6. Final Plat/Plat Alteration approval shall be presented by the Applicant as required
by city code and shall indicate the precise location of all required dedications and
easements per these conditions of approval. Interior streets, sidewalks and trails

1 within public ROW or public easements shall be open to the public and signed
2 accordingly at all times. All required infrastructure improvements as set forth in
3 these conditions and the subsequent SDP must be installed or bonded for prior to
4 final Plat/Plat Alteration approval.

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7 7. The Applicant shall have applied for final Plat/Plat Alteration approval within five
8 (5) years of date preliminary approval.²

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PRIOR TO ISSUANCE OF BUILDING PERMITS

8. The Applicant shall apply for and receive final Plat/Plat Alteration approval prior
to the issuance of any new building permits. To receive final Plat/Plat Alteration
approval, all required improvements set forth in the subsequent Street and Utility
Development permit (e.g., street, driveway and utility improvements) and per an
approved Final Landscaping Plan must be installed (with conveyance and
acceptance by the City as applicable) or bonded for. The amount of the
performance security for any bonded items shall be based upon the current cost
estimate of all materials and construction costs, including applicable tax. The
performance security shall consist of a performance bond in a form acceptable to
the City Attorney and in an amount acceptable to the Director and consistent with
city code. Cash deposited in an escrow account may also be accepted by the city.
All required landscaping plantings shall be installed within six months of approving
the performance security unless a longer time period is agreed to by the PCD
Director.

OTHER LANDSCAPING-RELATED CONDITIONS

9. Prior to issuance of a Street and Utility Development permit (SDP) for the project,
the applicant shall prepare and submit a Final Landscaping and Tree Conservation
Plan (TCP) for review and approval by the PCD Director. The submitted Final
Landscaping and TCP must be prepared with sufficient detail on specific plant
species, sizes, spacing and quantities to allow for adequate review by PCD. It must
also include a proposed irrigation plan that will be installed as part of the
installation, a table of tree unit credits (t.u.c.) assigned to each lot and details on
tree protection measures to be used. The submitted plan must be prepared using a
scale capable of being read without magnification of either the plan text or planting
area illustrations. The Final TCP must include—a commitment to planting or
retaining at least one (1) tree unit credit (t.u.c.) per residential lot that is <6,000 sf
in size. Two (2) t.u.c. are required per residential lot >6,000 sf in size with the
exception of Lot C5 which is exempt from the approved tree conservation
requirements of the plat as is the lot is already developed. Future uses of Lot C5
remain subject to the city's Tree Conservation or other landscaping requirements
in effect at the time a development permit is sought. As proposed by the Applicant,
they shall propose a covenant for review and approval by city PCD staff which
identifies those trees on individual lots that will be retained in perpetuity. Once

² RCW 58.17.140(3)(a)

language for the covenant is approved by the city, the terms will be executed during recording of the Final Plat in a manner acceptable to the city. Language allowing for removal of a retained tree in cases of disease, dying or hazardous circumstances are acceptable within the covenant but replanting is also required. A notation on the face of the final Plat/Plat Alteration map as required by PTMC 19.06 will provide future purchasers with reference to the resulting TCP requirements.

10. Maintenance responsibilities for ROW landscaping shall be determined during site plan review.
11. For landscaping approved within the adjoining street rights-of-way including the in-street rain gardens, the Applicant shall provide a 3-year financial guarantee for their survivability. Trees or other approved plantings that die or become diseased within the guarantee period shall be replaced and shall initiate a subsequent 3-year period starting on the date of replacement.

PRIOR TO ROADWAY, PATHWAY AND INFRASTRUCTION CONSTRUCTION

12. To ensure compliance with City Engineering Design Standards, together with the public and private street and utility installations required by this decision, the following plans must be prepared, incorporated into and submitted with a completed application for a **Street and Utility Development Permit (SDP)**. These plans shall be in substantial in conformance with the preliminary drawings submitted as part of the application (Ex. C) except where modified by these approval conditions. These plans must be reviewed and approved by City engineering staff, and constructed or bonded for by the Applicant prior to final approval of any development phase.
 - a. **Engineered plans for the public streets** serving this project including but not limited to the location of all driveways, turn around areas, sidewalks , and drainage facilities;
 - b. **Engineered plans for water service and sewer service** for the project including provisions for fire hydrant(s);
 - c. A **final engineered stormwater drainage plan and report** including construction drawings complying with the requirements of the Puget Sound Stormwater Management Manual and the Port Townsend Engineering Design standards must be submitted to PCD and approved by Public Works staff prior to issuance of any building permits. Said plan and report shall include detailed operation and maintenance (O & M) provisions. Once approved by City engineering staff, the O&M provisions must be formatted by the applicant (or their engineer) in a manner which facilitates their incorporation into any required CC&R's. The need for HOA responsibility shall be determined during SDP review.
 - d. A **final engineered non-motorized trail plan** meeting all applicable requirements of City-adopted plans (Non-Motorized Transportation and the EDS) and the plans approved by this decision.
 - e. **Any Street lighting** shall be dark sky compliant and minimized in conformance with the City's Street lighting policy (Ordinance 3271).

CONDITIONS RELATED TO THE PLAT/PLAT ALTERATION

1 13. The Applicant shall provide a mylar or other city-accepted reproduction of the
2 Plat/Plat Alteration to PCD for review and approval (5 paper copies and one
3 electronic .pdf version) as part of the final Plat/Plat Alteration approval process.
4 Said mylar shall contain the acknowledged signatures of all parties having an
5 ownership interest in the subject property as evidenced by an A.L.T.A. plat
6 certificate prepared by a local title company. Said plat certificate, or any update
7 provided, shall be less than 30 days old. The approved Plat/Plat Alteration shall
8 not become effective until the mylars required for recording have been filed with
9 the Jefferson County Auditor. While the City will assist in recording the Plat/Plat
10 Alteration mylar, the Applicant is responsible for all fees associated with recording.
11 All property taxes due and owing on the subject property must be paid in full prior
12 to obtaining the signature of the Jefferson County Treasurer.

13 OTHER/ONGOING CONDITIONS

14 14. Future occupancy of any units shall be subject to all applicable provisions of the
15 Port Townsend Municipal Code (PTMC), including zoning, subdivision and the
16 Engineering Design Standards.

17 15. If the Applicant proposes to add any development signage, it may be necessary to
18 obtain a sign permit. Please contact the PCD Department for signage requirements
19 prior to ordering, fabricating or installing any signs.

20 SCHOOL CONDITIONS

21 16. The Applicant shall prepare a walking conditions assessment of 35th Street for
22 students walking to and from school and school bus stops. The assessment shall
23 identify the availability of sidewalks and shoulders and address the visibility issues
24 identified in Exhibit K. City staff shall impose reasonable and proportionate
25 mitigation measures that may be necessary to ensure safe walking conditions, such
26 as crosswalks, shoulder widening and signage. Any such required measures shall
be implemented prior to final plat approval.

Dated this 17th day of May 2024.

Phil Olbrechts

Phil Olbrechts
City of Port Townsend Hearing Examiner

23 Appeal Right and Valuation Notices

24 This land use decision is final and subject to appeal to superior court as governed by Chapter
25 36.70C RCW. Appeal deadlines are short, and procedures strictly construed. Anyone wishing to
26 file a judicial appeal of this decision should consult with an attorney to ensure that all procedural
requirements are satisfied.

Affected property owners may request a change in valuation for property tax purposes
notwithstanding any program of revaluation