



SAN JUAN COUNTY
DEPARTMENT OF COMMUNITY DEVELOPMENT

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**BEFORE THE HEARING EXAMINER
FOR SAN JUAN COUNTY**

**FINDINGS, DECISION AND CONDITIONS OF APPROVAL
FOR THE
PLANNED UNIT DEVELOPMENT AND PRELIMINARY BINDING SITE PLAN KNOWN AS
CEDAR RIDGE**

FILE NUMBER: PBSP00-17-0002

OWNER: SUZANNE E. MOE
P.O. Box 1166
EASTSOUND, WA 98245

APPLICATION: PRELIMINARY BINDING SITE PLAN, WITH A PLANNED UNIT DEVELOPMENT, TO CREATE SEVEN CLUSTERED LOTS ON ONE ACRE OF A SEVEN ACRE PARCEL, FOR THE EXPRESSED INTENT OF RESERVING FUTURE RIGHTS TO UTILIZE A DENSITY BONUS FOR AFFORDABLE HOUSING ON THE RESIDUAL PARCEL AS PROVIDED IN SJCC 18.30.510, TABLE 13, RE: EASTSOUND RESIDENTIAL DISTRICTS

SITE ADDRESS: NOT CURRENTLY ADDRESSED, LOCATED IN THE NORTHWEST PORTION OF THE EASTSOUND URBAN GROWTH AREA, ALONG CEDAR RIDGE LANE, ON ORCAS ISLAND

TAX PARCEL NUMBER: 271424008

STAFF RECOMMENDATION: APPROVAL WITH CONDITIONS

SUMMARY OF DECISION: *APPROVED – SUBJECT TO CONDITIONS*

DATE OF DECISION: FEBRUARY 8, 2018

S.J.C. DEPARTMENT OF
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COMMUNITY DEVELOPMENT

I. INTRODUCTION

Suzanne Moe owns an undeveloped 7+ acre property located in the Northwest portion of the “Eastsound Urban Growth Area”, along Cedar Ridge Lane, on Orcas Island. Ms. Moe’s property is designated “Eastsound Residential”, allowing 1 unit per acre. The property is already the subject of a clustered 7-lots-on-one-acre Preliminary Subdivision approval issued by the County’s previous Hearing Examiner in the Fall of 2013, under File No. PLP000-13-0002. (*Staff Report, Project Data; Hearing Examiner Decision, stamped received on Dec. 2, 2013, for same property [Parcel No. 271424008], File No. PLP000-13-0002*).

Although the applicant has not requested final plat approval for the project authorized in her 2013 Preliminary Subdivision, the Staff Report explains that the following infrastructure features have already been installed on the site, as shown on the 2017 preliminary project map (included in the Record as part of *Exhibit No. 4*):

1. A 6-inch water main with two hydrants, with associated water stubs to each lot;
2. A 4-inch sewer maintenance line, with associated sewer stubs to each lot;
3. OPALCO power and fiber optic conduits; and
4. A storm water pond and flow control manhole per stormwater plan.

When the previous plat was under review, the applicant did not seek approval for or indicate an intent to reserve rights to later pursue use of any available ‘density bonus’ for ‘affordable housing’ on the remainder parcel shown on the subdivision. Nevertheless, at some point in 2017, the applicant’s agent, her husband, Mr. Johnson, inquired of staff if the remainder parcel could be developed using density bonus provisions for affordable housing found in the San Juan County Code. Staff responded to the applicant’s inquiry, explaining that: “*A density bonus for affordable housing must be proposed at the beginning of the land division process to be considered a complete submittal. Recording the current version of the plat would eliminate the opportunity to pursue affordable housing.*” (*Staff Report, at page 2; Testimony of Ms. Thompson and Mr. Johnson; and Ex. 4, Applicant’s project narrative, on page 2, “Reasons for Re-application”*).

As a result, the applicant submitted the combined application addressed in this Decision, for the ‘initial phase’ of a Planned Unit Development (PUD) with a Binding Site Plan (BSP) to be known as “Cedar Ridge”, a single family residential project in the Eastsound Urban Growth Area with the option of condominiums. The Staff Report, relying on the applicant’s project narrative provided in *Exhibit 4*, explains that the unintended elimination of the affordable housing density bonus option in the 2013 Preliminary Subdivision is the main reason for this new PUD/BSP application. Like the 2013 Preliminary Plat for the same property, the PUD/BSP proposal clusters seven lots onto one acre, but in the new PUD/BSP application, the applicant expressly indicates that she intends to reserve the remainder of the parcel for affordable housing purposes as part of some future, phase 2, development proposal for the site. (*Staff Report, at page 2; Testimony of Ms. Moe and Mr. Johnson; Exhibit 4, Cedar Ridge Project Narrative, Project Scope, at page 1, and proposed Cedar Ridge Project Map, Project Data note reading “Future Development Area...about six acres for*

Affordable Housing bonus density or any other allowable use”). The Examiner finds and concludes that under current county codes, the only future development activity on the remainder parcel that might qualify for the density bonus described in the application materials would be if an appropriate number of residential units developed somewhere on the 7-acre property are used for genuine affordable housing purposes – and not for ‘any other allowable use’. See *Affordable Housing code provisions, including without limitation SJCC 18.30.510, Table 13*.

As explained in SJCC 18.60.220, a planned unit development (PUD) is a type of development established under the Comprehensive Plan for the comprehensive planning and development of land as a single unit to preserve environmentally sensitive areas, trees and other natural features of a site; provide for high levels of affordable housing; promote efficient design of utilities and capital facilities; provide for usable open spaces; and encourage creative site design. And, SJCC 18.70.090 provides that a Binding Site Plan (BSP) process is an alternative land division process to the standard preliminary subdivision procedures, available for limited projects, including condominiums, planned unit developments or residential cluster developments as a result of subjecting a portion of a parcel or tract to either Chapter 64.32 or 64.34 RCW (Condominiums).

Finally, this Decision is expressly limited to the initial phase of the applicant’s “Cedar Ridge” land use plan, specifically the proposed 7-lot clustered PUD identified on the requested Binding Site Plan for the 7-acre site. As provided in SJCC 18.70.090(A)(4), “[p]hasing of development shall not be allowed through the binding site plan process. Subdivision is required”. Therefore, any future plans to utilize affordable housing density bonus options on the remainder parcel (labeled as “Future Development Area” on the BSP map included in Ex. 4), in a subsequent phase proposed by the applicant or any successor in interest, shall require a new subdivision or binding site plan application, or other process, as permitted by San Juan County Code provisions in effect at the time of such proposal. More importantly, to utilize any affordable housing density bonus options on the remainder parcel, the County Code is very clear that: “**Affordable housing units must be developed prior to or at the same time as other allowed residential units in any project granted a density bonus for affordable housing**”. SJCC 18.60.260(F). So, unless the residential units approved in this Decision for Phase I of the Cedar Ridge project are developed as genuine Affordable Housing in compliance with all county codes and restrictions, they cannot be developed first, or else the opportunity to utilize any potential affordable housing density bonus provisions on the remainder parcel would be extinguished. The other options would require a delay of any further development on phase one until after affordable housing units are developed on the remainder parcel or when the entire parcel can be developed at the same time.

II. CONTENTS OF RECORD

TESTIMONY AT PUBLIC HEARING:

At the public hearing, all witnesses provided testimony under oath. Julie Thompson, the County’s planner assigned to review the pending application, summarized her review, proposed conditions, and recommendation of approval. Suzanne Moe, the property owner and applicant, and her husband, Curt Johnson, who also served as the applicant’s agent and project surveyor, both spoke in

favor of the pending application. Mr. Johnson requested modifications to the conditions recommended in the Staff Report that would be consistent with changes he requested for his own PUD/BSP application heard by the Examiner on the same date for a neighboring parcel that he owns, under File No. PBSP00-17-0001. For purposes of this Decision and a separate Decision issued for Mr. Johnson's application regarding his neighboring parcel, the Examiner includes all testimony provided during the public hearings for both matters together, because Mr. Johnson indicated his comments overlapped and applied to both applications. For each, he argued that state subdivision statutes are not applicable to the pending application. On this point, he was in error.

No one spoke at the hearing in opposition to the application. Written comments, with some in favor of the application as an affordable housing proposal, and some challenging aspects of the application, such as needed utility services and the need for more specific affordable housing language, are included in the record as separate exhibits, identified and numbered as follows.

EXHIBITS:

A. Staff Report to the Hearing Examiner, prepared by Project Planner, Julie Thompson, dated November 16, 2017;

1. Request for Review
2. Determination of Nonsignificance
3. Application cover sheet
4. Cedar Ridge narrative, including map / site plan
5. Environmental Checklist
6. Page 8 of 9, SJC Resolution 62-2016 Fee Schedule
7. Stormwater Report date stamped September 9, 2013 prepared by Wagner Analytics LLC
8. August 23, 2017 Public Works memo regarding stormwater
9. September 11, 2017 Public Works memo regarding vehicular access
10. September 14, 2017 Fire Marshal memo regarding fire protection
11. August 9, 2017 Eastsound Planning Review Committee ("EPRC") comments
12. August 9, 2017 email from Health Dept. regarding water and sewer connections
13. July 26, 2017 memo from Stephanie Barney, WA DOE
14. July 24, 2017 memo from Paul Kamin, EWUA
15. September 11, 2017 email from Susan Kimple, ESWD
16. June 3, 2014 Certificate of Sewer Availability from ESWD
17. July 26, 2017 letter from Ed Sutton, President, View Haven Estates
18. July 26, 2017 email from Jim and Betsy Nelson
19. August 5, 2017 letter from Chris Dahl
20. August 5, 2017 letter from Andrew Brian Carlstrom
21. Comment letter date stamped August 3, 2017 from Ian and Ann Lister
22. Email dated August 3, 2017 from D.N. Kinsey
23. Legal ad
24. Verification of posting and mailing
25. Eastsound Subarea Plan 3.3 Policies

26. Hearing Examiner Decision, stamped received on Dec. 2, 2013, for same property [Parcel No. 271424008], File No. PLP000-13-0002). (*Added by the Examiner, taking official notice of the matter, accessible on San Juan County website-archives of previous Hearing Examiner Decisions*).

27. Eastsound Planning Review Committee (EPRC) meeting minutes from Aug. 3, 2017, re: discussion of Moe and Johnson applications. (*Added by the Examiner, taking official notice of approved EPRC minutes, accessible on the San Juan County website*).

III. APPLICABLE LAW

A. Jurisdiction.

An applicant intending to use a PUD to qualify for an affordable housing density bonus in a district where PUDs are permitted must file a PUD application together with a regular subdivision or binding site plan application for the project. *See* SJCC 18.60.220(B). In accord with these provisions, the requested PUD was filed together with a Binding Site Plan application. SJCC 18.80.160(E) provides that the same Decisionmaking Authority for the subdivision or binding site plan for the project shall have the authority to approve, approve with modifications, or disapprove the planned unit development. Under SJCC 18.80.170(D)(2), binding site plan applications for more than four lots are equivalent to long subdivisions for procedural purposes. Long subdivisions, aka preliminary plat applications, are subject to review, hearing and final decisions by the Hearing Examiner. SJCC 18.70.050(E). Additionally, SJCC 2.22.100 vests specific authority in the Hearing Examiner to receive and examine available information, conduct public hearings, prepare a record thereof, issue findings of fact, conclusions based upon those facts, and decisions which shall represent the county's final decision regarding various permits, expressly including subdivisions and binding site plans for more than four lots.

B. Process, Requirements, Standards for a Planned Unit Development.

The process, requirements, and standards for Planned Unit Development proposals are generally found in SJCC 18.60.220. Again, an applicant intending to use a PUD to qualify for an affordable housing density bonus in a district where PUDs are permitted must file a PUD application together with a regular subdivision or binding site plan application for the project. *See* SJCC 18.60.220(B).

Under SJCC 18.80.160(C)(2), PUD application materials must include:

- a. A statement that discusses the general design concept of the PUD, and what special purposes (e.g., senior housing; community and environmental purposes), if any, the PUD is intended to meet or fulfill;
- b. A description and layout of all proposed developments, including the location, use and size of all proposed structures, and the proposed development schedule;

- c. A statement of the number of dwelling units, number of **affordable** units and their type, average density, use restrictions, information on how affordability will be assured, and other pertinent data;
- d. A statement of the percentage and design approach of open space;
- e. A calculation of estimated new demands on capital facilities and services, and a demonstration that the development has met the requirements of SJCC 18.60.200 and 18.60.220(D) (1) or 18.60.200(E). This shall include either:
 - i. Arranging for sufficient water and sewer service to meet the additional demands of the development; or
 - ii. Demonstrating that such service is not currently available and that funding of capital facilities and service improvements is less appropriate than other alternatives; and
- f. A demonstration that the development contains sufficient infrastructure to meet the requirements of this code for stormwater management.

SJCC 18.60.220(G)(11) appears to allow phasing for a PUD, where it provides that if a PUD will be phased, each phase of a proposed PUD shall contain adequate infrastructure, open space, affordable housing, landscaping and all other conditions of the PUD sufficient to stand alone if no subsequent phases are developed. This application does not include details sufficient to address any development other than an initial phase, pertaining to the one-acre area where 7 clustered lots are proposed, leaving a 6-acre remainder parcel.

C. Criteria for Preliminary Binding Site Plan approval.

The process, requirements, and standards for Binding Site Plan proposals are generally found in SJCC 18.70.090 and 18.80.170, noting that the requirements to comply with numerous other state and county code provisions are referenced therein. For instance, SJCC 18.80.170(D)(3), provides in relevant part (emphasis added by the Examiner):

Criteria for Approval of Preliminary Binding Site Plans. The preliminary binding site plan shall be approved only if all of the following are met:

- a. The application meets the requirements in SJCC 18.70.090, the applicable standards in Chapters 18.40, 18.50 and 18.60 SJCC, and ***complies with the policies and requirements of Chapter 58.17 RCW***, the Shoreline Master Program, the State Environmental Policy Act, and the Comprehensive Plan;
- b. The associated planned unit development application, if required, is approved, and action has been completed on any shoreline permit that is required for proposed improvements; [and]
- c. ***The application satisfactorily addresses the comments of the reviewing authorities and is in the public interest;*** [...]

Chapter 58.17 RCW, which is the state subdivision statute referenced above, expressly mandates that:

“A proposed subdivision and dedication shall not be approved unless the city, town, or county

legislative body makes written findings that: (a) Appropriate provisions are made for the public health, safety, and general welfare and for such open spaces, drainage ways, streets or roads, alleys, other public ways, transit stops, potable water supplies, sanitary wastes, parks and recreation, playgrounds, schools and school grounds and all other relevant facts, including sidewalks and other planning features that assure safe walking conditions for students who only walk to and from school; and (b) the public use and interest will be served by the platting of such subdivision and dedication. If it finds that the proposed subdivision and dedication make such appropriate provisions and that the public use and interest will be served, then the legislative body shall approve the proposed subdivision and dedication. [.]” RCW 58.17.110(2).

D. Affordable Housing.

SJCC 18.60.260 addresses Affordable Housing, and provides the purpose and conditions under which housing may qualify as affordable housing for the purpose of utilizing density bonuses, and reads as follows:

A. Purpose. The purpose of this section is to set forth the conditions under which housing may qualify as affordable housing for the purpose of density bonuses or other provisions of the comprehensive plan or unified development code.

B. Affordable housing is housing where the occupants pay no more than 30 percent of gross monthly income for total housing costs, including the cost of property taxes and insurance for homeowners and monthly utilities, excluding telephone, for owners and renters. Except where further specified in the Comprehensive Plan and this code, “affordable housing” refers to such housing serving as the primary residence for very low-, low-, moderate- and middle-income households. The definition of income groups by household size shall be as most recently defined by the U.S. Department of Housing and Urban Development for San Juan County.

C. To qualify as affordable to a particular income group and family size, housing shall provide long-term affordability as defined below, and shall have an appropriate size and amenities and have a sufficient number of bedrooms to meet the needs for that family size as determined by the administrator, using appropriate information from the building code, the U.S. Department of Housing and Urban Development and the Washington State Office of Community Development.

D. Long-Term Affordability. In order to qualify as affordable housing, housing must provide assurance of affordability to applicable income groups for at least 50 years for ownership housing and 20 years for rental housing by one or more of the following methods:

1. Ownership of land or land and structures by a public agency or nonprofit housing provider;
2. Granting of a restrictive use easement in a form specified by the County for the portions of the site encompassing the affordable units to San Juan County for the purpose of affordable housing development;
3. In the case of rental housing only, the units are subject to a contract with a housing provider which assures their affordability for a minimum of 20 years; or
4. Housing which because of its size, location, amenities, restrictions on development or use, or other characteristics, has been specifically determined by resolution of the board of County commissioners to be affordable.

E. Permanently Affordable Housing. In order to qualify as permanently affordable housing, housing must provide assurance of affordability to applicable income groups for at least 99 years by one or more of the following methods:

1. Ownership of land or land and structures by a public agency or nonprofit housing provider with assurance of affordability for at least 99 years;
2. Granting of a restrictive use easement in a form specified by the County for the portions of the site encompassing the affordable units to San Juan County for the purpose of affordable housing development;
3. Housing which because of its size, location, amenities, restrictions on development or use, or other characteristics, has been specifically determined by resolution of the board of County commissioners to be permanently affordable.

F. Concurrent Development. **Affordable housing units must be developed prior to or at the same time as other allowed residential units in any project granted a density bonus for affordable housing.** (*Emphasis added due to the significance of this provision to the pending application*).

G. Limitation on Credit for Affordable Middle-Income Housing. No more than 25 percent of the dwelling units counted as affordable housing or permanently affordable housing for the purpose of obtaining a density bonus, use permit, or other special privilege reserved for affordable housing in any project may be for middle-income households.

E. Burden and Nature of Proof.

Under SJCC 18.80.040(B), “[t]he burden of proof is on the project permit applicant. The project permit application must be supported by evidence that it is consistent with the applicable state law, County development regulations, the Comprehensive Plan, and the applicant meets [her] burden of proving that any significant adverse environmental impacts have been adequately analyzed and addressed.”

IV. ISSUE PRESENTED

Whether a preponderance of evidence demonstrates that the applicant has satisfied her burden of proof to meet the criteria for Preliminary Binding Site Plan and Planned Unit Development approval?

Short Answer: Only if conditions are imposed on the proposal to ensure compliance with applicable county codes and state law, particularly those regarding Affordable Housing and appropriate assurances of potable water and sewer service for the project. Otherwise, the application cannot be approved as proposed.

V. FINDINGS OF FACT

1. Upon consideration of all the evidence, exhibits, testimony, codes, policies, regulations, and other information contained in the file, the undersigned Examiner issues the following findings, conclusions and Decision approving the requested Preliminary Binding Site Plan with a Planned Unit Development¹ subject to specific conditions of approval as set forth below.
2. Any statements in previous or following sections of this document that are deemed findings are hereby adopted as such, including without limitation the Introduction provided above.

Application reviewed and noticed as an Affordable Housing project.

3. The applicant submitted the pending Planned Unit Development and Binding Site Plan application to the San Juan County Community Development Department on or about April 6, 2017. The application's project narrative notes that the 7 lots on one acre "provide for efficient utility design and low cost housing due to small lot sizes" and the "Residual Area", depicted as the "Future Development Area" (a proposed 6 acre residual parcel) on the proposed site plan, "will likely incorporate an affordable housing density bonus and a Binding Site Plan unless another density is available as future county codes/subarea plans evolve." (Ex. 4, project narrative). The project narrative also states that the PUD/BSP application "should circumvent the water membership to vacant lots policy/requirement of the water purveyor until the building permit stage of development." (Ex. 4, at page 3). Staff reviewed the materials, and deemed the application complete on or about May 21, 2017. (Staff Report at page 3; and Exhibit 3). The County's published Notice of Application for this project expressly describes this project as follows: "Binding Site Plan for 7 Lots on 1 Acre, Affordable Housing" (emphasis added). (Ex. 23, Notice of Application for project, published in *The Journal & Sounder* on July 19, 2017).

4. The Staff Report indicates that this application was allowed to move forward under a fee waiver, relying on San Juan County Resolution No. 62-2016, which is included in the Record as Exhibit 6 and authorizes a fee waiver when the proposed dwellings are "intended for occupancy by very low income, low income, or moderate income families, as defined in Section 1 of the Housing Needs Assessment for San Juan County, Appendix 5 of the Comprehensive Plan". (See Ex. 6; and Staff Report, at page 21, item K; and Ex. 3, Application, bottom of page, hand written note – "Fee Waived", on June 26, 2017). Unfortunately, the Record before the Examiner does not include any legal instrument, binding covenant or other formal commitment to ensure that the occupants of the new homes on the 7 lots to be created via this proposed PUD/BSP (or on any other part of the 7 acre parcel) will be "very low income, low income, or moderate income families, as defined in Section 1 of the Housing Needs Assessment for San Juan County, Appendix 5 of the Comprehensive Plan".

¹ The record and this Decision include references to the project as a PUD/BSP, or BSP/PUD, using the acronyms for Planned Unit Development and Binding Site Plan. For purposes of this decision, when used together, they mean the same thing, which is this application for a Preliminary Binding Site Plan with a Planned Unit Development.

5. And, despite representations made at the time of application that achieved an application fee waiver, the Examiner finds that the project narrative for this PUD/BSP known as Cedar Ridge could be read to contradict staff's fee waiver determination, where it reads *"With no income limits or verification proposed for Phase I, it will be interesting to see what sale prices of homes will be. The applicant is not a builder and intends on selling vacant lots. The applicant believes the lot size alone will determine the type and cost of the home"*. (See Ex. 4, at page 5, 3rd paragraph).

6. Because this application was processed with a fee waiver only available for a genuine affordable housing project, conditions of approval have been modified to achieve this objective. Otherwise, the application should not have been processed and cannot be approved because application fees (at least \$4,600.00 for a Binding Site Plan) were never paid, based on the applicant's representation that this project should qualify as an affordable housing proposal. (See SJCC 18.80.020(C)(4), *application fees required as part of complete application*).

7. Again, the applicant obtained a fee waiver, of at least \$4,600.00, relying on San Juan County Resolution No. 62-2016, which authorizes waiver of otherwise applicable Planning and Land Use Fees when: a) *"The development or owner-occupied dwelling is intended for occupancy by very low income, low income, or moderate income families, as defined in Section 1 of the Housing Needs Assessment for San Juan County, Appendix 5 of the Comprehensive Plan"* or b) if the applicant is classified as a non-profit organization and the project is intended for occupancy by very low, low and moderate income families. There is no evidence in the Record to establish that the applicant is a non-profit organization, so the first basis is the only grounds for authorizing a fee waiver for this application. Further, the Record does not include substantial or credible proof that the County's affordable housing policies will be satisfied. The Examiner finds that the applicant's hopes and personal opinions are insufficient to establish that the proposed project will satisfy and achieve Affordable Housing goals and requirements found in applicable county codes. Therefore, to ensure that the purpose of the affordable housing fee waiver is fulfilled, and to enable the applicant to utilize the County's affordable housing density bonus provisions, an appropriate Condition of Approval (No. 21) has been included and must be satisfied in order to obtain Final Binding Site Plan approval. After all, based on the record, the Examiner finds that this application was submitted, reviewed, and noticed as an affordable housing project.

Utility services for the project.

8. The application expressly states that the "Proposed Method of Sewage Disposal" will be the Eastsound Water and Sewer District; and that the "Proposed Potable Water Source" will be the Eastsound Water Users Association. (Ex. 3, *Application*).

9. The applicant completed and submitted a SEPA Checklist for the project, stamped received by the County in late June of 2017. (Ex. 5, *SEPA Checklist*).

10. The SEPA checklist fails to properly list the name of utility entities providing various services, including water and sewer, but it explains that various utilities are available at the site, and that "all have been installed". (Ex. 5, *SEPA Checklist, at page 10, item 16 re: Utilities*).

11. In any event, the SEPA checklist at page 4 forecloses any consideration of onsite septic for sewage disposal, where it answers that “none” will be discharged into a septic system, and that “Eastsound Water and Sewer District main has been installed and [is] available for house hook ups”. Similarly, the checklist forecloses any consideration of a well-system for potable water, because it answers “no” in response to the question asking if groundwater will be withdrawn from a well for drinking water. (Ex. 5, SEPA Checklist, at pages 3 and 4, response to item 3(b)(1) re: Ground Water).

12. Reading the Application and the Checklist together, the Examiner believes that the applicant intended to say that Sewer and Water service will be provided by entities listed in the application, and that infrastructure needed for connections to such services has already been installed on the project site.

13. After reviewing the SEPA checklist, application materials, and other information in the file, the County’s SEPA Responsible Official issued a Determination of Nonsignificance for Ms. Moe’s proposal on or about July 19, 2017. (Ex. 2, SEPA DNS issued for this application).

14. In the Staff Report, Ms. Thompson represented that notices and publication required for the application were provided in accord with applicable county requirements. Staff Report, at page 3; Exhibits 23 and 24, Legal ad and posting/notice/mailling verification materials.

15. Exhibit A credibly summarizes the written comments received from reviewing agencies and members of the public, as well as some detailed staff responses or proposed conditions intended to address such comments. (Ex. A, Staff Report, pages 3 – 6). It also describes how the proposal has been designed, or can be conditioned, to comply with applicable development standards for the zone (Eastsound Residential, 1 unit per acre), including density, setbacks, open space, lot coverage, clustering, Storm Drainage, private roads, and concurrency. (Ex. A, pages 7-13).

16. The Staff Report summarizes aspects of the proposal that are, or as conditioned will be, in substantial compliance with applicable Planned Unit Development and Binding Site Plan standards and requirements for site. (Ex. A, pages 13-28).

17. The 2013 Decision approving a Preliminary Subdivision for the same site was largely based on a key finding – “that the proposed subdivision will be served by adequate public infrastructure and services”. In that matter, the record included a certificate of sewer availability from the Eastsound Sewer and Water District and a letter from the Eastsound Water Users Association stating that it has adequate capacity to provide water to the site. (Ex. 26, 2013 Preliminary Subdivision Decision, at pages 2 and 3). Condition of Approval No. 13 mandated that “All lots shall be served by the Eastsound water system,” and that a “Written guarantee of connection shall be provided prior to final subdivision approval.”

18. At the public hearing, and in his written “Narrative” describing the project (Ex. 4, at page 3), Mr. Johnson complained about the connection fees and charges imposed by water and sewer providers in the Eastsound area, where the project is located. As noted above, the project narrative expressly claims that the PUD/BSP application “should circumvent the water membership to vacant

lots policy/requirement of the water purveyor until the building permit stage of development.” (Ex. 4, at page 3). During part of his testimony, Mr. Johnson asked that Binding Site Plan approval should not require payment of connection fees, and argued that some sort of confirmation that sufficient utility system capacity exists to serve the project should be sufficient for approval. At the hearing, he also questioned whether provisions of the state subdivision statute (Ch. 58.17 RCW) should apply to this PUD/BSP proposal. As discussed below, the Examiner finds and concludes that Mr. Johnson’s request is not well founded in fact or law.

19. The County Code does not include “delaying payment of utility connection fees” or similar language as a basis to pursue a Binding Site Plan instead of a Preliminary Subdivision. And, attempting to “circumvent” utility purveyor charges and fees is not a proper basis to submit and support a PUD/BSP application.

20. If conditions for this proposed Binding Site Plan were substantially different than those contained in the previously issued, unchallenged Preliminary Plat decision regarding sewer and water utility requirements – which should be about the same, because the same policies found in RCW 58.17.110(2) apply to subdivisions as well as binding site plans – it would allow an end run around lawfully-issued conditions of approval without a proper amendment request or any LUPA appeal pursued after the preliminary plat was issued in 2013.

21. Similarly, future applicants should not be encouraged to submit applications using an “affordable housing” fee waiver as part of an effort to “circumvent” payment of utility connection charges. This project is conditioned to fulfill the application’s affordable housing justification, as well as compliance with state and county utility service requirements for subdivisions and binding site plans.

22. In a detailed decision involving a dispute as to whether appropriate provisions for potable water supplies must be made at the time of plat approval, or later when a building permit might be issued, the Washington Supreme Court analyzed state subdivision statutes, and concluded that proposed subdivisions shall not be approved unless appropriate provisions are first made for potable water, among other things. See *JZ Knight v. The City of Yelm et al.*, 173 Wn.2d 325; 267 P.3d 973 (2011).

23. The division of land “is a matter of state concern” to be “administered in a uniform manner by cities, towns, and counties throughout the state.” *Knight, at par. 12, citing RCW 58.17.010*. Among other reasons, the legislature enacted chapter 58.17 RCW “to facilitate adequate provision for water [and] sewerage [...]”. *Id.*

24. Every subdivision, and binding site plan, with limited exceptions not relevant to this application, must comply with chapter 58.17 RCW. *Id., citing RCW 58.17.020, .030*. And, as noted above, SJCC 18.80.170(D)(3)(a), the County’s “Criteria for Approval of Preliminary Binding Site Plans,” requires in relevant part that a preliminary binding site plan shall be approved only if the application “***complies with the policies and requirements of Chapter 58.17 RCW***”.

25. Subdivision and binding site plan (BSP) approval proceeds in two steps—preliminary plat or preliminary BSP approval and final plat or final BSP approval. At the preliminary approval stage,

the local decision maker with authority to approve a plat or BSP must “inquire into the public use and interest proposed to be served by the establishment of the subdivision” or BSP 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 [or designated local decision maker] ... 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 [or designated local decision maker] approves a final plat, only then can the landowner apply for a building permit. *Knight, at par. 13.*

26. Here, the same utility service policies and requirements found in the state subdivision statute apply to the requested binding site plan. *See SJCC 18.80.170(D)(3)(a).*

Comments.

27. According to the San Juan County website: the Eastsound Planning Review Committee (EPRC) advises the Planning Department, Planning Commission and County Council on land use and development matters affecting Eastsound; the EPRC is composed of seven members who are residents of Orcas island, serving two-year staggered terms; and the Committee’s guiding document is Resolution 128-1992.

28. The EPRC met on August 3, 2017 to discuss the pending application (File No. PBSP00-17-0002) and Mr. Johnson’s separate binding site plan application to create 6 clustered lots for Affordable Housing on a neighboring parcel under his ownership, under File No. PBSP00-17-0001. (*Ex. 11, email dated August 9, 2017, from Jeffrey Otis, EPRC Chair, to Julie Thompson; Ex. 27, EPRC Minutes for Aug. 3, 2017, accessible on the County’s website*). For both projects, EPRC minutes show that Committee members had concerns regarding water assurance and enforcement of moderate/affordable housing for qualified purchasers and clarifications on how that is to be determined.

29. The EPRC comments in Exhibit 11 correctly observe that “*the application doesn’t appear to comply with the application requirements in 18.70.50C1d regarding Health Dept. approval of adequate potable water for all of the proposed lots. Since the applicant is not proposing to build the residential units, the lots may remain empty for an undeterminable (?) amount of time. If adequate potable water is not guaranteed for each lot prior to approval of the binding site plan, there’s no assurance that water will be available at the time of building*”. The EPRC comments properly direct attention to SJCC provisions that mandate Health Department approval of an available and adequate potable water source for a project, and Certificates of future connections from sewer and water purveyors serving lots in an urban growth area or activity center, such as the Eastsound Urban Growth Area, where this project is located. Exhibit 11 also conveys the EPRC’s

concerns that the project proposal fails to include any mechanism to ensure that the application's purported affordable housing objectives will be enforced or verified.

30. Since that time, the applicant did not submit any clarifying materials on either topic. Instead, at the public hearing, Mr. Johnson again expressed his desire to delay payment of water connection fees until the time of building permit approval for the lots, well after the time any final binding site plan might be approved. And, the notations on the proposed Binding Site Plan map indicate a deliberate lack of commitment to utilizing the remainder parcel (or any part of the 7 acre property) for bona fide affordable housing purposes, where it reads: *"Future Development Area...about six acres for Affordable Housing bonus density or any other allowable use"*. See Exhibit 4, Cedar Ridge Project Narrative, Project Scope, at page 1, and proposed Cedar Ridge Project Map, Project Data notes.

31. Mr. Kinsey's written comment, included as Exhibit 22, observes that "there have been over 23 boundary adjustments and property changes since 2005" for Parcel No. 271424008000. He expressed concern that four (4) parcels were combined into one parcel, yet the proposal is to now add several homes to the single parcel. (*Ex. 22, emailed written comment letter from D.N. Kinsey, dated August 3, 2017*).

32. Several written comments voiced general support for both of the pending applications (Johnson and Moe, File Nos. PBSP00-17-0001 and PBSP00-17-0002), as "two affordable housing projects in the Urban Growth Area of Eastsound, Orcas Island". (*Exhibits 18, 19 and 20, which appear to be form comments containing virtually identical language*).

33. The support letters did not support the applications as general development proposals, but as "two affordable housing projects." During her testimony, the applicant, Ms. Moe, acknowledged the written comments that supported her application as an affordable housing project.

34. During the public hearing, Mr. Johnson took exception with the View Haven Estates' comment letter, Exhibit 17, when he credibly explained that instead of concerns about future residents from the Johnson/Moe developments driving on area roads, he was more interested in preventing existing neighbors from the View Haven area using the new Johnson/Moe private roadway as a cut through or short cut. Mr. Johnson fully supported and, in fact, requested an emergency-access-only / Fire, EMS, Utility only access restriction for the project, where it abuts Miguel Lane, somewhat similar to that requested by Mr. Sutton's written comments on behalf of View Haven Estates, but based on different motivations – i.e. no cut-through traffic using new private roads in the new development. (*Testimony of Mr Johnson; Ex. 17, Comment letter from Ed Sutton, President, View Haven Estates*).

35. Although a sewer water main has been installed to serve the proposed project, the sewer service purveyor for the site, the Eastsound Sewer and Water District (ESWD) wrote that the District has "some issues with the sewer main that was installed to serve the proposed project" and "until those issues are resolved, [the District] will not issue a Certificate of Sewer Availability." (*Exhibit 15, email dated Sept. 11, 2017, from Susan Kimple, ESWD Office Manager, to Ms. Thompson*). At this time, there is no basis to conclude that sufficient sewer system capacity will be available for new residential units whenever they may be constructed at some uncertain date well into the future. As

with any capacity-limited service system, until such time as a sewer service guarantee is secured, other applications may move forward before this project, and utilize available sewer system capacity. Accordingly, the Conditions of Approval for this project will require proof of sewer service from ESWD for the site prior to Final Binding Site Plan Approval.

36. The Water service purveyor for the project site, the Eastsound Water Users Association (EWUA), submitted a written comment regarding the Johnson/Moe applications, explaining that “While the EWUA has available capacity for this project, the developer has not yet purchased the membership capacity required for this project, and Eastsound Water does not have a contract to serve these developments at this time.” (*Exhibit 14, comment letter dated July 24, 2017, from Paul Kamin, General Manager for Eastsound Water*). The file does not include a current Certificate of Water Availability for the project, so there is no basis to conclude that sufficient water supply will be available for new residential units whenever they may be constructed at some uncertain date well into the future. As with any limited resource, other applications may move forward before this project, and utilize available water system capacity. Accordingly, the Conditions of Approval for this project will require proof of water service from Eastsound Water for the site prior to Final Binding Site Plan Approval.

37. As with all permits and project approvals issued by the County, this Decision does not waive or excuse an applicant’s obligation to comply with any utility service provider’s lawful regulations or requirements, including without limitation electrical, telephone, cable, internet, sanitation, and water service providers. This includes, without limitation, payment of any lawfully required connection fees, system facility charges, or application fees.

38. Except as modified in this Decision, all Findings and statements of fact contained in the Staff Report (included in the Record as *Exhibit “A”*) are incorporated herein by reference as Findings of the undersigned hearing examiner.

39. The County satisfied its SEPA review process through compliance with applicable review and notice procedures. The city received no appeals of its SEPA determination issued in connection with the application. The SEPA DNS specifically noted that the project includes a future development area for affordable housing bonus density (Ex. 2), and the published notice of application describes the application as an affordable housing project (Ex. 23). As noted above, this Decision includes conditions of approval needed to ensure that the application conforms with applicable county codes and policies.

39. Based on all evidence, exhibits and testimony in the record, the undersigned examiner specifically finds that the proposed project, as conditioned below, makes appropriate provisions for the considerations detailed in SJCC 18.60.220 (re: PUD), SJCC 18.70.090 and 18.80.170 (re: Binding Site Plans), SJCC 18.60.260 (re: Affordable Housing), and relevant provisions of Chapter 58.17 RCW (the state subdivision statute), and that the public interest will be served by the proposed preliminary binding site plan and planned unit development and associated dedications, easements, and improvements, all as conditioned below.

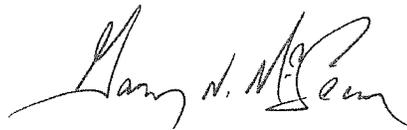
VI. CONCLUSIONS of LAW

1. Based on the Findings as summarized above, the undersigned examiner concludes that the proposed Preliminary Binding Site Plan with a Planned Unit Development can be conditioned to conform to all applicable land use requirements and appropriately mitigates adverse environmental impacts. Upon reaching such findings and conclusions as noted above, the pending meets the standards necessary to obtain preliminary binding site plan approval by the County.
2. The Department's recommended conditions of approval as set forth in the Staff Report, as modified herein, and the additional conditions set forth below, are reasonable, supported by the evidence, and capable of accomplishment.
3. Any Finding or other statements in previous or following sections of this document that are deemed Conclusions are hereby adopted as such.

VII. DECISION

Based upon the preceding Findings of Fact and Conclusions of Law, evidence presented through the course of the open record hearing, all materials contained in the record, and the Examiner's online site visit, the undersigned Examiner APPROVES the requested Preliminary Binding Site Plan and Planned Unit Development for Suzanne Moe's 7 acre property, subject to the attached Conditions of Approval, which are incorporated by this reference as part of this Decision.

ISSUED this 8th Day of February, 2018



Gary N. McLean
Hearing Examiner

CONDITIONS OF APPROVAL
for the
PRELIMINARY BINDING SITE PLAN AND PLANNED UNIT DEVELOPMENT
KNOWN AS THE CEDAR RIDGE PROJECT
File No. PBS00-17-0002
(Suzanne Moe, Applicant)

General conditions

- A. The preliminary binding site plan of Cedar Ridge shall comply with all applicable provisions of the San Juan County Code whether or not those provisions are enumerated or referred to in the approved preliminary BSP plans, application file materials, in this staff report or in the Hearing Examiner's decision. The burden is on the applicant to show compliance with all applicable provisions of the SJCC at every stage of development. FURTHER, the applicant shall comply with all professional report conclusions and recommendations submitted in connection with the preliminary plat and engineering reviews, as approved and or modified by the County.
- B. The binding site plan shall be developed in substantial conformance with the plans submitted in the application file, including without limitation Exhibit 4.
- C. The applicant shall obtain any permit or license required by a state, federal, tribal, or other regulatory body with jurisdiction over the subject matter; any conditions of regulatory agency permits and licenses shall be considered conditions of final approval of this BSP.
- D. All conditions of preliminary BSP approval shall be provided on the engineering plan set, which shall be submitted for review and approval by the designated county official prior to final BSP approval.

Specific conditions.

- 1. This preliminary binding site plan (BSP) approval allows for the development of seven single-family residences on a one-acre area, substantially as depicted on the Preliminary Project Map (Site Plan) for the Cedar Ridge project, included in the Record as part of Exhibit 4.
- 2. Binding site plan roads shall be built as specified in SJCC 18.60.100, unless variances are obtained.
- 3. Maintenance of the road and any commonly held areas shall be through provision of a maintenance agreement submitted to and approved by the Community Development Department Director, then recorded with the final BSP approval. All BSP property owners shall participate in the agreement.
- 4. All roads serving three or more lots shall comply with the road design and construction standards specified in SJCC 18.60.100.
- 5. Prior to any road construction activities, the applicant must first submit appropriate BMPs for Stormwater control to the Public Works Department, for the Director's review and approval, to ensure compliance with all County and state stormwater regulations and policies applicable to the site. Any additional conditions or modifications to the applicant's proposed stormwater BMPs that may be imposed by the Public Works Director or designee shall be included as conditions of approval for the entire PUD/BSP project addressed in this Decision.
- 6. Prior to Final BSP approval, the applicant shall submit a written narrative to the Public Works Director or designee, subject to his/her review and approval, describing access to and within the

property, which must include an analysis of the full build-out potential of the subject property and adjacent properties served by the access roads. If deemed to be in the public interest, the Director shall have discretion to limit access to/from the Cedar Ridge development via its southern boundary with Miguel Road to Fire/EMS/Law Enforcement/Utility vehicles and personnel only.

7. Consistent with the existing Conditions of Approval for the Preliminary Subdivision of the Moe property, RCW 58.17.110(2), and SJCC 18.80.170(D)(3), and to ensure that the project makes appropriate provisions for the public health, safety, and general welfare and for storm drainage, potable water supplies, and sanitary wastes, prior to Final Binding Site Plan approval:
 - A. All stormwater control features and elements must be complete, installed, constructed and functional, and water and sewer service infrastructure shall be properly stubbed to each lot, all subject to inspection, modification, acceptance and/or approval by the appropriate water and sewer system purveyor, and the Public Works Director or designee;
 - B. All lots in this PUD/BSP shall be served by the Eastsound Water Users Association system for potable water supply, and a written guarantee of connection with Eastsound Water shall be provided by the applicant prior to final Binding Site Plan approval; and
 - C. All lots in this PUD/BSP shall be served by the Eastsound Sewer and Water District for sewage disposal, and a written guarantee of connection with ESWD shall be provided by the applicant prior to Final Binding Site Plan approval.
8. Prior to final BSP approval, the applicant shall submit proposed emergency vehicle access and egress to the Fire Marshal for his/her review and approval.
9. All survey and drawing standards and requirements found in SJCC 18.70.070(F)(2) shall be followed, except where a deviation from any standard is approved in writing by the County engineer.
10. Maximum building envelopes/footprints permitted by County development regulations shall be shown on the final BSP.
11. Any sale, transfer, or lease of any lot, tract or parcel, created pursuant to the binding site plan, that does not conform to the requirements of the binding site plan or without binding site plan approval, shall be considered a violation of Chapter 58.17 RCW and shall be restrained by injunctive action and be illegal as provided in Chapter 58.17 RCW.
12. All public and private site improvements required by the approved binding site plan must be completed and accepted by the County prior to issuing the first building permit for the site.
13. This preliminary BSP approval shall expire if the map is not recorded within 60 months of the approval date. The final BSP application shall be submitted to the Department of Community Development at least 90 days in advance of the expiration date.

The following conditions shall be shown as restrictions on the face of the plat, in addition to those restrictions and dedications required by SJCC 18.70.070:

14. All development and use of the lands described herein shall be in accordance with this binding site plan, as it may be amended with the approval of the city, town, or county having jurisdiction over the

development of such land, and in accordance with such other governmental permits, approvals, regulations, requirements, and restrictions that may be imposed upon such land and the development and use thereof. This binding site plan shall be binding upon all now or hereafter having any interest in the land described herein.

15. Parcels are subject compliance with all control measures and recommendations included in the Stormwater Report for the Cedar Ridge Project as approved by the Stormwater Engineer with the SJC Public Works Department, a copy of which is on file with the San Juan County Department of Community Development.
16. All utilities shall be placed underground.
17. All disturbed areas shall be restored to pre-project configurations, replanted with local vegetation, and the vegetation maintained until it is firmly established. Compliance with the approved Stormwater Pollution Prevention Plan is required.
18. Maintenance of the roads serving the lots in this BSP is shared equally by the lot owners.
19. There are additional private declarations, conditions, covenants or restrictions in addition to those shown on the face of this plat. If any private declarations, conditions, covenants and/or restrictions which appear on the face of this plat are different, the more restrictive provisions shall govern. Any private deed restrictions are supplemental to the requirements of this code. The County shall not be party to any private restrictions.
20. Any excavation or construction activity will cease immediately if any material of potential archaeological significance is discovered during such excavation or construction until the administrator is notified and inspections and disposition of the archaeological material is provided for.

Affordable Housing Conditions.

SJCC 18.60.260 sets forth the conditions under which housing may qualify as affordable housing for the purpose of density bonuses or other provisions of the comprehensive plan or unified development code. This project is premised on the intent to provide affordable housing at some point in order to utilize density bonuses to develop the six-acre remainder parcel. In fact, the applicant obtained a fee waiver, of at least \$4,600.00, relying on San Juan County Resolution No. 62-2016, which authorizes waiver of otherwise applicable Planning and Land Use Fees when: a) *“The development or owner-occupied dwelling is intended for occupancy by very low income, low income, or moderate income families, as defined in Section 1 of the Housing Needs Assessment for San Juan County, Appendix 5 of the Comprehensive Plan”* or b) if the applicant is classified as a non-profit organization and the project is intended for occupancy by very low, low and moderate income families. There is no evidence in the Record to establish that the applicant is a non-profit organization, so the first basis is the only grounds for authorizing a fee waiver for this application. Further, the Record does not include substantial or credible proof that the County’s affordable housing policies will be satisfied. Therefore, to ensure that the purpose of the affordable housing fee waiver is fulfilled, and to enable the applicant to utilize the County’s affordable housing density bonus provisions, the following Condition is included and must be satisfied in order to obtain Final Binding Site Plan approval:

21. The applicant shall grant a restrictive use easement to San Juan County or record a restrictive covenant on the property, substantially in a form as approved by the County's attorney, for the purpose of affordable housing development intended to satisfy the County's Affordable Housing policies and purposes, including without limitation those found in SJCC 18.60.260, applicable to the six-acre remainder parcel and/or the 7 lots created by this PUD/BSP, subject to such conditions and limitations as the Community Development Director may require.

22. As provided in SJCC 18.60.260(F), **affordable housing units must be developed prior to or at the same time as other allowed residential units in any project granted a density bonus for affordable housing.** Accordingly, the applicant must choose to either develop the 7 lots created by this PUD/BSP as affordable housing before any development based on a density bonus can occur on the remainder parcel; or develop the one acre parcel at the same time as affordable housing units are developed on the remainder parcel using currently available affordable housing density bonuses.

23. Any future plans to utilize affordable housing density bonus options on the remainder parcel (labeled as "Future Development Area" on the BSP map included in Ex. 4), in a concurrent phase proposed by the applicant or any successor in interest, shall require a new subdivision or binding site plan application, or other process, as permitted by San Juan County Code provisions in effect at the time of such proposal.

EFFECTIVE DATE, POSSIBLE RECONSIDERATION, APPEALS, VALUATION NOTICES

Hearing Examiner decisions become effective when mailed or such later date in accordance with the laws and ordinance requirements governing the matter under consideration. SJCC 2.22.170. Before becoming effective, shoreline permits may be subject to review and approval by the Washington Department of Ecology, pursuant to RCW 90.58.140, WAC 173-27-130 and/or SJCC 18.80.110.

Decisions of the Hearing Examiner are final and not subject to administrative appeal to the San Juan County Council, unless the County council has adopted, by ordinance, written procedures for the discretionary review of such decisions. See Section 4.50 of the San Juan County Home Rule Charter and SJCC 2.22.100.

SJCC 2.22.210(O) sets forth the time, process and content of any request for reconsideration of the hearing examiner's decision.

Depending on the subject matter, this decision may be appealable to the San Juan County Superior Court or to the Washington State Shorelines Hearings Board. State law provides short deadlines and strict procedures for appeals and failure to timely comply with filing and service requirements may result in dismissal of any appeal. See RCW 36.70C and RCW 90.58. Persons seeking to file an appeal are encouraged to promptly review appeal deadlines and procedural requirements and confer with advisors of their choosing, possibly including a private attorney.

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