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DEC 30 2009

City of Bellingham
Planning

Reply to: Seattle Office

December 28, 2009

Tim Stewart
Planning Director
City of Bellingham
210 Lottie Street
Bellingham, WA 98225

Re: Fairhaven Highlands: Prerequisite Considerations

Dear Mr. Stewart:

I am writing to address certain legal issues raised in a Mr. Tull's November 12, 2009 letter to you. While the letter ostensibly related to the environmental analysis in the Draft EIS, the letter raised some legal issues that need to be addressed, too. In particular, Mr. Tull argued in his letter that the City need not treat the "prerequisite considerations" that are set forth in BMC 20.00.190 as mandatory elements of the permitting process. According to Mr. Tull, the prerequisite considerations are merely "recommendations" that must be addressed. That assertion, and others in his letter, are incorrect, as detailed below.

First, Mr. Tull's characterization of the "prerequisite considerations" as mere "recommendations" lacks any support from the text of the zoning ordinance. The text of the zoning ordinance makes clear that prerequisite considerations are mandatory elements:

Prerequisite considerations are items **which shall be addressed** by the responsible official in conjunction with any proposal not exempt from the State Environmental Policy Act (SEPA) . . .

BMC 20.38.050.A.6.b.i (emphasis supplied).

The word "shall" in the foregoing sentence clearly expresses the City Council's intent that these items are mandatory. *Venwest Yachts, Inc. v. Schweikert*, 142 Wn. App. 886, 894 (2008). There is nothing discretionary about them. Further, the Code mandates that the Responsible Official "shall" utilize the prerequisite consideration in formulating any conditions imposed on the project:

Any conditions attached to discretionary approval of a project pursuant to this section **shall be based upon the prerequisite**

consideration as explained by language (if any) contained in either the introductory paragraph to the area classification system or in the preceding text of the neighborhood plan, as well as the goals of the Comprehensive Plan.

BMC 20.38.050.A.6.b.ii (emphasis supplied).

The mandatory nature of the prerequisite considerations is captured in yet a third subsection of the Code:

Conditions based upon prerequisite considerations **shall be formulated** to correspond to the degree of impact which the specific development proposal is anticipated to have upon the situation giving rise to the prerequisite consideration; provided that, conditions to proposals which are based upon such prerequisite considerations shall be formulated so as to allow the reasonable use of property for a purpose to which it is suitably adapted.

BMC 20.38.050.A.6.b.iii (emphasis supplied).

Each of these three paragraphs use the word "shall" in describing the manner in which the prerequisite considerations are to be utilized by the Responsible Official. All three of these paragraphs are under the heading "Effect" of prerequisite considerations. There can be no doubt that the Responsible Official has a mandatory duty to utilize these prerequisite considerations in evaluating development applications to which they pertain.

Mr. Tull focuses on the last phrase in the last paragraph quoted above which provides that conditions shall "allow the reasonable use of property for a purpose to which it is suitably adapted." Note this language does not require you to forego imposing necessary conditions, even if they preclude a particular use sought by the developer. The Code requires that the conditions imposed allow for "the reasonable use of property," not the most intense use of property nor the use of property preferred by the landowner. As long as the conditions imposed will allow for a reasonable use of the property, this proviso has been satisfied.

For instance, applying this proviso to the Fairhaven Heights property, you are not required to avoid imposing conditions that might preclude development of the property with the 700-plus units in the current proposal. If you impose conditions that were to preclude that specific use of the property, but still allow for other reasonable uses of the property, you have complied with the proviso. Unless the applicant can demonstrate that, for instance, 100 units is not a reasonable use of the property, a condition limiting the number of units to 100 (because of, for instance, transportation network limitations) would not run afoul of the proviso (or the constitutional considerations upon which it is based).

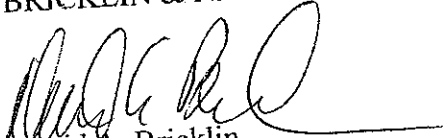
Mr. Tull's letter also suggests that conditions have changed since the prerequisite considerations were formulated and that, therefore, the prerequisite considerations should not apply to the current proposal. Mr. Tull ignores the vesting rules that, elsewhere, he has argued govern this application. If Mr. Tull is correct that the project has vested to Code requirements in place at the time of the original submission (a matter we vigorously dispute, as you know), then the application is vested to *all* of the Code provisions in effect at that time. Neither Mr. Tull nor his client can selectively pick and choose among Code provisions in effect at the time of the application and argue that they get the benefit of some of them, but can avoid others because "circumstances have changed." See, e.g., *Buechel v. DOE*, 125 Wn.2d 196, 206-07 & n.35 (1994). In other words, if Mr. Tull's clients have vested rights to have their application judged by the critical area ordinance in effect at the time they assert a complete application was submitted, then they also are bound to be judged by the prerequisite conditions in effect at that time, too.

Mr. Tull's assertion that conditions were different when the prerequisite conditions were adopted or that the prerequisite considerations were adopted "without the benefit of a transportation study," are arguments that Mr. Tull can advance in seeking legislative action by the City Council to modify the prerequisite considerations. But until and unless the City Council sees fit to modify the prerequisite considerations (for the reasons argued by Mr. Tull or otherwise), the prerequisite considerations remain as they were when adopted and as they were when the Fairhaven Highlands application was ostensibly vested.

The factual and traffic impact issues raised in Mr. Tull's letter were addressed by comment letters from our transportation consultant, Ross Tilghman, and many others in the community. I will not address those issues here. I am limiting this letter to the legal issues raised by Mr. Tull's letter. Thank you for your consideration of this analysis. Please let me know if you have any questions.

Very truly yours,

BRICKLIN & NEWMAN, LLP



David A. Bricklin

DAB:psc

cc: Responsible Development