

HEARING EXAMINER
FOR CHELAN COUNTY

In re:

TUSCAN VILLAGE AT LAKE
CHELAN

No. PD2008-002
P2008-009

MOTION OF THE CITY OF CHELAN
AND LAKE CHELAN SEWER
DISTRICT THAT THE HEARING
EXAMINER RECONSIDER HIS
DECISION AND/OR CLARIFY
CERTAIN ELEMENTS THEREOF

COMES NOW the City of Chelan and the Lake Chelan Sewer District, through their attorneys of record, and moves the Hearing Examiner to reconsider his Decision dated November 16, 2009, as set out below. This motion is based upon the record and Rule 1.24(B) of the Rules of Procedure for Proceedings Before the Chelan County Hearing Examiner.

1. Finding of Fact 74 / Conclusion of Law 16. Finding of Fact 74 and Conclusion of Law 16, regarding a decision of the Chelan County Board of Commissioners (the "BOCC"), is based upon comments of Counsel, and is not based on evidence in the record. Finding of Fact 74 and Conclusion of Law 16 are set out below, for convenience:

74. The Chelan County Board of Commissioners specifically addressed the issue of the applicability of the City of Chelan Development Standards to this Plan and PDD and specifically concluded that such standards would not be applicable to the area covered by the 2007 Interlocal Agreement. The City of Chelan's Development Standards were adopted after the 1997 Memorandum of Agreement and thus subject to independent review and potential disagreement.
16. The Chelan County Board of Commissioners decision of August 9, 2009 was not appealed and the Chelan County Hearing Examiner has no authority to reverse or alter that policy decision, and is bound by that policy decision in making his decision contained herein.

In fact, as indicated in the Final EIS, September 2009, page 12, section 2.6, the BOCC has made no decision regarding the applicability of the City's Development Standards to the South Shore Area. On

August 8, 2009, the BOCC considered a continued hearing on the matter, and continued it further to December 28, 2009. A copy of the minutes of the BOCC are attached as *Exhibit "A"*. Reference should be made to pages 7-8.

2. Parties to the Development Agreement. The Decision refers to the execution of a Development Agreement. In Finding of Fact 62, the reference to the Development Agreement is with regard to its approval by the BOCC and the Chelan City Council. However, in Conditions of Approval Nos. 9 and 11, the reference to the Development Agreement is with regard to the approval by the BOCC, only. Further, the Development Agreement is also mentioned in Condition of Approval No. 23 with reference only to the BOCC. Finally, Condition of Approval No. 25, which identifies the components of the Development Agreement refers only to the BOCC as a party.

While the City argued that the Development Agreement should be negotiated solely with the City's Council, it is clear the Hearing Examiner disagrees. However, the Decision is inconsistent, and based upon the provisions of Chelan County Code Section 14.18.020(2), the City is a party to the Development Agreement.

3. Finding of Fact 27. Finding of Fact No. 27 includes three points which need to be reconsidered. For convenience, Finding of Fact No. 27 is restated below, and it appears principally to be a direct quote from page 5 of the Staff Report, summarizing "Sanitation":

27. The site can handle an on-site sewage treatment system which would use treated water used for irrigation or infiltration as part of the open space. It is understood that a portion of the single family residential development may use on-site septic systems until such time as either the on-site system or city connection is necessary. Each option, identified in the Final EIS is a viable choice. As conditioned, it will be up to the applicant to secure a State approved on-site system and management agreement or hook up to the city system prior to finalizing the plat. Mitigation measures identified in the Final EIS are included in the conditions of approval.

3.1 The Site's ability to handle an on-site sewage treatment system. The first element of Finding of Fact No. 27 is inconsistent with the testimony on the subject, and is inconsistent with a conclusion that Condition No. 27 is imposed. In his testimony, Rick Esvelt confirmed that in order for a reclaimed water facility to be approved, a hydro-geologic study would have to be conducted to confirm the suitability of the site for a reclaimed water facility. The only other person testifying on the issue was Randy Asplund, whose written testimony was incorporated as Exhibit 10. Some of that testimony was incorporated as Finding of Fact No. 52. Randy Asplund testified that, based on his professional experience and expertise, the FEIS does not provide sufficient information on which to conclude that the reclaimed water facility and the associated wintertime discharges of reclaimed water to groundwater does not present a hazard to the water quality of Lake Chelan. Based on Mr. Asplund's opinion, he recommended specific independent studies be made, which recommendation is substantially included as Condition No. 27. The City and the Sewer District believe that the first sentence of Finding of Fact No. 27 is inconsistent with the adoption of Mr. Asplund's testimony at

Finding of Fact No. 52 (confirmed by the testimony of Rick Esvelt) and the imposition of Condition No. 27, and should therefore be stricken.

3.2 The understanding of the use of on-site septic systems. As indicated above, the second sentence of Finding of Fact No. 27 is based upon language in the Staff Report. The sentence is not a statement of fact, but a conclusory statement which is not based on a fact. The statement is with reference to the Final EIS, which specifically states that the project does not anticipate on-site septic systems for the treatment of domestic wastewater. There is no evidence supporting the statement in the Staff Report. Further, as indicated in Finding of Fact No. 50, based on the Staff Memo of October 21, 2009, the reference to “on-site septic” was in error. Please also see the comments made in section 4, with reference to Finding of Fact No. 55. Based on these points, the second sentence of Finding of Fact No. 27 should be removed, as it is based on an admitted mistaken statement in the Staff Memo, and which is not based on any fact found or discussed in the FEIS.

In addition, and as discussed in item 4, below, the first appearance of the reference to “on-site septic” in the Staff Report was a significant portion of the testimony of Dwane Van Epps, which was as described above, and Finding of Fact No. 48(c) should be corrected, accordingly.

3.3 The meaning of “necessary” in Finding of Fact No. 27 needs to be clarified. Notwithstanding the argument set out in item 3.2, the finding provides for on-site septic systems “until such time as either the on-site system or city connection is necessary.” It is not clear what standard is referenced with the term “necessary”, and it is conceivable that, based on the allowance of alternative wastewater treatment systems, it may never be “necessary” to make the determination on the alternatives for an on-site system or city connection.

4. Use of septic tanks as an interim measure should be stricken. In addition to the provisions of Item 3, above, Finding of Fact No. 55 should be stricken, as it is not based on any evidence in the record. For convenience, Finding of Fact No. 55 is set out below:

55. The issue of temporary use of septic tanks as an interim measure to be used in conjunction with the development of a wastewater treatment system was raised and discussed in the FEIS. The FEIS, with the addition of condition of approval #27, requires the entire issue of water quality, safety and protection of the public and environment be addressed in a project specific environmental review at the time a specific system is chosen, but before final plat approval.

The Staff Report is similarly incorrect. At page 12 of 31, in reference to the Capital Facilities Plan Element, states:

Policy 15 has to do with supply and limiting systems to those within the UGA or the City. The Tuscan Village project is some what subjective in relationship to the City of Chelan’s time line, due to the phasing of the water and sewer extensions. Based on the findings of the FEIS, which includes the DEIS appendices, analysis the water supply can be secured through other utility purveyors, and onsite private

septic systems can be utilized until final build out of the development occurs. The private water sources identified in the FEIS will support the full build out of the proposed development. The project is Compatible with policies 1, 13 & 15 if the project is phased as proposed.

In his testimony, Public Works Director Dwane Van Epps specifically stated that the issue of temporary use of septic tanks as an interim measure was not raised and discussed in the FEIS. In fact, as referenced by Mr. Van Epps, the FEIS specifically was premised on the fact that on-site systems were not being proposed. See Final EIS, September 2009, page 14 (“No septic systems are proposed. Project engineers have conferred on the adequacy of the site to handle infiltration in times when irrigation is not occurring (See FEIS Exhibit C)”, which was in response to a specific inquiry by the City). The City and the Sewer District cannot locate any mention in the FEIS regarding the use of on-site septic systems at any time.

In addressing the potential of phasing of the wastewater options, the FEIS provides that the phasing would be in the form of the first units in the Project discharging to the Sewer District’s line, and units from the Project would be removed from the Sewer District’s line at the time the reclaimed water facility was constructed. See DEIS, Revised September, 2009, pages 40-41.

After responding to the various comments to the DEIS, the FEIS lists proposed and identified mitigations, specifically stating, with regard to water and wastewater issues on pages 21-22:

Tuscan Village proponents have the necessary water rights to supply the project. The DEIS identified several alternatives for provision of potable water and wastewater treatment. All are technically feasible. The environmental differences identified are primarily on- and off-site construction impacts and the ability to provide reclamation and reuse of wastewater. Mitigation is basically to ensure the chosen system configuration is in conformance to State requirements.

1. The applicant shall, as part of the final plat submission, demonstrate that plans and agreements are in place to provide both potable water and wastewater to the project. The systems shall be approved by WDOE and WDOH and shall meet all State standards for public water supply and public waste water treatment. The wastewater and water systems shall be subject to additional review at the engineering level to address system-specific issues.

Finding of Fact No. 55 is premised upon the discussion of the use of on-site septic systems in the FEIS. However, there is no discussion regarding the use of on-site septic systems, except to state that one-site septic systems are not part of the Project. There is no basis in fact for Finding of Fact No. 55, and there is no basis in fact for the Staff Report, excerpted above. Finding of Fact No. 55 should therefore be stricken.

5. An additional Finding of Fact should be entered regarding the jurisdiction of the Sewer District. Dwane Van Epps testified that most of the lands within the Project is within the jurisdiction of the Sewer District. He further testified that the Sewer District is in the process of

undertaking the planning necessary for the Project, depending upon the decision of the Hearing Examiner, which has been accomplished through the hiring of RH2 Engineering. The Sewer District proposes the following Finding of Fact:

Most of the lands within the Project are with the jurisdictional boundaries of the Lake Chelan Sewer District. The Lake Chelan Sewer District has undertaken the planning for the impact of the Project on its facilities.

6. The hydrogeologic study should be accomplished by an accredited expert. Condition of Approval No. 27 requires a specific independent study to examine the hydrogeologic conditions of the area with regard to the interaction of reclaimed water with the lake. While the City and the Sewer District agree with this requirement, the condition should require the study be performed by a person with appropriate educational and technical expertise and experience. The City recommends Condition of Approval No. 27 be amended to read as follows:

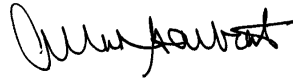
27. Prior to final plat approval, a specific independent study (or studies as may be appropriate), by a person (or persons) or organization (or organizations), having educational, technical and practical qualifications as a hydrogeologic engineer, having no relationship with the Planned Development or the applicant, selected by the applicant and approved by the County, shall be required to examine the hydrogeologic conditions, the interaction of reclaimed water with the lake and examination of the potential impacts of both nitrogen and phosphorus loadings on lake water quality. Such studies shall specifically address the development of a groundwater monitoring plan and mitigation measures in order to insure the water quality of Lake Chelan is preserved. The applicant shall comply with all recommended mitigation measures.

7. The date of the Memorandum of Understanding should be corrected. Finding of Fact No. 64 refers to the Memorandum of Understanding as being signed on July 8, 2009. This is incorrect. The date of execution was July 8, 1997, and the Finding should be corrected.

8. Testimony of Craig Gildroy should be corrected. Finding of Fact No. 48(b) illustrated that the Craig Gildroy testified that the Tuscan plan was in harmony with the Comprehensive Plan. The Finding of Fact should be made complete, in that the reasons for Mr. Gildroy's conclusions was based on the following City of Chelan Comprehensive Plan goals and policies: to encourage new commercial development to locate downtown to "round out" the commercial district; to encourage land uses to round out the commercial core; and Plans for development or redevelopment along Lake Chelan and other public open space should be oriented to tourist commercial, recreational services, activities, and residential; and create a strategic plan for a downtown "renaissance". The land uses of "commercial" and "retail" are too broad to satisfy the intent of the City of Chelan Comprehensive Plan, and a determination of harmony could therefore not be made. Instead, Mr. Gildroy requested that the permitted land uses be as stated in the written narrative or according to the Tourist Accommodation zone.

9. The description of the “Interlocal Agreement” for the Southshore should be corrected. Finding of Fact No. 65 refers to the Interlocal agreement for the Southshore as being recorded on July 9, 2009. In fact, the “Interlocal Agreement for Planning & Coordinating South Shore Urban Services and Facilities” was recorded July 18, 2007.

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