BEFORE THE HEARING EXAMINER for the
CITY of SAMMAMISH

ORDER ACCEPTING A REQUEST FOR RECONSIDERATION and INVITING COMMENTS

FILE NUMBER: UZDP2019-00562

APPELLANTS: STCA, LLC & STC JV1, LLC
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APPLICANTS: Same as Appellants

TYPE OF CASE: Appeal from denial of a Unified Zone Development Plan

WHEREAS, on August 30, 2021, the City of Sammamish Hearing Examiner ("Examiner") issued a Decision in the above-entitled matter; and

WHEREAS, on September 9, 2021, Respondent Department of Community Development filed a timely Motion for Reconsideration (the "Motion"); and

WHEREAS, the Examiner has read the Motion and desires to allow parties of record to present written comments in response to the Motion before acting upon it, as authorized by Hearing Examiner Rule of Procedure 504(d)(3).

NOW, THEREFORE, the Hearing Examiner issues the following:

ORDER

1. City Staff shall mail or otherwise provide a copy of the Motion and this Order to all parties of record.

2. All parties of record (other than Respondent which submitted the Motion) may submit written comment in response to the Motion on or before close of business on Friday, September 24, 2021 (which is the 10th working day after the date of this Order). Comments shall be submitted to Cynthia Schaff, Hearing Examiner Clerk, preferably by e-mal to cschaff@sammamish.us, or by USPS to 801 228th Avenue SE, Sammamish, WA 98075. Ms. Schaff will forward timely received written comments to the Examiner after the end of the comment period. Comments or portions of comments which address matters beyond the scope of the Motion will not be considered.

3. The Examiner will issue a final Order on the merits of the Motion within 14 days after the close of the comment period.

ORDER issued September 10, 2021.

\s\ John E. Galt

John E. Galt
Hearing Examiner

Hearing Examiner Galt

BEFORE THE HEARING EXAMINER
CITY OF SAMMAMISH

In re the Appeal of: Findings/Conclusions/ Decision Town Center Phase 1: SW Quadrant, Unified Zone Development Plan STCA, LLC & STC JV1, LLC, Appellant	**NO. UZDP2019-00562** CITY OF SAMMAMISH'S MOTION FOR REDCONSIDERATION

RECONSIDERATION REQUEST

The City of Sammamish Department of Community Development ("DCD", "Department") requests reconsideration of the Examiner's Decision ("Decision") dated August 30, 2021. The specific aspects of the Decision encompassed in this request are detailed below.[1]

I. INTRODUCTION

[1] Pursuant to HEROP 504b the request is made by DCD which is located in City Hall, and which can be reached through its counsel of record for this proceeding with the contact information noted below.

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Reviewing a massive record, including thousands of pages of exhibits and many hours of testimony over seven hearing days is no small task, particularly within the constricted time frame set by the Code. The Department appreciates the Examiner's efforts in this regard which are reflected in the eighty-eight-page Decision. Per SMC 20.10.260 reconsideration is also part of the hearing examiner review process and is particularly important here in light of the scope of the underlying decision. The Department therefore brings the following to the Examiner's attention and requests reconsideration/clarification.[2]

II. RECONSIDERATION REQUESTS

A. The Department was within its discretion in declining to approve STCA's townhome proposal.

The Decision presents as a determination that the Department erred with regard to townhomes in denying the UZDP application Department, based on a Department misreading of the Code to the effect that townhomes are forbidden in the A-1 zone. See, e.g., Decision Section 12.2 (including 12.2.1). In doing so, the Decision does not acknowledge the facts and analysis presented by DCD during the seven-day de novo hearing. The touchstone of DCD testimony was that appropriately designed and placed townhomes could be interspersed as part of an overall appropriate A-1 zone plan integrating pedestrian oriented and mixed-use, rather than presented in "monoculture" blocks. As explained, this would be consistent with the Code statement of the purpose of the A-1 zone, " to provide for a pedestrian-oriented mix of retail, office, residential, and civic uses…" SMC 21B.10.030(1)(a). The Department's

[2] The Department reserves the right to take exception to the Decision, including but not limited to those parts noted in this request, through a LUPA action in superior court.

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testimony at the hearing was that in the Department's judgment the STCA proposal for townhomes does not meet this (and related) Code purposes. See, e.g., Tr. 1076 lines 11-16, at 1077 line 6 through 1078 line 15; Tr. 882-86.[3]

Respectfully, the Decision appears to remand because the Department cannot proceed on the basis that townhomes are not ever permitted in the A-1 zone. However, the factual record compiled during the hearing reflects the Department position that townhomes can be permitted, but not as proposed in the STCA application.

Therefore, with regard to this issue, the Decision appears to be based in whole or in part on erroneous facts or information and, in contravention of the Code, contradicts the Department's exercise per Code of its professional judgment and discretion, and substitutes the Examiner's. Reconsideration/clarification is therefore requested to the specific effect that, while townhomes may be part of a proposal for the A-1 zone, it was within the Department's Code-granted discretion to decline to approve the townhome plan presented to it by STCA.

B. Decisions On Other Projects Do Not Bind Here.

The Decision cites and relies on other DCD UZDP decisions as effecting a kind of estoppel, suggesting that what may have been approved for very different applications (in terms of scope, location, etc.) may bind DCD here.[4] It also appears to go further, suggesting

[3] STCA testimony described its townhomes' private front yards as somehow fulfilling this explicit Code purpose. See Tr. 366-69. The Department, applying its professional judgment and Code discretion, disagreed.

[4] E.g. Decision sections 13.2.1, 13.2.2, 14.1.3,17.2.1,17.2.2,17.2.3, 19.1.12.

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that, where particular Code requirements may not have been applied in other application contexts, they may not be applied here or if applied should lead to approval.

However, there is no requirement in the Code or elsewhere that the Department's discretionary decision on a current application must be justified in terms of past ones on other applicants' proposals. Processing of prior decisions may have called for less information/analysis and not raised the same issues in applying Code requirements. [5] This could be because their locations were different, their zoning differed in whole or in part, they were on existing established arterial streets with public infrastructure so they did not entail siting and dedication of significant city infrastructure as envisioned by the TCP, and/or they were reviewed and vested under older stormwater and public works standards with different processes for variations.

The preceding important factual/physical differences are not the first predicates for reconsideration here. Reconsideration is called for in the first place because the Decision rests on an acknowledged extension of *Sleasman v. City of Lacey, 159 Wash. 2d 639, 151 P.3d 990 (2007). Sleasman* involved fines in the specific context of a Code enforcement action and in that context held that "a nonexistent enforcement policy cannot provide notice to the Sleasmans."

[5] For example, Decision section 14.1.3 states that in three earlier UZDP decisions, all prepared by or under the supervision of a planner no longer with the City, no TCP Goals and Policies Compliance Analysis was documented, as if this demonstrates error by DCD in undertaking such an analysis here.

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Reliance on an extension of *Sleasman* is legal error; there are cases that directly apply to this application context. In *Buechel v. Dep't of Ecology*, 125 Wash. 2d 196, 211, 884 P.2d 910, 919-920 (1994) the Washington Supreme Court held:

> The proper action on a land use decision cannot be foreclosed because of a possible past error in another case involving different property. No authority is cited for the proposition that the Board can be estopped from enforcing existing regulations by prior decisions not ever even considered by the Board. In *Mercer Island v. Steinmann*, 9 Wn. App. 479, 483, 513 P.2d 80 (1973), the court stated that a municipality is not precluded from enforcing zoning regulations if its officers have failed to properly enforce zoning regulations. That court explained that the elements of estoppel are wanting. The governmental zoning power may not be forfeited by the action of local officers in disregard of the statute and the ordinance; the public has an interest in zoning that cannot be destroyed. Therefore, the landowner's argument that the action of the Board is arbitrary or capricious is not well taken. First, the Board never reviewed the 1980 neighbor's variance decision and its review would have been de novo. Second, the Department is not estopped from attempting to enforce zoning law because of a prior decision regarding other property.

See also *Dykstra v. Skagit Cty.*, 97 Wash. App. 670, 677 985 P.2d 424 (1999).

In other words, decisions on land use applications, particularly where discretionary judgment is involved per Code, are not precedential. See *Buechel, supra*, at 209 ("The size, location, and physical attributes of a piece of property are relevant…").

DCD therefore requests reconsideration/clarification that the Decision is not intended to require the Department to: overlook or not apply Code requirements; to adhere to past discretionary decisions on unrelated applications; to grant variances, variations, deviations or dispensations from same, or to replicate processing errors or omissions that may have occurred with regard to past applications.

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C. Advance Payment For Street Vacation Is Not Required .

The Decision suggests that the City addressed the issue of street vacation "nonsensically" as an all or nothing proposition. See, e.g., Decision section 3.2.2 et seq. However, the Record reflects a considered approach by the Department that called for commencement of the street vacation process during the pendency of the UZDP so that there was a colorable basis for processing a UZDP application that includes STCA development on City right of way. The Decision rejects this approach:

> Why would one pay for right-of-way that might never be needed if a future land use application were not approved? And once vacated, it would seem highly unlikely that the municipality would be interested in refunding the compensation it received and re-acquiring the right-of-way.

Id at 3.2.2

This speculation is apparently based on statements in STCA's Posthearing Brief [6], to which the City was not able to reply, misreading Exhibit 1006, the Public Works Standards (PWS) applicable to vacations. The PWS provide in section I.2 cited by STCA that:

> Where the vacation was initiated by the City Council or was a requirement by the City as a condition of a permit or approval, the owners of the property abutting the area vacated shall not be required to pay such sum that includes the appraised value of the area and costs associated with the physical closure. [Emphasis added.] [7]

[6] Appellant's Posthearing Brief at 25.

[7] This is in keeping with state law which does not require that cities obtain payment from abutting owners. See *Greater Harbor 2000, ET AL. v. City of Seattle, ET AL.*, 132 Wash. 2d 267, 282-83, 937 P.2d 1082 (1997)

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In other words, STCA could have pursued the street vacation process, noted that the vacation would be required as part of a UZDP, and set the stage to obtain City Council approval for it.

There are middle ground and pragmatic approaches available, which the Decision appears to preclude. Deferral of a street vacation application until after a UZDP has been finally approved, including presumably through any appeal process, is highly prejudicial to the public, the Department, and the City Council -- and arguably even to UZDP applicants. Neither the Department, nor the Examiner, nor STCA can assume or grant a street vacation. These are at the complete discretion of City Council. Per SMC 20.05.040(1)q, the Department cannot issue a decision approving a plan entailing development of property[8] still in the City's domain.

STCA has apparently chosen not to seek a street vacation, despite staff admonishments to do so, because it is to its advantage to present the Council with a fait accompli in the form of a final UZDP that requires a vacation and leaves the Council no options other than to give an unqualified yes -- or require everyone to go back to the drawing board.[9] However, the Decision's speculation that the vacation is a foregone conclusion overlooks the Council's ability to place conditions on a vacation. Here, these could concern public access, use, and the like – which could require a UZDP to go back to the drawing board.

[8] See Tr. 1008-1009; 1395-97. See also 1368-69.

[9] See Tr. 143.

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It is not the Department's responsibility to act as broker for an applicant to obtain approval/control of property from City Council ; that is the applicant's responsibility. And it is not up to the Department, or the Examiner, to assume or speculate upon whether or on what conditions a vacation not even requested might be granted.

The Department therefore respectfully requests reconsideration of Decision section 3 in its entirety, because it is based on erroneous information and does not comply with applicable law. This request includes, but is not limited to section 3.2.5, which unless clarified suggests that the Department is required to issue a UZDP approval despite the applicant's failure to even apply for a street vacation, which is subject to City Council, not DCD review and decision.

D. Dicta Concerning City Contribution to Capital Facilities (e.g. City Square) Should be Deleted

The Department requests reconsideration/clarification, specifically deletion, of Decision Section 10.2.3 as both outside the Examiner's jurisdiction[10] and based on speculation.[11] As worded this section appears to presume that the City Council must contribute some further unspecified amount. It further appears to presume that the City's "dedication" of property the City controls to Town Center development is not also a basis, separately or in concert with the contributions the City has already made, for the Department to make a discrete determination as to the appropriate location for City Square.

[10] See section 10.2.3 (construing RCW 82.02.020 concerning

[11] See, e.g., Section 10.2.3 (speculation concerning City contributions, concerning reviewing court determinations on need for City Square).

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The Decision's statements are effectively dicta, ultra vires and will contribute to rather than reduce confusion and contention.

Respectfully submitted September 9, 2021 by Co-Counsel for City of Sammamish:

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DECLARATION OF SERVICE

Peter Eglick declares that I am well over the age of eighteen, not a party to this lawsuit and am competent to testify as to all matters herein. On September 9, 2021, I caused true and correct copies of the foregoing document to be delivered via Email to the parties listed below:

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I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED: This 9th day of September, 2021 at Lake Forest Park , Washington.

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