



KITSAP COUNTY DEPARTMENT OF COMMUNITY DEVELOPMENT

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STAFF REPORT

RECOMMENDATION TO THE HEARING EXAMINER

Report Date: September 19, 2016
Hearing Date: September 26, 2016

Appeal Submittal Date: June 16, 2016
Staff Planner: Scott Diener

Project Name: SMCI Preliminary Short Plat 12 00686

Type of Action: Appeal of administrative denial of SMCI Preliminary Short Plat application

Summary of Appeal: William Lynn, as the designated project representative, has filed an appeal of the decision by the Department of Community Development (DCD) to deny the project application on June 17, 2016 regarding the SMCI Preliminary Short Plat application.

Land Use File No: 12 00686

Tax Account Number: 282501-4-025-2007

Project Location: The project location is in the Tracyton community, due east of the Central Kitsap Urban Growth Area, currently zoned Rural Residential (vested to Urban Low Residential).

Appellant(s): SMCI Corp, POB 883, Gig Harbor, WA 98335
Authorized Agent / Representative: William Lynn
1201 Pacific Ave, Ste 2100, Tacoma, WA 98402

Parcel Owner: SMCI Corp, POB 883, Gig Harbor, WA 98335

Project History: On June 27, 2012, SMCI Corp filed a 9-lot Preliminary Short Plat application. The application was deemed 'complete' for further review on August 1, 2012. As with any such application, the applicant is required to demonstrate stormwater treatment feasibility.

DCD denied the application on May 3, 2013 when after two review cycles the applicant was unable to demonstrate consistency with Kitsap County Code (KCC) Title 12 Stormwater Drainage. On appeal, the application was settled and remanded for further review because changes were agreed upon for the application to stand enough chance with further review.

To date, however, the application has had nine review cycles, each attempting to achieve a compliant stormwater drainage design. DCD has repeatedly communicated—both in person and

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through written communication—with the project engineer regarding the KCC stormwater drainage requirements, each time attempting to get to adequate stormwater treatment and a favorable decision. Simply stated, the engineer has not been able to provide a stormwater design that complies with Title 12. DCD also asked an independent reviewer—Public Works Deputy Director and licensed Professional Engineer David Tucker—to evaluate the drainage design, and he also concluded that the submittal is not compliant with KCC Title 12. This evaluation resulted in a meeting with the engineer where DCD explained the application and modeling used to analyze stormwater were deficient.

SMCI’s last submittal was provided to DCD on January 20, 2016 in response to a request for corrections provided to the applicant on October 22, 2015. DCD conducted its review of the information provided and found the (most recent) submittal to be deficient and fails to meet code.

DCD advised in a June 2, 2016 letter and June 7, 2016 Notice of Decision that the application was being denied. On June 21, 2016, DCD received Notice of Appeal.

The primary aspects of the appeal are listed in the table below, followed by relevant code and DCD response.

Issues raised by appellants	Relevant Code	Department Response
<p>1. It was improper and inconsistent with applicable codes for the County to deny the short plat on the basis of the claimed inconsistencies with applicable storm water and drainage requirements. This is an improper procedure, inconsistent with County’s normal processes, and inconsistent with the applicable provisions of County and State law. It was especially inappropriate to deny the short plat when the delays and multiple submittals were the result of extraordinary County</p>	<p>KCC 16.48.02 0(A); KCC 16.04.06 0(D); KCC 21.04.17 0(B)</p>	<p>Despite repeated attempts by SMCI to show compliance with all aspects of KCC Title 12 Stormwater Drainage, the application does not meet KCC Title 12’s minimum requirements. The stormwater flow control standard articulated in KCC Section 12.18.110 requires a professional engineer to demonstrate compliance through the use of mathematical modeling and other analyses. Since the standard is not prescriptive, any change to one of the design elements could impact other features and require additional analyses to demonstrate compliance.</p> <p>The applicant proposed to infiltrate stormwater from the development through new and existing fill material located onsite. Chapter 7.3.3 of the Kitsap County Stormwater Design Manual (KCSDM) states “Infiltration facilities shall not be constructed in fill materials. An exception may be made for engineered fill specifically designed for the purpose of infiltration when overexcavation is proposed to enable utilization of suitable soils beneath restrictive soils layers.” The</p>

<p>requirements, including storm water modeling. An additional cause for delay and multiple submittals was varying standards imposed by a changing cast of County reviewers.</p>	<p>proposed design does not meet this criteria, and the applicant’s engineer requested a technical deviation (KCC 12.04.025(1)) from this criteria. However, he was unable to show how the proposal met all four technical deviation requirements. In particular he did not demonstrate how the design could simultaneously meet safety, facility function, and environmental protection requirements while producing a compensating or comparable result. The proposed design and analysis did not show how it maintained the fill material’s structural integrity while still meeting all aspects of the code and stormwater design manual related to flow control. His proposed solutions for structural stability often undermined his flow control demonstration analysis. Additionally, the design does not produce a comparable result since the stormwater runoff generated on the site does not infiltrate as proposed.</p> <p>When the existing fill material was placed on the site years ago, it was placed on glacial till. Glacial till often does not have good infiltrative qualities. Because of this limitation, a groundwater modeling analysis was completed. The groundwater modeling consultant determined none of the stormwater runoff generated by the proposed development would infiltrate onsite. Instead the water travels horizontally through the existing and proposed fill material and discharges into the wetland immediately adjacent to the project site. The result is a surface flow off the site rather than groundwater infiltration proposed by the applicant’s engineer.</p> <p>The engineer of record submitted 9 revisions attempting to show how the project would meet both KCC 12.18.110 Flow Control and all the elements of a technical deviation to allow infiltration of stormwater runoff into fill material. DCD reviewed and responded to each submittal ultimately determining, based on the information provided, that KCC 12.18.110 and 12.04.025 could not be met. In an attempt to be sure DCD’s decision-making was correct, DCD utilized an independent reviewer, Dave Tucker, PE, Assistant Director, Public Works-Utilities, to evaluate the drainage designs. Mr Tucker also independently determined that the project did not meet</p>
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		<p>KCC Title 12 requirements.</p> <p>DCD has the authority to deny an application if that application does not comply with Kitsap County Code requirements. KCC 16.48.020(A), KCC 16.04.060(D) and KCC 21.04.170B. The Department has a duty to explain deficiencies that exist in a plan set. The department explained deficiencies via multiple letters (see exhibit no. 9). The code identified by DCD as not being met have remained the same from the original submittal of June 2012, as well as all subsequent submittals. Ultimately, DCD had to conclude its review, resulting in a final denial letter of June 2, 2016 being issued with a Notice of Administrative Decision on June 7, 2016.</p>
<p>2. Even if the applicant's storm water design does not currently meet the storm water requirements, it should be given an opportunity to modify its design so that the requirements can be met. There are, in fact, other ways of providing storm drainage at the site, and the applicant has a right to modify its design to meet County requirements.</p>	<p>KCC 21.04.150(D); KCC 16.48.020(A); KCC 16.04.060(D); KCC 21.04.170(B)</p>	<p>The Department does not dispute that opportunities to modify are a necessary part of permit review and are provided for in code. KCC 21.04.150(D) provides the process for reviewing modifications to applications that have not yet received preliminary approval, and applies here. As stated therein, the making of minor modifications has no bearing on the codes under which the project is reviewed; however, a major modification is considered to be such a significant change that it will be considered a new application, and reviewed under the codes in effect at the time of the major modification. In other words, vesting may be lost through what the applicant proposes by way of changes. The code specifically lists what the County considers to be major modifications.</p> <p>This distinction between major and minor changes has proven problematic for SMCI because it initially proposed to address stormwater by infiltration at a time when the parcel was in the Urban Low zone and allowed a density of 5-9 dwelling units per acre. After SMCI's submittal of a complete application, the County was required (following an appeal to the Growth Management Hearings Board) to retract its Urban Growth Area boundaries and SMCI's property became Rural Residential with an allowed density of 1 dwelling unit per 5 acres. Clearly, SMCI's project could not be allowed as proposed if vesting were lost. Accordingly, while modification is allowed, the scope of the</p>

	<p>modifications that SMCI can make are limited if it wants to stay vested to the code in effect at the time of the application.</p> <p>Even with these limitations, multiple opportunities to modify have already been given to SMCI to address multiple concerns, including stormwater. SMCI submitted its preliminary short plat application on June 27, 2012. On or about July 2, 2012, a letter was sent notifying SMCI that its application was incomplete and what documents were needed for review. On or about August 1, 2014, a complete application was finally provided, and review was made by the Department's environmental and planning group. On or about September 20, 2014 a letter was sent to SMCI detailing that additional information was needed for the onsite wetland and for certain short plat requirements. It was conveyed to the applicant that this did not constitute a complete review by all Department groups. Revisions were submitted in January 2013, but these still did not comply with code and the applicant was unwilling to make the necessary changes to address the deficiencies. Accordingly, the permit was denied on or about May 3, 2013.</p> <p>The May 3, 2013 denial was appealed by SMCI, who then made sufficient changes to the application that the Department was comfortable that there was a potential for compliance. The appeal was then settled and another revised application was submitted on or about May 22, 2014. On or about June 3, 2014, additional corrections were requested by the Department in order to comply with the County's stormwater code. On or about June 16, 2014 some corrections were made, but unfortunately, these did not solve the noncompliance. Another correction letter was sent on or about October 2, 2014, to which additional corrections were provided on or about December 18, 2014. These corrections necessitated still more changes to the plans to show compliance with stormwater codes, and another correction letter was sent on or about January 13, 2015. At this point, the Department engaged the services of a professional engineer from the Public Works Department, David Tucker, to conduct an independent review of the project. His comments were incorporated into the January</p>
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		<p>13, 2015 correction letter. In April 2015, the applicant submitted more information and corrections in attempt to show compliance, but there still were problems and yet another correction letter was sent on or about June 3, 2015.</p> <p>A fairly significant revision was provided by the applicant on or about July 28, 2015 and the Department conducted an in-depth review. Still, more corrections were needed and the final correction letter was sent on October 7, 2015. After receiving an extension to provide the necessary information, the applicant submitted the last revision on January 20, 2016. The Department carefully reviewed the information and corrections and was convinced that this repetitious cycle would not bring the application any closer to compliance with the County's stormwater requirements. Each correction, while addressing one issue, would merely create other nonconformities, which would then need correcting. Finally, on June 2, 2016, almost four years after the application was initially submitted and after careful consideration of County codes and policies, the Department issued letter denying the application.</p> <p>There can be no serious contention that the Department did not give the applicant sufficient opportunities to modify the application. This relatively simple 9-lot preliminary short plat has gone through nine cycles of Department review, significantly more than what is considered average for a project of this kind. The decision to deny is not invalid for the failure to provide opportunities.</p> <p>The Department always has the authority to deny a short plat if that application does not comply with code. KCC 16.48.020(A), KCC 16.04.060(D) and KCC 21.04.170B. Despite repeated attempts by SMCI to show compliance with all aspects of the County's stormwater code, the application was still noncompliant. Thus, so long as the Department explained the deficiencies, which it did (Exhibit 9-9), the Department was authorized to deny the application.</p>
<p>3. The County's decision is contrary to laws including</p>	<p>RCW 58.17.03</p>	<p>The Department has not deprived SMCI of any vested rights under RCW 58.17.033. This section states in full:</p>

<p>the statutory protection of the appellant's vested rights under RCW 58.17.033. The County's decision to deny the short plat rather than providing the opportunity to make corrections constitutes a denial of the appellant's vested rights and the unlawful application of zoning and other land use provisions adopted after the date of the appellant's complete short plat application.</p>	<p>3</p>	<p>(1) A proposed division of land, as defined in RCW 58.17.020, shall be considered under the subdivision or short subdivision ordinance, and zoning or other land use control ordinances, in effect on the land at the time a fully completed application for preliminary plat approval of the subdivision, or short plat approval of the short subdivision, has been submitted to the appropriate county, city, or town official.</p> <p>(2) The requirements for a fully completed application shall be defined by local ordinance.</p> <p>(3) The limitations imposed by this section shall not restrict conditions imposed under chapter 43.21C RCW.</p> <p>The Department has never attempted to impose a different regulation upon SMCI's short plat application other than the ones in effect at the time the fully complete application was submitted. And, it is with these regulations that SMCI's application is noncompliant.</p> <p>As noted above, part of these regulations clearly state that if an application undergoes a major change, vesting is lost. SMCI has not been deprived of any right under this code because the only "right" that SMCI could have is to have "that application" processed under the regulations in effect at the time of a complete application. Noble Manor Co. v. Pierce County, 133 Wn.2d 269, 284-5, 943 P.2d 1378 (1997)("we conclude that what is vested is what is sought in the application for a short plat..."). See also Alliance Investment Group of Ellensburg, LLC v. City of Ellensburg, 189 Wn. App. 763, 773, 358 P.3d 1227 (2015), amended on denial of reconsideration (Oct. 20, 2015)("The vesting recognized under the land division statute is specific to the action at issue, not to all possible uses permitted by law."); Westside Business Park, LLC v. Pierce County, 100 Wn. App. 599, 604, 5 P.3d 713 (2000). Accordingly, if "that</p>
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		<p>application” changes substantially, it is no longer “that application.” SMCI, thus far, has not made any substantial change, as such is defined in KCC 21.04.150. To date, all changes have been minor and have not affected the application’s vesting date or the regulations under which the application has been reviewed.</p>
<p>4. The County's decision is contrary to its past practices, its past interpretations of its own code, and with the provisions of its code including Kitsap County Code Chapter 21.04, Chapter 16.48, and Chapter 16.04.</p>		<p>The Department is unaware of any inconsistencies with its own application of chapters 21.04, 1.48 or 16.04 of Kitsap County Code. Should any materials submitted by SMCI suggest this alleged inconsistency, the Department reserves the right to take additional time to investigate and respond.</p>
<p>5. The Applicant has been prevented from modifying its plans to meet County requirements by threats that the revision will cause the applicant to lose its vested rights. It is unlawful for the County to force the applicant to choose between its statutorily protected vested rights and meeting storm water requirements.</p>		<p>See the Department’s answer to Appeal Point #3. The County, through lawfully adopted regulations, has limited the extent an application can be amended and still be considered the same application. This is not contrary to law as noted above. Furthermore, there has been no “threat.” The provisions of Kitsap County’s Code on this point are expressly and clearly written; the Department is obligated to follow and implement the code as adopted by the local legislative body.</p>
<p>6. The design submitted by the applicant is in part dictated by the requirement to meet minimum density and that limits the ability to meet storm requirements.</p>	<p>KCC 17.382.0 60; KCC 17.120.0 10;</p>	<p>SMCI submitted its application at a time when the property was inside an Urban Growth Area with an Urban Low zoning designation and, as such, was required under the Growth Management Act, Kitsap County Code and case law to exhibit urban levels of density.¹ In this case, the urban density required by the County is a range of five (minimum)</p>

¹ It is acknowledged that Growth Management Hearings Boards cannot establish “bright-line” rules for what is considered an urban density, but GMA still requires urban areas to have urban levels of development and not be characterized by rural growth. *Thurston County v. Western Washington Growth Mgmt. Hearings Bd.*, 164 Wn.2d 329, 360, 190 P.3d 38, 53 (2008).

<p>The combination of County requirements makes it impossible for the application to establish a reasonable use of the property and constitutes an unlawful taking of property.</p>	<p>KCC 17.420.050(A)</p>	<p>to nine (maximum) dwelling units per acre. See former KCC 17.382.060, to which the project vested.² The allowed density under current zoning, which is Rural Residential, and that which is enjoyed by neighboring parcels, is one dwelling unit per five acres. KCC 17.120.010. There is no minimum or maximum density associated with the Rural Residential zoning. KCC 17.420.050(A). SMCI has not shown, nor can it show, that it would not be able to construct a single family residence on its parcel; it merely may not be able to develop at the density it wishes because of the site specific conditions of the property and the inability to demonstrate compliance with the County’s stormwater code. Reasonable use does not mean development in the way or at the intensity desired, but takes into account the allowable uses under zoning and what may be enjoyed by neighboring parcels. <i>Buechel v. State Dep't of Ecology</i>, 125 Wn.2d 196, 208, 884 P.2d 910 (1994).</p> <p>As it relates to the takings challenge, these allegations are constitutional in nature and are outside the authority of the Hearing Examiner to decide. <i>Exendine v. City of Sammamish</i>, 127 Wn. App. 574, 587, 113 P.3d 494 (2005), as amended on denial of reconsideration (May 31, 2005).</p>
<p>7. The decision is otherwise unlawful, arbitrary, and capricious.</p>		<p>A decision is arbitrary and capricious when it is “a willful and unreasoning action, taken without regard to or consideration of the facts and circumstances surrounding the action.” <i>Hayes v. City of Seattle</i>, 131 Wn.2d 706, 717–18, 934 P.2d 1179, 1185 (1997), opinion corrected, 943 P.2d 265 (Wash. 1997)(quoting <i>Kendall v. Douglas, Grant, Lincoln & Okanogan Counties Pub. Hosp. Dist. 6</i>, 118 Wn.2d 1, 14, 820 P.2d 497 (1991)). Under this standard, a reviewing body cannot make an independent assessment, but determines whether the evidence presented adequately supports the action of the governmental body. <i>Norquest/RCA-W Bitter Lake P'ship v. City of Seattle</i>, 72 Wn. App. 467, 476, 865 P.2d 18(1994). Further, “where there is room for two opinions, action is not arbitrary and capricious even though one may</p>

² The current version of this provision is the same, but is codified at KCC 17.420.050(A) following the adoption of Ordinance 534-2016. This ordinance was part of the 2016 Comprehensive Plan Update, but has not been updated in the County’s online code. It can, however, be found on the Comp Plan Update page: http://complan.kitsapgov.com/Documents/CP_BoCC_FDO_AppendixE_Title17_2016_0630.pdf

		<p>believe an erroneous conclusion has been reached.” Bennett v. Bd. of Adjustment of Benton County, 29 Wn. App. 753, 755, 631 P.2d 3 (1981).</p> <p>DCD will continue to show there is ample evidence in the record demonstrating that SMCI’s application continues to be noncompliant with the County’s stormwater code. Accordingly, the Department’s action to deny the application is not arbitrary or capricious.</p>
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Recommendation:

Based on the above analysis, the Department recommends that the appeal be **DENIED**, and that the SMCI Preliminary Short Plat appeal be dismissed.

Cc: Appellant Parties:
SMCI Corporation
DCD File
Hearing Examiner
Clerk of Hearing Examiner
DCD Staff Planner: Scott Diener