

**CITY OF ISSAQUAH
City Council Special Meeting**

8:00 PM
March 29, 2021

Virtual Meeting

MINUTES

COUNCIL AND ADMINISTRATIVE PERSONNEL PRESENT

Alternate Meeting Format: On March 6, 2020 the Mayor declared a civil emergency due to the outbreak of novel coronavirus (COVID-19). On March 24, 2020 the Governor issued Proclamation 20-28 relating to the COVID-19 emergency and open public meetings. The proclamation has been extended. Due to these factors, the meeting was held using a remote meeting platform.

Councilmembers:
Barbara de Michele
Stacy Goodman
Zach Hall
Victoria Hunt
Tola Marts
Chris Reh
Lindsey Walsh

Administration/Staff:
Christine Eggers, City Clerk
Brett Vinson, Attorney

CALL TO ORDER - OPEN SESSION

Council President Hunt called the meeting to order at 8:50 PM.

CLOSED SESSION

- a) The purpose of this special meeting is to allow the City Council to recess into Executive Session to discuss pending/potential litigation per RCW 42.30.110(1)(i).

The meeting was recessed into Executive Session at 8:51 PM. The item was expected to take approximately 60 minutes. The session was extended by 35 minutes.

ADJOURNMENT - OPEN SESSION

The open meeting reconvened at 10:26 PM. There being no further business to come before the Council, the meeting was adjourned at 10:26 PM.

Christine Eggers, City Clerk

Mary Lou Pauly, Mayor



**CITY COUNCIL
AGENDA BILL**

City Council Regular Meeting - 19 Apr 2021

UPDATED
AB 8136 -

Consent Calendar

Consolidated Appeal of Hearing Examiner's Denial of the Preliminary Plat of High Street Collection at Issaquah Highlands, QUASI-JUDICIAL, APP21-00001 & APP21-00002

**Proposed Council Action:
Adopt Findings & Conclusions**

**DEPARTMENT OF
COUNCIL LIAISON
OTHER COUNCIL MEETINGS
COMP PLAN POLICY NOS.
OTHER POLICIES**

City Clerk's Office Tina Eggers
n/a
March 15, 2021; April 5, 2021; April 13, 2021
n/a
Council Rules & Procedures 4.15 Quasi-Judicial Decisions and Appeals; IMC 18.04.250-2-Table Review Appeals

EXHIBITS

A. APP21-00001 IHIF-C (Shelter Holdings) Appeal
B. APP21-00002 City of Issaquah Appeal
C. Hearing Examiner's Decision dated Feb. 1, 2021
D. Proposed Schedule & Procedures
E. IHIF-C (Shelter Holdings) Supplement Appeal Brief
F. City of Issaquah Supplemental Appeal Brief
G. Findings of Fact, Conclusions, and Decision (*posted 4/19/2021*)

SUMMARY STATEMENT

Introduction

~~This agenda bill initially seeks to consolidate a closed record appeal hearing date and approve hearing procedures for APP21-00001 (Exhibit A) and APP21-00002 (Exhibit B). This agenda bill seeks to facilitate the consolidated closed record appeal hearing for APP21-00001 (Exhibit A) and APP21-00002 (Exhibit B) and continue the hearing to allow for further deliberations. See the Update section for additional information.~~

~~At the April 13, 2021 Special Council meeting, the City Council will continue deliberations on APP21-00001 (Exhibit A) and APP21-00002 (Exhibit B). Following deliberations, the City Council may decide the appeal. See the Update section (Update 2 of 2) for additional information.~~

This agenda bill seeks to adopt the Findings of Fact and Conclusions of Law. See the Update section, (Update 3 of 3) for additional information.

Background

On February 1, 2021, the City's Hearing Examiner denied the Preliminary Plat of High Street Collection at Issaquah Highlands (Exhibit C). Both the City and IHIF-C have appealed the denial of the plat. However, IHIF-C also appealed the "Determination of Vested Status" that the City's Development Services Director made in Section V of the March 3, 2020 Staff Report. Section V of the Staff Report related to the vesting determination is generally summarized as follows:

1. The extent of vesting for IHIF-C's August 1 and 28, 2017 preliminary plat application is limited to (i) the use designation identified under the 1996 Issaquah Highlands Development Agreement ("IHDA"), and (ii) the substantive land use standards of the IHDA that are necessary to effectuate the specific development proposal, if any, that was identified in IHIF-C's August 1 and 28, 2017 plat application; and
2. Vesting for IHIF-C's August 1 and 28, 2017 preliminary plat application is limited to (i) substantive land use controls, (ii) does not extend to subsequent permit applications, and (iii) does not include post-buildout period submittals.

The City Council is the decision-maker for these appeals.

Process

Pursuant to the provisions of RCW 42.36.010, quasi-judicial decisions are those that determine the legal rights, duties, or privileges of specific parties based on a hearing or other contested case proceeding, such as preliminary plats, site-specific rezones and appeals. Quasi-judicial decisions require a decision be made by Council using a specific process. Both Issaquah Municipal Code (IMC) Table 18.04.250-2: Table of Level 0 through 6 Review Appeals and Council Rule Section 4.15, Quasi-Judicial Decisions and Appeals govern the process and procedures for Quasi-Judicial Appeals.

Pursuant to Council Rule 4.15(B), the Council’s decision for this quasi-judicial matter shall be based upon and supported by the “record” in the matter. The “record” consists of all exhibits, testimony, and comments presented at the public hearing before the Hearing Examiner. Pursuant to IMC Table 18.04.250-2, this appeal is considered a closed record appeal.

In closed record appeals, City Council is required to take action based on the factual record established at a prior open record public hearing, which in this case is the record of the Hearing Examiner, and on the relevant decision criteria in the IMC. For this appeal, the Council’s decision is restricted to the facts presented in the proceedings that resulted in the appeal being filed, including any findings or minutes prepared. **No new arguments or issues may be presented.**

In quasi-judicial closed record proceedings, Councilmembers shall comply with all applicable laws including the appearance of fairness doctrine (Chapter 42.36 RCW). The appearance of fairness doctrine:

1. Prohibits ex parte (outside of the hearing) communications with limited exceptions requiring disclosure on the record.
2. Prohibits a Councilmember from making a determination on the matter in advance of the hearing.
3. Requires the hearing to be fair and impartial.
4. Prohibits the participation of any Councilmember who has a conflict of interest or financial or other personal interest in the outcome of the hearing or proceedings.

A Councilmember shall consult with designated attorney, Brett Vinson, to determine whether they should recuse themselves from the quasi-judicial discussion and decision. If a member is recused on the advice of the Attorney, they shall announce their intent under the Appearance of Fairness Disclosures and shall leave the meeting. Under Council Rules of Procedure, they will be considered absent when voting occurs.

Next Steps – Proposed Schedule

In accordance with IMC Table 18.04.250-2, the time limit for Council to consider and decide the appeal is 60 days. An extension is allowed, if agreed to by parties of the appeal. The following schedule and procedures as outlined in Exhibit D are proposed.

Type of Council Meeting	Date*	Proposed Council Action
Regular Meeting	March 15, 2021	Set appeal hearing date
Regular Meeting	April 5, 2021	Conduct closed record appeal hearing (if necessary, continue hearing to date/time certain)
Special Meeting	April 13, 2021	Deliberate and decide appeal (if necessary, continue deliberations to date/time certain)
Special Meeting	April 21, 2021	Adopt Findings of Fact and Conclusions of Law

**Unless another date has been formally designated.*

Financial Information

n/a

Administration's Recommendation

~~Set the consolidated appeal hearing for the Regular Council meeting of April 5, 2021; and approve the schedule and hearing procedures as presented. Conduct the appeal hearing and begin deliberations.~~

~~Decide Appeal: Affirm, Remand, Reverse or Modify the Hearing Examiner’s decision based upon the record and presentations presented to them during the hearing. Adopt Findings of Fact and Conclusions of Law.~~

Update

(Note: this agenda bill will be updated as needed for the hearing, deliberations, decision, and formal adoption of findings.)

Update 1 of 3

At the March 15, 2021 Council meeting, the City Council formally consolidated APP21-00001 and APP21-00002; set the closed record appeal hearing to be heard at the Regular Council meeting of April 5, 2021; and, approved the schedule and hearing procedures as set forth in Exhibit D.

Supplemental Appeal Briefs

As outlined in Exhibit D, the Appellants were provided the opportunity to submit a supplemental brief no later than 5 pm, March 23, 2021. Supplemental briefs were received by both Appellants in a timely manner, and are provided as Exhibits E and F.

Closed Record Appeal Hearing Process

1. Council President will preside over the Hearing and will provide Opening Remarks.
2. Legal counsel, Brett Vinson, will make inquiries related to conflict-of-interest.
3. Legal counsel, Brett Vinson, will provide a brief introduction of relevant facts of underlying appeal in lieu of staff. Each side will have a total of 15 minutes for argument inclusive of rebuttal time.
4. Each side will be responsible for ensuring that time for rebuttal is reserved. The parties can allocate the time between the vesting appeal and the plat appeal in their discretion.
5. The order for argument will be as follows:
 - a. City
 - b. IHIF-C
 - c. City Rebuttal if time reserved
 - d. IHIF-C Rebuttal if time reserved
6. Closing Argument – 10 mins each. City first followed by IHIF-C.

Like any judicial hearing, the Council may ask questions of the attorneys during their presentations. No one else will be allowed to ask any questions or provide any new testimony.

Once the hearing is closed, the City Council may recess to Executive Session to deliberate. As set forth in the city code and council rules, the City Council may Affirm, Remand, Reverse or Modify the Hearing Examiner's decision based upon the record and presentations presented to them during the hearing.

Any action, such as continuing deliberations, or deciding the appeal and directing legal counsel to prepare written findings and conclusions would occur in open session.

Update 2 of 3

At the April 5 City Council meeting, the appeal hearing was formerly held and closed. Council recessed into Executive Session to deliberate and returned in open session to continue its deliberations to a Special City Council Meeting on April 13.

Following deliberations at the April 13 meeting, the City Council may return to open session to announce its DECISION to Affirm, Remand, Reverse or Modify the Hearing Examiner's decision based upon the record and presentations presented to them during the hearing; and, direct legal counsel to prepare the Findings of Fact and Conclusions of Law for adoption at a specified date.

Update 3 of 3

The City Council rendered its decision in open session, following deliberations at the April 13 Special Meeting. The motion carried, 7-0, to:

REVERSE the Decision of the Hearing Examiner denying the preliminary plat, to MODIFY the Decision to impose the City Proposed Conditions of Approval dated August 10, 2020 and to ADOPT the Vesting determination as set forth in Staff report Dated March 3, 2020; and to further DIRECT the special city attorney to prepare Findings of Fact and Conclusions of Law consistent with this motion, for adoption at the City Council Regular Meeting of April 19, 2021.

The Findings of Fact and Conclusions of Law are being prepared; the online agenda will be updated to include this document as Exhibit G once complete. As of April 19, the online agenda has been updated to include Exhibit G.

At Monday's meeting, the City Council will be asked to adopt the Findings of Fact and Conclusions of Law.

Alternative(s)

Set closed record appeal hearing for another date. (Impact: Date may not be agreeable to appellants.)

- 1) Continue appeal hearing to a date/time certain
- 2) Continue deliberations to a Special City Council Meeting of April 13, 2021 beginning at 7:30 PM or at the conclusion of the Study Session that precedes the special meeting, whichever is later. (Or, designate a different date/time.)
- 3) Continue deliberations to a date/time certain.

~~4) Decide appeal and direct legal counsel to prepare the Findings of Fact and Conclusions of Law for adoption at the City Council Regular Meeting of April 19, 2021. (Or, designate a different date/time.)~~

Amend the Findings of Fact and Conclusions.

RECOMMENDATION

Administration / City Clerk's Office:

MOVE TO:

~~1) Consolidate APP21-0001 and APP21-0002 and set the closed record appeal hearing to be heard at the Regular Council meeting of April 5, 2021; and 2) Approve the schedule and hearing procedures as set forth in Exhibit D of AB 8136.~~

In open session, following Executive Session:

~~MOVE TO: Continue deliberations to a Special City Council Meeting of April 13, 2021, beginning at 7:30 PM or at the conclusion of the Study Session that precedes the special meeting, whichever is later.~~

In open session, following Executive Session:

~~MOVE TO: Decide to [Affirm, Remand, Reverse or Modify] the appeal and direct legal counsel to prepare the Findings of Fact and Conclusions of Law for adoption at the City Council Regular Meeting of April 19, 2021.~~

MOVE TO: Adopt the Findings of Fact and Conclusions of Law as prepared by City Council legal counsel, Brett Vinson, to REVERSE the Decision of the Hearing Examiner denying the Preliminary Plat of High Street Collection at Issaquah Highlands, to MODIFY the Decision to impose the City Proposed Conditions of Approval dated August 10, 2020 and to ADOPT the Vesting determination as set forth in the Staff Report dated March 3, 2020.



Development Services Department
 1775 12th Ave. NW | P.O. Box 1307
 Issaquah, WA 98027
 425-837-3100 | DSD@issaquahwa.gov

Appeal Application

1 Project Information

Project Name:	High Street Collection at Issaquah Highlands Preliminary Plat
Project Address:	Lot B of the Issaquah Highlands, north of NE Discovery Drive and west of 9th Avenue NE
Permit Number: (If Applicable)	No. PP17-00002, No. PRJ16-00013
Appeal File Number: (To be completed by City)	
Appellant Contact: Name: Mailing Address: Email Address: Phone Number:	Tia Heim IHIF Commercial, L.L.C. 11624 SE 5th St. Suite 210, Bellevue, WA 98005 tia.heim@shelterholdings.com (425) 559-2300
Appellant Representative Contact: Name: Mailing Address: Email Address: Phone Number:	Patrick J. Schneider Foster Garvey PC 1111 Third Ave, Suite 3000, Seattle, WA 98101 pat.schneider@foster.com (206) 447-4400
Description/Subject of Appeal:	

2 Submittal Requirements

	Yes	No
1. Appeal Application		
2. Processing Fee in accordance with City's Fee Schedule		
3. Written Narrative describing the appeal		
4. Additional information, plans, reports, etc. that may be provided by the appellant		

Note: Please submit two (2) hard copies and one electronic copy of all documents. Electronic copies may be requested for all additional submissions.

Appeal Application




3 Applicable Codes, Regulations and Procedures

Appeals are reviewed as outlined in Issaquah Municipal Code [IMC 18.04](#) Procedures and [IMC 1.32](#) Appeals. These codes contain pertinent information including examples of decisions types that may be appealed, appeal time periods, appeal decision maker, appeal procedures, etc.

Please also review [The Rules and Procedure for Proceedings before the City's Hearing Examiner](#).

4 Submit this Checklist to the City of Issaquah

Permit Center
1775 12th Ave NW
Issaquah, WA 98027

Appellant Signature: 	Date: February 12, 2021
Appellant Name (Please Print): Tia Heim	



1111 Third Avenue
Suite 3000
Seattle, WA 98101

Main: 206.447.4400
Fax: 206.447.9700
foster.com

February 12, 2021

VIA EMAIL

Permit Center
Community Planning and Development
c/o Candace Baer
City of Issaquah
1775 12th Avenue Northwest
Issaquah, WA 98027

VIA U.S. MAIL

Tina Eggers, City Clerk
City of Issaquah
PO Box 1307
Issaquah, WA 98027

RE: **Appeal to the City Council by IHIF-Commercial, LLC** of the Hearing Examiner’s denial of its plat application and of the Director’s vesting determination

Councilmembers:

This is an appeal by IHIF-Commercial, LLC, referred to by the Hearing Examiner as “IHIF,” which does business as Shelter Holdings and is referred to in this appeal as “Shelter”.

In his Decision rejecting Shelter’s plat application, the Hearing Examiner lays bare the mess that City staff, with the support of the City Attorney, has made of the state vested rights doctrine. The Director’s vesting analysis, which the Hearing Examiner analyzed and rejected, but nonetheless believed he could not disregard, is only the latest in a series of City actions that have forced Shelter to keep vacant its 21 acres of property in the Issaquah Highlands for years. The Hearing Examiner’s Decision comes three-and-a-half years to the day after Shelter submitted its plat application—a process that state law and the City code requires to take 90 days. This delay has inflicted immense damages on Shelter; Shelter’s damages expert recently calculated that Shelter’s compensable damages exceed \$10,000,000, plus Shelter’s attorneys’ fees, and these damages increase by tens of thousands of dollars each day.

This letter appeals the following decisions to the City Council:

- (1) The Hearing Examiner’s February 1, 2021 Decision denying the High Street Collection at Issaquah Highlands Preliminary Plat, Application Nos. PP17-00002 and PRJ16-00013, which is attached as **Exhibit A** (“Decision”); and of

Appeal to the City Council

February 12, 2021

Page 2

- (2) The “Determination of Vested Status” that the City’s Development Services Director made in Section V of the March 3, 2020 Staff Report, which is attached as **Exhibit B** (“Vesting Determination”).

The Hearing Examiner denied Shelter’s application for approval of its preliminary plat, but his Decision explained in detail his discomfort with some of the ways in which, for the past 42 months, the City has abused Shelter’s vested rights. For example, at page 41 of his Decision he wrote:

[T]he Hearing Examiner has considered the Director’s vesting determination in relation to the preliminary plat and finds it, and the City’s subsequent stance concerning this proposal, highly problematic. . . . Like IHIF, the Hearing Examiner was surprised to learn in the City’s staff report that the City believed some aspects of the DA would apply to the proposal, others would not, and crucially, that the City’s Replacement Regulations would apply in various respects. . . .

Also, on page 41 he wrote:

The Hearing Examiner is unaware of this approach to vesting ever being employed in the context of review of a preliminary plat, let alone one that a jurisdiction has repeatedly indicated is ‘vested,’ to a specific set of regulations, as occurred here. Such an approach to vesting runs contrary to Reclamation Co. v. Bjornsen, 125 Wn. App. 432, 105 P.3d 94 (2005), among other decisions concerning vesting.

And at page 42 he wrote:

While the Hearing Examiner lacks authority to independently decide whether the City’s vesting interpretation is legally correct, he feels it important to stress that he does not understand the City’s approach to vesting in terms of this preliminary plat.

As the Hearing Examiner explained, the law of vested rights fixes the date upon which a property owner’s right to use his or her property in a particular way under the law as it exists on that date. Ex. A, Decision at 41 (citing to and quoting *Reclamation Co. v. Bjornsen*, 125 Wn. App. 432, 105 P. 3d 94 (2005)). A complete plat application vests the applicant to the development regulations in place at the time of submittal. RCW 58.17.033 (extending vested rights to plat applications); *Noble Manor v. Pierce County*, 133 Wn.2d 269, 943 P.2d 1378 (1997) (holding a vested plat also vests the right to build projects within the plat if the regulator was aware of the projects). Subsequently enacted regulations cannot retroactively di-vest an applicant of rights vested under state law. *West Main Assoc. v. City of Bellevue*, 106 Wn.2d 47, 51, 720 P.2d 782 (1986). Vested rights are property rights protected by the United States and Washington Constitutions. *Bailey v. School District No. 49*, 108 Wn. 612, 613-14, 185 P. 810 (1919) (“a vested right of action is property in the same sense in which tangible things are

Appeal to the City Council

February 12, 2021

Page 3

property and is equally protected against arbitrary interference . . . it is not competent for the Legislature to take it away.”) (quoting *Pritchard v. Norton*, 106 U.S. 124, 1 S. Ct. 102, 27 L.Ed. 104 (1882)).

The Hearing Examiner erred in declining to decide the vesting issues presented by Shelter’s application, but he appropriately declined to follow the Director’s vesting determination because it was nonsensically bad. He then incorrectly declined to apply the regulations in the Grand Ridge Annexation and Development Agreement (“Development Agreement”) because he believed the Director’s vesting determination precluded him from doing so.

Regardless of this error, the City Council cannot similarly evade responsibility for deciding which regulations apply and must approve Shelter’s plat under those regulations. Both City staff and the applicant asked the Hearing Examiner to approve the plat, and the City Council now has both the jurisdiction and the responsibility to decide this appeal of the Hearing Examiner’s Decision,¹ and also decide this appeal of the Vesting Determination that the Director embedded in the March 3, 2020 Staff Report and refused to make “independently appealable separate from the administrative decision approving or denying the underlying project application.” Ex. B, Staff Report at 6.

The City’s code requires the Council to decide this appeal within 60 days. IMC Table 18.04.250-2. More than 42 months have passed since Shelter submitted its plat application, and state law, the City’s code, and the Development Agreement to which Shelter’s application is vested required the City to make a decision on Shelter’s application in 2017. RCW 58.17.140; IMC 18.13.150; Development Agreement Appendix L. The City’s unconscionable delay is a material cause of the millions of dollars of damages that Shelter is suffering as a result of the City’s multiple violations of Shelter’s rights. These damages are summarized in **Exhibit C** to this appeal.

The Director’s various vesting determinations do not diminish the City’s liability exposure, however. Even if the Director and his staff were correct that the City could strip Shelter of its vested rights, Shelter’s property then would be undevelopable because the current regulations prohibit economically viable development—as they have since this Council adopted them in March of 2018. This creates a “regulatory taking” of Shelter’s property for which the City will be liable for paying just compensation, currently \$46 million and growing as time passes.

The longer this City Council continues to refuse to recognize Shelter’s vested rights, and the longer this City Council chooses to apply regulations that deprive Shelter economically beneficial use of its property, the more Shelter’s damages will rise. The City is liable for Shelter’s multi-million-dollar damages, and it is this City Council who must answer for the significant impact that liability will have on the City’s fiscal well-being.

¹ IMC 18.04.490.C.1 and Table 18.04.250-2.

Appeal to the City Council

February 12, 2021

Page 4

The City Council is acting in a quasi-judicial capacity in reviewing this appeal by Shelter, and the Council cannot be represented in this appeal by the same attorneys who advocated for, and indeed helped make, the decisions under appeal. *See* Ex. B, Staff Report at 6 (“Pursuant to IMC 18.01.050(C) in consultation with the City Attorney, the Director hereby renders the following determination regarding the vested status of the Applicant’s preliminary plat application.”). Shelter objects to any representation of the City Council by the law firm of Ogden Murphy Wallace PLLC, which worked with the Director when he made his Vesting Determination, and represented Lucy Sloman and Doug Schlepp when they made (and defended at the plat hearing) their recommendations regarding the preliminary plat that the Hearing Examiner has rejected by denying Shelter’s application.

Shelter’s preliminary plat must be approved as proposed by Shelter, and the Director’s Vesting Determination must be reversed, for the many reasons explained below.

I. Statements of Error

1. The Hearing Examiner erred by denying Shelter’s plat application when neither the City nor Shelter asked him to, and when the Director’s own vesting determination confirms that Shelter’s plat application is vested to the Development Agreement. Contrary to the Hearing Examiner’s Decision, the Hearing Examiner had the authority to reject efforts by City staff (in their Staff Report and at the plat hearing) to retroactively apply regulations that the City Council adopted in March 2018 (the “Replacement Regulations”²) to Shelter’s vested plat application. The Hearing Examiner, not City staff, is the City’s original decisionmaker in the process that the City is applying to Shelter’s plat application, and that role necessarily gives the Hearing Examiner the authority to determine which regulations to apply to the facts. The Hearing Examiner should have acknowledged that the Director determined that Shelter’s plat application is vested to the Development Agreement and applied the Development Standards in the Development Agreement, including those in the appendices, and approved Shelter’s plat application under those regulations.
2. The Vesting Determination violates Shelter’s vested rights by refusing to consider the application materials and related information submitted by Shelter after September 18, 2017 and before the Replacement Regulations took effect in March 2018, in determining what Shelter is vested to through its preliminary plat application (*see* Sections 3.2 and 3.3 of the Staff Report). This refusal led to the nonsensical determinations in the Staff Report that apply provisions of both the Replacement Regulations and the Development Agreement to Shelter’s plat.
3. The Vesting Determination unnecessarily and erroneously opined that Shelter’s vested plat application did not vest Shelter’s Site Development Permit (“SDP”) and Administrative Site Development Permit (“ASDP”) applications by operation of RCW 58.17.033 and cases interpreting it, such as *Noble Manor* (*see* Section 3.3 of the

² The Replacement Regulations are codified at Chapter 18.19B IMC.

Appeal to the City Council

February 12, 2021

Page 5

Staff Report). This portion of the Vesting Determination is unnecessary because the Director previously made such a vesting determination in 2018 and that determination is on appeal in superior court. The Director's gratuitous new determination forces Shelter to bring yet another appeal.³ The determination is erroneous as well as unnecessary because Shelter provided ample information to the City about its SDP and ASDP applications and how they fit into the plat application prior to the termination of the Development Agreement. The very purpose of Shelter's plat is to divide Shelter's property into lots that facilitate development of Shelter's SDP and ASDP applications. The Director's decision to ignore this information and refuse to recognize Shelter's SDP and ASDP applications as vested through the plat violates state law.

4. The Vesting Determination violates Shelter's vested rights by refusing to process Shelter's preliminary plat application under the procedures required by the Development Agreement (*see* Section 3.3.C of the Staff Report). City staff should have sent Shelter's plat application to the Urban Village Development Commission ("UVDC") in 2018, as it did for Polygon's Westridge plat, then to this Council for a final decision. Instead, in 2019, City staff disbanded the UVDC and used the procedures set forth in the Replacement Regulations to cause additional delay. Shelter presents this error to preserve the issue. Because staff forced Shelter to endure this illegal process, only money damages can remedy this error. Nothing this Council can do will provide a remedy, but the Council has a responsibility to avoid additional damages by reversing the Hearing Examiner and approving the plat. Had the City applied the process required by the Development Agreement, the City Council would have been the original decisionmaker on Shelter's plat.
5. The Hearing Examiner erred by making factual findings that are inaccurate and not supported by the record, as detailed in Section III.E below.
6. The Hearing Examiner, the Director, and City staff all violated Shelter's constitutional rights, including:
 - a. The City violated Shelter's right to equal protection of the law by applying different laws to Shelter than it applied to similarly-situated Polygon. The Director and his staff deprived Shelter of the procedural protections of the Development Agreement that they applied to Polygon by forcing Shelter through the procedures of the Replacement Regulations, and the Hearing Examiner's Decision deprives Shelter of the protection of the substantive law that the City applied to Polygon when the City recognized Polygon's vested rights (*see* Decision at 42). The Hearing Examiner's Decision makes clear that he understood and was troubled by this defect.
 - b. The City violated Shelter's right to due process by failing to process the plat

³ This reflects a pattern by the City of unnecessarily complicating the issues and increasing the damages by issuing multiple vesting determinations that Shelter must appeal.

Appeal to the City Council

February 12, 2021

Page 6

application within the timeframes and under the procedures required by law. Shelter has a procedural due process right to a plat approval within 90 days of application. Shelter also had a constitutionally protected right to have its application processed according to the procedures set forth in the Development Agreement. The City's arbitrary and capricious failure to complete processing of Shelter's plat for over 42 months bears no rational relationship to any legitimate government interest and thus violates Shelter's substantive due process rights as well as its procedural due process rights.

II. Factual Background**A. Shelter's Plat is Vested to the Development Agreement**

All parties agree that Shelter's preliminary plat is vested to the Development Agreement. State law provides that a complete application for a preliminary plat vests to the law in effect upon submittal. RCW 58.17.033. When Shelter submitted its plat application, the Development Agreement provided the only development regulations for the Issaquah Highlands. *See* Decision at 3-4, Finding 2. Those development regulations, called "Development Standards" in the Development Agreement, established the zoning standards and permitting procedures for development in the Issaquah Highlands. *See id.*

As the Hearing Examiner found, "[t]he vested status of any proposal submitted has been a concern of paramount importance to [Shelter] since it first contemplated development of the property." Decision at 6, Finding 8. In December of 2016, City staff issued a "Development Entitlement Memorandum," which said the property would be entitled under the Development Agreement and referenced a "vesting requirements interpretation" prepared by the Director. *Id.*, Findings 7-8. Shelter requested a copy of this interpretation in January of 2017. *Id.* The Director provided the interpretation in a March 27, 2017 letter, in which he wrote:

When an application is submitted meeting those requirements [for completeness], the application is vested and would be unaffected by any future changes in zoning or development regulations so long as the application remains active (IMC 18.04.220.D.2). ***This would include any changes as a result of termination of the Issaquah Highlands Development Agreement.***

Ex. BB (emphasis added). At the time the Director wrote that letter, Shelter was working with the City on this preliminary plat application process. Shelter submitted its complete plat application later that year, on August 1, 2017. Staff determined in October of 2017 that the plat application was complete, but back-dated the determination to August 11, 2017, expressly to comply with the Development Agreement's requirement that staff make the completeness determination within ten days.

Shortly after submitting its plat application, Shelter met with staff to discuss entitlements for the projects within the plat. Shelter submitted pre-application materials for several Site Development Permits ("SDP") and Administrative Site Development Permits ("ASDP"), and on

Appeal to the City Council

February 12, 2021

Page 7

November 21, 2017 Shelter met with the Director who confirmed that Shelter's plat application and SDP and ASDP pre-applications were complete and vested to the Development Agreement. Decision at 11, Finding 24. The next day, the Director confirmed again in writing that Shelter's SDP and ASDPs were vested. *Id.*, Finding 25. Over the next two months, Shelter submitted SDP and ASDP applications, which the Director eventually confirmed on March 18, 2018 were complete.

On March 19, 2018, the City Council adopted the Replacement Regulations, terminating the Development Agreement. Decision at 13, Finding 30. On April 4, 2018, the Director wrote a letter to Shelter's attorney "di-vesting" Shelter's vested SDP and ASDP applications. *Id.* at 14, Finding 31. However, the Director confirmed in that letter that the City considers Shelter's "preliminary plat to be vested." *Id.* The Director further confirmed that the preliminary plat was tentatively scheduled to go to the UVDC (the process required by the Development Agreement), on May 15, 2018, thus acknowledging that the plat was vested to process in the Development Agreement. *See* Decision at 15, Finding 32.

When the City finally issued its Staff Report on Shelter's plat two years later, on March 3, 2020, the Director made yet another vesting determination. *See* Ex. B, Staff Report at Section V. The Director confirmed that "the application is vested" to the Development Agreement. *Id.* at 7. But the Director and City staff then carved away at the scope of that vesting determination by (1) finding that certain materials and information submitted to the City after Shelter submitted its complete plat application did not "vest" as well; (2) denying that Shelter's SDP and ASDP applications vest through the vested plat; (3) denying Shelter its vested rights to the procedures for processing the plat application under the Development Agreement; and (4) applying a nonsensical hodgepodge of development regulations to Shelter's plat application that City staff cherry-picked in part from the Development Agreement, and in part from the Replacement Regulations (which should not have governed the plat application at all).

The result is a Staff Report that is inconsistent with the Director's own determination that Shelter's plat application is vested pursuant to state law, because the artificial limits on vesting placed by the Director and City staff violate Washington law.

B. The City Has Caused Years of Delay in Processing Shelter's Preliminary Plat Application

Attached to this appeal as **Exhibit D** is Exhibit WW-2, which Shelter presented to the Hearing Examiner in the preliminary plat hearing. It shows the chronology of submittals by Shelter and delays by the City that led to the City taking years to make a decision on a simple 10-lot plat.

As Exhibit WW-2 shows, Shelter began the preliminary plat process four years ago, in January 2017. The City required Shelter to complete a collaborative meeting and a pre-application meeting before Shelter could submit its preliminary plat application, even though

Appeal to the City Council

February 12, 2021

Page 8

neither of those steps is required under the procedures in the Development Agreement.⁴ Shelter completed the collaborative meeting on March 21, 2017, and the pre-application meeting on May 31, 2017. Decision at 7, Findings 10-11.

On August 1, 2017, Shelter submitted its plat application to the City, which the City later deemed complete as of August 11, 2017. Decision at 8-9, Findings 13 & 15. The Development Agreement's procedures required action on permit applications within a matter of a few months, *see* App'x L, and State law requires a decision within 90 days, RCW 58.17.140, so the Council was legally required to act on Shelter's plat application in 2017. Its failure to do so until some future time in 2021 is part of the damages actions currently underway in state and federal court.

The plat drawings submitted with the application on August 1, 2017 included a table that allocated the "Allowable Development," a defined term in the Development Agreement, to specific blocks and lots, informing City staff of where the planned retail and commercial developments would be located on the plat.

In the months that followed, Shelter discussed with staff the projects Shelter intended to build within the plat and submitted complete SDP and ASDP applications that complied with the Development Agreement. *See* Decision at 10-12. As mentioned above, Shelter also had submitted complete pre-application materials for its SDP and ASDP prior to the Director's November 21, 2017 email confirming those projects had vested.

On December 15, 2017, Shelter submitted additional information during the plat process that included building footprints consistent with the projects Shelter had discussed with staff and then described in its SDP and ASDP applications. Decision at 9, Finding 18. Shelter emailed City staff to explain that the "submissions were provided to address 'minor lot line revisions' that were necessary to accommodate proposed building locations, improvements, and other plat features, and to depict 'proposed buildings' to assist the City in understanding the evolution of the site design for the plat." Decision at 9-10, Finding 18. The building footprints reflected the SDP and ASDP applications. The City accepted the updated plat without comment and then issued public notice of the plat application using the plat showing the building footprints and adjusted lot lines. Decision at 10, Finding 19. The Notice of Application told the public that the Shelter's preliminary plat application would go to UVDC and then City Council as the decisionmaker. *Id.*

The Hearing Examiner found that "[a]fter issuing notice of the application, and despite its earlier assertions that the application was deemed 'complete' under the DA, the City did not timely schedule the preliminary plat for review by the Urban Village Development Commission, as required by the DA." Decision at 10, Finding 20.

⁴ The Hearing Examiner's Decision at Footnote 7 states that "presumably" the City meant to require a "Project Feasibility Meeting" as opposed to an "Early Collaboration Meeting." There is no factual basis for this presumption and, even if this were true, Project Feasibility Meetings are "optional" for certain Implementing Approvals and not required at all for preliminary plat applications under the Development Agreement, Appendix L.

Appeal to the City Council

February 12, 2021

Page 9

In the Director's April 4, 2018 letter in which he determined that Shelter's plat application was vested to the Development Agreement, the Director noted "that a meeting on the preliminary plat had been tentatively scheduled before the Urban Village Development Commission (UVDC) on May 15, 2018, consistent with the requirements of the DA." Decision at 15, Finding 32.

The City never scheduled that meeting and a year later, on April 5, 2019, despite there not having been any further regulatory changes, the City changed course and Lucy Sloman wrote a letter to Shelter stating that the City "would be processing the plat, henceforth, pursuant to the procedural requirements of the City's Replacement Regulations, not those of the DA." Decision at 26, Finding 10. Shelter objected and, on April 15, 2019, Ms. Sloman responded in a second letter restating that the City would no longer apply the procedures in the Development Agreement and would apply the procedures in the Replacement Regulations to Shelter's plat application. Decision at 27, Finding 42.

The Replacement Regulations require additional procedural steps that the Development Agreement does not, including a community conference before the Development Commission, and a decision by the Hearing Examiner (not City Council). See Decision at 26, Finding 41. Shelter is complying with this process under protest. Decision at 27, Finding 43.

The City did not provide a decision on Shelter's plat application until February 1, 2021 – 42 months after the City deemed Shelter's plat application complete. Staff did not even schedule the first day of the hearing before the Hearing Examiner until March 9, 2020. Decision at 29, Finding 46. Although the Hearing Examiner informed staff on March 27 and again on May 11 that he was available for the second day of hearing, staff did not schedule the second day until August 3, 2020. Decision at 35, Finding 64. The Hearing Examiner took nearly six months to finally issue his decision on February 1, 2021. And he denied the plat, even though all parties requested that he approve it. See Ex. B, Staff Report at 31 ("The Administration recommends that the Hearing Examiner approve the Preliminary Plat . . .").

C. The City's Actions Have Also Caused Years of Delay on Shelter's SDP and ASDP Applications

As discussed above and noted by the Hearing Examiner's Decision, Shelter submitted three development permit applications in 2017 "related to development that it intended to pursue within the preliminary plat." Decision at 10, Finding 21. These are: (1) a Medical Office Building (No. ASDP18-00007); (2) a Self-Storage Facility (No. ASDP18-00006); and (3) a Retail Development (No. SDP18-00001)." Decision at 10, Finding 21.

The City has refused to recognize Shelter's SDP and ASDP applications as vested to the Development Agreement. Rather than allow Shelter to appeal the April 4, 2018 determination by the Director that the SDP and ASDP applications were "di-vested," the City implemented the Director's determination by requiring Shelter to continue through 10 months of hearings before the Development Commission in order for the Development Commission to deny Shelter's applications – even though both parties agreed at the outset that the applications could not

Appeal to the City Council

February 12, 2021

Page 10

comply with the Replacement Regulations that the City applied and that the Development Commission had no jurisdiction to review the Director's vesting determination. *See* Decision at 18, Finding 36.

Shelter appealed the denial to the Hearing Examiner, who affirmed the Director's vesting determination on the SDP and ASDP applications and also ruled that Shelter's SDP and ASDP application did not vest through the plat application, even though neither party asked the Hearing Examiner to decide that issue. *See* Decision at 22-26.

Shelter immediately appealed the Hearing Examiner's decision to King County Superior Court, but the City removed the case to federal court in February of 2020. Shelter moved for remand of the land use appeal to state court, which the federal court granted in January of 2021. Shelter is currently seeking a hearing date for the motion for summary judgment regarding Shelter's vested rights for its SDP and ASDP applications.

D. The City Treated Shelter's Applications Differently from a Similarly Situated Plat Application on the Neighboring Property

The City's treatment of Shelter differed markedly from its treatment of Polygon, whose plat is indistinguishable from Shelter's for purposes of vesting. Polygon owned the land adjacent to Shelter's land, and Polygon applied for its 73-lot subdivision two weeks before Shelter applied for its 10-lot plat subdivision. As the Hearing Examiner found:

Of particular note, Polygon applied for preliminary plat approval for its 'Westridge North Single Family' proposal on July 14, 2017, just over two weeks before Shelter applied for approval of this preliminary plat. Polygon then submitted revised plans related to its plat several times in early 2018. Unlike the present circumstances, however, the City did not determine that these later-submitted plans (where were definitely submitted after the defined Buildout Period in the DA) would create vesting issues. Instead, City staff prepared a staff report for the Westridge North proposal on March 9, 2018, in which the City reviewed the plat against each and every appendix in the DA, and the UVDC held a public hearing on the proposal on March 20, 2018, which then concluded on April 17, 2018. On May 10, 2018, the UVDC then recommended approval of the project to the City Council.

Decision at 32, Finding 57, Footnote 14.

The City treated Polygon's plat as vested to the procedures of the Development Agreement, sending it to the UVDC for a hearing and recommendation, then to this Council for approval on July 18, 2018. The Hearing Examiner found that the City decision to review Polygon's "preliminary plat against each of the appendices in the DA" . . . "comports with the Hearing Examiner's understanding of the vested rights doctrine, as explained above, and lends itself to a consistent, understandable review process." Decision at 42.

Appeal to the City Council

February 12, 2021

Page 11

In contrast, the City did not process Shelter's plat application under the procedures required by the Development Agreement, and City staff took a piecemeal approach to which substantive regulations and appendices in the Development Agreement they applied. As a result of this differential treatment, Polygon has already built out its plat and is selling homes while Shelter's property sits empty and unusable because the City both denied Shelter's vested rights and enacted Replacement Regulations that prohibit economical use of the property.

III. Legal Arguments**A. Statement of Error 1: The Hearing Examiner Should Have Approved Shelter's Plat Application**

State law is clear: a plat is judged under the zoning and other land use controls in effect on the day a complete application is submitted. RCW 58.17.033. No party disputes that this plat is vested to the Development Agreement, nor does any party dispute that the only zoning and land use controls in effect on the day that Shelter submitted its plat application were found in the Development Agreement. The Hearing Examiner should have determined that Shelter's plat is vested to the Development Agreement (an undisputed fact) and applied the Development Standards in the Development Agreement to approve Shelter's plat. He should have rejected City staff's attempt to apply a mismatch of portions of the Development Agreement and the Replacement Regulations to Shelter's plat application, which the Hearing Examiner explained runs contrary to state vesting law. *See* Decision at 41 ("Such an approach to vesting runs contrary to *Reclamation Co. v. Bjornsen*, 125 Wn. App. 432, 105 P.3d 94 (2005), among other decisions concerning vesting.").

As the Hearing Examiner acknowledged, *see* Decision at 42 (citing and quoting *Friends of the Law v. King County*, 123 Wn.2d 518, 869 P.2d 1056 (1994)), the land use approval process is iterative: an applicant submits the application, then staff issue correction notices, and the applicant makes appropriate changes in response. But the development rights vest when the complete application is submitted, not when all corrections are addressed. The responses to corrections are part of the vested application, evaluated against the same law as the original application.

The Hearing Examiner recognized all of this, and correctly recited state law in his Decision at pp. 40-43. Neither the Director's vesting determination nor staff's bizarre "two-tier" application of that determination finds any support in the law. However, the Examiner felt constrained by City Code, which he read as requiring him to follow the Director's vesting determination. But then he *did not* follow the Director's vesting determination because he did not approve the plat subject to the conditions staff requested. He framed his decision as a denial compelled by the mess that the Director and staff made of the vested rights doctrine.

The Hearing Examiner was incorrect about the scope of his authority. He is the decisionmaker on Level 3 applications. The Director, City staff, and the City Attorney have asserted for years, and the Hearing Examiner has consistently held, that the Director's vesting determination is not an independent decision, appealable separate from the underlying land use decision. If this is true, then the Vesting Determination at Section V of the Staff Report cannot

Appeal to the City Council

February 12, 2021

Page 12

be entitled to any more weight than the rest of the Staff Report, and the Hearing Examiner should have acknowledged that the Director determined the plat was vested to the Development Agreement, and then decided for himself how to apply the Development Agreement's regulations to Shelter's application.

Code should not be interpreted in a way that leads to absurd results. *Cent. Puget Sound Reg'l Transit Auth. v. WR-SRI 120th N. LLC*, 191 Wn.2d 223, 234, 422 P.3d 891 (2018). The City Code is not a model of clarity when it comes to defining the correct way to appeal vesting determinations, but into that confusion, the Hearing Examiner read a limitation into his own authority that leads to the absurd result that he cannot issue a decision that he knows is compelled by state law until after an appellate authority tells him to. The Level 3 approval process establishes the Hearing Examiner as the decisionmaker in the first instance; it does not require an appeal before the Hearing Examiner can issue a decision. The Examiner should have read the Code in a way that complied with state law without requiring the applicant to ask permission from an appellate body.

Moreover, even assuming the City Code requires the Hearing Examiner to follow the vesting determination found in Section V of the Staff Report, the Hearing Examiner should still have corrected the mess the application of that vesting determination made by City staff in Sections VI-VII of the Staff Report, which were separate from the Director's vesting determination. The conclusions of the Staff Report do not flow inexorably from the Director's vesting determination and are independent applications of regulations to Shelter's application made and authorized by Lucy Sloman and Doug Schlepp, as the separate signature blocks on page 32 confirm. It runs counter to the City's code for the Hearing Examiner to refuse to address staff's a la carte application of regulations from both the Development Agreement and the Replacement Regulations when the Hearing Examiner clearly agrees with Shelter that this approach is unprecedented and violates state law.

The Hearing Examiner is an administrative officer, authorized by the City's code which is itself promulgated under the authority of state law. Under Article XI § 11 of the Washington State Constitution, City Code cannot be read to authorize a result that is at odds with state law. Here, the Hearing Examiner interpreted the City Code as constraining him from issuing a decision that complies with the black-letter law of vested rights under RCW 58.17.033 and the cases that interpret it. The Hearing Examiner has no authority to issue a ruling that he knows contradicts state law, even if he feels local code requires it. The City's code may require the Director to make vesting determinations, but it does not permit the Director to re-write state law on vested rights in doing so, and it does not permit the Hearing Examiner to ignore state law in reaching his decision. The Hearing Examiner should have applied the state vested rights doctrine, rejected staff's nonsensical and unlawful violation of Shelter's vested rights, and approved the plat accordingly.

Appeal to the City Council

February 12, 2021

Page 13

B. Statement of Error 2: The Director Should Have Considered the Application Materials and Related Information Submitted by Shelter for its Plat Application after September 18, 2017

The land use entitlement process is iterative, and applicant materials submitted throughout the course of staff's review "relate back" to, and are part of, the original, vested application. Here, it is undisputed that Shelter's plat application vested on August 1, 2017, and that in the months that followed, Shelter submitted various additional items that added to, but did not substantially alter, the plat depicted in the vested application. After waiting 228 days for the first comments from staff, and many months more for clarification of that notice, Shelter updated its plat in March of 2019, a year before staff would schedule the first hearing. All of those materials should have been considered part of the original plat application and evaluated for compliance with the Development Agreement to which it vested.

Instead, the Staff Report concluded that only the materials submitted during the "Buildout Period" vest, while materials submitted after must be judged under the Replacement Regulations. In fact, the Development Agreement's Buildout Period is irrelevant to the vesting of a plat application,⁵ which is mandated by state law regardless of what local law provides. Under RCW 58.17.033, any plat application submitted prior to the effective date of the Replacement Regulations vested to the Development Agreement, regardless of whether any buildout period had expired.

Staff then recommended that the Hearing Examiner apply certain parts of the Development Agreement while ignoring others in favor of the Replacement Regulations. Staff invented a complicated "two-tier" vesting regime that not only finds no support in law, but directly contradicts binding authority, including but not limited to *Reclamation Co. v. Bjornsen*, 125 Wn. App. 432, 105 P.3d 94 (2005).

The law requires that once an application vests, all information the applicant submits becomes part of that application and is judged according to the law in effect when the application was submitted. The Hearing Examiner correctly summarized the law as follows:

That said, the Hearing Examiner has considered the Director's vesting determination in relation to the preliminary plat and finds it, and the City's subsequent stance concerning this proposal, **highly problematic**. . . . Like [Shelter], **the Hearing Examiner was surprised** to learn in the City's staff report that the City believed some aspects of the DA would apply to the proposal, others would not, and crucially that the City's Replacement Regulations would apply in various respects.

⁵ The preliminary plat is an "Implementing Approval" under the Development Agreement, in common with SDP, ASDP, and building permits. Ex. Q (Development Agreement) at 13. As Shelter will establish in its judicial appeal of the City's denial of the SDP and ASDP applications, applications for implementing approvals vest to the Development Agreement under its plain language. However, there is no dispute that plat applications vest according to the state subdivision statute independent of the Development Agreement, RCW 58.17.033, so for the purposes of this appeal, Shelter focuses on state law, but does not waive any arguments regarding the Development Agreement's plain language.

Appeal to the City Council

February 12, 2021

Page 14

The Hearing Examiner is unaware of this approach to vesting ever being employed in the context of review of a preliminary plat, let alone one that a jurisdiction has repeatedly indicated is “vested,” to a specific set of regulations, as occurred here. **Such an approach to vesting runs contrary to *Reclamation Co. v. Bjornsen*, 125 Wn. App. 432, 105 P.3d 94 (2005), among other decisions concerning vesting.** In *Reclamation*, for instance, the Clark County Hearing Examiner reviewed a proposal by selecting evaluating two sets of regulations, those applicable when Clark County first deemed the proposal complete for purposes of project review, and later amendments to the regulations promulgated by the County. In doing so, the Clark County Hearing Examiner accepted the applicant’s argument that vested development rights were meant, at common law, to benefit developers and, as such, a piecemeal approach to which regulations apply would be appropriate. Division 2 of the Court of Appeals rejected this approach, noting that, while “the general purpose of vesting land use regulations is to benefit developers,” another “important purpose of the vesting rule” is to establish a “date certain upon which the owner’s right to use his or her property in a particular way becomes fixed” so that a reviewing court “is not required to search through the moves and countermoves of the parties, and ‘the stalling or acceleration of administrative action in the issuance of permits’ in each case.” 125 Wn. App. At 435.

Moreover, **courts have recognized that the land use application process is iterative.** As such, the legislature has granted local jurisdictions the authority to determine when a particular proposal is “complete” for purposes of vesting. Such a determination does not fix the materials submitted for review of an application in stone. Rather, such a determination fixes which land use regulations will apply to such a proposal, regardless of the outcome of the iterative review process. As the Washington State Supreme Court has explained:

A preliminary plat application is meant to give local governments and the public an approximate picture of how the final subdivision will look. RCW 58.17.020(4). It is to be expected that modifications will be made during the give and take of the approval process. Although it is up to local governments to decide what level of specificity they will require from a developer in its initial application, RCW 58.17.033, they may not cause the vesting of the application to be contingent on future events or decisions, nor make the application process so odious that completion is nearly impossible. *West Main*, 106 Wn.2d at 52-53; *Adams*, 70 Wn. App. at 479. Once a completed application has been submitted, it is to be judged under the laws in effect at the time of submission.

Friends of the Law v. King County, 123 Wn.2d 518, 869 P.2d 1056 (1994).

Appeal to the City Council

February 12, 2021

Page 15

Here, the City appears to contend that each submission an applicant makes during the iterative project review process has vesting implications for the particular proposal that is currently under review (as opposed to implications for future development proposals). Moreover, some of the City's materials seem to indicate that certain aspects of the DA itself "vest" (i.e., certain Appendices) while others do not. While the Hearing Examiner lacks authority to independently decide whether the City's vesting interpretation is legally correct, he feels it important to stress that **he does not understand the City's approach to vesting in terms of this preliminary plat**. As noted in the above decision, for instance, a different developer (Polygon) applied for preliminary plat approval almost contemporaneously with IHIF and the City reviewed the preliminary plat against each of the appendices in the DA. That approach comports with the Hearing Examiner's understanding of the vested rights doctrine, as explained above, and lends itself to a consistent, understandable review process.

Decision at 41-42 (emphasis added). However, after correctly summarizing the binding state law, the Hearing Examiner failed to follow it to its logical conclusion. He should have rejected staff's nonsensical two-tiered vesting determination. It therefore falls to this Council to reach the conclusion the Hearing Examiner declined to, and rule that the plat application vested to the Development Standards of the Development Agreement, and the plat must be approved under these regulations.

C. Statement of Error 3: The Vesting Determination Improperly Addresses Vesting of Shelter's SDP and ASDP Applications

The lion's share of the Director's Vesting Determination is dedicated to a question that is irrelevant to the question of whether or not the plat should be approved: the vested status of Shelter's SDP and ASDP applications for projects in the plat. The Director's position on the topic repeats the conclusion the Hearing Examiner previously reached in Shelter's appeal of the Development Commission's denial of those SDP and ASDP applications, and the Examiner's erroneous decision on those applications is currently on appeal. But, as the Hearing Examiner wrote,

As [Shelter] points out, whether the Hearing Examiner rightly decided the appeals associated with its site development permits is immaterial. The Hearing Examiner's decisions on those permits, including his analysis of several cases including *Noble Manor*, *Westside Manor* [sic], and *Ellensburg*, all addressed whether and to what extent a vested preliminary plat would afford certain vested rights on later site development permits. The Hearing Examiner's previous decisions did not address the current proposal or the vested status of the preliminary plat.

Decision at 41. The Director's vesting determination is the mirror image of the position the Hearing Examiner rejected in the quoted passage: whether the plat should be approved does not depend on the SDP applications for projects within the plat. That is a question properly

Appeal to the City Council

February 12, 2021

Page 16

addressed in Shelter's pending judicial appeal of the Development Commission's denial of those SDP and ASDP applications, not here, in a plat approval process.

By gratuitously opining on the vested status of Shelter's SDP and ASDP applications when he knew full well that his position was already the subject of a judicial appeal, the Director forced Shelter to appeal that portion of his appeal to avoid a waiver argument and to avoid the possibility of inconsistent rulings. Because of the potential prejudice this superfluous passage poses to Shelter, Shelter would have had to appeal this passage even if the Hearing Examiner had approved the plat. There was no need for the Director to address SDP and ASDP application vesting in this plat process, so the Director's analysis of that issue should be ignored as dictum.

D. Statement of Error 4: Under State Law, Staff's Knowledge of Future Projects Intended for a Plat Vests Those Projects to the Law Governing the Plat

If Council decides to reach the merits of the superfluous portions of the Director's vesting determination, it should reverse and confirm that Shelter's SDP and ASDP applications vested to the Development Agreement. By operation of state law, Shelter's vested application for preliminary plat approval vested to the Development Agreement any permit applications for projects within the plat that the applicant made known to the City. *See* RCW 58.17.033; *accord Noble Manor v. Pierce County*, 133 Wn.2d 269, 943 P.2d 1378 (1997) (holding that applications for building permits vested to the minimum lot size requirement in place at the time of application for short plat approval); *Westside Business Park, LLC v. Pierce County*, 100 Wn. App. 599, 5 P.3d 713 (2000) (holding *Noble Manor* vesting available where applicant orally informs staff of the plat's intended purposes). The Director does not dispute that Shelter informed staff of its intended uses while the Development Agreement was still in effect and did so years before staff took any meaningful action to process the plat, which the case law demonstrates is sufficient to establish vesting.

The Director's determination that Shelter's SDP and ASDP applications are not vested through the plat directly contradicts Washington law as stated in *Noble Manor* and *Westside Business Park*. Whereas those cases require the City to consider all information submitted in the course of processing a plat application, the Director arbitrarily chose to ignore any information submitted by Shelter after the Buildout Period.

Nothing in the Development Agreement or state law permits the City to narrow the scope of an applicant's vested rights by simply ignoring the supplemental application materials submitted for a vested plat application. In particular, the December 15, 2017 supplemental plat depicts the building footprints of Shelter's SDP and ASDP applications. The City used that plat figure to publicly notice Shelter's preliminary plat application on December 27, 2017. Based on that submittal alone, Shelter's SDP and ASDP applications are vested through the plat under *Noble Manor*.

But Shelter's December 15, 2017 submittal was just one piece of information of many that Shelter provided to the City about its development plans, including detailed information about Shelter's SDP and ASDP applications and how those related to the plat application, providing far more detail regarding the development of the proposed lots than sufficed to accord

Appeal to the City Council

February 12, 2021

Page 17

vested rights through plat applications in *Noble Manor* or *Westside Business Park*.⁶ The Director's vesting determination ignores materials and information submitted by Shelter over the course of the *seven months* that passed before the City terminated the Development Agreement, including complete permit applications, that communicated Shelter's intended use of the property under the plat. Those materials expressly tie Shelter's SDP and ASDP applications to the plat application and establish beyond argument that staff was fully aware of the plat's intended uses months before Council changed the regulations, and *years* before staff took any meaningful step to process any of Shelter's applications.

To justify his conclusion, the Director simply asserts that he can ignore information submitted after the Buildout Period. But this position finds no support in the cases, which interpret the scope of vesting under the state subdivision statute, which is not affected by the Development Agreement's Buildout Period. *Noble Manor* and *Westside Business Park* hold vested rights arise when the applicant informs the regulator of projects simultaneous with (*Noble Manor*) or prior to (*Westside Business Park*) the submittal of the plat application, but nothing in those cases or any other suggests that the regulator may blind itself to information the applicant provides after application but before a change in regulations. The Director's determination is inconsistent with the plain language of the Development Agreement, contradictory to state law, inconsistent with how the City treated Polygon's plat application next door, and contradictory to City staff's belated clarification that it considered two years' worth of supplemental submittals on Shelter's plat application. Moreover, the Director's current vesting interpretation is directly contradictory to what he told Polygon and Shelter about their vested rights in March 2017 and June 2017, when Shelter was preparing its preliminary plat application, and how the Department actually treated Polygon.

Even if the City were allowed to disregard, for vesting purposes, information and materials submitted after the end of the Buildout Period (it is not), Shelter's SDP and ASDP applications *still* vested through the plat. The August 1, 2017 plat application includes a table that explains where various "Allowable Development," a defined term under the Development Agreement, would occur on the property under the Development Agreement. Shelter also discussed at least two of its projects (the medical office and retail buildings) with staff during the Buildout Period. Additionally, it was the Director who, in January 2017, advised Shelter to pursue a preliminary plat application to achieve vesting for Shelter's later SDP and ASDP applications.

⁶ See *Noble Manor*, 133 Wn.2d at 276-77 ("We conclude that it is not only the right to divide land which vests at the time of a . . . subdivision application, but also the right to develop or use the property under the laws as they exist at the time of application."); see also *Assoc. of Rural Residents v. Kitsap Cnty.*, 141 Wn.2d 185, 193-94, 4 P.3d 115 (2000) (entire application, including a planned unit development filed with a plat application, considered vested to the land use regulations that existed at the time of subdivision application: "The vested rights doctrine applies to situations in which property is being developed, not merely divided."); *Schneider Homes, Inc. v. City of Kent*, 87 Wn. App. 774, 779, 942 P.2d 1096 (1997) (preliminary plat and PUD application vested right to have entire project developed under then-existing regulations because "[t]he doctrine reflected in RCW 58.17.033 vests rights to develop, not merely divide the land").

Appeal to the City Council

February 12, 2021

Page 18

E. Statement of Error 5: The Hearing Examiner Made Factual Findings that are Unsupported by Evidence in the Record

The Hearing Examiner's Decision erred by making factual findings that are not accurate and are contradicted by evidence in the record, and some of these errors are material:

- On page 6, Finding 9, the email from Dave Cayton to Christopher Wright was dated March 8, 2017, not March 8, 2018.
- On page 8, Finding 14, the materials submitted on August 28, 2017 were not "inadvertently omitted" from Shelter's original preliminary plat submittal, as the Hearing Examiner concluded. Shelter attempted to submit those materials online on August 15, 2017, but the City refused to accept them. Ex. DD. On August 28, 2017, at the instruction of the City, the materials were uploaded using inaccurate categories, which the City promised to fix later.
- On page 9, Finding 16, the Decision inaccurately characterizes a comment received on Shelter's Medical Office Building SDP application as a comment received on Shelter's plat application.
- On page 11, Finding 23, the Decision does not acknowledge that even though the Administration originally recommended in the fall of 2017 that the Replacement Regulations should include language that recognized vested rights in SDP and ASDP applications "because this approach would be 'consistent with the vested rights doctrine' and the Supreme Court's decision in *West Main Associates v. Bellevue*, 106 Wn.2d 47, 720 P.2d 782 (1986)," in February of 2018, the Administration changed its recommendation to Council and now interprets its new regulations in a way that is inconsistent with *West Main Associates v. Bellevue*. Thus, the Administration is contradicting its own determination that refusing to recognize vesting of SDP and ASDP applications violates the holding of *West Main Associates v. Bellevue*.
- On page 17, Finding 35, the Decision quotes the Hearing Examiner's prior SDP decision and suggests that Shelter could have requested a formal code interpretation to resolve the vested rights question. This is inaccurate: at the plat hearing Shelter presented a transcript of Director Niven's testimony that he could not issue such a formal Code interpretation.
- On page 22-23, Finding 38, the Decision quotes the Hearing Examiner's prior SDP decision and asserts that Shelter's plat application did not discuss or depict building footprints, which is misleading. As the Decision notes, Shelter's December 15, 2017 submittal, which the City used to publicly notice Shelter's plat application, showed building footprints, and as the Hearing Examiner noted at p. 42, the land use entitlement process is iterative, so later-submitted materials become part of the application packet. On page 23-24, Finding 39, it is similarly inaccurate to recite his prior decision's assertion that Shelter's preliminary plat application "did not describe the specific use[s] for development of the property . . ." Shelter's plat application materials have always described the specific uses of the property.

Appeal to the City Council

February 12, 2021

Page 19

- On page 26, Finding 40, the Decision misstates that “[f]rom early 2018 through March 2019, IHIF continued to respond to requests from the City for additional information and revisions related to review of IHIF’s preliminary plat.” As the evidence in the record shows, Shelter was waiting for information from City staff during that time that the City failed to provide for months. Shelter made every effort to move its application forward. It is likewise inaccurate to state that Shelter submitted “a significant amount of new information in March 2019.” Rather, the supplemental plat Shelter submitted in March of 2019 responded to staff comments and made minor changes to the plat.
- On page 27, Finding 42, the Decision mischaracterizes Lucy Sloman’s April 5, 2019 letter as “reiterating the City’s position” on vesting that was provided in the Director’s April 4, 2018 letter. In fact, Ms. Sloman’s letter was the first time staff took the position that Shelter’s plat application would be subject to the procedures of the Replacement Regulations; the Director’s April 4, 2018 letter expressly committed to scheduling a hearing before the UVDC in accordance with the procedures in the Development Agreement.

F. Statement of Error 6: Shelter’s Plat Should Have Been Processed Under the Procedures in the Development Agreement

Shelter had a contractual and a constitutional right to the procedures of the Development Agreement, each of which City staff, the Hearing Examiner, and this Council violated by employing the procedures of the Replacement Regulations. Polygon is similarly situated to Shelter in every respect relevant to the processing of their plat applications, yet the City treated Polygon lawfully even as it trampled Shelter’s rights. The UVDC held the pre-decisional hearing on Polygon’s Westridge plat, then this Council approved the plat according to the development standards of the Development Agreement, all within a year of Polygon’s application. Had the City extended Shelter the equal protection of the laws in accordance with the state and federal constitutions, this Council would have approved Shelter’s plat in 2018.

Instead, Shelter has endured a plat approval process that has taken 42 months and counting. The damage from staff’s illegal decision is done, and there is no relief that Council can grant that will remedy the harm Shelter has suffered. Only an award of money damages can do so, and Shelter is currently seeking such an award in multiple lawsuits for damages. Shelter raises the issue here to avoid a waiver argument in the future.

G. Statement of Error 7: The City Violated Shelter’s Constitution Rights to Equal Protection and Due Process

The Hearing Examiner is part of the City, which must exercise the power of the state in accordance with the state and federal constitutions, each of which in its own way guarantees the equal protections of the law. While the Hearing Examiner lacks jurisdiction to rule on constitutional questions, he nevertheless is bound to issue decisions that comply with the state and federal constitutions, including their guarantees of equal protection and due process rights. The same restrictions and obligations extend to any quasi-judicial decision made by this Council.

Appeal to the City Council

February 12, 2021

Page 20

a. The Decision Violates Shelter's Right to Equal Protection

Here, the Hearing Examiner's Findings of Fact note the unwarranted differential treatment of Polygon and Shelter. Although the Hearing Examiner could not undo City staff's prior violation of Shelter's right to the same procedures afforded to Polygon, the Hearing Examiner could have applied the same substantive law to Shelter's application that this Council had previously applied to Polygon's plat. But he refused, resulting in a decision that further violates Shelter's constitutional right to equal protection of the laws. The facts of this case are even more egregious than those in the reported cases, which address government treating similarly situated parties differently under the law: in this case, the City did not even apply the same *law*.

Where two parties are similarly situated, as Shelter and Polygon are, the government must treat them similarly unless it can establish that differential treatment bears a rational relationship to a legitimate state interest. *Lockary v. Kayfetz*, 917 F.2d 1150, 1155 (9th Cir. 1990). The City cannot do so here. During the same time periods, Shelter and Polygon submitted complete applications for projects that complied with the Development Agreement, and no legitimate state interest is served by the City's decision to apply one set of laws to Polygon and another set of laws to Shelter.

b. The Decision Violates Shelter's Right to Due Process

The City's arbitrary and capricious failure to complete processing of Shelter's plat for over 42 months bears no rational relationship to any legitimate government interest and thus violates Shelter's substantive due process rights. *See, e.g., Shanks v. Dressel*, 540 F.3d 1082, 1088 (9th Cir. 2008); *see also Christensen v. Yolo Cty. Bd. of Supervisors*, 995 F.2d 161, 165 (9th Cir. 1993) (applying the "rational relationship" test to a land use decision). Unreasonable delay in the land use context can constitute a substantive due process violation. *See N. Pacifica LLC v. City of Pacifica*, 526 F.3d 478, 485 (9th Cir. 2008); *Bateson v. Geisse*, 857 F.2d 1300, 1303 (9th Cir. 1988).

The Hearing Examiner's Decision and the Director's vesting determination also violated Shelter's procedural due process rights. State law requires plat approval within 90 days. RCW 58.17.140 (tracked by the City's code at IMC 18.13.150). The Washington State Supreme Court ruled this period is mandatory. *Norco Constr. v. King County*, 649 P.2d 103, 107 (Wash. 1982).

Given the importance of swift plat approval and the ease with which the City could have given Shelter the process it was due, the City's process does not meet the minimum the Constitution requires, as measured under the *Mathews v. Eldridge* test. 424 U.S. 319, 335 (1976). To determine whether existing procedures are adequate to protect the interest at stake, a court must consider the following three factors: (1) the private interest affected by the official action; (2) the risk of an erroneous deprivation of such interest through the procedures used, and the probable value of additional or substitute procedural safeguards; and (3) the Government's interest—including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement might entail. *Id.* at 335.

Appeal to the City Council

February 12, 2021

Page 21

All three factors weigh in favor of requiring staff to process Shelter’s plat application within the statutory time limits imposed by the State legislature, which the City incorporated into its code, and within the limits the City separately agreed in the Development Agreement. First, Shelter’s private interests are high: the development rights inherent to owning property, combined with the property right created by submitting an application that complied with the Development Agreement, reflect millions of dollars in value. Second, the risk of erroneously depriving Shelter of its interest in its development is also high. The City’s continued delay has functionally denied Shelter the right to develop its property – a right which the City agreed to in the Development Agreement in exchange for millions of dollars of private investment in public infrastructure. Third, the City has no legitimate interest in delaying a decision on Shelter’s application beyond the original 90-day period that expired in 2017.

IV. Relief Requested

Shelter requests that the City Council reverse the Hearing Examiner’s denial of the plat application. The Council has a duty to process this plat in accordance with applicable law and should approve the plat, subject only to those conditions authorized by the Development Agreement, as Shelter proposed. Shelter also requests that the City Council reverse or nullify the Vesting Determination in the Staff Report to the extent that it makes determinations other than that the plat application vested to the Development Agreement.

V. Appellant and Its Designated Representatives

Appellant: IHIF-Commercial, L.L.C.
 Address: 11624 SE 5th
 Bellevue, WA 98005
 Telephone: (425) 559-2365

Appellant’s designated representatives are the law firms of Foster Garvey PC and McCullough Hill Leary PS:

Patrick J. Schneider
 Steven J. Gillespie
 Foster Garvey, PC
 1111 Third Avenue, Suite 3000
 Seattle, Washington 98101
 (206) 447-4400

Jacqueline C. Quarré
 McCullough Hill Leary, PS
 701 5th Avenue, Suite 6600
 Seattle, Washington 98104
 (206) 812-3388

Appeal to the City Council
February 12, 2021
Page 22

Sincerely,

FOSTER GARVEY PC



Patrick J. Schneider
Steven J. Gillespie
Attorneys for Appellant IHIF-Commercial, L.L.C.

MCCULLOUGH HILL LEARY, PS



Jacqueline C. Quarré
Co-Counsel for Appellant IHIF-Commercial, L.L.C.

- Exhibits: Exhibit A – Hearing Examiner’s February 1, 2021 Decision
- Exhibit B – Staff Report dated March 3, 2020
- Exhibit C – Damages Summary
- Exhibit D – Exhibit WW-2

Exhibit A

**BEFORE THE HEARING EXAMINER
FOR THE CITY OF ISSAQUAH**

In the Matter of the Application of	)	No. PP17-00002
	)	No. PRJ16-00013
)	
IHIF-Commercial, LLC	)	High Street Collection at
	)	Issaquah Highlands Preliminary Plat
)	
	)	FINDINGS, CONCLUSIONS,
<u>For Approval of a Preliminary Plat</u>	)	AND DECISION

SUMMARY OF DECISION

The request for approval of a preliminary plat to subdivide a 21.46-acre property into 10 lots, primarily for commercial and retail development, on “Lot B” of the Issaquah Highlands, north of NE Discovery Drive and west of 9th Avenue NE, is **DENIED**.

Although the record demonstrates that the proposed preliminary plat would likely make “appropriate provisions for the public health, safety, and general welfare” as required by Revised Code of Washington (RCW) 58.17.110(1)(a)—including appropriate provisions for open spaces, drainage ways, streets, sidewalks, potable water supplies, and sanitary wastes—insufficient information currently exists to determine whether “the public interest will be served by the subdivision and dedication” of the proposed plat, as required by RCW 58.17.110(1)(b).

Specifically, the City of Issaquah (City) and IHIF-Commercial, LLC (Applicant, or IHIF), fundamentally disagree on which regulations apply to review of this proposal: the Applicant contends that the proposal vests to regulations within a now defunct development agreement that was in place at the time the City deemed this preliminary plat complete; the City maintains that some provisions of the development agreement continue to apply to the proposed plat while other matters are governed by regulations the City Council specifically adopted to replace the development agreement.

Both parties seemingly agree that the Hearing Examiner lacks authority to independently decide this issue and that any challenge to the vesting determination made in relation to this proposal must occur in another forum. This issue, however, is so fundamental to review of the proposal that making a determination about the preliminary plat, without first having the vesting issue resolved, would inject additional uncertainty into a matter that has been riddled with confusion and misunderstandings for several years, and the public interest would not be served by doing so. Accordingly, denial is warranted until an appropriate forum with jurisdiction can provide additional guidance on vesting to the parties so that any confusion about which regulations govern is settled.

*Findings, Conclusions, and Decision
City of Issaquah Hearing Examiner
High Street Collection Preliminary Plat
Nos. PP17-00002 & PRJ16-00013*

SUMMARY OF RECORD

Hearing Date:

The Hearing Examiner held an open record hearing on the request on March 9, 2020. The hearing was scheduled to continue, for a second day, on March 20, 2020. On March 12, 2020, however, the City informed the Hearing Examiner that all public meetings, public hearings, and administrative appeal proceedings would be immediately discontinued until further notice in light of the outbreak of the COVID-19 pandemic. On March 27, 2020, and again on May 11, 2020, the Hearing Examiner informed the City of his willingness to hold hearings using remote technology, and the open record hearing was scheduled to continue on July 8, 2020, using such technology.¹ Prior to commencing the continued hearing on July 8, 2020, however, it was determined that additional public notice of the continued hearing had not been issued. Accordingly, the hearing was continued so that appropriate public notice could be provided.² Ultimately, the hearing recommenced and concluded on August 3, 2020. The record was left open until August 18, 2020, to allow the parties to submit additional information, including an “agreed” upon set of project plans for review and proposed approval conditions, with justification, from each party.³

Testimony:

The following individuals presented testimony under oath at the open record hearing:

Lucy Sloman, City Land Development Manager
 Doug Schlepp, City Development Senior Consulting Engineer
 Eric Evans, Applicant Director of Development
 Michael Swenson, P.E., Transpo Group
 Mark Veldee, P.E., KPFF
 Tia Heim, Applicant Representative

Attorney Patrick Schneider represented the Applicant at the open record hearing.
 Attorney Zach Lell represented the City at the open record hearing.

Exhibits, Motions, and Pleadings:

Attachment A details the exhibits that were admitted into the record, as well as pleadings, motions, and other materials submitted by the parties.

The Hearing Examiner enters the following findings and conclusions based upon the testimony and exhibits admitted at the open record hearing:

¹ See Exhibit WW and Exhibit XX.

² *Order on Continued Hearing*, dated July 8, 2020.

³ Exhibit YY; *City Proposed Conditions of Approval*, dated August 10, 2020; *Applicant Response to City’s Proposed Conditions of Approval*, dated August 18, 2020.

Findings, Conclusions, and Decision
 City of Issaquah Hearing Examiner
 High Street Collection Preliminary Plat
 Nos. PP17-00002 & PRJ16-00013

FINDINGS

Regulatory Background

1. In 1995, the Washington State Legislature adopted Sections 36.70B.170 to .200 Revised Code of Washington (RCW), which allowed local governments to enter into development agreements with persons having ownership or control of real property. The statute provides that a “development agreement must set forth the development standards and other provisions that shall apply to and govern and vest the development, use, and mitigation of the development of the real property for the duration specified in the agreement.” *RCW 36.70B.170(1)*. The statute further explains that the “development standards” that must be set forth in a development agreement include “[r]eview procedures and standards for implementing decisions” and a “build-out or vesting period for applicable standards.” *RCW 36.70B.170(3)(i) and (j)*. The statute states that executing development agreements is a proper exercise of “county and city police power and contract authority.” *RCW 36.70B.170(4)*. Finally, *RCW 36.70B.180* provides:

Unless amended or terminated, a development agreement is enforceable during its term by a party to the agreement. A development agreement and the development standards in the agreement govern during the term of the agreement, or for all or that part of the build-out period specified in the agreement, and may not be subject to an amendment to a zoning ordinance or development standard or regulation or a new zoning ordinance or development standard or regulation adopted after the effective date of the agreement. A permit or approval issued by the county or city after the execution of the development agreement must be consistent with the development agreement.

Exhibit F.

2. On June 19, 1996, the City entered into a development agreement entitled the “Grand Ridge Annexation and Development Agreement.” This agreement later became known as the “Issaquah Highlands Annexation and Development Agreement” (Development Agreement, or DA), which covers development of the Issaquah Highlands area, including the subject property. The DA, including its appendices and amendments, provides development standards related to everything from zoning and density requirements to agreed mitigation and specific design review requirements. Of particular note:
 - Unlike the municipal code, the DA does not generally provide for differing treatment of various land use permits. Instead, it defines *implementing approvals* as “land use approvals or permits” which “implement or otherwise are consistent [with the DA], including but not limited to plats, short plats, binding site plans, site development permits, building permits, and grading permits.”⁴

⁴ *Exhibit P (Section 6, Definitions).*

- Comprehensive standards for infrastructure throughout all of the Issaquah Highlands are provided, including standards related to: stormwater improvements (Appendix D); sewer service (Appendix G); roadways (Appendix H) and other transportation improvements (Appendix J); capital facilities improvements, including those related to park, police, fire, and public works (Appendix K); urban trails (Appendix T); and public spaces, such as parks, plazas, and woonerfs (Exhibit U).
- The DA provides for a process to allow modifications to its own development standards, including “administrative minor modifications” (AMMs).
- The DA provides detailed and specific guidelines related to processing and approval of land use permits (i.e, implementing approvals), covering permit approval from the preliminary application stage through the construction permit stage of development (Appendix L).
- The DA provides for a dispute resolution process (Section 5.11).

Exhibit P.

3. The DA also contains provisions concerning, vesting and termination of the agreement. Specifically, the DA includes the following sections:

[Section] 3.23 VESTING OF DEVELOPMENT STANDARDS AND MITIGATION

All development with the [Urban Growth Area] shall be governed by the Development Standards and shall be implemented through plats, short plats, binding site plans, site development permits, building permits and other permits and approvals (“Implementing Approvals”) issued by the City. A “Buildout Period” of twenty (20) years following first final plat approval is established for the development and construction of uses for the [Issaquah Highlands] Project. During the Buildout Period, the City shall not modify or impose new or additional Development Standards beyond those set forth in this Agreement. . .

* * *

[Section] 3.23.2 After Buildout. The Development Standards shall continue to apply to all applications for Implementing Approval submitted after expiration of the Buildout Period, except either party may terminate this Agreement, and the zoning and development regulations may be modified, as provided in Section 5.13.

* * *

*Findings, Conclusions, and Decision
 City of Issaquah Hearing Examiner
 High Street Collection Preliminary Plat
 Nos. PP17-00002 & PRJ16-00013*

[Section] 5.13 TERM

The term of this Agreement shall continue at a minimum through the Buildout Period, and shall continue after the Buildout Period unless and until either the City or the Partnership . . . gives notice of termination. . . . No sooner than six (6) months after the notice of termination, the City shall hold public hearings and shall adopt zoning and related development standards for the UGA portion of the Property, or portions thereof as determined appropriate by the City. Upon such adoption, this Agreement shall terminate and thereafter the UGA portion of the Property shall be governed by the adopted City zoning and related development regulations.

Exhibit P.

4. The first final plat under the DA was approved on September 18, 1997. Accordingly, the “Buildout Period” under the DA expired on September 18, 2017. Under the terms of the DA, however, its development standards remained effective until the City Council voted to enact Ordinance No. 2830, effective March 28, 2018 (and later codified at Chapter 18.19B of the Issaquah Municipal Code (IMC)). The ordinance terminated the DA and promulgated “Replacement Regulations” replacing the development standards and regulations previously governing land subject to the DA. *Exhibit F; Exhibit L.*

5. Of particular note, the Replacement Regulations include different procedures than the DA related to the processing of land use applications, as found in IMC 18.19B.270. Under Appendix L of the DA, for instance, a preliminary plat would be processed as follows: the proposal’s submission to the City; the City issuing a “sufficiency” determination within 10 calendar days; the City’s (now defunct) Major Development Review Team holding an application conference with the developer to furnish written comments; the City’s (now defunct) Urban Village Development Commission considering the matter within 60 days from the sufficiency determination and issuing a recommendation to the City Council; and the City Council approving or denying the preliminary plat. Under the Replacement Regulations, a preliminary plat is processed by: the proposal’s submission to the City; the City determining that the application is “complete”; the City’s Development Commission reviewing the proposal at an informal public meeting; City staff (with the assistance of the Applicant, if they so choose) preparing a “community conference response memo”; distribution of the response memo to parties of record and the Development Commission for additional public comment; incorporation of public comment into the community conference response memo, if appropriate; production of a final community conference response memo; preparation of a staff report by City staff; and an open record public hearing before the Hearing Examiner, who then issues a final decision on the preliminary plat. *Exhibit P, Appendix L; IMC 18.19B.270.C.*

*Findings, Conclusions, and Decision
 City of Issaquah Hearing Examiner
 High Street Collection Preliminary Plat
 Nos. PP17-00002 & PRJ16-00013*

6. In addition, the Replacement Regulations include the following provision concerning the vesting of permits:

Only vesting established by Washington State law shall apply to the vesting of development applications for properties located within Issaquah Highlands previously covered by the terminated development agreements.

These are:

1. Building permits which comply with RCW 19.27.095; or
2. Long or short plats which comply with RCW 58.17.033; or
3. Development agreements per RCW 36.70B.180.

IMC18.19B.280.A.

Procedural Background

City's Initial Review of IHIF's Preliminary Plat

7. IHIF Commercial, LLC (Applicant, or IHIF) requests preliminary plat approval to subdivide 21.46 acres that it owns on "Lot B" of the Issaquah Highlands, north of NE Discovery Drive and west of 9th Avenue NE, primarily for commercial and retail development. IHIF began communicating its intention to develop the property several years ago, as evinced by a "Development Entitlement Memorandum" prepared by the City on December 1, 2016, which noted that the property would be "permitted under the Issaquah Highlands Development Agreement." *Exhibit Y.*
8. The vested status of any proposal submitted has been a concern of paramount importance to IHIF since it first contemplated development of the property. On January 24, 2017, for instance, Applicant Representative Tia Heim emailed Lucy Sloman, the City's Land Development Manager, to request a copy of the "vesting requirements interpretation" previously prepared by City Development Services Director Keith Niven that was referenced in the December 2016 Development Entitlement Memorandum.⁵ *Exhibit XX-10.*
9. By February 28, 2017, IHIF determined that it would move forward with development of the property and requested an optional "Preliminary Application Meeting" with the City, consistent with procedures in Appendix L of the DA.⁶ On March 8, 2018, David Cayton, an engineering consultant working on behalf of IHIF, emailed City Development Services Department Project Oversight Manager Christopher Wright. In the email, Mr. Cayton noted that the City denied IHIF's request to conduct a Preliminary Application Meeting but, instead, would require an "early collaborative meeting." Mr. Cayton

⁵ This specific vesting requirements interpretation of Mr. Niven was not included in the record for the present application.

⁶*Exhibit WW-2.*

*Findings, Conclusions, and Decision
City of Issaquah Hearing Examiner
High Street Collection Preliminary Plat
Nos. PP17-00002 & PRJ16-00013*

indicated that IHIF would like to schedule such a meeting as soon as possible and provided Mr. Wright with draft versions of a “Project Narrative, a SEPA Checklist and a draft copy of a Preliminary Plat” for the City’s review. That same day, Mr. Wright emailed Mr. Cayton back and noted that the information he provided would be sufficient for him to schedule the “Early Collaboration Meeting.”⁷ *Exhibit AA.*

10. IHIF and the City held the Early Collaboration Meeting on March 21, 2017. On March 27, 2017, Applicant Representative Heim emailed Land Development Manager Sloman to (again) request a Preliminary Application Meeting. In response, Sloman noted that the meeting could be scheduled but that the City would need “enough info to know that you can and how you’d service wet utilities” for the project area, and that a traffic study would be necessary because the City would not be “able to have a full review” without “knowing the roads, traffic, interconnections, etc.” *Exhibit XX-11.*
11. The Preliminary Application Meeting eventually occurred on May 31, 2017.⁸ City Senior Planner Jean Lin emailed Mr. Cayton on June 7, 2017, with comments summarizing the parties’ discussion. The comments identify several “action items” the City determined would need to be addressed prior to submission of IHIF’s preliminary plat, including more information on existing and proposed streets and frontage improvements, information on the placement of wet and dry utilities, and conceptual grading and drainage plans. The comments also noted that the City “must receive a letter from the [Issaquah Highland’s Community Association’s Architectural Review Committee] supporting the plat’s design,” that a “transportation impact analysis would be required,” that the City “strongly urged” that IHIF meet with Eastside Fire and Rescue, and that the City “strongly urged” IHIF to continue a trail through the plat, from High Street east of 9th Avenue NE to connect with NE Discovery Drive. Finally, the City’s Public Works Department provided detailed comments about water flow interruptions and about the design, operation, connection, and location of specific utilities (especially in relation to stormwater). *Exhibit CC.*
12. After receiving the City’s comments at the Preliminary Application Meeting, the IHIF team continued to work with City staff in advance of submitting its preliminary plat application to address the City’s concerns. Of note:
 - Mark Veldee, a consulting engineer working with IHIF, met with City Development Senior Consulting Engineer Doug Schlepp and with Dan Ervin, another of the City’s consultants, on June 7, 2017, to discuss stormwater. On

⁷ Appendix L of the DA does not reference the term “Early Collaboration Meeting.” It does, however, have provisions for a “Project Feasibility Meeting,” wherein an applicant would meet with the City to “eliminate as many potential problems as possible in order for the application to be processed without delay or undue expense” prior to an applicant submitting a project application. *Appendix L.* Presumably Mr. Wright’s email referred to this type of meeting.

⁸ *Exhibit WW-2.*

June 27, 2017, Mr. Ervin emailed Mr. Veldee and explained that stormwater detention “will not be required for any improvements you make to Discovery Drive.” *Exhibit UU*.

- On July 10, 2017, Mr. Cayton emailed Ms. Lin to inquire about whether a “Preliminary Street Lighting Plan” would be required at the preliminary plat stage of review and to inquire about scheduling a meeting with Eastside Fire. In response, Ms. Lin noted that a “street lighting plan at a conceptual level would be helpful” so the City could ensure that “there are appropriate locations allocated for all the components of the frontage improvements” as an “integral part” of the preliminary plat review process. In addition, she informed Mr. Cayton that Eastside Fire’s primary concern was that “the width of the streets meet the Issaquah Highland street standards” and that, if that was so, no meeting would be necessary. *Exhibit WW-12*.
13. Ultimately, IHIF submitted its preliminary plat application on August 1, 2017, approximately six weeks before the end of the Buildout Period specified in the DA. IHIF included the following materials with the plat application: (1) a set of project plans; (2) a “Project Narrative,” dated July 15, 2017, providing background information on the proposal and a detailed analysis addressing how the preliminary plat would comply with the requirements of the DA, including each of its appendices; (3) a Traffic Study Memorandum, prepared by Transpo Group, dated July 28, 2017, providing detail about the proposed configuration of NE Discovery Drive; (4) a Preliminary Stormwater Report, prepared by KPFF Consulting Engineers, dated July 2017; and (5) a letter from Ms. Heim noting that, in IHIF’s view, the submitted materials sufficiently addressed the City’s earlier comments and that, as such, a determination of completeness should be issued for the proposal. *Exhibits B-1.1 through B-1.6*.
 14. On August 28, 2017, still prior to the end of the Buildout Period, IHIF submitted additional materials for review that were inadvertently omitted from their original submittal, including: title information; a State Environmental Policy Act (SEPA) Checklist, dated July 27, 2017; information on agent authority and property ownership; a memorandum concerning lot closure calculations, prepared by Core Design, Inc.; and legal descriptions of a proposed public sidewalk easement and public trail/landscape easement. *Exhibit B-2.1 through B2-.17*.
 15. On September 25, 2017, Mr. Cayton emailed Ms. Lin to inquire about the status of the application, noting that, under the DA, “we were to have an application conference within 30 days of the completeness determination.” On October 2, 2017, Ms. Lin responded. In her email, she explained that the application was deemed complete and that “getting you an application completeness letter is on my to do list.” In addition, Ms. Lin pointed out that, “per the DA, we have to determine if the application is complete within 10 days of submittal, so I will be adjusting the date accordingly.” On October 6, 2017, Ms. Lin sent

Findings, Conclusions, and Decision
City of Issaquah Hearing Examiner
High Street Collection Preliminary Plat
Nos. PP17-00002 & PRJ16-00013

Page 8 of 50

the “Complete Application Determination,” backdated to August 11, 2017, and told Mr. Cayton that the City would “follow up with you with any questions or comments in the next week or two” after it reviewed the submitted application materials. In addition, she requested that IHIF install a project sign at the site (i.e., post notice of the application) and submit an affidavit concerning notice being posted, which IHIF did on October 17, 2017.⁹ *Exhibit EE.*

16. On October 5, 2017, Ms. Lin emailed the IHIF team to relay comments provided by the Eastside Fire Marshal’s Office about fire access to one of the proposed lots within the preliminary plat and about the need for NE Discovery Drive to be widened adjacent to the plat to “provide 20’ clear road width without on-street parking (preferred), with an absolute minimum of 18’ road width.” *Exhibit XX-04.*
17. On November 16, 2017, Doug Schlepp provided additional comments to Mark Veldee concerning stormwater management. His email noted:

After discussing this with the PWE Utilities Manager, Bob York, there is capacity in the City. You may work directly with Dave Segal who had modeled the Upper Reid Pond previously concerning the capacity for both detention and treatment – all design work is still subject to City review and approval. Note that while the pond was designed under the KCSWDM [King County Storm Water Design Manual] you will need to comply with the new Standard based on the 2014 DOE [Department of Ecology] Manual adopted by the City.

Bob [York] and I will be working on the fee to use [the Upper Reid Pond Stormwater] facility. . . I recommend that you consider this effort more globally for all [IHIF] properties that may benefit from this rather than a project by project analysis. This would need to be incorporated into the plat documents.

Exhibit XX-05.

18. On December 15, 2017, prior to the City issuing notice of the preliminary plat application, IHIF submitted two additional documents for review: (a) an updated “Preliminary Plat” drawing with proposed lot line revisions and (b) a “Preliminary Engineering Overview Site Plan” depicting building footprints on the proposed lots, consistent with the materials IHIF had submitted for the three site development permits it had previously submitted, related to development within the preliminary plat. Of particular note, none of IHIF’s earlier preliminary plat submittals depicted proposed

⁹ Exhibit C-2.

building footprints. Mr. Cayton emailed Ms. Lin that same day to explain that these additional submissions were provided to address “minor lot line revisions” that were necessary to accommodate proposed building locations, improvements, and other plat features, and to depict “proposed buildings” to assist the City in understanding the evolution of the site design for the plat. *Exhibits B-3.2 and B-3.3; Exhibit GG.*

19. On December 27, 2017, the City mailed notice of the preliminary plat application to property owners within 300 feet of the project site and parties of record. The notice materials stated that the City Council (not the Hearing Examiner) would serve as the “Decision Maker” for the proposal, although the “[d]ate and time of the meeting and hearing has not been set,” and indicated that the City had made a preliminary determination that the “Development Regulations that will be used for Project Mitigation and Consistency” would be those in the DA (in conjunction with the City Comprehensive Plan). In addition, the “Preliminary Engineering Overview Site Plan,” depicting building footprints on the proposed lots within the plat, was included with the notice materials. Finally, the notice provided for the submission of public comments through January 17, 2018. The record does not reflect whether the City received any public comments in response to the notice of application. *Exhibit C-1.*
20. After issuing notice of the application, and despite its earlier assertions that the application was deemed “complete” under the DA, the City did not timely schedule the preliminary plat for review by the Urban Village Development Commission, as required by the DA.¹⁰ *Exhibit JJ.*

City’s Review of Site Development Permits and Associated Appeals

21. While the City continued to review IHIF’s submitted preliminary plat materials, IHIF submitted three development permits related to development that it intended to pursue within the preliminary plat: a potential Medical Office Building (No. ASDP18-00007), Self-Storage Facility (No. ASDP18-00006), and Retail Development (No. SDP18-00001). IHIF initially submitted the Site Development Permit (SDP) application for a Retail Development and the Administrative Site Development Permit (ASDP) application for a Medical Office Building on October 23, 2017. It later submitted the ASDP application for a Self-Storage Facility on December 1, 2017. Of note, all three applications were submitted after expiration of the Buildout Period specified within the DA. *Exhibit F.*

¹⁰ Appendix L of the DA provides in Section 3 of Part Two that the City “shall determine if the information contained in the application or modification request submitted by the developer is sufficient,” meaning the “required submission materials are sufficiently complete to allow continued processing.” If sufficient, the application “shall be placed on the agenda for consideration at an [Urban Village Development Commission] meeting to be held within sixty (60) days.” If the application is deemed insufficient, “it shall be returned to the developer within ten (10) calendar days with written documentation of the inadequacies.” If the City “does not notify the applicant within ten (10) calendar days of receipt of an application . . . it shall be deemed sufficient and review shall proceed.” *Exhibit P.*

*Findings, Conclusions, and Decision
City of Issaquah Hearing Examiner
High Street Collection Preliminary Plat
Nos. PP17-00002 & PRJ16-00013*

22. On November 16, 2017, the City’s Development Services Department (DSD) provided a memorandum to the City Council about unbuilt properties in Issaquah Highlands that would remain once the City adopted “Replacement Regulations.” In the memorandum, DSD recommended that the City Council include language in the Replacement Regulations related to vesting that would read:

Development for which a complete ASDP, SDP, or other similar land use permit application has been submitted prior to the effective date of the ordinance adopting [the Replacement Regulations] shall be vested against the provisions of [the Replacement Regulations] and shall be processed under the regulations in existence prior to the effective date as long as the permit application remains active.

Exhibit F.

23. The memorandum also stated that, as an alternative, the City Council could refrain from including any language about vesting in the Replacement Regulations or include language that would only allow for vested rights for complete building permit applications, subdivision applications, or development agreements, consistent with state law. Ultimately, DSD recommended that the City Council adopt language allowing for ASDP, SDP, or other similar land use permit applications because this approach would be “consistent with the vested rights doctrine” and the Supreme Court’s decision in *West Main Associates v. Bellevue*, 106 Wn.2d 47, 720 P.2d 782 (1986). *Exhibit F.*
24. On November 21, 2017, representatives of IHIF, including Tia Heim, met with Director Niven to discuss its pending applications, including the application related to a Retail Development and a Medical Office Building. According to Ms. Heim, Mr. Niven confirmed that the submitted ASDP and SDP applications were complete and would vest to the Development Standards of the DA. *Exhibit F.*
25. The same day, Ms. Heim emailed Mr. Niven about the meeting that occurred, stating: “[a]s we discussed, we would like the City to confirm our understanding that [IHIF’s] land use permit applications have been deemed complete [per the requirements of the DA] and are therefore vested to the Development Standards in the Development Agreement.” Mr. Niven responded to Ms. Heim’s email that evening, noting that, unless a request for additional information has been received, “these applications are viewed as ‘Complete’ per the terms of the Development Agreement.” Approximately 20 minutes later, Ms. Heim again emailed Mr. Niven, stating “I am assuming that you mean that the applications are complete and vested to the Development Agreement as stated in the email below and as we discussed in our meeting with you today.” Ms. Heim requested that Mr. Niven confirm that her understanding of the situation was correct. The next morning, on November 22, 2017, Mr. Niven responded, emailing “yes.” *Exhibit FF.*

Findings, Conclusions, and Decision
City of Issaquah Hearing Examiner
High Street Collection Preliminary Plat
Nos. PP17-00002 & PRJ16-00013

26. Land Development Manager Lucy Sloman was cc'd on the email communication that occurred between Ms. Heim and Mr. Niven. Following Mr. Niven's communication with Ms. Heim on the morning of November 22, 2017, Ms. Sloman emailed Mr. Niven (no other parties were cc'd on the email) to express confusion in light of her belief that IHIF's pending applications would not vest "unless the council agrees to the vesting language" recommended by DSD. In reply, Mr. Niven stated "They are vested at this moment under the DA" but, "If the Council removes the proposed vesting language, they will lose their vested status." In response, Ms. Sloman wrote "Shouldn't that be clear in the response?" The record does not reflect that either Mr. Niven or Ms. Sloman clarified the earlier response to Ms. Heim's inquiry. *Exhibit XX-07*.
27. Ultimately, on March 5, 2018, Attorney Patrick Schneider wrote to the City on behalf of IHIF to notify the City that the City had failed to comply with the terms of the DA in several ways. The letter summarized IHIF's claims (referring to IHIF as "IHIF-C") as follows:

Since purchasing its property in 2013, IHIF-C has been working with the City in good faith on development proposals for its property. IHIF-C met with City staff on several occasions to discuss possible extension of the DA or modification to allow mixed-use development. At the City's suggestion, in 2016, IHIF-C spent over \$100,000, on a community outreach effort centered around a mixed-use development proposal that included affordable housing, community retail, and medical offices/health services uses. On several occasions between 2015 and 2017, IHIF-C made written requests to the City to either extend the DA with respect to its property or to enter into a new development agreement with the City. When it became clear that the City was not supportive of these efforts, in late 2016, IHIF-C modified its development proposal to only include uses that were allowed as a matter-of-right under the DA.

To effectuate those uses, IHIF-C requested several DA Implementing Approvals including a preliminary plat and permits for four uses: Retail, Medical Office, Storage, and Commercial. As detailed below, the City repeatedly violated (and continues to violate) the DA processing timelines for those permits in an overt effort to prevent IHIF-C's proposed development—not because the development is not allowed under the DA, but because the City's new administration simply doesn't like it.

Staff has provided inconsistent and erroneous information on the vesting of IHIF-C's Implementing Approvals and has treated IHIF-C unfairly and differently than other similarly situated landowners by delaying review of

*Findings, Conclusions, and Decision
City of Issaquah Hearing Examiner
High Street Collection Preliminary Plat
Nos. PP17-00002 & PRJ16-00013*

IHIF-C’s preliminary plat and refusing to deem IHIF-C’s [associated site development permit applications as] complete, allegedly because the preliminary plat wasn’t finalized, when the sole reason for this was the City’s repeated refusal to follow the DA Section 3.22 (*City Processing and Review*) and Appendix L timelines. By refusing to acknowledge the vested status of IHIF-C’s Implementing Approvals, the City is expressing its intent to ignore the tens of millions of dollars in mitigation that was constructed to support development on IHIF-C’s property. This mitigation is expressly designed as part of the “Development Standards” that IHIF-C vested to by submitting its Implementing Approvals, yet the City has refused to acknowledge this fact or explain why the City believes that it can unilaterally strip IHIF-C of these property rights.

Exhibit JJ.

28. Following the summary, Mr. Schneider wrote 10 additional pages in the letter explaining, in detail, the various ways in which the City has violated the DA. He also noted that the City could cure the situation through: (1) timely processing IHIF’s pending applications consistent with the DA; (2) recognizing IHIF’s pending applications are vested to Sections 3.23 (Vesting) and 3.23.2 (After Buildout), and to the “Development Standards” in Section 6 of the DA, which include mitigation associated with full build out of IHIF’s property; (3) acknowledging that the vesting for IHIF’s preliminary plat (and other applications) continues despite the adoption of future replacement regulations; and (4) allowing the continued processing of IHIF’s preliminary plat, associated development permits, and construction of such permits under the DA’s development standards. On March 8, 2018, Keith Niven responded to Mr. Schneider’s letter and requested that the parties engage in a conversation to allow the City to better understand IHIF’s claims and give the City an opportunity to respond to such claims. *Exhibit JJ.*
29. On March 15, 2018, IHIF and the City signed an agreement concerning some of the claims raised by Mr. Schneider in his letter the week before. Of note, the agreement acknowledged that the City Council had not yet adopted replacement regulations for the DA and that the parties may have differing positions regarding the effect of the replacement regulations on IHIF’s applications, including differing positions on the effect of replacement regulations on vesting. *Exhibit F.*
30. As noted above, on March 19, 2018, the City Council voted to enact Ordinance No. 2830, effective March 28, 2018 (and later codified at Chapter 18.19B IMC). The ordinance terminated the DA and promulgated the Replacement Regulations, replacing the development regulations previously governing land subject to the DA. *Exhibit F.*

Findings, Conclusions, and Decision
City of Issaquah Hearing Examiner
High Street Collection Preliminary Plat
Nos. PP17-00002 & PRJ16-00013

31. On April 4, 2018, Director Niven wrote Mr. Schneider to further elaborate on the City’s position concerning the vested status of IHIF’s pending land use applications. In the letter, Director Niven argued:
- The City Council adopted replacement regulations on March 19, 2018, resulting in termination of the DA. Accordingly, and consistent with Section 5.13 of the DA itself, the Replacement Regulations govern all future development on IHIF’s property “except the extent that the City Council has, in its legislative policy discretion, voluntarily recognized vesting protection for specified categories of land use applications.”
 - Neither the DA nor applicable state law independently affords vesting protection to outstanding applications for Implementing Approvals following termination of the DA. Thus, the Replacement Regulations govern future development of the IHIF property “*regardless of any outstanding land use permit applications.*” (Emphasis in original).
 - Under state law, including provisions in RCW 36.70B.180 and .190, a development agreement is only binding and enforceable during its actual term and “without any regard for the purportedly ‘vested’ status of previously submitted land use applications.” Put differently, termination of a development agreement “automatically extinguishes all outstanding land use permit application rights” including “the right to develop under the development standards contained in the agreement.”
 - The City Council adopted IMC 18.19C.280, as part of the Replacement Regulations, with the intent to “afford vested rights only to the categories of land use application for which vesting is recognized by state law—i.e., building permits and plats.” Thus, the City considers IHIF’s “preliminary plat to be vested” while its various site development permits are not.
 - Under state law, a complete subdivision application “vests the underlying proposal ‘only at a very general level’—i.e., to the land uses allowed under the municipality’s current regulations.” Under *Alliance Investment Group v. City of Ellensburg*, 189 Wn. App. 763, 358 P.3d 1227 (2015), however, “[a]ny specific project will still have to meet the development standards at the time the building permit is filed.” Moreover, under *Noble Manor Co. v. Pierce County*, 133 Wn.2d 269, 943 P.2d 1378 (1997), “[w]hat is vested is what is sought in the application for a . . . plat.” Accordingly, the City considers IHIF’s “preliminary plat application to be vested to the use regulations” set forth in the DA, as well as to “any development standard in the Agreement that are necessary to accommodate the specific development plan or concept—if any—identified in [IHIF’s] plat application materials.”

Exhibit G.

32. Director Niven also responded to each of the specific allegations levelled by Mr. Schneider in the remainder of the letter from March 5, 2018. In particular, Director

*Findings, Conclusions, and Decision
 City of Issaquah Hearing Examiner
 High Street Collection Preliminary Plat
 Nos. PP17-00002 & PRJ16-00013*

Niven stressed that the City “worked diligently and in good faith to expeditiously review and process” IHIF’s applications but delays resulted in light “of the City’s staffing resource shortage.” The letter noted, however, that a meeting on the preliminary plat had been tentatively scheduled before the Urban Village Development Commission (UVDC) on May 15, 2018, consistent with the requirements of the DA. *Exhibit G*.

33. On April 13, 2018, IHIF attempted to appeal Mr. Niven’s letter to the Hearing Examiner, who dismissed the appeal on summary judgment. The Hearing Examiner summarized his decision as follows:

Although the municipal code grants the Hearing Examiner authority to hear some matters that are not expressly enumerated in IMC 18.03.060, nothing in the municipal code suggests that the Issaquah City Council intended the Hearing Examiner to have the appellate authority to review *every* administrative decision made by the City, as is implied by the Appellant’s arguments. Instead, other provisions of the municipal code, such as IMC 18.04.252, IMC 5.05.160, and IMC 3.09.150, augment the Hearing Examiner’s authority but, in every instance, the Issaquah City Council has made the Hearing Examiner’s authority explicit. Put another way, IMC Table 18.04.250-1 is not a “catch-all” provision granting the Hearing Examiner authority to hear all other administrative decisions not explicitly delineated in IMC Table 18.04.-250-2 or IMC 18.03.060. Accordingly, the Hearing Examiner lacks authority to review [Director Niven’s letter from April 4, 2018] as a substantive, final decision under the municipal code. Additionally, nothing in the Development Agreement grants the Hearing Examiner the authority to settle disputes over interpretation of the Development Agreement itself, as is the case here.

*Decision on City’s Motion to Dismiss, dated June 28, 2018.*¹¹

34. Following IHIF’s initial appeal, the City continued to process IHIF’s site development permit applications consistent with the City’s Replacement Regulations (not the DA). Accordingly, Director Niven determined that review of the site development permits would be necessary, as a Level 3 review process, under IMC 18.19B.270, by the City’s Development Commission (a separate entity from the Urban Village Development Commission, or UVDC, that was created to address permits governed by various development agreements, including the Issaquah Highlands DA). Thus, on September 17, 2018, Director Niven issued three staff reports related to the three pending site development applications. Each staff report included an analysis of vesting and a determination that the pending applications would not vest to the development

¹¹ Although this decision was not provided by the parties in the exhibits related to the current appeal, the Hearing Examiner takes judicial notice of it as, clearly, it relates to the present matter.

regulations under the DA but, instead, would need to adhere to the requirements of the Replacement Regulations. Each staff report recommended that the Development Commission deny the permits for failure to adhere to the requirements of the Replacement Regulations or, alternatively, place the permits on hold “until a final decision on the associated preliminary plat has been made.” *Exhibit E.*

35. On October 1, 2018, IHIF appealed Director Niven’s staff reports to the Hearing Examiner. Following oral argument on a motion to dismiss by the City, the Hearing Examiner issued a decision on the matter, dismissing the appeal. The Hearing Examiner explained his decision as follows:

The City and the Appellant disagree about the scope of the Hearing Examiner’s appellate jurisdiction under the Issaquah Municipal Code. There is no disagreement, however, that a staff report does not constitute a final decision on a specific application that the Hearing Examiner has the authority to review under IMC 18.03.060.D. This is true for at least two reasons. First, the staff reports do not purport to make a final decision on any of these pending applications and merely provide recommendations to the Development Commission. Second, although each of the applications involve some type of Level 0 through Level 3 review under IMC Table 18.04.250-2, the staff reports do not, themselves, involve the type of specific review of a final land use decision that the Hearing Examiner would have the appellate authority to address under IMC 18.03.060.D and IMC Table 18.04.250-2.

Accordingly, because the staff reports themselves are not reviewable by the Hearing Examiner as final land use decisions, the question becomes whether the Hearing Examiner has authority to review the Director’s analysis on vesting contained within each staff report as a code interpretation, appealable under either IMC 18.01.050.B or IMC 18.19B.040. An analysis of the municipal code leads to the conclusion that he does not.

Here, the Appellant argues that because “a vesting determination requires the Director to interpret and apply code, it necessarily is a subset of code interpretations” appealable to the Hearing Examiner. *Appellant’s Response to Motion to Dismiss, page 7.* This logic goes beyond the argument the Appellant put forth in the initial appeal and, essentially, contends that *any* interpretation or application of the municipal code by the Director, whether it appears in a formal decision document or not, is appealable to the Hearing Examiner. This would clearly lead to chaos as every determination or decision of the City that involved “interpreting” or “applying” the municipal code would be appealable. The Hearing Examiner is confident that the

*Findings, Conclusions, and Decision
City of Issaquah Hearing Examiner
High Street Collection Preliminary Plat
Nos. PP17-00002 & PRJ16-00013*

Page 16 of 50

Issaquah City Council did not intend to allow interlocutory appeals at every potential step of the permit review process and that the Hearing Examiner's appellate jurisdiction would, in this instance, remain limited to reviewing final decisions made by the Development Commission as part of the Level 3 review process.

The Hearing Examiner recognizes that, under IMC 18.01.050, anyone "may request an interpretation of [the municipal code] by filing a written request" and that the resulting interpretation would be appealable to the Hearing Examiner. Similarly, the Hearing Examiner recognizes that IMC 18.19B.040 allows for a request for a formal interpretation of the code appealable to the Hearing Examiner. The Appellant has twice appealed informal documents produced by the Director rather than requesting a formal interpretation of the municipal code. An appeal of the vesting analysis of the City must await a final decision by the City, either as a formal code interpretation (that has been appealed) or as part of an appeal of a final decision on a specific permit application issued by the Development Commission.

Although the municipal code grants the Hearing Examiner authority to hear some matters that are not expressly enumerated in IMC 18.03.060, nothing in the municipal code suggests that the Issaquah City Council intended the Hearing Examiner to have the appellate authority to review *every* administrative decision made by the City or that the Council intended to allow for interlocutory appeals to the Hearing Examiner every time the Director informally interprets or applies the municipal code within a staff report. Instead, the municipal code allows for a formal process for code interpretations, under both IMC 18.01.050.A and IMC 18.19B.040, that includes an opportunity for appeal of such formal interpretation to the Hearing Examiner. Alternatively, the Appellant has the opportunity to appeal all aspects of the decision (including the Director's vesting determination) once the Planning Commission has issued final decisions on underlying permits as the culmination of the Level 3 review process implemented by the Issaquah City Council.

Here, the Appellant has elected not to use the formal code interpretation process and the Hearing Examiner lacks the authority to hear an interlocutory appeal prior to the culmination of the Level 3 process involving the Development Commission. The Hearing Examiner lacks authority to independently review a code interpretation or vesting determination made within a staff report. Language in a staff report is not a final decision that is

Findings, Conclusions, and Decision
City of Issaquah Hearing Examiner
High Street Collection Preliminary Plat
Nos. PP17-00002 & PRJ16-00013

Page 17 of 50

reviewable outside the scope of the Level 3 process dictated by the Issaquah City Council.

In addition, although the Appellant has presented a strong case concerning procedural due process and fairness, the Hearing Examiner lacks the authority to address equity or an as-applied due process challenge to specific provisions of the municipal code. The Issaquah City Council has dictated that a closed record appeal before the Hearing Examiner is allowed following final decisions of the Development Commission, a policy decision made under authority of the Growth Management Act. Under the unique and complex circumstances present with this matter, this has created a situation whereby the Appellant must present factual evidence related to a dispositive legal issue (vesting) to the Development Commission, a decisionmaking body without legal training or jurisdiction to overturn the Director’s vesting determination. Following a final decision of the Commission, any appeal to the Hearing Examiner would be on a closed record whereby the Hearing Examiner would not be able to observe witness testimony (or ask additional questions). Although this creates certain challenges, appellate courts manage this task regularly. Moreover, while it may be more expedient to have the Hearing Examiner decide the vesting issue now, the municipal code does not grant the Hearing Examiner authority to usurp or replace the authority of the Development Commission for purposes of expediency.

Exhibit E.

36. Following the Hearing Examiner’s denial of its appeal associated with Director Niven’s staff reports on the site development permits, IHIF participated in hearings on those applications before the Development Commission under protest, a process involving 19 days of hearings that occurred over a 10-month period. Ultimately, on July 24, 2019, the Development Commission denied the applications as inconsistent with the Replacement Regulations. In its decision, the Development Commission noted that “it does not have jurisdiction to review the vesting determination by the Development Services Director” under IMC 18.01.050.C and that such authority would, in such circumstances, fall to the Hearing Examiner.” *Exhibit F.*
37. Thus, on July 24, 2019, IHIF timely appealed the Development Commission’s decisions to the Hearing Examiner. The appeal included 14 separate assignments of error. Following a prehearing conference on August 13, 2019, the City and IHIF both submitted dispositive motions related to the appeal. On September 24, 2019, the Hearing Examiner heard oral argument on the dispositive motions. On November 15, 2019, the Hearing Examiner then issued a decision on the dispositive motions, which ultimately dismissed the appeal in its entirety. The Hearing Examiner’s conclusions state:

*Findings, Conclusions, and Decision
 City of Issaquah Hearing Examiner
 High Street Collection Preliminary Plat
 Nos. PP17-00002 & PRJ16-00013*

The Appellant is not entitled to summary judgment because the Director’s vesting determination was not clearly erroneous. The primary question at issue in this matter involves a contract dispute between the parties because, under RCW 36.70B.170(4), cities may enter into such agreements as a proper exercise of “county and city police power and contract authority.” [Footnote omitted]. Here, the Appellant contends that the 20-year buildout period provided by Section 3.23 of the DA did not provide for vesting because the City could not modify or impose new or additional Development Standards during this period. The Appellant argues that, instead, the “vesting” that the parties were referring to in the DA actually refers to the period after the buildout period but before the adoption of Replacement Regulations. The City contends that, consistent with RCW 36.70B.170(3)(i), the 20-year buildout period *was* the vesting period and that the parties did not provide for additional vested rights beyond that 20-year period. Based on the plain language of the DA, the City’s argument is the more persuasive of the two.

RCW 36.70B.170(3)(i) equates the term “Buildout Period” with “vesting period,” and the two terms are used interchangeably in the governing statute. Accordingly, in the DA, the buildout period accounted for 20 years of vested development rights for all Implementing Approvals—not just those recognized under the common law. During that time, the developer could develop the property consistent with the DA and (barring certain exceptions not relevant here) without accounting for changes to the municipal code, including the City’s zoning ordinances and critical areas ordinances. This was a valuable contract right that the parties negotiated and executed.

After the buildout period, Section 3.23.2 of the DA provided that the Development Standards of the DA would continue to apply except through termination of the contract. Under Section 5.13, termination of the DA would occur once the City adopted Replacement Regulations and “thereafter the UGA portion of the Property shall be governed by the adopted City zoning and related development regulations.” Nowhere in Section 3.23.2 or Section 5.13 are vesting or vested rights explicitly discussed. Contrary to the Appellant’s assertions, it is not unreasonable or absurd to believe that—having granted the developer a 20-year period of vested rights during the buildout—the City did not intend to allow further vested development rights beyond the buildout period. Had the parties intended that result, they could have written this into the contract by stating that all applications for Implementing Approvals deemed complete,

Findings, Conclusions, and Decision
City of Issaquah Hearing Examiner
High Street Collection Preliminary Plat
Nos. PP17-00002 & PRJ16-00013

Page 19 of 50

submitted after the buildout, be considered under the DA regardless of whether the City adopted Replacement Regulations. The parties did not do this. Accordingly, the Director's determination is not clearly erroneous because it is consistent with the plain language of the DA.

In addition, the Director's vesting determinations are not clearly erroneous because they are not contrary to the plain language of IMC 18.19B.280, the Replacement Regulations. This ordinance provides that "[o]nly vesting established by Washington State law shall apply to the vesting of development applications for properties located within Issaquah Highlands previously covered by the terminated development agreements." This includes applications for building permits, preliminary plats, and vested development rights established through development agreements. As noted above, the DA did not account for vested rights beyond the 20-year buildout period and IMC 18.19B.280 does not recognize vested development rights for SDPs or ASDPs.

The Appellant also argues that the Director's vesting determinations are inconsistent with decades of cases addressing vested development rights. Washington courts have recognized vested development rights for over 60 years, since *State ex rel. Ogden v. Bellevue*, 45 Wn.2d 492, 275 P.2d 899 (1954) was decided. As noted by Justice Utter, the "purpose of the vesting doctrine is to allow developers to determine, or 'fix,' the rules that will govern their land development," which is important because society "suffers if property owners cannot plan development with reasonable certainty and cannot carry out the developments they begin." *West Main Assocs. v. Bellevue*, 106 Wn.2d 47, 720 P.2d 782 (1986). Moreover, our "vested rights doctrine" is, according to the Washington Supreme Court, "one of the most protective of developer's rights" in the country. *Erickson & Assocs. v. McLerran*, 123 Wn.2d 864, 872 P.2d 1090 (1994). This doctrine, however, is nowhere enshrined in Washington's Constitution, and the DA does not state anywhere that the parties intended to incorporate common law vesting principles into the contract. As the City correctly argues, citing *Redford v. City of Seattle*, 94 Wn.2d 198, 206, 615 P.2d 1285 (1980), "It is axiomatic that, just as a contract can create enforceable rights, it can place limitations and restrictions on those rights." *City's Motion for Partial Summary Judgment, dated September 6, 2019*. Thus, the only vested rights applicable to the Appellant's permits are those allowed under the DA, and the contract does not explicitly provide for vested development rights in complete applications submitted after the buildout period.

Findings, Conclusions, and Decision
City of Issaquah Hearing Examiner
High Street Collection Preliminary Plat
Nos. PP17-00002 & PRJ16-00013

Page 20 of 50

The Appellant argues that this is an absurd result because it means the parties agreed to a period where no vested development rights would exist, as if such rights are mandatory under the common law. Contrary to the Appellant's assertions, vested development rights are not sacrosanct. Washington courts have recognized that vested development rights may, at times, be contrary to the public interest. In *Erickson*, 123 Wn.2d 864, [at 874-74] for instance, a case decided shortly before the parties executed the DA, the court noted:

Development interests and due process rights protected by the vested rights doctrine come at a cost to the public interest. The practical effect of recognizing a vested right is to sanction the creation of a new nonconforming use. A proposed development which does not conform to newly adopted laws is, by definition, inimical to the public interest embodied in those laws. If a vested right is too easily granted, the public interest is subverted.

Several cases since *Erickson* was decided have further limited the scope and applicability of vested development rights under the common law. In *Abbey Road Group, LLC v. City of Bonney Lake*, 167 Wn.2d 242, 251, 218 P.3d 180 (2009), for instance, the court refused to expand the doctrine to all development applications, including site plan applications specifically, because “such a rule would eviscerate the balance struck in the vesting statute” and “instituting such broad reforms in land use law is a job better suited to the legislature.” And, in *Town of Woodway v. Snohomish County*, 180 Wn.2d 165, 173, 322 P.3d 1219 (2014), the court determined that “[w]hile it originated at common law, the vested rights doctrine is now statutory.”

Accordingly, if the SDP and ASDP applications submitted by the Appellant are afforded any vested rights, it must be through the language of the contract, i.e., the DA, executed by the parties themselves. The most straightforward interpretation of the DA, however, leads to the conclusion that the parties did not account for vested development rights after the 20-year buildout period.

The DA does not dictate that Appellant's SDP and ASDP applications vested to its Development Standards and Washington's vested rights doctrine, a judicial construct the application of which has fallen out of favor in recent years, is inapplicable to the current dispute. Accordingly, the Director did not commit clear error in making his vesting determination, and the Appellant is not entitled to summary judgment on these issues.

Findings, Conclusions, and Decision
City of Issaquah Hearing Examiner
High Street Collection Preliminary Plat
Nos. PP17-00002 & PRJ16-00013

Page 21 of 50

Exhibit F.

38. Although the appeal primarily focused on the status of vested rights related to IHIF's site development permits, the Hearing Examiner's decision briefly touched on IHIF's preliminary plat application:

The Appellant contends, in Issue #12, that the Director's vesting determination violates RCW 58.17.033 and case law interpreting the Subdivision Act (Chapter 58.17 RCW) because the Appellant applied for a preliminary plat related to the subject property, and such application "vests all development that is consistent with the plat application and disclosed to the City in the plat application and during the City's review process," including the SDP and ASDP applications. *Appeal, dated July 24, 2019.*

Contrary to the Appellant's assertions, *Noble Manor v. Pierce County*, 133 Wn.2d 269, 943 P.2d 1378 (1997), did not provide that submission of a complete preliminary plat application vests all future permits on land associated with the plat to development standards in place when the plat application was deemed complete. Instead, the court held:

Not all conceivable uses allowed by the laws in effect at the time of a short plat application are vested development rights of the applicant. However, when a developer makes an application for a specific use, then the applicant has a right to have that application considered under the zoning and land use laws existing at the time the completed plat application is submitted.

If a landowner requests only a division of land without any specified use revealed, then the county, city or town may consider the application to see if any legal use can be made of the land so divided, and no particular development rights would vest at that time. However, when an application is made for division of land for a specified use, then the applicant has the right to have that application for that use considered under the land use laws in effect on the date of the application.

Noble Manor, 133 Wn.2d at 285.

Here, the project narrative submitted with the High Street Collection at Issaquah Highlands Plat (Exhibit C-12), for instance, did not explicitly discuss the potential for a Medical Office Building, Self-Storage Facility, or a specific Retail Development, as delineated in the SDP and ASDP applications. Moreover, the application did not depict building footprints or

Findings, Conclusions, and Decision
 City of Issaquah Hearing Examiner
 High Street Collection Preliminary Plat
 Nos. PP17-00002 & PRJ16-00013

specific development parameters of future buildings on the project site. *See Exhibit S-22*. In short, the Appellant did not make “an application for a specific use” under *Noble Manor*, and, accordingly, its preliminary plat application did not create vested development rights for all other permits associated with the property. This issue must be dismissed because it is resolved by reference to the submitted factual record and clearly established legal precedent. [Footnote omitted].

Next, the Appellant argues in Issue #13 that the Director’s vesting determinations are “a consequence of the Director’s and the Department’s refusal to comply with the Development Agreement while it was in effect” and that, had the City acted within the time periods prescribed by the DA, the SDP and ASDP permits would have issued prior to termination of the DA. This argument may well have merit. Ultimately, though, DA Sections 5.11.1 and 5.11.2 govern dispute resolutions under the DA. Of particular note, Section 5.11.2, entitled “Default and Remedies” provides that any party “not in default under this Agreement shall have all rights and remedies provided by law including without limitation damages, specific performance or writs to compel performance or require action consistent with this Agreement.” As the Hearing Examiner lacks authority to assess damages, require specific performance, or issue writs, it is clear that the parties intended the type of dispute at issue here (i.e., the City not complying with the timing requirements of the DA), to be addressed by the superior court. Accordingly, this issue must be dismissed.

Finally, the Appellant argues in Issue #14 that the Director’s vesting determinations “are contrary to his prior, written and oral acknowledgments that [IHIF’s] applications are vested” and that the determinations are “motivated by politics and personal animus.” Whether this issue states a claim where cognizable relief is possible is questionable. RCW 64.40.020, however, already provides for the possibility of relief when a governmental entity acts arbitrarily, capriciously, unlawfully, or in excess of its lawful authority in processing a permit. Again, however, this is a claim that must be heard by the superior court. Thus, this issue must also be dismissed.

Exhibit F.

39. On December 2, 2019, IHIF timely requested reconsideration of certain aspects of the Hearing Examiner’s decision. The Hearing Examiner granted IHIF’s request and, after reviewing legal briefing submitted by the parties, the Hearing Examiner denied reconsideration. That decision noted:

Findings, Conclusions, and Decision
City of Issaquah Hearing Examiner
High Street Collection Preliminary Plat
Nos. PP17-00002 & PRJ16-00013

Page 23 of 50

As previously discussed in the Hearing Examiner's decision, *Noble Manor* does not support the Appellant's argument that under RCW 58.17.033(1) a completed preliminary plat application vests all future development permits on land associated with the plat to the development standards in effect when the preliminary plat application was complete. Rather, the court held in *Noble Manor*:

Not all conceivable uses allowed by the laws in effect at the time of a short plat application are vested development rights of the applicant. However, when a developer makes an application for a specific use, then the applicant has a right to have that application considered under the zoning and land use laws existing at the time the completed plat application is submitted.

If a landowner requests only a division of land without any specified use revealed, then the county, city or town may consider the application to see if any legal use can be made of the land so divided, and no particular development rights would vest at that time. However, when an application is made for division of land for a specified use, then the applicant has the right to have that application for that use considered under the land use laws in effect on the date of the application.

133 Wn.2d at 285.

Because the record demonstrated that the Appellant's preliminary plat application materials did not describe the "specific use[s]" for development of the property that were later proposed in its subsequent SDP and ASDP applications, the Hearing Examiner's decision determined that the Appellant's preliminary plat application did not create vested development rights applicable to the subsequent permit applications. *Noble Manor*, 133 Wn.2d at 285. The Appellant contends that [*Westside Business Park, LLC v. Pierce County*, 100 Wn. App. 699 (2000)] compels a different result. The Appellant's reliance on *Westside*, however, is unavailing.

In *Westside*, a developer completed a short plat approval application that did not describe a specific use for potential future development. 100 Wn. App. at 601. Although the application did not describe a specific use, the developer had revealed its specific use to the County during a predevelopment conference that occurred *prior to* submission of the completed short plat application. *Westside*, 100 Wn. App. at 601. Relying on the developer's pre-application disclosure of its specific use to the

Findings, Conclusions, and Decision
City of Issaquah Hearing Examiner
High Street Collection Preliminary Plat
Nos. PP17-00002 & PRJ16-00013

Page 24 of 50

County, the *Westside* court held that RCW 58.17.033 applied to vest the developer's intended use. 100 Wn. App. at 605.

Unlike in *Westside*, here the record does not show that the Appellant had described specific uses for potential future development of the subject property to the City *prior to, or contemporaneously with*, submission of its completed preliminary plat application in August 2017. To the contrary, the Hearing Examiner's Finding of Fact No. 5 – and all the record materials cited in the Appellant's reconsideration request – confirm that the Appellant's disclosure of its intended specific uses of the property occurred *after* the preliminary plat application was accepted as complete. Because *Westside* does not support the Appellant's contention that its disclosures of specific uses made after the completed preliminary plat application required the City to evaluate its SDP and ASDP applications under the development standards in effect when the preliminary plat application was complete, the Appellant has not demonstrated that the Hearing Examiner applied an incorrect legal standard or disregarded *material* facts in the record.

Additionally, *Alliance Investment Group of Ellensburg, LLC v. Ellensburg*, 189 Wn. App. 763 (2015) provides further support for the Hearing Examiner's decision on the plat vesting issue. In *Alliance*, the developer argued that the city's knowledge of its intent to develop a business park when it submitted a plat application required the city to evaluate subsequent building permit applications under the law in effect at the time of the completed plat application. 189 Wn. App. at 773. The court rejected this argument, stating:

To the extent that Alliance identified a business park as its purpose in the subdivision, it likely has vested its rights to the light-industrial zoning on the short plat and the uses identified at the time by the zoning laws. But it has vested rights only at a very general level. Any specific project will still have to meet the development standards at the time the building permit is filed. The vesting recognized under the land division statute is specific to the action at issue, not to all possible uses permitted by law.

Alliance, 189 Wn. App. at 773. Under *Alliance*, the Appellant's preliminary plat application only vests as to the general zoning uses identified in the application and does not vest to all future development permits. 189 Wn. App. at 773.

Findings, Conclusions, and Decision
 City of Issaquah Hearing Examiner
 High Street Collection Preliminary Plat
 Nos. PP17-00002 & PRJ16-00013

Page 25 of 50

To the extent that *Westside* and *Alliance* are in conflict, *Alliance* provides more persuasive authority. *Alliance* was more recently decided and had considered the Washington Supreme Court’s clear pronouncement that “[w]hile it originated at common law, the vested rights doctrine is now statutory.” 189 Wn. App. at 768 (quoting *Town of Woodway v. Snohomish County*, 180 Wn.2d 165, 173 (2014)). In contrast, *Westside* was decided without the benefit of Supreme Court cases clarifying that the vested rights doctrine is purely statutory. See *Potala Village Kirkland, LLC v. Kirkland*, 183 Wn. App. 191, 209 (2014) (calling into question *Westside*’s continued vitality in light of subsequent Washington Supreme Court decisions). Thus, even if not clearly distinguishable on its facts, *Westside* does not assist the Appellant.

Because the record does not support a conclusion that an obvious legal error has occurred or that a material factual issue was overlooked that would change the previous decision, the request for reconsideration is hereby **DENIED**.

Exhibit I.

City’s Additional Review of IHIF’s Preliminary Plat Materials

40. From early 2018 through March 2019, IHIF continued to respond to requests from the City for additional information and revisions related to review of IHIF’s preliminary plat.¹² This ultimately resulted in IHIF submitting a significant amount of new information for preliminary plat review on March 5, 2019, including a revised Preliminary Stormwater Report, dated February 2019; a revised Traffic Study, dated March 4, 2019; a supplemental Project Narrative; a comment response letter addressing the City’s compiled comments, dated March 16, 2018; and a revised set of project plans. *Exhibits B-6.1 through B-6.9.*
41. On April 5, 2019, Land Development Manager Sloman provided a letter to Applicant Representative Tia Heim regarding the manner in which the City intended to continue its review of IHIF’s preliminary plat. In the letter, Ms. Sloman explained that the City would be processing the preliminary plat, henceforth, pursuant to the procedural requirements of the City’s Replacement Regulations, not those of the DA. Accordingly, the preliminary plat application would next be sent to the City’s Development Commission for an informal public meeting (i.e., “community conference”) and, following this, for a decision by the Hearing Examiner, as directed by IMC 18.19B.270. In a response dated April 8, 2019, Ms. Heim noted that the City had “previously confirmed that our plat is vested to the Development Agreement” and, as such, a hearing before the UVDC would be the next required step under the DA followed by a final

¹² See, especially, *Exhibit NN and Exhibit WW-2.*

decision on the preliminary plat by the City Council. Ms. Heim implored the City to “immediately issue a final and appealable decision” explaining its actions if it “no longer acknowledges that our plat application is vested to the Development Standards enacted through the Development Agreement and has now ‘di-vested’ our plat.” *Exhibit QQ.*

42. On April 15, 2019, Ms. Sloman provided an additional letter to Ms. Heim, further detailing the City’s position on procedural requirements associated with continued review of the preliminary plat. In it, Ms. Sloman reiterated the City’s position on vesting—as detailed in Director Niven’s earlier letter from April 4, 2018 (Exhibit G)—and stressed that the City had “not altered or otherwise changed its position from the substance of Mr. Niven’s April 4, 2018 letter.” Accordingly, Ms. Sloman noted that “the City considers the High Street Preliminary Plat application to be vested in the manner and to the extent recognized by state law.” The letter then further clarified the City’s position that vesting “extends only to substantive zoning ordinance, not to processing requirements or procedural rules,” as detailed in *Graham Neighborhood Ass’n v. F.G. Assoc.’s*, 162 Wn. App. 98 (2011). Ms. Sloman explained that, in light of this, the City intended to “process the High Street Preliminary Plat application in accordance with the current procedures prescribed by the [municipal code],” including those contained in the Replacement Regulations, such that the preliminary plat would be sent next to the Development Commission and then to the Hearing Examiner. In addition, Ms. Sloman stressed that the UVDC was terminated on March 26, 2019, and “is no longer operative,” stating that review of IHIF’s preliminary plat by the UVDC would be “a practical impossibility at this point.” *Exhibit H.*
43. Despite its reservations, IHIF determined that it would like to proceed (under protest) to the next stage of review as delineated by Ms. Sloman, and requested that the Community Conference before the Development Commission be scheduled as soon as possible. In an email from June 21, 2019, Ms. Heim requested that any staff report associated with the meeting before the Development Commission be provided so that IHIF would have time to prepare and that IHIF would like the City to clearly articulate “what our preliminary plat is vested to in advance of the Community Conference.” On July 1, 2019, Ms. Sloman responded to Ms. Heim’s email, noting:
- The “City shares your desire for an expeditious and efficient process for evaluating your plat application.”
 - The City code “does not specify a procedural format” for the Community Conference meeting and the purpose of such meeting is “to solicit public comment” on the proposal.
 - The Development Commission “doesn’t have authority to address or resolve vesting questions” and, instead, such issues “will be addressed before the Hearing Examiner and in that staff report.”

Exhibit RR.

Findings, Conclusions, and Decision
City of Issaquah Hearing Examiner
High Street Collection Preliminary Plat
Nos. PP17-00002 & PRJ16-00013

Page 27 of 50

44. The Community Conference associated with the application was ultimately held on August 15, 2019. At the Community Conference, members of the public and the Development Commission expressed concern or requested additional information about several matters, including: the potential for a self-storage facility being included within the preliminary plat; the design of Discovery Drive and its ability to address cumulative traffic impacts from development of the plat, as well as development of several other projects in the area; the adequacy of pedestrian and bicycle facilities associated with the preliminary plat; which development regulations would apply to development of the preliminary plat (i.e., the DA regulations or the Replacement Regulations); proposed block sizes within the preliminary plat; the role of the City’s Architectural Review Committee (ARC) in reviewing the proposal; whether additional review would be necessary under SEPA; how road and trail connections within the preliminary plat would work; and the adequacy of proposed stormwater facilities serving the preliminary plat. *Exhibit D; Exhibit XX-2; Exhibit XX-12.*
45. Consistent with IMC 18.19B.270.C.3, the City and IHIF prepared a “community conference response memo” summarizing the “topics, concerns, and opportunities raised at the community conference” and providing “a conclusion for each topic as to what should or should not happen relative to the proposal and applicable codes.” In the response memo, which was issued on October 10, 2019, IHIF and the City each provided responses to the various matters raised at the Community Conference. Of note:
- Both the City and IHIF stated that self-storage would be an allowed use within the preliminary plat.
 - Both the City and IHIF determined that Discovery Drive had been appropriately designed to address total traffic loads for the preliminary plat and other area development.
 - Both the City and IHIF determined that the preliminary plat would provide for appropriate pedestrian and bicycle facilities.
 - In terms of which regulations would govern development of the preliminary plat, the City noted that the Director Niven would issue “a formal determination regarding vesting” in the “staff report for the preliminary plat hearing.” IHIF detailed its continuing contention that the plat would be vested to the development standards of the DA.
 - IHIF and the City both stressed the Applicant’s willingness to ensure that adequate pedestrian facilities would provide mid-block connections throughout the plat.
 - The ARC already reviewed the proposal and approved it.
 - The City determined that no additional SEPA review of the preliminary plat would be necessary. IHIF stressed that an EIS was already issued for the entire Issaquah Highlands and included required mitigation.
 - Both the City and IHIF determined that adequate road and trail connections would be provided throughout the plat.

*Findings, Conclusions, and Decision
 City of Issaquah Hearing Examiner
 High Street Collection Preliminary Plat
 Nos. PP17-00002 & PRJ16-00013*

- The City determined that stormwater detention and treatment would be “vested to the King County 2009 Surface Water Design Manual” as amended by the City’s “2011 Addendum” to the DA. The City noted, however, that it would be IHIF’s responsibility to “detain and treat stormwater to meet City standards” and that, if IHIF were to use any of the City’s existing stormwater facilities to do so, the “stormwater discharge fee” would require “a separate negotiation.” IHIF explained that no permanent surface ponds would be created within the development and that the City previously offered IHIF an opportunity to pay a “fee in lieu” to dispose of at least some of the stormwater on-site “because the City’s existing offsite stormwater facility has additional capacity.”
- The City and IHIF provided additional information about the parties’ disagreement concerning the vested status of the preliminary plat.

Exhibit D-1.

46. Following the Community Conference, the City and the Applicant continued to communicate about the preliminary plat, and, ultimately, the hearing before the Hearing Examiner was set for March 9, 2020. *Exhibit WW.*

Notice of Open Record Hearing

47. After the open record public hearing before the Hearing Examiner was scheduled, the City provided notice of the hearing as required by the municipal code. To that end, on February 21, 2020, the City mailed or emailed notice of the hearing to property owners within 300 feet of the subject property, and to reviewing government departments and agencies. Such materials noted that written comments on the proposal would be accepted up to, and at, the hearing on March 9, 2020. *Exhibit C-3.* Also on February 21, 2020, the City published notice of the hearing in the *Issaquah Report*, and IHIF posted notice of the hearing on the project site. *Exhibit C-4; Exhibit C-5; Exhibit C-6.*

48. The City received two public comments in response to the public hearing notice materials. Jen Noland inquired about what subjects would be covered at the public hearing and about whether the public would have input about the types of retail and commercial development that would be allowed. Seattle resident Kent Worthington commented that he mistakenly received notice of the public hearing. *Exhibit O-1; Exhibit O-2.*

49. In addition to the public comments discussed above, the City also received comments from King County Metro. King County Metro stated that it had no concerns about the proposal but noted that the project is immediately adjacent to a “very high ridership” bus stop and that such stop “should be maintained when future construction is planned.” *Exhibit O-3.*

City’s Staff Report

*Findings, Conclusions, and Decision
City of Issaquah Hearing Examiner
High Street Collection Preliminary Plat
Nos. PP17-00002 & PRJ16-00013*

50. On March 3, 2020, the City prepared a staff report for review in conjunction with the open record hearing on the proposal. Of particular note:
- The report states that the Comprehensive Plan designation of the subject property is “Retail.” All previous materials, however, including the staff report prepared for the meeting before the Development Commission, identified the Comprehensive Plan designation of the property as “Urban Village.” *See Exhibit XX-2.* The current staff report does not appear to address the zoning designation of the subject property although materials submitted to the Development Commission state that the property is zoned “Urban Village-Commercial/Retail” (UV-COM/RET). *See Exhibit XX-2.*
 - The staff report notes that “[d]ifferent sets of drawings have been submitted to the City in relation to the Applicant’s preliminary plat application,” including materials submitted on August 1, 2017; August 28, 2017; December 15, 2017; February 7, 2018; February 22, 2018; and March 5, 2019. The staff report stresses that the August 2017 submissions “were made during the defined ‘Buildout Period’ of [the] now-terminated 1996 Development Agreement” but that all other submittals were received after the Buildout Period had expired.” Because of this, City staff “reviewed only the vested permit materials from August 1 and August 28, 2017, under the applicable [DA] provisions.”
 - Section V of the staff report included a detailed “Determination of Vested Status” pursuant to IMC 18.01.050.C, prepared by Director Niven in consultation with the City Attorney. This included a statement explaining that, as “the Hearing Examiner has previously concluded, the Director’s vesting determination is not a final land use decision in and of itself, and it is not independently appealable separate” from the Hearing Examiner’s decision “approving or denying the underlying project application.” The vesting determination ultimately concludes that the vesting afforded the materials submitted prior to expiration of the buildout period (i.e., the materials submitted by IHIF in August 2017) would be limited to “effectuate the specific development proposal, if any, identified” in such materials and that all materials submitted after expiration of the Buildout Period on September 18, 2017, would “not operate to retroactively expand the vested rights that accrued in the Applicant’s original . . . preliminary plat application.”

Exhibit R.

51. Section VI of the staff report addresses how the City believes the preliminary plat would comply with provisions of the DA, where applicable; with the Replacement Regulations, where applicable; and with the State Subdivision Act (Chapter 58.17 RCW). To assist in explaining this, the City provides a chart (on Page 12), detailing which Appendices of the DA it “used for the plat review” and which Appendices it did not use in reviewing the plat because of its determination that such appendices are “not vested” and the Replacement Regulations, instead, would be applicable. Ultimately, the staff report determines that the following Appendices are applicable to the preliminary plat:

*Findings, Conclusions, and Decision
 City of Issaquah Hearing Examiner
 High Street Collection Preliminary Plat
 Nos. PP17-00002 & PRJ16-00013*

Appendix A, Guiding Principles and Goals; Appendix B, Land Uses (but not any development standards contained therein); Appendix D, Storm and Ground Water; Appendix F, Water Service; Appendix G, Sewer Service; Appendix H, Road Design; Appendix I, SEPA; Appendix S, Urban Design Guidelines; and Appendix T, Trails.
Exhibit R.

52. This approach to review of the preliminary plat stands in sharp contrast to that advocated by IHIF. In its submitted preliminary plat materials, for instance, IHIF included a “Project Narrative,” dated July 15, 2017 and a “Supplemental Project Narrative,” dated March 1, 2019, in which it details how the proposal would comply with *every* appendix associated with the DA.¹³ *Exhibit B-2.4; Exhibit B-6.9.*

Open Record Public Hearing – March 9, 2020

53. The open record hearing before the Hearing Examiner commenced on March 9, 2020. At the outset of the hearing, Attorney Patrick Schneider, on behalf of IHIF, submitted a pleading entitled “Objection to New and Ongoing Violations of the Applicant’s Vested Rights,” dated March 9, 2020. The pleading advances several arguments and stresses that IHIF is “participating in this plat hearing under protest.” In it, IHIF argues that the City’s staff report “demonstrates and implements a new violation of [IHIF’s] vested rights, and the Department is asking the Hearing Examiner to participate in this violation.” IHIF further argues:

- The staff report asks the Hearing Examiner to deem the preliminary plat application “vested to only limited parts of the Development Agreement” but such “picking and choosing by staff among the regulations to which an applicant is vested is a fundamental violation of the vested rights doctrine.”
- The staff report asks the Hearing Examiner “to participate in this violation of [IHIF’s] vested rights by making a decision about the application materials” from August 2017, as opposed to the most current materials that were submitted on March 19, 2019, following “long-awaited comments from staff.”
- The staff report “makes the vested rights doctrine nonsensical by purporting to make a vesting determination for each document submitted by the applicant.” But vesting applies to “the *processing* of an application so that the application is reviewed under the regulations in effect at the time of submittal of the original application.”
- The vesting determination in Section V of the staff report states that it is not a final land use decision appealable separate from the underlying permit decision and, accordingly, IHIF “will appeal the vesting determination in Section V to the

¹³ Despite the differences in how each party reviewed the preliminary plat, both end up determining that appropriate provisions would be made for open spaces, drainage ways, streets, sidewalks, potable water supplies, and sanitary wastes. While the Hearing Examiner concurs this is likely true, only limited information on how the plat would address these matters is included in this decision as the focus of this decision is on the impacts the City’s approach to vesting have had on review of the preliminary plat.

Findings, Conclusions, and Decision
City of Issaquah Hearing Examiner
High Street Collection Preliminary Plat
Nos. PP17-00002 & PRJ16-00013

City Council” once the Hearing Examiner makes a decision about the plat application.

- IHIF requests that “the Hearing Examiner determine whether this hearing is about a plat application that is vested to the Development Agreement” or about a “plat application that is subject” to the Replacement Regulations “on a piecemeal basis as set forth in the Staff Report.”

Objection to New and Ongoing Violations of the Applicant’s Vested Rights, dated March 9, 2020.

54. The Hearing Examiner determined that the pleading would be included in the record and asked the parties to speak about it prior to commencing with witness testimony. Mr. Schneider explained that IHIF has taken issue with Director Niven’s views on vesting for several years and believes the City’s current staff report creates even more problems concerning the vested status of the preliminary plat. He stressed that IHIF has operated for several years under the impression that, at a minimum, the preliminary plat vests to the provisions of the DA, and IHIF believes the Hearing Examiner should review the preliminary plat against the DA and the requirements of the State Subdivision Act, not in piecemeal fashion with consideration (in some instances) given to the Replacement Regulations. *Argument of Mr. Schneider.*
55. Attorney Zach Lell, representing the City, noted that the City had not had adequate time to review the new pleading, having just received it. He stressed, however, that the City has attempted to make its views on the vested status of the preliminary plat clear for several years and it does not believe the approach to project review set out in the staff report represented anything new, unsurprising, or different. Mr. Lell further explained that the City has reviewed all of the various materials submitted by IHIF concerning the preliminary plat but, ultimately, the parties disagree on how such submittals should be treated for purposes of vesting. *Argument of Mr. Lell.*
56. Ultimately, the Hearing Examiner determined that it would be appropriate to allow the City to submit a responsive pleading in advance of March 20, 2020, the date scheduled to conclude the open record hearing on the preliminary plat. *Oral Ruling of the Hearing Examiner, March 9, 2020.*

Witness Testimony

57. Land Development Manager Lucy Sloman provided testimony detailing City staff’s review of IHIF’s preliminary plat. Ms. Sloman detailed the history of the property, the DA, the City’s views on vesting, the Replacement Regulations, and the various materials submitted by IHIF since 2017 related to the preliminary plat. She stressed that, in the final review that occurred and resulted in preparation of the City’s staff report, the City determined that the plat materials provided by IHIF were either “too detailed” in many instances, or “not detailed enough” for appropriate review. Staff attempted to address

*Findings, Conclusions, and Decision
City of Issaquah Hearing Examiner
High Street Collection Preliminary Plat
Nos. PP17-00002 & PRJ16-00013*

this problem through its recommended conditions of approval and through providing extensive redline comments on the submitted plat plans. Ms. Sloman also stressed that the City has acted in good faith in working with IHIF over the years and has made every effort to comply with its regulatory duties. She noted, for instance, that the City processed the plat materials of another Applicant (Polygon) under the DA, but the City later determined that doing so was a mistake and that it should rectify that mistake in review of the IHIF preliminary plat application.¹⁴ And, in addition to the length of time necessary for its review, she stressed that the City has been chronically understaffed and that there were significant time delays that occurred while both parties waited on revisions or comments from each side to be provided. In response to questions from Mr. Schneider, Ms. Sloman explained that the City's recommendation concerning the plat does not ask for a specific set of project plans to be approved. Instead, the City would ask that the final plan set from March 2019 be approved, with several changes that would be necessary, and with the caveat that any approval would not impact the City's views on vesting. Ms. Sloman stressed that the City is trying to avoid "pre-approving" certain construction-level details of the preliminary plat. She agreed that, ultimately, it would be appropriate for the parties to provide an "agreed" plan set for review by the Hearing Examiner. *Testimony of Ms. Sloman.*

58. Doug Schlepp, City Development Senior Consulting Engineer, provided additional testimony about the City's concerns over the level of detail provided with the preliminary plat materials. He explained, for instance, that the submitted plat plans include the location of water meters, fire lines, and other mechanical details, and that such information is normally reviewed at later stages of development. Mr. Schlepp noted that, accordingly, the City determined that enough information exists for conditional approval of the preliminary plat, but the City wanted to ensure that such approval would not preclude the City from requiring later changes to design requirements of these mechanical details. *Testimony of Mr. Schlepp.*
59. Eric Evans, IHIF's Director of Development, testified about the history of IHIF's submissions and efforts to move review of the preliminary plat forward in a timely manner. Mr. Evans stressed that IHIF submitted plan revisions several times in response to review by City staff because preliminary plats are (usually) reviewed through an

¹⁴ Several of the exhibits in the current record relate to Polygon's various projects, including Exhibits BB, KK, LL, and XX-16. Of particular note, Polygon applied for preliminary plat approval for its "Westridge North Single Family" proposal on July 14, 2017, just over two weeks before IHIF applied for approval of this preliminary plat. Polygon then submitted revised plans related to its plat several times in early 2018. Unlike in the present circumstances, however, the City did not determine that these later-submitted plans (which were definitely submitted after the defined Buildout Period in the DA) would create vesting issues. Instead, City staff prepared a staff report for the Westridge North proposal on March 9, 2018, in which the City reviewed the plat against each and every appendix in the DA, and the UVDC held a public hearing on the proposal on March 20, 2018, which then concluded on April 17, 2018. On May 10, 2018, the UVDC then recommended approval of the project to the City Council. *See, especially, Exhibit LL.*

iterative process. Many of the comments and concerns raised by City staff in relation to the current proposal, however, do not appear to be based on particular requirements related to the adequate treatment of water, sewer, or other utilities but, instead, seem to focus on the City's position on vested rights and this proposal's impact on IHIF's site development permits. *Testimony of Mr. Evans.*

60. Michael Swenson, P.E., Transpo Group, also testified on behalf of IHIF and explained how review of the road system associated with the preliminary plat, and the potential traffic impacts, occurred. He explained that Transpo Group prepared several new memoranda and reports addressing the proposed road network within the plat and traffic, although traffic was already thoroughly addressed in the early EIS prepared in association with the DA. *Testimony of Mr. Swenson.*
61. Mark Veldee, P.E., KPFF, provided testimony on behalf of IHIF about proposed plat infrastructure, including information on the road network and on the treatment of stormwater within the preliminary plat. He explained that IHIF seeks to use previously-approved administrative minor modifications (AMMs) from the DA for the road network within the preliminary plat and that this has been reflected in the submitted plat plans. In regard to stormwater, Mr. Veldee explained that there are two existing stormwater systems available to serve the preliminary plat, one of which the City owns (the "Reid Pond System") and one that is owned by IHIF (the "Bypass System"). He noted that stormwater from Discovery Drive would be collected and transmitted to the Reid Pond System while the rest of the stormwater within the plat would be conveyed to the "Bypass System." He stressed that, ultimately, stormwater would be adequately addressed through development of the preliminary plat. Finally, Mr. Veldee stressed that the City requested additional details about plat infrastructure on several occasions and IHIF's submitted plans to reflect this. He noted that, with a project as complex as this, significant detail concerning utilities is necessary at the preliminary plat stage of development to ensure that the entire system works. Here, for instance, many utilities would be embedded within Discovery Drive and, accordingly, detailed information about how this would be accomplished was necessary. *Testimony of Mr. Veldee.*
62. Applicant Representative Tia Heim testified at length about IHIF's efforts to obtain review of the preliminary plat and the parties' ongoing disputes about vested rights. Ms. Heim stressed that, despite providing IHIF with assurances about the vested status of the preliminary plat, the City failed to process the plat consistent with the requirements and timelines of the DA. Despite this, IHIF believed—until recently—that the substantive aspects of the preliminary plat would be reviewed against the development regulations and appendices of the DA. Ms. Heim also explained that, in December 2017, IHIF submitted additional plat materials to make them consistent with the site development permit materials it had submitted, and in response to feedback from the City. She stressed that the record does not reflect that the City continued to process its preliminary

*Findings, Conclusions, and Decision
City of Issaquah Hearing Examiner
High Street Collection Preliminary Plat
Nos. PP17-00002 & PRJ16-00013*

Page 34 of 50

plat materials while the City was reviewing (and ultimately denying) IHIF’s site development permits, causing significant delay. Ms. Heim discussed the City’s proposed approval conditions for the preliminary plat and explained that, in her view, many of the conditions appear unnecessary in light of the final materials submitted by the Applicant in March 2019. *Testimony of Ms. Heim.*

63. Time ran out on the initial hearing date prior to the conclusion of Ms. Heim’s testimony. Before concluding for the day, however, the Hearing Examiner ruled that the City could provide a response to Mr. Schneider’s pleading. In addition, the Hearing Examiner ruled that the parties should submit an “agreed upon” plan set prior to the continued hearing on March 20, 2020. *Oral Ruling of the Hearing Examiner.*

COVID-19 and Additional Pleadings

64. Just days after the conclusion of the first hearing date, the City informed the Hearing Examiner (on March 12, 2020) that all public meetings, public hearings, and administrative appeal proceedings would be immediately discontinued until further notice in light of the outbreak of the COVID-19 pandemic. On March 27, 2020, and again on May 11, 2020, the Hearing Examiner informed the City of his willingness to hold hearings using remote meeting technology, and the open record hearing was scheduled to continue on July 8, 2020, using such technology.¹⁵ Prior to commencing the continued hearing on July 8, 2020, however, it was determined that additional public notice of the continued hearing had not been provided. Accordingly, the hearing was continued so that appropriate public notice could be provided.¹⁶ Ultimately, the hearing recommenced and concluded on August 3, 2020. Between the initial hearing date on March 9, 2020, and the continued hearing on August 3, 2020, however, the parties submitted several additional pleadings. *Exhibit WW-2; Exhibit XX-1.*
65. On March 20, 2020, the City provided a pleading entitled “Response to Applicant’s Objection to New and Ongoing Violations of the Applicant’s Vested Rights,” consistent with the oral ruling of the Hearing Examiner at the conclusion of the first hearing date. In this pleading, the City argues that IHIF’s objections simply repeat the objections about vested rights it has made on several other occasions, many of which the Hearing Examiner has rejected in earlier appeals. Of particular note, the City argues:
- IHIF’s contention that the City is improperly “picking and choosing” the standards applicable to the preliminary plat is misplaced because the legal

¹⁵ See Exhibit WW and Exhibit XX.

¹⁶ *Order on Continued Hearing*, dated July 8, 2020. The City received three additional comments in response to its notice materials. King County Metro provided additional comments on construction impacts on area bus stops and area resident Christina Marchoine expressed concern about the types of commercial and retail development that would be developed within the preliminary plat, especially in relation to parking. *Exhibits O-3 through O-5.*

framework on vesting, defined by *Noble Manor* and its progeny, “contemplates—indeed, requires—precisely this type of issue-specific vesting approach for preliminary plats.”

- The City considered all of the “numerous submittals and plan sets” provided by IHIF for preliminary plat review. As Ms. Sloman explained at the first hearing date, however, “details of [IHIF’s] proposed development that were identified only in [IHIF’s] post-Buildout Period” application materials “are not vested to the Development Agreement.” The City believes its approach to review of the materials “is consistent with, and indeed compelled by, the [Hearing Examiner’s] previous decisions” addressing this issue.

Response to Applicant’s Objection to New and Ongoing Violations of the Applicant’s Vested Rights, dated March 20, 2020.

66. In addition to this pleading, Ms. Sloman emailed Ms. Heim and Mr. Veldee on March 11, 2020, about preparing an “agreed upon” plan set for review by the Hearing Examiner. Ms. Sloman requested that IHIF provide extensive revisions to its final preliminary plat plan set (from March 5, 2019) to address what should and should not be included in relation to utility service; utility points of connection; sidewalks; curbs and gutters; driveways; curb ramps; hydrants; streetlights; street trees; easements; and other construction level information. *Exhibit VV-1.*
67. On April 16, 2020, IHIF submitted an additional pleading, entitled “[IHIF’s] Reply to the City’s Response and to Lucy Sloman’s Post-Hearing Email Directing Changes to [IHIF’s] Plat Plans.” In the pleading, Attorney Patrick Schneider explains, in detail, the ways in which IHIF believes the City is erring in relation to review of the preliminary plat, especially in light of case law concerning the vested rights doctrine. Of particular note, Mr. Schneider argues that the “City is so focused on justifying the position it has taken in separate actions related to” IHIF’s site development permit applications “that it is willing to make a mess of the review and approval of this simple plat application that is vested to the Development Agreement.” The pleading then goes on to argue how the City has “made a mess” of the review and approval process, contrary to applicable law, noting:

The Staff Report and the City’s Response together make a hash out of this plat process and the law of vested rights, and they ask the Hearing Examiner to do the same by applying the Development Agreement only to the portions of [IHIF’s] application that the Director believes do not enable [IHIF’s site development permit applications]. As for the remainder of the plat application – the portions that the Director apparently thinks do enable the SDP and ASDP applications – it is impossible to tell whether the Director is asking the Hearing Examiner to apply the Replacement Regulations instead of the Development

*Findings, Conclusions, and Decision
City of Issaquah Hearing Examiner
High Street Collection Preliminary Plat
Nos. PP17-00002 & PRJ16-00013*

Agreement, or is asking the Hearing Examiner to simply not approve those portions of the application even though they are consistent with the Development Agreement. Either way, this a la carte approach to vested rights is illegal as well as hopelessly muddled and impossible to implement.

Tellingly, the City’s Response brief cites no law that stands for the proposition that government may do what the Staff Report dose: pick and choose which pieces of a regulatory regime will govern a vested application. In fact, the law is to the contrary. . .

. . .
 The City’s assertion that the Hearing Examiner’s previous decision regarding vesting of SDP and ASDP applications compels the City to bisect a single vested application into “vested” materials that will be analyzed under the Development Agreement and “non-vested” materials which will be disregarded and/or considered under Replacement Regulations, is a bald mischaracterization of that earlier decision.

Following discussion of the legal issues, Mr. Schneider then provides a detailed response to Ms. Sloman’s email from March 11, 2020. In it, Mr. Schneider explains why IHIF does not intend to make significant changes to the plat materials it has already submitted. *Shelter’s Reply to the City’s Response and to Lucy Sloman’s Post-Hearing Email Directing Changes to Shelter’s Plat Plans, dated April 20, 2020.*

- 68. On April 20, 2020, the City provided an additional pleading, entitled “Objection and Motion to Strike Reply,” in which it argues that the Hearing Examiner never requested the new pleading submitted by Mr. Schneider. The next day, Mr. Schneider provided a “Response to the Department’s ‘Objection and Motion to Strike Reply.’” In his response, Mr. Schneider stresses that the current matter is not an appeal wherein the parties are engaged in motions practice but, instead, involves a “pre-decision hearing, the purpose of which to present evidence and explanation to the Hearing Examiner so that he can make an informed decision” about “whether and how to approve” the preliminary plat application. On May 11, 2020, the Hearing Examiner issued a decision on the motion to strike and determined that the various pleadings would be included in the record. *See Pleadings, Motions, and Orders, Attachment A.*

Open Record Public Hearing – August 3, 2020

- 69. The open record public hearing on the preliminary plat recommenced, and concluded, on August 3, 2020. Very little additional information about the substance of the preliminary plat was presented at the continued hearing. Instead, Lucy Sloman, Tia Heim, Doug Schlepp, and Mark Veldee all provided additional, detailed information about the project

*Findings, Conclusions, and Decision
 City of Issaquah Hearing Examiner
 High Street Collection Preliminary Plat
 Nos. PP17-00002 & PRJ16-00013*

review that occurred for the proposal. Much of this testimony concerned the vested status of the proposal and each parties' views on appropriate conditions that should be included with approval of the preliminary plat. *Testimony of Ms. Sloman, Ms. Heim, Mr. Schlepp, and Mr. Veldee.*

70. At the conclusion of the hearing, the Hearing Examiner ruled (again) that the parties should submit an agreed upon plan set—without any redline revisions or commentary—that would be included in the record as Exhibit YY. In addition, the Hearing Examiner ruled that each party could submit proposed conditions of approval associated with the agreed upon plan set, along with justification for inclusion of such conditions. The parties complied with this request. *Exhibit YY; Attachment A.*
71. In its proposed conditions of approval, the City repeatedly stresses the idea that approval of the preliminary plat would not relieve IHIF with complying with the Replacement Regulations in terms of future applications associated with development of the preliminary plat. Moreover, the City's proposed conditions stress the idea that IHIF's submitted preliminary plat plans should be treated as "conceptual" in nature such that future alterations to such plans may be necessary with design level review, especially in relation to road and utility plans, and treatment of stormwater. The City's proposed conditions also address mitigation for future development of the project site and note that "applicable impact fees for traffic, park, fire protection, and schools" as well as "mitigation fees for police, general governmental buildings and bicycle and pedestrian facilities shall be evaluated and imposed" at the time future building permits are received related to site development permits. The City also provided proposed conditions explicitly disavowing the content of several of the plat plans within the agreed upon plan set (Exhibit YY), generally on the grounds that such material included information about the vested status of development. Finally, the City recommended a condition noting that the preliminary plat would be "expressly limited by and subject to the Director's Vesting Determination" as set forth in the Staff Report, which (per the proposed condition) would be adopted by reference and incorporated into the Hearing Examiner's decision. *City of Issaquah Proposed Conditions of Approval, dated August 10, 2020.*
72. IHIF's proposed conditions stand in stark contrast to those provided by the City. In general, its proposed conditions are far less detailed and, in explaining its conditions, IHIF stresses that the "Hearing Examiner does not have the authority to make a vesting determination in the context of a plat hearing" such that it would be inappropriate for the Hearing Examiner's conditions to include significant language about the vesting of the preliminary plat or the vested status of other, potential development associated with the preliminary plat. Of particular note, the Applicant stresses that any approval condition concerning mitigation for future development of the project site would be in appropriate, especially considering provisions in Appendix I of the DA that covered the mitigation of

*Findings, Conclusions, and Decision
City of Issaquah Hearing Examiner
High Street Collection Preliminary Plat
Nos. PP17-00002 & PRJ16-00013*

Page 38 of 50

project impacts. *Shelter Response to Proposed Conditions of Approval, dated August 18, 2020.*

CONCLUSIONS

Jurisdiction

The Hearing Examiner has authority to hear and approve, conditionally approve, or disapprove the preliminary plat request after review of the preliminary plat, the administration’s recommendation, testimony, and exhibits submitted at the public hearing. The Hearing Examiner makes the final decision on preliminary subdivisions. *Issaquah Municipal Code (IMC) 18.03.060.B; 18.03.170; 18.04.490.C.1; 18.13.140.A.*

Criteria for Review

Preliminary Plat

Preliminary plat proposals are reviewed through the Modified Level 4 review process and, normally, must comply with all the standards and criteria set forth in Chapter 18.13 IMC. *IMC 18.04.480 and 18.04.490.C.1.* Here, however, the parties disagree on what regulations apply to the Hearing Examiner’s review of the preliminary plat. The City contends that some aspects of the DA that formerly governed the property should be reviewed, while some aspects of the Replacement Regulations that currently govern the property should be reviewed. The Applicant disagrees, arguing that the preliminary plat should be reviewed solely against the development standards contained within the DA.

Any preliminary plat approval, however, would need to comply with the State’s Subdivision Act, Chapter 58.17 RCW.

The standards and criteria regarding preliminary plats set forth in Chapter 18.13 IMC are established to promote the orderly and efficient division and re-division of land within the city, to avoid placing undue and unnecessary burdens on both the Applicant and the City, and to promote the public health and general welfare, complying with the provisions of Chapter 58.17 RCW.

The criteria for review of a preliminary plat are set forth in RCW 58.17.110(2), as follows:

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

*Findings, Conclusions, and Decision
City of Issaquah Hearing Examiner
High Street Collection Preliminary Plat
Nos. PP17-00002 & PRJ16-00013*

- (b) The public use and interest will be served by the platting of such subdivision and dedication.
RCW 58.17.110(2).

The criteria for review adopted by the Issaquah City Council are designed to implement the requirement of Chapter 36.70B RCW to enact the Growth Management Act. In particular, RCW 36.70B.040 mandates that local jurisdictions review proposed development to ensure consistency with City development regulations, considering the type of land use, the level of development, infrastructure, and the characteristics of development. *RCW 36.70B.040.*

Conclusions Based on Findings

Because of the ongoing dispute between the parties concerning the vested status of the proposal, the public use and interest would not be served by approval of the proposed preliminary plat, as required by RCW 58.17.110(2). Under RCW 58.17.020(4), a *preliminary plat* is defined as a “neat and approximate drawing of a proposed subdivision showing the *general* layout of streets and alleys, lots, blocks, and other elements of a subdivision consistent with the requirements of [Chapter 58.17 RCW]” and shall “be the basis for the approval or disapproval of the *general* layout of a subdivision.” (Emphasis added). RCW 58.17.110(1) requires a determination of whether a preliminary plat has made appropriate provisions for “the public health, safety, and general welfare” as well as for “open spaces, drainage ways, streets or roads, alleys, other public ways, transit stops, potable water supplies, sanitary wastes, parks and recreation, playgrounds, school and schoolgrounds.” The parties agree and, the Hearing Examiner concurs that the *general layout* of the proposed subdivision would likely satisfy the requirements for plat approval under RCW 58.17.110(1). The agreement among the parties, however, ends with this understanding of the “general” layout of the preliminary plat and does not extend to such matters as the substantive review of what development regulations apply to the proposal or what types of approval conditions would be appropriate were the Hearing Examiner to approve the preliminary plat. Accordingly, the Hearing Examiner has determined that the parties’ ongoing dispute about vesting must first be resolved before any meaningful decision on the proposal can be made. This is especially true given the Hearing Examiner’s responsibility to craft appropriate approval conditions.

In reflecting on the last of decade of his career (focused exclusively on land use, environmental law, and appellate law), the Hearing Examiner is hard-pressed to recall a matter more vexing than the current one. Because, while it is not uncommon to have parties disagree about the applicability or scope of certain laws or regulations to a proposal, or the weight and applicability of various cases or persuasive authority to a particular matter, the Hearing Examiner cannot recall a situation where the parties disagree fundamentally about what regulations actually apply to a land use proposal. This has created an untenable situation in terms of the Hearing Examiner’s review of this matter: despite spending months attempting to craft a decision addressing the substance of the proposed preliminary plat, the Hearing Examiner has failed in this effort.

Findings, Conclusions, and Decision
City of Issaquah Hearing Examiner
High Street Collection Preliminary Plat
Nos. PP17-00002 & PRJ16-00013

Page 40 of 50

In terms of vesting, the parties seemingly agree that, under IMC 18.01.050.C, the Development Services Director is given the sole authority to determine the vested status of any given application under the municipal code. Further, by operation of other provisions of the code, such determination is not considered a “stand alone” determination that can be appealed independent of any appeal on the underlying proposal itself. Accordingly, the Hearing Examiner sometimes is tasked with reviewing such a determination when asked to sit in an appellate capacity—as occurred with IHIF’s appeals of the Development Commission’s decisions on its site development permit applications—but not always. Here, the municipal code requires the Hearing Examiner to review the preliminary plat in the first instance, not in an appellate capacity. As such, the Hearing Examiner lacks authority to independently decide the vested rights dispute.

That said, the Hearing Examiner has considered the Director’s vesting determination in relation to the preliminary plat and finds it, and the City’s subsequent stance concerning this proposal, highly problematic. As IHIF points out, whether the Hearing Examiner rightly decided the appeals associated with its site development permits is immaterial. The Hearing Examiner’s decisions on those permits, including his analysis of several cases including *Noble Manor*, *Westside Manor*, and *Ellensburg*, all addressed whether and to what extent a vested preliminary plat would afford certain vested rights on later site development permits. The Hearing Examiner’s previous decisions did not address the current proposal or the vested status of the preliminary plat. Like IHIF, the Hearing Examiner was surprised to learn in the City’s staff report that the City believed some aspects of the DA would apply to the proposal, others would not, and *crucially* that the City’s Replacement Regulations would apply in various respects.

The Hearing Examiner is unaware of this approach to vesting ever being employed in the context of review of a preliminary plat, let alone one that a jurisdiction has repeatedly indicated is “vested,” to a specific set of regulations, as occurred here. Such an approach to vesting runs contrary to *Reclamation Co. v. Bjornsen*, 125 Wn. App. 432, 105 P.3d 94 (2005), among other decisions concerning vesting. In *Reclamation*, for instance, the Clark County Hearing Examiner reviewed a proposal by selecting evaluating two sets of regulations, those applicable when Clark County first deemed the proposal complete for purposes of project review, and later amendments to the regulations promulgated by the County. In doing so, the Clark County Hearing Examiner accepted the applicant’s argument that vested development rights were meant, at common law, to benefit developers and, as such, a piecemeal approach to which regulations apply would be appropriate. Division 2 of the Court of Appeals rejected this approach, noting that, while “the general purpose of vesting land use regulations is to benefit developers,” another “important purpose of the vesting rule” is to establish a “date certain upon which the owner’s right to use his or her property in a particular way becomes fixed” so that a reviewing court “is not required to search through the moves and countermoves of the parties, and ‘the stalling or acceleration of administrative action in the issuance of permits’ in each case.” 125 Wn. App. At 435.

Findings, Conclusions, and Decision
 City of Issaquah Hearing Examiner
 High Street Collection Preliminary Plat
 Nos. PP17-00002 & PRJ16-00013

Page 41 of 50

The current situation is comparable. Under the City's approach, it has clearly become necessary to "search through the moves and countermoves of the parties" in the present matter to understand the City's stance on the development regulations applicable to the proposal.

Moreover, courts have recognized that the land use application process is iterative. As such, the legislature has granted local jurisdictions the authority to determine when a particular proposal is "complete" for purposes of vesting. Such a determination does not fix the materials submitted for review of an application in stone. Rather, such a determination fixes which land use regulations will apply to such a proposal, regardless of the outcome of the iterative review process. As the Washington State Supreme Court has explained:

A preliminary plat application is meant to give local governments and the public an approximate picture of how the final subdivision will look. *RCW 58.17.020(4)*. It is to be expected that modifications will be made during the give and take of the approval process. Although it is up to local governments to decide what level of specificity they will require from a developer in its initial application, *RCW 58.17.033*, they may not cause the vesting of the application to be contingent on future events or decisions, nor make the application process so odious that completion is nearly impossible. *West Main*, 106 Wn.2d at 52-53; *Adams*, 70 Wn. App. at 479. Once a completed application has been submitted, it is to be judged under the laws in effect at the time of submission.

Friends of the Law v. King County, 123 Wn.2d 518, 869 P.2d 1056 (1994).

Here, the City appears to contend that each submission an applicant makes during the iterative project review process has vesting implications for the particular proposal that is currently under review (as opposed to implications for future development proposals). Moreover, some of the City's materials seem to indicate that certain aspects of the DA itself "vest" (i.e., certain Appendices) while others do not. While the Hearing Examiner lacks authority to independently decide whether the City's vesting interpretation is legally correct, he feels it important to stress that he does not understand the City's approach to vesting in terms of this preliminary plat. As noted in the above decision, for instance, a different developer (Polygon) applied for preliminary plat approval almost contemporaneously with IHIF and the City reviewed the preliminary plat against each of the appendices in the DA. That approach comports with the Hearing Examiner's understanding of the vested rights doctrine, as explained above, and lends itself to a consistent, understandable review process.

Under the current approach, the Hearing Examiner is unable to determine what substantive provisions should be reviewed in terms of this preliminary plat. In addition to the obvious challenges this creates, there are serious implications in terms of the Hearing Examiner's efforts to craft appropriate approval conditions. For instance, in their submissions concerning potential approval conditions, the parties expressed a fundamental disagreement about whether language about mitigation should be included in such conditions. Under the DA, mitigation for project

Findings, Conclusions, and Decision
City of Issaquah Hearing Examiner
High Street Collection Preliminary Plat
Nos. PP17-00002 & PRJ16-00013

Page 42 of 50

impacts—including mitigation under SEPA—was clearly addressed. The municipal code, however, includes provisions on impact fees and SEPA mitigation that were promulgated after the DA was first created. In its recommended plat conditions, however, the City suggests that it would impose such impact fees and SEPA mitigation on later projects associated with the preliminary plat. Without clear guidance on the vested status of the preliminary plat, this creates additional potential problems in the future.

In conclusion, the Hearing Examiner has determined clear guidance on the vested status of this proposal is necessary, from a forum with appropriate jurisdiction, before review of this preliminary plat can be completed. Such guidance, hopefully, would address, at a minimum: (a) which regulations are applicable to the preliminary plat; and (b) whether the SEPA review associated with the DA addressed all necessary project impacts associated with environmental impacts from development within the Issaquah Highlands, including the subject property. *Findings 1 – 72.*

DECISION

Based on the preceding findings and conclusions, the request for a preliminary plat to subdivide 21.46-acres into 10 lots for mixed-use development, on “Lot B” of the Issaquah Islands north of NE Discovery Drive and west of 9th Avenue NE, is **DENIED**.

Decided this 1st day of February 2021.



ANDREW M. REEVES
 Hearing Examiner
 Sound Law Center

Attachment A

Exhibit List:

The following exhibits were admitted into the record throughout the review process:

- A. Listing and Comparison of Application Materials (Prepared by City)
- B. Application Materials from August 1, 2017:
 - 1.1 Land Use Application, dated August 1, 2017
 - 1.2 Plan Set

*Findings, Conclusions, and Decision
 City of Issaquah Hearing Examiner
 High Street Collection Preliminary Plat
 Nos. PP17-00002 & PRJ16-00013*

- 1.3 Project Narrative, dated July 15, 2017
- 1.4 Traffic Analysis Memorandum, Transpo Group, dated July 28, 2017
- 1.5 Preliminary Stormwater Report, KPFF Consulting Engineers, dated July 2017
- 1.6 Pre-Application Comment Letter, dated July 27, 2017
- Application Materials from August 28, 2017:
 - 2.1 Additional File Submittal Confirmation
 - 2.2 Land Use Application, dated April 6, 2017
 - 2.3 Plan Set
 - 2.4 Project Narrative, dated July 15, 2017
 - 2.5 Traffic Analysis Memorandum, Transpo Group, dated July 28, 2017
 - 2.6 Preliminary Stormwater Report, KPFF Consulting Engineers, dated July 2017
 - 2.7 Title Report, dated July 28, 2017
 - 2.8 SEPA Checklist, dated July 28, 2017
 - 2.9 Affidavit of Agent Authority, dated July 10, 2017
 - 2.10 Affidavit of Ownership, dated July 10, 2017
 - 2.11 Lot Closure Calculations, Core Design, Inc., dated July 28, 2017
 - 2.12 Preliminary Plat Submittal Memorandum, dated July 27, 2017
 - 2.13 Sidewalk Easement: Legal Description
 - 2.14 Public Trail Easement: Legal Description
 - 2.15 8 x 11 Plan Set
 - 2.16 8 x 11 Vicinity Map
 - 2.17 Vicinity Map
- Application Materials from December 15, 2017:
 - 3.1 Additional File Submittal Confirmation
 - 3.2 Overview Site Plan (with Building Footprints), dated December 14, 2017
 - 3.3 Revised Lot Lines Plan, dated December 15, 2017
- Application Materials from February 7, 2018:
 - 4.1 Additional File Submittal Confirmation
 - 4.2 Traffic Impact Analysis Memorandum, Transpo Group, dated February 6, 2018
- Application Materials from February 22, 2018:
 - 5.1 Additional File Submittal Confirmation
 - 5.2 Architecture Review Committee Approval Letter, dated July 28, 2017
- Application Materials from March 5, 2019:
 - 6.1 Additional File Submittal Confirmation
 - 6.2 Plan Set
 - 6.3 Project Narrative, dated July 15, 2017
 - 6.4 Response to Comments (Traffic), Transpo Group, dated March 4, 2019
 - 6.5 Preliminary Stormwater Report (Revised), KPFF Consulting Engineers, dated February 2019
 - 6.6 Response to Comments from March 16, 2018
 - 6.7 Applicant Response to Comments, dated March 5, 2019
 - 6.8 Additional File Submittal Confirmation (#2)

*Findings, Conclusions, and Decision
 City of Issaquah Hearing Examiner
 High Street Collection Preliminary Plat
 Nos. PP17-00002 & PRJ16-00013*

- 6.9 Supplemental Project Narrative, dated March 1, 2019
- 6.10 Email from Ken Shipley to Jean Lin, dated March 6, 2019, with email string
- C. Notice Materials:
 - 1. Affidavit of Mailing (Application), dated December 27, 2017
 - 2. Affidavit of Posting (Application), dated October 17, 2017
 - 3. Affidavit of Mailing (Hearing), dated February 21, 2020
 - 4. Published Notice, *Issaquah Reporter*, dated February 21, 2020
 - 5. Updated Site Posting, dated February 21, 2020
 - 6. Affidavit of Publication, dated February 21, 2020
- D. Community Conference Materials:
 - 1. Community Conference Memorandum, dated October 10, 2019
 - 2. Public Comments:
 - a. Comment from Pedro Guzman
 - b. Comment from Jonathan Chen
 - c. Comment from Suyesh Chaudhari
 - d. Comment from Alison Kimble
 - e. Comment from Lei Wang
 - f. Comment from Sathyaprasad Ramaseshan
 - g. Comment from Anushri Sarda
 - h. Comment from Chaitalee Zade
 - i. Comment from Erin Fields
 - 3. Additional Public Comments (in Response to Conference Memorandum):
 - a. Comment from Alison Kimble
 - b. Comment from Sathyaprasad Ramaseshan
 - c. Comment from Erin Fields
 - d. Comment from Bob Kaila
 - e. Comment from Siddhartha Rabindran
 - f. Comment from Amanveer Kaila
 - g. Comment from Lei Wang
 - h. Comment from Catalina Millas
 - i. Comment from Nina Milligan
 - j. Comment from Ravi Mudunuri
 - k. Comment from Vasundhara Subrahmanian
 - l. Comment from Jonathan Li On Wing
 - m. Comment from Mike Zalewski
- E. Hearing Examiner's Decision on City's Motion to Dismiss, No. APP18-00005, dated November 27, 2018
- F. Hearing Examiner's Decision on Dispositive Motions, No. APP19-00002, dated November 15, 2019
- G. Letter from Keith Niven to Patrick Schneider, dated April 4, 2018
- H. Letter from Lucy Sloman to Tia Heim, dated April 15, 2019

Findings, Conclusions, and Decision
City of Issaquah Hearing Examiner
High Street Collection Preliminary Plat
Nos. PP17-00002 & PRJ16-00013

- I. Hearing Examiner’s Decision on Request for Reconsideration, No. APP19-00002, dated January 24, 2020
- J. Comprehensive Plan (Excerpts)
- K. Communications/Comments Between Applicant and City:
 - 1. Email from Lucy Sloman to Tia Heim, dated February 25, 2020, with email string
 - 2. Email from Lucy Sloman, dated July 26, 2019
 - 3. Email from Lucy Sloman to Tia Heim, dated July 19, 2019, with email string
 - 4. Email from Jean Lin to Ken Shipley, dated February 21, 2019, with email string
 - 5. Responses:
 - A. Email from Lucy Sloman to Tia Heim, dated December 21, 2018, with email string
 - B. City Responses to Applicant Comments
 - 6. Email from Doug Schlepp to Tia Heim, dated October 15, 2018
 - 7. Responses:
 - A. Email from Doug Schlepp to Tia Heim, dated March 29, 2018
 - B. Memorandum from Transpo Group, dated February 6, 2018, with City Annotations
 - 8. Email from Jean Lin to Dave Cayton, dated March 23, 2018, with email string
 - 9. Email from Doug Schlepp to Mike Swenson, dated March 22, 2018
 - 10. Plan Set, with City Annotations
 - 11. Email from Dave Cayton to Jean Lin, dated February 22, 2018
 - 12. Email from Jean Lin to Dave Cayton, dated February 21, 2018, with email string
 - 13. Email from Doug Schlepp to Mike Swenson, dated January 24, 2018, with email string
 - 14. Email from Dave Cayton to Jean Lin, dated December 15, 2017
- L. Action Memorandum, Development Services Department, dated March 29, 2013
- M. Complete Application Determination, dated August 11, 2017
- N. Ordinance No. 2830, effective March 28, 2019
- O. Comments on Public Hearing:
 - 1. Comment from Jen Noland, dated February 25, 2020
 - 2. Comment from Kent Worthington, dated March 2, 2020
 - 3. Comment from Jessica Conquest, King County Metro, dated March 4, 2020
 - 4. Comment from Lawrence Chung, King County Metro, dated August 3, 2020
 - 5. Comment from Christina Marchione, dated July 31, 2020
- P. Issaquah Highlands Development Agreement (Revised)
- Q. Grand Ridge Annexation and Development Agreement (Original)
- R. Staff Report, dated March 3, 2020
- S. Staff PowerPoint Presentation, dated March 9, 2020
- T. Grand Ridge Final Environmental Impact Statement, dated September 1995
- U. Amendment to Grand Ridge/Issaquah Highlands Annexation and Development Agreement, dated February 2000
- V. Revised Recommendation & Proposed Conditions of Approval, dated March 9, 2020

Findings, Conclusions, and Decision
 City of Issaquah Hearing Examiner
 High Street Collection Preliminary Plat
 Nos. PP17-00002 & PRJ16-00013

- W. Curriculum Vitae for Mike Swenson
- X. Curriculum Vitae for Mark Veldee
- Y. Revised Development Entitlement Memorandum, dated December 1, 2016
- Z. Applicant Summary of Review Dates and Timeline
- AA. Email from Christopher Wright to Dave Cayton, dated March 10, 2017, with email string
- BB. Letter from Keith Niven to Nick Abdelnour, dated March 27, 2017
- CC. Email from Jean Lin to Dave Cayton, dated June 7, 2017, with email string
- DD. Email from Sarabeth Levine to Tia Heim, dated August 15, 2017
- EE. Email from Jean Lin to Dave Cayton, dated October 6, 2017, with email string
- FF. Email from Keith Niven to Tia Heim, dated November 22, 2017, with email string
- GG. Email from Dave Cayton to Jean Lin, dated December 15, 2017, with attachments
- HH. Email from Darwin Li to Doug Schlepp, dated February 6, 2018, with attachment
- II. Email from Doug Schlepp to Mike Swenson, dated February 19, 2018, with email string
- JJ. Letter from Keith Niven to Patrick Schneider, dated March 8, 2018, with attachment
- KK. Staff Report for Westridge North Preliminary Plat, dated March 9, 2018
- LL. Urban Village Development Commission Recommendation, Westridge North Preliminary Plat, dated May 4, 2018
- MM. Email from Lucy Sloman to Tia Heim, dated August 24, 2018, with email string
- NN. Email from Lucy Sloman to Tia Heim, dated December 21, 2018, with email string
- OO. Email from Jean Lin to Ken Shipley, dated March 6, 2019, with email string
- PP. Email from Lucy Sloman to Tia Heim, dated April 5, 2019, with attachment
- QQ. Email from Tia Heim to Lucy Sloman, dated April 8, 2019, with email string
- RR. Email from Tia Heim to Lucy Sloman, dated July 17, 2019, with email string
- SS. Email from Tia Heim to Lucy Sloman, dated August 7, 2019, with email string
- TT. Email from Lucy Sloman, dated October 18, 2019, with email string and attachment
- UU. Email from Mark Veldee to Dan Ervin and Doug Schlepp, dated June 28, 2017, with email string
- VV. Additional Materials, March 11, 2020:
 1. Email from Lucy Sloman to Tia Heim, dated March 11, 2020
 2. Plan Set with City Annotations
 3. Plan Set for Preliminary Plat of Westridge North
 4. High Street Collection, Preliminary Engineering Notes, revised April 15, 2020
 5. Information Concerning Proposed Trail Connection
- WW. Additional Submittals from Applicant:
 1. Issaquah Highlands Public Meeting Hearing Transcript (Excerpt), dated October 24, 2018
 2. Plat Review Dates and Timeline, updated July 9, 2020
 3. Email from Candice Baer to David Ortman, dated December 16, 2019, with email string
 4. Email from Zach Lell to Candice Baer, dated February 3, 2020, with email string
 5. Email from Candice Baer to Lucy Sloman, dated February 4, 2020, with email string

Findings, Conclusions, and Decision
City of Issaquah Hearing Examiner
High Street Collection Preliminary Plat
Nos. PP17-00002 & PRJ16-00013

6. Email from Candice Baer to Lucy Sloman, dated April 17, 2020, with attachment
 7. Email from Keith Niven to the Hearing Examiner, dated March 31, 2020, with email string
 8. Email from Lucy Sloman to Tia Heim, dated March 4, 2020, with email string
 9. Email from Jacqueline Quarre to Zach Lell, dated May 28, 2020, with attachment
 10. Email from Tina Eggers to Jacqueline Quarre, dated June 4, 2020, with email string
 11. Email from Zach Lell to Pat Schneider, dated July 7, 2020, with email string
 12. Email from Jean Lin to Dave Cayton, dated July 17, 2017, with email string
 13. Email from Jean Lin to Dave Cayton, dated July 10, 2017, with email string
 14. Applicant's Proposed Findings
 15. Applicant's Revised Proposed Conditions of Approval
 16. Email from Candice Baer to David Ortman, dated January 27, 2020
 17. Email from David Ortman to Candice Baer, dated January 27, 2020, with email string
 18. Emails about Scheduling (March 27 through March 31, 2020)
- XX. Additional Submittals from City:
1. City Plat Review Dates & Timeline
 2. Development Services Department Development Commission, Community Conference Staff Report, dated August 8, 2019
 3. Email from Candice Baer, dated March 12, 2020, with attached Emergency Proclamation, dated March 6, 2020
 4. Email from Jean Lin to David Holmes, dated October 5, 2017
 5. Email from Doug Schlepp to Mark Veldee, dated November 16, 2017, with email string
 6. Discovery Drive Information
 7. Email from Lucy Sloman to Keith Niven, dated November 22, 2017, with email string
 8. Memorandum on "End of DAs – Vesting & FAR," dated December 12, 2017
 9. Email from Lucy Sloman to Nick Abdelnour, dated December 1, 2016
 10. Email from Tia Heim to Lucy Sloman, dated January 4, 2017
 11. Email from Tia Heim to Christopher Wright, dated April 3, 2017, with email string
 12. Affidavit of Mailing (Community Conference), dated August 2, 2019, with attachments
 13. Email from Lucy Sloman to Tia Heim, dated August 5, 2019, with email string
 14. Email from Gretchen Garrett, dated August 8, 2019
 15. Email from Lucy Sloman, dated October 10, 2019
 16. Letter from Keith Niven to Nick Abdelnour, dated November 22, 2017
 17. Email from Candice Baer to the Hearing Examiner, dated March 3, 2020
 18. Traffic Impact Analysis Memorandum, Transpo Group, dated February 6, 2018, with City Annotations

Findings, Conclusions, and Decision
City of Issaquah Hearing Examiner
High Street Collection Preliminary Plat
Nos. PP17-00002 & PRJ16-00013

- YY. Final Preliminary Plat Plan Set (23 Sheets):
1. Title Sheet (Sheet P1.01), revised February 8, 2019
 2. Preliminary Plat (Sheet P1.02), revised February 8, 2019
 3. Preliminary Landscape Plan (Sheet L1.01), undated
 4. Existing Conditions (Sheet C1.02), dated November 2017
 5. Existing Conditions (Sheet C1.03), dated November 2017
 6. Existing Conditions (Sheet C1.04), dated November 2017
 7. Existing Conditions (Sheet C1.05), dated November 2017
 8. Existing Conditions (Sheet C1.06), dated November 2017
 9. Preliminary Engineering Notes, Legend, and Abbreviations (Sheet C-100), revised April 15, 2020
 10. Preliminary Engineering Overview Site Plan (Sheet C-101), dated February 22, 2019
 11. Preliminary Engineering Overview Key Map (Sheet C-200), dated February 22, 2019
 12. Preliminary Engineering Grading and Utility Plan Block A (Sheet C-201), dated February 22, 2019
 13. Preliminary Engineering Grading and Utility Plan Block B and C (Sheet C-202), dated February 22, 2019
 14. Preliminary Engineering Grading and Utility Plan Block D and E (Sheet C-203), dated February 22, 2019
 15. Preliminary Engineering Northeast Federal Drive Plan and Profile (Sheet C-300), dated February 22, 2019
 16. Preliminary Engineering 8th Avenue Northeast Plan and Profile (Sheet C-301), dated February 22, 2019
 17. Preliminary Engineering Northeast Discovery Drive Plan and Profile (Sheet C-302), dated February 22, 2019
 18. Preliminary Engineering Northeast Discovery Drive Plan and Profile (Sheet C-303), dated February 22, 2019
 19. Preliminary Engineering Northeast Discovery Drive Plan and Profile (Sheet C-304), dated February 22, 2019
 20. Preliminary Engineering Northeast Discovery Drive Plan and Profile (Sheet C-305), dated February 22, 2019
 21. Preliminary Engineering Multi-Purpose Trail Plan (Sheet C-306), dated February 22, 2019
 22. Preliminary Engineering 8th Ave Northeast Plan (Sheet C-307), dated February 22, 2019
 23. Preliminary Engineering Roadway Sections (Sheet C-308), dated February 22, 2019

Pleadings, Motions, and Orders:

*Findings, Conclusions, and Decision
 City of Issaquah Hearing Examiner
 High Street Collection Preliminary Plat
 Nos. PP17-00002 & PRJ16-00013*

- Applicant Objection to New and Ongoing Violations of Applicant's Vested Rights, dated March 9, 2019
- City Response to Applicant's Objection to New and Ongoing Violations of the Applicant's Vested Rights, dated March 20, 2020
- Applicant Reply to City's Response and to Lucy Sloman's Post-Hearing Email Directing Changes to Applicant's Plat Plans, dated April 16, 2020
- City Objection and Motion to Strike Reply, dated April 20, 2020
- Applicant Response to City's Objection and Motion to Strike Reply, dated April 21, 2020
- Decision on Motion to Strike, dated May 11, 2020
- Order on Continued Hearing, dated July 8, 2020
- City Proposed Conditions of Approval, dated August 10, 2020
- Applicant Response to City's Proposed Conditions of Approval, dated August 18, 2020
- Hearing Examiner's Update on Decision, issued January 27, 2021

*Findings, Conclusions, and Decision
City of Issaquah Hearing Examiner
High Street Collection Preliminary Plat
Nos. PP17-00002 & PRJ16-00013*

Page 50 of 50

Exhibit B



Development Services
 1775 – 12th Ave. NW | P.O. Box 1307
 Issaquah, WA 98027
 425-837-3100
issaquahwa.gov

**CITY OF ISSAQUAH
 DEVELOPMENT SERVICES DEPARTMENT**

**Issaquah Highlands
 Preliminary Plat
 High Street Collection**

STAFF REPORT

March 3, 2020

I. Application Information

Project: Preliminary Plat of Issaquah Highlands High Street Collection

File Numbers: PP17-00002
 PRJ16-00013

Applicant/Engineer: Kenneth Shipley, PLS
 Core Design, Inc.
 12100 NE 195th Street, Suite 300
 Bothell, WA 98011

Owner: Tia Heim
 Issaquah Highlands Investment Fund, LLC
 11624 SE 5th Street, Suite 100
 Bellevue, WA 98005

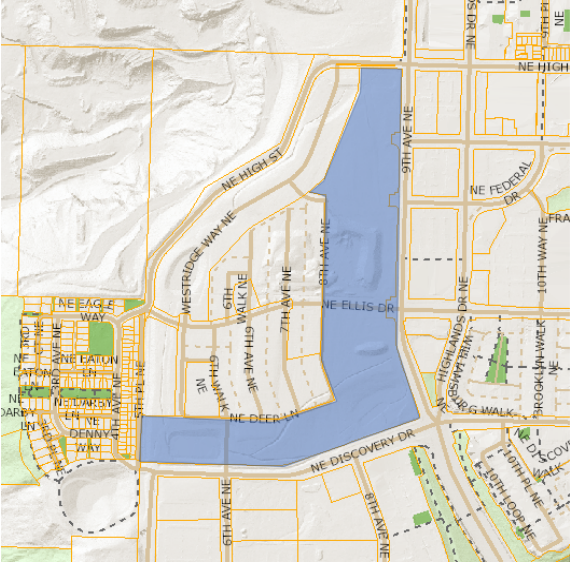
Staff Contacts: Lucy Sloman, Land Development Manager, Development Services
 Department, (425) 837-3433 lucys@issaquahwa.gov
 Doug Schlepp, Senior Consulting Engineer, Development Services
 Department, (425)-837-3432 dougs@issaquahwa.gov

Request: Application for approval of a preliminary plat for Lot B of City of
 Issaquah Lot Line Adjustment LLA14-00002 (also called “Shelter” or
 “IHIF-C”) establishing ten (10) parcels and six (6) tracts for access
 and utilities on approximately 21.46 acres. Additionally, the
 proposal includes a trail connection on the western edge of the
 proposed plat.

Application Date: August 1, 2017

Location: Property in Section 27, Township 24 N, Range 6E. The site is located in the Issaquah Highlands: north of NE Discovery Drive, west of the 9th Ave NE, and east of Westridge residential and West Highlands Park; see vicinity map below. A full legal description is provided with the application; see Sht P1.01 of the plan set.

Existing Land Use: Lot B is currently cleared and vacant, though some streets have been constructed through the property including Ellis Dr and 6th Ave NE, but not accepted.¹



Surrounding Land Uses:

North: NE High Street and Lakeside sand and gravel quarry; this area is covered by the Lakeside Development Agreement, approved in 2012, and allows for mixed-use development.

West: Westridge residential, currently under construction, and West Highlands Park, which was completed years ago (mid-2010s). Both areas are a combination of townhomes and single-family residential.

South: Discovery Drive and Swedish Hospital, Discovery West apartments, and vacant parcels owned by Swedish and the City. Swedish’s property is covered by the Swedish Development Agreement, approved in 2013, and allows for commercial use development.

East: 9th Ave NE and Grand Ridge Plaza.

Comprehensive Plan:

Land Use: Retail
Subarea: Issaquah Highlands

II. Summary of Proposed Action

The Applicant is requesting preliminary plat approval of Issaquah Highlands Lot B of City of Issaquah Lot Line Adjustment LLA14-00002; the property is commonly referred to as the Shelter Holdings or IHF-C property. The acreage of the plat application is approximately 21.46 acres. There will be a total of 10 parcels and 6 tracts, A-F. Per the Narrative, four of the six access and utility tracts (Tracts A, C, E, F) within the plat are proposed to be dedicated

¹ Note: What is currently named 6th Ave NE was, until recently, named 7th Ave NE. 7th Ave NE appears on the August 1 & 28, 2017 Plan Set but this Staff Report only uses 6th Ave NE.

to the City as public rights-of-way. The Applicant is likely to develop the property in phases, as indicated in their Narrative, e.g. Summary of Proposed Action. This plat was reviewed in its totality, not for phased development. If the property improvements, i.e. infrastructure, are not complete by final plat being sent to the Hearing Examiner or decision maker, then the improvements must be bonded for per IMC 18.13. Phasing of the completion of improvements must ensure that sufficient services and facilities for functionality, safety, etc... are provided on each property or for each phase as they are completed. These include utilities, access for pedestrians and vehicles. **[Condition 1]**

III. Background/History

The following section provides a summary of background/historical information relevant to this application:

- PP02-004IH and FP02-006IH were the platting permits for the IH Town Center which included the tract that became High Street right-of-way.
- Lot Line Adjustment: LLA02-001IH configured the former Microsoft property and included this property
- Lot Line Adjustment: LLA14-00002 and Right-of-Way dedication (Recording No. 20140728000736) resulted in the dedication of NE Discovery Drive and segregated the property north of Discovery Drive (Polygon’s Westridge North and Shelter Holdings property) from Polygon’s Westridge South parcel. ²
- Short Plat: SP16-00001 subdivided Westridge North into parcels for future development including the property that is the subject of this proposed plat, Lot B.

Different sets of drawings have been submitted to the City in relation to the Applicant’s preliminary plat application. The Applicant’s original preliminary plat application was submitted August 1, 2017 and deemed sufficient in August 2017 (Exhibit M). A second submittal was made August 28, 2017 and the Reason for Submittal selected by the Applicant was *Response to Reviewer Comments*. The following chart provides a comparison of the two August submittal materials (Note: for the Hearing Examiner’s reference, Exhibit A is a complete accounting and comparison of all submitted materials from all dates; Exhibit B is all submittal materials received from the Applicant in association with PP17-00002):

Document name	Aug 1, 2017 submittal	Aug 28, 2017 submittal	Match?
Drainage Report	√		Yes †
Preliminary Stormwater Report		√	Yes †
Plan Set	√	√	Yes *
Pre-Application Comment Letter Memo	√		
Project Narrative	√	√	Yes *
Traffic Study	√		Yes *
Traffic Analysis		√	Yes *

² For purposes of this Staff Report, the adjacent property owner is referred to as Polygon. In fact, Polygon Northwest has been recently purchased by Taylor Morrison Homes and their name may be changed as a result.

Document name	Aug 1, 2017 submittal	Aug 28, 2017 submittal	Match?
8x11 Plan Sheet		√	NA
8x11 Vicinity Map		√	NA
Affidavit of Agent Authority		√	NA
Affidavit of Ownership		√	NA
Lot Closure Calculations		√	NA
Paper Land Use Permit Application		√	NA
Preliminary Plat Submittal Memo		√	?
SEPA Checklist		√	NA
Sidewalk Easement Legal Description		√	NA
Title Report		√	NA
Trail Easement Legal Description		√	NA
Vicinity Map		√	NA

* electronic comparison

† locked document requiring visual comparison; same issuance dates, different document names

On December 15, 2017, the Applicant self-initiated a subsequent submittal to the original plat application and the Reason for Submittal selected by the Applicant was “*Change in Original Project*”. On February 7 and 22, 2018, two additional submittals were made, and the Reason for Submittals selected was *Response to Reviewer Comments*. And a final set of plans was submitted March 5, 2019 and the Reason for Submittal selected was *Response to Reviewer Comments*, regarding the City’s comments on the August 2017 plans. (Since the August 1 and August 28, 2017 Plan Sets were identical it is irrelevant which plan the comments were sent on.)

Both the August 1 and 28, 2017 submittals were made during the defined “Buildout Period” of a now-terminated 1996 Development Agreement (“Development Agreement” or “IHDA”³) that previously governed land use and development within the Issaquah Highlands project. The Applicant’s subsequent submittals on December 15, 2017, February 7 and 22, 2018, and March 5, 2019 were all filed after the Buildout Period had expired.

The City and the Applicant have disagreed regarding the extent to which the Applicant’s original August 1 and 28, 2017 preliminary plat application is vested to the standards set forth in the Development Agreement, as well whether the Applicant’s post-Buildout Period submittals (including the December 15, 2017 “supplement”) should be deemed vested to the Development Agreement at all, or to the City’s Replacement Regulations—i.e., the regulations adopted by Ordinance No. 2830, now codified at Chapter 18.19B IMC, which went into effect on March 28, 2018.

Additionally, in the Project Narratives submitted in August 1 and 28, 2017 (which are also identical), the Applicant has asserted that the proposed plat is categorically vested to all the development standards in the Development Agreement, rather than those necessary for

³ IHDA: Issaquah Highlands Development Agreement

reviewing the plat and which are shown in the plat drawings and the specific development proposal, if any, described in the accompanying application materials.

As indicated in the Director’s vesting determination set forth in Section V, below, of this Staff Report, the Director has formally concluded that only the Applicant’s August 1 and August 28, 2017 plat applications are vested to the standards contained in the IHDA. The Director’s vesting determination also concludes that, in accordance with applicable state law, the Applicant’s August 1 and 28, 2017 plat applications are vested to the use designation of the underlying property in effect at the time of complete application submittal, as well as to the substantive land use controls necessary to effectuate the specific development proposal, if any, identified in or with the plat application. Therefore, City Staff have reviewed only the vested permit materials from August 1 and 28, 2017 under the applicable IHDA provisions.

IV. Project Chronology and preceding activities

- March 21, 2017 The City held a Collaboration Meeting for the application.
- May 31, 2017 The City’s held a Pre-Application Conference, File No. PRE17-00006
- Aug. 1, 2017 The Applicant submitted the preliminary plat application.
- Aug. 11, 2017 The preliminary plat application was deemed sufficient per IHDA, Appendix L, Part Two, Section 3. ([Exhibit M](#))
- Aug. 28, 2017 The Applicant submitted additional information in response to reviewer comments.
- Sept. 18, 2017 The 20-year Buildout Period under the Development Agreement expired.
- Dec. 15, 2017 The Applicant submitted additional new information at its own instigation, including a depiction of building footprints on the proposed new lots identified in the plat application.
- Jan. 9, 2018 DSD engineers emailed comments to the Applicant’s engineering consultant.
- Feb. 7 & 22, 2018 Additional materials submitted in Response to Reviewer comments
- March 16, 2018 DSD provided comments via MyBuildingPermit.com to the Applicant.
- March 19, 2018 The Issaquah Highlands Development Agreement (IHDA) was terminated by the City Council and Replacement Regulations were approved, effective March 28, 2018.
- March 5, 2019 The Applicant resubmitted revised drawings and analyses in response to the City’s March 16, 2018 comments.
- August 15, 2019 A Community Conference was held before the Development Commission as required by IMC 18.19B.270.C. File No. COM19-00001
- October 10, 2019 A Community Conference Response Memo was distributed to Parties of Record for comment as required by IMC 18.19B.270.C.
- October 25, 2019 Comment period concludes.
- Nov. 15, 2019 The Hearing Examiner upheld the Director’s determination regarding the legal effect of the Buildout Period with respect to vesting of applications under the IHDA in Appeal No. APP19-00002.

Public Notice

A Notice of Application was distributed on December 27, 2017, and the property was posted on October 17, 2017. Per IMC 18.04.180.B the following required public notification for the Public Hearing has occurred: The Public Hearing legal notice was published in the Issaquah Reporter on February 21, 2020. The Notice of Hearing was mailed on February 24, 2020 to property owners within 300 ft and emailed to Parties of Record. The Applicant updated the sign posted on site on February 21, 2020 with the hearing date. The Hearing Examiner's Public Hearing on the proposal is scheduled for March 9, 2020. See [Exhibit C](#) for documentation of the required notices which have been sent in association with this permit.

In response to the Notice of Application, no public comments were received. In association with the Community Conference, nine comments were received in association with the meeting and twelve in response to the Response Memo. These are provided in [Exhibit D](#). To date, two comments have been received in response to the Preliminary Plat Public Hearing Notice. See [Exhibit O](#).

Community Conference

As required by IMC 18.19B.270, a Community Conference was held on the proposal. The public meeting was August 15, 2019 in front of the Development Commission. Following the meeting, a Response Memo was prepared, reviewed by the Applicant, and sent to Parties of Record. Following a two-week comment period, the memo was finalized; as required. It is attached is [Exhibit D](#). During the comment period, twelve emails were received from eleven people, commenting on the Response Memo; these are attached to the memo. No changes to the Response Memo distributed to the public were made as the comments were not consistent with code and/or reiterated comments that the memo already responded to, consistent with IMC 18.19B.270.C. The Applicant chose to not update or revise their proposal in response to the comments contained in the Response Memo.

V. Determination of Vested Status (IMC 18.01.050(C))

Pursuant to IMC 18.01.050(C) in consultation with the City Attorney, the Director hereby renders the following determination regarding the vested status of the Applicant's preliminary plat application. As the Hearing Examiner has previously concluded, the Director's vesting determination is not a final land use decision in and of itself, and it is not independently appealable separate from the administrative decision approving or denying the underlying project application. See [Exhibit E](#), November 27, 2018 Hearing Examiner decision on the request to dismiss the Applicant's Appeal, APP18-00005.

3.1 The Applicant's August 1 and 28, 2017 Preliminary Plat Application Is Vested to the IHDA.

The IHDA established a 20-year Buildout Period measured from the recording of the first plat approved under the IHDA. See IHDA, §6 and [Exhibit P](#). Subject to a few exceptions not relevant here, the City was generally prohibited from adopting and applying new or

different standards to property located within the Issaquah Highlands during the Buildout Period. See IHDA, §3.23 (“[d]uring the Buildout Period, the City shall not modify or impose new or additional Development Standards beyond those set forth in this Agreement.” The Buildout Period expired on September 18, 2017.

The Applicant’s August 1 and 28, 2017 preliminary plat application is an application for an “Implementing Approval” as defined by the IHDA. See IHDA, §6. In accordance with Sections 3.23, 3.23.2 and 5.13 of the IHDA and the applicable provisions of the governing statute for Development Agreements, see RCW 36.70B.170- .190, the Director has previously determined that the Buildout Period is the vesting period under the IHDA. Applications for Implementing Approvals submitted after the expiration of the Buildout Period are not subject to vesting under the IHDA.⁴ The Director’s determination on this point has been upheld by the Hearing Examiner. See Exhibit F, November 15, 2019 Hearing Examiner decision on Dispositive Motions on APP19-00002.

The vesting provision of the Issaquah Highlands Replacement Regulations, Chapter 18.19B IMC, recognizes preliminary plats as one of the categories of land use applications for which vested rights apply under state law:

- A. Only vesting established by Washington State law shall apply to the vesting of development applications for properties located within Issaquah Highlands previously covered by the terminated development agreements. These are:
 1. Building permits which comply with RCW 19.27.095; or
 2. Long or short plats which comply with RCW 58.17.033; or
 3. Development agreements per RCW 36.70B.180.

IMC 18.19B.280(A) (emphasis added).

Accordingly, because the Applicant’s August 1 and 28, 2017 complete preliminary plat application was submitted to the City within the Buildout Period of IHDA, the application is vested pursuant to IMC 18.19B.280 and RCW 58.17.033. As the City has previously conveyed to the Applicant, the extent of vesting for the Applicant’s preliminary plat application is determined by relevant state law. See Exhibit G, Keith Niven April 4, 2018 letter to Patrick Schneider; Exhibit H, Lucy Sloman April 15, 2019 letter to Tia Heim.

3.2 The Extent of Vesting for the Applicant’s August 1 and 28, 2017 Preliminary Plat Application Is Limited To (i) the Use Designation Identified under the IHDA, and (ii) the Substantive Land Use Standards of the IHDA that are Necessary to Effectuate the Specific Development Proposal, if any, that was Identified in the Applicant’s August 1 and 28, 2017 Plat Application.

The manner and extent to which a preliminary plat application vests is governed by Washington caselaw construing RCW 58.17.033—primarily *Noble Manor Co. v. Pierce County*, 133 Wn.2d 269, 943 P.2d 1378 (1997). The Supreme Court in *Noble Manor* held that where a preliminary plat application discloses a specific, proposed use of the

⁴ Instead, these applications are governed by State-law vesting law and subject to the City’s Replacement Regulations which went into effect on March 28, 2018.

underlying property, the Applicant has the right not only to subdivide the property, but also to develop it, under the zoning and land use regulations in effect at the time the plat application is submitted to the extent necessary to accommodate that use. *Noble Manor*, 133 Wn.2d at 278, 283-85 (citing RCW 58.17.033). The *Noble Manor* Court emphasized that, under this legal standard, “what is vested is what is sought in the application for a . . . plat[.]” *Noble Manor*, 133 Wn.2d at 284.

In construing *Noble Manor*, subsequent court decisions have clarified that a preliminary plat Applicant “has vested rights only at a very general level”—i.e., the right to develop under the zoning uses allowed at the time of plat application submittal. *Alliance Investment Group of Ellensburg, LLC v. City of Ellensburg*, 189 Wn. App. 763, 773, 358 P.3d 1227 (2015) (emphasis added). “[B]uildings to support those uses will need to conform to the building standards (and associated ordinances. . .) existing at the time they are built.” *Id.*

Based upon this controlling precedent, the Director determines that the Applicant’s preliminary plat application is vested to the use designation of the Applicant’s project site as it existed under the IHDA in August 2017. The Director further determines that the Applicant has a vested right to develop its property under the substantive standards contained in the IHDA to the extent necessary to effectuate the specific development proposal, if any, identified in the Applicant’s August 1 and 28, 2017 preliminary plat application materials. Section VI of this Staff Report identifies the specific standards of the IHDA that are vested under this analysis and proceeds to evaluate the compliance of the Applicant’s August 1 and 28, 2017 plat application with those standards; Section IX contains the proposed Approval Conditions.

3.3 Vesting for the Applicant’s August 1 and 28, 2017 Preliminary Plat Application Is Limited to Substantive Land Use Controls, Does Not Extend to Subsequent Permit Applications, and Does Not Include Post-Buildout Period Submittals.

A. The Applicant’s Post-Buildout Period Submittals are Not Vested to the IHDA.

As noted earlier in this Staff Report, the Applicant has submitted numerous “supplements”, revisions and other modifications to its original August 1 and 28, 2017 preliminary plat application—including without limitation the Applicant’s self-initiated December 15, 2017 “supplement”. To the extent that these submittals purported to modify the Applicant’s original development plan and occurred after the expiration of the IHDA’s Buildout on September 18, 2017, they fall within the timeframe during which the parties had contractually agreed that applications for Implementing Approvals—including preliminary plats—could not vest. See IHDA, §3.23.2, §5.13. The Director has determined that post-Buildout Period submittals, specifically including the Applicant’s December 15, 2017 “supplement”, do not operate to retroactively expand the vested rights that accrued in the Applicant’s original August 1 and 28, 2017 preliminary plat application. The Hearing Examiner has rejected the Applicant’s contrary argument.⁵ See Exhibit I, January 24, 2020 Hearing Examiner decision on Reconsideration on APP19-00002.

⁵ The Applicant submitted various technical reports to the City during the review process for the preliminary plat. These included, without limitation, traffic impact and stormwater reports that were submitted after the expiration of the Buildout Period under the IHDA. These reports, which address the

B. The Applicant's Subsequent Permit Applications Are Not Vested to the IHDA.

Likewise, the extent of vesting for the Applicant's August 1 and 28, 2017 preliminary plat application is confined under state law to that application. The *Noble Manor* Court repeatedly emphasized that any vested development rights accruing from the submittal of a complete plat application are limited to consideration of "that application" itself. *Noble Manor*, 133 Wn.2d at 271, 278, 284-85 (emphasis added). Nothing in the IHDA, applicable City ordinances, and/or state law purports to vest separate, future development applications in any manner as a result of a preliminary plat application.

As noted above, this principle means that any future structures on the project site must comply with applicable building and construction standards in effect when complete building permit applications for those structures are submitted. See *Alliance Investment Group*, 189 Wn. App. at 773. It also means that regulatory standards and mitigation requirements that are specific to applications for separate, future permits (i.e., "Implementing Approvals" as defined under the IHDA) will be identified and imposed when complete applications for such future permits are ultimately submitted. For example, impact fees, utility connection charges and similar monetary assessments are calculated and assessed at the building permit stage of development rather than during the preliminary plat approval process.⁶ **[Condition 2]** Contrary to the Applicant's conflicting statements otherwise,⁷ the Applicant's preliminary plat application is vested only to those

impacts of the plat, have been considered as part of staff's analysis. However, to the extent the reports were submitted after the filing of the Applicant's August 1 and 28, 2017 preliminary plat application and after the Buildout Period, the content of these reports does not operate to retroactively afford any additional vested rights to the Applicant.

- ⁶ The Applicant's plan set (August 1 and 28, 2017) states on the cover sheet, P1.01, Note #7: "The allowable development shown on this plat has been fully mitigated per the IHDA." While in fact, impact fees, utility connection charges and similar monetary impositions assessed during the land use permitting process are not subject to vesting under state law. See, e.g., *Pavlina v. City of Vancouver*, 122 Wn. App. 520, 528-30, 94 P.3d 366 (2004); *New Castle Inv. V. City of LaCenter*, 98 Wn. App. 224, 230-38, 989 P.2d 569 (1999); *Lincoln Shiloh Assocs. v. Mukilteo Water Dist.*, 45 Wn. App. 123, 128, 724 P.2d 1083, 742 P.2d 177, review denied, 107 Wash.2d 1014 (1986). In accordance with applicable standards and procedures under the IMC, the City may consider any documentation provided by the Applicant which would indicate mitigation has been previously paid and sufficient. The relevant timeframe for any such consideration would be when the impact fees and/or other mitigation requirements are actually being imposed—not at the preliminary plat review stage. Nothing in this staff report should be construed as excusing the Applicant's compliance with any and all applicable standards, procedures, and processes which govern and apply to future stages of site development, including without limitation at the building permit stage.
- ⁷ The Applicant's plan set (August 1 and 28, 2017) states on the cover sheet, P1.01, Note #7: "Final Plat and Building Permits are vested to the Development Standards under the IHDA." This conflicts with Applicant statements in the Narrative, such as: "The Plat does not propose construction of any structures; rather, the allocation of Allowable Development included in the Plat will be implemented by future specific development proposals. The Applicant anticipates that the future development on the lots created by this Plat could include buildings reaching up to 8-story heights, some of which may include ground-level retail, with parking provided either on-grade, below-grade or in a parking structure." (Project Narrative, pg. 2-3) And "Specific elements like parking, pedestrian connections and open space areas will be determined in connection with future development proposals to implement the Plat." (Project Narrative, pg. 4). From the August 1 and August 28, 2017 plat application materials it is clear

standards and requirements that are necessary for, and applicable to, the City’s regulatory evaluation of the plat application itself. The Director accordingly rejects the following statement from the Applicant’s plat application, and other, similar statements set forth throughout the Applicant’s application materials, which purports to categorically vest “final plat and building permits” to the IHDA, where such separate, future permit applications have not even been submitted:

7. FINAL PLAT AND BUILDING PERMITS ARE VESTED TO THE DEVELOPMENT STANDARDS UNDER THE ISSAQUAH HIGHLANDS DEVELOPMENT AGREEMENT. THE ALLOWABLE DEVELOPMENT SHOWN ON THIS PLAT HAS BEEN FULLY MITIGATED PER THE ISSAQUAH HIGHLANDS DEVELOPMENT AGREEMENT.

C. The Applicant’s Preliminary Plat Application Is Not Vested to the Processing Procedures Contained in the IHDA.

As previously explained in the City’s April 15, 2019 letter (See Exhibit H), the Applicant’s August 1 and 28, 2017 preliminary plat application is not vested to the processing procedures contained in the now-expired IHDA.

The state vesting statute for plats provides in relevant part that plat applications

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. . . . has been submitted to the appropriate. . . .city. . . . official.

RCW 58.17.033(1) (emphasis added).

Washington courts have clarified that not all local ordinances relating to land are “land use control” regulations for purposes of statutory vesting. Rather, “land use control ordinances” are those that exert “a restraining or directing influence” over land use. *See, e.g., Westside Bus. Park, LLC v. Pierce County*, 100 Wn. App. 599, 606-07, 5 P.2d 713 (2000) (citation omitted). Moreover, “[t]he vested rights rule is generally limited to those laws which can loosely be considered zoning laws.” *New Castle Invs. v. City of LaCenter*, 98 Wn. App. 224, 232, 237-38, 989 P.2d 569 (1999).

Vesting accordingly extends only to substantive zoning ordinances, not to processing requirements or procedural rules. *See, e.g., Graham Neighborhood Assn. v. Pierce County, et al.*, 162 Wn. App. 614, 252 P.3d 898 (2011). Stated differently, “[t]he vested rights doctrine protects developers against the effect of new regulations, not proceedings authorized by existing regulations.” *R.C. Hedreen Co. v. City of Seattle*, 74 F.3d 1246 (9th Cir. 1996) (unpublished) (emphasis added).

Pursuant to this authority, any applicable vesting for the Applicant’s preliminary plat application does not extend to the City’s procedural regulations for processing the plat. The plat application is accordingly being processed in accordance with the current procedures prescribed by IMC 18.19B.270, IMC 18.04.140, IMC 18.04.470 and other applicable IMC provisions. This involves a Community Conference before the Development

that the plat application did not identify any particular building(s) or specific development proposal beyond subdividing the underlying property, configuring the resulting proposed lots, locating street infrastructure, and similar basic matters.

Commission (conducted on August 15, 2019), a pre-decisional open-record hearing before the Hearing Examiner (currently scheduled for March 9, 2020), and a final, appealable decision by the Examiner.⁸ **[Condition 3]**

Keith Niven, AICP
 Development Services Director
 City of Issaquah

VI. Basis for Review and Approval

RCW

According to State law, to be approved, the proposed plat must comply with the requirements of Chapter 18.13 IMC (Subdivisions) and make appropriate provisions, as specified in RCW 58.17, that the public interest will be served by the subdivision and dedication; and that provisions have been made for, but not limited to, the public health, safety, and general welfare; for 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 shall consider all other relevant facts, including sidewalks and other planning features that assure safe walking conditions for students who only walk to and from school. See RCW 58.17.110.

Issaquah Highlands Development Agreement (IHDA)

In addition, the review of the proposed preliminary plat is also based partially on its consistency with the substantive land use controls set forth in the now-expired IHDA, as amended, as well as other sections of the Issaquah Municipal Code and the City’s Comprehensive Plan. The Development Agreement contains a variety of development goals and standards that are organized into individual appendices. Each appendix provides direction to the Applicant generally in the form of performance guidelines and/or development standards for a particular aspect of the project. The appendices are intended to implement the urban village concept for Issaquah Highlands, as envisioned in the Comprehensive Plan and the Development Agreement, while accommodating and integrating development with the site’s unique environmental features and development opportunities.

Not all the appendices or standards contained in the Development Agreement are directly applicable to this preliminary plat application, since the plat deals only with the layout of

⁸ The hearing body previously designated to review preliminary plat applications under the now-expired IHDA was the Urban Village Development Commission (UVDC) which held a public hearing and made a recommendation to the City Council as decision maker. As the City’s April 15, 2019 letter (Exhibit H) indicated, the UVDC was effectively concluded. The City reassigned the UVDC’s duties to the Development Commission, effective November 13, 2019 by Ordinance No. 2879.

lots, tracts, easements, and streets as well as the infrastructure to serve it. Grading is also addressed to some extent. As the preliminary plat was submitted during the Buildout Period of the IHDA, per State law, and as discussed above in Section V, it is vested to those IHDA standards necessary to evaluate the plat application and any specific development proposal identified in the Applicant’s August 1 and 28, 2017 preliminary plat application materials. Conversely, the application is not vested to those IHDA standards which are not directly implicated by the content of the application itself.

The following is a list of which IHDA appendices are necessary for reviewing the plat and which are not, i.e. those appendices which the Director has determined are vested to the extent indicated above.

<i>IHDA appendices used for the plat review and vested</i>	<i>IHDA appendices not used for the plat review and not vested and instead defer to IMC Title 18</i>
App. A: Guiding Principles & Goals ⁹	
App. B: Land Uses ¹⁰	App. B: Land Uses, development standards
App. D: Storm and Ground Water	App. C: Quarry Activities
App. F: Water Service	App. E: Critical Areas
App. G: Sewer Service	App. J: Master Transportation Financing Plan
App. H: Road Design	App. K: Capital Facilities
App. I: SEPA	App. L: Processing
App. S: Urban Design Guidelines ⁹	App. M: Elections & Modifications
App. T: Trails	App. N: Dimension Standards
	App. O: Parking
	App. P: Landscaping
	App. Q: Signs
	App. R: Affordable Housing
	App. U: Parks, Plazas, Woonerfs

Unless expressly identified, approval of this preliminary plat application does not modify any City regulations or the Issaquah Highlands Development Agreement standards which

⁹ The question of whether Appendices A (Goals) and S (Guidelines) are vested or not is essentially an academic question. These appendices were adopted verbatim in the Issaquah Highlands Replacement Regulations IMC 18.19B as Attachments 1 and 2.

¹⁰ Appendix B (Land Uses) contains uses and some development standards. Allowed uses under the IHDA for this property are Residential, Retail, Recreation, Commercial; however, they can only be implemented under the IHDA based on the allowable development a property owner purchased. The Applicant has purchased the allowable development shown on Sheet P1.02 of the August 1 & 28, 2017 Plan Set. The specific implementation of those uses, e.g. density, are not part of the plat application and therefore are not vested.

are in conflict with elements of the proposed plat or application. Modification of the standards or guidelines requires an explicit approval in the Notice of Decision for this application or submittal and approval of a separate Administrative Adjustment of Standards as allowed under IMC 18.19A, Central Issaquah Development and Design Standards per IMC 18.19B.030.

Construction Details

In the preliminary Drainage Report and on some sheets of the preliminary plat a level of detail unnecessary and inappropriate at the preliminary plat stage of review is shown. For instance, on C 300 Sheets sawcut locations, curb types, striping and marking details, streetlight locations, manhole placement, etc... are shown. Furthermore, draft trail and sidewalk easements were provided. These designs and documents have not been reviewed with this application because, until the preliminary plat is approved, it is premature if not impossible to review construction level of detail and the easement legal descriptions, though the City agrees those may be necessary. Conceptual road, trail and utility plans were reviewed for compliance with against the Development Agreement standards as a necessary part of plat review. A detailed review of the roads, trail and utilities will be completed during the Site Work permit(s) review and approval. **[Condition 4]**

MAIN BODY OF DEVELOPMENT AGREEMENT

The Main Body of the IHDA establishes the framework for all requirements of the Development Agreement, as established by IMC 18.06.120(B), Urban Village District – UV, Development Agreement Contents. It also contains the base information for the proposed development (i.e. land allocation, number of residential units, amount of commercial, required mitigation, etc.).

Section 2.2.2 (e), generally describes the intent of the different Development and Expansion Areas. Development Area 4, where this proposed plat is located, is described as the “urban village center”.

The IHDA establishes Allowable Development for the total project and the Master Developer sold that allowable development with the purchase of property. The Applicant has purchased the following allowable development prior to the expiration or termination of the IHDA:

- Commercial: 1,626,337 GSF (Original Commercial except 325,000 SF are 1st Amendment/Mitchell Hill)
- Retail: 225,250 GSF (Original Retail)
- Residential: 3 DU

With the termination of the IHDA, the Replacement Regulations (IMC 18.19B) carried forward this same allowable development as a zoning cap. The plat specifies the distribution of the allowable development the Applicant has purchased (as shown on the August 1 and 28, 2017 Plan Set, Sht P1.02):

ALLOWABLE DEVELOPMENT PER ISSAQUAH HIGHLANDS DEVELOPMENT AGREEMENT (BY BLOCK)						
BLOCK	A (LOTS 1-2)	B (LOTS 3-4)	C (LOTS 5-6)	D (LOTS 7-8)	E (LOTS 9-10)	TOTAL
RETAIL	50,000 SF	50,000 SF	80,000 SF	40,000 SF	5,250 SF	225,250 SF
COMMERCIAL	396,448 SF	365,983 SF	419,697 SF	235,924 SF	208,285 SF	1,626,337 SF
BLOCK TOTAL	446,448 SF	415,983 SF	499,697 SF	275,924 SF	213,535 SF	1,851,587 SF
RESIDENTIAL UNITS	1	1	1			3
* ALLOWABLE DEVELOPMENT MAY BE REALLOCATED BETWEEN BLOCKS BY OWNER, PROVIDED THAT TOTAL ALLOWABLE DEVELOPMENT IS NOT EXCEEDED						

The August 1 and 28, 2017 Plan Set, Sht P1.02 indicates that the “Allowable Development may be reallocated between blocks by owner provided that the total allowable development is not exceeded.” This is not addressed in the IHDA but is consistent with IMC 18.19B.270.E. While not exceeding the Allowable Development is one factor, there are other ones. For instance, placing all 1.8 million sq.ft. for instance on a single lot or even a block could cause the roadway system to fail as it was not designed to serve such an undistributed load. Likewise, the utilities were designed to a particular distribution and may not be able to serve the redistributed uses. Further review with construction permits by the City is necessary to determine if and how infrastructure to serve the redistributed allowable development would be required. Finally, the Replacement Regulations include regulations regarding minimum Floor Area Ratios (FAR) and other development standards which could be impacted by the distribution of allowable development. The current proposal shown in the plat (as indicated above in the chart snippet from August 1 and 28, 2017 Plan Set, Sht P1.02) is not inconsistent with the Replacement Regulations’ minimum FAR requirement. *See* IMC 18.19B.140(C). There are other distributions of allowable development among the lots and blocks proposed by this application that may or may not comply. The City must have an opportunity to review any proposed redistribution of allowable development to ensure it complies with applicable regulations and that infrastructure can serves the redistributed allowable development. **[Condition 5]**

APPENDIX A: PLANNING GOALS & COMMITMENTS

Appendix A provides guiding principles and establishes community expectations for the Issaquah Highlands, including a series of Commitments the Master Developer will meet. In general, the application meets the nine project principles and applicable commitments identified in Appendix A. The following are the nine Principles of the Issaquah Highlands project with selected text (shown in italics) provided for informational or the basis of discussion.

Planning Goals and Objectives

Principle #1 Sustainability and stewardship: build a sustainable and sustaining community; resource-efficient buildings; encourage restoration, conservation, reduction, reuse, and recycling of site and landscape materials throughout the construction and operation of the project; develop mixed-used, pedestrian oriented communities; extend and expand recycling programs.

This principle and the specific bulleted statements do not directly apply to this preliminary plat but will come into play with specific proposals for developing the resulting lots and blocks.

Principle #2 Pedestrian Friendly Design: to establish through land use proximities and circulation infrastructure a community that encourages walking, bicycling, and transit use;

functional and safe walkways and bike paths; access to retail, grocery, public facilities, and offices; give circulation priority to pedestrian scale proximities, activities, and orientation

- *functional and safe walkways and bike paths*
- *give circulation priority to pedestrian scale proximities, activities, and orientation*

A pedestrian system is provided by sidewalks along streets as well as a proposed trail to build out trails in this area. The mid-block crossings discussed under Appendix S below and committed to by the Applicant will further this Principle.

Principle #3 Integrated Diversity: to accommodate a diversity of incomes, household makeups, lifestyles, activities, land uses, public and private spaces, and architectural expressions in an integrated mix that enhances the richness of peoples’ lives.

This principle and the specific bulleted statements do not directly apply to this preliminary plat but will come into play with specific proposals for developing the resulting lots and blocks though the land uses and densities that are identified in the plat will complete the diversity and vision of the Urban Village.

Principle #4 Community Values: while respecting individual privacy, create a very sociable public realm that enhances the community life of children, adults and seniors and promotes common values and shared responsibilities; integrate a variety of safe places for children’s play and exploration, including parks, community gardens, natural play spaces, and safe streets.

This principle and the specific bulleted statements do not directly apply to this preliminary plat but will come into play with specific proposals for developing the resulting lots and blocks.

Principle #5 Civic Celebration/Community Amenities: give special prominence, maximum public exposure, and extraordinary architectural quality to civic and common community spaces and buildings; provide an overall urban design in which people can orient themselves around natural features and civic buildings.

This principle and the specific bulleted statements do not directly apply to this preliminary plat but will come into play with specific proposals for developing the resulting lots and blocks.

Principle #6 Identity within local context: give Issaquah Highlands a unique and memorable identity as a neighborhood district of the City of Issaquah.

This principle and the specific bulleted statements do not directly apply to this preliminary plat but will come into play with specific proposals for developing the resulting lots and blocks.

Principle #7 Self-sufficiency and Regional Contribution: create a complete community that accommodates living, working, learning, playing and nurturing while contributing to the richness, opportunity, and quality of life of the region.

- *accommodate live/work, corporate, professional, and artisan workplace and employment opportunities for Issaquah Highlands, Issaquah, and Sammamish Plateau residents*

This principle and the specific bulleted statements do not directly apply to this preliminary plat but will come into play with specific proposals for developing the resulting lots and blocks though the land uses and densities that are identified in the plat will provide an opportunity to implement this principle.

Principle #8 Vitality, Flexibility and Collaboration: grow a vital and economically viable community; exploit strategic I-90 location; ongoing collaboration between private, public agency, residents, and citizens at large.

This principle and the specific bulleted statements do not directly apply to this preliminary plat but will come into play with specific proposals for developing the resulting lots and blocks.

Principle #9 Economy and Serviceability: adequate, safe, and reasonable circulation infrastructure to accommodate anticipated use with a minimum of paving.

- *adequate, safe and reasonable circulation infrastructure to accommodate anticipated use with a minimum of paving*

This plat provides the infrastructure to serve the proposed lots and blocks. By using the adopted standards, the principle achieves the balance between adequate and reasonable.

Additionally, some of Appendix A’s Goals and Objectives are relevant in the review of the plat, primarily associated with Circulation, and these are discussed in the following section.

Issaquah Highlands Circulation

Goal: Plan circulation to provide convenient and safe bicycle and pedestrian access, and accommodate public transit.

A. Objective: Circulation at Issaquah Highlands should give priority consideration to bikes, pedestrian and intra and regional transit.

Collector Arterial Roads

Goal: Collector arterials should be safe, attractive, and appropriately designed and accessed to handle the expected traffic loads.

Neighborhood Streets

Goal: Neighborhood streets should be designed not just to provide safe and convenient access for vehicles and pedestrians, but to be an integral part of the character of each neighborhoods sociable public realm.

A. Objective: Neighborhood streets at Issaquah Highlands should be as narrow as possible and still maintain adequate travel ways, safety and service vehicle access, and on street parking.

B. Objective: Issaquah Highlands neighborhood streets should provide safe and attractive designs where the whole composition of streets, trees, parkways, walks, front yards and front porches define and contain a common space for residents to stroll, meet, play, and socialize

Generally, the plat achieves these Goals and Objectives. Further review will occur with construction permits as well as future development permits.

APPENDIX B: LAND USE STANDARDS

Appendix B identifies allowable uses for each Development Area; the project is located in Development Area 4. The proposed uses shown on August 1 and 28, 2017 Plan Set, Sht P1.02 comply with allowed uses as shown.

Area	Allowed Uses	Complies?
Development Area 4	Residential, Retail, Recreational, and Commercial	Yes

APPENDIX D: SURFACE WATER MANAGEMENT STANDARDS

Appendix D establishes standards for surface water management. Storm drainage facilities will comply with the 2009 King County Surface Water Design Manual (KCSWDM) and the City of Issaquah 2011 Addendum (per the Development Agreement), which together identify the requirements for the storm water detention, treatment and conveyance systems.

A Preliminary Stormwater Report by KPFF dated July 2017 was prepared for the project; subsequently, an updated Preliminary Stormwater Report by KPFF dated February 2019 was received with the March 5, 2019 resubmittal. This February 2019 report has been reviewed but it is not fully accepted as part of the preliminary plat review. While the February 2019 report addresses some of the City’s concerns such as removing the storm facilities from the right of way, the Applicant’s design team incorrectly states that existing public storm facilities in the Issaquah Highlands were designed to accommodate the proposed improvements. None of the existing storm water systems were designed to accommodate this development because the previous property owner, Microsoft, designed and built a system completely separate from the City’s system. While existing capacity may exist within the public downstream systems, no analysis has been provided to demonstrate that. Also existing discharge conditions to the public storm water system are temporary and only are part of interim measures put in place to facilitate the development of the Polygon’s southernmost development. These measures don’t grant or vest the proposed development discharge rights.

The Applicant’s design team has determined infiltration is not feasible. Compliance with storm flow control and treatment requirements will be achieved through a combination of onsite vaults, ponds, and cartridge filters. Runoff from pollution generating impervious surfaces will require Sensitive Lake Water Quality Treatment per the KCSWDM.

Additional downstream analysis may be required consistent with the KCSWDM Core Requirement No. 2 depending on a more detailed review of the proposed methods of stormwater management and points of discharge. **[Condition 6]**

All on-site storm facilities serving the new development parcels will be privately owned and maintained, and improvements within public Right-of-way will be publicly owned and maintained. Note that with the construction of new roadways, it is the Applicant’s responsibility to detain and treat stormwater runoff from the right of way. Any detention or treatment facility that receives public stormwater, such as from the new roadways the Applicant is building, must be public. This could be accomplished by, for instance, placing the on-site facility in a separate tract, which is dedicated to the City. **[Condition 7]**

While the preliminary 2017 KPFF Storm Report indicates that storm detention facilities will be provided within “development lots, blocks or new streets”, and sheet C-300 shows a detention facility within NE Federal Drive, locating detention facilities within the public right-of-way is only allowed where no other feasible alternative is available. Given the size and configuration of the proposed lots and blocks, stormwater can be accommodated onsite. Though the 2019 report shows all vaults outside of right of way, a condition is established to ensure clear expectations. **[Condition 8]**

Both the 2017 and 2019 KPFF Storm Reports indicate that portions of the development may discharge to the Upper Reid pond without detention or water quality treatment. The report has also assumed that the fee in lieu for this discharge would be \$0.628 per impervious square foot based on a proposed but unexecuted agreement from 2016. It is the Applicant’s responsibility to detain and treat stormwater to meet City standards, which require detention and treatment. With each future land use and construction permit, the Applicant shall demonstrate that each parcel meets this requirement prior to approval of parcel-specific development plans. The Applicant has indicated an interest in partnering with the City to use city-owned stormwater facilities in the area. Although this is one alternative that might be utilized to meet this requirement, there is no agreement in place at this time to use City facilities.

By way of example, Polygon has provided flow control and water quality treatment on their property and negotiated an agreement with the City to have the City take a portion of their treated water beyond what they control and detain on their property. As with Polygon, this would be a separate agreement negotiated between the City and the property owner. This is not part of the platting process but a separate negotiation between the parties based on the City’s excess capacity and the property owner’s facility design capacity. **[Condition 9]**

In the Camp Creek Landslide White Paper Analysis dated May 2004 (prepared by the Issaquah Highlands Master Developer and approved by the City) the subject parcel is part of a development area limited to a 100-year storm discharge limit of 4cfs. This development area consists of the three parcels, one of which is the subject of this proposed plat. Lot B, the property being platted, is 35.75 % of the total area. Based on the area of the subject property, its prorated share is a maximum stormwater discharge volume of 1.43cfs, or 35.75% of 4 cfs.

Generally, the plat, with conditions, complies with the stormwater standards, at a preliminary plat level of review. Further review will occur with construction permits as well as future development permits.

APPENDIX F: WATER

Appendix F establishes standards for potable water service, along with City standards for construction design. The Appendix requires that landscaping and irrigation shall incorporate water conservation. The water conservation for all landscaping shall be reviewed with future Site Work and or Landscape permits. **[Condition 10]**

Water supply is available from the City-owned water system. There is sufficient capacity in the existing system for this proposal and no off-site improvements are necessary. All public pipelines must be installed within rights-of-way or within public utility easements. Any necessary easements must be recorded prior to City acceptance of the utility for service.

Hydrant locations will be reviewed and approved by the City and Eastside Fire and Rescue as part of the Site Work Permit. Hydrants where possible should be located to minimize impacts to on-street parking; curb bulbs or similar devices that prevent drivers from parking in front of hydrants will be provided.

Generally, the plat, with conditions, complies with the water standards at a preliminary plat level of review. Further review will occur with construction permits as well as future development permits.

APPENDIX G: SEWER

Appendix G establishes standards for sewer service within Issaquah Highlands, along with City standards for construction design.

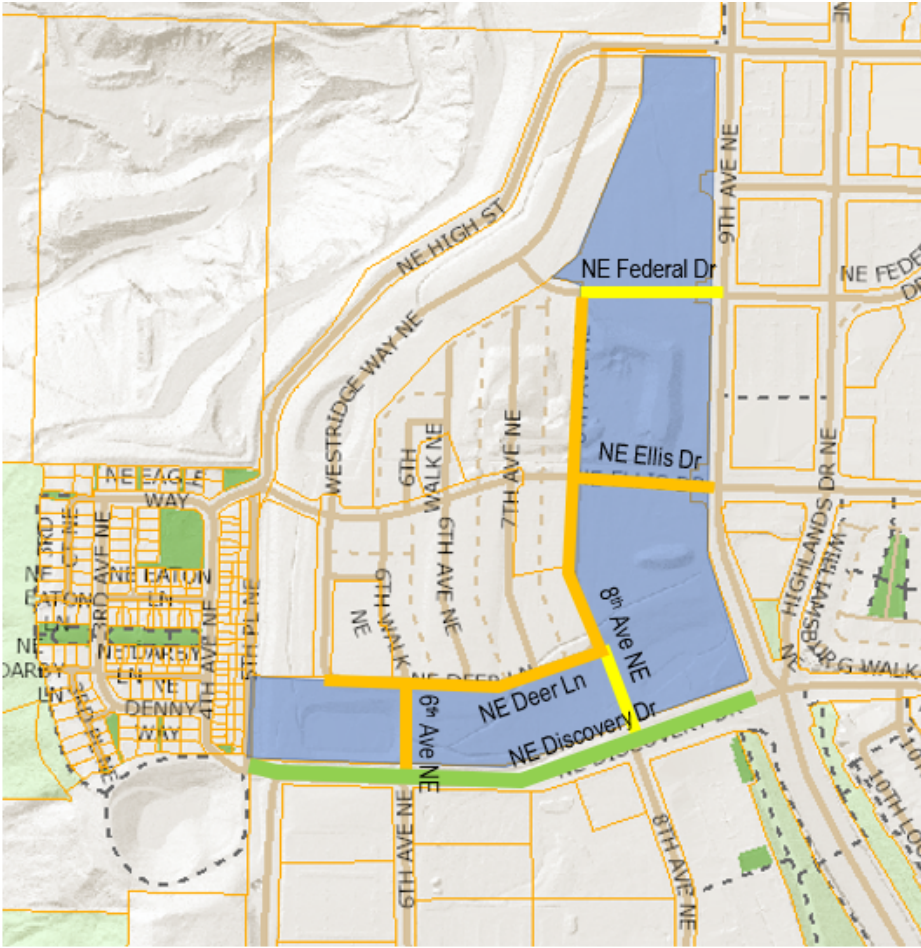
A comprehensive sewer collection system has been installed in Issaquah Highlands to convey sewage directly to regional METRO facilities. Sewer service is available from the City-owned sanitary sewer system in the adjacent streets. There is sufficient capacity in the existing system for this proposal, and no off-site improvements are necessary. All public pipelines must be installed within rights-of-way or within utility easements. Any necessary easements must be recorded prior to City acceptance of the utility for service.

Generally, the plat complies with the sewer standards, at a preliminary plat level of review. Further review will occur with construction permits as well as future development permits.

APPENDIX H: STREET STANDARDS

Appendix H establishes standards for all streets and alleys, whether public or private, within Issaquah Highlands, along with the City Street standards for construction design. Pedestrian and bicycle circulation facilities that are provided by elements of streets are also discussed here.

Access to the site will be provided by the NE Highlands Drive/9th Avenue NE couplet as well as the segments of adjacent streets constructed by Polygon for their Westridge projects, including NE Ellis Drive, a portion of 8th Avenue NE, NE Deer Lane, and 6th Avenue NE (formerly 7th Avenue NE). These roadways straddle the property line between Polygon and the Applicant's property. Dedication is discussed below. Further access will be provided by completing the street grid. See graphic and description below.



Above: Blue is subject property; yellow lines are roads that must be completely built by the Applicant as part of implementing this plat; green line is a road that must be completed by the Applicant as part of implementing this plat; orange lines are roads being built by the adjacent property owner in partnership with the Applicant, but may need to be modified as incomplete roads are completed by the Applicant.

The adjacent property owner, Polygon, as well as the Port Blakely Communities, Master Developer, have built some of these adjacent roadways. The following summarizes the road name, classification, and status; more details on compliance with the standards is provided after the chart. Traffic studies are reviewed below the compliance with standards.

Street	Proposed Classification	Status
NE Federal Drive	Sub-collector 1	<i>Incomplete</i> East and west of the subject property, this roadway has been built or permits issued for its construction. No

Street	Proposed Classification	Status
		portion within the property has been constructed or permitted, and it will need to be fully built as part of the parcel's development. This is shown in the August 1&28, 2017 plans on Sht C-300, C-307.
NE Ellis Drive	Sub-collector 1	This roadway has been permitted and built by Polygon as part of the Westridge development. Landscape compliance will be reviewed with construction permits. *
8 th Avenue NE	Sub-collector 1	<i>Incomplete</i> A portion of 8 th Ave NE has already been constructed by Polygon. The remaining section of 8 th Ave NE that will connect NE Deer Ln and NE Discovery Dr has not been constructed, and it will need to be fully built as part of the parcel's development. This is shown in the August 1&28, 2017 plans on Sht C-301, C-307.
6 th Avenue NE (formerly 7 th Avenue NE)	Sub-collector 1	This roadway has been permitted and built by Polygon as part of the Westridge development. Additional modification may be required to intersect with NE Discovery Drive. Landscape compliance will be reviewed with construction permits. *
NE Deer Lane	Sub-collector 1	This roadway has been permitted and built by Polygon as part of the Westridge development. Landscape compliance will be reviewed with construction permits. *
NE Discovery Drive	Minor Arterial Collector Arterial Neighborhood Collector 1	<i>Incomplete</i> This roadway was partially permitted and constructed by Microsoft, the previous property owner. It is the responsibility of the Applicant to construct and build their frontage improvements to complete the northern portion of the roadway. This is incorrectly shown in the August 1&28, 2017 plans on Sht C-302-304, C-307.

* Sht L1.01 of the August 1 and 28, 2017 Plan Set shows that frontage improvements are by others (purple); however, the adjacent property owner who is building these improvements has indicated in their landscape permits that the Applicant is installing the landscape including street trees. This is a apparently a private arrangement between the adjacent property owners; however, street trees and landscape plantings are required per the Development Agreement and will be addressed with future permits for construction.

The roads listed as *Incomplete* above are reviewed for the appropriateness of the street classification and compliance with the standards.

Sub-Collector Standard:

All proposed streets except Discovery Drive are proposed as Sub-Collector 1 streets. For the two incomplete roads where Sub-Collector 1 is being applied, the standards are:

	ROW width	Pave-ment width	# of Lanes	Bike Lane	On-street Parking	Planting Strip **	Side-walk	Travel Lane width
Development Agreement	44-48 ft [52 ft*]	30 ft [34 ft*]	2	None	Both sides	4 ft min.	5 ft both sides	15 ft [17 ft *]
Plat Drawing Proposal NE Federal Dr 8 th Ave NE	61 ft	36 ft	2	None	Both	4.5 ft	5.5 ft	18 ft
	52 ft	34 ft	2	None	Both	4 ft	5 ft	17 ft
Plat Narrative for both NE Federal Dr & 8 th Ave NE	52 ft	34 ft	2	None	Both	4 ft	5 ft	17 ft

* Travel lane width assumes 9 ft travel lane and 6 ft on-street parking, equaling 15 ft. AMM07-006IH allows an Applicant to choose to build on-street parking at 7 ft in width; AMM16-00002 increases the travel lane widths of Sub-Collector 1 to 10 ft. This would result in an allowable travel lane width of 17 ft which is shown in the chart above.

** Tree Wells are shown but not dimensioned in the plans. This review assumes they are 4 ft x 6 ft interior dimensions, as the drawings scale.

The above table demonstrates that the proposal for 8th Ave NE complies with the street standard, while the Federal Drive extension has two elements that may be larger than the standard: sidewalk widths (5.5 ft rather than 5 ft) and parking width (8 ft rather than 7 ft). The City is supportive of both increases for the location in which they are shown. However, these must be reviewed and approved through an Administrative Adjustment of Standards, using CIDDS 1.1 or 6.3. However, these requests have not been submitted for consolidated review per IMC 18.04.160. **[Condition 11]**

NE Discovery Drive:

Although there is an existing street called NE Discovery Drive, it is only partially built. Per the City’s Street Standards, every project must construct frontage improvements. The Narrative excludes Discovery Drive as one of the streets to be addressed in the plat, while the drawings show the street section for construction of various segments of Discovery Drive the proposed street classifications are found in the Traffic Impact Analysis Response to Comments dated March 4, 2019 and as corrected above.

Discovery Drive was permitted and partially constructed by Microsoft at the time it was beginning construction of its campus, which was never completed. (This plat is located in a portion of that Microsoft campus property.) Though the Site Development Permit for the Microsoft Campus has expired, the context and background of the Administrative Minor Modifications (AMM) that led to the existing form of Discovery Drive is informative. With the Microsoft proposal, Discovery Drive was divided into three segments, which are summarized below:

East to West	ADT	ROW width	Pave-ment width	# of Lanes	Travel Lane width	Bike Lane	On-street Pkg	Land. Strip	Side-walk	Median
Highlands Dr to 8 th Ave										
Microsoft Campus Arterial		125 ft	84 ft	4 plus 3 turn lanes	12 ft	None	None	14.5 ft both sides	6 ft both sides	None [built w/ median]
Development Agreement: Minor Arterial	15,001 – 40,000	90 ft	71 ft incl. median	4	11 ft	5 ft	None	4.5 ft min both sides	5 ft both sides	17 ft
Proposed: No change from extg (estimated) ****		125 ft	85 ft incl. median	2 plus 3 turn lanes	12 ft	None	None	14.5 ft	6 ft	Varies 12.5 – 25 ft
8 th Ave to 6 th Ave										
Microsoft Campus Arterial Transition (based on Minor Arterial)		110 ft	55 ft incl. median	3 plus 2 travel / turn lanes	11 ft	None	None	14.5 ft both sides	6 ft both sides	14 ft
Development Agreement: *** Collector Arterial	4,001 - 15,000	75 ft	53 ft	2	13 ft	5 ft	None	6 ft min	8 ft for comm'l	17 ft
Proposed Sht C-303, Sec. E Sht C-307, Sec. E Sht C-304, Sec. F Sht C-307, Sec. F		** extra: 16.3 ft 8.1 ft	35.3 ft 17 ft	2? 2?	unclear	unclear	unclear	4 ft 4 ft	5 ft 5 ft	Existing
6 th Ave to west edge of project										
Microsoft Campus Collector 2		43 ft	22 ft	2	11 ft	None	None	5.5. ft	5 ft	None
Development Agreement: Neighborhood Collector 1 *	1,001 – 5,500	46 ft	30 ft *	2	9 ft *	6 ft *	None	4 ft min.	6 ft *	None
Proposed Sht C-302 Sht C-307, Sec. C Sht C-307, Sec. D		** extra: 28.6 ft 13.4 ft	23 ft 38 ft	unclear	unclear	unclear	unclear	4 ft	5 ft	None

* AMM07-006IH allows an Applicant to choose to build on-street parking at 7 ft in width
AM08-004IH alters Neighborhood Collector 1 to 9 ft travel lanes, 6 ft bike lanes, 6 ft sidewalks, max ADT 5500

** Existing right of way is significantly wider than the proposed improvements

*** Collector Arterial is the intermediate/transitional standard between Minor Arterial and Neighborhood Collector

**** August 1 & 28, 2017 Plan Set, Sht 203, incorrectly depicts existing frontage improvements as fully paved from back of sidewalk to curb; whereas, in fact it has a 6 ft sidewalk and 14 ft planting strip consistent with standards.

Traffic and some road components such as on-street parking and bike lanes are typically the determinants of which road classifications are appropriate. The February 6, 2018 Issaquah Highlands Town Center Impact Analysis (submitted February 7, 2018) and March 4, 2019 Traffic Impact Analysis (submitted March 5, 2019) were received in response to comments. The March 4, 2019 document identifies the Average Daily Trips (ADT) for NE Discovery Drive. This is necessary to confirm that the road classification elected by Microsoft is still the appropriate one for this plat. Because the easternmost and central segments of Discovery Drive have a bike lane, the Neighborhood Collector should continue it, ensuring continuity and safety for cyclists in a busy corridor, so the Neighborhood Collector 1 standard which includes a bike lane is proposed. The August 1 and 28, 2017 plan set show one configuration for this westernmost segment of Discovery Dr; the March 4, 2019 Traffic Impact Analysis (TIA) shows another. At a planning level of review, the March 4, 2019 TIA is most consistent with the road standard and circumstances; however additional review is required with construction permits. **[Condition 12]** The ADTs provided for NE Discovery Drive are consistent with the road classifications below, per the IHDA. It should also be noted that the road classifications do not specify intersection control or where a turn lane is necessary. The City’s Street Standards would be used.

East to West	ADT	ROW width	Pave-ment width	# of Lanes	Travel Lane width *	Bike Lane	On-street Pkg	Land. Strip	Side-walk	Median
Highlands Dr to 8 th Ave										
Development Agreement: Minor Arterial	15,001 – 40,000	90 ft	71 ft incl. median	4	11 ft	5 ft	None	4.5 ft min both sides	5 ft both sides	17 ft
8 th Ave to 6 th Ave										
Development Agreement: Collector Arterial	4,001 - 15,000	75 ft	53 ft	2	13 ft	5 ft	None	6 ft min	8 ft for comm'l	17 ft
6 th Ave to west edge of project										
Development Agreement: Neighborhood Collector 1 **	1,001 – 5,500	46 ft	30 ft	2	9 ft	6 ft	None	4 ft min.	6 ft	None

* Fire codes require 20 ft fire lanes. Though typically one 10 ft lane in each direction, this can be met with other combinations such as two 10 ft lanes headed in one direction between a median and curb or a travel lane and bike lane.

Minor Arterial: 2 – 11 ft lanes on the north side of the median comply.

Collector Arterial: based on Issaquah Highlands’ historical adopted standard of 18 ft for fire lanes, 13 ft travel and 5 ft bike lane combine for a total of 18 ft. on the north side of the median complies.

** Classifications were provided in a Traffic Impact Analysis Response to Comments dated March 4, 2019; submitted March 5, 2019. The westernmost section was classified as a Neighborhood Arterial; however, the IHDA doesn’t have a Neighborhood Arterial but it does include a Neighborhood Collector.

Pedestrian and Bicycle System:

All of the proposed vehicular circulation elements proposed in this plat include sidewalks on both sides of the street, providing an important level of connectivity for people on foot. A segregated bicycle lane is proposed on Discovery Drive but for all other streets in the plat, bicycles are sharing the travel lane with cars. This is consistent with the Development Agreement.

Park Drive:

Though Park Drive has a right-of-way stub from 9th Ave NE and the Westridge North Single-Family plat is building a half block of Park Drive to the west of this property, the Applicant has declined to complete the grid. The vehicular connection would improve connectivity. The Applicant has indicated in the Narrative that it may choose to build the vehicular connection but that the decision is at their discretion. If the road connection is built, the selected road classification(s) must communicate the change from one Neighborhood Type to another, one use to another s the single-family neighborhood to the west is House & Garden. This could be achieved by extending the road built to the west.

Other Standards for vehicular circulation that are not depicted as this time:

The Narrative also refers to the right to build future projects with Character Streets and/or alleys. While the IHDA includes an alley standard, no alleys are shown with this plat. Any proposal for an alley would be reviewed against the applicable standards in place at the time of application. Character Streets have been built in the adjacent Westridge projects. This street classification was approved for use in the Lakeside Development Agreement and allowed for use in the Westridge projects through modification of standards. Likewise, a future proposal incorporating Character Streets must be evaluated at that time against adopted City standards or any adjustment processes available. **[Condition 13]**

Traffic:

A preliminary traffic analysis memo dated July 28, 2017 has been prepared and submitted for this project. Additionally, a March 4, 2019 Traffic Impact Analysis Response to Comments together with a March 5, 2019 Traffic Study was submitted. The preliminary plat depicts Allowable Development granted by the IHDA. Projects in Issaquah Highlands must construct localized frontage and intersection improvements to address public safety, functionality, and emergency response operational needs. The proposed modification to the signal at NE Discovery Drive and 8th Avenue NE to restrict the northbound travel as identified in the February 6, 2018 Traffic Report is not acceptable. Further analysis to assess the operational impact of activating/extending certain legs of intersections at Federal & 9th and 8th and Discovery is necessary. This analysis will ensure that level of service standards, sight distance requirements, and full operation of all legs of the intersection are evaluated and meet City standards. **[Condition 14]**

Sight distance: A standard part of the review of a proposed road system includes evaluation of compliance with the City's sight distance requirements. Compliance will be reviewed during Site Work permit(s) and permanently established with the Final Plat if any restrictions are needed over private property. **[Condition 13]**

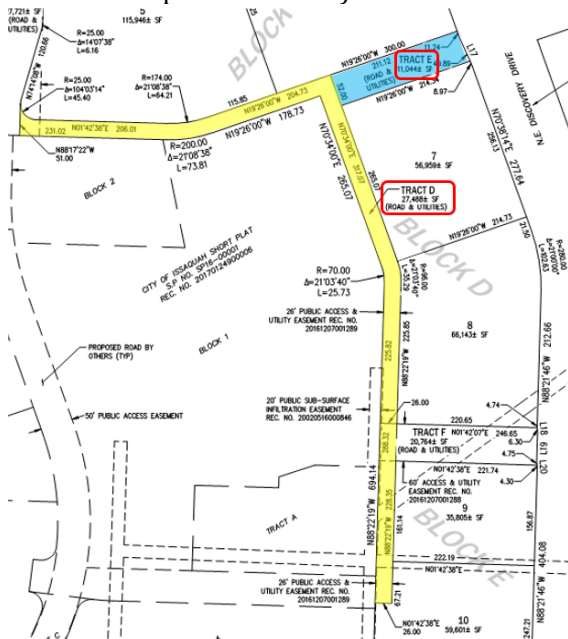
Traffic Covenants: In advance of this action, the following Traffic Covenants impacting the development were terminated (Rec. No. 20131018000935): Notice of Traffic Covenants

(20020520001680), Traffic Standards Covenant (Rec. No. 20061207000107) and Traffic Standards and Town Center Amenities Covenant (Rec. No. 20020520001679). These covenants benefitted the unrealized Microsoft Development and the owner of the subject property at time determined that they were no longer relevant.

Curb bulbs: Curb bulbs serve several purposes. First at pedestrian crossings, whether for intersections, mid-block crossing, or trail crossings, they allow pedestrians to be at the travel lane edge of the on-street parking or the travel lane, which improves the sightlines between pedestrians preparing to cross the street and drivers. Second, they can be used to preclude parking in front of hydrants and near intersections, parking isn't allowed. However, they can impact turning movements for larger vehicles such as fire trucks and school buses. The Applicant is encouraged to provide curb bulbs in the locations identified above, if the curb bulbs can be placed without impacting the functionality of the road for these larger vehicles. **[Condition 15]**

Dedications

The August 1 and 28, 2017 Narrative states that certain roads will be dedicated as right-of-way (see Narrative, page 4); however, Deer Ln is not included in this list. The adjacent property owner, Polygon, is building the following roads: NE Ellis Dr, 8th Ave NE between NE Federal Dr and NE Deer Ln, 6th Ave NE (shown as 7th Ave NE) between NE Deer Ln and NE Discovery Dr, Deer Ln. Polygon will be dedicating roads to the City where they are located on Polygon property; however, half of Deer Ln and 8th Ave between Federal Dr and Deer Ln are located on the Applicant's property and the other half is on Polygon's property. Based on the statements in the Narrative and other agreements discussed below it is assumed this is an oversight. (Narrative: "The streets to be constructed along the shared property line between the subject property and the adjacent Polygon project shall be dedicated as public streets.")



Left: Location of tracts discussed above. 8th Ave NE between NE Deer Ln Tract E is blue, Tract D is yellow. Note north is to the left.

As part of the improvements of the NE Ellis Drive extension, constructed by Polygon NW (Grantee), Polygon received an Access and Utilities Easement Agreement dated March 11, 2016 from IHIF Property (Grantor), recording number 20160315000674. Provision 6 of this document state “Relocation and Dedication. Grantor and Grantee agree that, prior to Grantee’s constructions of improvements in the Easement Area, the Easement Area may be relocated upon request of Grantor. Upon completion of construction of the utilities and private roadways in the Easement Area in accordance with the terms of this Easement, and final acceptance and approval of such construction by the City of Issaquah, and upon written request of the Grantee and City of Issaquah, Grantor shall dedicate and convey the Easement Area to the City of Issaquah.”

As part of the improvements of the 6th Avenue NE extension (formerly 7th Avenue NE), constructed by Polygon NW (Grantee), Polygon received an Access and Utilities Easement Agreement dated March 11, 2016 from IHIF Property (Grantor), recording number 20160315000673, which was subsequently amended on December 2, 2016, recording number 20161207001288. Provision 6 of this document has the same commitment for dedication as noted above in the NE Ellis Drive easement agreement.

As part of the improvements of the 8th Avenue NE and NE Deer Lane extensions, constructed by Polygon NW (Grantee), Polygon received an Access and Utilities Easement Agreement dated December 2, 2016 from IHIF Property (Grantor), recording number 20161207001289. Provision 6 of this document has the same commitment for dedication as noted above in the NE Ellis Drive easement agreement.

With the above-stated conditions, the proposed plat is consistent with applicable street requirements and the Development Agreement. Additional detailed review will occur with the permits for construction associated with this plat.

APPENDIX I: SEPA COMPLIANCE

The proposed urban development within the Issaquah Highlands project area has been addressed and analyzed in prior environmental documents. Pursuant to Step 3 of Appendix I, the City acknowledges the EIS satisfies the SEPA requirement and may, pursuant to the procedures and standards set forth in this Appendix I, require measures beyond those in the Agreement, only to the extent:

- An implementing approval or requested modification exceeds the project envelope;
- It is concluded, pursuant to WAC 197-11-600(3)(b), that substantial changes have been made to the project; or,
- It is concluded that there is new information indicating probable significant adverse environmental impacts.

The City has determined this proposal as an Implementing Approval, as defined in Appendix I of the Development Agreement, is within the Project Envelope. As specified in Appendix I, the existing Grand Ridge Environmental Impact Statement shall be utilized and no additional or supplemental State Environmental Policy Act (SEPA) checklist or threshold determination is required when an application for an Implementing Approval is within the Project Envelope. The proposed preliminary plat meets the Project Envelope as

defined in the relevant portions of the sections of the Development Agreements and is, therefore, consistent with the Development Agreements.

APPENDIX S: URBAN DESIGN GUIDELINES

The design guidelines comprise a key part of defining the vision for Issaquah Highlands. The design guidelines serve the overall purpose of creating a framework that ensures the buildings, the landscape, the circulation system, the social gathering places, and the limited use open spaces and private parks relate to one another in a way that achieves the Issaquah Highlands vision as described both in this Appendix and Appendix A: Goals and Objectives. However, with a preliminary plat they primarily apply in reviewing the circulation system. Subsequent permits will also use the Neighborhood Type for review of other aspects of Appendix S.

The proposal is in an area designated as Traditional Townscape Neighborhood Type. The proposal is consistent with many of the relevant Urban Design Guidelines or UDG of the House and Garden neighborhood type:

Circulation: (all material quoted from Appendix S)

Arterial Streets:

Encourage: An interconnected system

Neighborhood Streets:

Street patterns should interconnect and encourage easy access from one neighborhood to another but also discourage high speed travel. Individual streets should be as narrow as practicable while maintaining adequate travel ways and emergency and service vehicle access. An interconnected pedestrian system of sidewalks, paths, trails, and low volume streets should provide for continuous walking routes through and between different neighborhoods. Similarly, bicycle lanes and low-volume streets should be planned to provide an interconnected system of bicycle routes.

Encourage: Interconnected but low speed neighborhood streets

Encourage: Narrow streets and alleys

Encourage: On-street parking for guests, visitors and business patrons

Discourage: High speed streets, such as unnecessarily wide streets, straight, long streets or streets without parking

Discourage: Unconnected pedestrian routes

Trails:

The primary pedestrian circulation system at Grand Ridge coincides with the street system, since sidewalks are a required element of all streets. Where the street system does not provide a continuous pedestrian route, trails may provide the pedestrian connection. Thus trails are provided within Issaquah Highlands primarily for pedestrian circulation, not as wilderness paths. However, the trail system should provide for a variety of experiences such as through wooded areas, parks, residential neighborhoods, and commercial and shopping areas, and along wetlands and storm water collection ponds. Trails also may provide for non-motorized (bicycles, roller blades, roller skates, skate boards, etc.) connections within the community, when the street system does not.

By interconnecting at various locations, the trail system should provide continuous pathways through the community, to new and existing trails, adjacent rural open space, and to major activity centers such as large parks, schools, recreational facilities and shopping areas.

Traditional Townscape Neighborhood Type:

(Each Neighborhood Type contains guidelines for Neighborhood Character, Circulation including parking, and Landscape. This Staff Report focuses on Circulation.)

“Neighborhood streets in the traditional townscape neighborhood tend to be streets set in a geometric pattern with sidewalks and on-street parking. ... The vehicular circulation system is generally one of a network of interconnected streets. ... The pedestrian circulation system consists primarily of a grid of interconnected sidewalks along the streets; the grid may be broken occasionally by a cross-connecting walkway. ”

“On-street parking should be used to meet retail and commercial parking needs to the fullest extent possible, without causing parking “spill over” unnecessarily into adjacent predominantly residential areas.”

Circulation:

Encouraged: A geometric pattern of interconnected streets

Village Mixed Use District:

“The Village Mixed Use District combines residential, retail, and/or commercial uses either in the same building or in close proximity in such a way that their diversity and activity is experienced by all users. The distinguishing characteristic of this overlay district is that it contains a substantial amount of retail and commercial uses such as when retail businesses, restaurants, and/or offices are located on the ground floor of an office or residential building or when retail businesses are located across a plaza or street from residential or office uses.”

“Circulation Guidelines: ... Street patterns should impede rapid vehicular travel and contain traffic-calming techniques such as narrow streets or woonerfs, varied paving materials, landscaped areas, and through-block pedestrian crossings. The street character should be pedestrian-friendly by including elements such as street trees, short pedestrian crossings, street furniture, and lighting appropriate for both pedestrians and business activity.”

Staff Analysis: The proposed street system is interconnected, geometric, and generally narrow. In some cases, on-street parking has not been incorporated as encouraged above due to the selected street standards not requiring it and the Applicant declined to add it. The Applicant has committed both in the drawing set and the Narrative to provide mid-block crossings.

August 1 and 28, 2017, Plan Set, Sht P1.01, Note 9: *“Pedestrian access will be provided through mid-block crossings in each block. Locations to be determined at final design.”*

August 1 and 28, 2017, Narrative, Appendix T: *“Each of the Blocks ... shall have a mid-block pedestrian connection, the exact configuration and alignment of which shall be determined in connection with implementing development proposal(s) for that block.”*

This is appropriate and necessary in implementing a pedestrian friendly community.

[Condition 16]

Generally, the plat, as conditioned, achieves these urban design guidelines. Further review will occur with construction permits as well as future development permits.

APPENDIX T: TRAILS

The purpose and intent of the Issaquah Highlands Trail Appendix is to encourage a variety of experiences for pedestrians, bicycles, and other non-motorized modes of transportation within Issaquah Highlands through trails.

Under Appendix H, Roads, is the discussion of pedestrian and bicycle facilities which are incorporated into components of the street section. Appendix T, Trails, covers proposed facilities that are separate from the road system. The Applicant has proposed to continue a trail that is under construction to the north; see location on graphic below.



Above: Blue highlight shows the proposed trail location in Lot 10 of Block E (North is to the right). Dashed blue line represents the trail under construction to the north, which this trail connects to.

The Applicant has proposed a “forest trail” with a “crushed surfacing”; see August 1 & 28, 2017 Plan Set, Sht C-306. In fact, this is the continuation of a trail for mixed pedestrian/bicycle users and so a Multi-Purpose trail standard is appropriate.

A Multi-purpose trail is described in Appendix T as: “Multi-purpose trails are high-use paved trails designed to provide recreational opportunities for pedestrians and non-motorized wheel users.” As this trail connects from a trail system from the north along Highlands Dr to High St to the trail shown above, this trail will have both a high-use and the need to serve both pedestrians and bicyclists. Other than a Combined Use trail, which is essentially an access road that also serves pedestrians and bicyclists, there is no other IHDA trail standard that serves both users.

In summary, the proposal and the requirements for trails are:

Trail Element	Allowed	Proposed	Complies?
Type	Multi-purpose	Forest Trail	No
Width	Corridor: 22-24 ft Tread: 10-12 ft Shoulders: 2 ft Borders: 4 ft	Corridor: 5 ft Tread: 5 ft Shoulders: 0 ft Borders: 0 ft	No
Surface	Asphalt Concrete Special Paving	Crushed Rock	No
Users	Pedestrian Bicycle		No

Generally, the plat, with conditions, complies with the trail standards at a preliminary plat level of review. Further review will occur with construction permits as well as future development permits. **[Condition 17]**

COMPREHENSIVE PLAN COMPLIANCE

Applications submitted for the Urban Villages need to not only be consistent with the applicable Development Agreement and Issaquah Municipal Code, but must also demonstrate consistency with the Issaquah Comprehensive Plan. See Exhibit J for excerpts from the Comprehensive Plan that illustrate consistency with the submitted application.

PUBLIC COMMENT

Public comments were provided and addressed through the Community Conference process. See Exhibit D.

CITY DEPARTMENT REVIEW COMMENTS

A. Fire

No comments.

B. Public Works Operations

Comments are either incorporated into the plat review above or are relevant to future Site Work Permits which will be addressed at that time.

C. Police

No comments.

D. Building

No comments.

VII. Administration Recommendation

The Administration recommends that the Hearing Examiner approve the Preliminary Plat for the project known as High Street Collection, PP17-00002, as described and evaluated in the Staff Report dated March 3, 2020 with Exhibits A-P, and, except where noted in the Staff Report and approval conditions, project drawings and reports received on August 1, 2017,

August 28, 2017, and the following technical reports: traffic Studies received February 2, 2018 and March 5, 2019; and subject to the recommended conditions of approval below.



03/02/2020

Lucy Sloman, AICP
 Development Services Land Development Manager
 City of Issaquah



03/03/2020

Doug Schlepp, PE
 Development Services Consulting Engineer
 City of Issaquah

VIII. Exhibits

- A. Listing and Comparison of IHIF-C/Shelter Application Materials for PP17-00002
- B. Application materials
 - 1. August 1, 2017 Materials
 - 1.1 Application
 - 1.2 Plan Set
 - 1.3 Project Narrative (dated July 15, 2017)
 - 1.4 Traffic Study (Transpo Memo, dated July 28, 2017)
 - 1.5 Drainage Report (KPFF Preliminary Stormwater Report, dated July 2017)
[Exhibit not marked as the document is locked]
 - 1.6 Pre-Application Comment Letter Memo (dated July 27, 2017)
 - 2. August 28, 2017 Materials
 - 2.1 Additional File Submittal
 - 2.2 Paper Land Use Permit Application (dated 4/6/2017)
 - 2.3 Plan Set
 - 2.4 Project Narrative (dated July 15, 2017)
 - 2.5 Traffic Analysis (Transpo Memo, dated July 28, 2017)
 - 2.6 Preliminary Stormwater Report (KPFF Preliminary Stormwater Report, dated July 2017)) [Exhibit not marked as the document is locked]
 - 2.7 Title Report (dated July 28, 2017)
 - 2.8 SEPA Checklist (signed July 28, 2017)
 - 2.9 Affidavit of Agent Authority (dated July 10, 2017)
 - 2.10 Affidavit of Ownership (dated July 10, 2017)
 - 2.11 Lot Closure Calculations (dated July 28, 2017)
 - 2.12 Preliminary Plat Submittal Memo (dated July 27, 2017)

- 2.13 Sidewalk Easement Legal Description (dated July 28, 2017)
- 2.14 Trail Easement Legal Description (dated July 28, 2017)
- 2.15 8x11 Plan Sheet
- 2.16 8x11 Vicinity Map
- 2.17 Vicinity Map
- 3. December 15, 2017 Materials
 - 3.1 Additional File Submittal
 - 3.2 Overview Site Plan (dated December 14, 2017)
 - 3.3 Civil Sheet (dated December 15, 2017)
- 4. February 7, 2018 Materials
 - 4.1 Additional File Submittal
 - 4.2 Traffic Impact Analysis (Transpo Memo, dated February 6, 2018)
- 5. February 22, 2018 Materials
 - 5.1 Additional File Submittal
 - 5.2 ARC approval (dated July 28, 2017)
- 6. March 5, 2019 Materials
 - 6.1 Additional File Submittal #1
 - 6.2 Plan Set (revised February 8, 2019)
 - 6.3 Project Narrative (dated July 15, 2017)
 - 6.4 Traffic Study (Transpo Memo, dated March 4, 2019)
 - 6.5 Drainage Report (KPPFF Preliminary Stormwater Report, dated February 2019)
 - 6.6 Comment Response Letter (dated February 8, 2019 in footer)
 - 6.7 Email Response High Street Collections (dated March 2019 in footer)
 - 6.8 Additional File Submittal #2
 - 6.9 Supplemental Project Narrative (dated March 1, 2019)
 - 6.10 Email from Ken Shipley to Jean Lin regarding uploaded documents (dated March 6, 2019)
- C. Notice
 - 1. Notice of Application: mailed to property owners within 300 ft, Dec. 27, 2017
 - 2. Notice of Application: Affidavit of Site Posting, Oct. 17, 2017
 - 3. Notice of Hearing: mailed to property owners within 300 ft, Feb. 21, 2020
 - 4. Notice of Hearing: Legal Notice in Issaquah Reporter, Feb. 21, 2020
 - 5. Notice of Hearing: Updated Site Posting, Feb. 21, 2020
- D. Community Conference Response Memo
 - 1. Community Conference Response Memo with attachments, Oct. 10, 2019
 - 2. Public Comments (emailed) before or during the Community Conference, August 14-16, 2019
 - 3. Public Comments (emailed) in response to the Response Memo, Oct. 11-15, 2019
- E. Hearing Examiner decision on the request to dismiss the Applicant’s Appeal, APP18-00005, November 27, 2018
- F. Hearing Examiner decision on Dispositive Motions on APP19-00002, November 15, 2019

- G. Keith Niven April 4, 2018 letter to Patrick Schneider
- H. Lucy Sloman April 15, 2019 letter to Tia Heim on Preliminary Plat process
- I. Hearing Examiner decision on Reconsideration on APP19-00002, January 24, 2020
- J. City of Issaquah Comprehensive Plan excerpts
- K. City Comments on Preliminary Plat submittals (select)
 - 1. Aug 16, 2019 – Feb. 25, 2020 emails, COM19-00001 / PP17-00002
 - 2. July 26, 2019 Outlook Email Misdirection
 - 3. June 21, 2019 – July 19, 2019 emails, High Street Collection Plat
 - 4. Feb. 5, 2019 – Feb. 21, 2019 emails, PP17-00002 Marked Up Plans
 - 5. A. April 17, 2018 – Dec. 21, 2018 emails, High Street Collection Preliminary Plat – March 29 follow-up
 - B. Attachments to email tracking comments and responses
 - 6. Oct. 15, 2018 email, High Street Collection Preliminary Plat – March 29 follow-up
 - 7. A. March 29, 2018 email, High Streets Collection TIA PP17-00002
 - B. March 29, 2018 Marked Up Plans (MUP) for Traffic Impact Analysis
 - 8. March 22, 2018 - March 23, 2018 emails, High Street Collection Preliminary Plat Comments
 - 9. March 22, 2018, email PP17-00002 TIA 1R Traffic Impact Analysis
 - 10. March 16, 2018 Marked Up Plans (MUP) August 2017 Plan Set
 - 11. February 22, 2018 email, High Street Collection, ARC Approval
 - 12. Sept. 25 – Feb. 21, 2018 emails, High Street Collection
 - 13. Jan. 5, 2018 – Jan. 24, 2018 emails, IH Shelter Plat Traffic Analysis
 - 14. Dec. 15, 2017 email, High Street Collection Preliminary Plat additional submittal items
- L. Action Memo 03-29-13-01 (JR), Buildout Period
- M. Sufficiency memo, August 11, 2017
- N. Ordinance No. 2380, Terminating the Issaquah Highlands Development Regulations and adopting the Issaquah Highlands Replacement Regulations (IMC 18.19B); the entirety of the Issaquah Highlands Replacement Regulations (IMC 18.19B) are available here: <https://www.codepublishing.com/WA/Issaquah/#!/Issaquah18/Issaquah1819B.html#18.19B>
- O. Public Comments received in response to the Public Hearing Notice:
 - 1. Jennifer Noland, Feb. 25, 2020
 - 2. Kent Worthington, March 2, 2020
- P. Issaquah Highlands Development Agreement (as provided at the hearing and at the following link: <http://issaquahwa.gov/DocumentCenter/View/4513/00-IH-Development-Agreement-Full-Document>)

IX. Conditions of Approval

- 1 In the event the project is phased, the Director or his/her designee has the right to apply additional conditions with Building or Site Work permits to ensure each phase complies with the Development Agreement and City Code, such as but not limited to access, fire, utility, and circulation requirements.
- 2 Approval of this application is specific and limited to the Applicant's preliminary plat — an "Implementing Approval" as defined by the IHDA. Future land use, building, and other development permits and approvals necessary to develop the underlying project site will be required to comply with all applicable standards, procedures, and processes under the IMC.
- 3 Approval of this Application approves only the August 1 and 28, 2017 submittal materials and the technical reports for drainage and traffic submitted March 5, 2019, and as conditioned herein, which will be the basis for implementing the Preliminary Plat.
- 4 Conceptual road and utility plans received a planning level of review for compliance with the Development Agreement and City Codes. A construction level of review of the roads, trail, and utilities will be completed during the Site Work permit(s) review and approval. Sidewalk and Trail easements will be reviewed with the Final Plat.
- 5 Any redistribution of allowable development from that shown in the plat, must be reviewed to ensure the redistribution can be served by the infrastructure and for compliance with applicable development standards.
- 6 None of the Applicant's drainage reports, TIRs, etc... (including 8/1/2017, 8/28/2017, 3/5/2019 submittals) are sufficient to design the stormwater system to serve this property. With the submittal of Site Work permit(s), a stormwater downstream analysis per the KCSWDM Core Requirement No. 2 shall be required.
- 7 All on-site storm facilities serving the new development will be privately owned and maintained (unless they receive public water and are on a separate tract), improvements within public Right-of-way will be publicly owned and maintained.
- 8 With all future construction and land use permits, Stormwater Detention facilities shall be located outside the public right-of-way.
- 9 With Site Work permits, flow control and water quality treatment shall be provided by the Applicant on each development parcel, unless otherwise agreed to by and at the discretion of the City through a separate agreement with the Applicant. It is also the Applicant's responsibility to treat and detain any new roadways or rights of way which they build as implementation of this proposed preliminary plat.
- 10 Compliance with water conservation for all landscaping shall be reviewed with future Site Work and or Landscape permits.
- 11 An Administrative Adjustment of Standards must be submitted, reviewed, and approved to increase the width of the sidewalk and on-street parking for Federal

-
- Drive or the road designed and constructed consistent with the adopted IHDA standard.
- 12 With the submittal of the Site Work Permit for Discovery Drive, the February 6, 2018 and March 5, 2019 Traffic Analyses will be used to develop the construction plan for Discovery Drive between 6th Ave to western edge of project as a Neighborhood Collector 1.
 - 13 Only the streets depicted in the preliminary plat application have been evaluated and are vested to the IHDA. Additional streets proposed by the Applicant in future development applications will be evaluated against adopted standards which are in place at the time these additional streets are proposed.
 - 14 With the submittal of the Site Work permit for the following intersections, the Applicant shall prepare an analysis to assess the impact of activating the westerly leg of 9th Ave NE and NE Federal Dr and the northerly leg of NE Discovery Dr and 8th Ave NE. This analysis will ensure IHDA and City standards and regulations are met including operations, sight distance analysis, level of service, and safe appropriate circulation.
 - 15 The Applicant is encouraged to consider providing curb bulbs to improve pedestrian sightlines at crossings and to preclude parking where it is not allowed, such as at hydrants and intersections, if their design and placement will not interfere with the movement of larger vehicles such as fire trucks or school buses. This will be evaluated with Site Work permits if the Applicant chooses to provide them.
 - 16 With the submittal of future land use or construction permits, mid-block crossings shall be identified to implement the plat, ensure safe locations for pedestrians to cross 8th Ave and Deer Ln, and achieve the expectations of Appendix S.
 - 17 With the submittal of future land use or construction permit for the trail, the proposed trail must be shown, designed, and constructed consistent with Multi-Purpose trail standards as defined in the IHDA.

Exhibit C

EXHIBIT C – DAMAGES SUMMARY

Shelter's damages are explained in the report prepared by Anthony Gibbons, MAI and provided to the City on October 19, 2020. The following provides a summary of Shelter's damages (not including the attorney fees that can be awarded to Shelter):

1. If Shelter Prevails, then the City Owes Damages

The City's refusal to recognize Shelter's vested rights has prevented Shelter from developing its property and resulted in millions of dollars of delay damages. If Shelter prevails in restoring its vested rights, then the City owes Shelter:

- \$7,892,010 in delay damages as of November 1, 2020
- Plus \$201,250 per month in additional delay damages since November 1, 2020
- Plus 7% interest accruing and compounding on the delay damages (approximately \$47,000 per month and climbing through compounding)
- Plus reasonable out-of-pocket expenses and holding costs incurred since November 1, 2020

2. If the City Prevails, then the City Owes Just Compensation for Taking Shelter's Property

If the City prevails and succeeds in di-vesting Shelter's vested rights, then the City has taken Shelter's property because the Replacement Regulations that the City is applying do not allow beneficial economic use of Shelter's property. If the City prevails and the Replacement Regulations apply to Shelter's property, then the City owes Shelter:

- \$32,500,000 for the value of the property on April 4, 2018
- Plus \$10,042,500 in interest at the 12% statutory interest rate through November 1, 2020
- Plus 12% interest at the statutory interest rate since November 1, 2020 (approximately \$325,000 per month)
- Plus \$3,380,277 out-of-pocket expenses through November 1, 2020
- Plus reasonable out-of-pocket expenses and holding costs incurred since November 1, 2020

Exhibit D

PLAT REVIEW DATES AND TIMELINE – UPDATED 7/21/2020

Dates	Explanation	# of Days waiting for City	# of Days with applicant				
8/1/2017 - 3/16/18	Submittal to first comments on plan set waiting for meeting to discuss comments	228					
3/17/18 - 3/29/18		13					
3/30 -4/18/18	waiting for follow up items requested of City at the 3/29 meeting	20					
4/19/18 -4/26/18	Shelter reviewing City's new comments		8				
4/27/18- 8/24/18	Shelter asked for clarification and basis and waited for City response	120					
8/25/18 -10/10/18	Shelter reviewing City info and asks for further clarification and basis form comments		47				
10/11/18 -12/21/18	Waiting for City response to 10/10/18 email request	72					
12/22/18-3/5/19	Shelter revising application and resubmitted on 3/5/18		74				
3/6/19 - 8/15/19	resubmittal to community conference	162					
8/16/19 -3/9/20	Community conference to Hearing Examiner	206					
3/10/20 – 3/26/20	Hearing Continued to scheduled date of 3/20/20 before it was canceled by the City due to COVID-19.			16			
3/27/20 – 7/8/20	Waiting for City’s rescheduled date after the Hearing Examiner informs the City he can hold remote hearings	103					
7/9/20 – 8/3/20	Hearing rescheduled due to City’s lack of public notice	26					
	TOTAL	950	129		1,095	Total Days	
		87%	12%				

Updated Exhibit WW-2

PLAT REVIEW DATES AND TIMELINE – UPDATED 7/21/2020

Dates	Explanation
1/17/2017	Meeting with Keith Niven where Shelter informed him that it would be submitting application to divide the property into lots.
2/28/2017 3/2/2017	Shelter requests Pre-App meeting with the City City denies Shelter’s request for pre-app and informs Shelter that an early collaborative meeting must occur first.
3/21/2017 3/27/2017	Collaborative Meeting between City and Shelter Lucy Sloman tells Shelter that utility plan and traffic study are required before Shelter can schedule it’s pre-app meeting
3/31/2017	City finally acknowledges utility plan and traffic analysis are not required at this point and can move forward, and Shelter requests a pre-app meeting date.
4/3/2017	City informs Shelter that they need to submit a full preliminary land use application package before a pre-app meeting can be scheduled.
4/13/2017	Preliminary Land Use Application Package is submitted online
5/31/2017	Pre-App Meeting
6/7/2017	City provides notes from pre-app meeting
8/1/2017	Shelter submits complete application submitted for preliminary plat

PLAT REVIEW DATES AND TIMELINE – UPDATED 7/21/2020

Dates	Explanation
10/6/2017	After many requests the City provided a letter deeming the application complete – back-dated to August 11, 2017
12/15/2017	Shelter submits a supplement to its application through Mybuildingpermit.com and by email to assigned planner
12/27/2017	City issues public notice of Plat application using the supplement from 12/15/2017
1/9/2018	In context of reviewing the MOB SDP, City engineering reviewer informs Shelter that City changed its opinion regarding the required scope of transportation analysis for the plat and asks us to submit a different analysis from what was requested at pre-application meetings.
1/16/2018	Shelter meets with City engineering reviewer to discuss scope of transportation analysis
2/16/2018	Shelter submits updated transportation analysis to City per City's request
3/16/2018	City provides first set of comments on the preliminary plat application to Shelter
3/29/2018	City and Shelter meet to discuss City's comments, which results in the need for follow up items from the City before applicant can revise and resubmit the application
4/18/2018	City provides response to the 3/29 meeting follow up items, but comments give different direction than 3/16/18 comments and ask for many changes that are not supported by applicable regulations
4/27/2018	Shelter asks for clarification and legal basis for comments from City and waited for City response. Over the next 4 months Shelter requests response from City many times and explains that they cannot resubmit until they get this info
8/25/2018	City finally responds to Shelter's email from April
10/11/2018	Shelter reviews all of the materials in City's 8/24/18 response and informs City that the City's response was not complete and did not provide enough information to allow Shelter to move forward and sends additional request for information and clarification to the City.

Updated Exhibit WW-2

PLAT REVIEW DATES AND TIMELINE – UPDATED 7/21/2020

Dates	Explanation
12/21/2018	City responds to 10/11/2018 email request from Shelter, and Shelter begins working on resubmittal based on that information.
3/5/2019	Shelter resubmitted plat application
4/5/2019	City informs Shelter that the City has now determined the plat application is no longer vested to process and will be sent to Development Commission. Further the City informs Shelter it must either (a) wait until its hearings on Shelter’s other permits in front of Development Commission conclude; or (b)interrupt those ongoing permit hearings to pursue the plat.
4/8/2019	Shelter objected to the City's proposed process and requested the plat application be processed pursuant to the Development Agreement, to which its plat application is vested. Shelter further requested that if City had di-vested the plat application that the City immediately issue a final and appealable decision explaining such action.
4/15/2019	City issued a response letter to Shelter insisting that the City will apply the IMC procedures to the plat application
8/15/2019	Community Conference on Preliminary Plat in front of Development Commission
10/10/2019	City issued the Community Conference Response Memo
10/25/2019	City determines comment period on response memo has expired
10/28/2019	City provides comments received on Community response memo to Shelter and asks Shelter to determine if any are consistent with Code and whether Shelter intends to revise its drawings in response to community comments.
10/31/2019	Shelter informs City that none of public comments are consistent with code and no further revisions to the application are required. Shelter objects to process but requests hearing as soon as possible.
11/4/2019	City staff says they "continue to work with the Hearing Examiner" to identify a hearing date.
11/14/2019	City staff claims to be working with the Hearing Examiner to identify a date for the hearing.
12/13/2019	City informs David Ortman that they will need one more date for another preliminary plat that will likely be longer than a regular plat hearing.

PLAT REVIEW DATES AND TIMELINE – UPDATED 7/21/2020

Dates	Explanation
12/16/2019	City staff informs Shelter they have now asked the Clerk of the Hearing Examiner for possible hearing dates.
12/16/2019	Mr. Ortman informed the City that February 4 th and 5 th are reserved for the preliminary plat hearing.
1/27/2020	City informs Hearing Examiner’s office that “We would like to postpone this one until the end of February.” City asks if Feb 24 th and 25 th are available.
1/27/2020	David Ortman confirms they removed the hearing from their calendar and asks if March 9/10 will work.
1/27/2020	Ms. Baer tells Mr. Ortman she will check with the applicant to see if applicant can wait the additional two weeks and Mr. Ortman confirms that March 9.10 are two consecutive dates that are open and asks Ms. Baer to let him know if those will work.
1/30/2020	David Ortman informs Ms. Baer that March 3 rd and March 9 th are preferred dates for the Hearing, otherwise March 9 th and 16 th are the other option.
1/31/2020	City informs Shelter that first date for hearing will be March 9, 2020 and they are seeking additional dates the following week.
2/4/2020	Ms. Baer informs Mr. Ortman that the City would like March 9 th to be first date with continuation to March 18 th , 19 th or 20 th
2/4/2020	Mr. Ortman confirms the hearing dates that the City requested.
2/6/2020	City confirms that plat hearing dates are March 9, 2020 and March 20, 2020, 9am-5pm
2/20/2020	City issues Notice of Public Hearing
3/9/2020	Hearing Date, continued hearing date set for March 20, 2020

PLAT REVIEW DATES AND TIMELINE – UPDATED 7/21/2020

Dates	Explanation
3/12/2020	City notifies Shelter that the March 20 th date for the continued hearing is canceled and they will contact applicant to reschedule when the current emergency has terminated.
3/27/2020	Sound Law Center notifies City that it can continue to hold hearings through use of remote technology.
3/31/2020	Keith Niven responds to Hearing Examiner requesting that the Hearing Examiner send Ms. Baer possible dates for this hearing continuation in May 2020.
3/31/2020	Hearing Examiner responds offering remote hearing in April and offers May 4 th or May 11 th as dates for in-person hearing if room is available.
5/11/2020	In the Denial of the City's Motion to Strike, Hearing Examiner Reeves informs the parties that he stands ready to recommence the hearing (perhaps through use of remote meeting technology) whenever the City determines that it is safe and appropriate to do so.
5/28/2020	Shelter sent letter to City re: public records request related to scheduling of this hearing asking for explanation as to when and how the February 4 th and 5 th Hearing Dates (which were set by the Hearing Examiner but never offered to Shelter by the City) were canceled.
6/2/2020	City offers Shelter possible dates for continuance of hearing of July 8, 22 or 23 rd .
6/3/2020	Shelter confirms the July 8 th date.
6/4/2020	City responds to Shelter's May 28 th request for explanation by stating "this is not a request for an identifiable public record, and thus, the City cannot respond to same."
7/6/2020	Shelter contacted the City with questions regarding procedural aspects of the remote hearing. Shelter also noted that the City's website did not show any notice of the hearing. Shelter requested that the City either confirm that notice was provided or confirm that the City determined that additional notice was not necessary and the City would be willing to defend its lack of notice in the future, were it to become an issue.
7/7/2020	Having not received a response from the City to the 7/6/20 email, Shelter followed up with City Attorney Zach Lell requesting a response.
7/7/2020	Zach Lell responded to Shelter refusing to provide the requested confirmation regarding lack of notice and willingness to defend its decision regarding notice in the future.
7/8/2020	After AV testing, the hearing was continued due to City's failure to provide notice of the continued hearing and unwillingness to defend such decision. The new hearing date was set for 8/3/20.
8/3/2020	New Date for Day 2 of the Hearing



KeyBank National Association
Seattle, WA 98104

114843

114843
1937/1250
968

FOSTER GARVEY PC
1111 3RD AVENUE SUITE 3000
SEATTLE, WASHINGTON, 98101

PH. (206) 447-4400

ONE THOUSAND FIVE HUNDRED AND 00/100

PAY

DATE

AMOUNT

TO THE
ORDER OF

Feb 09 2021

\$*****1,500.00*

City of Issaquah

MEMO _____



FOSTER GARVEY PC

SEATTLE, WA 98101

2/9/2021

114843
114843

479153

City of Issaquah

Invoice #

Invoice Date

Q1519570

2/8/2021

Appeal fee

\$1,500.00

Client/Matter Code

209611.2

2/8/2021

City of Issaquah - Appeal fee

\$1,500.00

FOSTER GARVEY PC

SEATTLE, WA 98101

114843



Development Services Department
 1775 12th Ave. NW | P.O. Box 1307
 Issaquah, WA 98027
 425-837-3100 | DSD@issaquahwa.gov

Appeal Application

1 Project Information

Project Name:	High Street Collection at Issaquah Highlands Preliminary Plat
Project Address:	Lot B of the Issaquah Highlands, north of NE Discovery Drive and west of 9th Avenue NE
Permit Number: (If Applicable)	No. PP17-00002, No. PRJ16-00013
Appeal File Number: (To be completed by City)	
Appellant Contact: Name: Mailing Address: Email Address: Phone Number:	Lucy Sloman, <i>Land Dev. Mgr. Comm. Planning & Dev. Dept. (formerly DSD)</i> 1775 - 12th Avenue, NW, Issaquah, WA 98027 LucyS@issaquahwa.gov Direct 425|837-3433 • Front Desk 425|837-3100
Appellant Representative Contact: Name: Mailing Address: Email Address: Phone Number:	J. Zach Lell Ogden Murphy Wallace, PLLC 901 Fifth Avenue, Suite 3500, Seattle, WA 98164-2008 zlell@omwlaw.com 206.447.7000
Description/Subject of Appeal:	Appeal of the Findings, Conclusions, and Decision of the City of Issaquah Hearing Examiner, dated February 1, 2021 (Notice of Decision issued February 8, 2021). See Exhibit A submitted herewith and attached hereto further identifying description of appeal and appeal subject(s), including appendices to same.

2 Submittal Requirements

	Yes	No
1. Appeal Application	<input checked="" type="checkbox"/>	<input type="checkbox"/>
2. Processing Fee in accordance with City's Fee Schedule	<input checked="" type="checkbox"/>	<input type="checkbox"/>
3. Written Narrative describing the appeal	<input checked="" type="checkbox"/>	<input type="checkbox"/>
4. Additional information, plans, reports, etc. that may be provided by the appellant	<input type="checkbox"/>	<input checked="" type="checkbox"/>

Note: Please submit two (2) hard copies and one electronic copy of all documents. Electronic copies may be requested for all additional submissions.



Appeal Application

3 Applicable Codes, Regulations and Procedures

Appeals are reviewed as outlined in Issaquah Municipal Code [IMC 18.04](#) Procedures and [IMC 1.32](#) Appeals. These codes contain pertinent information including examples of decisions types that may be appealed, appeal time periods, appeal decision maker, appeal procedures, etc.

Please also review [The Rules and Procedure for Proceedings before the City's Hearing Examiner](#).

4 Submit this Checklist to the City of Issaquah

Permit Center
1775 12th Ave NW
Issaquah, WA 98027


Appellant Signature:  02/22/2021	Date: February 22, 2021
Appellant Name (Please Print): City of Issaquah Community Planning and Development Department	

EXHIBIT A

EXHIBIT A**WRITTEN APPEAL NARRATIVE/STATEMENT OF APPEAL GROUNDS****I. Introduction**

The City of Issaquah Community Planning and Development Department (“Department”) hereby submits its written narrative and statement of grounds for the Department’s administrative appeal of the City of Issaquah Hearing Examiner’s February 1, 2021 Findings, Conclusions and Decision (“Decision”) denying approval of IHIF-Commercial’s (“IHIF-C” or the “Applicant”) preliminary plat application (No. PP17-00002; NO. PRJ16-00013). Both the Decision and the City’s Notice of Decision, dated February 8, 2021 (“Notice of Decision”), pertaining to the Decision are attached hereto as Appendix 1 and 2, respectively. For the reasons set forth below, it was clearly erroneous to deny IHIF-C’s plat application. The Department respectfully requests that the City Council reverse or modify the decision, or remand IHIF-C’s plat application back to the Hearing Examiner with direction(s) to approve it subject to appropriate conditions as identified in the Relief Requested section below, and as further explained herein.

II. Jurisdiction, Timeliness, and Procedural Compliance of Appeal

2.1 The City Council is authorized by the City’s procedural regulations to “review all elements and make the final decision” on “[a]ppeals to decisions made through the Level 4 Review (Hearing Examiner’s decisions)[.]” IMC 18.03.030(E); IMC Table 18.04.250-2. The Hearing Examiner’s February 1, 2021 Decision denying IHIF-C’s preliminary plat application is a Level 4 Review matter. IMC Table 18.04.100-1. Decisions made by the Hearing Examiner are appealable according to the rules and regulations set forth in the Issaquah Municipal Code and the City’s Land Use Code. IMC 18.03.220. The City Council reviews any such appeal on a closed record, based exclusively upon the evidence and testimony presented during the public hearing process. IMC Table 18.04.250-2.

2.2 The Department’s appeal of the Decision is timely. Any administrative appeal of a Hearing Examiner’s Decision must be filed with the City’s Permit Center within 14 days of the Notice of Decision. IMC Table 18.04.250-2. In this instance, the Notice of Decision for the Hearing Examiner’s February 1, 2021 Decision was issued by the City’s Planning Manager on February 8, 2021. *See* Appendix 2 – attached hereto. The computation of time for any period prescribed by the City’s code excludes the first day and includes the last day, unless the last day is a Sunday or holiday, in which case it is also included. IMC 1.04.070. The Department’s appeal was filed on February 22, 2021—the fourteenth day following the City’s February 8, 2021 Notice of Decision—and meets this deadline.

2.3 The Department’s appeal of the Decision is also compliant with the substantive and procedural requirements for administrative appeals under the code. In accordance with Chapter 1.32 IMC, Chapter 18.04 IMC and the Appeal Application Form distributed with the City’s February 8, 2021 Notice of Decision, the Department’s appeal was filed, or is being contemporaneously filed, with the City’s Permit Center and was accompanied, or is being contemporaneously accompanied, by the applicable \$1,500 administrative appeal fee. Out of an abundance of caution, the Department’s appeal was also filed with the City Clerk’s office and emailed to both the Clerk’s office and the Permit Center as well.

III. Statement of Grounds for Appeal

3.1 The Department challenges the substantive outcome of the Decision (*i.e.*, denial of IHIF-C's preliminary plat application), as well as the Summary of Decision and Conclusions Based on Findings set forth at page 1 and pages 40-43, respectively, of the Decision. As discussed in more detail below, both the Applicant and the Department agreed that the plat should be approved. All relevant substantive testimony and evidence presented during the hearing supported this outcome. The Decision itself identifies no relevant standard for plat approval under the 1996 Issaquah Highlands Development Agreement or the City's code that IHIF-C's plat application does not actually satisfy. The Department respectfully submits that the Hearing Examiner's denial of the plat application under these circumstances contravenes IMC 18.04.220(B) and IMC 18.04.480, is clearly erroneous and constitutes reversible error.

3.2 The City's code establishes clear decisional standards for denying a land use development application. In pertinent part, these criteria provide that a development proposal may be denied only if it does not comply with applicable local standards:

A Development Permit¹ or application may be denied only if:

1. The development proposal is not consistent with the Comprehensive Plan;
2. *The development proposal does not comply with all applicable codes, rules and regulations; or*
3. The development proposal does not satisfy the elements of the Design Criteria Checklist (see Chapter 18.07 IMC, Appendix 2).

IMC 18.04.220(B) (emphasis added). *See also* IMC 18.04.480 ("Level 4 permits are decided in accordance with the purpose and intent of this chapter, using approval criteria found in this chapter and Chapter 1.32 IMC (Appeals), and other applicable approval criteria.").

No testimony or evidence was presented during the public hearing suggesting that IHIF-C's preliminary plat application did (does) not comply with the applicable standards for plat approval. Indeed, both the Applicant and the Department agreed that the plat should be approved. All relevant substantive testimony and evidence presented during the hearing supported this outcome. The Decision itself likewise identifies no relevant standard for plat approval under the 1996 Issaquah Highlands Development Agreement or the City's code that IHIF-C's plat application does not actually satisfy. The Department respectfully submits that the Hearing Examiner's denial of the plat application under these circumstances contravenes IMC 18.04.220(B) and IMC 18.04.480, is clearly erroneous and constitutes reversible error.

3.3. The Decision's ultimate conclusion was that the parties' fundamental dispute over vested rights prevented the Hearing Examiner from determining that the "public use and interest" criterion of the State Subdivision Act had been satisfied.² This conclusion was clearly erroneous, and general considerations of the "public use and interest" should not have operated to compel the Examiner to deny IHIF-C's preliminary plat application where: (i) both the Department and Applicant agreed the application should

¹ IHIF-C's preliminary plat application is a Development Permit application as defined under the City's code. *See* IMC (defining application as a "[w]ritten request for a specific development proposal"); IMC 18.02.060 (defining development as including "the division of land into two (2) or more parcels").

² Decision, at 1, 40.

be approved; (ii) no member of the public testified or submitted evidence supporting denial; and (iii) no evidence was identified that the application did not satisfy the standards for approval.

The “public use and interest” criterion is set forth at RCW 58.17.110, which provides in relevant part as follows:

The city, town, or county legislative body³ shall inquire into the public use and interest proposed to be served by the establishment of the subdivision and dedication. It shall determine: (a) If appropriate provisions are made for, but not limited to, the public health, safety, and general welfare, for open spaces, drainage ways, streets or roads, alleys, other public ways, transit stops, potable water supplies, sanitary wastes, parks and recreation, playgrounds, schools and schoolgrounds, and shall consider 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) whether the public interest will be served by the subdivision and dedication.

(Emphasis added.) The statute proceeds to require a finding that “the proposed subdivision and dedication make such appropriate provisions. . . that the public use and interest will be served[.]” RCW 58.17.110(2).

The generic “public use and interest” criterion of RCW 58.17.110 is subordinate to the specific, substantive standards governing the plat review process. Washington courts have held that this consideration cannot be used to deny a preliminary plat application which—as here—otherwise satisfies the actual criteria for approval. *See, e.g., Carlson v. Town of Beaux Arts Village*, 41 Wn. App. 402, 407-08, 704 P.2d 663 (1985)⁴ (reversing municipality’s rejection of plat application on public interest grounds where applicant had met all stated local requirements). *See also* William F. Stoebuck and John W. Weaver, 17 Wash. Prac., Real Estate §5.4 (2d ed) (“[I]f there are standing regulations on the particular subject and if the proposed subdivision complies with those regulations, then the subdivision application may not be denied on the ground that it fails to serve the public interest on that subject.”).

This principle applies with particular force in the present matter, where all parties concur that IHIF-C’s plat *should* be approved. While the parties disagree concerning which aspects of IHIF-C larger development proposal are vested, this consideration should not have prevented the Hearing Examiner from approving IHIF-C’s plat application since—as the Decision itself repeatedly acknowledges—it is the City’s Director who has exclusive authority to make vesting determinations in this context; there was no need for the Examiner to adjudicate this dispute in the first instance. *See* IMC 18.01.050(C). No reported Washington precedent, and certainly no caselaw interpreting RCW 58.17.110, supports denying a plat application under these circumstances.

Significantly, the “inquiry” contemplated by RCW 58.17.110(1) did not even occur during the March 9, 2020 and August 3, 2020 hearing on IHIF-C’s plat application—at least in the form of any direct questioning

³ In accordance with RCW 58.17.330, the City of Issaquah has empowered the Hearing Examiner to make the final decision on preliminary plat applications. *See* IMC Table 18.04.100-1; Chapter 18.13 IMC; IMC 18.04.490(C). The reference in RCW 58.17.110 to the City’s “legislative body” accordingly means the Hearing Examiner for purposes of this proceeding.

⁴ Superseded by statute as stated in *Potala Village Kirkland, LLC v. City of Kirkland*, 183 Wn. App. 191, 334 P.3d 1143 (2014).

to, or discussion by, the parties. As the Hearing Examiner acknowledged, both at the outset of the hearing and again repeatedly during the proceedings, the larger vesting dispute between the parties was well known in advance of the preliminary plat proceedings. The Examiner did not suggest in any manner during the hearing that concerns regarding RCW 58.17.110 might prevent him from ultimately approving the plat. As noted above, both the City and the Applicant agreed that the underlying plat application *should* be approved—a collective recommendation underscoring the belief of both parties that the “public use and interest” criterion had in fact been satisfied. Of equal importance, no member of the “public” (the explicit focus of RCW 58.17.110) raised any concerns to this effect whatsoever. Because no specific inquiries addressing this criterion in relation to the vesting dispute were posed during the hearing, neither party was put on notice of the Examiner’s concern or otherwise had a meaningful opportunity to respond.

By denying IHIF-C’s preliminary plat application on general “public use and interest” grounds under RCW 58.17.110 without any evidence that the actual, substantive standards for approval had not been met, the Department respectfully submits that the Decision contravenes IMC 18.04.220(B) and IMC 18.04.480, is clearly erroneous and constitutes reversible error.

3.4 The Decision appears to express the Hearing Examiner’s self-perceived inability to determine which set of plat drawings, etc. were actually being presented for review and approval.⁵ This consideration should not have prevented the Examiner from approving IHIF-C’s preliminary plat application. To the extent the Decision denying the plat application was based, at least in part, on this factor, it was error.

It is true that the parties have disagreed regarding the content and extent of detail depicted on some of IHIF-C’s plat plan submittals following its original August 2017 preliminary plat application.⁶ At the Hearing Examiner’s direction, City staff worked with IHIF-C in March 2020 to present an agreed-upon set of drawings to the Examiner following the initial March 9, 2020 public hearing installment. While there was some initial dispute between the parties on this point, the Department understood that any meaningful confusion and disagreement had been resolved by the conclusion of the hearing process in August 2020. Indeed, the Hearing Examiner directly addressed this issue with the parties when the plat hearing reconvened on August 3, 2020.

Following the conclusion of the hearing on August 3, 2020, IHIF-C and the Department were each requested to send email confirmation(s) as to the correct plan set that was being presented for approval. Both parties agreed and acknowledged this direction at the hearing, and then proceeded to email their respective confirmation(s) as the Examiner had directed. As the parties mutually concurred, the final, agreed-upon plan set for IHIF-C plat application is set forth in Exhibit YY. There was no indication during the August 3rd proceeding of any remaining concern on this point. If any question to that effect had been asked, the City’s witnesses were prepared to address it through additional hearing testimony. The Department accordingly exited the proceedings with the understanding that any confusion or uncertainty had been resolved to the Examiner’s satisfaction—at the very least, with sufficient clarity to enable approval of the plat as both the Applicant and the Department had recommended. The Decision, however, did not result in approval of the plat as both the Applicant and the Department had recommended, and the Department respectfully submits that the Hearing Examiner’s denial of the plat

⁵ Decision, at 42-43.

⁶ Testimony of Lucy Sloman; testimony of Tia Heim.

application under these circumstances contravenes IMC 18.04.220(B) and IMC 18.04.480, is clearly erroneous and constitutes reversible error.

3.5 The Decision appears to fault the Director's vesting analysis for requiring two different sets of standards (*i.e.*, the Development Agreement requirements and the Issaquah Highlands Replacement Regulations, codified at Chapter 18.19B IMC) to be applied to various aspects of IHIF-C's development proposal.⁷ In this regard, the Hearing Examiner appears to have concluded that this approach somehow prevented him from approving the plat application.⁸ This conclusion was clearly erroneous, and should not have caused the Examiner to deny the application.

Any arguable confusion and complexity on this issue stemmed from the timing and content of the various iterations of and supplements to IHIF-C's plat application materials in relation to the Development Agreement's defined Buildout Period—the 20 year period during which the City was prohibited from adopting and enforcing new land use regulations within the Issaquah Highlands. The Buildout Period expired on September 18, 2017. IHIF-C's original preliminary plat application was filed in August 2017 and thus within the Buildout Period. However, after the Buildout Period expired, IHIF-C proceeded to submit additional plat materials, including a self-initiated supplement on December 15, 2017, purporting to show the footprints of various future buildings and other construction-level details related to those buildings.

The Department's staff report for IHIF-C's preliminary plat application primarily evaluated the proposal under the Development Standards set forth in the Development Agreement. However, the Director's vesting determination for the proposal also determined, correctly, that vesting under the Development Agreement would not apply to the buildings, etc. that had been identified by IHIF-C after expiration of the Buildout Period—the point after which the parties had contractually agreed that submittals would not vest. The Director's vesting determination emphasized that any such future development of the property would be required to comply with the development standards and mitigation requirements in effect at that time, and that such future project-level construction was not vested as result of IHIF-C's plat application.

As the Decision correctly notes, and as the Hearing Examiner himself repeatedly acknowledged throughout the hearing, this issue was not within the Examiner's purview in the first instance. See IMC 18.01.050(C). Nevertheless, the Decision includes a lengthy discussion asserting that the Director's vesting determination somehow operated to prevent the Hearing Examiner from approving the plat. Because the Examiner had no authority to address vesting in the first instance, the Department respectfully submits that the Hearing Examiner's denial of the plat application under these circumstances contravenes IMC 18.04.220(B) and IMC 18.04.480, is clearly erroneous and constitutes reversible error.

Undisputed evidence and testimony submitted during the plat hearing confirms that IHIF-C's plat application satisfies all relevant standards and should be approved—regardless of which body of standards is ultimately used to evaluate its compliance. Indeed, the Hearing Examiner repeatedly stressed during the hearing that the core proposal under review was simply whether the subject property met the applicable standards for division into the separate lots that had been proposed by IHIF-C. And, during the public hearing the Examiner repeatedly admonished the Department to limit its testimony to this basic

⁷ Decision, at 42.

⁸ Decision, at 42-43.

issue. While the parties have variously disagreed regarding the vested status of the application in relation to certain construction-level details (*i.e.*, future building footprints, etc.) depicted on subsequent iterations of the plat drawings, no evidence was presented suggesting that the property did not satisfy the basic standards for division itself. It remains uncontested that the lot sizes, configuration, layout and other fundamental aspects of the proposal are compliant and that they comprise a “neat and approximate drawing” of the proposed subdivision as required by law. *See* RCW 58.17.020(4). Indeed, the Decision acknowledges this point.⁹ This conclusion in and of itself should have constituted a sufficient basis to approve the application—especially given the absence of any contrary evidence or argument from any party or the public.

To the extent of any uncertainty, the plat application’s compliance was addressed at length by the Department in both the pre-hearing staff report¹⁰ and further emphasized and clarified in hearing testimony.¹¹ City staff concluded that the plat satisfied all applicable standards for approval.¹² The Department’s presentation during the initial hearing installment on March 9, 2020, which focused primarily on the plat application’s compliance with the Development Agreement’s standards, reiterated this conclusion.¹³ Consistent with this approach, the revised approval conditions (related to the plat itself, not future site development) proposed by the Department in August 2020 were likewise overwhelmingly rooted in the Development Agreement.¹⁴ Staff accordingly acknowledged that the SEPA mitigation necessary to approve the plat itself (again, as distinct from future development on the subject property) had already been provided through the Development Agreement’s framework.

In sum, the Department overwhelmingly used the Development Agreement standards to evaluate all aspects of the plat application that were actually implicated by the subdivision proposal itself. Both parties agreed, and all of the hearing evidence supports the conclusion, that IHIF-C’s plat application meets the standards for approval in this regard. Under these circumstances, the Department respectfully submits that the Hearing Examiner’s denial of the plat application under these circumstances contravenes IMC 18.04.220(B) and IMC 18.04.480, is clearly erroneous and constitutes reversible error.

3.6 The Decision contains a lengthy discussion espousing the Hearing Examiner’s own theories regarding and interpretations of the vested rights doctrine in relation to preliminary plat applications generally.¹⁵ As the Decision itself acknowledges repeatedly, however, the vesting determination for IHIF-C’s plat application is an issue that lies within the exclusive purview of the Director—not the Examiner.¹⁶ *See* IMC 18.01.050(C). A statement is dicta when it is not necessary to the tribunal’s decision in a particular case. *See, e.g., Protect the Peninsula’s Future v. City of Port Angeles*, 175 Wn. App. 201, 215, 304 P.3d 914 (2013) (citing *Ruse v. Dep’t of Labor & Indus.*, 138 Wn.2d 1, 8–9, 977 P.2d 570 (1999)). Because this topic

⁹ Decision, at 40.

¹⁰ Exhibit R, at 11-13.

¹¹ Testimony of Lucy Sloman; testimony of Doug Schlepp.

¹² Exhibit V, at 1; testimony of Lucy Sloman; testimony of Doug Schlepp.

¹³ Testimony of Lucy Sloman; testimony of Doug Schlepp.

¹⁴ City Proposed Conditions of Approval Dated August 10, 2020.

¹⁵ Decision, at 40-43.

¹⁶ *See, e.g.,* Decision, at 41.

is categorically beyond the Hearing Examiner's subject matter jurisdiction and is thus by definition unnecessary to the Decision, it is appropriately characterized as dicta. Dicta is not binding authority, *see, e.g., Hildahl v. Bringolf*, 101 Wn. App. 634, 650–51, 5 P.3d 38 (2000), and including this content in the Decision was inappropriate and clearly erroneous. The Department respectfully requests that the Decision be modified to strike these unwarranted and unnecessary statements from the decisional record.

3.7 During the initial March 9, 2020 installment of the public hearing on IHIF-C's preliminary plat application, IHIF-C presented extensive testimony addressing issues related to vesting, procedures, and the City's alleged delays in processing the plat application.¹⁷ In this regard, IHIF-C submitted into evidence a purported "timeline" of relevant events identifying, from IHIF-C's point of view, various milestone procedural dates and relevant communications between the applicant's project team and City staff members.¹⁸ Indeed, during the first day of the plat hearing, IHIF-C was afforded an unfettered opportunity to present this type of testimony, including a lengthy, detailed, point-by-point verbal question-and-answer narrative to accompany and explain IHIF-C's written timeline exhibit.¹⁹ The Hearing Examiner did not limit or otherwise constrain IHIF-C's ability to provide this information in any manner.

The Department was compelled to refute IHIF-C's narrative by presenting contrary testimony and evidence to complete the record once the hearing reconvened. To this end, the Department created and submitted its own timeline of relevant dates and events.²⁰ The Department's witnesses likewise prepared extensively in advance of the August 3, 2020 hearing date to offer testimony in order to fully complete the record and to directly rebut IHIF-C's argument(s) on the processing, vesting and other procedural issues. When the plat hearing ultimately reconvened on August 3rd, the Department attempted to offer this testimony by reference to the Department's own written timeline exhibit—in the same manner and format that IHIF-C had itself employed during the original March 9, 2020 hearing installment.²¹ It was assumed, logically and as a matter of basic fairness, that the Department would be afforded an equivalent opportunity to present its own evidence concerning the relevant events and timing considerations.

The Hearing Examiner, however, interrupted the Department's presentation at the onset and indicated that he now wished only to hear testimony that was strictly related to the proposed plat's compliance with the relevant approval criteria, and that other testimony would not be allowed. The Department objected to this constraint, explaining the necessity of completing the record and rebutting the voluminous testimony that had previously been introduced by IHIF-C. The Department noted that future judicial review of the Plat Decision under the Land Use Petition Act (LUPA), Chapter 36.70C RCW, would likely be conducted on a closed record, *see* RCW 36.70C.120, underscoring the practical and legal necessity of creating a complete record on all issues during the local administrative proceedings.

The Examiner ultimately declined to allow any of the Department's intended testimony. However, in response to the Department's concerns the Examiner indicated that he would include a specific finding in the Plat Decision acknowledging that the parties—primarily the Department—had not been afforded an

¹⁷ *See, e.g.*, testimony of Tia Heim; Exhibit Z; Exhibit WW2.

¹⁸ *See* Exhibit Z; Exhibit WW2.

¹⁹ Testimony of Tia Heim.

²⁰ *See* Exhibit XX1.

²¹ Testimony of Lucy Sloman.

opportunity to create a full and complete factual record on the issues above. Out of respect for the Hearing Examiner's stated preference and directive, and in reliance upon the Examiner's assurance above, the Department abstained from further objection at the August 3, 2020 hearing.

Despite the Hearing Examiner's assurances, the February 1, 2021 Plat Decision does not contain the promised finding acknowledging that the Department had not been afforded an opportunity to rebut IHIF-C's various procedural and timing arguments and to create complete record on these issues. This omission was clearly erroneous and constitutes yet another reversible error. The Department respectfully requests that the Decision be modified to include the promised finding.

IV. Relief Requested

Sitting in its appellate capacity, the City Council has broad discretion to craft an appeal outcome that serves the interests of justice. "The decision appealed may be affirmed, reversed, remanded or modified." IMC 1.32.020(E). Here, in recognition that both the Department and the Applicant agree that IHIF-C's preliminary plat satisfies the applicable criteria and *should* be approved, the Department respectfully requests that the City Council resolve this appeal through one of the approaches below, which are each intended to ensure that: (i) IHIF-C's preliminary plat application is approved; (ii) approval of the plat does not extend vesting protection to the future buildings and related details depicted on IHIF-C's post-Buildout Period submittals in contravention of the Development Agreement; and (ii) all future permit applications submitted for the subject property must comply with the regulations, procedures and mitigation requirements applicable and in effect at that time. The Department accordingly requests that the City Council:

(i) Reverse the Decision and replace it with a new decision approving IHIF-C's preliminary plat subject to the City Proposed Conditions of Approval Dated August 10, 2020, as originally requested by the Department; or

(ii) Remand the IHIF-C's preliminary plat application back to the Hearing Examiner with direction(s) to approve the plat subject to the City Proposed Conditions of Approval Dated August 10, 2020, as originally requested by the Department.

If any part of the Decision will be retained, the Department further respectfully requests that the Decision be modified to strike from the decisional record the Hearing Examiner's dicta on pages 40-43 of the Decision regarding preliminary plat vesting—a subject regarding which the Examiner himself acknowledges he has no jurisdiction to address.

Finally, the Department also respectfully requests that the new decision approving IHIF-C's preliminary plat application, or any part of the Decision that will be retained, be drafted or modified, as applicable, to include a finding, per the Hearing Examiner's previous assurances, that the City was not afforded an opportunity to rebut IHIF-C's testimony and to create a full and complete record on issues other than those strictly related to the plat application's compliance with the substantive approval criteria.

APPENDIX - 1

**BEFORE THE HEARING EXAMINER
FOR THE CITY OF ISSAQUAH**

In the Matter of the Application of	)	No. PP17-00002
	)	No. PRJ16-00013
)	
IHIF-Commercial, LLC	)	High Street Collection at
	)	Issaquah Highlands Preliminary Plat
)	
	)	FINDINGS, CONCLUSIONS,
<u>For Approval of a Preliminary Plat</u>	)	AND DECISION

SUMMARY OF DECISION

The request for approval of a preliminary plat to subdivide a 21.46-acre property into 10 lots, primarily for commercial and retail development, on “Lot B” of the Issaquah Highlands, north of NE Discovery Drive and west of 9th Avenue NE, is **DENIED**.

Although the record demonstrates that the proposed preliminary plat would likely make “appropriate provisions for the public health, safety, and general welfare” as required by Revised Code of Washington (RCW) 58.17.110(1)(a)—including appropriate provisions for open spaces, drainage ways, streets, sidewalks, potable water supplies, and sanitary wastes—insufficient information currently exists to determine whether “the public interest will be served by the subdivision and dedication” of the proposed plat, as required by RCW 58.17.110(1)(b).

Specifically, the City of Issaquah (City) and IHIF-Commercial, LLC (Applicant, or IHIF), fundamentally disagree on which regulations apply to review of this proposal: the Applicant contends that the proposal vests to regulations within a now defunct development agreement that was in place at the time the City deemed this preliminary plat complete; the City maintains that some provisions of the development agreement continue to apply to the proposed plat while other matters are governed by regulations the City Council specifically adopted to replace the development agreement.

Both parties seemingly agree that the Hearing Examiner lacks authority to independently decide this issue and that any challenge to the vesting determination made in relation to this proposal must occur in another forum. This issue, however, is so fundamental to review of the proposal that making a determination about the preliminary plat, without first having the vesting issue resolved, would inject additional uncertainty into a matter that has been riddled with confusion and misunderstandings for several years, and the public interest would not be served by doing so. Accordingly, denial is warranted until an appropriate forum with jurisdiction can provide additional guidance on vesting to the parties so that any confusion about which regulations govern is settled.

*Findings, Conclusions, and Decision
City of Issaquah Hearing Examiner
High Street Collection Preliminary Plat
Nos. PP17-00002 & PRJ16-00013*

SUMMARY OF RECORD

Hearing Date:

The Hearing Examiner held an open record hearing on the request on March 9, 2020. The hearing was scheduled to continue, for a second day, on March 20, 2020. On March 12, 2020, however, the City informed the Hearing Examiner that all public meetings, public hearings, and administrative appeal proceedings would be immediately discontinued until further notice in light of the outbreak of the COVID-19 pandemic. On March 27, 2020, and again on May 11, 2020, the Hearing Examiner informed the City of his willingness to hold hearings using remote technology, and the open record hearing was scheduled to continue on July 8, 2020, using such technology.¹ Prior to commencing the continued hearing on July 8, 2020, however, it was determined that additional public notice of the continued hearing had not been issued. Accordingly, the hearing was continued so that appropriate public notice could be provided.² Ultimately, the hearing recommenced and concluded on August 3, 2020. The record was left open until August 18, 2020, to allow the parties to submit additional information, including an “agreed” upon set of project plans for review and proposed approval conditions, with justification, from each party.³

Testimony:

The following individuals presented testimony under oath at the open record hearing:

- Lucy Sloman, City Land Development Manager
- Doug Schlepp, City Development Senior Consulting Engineer
- Eric Evans, Applicant Director of Development
- Michael Swenson, P.E., Transpo Group
- Mark Veldec, P.E., KPFF
- Tia Heim, Applicant Representative

Attorney Patrick Schneider represented the Applicant at the open record hearing.
 Attorney Zach Lell represented the City at the open record hearing.

Exhibits, Motions, and Pleadings:

Attachment A details the exhibits that were admitted into the record, as well as pleadings, motions, and other materials submitted by the parties.

The Hearing Examiner enters the following findings and conclusions based upon the testimony and exhibits admitted at the open record hearing:

¹ See Exhibit WW and Exhibit XX.

² *Order on Continued Hearing*, dated July 8, 2020.

³ Exhibit YY; *City Proposed Conditions of Approval*, dated August 10, 2020; *Applicant Response to City's Proposed Conditions of Approval*, dated August 18, 2020.

*Findings, Conclusions, and Decision
 City of Issaquah Hearing Examiner
 High Street Collection Preliminary Plat
 Nos. PP17-00002 & PRJ16-00013*

FINDINGS

Regulatory Background

1. In 1995, the Washington State Legislature adopted Sections 36.70B.170 to .200 Revised Code of Washington (RCW), which allowed local governments to enter into development agreements with persons having ownership or control of real property. The statute provides that a “development agreement must set forth the development standards and other provisions that shall apply to and govern and vest the development, use, and mitigation of the development of the real property for the duration specified in the agreement.” *RCW 36.70B.170(1)*. The statute further explains that the “development standards” that must be set forth in a development agreement include “[r]eview procedures and standards for implementing decisions” and a “build-out or vesting period for applicable standards.” *RCW 36.70B.170(3)(i) and (j)*. The statute states that executing development agreements is a proper exercise of “county and city police power and contract authority.” *RCW 36.70B.170(4)*. Finally, RCW 36.70B.180 provides:

Unless amended or terminated, a development agreement is enforceable during its term by a party to the agreement. A development agreement and the development standards in the agreement govern during the term of the agreement, or for all or that part of the build-out period specified in the agreement, and may not be subject to an amendment to a zoning ordinance or development standard or regulation or a new zoning ordinance or development standard or regulation adopted after the effective date of the agreement. A permit or approval issued by the county or city after the execution of the development agreement must be consistent with the development agreement.

Exhibit F.

2. On June 19, 1996, the City entered into a development agreement entitled the “Grand Ridge Annexation and Development Agreement.” This agreement later became known as the “Issaquah Highlands Annexation and Development Agreement” (Development Agreement, or DA), which covers development of the Issaquah Highlands area, including the subject property. The DA, including its appendices and amendments, provides development standards related to everything from zoning and density requirements to agreed mitigation and specific design review requirements. Of particular note:
 - Unlike the municipal code, the DA does not generally provide for differing treatment of various land use permits. Instead, it defines *implementing approvals* as “land use approvals or permits” which “implement or otherwise are consistent [with the DA], including but not limited to plats, short plats, binding site plans, site development permits, building permits, and grading permits.”⁴

⁴ *Exhibit P (Section 6, Definitions).*

- Comprehensive standards for infrastructure throughout all of the Issaquah Highlands are provided, including standards related to: stormwater improvements (Appendix D); sewer service (Appendix G); roadways (Appendix H) and other transportation improvements (Appendix J); capital facilities improvements, including those related to park, police, fire, and public works (Appendix K); urban trails (Appendix T); and public spaces, such as parks, plazas, and woonerfs (Exhibit U).
- The DA provides for a process to allow modifications to its own development standards, including “administrative minor modifications” (AMMs).
- The DA provides detailed and specific guidelines related to processing and approval of land use permits (i.e. implementing approvals), covering permit approval from the preliminary application stage through the construction permit stage of development (Appendix L).
- The DA provides for a dispute resolution process (Section 5.11).

Exhibit P.

3. The DA also contains provisions concerning, vesting and termination of the agreement. Specifically, the DA includes the following sections:

[Section] 3.23 VESTING OF DEVELOPMENT STANDARDS AND MITIGATION

All development with the [Urban Growth Area] shall be governed by the Development Standards and shall be implemented through plats, short plats, binding site plans, site development permits, building permits and other permits and approvals (“Implementing Approvals”) issued by the City. A “Buildout Period” of twenty (20) years following first final plat approval is established for the development and construction of uses for the [Issaquah Highlands] Project. During the Buildout Period, the City shall not modify or impose new or additional Development Standards beyond those set forth in this Agreement. . .

* * *

[Section] 3.23.2 After Buildout. The Development Standards shall continue to apply to all applications for Implementing Approval submitted after expiration of the Buildout Period, except either party may terminate this Agreement, and the zoning and development regulations may be modified, as provided in Section 5.13.

* * *

*Findings, Conclusions, and Decision
 City of Issaquah Hearing Examiner
 High Street Collection Preliminary Plat
 Nos. PP17-00002 & PRJ16-00013*

Page 4 of 50

[Section] 5.13 TERM

The term of this Agreement shall continue at a minimum through the Buildout Period, and shall continue after the Buildout Period unless and until either the City or the Partnership . . . gives notice of termination. . . . No sooner than six (6) months after the notice of termination, the City shall hold public hearings and shall adopt zoning and related development standards for the UGA portion of the Property, or portions thereof as determined appropriate by the City. Upon such adoption, this Agreement shall terminate and thereafter the UGA portion of the Property shall be governed by the adopted City zoning and related development regulations.

Exhibit P.

4. The first final plat under the DA was approved on September 18, 1997. Accordingly, the “Buildout Period” under the DA expired on September 18, 2017. Under the terms of the DA, however, its development standards remained effective until the City Council voted to enact Ordinance No. 2830, effective March 28, 2018 (and later codified at Chapter 18.19B of the Issaquah Municipal Code (IMC)). The ordinance terminated the DA and promulgated “Replacement Regulations” replacing the development standards and regulations previously governing land subject to the DA. *Exhibit F; Exhibit L.*

5. Of particular note, the Replacement Regulations include different procedures than the DA related to the processing of land use applications, as found in IMC 18.19B.270. Under Appendix L of the DA, for instance, a preliminary plat would be processed as follows: the proposal’s submission to the City; the City issuing a “sufficiency” determination within 10 calendar days; the City’s (now defunct) Major Development Review Team holding an application conference with the developer to furnish written comments; the City’s (now defunct) Urban Village Development Commission considering the matter within 60 days from the sufficiency determination and issuing a recommendation to the City Council; and the City Council approving or denying the preliminary plat. Under the Replacement Regulations, a preliminary plat is processed by: the proposal’s submission to the City; the City determining that the application is “complete”; the City’s Development Commission reviewing the proposal at an informal public meeting; City staff (with the assistance of the Applicant, if they so choose) preparing a “community conference response memo”; distribution of the response memo to parties of record and the Development Commission for additional public comment; incorporation of public comment into the community conference response memo, if appropriate; production of a final community conference response memo; preparation of a staff report by City staff; and an open record public hearing before the Hearing Examiner, who then issues a final decision on the preliminary plat. *Exhibit P, Appendix L; IMC 18.19B.270.C.*

*Findings, Conclusions, and Decision
 City of Issaquah Hearing Examiner
 High Street Collection Preliminary Plat
 Nos. PP17-00002 & PRJ16-00013*

6. In addition, the Replacement Regulations include the following provision concerning the vesting of permits:

Only vesting established by Washington State law shall apply to the vesting of development applications for properties located within Issaquah Highlands previously covered by the terminated development agreements.

These are:

1. Building permits which comply with RCW 19.27.095; or
2. Long or short plats which comply with RCW 58.17.033; or
3. Development agreements per RCW 36.70B.180.

IMC18.19B.280.A.

Procedural Background

City's Initial Review of IHIF's Preliminary Plat

7. IHIF Commercial, LLC (Applicant, or IHIF) requests preliminary plat approval to subdivide 21.46 acres that it owns on "Lot B" of the Issaquah Highlands, north of NE Discovery Drive and west of 9th Avenue NE, primarily for commercial and retail development. IHIF began communicating its intention to develop the property several years ago, as evinced by a "Development Entitlement Memorandum" prepared by the City on December 1, 2016, which noted that the property would be "permitted under the Issaquah Highlands Development Agreement." *Exhibit Y.*
8. The vested status of any proposal submitted has been a concern of paramount importance to IHIF since it first contemplated development of the property. On January 24, 2017, for instance, Applicant Representative Tia Heim emailed Lucy Sloman, the City's Land Development Manager, to request a copy of the "vesting requirements interpretation" previously prepared by City Development Services Director Keith Niven that was referenced in the December 2016 Development Entitlement Memorandum.⁵ *Exhibit XX-10.*
9. By February 28, 2017, IHIF determined that it would move forward with development of the property and requested an optional "Preliminary Application Meeting" with the City, consistent with procedures in Appendix L of the DA.⁶ On March 8, 2018, David Cayton, an engineering consultant working on behalf of IHIF, emailed City Development Services Department Project Oversight Manager Christopher Wright. In the email, Mr. Cayton noted that the City denied IHIF's request to conduct a Preliminary Application Meeting but, instead, would require an "early collaborative meeting." Mr. Cayton

⁵ This specific vesting requirements interpretation of Mr. Niven was not included in the record for the present application.

⁶*Exhibit WW-2.*

*Findings, Conclusions, and Decision
City of Issaquah Hearing Examiner
High Street Collection Preliminary Plat
Nos. PP17-00002 & PRJ16-00013*

indicated that IHIF would like to schedule such a meeting as soon as possible and provided Mr. Wright with draft versions of a “Project Narrative, a SEPA Checklist and a draft copy of a Preliminary Plat” for the City’s review. That same day, Mr. Wright emailed Mr. Cayton back and noted that the information he provided would be sufficient for him to schedule the “Early Collaboration Meeting.”⁷ *Exhibit AA.*

10. IHIF and the City held the Early Collaboration Meeting on March 21, 2017. On March 27, 2017, Applicant Representative Heim emailed Land Development Manager Sloman to (again) request a Preliminary Application Meeting. In response, Sloman noted that the meeting could be scheduled but that the City would need “enough info to know that you can and how you’d service wet utilities” for the project area, and that a traffic study would be necessary because the City would not be “able to have a full review” without “knowing the roads, traffic, interconnections, etc.” *Exhibit XX-11.*
11. The Preliminary Application Meeting eventually occurred on May 31, 2017.⁸ City Senior Planner Jean Lin emailed Mr. Cayton on June 7, 2017, with comments summarizing the parties’ discussion. The comments identify several “action items” the City determined would need to be addressed prior to submission of IHIF’s preliminary plat, including more information on existing and proposed streets and frontage improvements, information on the placement of wet and dry utilities, and conceptual grading and drainage plans. The comments also noted that the City “must receive a letter from the [Issaquah Highland’s Community Association’s Architectural Review Committee] supporting the plat’s design,” that a “transportation impact analysis would be required,” that the City “strongly urged” that IHIF meet with Eastside Fire and Rescue, and that the City “strongly urged” IHIF to continue a trail through the plat, from High Street east of 9th Avenue NE to connect with NE Discovery Drive. Finally, the City’s Public Works Department provided detailed comments about water flow interruptions and about the design, operation, connection, and location of specific utilities (especially in relation to stormwater). *Exhibit CC.*
12. After receiving the City’s comments at the Preliminary Application Meeting, the IHIF team continued to work with City staff in advance of submitting its preliminary plat application to address the City’s concerns. Of note:
 - Mark Veldee, a consulting engineer working with IHIF, met with City Development Senior Consulting Engineer Doug Schlepp and with Dan Ervin, another of the City’s consultants, on June 7, 2017, to discuss stormwater. On

⁷ Appendix L of the DA does not reference the term “Early Collaboration Meeting.” It does, however, have provisions for a “Project Feasibility Meeting,” wherein an applicant would meet with the City to “eliminate as many potential problems as possible in order for the application to be processed without delay or undue expense” prior to an applicant submitting a project application. *Appendix L.* Presumably Mr. Wright’s email referred to this type of meeting.

⁸ *Exhibit WW-2.*

June 27, 2017, Mr. Ervin emailed Mr. Veldee and explained that stormwater detention “will not be required for any improvements you make to Discovery Drive.” *Exhibit UU.*

- On July 10, 2017, Mr. Cayton emailed Ms. Lin to inquire about whether a “Preliminary Street Lighting Plan” would be required at the preliminary plat stage of review and to inquire about scheduling a meeting with Eastside Fire. In response, Ms. Lin noted that a “street lighting plan at a conceptual level would be helpful” so the City could ensure that “there are appropriate locations allocated for all the components of the frontage improvements” as an “integral part” of the preliminary plat review process. In addition, she informed Mr. Cayton that Eastside Fire’s primary concern was that “the width of the streets meet the Issaquah Highland street standards” and that, if that was so, no meeting would be necessary. *Exhibit WW-12.*

13. Ultimately, IHIF submitted its preliminary plat application on August 1, 2017, approximately six weeks before the end of the Buildout Period specified in the DA. IHIF included the following materials with the plat application: (1) a set of project plans; (2) a “Project Narrative,” dated July 15, 2017, providing background information on the proposal and a detailed analysis addressing how the preliminary plat would comply with the requirements of the DA, including each of its appendices; (3) a Traffic Study Memorandum, prepared by Transpo Group, dated July 28, 2017, providing detail about the proposed configuration of NE Discovery Drive; (4) a Preliminary Stormwater Report, prepared by KPPF Consulting Engineers, dated July 2017; and (5) a letter from Ms. Heim noting that, in IHIF’s view, the submitted materials sufficiently addressed the City’s earlier comments and that, as such, a determination of completeness should be issued for the proposal. *Exhibits B-1.1 through B-1.6.*
14. On August 28, 2017, still prior to the end of the Buildout Period, IHIF submitted additional materials for review that were inadvertently omitted from their original submittal, including: title information; a State Environmental Policy Act (SEPA) Checklist, dated July 27, 2017; information on agent authority and property ownership; a memorandum concerning lot closure calculations, prepared by Core Design, Inc.; and legal descriptions of a proposed public sidewalk easement and public trail/landscape easement. *Exhibit B-2.1 through B2-17.*
15. On September 25, 2017, Mr. Cayton emailed Ms. Lin to inquire about the status of the application, noting that, under the DA, “we were to have an application conference within 30 days of the completeness determination.” On October 2, 2017, Ms. Lin responded. In her email, she explained that the application was deemed complete and that “getting you an application completeness letter is on my to do list.” In addition, Ms. Lin pointed out that, “per the DA, we have to determine if the application is complete within 10 days of submittal, so I will be adjusting the date accordingly.” On October 6, 2017, Ms. Lin sent

*Findings, Conclusions, and Decision
City of Issaquah Hearing Examiner
High Street Collection Preliminary Plat
Nos. PP17-00002 & PRJ16-00013*

the “Complete Application Determination,” backdated to August 11, 2017, and told Mr. Cayton that the City would “follow up with you with any questions or comments in the next week or two” after it reviewed the submitted application materials. In addition, she requested that IHIF install a project sign at the site (i.e., post notice of the application) and submit an affidavit concerning notice being posted, which IHIF did on October 17, 2017.⁹ *Exhibit EE.*

16. On October 5, 2017, Ms. Lin emailed the IHIF team to relay comments provided by the Eastside Fire Marshal’s Office about fire access to one of the proposed lots within the preliminary plat and about the need for NE Discovery Drive to be widened adjacent to the plat to “provide 20’ clear road width without on-street parking (preferred), with an absolute minimum of 18’ road width.” *Exhibit XX-04.*
17. On November 16, 2017, Doug Schlepp provided additional comments to Mark Veldee concerning stormwater management. His email noted:

After discussing this with the PWE Utilities Manager, Bob York, there is capacity in the City. You may work directly with Dave Segal who had modeled the Upper Reid Pond previously concerning the capacity for both detention and treatment – all design work is still subject to City review and approval. Note that while the pond was designed under the KCSWDM [King County Storm Water Design Manual] you will need to comply with the new Standard based on the 2014 DOE [Department of Ecology] Manual adopted by the City.

Bob [York] and I will be working on the fee to use [the Upper Reid Pond Stormwater] facility. . . I recommend that you consider this effort more globally for all [IHIF] properties that may benefit from this rather than a project by project analysis. This would need to be incorporated into the plat documents.

Exhibit XX-05.

18. On December 15, 2017, prior to the City issuing notice of the preliminary plat application, IHIF submitted two additional documents for review: (a) an updated “Preliminary Plat” drawing with proposed lot line revisions and (b) a “Preliminary Engineering Overview Site Plan” depicting building footprints on the proposed lots, consistent with the materials IHIF had submitted for the three site development permits it had previously submitted, related to development within the preliminary plat. Of particular note, none of IHIF’s earlier preliminary plat submittals depicted proposed

⁹ Exhibit C-2.

building footprints. Mr. Cayton emailed Ms. Lin that same day to explain that these additional submissions were provided to address “minor lot line revisions” that were necessary to accommodate proposed building locations, improvements, and other plat features, and to depict “proposed buildings” to assist the City in understanding the evolution of the site design for the plat. *Exhibits B-3.2 and B-3.3; Exhibit GG.*

19. On December 27, 2017, the City mailed notice of the preliminary plat application to property owners within 300 feet of the project site and parties of record. The notice materials stated that the City Council (not the Hearing Examiner) would serve as the “Decision Maker” for the proposal, although the “[d]ate and time of the meeting and hearing has not been set,” and indicated that the City had made a preliminary determination that the “Development Regulations that will be used for Project Mitigation and Consistency” would be those in the DA (in conjunction with the City Comprehensive Plan). In addition, the “Preliminary Engineering Overview Site Plan,” depicting building footprints on the proposed lots within the plat, was included with the notice materials. Finally, the notice provided for the submission of public comments through January 17, 2018. The record does not reflect whether the City received any public comments in response to the notice of application. *Exhibit C-1.*

20. After issuing notice of the application, and despite its earlier assertions that the application was deemed “complete” under the DA, the City did not timely schedule the preliminary plat for review by the Urban Village Development Commission, as required by the DA.¹⁰ *Exhibit JJ.*

City’s Review of Site Development Permits and Associated Appeals

21. While the City continued to review IHIF’s submitted preliminary plat materials, IHIF submitted three development permits related to development that it intended to pursue within the preliminary plat: a potential Medical Office Building (No. ASDP18-00007), Self-Storage Facility (No. ASDP18-0006), and Retail Development (No. SDP18-00001). IHIF initially submitted the Site Development Permit (SDP) application for a Retail Development and the Administrative Site Development Permit (ASDP) application for a Medical Office Building on October 23, 2017. It later submitted the ASDP application for a Self-Storage Facility on December 1, 2017. Of note, all three applications were submitted after expiration of the Buildout Period specified within the DA. *Exhibit F.*

¹⁰ Appendix L of the DA provides in Section 3 of Part Two that the City “shall determine if the information contained in the application or modification request submitted by the developer is sufficient,” meaning the “required submission materials are sufficiently complete to allow continued processing.” If sufficient, the application “shall be placed on the agenda for consideration at an [Urban Village Development Commission] meeting to be held within sixty (60) days.” If the application is deemed insufficient, “it shall be returned to the developer within ten (10) calendar days with written documentation of the inadequacies.” If the City “does not notify the applicant within ten (10) calendar days of receipt of an application . . . it shall be deemed sufficient and review shall proceed.” *Exhibit P.*

*Findings, Conclusions, and Decision
City of Issaquah Hearing Examiner
High Street Collection Preliminary Plat
Nos. PP17-00002 & PRJ16-00013*

22. On November 16, 2017, the City’s Development Services Department (DSD) provided a memorandum to the City Council about unbuilt properties in Issaquah Highlands that would remain once the City adopted “Replacement Regulations.” In the memorandum, DSD recommended that the City Council include language in the Replacement Regulations related to vesting that would read:

Development for which a complete ASDP, SDP, or other similar land use permit application has been submitted prior to the effective date of the ordinance adopting [the Replacement Regulations] shall be vested against the provisions of [the Replacement Regulations] and shall be processed under the regulations in existence prior to the effective date as long as the permit application remains active.

Exhibit F.

23. The memorandum also stated that, as an alternative, the City Council could refrain from including any language about vesting in the Replacement Regulations or include language that would only allow for vested rights for complete building permit applications, subdivision applications, or development agreements, consistent with state law. Ultimately, DSD recommended that the City Council adopt language allowing for ASDP, SDP, or other similar land use permit applications because this approach would be “consistent with the vested rights doctrine” and the Supreme Court’s decision in *West Main Associates v. Bellevue*, 106 Wn.2d 47, 720 P.2d 782 (1986). *Exhibit F.*
24. On November 21, 2017, representatives of IHIF, including Tia Heim, met with Director Niven to discuss its pending applications, including the application related to a Retail Development and a Medical Office Building. According to Ms. Heim, Mr. Niven confirmed that the submitted ASDP and SDP applications were complete and would vest to the Development Standards of the DA. *Exhibit F.*
25. The same day, Ms. Heim emailed Mr. Niven about the meeting that occurred, stating: “[a]s we discussed, we would like the City to confirm our understanding that [IHIF’s] land use permit applications have been deemed complete [per the requirements of the DA] and are therefore vested to the Development Standards in the Development Agreement.” Mr. Niven responded to Ms. Heim’s email that evening, noting that, unless a request for additional information has been received, “these applications are viewed as ‘Complete’ per the terms of the Development Agreement.” Approximately 20 minutes later, Ms. Heim again emailed Mr. Niven, stating “I am assuming that you mean that the applications are complete and vested to the Development Agreement as stated in the email below and as we discussed in our meeting with you today.” Ms. Heim requested that Mr. Niven confirm that her understanding of the situation was correct. The next morning, on November 22, 2017, Mr. Niven responded, emailing “yes.” *Exhibit FF.*

*Findings, Conclusions, and Decision
City of Issaquah Hearing Examiner
High Street Collection Preliminary Plat
Nos. PP17-00002 & PRJ16-00013*

26. Land Development Manager Lucy Sloman was cc'd on the email communication that occurred between Ms. Heim and Mr. Niven. Following Mr. Niven's communication with Ms. Heim on the morning of November 22, 2017, Ms. Sloman emailed Mr. Niven (no other parties were cc'd on the email) to express confusion in light of her belief that IHIF's pending applications would not vest "unless the council agrees to the vesting language" recommended by DSD. In reply, Mr. Niven stated "They are vested at this moment under the DA" but, "If the Council removes the proposed vesting language, they will lose their vested status." In response, Ms. Sloman wrote "Shouldn't that be clear in the response?" The record does not reflect that either Mr. Niven or Ms. Sloman clarified the earlier response to Ms. Heim's inquiry. *Exhibit XX-07.*
27. Ultimately, on March 5, 2018, Attorney Patrick Schneider wrote to the City on behalf of IHIF to notify the City that the City had failed to comply with the terms of the DA in several ways. The letter summarized IHIF's claims (referring to IHIF as "IHIF-C") as follows:

Since purchasing its property in 2013, IHIF-C has been working with the City in good faith on development proposals for its property. IHIF-C met with City staff on several occasions to discuss possible extension of the DA or modification to allow mixed-use development. At the City's suggestion, in 2016, IHIF-C spent over \$100,000, on a community outreach effort centered around a mixed-use development proposal that included affordable housing, community retail, and medical offices/health services uses. On several occasions between 2015 and 2017, IHIF-C made written requests to the City to either extend the DA with respect to its property or to enter into a new development agreement with the City. When it became clear that the City was not supportive of these efforts, in late 2016, IHIF-C modified its development proposal to only include uses that were allowed as a matter-of-right under the DA.

To effectuate those uses, IHIF-C requested several DA Implementing Approvals including a preliminary plat and permits for four uses: Retail, Medical Office, Storage, and Commercial. As detailed below, the City repeatedly violated (and continues to violate) the DA processing timelines for those permits in an overt effort to prevent IHIF-C's proposed development—not because the development is not allowed under the DA, but because the City's new administration simply doesn't like it.

Staff has provided inconsistent and erroneous information on the vesting of IHIF-C's Implementing Approvals and has treated IHIF-C unfairly and differently than other similarly situated landowners by delaying review of

*Findings, Conclusions, and Decision
City of Issaquah Hearing Examiner
High Street Collection Preliminary Plat
Nos. PP17-00002 & PRJ16-00013*

Page 12 of 50

IHIF-C's preliminary plat and refusing to deem IHIF-C's [associated site development permit applications as] complete, allegedly because the preliminary plat wasn't finalized, when the sole reason for this was the City's repeated refusal to follow the DA Section 3.22 (*City Processing and Review*) and Appendix L timelines. By refusing to acknowledge the vested status of IHIF-C's Implementing Approvals, the City is expressing its intent to ignore the tens of millions of dollars in mitigation that was constructed to support development on IHIF-C's property. This mitigation is expressly designed as part of the "Development Standards" that IHIF-C vested to by submitting its Implementing Approvals, yet the City has refused to acknowledge this fact or explain why the City believes that it can unilaterally strip IHIF-C of these property rights.

Exhibit JJ.

28. Following the summary, Mr. Schneider wrote 10 additional pages in the letter explaining, in detail, the various ways in which the City has violated the DA. He also noted that the City could cure the situation through: (1) timely processing IHIF's pending applications consistent with the DA; (2) recognizing IHIF's pending applications are vested to Sections 3.23 (Vesting) and 3.23.2 (After Buildout), and to the "Development Standards" in Section 6 of the DA, which include mitigation associated with full build out of IHIF's property; (3) acknowledging that the vesting for IHIF's preliminary plat (and other applications) continues despite the adoption of future replacement regulations; and (4) allowing the continued processing of IHIF's preliminary plat, associated development permits, and construction of such permits under the DA's development standards. On March 8, 2018, Keith Niven responded to Mr. Schneider's letter and requested that the parties engage in a conversation to allow the City to better understand IHIF's claims and give the City an opportunity to respond to such claims. *Exhibit JJ.*
29. On March 15, 2018, IHIF and the City signed an agreement concerning some of the claims raised by Mr. Schneider in his letter the week before. Of note, the agreement acknowledged that the City Council had not yet adopted replacement regulations for the DA and that the parties may have differing positions regarding the effect of the replacement regulations on IHIF's applications, including differing positions on the effect of replacement regulations on vesting. *Exhibit F.*
30. As noted above, on March 19, 2018, the City Council voted to enact Ordinance No. 2830, effective March 28, 2018 (and later codified at Chapter 18.19B IMC). The ordinance terminated the DA and promulgated the Replacement Regulations, replacing the development regulations previously governing land subject to the DA. *Exhibit F.*

*Findings, Conclusions, and Decision
City of Issaquah Hearing Examiner
High Street Collection Preliminary Plat
Nos. PP17-00002 & PRJ16-00013*

Page 13 of 50

31. On April 4, 2018, Director Niven wrote Mr. Schneider to further elaborate on the City’s position concerning the vested status of IHIF’s pending land use applications. In the letter, Director Niven argued:
- The City Council adopted replacement regulations on March 19, 2018, resulting in termination of the DA. Accordingly, and consistent with Section 5.13 of the DA itself, the Replacement Regulations govern all future development on IHIF’s property “except the extent that the City Council has, in its legislative policy discretion, voluntarily recognized vesting protection for specified categories of land use applications.”
 - Neither the DA nor applicable state law independently affords vesting protection to outstanding applications for Implementing Approvals following termination of the DA. Thus, the Replacement Regulations govern future development of the IHIF property “*regardless of any outstanding land use permit applications.*” (Emphasis in original).
 - Under state law, including provisions in RCW 36.70B.180 and .190, a development agreement is only binding and enforceable during its actual term and “without any regard for the purportedly ‘vested’ status of previously submitted land use applications.” Put differently, termination of a development agreement “automatically extinguishes all outstanding land use permit application rights” including “the right to develop under the development standards contained in the agreement.”
 - The City Council adopted IMC 18.19C.280, as part of the Replacement Regulations, with the intent to “afford vested rights only to the categories of land use application for which vesting is recognized by state law—i.e., building permits and plats.” Thus, the City considers IHIF’s “preliminary plat to be vested” while its various site development permits are not.
 - Under state law, a complete subdivision application “vests the underlying proposal ‘only at a very general level’—i.e., to the land uses allowed under the municipality’s current regulations.” Under *Alliance Investment Group v. City of Ellensburg*, 189 Wn. App. 763, 358 P.3d 1227 (2015), however, “[a]ny specific project will still have to meet the development standards at the time the building permit is filed.” Moreover, under *Noble Manor Co. v. Pierce County*, 133 Wn.2d 269, 943 P.2d 1378 (1997), “[w]hat is vested is what is sought in the application for a . . . plat.” Accordingly, the City considers IHIF’s “preliminary plat application to be vested to the use regulations” set forth in the DA, as well as to “any development standard in the Agreement that are necessary to accommodate the specific development plan or concept—if any—identified in [IHIF’s] plat application materials.”

Exhibit G.

32. Director Niven also responded to each of the specific allegations levelled by Mr. Schneider in the remainder of the letter from March 5, 2018. In particular, Director

*Findings, Conclusions, and Decision
 City of Issaquah Hearing Examiner
 High Street Collection Preliminary Plat
 Nos. PP17-00002 & PRJ16-00013*

Niven stressed that the City “worked diligently and in good faith to expeditiously review and process” IHIF’s applications but delays resulted in light “of the City’s staffing resource shortage.” The letter noted, however, that a meeting on the preliminary plat had been tentatively scheduled before the Urban Village Development Commission (UVDC) on May 15, 2018, consistent with the requirements of the DA. *Exhibit G.*

33. On April 13, 2018, IHIF attempted to appeal Mr. Niven’s letter to the Hearing Examiner, who dismissed the appeal on summary judgment. The Hearing Examiner summarized his decision as follows:

Although the municipal code grants the Hearing Examiner authority to hear some matters that are not expressly enumerated in IMC 18.03.060, nothing in the municipal code suggests that the Issaquah City Council intended the Hearing Examiner to have the appellate authority to review *every* administrative decision made by the City, as is implied by the Appellant’s arguments. Instead, other provisions of the municipal code, such as IMC 18.04.252, IMC 5.05.160, and IMC 3.09.150, augment the Hearing Examiner’s authority but, in every instance, the Issaquah City Council has made the Hearing Examiner’s authority explicit. Put another way, IMC Table 18.04.250-1 is not a “catch-all” provision granting the Hearing Examiner authority to hear all other administrative decisions not explicitly delineated in IMC Table 18.04.-250-2 or IMC 18.03.060. Accordingly, the Hearing Examiner lacks authority to review [Director Niven’s letter from April 4, 2018] as a substantive, final decision under the municipal code. Additionally, nothing in the Development Agreement grants the Hearing Examiner the authority to settle disputes over interpretation of the Development Agreement itself, as is the case here.

*Decision on City’s Motion to Dismiss, dated June 28, 2018.*¹¹

34. Following IHIF’s initial appeal, the City continued to process IHIF’s site development permit applications consistent with the City’s Replacement Regulations (not the DA). Accordingly, Director Niven determined that review of the site development permits would be necessary, as a Level 3 review process, under IMC 18.19B.270, by the City’s Development Commission (a separate entity from the Urban Village Development Commission, or UVDC, that was created to address permits governed by various development agreements, including the Issaquah Highlands DA). Thus, on September 17, 2018, Director Niven issued three staff reports related to the three pending site development applications. Each staff report included an analysis of vesting and a determination that the pending applications would not vest to the development

¹¹ Although this decision was not provided by the parties in the exhibits related to the current appeal, the Hearing Examiner takes judicial notice of it as, clearly, it relates to the present matter.

regulations under the DA but, instead, would need to adhere to the requirements of the Replacement Regulations. Each staff report recommended that the Development Commission deny the permits for failure to adhere to the requirements of the Replacement Regulations or, alternatively, place the permits on hold “until a final decision on the associated preliminary plat has been made.” *Exhibit E.*

35. On October 1, 2018, IHIF appealed Director Niven’s staff reports to the Hearing Examiner. Following oral argument on a motion to dismiss by the City, the Hearing Examiner issued a decision on the matter, dismissing the appeal. The Hearing Examiner explained his decision as follows:

The City and the Appellant disagree about the scope of the Hearing Examiner’s appellate jurisdiction under the Issaquah Municipal Code. There is no disagreement, however, that a staff report does not constitute a final decision on a specific application that the Hearing Examiner has the authority to review under IMC 18.03.060.D. This is true for at least two reasons. First, the staff reports do not purport to make a final decision on any of these pending applications and merely provide recommendations to the Development Commission. Second, although each of the applications involve some type of Level 0 through Level 3 review under IMC Table 18.04.250-2, the staff reports do not, themselves, involve the type of specific review of a final land use decision that the Hearing Examiner would have the appellate authority to address under IMC 18.03.060.D and IMC Table 18.04.250-2.

Accordingly, because the staff reports themselves are not reviewable by the Hearing Examiner as final land use decisions, the question becomes whether the Hearing Examiner has authority to review the Director’s analysis on vesting contained within each staff report as a code interpretation, appealable under either IMC 18.01.050.B or IMC 18.19B.040. An analysis of the municipal code leads to the conclusion that he does not.

Here, the Appellant argues that because “a vesting determination requires the Director to interpret and apply code, it necessarily is a subset of code interpretations” appealable to the Hearing Examiner. *Appellant’s Response to Motion to Dismiss, page 7.* This logic goes beyond the argument the Appellant put forth in the initial appeal and, essentially, contends that *any* interpretation or application of the municipal code by the Director, whether it appears in a formal decision document or not, is appealable to the Hearing Examiner. This would clearly lead to chaos as every determination or decision of the City that involved “interpreting” or “applying” the municipal code would be appealable. The Hearing Examiner is confident that the

*Findings, Conclusions, and Decision
City of Issaquah Hearing Examiner
High Street Collection Preliminary Plat
Nos. PP17-00002 & PRJ16-00013*

Page 16 of 50

Issaquah City Council did not intend to allow interlocutory appeals at every potential step of the permit review process and that the Hearing Examiner's appellate jurisdiction would, in this instance, remain limited to reviewing final decisions made by the Development Commission as part of the Level 3 review process.

The Hearing Examiner recognizes that, under IMC 18.01.050, anyone "may request an interpretation of [the municipal code] by filing a written request" and that the resulting interpretation would be appealable to the Hearing Examiner. Similarly, the Hearing Examiner recognizes that IMC 18.19B.040 allows for a request for a formal interpretation of the code appealable to the Hearing Examiner. The Appellant has twice appealed informal documents produced by the Director rather than requesting a formal interpretation of the municipal code. An appeal of the vesting analysis of the City must await a final decision by the City, either as a formal code interpretation (that has been appealed) or as part of an appeal of a final decision on a specific permit application issued by the Development Commission.

Although the municipal code grants the Hearing Examiner authority to hear some matters that are not expressly enumerated in IMC 18.03.060, nothing in the municipal code suggests that the Issaquah City Council intended the Hearing Examiner to have the appellate authority to review *every* administrative decision made by the City or that the Council intended to allow for interlocutory appeals to the Hearing Examiner every time the Director informally interprets or applies the municipal code within a staff report. Instead, the municipal code allows for a formal process for code interpretations, under both IMC 18.01.050.A and IMC 18.19B.040, that includes an opportunity for appeal of such formal interpretation to the Hearing Examiner. Alternatively, the Appellant has the opportunity to appeal all aspects of the decision (including the Director's vesting determination) once the Planning Commission has issued final decisions on underlying permits as the culmination of the Level 3 review process implemented by the Issaquah City Council.

Here, the Appellant has elected not to use the formal code interpretation process and the Hearing Examiner lacks the authority to hear an interlocutory appeal prior to the culmination of the Level 3 process involving the Development Commission. The Hearing Examiner lacks authority to independently review a code interpretation or vesting determination made within a staff report. Language in a staff report is not a final decision that is

Findings, Conclusions, and Decision
City of Issaquah Hearing Examiner
High Street Collection Preliminary Plat
Nos. PP17-00002 & PRJ16-00013

Page 17 of 50

reviewable outside the scope of the Level 3 process dictated by the Issaquah City Council.

In addition, although the Appellant has presented a strong case concerning procedural due process and fairness, the Hearing Examiner lacks the authority to address equity or an as-applied due process challenge to specific provisions of the municipal code. The Issaquah City Council has dictated that a closed record appeal before the Hearing Examiner is allowed following final decisions of the Development Commission, a policy decision made under authority of the Growth Management Act. Under the unique and complex circumstances present with this matter, this has created a situation whereby the Appellant must present factual evidence related to a dispositive legal issue (vesting) to the Development Commission, a decisionmaking body without legal training or jurisdiction to overturn the Director's vesting determination. Following a final decision of the Commission, any appeal to the Hearing Examiner would be on a closed record whereby the Hearing Examiner would not be able to observe witness testimony (or ask additional questions). Although this creates certain challenges, appellate courts manage this task regularly. Moreover, while it may be more expedient to have the Hearing Examiner decide the vesting issue now, the municipal code does not grant the Hearing Examiner authority to usurp or replace the authority of the Development Commission for purposes of expediency.

Exhibit E.

36. Following the Hearing Examiner's denial of its appeal associated with Director Niven's staff reports on the site development permits, IHIF participated in hearings on those applications before the Development Commission under protest, a process involving 19 days of hearings that occurred over a 10-month period. Ultimately, on July 24, 2019, the Development Commission denied the applications as inconsistent with the Replacement Regulations. In its decision, the Development Commission noted that "it does not have jurisdiction to review the vesting determination by the Development Services Director" under IMC 18.01.050.C and that such authority would, in such circumstances, fall to the Hearing Examiner." *Exhibit F.*
37. Thus, on July 24, 2019, IHIF timely appealed the Development Commission's decisions to the Hearing Examiner. The appeal included 14 separate assignments of error. Following a prehearing conference on August 13, 2019, the City and IHIF both submitted dispositive motions related to the appeal. On September 24, 2019, the Hearing Examiner heard oral argument on the dispositive motions. On November 15, 2019, the Hearing Examiner then issued a decision on the dispositive motions, which ultimately dismissed the appeal in its entirety. The Hearing Examiner's conclusions state:

*Findings, Conclusions, and Decision
City of Issaquah Hearing Examiner
High Street Collection Preliminary Plat
Nos. PP17-00002 & PRJ16-00013*

Page 18 of 50

The Appellant is not entitled to summary judgment because the Director’s vesting determination was not clearly erroneous. The primary question at issue in this matter involves a contract dispute between the parties because, under RCW 36.70B.170(4), cities may enter into such agreements as a proper exercise of “county and city police power and contract authority.” [Footnote omitted]. Here, the Appellant contends that the 20-year buildout period provided by Section 3.23 of the DA did not provide for vesting because the City could not modify or impose new or additional Development Standards during this period. The Appellant argues that, instead, the “vesting” that the parties were referring to in the DA actually refers to the period after the buildout period but before the adoption of Replacement Regulations. The City contends that, consistent with RCW 36.70B.170(3)(i), the 20-year buildout period *was* the vesting period and that the parties did not provide for additional vested rights beyond that 20-year period. Based on the plain language of the DA, the City’s argument is the more persuasive of the two.

RCW 36.70B.170(3)(i) equates the term “Buildout Period” with “vesting period,” and the two terms are used interchangeably in the governing statute. Accordingly, in the DA, the buildout period accounted for 20 years of vested development rights for all Implementing Approvals—not just those recognized under the common law. During that time, the developer could develop the property consistent with the DA and (barring certain exceptions not relevant here) without accounting for changes to the municipal code, including the City’s zoning ordinances and critical areas ordinances. This was a valuable contract right that the parties negotiated and executed.

After the buildout period, Section 3.23.2 of the DA provided that the Development Standards of the DA would continue to apply except through termination of the contract. Under Section 5.13, termination of the DA would occur once the City adopted Replacement Regulations and “thereafter the UGA portion of the Property shall be governed by the adopted City zoning and related development regulations.” Nowhere in Section 3.23.2 or Section 5.13 are vesting or vested rights explicitly discussed. Contrary to the Appellant’s assertions, it is not unreasonable or absurd to believe that—having granted the developer a 20-year period of vested rights during the buildout—the City did not intend to allow further vested development rights beyond the buildout period. Had the parties intended that result, they could have written this into the contract by stating that all applications for Implementing Approvals deemed complete,

*Findings, Conclusions, and Decision
City of Issaquah Hearing Examiner
High Street Collection Preliminary Plat
Nos. PP17-00002 & PRJ16-00013*

Page 19 of 50

submitted after the buildout, be considered under the DA regardless of whether the City adopted Replacement Regulations. The parties did not do this. Accordingly, the Director's determination is not clearly erroneous because it is consistent with the plain language of the DA.

In addition, the Director's vesting determinations are not clearly erroneous because they are not contrary to the plain language of IMC 18.19B.280, the Replacement Regulations. This ordinance provides that "[o]nly vesting established by Washington State law shall apply to the vesting of development applications for properties located within Issaquah Highlands previously covered by the terminated development agreements." This includes applications for building permits, preliminary plats, and vested development rights established through development agreements. As noted above, the DA did not account for vested rights beyond the 20-year buildout period and IMC 18.19B.280 does not recognize vested development rights for SDPs or ASDPs.

The Appellant also argues that the Director's vesting determinations are inconsistent with decades of cases addressing vested development rights. Washington courts have recognized vested development rights for over 60 years, since *State ex rel. Ogden v. Bellevue*, 45 Wn.2d 492, 275 P.2d 899 (1954) was decided. As noted by Justice Utter, the "purpose of the vesting doctrine is to allow developers to determine, or 'fix,' the rules that will govern their land development," which is important because society "suffers if property owners cannot plan development with reasonable certainty and cannot carry out the developments they begin." *West Main Assocs. v. Bellevue*, 106 Wn.2d 47, 720 P.2d 782 (1986). Moreover, our "vested rights doctrine" is, according to the Washington Supreme Court, "one of the most protective of developer's rights" in the country. *Erickson & Assocs. v. McLerran*, 123 Wn.2d 864, 872 P.2d 1090 (1994). This doctrine, however, is nowhere enshrined in Washington's Constitution, and the DA does not state anywhere that the parties intended to incorporate common law vesting principles into the contract. As the City correctly argues, citing *Redford v. City of Seattle*, 94 Wn.2d 198, 206, 615 P.2d 1285 (1980), "It is axiomatic that, just as a contract can create enforceable rights, it can place limitations and restrictions on those rights." *City's Motion for Partial Summary Judgment, dated September 6, 2019*. Thus, the only vested rights applicable to the Appellant's permits are those allowed under the DA, and the contract does not explicitly provide for vested development rights in complete applications submitted after the buildout period.

Findings, Conclusions, and Decision
City of Issaquah Hearing Examiner
High Street Collection Preliminary Plat
Nos. PP17-00002 & PRJ16-00013

Page 20 of 50

The Appellant argues that this is an absurd result because it means the parties agreed to a period where no vested development rights would exist, as if such rights are mandatory under the common law. Contrary to the Appellant's assertions, vested development rights are not sacrosanct. Washington courts have recognized that vested development rights may, at times, be contrary to the public interest. In *Erickson*, 123 Wn.2d 864, [at 874-74] for instance, a case decided shortly before the parties executed the DA, the court noted:

Development interests and due process rights protected by the vested rights doctrine come at a cost to the public interest. The practical effect of recognizing a vested right is to sanction the creation of a new nonconforming use. A proposed development which does not conform to newly adopted laws is, by definition, inimical to the public interest embodied in those laws. If a vested right is too easily granted, the public interest is subverted.

Several cases since *Erickson* was decided have further limited the scope and applicability of vested development rights under the common law. In *Abbey Road Group, LLC v. City of Bonney Lake*, 167 Wn.2d 242, 251, 218 P.3d 180 (2009), for instance, the court refused to expand the doctrine to all development applications, including site plan applications specifically, because “such a rule would eviscerate the balance struck in the vesting statute” and “instituting such broad reforms in land use law is a job better suited to the legislature.” And, in *Town of Woodway v. Snohomish County*, 180 Wn.2d 165, 173, 322 P.3d 1219 (2014), the court determined that “[w]hile it originated at common law, the vested rights doctrine is now statutory.”

Accordingly, if the SDP and ASDP applications submitted by the Appellant are afforded any vested rights, it must be through the language of the contract, i.e., the DA, executed by the parties themselves. The most straightforward interpretation of the DA, however, leads to the conclusion that the parties did not account for vested development rights after the 20-year buildout period.

The DA does not dictate that Appellant's SDP and ASDP applications vested to its Development Standards and Washington's vested rights doctrine, a judicial construct the application of which has fallen out of favor in recent years, is inapplicable to the current dispute. Accordingly, the Director did not commit clear error in making his vesting determination, and the Appellant is not entitled to summary judgment on these issues.

Findings, Conclusions, and Decision
City of Issaquah Hearing Examiner
High Street Collection Preliminary Plat
Nos. PP17-00002 & PRJ16-00013

Page 21 of 50

Exhibit F.

38. Although the appeal primarily focused on the status of vested rights related to IHIF's site development permits, the Hearing Examiner's decision briefly touched on IHIF's preliminary plat application:

The Appellant contends, in Issue #12, that the Director's vesting determination violates RCW 58.17.033 and case law interpreting the Subdivision Act (Chapter 58.17 RCW) because the Appellant applied for a preliminary plat related to the subject property, and such application "vests all development that is consistent with the plat application and disclosed to the City in the plat application and during the City's review process," including the SDP and ASDP applications. *Appeal, dated July 24, 2019.*

Contrary to the Appellant's assertions, *Noble Manor v. Pierce County*, 133 Wn.2d 269, 943 P.2d 1378 (1997), did not provide that submission of a complete preliminary plat application vests all future permits on land associated with the plat to development standards in place when the plat application was deemed complete. Instead, the court held:

Not all conceivable uses allowed by the laws in effect at the time of a short plat application are vested development rights of the applicant. However, when a developer makes an application for a specific use, then the applicant has a right to have that application considered under the zoning and land use laws existing at the time the completed plat application is submitted.

If a landowner requests only a division of land without any specified use revealed, then the county, city or town may consider the application to see if any legal use can be made of the land so divided, and no particular development rights would vest at that time. However, when an application is made for division of land for a specified use, then the applicant has the right to have that application for that use considered under the land use laws in effect on the date of the application.

Noble Manor, 133 Wn.2d at 285.

Here, the project narrative submitted with the High Street Collection at Issaquah Highlands Plat (Exhibit C-12), for instance, did not explicitly discuss the potential for a Medical Office Building, Self-Storage Facility, or a specific Retail Development, as delineated in the SDP and ASDP applications. Moreover, the application did not depict building footprints or

Findings, Conclusions, and Decision
 City of Issaquah Hearing Examiner
 High Street Collection Preliminary Plat
 Nos. PP17-00002 & PRJ16-00013

specific development parameters of future buildings on the project site. *See Exhibit S-22.* In short, the Appellant did not make “an application for a specific use” under *Noble Manor*, and, accordingly, its preliminary plat application did not create vested development rights for all other permits associated with the property. This issue must be dismissed because it is resolved by reference to the submitted factual record and clearly established legal precedent. [Footnote omitted].

Next, the Appellant argues in Issue #13 that the Director’s vesting determinations are “a consequence of the Director’s and the Department’s refusal to comply with the Development Agreement while it was in effect” and that, had the City acted within the time periods prescribed by the DA, the SDP and ASDP permits would have issued prior to termination of the DA. This argument may well have merit. Ultimately, though, DA Sections 5.11.1 and 5.11.2 govern dispute resolutions under the DA. Of particular note, Section 5.11.2, entitled “Default and Remedies” provides that any party “not in default under this Agreement shall have all rights and remedies provided by law including without limitation damages, specific performance or writs to compel performance or require action consistent with this Agreement.” As the Hearing Examiner lacks authority to assess damages, require specific performance, or issue writs, it is clear that the parties intended the type of dispute at issue here (i.e., the City not complying with the timing requirements of the DA), to be addressed by the superior court. Accordingly, this issue must be dismissed.

Finally, the Appellant argues in Issue #14 that the Director’s vesting determinations “are contrary to his prior, written and oral acknowledgments that [IHIF’s] applications are vested” and that the determinations are “motivated by politics and personal animus.” Whether this issue states a claim where cognizable relief is possible is questionable. RCW 64.40.020, however, already provides for the possibility of relief when a governmental entity acts arbitrarily, capriciously, unlawfully, or in excess of its lawful authority in processing a permit. Again, however, this is a claim that must be heard by the superior court. Thus, this issue must also be dismissed.

Exhibit F.

39. On December 2, 2019, IHIF timely requested reconsideration of certain aspects of the Hearing Examiner’s decision. The Hearing Examiner granted IHIF’s request and, after reviewing legal briefing submitted by the parties, the Hearing Examiner denied reconsideration. That decision noted:

*Findings, Conclusions, and Decision
City of Issaquah Hearing Examiner
High Street Collection Preliminary Plat
Nos. PP17-00002 & PRJ16-00013*

Page 23 of 50

As previously discussed in the Hearing Examiner's decision, *Noble Manor* does not support the Appellant's argument that under RCW 58.17.033(1) a completed preliminary plat application vests all future development permits on land associated with the plat to the development standards in effect when the preliminary plat application was complete. Rather, the court held in *Noble Manor*:

Not all conceivable uses allowed by the laws in effect at the time of a short plat application are vested development rights of the applicant. However, when a developer makes an application for a specific use, then the applicant has a right to have that application considered under the zoning and land use laws existing at the time the completed plat application is submitted.

If a landowner requests only a division of land without any specified use revealed, then the county, city or town may consider the application to see if any legal use can be made of the land so divided, and no particular development rights would vest at that time. However, when an application is made for division of land for a specified use, then the applicant has the right to have that application for that use considered under the land use laws in effect on the date of the application.

133 Wn.2d at 285.

Because the record demonstrated that the Appellant's preliminary plat application materials did not describe the "specific use[s]" for development of the property that were later proposed in its subsequent SDP and ASDP applications, the Hearing Examiner's decision determined that the Appellant's preliminary plat application did not create vested development rights applicable to the subsequent permit applications. *Noble Manor*, 133 Wn.2d at 285. The Appellant contends that [*Westside Business Park, LLC v. Pierce County*, 100 Wn. App. 699 (2000)] compels a different result. The Appellant's reliance on *Westside*, however, is unavailing.

In *Westside*, a developer completed a short plat approval application that did not describe a specific use for potential future development. 100 Wn. App. at 601. Although the application did not describe a specific use, the developer had revealed its specific use to the County during a predevelopment conference that occurred *prior to* submission of the completed short plat application. *Westside*, 100 Wn. App. at 601. Relying on the developer's pre-application disclosure of its specific use to the

Findings, Conclusions, and Decision
City of Issaquah Hearing Examiner
High Street Collection Preliminary Plat
Nos. PP17-00002 & PRJ16-00013

Page 24 of 50

County, the *Westside* court held that RCW 58.17.033 applied to vest the developer's intended use. 100 Wn. App. at 605.

Unlike in *Westside*, here the record does not show that the Appellant had described specific uses for potential future development of the subject property to the City *prior to, or contemporaneously with*, submission of its completed preliminary plat application in August 2017. To the contrary, the Hearing Examiner's Finding of Fact No. 5 – and all the record materials cited in the Appellant's reconsideration request – confirm that the Appellant's disclosure of its intended specific uses of the property occurred *after* the preliminary plat application was accepted as complete. Because *Westside* does not support the Appellant's contention that its disclosures of specific uses made after the completed preliminary plat application required the City to evaluate its SDP and ASDP applications under the development standards in effect when the preliminary plat application was complete, the Appellant has not demonstrated that the Hearing Examiner applied an incorrect legal standard or disregarded *material* facts in the record.

Additionally, *Alliance Investment Group of Ellensburg, LLC v. Ellensburg*, 189 Wn. App. 763 (2015) provides further support for the Hearing Examiner's decision on the plat vesting issue. In *Alliance*, the developer argued that the city's knowledge of its intent to develop a business park when it submitted a plat application required the city to evaluate subsequent building permit applications under the law in effect at the time of the completed plat application. 189 Wn. App. at 773. The court rejected this argument, stating:

To the extent that Alliance identified a business park as its purpose in the subdivision, it likely has vested its rights to the light-industrial zoning on the short plat and the uses identified at the time by the zoning laws. But it has vested rights only at a very general level. Any specific project will still have to meet the development standards at the time the building permit is filed. The vesting recognized under the land division statute is specific to the action at issue, not to all possible uses permitted by law.

Alliance, 189 Wn. App. at 773. Under *Alliance*, the Appellant's preliminary plat application only vests as to the general zoning uses identified in the application and does not vest to all future development permits. 189 Wn. App. at 773.

Findings, Conclusions, and Decision
 City of Issaquah Hearing Examiner
 High Street Collection Preliminary Plat
 Nos. PP17-00002 & PRJ16-00013

Page 25 of 50

To the extent that *Westside* and *Alliance* are in conflict, *Alliance* provides more persuasive authority. *Alliance* was more recently decided and had considered the Washington Supreme Court’s clear pronouncement that “[w]hile it originated at common law, the vested rights doctrine is now statutory.” 189 Wn. App. at 768 (quoting *Town of Woodway v. Snohomish County*, 180 Wn.2d 165, 173 (2014)). In contrast, *Westside* was decided without the benefit of Supreme Court cases clarifying that the vested rights doctrine is purely statutory. See *Potala Village Kirkland, LLC v. Kirkland*, 183 Wn. App. 191, 209 (2014) (calling into question *Westside*’s continued vitality in light of subsequent Washington Supreme Court decisions). Thus, even if not clearly distinguishable on its facts, *Westside* does not assist the Appellant.

Because the record does not support a conclusion that an obvious legal error has occurred or that a material factual issue was overlooked that would change the previous decision, the request for reconsideration is hereby **DENIED**.

Exhibit I.

City’s Additional Review of IHIF’s Preliminary Plat Materials

40. From early 2018 through March 2019, IHIF continued to respond to requests from the City for additional information and revisions related to review of IHIF’s preliminary plat.¹² This ultimately resulted in IHIF submitting a significant amount of new information for preliminary plat review on March 5, 2019, including a revised Preliminary Stormwater Report, dated February 2019; a revised Traffic Study, dated March 4, 2019; a supplemental Project Narrative; a comment response letter addressing the City’s compiled comments, dated March 16, 2018; and a revised set of project plans. *Exhibits B-6.1 through B-6.9.*
41. On April 5, 2019, Land Development Manager Sloman provided a letter to Applicant Representative Tia Heim regarding the manner in which the City intended to continue its review of IHIF’s preliminary plat. In the letter, Ms. Sloman explained that the City would be processing the preliminary plat, henceforth, pursuant to the procedural requirements of the City’s Replacement Regulations, not those of the DA. Accordingly, the preliminary plat application would next be sent to the City’s Development Commission for an informal public meeting (i.e., “community conference”) and, following this, for a decision by the Hearing Examiner, as directed by IMC 18.19B.270. In a response dated April 8, 2019, Ms. Heim noted that the City had “previously confirmed that our plat is vested to the Development Agreement” and, as such, a hearing before the UVDC would be the next required step under the DA followed by a final

¹² See, especially, *Exhibit NN and Exhibit WW-2.*

*Findings, Conclusions, and Decision
City of Issaquah Hearing Examiner
High Street Collection Preliminary Plat
Nos. PP17-00002 & PRJ16-00013*

decision on the preliminary plat by the City Council. Ms. Heim implored the City to “immediately issue a final and appealable decision” explaining its actions if it “no longer acknowledges that our plat application is vested to the Development Standards enacted through the Development Agreement and has now ‘di-vested’ our plat.” *Exhibit QQ*.

42. On April 15, 2019, Ms. Sloman provided an additional letter to Ms. Heim, further detailing the City’s position on procedural requirements associated with continued review of the preliminary plat. In it, Ms. Sloman reiterated the City’s position on vesting—as detailed in Director Niven’s earlier letter from April 4, 2018 (Exhibit G)—and stressed that the City had “not altered or otherwise changed its position from the substance of Mr. Niven’s April 4, 2018 letter.” Accordingly, Ms. Sloman noted that “the City considers the High Street Preliminary Plat application to be vested in the manner and to the extent recognized by state law.” The letter then further clarified the City’s position that vesting “extends only to substantive zoning ordinance, not to processing requirements or procedural rules,” as detailed in *Graham Neighborhood Ass’n v. F.G. Assoc’s*, 162 Wn. App. 98 (2011). Ms. Sloman explained that, in light of this, the City intended to “process the High Street Preliminary Plat application in accordance with the current procedures prescribed by the [municipal code],” including those contained in the Replacement Regulations, such that the preliminary plat would be sent next to the Development Commission and then to the Hearing Examiner. In addition, Ms. Sloman stressed that the UVDC was terminated on March 26, 2019, and “is no longer operative,” stating that review of IHIF’s preliminary plat by the UVDC would be “a practical impossibility at this point.” *Exhibit H*.
43. Despite its reservations, IHIF determined that it would like to proceed (under protest) to the next stage of review as delineated by Ms. Sloman, and requested that the Community Conference before the Development Commission be scheduled as soon as possible. In an email from June 21, 2019, Ms. Heim requested that any staff report associated with the meeting before the Development Commission be provided so that IHIF would have time to prepare and that IHIF would like the City to clearly articulate “what our preliminary plat is vested to in advance of the Community Conference.” On July 1, 2019, Ms. Sloman responded to Ms. Heim’s email, noting:
- The “City shares your desire for an expeditious and efficient process for evaluating your plat application.”
 - The City code “does not specify a procedural format” for the Community Conference meeting and the purpose of such meeting is “to solicit public comment” on the proposal.
 - The Development Commission “doesn’t have authority to address or resolve vesting questions” and, instead, such issues “will be addressed before the Hearing Examiner and in that staff report.”

Exhibit RR.

*Findings, Conclusions, and Decision
City of Issaquah Hearing Examiner
High Street Collection Preliminary Plat
Nos. PP17-00002 & PRJ16-00013*

44. The Community Conference associated with the application was ultimately held on August 15, 2019. At the Community Conference, members of the public and the Development Commission expressed concern or requested additional information about several matters, including: the potential for a self-storage facility being included within the preliminary plat; the design of Discovery Drive and its ability to address cumulative traffic impacts from development of the plat, as well as development of several other projects in the area; the adequacy of pedestrian and bicycle facilities associated with the preliminary plat; which development regulations would apply to development of the preliminary plat (i.e., the DA regulations or the Replacement Regulations); proposed block sizes within the preliminary plat; the role of the City's Architectural Review Committee (ARC) in reviewing the proposal; whether additional review would be necessary under SEPA; how road and trail connections within the preliminary plat would work; and the adequacy of proposed stormwater facilities serving the preliminary plat. *Exhibit D; Exhibit XX-2; Exhibit XX-12.*
45. Consistent with IMC 18.19B.270.C.3, the City and IHIF prepared a "community conference response memo" summarizing the "topics, concerns, and opportunities raised at the community conference" and providing "a conclusion for each topic as to what should or should not happen relative to the proposal and applicable codes." In the response memo, which was issued on October 10, 2019, IHIF and the City each provided responses to the various matters raised at the Community Conference. Of note:
- Both the City and IHIF stated that self-storage would be an allowed use within the preliminary plat.
 - Both the City and IHIF determined that Discovery Drive had been appropriately designed to address total traffic loads for the preliminary plat and other area development.
 - Both the City and IHIF determined that the preliminary plat would provide for appropriate pedestrian and bicycle facilities.
 - In terms of which regulations would govern development of the preliminary plat, the City noted that the Director Niven would issue "a formal determination regarding vesting" in the "staff report for the preliminary plat hearing." IHIF detailed its continuing contention that the plat would be vested to the development standards of the DA.
 - IHIF and the City both stressed the Applicant's willingness to ensure that adequate pedestrian facilities would provide mid-block connections throughout the plat.
 - The ARC already reviewed the proposal and approved it.
 - The City determined that no additional SEPA review of the preliminary plat would be necessary. IHIF stressed that an EIS was already issued for the entire Issaquah Highlands and included required mitigation.
 - Both the City and IHIF determined that adequate road and trail connections would be provided throughout the plat.

*Findings, Conclusions, and Decision
 City of Issaquah Hearing Examiner
 High Street Collection Preliminary Plat
 Nos. PP17-00002 & PRJ16-00013*

- The City determined that stormwater detention and treatment would be “vested to the King County 2009 Surface Water Design Manual” as amended by the City’s “2011 Addendum” to the DA. The City noted, however, that it would be IHIF’s responsibility to “detain and treat stormwater to meet City standards” and that, if IHIF were to use any of the City’s existing stormwater facilities to do so, the “stormwater discharge fee” would require “a separate negotiation.” IHIF explained that no permanent surface ponds would be created within the development and that the City previously offered IHIF an opportunity to pay a “fee in lieu” to dispose of at least some of the stormwater on-site “because the City’s existing offsite stormwater facility has additional capacity.”
- The City and IHIF provided additional information about the parties’ disagreement concerning the vested status of the preliminary plat.

Exhibit D-1.

46. Following the Community Conference, the City and the Applicant continued to communicate about the preliminary plat, and, ultimately, the hearing before the Hearing Examiner was set for March 9, 2020. *Exhibit WW.*

Notice of Open Record Hearing

47. After the open record public hearing before the Hearing Examiner was scheduled, the City provided notice of the hearing as required by the municipal code. To that end, on February 21, 2020, the City mailed or emailed notice of the hearing to property owners within 300 feet of the subject property, and to reviewing government departments and agencies. Such materials noted that written comments on the proposal would be accepted up to, and at, the hearing on March 9, 2020. *Exhibit C-3.* Also on February 21, 2020, the City published notice of the hearing in the *Issaquah Report*, and IHIF posted notice of the hearing on the project site. *Exhibit C-4; Exhibit C-5; Exhibit C-6.*
48. The City received two public comments in response to the public hearing notice materials. Jen Noland inquired about what subjects would be covered at the public hearing and about whether the public would have input about the types of retail and commercial development that would be allowed. Seattle resident Kent Worthington commented that he mistakenly received notice of the public hearing. *Exhibit O-1; Exhibit O-2.*
49. In addition to the public comments discussed above, the City also received comments from King County Metro. King County Metro stated that it had no concerns about the proposal but noted that the project is immediately adjacent to a “very high ridership” bus stop and that such stop “should be maintained when future construction is planned.” *Exhibit O-3.*

City’s Staff Report

*Findings, Conclusions, and Decision
City of Issaquah Hearing Examiner
High Street Collection Preliminary Plat
Nos. PP17-00002 & PRJ16-00013*

Page 29 of 50

50. On March 3, 2020, the City prepared a staff report for review in conjunction with the open record hearing on the proposal. Of particular note:
- The report states that the Comprehensive Plan designation of the subject property is “Retail.” All previous materials, however, including the staff report prepared for the meeting before the Development Commission, identified the Comprehensive Plan designation of the property as “Urban Village.” *See Exhibit XX-2.* The current staff report does not appear to address the zoning designation of the subject property although materials submitted to the Development Commission state that the property is zoned “Urban Village-Commercial/Retail” (UV-COM/RET). *See Exhibit XX-2.*
 - The staff report notes that “[d]ifferent sets of drawings have been submitted to the City in relation to the Applicant’s preliminary plat application,” including materials submitted on August 1, 2017; August 28, 2017; December 15, 2017; February 7, 2018; February 22, 2018; and March 5, 2019. The staff report stresses that the August 2017 submissions “were made during the defined ‘Buildout Period’ of [the] now-terminated 1996 Development Agreement” but that all other submittals were received after the Buildout Period had expired.” Because of this, City staff “reviewed only the vested permit materials from August 1 and August 28, 2017, under the applicable [DA] provisions.”
 - Section V of the staff report included a detailed “Determination of Vested Status” pursuant to IMC 18.01.050.C, prepared by Director Niven in consultation with the City Attorney. This included a statement explaining that, as “the Hearing Examiner has previously concluded, the Director’s vesting determination is not a final land use decision in and of itself, and it is not independently appealable separate” from the Hearing Examiner’s decision “approving or denying the underlying project application.” The vesting determination ultimately concludes that the vesting afforded the materials submitted prior to expiration of the buildout period (i.e., the materials submitted by IHIF in August 2017) would be limited to “effectuate the specific development proposal, if any, identified” in such materials and that all materials submitted after expiration of the Buildout Period on September 18, 2017, would “not operate to retroactively expand the vested rights that accrued in the Applicant’s original . . . preliminary plat application.”

Exhibit R.

51. Section VI of the staff report addresses how the City believes the preliminary plat would comply with provisions of the DA, where applicable; with the Replacement Regulations, where applicable; and with the State Subdivision Act (Chapter 58.17 RCW). To assist in explaining this, the City provides a chart (on Page 12), detailing which Appendices of the DA it “used for the plat review” and which Appendices it did not use in reviewing the plat because of its determination that such appendices are “not vested” and the Replacement Regulations, instead, would be applicable. Ultimately, the staff report determines that the following Appendices are applicable to the preliminary plat:

*Findings, Conclusions, and Decision
 City of Issaquah Hearing Examiner
 High Street Collection Preliminary Plat
 Nos. PP17-00002 & PRJ16-00013*

Appendix A, Guiding Principles and Goals; Appendix B, Land Uses (but not any development standards contained therein); Appendix D, Storm and Ground Water; Appendix F, Water Service; Appendix G, Sewer Service; Appendix H, Road Design; Appendix I, SEPA; Appendix S, Urban Design Guidelines; and Appendix T, Trails.
Exhibit R.

52. This approach to review of the preliminary plat stands in sharp contrast to that advocated by IHIF. In its submitted preliminary plat materials, for instance, IHIF included a “Project Narrative,” dated July 15, 2017 and a “Supplemental Project Narrative,” dated March 1, 2019, in which it details how the proposal would comply with *every* appendix associated with the DA.¹³ *Exhibit B-2.4; Exhibit B-6.9.*

Open Record Public Hearing – March 9, 2020

53. The open record hearing before the Hearing Examiner commenced on March 9, 2020. At the outset of the hearing, Attorney Patrick Schneider, on behalf of IHIF, submitted a pleading entitled “Objection to New and Ongoing Violations of the Applicant’s Vested Rights,” dated March 9, 2020. The pleading advances several arguments and stresses that IHIF is “participating in this plat hearing under protest.” In it, IHIF argues that the City’s staff report “demonstrates and implements a new violation of [IHIF’s] vested rights, and the Department is asking the Hearing Examiner to participate in this violation.” IHIF further argues:

- The staff report asks the Hearing Examiner to deem the preliminary plat application “vested to only limited parts of the Development Agreement” but such “picking and choosing by staff among the regulations to which an applicant is vested is a fundamental violation of the vested rights doctrine.”
- The staff report asks the Hearing Examiner “to participate in this violation of [IHIF’s] vested rights by making a decision about the application materials” from August 2017, as opposed to the most current materials that were submitted on March 19, 2019, following “long-awaited comments from staff.”
- The staff report “makes the vested rights doctrine nonsensical by purporting to make a vesting determination for each document submitted by the applicant.” But vesting applies to “the *processing* of an application so that the application is reviewed under the regulations in effect at the time of submittal of the original application.”
- The vesting determination in Section V of the staff report states that it is not a final land use decision appealable separate from the underlying permit decision and, accordingly, IHIF “will appeal the vesting determination in Section V to the

¹³ Despite the differences in how each party reviewed the preliminary plat, both end up determining that appropriate provisions would be made for open spaces, drainage ways, streets, sidewalks, potable water supplies, and sanitary wastes. While the Hearing Examiner concurs this is likely true, only limited information on how the plat would address these matters is included in this decision as the focus of this decision is on the impacts the City’s approach to vesting have had on review of the preliminary plat.

*Findings, Conclusions, and Decision
City of Issaquah Hearing Examiner
High Street Collection Preliminary Plat
Nos. PP17-00002 & PRJ16-00013*

City Council” once the Hearing Examiner makes a decision about the plat application.

- IHIF requests that “the Hearing Examiner determine whether this hearing is about a plat application that is vested to the Development Agreement” or about a “plat application that is subject” to the Replacement Regulations “on a piecemeal basis as set forth in the Staff Report.”

Objection to New and Ongoing Violations of the Applicant’s Vested Rights, dated March 9, 2020.

54. The Hearing Examiner determined that the pleading would be included in the record and asked the parties to speak about it prior to commencing with witness testimony. Mr. Schneider explained that IHIF has taken issue with Director Niven’s views on vesting for several years and believes the City’s current staff report creates even more problems concerning the vested status of the preliminary plat. He stressed that IHIF has operated for several years under the impression that, at a minimum, the preliminary plat vests to the provisions of the DA, and IHIF believes the Hearing Examiner should review the preliminary plat against the DA and the requirements of the State Subdivision Act, not in piecemeal fashion with consideration (in some instances) given to the Replacement Regulations. *Argument of Mr. Schneider.*
55. Attorney Zach Lell, representing the City, noted that the City had not had adequate time to review the new pleading, having just received it. He stressed, however, that the City has attempted to make its views on the vested status of the preliminary plat clear for several years and it does not believe the approach to project review set out in the staff report represented anything new, unsurprising, or different. Mr. Lell further explained that the City has reviewed all of the various materials submitted by IHIF concerning the preliminary plat but, ultimately, the parties disagree on how such submittals should be treated for purposes of vesting. *Argument of Mr. Lell.*
56. Ultimately, the Hearing Examiner determined that it would be appropriate to allow the City to submit a responsive pleading in advance of March 20, 2020, the date scheduled to conclude the open record hearing on the preliminary plat. *Oral Ruling of the Hearing Examiner, March 9, 2020.*

Witness Testimony

57. Land Development Manager Lucy Sloman provided testimony detailing City staff’s review of IHIF’s preliminary plat. Ms. Sloman detailed the history of the property, the DA, the City’s views on vesting, the Replacement Regulations, and the various materials submitted by IHIF since 2017 related to the preliminary plat. She stressed that, in the final review that occurred and resulted in preparation of the City’s staff report, the City determined that the plat materials provided by IHIF were either “too detailed” in many instances, or “not detailed enough” for appropriate review. Staff attempted to address

*Findings, Conclusions, and Decision
City of Issaquah Hearing Examiner
High Street Collection Preliminary Plat
Nos. PP17-00002 & PRJ16-00013*

this problem through its recommended conditions of approval and through providing extensive redline comments on the submitted plat plans. Ms. Sloman also stressed that the City has acted in good faith in working with IHIF over the years and has made every effort to comply with its regulatory duties. She noted, for instance, that the City processed the plat materials of another Applicant (Polygon) under the DA, but the City later determined that doing so was a mistake and that it should rectify that mistake in review of the IHIF preliminary plat application.¹⁴ And, in addition to the length of time necessary for its review, she stressed that the City has been chronically understaffed and that there were significant time delays that occurred while both parties waited on revisions or comments from each side to be provided. In response to questions from Mr. Schneider, Ms. Sloman explained that the City's recommendation concerning the plat does not ask for a specific set of project plans to be approved. Instead, the City would ask that the final plan set from March 2019 be approved, with several changes that would be necessary, and with the caveat that any approval would not impact the City's views on vesting. Ms. Sloman stressed that the City is trying to avoid "pre-approving" certain construction-level details of the preliminary plat. She agreed that, ultimately, it would be appropriate for the parties to provide an "agreed" plan set for review by the Hearing Examiner. *Testimony of Ms. Sloman.*

58. Doug Schlepp, City Development Senior Consulting Engineer, provided additional testimony about the City's concerns over the level of detail provided with the preliminary plat materials. He explained, for instance, that the submitted plat plans include the location of water meters, fire lines, and other mechanical details, and that such information is normally reviewed at later stages of development. Mr. Schlepp noted that, accordingly, the City determined that enough information exists for conditional approval of the preliminary plat, but the City wanted to ensure that such approval would not preclude the City from requiring later changes to design requirements of these mechanical details. *Testimony of Mr. Schlepp.*
59. Eric Evans, IHIF's Director of Development, testified about the history of IHIF's submissions and efforts to move review of the preliminary plat forward in a timely manner. Mr. Evans stressed that IHIF submitted plan revisions several times in response to review by City staff because preliminary plats are (usually) reviewed through an

¹⁴ Several of the exhibits in the current record relate to Polygon's various projects, including Exhibits BB, KK, LL, and XX-16. Of particular note, Polygon applied for preliminary plat approval for its "Westridge North Single Family" proposal on July 14, 2017, just over two weeks before IHIF applied for approval of this preliminary plat. Polygon then submitted revised plans related to its plat several times in early 2018. Unlike in the present circumstances, however, the City did not determine that these later-submitted plans (which were definitely submitted after the defined Buildout Period in the DA) would create vesting issues. Instead, City staff prepared a staff report for the Westridge North proposal on March 9, 2018, in which the City reviewed the plat against each and every appendix in the DA, and the UVDC held a public hearing on the proposal on March 20, 2018, which then concluded on April 17, 2018. On May 10, 2018, the UVDC then recommended approval of the project to the City Council. *See, especially, Exhibit LL.*

iterative process. Many of the comments and concerns raised by City staff in relation to the current proposal, however, do not appear to be based on particular requirements related to the adequate treatment of water, sewer, or other utilities but, instead, seem to focus on the City's position on vested rights and this proposal's impact on IHIF's site development permits. *Testimony of Mr. Evans.*

60. Michael Swenson, P.E., Transpo Group, also testified on behalf of IHIF and explained how review of the road system associated with the preliminary plat, and the potential traffic impacts, occurred. He explained that Transpo Group prepared several new memoranda and reports addressing the proposed road network within the plat and traffic, although traffic was already thoroughly addressed in the early EIS prepared in association with the DA. *Testimony of Mr. Swenson.*
61. Mark Veldee, P.E., KPFF, provided testimony on behalf of IHIF about proposed plat infrastructure, including information on the road network and on the treatment of stormwater within the preliminary plat. He explained that IHIF seeks to use previously-approved administrative minor modifications (AMMs) from the DA for the road network within the preliminary plat and that this has been reflected in the submitted plat plans. In regard to stormwater, Mr. Veldee explained that there are two existing stormwater systems available to serve the preliminary plat, one of which the City owns (the "Reid Pond System") and one that is owned by IHIF (the "Bypass System"). He noted that stormwater from Discovery Drive would be collected and transmitted to the Reid Pond System while the rest of the stormwater within the plat would be conveyed to the "Bypass System." He stressed that, ultimately, stormwater would be adequately addressed through development of the preliminary plat. Finally, Mr. Veldee stressed that the City requested additional details about plat infrastructure on several occasions and IHIF's submitted plans to reflect this. He noted that, with a project as complex as this, significant detail concerning utilities is necessary at the preliminary plat stage of development to ensure that the entire system works. Here, for instance, many utilities would be embedded within Discovery Drive and, accordingly, detailed information about how this would be accomplished was necessary. *Testimony of Mr. Veldee.*
62. Applicant Representative Tia Heim testified at length about IHIF's efforts to obtain review of the preliminary plat and the parties' ongoing disputes about vested rights. Ms. Heim stressed that, despite providing IHIF with assurances about the vested status of the preliminary plat, the City failed to process the plat consistent with the requirements and timelines of the DA. Despite this, IHIF believed—until recently—that the substantive aspects of the preliminary plat would be reviewed against the development regulations and appendices of the DA. Ms. Heim also explained that, in December 2017, IHIF submitted additional plat materials to make them consistent with the site development permit materials it had submitted, and in response to feedback from the City. She stressed that the record does not reflect that the City continued to process its preliminary

*Findings, Conclusions, and Decision
City of Issaquah Hearing Examiner
High Street Collection Preliminary Plat
Nos. PP17-00002 & PRJ16-00013*

Page 34 of 50

plat materials while the City was reviewing (and ultimately denying) IHIF’s site development permits, causing significant delay. Ms. Heim discussed the City’s proposed approval conditions for the preliminary plat and explained that, in her view, many of the conditions appear unnecessary in light of the final materials submitted by the Applicant in March 2019. *Testimony of Ms. Heim.*

63. Time ran out on the initial hearing date prior to the conclusion of Ms. Heim’s testimony. Before concluding for the day, however, the Hearing Examiner ruled that the City could provide a response to Mr. Schneider’s pleading. In addition, the Hearing Examiner ruled that the parties should submit an “agreed upon” plan set prior to the continued hearing on March 20, 2020. *Oral Ruling of the Hearing Examiner.*

COVID-19 and Additional Pleadings

64. Just days after the conclusion of the first hearing date, the City informed the Hearing Examiner (on March 12, 2020) that all public meetings, public hearings, and administrative appeal proceedings would be immediately discontinued until further notice in light of the outbreak of the COVID-19 pandemic. On March 27, 2020, and again on May 11, 2020, the Hearing Examiner informed the City of his willingness to hold hearings using remote meeting technology, and the open record hearing was scheduled to continue on July 8, 2020, using such technology.¹⁵ Prior to commencing the continued hearing on July 8, 2020, however, it was determined that additional public notice of the continued hearing had not been provided. Accordingly, the hearing was continued so that appropriate public notice could be provided.¹⁶ Ultimately, the hearing recommenced and concluded on August 3, 2020. Between the initial hearing date on March 9, 2020, and the continued hearing on August 3, 2020, however, the parties submitted several additional pleadings. *Exhibit WW-2; Exhibit XX-1.*
65. On March 20, 2020, the City provided a pleading entitled “Response to Applicant’s Objection to New and Ongoing Violations of the Applicant’s Vested Rights,” consistent with the oral ruling of the Hearing Examiner at the conclusion of the first hearing date. In this pleading, the City argues that IHIF’s objections simply repeat the objections about vested rights it has made on several other occasions, many of which the Hearing Examiner has rejected in earlier appeals. Of particular note, the City argues:
 - IHIF’s contention that the City is improperly “picking and choosing” the standards applicable to the preliminary plat is misplaced because the legal

¹⁵ See Exhibit WW and Exhibit XX.

¹⁶ *Order on Continued Hearing*, dated July 8, 2020. The City received three additional comments in response to its notice materials. King County Metro provided additional comments on construction impacts on area bus stops and area resident Christina Marchoine expressed concern about the types of commercial and retail development that would be developed within the preliminary plat, especially in relation to parking. *Exhibits O-3 through O-5.*

*Findings, Conclusions, and Decision
 City of Issaquah Hearing Examiner
 High Street Collection Preliminary Plat
 Nos. PP17-00002 & PRJ16-00013*

framework on vesting, defined by *Noble Manor* and its progeny, “contemplates—indeed, requires—precisely this type of issue-specific vesting approach for preliminary plats.”

- The City considered all of the “numerous submittals and plan sets” provided by IHIF for preliminary plat review. As Ms. Sloman explained at the first hearing date, however, “details of [IHIF’s] proposed development that were identified only in [IHIF’s] post-Buildout Period” application materials “are not vested to the Development Agreement.” The City believes its approach to review of the materials “is consistent with, and indeed compelled by, the [Hearing Examiner’s] previous decisions” addressing this issue.

Response to Applicant’s Objection to New and Ongoing Violations of the Applicant’s Vested Rights, dated March 20, 2020.

66. In addition to this pleading, Ms. Sloman emailed Ms. Heim and Mr. Veldee on March 11, 2020, about preparing an “agreed upon” plan set for review by the Hearing Examiner. Ms. Sloman requested that IHIF provide extensive revisions to its final preliminary plat plan set (from March 5, 2019) to address what should and should not be included in relation to utility service; utility points of connection; sidewalks; curbs and gutters; driveways; curb ramps; hydrants; streetlights; street trees; easements; and other construction level information. *Exhibit VV-1.*
67. On April 16, 2020, IHIF submitted an additional pleading, entitled “[IHIF’s] Reply to the City’s Response and to Lucy Sloman’s Post-Hearing Email Directing Changes to [IHIF’s] Plat Plans.” In the pleading, Attorney Patrick Schneider explains, in detail, the ways in which IHIF believes the City is erring in relation to review of the preliminary plat, especially in light of case law concerning the vested rights doctrine. Of particular note, Mr. Schneider argues that the “City is so focused on justifying the position it has taken in separate actions related to” IHIF’s site development permit applications “that it is willing to make a mess of the review and approval of this simple plat application that is vested to the Development Agreement.” The pleading then goes on to argue how the City has “made a mess” of the review and approval process, contrary to applicable law, noting:

The Staff Report and the City’s Response together make a hash out of this plat process and the law of vested rights, and they ask the Hearing Examiner to do the same by applying the Development Agreement only to the portions of [IHIF’s] application that the Director believes do not enable [IHIF’s] site development permit applications. As for the remainder of the plat application – the portions that the Director apparently thinks do enable the SDP and ASDP applications – it is impossible to tell whether the Director is asking the Hearing Examiner to apply the Replacement Regulations instead of the Development

*Findings, Conclusions, and Decision
City of Issaquah Hearing Examiner
High Street Collection Preliminary Plat
Nos. PP17-00002 & PRJ16-00013*

Page 36 of 50

Agreement, or is asking the Hearing Examiner to simply not approve those portions of the application even though they are consistent with the Development Agreement. Either way, this a la carte approach to vested rights is illegal as well as hopelessly muddled and impossible to implement.

Tellingly, the City’s Response brief cites no law that stands for the proposition that government may do what the Staff Report dose: pick and choose which pieces of a regulatory regime will govern a vested application. In fact, the law is to the contrary. . .

...
 The City’s assertion that the Hearing Examiner’s previous decision regarding vesting of SDP and ASDP applications compels the City to bisect a single vested application into “vested” materials that will be analyzed under the Development Agreement and “non-vested” materials which will be disregarded and/or considered under Replacement Regulations, is a bald mischaracterization of that earlier decision.

Following discussion of the legal issues, Mr. Schneider then provides a detailed response to Ms. Sloman’s email from March 11, 2020. In it, Mr. Schneider explains why IHIF does not intend to make significant changes to the plat materials it has already submitted. *Shelter’s Reply to the City’s Response and to Lucy Sloman’s Post-Hearing Email Directing Changes to Shelter’s Plat Plans, dated April 20, 2020.*

- 68. On April 20, 2020, the City provided an additional pleading, entitled “Objection and Motion to Strike Reply,” in which it argues that the Hearing Examiner never requested the new pleading submitted by Mr. Schneider. The next day, Mr. Schneider provided a “Response to the Department’s ‘Objection and Motion to Strike Reply.’” In his response, Mr. Schneider stresses that the current matter is not an appeal wherein the parties are engaged in motions practice but, instead, involves a “pre-decision hearing, the purpose of which to present evidence and explanation to the Hearing Examiner so that he can make an informed decision” about “whether and how to approve” the preliminary plat application. On May 11, 2020, the Hearing Examiner issued a decision on the motion to strike and determined that the various pleadings would be included in the record. *See Pleadings, Motions, and Orders, Attachment A.*

Open Record Public Hearing – August 3, 2020

- 69. The open record public hearing on the preliminary plat recommenced, and concluded, on August 3, 2020. Very little additional information about the substance of the preliminary plat was presented at the continued hearing. Instead, Lucy Sloman, Tia Heim, Doug Schlepp, and Mark Veldee all provided additional, detailed information about the project

*Findings, Conclusions, and Decision
 City of Issaquah Hearing Examiner
 High Street Collection Preliminary Plat
 Nos. PP17-00002 & PRJ16-00013*

review that occurred for the proposal. Much of this testimony concerned the vested status of the proposal and each parties' views on appropriate conditions that should be included with approval of the preliminary plat. *Testimony of Ms. Sloman, Ms. Heim, Mr. Schlepp, and Mr. Veldee.*

70. At the conclusion of the hearing, the Hearing Examiner ruled (again) that the parties should submit an agreed upon plan set—without any redline revisions or commentary—that would be included in the record as Exhibit YY. In addition, the Hearing Examiner ruled that each party could submit proposed conditions of approval associated with the agreed upon plan set, along with justification for inclusion of such conditions. The parties complied with this request. *Exhibit YY; Attachment A.*
71. In its proposed conditions of approval, the City repeatedly stresses the idea that approval of the preliminary plat would not relieve IHIF with complying with the Replacement Regulations in terms of future applications associated with development of the preliminary plat. Moreover, the City's proposed conditions stress the idea that IHIF's submitted preliminary plat plans should be treated as "conceptual" in nature such that future alterations to such plans may be necessary with design level review, especially in relation to road and utility plans, and treatment of stormwater. The City's proposed conditions also address mitigation for future development of the project site and note that "applicable impact fees for traffic, park, fire protection, and schools" as well as "mitigation fees for police, general governmental buildings and bicycle and pedestrian facilities shall be evaluated and imposed" at the time future building permits are received related to site development permits. The City also provided proposed conditions explicitly disavowing the content of several of the plat plans within the agreed upon plan set (Exhibit YY), generally on the grounds that such material included information about the vested status of development. Finally, the City recommended a condition noting that the preliminary plat would be "expressly limited by and subject to the Director's Vesting Determination" as set forth in the Staff Report, which (per the proposed condition) would be adopted by reference and incorporated into the Hearing Examiner's decision. *City of Issaquah Proposed Conditions of Approval, dated August 10, 2020.*
72. IHIF's proposed conditions stand in stark contrast to those provided by the City. In general, its proposed conditions are far less detailed and, in explaining its conditions, IHIF stresses that the "Hearing Examiner does not have the authority to make a vesting determination in the context of a plat hearing" such that it would be inappropriate for the Hearing Examiner's conditions to include significant language about the vesting of the preliminary plat or the vested status of other, potential development associated with the preliminary plat. Of particular note, the Applicant stresses that any approval condition concerning mitigation for future development of the project site would be inappropriate, especially considering provisions in Appendix I of the DA that covered the mitigation of

*Findings, Conclusions, and Decision
City of Issaquah Hearing Examiner
High Street Collection Preliminary Plat
Nos. PP17-00002 & PRJ16-00013*

Page 38 of 50

project impacts. *Shelter Response to Proposed Conditions of Approval, dated August 18, 2020.*

CONCLUSIONS

Jurisdiction

The Hearing Examiner has authority to hear and approve, conditionally approve, or disapprove the preliminary plat request after review of the preliminary plat, the administration’s recommendation, testimony, and exhibits submitted at the public hearing. The Hearing Examiner makes the final decision on preliminary subdivisions. *Issaquah Municipal Code (IMC) 18.03.060.B; 18.03.170; 18.04.490.C.1; 18.13.140.A.*

Criteria for Review

Preliminary Plat

Preliminary plat proposals are reviewed through the Modified Level 4 review process and, normally, must comply with all the standards and criteria set forth in Chapter 18.13 IMC. *IMC 18.04.480 and 18.04.490.C.1.* Here, however, the parties disagree on what regulations apply to the Hearing Examiner’s review of the preliminary plat. The City contends that some aspects of the DA that formerly governed the property should be reviewed, while some aspects of the Replacement Regulations that currently govern the property should be reviewed. The Applicant disagrees, arguing that the preliminary plat should be reviewed solely against the development standards contained within the DA.

Any preliminary plat approval, however, would need to comply with the State’s Subdivision Act, Chapter 58.17 RCW.

The standards and criteria regarding preliminary plats set forth in Chapter 18.13 IMC are established to promote the orderly and efficient division and re-division of land within the city, to avoid placing undue and unnecessary burdens on both the Applicant and the City, and to promote the public health and general welfare, complying with the provisions of Chapter 58.17 RCW.

The criteria for review of a preliminary plat are set forth in RCW 58.17.110(2), as follows:

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

*Findings, Conclusions, and Decision
City of Issaquah Hearing Examiner
High Street Collection Preliminary Plat
Nos. PP17-00002 & PRJ16-00013*

- (b) The public use and interest will be served by the platting of such subdivision and dedication.
RCW 58.17.110(2).

The criteria for review adopted by the Issaquah City Council are designed to implement the requirement of Chapter 36.70B RCW to enact the Growth Management Act. In particular, RCW 36.70B.040 mandates that local jurisdictions review proposed development to ensure consistency with City development regulations, considering the type of land use, the level of development, infrastructure, and the characteristics of development. *RCW 36.70B.040.*

Conclusions Based on Findings

Because of the ongoing dispute between the parties concerning the vested status of the proposal, the public use and interest would not be served by approval of the proposed preliminary plat, as required by RCW 58.17.110(2). Under RCW 58.17.020(4), a *preliminary plat* is defined as a “neat and approximate drawing of a proposed subdivision showing the *general* layout of streets and alleys, lots, blocks, and other elements of a subdivision consistent with the requirements of [Chapter 58.17 RCW]” and shall “be the basis for the approval or disapproval of the *general* layout of a subdivision.” (Emphasis added). RCW 58.17.110(1) requires a determination of whether a preliminary plat has made appropriate provisions for “the public health, safety, and general welfare” as well as for “open spaces, drainage ways, streets or roads, alleys, other public ways, transit stops, potable water supplies, sanitary wastes, parks and recreation, playgrounds, school and schoolgrounds.” The parties agree and, the Hearing Examiner concurs that the *general layout* of the proposed subdivision would likely satisfy the requirements for plat approval under RCW 58.17.110(1). The agreement among the parties, however, ends with this understanding of the “general” layout of the preliminary plat and does not extend to such matters as the substantive review of what development regulations apply to the proposal or what types of approval conditions would be appropriate were the Hearing Examiner to approve the preliminary plat. Accordingly, the Hearing Examiner has determined that the parties’ ongoing dispute about vesting must first be resolved before any meaningful decision on the proposal can be made. This is especially true given the Hearing Examiner’s responsibility to craft appropriate approval conditions.

In reflecting on the last of decade of his career (focused exclusively on land use, environmental law, and appellate law), the Hearing Examiner is hard-pressed to recall a matter more vexing than the current one. Because, while it is not uncommon to have parties disagree about the applicability or scope of certain laws or regulations to a proposal, or the weight and applicability of various cases or persuasive authority to a particular matter, the Hearing Examiner cannot recall a situation where the parties disagree fundamentally about what regulations actually apply to a land use proposal. This has created an untenable situation in terms of the Hearing Examiner’s review of this matter: despite spending months attempting to craft a decision addressing the substance of the proposed preliminary plat, the Hearing Examiner has failed in this effort.

*Findings, Conclusions, and Decision
City of Issaquah Hearing Examiner
High Street Collection Preliminary Plat
Nos. PP17-00002 & PRJ16-00013*

In terms of vesting, the parties seemingly agree that, under IMC 18.01.050.C, the Development Services Director is given the sole authority to determine the vested status of any given application under the municipal code. Further, by operation of other provisions of the code, such determination is not considered a “stand alone” determination that can be appealed independent of any appeal on the underlying proposal itself. Accordingly, the Hearing Examiner sometimes is tasked with reviewing such a determination when asked to sit in an appellate capacity—as occurred with IHIF’s appeals of the Development Commission’s decisions on its site development permit applications—but not always. Here, the municipal code requires the Hearing Examiner to review the preliminary plat in the first instance, not in an appellate capacity. As such, the Hearing Examiner lacks authority to independently decide the vested rights dispute.

That said, the Hearing Examiner has considered the Director’s vesting determination in relation to the preliminary plat and finds it, and the City’s subsequent stance concerning this proposal, highly problematic. As IHIF points out, whether the Hearing Examiner rightly decided the appeals associated with its site development permits is immaterial. The Hearing Examiner’s decisions on those permits, including his analysis of several cases including *Noble Manor*, *Westside Manor*, and *Ellensburg*, all addressed whether and to what extent a vested preliminary plat would afford certain vested rights on later site development permits. The Hearing Examiner’s previous decisions did not address the current proposal or the vested status of the preliminary plat. Like IHIF, the Hearing Examiner was surprised to learn in the City’s staff report that the City believed some aspects of the DA would apply to the proposal, others would not, and *crucially* that the City’s Replacement Regulations would apply in various respects.

The Hearing Examiner is unaware of this approach to vesting ever being employed in the context of review of a preliminary plat, let alone one that a jurisdiction has repeatedly indicated is “vested,” to a specific set of regulations, as occurred here. Such an approach to vesting runs contrary to *Reclamation Co. v. Bjornsen*, 125 Wn. App. 432, 105 P.3d 94 (2005), among other decisions concerning vesting. In *Reclamation*, for instance, the Clark County Hearing Examiner reviewed a proposal by selecting evaluating two sets of regulations, those applicable when Clark County first deemed the proposal complete for purposes of project review, and later amendments to the regulations promulgated by the County. In doing so, the Clark County Hearing Examiner accepted the applicant’s argument that vested development rights were meant, at common law, to benefit developers and, as such, a piecemeal approach to which regulations apply would be appropriate. Division 2 of the Court of Appeals rejected this approach, noting that, while “the general purpose of vesting land use regulations is to benefit developers,” another “important purpose of the vesting rule” is to establish a “date certain upon which the owner’s right to use his or her property in a particular way becomes fixed” so that a reviewing court “is not required to search through the moves and countermoves of the parties, and ‘the stalling or acceleration of administrative action in the issuance of permits’ in each case.” 125 Wn. App. At 435.

Findings, Conclusions, and Decision
 City of Issaquah Hearing Examiner
 High Street Collection Preliminary Plat
 Nos. PP17-00002 & PRJ16-00013

Page 41 of 50

The current situation is comparable. Under the City's approach, it has clearly become necessary to "search through the moves and countermoves of the parties" in the present matter to understand the City's stance on the development regulations applicable to the proposal.

Moreover, courts have recognized that the land use application process is iterative. As such, the legislature has granted local jurisdictions the authority to determine when a particular proposal is "complete" for purposes of vesting. Such a determination does not fix the materials submitted for review of an application in stone. Rather, such a determination fixes which land use regulations will apply to such a proposal, regardless of the outcome of the iterative review process. As the Washington State Supreme Court has explained:

A preliminary plat application is meant to give local governments and the public an approximate picture of how the final subdivision will look. *RCW 58.17.020(4)*. It is to be expected that modifications will be made during the give and take of the approval process. Although it is up to local governments to decide what level of specificity they will require from a developer in its initial application, *RCW 58.17.033*, they may not cause the vesting of the application to be contingent on future events or decisions, nor make the application process so odious that completion is nearly impossible. *West Main*, 106 Wn.2d at 52-53; *Adams*, 70 Wn. App. at 479. Once a completed application has been submitted, it is to be judged under the laws in effect at the time of submission.

Friends of the Law v. King County, 123 Wn.2d 518, 869 P.2d 1056 (1994).

Here, the City appears to contend that each submission an applicant makes during the iterative project review process has vesting implications for the particular proposal that is currently under review (as opposed to implications for future development proposals). Moreover, some of the City's materials seem to indicate that certain aspects of the DA itself "vest" (i.e., certain Appendices) while others do not. While the Hearing Examiner lacks authority to independently decide whether the City's vesting interpretation is legally correct, he feels it important to stress that he does not understand the City's approach to vesting in terms of this preliminary plat. As noted in the above decision, for instance, a different developer (Polygon) applied for preliminary plat approval almost contemporaneously with IHIF and the City reviewed the preliminary plat against each of the appendices in the DA. That approach comports with the Hearing Examiner's understanding of the vested rights doctrine, as explained above, and lends itself to a consistent, understandable review process.

Under the current approach, the Hearing Examiner is unable to determine what substantive provisions should be reviewed in terms of this preliminary plat. In addition to the obvious challenges this creates, there are serious implications in terms of the Hearing Examiner's efforts to craft appropriate approval conditions. For instance, in their submissions concerning potential approval conditions, the parties expressed a fundamental disagreement about whether language about mitigation should be included in such conditions. Under the DA, mitigation for project

Findings, Conclusions, and Decision
City of Issaquah Hearing Examiner
High Street Collection Preliminary Plat
Nos. PP17-00002 & PRJ16-00013

Page 42 of 50

impacts—including mitigation under SEPA—was clearly addressed. The municipal code, however, includes provisions on impact fees and SEPA mitigation that were promulgated after the DA was first created. In its recommended plat conditions, however, the City suggests that it would impose such impact fees and SEPA mitigation on later projects associated with the preliminary plat. Without clear guidance on the vested status of the preliminary plat, this creates additional potential problems in the future.

In conclusion, the Hearing Examiner has determined clear guidance on the vested status of this proposal is necessary, from a forum with appropriate jurisdiction, before review of this preliminary plat can be completed. Such guidance, hopefully, would address, at a minimum: (a) which regulations are applicable to the preliminary plat; and (b) whether the SEPA review associated with the DA addressed all necessary project impacts associated with environmental impacts from development within the Issaquah Highlands, including the subject property.
Findings 1 – 72.

DECISION

Based on the preceding findings and conclusions, the request for a preliminary plat to subdivide 21.46-acres into 10 lots for mixed-use development, on “Lot B” of the Issaquah Islands north of NE Discovery Drive and west of 9th Avenue NE, is **DENIED**.

Decided this 1st day of February 2021.



ANDREW M. REEVES
Hearing Examiner
Sound Law Center

Attachment A

Exhibit List:

The following exhibits were admitted into the record throughout the review process:

- A. Listing and Comparison of Application Materials (Prepared by City)
- B. Application Materials from August 1, 2017:
 - 1.1 Land Use Application, dated August 1, 2017
 - 1.2 Plan Set

*Findings, Conclusions, and Decision
City of Issaquah Hearing Examiner
High Street Collection Preliminary Plat
Nos. PP17-00002 & PRJ16-00013*

Page 43 of 50

- 1.3 Project Narrative, dated July 15, 2017
- 1.4 Traffic Analysis Memorandum, Transpo Group, dated July 28, 2017
- 1.5 Preliminary Stormwater Report, KPFF Consulting Engineers, dated July 2017
- 1.6 Pre-Application Comment Letter, dated July 27, 2017
- Application Materials from August 28, 2017:
 - 2.1 Additional File Submittal Confirmation
 - 2.2 Land Use Application, dated April 6, 2017
 - 2.3 Plan Set
 - 2.4 Project Narrative, dated July 15, 2017
 - 2.5 Traffic Analysis Memorandum, Transpo Group, dated July 28, 2017
 - 2.6 Preliminary Stormwater Report, KPFF Consulting Engineers, dated July 2017
 - 2.7 Title Report, dated July 28, 2017
 - 2.8 SEPA Checklist, dated July 28, 2017
 - 2.9 Affidavit of Agent Authority, dated July 10, 2017
 - 2.10 Affidavit of Ownership, dated July 10, 2017
 - 2.11 Lot Closure Calculations, Core Design, Inc., dated July 28, 2017
 - 2.12 Preliminary Plat Submittal Memorandum, dated July 27, 2017
 - 2.13 Sidewalk Easement: Legal Description
 - 2.14 Public Trail Easement: Legal Description
 - 2.15 8 x 11 Plan Set
 - 2.16 8 x 11 Vicinity Map
 - 2.17 Vicinity Map
- Application Materials from December 15, 2017:
 - 3.1 Additional File Submittal Confirmation
 - 3.2 Overview Site Plan (with Building Footprints), dated December 14, 2017
 - 3.3 Revised Lot Lines Plan, dated December 15, 2017
- Application Materials from February 7, 2018:
 - 4.1 Additional File Submittal Confirmation
 - 4.2 Traffic Impact Analysis Memorandum, Transpo Group, dated February 6, 2018
- Application Materials from February 22, 2018:
 - 5.1 Additional File Submittal Confirmation
 - 5.2 Architecture Review Committee Approval Letter, dated July 28, 2017
- Application Materials from March 5, 2019:
 - 6.1 Additional File Submittal Confirmation
 - 6.2 Plan Set
 - 6.3 Project Narrative, dated July 15, 2017
 - 6.4 Response to Comments (Traffic), Transpo Group, dated March 4, 2019
 - 6.5 Preliminary Stormwater Report (Revised), KPFF Consulting Engineers, dated February 2019
 - 6.6 Response to Comments from March 16, 2018
 - 6.7 Applicant Response to Comments, dated March 5, 2019
 - 6.8 Additional File Submittal Confirmation (#2)

*Findings, Conclusions, and Decision
 City of Issaquah Hearing Examiner
 High Street Collection Preliminary Plat
 Nos. PP17-00002 & PRJ16-00013*

- 6.9 Supplemental Project Narrative, dated March 1, 2019
- 6.10 Email from Ken Shipley to Jean Lin, dated March 6, 2019, with email string
- C. Notice Materials:
 - 1. Affidavit of Mailing (Application), dated December 27, 2017
 - 2. Affidavit of Posting (Application), dated October 17, 2017
 - 3. Affidavit of Mailing (Hearing), dated February 21, 2020
 - 4. Published Notice, *Issaquah Reporter*, dated February 21, 2020
 - 5. Updated Site Posting, dated February 21, 2020
 - 6. Affidavit of Publication, dated February 21, 2020
- D. Community Conference Materials:
 - 1. Community Conference Memorandum, dated October 10, 2019
 - 2. Public Comments:
 - a. Comment from Pedro Guzman
 - b. Comment from Jonathan Chen
 - c. Comment from Suyesh Chaudhari
 - d. Comment from Alison Kimble
 - e. Comment from Lei Wang
 - f. Comment from Sathyaprasad Ramaseshan
 - g. Comment from Anushri Sarada
 - h. Comment from Chaitalee Zade
 - i. Comment from Erin Fields
 - 3. Additional Public Comments (in Response to Conference Memorandum):
 - a. Comment from Alison Kimble
 - b. Comment from Sathyaprasad Ramaseshan
 - c. Comment from Erin Fields
 - d. Comment from Bob Kaila
 - e. Comment from Siddhartha Rabindran
 - f. Comment from Amanveer Kaila
 - g. Comment from Lei Wang
 - h. Comment from Catalina Millas
 - i. Comment from Nina Milligan
 - j. Comment from Ravi Mudunuri
 - k. Comment from Vasundhara Subrahmanian
 - l. Comment from Jonathan Li On Wing
 - m. Comment from Mike Zalewski
- E. Hearing Examiner's Decision on City's Motion to Dismiss, No. APP18-00005, dated November 27, 2018
- F. Hearing Examiner's Decision on Dispositive Motions, No. APP19-00002, dated November 15, 2019
- G. Letter from Keith Niven to Patrick Schneider, dated April 4, 2018
- H. Letter from Lucy Sloman to Tia Heim, dated April 15, 2019

*Findings, Conclusions, and Decision
 City of Issaquah Hearing Examiner
 High Street Collection Preliminary Plat
 Nos. PP17-00002 & PRJ16-00013*

- I. Hearing Examiner's Decision on Request for Reconsideration, No. APP19-00002, dated January 24, 2020
- J. Comprehensive Plan (Excerpts)
- K. Communications/Comments Between Applicant and City:
 - 1. Email from Lucy Sloman to Tia Heim, dated February 25, 2020, with email string
 - 2. Email from Lucy Sloman, dated July 26, 2019
 - 3. Email from Lucy Sloman to Tia Heim, dated July 19, 2019, with email string
 - 4. Email from Jean Lin to Ken Shipley, dated February 21, 2019, with email string
 - 5. Responses:
 - A. Email from Lucy Sloman to Tia Heim, dated December 21, 2018, with email string
 - B. City Responses to Applicant Comments
 - 6. Email from Doug Schlepp to Tia Heim, dated October 15, 2018
 - 7. Responses:
 - A. Email from Doug Schlepp to Tia Heim, dated March 29, 2018
 - B. Memorandum from Transpo Group, dated February 6, 2018, with City Annotations
 - 8. Email from Jean Lin to Dave Cayton, dated March 23, 2018, with email string
 - 9. Email from Doug Schlepp to Mike Swenson, dated March 22, 2018
 - 10. Plan Set, with City Annotations
 - 11. Email from Dave Cayton to Jean Lin, dated February 22, 2018
 - 12. Email from Jean Lin to Dave Cayton, dated February 21, 2018, with email string
 - 13. Email from Doug Schlepp to Mike Swenson, dated January 24, 2018, with email string
 - 14. Email from Dave Cayton to Jean Lin, dated December 15, 2017
- L. Action Memorandum, Development Services Department, dated March 29, 2013
- M. Complete Application Determination, dated August 11, 2017
- N. Ordinance No. 2830, effective March 28, 2019
- O. Comments on Public Hearing:
 - 1. Comment from Jen Noland, dated February 25, 2020
 - 2. Comment from Kent Worthington, dated March 2, 2020
 - 3. Comment from Jessica Conquest, King County Metro, dated March 4, 2020
 - 4. Comment from Lawrence Chung, King County Metro, dated August 3, 2020
 - 5. Comment from Christina Marchione, dated July 31, 2020
- P. Issaquah Highlands Development Agreement (Revised)
- Q. Grand Ridge Annexation and Development Agreement (Original)
- R. Staff Report, dated March 3, 2020
- S. Staff PowerPoint Presentation, dated March 9, 2020
- T. Grand Ridge Final Environmental Impact Statement, dated September 1995
- U. Amendment to Grand Ridge/Issaquah Highlands Annexation and Development Agreement, dated February 2000
- V. Revised Recommendation & Proposed Conditions of Approval, dated March 9, 2020

*Findings, Conclusions, and Decision
 City of Issaquah Hearing Examiner
 High Street Collection Preliminary Plat
 Nos. PP17-00002 & PRJ16-00013*

- W. Curriculum Vitae for Mike Swenson
- X. Curriculum Vitae for Mark Veldee
- Y. Revised Development Entitlement Memorandum, dated December 1, 2016
- Z. Applicant Summary of Review Dates and Timeline
- AA. Email from Christopher Wright to Dave Cayton, dated March 10, 2017, with email string
- BB. Letter from Keith Niven to Nick Abdelnour, dated March 27, 2017
- CC. Email from Jean Lin to Dave Cayton, dated June 7, 2017, with email string
- DD. Email from Sarabeth Levine to Tia Heim, dated August 15, 2017
- EE. Email from Jean Lin to Dave Cayton, dated October 6, 2017, with email string
- FF. Email from Keith Niven to Tia Heim, dated November 22, 2017, with email string
- GG. Email from Dave Cayton to Jean Lin, dated December 15, 2017, with attachments
- HH. Email from Darwin Li to Doug Schlepp, dated February 6, 2018, with attachment
- II. Email from Doug Schlepp to Mike Swenson, dated February 19, 2018, with email string
- JJ. Letter from Keith Niven to Patrick Schneider, dated March 8, 2018, with attachment
- KK. Staff Report for Westridge North Preliminary Plat, dated March 9, 2018
- LL. Urban Village Development Commission Recommendation, Westridge North Preliminary Plat, dated May 4, 2018
- MM. Email from Lucy Sloman to Tia Heim, dated August 24, 2018, with email string
- NN. Email from Lucy Sloman to Tia Heim, dated December 21, 2018, with email string
- OO. Email from Jean Lin to Ken Shipley, dated March 6, 2019, with email string
- PP. Email from Lucy Sloman to Tia Heim, dated April 5, 2019, with attachment
- QQ. Email from Tia Heim to Lucy Sloman, dated April 8, 2019, with email string
- RR. Email from Tia Heim to Lucy Sloman, dated July 17, 2019, with email string
- SS. Email from Tia Heim to Lucy Sloman, dated August 7, 2019, with email string
- TT. Email from Lucy Sloman, dated October 18, 2019, with email string and attachment
- UU. Email from Mark Veldee to Dan Ervin and Doug Schlepp, dated June 28, 2017, with email string
- VV. Additional Materials, March 11, 2020:
 1. Email from Lucy Sloman to Tia Heim, dated March 11, 2020
 2. Plan Set with City Annotations
 3. Plan Set for Preliminary Plat of Westridge North
 4. High Street Collection, Preliminary Engineering Notes, revised April 15, 2020
 5. Information Concerning Proposed Trail Connection
- WW. Additional Submittals from Applicant:
 1. Issaquah Highlands Public Meeting Hearing Transcript (Excerpt), dated October 24, 2018
 2. Plat Review Dates and Timeline, updated July 9, 2020
 3. Email from Candice Baer to David Ortman, dated December 16, 2019, with email string
 4. Email from Zach Lell to Candice Baer, dated February 3, 2020, with email string
 5. Email from Candice Baer to Lucy Sloman, dated February 4, 2020, with email string

*Findings, Conclusions, and Decision
 City of Issaquah Hearing Examiner
 High Street Collection Preliminary Plat
 Nos. PP17-00002 & PRJ16-00013*

6. Email from Candice Baer to Lucy Sloman, dated April 17, 2020, with attachment
 7. Email from Keith Niven to the Hearing Examiner, dated March 31, 2020, with email string
 8. Email from Lucy Sloman to Tia Heim, dated March 4, 2020, with email string
 9. Email from Jacqueline Quarre to Zach Lell, dated May 28, 2020, with attachment
 10. Email from Tina Eggers to Jacqueline Quarre, dated June 4, 2020, with email string
 11. Email from Zach Lell to Pat Schneider, dated July 7, 2020, with email string
 12. Email from Jean Lin to Dave Cayton, dated July 17, 2017, with email string
 13. Email from Jean Lin to Dave Cayton, dated July 10, 2017, with email string
 14. Applicant's Proposed Findings
 15. Applicant's Revised Proposed Conditions of Approval
 16. Email from Candice Baer to David Ortman, dated January 27, 2020
 17. Email from David Ortman to Candice Baer, dated January 27, 2020, with email string
 18. Emails about Scheduling (March 27 through March 31, 2020)
- XX. Additional Submittals from City:
1. City Plat Review Dates & Timeline
 2. Development Services Department Development Commission, Community Conference Staff Report, dated August 8, 2019
 3. Email from Candice Baer, dated March 12, 2020, with attached Emergency Proclamation, dated March 6, 2020
 4. Email from Jean Lin to David Holmes, dated October 5, 2017
 5. Email from Doug Schlepp to Mark Veldee, dated November 16, 2017, with email string
 6. Discovery Drive Information
 7. Email from Lucy Sloman to Keith Niven, dated November 22, 2017, with email string
 8. Memorandum on "End of DAs – Vesting & FAR," dated December 12, 2017
 9. Email from Lucy Sloman to Nick Abdelnour, dated December 1, 2016
 10. Email from Tia Heim to Lucy Sloman, dated January 4, 2017
 11. Email from Tia Heim to Christopher Wright, dated April 3, 2017, with email string
 12. Affidavit of Mailing (Community Conference), dated August 2, 2019, with attachments
 13. Email from Lucy Sloman to Tia Heim, dated August 5, 2019, with email string
 14. Email from Gretchen Garrett, dated August 8, 2019
 15. Email from Lucy Sloman, dated October 10, 2019
 16. Letter from Keith Niven to Nick Abdelnour, dated November 22, 2017
 17. Email from Candice Baer to the Hearing Examiner, dated March 3, 2020
 18. Traffic Impact Analysis Memorandum, Transpo Group, dated February 6, 2018, with City Annotations

*Findings, Conclusions, and Decision
 City of Issaquah Hearing Examiner
 High Street Collection Preliminary Plat
 Nos. PP17-00002 & PRJ16-00013*

Page 48 of 50

- YY. Final Preliminary Plat Plan Set (23 Sheets):
1. Title Sheet (Sheet P1.01), revised February 8, 2019
 2. Preliminary Plat (Sheet P1.02), revised February 8, 2019
 3. Preliminary Landscape Plan (Sheet L1.01), undated
 4. Existing Conditions (Sheet C1.02), dated November 2017
 5. Existing Conditions (Sheet C1.03), dated November 2017
 6. Existing Conditions (Sheet C1.04), dated November 2017
 7. Existing Conditions (Sheet C1.05), dated November 2017
 8. Existing Conditions (Sheet C1.06), dated November 2017
 9. Preliminary Engineering Notes, Legend, and Abbreviations (Sheet C-100), revised April 15, 2020
 10. Preliminary Engineering Overview Site Plan (Sheet C-101), dated February 22, 2019
 11. Preliminary Engineering Overview Key Map (Sheet C-200), dated February 22, 2019
 12. Preliminary Engineering Grading and Utility Plan Block A (Sheet C-201), dated February 22, 2019
 13. Preliminary Engineering Grading and Utility Plan Block B and C (Sheet C-202), dated February 22, 2019
 14. Preliminary Engineering Grading and Utility Plan Block D and E (Sheet C-203), dated February 22, 2019
 15. Preliminary Engineering Northeast Federal Drive Plan and Profile (Sheet C-300), dated February 22, 2019
 16. Preliminary Engineering 8th Avenue Northeast Plan and Profile (Sheet C-301), dated February 22, 2019
 17. Preliminary Engineering Northeast Discovery Drive Plan and Profile (Sheet C-302), dated February 22, 2019
 18. Preliminary Engineering Northeast Discovery Drive Plan and Profile (Sheet C-303), dated February 22, 2019
 19. Preliminary Engineering Northeast Discovery Drive Plan and Profile (Sheet C-304), dated February 22, 2019
 20. Preliminary Engineering Northeast Discovery Drive Plan and Profile (Sheet C-305), dated February 22, 2019
 21. Preliminary Engineering Multi-Purpose Trail Plan (Sheet C-306), dated February 22, 2019
 22. Preliminary Engineering 8th Ave Northeast Plan (Sheet C-307), dated February 22, 2019
 23. Preliminary Engineering Roadway Sections (Sheet C-308), dated February 22, 2019

Pleadings, Motions, and Orders:

*Findings, Conclusions, and Decision
 City of Issaquah Hearing Examiner
 High Street Collection Preliminary Plat
 Nos. PP17-00002 & PRJ16-00013*

Page 49 of 50

- Applicant Objection to New and Ongoing Violations of Applicant's Vested Rights, dated March 9, 2019
- City Response to Applicant's Objection to New and Ongoing Violations of the Applicant's Vested Rights, dated March 20, 2020
- Applicant Reply to City's Response and to Lucy Sloman's Post-Hearing Email Directing Changes to Applicant's Plat Plans, dated April 16, 2020
- City Objection and Motion to Strike Reply, dated April 20, 2020
- Applicant Response to City's Objection and Motion to Strike Reply, dated April 21, 2020
- Decision on Motion to Strike, dated May 11, 2020
- Order on Continued Hearing, dated July 8, 2020
- City Proposed Conditions of Approval, dated August 10, 2020
- Applicant Response to City's Proposed Conditions of Approval, dated August 18, 2020
- Hearing Examiner's Update on Decision, issued January 27, 2021

*Findings, Conclusions, and Decision
City of Issaquah Hearing Examiner
High Street Collection Preliminary Plat
Nos. PP17-00002 & PRJ16-00013*

Page 50 of 50

APPENDIX - 2

Lucy Sloman AICP Land Development Manager
 Community Planning & Development Department (formerly DSD)
 Direct 425|837-3433 • Front Desk 425|837-3100 • **425|837-3470 REPORT SPILLS**



[Issaquah, WA - Official Website](http://www.issaquahwa.gov)

From: Lucy Sloman

Sent: Monday, February 8, 2021 2:42 PM

To: mjzalewsk@gmail.com; narendraparmar@gmail.com; Geoffrey Walker <geoffw@gmail.com>; mkilzi@msn.com; c.millasb@gmail.com; leaantoinette@gmail.com; bskaila@gmail.com; amanveer.kaila@gmail.com; bob.2012.g@gmail.com; guzman.p@gmail.com; nbratton@forterra.org; gclark@mbaks.com; davidmorse@regencycenters.com; Vasu016@gmail.com; rvsiddhartha@gmail.com; wuyang.hgb@gmail.com; jasonkravitz@gmail.com; chenxin890707@gmail.com; rk.mudunuri@gmail.com; suyeshc@gmail.com; jwchen86@gmail.com; alison.m.kimble@gmail.com; lwangad025@gmail.com; rsathyaprasad@gmail.com; anushrisarda@outlook.com; chaitaleezade@yahoo.com; erinpfields@gmail.com; jlionw@gmail.com; bskaila@gmail.com; caskleon@gmail.com; Jennifer0033@hotmail.com; jconquest@kingcounty.gov; edterp22@gmail.com; Sarah Hoey <Sarah.H@ihcommunity.org>; Nina Milligan <nina.m@IHCouncil.org>

Cc: Tia Heim <Tia.Heim@Shelterholdings.com>; Zach Lell <zlell@omwlaw.com>; Candice Baer <candyb@issaquahwa.gov>

Subject: FW: Issaquah Hearing Examiner's Decision - IHIF High Street Collection Preliminary Plat

Importance: High

Dear Parties of Record

You are receiving this email because you have commented or expressed interest in the land use activities on the subject property. Attached is the Hearing Examiner's decision on the Preliminary Plat for the Shelter/IHIF-C property located west of 9th Ave NE between NE High St and NE Discovery Drive. Regarding this Notice of Decision:

- **Appeal:** With this notice, begins a 14 day appeal period. While the state is under the Governor's order related to Covid, if you would like to appeal this decision, please submit your appeal by email to CPDSupportServices@issaquahwa.gov along with a copy of your check for \$1500 payable to the City of Issaquah by 5pm **Tuesday February 22, 2021**. In addition to the email, a hard copy of the Notice of Appeal and a check for the filing fee must be deposited in the mail addressed to City of Issaquah Permit Center, Attention Candy Baer, PO Box1307, Issaquah, WA 98027 and postmarked no later than Tuesday February 22, 2021 in order for the appeal to be valid. Appellants should present specific factual objections to the Notice of Decision in their Notice of Appeal.

- **Change in Valuation:** Property owners affected by this decision may request a change in valuation for property tax purposes notwithstanding any program of revaluation. Affected property owners may obtain further information regarding revaluation from the King County Assessor's Office, 500 Fourth Ave., #ADM-AS-0708, Seattle, WA 98104, (206) 296-7300.

Regards

Lucy

Lucy Sloman AICP Land Development Manager
Community Planning & Development Department (formerly DSD)
Direct 425|837-3433 · Front Desk 425|837-3100 · 425|837-3470 REPORT SPILLS

 <p>CITY OF ISSAQUAH WASHINGTON</p>	<p>Cash Register Receipt City of Issaquah</p>	<p>Receipt Number R14901</p>
---	--	---

DESCRIPTION	ACCOUNT	QTY	PAID
APP21-00002 Address: APN:			\$1,500.00
APPEAL	100-10-1010-503-345830		\$1,500.00
TOTAL FEES PAID BY RECEIPT: R14901			\$1,500.00

Date Paid: 2/22/2021
 Paid By: CITY
 Cashier: PM
 Pay Method: ACCT XFER 02

**BEFORE THE HEARING EXAMINER
FOR THE CITY OF ISSAQUAH**

In the Matter of the Application of	)	No. PP17-00002
	)	No. PRJ16-00013
)	
IHIF-Commercial, LLC	)	High Street Collection at
	)	Issaquah Highlands Preliminary Plat
)	
	)	FINDINGS, CONCLUSIONS,
<u>For Approval of a Preliminary Plat</u>	)	AND DECISION

SUMMARY OF DECISION

The request for approval of a preliminary plat to subdivide a 21.46-acre property into 10 lots, primarily for commercial and retail development, on “Lot B” of the Issaquah Highlands, north of NE Discovery Drive and west of 9th Avenue NE, is **DENIED**.

Although the record demonstrates that the proposed preliminary plat would likely make “appropriate provisions for the public health, safety, and general welfare” as required by Revised Code of Washington (RCW) 58.17.110(1)(a)—including appropriate provisions for open spaces, drainage ways, streets, sidewalks, potable water supplies, and sanitary wastes—insufficient information currently exists to determine whether “the public interest will be served by the subdivision and dedication” of the proposed plat, as required by RCW 58.17.110(1)(b).

Specifically, the City of Issaquah (City) and IHIF-Commercial, LLC (Applicant, or IHIF), fundamentally disagree on which regulations apply to review of this proposal: the Applicant contends that the proposal vests to regulations within a now defunct development agreement that was in place at the time the City deemed this preliminary plat complete; the City maintains that some provisions of the development agreement continue to apply to the proposed plat while other matters are governed by regulations the City Council specifically adopted to replace the development agreement.

Both parties seemingly agree that the Hearing Examiner lacks authority to independently decide this issue and that any challenge to the vesting determination made in relation to this proposal must occur in another forum. This issue, however, is so fundamental to review of the proposal that making a determination about the preliminary plat, without first having the vesting issue resolved, would inject additional uncertainty into a matter that has been riddled with confusion and misunderstandings for several years, and the public interest would not be served by doing so. Accordingly, denial is warranted until an appropriate forum with jurisdiction can provide additional guidance on vesting to the parties so that any confusion about which regulations govern is settled.

*Findings, Conclusions, and Decision
City of Issaquah Hearing Examiner
High Street Collection Preliminary Plat
Nos. PP17-00002 & PRJ16-00013*

SUMMARY OF RECORD

Hearing Date:

The Hearing Examiner held an open record hearing on the request on March 9, 2020. The hearing was scheduled to continue, for a second day, on March 20, 2020. On March 12, 2020, however, the City informed the Hearing Examiner that all public meetings, public hearings, and administrative appeal proceedings would be immediately discontinued until further notice in light of the outbreak of the COVID-19 pandemic. On March 27, 2020, and again on May 11, 2020, the Hearing Examiner informed the City of his willingness to hold hearings using remote technology, and the open record hearing was scheduled to continue on July 8, 2020, using such technology.¹ Prior to commencing the continued hearing on July 8, 2020, however, it was determined that additional public notice of the continued hearing had not been issued. Accordingly, the hearing was continued so that appropriate public notice could be provided.² Ultimately, the hearing recommenced and concluded on August 3, 2020. The record was left open until August 18, 2020, to allow the parties to submit additional information, including an “agreed” upon set of project plans for review and proposed approval conditions, with justification, from each party.³

Testimony:

The following individuals presented testimony under oath at the open record hearing:

Lucy Sloman, City Land Development Manager
 Doug Schlepp, City Development Senior Consulting Engineer
 Eric Evans, Applicant Director of Development
 Michael Swenson, P.E., Transpo Group
 Mark Veldee, P.E., KPFF
 Tia Heim, Applicant Representative

Attorney Patrick Schneider represented the Applicant at the open record hearing.
 Attorney Zach Lell represented the City at the open record hearing.

Exhibits, Motions, and Pleadings:

Attachment A details the exhibits that were admitted into the record, as well as pleadings, motions, and other materials submitted by the parties.

The Hearing Examiner enters the following findings and conclusions based upon the testimony and exhibits admitted at the open record hearing:

¹ See Exhibit WW and Exhibit XX.

² *Order on Continued Hearing*, dated July 8, 2020.

³ Exhibit YY; *City Proposed Conditions of Approval*, dated August 10, 2020; *Applicant Response to City’s Proposed Conditions of Approval*, dated August 18, 2020.

Findings, Conclusions, and Decision
 City of Issaquah Hearing Examiner
 High Street Collection Preliminary Plat
 Nos. PP17-00002 & PRJ16-00013

FINDINGS

Regulatory Background

1. In 1995, the Washington State Legislature adopted Sections 36.70B.170 to .200 Revised Code of Washington (RCW), which allowed local governments to enter into development agreements with persons having ownership or control of real property. The statute provides that a “development agreement must set forth the development standards and other provisions that shall apply to and govern and vest the development, use, and mitigation of the development of the real property for the duration specified in the agreement.” *RCW 36.70B.170(1)*. The statute further explains that the “development standards” that must be set forth in a development agreement include “[r]eview procedures and standards for implementing decisions” and a “build-out or vesting period for applicable standards.” *RCW 36.70B.170(3)(i) and (j)*. The statute states that executing development agreements is a proper exercise of “county and city police power and contract authority.” *RCW 36.70B.170(4)*. Finally, *RCW 36.70B.180* provides:

Unless amended or terminated, a development agreement is enforceable during its term by a party to the agreement. A development agreement and the development standards in the agreement govern during the term of the agreement, or for all or that part of the build-out period specified in the agreement, and may not be subject to an amendment to a zoning ordinance or development standard or regulation or a new zoning ordinance or development standard or regulation adopted after the effective date of the agreement. A permit or approval issued by the county or city after the execution of the development agreement must be consistent with the development agreement.

Exhibit F.

2. On June 19, 1996, the City entered into a development agreement entitled the “Grand Ridge Annexation and Development Agreement.” This agreement later became known as the “Issaquah Highlands Annexation and Development Agreement” (Development Agreement, or DA), which covers development of the Issaquah Highlands area, including the subject property. The DA, including its appendices and amendments, provides development standards related to everything from zoning and density requirements to agreed mitigation and specific design review requirements. Of particular note:
 - Unlike the municipal code, the DA does not generally provide for differing treatment of various land use permits. Instead, it defines *implementing approvals* as “land use approvals or permits” which “implement or otherwise are consistent [with the DA], including but not limited to plats, short plats, binding site plans, site development permits, building permits, and grading permits.”⁴

⁴ *Exhibit P (Section 6, Definitions).*

- Comprehensive standards for infrastructure throughout all of the Issaquah Highlands are provided, including standards related to: stormwater improvements (Appendix D); sewer service (Appendix G); roadways (Appendix H) and other transportation improvements (Appendix J); capital facilities improvements, including those related to park, police, fire, and public works (Appendix K); urban trails (Appendix T); and public spaces, such as parks, plazas, and woonerfs (Exhibit U).
- The DA provides for a process to allow modifications to its own development standards, including “administrative minor modifications” (AMMs).
- The DA provides detailed and specific guidelines related to processing and approval of land use permits (i.e, implementing approvals), covering permit approval from the preliminary application stage through the construction permit stage of development (Appendix L).
- The DA provides for a dispute resolution process (Section 5.11).

Exhibit P.

3. The DA also contains provisions concerning, vesting and termination of the agreement. Specifically, the DA includes the following sections:

[Section] 3.23 VESTING OF DEVELOPMENT STANDARDS AND MITIGATION

All development with the [Urban Growth Area] shall be governed by the Development Standards and shall be implemented through plats, short plats, binding site plans, site development permits, building permits and other permits and approvals (“Implementing Approvals”) issued by the City. A “Buildout Period” of twenty (20) years following first final plat approval is established for the development and construction of uses for the [Issaquah Highlands] Project. During the Buildout Period, the City shall not modify or impose new or additional Development Standards beyond those set forth in this Agreement. . .

* * *

[Section] 3.23.2 After Buildout. The Development Standards shall continue to apply to all applications for Implementing Approval submitted after expiration of the Buildout Period, except either party may terminate this Agreement, and the zoning and development regulations may be modified, as provided in Section 5.13.

* * *

*Findings, Conclusions, and Decision
 City of Issaquah Hearing Examiner
 High Street Collection Preliminary Plat
 Nos. PP17-00002 & PRJ16-00013*

[Section] 5.13 TERM

The term of this Agreement shall continue at a minimum through the Buildout Period, and shall continue after the Buildout Period unless and until either the City or the Partnership . . . gives notice of termination. . . . No sooner than six (6) months after the notice of termination, the City shall hold public hearings and shall adopt zoning and related development standards for the UGA portion of the Property, or portions thereof as determined appropriate by the City. Upon such adoption, this Agreement shall terminate and thereafter the UGA portion of the Property shall be governed by the adopted City zoning and related development regulations.

Exhibit P.

4. The first final plat under the DA was approved on September 18, 1997. Accordingly, the “Buildout Period” under the DA expired on September 18, 2017. Under the terms of the DA, however, its development standards remained effective until the City Council voted to enact Ordinance No. 2830, effective March 28, 2018 (and later codified at Chapter 18.19B of the Issaquah Municipal Code (IMC)). The ordinance terminated the DA and promulgated “Replacement Regulations” replacing the development standards and regulations previously governing land subject to the DA. *Exhibit F; Exhibit L.*
5. Of particular note, the Replacement Regulations include different procedures than the DA related to the processing of land use applications, as found in IMC 18.19B.270. Under Appendix L of the DA, for instance, a preliminary plat would be processed as follows: the proposal’s submission to the City; the City issuing a “sufficiency” determination within 10 calendar days; the City’s (now defunct) Major Development Review Team holding an application conference with the developer to furnish written comments; the City’s (now defunct) Urban Village Development Commission considering the matter within 60 days from the sufficiency determination and issuing a recommendation to the City Council; and the City Council approving or denying the preliminary plat. Under the Replacement Regulations, a preliminary plat is processed by: the proposal’s submission to the City; the City determining that the application is “complete”; the City’s Development Commission reviewing the proposal at an informal public meeting; City staff (with the assistance of the Applicant, if they so choose) preparing a “community conference response memo”; distribution of the response memo to parties of record and the Development Commission for additional public comment; incorporation of public comment into the community conference response memo, if appropriate; production of a final community conference response memo; preparation of a staff report by City staff; and an open record public hearing before the Hearing Examiner, who then issues a final decision on the preliminary plat. *Exhibit P, Appendix L; IMC 18.19B.270.C.*

*Findings, Conclusions, and Decision
City of Issaquah Hearing Examiner
High Street Collection Preliminary Plat
Nos. PP17-00002 & PRJ16-00013*

Page 5 of 50

6. In addition, the Replacement Regulations include the following provision concerning the vesting of permits:

Only vesting established by Washington State law shall apply to the vesting of development applications for properties located within Issaquah Highlands previously covered by the terminated development agreements.

These are:

1. Building permits which comply with RCW 19.27.095; or
2. Long or short plats which comply with RCW 58.17.033; or
3. Development agreements per RCW 36.70B.180.

IMC18.19B.280.A.

Procedural Background

City's Initial Review of IHIF's Preliminary Plat

7. IHIF Commercial, LLC (Applicant, or IHIF) requests preliminary plat approval to subdivide 21.46 acres that it owns on "Lot B" of the Issaquah Highlands, north of NE Discovery Drive and west of 9th Avenue NE, primarily for commercial and retail development. IHIF began communicating its intention to develop the property several years ago, as evinced by a "Development Entitlement Memorandum" prepared by the City on December 1, 2016, which noted that the property would be "permitted under the Issaquah Highlands Development Agreement." *Exhibit Y.*
8. The vested status of any proposal submitted has been a concern of paramount importance to IHIF since it first contemplated development of the property. On January 24, 2017, for instance, Applicant Representative Tia Heim emailed Lucy Sloman, the City's Land Development Manager, to request a copy of the "vesting requirements interpretation" previously prepared by City Development Services Director Keith Niven that was referenced in the December 2016 Development Entitlement Memorandum.⁵ *Exhibit XX-10.*
9. By February 28, 2017, IHIF determined that it would move forward with development of the property and requested an optional "Preliminary Application Meeting" with the City, consistent with procedures in Appendix L of the DA.⁶ On March 8, 2018, David Cayton, an engineering consultant working on behalf of IHIF, emailed City Development Services Department Project Oversight Manager Christopher Wright. In the email, Mr. Cayton noted that the City denied IHIF's request to conduct a Preliminary Application Meeting but, instead, would require an "early collaborative meeting." Mr. Cayton

⁵ This specific vesting requirements interpretation of Mr. Niven was not included in the record for the present application.

⁶*Exhibit WW-2.*

*Findings, Conclusions, and Decision
City of Issaquah Hearing Examiner
High Street Collection Preliminary Plat
Nos. PP17-00002 & PRJ16-00013*

indicated that IHIF would like to schedule such a meeting as soon as possible and provided Mr. Wright with draft versions of a “Project Narrative, a SEPA Checklist and a draft copy of a Preliminary Plat” for the City’s review. That same day, Mr. Wright emailed Mr. Cayton back and noted that the information he provided would be sufficient for him to schedule the “Early Collaboration Meeting.”⁷ *Exhibit AA.*

10. IHIF and the City held the Early Collaboration Meeting on March 21, 2017. On March 27, 2017, Applicant Representative Heim emailed Land Development Manager Sloman to (again) request a Preliminary Application Meeting. In response, Sloman noted that the meeting could be scheduled but that the City would need “enough info to know that you can and how you’d service wet utilities” for the project area, and that a traffic study would be necessary because the City would not be “able to have a full review” without “knowing the roads, traffic, interconnections, etc.” *Exhibit XX-11.*
11. The Preliminary Application Meeting eventually occurred on May 31, 2017.⁸ City Senior Planner Jean Lin emailed Mr. Cayton on June 7, 2017, with comments summarizing the parties’ discussion. The comments identify several “action items” the City determined would need to be addressed prior to submission of IHIF’s preliminary plat, including more information on existing and proposed streets and frontage improvements, information on the placement of wet and dry utilities, and conceptual grading and drainage plans. The comments also noted that the City “must receive a letter from the [Issaquah Highland’s Community Association’s Architectural Review Committee] supporting the plat’s design,” that a “transportation impact analysis would be required,” that the City “strongly urged” that IHIF meet with Eastside Fire and Rescue, and that the City “strongly urged” IHIF to continue a trail through the plat, from High Street east of 9th Avenue NE to connect with NE Discovery Drive. Finally, the City’s Public Works Department provided detailed comments about water flow interruptions and about the design, operation, connection, and location of specific utilities (especially in relation to stormwater). *Exhibit CC.*
12. After receiving the City’s comments at the Preliminary Application Meeting, the IHIF team continued to work with City staff in advance of submitting its preliminary plat application to address the City’s concerns. Of note:
 - Mark Veldee, a consulting engineer working with IHIF, met with City Development Senior Consulting Engineer Doug Schlepp and with Dan Ervin, another of the City’s consultants, on June 7, 2017, to discuss stormwater. On

⁷ Appendix L of the DA does not reference the term “Early Collaboration Meeting.” It does, however, have provisions for a “Project Feasibility Meeting,” wherein an applicant would meet with the City to “eliminate as many potential problems as possible in order for the application to be processed without delay or undue expense” prior to an applicant submitting a project application. *Appendix L.* Presumably Mr. Wright’s email referred to this type of meeting.

⁸ *Exhibit WW-2.*

- June 27, 2017, Mr. Ervin emailed Mr. Veldee and explained that stormwater detention “will not be required for any improvements you make to Discovery Drive.” *Exhibit UU*.
- On July 10, 2017, Mr. Cayton emailed Ms. Lin to inquire about whether a “Preliminary Street Lighting Plan” would be required at the preliminary plat stage of review and to inquire about scheduling a meeting with Eastside Fire. In response, Ms. Lin noted that a “street lighting plan at a conceptual level would be helpful” so the City could ensure that “there are appropriate locations allocated for all the components of the frontage improvements” as an “integral part” of the preliminary plat review process. In addition, she informed Mr. Cayton that Eastside Fire’s primary concern was that “the width of the streets meet the Issaquah Highland street standards” and that, if that was so, no meeting would be necessary. *Exhibit WW-12*.
13. Ultimately, IHIF submitted its preliminary plat application on August 1, 2017, approximately six weeks before the end of the Buildout Period specified in the DA. IHIF included the following materials with the plat application: (1) a set of project plans; (2) a “Project Narrative,” dated July 15, 2017, providing background information on the proposal and a detailed analysis addressing how the preliminary plat would comply with the requirements of the DA, including each of its appendices; (3) a Traffic Study Memorandum, prepared by Transpo Group, dated July 28, 2017, providing detail about the proposed configuration of NE Discovery Drive; (4) a Preliminary Stormwater Report, prepared by KPFF Consulting Engineers, dated July 2017; and (5) a letter from Ms. Heim noting that, in IHIF’s view, the submitted materials sufficiently addressed the City’s earlier comments and that, as such, a determination of completeness should be issued for the proposal. *Exhibits B-1.1 through B-1.6*.
14. On August 28, 2017, still prior to the end of the Buildout Period, IHIF submitted additional materials for review that were inadvertently omitted from their original submittal, including: title information; a State Environmental Policy Act (SEPA) Checklist, dated July 27, 2017; information on agent authority and property ownership; a memorandum concerning lot closure calculations, prepared by Core Design, Inc.; and legal descriptions of a proposed public sidewalk easement and public trail/landscape easement. *Exhibit B-2.1 through B2-.17*.
15. On September 25, 2017, Mr. Cayton emailed Ms. Lin to inquire about the status of the application, noting that, under the DA, “we were to have an application conference within 30 days of the completeness determination.” On October 2, 2017, Ms. Lin responded. In her email, she explained that the application was deemed complete and that “getting you an application completeness letter is on my to do list.” In addition, Ms. Lin pointed out that, “per the DA, we have to determine if the application is complete within 10 days of submittal, so I will be adjusting the date accordingly.” On October 6, 2017, Ms. Lin sent

the “Complete Application Determination,” backdated to August 11, 2017, and told Mr. Cayton that the City would “follow up with you with any questions or comments in the next week or two” after it reviewed the submitted application materials. In addition, she requested that IHIF install a project sign at the site (i.e., post notice of the application) and submit an affidavit concerning notice being posted, which IHIF did on October 17, 2017.⁹ *Exhibit EE.*

16. On October 5, 2017, Ms. Lin emailed the IHIF team to relay comments provided by the Eastside Fire Marshal’s Office about fire access to one of the proposed lots within the preliminary plat and about the need for NE Discovery Drive to be widened adjacent to the plat to “provide 20’ clear road width without on-street parking (preferred), with an absolute minimum of 18’ road width.” *Exhibit XX-04.*
17. On November 16, 2017, Doug Schlepp provided additional comments to Mark Veldee concerning stormwater management. His email noted:

After discussing this with the PWE Utilities Manager, Bob York, there is capacity in the City. You may work directly with Dave Segal who had modeled the Upper Reid Pond previously concerning the capacity for both detention and treatment – all design work is still subject to City review and approval. Note that while the pond was designed under the KCSWDM [King County Storm Water Design Manual] you will need to comply with the new Standard based on the 2014 DOE [Department of Ecology] Manual adopted by the City.

Bob [York] and I will be working on the fee to use [the Upper Reid Pond Stormwater] facility. . . I recommend that you consider this effort more globally for all [IHIF] properties that may benefit from this rather than a project by project analysis. This would need to be incorporated into the plat documents.

Exhibit XX-05.

18. On December 15, 2017, prior to the City issuing notice of the preliminary plat application, IHIF submitted two additional documents for review: (a) an updated “Preliminary Plat” drawing with proposed lot line revisions and (b) a “Preliminary Engineering Overview Site Plan” depicting building footprints on the proposed lots, consistent with the materials IHIF had submitted for the three site development permits it had previously submitted, related to development within the preliminary plat. Of particular note, none of IHIF’s earlier preliminary plat submittals depicted proposed

⁹ Exhibit C-2.

building footprints. Mr. Cayton emailed Ms. Lin that same day to explain that these additional submissions were provided to address “minor lot line revisions” that were necessary to accommodate proposed building locations, improvements, and other plat features, and to depict “proposed buildings” to assist the City in understanding the evolution of the site design for the plat. *Exhibits B-3.2 and B-3.3; Exhibit GG.*

19. On December 27, 2017, the City mailed notice of the preliminary plat application to property owners within 300 feet of the project site and parties of record. The notice materials stated that the City Council (not the Hearing Examiner) would serve as the “Decision Maker” for the proposal, although the “[d]ate and time of the meeting and hearing has not been set,” and indicated that the City had made a preliminary determination that the “Development Regulations that will be used for Project Mitigation and Consistency” would be those in the DA (in conjunction with the City Comprehensive Plan). In addition, the “Preliminary Engineering Overview Site Plan,” depicting building footprints on the proposed lots within the plat, was included with the notice materials. Finally, the notice provided for the submission of public comments through January 17, 2018. The record does not reflect whether the City received any public comments in response to the notice of application. *Exhibit C-1.*
20. After issuing notice of the application, and despite its earlier assertions that the application was deemed “complete” under the DA, the City did not timely schedule the preliminary plat for review by the Urban Village Development Commission, as required by the DA.¹⁰ *Exhibit JJ.*

City’s Review of Site Development Permits and Associated Appeals

21. While the City continued to review IHIF’s submitted preliminary plat materials, IHIF submitted three development permits related to development that it intended to pursue within the preliminary plat: a potential Medical Office Building (No. ASDP18-00007), Self-Storage Facility (No. ASDP18-00006), and Retail Development (No. SDP18-00001). IHIF initially submitted the Site Development Permit (SDP) application for a Retail Development and the Administrative Site Development Permit (ASDP) application for a Medical Office Building on October 23, 2017. It later submitted the ASDP application for a Self-Storage Facility on December 1, 2017. Of note, all three applications were submitted after expiration of the Buildout Period specified within the DA. *Exhibit F.*

¹⁰ Appendix L of the DA provides in Section 3 of Part Two that the City “shall determine if the information contained in the application or modification request submitted by the developer is sufficient,” meaning the “required submission materials are sufficiently complete to allow continued processing.” If sufficient, the application “shall be placed on the agenda for consideration at an [Urban Village Development Commission] meeting to be held within sixty (60) days.” If the application is deemed insufficient, “it shall be returned to the developer within ten (10) calendar days with written documentation of the inadequacies.” If the City “does not notify the applicant within ten (10) calendar days of receipt of an application . . . it shall be deemed sufficient and review shall proceed.” *Exhibit P.*

*Findings, Conclusions, and Decision
City of Issaquah Hearing Examiner
High Street Collection Preliminary Plat
Nos. PP17-00002 & PRJ16-00013*

22. On November 16, 2017, the City’s Development Services Department (DSD) provided a memorandum to the City Council about unbuilt properties in Issaquah Highlands that would remain once the City adopted “Replacement Regulations.” In the memorandum, DSD recommended that the City Council include language in the Replacement Regulations related to vesting that would read:

Development for which a complete ASDP, SDP, or other similar land use permit application has been submitted prior to the effective date of the ordinance adopting [the Replacement Regulations] shall be vested against the provisions of [the Replacement Regulations] and shall be processed under the regulations in existence prior to the effective date as long as the permit application remains active.

Exhibit F.

23. The memorandum also stated that, as an alternative, the City Council could refrain from including any language about vesting in the Replacement Regulations or include language that would only allow for vested rights for complete building permit applications, subdivision applications, or development agreements, consistent with state law. Ultimately, DSD recommended that the City Council adopt language allowing for ASDP, SDP, or other similar land use permit applications because this approach would be “consistent with the vested rights doctrine” and the Supreme Court’s decision in *West Main Associates v. Bellevue*, 106 Wn.2d 47, 720 P.2d 782 (1986). *Exhibit F.*
24. On November 21, 2017, representatives of IHIF, including Tia Heim, met with Director Niven to discuss its pending applications, including the application related to a Retail Development and a Medical Office Building. According to Ms. Heim, Mr. Niven confirmed that the submitted ASDP and SDP applications were complete and would vest to the Development Standards of the DA. *Exhibit F.*
25. The same day, Ms. Heim emailed Mr. Niven about the meeting that occurred, stating: “[a]s we discussed, we would like the City to confirm our understanding that [IHIF’s] land use permit applications have been deemed complete [per the requirements of the DA] and are therefore vested to the Development Standards in the Development Agreement.” Mr. Niven responded to Ms. Heim’s email that evening, noting that, unless a request for additional information has been received, “these applications are viewed as ‘Complete’ per the terms of the Development Agreement.” Approximately 20 minutes later, Ms. Heim again emailed Mr. Niven, stating “I am assuming that you mean that the applications are complete and vested to the Development Agreement as stated in the email below and as we discussed in our meeting with you today.” Ms. Heim requested that Mr. Niven confirm that her understanding of the situation was correct. The next morning, on November 22, 2017, Mr. Niven responded, emailing “yes.” *Exhibit FF.*

Findings, Conclusions, and Decision
City of Issaquah Hearing Examiner
High Street Collection Preliminary Plat
Nos. PP17-00002 & PRJ16-00013

26. Land Development Manager Lucy Sloman was cc'd on the email communication that occurred between Ms. Heim and Mr. Niven. Following Mr. Niven's communication with Ms. Heim on the morning of November 22, 2017, Ms. Sloman emailed Mr. Niven (no other parties were cc'd on the email) to express confusion in light of her belief that IHIF's pending applications would not vest "unless the council agrees to the vesting language" recommended by DSD. In reply, Mr. Niven stated "They are vested at this moment under the DA" but, "If the Council removes the proposed vesting language, they will lose their vested status." In response, Ms. Sloman wrote "Shouldn't that be clear in the response?" The record does not reflect that either Mr. Niven or Ms. Sloman clarified the earlier response to Ms. Heim's inquiry. *Exhibit XX-07*.
27. Ultimately, on March 5, 2018, Attorney Patrick Schneider wrote to the City on behalf of IHIF to notify the City that the City had failed to comply with the terms of the DA in several ways. The letter summarized IHIF's claims (referring to IHIF as "IHIF-C") as follows:

Since purchasing its property in 2013, IHIF-C has been working with the City in good faith on development proposals for its property. IHIF-C met with City staff on several occasions to discuss possible extension of the DA or modification to allow mixed-use development. At the City's suggestion, in 2016, IHIF-C spent over \$100,000, on a community outreach effort centered around a mixed-use development proposal that included affordable housing, community retail, and medical offices/health services uses. On several occasions between 2015 and 2017, IHIF-C made written requests to the City to either extend the DA with respect to its property or to enter into a new development agreement with the City. When it became clear that the City was not supportive of these efforts, in late 2016, IHIF-C modified its development proposal to only include uses that were allowed as a matter-of-right under the DA.

To effectuate those uses, IHIF-C requested several DA Implementing Approvals including a preliminary plat and permits for four uses: Retail, Medical Office, Storage, and Commercial. As detailed below, the City repeatedly violated (and continues to violate) the DA processing timelines for those permits in an overt effort to prevent IHIF-C's proposed development—not because the development is not allowed under the DA, but because the City's new administration simply doesn't like it.

Staff has provided inconsistent and erroneous information on the vesting of IHIF-C's Implementing Approvals and has treated IHIF-C unfairly and differently than other similarly situated landowners by delaying review of

*Findings, Conclusions, and Decision
City of Issaquah Hearing Examiner
High Street Collection Preliminary Plat
Nos. PP17-00002 & PRJ16-00013*

Page 12 of 50

IHIF-C's preliminary plat and refusing to deem IHIF-C's [associated site development permit applications as] complete, allegedly because the preliminary plat wasn't finalized, when the sole reason for this was the City's repeated refusal to follow the DA Section 3.22 (*City Processing and Review*) and Appendix L timelines. By refusing to acknowledge the vested status of IHIF-C's Implementing Approvals, the City is expressing its intent to ignore the tens of millions of dollars in mitigation that was constructed to support development on IHIF-C's property. This mitigation is expressly designed as part of the "Development Standards" that IHIF-C vested to by submitting its Implementing Approvals, yet the City has refused to acknowledge this fact or explain why the City believes that it can unilaterally strip IHIF-C of these property rights.

Exhibit JJ.

28. Following the summary, Mr. Schneider wrote 10 additional pages in the letter explaining, in detail, the various ways in which the City has violated the DA. He also noted that the City could cure the situation through: (1) timely processing IHIF's pending applications consistent with the DA; (2) recognizing IHIF's pending applications are vested to Sections 3.23 (Vesting) and 3.23.2 (After Buildout), and to the "Development Standards" in Section 6 of the DA, which include mitigation associated with full build out of IHIF's property; (3) acknowledging that the vesting for IHIF's preliminary plat (and other applications) continues despite the adoption of future replacement regulations; and (4) allowing the continued processing of IHIF's preliminary plat, associated development permits, and construction of such permits under the DA's development standards. On March 8, 2018, Keith Niven responded to Mr. Schneider's letter and requested that the parties engage in a conversation to allow the City to better understand IHIF's claims and give the City an opportunity to respond to such claims. *Exhibit JJ.*
29. On March 15, 2018, IHIF and the City signed an agreement concerning some of the claims raised by Mr. Schneider in his letter the week before. Of note, the agreement acknowledged that the City Council had not yet adopted replacement regulations for the DA and that the parties may have differing positions regarding the effect of the replacement regulations on IHIF's applications, including differing positions on the effect of replacement regulations on vesting. *Exhibit F.*
30. As noted above, on March 19, 2018, the City Council voted to enact Ordinance No. 2830, effective March 28, 2018 (and later codified at Chapter 18.19B IMC). The ordinance terminated the DA and promulgated the Replacement Regulations, replacing the development regulations previously governing land subject to the DA. *Exhibit F.*

Findings, Conclusions, and Decision
City of Issaquah Hearing Examiner
High Street Collection Preliminary Plat
Nos. PP17-00002 & PRJ16-00013

Page 13 of 50

31. On April 4, 2018, Director Niven wrote Mr. Schneider to further elaborate on the City's position concerning the vested status of IHIF's pending land use applications. In the letter, Director Niven argued:
- The City Council adopted replacement regulations on March 19, 2018, resulting in termination of the DA. Accordingly, and consistent with Section 5.13 of the DA itself, the Replacement Regulations govern all future development on IHIF's property "except the extent that the City Council has, in its legislative policy discretion, voluntarily recognized vesting protection for specified categories of land use applications."
 - Neither the DA nor applicable state law independently affords vesting protection to outstanding applications for Implementing Approvals following termination of the DA. Thus, the Replacement Regulations govern future development of the IHIF property "*regardless of any outstanding land use permit applications.*" (Emphasis in original).
 - Under state law, including provisions in RCW 36.70B.180 and .190, a development agreement is only binding and enforceable during its actual term and "without any regard for the purportedly 'vested' status of previously submitted land use applications." Put differently, termination of a development agreement "automatically extinguishes all outstanding land use permit application rights" including "the right to develop under the development standards contained in the agreement."
 - The City Council adopted IMC 18.19C.280, as part of the Replacement Regulations, with the intent to "afford vested rights only to the categories of land use application for which vesting is recognized by state law—i.e., building permits and plats." Thus, the City considers IHIF's "preliminary plat to be vested" while its various site development permits are not.
 - Under state law, a complete subdivision application "vests the underlying proposal 'only at a very general level'—i.e., to the land uses allowed under the municipality's current regulations." Under *Alliance Investment Group v. City of Ellensburg*, 189 Wn. App. 763, 358 P.3d 1227 (2015), however, "[a]ny specific project will still have to meet the development standards at the time the building permit is filed." Moreover, under *Noble Manor Co. v. Pierce County*, 133 Wn.2d 269, 943 P.2d 1378 (1997), "[w]hat is vested is what is sought in the application for a . . . plat." Accordingly, the City considers IHIF's "preliminary plat application to be vested to the use regulations" set forth in the DA, as well as to "any development standard in the Agreement that are necessary to accommodate the specific development plan or concept—if any—identified in [IHIF's] plat application materials."

Exhibit G.

32. Director Niven also responded to each of the specific allegations levelled by Mr. Schneider in the remainder of the letter from March 5, 2018. In particular, Director

*Findings, Conclusions, and Decision
City of Issaquah Hearing Examiner
High Street Collection Preliminary Plat
Nos. PP17-00002 & PRJ16-00013*

Page 14 of 50

Niven stressed that the City “worked diligently and in good faith to expeditiously review and process” IHIF’s applications but delays resulted in light “of the City’s staffing resource shortage.” The letter noted, however, that a meeting on the preliminary plat had been tentatively scheduled before the Urban Village Development Commission (UVDC) on May 15, 2018, consistent with the requirements of the DA. *Exhibit G*.

33. On April 13, 2018, IHIF attempted to appeal Mr. Niven’s letter to the Hearing Examiner, who dismissed the appeal on summary judgment. The Hearing Examiner summarized his decision as follows:

Although the municipal code grants the Hearing Examiner authority to hear some matters that are not expressly enumerated in IMC 18.03.060, nothing in the municipal code suggests that the Issaquah City Council intended the Hearing Examiner to have the appellate authority to review *every* administrative decision made by the City, as is implied by the Appellant’s arguments. Instead, other provisions of the municipal code, such as IMC 18.04.252, IMC 5.05.160, and IMC 3.09.150, augment the Hearing Examiner’s authority but, in every instance, the Issaquah City Council has made the Hearing Examiner’s authority explicit. Put another way, IMC Table 18.04.250-1 is not a “catch-all” provision granting the Hearing Examiner authority to hear all other administrative decisions not explicitly delineated in IMC Table 18.04.-250-2 or IMC 18.03.060. Accordingly, the Hearing Examiner lacks authority to review [Director Niven’s letter from April 4, 2018] as a substantive, final decision under the municipal code. Additionally, nothing in the Development Agreement grants the Hearing Examiner the authority to settle disputes over interpretation of the Development Agreement itself, as is the case here.

*Decision on City’s Motion to Dismiss, dated June 28, 2018.*¹¹

34. Following IHIF’s initial appeal, the City continued to process IHIF’s site development permit applications consistent with the City’s Replacement Regulations (not the DA). Accordingly, Director Niven determined that review of the site development permits would be necessary, as a Level 3 review process, under IMC 18.19B.270, by the City’s Development Commission (a separate entity from the Urban Village Development Commission, or UVDC, that was created to address permits governed by various development agreements, including the Issaquah Highlands DA). Thus, on September 17, 2018, Director Niven issued three staff reports related to the three pending site development applications. Each staff report included an analysis of vesting and a determination that the pending applications would not vest to the development

¹¹ Although this decision was not provided by the parties in the exhibits related to the current appeal, the Hearing Examiner takes judicial notice of it as, clearly, it relates to the present matter.

regulations under the DA but, instead, would need to adhere to the requirements of the Replacement Regulations. Each staff report recommended that the Development Commission deny the permits for failure to adhere to the requirements of the Replacement Regulations or, alternatively, place the permits on hold “until a final decision on the associated preliminary plat has been made.” *Exhibit E.*

35. On October 1, 2018, IHIF appealed Director Niven’s staff reports to the Hearing Examiner. Following oral argument on a motion to dismiss by the City, the Hearing Examiner issued a decision on the matter, dismissing the appeal. The Hearing Examiner explained his decision as follows:

The City and the Appellant disagree about the scope of the Hearing Examiner’s appellate jurisdiction under the Issaquah Municipal Code. There is no disagreement, however, that a staff report does not constitute a final decision on a specific application that the Hearing Examiner has the authority to review under IMC 18.03.060.D. This is true for at least two reasons. First, the staff reports do not purport to make a final decision on any of these pending applications and merely provide recommendations to the Development Commission. Second, although each of the applications involve some type of Level 0 through Level 3 review under IMC Table 18.04.250-2, the staff reports do not, themselves, involve the type of specific review of a final land use decision that the Hearing Examiner would have the appellate authority to address under IMC 18.03.060.D and IMC Table 18.04.250-2.

Accordingly, because the staff reports themselves are not reviewable by the Hearing Examiner as final land use decisions, the question becomes whether the Hearing Examiner has authority to review the Director’s analysis on vesting contained within each staff report as a code interpretation, appealable under either IMC 18.01.050.B or IMC 18.19B.040. An analysis of the municipal code leads to the conclusion that he does not.

Here, the Appellant argues that because “a vesting determination requires the Director to interpret and apply code, it necessarily is a subset of code interpretations” appealable to the Hearing Examiner. *Appellant’s Response to Motion to Dismiss, page 7.* This logic goes beyond the argument the Appellant put forth in the initial appeal and, essentially, contends that *any* interpretation or application of the municipal code by the Director, whether it appears in a formal decision document or not, is appealable to the Hearing Examiner. This would clearly lead to chaos as every determination or decision of the City that involved “interpreting” or “applying” the municipal code would be appealable. The Hearing Examiner is confident that the

*Findings, Conclusions, and Decision
City of Issaquah Hearing Examiner
High Street Collection Preliminary Plat
Nos. PP17-00002 & PRJ16-00013*

Page 16 of 50

Issaquah City Council did not intend to allow interlocutory appeals at every potential step of the permit review process and that the Hearing Examiner's appellate jurisdiction would, in this instance, remain limited to reviewing final decisions made by the Development Commission as part of the Level 3 review process.

The Hearing Examiner recognizes that, under IMC 18.01.050, anyone "may request an interpretation of [the municipal code] by filing a written request" and that the resulting interpretation would be appealable to the Hearing Examiner. Similarly, the Hearing Examiner recognizes that IMC 18.19B.040 allows for a request for a formal interpretation of the code appealable to the Hearing Examiner. The Appellant has twice appealed informal documents produced by the Director rather than requesting a formal interpretation of the municipal code. An appeal of the vesting analysis of the City must await a final decision by the City, either as a formal code interpretation (that has been appealed) or as part of an appeal of a final decision on a specific permit application issued by the Development Commission.

Although the municipal code grants the Hearing Examiner authority to hear some matters that are not expressly enumerated in IMC 18.03.060, nothing in the municipal code suggests that the Issaquah City Council intended the Hearing Examiner to have the appellate authority to review *every* administrative decision made by the City or that the Council intended to allow for interlocutory appeals to the Hearing Examiner every time the Director informally interprets or applies the municipal code within a staff report. Instead, the municipal code allows for a formal process for code interpretations, under both IMC 18.01.050.A and IMC 18.19B.040, that includes an opportunity for appeal of such formal interpretation to the Hearing Examiner. Alternatively, the Appellant has the opportunity to appeal all aspects of the decision (including the Director's vesting determination) once the Planning Commission has issued final decisions on underlying permits as the culmination of the Level 3 review process implemented by the Issaquah City Council.

Here, the Appellant has elected not to use the formal code interpretation process and the Hearing Examiner lacks the authority to hear an interlocutory appeal prior to the culmination of the Level 3 process involving the Development Commission. The Hearing Examiner lacks authority to independently review a code interpretation or vesting determination made within a staff report. Language in a staff report is not a final decision that is

Findings, Conclusions, and Decision
City of Issaquah Hearing Examiner
High Street Collection Preliminary Plat
Nos. PP17-00002 & PRJ16-00013

Page 17 of 50

reviewable outside the scope of the Level 3 process dictated by the Issaquah City Council.

In addition, although the Appellant has presented a strong case concerning procedural due process and fairness, the Hearing Examiner lacks the authority to address equity or an as-applied due process challenge to specific provisions of the municipal code. The Issaquah City Council has dictated that a closed record appeal before the Hearing Examiner is allowed following final decisions of the Development Commission, a policy decision made under authority of the Growth Management Act. Under the unique and complex circumstances present with this matter, this has created a situation whereby the Appellant must present factual evidence related to a dispositive legal issue (vesting) to the Development Commission, a decisionmaking body without legal training or jurisdiction to overturn the Director’s vesting determination. Following a final decision of the Commission, any appeal to the Hearing Examiner would be on a closed record whereby the Hearing Examiner would not be able to observe witness testimony (or ask additional questions). Although this creates certain challenges, appellate courts manage this task regularly. Moreover, while it may be more expedient to have the Hearing Examiner decide the vesting issue now, the municipal code does not grant the Hearing Examiner authority to usurp or replace the authority of the Development Commission for purposes of expediency.

Exhibit E.

36. Following the Hearing Examiner’s denial of its appeal associated with Director Niven’s staff reports on the site development permits, IHIF participated in hearings on those applications before the Development Commission under protest, a process involving 19 days of hearings that occurred over a 10-month period. Ultimately, on July 24, 2019, the Development Commission denied the applications as inconsistent with the Replacement Regulations. In its decision, the Development Commission noted that “it does not have jurisdiction to review the vesting determination by the Development Services Director” under IMC 18.01.050.C and that such authority would, in such circumstances, fall to the Hearing Examiner.” *Exhibit F.*
37. Thus, on July 24, 2019, IHIF timely appealed the Development Commission’s decisions to the Hearing Examiner. The appeal included 14 separate assignments of error. Following a prehearing conference on August 13, 2019, the City and IHIF both submitted dispositive motions related to the appeal. On September 24, 2019, the Hearing Examiner heard oral argument on the dispositive motions. On November 15, 2019, the Hearing Examiner then issued a decision on the dispositive motions, which ultimately dismissed the appeal in its entirety. The Hearing Examiner’s conclusions state:

*Findings, Conclusions, and Decision
 City of Issaquah Hearing Examiner
 High Street Collection Preliminary Plat
 Nos. PP17-00002 & PRJ16-00013*

The Appellant is not entitled to summary judgment because the Director’s vesting determination was not clearly erroneous. The primary question at issue in this matter involves a contract dispute between the parties because, under RCW 36.70B.170(4), cities may enter into such agreements as a proper exercise of “county and city police power and contract authority.” [Footnote omitted]. Here, the Appellant contends that the 20-year buildout period provided by Section 3.23 of the DA did not provide for vesting because the City could not modify or impose new or additional Development Standards during this period. The Appellant argues that, instead, the “vesting” that the parties were referring to in the DA actually refers to the period after the buildout period but before the adoption of Replacement Regulations. The City contends that, consistent with RCW 36.70B.170(3)(i), the 20-year buildout period *was* the vesting period and that the parties did not provide for additional vested rights beyond that 20-year period. Based on the plain language of the DA, the City’s argument is the more persuasive of the two.

RCW 36.70B.170(3)(i) equates the term “Buildout Period” with “vesting period,” and the two terms are used interchangeably in the governing statute. Accordingly, in the DA, the buildout period accounted for 20 years of vested development rights for all Implementing Approvals—not just those recognized under the common law. During that time, the developer could develop the property consistent with the DA and (barring certain exceptions not relevant here) without accounting for changes to the municipal code, including the City’s zoning ordinances and critical areas ordinances. This was a valuable contract right that the parties negotiated and executed.

After the buildout period, Section 3.23.2 of the DA provided that the Development Standards of the DA would continue to apply except through termination of the contract. Under Section 5.13, termination of the DA would occur once the City adopted Replacement Regulations and “thereafter the UGA portion of the Property shall be governed by the adopted City zoning and related development regulations.” Nowhere in Section 3.23.2 or Section 5.13 are vesting or vested rights explicitly discussed. Contrary to the Appellant’s assertions, it is not unreasonable or absurd to believe that—having granted the developer a 20-year period of vested rights during the buildout—the City did not intend to allow further vested development rights beyond the buildout period. Had the parties intended that result, they could have written this into the contract by stating that all applications for Implementing Approvals deemed complete,

Findings, Conclusions, and Decision
City of Issaquah Hearing Examiner
High Street Collection Preliminary Plat
Nos. PP17-00002 & PRJ16-00013

Page 19 of 50

submitted after the buildout, be considered under the DA regardless of whether the City adopted Replacement Regulations. The parties did not do this. Accordingly, the Director's determination is not clearly erroneous because it is consistent with the plain language of the DA.

In addition, the Director's vesting determinations are not clearly erroneous because they are not contrary to the plain language of IMC 18.19B.280, the Replacement Regulations. This ordinance provides that "[o]nly vesting established by Washington State law shall apply to the vesting of development applications for properties located within Issaquah Highlands previously covered by the terminated development agreements." This includes applications for building permits, preliminary plats, and vested development rights established through development agreements. As noted above, the DA did not account for vested rights beyond the 20-year buildout period and IMC 18.19B.280 does not recognize vested development rights for SDPs or ASDPs.

The Appellant also argues that the Director's vesting determinations are inconsistent with decades of cases addressing vested development rights. Washington courts have recognized vested development rights for over 60 years, since *State ex rel. Ogden v. Bellevue*, 45 Wn.2d 492, 275 P.2d 899 (1954) was decided. As noted by Justice Utter, the "purpose of the vesting doctrine is to allow developers to determine, or 'fix,' the rules that will govern their land development," which is important because society "suffers if property owners cannot plan development with reasonable certainty and cannot carry out the developments they begin." *West Main Assocs. v. Bellevue*, 106 Wn.2d 47, 720 P.2d 782 (1986). Moreover, our "vested rights doctrine" is, according to the Washington Supreme Court, "one of the most protective of developer's rights" in the country. *Erickson & Assocs. v. McLerran*, 123 Wn.2d 864, 872 P.2d 1090 (1994). This doctrine, however, is nowhere enshrined in Washington's Constitution, and the DA does not state anywhere that the parties intended to incorporate common law vesting principles into the contract. As the City correctly argues, citing *Redford v. City of Seattle*, 94 Wn.2d 198, 206, 615 P.2d 1285 (1980), "It is axiomatic that, just as a contract can create enforceable rights, it can place limitations and restrictions on those rights." *City's Motion for Partial Summary Judgment, dated September 6, 2019*. Thus, the only vested rights applicable to the Appellant's permits are those allowed under the DA, and the contract does not explicitly provide for vested development rights in complete applications submitted after the buildout period.

Findings, Conclusions, and Decision
City of Issaquah Hearing Examiner
High Street Collection Preliminary Plat
Nos. PP17-00002 & PRJ16-00013

Page 20 of 50

The Appellant argues that this is an absurd result because it means the parties agreed to a period where no vested development rights would exist, as if such rights are mandatory under the common law. Contrary to the Appellant's assertions, vested development rights are not sacrosanct. Washington courts have recognized that vested development rights may, at times, be contrary to the public interest. In *Erickson*, 123 Wn.2d 864, [at 874-74] for instance, a case decided shortly before the parties executed the DA, the court noted:

Development interests and due process rights protected by the vested rights doctrine come at a cost to the public interest. The practical effect of recognizing a vested right is to sanction the creation of a new nonconforming use. A proposed development which does not conform to newly adopted laws is, by definition, inimical to the public interest embodied in those laws. If a vested right is too easily granted, the public interest is subverted.

Several cases since *Erickson* was decided have further limited the scope and applicability of vested development rights under the common law. In *Abbey Road Group, LLC v. City of Bonney Lake*, 167 Wn.2d 242, 251, 218 P.3d 180 (2009), for instance, the court refused to expand the doctrine to all development applications, including site plan applications specifically, because “such a rule would eviscerate the balance struck in the vesting statute” and “instituting such broad reforms in land use law is a job better suited to the legislature.” And, in *Town of Woodway v. Snohomish County*, 180 Wn.2d 165, 173, 322 P.3d 1219 (2014), the court determined that “[w]hile it originated at common law, the vested rights doctrine is now statutory.”

Accordingly, if the SDP and ASDP applications submitted by the Appellant are afforded any vested rights, it must be through the language of the contract, i.e., the DA, executed by the parties themselves. The most straightforward interpretation of the DA, however, leads to the conclusion that the parties did not account for vested development rights after the 20-year buildout period.

The DA does not dictate that Appellant's SDP and ASDP applications vested to its Development Standards and Washington's vested rights doctrine, a judicial construct the application of which has fallen out of favor in recent years, is inapplicable to the current dispute. Accordingly, the Director did not commit clear error in making his vesting determination, and the Appellant is not entitled to summary judgment on these issues.

Findings, Conclusions, and Decision
City of Issaquah Hearing Examiner
High Street Collection Preliminary Plat
Nos. PP17-00002 & PRJ16-00013

Page 21 of 50

Exhibit F.

38. Although the appeal primarily focused on the status of vested rights related to IHIF’s site development permits, the Hearing Examiner’s decision briefly touched on IHIF’s preliminary plat application:

The Appellant contends, in Issue #12, that the Director’s vesting determination violates RCW 58.17.033 and case law interpreting the Subdivision Act (Chapter 58.17 RCW) because the Appellant applied for a preliminary plat related to the subject property, and such application “vests all development that is consistent with the plat application and disclosed to the City in the plat application and during the City’s review process,” including the SDP and ASDP applications. *Appeal, dated July 24, 2019.*

Contrary to the Appellant’s assertions, *Noble Manor v. Pierce County*, 133 Wn.2d 269, 943 P.2d 1378 (1997), did not provide that submission of a complete preliminary plat application vests all future permits on land associated with the plat to development standards in place when the plat application was deemed complete. Instead, the court held:

Not all conceivable uses allowed by the laws in effect at the time of a short plat application are vested development rights of the applicant. However, when a developer makes an application for a specific use, then the applicant has a right to have that application considered under the zoning and land use laws existing at the time the completed plat application is submitted.

If a landowner requests only a division of land without any specified use revealed, then the county, city or town may consider the application to see if any legal use can be made of the land so divided, and no particular development rights would vest at that time. However, when an application is made for division of land for a specified use, then the applicant has the right to have that application for that use considered under the land use laws in effect on the date of the application.

Noble Manor, 133 Wn.2d at 285.

Here, the project narrative submitted with the High Street Collection at Issaquah Highlands Plat (Exhibit C-12), for instance, did not explicitly discuss the potential for a Medical Office Building, Self-Storage Facility, or a specific Retail Development, as delineated in the SDP and ASDP applications. Moreover, the application did not depict building footprints or

Findings, Conclusions, and Decision
 City of Issaquah Hearing Examiner
 High Street Collection Preliminary Plat
 Nos. PP17-00002 & PRJ16-00013

specific development parameters of future buildings on the project site. *See Exhibit S-22*. In short, the Appellant did not make “an application for a specific use” under *Noble Manor*, and, accordingly, its preliminary plat application did not create vested development rights for all other permits associated with the property. This issue must be dismissed because it is resolved by reference to the submitted factual record and clearly established legal precedent. [Footnote omitted].

Next, the Appellant argues in Issue #13 that the Director’s vesting determinations are “a consequence of the Director’s and the Department’s refusal to comply with the Development Agreement while it was in effect” and that, had the City acted within the time periods prescribed by the DA, the SDP and ASDP permits would have issued prior to termination of the DA. This argument may well have merit. Ultimately, though, DA Sections 5.11.1 and 5.11.2 govern dispute resolutions under the DA. Of particular note, Section 5.11.2, entitled “Default and Remedies” provides that any party “not in default under this Agreement shall have all rights and remedies provided by law including without limitation damages, specific performance or writs to compel performance or require action consistent with this Agreement.” As the Hearing Examiner lacks authority to assess damages, require specific performance, or issue writs, it is clear that the parties intended the type of dispute at issue here (i.e., the City not complying with the timing requirements of the DA), to be addressed by the superior court. Accordingly, this issue must be dismissed.

Finally, the Appellant argues in Issue #14 that the Director’s vesting determinations “are contrary to his prior, written and oral acknowledgments that [IHIF’s] applications are vested” and that the determinations are “motivated by politics and personal animus.” Whether this issue states a claim where cognizable relief is possible is questionable. RCW 64.40.020, however, already provides for the possibility of relief when a governmental entity acts arbitrarily, capriciously, unlawfully, or in excess of its lawful authority in processing a permit. Again, however, this is a claim that must be heard by the superior court. Thus, this issue must also be dismissed.

Exhibit F.

39. On December 2, 2019, IHIF timely requested reconsideration of certain aspects of the Hearing Examiner’s decision. The Hearing Examiner granted IHIF’s request and, after reviewing legal briefing submitted by the parties, the Hearing Examiner denied reconsideration. That decision noted:

Findings, Conclusions, and Decision
City of Issaquah Hearing Examiner
High Street Collection Preliminary Plat
Nos. PP17-00002 & PRJ16-00013

Page 23 of 50

As previously discussed in the Hearing Examiner's decision, *Noble Manor* does not support the Appellant's argument that under RCW 58.17.033(1) a completed preliminary plat application vests all future development permits on land associated with the plat to the development standards in effect when the preliminary plat application was complete. Rather, the court held in *Noble Manor*:

Not all conceivable uses allowed by the laws in effect at the time of a short plat application are vested development rights of the applicant. However, when a developer makes an application for a specific use, then the applicant has a right to have that application considered under the zoning and land use laws existing at the time the completed plat application is submitted.

If a landowner requests only a division of land without any specified use revealed, then the county, city or town may consider the application to see if any legal use can be made of the land so divided, and no particular development rights would vest at that time. However, when an application is made for division of land for a specified use, then the applicant has the right to have that application for that use considered under the land use laws in effect on the date of the application.

133 Wn.2d at 285.

Because the record demonstrated that the Appellant's preliminary plat application materials did not describe the "specific use[s]" for development of the property that were later proposed in its subsequent SDP and ASDP applications, the Hearing Examiner's decision determined that the Appellant's preliminary plat application did not create vested development rights applicable to the subsequent permit applications. *Noble Manor*, 133 Wn.2d at 285. The Appellant contends that [*Westside Business Park, LLC v. Pierce County*, 100 Wn. App. 699 (2000)] compels a different result. The Appellant's reliance on *Westside*, however, is unavailing.

In *Westside*, a developer completed a short plat approval application that did not describe a specific use for potential future development. 100 Wn. App. at 601. Although the application did not describe a specific use, the developer had revealed its specific use to the County during a predevelopment conference that occurred *prior to* submission of the completed short plat application. *Westside*, 100 Wn. App. at 601. Relying on the developer's pre-application disclosure of its specific use to the

Findings, Conclusions, and Decision
City of Issaquah Hearing Examiner
High Street Collection Preliminary Plat
Nos. PP17-00002 & PRJ16-00013

Page 24 of 50

County, the *Westside* court held that RCW 58.17.033 applied to vest the developer's intended use. 100 Wn. App. at 605.

Unlike in *Westside*, here the record does not show that the Appellant had described specific uses for potential future development of the subject property to the City *prior to, or contemporaneously with*, submission of its completed preliminary plat application in August 2017. To the contrary, the Hearing Examiner's Finding of Fact No. 5 – and all the record materials cited in the Appellant's reconsideration request – confirm that the Appellant's disclosure of its intended specific uses of the property occurred *after* the preliminary plat application was accepted as complete. Because *Westside* does not support the Appellant's contention that its disclosures of specific uses made after the completed preliminary plat application required the City to evaluate its SDP and ASDP applications under the development standards in effect when the preliminary plat application was complete, the Appellant has not demonstrated that the Hearing Examiner applied an incorrect legal standard or disregarded *material* facts in the record.

Additionally, *Alliance Investment Group of Ellensburg, LLC v. Ellensburg*, 189 Wn. App. 763 (2015) provides further support for the Hearing Examiner's decision on the plat vesting issue. In *Alliance*, the developer argued that the city's knowledge of its intent to develop a business park when it submitted a plat application required the city to evaluate subsequent building permit applications under the law in effect at the time of the completed plat application. 189 Wn. App. at 773. The court rejected this argument, stating:

To the extent that Alliance identified a business park as its purpose in the subdivision, it likely has vested its rights to the light-industrial zoning on the short plat and the uses identified at the time by the zoning laws. But it has vested rights only at a very general level. Any specific project will still have to meet the development standards at the time the building permit is filed. The vesting recognized under the land division statute is specific to the action at issue, not to all possible uses permitted by law.

Alliance, 189 Wn. App. at 773. Under *Alliance*, the Appellant's preliminary plat application only vests as to the general zoning uses identified in the application and does not vest to all future development permits. 189 Wn. App. at 773.

To the extent that *Westside* and *Alliance* are in conflict, *Alliance* provides more persuasive authority. *Alliance* was more recently decided and had considered the Washington Supreme Court’s clear pronouncement that “[w]hile it originated at common law, the vested rights doctrine is now statutory.” 189 Wn. App. at 768 (quoting *Town of Woodway v. Snohomish County*, 180 Wn.2d 165, 173 (2014)). In contrast, *Westside* was decided without the benefit of Supreme Court cases clarifying that the vested rights doctrine is purely statutory. See *Potala Village Kirkland, LLC v. Kirkland*, 183 Wn. App. 191, 209 (2014) (calling into question *Westside*’s continued vitality in light of subsequent Washington Supreme Court decisions). Thus, even if not clearly distinguishable on its facts, *Westside* does not assist the Appellant.

Because the record does not support a conclusion that an obvious legal error has occurred or that a material factual issue was overlooked that would change the previous decision, the request for reconsideration is hereby **DENIED**.

Exhibit I.

City’s Additional Review of IHIF’s Preliminary Plat Materials

40. From early 2018 through March 2019, IHIF continued to respond to requests from the City for additional information and revisions related to review of IHIF’s preliminary plat.¹² This ultimately resulted in IHIF submitting a significant amount of new information for preliminary plat review on March 5, 2019, including a revised Preliminary Stormwater Report, dated February 2019; a revised Traffic Study, dated March 4, 2019; a supplemental Project Narrative; a comment response letter addressing the City’s compiled comments, dated March 16, 2018; and a revised set of project plans. *Exhibits B-6.1 through B-6.9.*
41. On April 5, 2019, Land Development Manager Sloman provided a letter to Applicant Representative Tia Heim regarding the manner in which the City intended to continue its review of IHIF’s preliminary plat. In the letter, Ms. Sloman explained that the City would be processing the preliminary plat, henceforth, pursuant to the procedural requirements of the City’s Replacement Regulations, not those of the DA. Accordingly, the preliminary plat application would next be sent to the City’s Development Commission for an informal public meeting (i.e., “community conference”) and, following this, for a decision by the Hearing Examiner, as directed by IMC 18.19B.270. In a response dated April 8, 2019, Ms. Heim noted that the City had “previously confirmed that our plat is vested to the Development Agreement” and, as such, a hearing before the UVDC would be the next required step under the DA followed by a final

¹² See, especially, *Exhibit NN and Exhibit WW-2.*

decision on the preliminary plat by the City Council. Ms. Heim implored the City to “immediately issue a final and appealable decision” explaining its actions if it “no longer acknowledges that our plat application is vested to the Development Standards enacted through the Development Agreement and has now ‘di-vested’ our plat.” *Exhibit QQ*.

42. On April 15, 2019, Ms. Sloman provided an additional letter to Ms. Heim, further detailing the City’s position on procedural requirements associated with continued review of the preliminary plat. In it, Ms. Sloman reiterated the City’s position on vesting—as detailed in Director Niven’s earlier letter from April 4, 2018 (Exhibit G)—and stressed that the City had “not altered or otherwise changed its position from the substance of Mr. Niven’s April 4, 2018 letter.” Accordingly, Ms. Sloman noted that “the City considers the High Street Preliminary Plat application to be vested in the manner and to the extent recognized by state law.” The letter then further clarified the City’s position that vesting “extends only to substantive zoning ordinance, not to processing requirements or procedural rules,” as detailed in *Graham Neighborhood Ass’n v. F.G. Assoc’s*, 162 Wn. App. 98 (2011). Ms. Sloman explained that, in light of this, the City intended to “process the High Street Preliminary Plat application in accordance with the current procedures prescribed by the [municipal code],” including those contained in the Replacement Regulations, such that the preliminary plat would be sent next to the Development Commission and then to the Hearing Examiner. In addition, Ms. Sloman stressed that the UVDC was terminated on March 26, 2019, and “is no longer operative,” stating that review of IHIF’s preliminary plat by the UVDC would be “a practical impossibility at this point.” *Exhibit H*.

43. Despite its reservations, IHIF determined that it would like to proceed (under protest) to the next stage of review as delineated by Ms. Sloman, and requested that the Community Conference before the Development Commission be scheduled as soon as possible. In an email from June 21, 2019, Ms. Heim requested that any staff report associated with the meeting before the Development Commission be provided so that IHIF would have time to prepare and that IHIF would like the City to clearly articulate “what our preliminary plat is vested to in advance of the Community Conference.” On July 1, 2019, Ms. Sloman responded to Ms. Heim’s email, noting:

- The “City shares your desire for an expeditious and efficient process for evaluating your plat application.”
- The City code “does not specify a procedural format” for the Community Conference meeting and the purpose of such meeting is “to solicit public comment” on the proposal.
- The Development Commission “doesn’t have authority to address or resolve vesting questions” and, instead, such issues “will be addressed before the Hearing Examiner and in that staff report.”

Exhibit RR.

Findings, Conclusions, and Decision
 City of Issaquah Hearing Examiner
 High Street Collection Preliminary Plat
 Nos. PP17-00002 & PRJ16-00013

44. The Community Conference associated with the application was ultimately held on August 15, 2019. At the Community Conference, members of the public and the Development Commission expressed concern or requested additional information about several matters, including: the potential for a self-storage facility being included within the preliminary plat; the design of Discovery Drive and its ability to address cumulative traffic impacts from development of the plat, as well as development of several other projects in the area; the adequacy of pedestrian and bicycle facilities associated with the preliminary plat; which development regulations would apply to development of the preliminary plat (i.e., the DA regulations or the Replacement Regulations); proposed block sizes within the preliminary plat; the role of the City's Architectural Review Committee (ARC) in reviewing the proposal; whether additional review would be necessary under SEPA; how road and trail connections within the preliminary plat would work; and the adequacy of proposed stormwater facilities serving the preliminary plat. *Exhibit D; Exhibit XX-2; Exhibit XX-12.*
45. Consistent with IMC 18.19B.270.C.3, the City and IHIF prepared a "community conference response memo" summarizing the "topics, concerns, and opportunities raised at the community conference" and providing "a conclusion for each topic as to what should or should not happen relative to the proposal and applicable codes." In the response memo, which was issued on October 10, 2019, IHIF and the City each provided responses to the various matters raised at the Community Conference. Of note:
- Both the City and IHIF stated that self-storage would be an allowed use within the preliminary plat.
 - Both the City and IHIF determined that Discovery Drive had been appropriately designed to address total traffic loads for the preliminary plat and other area development.
 - Both the City and IHIF determined that the preliminary plat would provide for appropriate pedestrian and bicycle facilities.
 - In terms of which regulations would govern development of the preliminary plat, the City noted that the Director Niven would issue "a formal determination regarding vesting" in the "staff report for the preliminary plat hearing." IHIF detailed its continuing contention that the plat would be vested to the development standards of the DA.
 - IHIF and the City both stressed the Applicant's willingness to ensure that adequate pedestrian facilities would provide mid-block connections throughout the plat.
 - The ARC already reviewed the proposal and approved it.
 - The City determined that no additional SEPA review of the preliminary plat would be necessary. IHIF stressed that an EIS was already issued for the entire Issaquah Highlands and included required mitigation.
 - Both the City and IHIF determined that adequate road and trail connections would be provided throughout the plat.

*Findings, Conclusions, and Decision
City of Issaquah Hearing Examiner
High Street Collection Preliminary Plat
Nos. PP17-00002 & PRJ16-00013*

Page 28 of 50

- The City determined that stormwater detention and treatment would be “vested to the King County 2009 Surface Water Design Manual” as amended by the City’s “2011 Addendum” to the DA. The City noted, however, that it would be IHIF’s responsibility to “detain and treat stormwater to meet City standards” and that, if IHIF were to use any of the City’s existing stormwater facilities to do so, the “stormwater discharge fee” would require “a separate negotiation.” IHIF explained that no permanent surface ponds would be created within the development and that the City previously offered IHIF an opportunity to pay a “fee in lieu” to dispose of at least some of the stormwater on-site “because the City’s existing offsite stormwater facility has additional capacity.”
- The City and IHIF provided additional information about the parties’ disagreement concerning the vested status of the preliminary plat.

Exhibit D-1.

46. Following the Community Conference, the City and the Applicant continued to communicate about the preliminary plat, and, ultimately, the hearing before the Hearing Examiner was set for March 9, 2020. *Exhibit WW.*

Notice of Open Record Hearing

47. After the open record public hearing before the Hearing Examiner was scheduled, the City provided notice of the hearing as required by the municipal code. To that end, on February 21, 2020, the City mailed or emailed notice of the hearing to property owners within 300 feet of the subject property, and to reviewing government departments and agencies. Such materials noted that written comments on the proposal would be accepted up to, and at, the hearing on March 9, 2020. *Exhibit C-3.* Also on February 21, 2020, the City published notice of the hearing in the *Issaquah Report*, and IHIF posted notice of the hearing on the project site. *Exhibit C-4; Exhibit C-5; Exhibit C-6.*
48. The City received two public comments in response to the public hearing notice materials. Jen Noland inquired about what subjects would be covered at the public hearing and about whether the public would have input about the types of retail and commercial development that would be allowed. Seattle resident Kent Worthington commented that he mistakenly received notice of the public hearing. *Exhibit O-1; Exhibit O-2.*
49. In addition to the public comments discussed above, the City also received comments from King County Metro. King County Metro stated that it had no concerns about the proposal but noted that the project is immediately adjacent to a “very high ridership” bus stop and that such stop “should be maintained when future construction is planned.” *Exhibit O-3.*

City’s Staff Report

*Findings, Conclusions, and Decision
City of Issaquah Hearing Examiner
High Street Collection Preliminary Plat
Nos. PP17-00002 & PRJ16-00013*

50. On March 3, 2020, the City prepared a staff report for review in conjunction with the open record hearing on the proposal. Of particular note:
- The report states that the Comprehensive Plan designation of the subject property is “Retail.” All previous materials, however, including the staff report prepared for the meeting before the Development Commission, identified the Comprehensive Plan designation of the property as “Urban Village.” *See Exhibit XX-2.* The current staff report does not appear to address the zoning designation of the subject property although materials submitted to the Development Commission state that the property is zoned “Urban Village-Commercial/Retail” (UV-COM/RET). *See Exhibit XX-2.*
 - The staff report notes that “[d]ifferent sets of drawings have been submitted to the City in relation to the Applicant’s preliminary plat application,” including materials submitted on August 1, 2017; August 28, 2017; December 15, 2017; February 7, 2018; February 22, 2018; and March 5, 2019. The staff report stresses that the August 2017 submissions “were made during the defined ‘Buildout Period’ of [the] now-terminated 1996 Development Agreement” but that all other submittals were received after the Buildout Period had expired.” Because of this, City staff “reviewed only the vested permit materials from August 1 and August 28, 2017, under the applicable [DA] provisions.”
 - Section V of the staff report included a detailed “Determination of Vested Status” pursuant to IMC 18.01.050.C, prepared by Director Niven in consultation with the City Attorney. This included a statement explaining that, as “the Hearing Examiner has previously concluded, the Director’s vesting determination is not a final land use decision in and of itself, and it is not independently appealable separate” from the Hearing Examiner’s decision “approving or denying the underlying project application.” The vesting determination ultimately concludes that the vesting afforded the materials submitted prior to expiration of the buildout period (i.e., the materials submitted by IHIF in August 2017) would be limited to “effectuate the specific development proposal, if any, identified” in such materials and that all materials submitted after expiration of the Buildout Period on September 18, 2017, would “not operate to retroactively expand the vested rights that accrued in the Applicant’s original . . . preliminary plat application.”

Exhibit R.

51. Section VI of the staff report addresses how the City believes the preliminary plat would comply with provisions of the DA, where applicable; with the Replacement Regulations, where applicable; and with the State Subdivision Act (Chapter 58.17 RCW). To assist in explaining this, the City provides a chart (on Page 12), detailing which Appendices of the DA it “used for the plat review” and which Appendices it did not use in reviewing the plat because of its determination that such appendices are “not vested” and the Replacement Regulations, instead, would be applicable. Ultimately, the staff report determines that the following Appendices are applicable to the preliminary plat:

*Findings, Conclusions, and Decision
 City of Issaquah Hearing Examiner
 High Street Collection Preliminary Plat
 Nos. PP17-00002 & PRJ16-00013*

Appendix A, Guiding Principles and Goals; Appendix B, Land Uses (but not any development standards contained therein); Appendix D, Storm and Ground Water; Appendix F, Water Service; Appendix G, Sewer Service; Appendix H, Road Design; Appendix I, SEPA; Appendix S, Urban Design Guidelines; and Appendix T, Trails.
Exhibit R.

52. This approach to review of the preliminary plat stands in sharp contrast to that advocated by IHIF. In its submitted preliminary plat materials, for instance, IHIF included a “Project Narrative,” dated July 15, 2017 and a “Supplemental Project Narrative,” dated March 1, 2019, in which it details how the proposal would comply with *every* appendix associated with the DA.¹³ *Exhibit B-2.4; Exhibit B-6.9.*

Open Record Public Hearing – March 9, 2020

53. The open record hearing before the Hearing Examiner commenced on March 9, 2020. At the outset of the hearing, Attorney Patrick Schneider, on behalf of IHIF, submitted a pleading entitled “Objection to New and Ongoing Violations of the Applicant’s Vested Rights,” dated March 9, 2020. The pleading advances several arguments and stresses that IHIF is “participating in this plat hearing under protest.” In it, IHIF argues that the City’s staff report “demonstrates and implements a new violation of [IHIF’s] vested rights, and the Department is asking the Hearing Examiner to participate in this violation.” IHIF further argues:

- The staff report asks the Hearing Examiner to deem the preliminary plat application “vested to only limited parts of the Development Agreement” but such “picking and choosing by staff among the regulations to which an applicant is vested is a fundamental violation of the vested rights doctrine.”
- The staff report asks the Hearing Examiner “to participate in this violation of [IHIF’s] vested rights by making a decision about the application materials” from August 2017, as opposed to the most current materials that were submitted on March 19, 2019, following “long-awaited comments from staff.”
- The staff report “makes the vested rights doctrine nonsensical by purporting to make a vesting determination for each document submitted by the applicant.” But vesting applies to “the *processing* of an application so that the application is reviewed under the regulations in effect at the time of submittal of the original application.”
- The vesting determination in Section V of the staff report states that it is not a final land use decision appealable separate from the underlying permit decision and, accordingly, IHIF “will appeal the vesting determination in Section V to the

¹³ Despite the differences in how each party reviewed the preliminary plat, both end up determining that appropriate provisions would be made for open spaces, drainage ways, streets, sidewalks, potable water supplies, and sanitary wastes. While the Hearing Examiner concurs this is likely true, only limited information on how the plat would address these matters is included in this decision as the focus of this decision is on the impacts the City’s approach to vesting have had on review of the preliminary plat.

City Council” once the Hearing Examiner makes a decision about the plat application.

- IHIF requests that “the Hearing Examiner determine whether this hearing is about a plat application that is vested to the Development Agreement” or about a “plat application that is subject” to the Replacement Regulations “on a piecemeal basis as set forth in the Staff Report.”

Objection to New and Ongoing Violations of the Applicant’s Vested Rights, dated March 9, 2020.

54. The Hearing Examiner determined that the pleading would be included in the record and asked the parties to speak about it prior to commencing with witness testimony. Mr. Schneider explained that IHIF has taken issue with Director Niven’s views on vesting for several years and believes the City’s current staff report creates even more problems concerning the vested status of the preliminary plat. He stressed that IHIF has operated for several years under the impression that, at a minimum, the preliminary plat vests to the provisions of the DA, and IHIF believes the Hearing Examiner should review the preliminary plat against the DA and the requirements of the State Subdivision Act, not in piecemeal fashion with consideration (in some instances) given to the Replacement Regulations. *Argument of Mr. Schneider.*
55. Attorney Zach Lell, representing the City, noted that the City had not had adequate time to review the new pleading, having just received it. He stressed, however, that the City has attempted to make its views on the vested status of the preliminary plat clear for several years and it does not believe the approach to project review set out in the staff report represented anything new, unsurprising, or different. Mr. Lell further explained that the City has reviewed all of the various materials submitted by IHIF concerning the preliminary plat but, ultimately, the parties disagree on how such submittals should be treated for purposes of vesting. *Argument of Mr. Lell.*
56. Ultimately, the Hearing Examiner determined that it would be appropriate to allow the City to submit a responsive pleading in advance of March 20, 2020, the date scheduled to conclude the open record hearing on the preliminary plat. *Oral Ruling of the Hearing Examiner, March 9, 2020.*

Witness Testimony

57. Land Development Manager Lucy Sloman provided testimony detailing City staff’s review of IHIF’s preliminary plat. Ms. Sloman detailed the history of the property, the DA, the City’s views on vesting, the Replacement Regulations, and the various materials submitted by IHIF since 2017 related to the preliminary plat. She stressed that, in the final review that occurred and resulted in preparation of the City’s staff report, the City determined that the plat materials provided by IHIF were either “too detailed” in many instances, or “not detailed enough” for appropriate review. Staff attempted to address

*Findings, Conclusions, and Decision
City of Issaquah Hearing Examiner
High Street Collection Preliminary Plat
Nos. PP17-00002 & PRJ16-00013*

this problem through its recommended conditions of approval and through providing extensive redline comments on the submitted plat plans. Ms. Sloman also stressed that the City has acted in good faith in working with IHIF over the years and has made every effort to comply with its regulatory duties. She noted, for instance, that the City processed the plat materials of another Applicant (Polygon) under the DA, but the City later determined that doing so was a mistake and that it should rectify that mistake in review of the IHIF preliminary plat application.¹⁴ And, in addition to the length of time necessary for its review, she stressed that the City has been chronically understaffed and that there were significant time delays that occurred while both parties waited on revisions or comments from each side to be provided. In response to questions from Mr. Schneider, Ms. Sloman explained that the City's recommendation concerning the plat does not ask for a specific set of project plans to be approved. Instead, the City would ask that the final plan set from March 2019 be approved, with several changes that would be necessary, and with the caveat that any approval would not impact the City's views on vesting. Ms. Sloman stressed that the City is trying to avoid "pre-approving" certain construction-level details of the preliminary plat. She agreed that, ultimately, it would be appropriate for the parties to provide an "agreed" plan set for review by the Hearing Examiner. *Testimony of Ms. Sloman.*

58. Doug Schlepp, City Development Senior Consulting Engineer, provided additional testimony about the City's concerns over the level of detail provided with the preliminary plat materials. He explained, for instance, that the submitted plat plans include the location of water meters, fire lines, and other mechanical details, and that such information is normally reviewed at later stages of development. Mr. Schlepp noted that, accordingly, the City determined that enough information exists for conditional approval of the preliminary plat, but the City wanted to ensure that such approval would not preclude the City from requiring later changes to design requirements of these mechanical details. *Testimony of Mr. Schlepp.*
59. Eric Evans, IHIF's Director of Development, testified about the history of IHIF's submissions and efforts to move review of the preliminary plat forward in a timely manner. Mr. Evans stressed that IHIF submitted plan revisions several times in response to review by City staff because preliminary plats are (usually) reviewed through an

¹⁴ Several of the exhibits in the current record relate to Polygon's various projects, including Exhibits BB, KK, LL, and XX-16. Of particular note, Polygon applied for preliminary plat approval for its "Westridge North Single Family" proposal on July 14, 2017, just over two weeks before IHIF applied for approval of this preliminary plat. Polygon then submitted revised plans related to its plat several times in early 2018. Unlike in the present circumstances, however, the City did not determine that these later-submitted plans (which were definitely submitted after the defined Buildout Period in the DA) would create vesting issues. Instead, City staff prepared a staff report for the Westridge North proposal on March 9, 2018, in which the City reviewed the plat against each and every appendix in the DA, and the UVDC held a public hearing on the proposal on March 20, 2018, which then concluded on April 17, 2018. On May 10, 2018, the UVDC then recommended approval of the project to the City Council. *See, especially, Exhibit LL.*

iterative process. Many of the comments and concerns raised by City staff in relation to the current proposal, however, do not appear to be based on particular requirements related to the adequate treatment of water, sewer, or other utilities but, instead, seem to focus on the City's position on vested rights and this proposal's impact on IHIF's site development permits. *Testimony of Mr. Evans.*

60. Michael Swenson, P.E., Transpo Group, also testified on behalf of IHIF and explained how review of the road system associated with the preliminary plat, and the potential traffic impacts, occurred. He explained that Transpo Group prepared several new memoranda and reports addressing the proposed road network within the plat and traffic, although traffic was already thoroughly addressed in the early EIS prepared in association with the DA. *Testimony of Mr. Swenson.*
61. Mark Veldee, P.E., KPFF, provided testimony on behalf of IHIF about proposed plat infrastructure, including information on the road network and on the treatment of stormwater within the preliminary plat. He explained that IHIF seeks to use previously-approved administrative minor modifications (AMMs) from the DA for the road network within the preliminary plat and that this has been reflected in the submitted plat plans. In regard to stormwater, Mr. Veldee explained that there are two existing stormwater systems available to serve the preliminary plat, one of which the City owns (the "Reid Pond System") and one that is owned by IHIF (the "Bypass System"). He noted that stormwater from Discovery Drive would be collected and transmitted to the Reid Pond System while the rest of the stormwater within the plat would be conveyed to the "Bypass System." He stressed that, ultimately, stormwater would be adequately addressed through development of the preliminary plat. Finally, Mr. Veldee stressed that the City requested additional details about plat infrastructure on several occasions and IHIF's submitted plans to reflect this. He noted that, with a project as complex as this, significant detail concerning utilities is necessary at the preliminary plat stage of development to ensure that the entire system works. Here, for instance, many utilities would be embedded within Discovery Drive and, accordingly, detailed information about how this would be accomplished was necessary. *Testimony of Mr. Veldee.*
62. Applicant Representative Tia Heim testified at length about IHIF's efforts to obtain review of the preliminary plat and the parties' ongoing disputes about vested rights. Ms. Heim stressed that, despite providing IHIF with assurances about the vested status of the preliminary plat, the City failed to process the plat consistent with the requirements and timelines of the DA. Despite this, IHIF believed—until recently—that the substantive aspects of the preliminary plat would be reviewed against the development regulations and appendices of the DA. Ms. Heim also explained that, in December 2017, IHIF submitted additional plat materials to make them consistent with the site development permit materials it had submitted, and in response to feedback from the City. She stressed that the record does not reflect that the City continued to process its preliminary

plat materials while the City was reviewing (and ultimately denying) IHIF’s site development permits, causing significant delay. Ms. Heim discussed the City’s proposed approval conditions for the preliminary plat and explained that, in her view, many of the conditions appear unnecessary in light of the final materials submitted by the Applicant in March 2019. *Testimony of Ms. Heim.*

63. Time ran out on the initial hearing date prior to the conclusion of Ms. Heim’s testimony. Before concluding for the day, however, the Hearing Examiner ruled that the City could provide a response to Mr. Schneider’s pleading. In addition, the Hearing Examiner ruled that the parties should submit an “agreed upon” plan set prior to the continued hearing on March 20, 2020. *Oral Ruling of the Hearing Examiner.*

COVID-19 and Additional Pleadings

64. Just days after the conclusion of the first hearing date, the City informed the Hearing Examiner (on March 12, 2020) that all public meetings, public hearings, and administrative appeal proceedings would be immediately discontinued until further notice in light of the outbreak of the COVID-19 pandemic. On March 27, 2020, and again on May 11, 2020, the Hearing Examiner informed the City of his willingness to hold hearings using remote meeting technology, and the open record hearing was scheduled to continue on July 8, 2020, using such technology.¹⁵ Prior to commencing the continued hearing on July 8, 2020, however, it was determined that additional public notice of the continued hearing had not been provided. Accordingly, the hearing was continued so that appropriate public notice could be provided.¹⁶ Ultimately, the hearing recommenced and concluded on August 3, 2020. Between the initial hearing date on March 9, 2020, and the continued hearing on August 3, 2020, however, the parties submitted several additional pleadings. *Exhibit WW-2; Exhibit XX-1.*
65. On March 20, 2020, the City provided a pleading entitled “Response to Applicant’s Objection to New and Ongoing Violations of the Applicant’s Vested Rights,” consistent with the oral ruling of the Hearing Examiner at the conclusion of the first hearing date. In this pleading, the City argues that IHIF’s objections simply repeat the objections about vested rights it has made on several other occasions, many of which the Hearing Examiner has rejected in earlier appeals. Of particular note, the City argues:
- IHIF’s contention that the City is improperly “picking and choosing” the standards applicable to the preliminary plat is misplaced because the legal

¹⁵ See Exhibit WW and Exhibit XX.

¹⁶ *Order on Continued Hearing*, dated July 8, 2020. The City received three additional comments in response to its notice materials. King County Metro provided additional comments on construction impacts on area bus stops and area resident Christina Marchoine expressed concern about the types of commercial and retail development that would be developed within the preliminary plat, especially in relation to parking. *Exhibits O-3 through O-5.*

framework on vesting, defined by *Noble Manor* and its progeny, “contemplates—indeed, requires—precisely this type of issue-specific vesting approach for preliminary plats.”

- The City considered all of the “numerous submittals and plan sets” provided by IHIF for preliminary plat review. As Ms. Sloman explained at the first hearing date, however, “details of [IHIF’s] proposed development that were identified only in [IHIF’s] post-Buildout Period” application materials “are not vested to the Development Agreement.” The City believes its approach to review of the materials “is consistent with, and indeed compelled by, the [Hearing Examiner’s] previous decisions” addressing this issue.

Response to Applicant’s Objection to New and Ongoing Violations of the Applicant’s Vested Rights, dated March 20, 2020.

66. In addition to this pleading, Ms. Sloman emailed Ms. Heim and Mr. Veldee on March 11, 2020, about preparing an “agreed upon” plan set for review by the Hearing Examiner. Ms. Sloman requested that IHIF provide extensive revisions to its final preliminary plat plan set (from March 5, 2019) to address what should and should not be included in relation to utility service; utility points of connection; sidewalks; curbs and gutters; driveways; curb ramps; hydrants; streetlights; street trees; easements; and other construction level information. *Exhibit VV-1.*

67. On April 16, 2020, IHIF submitted an additional pleading, entitled “[IHIF’s] Reply to the City’s Response and to Lucy Sloman’s Post-Hearing Email Directing Changes to [IHIF’s] Plat Plans.” In the pleading, Attorney Patrick Schneider explains, in detail, the ways in which IHIF believes the City is erring in relation to review of the preliminary plat, especially in light of case law concerning the vested rights doctrine. Of particular note, Mr. Schneider argues that the “City is so focused on justifying the position it has taken in separate actions related to” IHIF’s site development permit applications “that it is willing to make a mess of the review and approval of this simple plat application that is vested to the Development Agreement.” The pleading then goes on to argue how the City has “made a mess” of the review and approval process, contrary to applicable law, noting:

The Staff Report and the City’s Response together make a hash out of this plat process and the law of vested rights, and they ask the Hearing Examiner to do the same by applying the Development Agreement only to the portions of [IHIF’s] application that the Director believes do not enable [IHIF’s site development permit applications]. As for the remainder of the plat application – the portions that the Director apparently thinks do enable the SDP and ASDP applications – it is impossible to tell whether the Director is asking the Hearing Examiner to apply the Replacement Regulations instead of the Development

*Findings, Conclusions, and Decision
City of Issaquah Hearing Examiner
High Street Collection Preliminary Plat
Nos. PP17-00002 & PRJ16-00013*

Agreement, or is asking the Hearing Examiner to simply not approve those portions of the application even though they are consistent with the Development Agreement. Either way, this a la carte approach to vested rights is illegal as well as hopelessly muddled and impossible to implement.

Tellingly, the City’s Response brief cites no law that stands for the proposition that government may do what the Staff Report dose: pick and choose which pieces of a regulatory regime will govern a vested application. In fact, the law is to the contrary. . .

. . .
 The City’s assertion that the Hearing Examiner’s previous decision regarding vesting of SDP and ASDP applications compels the City to bisect a single vested application into “vested” materials that will be analyzed under the Development Agreement and “non-vested” materials which will be disregarded and/or considered under Replacement Regulations, is a bald mischaracterization of that earlier decision.

Following discussion of the legal issues, Mr. Schneider then provides a detailed response to Ms. Sloman’s email from March 11, 2020. In it, Mr. Schneider explains why IHIF does not intend to make significant changes to the plat materials it has already submitted. *Shelter’s Reply to the City’s Response and to Lucy Sloman’s Post-Hearing Email Directing Changes to Shelter’s Plat Plans, dated April 20, 2020.*

- 68. On April 20, 2020, the City provided an additional pleading, entitled “Objection and Motion to Strike Reply,” in which it argues that the Hearing Examiner never requested the new pleading submitted by Mr. Schneider. The next day, Mr. Schneider provided a “Response to the Department’s ‘Objection and Motion to Strike Reply.’” In his response, Mr. Schneider stresses that the current matter is not an appeal wherein the parties are engaged in motions practice but, instead, involves a “pre-decision hearing, the purpose of which to present evidence and explanation to the Hearing Examiner so that he can make an informed decision” about “whether and how to approve” the preliminary plat application. On May 11, 2020, the Hearing Examiner issued a decision on the motion to strike and determined that the various pleadings would be included in the record. *See Pleadings, Motions, and Orders, Attachment A.*

Open Record Public Hearing – August 3, 2020

- 69. The open record public hearing on the preliminary plat recommenced, and concluded, on August 3, 2020. Very little additional information about the substance of the preliminary plat was presented at the continued hearing. Instead, Lucy Sloman, Tia Heim, Doug Schlepp, and Mark Veldee all provided additional, detailed information about the project

*Findings, Conclusions, and Decision
 City of Issaquah Hearing Examiner
 High Street Collection Preliminary Plat
 Nos. PP17-00002 & PRJ16-00013*

review that occurred for the proposal. Much of this testimony concerned the vested status of the proposal and each parties' views on appropriate conditions that should be included with approval of the preliminary plat. *Testimony of Ms. Sloman, Ms. Heim, Mr. Schlepp, and Mr. Veldee.*

70. At the conclusion of the hearing, the Hearing Examiner ruled (again) that the parties should submit an agreed upon plan set—without any redline revisions or commentary—that would be included in the record as Exhibit YY. In addition, the Hearing Examiner ruled that each party could submit proposed conditions of approval associated with the agreed upon plan set, along with justification for inclusion of such conditions. The parties complied with this request. *Exhibit YY; Attachment A.*
71. In its proposed conditions of approval, the City repeatedly stresses the idea that approval of the preliminary plat would not relieve IHIF with complying with the Replacement Regulations in terms of future applications associated with development of the preliminary plat. Moreover, the City's proposed conditions stress the idea that IHIF's submitted preliminary plat plans should be treated as "conceptual" in nature such that future alterations to such plans may be necessary with design level review, especially in relation to road and utility plans, and treatment of stormwater. The City's proposed conditions also address mitigation for future development of the project site and note that "applicable impact fees for traffic, park, fire protection, and schools" as well as "mitigation fees for police, general governmental buildings and bicycle and pedestrian facilities shall be evaluated and imposed" at the time future building permits are received related to site development permits. The City also provided proposed conditions explicitly disavowing the content of several of the plat plans within the agreed upon plan set (Exhibit YY), generally on the grounds that such material included information about the vested status of development. Finally, the City recommended a condition noting that the preliminary plat would be "expressly limited by and subject to the Director's Vesting Determination" as set forth in the Staff Report, which (per the proposed condition) would be adopted by reference and incorporated into the Hearing Examiner's decision. *City of Issaquah Proposed Conditions of Approval, dated August 10, 2020.*
72. IHIF's proposed conditions stand in stark contrast to those provided by the City. In general, its proposed conditions are far less detailed and, in explaining its conditions, IHIF stresses that the "Hearing Examiner does not have the authority to make a vesting determination in the context of a plat hearing" such that it would be inappropriate for the Hearing Examiner's conditions to include significant language about the vesting of the preliminary plat or the vested status of other, potential development associated with the preliminary plat. Of particular note, the Applicant stresses that any approval condition concerning mitigation for future development of the project site would be in appropriate, especially considering provisions in Appendix I of the DA that covered the mitigation of

*Findings, Conclusions, and Decision
City of Issaquah Hearing Examiner
High Street Collection Preliminary Plat
Nos. PP17-00002 & PRJ16-00013*

Page 38 of 50

project impacts. *Shelter Response to Proposed Conditions of Approval, dated August 18, 2020.*

CONCLUSIONS

Jurisdiction

The Hearing Examiner has authority to hear and approve, conditionally approve, or disapprove the preliminary plat request after review of the preliminary plat, the administration’s recommendation, testimony, and exhibits submitted at the public hearing. The Hearing Examiner makes the final decision on preliminary subdivisions. *Issaquah Municipal Code (IMC) 18.03.060.B; 18.03.170; 18.04.490.C.1; 18.13.140.A.*

Criteria for Review

Preliminary Plat

Preliminary plat proposals are reviewed through the Modified Level 4 review process and, normally, must comply with all the standards and criteria set forth in Chapter 18.13 IMC. *IMC 18.04.480 and 18.04.490.C.1.* Here, however, the parties disagree on what regulations apply to the Hearing Examiner’s review of the preliminary plat. The City contends that some aspects of the DA that formerly governed the property should be reviewed, while some aspects of the Replacement Regulations that currently govern the property should be reviewed. The Applicant disagrees, arguing that the preliminary plat should be reviewed solely against the development standards contained within the DA.

Any preliminary plat approval, however, would need to comply with the State’s Subdivision Act, Chapter 58.17 RCW.

The standards and criteria regarding preliminary plats set forth in Chapter 18.13 IMC are established to promote the orderly and efficient division and re-division of land within the city, to avoid placing undue and unnecessary burdens on both the Applicant and the City, and to promote the public health and general welfare, complying with the provisions of Chapter 58.17 RCW.

The criteria for review of a preliminary plat are set forth in RCW 58.17.110(2), as follows:

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

*Findings, Conclusions, and Decision
City of Issaquah Hearing Examiner
High Street Collection Preliminary Plat
Nos. PP17-00002 & PRJ16-00013*

- (b) The public use and interest will be served by the platting of such subdivision and dedication.
RCW 58.17.110(2).

The criteria for review adopted by the Issaquah City Council are designed to implement the requirement of Chapter 36.70B RCW to enact the Growth Management Act. In particular, RCW 36.70B.040 mandates that local jurisdictions review proposed development to ensure consistency with City development regulations, considering the type of land use, the level of development, infrastructure, and the characteristics of development. *RCW 36.70B.040.*

Conclusions Based on Findings

Because of the ongoing dispute between the parties concerning the vested status of the proposal, the public use and interest would not be served by approval of the proposed preliminary plat, as required by RCW 58.17.110(2). Under RCW 58.17.020(4), a *preliminary plat* is defined as a “neat and approximate drawing of a proposed subdivision showing the *general* layout of streets and alleys, lots, blocks, and other elements of a subdivision consistent with the requirements of [Chapter 58.17 RCW]” and shall “be the basis for the approval or disapproval of the *general* layout of a subdivision.” (Emphasis added). RCW 58.17.110(1) requires a determination of whether a preliminary plat has made appropriate provisions for “the public health, safety, and general welfare” as well as for “open spaces, drainage ways, streets or roads, alleys, other public ways, transit stops, potable water supplies, sanitary wastes, parks and recreation, playgrounds, school and schoolgrounds.” The parties agree and, the Hearing Examiner concurs that the *general layout* of the proposed subdivision would likely satisfy the requirements for plat approval under RCW 58.17.110(1). The agreement among the parties, however, ends with this understanding of the “general” layout of the preliminary plat and does not extend to such matters as the substantive review of what development regulations apply to the proposal or what types of approval conditions would be appropriate were the Hearing Examiner to approve the preliminary plat. Accordingly, the Hearing Examiner has determined that the parties’ ongoing dispute about vesting must first be resolved before any meaningful decision on the proposal can be made. This is especially true given the Hearing Examiner’s responsibility to craft appropriate approval conditions.

In reflecting on the last of decade of his career (focused exclusively on land use, environmental law, and appellate law), the Hearing Examiner is hard-pressed to recall a matter more vexing than the current one. Because, while it is not uncommon to have parties disagree about the applicability or scope of certain laws or regulations to a proposal, or the weight and applicability of various cases or persuasive authority to a particular matter, the Hearing Examiner cannot recall a situation where the parties disagree fundamentally about what regulations actually apply to a land use proposal. This has created an untenable situation in terms of the Hearing Examiner’s review of this matter: despite spending months attempting to craft a decision addressing the substance of the proposed preliminary plat, the Hearing Examiner has failed in this effort.

Findings, Conclusions, and Decision
City of Issaquah Hearing Examiner
High Street Collection Preliminary Plat
Nos. PP17-00002 & PRJ16-00013

Page 40 of 50

In terms of vesting, the parties seemingly agree that, under IMC 18.01.050.C, the Development Services Director is given the sole authority to determine the vested status of any given application under the municipal code. Further, by operation of other provisions of the code, such determination is not considered a “stand alone” determination that can be appealed independent of any appeal on the underlying proposal itself. Accordingly, the Hearing Examiner sometimes is tasked with reviewing such a determination when asked to sit in an appellate capacity—as occurred with IHIF’s appeals of the Development Commission’s decisions on its site development permit applications—but not always. Here, the municipal code requires the Hearing Examiner to review the preliminary plat in the first instance, not in an appellate capacity. As such, the Hearing Examiner lacks authority to independently decide the vested rights dispute.

That said, the Hearing Examiner has considered the Director’s vesting determination in relation to the preliminary plat and finds it, and the City’s subsequent stance concerning this proposal, highly problematic. As IHIF points out, whether the Hearing Examiner rightly decided the appeals associated with its site development permits is immaterial. The Hearing Examiner’s decisions on those permits, including his analysis of several cases including *Noble Manor*, *Westside Manor*, and *Ellensburg*, all addressed whether and to what extent a vested preliminary plat would afford certain vested rights on later site development permits. The Hearing Examiner’s previous decisions did not address the current proposal or the vested status of the preliminary plat. Like IHIF, the Hearing Examiner was surprised to learn in the City’s staff report that the City believed some aspects of the DA would apply to the proposal, others would not, and *crucially* that the City’s Replacement Regulations would apply in various respects.

The Hearing Examiner is unaware of this approach to vesting ever being employed in the context of review of a preliminary plat, let alone one that a jurisdiction has repeatedly indicated is “vested,” to a specific set of regulations, as occurred here. Such an approach to vesting runs contrary to *Reclamation Co. v. Bjornsen*, 125 Wn. App. 432, 105 P.3d 94 (2005), among other decisions concerning vesting. In *Reclamation*, for instance, the Clark County Hearing Examiner reviewed a proposal by selecting evaluating two sets of regulations, those applicable when Clark County first deemed the proposal complete for purposes of project review, and later amendments to the regulations promulgated by the County. In doing so, the Clark County Hearing Examiner accepted the applicant’s argument that vested development rights were meant, at common law, to benefit developers and, as such, a piecemeal approach to which regulations apply would be appropriate. Division 2 of the Court of Appeals rejected this approach, noting that, while “the general purpose of vesting land use regulations is to benefit developers,” another “important purpose of the vesting rule” is to establish a “date certain upon which the owner’s right to use his or her property in a particular way becomes fixed” so that a reviewing court “is not required to search through the moves and countermoves of the parties, and ‘the stalling or acceleration of administrative action in the issuance of permits’ in each case.” 125 Wn. App. At 435.

Findings, Conclusions, and Decision
 City of Issaquah Hearing Examiner
 High Street Collection Preliminary Plat
 Nos. PP17-00002 & PRJ16-00013

Page 41 of 50

The current situation is comparable. Under the City's approach, it has clearly become necessary to "search through the moves and countermoves of the parties" in the present matter to understand the City's stance on the development regulations applicable to the proposal.

Moreover, courts have recognized that the land use application process is iterative. As such, the legislature has granted local jurisdictions the authority to determine when a particular proposal is "complete" for purposes of vesting. Such a determination does not fix the materials submitted for review of an application in stone. Rather, such a determination fixes which land use regulations will apply to such a proposal, regardless of the outcome of the iterative review process. As the Washington State Supreme Court has explained:

A preliminary plat application is meant to give local governments and the public an approximate picture of how the final subdivision will look. *RCW 58.17.020(4)*. It is to be expected that modifications will be made during the give and take of the approval process. Although it is up to local governments to decide what level of specificity they will require from a developer in its initial application, *RCW 58.17.033*, they may not cause the vesting of the application to be contingent on future events or decisions, nor make the application process so odious that completion is nearly impossible. *West Main*, 106 Wn.2d at 52-53; *Adams*, 70 Wn. App. at 479. Once a completed application has been submitted, it is to be judged under the laws in effect at the time of submission.

Friends of the Law v. King County, 123 Wn.2d 518, 869 P.2d 1056 (1994).

Here, the City appears to contend that each submission an applicant makes during the iterative project review process has vesting implications for the particular proposal that is currently under review (as opposed to implications for future development proposals). Moreover, some of the City's materials seem to indicate that certain aspects of the DA itself "vest" (i.e., certain Appendices) while others do not. While the Hearing Examiner lacks authority to independently decide whether the City's vesting interpretation is legally correct, he feels it important to stress that he does not understand the City's approach to vesting in terms of this preliminary plat. As noted in the above decision, for instance, a different developer (Polygon) applied for preliminary plat approval almost contemporaneously with IHIF and the City reviewed the preliminary plat against each of the appendices in the DA. That approach comports with the Hearing Examiner's understanding of the vested rights doctrine, as explained above, and lends itself to a consistent, understandable review process.

Under the current approach, the Hearing Examiner is unable to determine what substantive provisions should be reviewed in terms of this preliminary plat. In addition to the obvious challenges this creates, there are serious implications in terms of the Hearing Examiner's efforts to craft appropriate approval conditions. For instance, in their submissions concerning potential approval conditions, the parties expressed a fundamental disagreement about whether language about mitigation should be included in such conditions. Under the DA, mitigation for project

Findings, Conclusions, and Decision
City of Issaquah Hearing Examiner
High Street Collection Preliminary Plat
Nos. PP17-00002 & PRJ16-00013

Page 42 of 50

impacts—including mitigation under SEPA—was clearly addressed. The municipal code, however, includes provisions on impact fees and SEPA mitigation that were promulgated after the DA was first created. In its recommended plat conditions, however, the City suggests that it would impose such impact fees and SEPA mitigation on later projects associated with the preliminary plat. Without clear guidance on the vested status of the preliminary plat, this creates additional potential problems in the future.

In conclusion, the Hearing Examiner has determined clear guidance on the vested status of this proposal is necessary, from a forum with appropriate jurisdiction, before review of this preliminary plat can be completed. Such guidance, hopefully, would address, at a minimum: (a) which regulations are applicable to the preliminary plat; and (b) whether the SEPA review associated with the DA addressed all necessary project impacts associated with environmental impacts from development within the Issaquah Highlands, including the subject property. *Findings 1 – 72.*

DECISION

Based on the preceding findings and conclusions, the request for a preliminary plat to subdivide 21.46-acres into 10 lots for mixed-use development, on “Lot B” of the Issaquah Islands north of NE Discovery Drive and west of 9th Avenue NE, is **DENIED**.

Decided this 1st day of February 2021.



ANDREW M. REEVES
 Hearing Examiner
 Sound Law Center

Attachment A

Exhibit List:

The following exhibits were admitted into the record throughout the review process:

- A. Listing and Comparison of Application Materials (Prepared by City)
- B. Application Materials from August 1, 2017:
 - 1.1 Land Use Application, dated August 1, 2017
 - 1.2 Plan Set

*Findings, Conclusions, and Decision
 City of Issaquah Hearing Examiner
 High Street Collection Preliminary Plat
 Nos. PP17-00002 & PRJ16-00013*

- 1.3 Project Narrative, dated July 15, 2017
- 1.4 Traffic Analysis Memorandum, Transpo Group, dated July 28, 2017
- 1.5 Preliminary Stormwater Report, KPFF Consulting Engineers, dated July 2017
- 1.6 Pre-Application Comment Letter, dated July 27, 2017
- Application Materials from August 28, 2017:
 - 2.1 Additional File Submittal Confirmation
 - 2.2 Land Use Application, dated April 6, 2017
 - 2.3 Plan Set
 - 2.4 Project Narrative, dated July 15, 2017
 - 2.5 Traffic Analysis Memorandum, Transpo Group, dated July 28, 2017
 - 2.6 Preliminary Stormwater Report, KPFF Consulting Engineers, dated July 2017
 - 2.7 Title Report, dated July 28, 2017
 - 2.8 SEPA Checklist, dated July 28, 2017
 - 2.9 Affidavit of Agent Authority, dated July 10, 2017
 - 2.10 Affidavit of Ownership, dated July 10, 2017
 - 2.11 Lot Closure Calculations, Core Design, Inc., dated July 28, 2017
 - 2.12 Preliminary Plat Submittal Memorandum, dated July 27, 2017
 - 2.13 Sidewalk Easement: Legal Description
 - 2.14 Public Trail Easement: Legal Description
 - 2.15 8 x 11 Plan Set
 - 2.16 8 x 11 Vicinity Map
 - 2.17 Vicinity Map
- Application Materials from December 15, 2017:
 - 3.1 Additional File Submittal Confirmation
 - 3.2 Overview Site Plan (with Building Footprints), dated December 14, 2017
 - 3.3 Revised Lot Lines Plan, dated December 15, 2017
- Application Materials from February 7, 2018:
 - 4.1 Additional File Submittal Confirmation
 - 4.2 Traffic Impact Analysis Memorandum, Transpo Group, dated February 6, 2018
- Application Materials from February 22, 2018:
 - 5.1 Additional File Submittal Confirmation
 - 5.2 Architecture Review Committee Approval Letter, dated July 28, 2017
- Application Materials from March 5, 2019:
 - 6.1 Additional File Submittal Confirmation
 - 6.2 Plan Set
 - 6.3 Project Narrative, dated July 15, 2017
 - 6.4 Response to Comments (Traffic), Transpo Group, dated March 4, 2019
 - 6.5 Preliminary Stormwater Report (Revised), KPFF Consulting Engineers, dated February 2019
 - 6.6 Response to Comments from March 16, 2018
 - 6.7 Applicant Response to Comments, dated March 5, 2019
 - 6.8 Additional File Submittal Confirmation (#2)

Findings, Conclusions, and Decision
City of Issaquah Hearing Examiner
High Street Collection Preliminary Plat
Nos. PP17-00002 & PRJ16-00013

- 6.9 Supplemental Project Narrative, dated March 1, 2019
- 6.10 Email from Ken Shipley to Jean Lin, dated March 6, 2019, with email string
- C. Notice Materials:
 - 1. Affidavit of Mailing (Application), dated December 27, 2017
 - 2. Affidavit of Posting (Application), dated October 17, 2017
 - 3. Affidavit of Mailing (Hearing), dated February 21, 2020
 - 4. Published Notice, *Issaquah Reporter*, dated February 21, 2020
 - 5. Updated Site Posting, dated February 21, 2020
 - 6. Affidavit of Publication, dated February 21, 2020
- D. Community Conference Materials:
 - 1. Community Conference Memorandum, dated October 10, 2019
 - 2. Public Comments:
 - a. Comment from Pedro Guzman
 - b. Comment from Jonathan Chen
 - c. Comment from Suyesh Chaudhari
 - d. Comment from Alison Kimble
 - e. Comment from Lei Wang
 - f. Comment from Sathyaprasad Ramaseshan
 - g. Comment from Anushri Sarda
 - h. Comment from Chaitalee Zade
 - i. Comment from Erin Fields
 - 3. Additional Public Comments (in Response to Conference Memorandum):
 - a. Comment from Alison Kimble
 - b. Comment from Sathyaprasad Ramaseshan
 - c. Comment from Erin Fields
 - d. Comment from Bob Kaila
 - e. Comment from Siddhartha Rabindran
 - f. Comment from Amanveer Kaila
 - g. Comment from Lei Wang
 - h. Comment from Catalina Millas
 - i. Comment from Nina Milligan
 - j. Comment from Ravi Mudunuri
 - k. Comment from Vasundhara Subrahmanian
 - l. Comment from Jonathan Li On Wing
 - m. Comment from Mike Zalewski
- E. Hearing Examiner’s Decision on City’s Motion to Dismiss, No. APP18-00005, dated November 27, 2018
- F. Hearing Examiner’s Decision on Dispositive Motions, No. APP19-00002, dated November 15, 2019
- G. Letter from Keith Niven to Patrick Schneider, dated April 4, 2018
- H. Letter from Lucy Sloman to Tia Heim, dated April 15, 2019

Findings, Conclusions, and Decision
City of Issaquah Hearing Examiner
High Street Collection Preliminary Plat
Nos. PP17-00002 & PRJ16-00013

- I. Hearing Examiner’s Decision on Request for Reconsideration, No. APP19-00002, dated January 24, 2020
- J. Comprehensive Plan (Excerpts)
- K. Communications/Comments Between Applicant and City:
 - 1. Email from Lucy Sloman to Tia Heim, dated February 25, 2020, with email string
 - 2. Email from Lucy Sloman, dated July 26, 2019
 - 3. Email from Lucy Sloman to Tia Heim, dated July 19, 2019, with email string
 - 4. Email from Jean Lin to Ken Shipley, dated February 21, 2019, with email string
 - 5. Responses:
 - A. Email from Lucy Sloman to Tia Heim, dated December 21, 2018, with email string
 - B. City Responses to Applicant Comments
 - 6. Email from Doug Schlepp to Tia Heim, dated October 15, 2018
 - 7. Responses:
 - A. Email from Doug Schlepp to Tia Heim, dated March 29, 2018
 - B. Memorandum from Transpo Group, dated February 6, 2018, with City Annotations
 - 8. Email from Jean Lin to Dave Cayton, dated March 23, 2018, with email string
 - 9. Email from Doug Schlepp to Mike Swenson, dated March 22, 2018
 - 10. Plan Set, with City Annotations
 - 11. Email from Dave Cayton to Jean Lin, dated February 22, 2018
 - 12. Email from Jean Lin to Dave Cayton, dated February 21, 2018, with email string
 - 13. Email from Doug Schlepp to Mike Swenson, dated January 24, 2018, with email string
 - 14. Email from Dave Cayton to Jean Lin, dated December 15, 2017
- L. Action Memorandum, Development Services Department, dated March 29, 2013
- M. Complete Application Determination, dated August 11, 2017
- N. Ordinance No. 2830, effective March 28, 2019
- O. Comments on Public Hearing:
 - 1. Comment from Jen Noland, dated February 25, 2020
 - 2. Comment from Kent Worthington, dated March 2, 2020
 - 3. Comment from Jessica Conquest, King County Metro, dated March 4, 2020
 - 4. Comment from Lawrence Chung, King County Metro, dated August 3, 2020
 - 5. Comment from Christina Marchione, dated July 31, 2020
- P. Issaquah Highlands Development Agreement (Revised)
- Q. Grand Ridge Annexation and Development Agreement (Original)
- R. Staff Report, dated March 3, 2020
- S. Staff PowerPoint Presentation, dated March 9, 2020
- T. Grand Ridge Final Environmental Impact Statement, dated September 1995
- U. Amendment to Grand Ridge/Issaquah Highlands Annexation and Development Agreement, dated February 2000
- V. Revised Recommendation & Proposed Conditions of Approval, dated March 9, 2020

Findings, Conclusions, and Decision
 City of Issaquah Hearing Examiner
 High Street Collection Preliminary Plat
 Nos. PP17-00002 & PRJ16-00013

- W. Curriculum Vitae for Mike Swenson
- X. Curriculum Vitae for Mark Veldee
- Y. Revised Development Entitlement Memorandum, dated December 1, 2016
- Z. Applicant Summary of Review Dates and Timeline
- AA. Email from Christopher Wright to Dave Cayton, dated March 10, 2017, with email string
- BB. Letter from Keith Niven to Nick Abdelnour, dated March 27, 2017
- CC. Email from Jean Lin to Dave Cayton, dated June 7, 2017, with email string
- DD. Email from Sarabeth Levine to Tia Heim, dated August 15, 2017
- EE. Email from Jean Lin to Dave Cayton, dated October 6, 2017, with email string
- FF. Email from Keith Niven to Tia Heim, dated November 22, 2017, with email string
- GG. Email from Dave Cayton to Jean Lin, dated December 15, 2017, with attachments
- HH. Email from Darwin Li to Doug Schlepp, dated February 6, 2018, with attachment
- II. Email from Doug Schlepp to Mike Swenson, dated February 19, 2018, with email string
- JJ. Letter from Keith Niven to Patrick Schneider, dated March 8, 2018, with attachment
- KK. Staff Report for Westridge North Preliminary Plat, dated March 9, 2018
- LL. Urban Village Development Commission Recommendation, Westridge North Preliminary Plat, dated May 4, 2018
- MM. Email from Lucy Sloman to Tia Heim, dated August 24, 2018, with email string
- NN. Email from Lucy Sloman to Tia Heim, dated December 21, 2018, with email string
- OO. Email from Jean Lin to Ken Shipley, dated March 6, 2019, with email string
- PP. Email from Lucy Sloman to Tia Heim, dated April 5, 2019, with attachment
- QQ. Email from Tia Heim to Lucy Sloman, dated April 8, 2019, with email string
- RR. Email from Tia Heim to Lucy Sloman, dated July 17, 2019, with email string
- SS. Email from Tia Heim to Lucy Sloman, dated August 7, 2019, with email string
- TT. Email from Lucy Sloman, dated October 18, 2019, with email string and attachment
- UU. Email from Mark Veldee to Dan Ervin and Doug Schlepp, dated June 28, 2017, with email string
- VV. Additional Materials, March 11, 2020:
 1. Email from Lucy Sloman to Tia Heim, dated March 11, 2020
 2. Plan Set with City Annotations
 3. Plan Set for Preliminary Plat of Westridge North
 4. High Street Collection, Preliminary Engineering Notes, revised April 15, 2020
 5. Information Concerning Proposed Trail Connection
- WW. Additional Submittals from Applicant:
 1. Issaquah Highlands Public Meeting Hearing Transcript (Excerpt), dated October 24, 2018
 2. Plat Review Dates and Timeline, updated July 9, 2020
 3. Email from Candice Baer to David Ortman, dated December 16, 2019, with email string
 4. Email from Zach Lell to Candice Baer, dated February 3, 2020, with email string
 5. Email from Candice Baer to Lucy Sloman, dated February 4, 2020, with email string

Findings, Conclusions, and Decision
 City of Issaquah Hearing Examiner
 High Street Collection Preliminary Plat
 Nos. PP17-00002 & PRJ16-00013

6. Email from Candice Baer to Lucy Sloman, dated April 17, 2020, with attachment
 7. Email from Keith Niven to the Hearing Examiner, dated March 31, 2020, with email string
 8. Email from Lucy Sloman to Tia Heim, dated March 4, 2020, with email string
 9. Email from Jacqueline Quarre to Zach Lell, dated May 28, 2020, with attachment
 10. Email from Tina Eggers to Jacqueline Quarre, dated June 4, 2020, with email string
 11. Email from Zach Lell to Pat Schneider, dated July 7, 2020, with email string
 12. Email from Jean Lin to Dave Cayton, dated July 17, 2017, with email string
 13. Email from Jean Lin to Dave Cayton, dated July 10, 2017, with email string
 14. Applicant's Proposed Findings
 15. Applicant's Revised Proposed Conditions of Approval
 16. Email from Candice Baer to David Ortman, dated January 27, 2020
 17. Email from David Ortman to Candice Baer, dated January 27, 2020, with email string
 18. Emails about Scheduling (March 27 through March 31, 2020)
- XX. Additional Submittals from City:
1. City Plat Review Dates & Timeline
 2. Development Services Department Development Commission, Community Conference Staff Report, dated August 8, 2019
 3. Email from Candice Baer, dated March 12, 2020, with attached Emergency Proclamation, dated March 6, 2020
 4. Email from Jean Lin to David Holmes, dated October 5, 2017
 5. Email from Doug Schlepp to Mark Veldee, dated November 16, 2017, with email string
 6. Discovery Drive Information
 7. Email from Lucy Sloman to Keith Niven, dated November 22, 2017, with email string
 8. Memorandum on "End of DAs – Vesting & FAR," dated December 12, 2017
 9. Email from Lucy Sloman to Nick Abdelnour, dated December 1, 2016
 10. Email from Tia Heim to Lucy Sloman, dated January 4, 2017
 11. Email from Tia Heim to Christopher Wright, dated April 3, 2017, with email string
 12. Affidavit of Mailing (Community Conference), dated August 2, 2019, with attachments
 13. Email from Lucy Sloman to Tia Heim, dated August 5, 2019, with email string
 14. Email from Gretchen Garrett, dated August 8, 2019
 15. Email from Lucy Sloman, dated October 10, 2019
 16. Letter from Keith Niven to Nick Abdelnour, dated November 22, 2017
 17. Email from Candice Baer to the Hearing Examiner, dated March 3, 2020
 18. Traffic Impact Analysis Memorandum, Transpo Group, dated February 6, 2018, with City Annotations

*Findings, Conclusions, and Decision
 City of Issaquah Hearing Examiner
 High Street Collection Preliminary Plat
 Nos. PP17-00002 & PRJ16-00013*

- YY. Final Preliminary Plat Plan Set (23 Sheets):
1. Title Sheet (Sheet P1.01), revised February 8, 2019
 2. Preliminary Plat (Sheet P1.02), revised February 8, 2019
 3. Preliminary Landscape Plan (Sheet L1.01), undated
 4. Existing Conditions (Sheet C1.02), dated November 2017
 5. Existing Conditions (Sheet C1.03), dated November 2017
 6. Existing Conditions (Sheet C1.04), dated November 2017
 7. Existing Conditions (Sheet C1.05), dated November 2017
 8. Existing Conditions (Sheet C1.06), dated November 2017
 9. Preliminary Engineering Notes, Legend, and Abbreviations (Sheet C-100), revised April 15, 2020
 10. Preliminary Engineering Overview Site Plan (Sheet C-101), dated February 22, 2019
 11. Preliminary Engineering Overview Key Map (Sheet C-200), dated February 22, 2019
 12. Preliminary Engineering Grading and Utility Plan Block A (Sheet C-201), dated February 22, 2019
 13. Preliminary Engineering Grading and Utility Plan Block B and C (Sheet C-202), dated February 22, 2019
 14. Preliminary Engineering Grading and Utility Plan Block D and E (Sheet C-203), dated February 22, 2019
 15. Preliminary Engineering Northeast Federal Drive Plan and Profile (Sheet C-300), dated February 22, 2019
 16. Preliminary Engineering 8th Avenue Northeast Plan and Profile (Sheet C-301), dated February 22, 2019
 17. Preliminary Engineering Northeast Discovery Drive Plan and Profile (Sheet C-302), dated February 22, 2019
 18. Preliminary Engineering Northeast Discovery Drive Plan and Profile (Sheet C-303), dated February 22, 2019
 19. Preliminary Engineering Northeast Discovery Drive Plan and Profile (Sheet C-304), dated February 22, 2019
 20. Preliminary Engineering Northeast Discovery Drive Plan and Profile (Sheet C-305), dated February 22, 2019
 21. Preliminary Engineering Multi-Purpose Trail Plan (Sheet C-306), dated February 22, 2019
 22. Preliminary Engineering 8th Ave Northeast Plan (Sheet C-307), dated February 22, 2019
 23. Preliminary Engineering Roadway Sections (Sheet C-308), dated February 22, 2019

Pleadings, Motions, and Orders:

*Findings, Conclusions, and Decision
City of Issaquah Hearing Examiner
High Street Collection Preliminary Plat
Nos. PP17-00002 & PRJ16-00013*

Page 49 of 50

- Applicant Objection to New and Ongoing Violations of Applicant's Vested Rights, dated March 9, 2019
- City Response to Applicant's Objection to New and Ongoing Violations of the Applicant's Vested Rights, dated March 20, 2020
- Applicant Reply to City's Response and to Lucy Sloman's Post-Hearing Email Directing Changes to Applicant's Plat Plans, dated April 16, 2020
- City Objection and Motion to Strike Reply, dated April 20, 2020
- Applicant Response to City's Objection and Motion to Strike Reply, dated April 21, 2020
- Decision on Motion to Strike, dated May 11, 2020
- Order on Continued Hearing, dated July 8, 2020
- City Proposed Conditions of Approval, dated August 10, 2020
- Applicant Response to City's Proposed Conditions of Approval, dated August 18, 2020
- Hearing Examiner's Update on Decision, issued January 27, 2021

*Findings, Conclusions, and Decision
City of Issaquah Hearing Examiner
High Street Collection Preliminary Plat
Nos. PP17-00002 & PRJ16-00013*

Page 50 of 50

AB 8136, Exhibit D
 RE: Consolidated Appeal of Hearing Examiner's Denial of the Preliminary Plat of
 High Street Collection at Issaquah Highlands, QUASI-JUDICIAL
 APP21-00001 & APP21-00002

- PROPOSED HEARING SCHEDULE AND PROCEDURES -

Council Rule 4.15(D)¹ is supplemented with the following procedures agreed upon by the parties:

- A. The Parties will submit a maximum of 5-page supplemental brief via email to the City Clerk, clerks@issaquahwa.gov, and each other no later than 5 pm, March 23, 2021.
- B. Hearing procedures for hearing on April 5, 2021 will occur as follows:
 - 1. Council President will preside over the Hearing and will provide Opening Remarks.
 - 2. Brett Vinson will make inquires related to conflict-of-interest.
 - 3. Brett Vinson will provide a brief introduction of relevant facts of underlying appeal in lieu of staff.
 - 4. Each side will have a total of 15 minutes for argument inclusive of rebuttal time. Each side will be responsible for ensuring that time for rebuttal is reserved. The parties can allocate the time between the vesting appeal and the plat appeal in their discretion.
 - 5. The order for argument will be as follows:
 - a. City
 - b. IHIF-C
 - c. City Rebuttal if time reserved
 - d. IHIF-C Rebuttal if time reserved
 - 6. Closing Argument – 10 mins each. City first followed by IHIF-C.

¹ Available online at: Issaquahwa.gov/councilrules



1111 Third Avenue
Suite 3000
Seattle, WA 98101

Main: 206.447.4400
Fax: 206.447.9700
foster.com

March 23, 2021

BY U.S. MAIL AND EMAIL

Tina Eggers, City Clerk
City of Issaquah
PO Box 1307
Issaquah, WA 98027
clerks@issaquahwa.gov

RE: Summary of IHIF-Commercial, LLC (“Shelter”) Appeal to the City Council, and response to the Administration’s Appeal to the Council

Councilmembers:

The Administration and Hearing Examiner took forty months – over three-and-a-half years – to deny Shelter’s 10-lot plat application that both the Administration and Hearing Examiner agree should be approved. In so doing, the Administration, including the Director, staff, and the City Attorney, invented a new approach to vested rights that so plainly violates state law that the Hearing Examiner felt he must reject Shelter’s plat application rather than violate Shelter’s vested rights by applying the Administration’s vesting determination to the plat.

The Council must now decide whether it will join the Administration in its years-long violation of Shelter’s rights. If Councilmembers read nothing else in the Hearing Examiner’s decision, they should read pages 40-43. It is an extraordinary explanation of the ways in which the Administration’s approach to vesting violates the law: the Hearing Examiner euphemistically describes this approach as “highly problematic,” *see page 41*. The Administration’s own appeal to this Council derides this analysis of the law as “dicta” but does not cite any authority to demonstrate that it is wrong. The Hearing Examiner’s analysis is correct, and by denying the plat he declined to participate in the Administration’s violation of Shelter’s vested rights.

The Hearing Examiner’s denial and Shelter’s appeal place the vesting issue before the Council to decide whether it too, as the City’s final decision-maker, will participate in the Administration’s violation of Shelter’s vested rights.

In addition, Shelter’s appeal gives the Council the opportunity to correct the Administration’s refusal to recognize that Shelter’s Site Development Permit (“SDP”) and Administrative Site Development Permit (“ASDP”) applications are vested through Shelter’s plat application. By confirming that Shelter’s SDP and ASDP applications are vested through the plat, Council can begin to bring to an end the accrual of millions of dollars of damages that Shelter has suffered as a consequence of the Administration’s years-long refusal to abide by established law. These damages presently exceed \$10 million, and they rise by tens of thousands of dollars each day.

The Administration, in contrast, asks this Council to uphold the Director’s vesting determination in his Staff Report, and thereby approve the Administration’s ongoing denial of

Summary of Appeal to the City Council

March 23, 2021

Page 2

Shelter's vested rights. The Administration also asks the Council to approve Shelter's plat, but to condition the plat to ensure compliance with portions of the Replacement Regulations, even though the Administration purports to recognize that the application is vested *against* those same Replacement Regulations. Council should decline to participate in such unlawful nonsense and should approve Shelter's plat with the conditions proposed by Shelter, which ensure that the plat complies with the regulations in the Development Agreement to which Shelter is vested.

I. Council should grant Shelter's appeal

Shelter's appeal challenges two separate City decisions: (1) the Hearing Examiner's denial of Shelter's plat application, and (2) the Director's vesting determination that underlies that denial. The City's cross-appeal, by contrast, appeals only the denial of the plat. Both parties agree that Shelter's plat is vested and should be approved, but they disagree about the meaning of the word "vest," which the Director's determination redefines in a way that contradicts decades of established law. To "vest" means that the development regulations in place at the time of vesting apply to an application – in this case, the Development Standards in the Issaquah Highlands Development Agreement that were in effect in August of 2017 when Shelter applied for its plat. Yet the Administration proposes plat conditions based on the Replacement Regulations (Ch. 18.19B IMC), which were adopted seven months *after* Shelter's plat vested to the Development Agreement.

Shelter disagrees with the Hearing Examiner's ruling that he lacks jurisdiction to evaluate the Director's vesting determination and the Administration's proposed conditions, but this Council has such jurisdiction and must decide these issues. Fortunately, this case requires Council only to apply settled law to undisputed material facts.

Settled law: Under the Washington State subdivision statute, a plat application "shall be considered under the . . . zoning or other land use control ordinances, in effect" on the date the application is submitted. RCW 58.17.033(1). This statute codifies the judge-made concept of "vested rights:" regulations adopted after an applicant submits an application do not apply to the project. *See, e.g., West Main Assoc. v. City of Bellevue*, 106 Wn.2d 47, 51, 720 P.2d 782 (1986). A vested application can be governed by *one* set of regulations only; basing a decision on parts of one set of regulations and parts of another results in a project that complies with no law. *Reclamation Co. v. Bjornsen*, 125 Wn. App. 432, 105 P.3d 94 (2005).

As the Hearing Examiner wrote, the land use approval process is iterative: an applicant submits the application, then staff issue correction notices, and the applicant makes changes and provides additional information until the application satisfies all applicable law and the regulator approves it. *See* Decision at p. 42 (citing and quoting *Friends of the Law v. King County*, 123 Wn.2d 518, 869 P.2d 1056 (1994)). Development rights vest when the complete application is submitted, not after all corrections are addressed. *Bjornsen, supra*, 125 Wn. App. at 435. This concept is fundamental to Washington vesting law. *Id.* (vesting on a date certain avoids courts having to track the moves and countermoves of the parties). Supplemental materials, including responses to corrections, are part of, and evaluated under the same law as, the vested application. *See Friends of the Law v. King County*, 123 Wn.2d 518, 869 P.2d 1056 (1994).

Summary of Appeal to the City Council

March 23, 2021

Page 3

Undisputed material facts: When City staff deemed Shelter’s plat application complete in August of 2017, the only “zoning or other land use control ordinances” in effect were the Development Standards of the Development Agreement. Shelter submitted supplemental information in support of its application, and responded to staff correction notices, but that does not change staff’s conclusion that Shelter’s application was complete and vested when submitted.

More than seven months after Shelter submitted its plat application, this Council adopted the “Replacement Regulations” that terminated the Development Agreement and implemented new zoning for the Highlands.

Application of settled law to undisputed fact: All parties agree that Shelter’s plat is vested. The correct application of settled law to undisputed fact requires Council to (1) confirm that only the Development Agreement governs Shelter’s plat application, and thus reject the Administration’s attempt to redefine “vesting” by disregarding certain application materials and conditioning the plat to meet sections of the Replacement Regulations; and (2) approve Shelter’s plat subject to Shelter’s proposed conditions, which properly implement the Development Agreement and ensure that plat approval serves the public interest.

These are not close questions; even the Administration’s appeal acknowledges that there is no evidence that the plat does not comply with the Development Agreement. There is no lawful reason to reject the plat, so if Council affirms the Hearing Examiner a reviewing court will reverse. And, because the Hearing Examiner knew (and cited) the law that Council must ignore if it approves the plat as proposed by the Administration, the Council also will subject the City to an award of damages and attorneys’ fees under RCW 64.40.020 for Council’s knowing disregard of Shelter’s rights.

II. Council should reject the Administration’s appeal

The Hearing Examiner denied Shelter’s plat because he did not agree with the Director’s vesting determination but believed he lacked jurisdiction to reverse that vesting determination. The Council has such jurisdiction because the Council is the City’s final decision-maker, and the Council’s decision about which regulations apply is the fundamental decision that must be made in response to both this appeal and the Administration’s appeal.

Although the Director’s vesting determination correctly confirms that Shelter’s application vested on August 1, 2017, it then re-defines the concept of vested rights, contrary to all statutory and judicial authority, as a “two-tier” system, in which some application materials are vested to and governed by the law in effect when the application was submitted, while other materials submitted in support of the *same application* are not vested and are thus either governed by the regulations that Council adopted months later or are disregarded altogether. This concept of applying two separate and contradictory regulatory regimes to the same vested project violates the law cited by the Hearing Examiner that the Administration’s Notice of Appeal simply asks this Council to ignore.

The Administration’s appeal also asserts, without any citation to facts or law, that Shelter’s submittal of additional information complicated the plat review. City’s Appeal § 3.5.

Summary of Appeal to the City Council

March 23, 2021

Page 4

This unsupported allegation is irrelevant to determining which regulations apply to Shelter's vested application, and no law supports the Administration's position that an application is limited to only the materials submitted on the date of a complete application. As the Hearing Examiner acknowledged, the land use review process is iterative and inevitably requires the applicant to provide additional information. *See* Decision at p. 42 (citing *Friends of the Law v. King County*, 123 Wn.2d 518, 869 P.2d 1056 (1994) ("It is to be expected that modifications will be made during the give and take of the approval process.")).

In addition to applying an illegal combination of regulations to Shelter's plat application, the Staff Report goes further and asks the Hearing Examiner (and now the Council) to disregard supplemental information Shelter submitted after the Development Agreement's "Buildout Period," a concept that is irrelevant to vesting under the state subdivision statute quoted above. Once an application vests, the law draws no distinction between application materials submitted at the time of vesting and application materials submitted to supplement the vested application prior to a final decision on the application. Shelter's supplemental materials simply added detail or responded to corrections and did not materially alter the plat.

Shelter's plat application, (including supplemental materials) is utterly ordinary in every way except for how the Administration is handling it. Shelter submitted its application for a 10-lot plat at the same time Polygon applied to divide the neighboring property into over 70 lots, yet the Administration recognized Polygon's vested rights and processed and approved Polygon's plat under the Development Agreement in less than a year. *See* Hearing Examiner's Decision at p. 42. The Administration's differential treatment of Shelter violates both its vested rights and the constitutional rights that underpin vested rights (*see* Shelter's Appeal, pp. 4-6, Statements of Error 4-6).

This Council should reject the Administration's appeal and decline to apply the Replacement Regulations to Shelter's vested plat application.

III. Council should confirm that Shelter's SDP and ASDP vested through the plat

In addition to making a vesting determination on Shelter's plat, the Director's vesting determination in the Staff Report gratuitously made another vesting determination on Shelter's SDP and ASDP applications by determining that Shelter's vested plat application did not vest Shelter's SDP and ASDP applications. It was unnecessary for the Director to make this determination because, as the Hearing Examiner noted, SDP and ASDP vesting is not part of this plat appeal, Decision at p. 41. Nonetheless, the Director made the determination, apparently in an effort to use the plat process to support the Administration's 2018 decision to "di-vest" the SDP and ASDP applications. Shelter had to appeal this unnecessary vesting determination, and the City Council now must review it.

As Shelter explained in its Notice of Appeal, Shelter's vested plat also vests applications for projects within the plat, and the Director's contrary determination contradicts binding Supreme Court precedent in *Noble Manor v. Pierce County*, 133 Wn.2d 269, 943 P.2d 1378 (1997). As explained at pages 16-17 of Shelter's Notice of Appeal, Shelter's SDP and ASDP applications are vested to the Development Standards in the Development Agreement by means of the plat and because of the detailed information that Shelter presented to City staff about how

Summary of Appeal to the City Council

March 23, 2021

Page 5

each SDP and ASDP application fits into the plat. The entire purpose of Shelter’s plat is to enable development of the projects covered by the SDP and ASDP applications and all of the Allowable Development shown on the face of the plat, and a plat application does not just vest the right to draw lines on a map: it also vests the right to develop the plat in the manner disclosed to the City during the application process. *Noble Manor*, 133 Wn.2d at 280.

Council, sitting in its quasi-judicial capacity, must ensure that the City’s decisions comply with Washington law. By reversing the Director’s unlawful interpretation and ruling that Shelter’s SDP and ASDP applications are vested through Shelter’s vested plat, consistently with cases interpreting RCW 58.17.033, Council will not only comply with Washington law, but also stop the accrual of additional damages (and attorneys’ fees) and moot the need for Shelter’s concurrent judicial appeal regarding those applications.

IV. Conclusion

For all the reasons explained in Shelter’s appeal and summarized above, the Council should grant Shelter’s appeals of the Hearing Examiner’s denial of the plat and of the Director’s vesting determination, and also reject the Administration’s appeal which asks the Council to apply the Replacement Regulations to Shelter’s plat application. The Council should approve the plat subject to the conditions proposed by Shelter, which are consistent with the Development Agreement to which the plat is vested.

Sincerely,

FOSTER GARVEY PC



Patrick J. Schneider

FOSTER GARVEY PC



Steven J. Gillespie

MCCULLOUGH HILL LEARY, PS



Jacqueline C. Quarré

Attorneys for Appellant IHIF-Commercial, L.L.C.

cc (via email): Candace Baer, City of Issaquah
City’s Attorneys

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

BEFORE THE ISSAQUAH CITY COUNCIL

In the Matter of the Appeal of the	)	No. APP21-00001 & APP21-00002
)	
Hearing Examiner’s Findings, Conclusions	)	COMMUNITY PLANNING &
and Decision on IHIF-Commercial’s	)	DEVELOPMENT DEPARTMENT’S
Application for Preliminary Plat Approval	)	APPEAL BRIEF
)	

I. INTRODUCTION

The Community Planning & Development Department (“Department”) hereby submits its brief for the above-captioned closed-record appeal, which will review the Hearing Examiner’s February 1, 2021 Findings, Conclusion and Decision (“Plat Decision”) denying the preliminary plat application filed by applicant IHIF-Commercial (“Shelter”). The City Council should reverse the Examiner’s denial of Shelter’s plat application and affirm the Department’s vesting determination.

II. ARGUMENT

2.1 The Department’s Vesting Determination Was Correct.

“Vesting refers generally to the notion that a land use application, *under the proper conditions*, will be considered only under the land use statutes and ordinances in effect at the time of the application's submission.”¹ The standard for preliminary plat vesting codified at RCW 58.17.033(1) generally tracks this rule, but is subject to numerous exceptions. Vesting applies only to substantive local land use controls; mitigation requirements, state law mandates and processing procedures do not

¹ *Friends of the Law v. King County*, 123 Wn.2d 518, 522, 869 P.2d 1056 (1994) (emphasis added) (punctuation omitted).

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

vest.² Washington courts have also repeatedly emphasized that, with respect to preliminary plat vesting, “*what is vested is what is sought in the application*”.³

Separate from this general standard, parties may define the duration and extent of vesting contractually through a development agreement—a binding, recorded contract that controls the development of a particular area.⁴ The 1996 Issaquah Highlands Development Agreement that previously governed IHIF-C’s property utilized this approach.⁵ A central feature of the Development Agreement was a 20-year Buildout Period during which the City was prohibited from adopting and enforcing new land use regulations within the Issaquah Highlands.⁶ The Buildout Period ended on September 18, 2017.⁷ The Development Agreement expressly provided that development proposals submitted after the Buildout Period would be fully subject to the City’s new regulations upon adoption and thus were not vested to the Agreement.⁸

The Department’s vesting determination for Shelter’s plat application accurately reflected, and cited, the state law and contractual standards above.⁹ Shelter’s challenge to that determination disregards them.

A preliminary plat is “a neat and *approximate* drawing of a proposed subdivision showing the *general layout* of streets and alleys, lots, blocks, and *other elements of a subdivision*[.]”¹⁰ Shelter’s plat application, however, did not confine itself to this simple, basic format. In the narrative accompanying its original August 1, 2017 preliminary plat submittal, Shelter unilaterally asserted that all *future* site development on its property would be subject to the land use controls and mitigation framework of the Development Agreement—even though Shelter had not yet identified, much less applied for, any specific development proposal other than the basic subdivision of its land.¹¹ Shelter

² See, e.g., *Snohomish County v. PCHB.*, 187 Wn.2d 346, 358-70, 386 P.3d 1064 (2016); *Pavlina v. City of Vancouver*, 122 Wn. App. 520, 528-30, 94 P.3d 366 (2004); *New Castle Inv. V. City of LaCenter*, 98 Wn. App. 224, 230-38, 989 P.2d 569 (1999); *Lincoln Shiloh Assocs. v. Mukilteo Water Dist.*, 45 Wn. App. 123, 128, 724 P.2d 1083 (1986); *Graham Neighborhood Assn. v. Pierce County, et al.*, 162 Wn. App. 98, 115-16, 252 P.3d 898 (2011).

³ *Snohomish County*, 187 Wn.2d at 363 (quoting *Noble Manor Co. v. Pierce County*, 133 Wn.2d 269, 284, 943 P.3d 1378 (1997) (emphasis added)).

⁴ See RCW 36.70B.170(3)(i); RCW 36.70B.180.

⁵ Exhibit P; Exhibit Q.

⁶ Exhibit P, §3.23. See Appendix A-1.

⁷ Exhibit L.

⁸ Exhibit P, §3.23.2, §5.13; Exhibit Q, §3.23.2, §5.13. This interpretation is dictated by the plain text of the Development Agreement itself, was formally endorsed by the City’s Director, and has been upheld by the Hearing Examiner. See *Id.*; Exhibit F.

⁹ Exhibit R, at 6-11.

¹⁰ RCW 58.17.020(4) (emphasis added).

¹¹ Exhibit B.1.3, at 5. See Appendix A-2.

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

even included a note on its plat map purporting to vest all future building permits—again, for unspecified future projects that had not even been applied for.¹²

Several months later, *after* the Buildout Period of the Development Agreement had expired, Shelter proceeded to upload a purported “supplement” to its original plat application. This supplement depicted, for the first time, the footprints of future buildings within the plat.¹³ Shelter’s subsequent plat submittals—all filed *after* the expiration of the Buildout Period—included these buildings. They also contained an excessive degree of construction-level detail depicting future site development that in the Department’s view was inappropriate for and inconsistent with the purpose of a preliminary plat application, and was more appropriately reviewed at the site development permit and/or construction permit stage under the relevant City standards and procedures for those approvals.¹⁴

In this manner, Shelter thus attempted to both *prospectively* and *retroactively* vest the future development of its property. The Department was compelled to address these attempts in reviewing Shelter’s plat application. This was not an abstract or theoretical concern; the City’s new Issaquah Highlands regulations contain various zoning standards (e.g., setbacks, FAR requirements, open space mandates, etc.) that future developments must satisfy.¹⁵

A plat application does not vest future development of the underlying property except to the very limited extent necessary to effectuate a *specific* development proposal that was identified in the plat application itself.¹⁶ Shelter’s attempt to use its plat application to broadly vest unspecified future development on its property was correctly rejected by the Department.

The Department likewise properly refused to recognize vesting under the Development Agreement for the buildings and related construction-level detail that were depicted in Shelter’s post-Buildout Period plat submittals.¹⁷ These materials track the site development permit applications Shelter filed in the fall of 2017—*after* the Buildout Period expired—which both the Director and the Examiner have correctly determined are *not* vested to the Agreement.¹⁸ A contrary outcome would effectively circumvent the clear purpose and legal effect of the Buildout Period. Shelter cannot obtain through the back door what it could not have obtained through the front.

¹² Exhibit B.1.2, at 1 n.7. See Appendix A-3.

¹³ Exhibit B.3.2. See Appendix A-4 Shelter’s submittal form stated “Change in Original Proposal.” Exhibit B.3.1.

¹⁴ Exhibit B.6.2; Exhibit VV.1.

¹⁵ See, e.g., IMC 18.19B.140.

¹⁶ *Noble Manor*, 133 Wn.2d at 284; *Alliance Investment Group of Ellensburg, LLC v. City of Ellensburg*, 189 Wn. App. 763, 773, 358 P.3d 1227 (2015).

¹⁷ Exhibit R, at 8-11.

¹⁸ Exhibit B.3.2; Exhibit B.6.2; Exhibit F.

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

In criticizing the Department’s vesting determination, the Hearing Examiner and Shelter have each cited heavily to *Friends of the Law v. King County*¹⁹ and *East County Reclamation Co. v. Bjornsen*.²⁰ Neither case contradicts the Department’s position. *Friends of the Law* merely acknowledges that modifications to a preliminary plat application are generally to be expected “during the give and take of the approval process”.²¹ Nothing in the Court’s decision remotely suggests that a plat applicant can expand the original scope of its vested rights prospectively (through generic, unilateral statements of intent) or retroactively (through post hoc “supplements” to its original application) in the manner attempted by Shelter. *Bjornsen*, which did not involve a plat in the first instance, is even less relevant. That case merely holds that “an applicant. . . may not select which laws will govern its application.”²² This appeal involves precisely the opposite scenario: Shelter has not sought to selectively vest its preliminary plat, but rather to use its plat application as an umbrella to impermissibly vest future site development. Irrespective, both *Friends of the Law* and *Bjornsen* far predate the Washington Supreme Court’s current expression of the vested rights doctrine,²³ and—critically—neither case involved a contractually defined vesting framework under a development agreement.

2.2 The Hearing Examiner Erred by Denying Shelter’s Plat Application.

That Shelter’s plat application should have been approved is a matter of basic evidentiary weight. Both the applicant and the Department advocated for its approval, and no member of the public testified in opposition. *The record contains no evidence whatsoever suggesting that the application does not satisfy the basic standards for plat approval*—standards that have not appreciably changed during the relevant period, that do not meaningfully hinge on the vested status of the plat, and which were largely ignored by the Hearing Examiner’s Decision.²⁴

The Hearing Examiner’s rationale for denying the plat was his stated uncertainty over which standards to apply and his unilateral belief that the parties’ vesting dispute should be resolved by a court before the Examiner could approve it.²⁵ Neither of these reasons is sound. The City’s decisional standards prohibit denial of a project application unless the proposal affirmatively does *not* comply

¹⁹ 123 Wn.2d 518, 869 P.2d 1056 (1994). Plat Decision at 41-42; Shelter Appeal at 11.
²⁰ 125 Wn. App. 432, 105 P.3d 94 (2005).
²¹ 123 Wn.2d at 528.
²² 125 Wn. App. at 439 (emphasis added).
²³ See *Snohomish County*, 187 Wn.2d 346, *supra*.
²⁴ See, e.g., RCW 58.17.110; Chapter 18.13 IMC; Chapter 13 IMC (previous).
²⁵ Plat Decision at 1, 40-43.

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

with the criteria for approval.²⁶ The only criterion the Examiner identified in this regard is the generic “public use and interest” standard of RCW 58.17.110—a basis for denial that Washington courts have emphatically rejected where, as here, a plat is otherwise compliant.²⁷

More fundamentally, the parties’ disagreement over the extent of vested rights is not grounds to deny the application where the Examiner has no authority over vesting issues in the first instance.²⁸ The Hearing Examiner’s only role is to evaluate the plat’s compliance within the parameters of the Department’s vesting determination.²⁹ The Examiner correctly acknowledged this mandate³⁰ but failed to follow it. Even if the vesting determination was erroneous or confusing (it wasn’t), this should not have prevented the Hearing Examiner from fulfilling his own prescribed duty under the code. The Examiner’s denial of an unopposed plat under these circumstances was clearly erroneous and should be reversed.

III. CONCLUSION

For the reasons set forth above, the City Council is respectfully requested to reverse the Hearing Examiner’s denial of Shelter’s preliminary plat application and affirm the Department’s vesting determination.

DATED this 23rd day of March 2021.

OGDEN MURPHY WALLACE, PLLC

By /s/ J. Zachary Lell
J. Zachary Lell, WSBA 28744
Attorneys for Department of Planning & Community
Development

²⁶ IMC 18.04.220(B)
²⁷ See, e.g., *Carlson v. Town of Beaux Arts Village*, 41 Wn. App. 402, 406-08, 704 P.2d 663 (1985).
²⁸ IMC 18.01.050(C).
²⁹ *Id.*; IMC 18.03.060(B); IMC 18.04.220.
³⁰ Plat Decision at 41.

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

DECLARATION OF SERVICE

I, Kenya Owens, an employee of Ogden Murphy Wallace, PLLC, make the following true statement:

On the 23rd day of March 2021, I provided the attached via email to the following:

City Clerk’s Office:
CITY OF ISSAQUAH
Email: clerks@issaquahwa.gov

Appellant IHIF-Commercial, LLC
Patrick J. Schneider
Steven J. Gillespie
FOSTER GARVEY, PLLC
Email: pat.schneider@foster.com
steve.gillespie@foster.com
Legal Asst. nikea.smedley@foster.com

Appellant IHIF Commercial LLC
Jacqueline Quarre
McCullough Hill Leary
701 Fifth Avenue, Suite 6600
Seattle WA 98104
Email: jquarre@mhseattle.com

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

EXECUTED at Seattle, Washington this 23rd day of March 2021.

/s/Kenya Owens

Kenya Owens

Appendix A-1
Exhibit P (Sections 3.23 and 5.13)

governing Development Standards, or if substantial changes or new information relating to unmitigated impacts occur, utilizing the procedures and standards set forth in Appendix I. The City's annexation of the Property shall constitute the City's adoption of the County Issaquah HighlandsGrand Ridge EIS for purposes of review of Implementing Approvals after annexation.

3.22.3 County Review of Certain Revisions. The County shall be entitled to review certain revisions to the Development Standards to the extent provided in Appendix M (Sec. 4) and Section 6.4 of the Joint Agreement.

3.23 VESTING OF DEVELOPMENT STANDARDS AND MITIGATION

All development within the UGA shall be governed by the Development Standards and shall be implemented through plats, short plats, binding site plans, site development permits, building permits and other permits and approvals ("Implementing Approvals") issued by the City. A "Buildout Period" of twenty (20) years following first final plat approval is established for the development and construction of uses for the Issaquah HighlandsGrand Ridge Project. During the Buildout Period, the City shall not modify or impose new or additional Development Standards beyond those set forth in this Agreement. To the extent this Agreement does not establish Development Standards covering a certain subject, element or condition, then the Project shall be governed by the city codes and standards in effect upon the date of this Agreement, except as follows:

3.23.1 During Buildout. After notice, a public hearing and adoption of findings, the City Council may modify one or more Development Standards during the Buildout Period to the extent required to avoid a serious threat to the public health or safety. Notwithstanding the foregoing, the Uniform Building Code, Uniform Fire Code and other construction codes in effect on the date of a building permit application or other construction application shall apply, except no code changes after the date of this Agreement shall require retrofitting or modification of utilities, facilities or other infrastructure which were installed in accordance with this Agreement unless such retrofitting or modifications are required to avoid a serious threat to the public health or safety. The standards for surface and ground water stated in Section 3.7 may be reviewed and revised at the end of the fifth year following the recording of the first final plat and each five years thereafter, until completion of buildout, to the extent the revised standards meet the following criteria: are generally applied and proven effective throughout the City or County; are required to solve an unanticipated water quality or quantity problem; do not require the retrofit or resizing of existing or permitted facilities or reduction of area for the Allowable Development; are not the result of inadequate regional or area-wide facilities; do not preclude the implementation of the overall Project or its divisions consistent with this Agreement nor preclude the Partnership's ability to obtain commercially reasonable financing nor render the remaining project or

divisions financially infeasible by imposing costs which are unreasonable in light of the remaining authorized development; and provide equivalent or better protection for aquatic resources. A disagreement over the existence of a serious threat to public health or safety or the applicable criteria for revised surface and groundwater standards shall be decided through dispute resolution under Section 5.21 of this Agreement.

3.23.2 After Buildout. The Development Standards shall continue to apply to all applications for Implementing Approval submitted after expiration of the Buildout Period, except either party may terminate this Agreement, and the zoning and development regulations may be modified, as provided in Section 5.13.

3.23.3 Application and Processing Fees. The application and processing fees for all Implementing Approvals shall be established under Appendix L.

3.23.4 Replacement Regulations. During and after the Buildout Period, the Partnership, as an alternative to using one or more of the Development Standards for particular subject matters specified in Section 3, may request City approval to use new code provisions or generally-applicable standards for that subject adopted after the execution of this Agreement. After the Buildout Period, new standards also may be adopted as provided in Section 5.13.

3.24 ANNEXATION

3.24.1 City Zoning. The Issaquah City Council shall consider adoption of an "Urban Village" ("UV") zoning classification, or comparable master plan zone, to be added to the Issaquah Municipal Code prior to or concurrent with the City Council's consideration of the Zoning Ordinance under Section 3.24.4(a) below. A sample "UV" zoning ordinance is attached as Exhibit 4.

3.24.2 Annexation Through Petition Method. This Agreement shall be considered an Irrevocable Notice of Intent to Annex, subject to the terms of this Agreement. The Partnership is authorized to circulate a petition for annexation of the UGA portion of the Property which may be conditioned upon the City's completion of actions required in this Section 3.24.

3.24.3 Timing of Annexation. The Partnership shall submit the Annexation Petition on a date mutually agreed with the City, but not later than thirty (30) days following execution of this Agreement.

3.24.4 City Annexation Hearing and Council Action. Upon receipt of the Partnership annexation petition, the City shall hold final annexation hearings consistent with state and local laws prior to annexation of the UGA portion of the Property. The City's final annexation hearing shall consider two (2) ordinances:

provided in Appendix D (storm water and ground water facilities), Appendix F (water service), Appendix G (sewer service), Appendix J (transportation) and Appendix K (capital facilities plan).

5.12 AUTHORIZED AGENT

Each Partnership hereby designates Port Blakely Communities, Inc. ("PBC") as its agent with authority to give notices, approvals and otherwise act pursuant to this Agreement. Unless otherwise stated by the Partnership, representations and actions by PBC shall represent and bind each Partnership as to its respective ownership within the Property.

5.13 TERM

The term of this Agreement shall continue at a minimum through the Buildout Period, and shall continue after the Buildout Period unless and until either the City or the Partnership (or successor owners which own at least 51%, excluding all City-owned land, within the UGA portion of the Project) gives notice of termination. The City's notice of termination shall use the same notice procedures which would apply to a rezone of the UGA portion of the ~~Issaquah Highlands~~ Grand Ridge Project. The City shall mail notice to the Partnership under Section 5.18 and to any business or homeowner association or community groups which the City in its sole discretion determines should receive notice, but the failure to provide notice pursuant to this sentence shall not affect the validity of the City's termination notice using rezone procedures nor subject the City to any liability. Notice by the Partnership (or successors) shall be delivered to the City as provided in Section 5.18 of this Agreement. No sooner than six (6) months after the notice of termination, the City shall hold public hearings and shall adopt zoning and related development standards for the UGA portion of the Property, or portions thereof as determined appropriate by the City. Upon such adoption, this Agreement shall terminate and thereafter the UGA portion of the Property shall be governed by the adopted City zoning and related development regulations.

5.14 MORTGAGEE RIGHTS

Any person who is the beneficiary of a deed of trust or mortgagee ("Mortgagee") of a mortgage secured against all or any portion of the Property ("Mortgaged Parcel") shall be entitled to notice of default and opportunities to cure as provided in this section. Any Mortgagee may provide written notice to the City requesting a copy of all notices of default and correspondence, claims or litigation related thereto or the Mortgaged Parcel. For each Mortgagee who has provided such notice, the City during the remaining term in this Agreement shall notify such Mortgagee of any event of default, claim or litigation relating to the Partnership or the Mortgaged Parcel under this Agreement and provide the same opportunity to cure such event of default, within the times provided below, as provided to the Partnership under this Agreement. Failure of

Appendix A-2
Exhibit B.1.3 (Page 5)

This Plat is consistent with the Development Agreement vision and will allow development that will enhance the overall live/work/play community as described in *Appendix A, Issaquah Highlands Guiding Principles* (see pages 5-8). Pursuant to Section 3.23 and 6 of the Development Agreement, a Plat is an “Implementing Approval”, which vests to the “Development Standards” established in the Development Agreement. Therefore, future development proposals within this Plat shall be vested to the Development Standards under the Development Agreement.

Permit History

- This parcel was included as part of the original land included in the Grand Ridge/Issaquah Highlands Development in 1996.
- In January 2002, a Site Development Permit for Microsoft’s Issaquah Highlands’ campus was approved (SDP01-001IH). The campus encompassed 150 acres including the land in this Plat.
- A Lot Line Adjustment – LLA14-00002 and Right-of-Way dedication (Recording No. 20140728000736) (“BLA”) resulted in the dedication of NE Discovery Drive and segregated the subject parcel into a new development parcel – “Lot B north of Discovery”.
- In March of 2016 Applicant granted access and utilities easements to Issaquah Highlands Investment Fund, LLC (“Polygon”) for the future extension of 7th Avenue through the Property and the future extension of NE Ellis Drive through the Property. The easement for 7th Avenue extension was amended and restated in December of 2016. Applicant also granted Polygon an access and utility easement for a 26’ strip along a portion of the shared property line between Lot B North of Discovery and Lot A of the BLA. These street segments are required to be constructed by Polygon in connection with their development on Lot A of the BLA.

The High Street Collection at Issaquah Highlands Plat is governed by a variety of development regulations set forth in the Development Agreement and its associated appendices. As part of the project narrative, the Applicant has prepared the following summary of regulations and the applicant’s response to these requirements.

III. Development Standards and Regulations

Main Body of the Development Agreement

The Main Body of the Development Agreement establishes the framework for all Issaquah Highlands development, per Section 18.06.120B of the Issaquah Municipal Code. To that end, the Development Agreement contains the base information for the Issaquah Highlands development, including land use allocation, development regulations, number of residential units, amount of retail and commercial square footage, required mitigation strategies, etc.

Under Section 3.2, of the Development Agreement, Allowable Development for Issaquah Highlands is established. This Plat includes the portion of the Allowable Development allocated

Appendix A-3
Exhibit B.1.2
Page 1 (Expanded)

VERTICAL DATUM

(PER DAVID EVANS AND ASSOCIATES) NAVD 88 BASED ON N.G.S. STATION "MERCIA" LOCATED IN BELLEVUE, WASHINGTON.

BASIS OF BEARINGS

N88°02'05"W ALONG THE NORTH LINE OF THE NE 1/4 SECTION 27, TOWNSHIP 24N, RANGE 6E PER THE FINAL PLAT OF ISSAQUAH HIGHLANDS WEST 45, ACCORDING TO THE PLAT THEREOF, RECORDED IN VOLUME 235 OF PLATS, AT PAGES 15 THROUGH 22, RECORDING NO. 20060819000212, RECORDS OF KING COUNTY, WASHINGTON.

REFERENCES

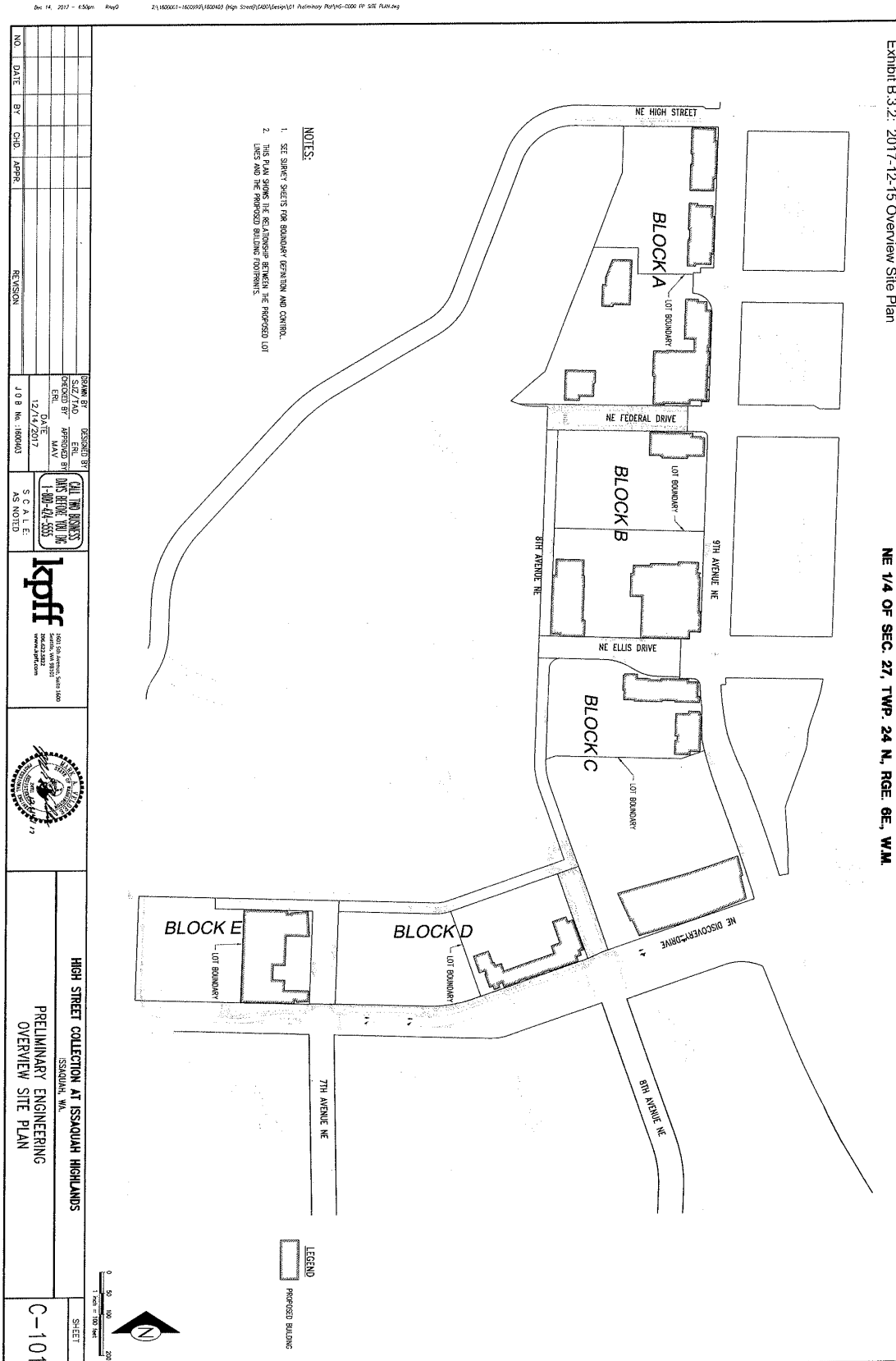
1. CITY OF ISSAQUAH BOUNDARY LINE ADJUSTMENT NO. 11A14-00002, RECORDED AUGUST 4, 2014 AS RECORDING NO. 20140804900004, RECORDS OF KING COUNTY, WASHINGTON
2. ISSAQUAH HIGHLANDS DEVELOPMENT AGREEMENT

NOTES

1. ALL TITLE INFORMATION SHOWN ON THIS MAP HAS BEEN EXTRACTED FROM FIRST AMERICAN TITLE COMPANY SUBDIVISION GUARANTEE NO. 2815538, DATED DECEMBER 22, 2016. IN PREPARING THIS MAP, CORE DESIGN, INC. HAS CONDUCTED NO INDEPENDENT TITLE SEARCH NOR IS CORE DESIGN, INC. AWARE OF ANY TITLE ISSUES AFFECTING THE SURVEYED PROPERTY OTHER THAN THOSE SHOWN ON THE MAP AND DISCLOSED BY THE REFERENCED GUARANTEE NO. 2815538. CORE DESIGN, INC. HAS RELIED WHOLLY ON FIRST AMERICAN'S REPRESENTATIONS OF THE TITLE'S CONDITION TO PREPARE THIS SURVEY AND THEREFORE CORE DESIGN, INC. QUALIFIES THE MAP'S ACCURACY AND COMPLETENESS TO THAT EXTENT.
2. THIS SURVEY REPRESENTS VISIBLE PHYSICAL IMPROVEMENT CONDITIONS EXISTING ON DECEMBER 6, 2016. ALL SURVEY CONTROL INDICATED AS "FOUND" WAS RECOVERED FOR THIS PROJECT IN DECEMBER, 2016.
3. TOTAL PROPERTY AREA = 934,971± SQUARE FEET (21.4639± ACRES).
4. ALL DISTANCES ARE IN FEET.
5. THIS IS A FIELD TRAVERSE SURVEY. A SOKKIA FIVE SECOND COMBINED ELECTRONIC TOTAL STATION WAS USED TO MEASURE THE ANGULAR AND DISTANCE RELATIONSHIPS BETWEEN THE CONTROLLING MONUMENTATION AS SHOWN. CLOSURE RATIOS OF THE TRAVERSE MET OR EXCEEDED THOSE SPECIFIED IN WAC 332-130-090. ALL MEASURING INSTRUMENTS AND EQUIPMENT ARE MAINTAINED IN ADJUSTMENT ACCORDING TO MANUFACTURER'S SPECIFICATIONS.
6. UTILITIES OTHER THAN THOSE SHOWN MAY EXIST ON THIS SITE. ONLY THOSE UTILITIES WITH EVIDENCE OF THEIR INSTALLATION VISIBLE AT GROUND SURFACE ARE SHOWN HEREON. UNDERGROUND UTILITY LOCATIONS SHOWN ARE APPROXIMATE ONLY. UNDERGROUND CONNECTIONS ARE SHOWN AS STRAIGHT LINES BETWEEN SURFACE UTILITY LOCATIONS BUT MAY CONTAIN BENDS OR CURVES NOT SHOWN. SOME UNDERGROUND LOCATIONS SHOWN HEREON MAY HAVE BEEN TAKEN FROM PUBLIC RECORDS. CORE DESIGN ASSUMES NO LIABILITY FOR THE ACCURACY OF PUBLIC RECORDS.
7. FINAL PLAT AND BUILDING PERMITS ARE VESTED TO THE DEVELOPMENT STANDARDS UNDER THE ISSAQUAH HIGHLANDS DEVELOPMENT AGREEMENT. THE ALLOWABLE DEVELOPMENT SHOWN ON THIS PLAT HAS BEEN FULLY MITIGATED PER THE ISSAQUAH HIGHLANDS DEVELOPMENT AGREEMENT.
8. ALL DEVELOPMENT OF THE LAND DESCRIBED HEREON SHALL BE IN ACCORDANCE WITH THE PRELIMINARY PLAT, AS IT MAY BE AMENDED. UPON COMPLETION, THE IMPROVEMENTS ON THE LAND MAY BE INCLUDED IN ONE (1) OR MORE CONDOMINIUMS OR OWNED BY AN ASSOCIATION OR OTHER LEGAL ENTITY IN WHICH THE OWNERS OF UNITS HEREIN OR THEIR OWNER'S ASSOCIATION HAVE A MEMBERSHIP OR OTHER LEGAL OR BENEFICIAL INTEREST.
9. PEDESTRIAN ACCESS WILL BE PROVIDED THROUGH MID-BLOCK CROSSINGS IN EACH BLOCK. LOCATIONS TO BE DETERMINED AT FINAL DESIGN.

Exhibit B.1.1: 2017-08-01 Application

Appendix A-4
Exhibit B.3.2 (Excerpt)





**Before the City of Issaquah
City Council**

FINDINGS OF FACT, CONCLUSIONS, AND DECISION

April 19, 2021

DECISION APPEALED: (Appeal of Findings, Conclusions, and Decisions of the City of Issaquah Hearing Examiner, dated February 1, 2021) (Notice of Decision issued February 8, 2021) (High Street Collection at Issaquah Highlands Preliminary Plat)

FILE NO: No. PP17-00002, No. PRJ 16-00013

APPELLANTS: IHIF-Commercial LLC, APP21-00001
City of Issaquah, APP21-00002

I. DECISION

Having reviewed the entire record of the Appeal identified above the Issaquah City Council:

- (1) Grants both Appellants’ appeal reversing the denial of the Hearing Examiner’s Decision denying approval of the preliminary plat;
- (2) Grants the City’s appeal related to the conditions of the plat and vesting determination; and
- (3) Denies all other statements of error of appellant IHIF-C’s appeal.
- (4) This Decision shall replace the decision of the Hearing Examiner.

Victoria Hunt, Council President

Date

II. SUMMARY OF THE RECORD

The record for this Appeal consists of the record for the open record hearings dated March 9, 2020 and August 3, 2020 in addition to the Appeal Applications submitted by both parties, the supplemental briefs submitted, as well as arguments made during the closed-record hearing on April 5, 2021.

The City Council deliberated the issues related to the Appeal on April 5, 2021 and April 13, 2021.

No exhibits were officially submitted during the April 5, 2021 Hearing.

On April 13, 2021, the Council held a special meeting to discuss the record, issues raised by Appellants, and reach a decision on the Appeal. This written decision follows.

III. FINDINGS OF FACT

The following Findings of Fact of the Hearing examiner are adopted and incorporated herein. The references to the Exhibits set forth below are references to the Exhibits of the Hearing Examiner's record.

1. In 1995, the Washington State Legislature adopted Sections 36.70B.170 to .200 Revised Code of Washington (RCW), which allowed local governments to enter into development agreements with persons having ownership or control of real property. The statute provides that a "development agreement must set forth the development standards and other provisions that shall apply to and govern and vest the development, use, and mitigation of the development of the real property for the duration specified in the agreement." *RCW 36.70B.170(1)*. The statute further explains that the "development standards" that must be set forth in a development agreement include "[r]eview procedures and standards for implementing decisions" and a "build-out or vesting period for applicable standards." *RCW 36.70B.170(3)(i) and (j)*. The statute states that executing development agreements is a proper exercise of "county and city police power and contract authority." *RCW 36.70B.170(4)*. Finally, *RCW 36.70B.180* provides:

Unless amended or terminated, a development agreement is enforceable during its term by a party to the agreement. A development agreement and the development standards in the agreement govern during the term of the agreement, or for all or that part of the build-out period specified in the agreement, and may not be subject to an amendment to a zoning ordinance or development standard or regulation or a new zoning ordinance or development standard or regulation adopted after the effective date of the agreement. A permit or approval issued by the county or city after the execution of the development agreement must be consistent with the development agreement.

Exhibit F.

2. On June 19, 1996, the City entered into a development agreement entitled the "Grand Ridge Annexation and Development Agreement." This agreement later became known as the "Issaquah Highlands Annexation and Development Agreement" (Development Agreement, or DA), which covers development of the Issaquah Highlands area, including the subject property.

The DA, including its appendices and amendments, provides development standards related to everything from zoning and density requirements to agreed mitigation and specific design review requirements. Of particular note:

Unlike the municipal code, the DA does not generally provide for differing treatment of various land use permits. Instead, it defines *implementing approvals* as “land use approvals or permits” which “implement or otherwise are consistent [with the DA], including but not limited to plats, short plats, binding site plans, site development permits, building permits, and grading permits.”

Comprehensive standards for infrastructure throughout all of the Issaquah Highlands are provided, including standards related to: stormwater improvements (Appendix D); sewer service (Appendix G); roadways (Appendix H) and other transportation improvements (Appendix J); capital facilities improvements, including those related to park, police, fire, and public works (Appendix K); urban trails (Appendix T); and public spaces, such as parks, plazas, and woonerfs (Exhibit U).

The DA provides for a process to allow modifications to its own development standards, including “administrative minor modifications” (AMMs).

The DA provides detailed and specific guidelines related to processing and approval of land use permits (i.e, implementing approvals), covering permit approval from the preliminary application stage through the construction permit stage of development (Appendix L).

The DA provides for a dispute resolution process (Section 5.11).

Exhibit P.

3. The DA also contains provisions concerning, vesting and termination of the agreement. Specifically, the DA includes the following sections:

[Section] 3.23 VESTING OF DEVELOPMENT STANDARDS AND MITIGATION

All development with the [Urban Growth Area] shall be governed by the Development Standards and shall be implemented through plats, short plats, binding site plans, site development permits, building permits and other permits and approvals (“Implementing Approvals”) issued by the City. A “Buildout Period” of twenty (20) years following first final plat approval is established for the development and construction of uses for the [Issaquah Highlands] Project. During the Buildout Period, the

City shall not modify or impose new or additional Development Standards beyond those set forth in this Agreement. . .

* * *

[Section] 3.23.2 After Buildout. The Development Standards shall continue to apply to all applications for Implementing Approval submitted after expiration of the Buildout Period, except either party may terminate this Agreement, and the zoning and development regulations may be modified, as provided in Section 5.13.

* * *

[Section] 5.13 TERM The term of this Agreement shall continue at a minimum through the Buildout Period, and shall continue after the Buildout Period unless and until either the City or the Partnership . . . gives notice of termination. . . . No sooner than six (6) months after the notice of termination, the City shall hold public hearings and shall adopt zoning and related development standards for the UGA portion of the Property, or portions thereof as determined appropriate by the City. Upon such adoption, this Agreement shall terminate and thereafter the UGA portion of the Property shall be governed by the adopted City zoning and related development regulations.

Exhibit P.

4. The first final plat under the DA was approved on September 18, 1997. Accordingly, the “Buildout Period” under the DA expired on September 18, 2017. Under the terms of the DA, however, its development standards remained effective until the City Council voted to enact Ordinance No. 2830, effective March 28, 2018 (and later codified at Chapter 18.19B of the Issaquah Municipal Code (IMC)). The ordinance terminated the DA and promulgated “Replacement Regulations” replacing the development standards and regulations previously governing land subject to the DA. *Exhibit F; Exhibit L.*
5. Of particular note, the Replacement Regulations include different procedures than the DA related to the processing of land use applications, as found in IMC 18.19B.270. Under Appendix L of the DA, for instance, a preliminary plat would be processed as follows:
 - the proposal’s submission to the City; the City issuing a “sufficiency” determination within 10 calendar days; the City’s (now defunct) Major Development Review Team holding an application conference with the developer to furnish written comments; the City’s (now defunct) Urban Village Development Commission considering the matter within 60 days from the sufficiency determination and issuing a recommendation to the

City Council; and the City Council approving or denying the preliminary plat. Under the Replacement Regulations, a preliminary plat is processed by: the proposal's submission to the City; the City determining that the application is "complete"; the City's Development Commission reviewing the proposal at an informal public meeting; City staff (with the assistance of the Applicant, if they so choose) preparing a "community conference response memo"; distribution of the response memo to parties of record and the Development Commission for additional public comment; incorporation of public comment into the community conference response memo, if appropriate; production of a final community conference response memo; preparation of a staff report by City staff; and an open record public hearing before the Hearing Examiner, who then issues a final decision on the preliminary plat. *Exhibit P, Appendix L; IMC 18.19B.270.C.*

6. In addition, the Replacement Regulations include the following provision concerning the vesting of permits:

Only vesting established by Washington State law shall apply to the vesting of development applications for properties located within Issaquah Highlands previously covered by the terminated development agreements. These are:

1. Building permits which comply with RCW 19.27.095; or
2. Long or short plats which comply with RCW 58.17.033; or
3. Development agreements per RCW 36.70B.180.

IMC18.19B.280.A.

7. Ultimately, IHIF-C submitted its preliminary plat application on August 1, 2017, approximately six weeks before the end of the Buildout Period specified in the DA. IHIF-C included the following materials with the plat application: (1) a set of project plans; (2) a "Project Narrative," dated July 15, 2017, providing background information on the proposal and a detailed analysis addressing how the preliminary plat would comply with the requirements of the DA, including each of its appendices; (3) a Traffic Study Memorandum, prepared by Transpo Group, dated July 28, 2017, providing detail about the proposed configuration of NE Discovery Drive; (4) a Preliminary Stormwater Report, prepared by KPFF Consulting Engineers, dated July 2017; and (5) a letter from Ms. Heim noting that, in IHIF-C's view, the submitted materials sufficiently addressed the City's earlier comments and that, as such, a determination of completeness should be issued for the proposal. *Exhibits B-1.1 through B-1.6.*
8. On December 15, 2017, prior to the City issuing notice of the preliminary plat application, IHIF-C submitted two additional documents for review:

(a) an updated “Preliminary Plat” drawing with proposed lot line revisions and (b) a “Preliminary Engineering Overview Site Plan” depicting building footprints on the proposed lots, consistent with the materials IHIF-C had submitted for the three site development permits it had previously submitted, related to development within the preliminary plat. Of particular note, none of IHIF-C’s earlier preliminary plat submittals depicted proposed building footprints. Mr. Cayton emailed Ms. Lin that same day to explain that these additional submissions were provided to address “minor lot line revisions” that were necessary to accommodate proposed building locations, improvements, and other plat features, and to depict “proposed buildings” to assist the City in understanding the evolution of the site design for the plat. *Exhibits B-3.2 and B-3.3; Exhibit GG.*

9. While the City continued to review IHIF-C’s submitted preliminary plat materials, IHIF-C submitted three development permits related to development that it intended to pursue within the preliminary plat: a potential Medical Office Building (No. ASDP18-00007), Self-Storage Facility (No. ASDP18-00006), and Retail Development (No. SDP18-00001). IHIF-C initially submitted the Site Development Permit (SDP) application for a Retail Development and the Administrative Site Development Permit (ASDP) application for a Medical Office Building on October 23, 2017. It later submitted the ASDP application for a Self-Storage Facility on December 1, 2017. Of note, all three applications were submitted after expiration of the Buildout Period specified within the DA. *Exhibit F.*

10. On April 4, 2018, Director Niven wrote Mr. Schneider to further elaborate on the City’s position concerning the vested status of IHIF-C’s pending land use applications. In the letter, Director Niven argued:

The City Council adopted replacement regulations on March 19, 2018, resulting in termination of the DA. Accordingly, and consistent with Section 5.13 of the DA itself, the Replacement Regulations govern all future development on IHIF-C’s property “except the extent that the City Council has, in its legislative policy discretion, voluntarily recognized vesting protection for specified categories of land use applications.”

Neither the DA nor applicable state law independently affords vesting protection to outstanding applications for Implementing Approvals following termination of the DA. Thus, the Replacement Regulations govern future development of the IHIF-C property “*regardless of any outstanding land use permit applications.*”

(Emphasis in original).

Under state law, including provisions in RCW 36.70B.180 and .190, a development agreement is only binding and enforceable during its actual term and “without any regard for the purportedly ‘vested’ status of previously submitted land use applications.” Put differently, termination of

a development agreement “automatically extinguishes all outstanding land use permit application rights” including “the right to develop under the development standards contained in the agreement.”

The City Council adopted IMC 18.19C.280, as part of the Replacement Regulations, with the intent to “afford vested rights only to the categories of land use application for which vesting is recognized by state law—i.e., building permits and plats.” Thus, the City considers IHIF-C’s “preliminary plat to be vested” while its various site development permits are not.

Under state law, a complete subdivision application “vests the underlying proposal ‘only at a very general level’—i.e., to the land uses allowed under the municipality’s current regulations.” Under *Alliance Investment Group v. City of Ellensburg*, 189 Wn. App. 763, 358 P.3d 1227 (2015), however, “[a]ny specific project will still have to meet the development standards at the time the building permit is filed.” Moreover, under *Noble Manor Co. v. Pierce County*, 133 Wn.2d 269, 943 P.2d 1378 (1997), “[w]hat is vested is what is sought in the application for a . . . plat.” Accordingly, the City considers IHIF’s “preliminary plat application to be vested to the use regulations” set forth in the DA, as well as to “any development standard in the Agreement that are necessary to accommodate the specific development plan or concept—if any—identified in [IHIF-C’s] plat application materials.”

Exhibit G.

11. The project narrative submitted with the High Street Collection at Issaquah Highlands Plat (Exhibit C-12), for instance, did not explicitly discuss the potential for a Medical Office Building, Self-Storage Facility, or a specific Retail Development, as delineated in the SDP and ASDP applications. Moreover, the application did not depict building footprints or specific development parameters of future buildings on the project site. *Exhibit S-22.*

12. On March 3, 2020, the City prepared a staff report for review in conjunction with the open record hearing on the proposal. Of particular note:

The report states that the Comprehensive Plan designation of the subject property is “Retail.” All previous materials, however, including the staff report prepared for the meeting before the Development Commission, identified the Comprehensive Plan designation of the property as “Urban Village.” See *Exhibit XX-2*. The current staff report does not appear to address the zoning designation of the subject property although materials submitted to the Development Commission state that the property is zoned “Urban Village-Commercial/Retail” (UV-COM/RET). *Exhibit XX-2*. The staff report notes that “[d]ifferent sets of drawings have been submitted to the City in relation to the Applicant’s preliminary plat application,” including materials submitted on August 1, 2017; August 28, 2017; December 15, 2017; February 7, 2018; February 22, 2018; and March 5, 2019. The staff report stresses that the August 2017

submissions “were made during the defined ‘Buildout Period’ of [the] now-terminated 1996 Development Agreement” but that all other submittals were received after the Buildout Period had expired.” Because of this, City staff “reviewed only the vested permit materials from August 1 and August 28, 2017, under the applicable [DA] provisions.”

Section V of the staff report included a detailed “Determination of Vested Status” pursuant to IMC 18.01.050.C, prepared by Director Niven in consultation with the City Attorney. This included a statement explaining that, as “the Hearing Examiner has previously concluded, the Director’s vesting determination is not a final land use decision in and of itself, and it is not independently appealable separate” from the Hearing Examiner’s decision “approving or denying the underlying project application.” The vesting determination ultimately concludes that the vesting afforded the materials submitted prior to expiration of the buildout period (i.e., the materials submitted by IHIF-C in August 2017) would be limited to “effectuate the specific development proposal, if any, identified” in such materials and that all materials submitted after expiration of the Buildout Period on September 18, 2017, would “not operate to retroactively expand the vested rights that accrued in the Applicant’s original . . . preliminary plat application.”

Exhibit R.

13. Section VI of the staff report addresses how the City believes the preliminary plat would comply with provisions of the DA, where applicable; with the Replacement Regulations, where applicable; and with the State Subdivision Act (Chapter 58.17 RCW). To assist in explaining this, the City provides a chart (on Page 12), detailing which Appendices of the DA it “used for the plat review” and which Appendices it did not use in reviewing the plat because of its determination that such appendices are “not vested” and the Replacement Regulations, instead, would be applicable. Ultimately, the staff report determines that the following Appendices are applicable to the preliminary plat:

Appendix A, Guiding Principles and Goals; Appendix B, Land Uses (but not any development standards contained therein); Appendix D, Storm and Ground Water; Appendix F, Water Service; Appendix G, Sewer Service; Appendix H, Road Design; Appendix I, SEPA; Appendix S, Urban Design Guidelines; and Appendix T, Trails. *Exhibit R.*

14. On August 10, 2020, in accordance with the Hearing Examiner’s direction at the August 3, 2020 installment of the public hearing on Applicant Shelter Holdings’ preliminary plat application, the City submitted proposed conditions of approval for the plat. The submission revised the proposed conditions originally set forth in Section IX of the City’s March 3, 2020 Staff Report, and subsequently revised on July 13, 2020 as provided in Exhibit V of the Hearing Examiner’s record.

IV. CONCLUSIONS

Having rendered the above-cited Findings, the Council draws the following Conclusions:

Authority:

1. Pursuant to the provisions of RCW 42.36.010, quasi-judicial decisions are those that determine the legal rights, duties, or privileges of specific parties based on a hearing or other contested case proceeding, such as preliminary plats, site specific rezones and appeals.
2. Quasi-judicial decisions require a decision be made by Council using a specific process. Both Issaquah Municipal Code (IMC) Table 18.04.250-2: Table of Level 0 through 6 Review Appeals and Council Rule Section 4.15, Quasi-Judicial Decisions and Appeals govern the process and procedures for Quasi-Judicial Appeals.

Pursuant to Council Rule 4.15(B), the Council’s decision for this quasi-judicial matter shall be based upon and supported by the “record” in the matter. The “record” consists of all exhibits, testimony, and comments presented at the public hearing before the Hearing Examiner. Pursuant to IMC Table 18.04.250-2, this appeal is considered a closed record appeal.

3. Pursuant to IMC 1.32.020 and Council Rule 4.15 (D), Council may decide to:
 - a. Affirm the decision of the responsible official or group. The decision of the official group shall be affirmed unless the decision was not supported by substantial evidence or any portion was clearly erroneous. “Substantial evidence” is evidence that would persuade a fair-minded person of the truth of the statement asserted. “Clearly erroneous” means that after reviewing all the evidence the City Council is left with the definite and firm conviction the decision was in error. The City Council shall give substantial weight to the decision of the previous decision maker.
 - b. Remand to the responsible official or group, provided that remand would not result in more than one open record hearing on the matter.
 - c. Reverse or modify the decision of the responsible official or group based on the record.

Approval of Preliminary Plat

4. State law dictates the conditions for plat approval as set forth in RCW 58.17.110 as follows:

RCW 58.17.110

Approval or disapproval of subdivision and dedication—Factors to be considered—Conditions for approval—Finding—Release from damages.

(1) The city, town, or county legislative body shall inquire into the public use and interest proposed to be served by the establishment of the subdivision and dedication. It shall determine: (a) If appropriate provisions are made for, but not limited to, the public health, safety, and general welfare, for open spaces, drainage ways, streets or roads, alleys, other public ways, transit stops, potable water supplies, sanitary wastes, parks and recreation, playgrounds, schools and schoolgrounds, and shall consider 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) whether the public interest will be served by the subdivision and dedication.

(2) 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 schoolgrounds 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. Dedication of land to any public body, provision of public improvements to serve the subdivision, and/or impact fees imposed under RCW 82.02.050 through 82.02.090 may be required as a condition of subdivision approval. Dedications shall be clearly shown on the final plat. No dedication, provision of public improvements, or impact fees imposed under RCW 82.02.050 through 82.02.090 shall be allowed that constitutes an unconstitutional taking of private property. The legislative body shall not as a condition to the approval of any subdivision require a release from damages to be procured from other property owners.

(3) If the preliminary plat includes a dedication of a public park with an area of less than two acres and the donor has designated that the park be named in honor of a deceased individual of good character, the city, town, or county legislative body must adopt the designated name.

(4) If water supply is to be provided by a groundwater withdrawal exempt from permitting under RCW 90.44.050, the applicant's compliance with RCW 90.44.050 and with applicable rules adopted pursuant to chapters 90.22 and 90.54 RCW is sufficient in determining appropriate provisions

for water supply for a subdivision, dedication, or short subdivision under this chapter.

5. The record before the Hearing Examiner clearly states that adequate and appropriate provisions for the elements set forth in 58.17.110(1)(a) have been met. Specifically on page 4 of the Decision the Hearing Examiner states as follows, “[...] the record demonstrates that the proposed preliminary plat would likely make “appropriate provisions for the public health, safety, and general welfare” as required by Revised Code of Washington (RCW) 58.17.110(1)(a)—including appropriate provisions for open spaces, drainage ways, streets, sidewalks, potable water supplies, and sanitary wastes.” However, the Hearing Examiner held that “—insufficient information currently exists to determine whether “the public interest will be served by the subdivision and dedication” of the proposed plat, as required by RCW 58.17.110(1)(b) due to the dispute regarding vesting.: Such a conclusion is contrary to the provisions of RCW 58.17.110 as there is sufficient evidence to demonstrate appropriate provisions for the public health, safety, and general welfare” have been met. Furthermore, other than the Hearing Examiner’s conclusory opinion, there is no evidence in the record that the “public interest” would not be served by the subdivision and decision of the proposed plat.
6. Based on the testimony and evidence in the record, the Council concludes that the Appellants met their burden to establish that denial of the preliminary plat was clearly erroneous.
7. By majority vote, the Council concludes sufficient evidence supports the conclusion the proposed preliminary plat makes appropriate provisions for the public health, safety, and general welfare required by Revised Code of Washington (RCW) 58.17.110(1)(a) and that the public interest s further served by the approval of the preliminary plat consistent with (RCW) 58.17.110(1)(b). **Therefore, the City Council reverses the hearing examiner’s denial of the preliminary plat and approves the preliminary plat as proposed.**

Conditions of the Plat

8. The preliminary plat application dated August 1, 2017 did not have any building footprints or level of detail that was set forth in later submissions, the conditions of the plat should therefore be those as set forth in the City’s August 10, 2020 proposal to the Hearing Examiner. The record consisted of sufficient facts to approve the conditions of the plat as proposed by the City.
9. By majority vote, the Council concludes that the conditions of the plat shall be those as set forth in the City’s August 10, 2020 submission to the Hearing Examiner. **Therefore, the City Council concludes that the Hearing Examiner erred by not adopting the City’s conditions of the plat.**

Vesting

10. Based on the testimony and evidence in the record, the Council concludes that the proposed preliminary plat dated August 1, 2017 does not vest to the Development Agreement. The proposed plat did not have any building footprints and the narrative did not make any references to the proposed uses identified in the December 15, 2017 plat revision.
11. In Washington State, the vested rights doctrine "refers generally to the notion that a land use application, under the proper conditions, will be considered only under the land use statutes and ordinances in effect at the time of the application's submission." See *Noble Manor Co. v. Pierce County*, 133 Wn.2d 269, 943 P.2d 1378 (1997). Courts have held that vesting is controlled by statute as set forth in RCW 58.17.033 (1) which states:
- 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.
12. The *Noble Manor* decision concluded:

We therefore conclude the Developer had a right to have its application to divide its land into three lots and to build three duplexes decided under the laws in existence on August 2, 1990, the date the application was filed. Since the laws effective on that date did allow for three duplexes on the property, the Developer obtained a vested right to develop its land in accord with the application. **Not all conceivable uses allowed by the laws in effect at the time of a short plat application are vested development rights of the applicant. However, when a developer makes an application for a specific use, then the applicant has a right to have that application considered under the zoning and land use laws existing at the time the completed plat application is submitted.**

If a landowner requests only a division of land without any specified use revealed, then the county, city or town may consider the application to see if any legal use can be made of the land so divided, and no particular development rights would vest at that time. However, when an application is made for division of land for a specified use, then the applicant has the right to have that application for that use considered under the land use laws in effect on the date of the application. (emphasis added) *Id.*

13. By majority vote, the Council concludes that the August 1, 2017 preliminary plat submission was only for a division of land and did not have the adequate detail necessary to vest to specific uses. Consistent with the holding in *Noble Manor*, the preliminary plat does not therefore vest to the full provisions of the Development Agreement. The City Council, therefore, adopts the vesting determination as set forth in the City's Staff Report dated March 3, 2020. **Therefore, the City Council concludes that the Hearing Examiner erred in not adopting the City's vesting determination.**
14. By majority vote, the City Council concludes that the Hearing Examiner erred when he did not allow the City an opportunity to supplement the record as he had indicated and, therefore, was not afforded an equal opportunity to present evidence.
15. By majority vote, the City concludes that the Hearing Examiner's conclusions set forth in pages 40-43 are dicta.
16. Any finding listed above which could be considered a conclusion is hereby incorporated as a conclusion.



**CITY COUNCIL
AGENDA BILL**

City Council Regular Meeting - 19 Apr 2021

**Port of Seattle Economic Development Partnership
Program Grant**

**Proposed Council Action:
Accept Grant; Authorize Agreement**

DEPARTMENT OF	Economic Development Jen Davis Hayes
COUNCIL LIAISON	n/a
OTHER COUNCIL MEETINGS	March 1, 2021
COMP PLAN POLICY NOS.	n/a
OTHER POLICIES	n/a
EXHIBITS	A. Grant Agreement

SUMMARY STATEMENT

Introduction

This agenda bill requests City Council action to accept grants funds in the amount of \$38,690 from the 2021 Port of Seattle Economic Development Partnership Program grant and authorization to enter into the related grant agreement. See Update for the latest information.

~~This agenda bill seeks City Council authorization to submit an application for the 2021 Port of Seattle Economic Development Partnership Program grant.~~

Background

The Port of Seattle has partnered with King County cities via its Economic Development Partnership Program since 1996 to provide non-competitive economic development grants. The City of Issaquah is eligible to receive up to \$38,690, based on a \$1 per capita allocation. This grant requires a 50% match.

This year eligible activities focus on projects that respond to COVID-19 relief and recovery and include:

- Small business (and key industry) assistance
- Buy local and placemaking (merchant driven)
- Local tourism promotion
- Workforce retention/development

Board/Commission Review

The Economic Vitality Commission has not met since the release of the 2021 Port of Seattle Economic Development Partnership Program Grant application on Feb. 18, 2021. The EVC is familiar with previous programs this funding supports and a draft application will be shared via email with the Commission for additional input.

Proposal

The Administration requests City Council authorization to submit an application to support the following program areas:

- Direct business technical assistance support through Startup425 and Business Impact NW
- Regional Business Summit support
- Issaquah Loyal implementation
- Business Assistance programs

Options/Alternatives

If the City does not submit an application, it would not receive the \$38,690 funding to support businesses. The 2021 adopted budget has already allocated \$56,035 to Economic Development activities, with the anticipation that this grant would reimburse for 2/3 of these expenses.

Public Engagement

City staff explored program options with Vision Partners, which includes the Greater Issaquah Chamber of Commerce, Visit Issaquah, Downtown Issaquah Association, Gilman Merchants Association, and Issaquah Highlands Council.

In addition, the 2020 Business Survey provided input on business needs that have helped to create and refine programs supported by this grant.

Next Steps

If the City Council approves moving forward, staff will submit an application by the end of March. If funds are awarded, this agenda bill will return to Council for authorization to accept funds and enter into the grant agreement.

Financial Information

The City of Issaquah is eligible to receive up to \$38,690, based on a \$1 per capita allocation. This grant requires a 50% match. The grant plus the 50% match will equal \$58,035. The 2021 adopted budget includes the Port Grant and City match totaling \$56,385 based on previous grant totals. The increase of \$1,650 is not currently allocated in the adopted budget, but these increased expenditures can be absorbed within existing budget authority.

Administration's Recommendation

~~The Administration recommends authorizing submittal of the Port of Seattle Economic Development Partnership Program Grant.~~

The Administration recommends acceptance of grant funds in the amount of \$38,690 and execution of the grant agreement with the Port of Seattle for the Economic Development Partnership Program.

Update

The City Council approved submittal of a grant application for the 2021 Port of Seattle Economic Development Partnership Program on March 1, 2021.

The City submitted the non-competitive grant application for this year's Economic Development Partnership Program on March 18, 2021. The grant program, which requires a 50% match, will provide over \$58,000 in economic development investments in 2021.

The City's application was approved for the following activities:

Project	Description	Port Contribution	City contribution (already budgeted)
Startup425	Eastside collaborative to provide startup and small business seminars and one-on-one business advisor services.	\$22,667	\$11,333
Regional Business Summit	One-day event bringing together experts to speak on regional business issues. Attendees will engage with presenters, share ideas, and walk away with tools and solutions to support their business's growth and success.	\$2,000	\$1,000
Business Retention	Continue #IssaquahLoyal shop local campaign. Create digital media of businesses for use now and in future. Business and amenity guide for local visitors.	\$7,357	\$3,678
Data Tools	Co-Star property	\$3,333	\$1,667

	subscription will add property search and analysis data to our toolkit to support businesses relocate, downsize or expand within Issaquah.		
	TOTAL	\$38,690	\$19,345

The Administration now requests Council authorization to accept the grant funds and enter into the related grant agreement with the Port of Seattle (Exhibit A).

Alternative(s)

~~Do not apply for funding. (Impact: This would eliminate the reimbursement for economic development activities.)~~

~~Do not authorize the agreement. (Impact: Economic Development Activities are drastically curtailed with a 2/3 reduction in budget resources.)~~

RECOMMENDATION

Administration / Economic Development Department:

MOVE TO:

~~Authorize submittal of the Port of Seattle Economic Development Partnership Program Grant application.~~

MOVE TO: Authorize acceptance of grant funds in the amount of \$38,690 and execution of the grant agreement with the Port of Seattle for the Economic Development Partnership Program.



ECONOMIC DEVELOPMENT PARTNERSHIP AGREEMENT

BETWEEN

THE PORT OF SEATTLE AND CITY OF ISSAQUAH

S-00320680

This Economic Development Partnership Agreement (the "Agreement") is made by and between the Port of Seattle (the "Port") and the City of Issaquah ("Agency"), both municipal corporations of the State of Washington (each, a "Party" or, collectively, the "Parties").

RECITALS

WHEREAS, engaging in the promotion of economic development is a recognized Port purpose authorized under RCW 53.08.245; and

WHEREAS, RCW 35.21.703 similarly authorizes cities to engage in economic development programs; and

WHEREAS, RCW 53.08.240(2) permits the Port to contract with another municipality to perform such undertakings each is authorized to perform; and

WHEREAS, the Port Commission of the Port of Seattle established the Economic Development Partnership Program (the "Program"), to advance the Port's Century Agenda, promote a dramatic growth agenda, support the creation of middle class jobs and help address the lack of economic development funding for local projects; and

WHEREAS, grant funding across the region is very limited for cities that want to pursue economic development projects or initiatives, and Washington State has not had an economic development grant program for over 20 years; and

WHEREAS, the Program will provide 38 King County cities per capita funding to advance local economic development throughout the region, and requires a 50% local match by the cities that receive the grants; and

WHEREAS, the Program will help the Port advance regional economic vitality through focused partnerships with King County cities; and

WHEREAS, the Program will make grants to cities that pursue programs and projects that stimulate business development, job creation and community revitalization, such as small business development, industry retention and expansion, and other economic development projects that support new investment and job creation;

NOW, THEREFORE the parties agree as follows:

1. Purpose. The purpose of this Agreement is to establish a contractual arrangement under which the Port will pay the Agency Program funds in the amount set forth in Section 2 solely for the purpose of carrying out the local initiative described in Exhibit A, attached and incorporated hereto by this reference (the "Project"). This Agreement shall be interpreted in furtherance of this purpose.
2. Responsibilities of the Port. The Port shall contribute Thirty-eight Thousand, six hundred ninety and 00/100 Dollars (\$38,690.00) (the "Grant Funds") to assist the Agency in funding the Project. The Port shall disburse the Grant Funds to the Agency no later than thirty (30) days after receipt of a complete and correct invoice(s) detailing those Project deliverables completed in accordance with Exhibit A.
3. Responsibilities of the Agency.
 - 3.1 The Agency shall contribute local funds equivalent to at least fifty percent (50%) of the Grant Funds towards the Project.
 - 3.2 The Agency may contract with local non-profits to complete the Project or elements of the Project; *provided*, that the Port shall not, under any circumstance, disburse the Grant Funds to any of the Agency's contractors or subcontractors.
 - 3.3 The Agency shall complete the Project by December 31, 2021.
4. Term. This Agreement shall become effective as of the date the Port executes this Agreement and shall terminate on December 31, 2021, unless earlier terminated under another provision of this Agreement.
5. Termination for Convenience. The Port may terminate this Agreement at any time for any reason, by giving the Agency thirty (30) days' written notice. In the event the Agency has completed any portion of the Project by the time it receives the Port's notice of termination, the Port shall pay the Agency the percentage of the Grant Funds attributable to the Agency's completed portion of the Project.
6. Termination for Default. Except in the case of delay or failure resulting from circumstances beyond the control and without the fault or negligence of the Agency, the Port shall be entitled, by written or oral notice to the Agency, to terminate Agreement for breach of any of the terms and to have all other rights against the Agency by reason of the Agency's breach as provided by law.
7. Waiver. Failure at any time of the Port to enforce any provision of this Agreement shall not constitute a waiver of such provision or prejudice the right of the Port to enforce such provision at any subsequent time. No term or condition of this Agreement shall be held to be waived, modified or deleted except by a written amendment signed by the Parties
8. Partial Invalidity. If any provision of this Agreement is or becomes void or unenforceable by force or operation of law, all other provisions hereof shall remain valid and enforceable.
9. Indemnification and Hold Harmless Agreement. The Agency shall defend, indemnify, and hold harmless the Port, its Commissioners, officers, employees, and agents (hereafter, collectively, the "Port") from all liability, claims, damages, losses, and expenses (including, but not limited to attorneys' and consultants' fees and other expenses of litigation or arbitration) arising out of or related to the fulfillment of this Agreement; *provided*, however, if and to the extent that this Agreement is construed to be relative to the construction, alternation, repair, addition to, subtraction from, improvement to, or maintenance of, any building, highway, road, railroad, excavation, or other structure, project, development, or improvement attached to real estate, including moving or demolition in connection therewith, and therefore subject to Section 4.24.115 of the Revised Code of Washington, it is agreed that where such liability, claim, damage, loss or expense arises from the concurrent negligence of (i) the Port, and (ii) the Agency, its agents, or its employees, it is expressly agreed that the Agency's obligations of indemnity under this paragraph shall be effective only to the extent of the Agency's negligence. Such obligations shall not be construed to negate, abridge, or otherwise reduce any other right or obligation of indemnity which would otherwise exist as to

any person or entity described in this paragraph. This paragraph shall not be construed so as to require the Agency to defend, indemnify, or hold harmless the Port from such claims, damages, losses or expenses caused by or resulting from the sole negligence of the Port.

In any and all claims against the Port, by any employee of the Agency, its agent, anyone directly or indirectly employed by either of them, or anyone for whose acts any of them may be liable, the indemnification obligation of this paragraph shall not be limited in any way by any limitation on the amount or type of damages compensation benefits payable by or for the Agency, or other person under applicable industrial insurance laws (including, but not limited to Title 51 of the Revised Code of Washington), it being clearly agreed and understood by the Parties hereto that the Agency expressly waives any immunity the Agency might have had under such laws. By executing this Agreement, the Agency acknowledges that the foregoing waiver has been mutually negotiated by the parties.

The Agency shall pay all attorneys' fees and expenses incurred by the Port in establishing and enforcing the Port's right under this paragraph, whether or not suit was instituted.

10. Comply with All Laws. The Agency shall at all times comply with all federal, state and local laws, ordinances and regulations, including but not limited to all environmental laws, which in any manner apply to the performance of this Agreement.

11. Integration. This Agreement, together with the attached Exhibit A, constitutes the entire agreement between the Parties and unless modified in writing by an amendment executed by the Parties, shall be implemented only as described herein.

12. Governing Law and Venue. This Agreement shall be governed by the laws of the State of Washington. Any action arising out of this Agreement shall be brought in King County.

13. No Employment Relationship Created. The Parties agree that nothing in this Agreement shall be construed to create an employment relationship between the Agency and the Port.

14. No Entity Created. The Parties agree that nothing in this Agreement shall be construed to create a joint entity between the Agency and the Port.

15. Notices. Notices to the Port shall be sent to the following address:

Port of Seattle
 Economic Development Division
 P. O. Box 1209
 Seattle, WA 98111

Notices to the Agency shall be sent to the following address:

City of Issaquah
 1775 12 Ave NW
 Issaquah, WA 98027

16. Audits and Retention of Records. The Agency shall make all books, records and documents (the "Records") relating to the performance of this Agreement open to inspection or audit by representatives of the Port or Washington State during the term of this Agreement and for a period of not less than six (6) years after termination of the Agreement; *provided*, that if any litigation, claim or audit arising out of, in connection with or related to this Agreement is initiated, the Agency shall retain such Records until the later of

(a) resolution or completion of litigation claim or audit; or (b) six (6) years after the termination of this Agreement.

17. Amendment. This Agreement may only be amended by written agreement of the Parties.

18. Dispute Resolution. The Parties shall use their best, good faith efforts to cooperatively resolve disputes that arise in connection with this Agreement.

IN WITNESS WHEREOF, the Parties hereto have executed this agreement as of the date first set forth above.

PORT OF SEATTLE

CITY OF ISSAQUAH

By: Connie Davis
Buyer

By:

Signature

Signature

Date

Date

Attachment A – Scope of Work**Background:**

1. **Project Description:** Summarize the project(s) you plan to implement and explain how project(s) address COVID-19 economic issues in your city. Include a brief description of the project goal(s) and summary of COVID-19 economic impacts being addressed.

Project 1: STARTUP 425

Funds will be used to continue the Startup 425 and re.Startup425 efforts, which includes:

- Start-up and small business seminars through Foundations Series
- Customized, 1:1 business advisory services through Business Impact NW
- Focused business acceleration through Innovation Lab

This program is a collaboration amongst five eastside cities. The cities have an interlocal agreement with Kirkland to administer the program. Issaquah's goal is to serve over 150 people. All services will be provided virtually until it is safe to meet in-person again and will address COVID 19 business impacts and more.

Project 2: REGIONAL BUSINESS SUMMIT

The Regional Business Summit is a one-day event bringing together experts to speak on issues that are of main concern to businesses in the region. Attendees will engage with presenters, share ideas, and walk away with tools and solutions to support their business's growth and success. The municipalities that participate are Snoqualmie, Issaquah, North Bend, New Castle and Sammamish.

Full sessions include:

- COVID-19 and Our Community with Overlake Medical Centers and Clinics staff
- Welcome Inspirational Speaker Bryan Clay, Olympic Champion
- CEO Panel with Governor Gary Locke (Bellevue College), Senator Mark Mullet (5th District, WA), Suzanne Dale Estey (WA Economic Development Assoc.)
- CEO Panel with Kemper Freeman (Kemper Development Co.), Renee Sunde (WA Retail Assoc.), Alan Stephens (Columbia Hospitality)

Breakout topics include:

- Business Model Innovation
- Customer Engagement
- Recovery Best Practices
- Technology to Support Growth & Increase Efficiency
- Workplace Health & Safety Laws
- Implementing Diversity, Equity and Inclusion
- Data Security
- Business Resources
- Social Media Storytelling

Project 3: BUSINESS RETENTION ACTIVITIES, INCLUDING SHOP LOCAL MARKETING

Issaquah launched #IssaquahLoyal shop local campaign in 2020 and will continue to build upon this brand to support Issaquah businesses. We will create media (videos, photography) of local businesses to utilize in focused #IssaquahLoyal quarterly campaigns and other business assistance efforts. Tools (app, hard copy material) will be developed to guides visitors to local businesses and amenities. These efforts are to continue to support existing businesses re-open in a safe manner that continues to provide jobs and services to our community.

Project 4: DATA TOOLS

Our team continues to enhance the data available for staff, policy makers, business owners, and other stakeholders to make decisions. In 2020 Port Grant, the Port Grant supported the creation of LocalIntel data tools on the Greater Issaquah Chamber of Commerce website. In 2021, the City will subscribe to Co-Star to add property search and analysis data to our toolkit. City leaders have requested a quarterly dashboard about economic indicators, which Co-Star data will

help fulfill. In addition, the information about vacancies and other real estate data provided through Co-Star will help staff respond to inquiries about helping small businesses recovering from COVID-19 find suitable commercial and office locations in Issaquah and help fill vacant spaces. This need has increased due to COVID-19, with additional commercial space availability in the past 6+ months.

2. **Brief Description Bullets:** Summarize the complete scope of work and goals briefly using 2 - 4 bullets. Please keep each bullet to 1 or 2 sentences. These bullets are meant to be a very brief synopsis the project(s) the Port of Seattle is funding in each city and may be used to describe each city's project(s) to the Port of Seattle Commission, to the public, and with local media.

- Host a **Regional Business Summit with Chamber of Commerce** to discuss regional issues and peer learning on business topics.
- Participated in the **Startup425** and **Re-Startup 425** regional partnerships to support start-up and small businesses
- Support local businesses through **#IssaquahLoyal** shop local campaign, creation of **guide for local visitors**, and **Co-Star** subscription to respond to small business find suitable commercial and office space.

3. **Project Scope of Work:** Outline project title or components, economic impacts of COVID-19 the project is addressing, project goals, project deliverables, and metrics (measurable outcomes) using the table below. View Appendix B for sample metrics, measures of success, and data sources. The table is used in the agreement between the Port of Seattle and each city.

Project title or component:	COVID-19 Economic Impacts:	Project goal(s):	Project deliverable(s) and estimated completion:	Metrics (measurable outcomes):
STARTUP 425	<ul style="list-style-type: none"> • Respond to the COVID-19 crisis by providing tools/classes/ workshops for regional businesses to aid in their economic recovery or for small businesses • To provide one-on-one technical support services to start-ups, entrepreneurs and small businesses 	<ul style="list-style-type: none"> • Annual report conducted by Startup 425 that delivers the number of individuals and businesses assisted, males vs. females, demographics and satisfaction with the program. 	<ul style="list-style-type: none"> • The annual report will be delivered (via Startup 425) with the City of Issaquah's final report to the Port of Seattle on November 1st. 	<ul style="list-style-type: none"> • Number of individuals who attend the foundations and other seminar series. • Number of women or minority entrepreneurs served. • Satisfaction on a rated scale of the program. • Number and types of businesses assisted with one-on-one technical assistance.
REGIONAL BUSINESS SUMMIT	<ul style="list-style-type: none"> • Local business and community leaders gather to address regional issues and gain knowledge to better run their business. 	<ul style="list-style-type: none"> • Report on topics, speakers and outcomes from the session. Report on next steps 	<ul style="list-style-type: none"> • Virtual event 	<ul style="list-style-type: none"> • Over 75 businesses participating in seminars.

<p>BUSINESS RETENTION INCLUDING BUY LOCAL MARKETING</p>	<ul style="list-style-type: none"> Local businesses survive and thrive in Issaquah. 	<ul style="list-style-type: none"> Create and utilize #IssaquahLoyal media Create tools to guide local visitors to local businesses and amenities. 	<ul style="list-style-type: none"> Local business videos and photography #IssaquahLoyal marketing campaigns App or hard copy of local business and amenity guide 	<ul style="list-style-type: none"> Number of local businesses media created Number of #IssaquahLoyal campaigns implemented Number of downloads of app OR guides printed and distributed
<p>DATA TOOLS</p>	<ul style="list-style-type: none"> Track recovery in real estate market 	<ul style="list-style-type: none"> Understand local real estate dynamics Increase response in providing real estate data to stakeholders, including business inquiries 	<ul style="list-style-type: none"> Quarterly Recovery Dashboard by end of 2021 Assistance provided to businesses with real estate related inquiries 	<ul style="list-style-type: none"> Number of businesses assisted

4. **Connection to Port of Seattle interests:** Explain how your project benefits the Port of Seattle and ties to the Port’s business interests?

*Port business interests tie closely to the health of aviation, maritime/ logistics, manufacturing, and construction/ trades clusters. Tourism is another important industry to the Port of Seattle.

Startup 425 exists to provide entrepreneurs with the tools and the education that is required in order to create a new business in the region. Even if only a handful of companies are produced by this program, the idea is that they would evolve into a future company. This could be in technology, manufacturing, tourism-related or any other economic sector. There is a definite possibility that any future company could have a direct impact on the Port by utilizing maritime services or, most likely, the SeaTac Airport.

5. **Project Budget:** Identify each project budget category, total funds (including the monetary value of in-kind resources), Port of Seattle funds and City monetary and in-kind matching funds. Include the total funds from each column in the second to last row. Include the percentage contributions to the Port of Seattle’s contribution in the last row. This table is used in the agreement between the Port of Seattle and each city.

Project:	Project Category (Please select one of the categories provided)	Port of Seattle Funds Awarded:	City Monetary Matching Funds:	City In-kind Matching Funds:	Total Funds (Including In-Kind):
Project 1: Startup425	Small Business Assistance	\$22,667	\$11,333		\$34,000
Project 2: Regional Business Summit	Small Business Assistance	\$2,000	\$1,000		\$3,000
Project 3a: Business Retention - Buy Local Marketing	Buy Local/ Placemaking	\$7,357	\$3,678		\$11,035
Project 3b: Business Retention – Local Visitor Business Guide	Tourism	\$3,333	\$1,667		\$5,000
Project 4: Data Tools	Small Business Assistance	\$3,333	\$1,667		\$5,000
Total Funds:		\$38,690	\$19,345		\$58,035
Percentage contribution to Port Funds*:		100%	50%		

*City monetary and in-kind matching funds must add up to at least 50% of the Port of Seattle funds awarded. In-kind resources can only be used for up to 25 percent of the grant award amount. See program guidelines for more details.

6. **Collaboration with partners:** Please identify any community organizations (chamber of commerce, neighborhood associations, Small Business Development Centers, SCORE, Greater Seattle Partners, etc.) you plan to work with to complete all or part of your project(s)?

SCORE – Mentors are used to teach the foundations series for Startup 425. Issaquah will continue to remain on member of the Startup 425 Committee with Renton, Bellevue, Kirkland and Redmond.

GREATER ISSAQUAH CHAMBER OF COMMERCIE, VISIT ISSAQUAH, GILMAN’S VILLAGE MERCHANTS ASSOCIATION, ISSAQUAH HIGHLANDS COUNCIL, DOWNTOWN ISSAQUAH ASSOCIATION, PROPERTY OWNERS/MANAGERS NETWORK – The City will leverage our relationships with these partners on all the activities listed above with a focus on the Startup425, Buy Local campaign and increased business retention communications activities.

7. **Use of consultants or contractors:** If you plan to use consultants or contractors to complete all or part of the project, please identify the firm or type of firm you plan to hire for this project.

A consultant or service will be hired for the following activities:

- Buy Local efforts
- Business Technical Assistance (through Startup425)

Contact Information

City: City of Issaquah

Federal Tax ID: 91-60001446

Address: City of Issaquah
1775 12th Ave NW
Issaquah, WA 98027

Contact Name: Jen Hays

Title: Project Manager

Email: jenh@issaquahwa.gov

Telephone: 425-837-3414

Alternate Contact: Benton Coblentz

Title: Economic Development Director

Email: bentonc@issaquahwa.gov

Phone: 425-837-3424