

**BEFORE the HEARING EXAMINER for the
CITY of LYNNWOOD**

DECISION

FILE NUMBER: PUD-24-0001

APPLICANT: Patrick Crosby
6406 208th Street SW
Lynnwood, WA 98036

AGENT: Puget Sound Planning, LLC
ATTN: Lee Michaelis
6100 219th Street SW, Suite 480
Mountlake Terrace, WA 98043

TYPE OF CASE: Preliminary Planned Unit Development for a three-lot single-family residential development

STAFF RECOMMENDATION: Approve subject to conditions

EXAMINER DECISION: GRANT subject to conditions

DATE OF DECISION: August 9, 2024

INTRODUCTION ¹

Patrick Crosby (“Crosby”) seeks approval of a Preliminary Planned Unit Development (“PUD”) for a three-lot single-family residential development.

Crosby filed the Preliminary PUD application on January 8, 2024. (Exhibit 9 ²) The Lynnwood Development and Business Services Department, Community Planning Division (“Planning”), deemed the application complete as of January 25, 2024. (Exhibit 1, PDF 2) Planning issued a Notice of Application on February 1, 2024. (Exhibit 10)

The subject property is located at 6406 208th Street SW. Its Assessor’s Parcel Number is 00380200004500 (“Lot 45”). (Exhibit 7, PDF 3)

¹ Any statement in this section deemed to be either a Finding of Fact or a Conclusion of Law is hereby adopted as such.
² Exhibit citations are provided for the reader’s benefit and indicate: 1) The source of a quote or specific fact; and/or 2) The major document(s) upon which a stated fact is based. Citations to exhibits that are available electronically in PDF use PDF page numbers, not source document page numbers. While the Examiner considers all relevant documents in the record, typically only major documents are cited. The Examiner’s Decision is based upon all documents in the record.

The Lynnwood Hearing Examiner (“Examiner”) viewed the subject property via Google Earth imagery: Overhead imagery captured August 23, 2022; Street View imagery captured July 2024..

The Examiner held a hybrid open record hearing on August 8, 2024: In-person participation was available at the City Hall; remote participation was available through the “Zoom” platform. Planning gave notice of the hearing as required by the Lynnwood Municipal Code (“LMC”). (Exhibit 11)

The following exhibits were entered into the hearing record during the hearing:

Exhibits 1 - 11: As enumerated in Exhibit 1, the Departmental Staff Report

Section 1.35.025 LMC requires that decisions on project permit applications be issued within 120 calendar days after the application is found to be complete; subsection 1.35.025(A) LMC lists four exclusions from the 120-day count, one of which is an extension mutually agreed upon by Planning and the applicant. The open record hearing was held on net review day 110. (Exhibit 1, PDF 2)

The action taken herein and the requirements, limitations and/or conditions imposed by this decision are, to the best of the Examiner’s knowledge or belief, only such as are lawful and within the authority of the Examiner to take pursuant to applicable law and policy.

FINDINGS OF FACT

1. “Lot 45” is Lot 45 in *Aurora Heights Division No. 2*, a 1949 subdivision. Lot 45 contains 1.71 acres (74,647 square feet (“SF”). Lot 45 is a long, narrow lot having 118 feet of frontage on the south side of 208th Street SW and a north-south depth of 633 feet. Lot 45 contains a single-family residence and an accessory building, both located along the east side of the lot near it’s north-south mid-point.³ A water course exits a culvert on the adjoining property to the west, near the mid-point of the common property line, and flows southerly as an open channel into a wetland located predominantly on the property to the south. The open water course is rated as a Type F (containing fish habitat) stream. Much of the south half of Lot 45 is densely wooded. (Exhibits 3, PDF 3; 4; 7, PDF 10)

Type F streams require a 100-foot buffer under LMC regulations. (The required buffer for the associated wetland is smaller and is encompassed within the required stream buffer.) The beginning point for measuring the buffer is the mouth of the culvert near the mid-point of the west property line. Thus, virtually the entire south half of Lot 45 lies within the regulatory stream buffer and, consequently, cannot be developed. (Exhibits 3, PDF 4; 4)

³ The accessory building was originally permitted as an Accessory Dwelling Unit (“ADU”), but is currently being used as an office. ADUs are not calculated when determining allowable density; a single-family lot is allowed one ADU. (Testimony)

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2. The subject property is zoned RS-8, a zoning category which requires that new residential lots be not less than 8,400 SF. Other RS-8 standards relevant to this application are: Minimum lot width = 70 feet; and side yard setbacks = 5 feet minimum, 15 feet combined side yards. [LMC 21.42.200, Table 21.42.02] Were it not for the significant percentage of Lot 45 that is encumbered by the stream buffer, Lot 45 would have a theoretical potential yield on the order of eight lots. Even if the required stream buffer were excluded from the calculation, the theoretical yield would be three lots (74,647 SF-45,149 SF buffer area = 29,498 SF ÷ 8,400 SF/lot = 3.5 lots).
3. Crosby wants to subdivide Lot 45 into three lots, retaining the present residence and accessory building on one lot and creating two lots to their north to avoid the regulatory stream buffer. Because of the narrow width of Lot 45, the new lots cannot meet RS-8 standards for lot area, width, or side setbacks (even though the requested lot yield is below the theoretical yield). Therefore, Crosby has presented this application for PUD approval. If this PUD is approved, Crosby will then file a short subdivision application to separate Lot 45 into three lots so that each may be sold. (Exhibit 3; testimony)
4. A PUD may be located in any zone. [LMC 21.30.600] A PUD may contain “any use not a direct contradiction to the objectives of the comprehensive plan” (subject to a limitation on the number of dwelling units in a residential PUD). [LMC 21.30.800]

PUD approval is a two-step process: Approval of a preliminary development plan establishes “the general intent and apportionment of land for buildings, stipulated use and circulation pattern, but shall not be construed to render inflexible the ultimate design, specific uses or final plan of the project.” [LMC 21.30.300, ¶ 1] Preliminary approval is valid for two years. Before the expiration of the two-year period, the applicant must submit a final plan for approval. [LMC 21.30.320] Once the final plan is approved, the PUD “shall be made a part of the zoning map”. [LMC 21.30.340]

The PUD regulations allow “permissive variations”. Those variations “may involve modifications in the regulations, requirements, and standards of the zone in which the project is located”. [LMC 21.30.950] Some variations are limited. One such limitation applies to yard requirements which may be varied only if the applicant demonstrates that “that the variations would provide equal or greater protection to adjacent or nearby properties.” [LMC 21.30.950(A)]

5. Project Design Review (“PDR”) approval is required to be obtained before approval of “commercial, industrial, and multiple-family [PUDs] and PUDs within nonresidential development”. [LMC 21.30.300, ¶ 2] That requirement does not apply in this case.
6. Each of Crosby’s proposed new lots would have a net area of 4,275 SF; the third lot (containing the existing buildings) would have an area of 18,297 SF; the remaining 45,149 SF would be a Native Growth Protection Area to protect the stream buffer. (Exhibit 3) Crosby seeks reduction in the total side yard setback requirement from 15 to 10 feet, reduction of the minimum lot width for the two new lots from 70 feet to approximately 45 feet, and lot area reduction from 8,400 SF to 4,275 SF net. (Exhibits 2; 3)

7. *JAC PUD* is categorically exempt from State Environmental Policy Act (“SEPA”) threshold determination requirements. (Exhibit 1, PDF 2)
8. No testimony or evidence was entered into the record by the general public either in support of or in opposition to the application.
9. Crosby submitted a proposed PUD site plan (Exhibit 3), a project narrative (Exhibit 2), and technical studies (Exhibits 4 – 6).
10. Planning has evaluated *JAC PUD* and recommends approval subject to two conditions. (Exhibit 1, PDF 6)

Crosby has no objection to the recommended conditions. (Testimony)
11. Any Conclusion of Law deemed to be a Finding of Fact is hereby adopted as such.

LEGAL FRAMEWORK ⁴

The Examiner is legally required to decide this case within the framework created by the following principles:

Authority

Both Preliminary and Final PUDs are Process I applications which require an open record hearing before the Examiner. The Examiner makes a final decision on the application which is subject to the right of reconsideration and appeal to Superior Court. [LMC 1.35.100, .168, and .175 and 21.30.300 and .320]

Review Criteria

The review criteria for PUDs are set forth at LMC 21.30.300, ¶ 1:

Before approval of any plan, the hearing examiner shall determine that such plans comply with the development policies of the comprehensive plan, the purpose of this title, and provisions of this chapter.

A “consistency determination” is also required for every project application. A consistency determination follows four steps set forth at LMC 1.35.070. Consistency criteria are:

1. Type of land use permitted at the site, including uses that may be allowed under certain circumstances if decision criteria are met;

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2. Density of residential development (if applicable); and,
3. Availability and adequacy of public facilities (for those facilities identified in the Comprehensive Plan, if the Plan or the City's development regulations provide for funding of these facilities).

[LMC 1.35.070(A)]

Vested Rights

The City has no vesting regulations for land development applications. "Vesting" serves to "fix" the regulations against which a development application is judged. [*Potala Village Kirkland, LLC v. City of Kirkland*, __ Wn. App. __ (Div. I, 2014)]

In the 1950s, the [state] supreme court first adopted the common law vested rights doctrine [for building permit applications]. ... In cases that followed, Washington courts applied the vested rights doctrine to permit applications other than building permit applications. They included conditional use permit applications, grading permit applications, shoreline substantial development permit applications, and septic permit applications.

In 1987, the legislature enacted legislation regarding the vested rights doctrine. The session laws added ... RCW 19.27.095(1) and RCW 58.17.033(1) respectively ... [which] only refer to building permit applications and subdivision applications. ...

Most recently, in *Town of Woodway v. Snohomish County*, the [state] supreme court reiterated that "[w]hile it originated at common law, the vested rights doctrine is now statutory."

[*Potala*, Slip Opinion 6 – 8 and 11] "With these points in mind, [the *Potala* court held] that the filing of [an] application for [a] shoreline substantial development permit, without filing an application for a building permit, [does] not vest rights to zoning or other land use control ordinances." [*Potala*, Slip Opinion at 12] The *Potala* court "express[ed] no opinion on whether or to what extent the vested rights doctrine applies to permits other than shoreline substantial development permits. These questions [were] not before [it]." [*Potala*, Slip Opinion at 25] Therefore, whether the vested rights doctrine applies to Crosby's proposal is debatable. A PUD is essentially a form of rezone.⁵ Historically, appellate courts have not applied the vested rights doctrine to stand-alone rezone applications.

Vesting is not particularly important in this case as the City has made no development regulations changes between the time the application was filed and this date.

Standard of Review

⁵ An approved final PUD "shall be made a part of the zoning map". [LMC 21.30.340]

The standard of review is preponderance of the evidence. The applicant has the burden of proof. [LMC 1.35.155]

Scope of Consideration

The Examiner has considered: all of the evidence and testimony; applicable adopted laws, ordinances, plans, and policies; and the pleadings, positions, and arguments of the parties of record.

CONCLUSIONS OF LAW

1. This is an infill development (multi-family housing across 208th Street SW and bordering on the west, two single-family houses and commercial uses to the east and south). The driveway serving the multi-family complex to the west runs along its east edge, next to the driveway serving the existing residence on Lot 45. The driveway serving the two residences on the east runs along their west property line, providing additional setback from the new lot in the northeast corner of Lot 45. The proposal will not adversely affect the surrounding area.
2. The proposed gross density (three lots on 1.71 acres) is less than two lots per acre, well below the density allowed under RS-8 zoning. The proposal provides a reasonable way to increase the density on Lot 45 while accommodating the unusual critical areas issues present on the lot.
3. Crosby's project narrative (Exhibit 2) and Planning's Staff Report (Exhibit 1) demonstrate compliance with applicable provisions of the zoning code.
4. The requested permissive variations in lot size, lot width, and side yard setback are not only reasonable, they are necessary to achieve any reasonable increase in density/yield while preserving the stream buffer.
5. *JAC PUD* passes the "consistency" test: Residential PUDs are an allowed use in all zones; the density is within the limit set by the RS-8 zone; and adequate utilities are available to serve the two additional dwellings that will result from this PUD.
6. The recommended conditions of approval as set forth in Exhibit 1 are reasonable, supported by the evidence, and capable of accomplishment with the following changes:
 - A. Recommended Condition 1. The plan set's exhibit number will replace its date of preparation. A reference to the ability to make minor adjustments to approved PUDs will be added to this condition.
 - B. The listed conditions do not make any mention of the "permissive variations." The permissive variations are an important element of this PUD and grant authority to not follow standard LMC requirements. The specific variations need to be listed in the conditions.

7. Any Finding of Fact deemed to be a Conclusion of Law is hereby adopted as such.

DECISION

Based upon the preceding Findings of Fact and Conclusions of Law, the testimony and evidence submitted at the open record hearing, and the Examiner's site view, the Examiner **GRANTS** the requested Preliminary *JAC PUD* Planned Unit Development **SUBJECT TO THE ATTACHED CONDITIONS**.

Decision issued August 9, 2024.

/s/ John E. Galt

John E. Galt
Hearing Examiner

HEARING PARTICIPANTS ⁶

Lee Michaelis

Zachary ("Zack") Spencer

NOTICE of RIGHT of RECONSIDERATION

This Decision is final subject to the right of any party of record to file with the Lynnwood Development and Business Services Department a written request for reconsideration within seven calendar days following the issuance of this Decision in accordance with the procedures of LMC 1.35.168. Any request shall specify the error of law or fact, procedural error, or new evidence which could not have been reasonably available at the time of the hearing conducted by the Examiner which forms the basis of the request. See LMC 1.35.168 for additional information and requirements regarding reconsideration.

NOTICE of RIGHT of APPEAL

This Decision is final subject to the right of a party of record (See LMC 1.35.148.) with standing, as provided in RCW 36.70C.060, to file a land use petition in Superior Court in accordance with the procedures of LMC 1.35.175 and the Land Use Petition Act [Chapter 36.70C RCW]. See LMC 1.35.175 for additional information and requirements regarding judicial appeals.

⁶ The official Parties of Record register is maintained by the City's Hearing Clerk.

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The following statement is provided pursuant to RCW 36.70B.130: “Affected property owners may request a change in valuation for property tax purposes notwithstanding any program of revaluation.”

CONDITIONS OF APPROVAL
JAC PLANNED UNIT DEVELOPMENT
PUD-24-0001

This Preliminary Planned Unit Development is subject to compliance with all applicable provisions, requirements, and standards of the Lynnwood Municipal Code, standards adopted pursuant thereto, and the following special conditions:

1. Exhibit 3 is the approved Planned Unit Development site plan. Revisions to approved PUD plans are subject to the provisions of LMC 1.35.180 and/or LMC 21.30.970.
2. An application for subdivision or short subdivision must be submitted within two years of the date of this Decision. (See LMC 21.30.320.)
3. The following permissive variations are approved as a part of this PUD: Reduction of lot area from 8,400 SF to 4,275 SF (net) for the two new lots; reduction of lot width from 70 feet to 45 feet (net) for the two new lots; and reduction of total side yard setback from 15 feet to 10 feet for the two new lots.