CITY OF SPOKANE HEARING EXAMINER

Re:	Preliminary Plat Application by D & J Rocky Ridge, LLC, for a 13-lot long plat to be named Aerie Ridge	))))	FINDINGS, CONCLUSIONS, AND DECISION FILE NO. Z1300043-PPLT

I. SUMMARY OF PROPOSAL AND DECISION

Proposal: The Owner, Whipple Consulting Engineers, Inc., on behalf of the owner, D & J Rocky Ridge, LLC, seeks approval of a preliminary plat in order to allow the subdivision of approximately 17.8 acres into 13 residential lots.

Decision: Denial of preliminary plat.

II. FINDINGS OF FACT
BACKGROUND INFORMATION

Owner/ Agent: Todd Whipple, P.E.
Whipple Consulting Engineers, Inc.
2528 N. Sullivan Road
Spokane Valley, WA 99216

Property Owner: D & J Rocky Ridge, LLC
1615 W. Pine Hill
Spokane, WA 99218

Property Address: 4000 W. Osage Way, Spokane, WA

Property Location: The project is easterly of Indian Trail Road, at the east end of W. Osage Way, in northwest Spokane, Spokane, Washington.

Legal Description: A full legal description is set forth on the preliminary plat of Aerie Ridge subdivision which is in the record as Exhibit 2D.

Zoning: The property is zoned RSF (Residential Single-family).

Comprehensive Plan Map Designation: The property is designated as Residential 4-10 in the city's Comprehensive Plan.

Site Description: The site has an irregular shape and is predominantly hilly. The slopes of the site approximately range from 2% to 70%. The site is approximately 17.8 acres in size. The site does not lie within any floodplains. There are no wetlands on the site. However, according to DNR mapping, there is an unclassified stream in the northwest portion of the site. The property

includes the following tax parcel numbers: 26262.2606; 26262.2607; 26262.2608; 26262.2609; 26265.0710; 26265.0711; 26262.0016; and 26262.0017. The site is undeveloped.

Surrounding Conditions and Uses: The site is surrounded by property that is zoned RSF. The surrounding area consists of residential lots to the north, east, and west, developed with single family residences. To the south are large un-platted areas that are owned by the City of Spokane, the Hillside Park Homeowners Association and Excelsior Youth center, all of which are vacant parcels.

Project Description: The Owner is proposing to create a 13-lot preliminary long plat on approximately 17.8 acres. Lots sizes vary from .58 acres to 3.55 acres. The project will be served with public sewer and water. Access to the site will be via an extension of Osage Way.

III. PROCEDURAL INFORMATION

Authorizing Ordinances: Spokane Municipal Code ("SMC") 17C.110, Residential Zones; SMC 17G.080.050, Subdivisions; and SMC 17G.060.170, Decision Criteria.

Notice of Community Meeting: Mailed: June 6, 2013
Posted: June 6, 2013

Notice of Application/Public Hearing: Mailed: September 26, 2013
Posted: October 1, 2013

Community Meeting: June 20, 2013

Public Hearing Date: October 31, 2013

Site Visit: October 30, 2013

SEPA: A Mitigated Determination of Nonsignificance ("MDNS") was issued by the City of Spokane on October 17, 2013. The deadline to appeal this threshold determination under SEPA was October 30, 2013. The MDNS was not appealed.

Testimony:

Dave Compton, City Planner
City of Spokane Planning & Development
808 West Spokane Falls Boulevard
Spokane, WA 99201

Eldon Brown, P.E.
Principal Development Engineer
City of Spokane, Engineering Services
808 W. Spokane Falls Blvd.
Spokane, WA 99201

Todd Whipple, P.E.
Whipple Consulting Engineers, Inc.
2528 N. Sullivan Road
Spokane Valley, WA 99216

Craig Thomas
4004 W. Hiawatha Drive
Spokane, WA 99208

Brett Kyle
4122 W. Osage Way
Spokane, WA 99208

Dwight Aden
9609 N. Ridgecrest Drive
Spokane, WA 99208

Exhibits:

1. Planning Services Staff Report
2. Application, including:
   - 2A General application
   - 2B Preliminary Long Plat application
   - 2C Notification Map application
   - 2D Site Plan
   - 2E Title Company and Owner Certification
3. Pre-Development Conference notes
4. Engineering Services comments
   - 4A Conceptual Drainage Letter by Whipple Consulting Engineers dated 06-19-13
   - 4B Traffic (Trip) Distribution Letter by Whipple Consulting Engineers dated 05-21-13
5. Avista comments
6. Williams Pipeline comments
7. Notice map
8. Parcel listing
9. Address listing
10. Notice of Community Meeting
11. Notice of Application and Public Hearing
12. Affidavit of mailings
    - 12A Community Meeting dated 06-06-13
    - 12B Combined application and hearing dated 09-26-13
13. Affidavit of posting
    - 13A Community Meeting dated 06-06-13
    - 13B Combined application and hearing dated 10-01-13
14. Request for publication of combined application and hearing dated 09-25-13
15. Affidavit of publication on 10-02 and 09, 2013
16. Affidavit of sign removal dated 06-21-13
17. SEPA Mitigated Determination of Nonsignificance MDNS issued 10-17-13
    - 17A Attachment A
18. Environmental checklist dated 06-26-13
19. Community Meeting sign in sheet
20. Informational Notice of Community Meeting
21. Aerie Ridge Project Narrative
22. Transmittal coversheets from Whipple Consulting Engineers
23. Hearing File Preparation Checklists
24. Letter dated 05-28-13 to Todd Whipple from Dave Compton
    re: Community Meeting Instructions
25. Email dated 05-31-13 to Mark Krigbaum from Dave Compton
    re: fees
26. Emails dated 05-31 and 06-04-13 to/from Mark Krigbaum and Aaron Reilly
    re: hydraulic analysis
27. Email dated 06-18-13 to Dave Compton from Mike Nilsson

re: gate on Osage Way

28. Letter dated 07-03-13 to Interested Parties from Dave Compton
re: requesting comments
29. Emails dated 08-05-13 to/from Patty Kells, Dave Compton and Mark Krigbaum
re: review time for project
30. Email dated 08-30-13 to Dave Compton from Mark Krigbaum
re: status of comments
31. Email dated 09-20-13 to Dave Compton from Mark Krigbaum
re: questions and comments regarding Engineering Service's comments
32. Letter dated 09-23-13 to Whipple Consulting Engineers from Dave Compton
re: notice of application and public hearing letter
33. Email dated 09-25-13 to Stacey Jenkin from Spokesman
re: publishing notice.
34. Email dated 09-25-13 to/from Stacey Jenkin and Dave Compton
re: map and timing
35. Email dated 09-27-13 to Stacey Jenkin from Spokesman
re: fees and publishing dates
36. Undated email to Mark Krigbaum from Dave Compton
re: hearing date
37. Public Comment
    - 37A Email from Shri Boyman dated 06-11-13, traffic concerns
    - 37B Emails to/from Marques and Marsh and Dave Compton dated 06-17-13, requesting copy of preliminary plat
    - 37C Email from Dwight Aden dated 10-10-13, safety concerns
    - 37D Letter from Scott & Jamie Van Wormer dated 10-17-13, supporting project
    - 37E Letter from Kathy Miotke, Chair Five Mile Prairie Neighborhood Association, dated 10-17-13, concerns and requests regarding the project

A Exhibits received at hearing
- A-1 Planning Services' PowerPoint presentation
- A-2 Letter dated 10-30-13 from Craig Thomas regarding concerns
- A-3 Submittal from Whipple Consulting Engineering containing:
    - A-3-1 Cover letter responding to questions and comments
    - A-3-2 Revised Site Plan
    - A-3-3 Topo map of site
    - A-3-4 Wetland investigation prepared by Biology Soil & Water, Inc.
    - A-3-5 Stream investigation prepared by Biology Soil & Water, Inc.
    - A-3-6 Habitat Management Plan for Estates at Rocky Ridge PUD
    - A-3-7 Full Size Preliminary Plat map of project

B. Historical Traffic Documents from Estates at Rocky Ridge 05-89-PP/PUD
- B-1 Exhibit #21 - Traffic Impact Analysis dated 11-09-05 prepared by Whipple Consulting Engineers
- B-2 Exhibit #22 - Supplemental Traffic Information dated 11-09-05 prepared by Whipple Consulting Engineers

C. Post-Hearing Correspondence and Comments
- C-1 Letter of Hearing Examiner dated November 5, 2013, seeking additional information
- C-2 Letter of Todd R. Whipple, P.E., Whipple Consulting Engineers, Inc. dated November 7, 2013
- C-3 Letter of Scott R. Chesney, AICP, Planning Director, dated November 12, 2013

C-4 E-mail of Dwight Arden, dated November 12, 2013
C-5 Letter of Kathy Miotke, dated November 12, 2013

IV. FINDINGS AND CONCLUSIONS

To be approved, the proposed preliminary plat must comply with the criteria set forth in Section 17G.060.170 of the Spokane Municipal Code. The Hearing Examiner concludes, after reviewing the proposed preliminary plat and the evidence of record, that the application is not consistent with those criteria because it fails to satisfy the minimum density requirement. As a result, the plat application must be denied.

1. *The project does not satisfy the minimum density standard. Therefore, the proposed subdivision is not consistent with the applicable land use codes. See SMC 17G.060.170(C)(1).*

The project site is zoned Residential Single Family ("RSF"), a residential category. The proposal is obviously an allowed use; the Owner seeks to build single-family residences in a single-family zone. See SMC 17.110.110 & Table 17C.110-1. However, the problematic issue here is not use, it is density.

A preliminary plat cannot be approved if it does not adhere to the minimum density standards. The development standards applicable to a property are not optional. "**All new lots** created through subdivision **must comply with the standards** for the base zone listed in **Table 17C.110-3**." See SMC 17C.110.200(C) (emphasis added). Those standards include the minimum density requirements: "The **minimum density requirements** for the single-family and multi-dwelling zones are stated in **Table 17C.110-3**. **All subdivision is required to comply with the minimum density requirements of the base zone**, unless modified by a PUD under 17G.070.030(B)(2)." See SMC 17C.110.205(F) (emphasis added). The referenced table, entitled "Development Standards," states that the minimum density applicable to the RSF zone is "**11,000 (4 units/acre)**." See Table 17C.110-3 (emphasis added).

The proposed plat substantially deviates from the minimum density requirement. City Staff estimated the net density of the project at .6 units per acre. *Testimony of D. Compton.* However, this calculation was based upon the prior version of the plat. At the hearing, the project engineer presented a modified preliminary plat. Under the modified plat, a 100 foot strip in the northeasterly part of the site that will be granted to upland owners as part of a settlement agreement with neighboring landowners. As a result of the modification, lots 8-11 of the plat were reduced in size from the original proposal. See Exhibit A-3-7. The revised plat states that the net density of the plat is .78 units per acre. See id. In any case, the density of the proposal remains less than 1 unit per acre, well short of the required 4 units per acre.

The Hearing Examiner cannot conceive of a way that the proposal, as currently configured, can satisfy the minimum density requirement. Applying the formula stated in SMC 17C.110.205(F), the Owner would need to develop approximately 54 units[1] on the project site,

[1] This estimate is made by taking the total square footage of the thirteen proposed lots (which necessarily excludes the roadway, Tract A, and the 100 foot strip to be donated to upland owners) and dividing that amount by 11,000 square feet, the minimum density figure stated in Table 17C.110-3, as

given its size. Looking at the problem another way, in order for a 13 unit subdivision to satisfy a density requirement of 4 units per acre, the development area could not exceed 3.25 acres (approximately). In this case, the proposal is to create 13 lots on a site that is approximately 17.83 acres. Even after deducting the proposed extension of Osage Way, Tract A (for drainage), and the 100 foot strip to the northeast, the lots still consist of approximately 13.67 acres, resulting in a density of less than 1 unit per acre. There is not enough area that qualifies for deduction from the development site in order to achieve the minimum density standard, or so it appeared from the information presented in the hearing.

The issue of density was not, however, adequately explored at the hearing. In particular, the record lacked detailed consideration of what areas could be deducted from the development area (e.g. critical areas, which includes steep slopes) for purposes of calculating the density. The comments of the project engineer and the Planning Department at the hearing addressed the issue in very broad terms. As a result, the Hearing Examiner was reluctant to assume, without specific feedback, that the minimum density requirement could not, in some fashion, be satisfied. In order to ensure that interested parties had an opportunity to address the concern, the Hearing Examiner invited additional comment on the matter via a letter dated November 5, 2013. See Exhibit C-1. Specifically, the Hearing Examiner posed two questions about this issue, including the following:

> How does or can the proposal satisfy the minimum density requirement for the RSF zone?

See id. In response[2] to this question, the project engineer submitted comment and materials through its letter dated November 7, 2013. See Exhibit C-2. In that letter, the project engineer discussed various reasons that the site could not accommodate a density that satisfied or approached the minimum density requirement. See id. Even reconfiguring the project in 22 lots and deducting areas which the engineer deemed impractical for secondary access[3] (satisfying city street standards), the project would only have a density of 1.78 units per acre—still less than half the required minimum density. Ultimately, the Owner acknowledged: "...the proposal does not meet the minimum density requirement." See id.

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follows: 595,593.55 sq. ft. ÷ 11,000 sq. ft. = 54.1449 or 54 units. This estimate follows the methodology stated in SMC 17C.110.205(F). It should be noted that the project engineer estimated that the minimum density standard would require 50 units on the site. See Exhibit C-2.

[2] The Planning Department also submitted a response to the Hearing Examiner's request for information. However, the Planning Department did not answer the first question posed. Instead, the Planning Department focused on the Hearing Examiner's authority to approve the development as proposed, despite the deviation from the minimum density standard. See Exhibit C-3.

[3] This was a hypothetical suggested by the project engineer, and was the kind of information the Hearing Examiner invited. However, it should be noted that the minimum density provisions do not generally authorize the deduction of areas that may be too steep to practically install roads to city standards, for purposes of the density calculation. Critical areas (including steep slopes that qualify as geologically hazardous areas) are deducted to determine the net density of a development. There may be some overlap in that regard.

2. *The Hearing Examiner does not have authority to waive or excuse the minimum density standard. As a result, the Hearing Examiner cannot approve the proposal.*

Given the fact that the proposal does not satisfy the minimum density requirement, in the Hearing Examiner's view, there are only two potential rationales to nonetheless approve the project. First, the project could be approved if the minimum density standard was discretionary or optional. Second, the project could be approved if the Hearing Examiner had authority to waive the minimum density standard under circumstances similar to this case. Unfortunately for the Owner, neither of these rationales can be supported.

The minimum density requirement is a mandatory development standard. As noted above, the minimum density provisions state that "**all** new lots **must** comply" with the development standards set forth on Table 17C.110-3. That table is labeled "Development Standards" and provides that the minimum density for RSF property is 4 units per acre. Further, the land use code explicitly states that "**all** subdivision is **required** to comply" with the minimum density requirements of the base zone. See SMC 17C.110.205(F). This language leaves very little room for interpretation. A mandatory standard has been articulated by the legislature.

The only express exception to the minimum density requirement appears to be through a PUD. The land use code provides that all subdivision must comply with the minimum density requirements of the base zone, "**unless modified by a PUD under 17G.070.030(B)(2)**." See SMC 17C.110.205(F) (emphasis added). Under that "Density Exception," the Hearing Examiner is authorized to waive the minimum density requirement, for properties with a designated critical area, if the following criteria are satisfied:

a. The development of the site with the critical area would not allow sufficient minimum lot size under the base zone requirement because critical area setbacks and buffers would reduce minimum lot sizes below those required by the base zone.

b. The development of the site would require reducing buffers, setbacks or other dimensional modifications due to the location of designated critical areas; and

c. The protection of the agricultural lands or critical area would be more effective by clustering the homes and structures to the minimum area necessary.

See SMC 17G.070.030(B)(2).

The forgoing Density Exception, however, is not available to the Owner. The Owner did not apply for a PUD, which precludes any consideration of this exception. The minimum density requirement cannot be "modified by a PUD" unless an owner first applies for a PUD. Even with an application, it is far from clear that the Owner could satisfy the criteria of the Density Exception, given the size of the property and the limited deductions available to reach the required net density. Without a PUD application to consider, however, no firm conclusions can be drawn in that regard.

Other than the Density Exception just described, there is nothing in the table or the municipal code that would permit the Hearing Examiner to overlook or waive the minimum density requirement as applied to Aerie Ridge. The Hearing Examiner's jurisdiction is limited to the powers delegated to it. See HJS Development, Inc. v. Pierce County, 148 Wn.2d 451, 61 P.3d

1141 (2003). Those powers do not include the discretion to waive development standards applicable to a project. See SMC 17G.050.010 et seq. Further, Washington courts have confirmed that a hearing examiner has no authority to exempt a landowner from the development standards contained in a subdivision ordinance. See Chaussee v. Snohomish County Council, 38 Wn.App. 630, 638, 689 P.2d 1084 (1984). The Hearing Examiner is certainly allowed to interpret and apply a subdivision ordinance, as written. See id. That includes the authority to rule on the applicability of the minimum density standard. However, the applicability of the minimum density standard is not genuinely in question. City staff and the Owner essentially conceded that the minimum density standard applied and was not met, although both offered various rationales for project approval. None of those rationales, however, establish that the Hearing Examiner has authority to approve the proposed subdivision in the face of a contrary development standard.

As stated above, the Hearing Examiner invited additional comment on two questions regarding the minimum density problem. The second question posed by the Hearing Examiner is relevant here. That question was:

> If the minimum density requirement cannot be satisfied, by what authority may the Hearing Examiner approve the proposed subdivision?

See Exhibit C-1. In response, the Planning Department submitted a letter dated November 12, 2013. See Exhibit C-3. In that letter, the Planning Department suggested two rationales in support of approval of the proposed development. First, the land use codes are intended to be flexible and adaptable, justifying approval when the unique features of the property warrant an approach that differs from the development standards. Second, the proposed development should be approved because the deviation from the minimum density constitutes a "minor adjustment" that is within the authority of the Planning Director to approve. Each of these arguments will be considered in turn.

In support of its first contention, the Planning Department cited to SMC 17A.050.030(A), which states as follows:

> Each area of land is, to some degree, unique as to its suitability for and constraints on development. Development standards and procedures imposed under this title cannot foresee all conceivable situations peculiar to the development of every property at every moment, but are designed as standards applicable to most situations. It is the intent of this title to provide flexibility, adaptability, and reasonableness in the application and administration of this title where special conditions exist and the strict application of the standard or procedure would not serve a public purpose.

The ideas expressed in this passage are certainly not objectionable, and should be taken into account in circumstances such as those presented in this case. However, for a multitude of reasons, these provisions cannot be relied upon to override or excuse the minimum density requirement.

First, the above-quoted language is a broad policy statement, not a specific directive or a set of decision criteria. The language does not provide any substantive guidance on how to apply development standards in a given case. Moreover, the *general* statement that land use standards are intended to be reasonable and flexible does not allow a decision-maker to

overlook the *specific* requirements of adopted development standards. Stated another way, a specific development standard has precedence over a general policy concept. See e.g. SMC 17A.010.050(D) ("A specific provision in a section or chapter applicable to a particular circumstance controls in case of conflict over a corresponding provision of general application.")

Second, if the Hearing Examiner had the broad authority suggested by the Planning Department, it is difficult to see how any standard could not be overridden as an exercise of discretion. In such a case, the Hearing Examiner could, invoking the need for flexibility or reasonableness, alter any number of standards, including setbacks, densities, bulk, height, etc. The Hearing Examiner does not accept this premise. The Hearing Examiner can no more approve a development that is substantially under the minimum density standard than approve a development that greatly exceeded the maximum density limitations. The fact that the legislature intends the codes to be flexible or adaptable does not necessarily mean that the minimum and maximum limits need not be honored.

Third, the intent of the legislature, as expressed in the quoted paragraph, is apparently fulfilled in the myriad of options, exceptions and deviations allowed under the land use codes. For example, flexibility is incorporated into the RSF development standards by allowing a range of densities, from 4 units per acre to 10 units per acre. A developer can adapt its proposal, given the unique circumstances of its property, to fit within that range. If the developer needs or desires to deviate from the minimum/maximum limits, the options are much more limited. The developer may be required to seek a variance, apply for PUD, or possibly pursue other approaches. This concept is incorporated into the minimum density standards, which include the Density Exception discussed above. Other than these options, it is not clear that an owner could obtain approval of a deviation from the minimum density standard. The Hearing Examiner ultimately concludes that the legislature intended it that way.

The Planning Department's second contention is that the the deviation from the minimum density requirement is permissible as a "minor adjustment" to the development standard. In support of this argument, the Planning Director cites SMC 17A.050.030(B), which provides in pertinent part that "...the planning services director is authorized to make a minor adjustment in the standard or procedure, upon making a written finding that no person of average sensibilities would be negatively impacted by an adjustment, and that the adjustment would be consistent with the spirit and intent of this title and the comprehensive plan." For the reasons that follow, the Hearing Examiner does not agree with the Planning Department's position.

First, the proposed deviation from the minimum density standard is not a "minor adjustment." The proposed development has a density of .78 units per acre. This is less than one-quarter of the minimum density. Stated another way, the proposed density is about 75-80% below the minimum standard. There is no definition of "minor adjustment" in the relevant code; deciding between "minor" and "major" is apparently quite subjective. Nonetheless, hairs need not be split in this case. The deviation is substantial and material. This is not a close call, such as might exist if the proposed development had a density of 3.7 units per acre, as one example.

Second, the proposed deviation is not consistent with the intent of the comprehensive plan or the land use codes. The comprehensive plan and development regulations applicable to this case are creatures of a post-GMA environment. The Growth Management Act requires that each city establish "...densities sufficient to permit the urban growth that is projected to occur in

the...city for the succeeding twenty-year period..." See RCW 36.70A.110(2). The city's comprehensive plan and development standards were adopted through a GMA-governed process, which included establishing densities based upon population projections and land use inventories for the city.

As a result of that process, the city established the Residential 4-10 designation and the RSF zoning classification. Both the land use designation and the zone classification set a minimum density of 4 units per acre, and a maximum density of 10 units per acre. These are the urban densities established for residential areas within the city. The minimum density was undoubtedly established in fulfillment of the GMA policy against allowing lower density development within urban areas. The comprehensive plan acknowledges that one of the primary goals of GMA, as related to the land use element, is to "[r]educe the inappropriate conversion of undeveloped land into sprawling, low density development." See Comprehensive Plan, Chapter 3, p. 7. For better or worse, depending upon your point of view, GMA required minimum density standards to be implemented, in order to promote the more intense and therefore efficient use of land within urban areas, including within the City of Spokane.

3. *The proposed subdivision is not consistent with the comprehensive plan designation for the property. See SMC 17G.060.170(C)(2).*

The site is designated as Residential 4-10 in the comprehensive plan. Under this designation, as the name suggests, the "...allowed density is a minimum of four units and a maximum of ten units per acre." See Comprehensive Plan § 3.5, p. 35. Consistent with the zoning provisions, the only express exception to the minimum density requirement is via an application for a PUD. See id. There is no residential designation below four units per acre. This is undoubtedly because one of the objectives of the Comprehensive Plan is to combat the development of large-lot subdivisions within urban areas. Such developments undermine the policies of GMA which are intended to promote the efficient use of land and to deter urban sprawl. Regardless of the pros and cons of such policies, in particular given the infill nature of this project, the Residential 4-10 designation applies to the property at issue. As a result, any proposal to develop the site must include a sufficient number of units, given its size, to achieve a minimum density of 4 units per acre. Because the Aerie Ridge proposal does not satisfy this standard, the proposal must be denied as inconsistent with the comprehensive plan designation.

4. *The minimum density requirement cannot be relaxed or excused based upon the physical and legal limitations on more intense development of the site.*

The Owner and the Planning Department understandably focus on a number of potential limitations on development of this site, including the fire code requirements, the difficulty with obtaining or constructing secondary access, and the challenging topography. While all of these conditions erect genuine impediments to higher density development, none of these conditions excuse the Owner from complying with the minimum density standards. If the real issue is that minimum density standard embodies a misguided public policy, or operates in unintended ways, the solution to that grievance will require a legislative fix. The Hearing Examiner does not have authority to rewrite the standards in order to authorize a low density development on an urban property.

It is very common that difficult topography limits the development potential of a site. It is equally true that the lack of secondary access, whether due to unforgiving terrain, the developer's lack of ownership or control of the adjoining land, or the development patterns of nearby land, often acts as an inherent limitation on the development potential of an owner's land. Legal requirements also create impediments to more intense development. This includes fire code requirements, such as those relating to the width of fire lanes, the installation of turnarounds, and requirements for secondary access when the road serves residences in excess of a certain threshold. In other words, there is a combination of physical and legal obstacles to more intense use, and those obstacles are encountered all the time in land development. In the normal course, these problems would just be considered part of the challenge of land development. The developer would be expected to either satisfy those conditions, or scale back his or her plans to point where the development could be reasonably and economically completed. In this case, the developer attempted to accomplish that objective by reducing the proposed density to the point in which the challenges of topography, access, and fire code restrictions were apparently taken out of play. The dilemma created by this approach, however, is that the proposal now does not satisfy the minimum density standard.

As discussed previously, the Hearing Examiner solicited feedback on this question: "If the minimum density requirement cannot be satisfied, by what authority may the Hearing Examiner approve the proposed subdivision?" See Exhibit C-1. In response to this question, the project engineer asserted that the lower density plat design was the direct result of a conflict between the minimum density standard and the fire code. See Exhibit C-2. The project engineer contended that, under the fire code, Osage Way could not be used as a fire apparatus access road to serve more than 13 additional residences. This is true because the fire code states that a single access road cannot be used to access more than 30 residences, unless the developer either (a) provides a separate, secondary access route, or (b) all residences served by the access road are equipped with automatic sprinklers. In this case, there are 17 residences already using Osage Way, and these properties are not owned by the developer. In addition, there is no realistic route for secondary access. As a result, the Owner proposed only 13 additional residences, bringing the total dwelling units on Osage Way to the fire code limit of 30. The Owner then asserted that because the minimum density standard requires at least 50 dwelling units on this site, there was a conflict between the fire code's cap and the minimum number required by the density standard. The project engineer then referred to SMC 17A.010.050(A) for the proposition that, in the case of conflicts in the codes, the more stringent regulation shall control. The project engineer suggested that the fire code takes precedence over the minimum density standard, and therefore the Hearing Examiner was authorized to permit the density deviation.

The Hearing Examiner rejects the project engineer's contentions for a number of reasons. The tension between the fire code and the minimum density standard is actually a false dilemma. The source of the apparent dilemma is the developer's decision to propose only thirteen lots on a 17.83-acre site. If the developer reduced the area it proposed to plat to 3.25 acres, or thereabouts, a 13-lot subdivision would satisfy the minimum density standard and would remain consistent with the fire code. The fact that the project can be redesigned in a way that eliminates the alleged contradiction shows that the there is, in reality, no contradiction. Here, the developer cannot satisfy both the fire code and the minimum density requirement because too much land has been included in the proposed plat. Presumably, developing only a small portion of this site is quite disadvantageous, from the developer's perspective. In such a scenario, a large area of the property would be set aside as undeveloped or undevelopable, at

least for the time being. However, the obstacles to more optimal use of the site primarily arise from the topography, development patterns around the property, and lack of secondary access routes. As stated above, there are inherent limitations on this particular piece of real estate. If those limitations cannot be overcome, the result is that the property cannot be developed as the Owner would prefer. If the developer truly cannot satisfy the design standards applicable to a proposed plat, the result is that the plat must be denied. The answer is not that the development standards can be ignored.

The Hearing Examiner also doubts that SMC 17A.010.050(A) can properly be applied to this case. Even assuming *arguendo* that there is a legitimate contradiction between the fire code and the minimum density standard, the cited provision does not appear to be intended to resolve this type of dilemma. SMC 17A.010.050(A) resolves conflicts by giving precedence to the "more stringent" regulation. Here, the two allegedly conflicting standards serve wholly different purposes. The minimum density provision is designed to prevent low density urban sprawl, and therefore requires more intense use of residential areas within a city. The fire code limits the number of dwelling units on a single access road in order to protect persons and property in the event of a fire. The term "stringent" suggests "rigorous," "exacting," or "strict." However, because these two standards have little to do with each other, it is difficult to conclude that one is a more rigorous standard of performance than the other. The minimum density standard is clearly more rigorous, if the requirement is measured by the need to maximize the use of the urban land. On the other hand, the fire code is certainly more stringent if the result is tested by which regulation allows the fewest number of dwelling units to be developed, given the circumstances of this case. But again, the wholly distinct purposes of the two standards makes such comparisons largely artificial. The Hearing Examiner concludes the two standards serve two very different functions, and thus SMC 17A.010.050(A) is not helpful in interpreting or comparing the respective rules.

To the extent that the applicable development standards operate in a manner that seems improper or unfair, the ultimate answer is that those standards would have to be changed by the legislative authorities. The Hearing Examiner can only interpret and apply the standards as adopted. The Hearing Examiner does not have the authority to excuse, waive or re-write those requirements.

DECISION

Based on the findings and conclusions above, it is the decision of the Hearing Examiner to deny the proposed preliminary plat for Aerie Ridge.

DATED this 21st day of November, 2013.

Brian T. McGinn
City of Spokane Hearing Examiner

NOTICE OF RIGHT TO APPEAL

Appeals of decisions by the Hearing Examiner are governed by Spokane Municipal Code 17G.060.210 and 17G.050.

Decisions of the Hearing Examiner regarding preliminary plats are final. They may be appealed to the City Council. All appeals must be filed with the Planning Department within fourteen (14) calendar days of the date of the decision. The date of the decision is the 21st day of November, 2013. **THE DATE OF THE LAST DAY TO APPEAL IS THE 5th DAY OF DECEMBER 2013 AT 5:00 P.M.**

In addition to paying the appeal fee to appeal the decision, the ordinance requires payment of a transcript fee to the City of Spokane to cover the costs of preparing a verbatim transcript and otherwise preparing a full record for the City Council.