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

**FINDINGS, CONCLUSIONS AND  
DECISION ON APPLICATION FOR  
PRELIMINARY PLAT OF LADERA**

**FILE NUMBER:** S2020-103

**APPLICANT:** PAHLISCH HOMES

**APPLICATION:** TO SUBDIVIDE 59.44 ACRES INTO 101 SINGLE FAMILY RESIDENTIAL LOTS AND THREE (3) TRACTS, WITH ASSOCIATED INFRASTRUCTURE IMPROVEMENTS, USING A DESIGN BASED ON A REQUEST TO APPLY R-1-10 ZONING STANDARDS INSTEAD OF R-1-12 STANDARDS UNDER THE CITY'S ON-SITE DENSITY TRANSFER PROVISIONS FOR PROPERTIES THAT INCLUDE CRITICAL AREAS, FOUND AT RMC 22.10.400

**LOCATION:** IMMEDIATELY WEST OF THE CURRENT WESTERLY TERMINUS OF STRAWBERRY LANE, AND SOUTH OF INTERSTATE 182. THE PROJECT SITE IS CURRENTLY VACANT, COMPRISED OF THREE (3) 20-ACRE PARCELS ON AND BELOW THE NORTH SLOPE OF BADGER MOUNTAIN. TO THE EAST, THE AREA COMMONLY KNOWN AS "COUNTRY RIDGE" IS GENERALLY DEVELOPED WITH SINGLE FAMILY HOMES ON LARGE LOTS.

**PARCEL NUMBERS:** BENTON COUNTY ASSESSOR PARCEL NOS. 12098400000400, 12098400000300, AND 12098400000200)

**REVIEW PROCESS:** TYPE III, PRELIMINARY PLAT,  
HEARING EXAMINER DECISION

**SUMMARY OF DECISION:** *DISAPPROVAL*

**DATE OF DECISION:** JUNE 18, 2021

## **I. CONTENTS OF RECORD.**

**Exhibits:** Staff Report. City of Richland Development Services Division Staff Report and recommendation of approval to the Hearing Examiner regarding the “Ladera” Preliminary Plat, File No. S2020-103, dated March 8, 2021 (27 pages); (PDF File of ‘Full Staff Report’ with exhibits available before the public hearing totals 655 pages);

1. Application materials;
2. Preliminary Plat Survey;
3. Title Report;
4. Geotechnical Report;
5. Fish and Wildlife Habitat Conservation Area Report, aka Critical Areas Report;
6. Traffic Impact Analysis
7. Public Notice & Affidavits
8. Environmental Checklist
9. Determination of Non-Significance
10. Site Photos
11. Agency Comments
12. Public Comments
- 12A. Friends of Country Ridge Hearing Memorandum (26 pages), from Friends’ counsel, James C. Carmody, dated March 8, 2021 [sometimes referenced as “FOCR Memo”]
13. Plats comprising the adjacent neighborhood “*Country Ridge*”
14. Late Comments
15. Revised Application Information
  - Revised application form
  - Applicant response to initial comments
16. Post-Hearing Correspondence
- 16A. Gibbon Comment Received after 5pm
17. Applicant’s Final Rebuttal memo, closing argument, from counsel, LeAnne M. Bremer
18. Planning Manager (M. Stevens) Memo

**Testimony/Comments:** The following persons were sworn and provided testimony under oath at the open-record hearing:

1. Shane O’Neill, Senior Planner, for the City of Richland;
2. Chad Bettesworth, Development Manager for the applicant, Pahlisch Homes;

3. Nathan Machiela, P.E., with Knutsen Engineering, applicant’s lead consultant/agent through application process;
4. John Mannix, PE, traffic engineer, prepared the TIA for the applicant’s proposal;
5. LeAnne Bremer, attorney for the applicant;
6. Michael Gibbon, local resident, owns a large lot and house abutting a portion of the project’s eastern boundary;
7. Bjorn Hedges, local resident, lives in neighborhood to east of site;
8. Brian Cable, local resident, lives along Strawberry Lane, to the east;
9. Rakesh Malhan, local resident, owns one of the 5 houses/parcels along the proposed plat’s eastern boundary;
10. Laurie Ness, local resident;
11. Patrick Ness, local resident;
12. Patrick Paulson;
13. Amy Hatfield, local resident, Country Ridge;
14. Chad Hatfield, local resident, Country Ridge;
15. Tom Atkinson, also sent lengthy written comment;
16. Mike Evans, local resident, Country Ridge, expressed concerns about wildland fire risks, emergency evacuation and access concerns;
17. Steve Bensussen, local resident, lower Country Ridge;
18. James Carmody, attorney for “Friends of Country Ridge”, filed a “Hearing Memorandum” (26 pages);
19. Paul Inserra, local resident, Country Ridge;
20. Tom Haller, local resident, lives along Strawberry Lane in Country Ridge;
21. Karin Nickola, local resident, Country Ridge;
22. Dawn Zimmerman, local resident, Country Ridge;
23. Rick Millikin, local resident, Country Ridge;
24. Richard Lorenzo, local resident, Country Ridge;
25. Shawndell Wilson, local resident, Country Ridge;
26. Brian Bieger, applicant’s wildlife habitat and science consultant, generated the Critical Areas Report for project; and
27. Pete Rogalsky, Public Works Director for the City of Richland.

## **II. APPLICABLE LAW.**

This application for preliminary plat approval was filed and vested under City of Richland development regulations in effect in November of 2020. Amendments to the city’s plat review process included in Ordinance No. 51-19 took effect on, and apply to applications filed after, November 11, 2019. (*Ord. No. 51-19, Sec. 11, and publication date noted on page 9, explaining effective date as the day following publication, which occurred on Nov. 10, 2019*). While the final decision-maker in the process changed, the substantive approval criteria remain unchanged. So, under applicable provisions of the Richland Municipal Code (RMC), this preliminary plat<sup>1</sup>

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<sup>1</sup> In this Decision and exhibits included in the Record, preliminary plat and preliminary subdivision mean the same thing, and use of one term should be read to apply to the other to the extent anyone views the terms to have distinct meanings, which for the purposes of this Decision, they do not.

application is first subject to review and approval by city staff with respect to the engineering elements of said plat, then the Hearing Examiner is responsible for conducting an open record public hearing followed by a final written Decision. A preliminary plat application is a Type III procedure. RMC 19.20.010(C)(1).

As explained in RMC 24.12.050(A), the hearing examiner shall consider any preliminary plat application and shall conduct an open record public hearing in accordance with Chapter 19.60 RMC. After the public hearing and review of materials in the record, the hearing examiner shall determine whether the preliminary plat is in accordance with the comprehensive plan and other applicable code requirements and shall either make a decision of approval or disapproval. The same provision of the city's code (RMC 24.12.050(A)) provides that any approval of the preliminary plat shall not be given by the hearing examiner without the prior review and approval of the city manager or her designee with respect to the engineering elements of said plat including the following:

1. Adequacy of proposed street, alley, right-of-way, easement, lighting, fire protection, drainage, and utility provisions;
2. Adequacy and accuracy of land survey data;
3. The submittal by the applicant of a plan for the construction of a system of street lights within the area proposed for platting, including a timetable for installation; provided, that in no event shall such a plan be approved that provides for the dedication of such a system of lighting to the city later than the occupancy of any of the dwellings within the subdivision.

The City's decision criteria for preliminary plat approval are substantially similar to state subdivision mandates found in RCW 58.17.110(2)<sup>2</sup> and reads as follows:

***Richland Municipal Code 24.12.053 Preliminary plat – Required findings.***

*The hearing examiner shall not approve any preliminary plat application, unless the approval is accompanied by written findings that:*

- A. The preliminary plat conforms to the requirements of this title;*
- B. 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;*
- C. The public use and interest will be served by the platting of such subdivision and dedication; and*
- D. The application is consistent with the requirements of RMC 19.60.095 (addresses transportation concurrency considerations).*

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<sup>2</sup> "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 (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. []" RCW 58.17.110(2).

And RMC 19.60.095 mandates the following additional findings:

**19.60.095 Required findings.**

*No development application for a Type II or Type III permit shall be approved by the city of Richland unless the decision to approve the permit application is supported by the following findings and conclusions:*

*A. The development application is consistent with the adopted comprehensive plan and meets the requirements and intent of the Richland Municipal Code.*

*B. Impacts of the development have been appropriately identified and mitigated under Chapter 22.09 RMC.*

*C. The development application is beneficial to the public health, safety and welfare and is in the public interest.*

*D. The development does not lower the level of service of transportation facilities below the level of service D, as identified in the comprehensive plan; provided, that if a development application is projected to decrease the level of service lower than level of service D, the development may still be approved if improvements or strategies to raise the level of service above the minimum level of service are made concurrent with development. For the purposes of this section, "concurrent with development" means that required improvements or strategies are in place at the time of occupancy of the project, or a financial commitment is in place to complete the required improvements within six years of approval of the development.*

*E. Any conditions attached to a project approval are as a direct result of the impacts of the development proposal and are reasonably needed to mitigate the impacts of the development proposal.*

The burden of proof rests with the applicant, and any decision to approve or deny a preliminary plat must be supported by a preponderance of evidence. *RMC 19.60.060 and Hearing Examiner Rules of Procedure, Sec. 3.08.* The application must be supported by proof that it conforms to the applicable elements of the city's development regulations, comprehensive plan and that any significant adverse environmental impacts have been adequately addressed. RMC 19.60.060.

The hearing examiner's decision regarding this preliminary plat application shall be final, subject to judicial appeal in the time and manner as provided in RMC 19.70.060 and Ch. 36.70C RCW (*The city's final decision on land use application may be appealed by a party of record with standing to file a land use petition in Benton County Superior Court. Such petition must be filed within 21 days of issuance of the decision.*) See RMC 24.12.050(B).

**III. ISSUE PRESENTED.**

Whether a preponderance of evidence demonstrates that the applicant has met its burden of proof to satisfy the criteria for preliminary plat approval?

*Short Answer:*           No.

Based on all the evidence, testimony, codes, policies, regulations, environmental documentation, and other information contained in the Record, the Examiner issues the following findings, conclusions, and Decision denying the pending application for the Ladera Preliminary Plat, as set forth below.

#### **IV. FINDINGS of FACT.**

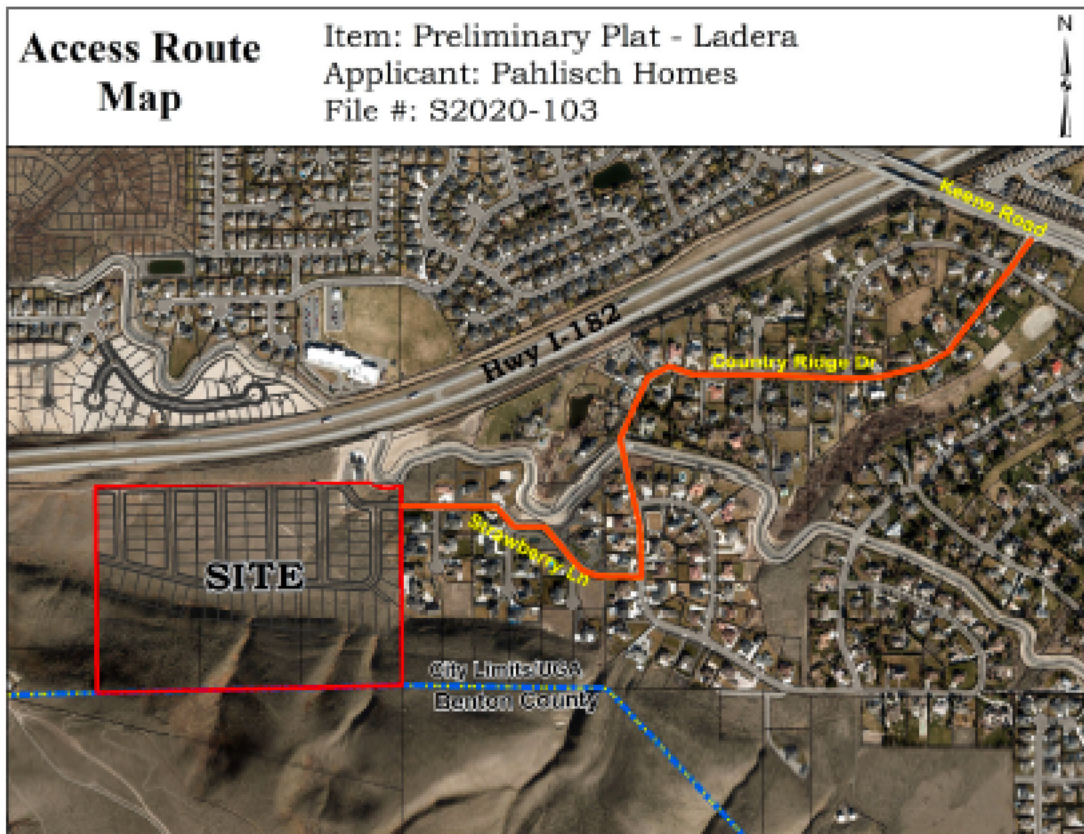
1. Any statements in previous or following sections of this document that are deemed findings are hereby adopted as such.
2. A public hearing is not a popularity contest, where a hearing examiner asks for a show of hands to reach a decision on a particular matter, instead, every application stands on its own two feet, and every applicant must demonstrate compliance with applicable approval criteria. The Rules of Procedure for the Richland Hearing Examiner explain that the Examiner is not to be concerned with the popularity of a matter presented but whether it meets the requirements of the applicable code, policy or regulation. The examiner's decision must be based on the record of the proceedings before the examiner. (*Richland Hearing Examiner Rules of Procedure, Introduction, at page 2*).
3. The Examiner has visited the road network that would serve the proposed new development and vicinity of the proposed plat on multiple occasions over the past few years in connection with other applications, and is fully advised on matters at issue herein, including without limitation adjacent developments and land uses, applicable law, application materials, and relevant comprehensive plan provisions.
4. Here, the Examiner is convinced that the quality of presentations during the public hearing process, including all testimony and exhibits offered during the public hearing, post-hearing submittals from the applicant and staff as authorized at the hearing, and in written comments from surrounding residents with specific concerns about the pending application, provide the decision maker with sufficient details, facts, arguments, expressions of specific local concerns, and analysis of applicable regulations, all needed to reach a fair decision.

#### ***Project Description.***

5. The applicant, Pahlisch Homes LLC , submitted this pending preliminary plat application on or about November 19, 2020. (*Ex. 1, Preliminary Plat Application materials; Staff Report, page 10*). Staff deemed the application materials complete for purposes of vesting on or about February 3, 2021, when they issued the first of several notices informing the public of the pending application and public hearing. (*Staff Report, page 10; Ex. 7, public hearing notices and confirmation materials*).
6. The proposed subdivision would divide a 59.44 acre site into 101 single family residential lots and three (3) tracts, with associated infrastructure improvements, to be known as the Ladera Subdivision. (*Staff Report, pages 1-3; Ex. 1, application materials*).

7. The project site is currently vacant, comprised of three (3) roughly 20-acre parcels on and below the north slope of Badger Mountain, immediately west of the current westerly terminus of Strawberry Lane, and south of Interstate 182. To the east, the area commonly known as “Country Ridge” is generally developed with single family homes on large lots. *(Staff Report; Ex. 1, application materials; Vicinity maps).*
8. The three affected parcels are currently assigned Benton County Assessor Parcel Nos. 12098400000400, 12098400000300, and 12098400000200.
9. The proposed plat would be served by City utilities, with new a public street that will form a loop inside the new plat, extending into the Ladera plat towards the west from the current west end point of Strawberry Lane, with five connecting streets running north/south in between dividing the loop into about five and a half blocks. The Staff Report notes that while the plat is designed with a street forming a loop, it offers opportunities for a westerly extension through properties that are not part of this application. *(Staff Report, page 2).*
10. As proposed, the Ladera plat would have only one fully-accessible point of ingress and egress, that would be its single connection with Strawberry Lane. The “Access Route Map” included on page 14 of the Staff Report is republished below. The applicant’s Traffic Impact Analysis, prepared by PBS, summarizes the proposed plat’s access and street improvements as follows:

“The project will extend Strawberry Lane west of its termination near Stallion Place. The project will complete full street improvements, curb to curb. All trips will be distributed through Strawberry Lane onto the existing County Ridge Drive. All trips will be distributed through Country Ridge Drive to Keene Road as the only access point to the neighborhood.” *(Ex. 6, Applicant’s TIA, prepared by PBS, dated Nov. 4, 2020, on page 1, on page 257 of .pdf file).*



**Figure 4 – Access Route Map**

11. The Staff Report, Fire Marshall comments, portions of the applicant’s Critical Areas Report, and WDFW comments, all direct attention to facts that make Fire Safety considerations of special concern on the Ladera site, including statements republished below. *(Staff Report, pages 14-15, Recommended Conditions 59-63; Fire Marshall Comments on .pdf pages 386-389; Ex. 5, Applicant’s Critical Areas Report, on .pdf pages 230, 233, 239, 240, and 244).*

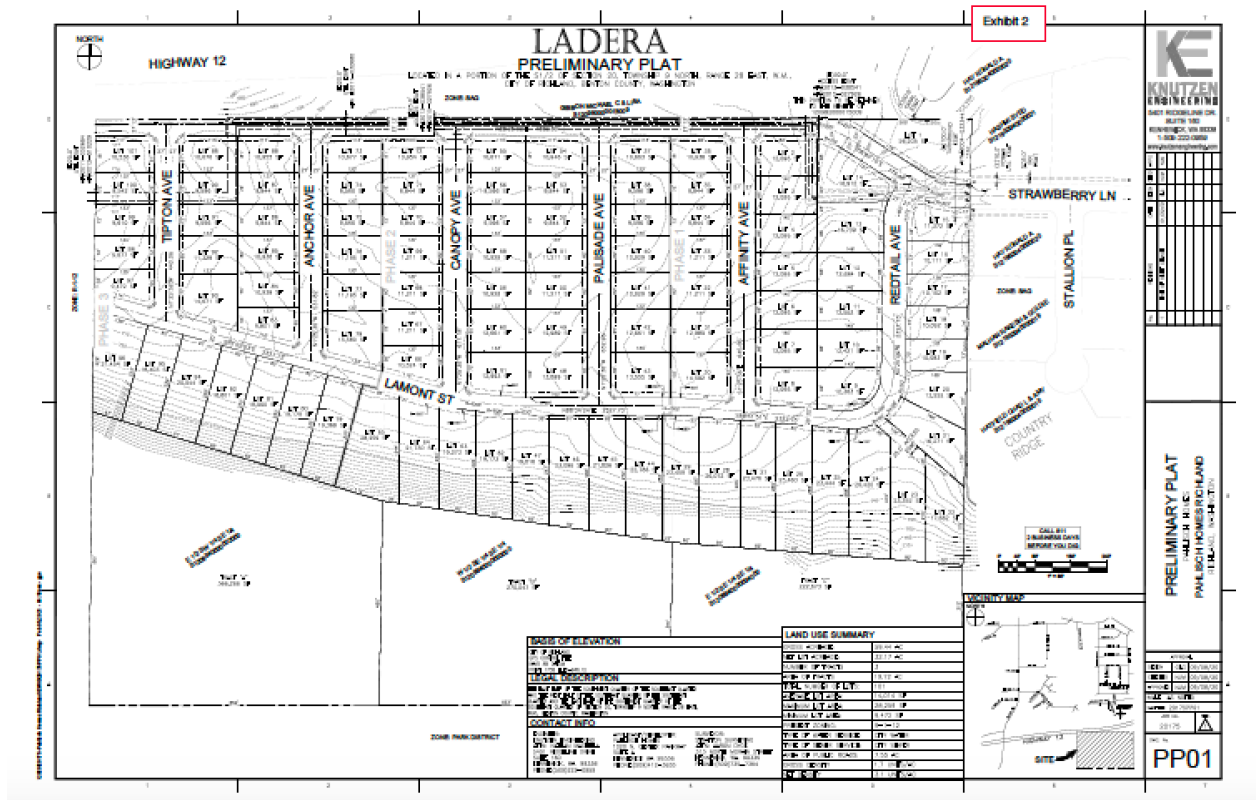
“It is worth noting that approximately 250 acres on the south side of Badger Mountain caught fire in 2010.” *(Ex. 5, .pdf page 230).*

“... [F]ire access requirements dictate that the subdivision have an alternate access during emergency situations. To meet this requirement, the applicant will utilize the existing gravel road that extends west from the subdivision and terminates at Dallas Road (Figure 4). It is likely that some pullouts or turnaround along the side of the gravel road will be required to meet the code requirements.” *(Ex. 5, .pdf page 233, with map showing location of “Fire Access Road” on Figures 3 and 4, .pdf pages 239 and 240).*

“Throughout the site are signs of past fires as evidenced by burnt sage brush stumps (Picture 7).” *(WDFW comments on .pdf pages 244 and 407).*



12. So, ample evidence in the record shows that, while this application cannot be approved as designed, any future application for development on the same site with more than 16 homes would most likely be required to include a Secondary Emergency Vehicle Access (SEVA) route meeting Fire and Public Works standards for such roads. And, consistent with other plats approved in recent years, a permanent SEVA must be paved with 2-inches of asphalt over 4-inches of gravel, at a minimum. The applicant is correct in stating that the final location of any SEVA route can be addressed after preliminary plat approval and imposed as a requirement that must be satisfied before final plat approval.
  
13. The new plat would comply with city development regulations mandating curbs, gutter and sidewalks on public rights-of-way within the plat boundaries. Staff recommended conditions for some additional off-site improvements deemed appropriate and supported by evidence in the record, although the applicant contested the necessity of some transportation/sidewalk related improvements. *(Testimony of applicant witnesses; Ex. 17, Applicant's post-hearing memorandum, including Attachment A, response to Staff Report recommended conditions from applicant's engineer, Mr. Machiela).*
  
14. A copy of the proposed plat is provided below. *(Exhibit 2, Ladera Preliminary Plat illustration).*



### ***Critical Areas on the Site.***

15. The tightly packed lines along the bottom parts of the southernmost lots shown in the proposed plat illustration above depicts the presence of very steep slopes in these areas. Steep slopes are specifically designated as a geologically hazardous areas, subject to the City's Critical Areas regulations, found in RMC 22.10.240-.295. On this subject, there is no dispute.
16. The Staff Report and site visits confirm that the southern portions of all three tax lots included in this preliminary plat proposal have some slopes that approach a grade of 1:1, which forms the lower portions of Badger Mountain itself. (*Staff Report, page 4*).
17. The applicant's Geotechnical Report explains: "Geologically hazardous areas are present on the southern portion of the property. Based on our field investigation and review of topographic data, approximately 32 acres of the site qualifies as a high geologic hazard." (*Ex. 4, Geotech. Report, on page 5, also on page 195/655 of PDF file of Staff Report materials*). The same report observes that: "Slopes greater than 40% exist throughout the hillslope portion of the property and continue beyond the property boundary." (*Id.*).
18. RMC 22.10.040 defines the term "Critical areas" as areas defined in RCW 36.70A.030(5) including any of the following areas or ecosystems: wetlands, areas with a critical recharging effect on aquifers used for potable water, fish and wildlife habitat conservation areas, frequently flooded areas and geologically hazardous areas. (emphasis added).
19. Again, there is no dispute that about a third of the southern portion of the Ladera site qualifies as a "geologically hazardous area." There is, however, some difference of opinion as to whether other parts of the project site qualify as Critical Areas, or even if they do, if such areas are subject to special protections found in relevant city codes, or if the current plat application, as proposed, satisfies relevant city regulations intended to protect and restore critical areas.
20. RMC 22.10.010.B expressly provides that RMC Chapter 22.10, the City's Critical Areas Code:

"...contains standards, guidelines, criteria and requirements intended to identify, analyze, avoid and mitigate probable impacts to the city of Richland's critical areas and to enhance and restore them when possible. The intent of these regulations is to protect ecological functions, avoid environmental impacts where such avoidance is feasible and reasonable. In appropriate circumstances, impacts to critical areas that result from regulated activities may be minimized, rectified, reduced and/or compensated for, consistent with the requirements of this chapter. [...]" (emphasis added).
21. In accord with City codes, including RMC 22.10.270 and .280 (re: staff determination that proposal may be near a geologically hazardous area triggering requirement that applicant

obtain a professional geologic study and report for the site), the applicant engaged the PBS Engineering firm to prepare a Geotechnical Report regarding the project site, a copy of which is included in the record as *Exhibit 4*.

22. There appear to be few, if any, material disputes regarding findings and recommendations regarding the Geotech Report (*Ex. 4*), except: a) whether portions of steep slopes that will be designated as ‘non-buildable’ areas will all be included in specially designated Tracts (now A, B, and C) with some parts of the steep slopes included in the backyard (southern) parts of multiple lots running along the south part of the proposed plat, or b) if all steep slope segments (i.e. Geologically Hazardous areas) should be carved out of all proposed lots and included in the larger proposed conservation tracts. (*See Ex. 2, proposed plat illustration, showing a dotted line along southern portions of south lots in the plat, indicating location for toe of slope of the steep slope areas included as part of such lots that will be conserved in some fashion, essentially designated as non-buildable areas on such lots, running through lots 22-29, 44-47, 62-65, 79-82, and 94-96; Staff Report, discussion on pages 17-18, proposed Conditions 64 and 65; Objections to such strategy in numerous public comments, including the Country Ridge Memo on pages 6-9*).
23. Because the Ladera site borders upon the Badger Mountain Fish and Wildlife Habitat Conservation Area to the south, and given the presence of shrub-steppe habitat on the site (as shown on WDFW map of Priority Shrub-Steppe Habitat, included as Figure 6 on page 17 of the Staff Report), and in accord with City codes, including RMC 22.10.200 (“*When development is proposed within a fish and wildlife habitat conservation area or its buffer, or where development is proposed to be located adjacent to a fish and wildlife habitat conservation area or its buffer or close enough to the FWHCA so as to likely impact critical area ecosystem functions and values, a habitat conservation report shall be prepared...*”), the applicant engaged the PBS Engineering firm to prepare a Fish and Wildlife Habitat Conservation Area Report regarding the project site, a copy of which is included in the record as *Exhibit 5*, also referenced throughout the record as the applicant’s Critical Areas Report.
24. Brian Bieger, PBS Senior Scientist /Project Manager, the applicant’s consultant who signed the Critical Areas Report, ended his report with a detailed Summary, which is republished below:

PBS was hired to complete a critical areas assessment for the proposed Ladera Subdivision in the City of Richland. The site was identified as having the potential for providing habitat for Townsend’s ground squirrels in addition to possibly meeting the WDFW definition of priority shrub-steppe habitat and borders a nature preserve that is designated as a FWHCA by the City.

Through the course of this assessment, it was determined that the study area is not likely being utilized by priority wildlife species as per WDFW definitions. There are some portions of the site that could be classified as shrubsteppe habitat in the eastern most portion of the site but most of the land represents a remnant shrub-steppe habitat dominated by invasive, non-native pasture grasses and forbs and taken as a whole, there is minimal amount of shrub coverage.

Lastly, the site shares a property boundary with the Badger Mountain preserve which has been designated a FWHCA by the City. There are currently no buffer requirements for this FWHCA.

Based on the topography of the site and the locations of the proposed developments, there will be a zone of no development between the development and the preserve. This no development zone will help ensure that the proposed development will not result in indirect impacts to the preserve. In order to prevent future development of this “buffer” my recommendation would be to place this area in a conservation covenant running with the land. This recommendation is in line with the WDFW recommendation regarding this project. Decisions to deed this area to the City or inclusion into the Badger Mountain preserve can be made at a future date. (Ex. 5, *Critical Areas Report, dated Jan. 15, 2021, prepared for the applicant by PBS Engineering, on .pdf page 235*)

25. The Examiner finds that the critical areas summary provided above, as well as some hearing testimony by applicant consultants on the same subject, was confusing or in conflict with other evidence in the record regarding the presence of Critical Areas on the project site. While the applicant’s critical areas report, included in the record as *Exhibit 5*, discusses the potential for shrub-steppe habitat on the project site, it is somewhat dismissive of the significance of such habitat in portions of the site where the applicant would like to build homes. The applicant’s post-hearing rebuttal memo is even more direct, where it argues that: “The steep slopes will be protected by a conservation covenant. This covenant will also protect the shrub-steppe habitat within these areas. The balance of the shrub-steppe habitat in the developable portion of the site is characterized as degraded and not of high ecological value according to the report of PBS Engineering in its Fish and Wildlife Habitat Assessment Report (Ex. 5).” (Ex. 17, on page 7).
26. Before the Critical Areas Report was issued, a WDFW habitat biologist, Michael Ritter, visited the Ladera site and shared his general summary of conditions with the applicant’s consultants. The WDFW Site Visit, and Mr. Ritter’s observations, are described in the Critical Areas Report as follows:

“WDFW habitat biologist Michael Ritter completed a site visit to evaluate the habitat conditions on the site. He completed a brief summary of the conditions on the site (attached to the report). He confirmed PBS biologists observations although it is worthy to note that he did observe pockets of cryptobiotic crust in the eastern most portion of the site that were not previously identified. His recommendation in regard to the proposed development is that “it would be worthwhile to pursue inclusion of the steep portions of the proposed development into the Badger Mountain Natural preserve as mitigation for the loss of shrub-steppe from this proposed development”. (Ex. 5, *Critical Areas Report, on .pdf page 234*).
27. So, after the applicant’s Critical Areas Report was issued in January, and the same WDFW Biologist, Mr. Ritter, had an opportunity to review the “*Ladera Preliminary Plat Application Narrative*” issued for this proposal, Mr. Ritter penned a sternly worded comment letter addressed to Mr. O’Neill, the County’s planner assigned to coordinate review of the Ladera plat application. As the Staff Report delicately observes, Mr. Ritter “disagrees with implications of the PBS assessment that non-steep-slope areas lack suitable wildlife habitat.” (*Staff Report, page 17*).
28. The WDFW comment letter from Mr. Ritter is dated February 19, 2021 and is included in the record as part of *Exhibit 11*, on pages 407 and 408 of the .pdf file created for this matter.

Given the significance of Mr. Ritter's comments, most of his letter is republished below, with several typographical errors corrected to be less distracting to the reader:

The Washington Department of Fish and Wildlife (WDFW) conducted a site visit in early January and on January 11 sent the following to the project consultant. I have omitted the photos in this correspondence to you but they are attached to the Critical Area Assessment that was prepared by the consultant.

*The northern portion of the site is generally flatter than the very steep southern portion. The east end of proposed development (Fig 1, blue polygon) supports sage brush, bunch grasses, and pockets of cryptobiotic crust and flowers (balsam root) (Pictures 1-4) which are indicative of shrub steppe. (emphasis added). The western portion is mostly bunch grasses (Picture 6) and the transition is sparse sage brush and bunch grass (Picture 5). Cheat grass is a common understory vegetation. Throughout the site are signs of past fires as evidenced by burnt sage brush stumps (Picture 7).*

*The proposed development site is part of a much larger WDFW Priority Habitats and Species (PHS) area (Figure 2) that is immediately adjacent (south) of the Badger Mountain Nature Preserve (Figure 3). The PHS area is also identified as a City of Richland Critical Area and Richland Municipal Code (Ch 22.10) provides ample rationale to protect critical habitats and species on and adjacent to the proposed development. Townsend's ground squirrels (WDFW Candidate Species) occur on the adjacent Badger Mountain Natural Preserve and shrub steppe habitat is contiguous across the proposed development site and the Natural Preserve. (emphasis added). Additionally, due to the steepness of the south side of the proposed development, that area is also categorized as a City of Richland Critical area.*

*Given the demand for residential housing within the Richland City limits as well as conservation of native habitats and species, it would be worthwhile to pursue inclusion (permanent and deeded) of the steep portion of the proposed development into the Badger Mountain Natural preserve as mitigation for loss of shrub steppe from this proposed development.*

Having provided this information about the project, we are surprised that the Ladera Preliminary Plat Application Narrative incorrectly described the project site. (Emphasis added). The Narrative specifically states that "...33% of the total site would be left in an undisturbed state, preserving the existing shrub/steppe habitat on the site." This implies that the remainder of the site (the area proposed for development) is devoid of this habitat type. **Our site visit clearly documents shrub-steppe habitat on site and that the entire area is WDFW Priority Habitat and a City of Richland Critical Area.** (emphasis added). We do not agree "... that the project site does not contain habitat that would meet the current WDFW of priority habitat..." (emphasis added). (Memo from PBS to Pahlisch Homes, 1/15/21 [Ex. 5, the applicant's Critical Areas Report]). As such, impacts to this habitat as a result of the proposed development should be mitigated for and that is why we recommended the steep area be set aside as mitigation. As portrayed, the steep area is being set aside due to its classification as a critical area, when in fact it should be clearly stated in the documents that it is being set aside as mitigation for impacts to shrub steppe habitat.

29. While it was not easy to find, given typos and odd labels used on some illustrations included in the Record, the Examiner carefully reviewed all exhibits and materials to locate the map that WDFW referenced as showing a "blue polygon" in the east end of the development site

where the presence of shrub steppe is indicated. (See Ritter letter, on .pdf page 407, republished in findings above). A copy of the illustration showing the blue polygon area where WDFW identified site conditions that are indicative of shrub steppe is provided below:



(See Figure 1 on .pdf page 245; also referenced in written public comments from Laurie Ness and Patrick Paulson on .pdf pages 587 and 588).

30. There is no credible dispute that the Ladera plat has been designed and proposed to include lots located within the blue polygon area shown above. And, while development might be allowable within such area, it must first satisfy all applicable City codes addressing Critical Areas considerations, including without limitation those found in RMC 22.10.400, the on-site density transfer provisions that the applicant seeks to use in order to allow for smaller lot sizes and reduced lot widths than would otherwise apply in the R-1-12 zone where the entire project site is located.

31. The Examiner finds that the applicant's consultant reports appear to be biased and written in a manner that tends to downplay potential challenges facing the proposed Ladera plat, especially with respect to how Critical Areas are to be addressed on the site. The WDFW biologist, Mr. Ritter, is presumably a state employee and is not a paid consultant engaged by the applicant. His letter reflects an attempt to balance urban development pressures (like the applicant's subdivision plans) with the need to appropriately protect Critical Areas. Thus, the WDFW comment letter is more credible than the applicant's evidence and arguments that seek to show that any shrub steppe habitat found on the portions of the site where homes are to be built is degraded and not of high ecological value.
32. Even so, Mr. Ritter's comments to correct the record and language in proposed conditions of approval, to ensure that the conservation areas on the site (Tracts A, B, and C) are recognized as mitigation for permanent impacts to the loss of shrub steppe habitat, do not obviate the applicant's requirement to satisfy the specific language found in City Codes addressing Critical Areas. This is of heightened relevance in this application, because the proposed plat has been designed and proposed with lot sizes, lot widths, and setbacks that seek to take advantage of the City's on-site density transfer provisions that might apply for projects that are affected by on-site Critical Areas. (*See RMC 22.10.400, captioned "On-site density transfer for critical areas."*)
33. The applicant's SEPA Environmental Checklist for this proposal described the project as follows:

This project proposes to subdivide three parcels totaling approximately 60 acres into 106 residential lots. Approximately 23 acres at the southern portion of the property will be retained as open space. The project will include construction of roadway, grading, utility improvements including water, irrigation, power, cable, gas and telephone to each lot and storm water disposal design for the run-off generated by the on-site improvements. The development includes the request of using R-1-10 lot sizes and related requirements utilizing the City's on-site density transfer code. (emphasis added). (*Ex. 8, Applicant's response to item 11 on SEPA Checklist, on page 3 of 15, also on page 362 of .pdf file for FULL Staff Report and exhibits*)
34. The above-referenced passage in the applicant's SEPA Checklist rebuts opposition comments that the applicant did not request a density transfer. (*FOCR Memo, argument on page 17*). But, the vague reference is imprecise and fails to explain or appreciate that any request for an on-site density transfer (and thus, the ability to take advantage of modified density, lot size, lot width, setback requirements, and the like) must comply with all provisions of the City's code that address the subject – specifically RMC 22.10.400 – and not just cherry-pick helpful subsections of the code and toss aside other subsections as pits that the proposed plat, as shown in *Exhibit 2*, does not and cannot satisfy.
35. The Staff Report explains that the entire project site is zoned R-1-12, which is consistent with the low-density residential development designation (zero to 5 dwelling units per acre) assigned in the City's Comprehensive Plan. (*Staff Report, page 3*).

36. There is a dispute regarding the how density calculations should be made for this site. Essentially, the applicant proposes much larger and longer lots along the southern/bottom part of the plat, that would include parts of the steep slope coming down from Badger Mountain, but with those areas somehow designated for conservation purposes; but, multiple local residents argued that city codes do not or should not allow new plats to create large lots with significant critical areas in the lot boundaries just for purposes of satisfying average lot size requirements for the plat or something to this effect. The result of such proposed configuration has a material bearing on density calculations as well as average lot size calculations, among other things. While this application is denied for other reasons, it should also be denied because leaving substantial acreage of non-buildable steep slopes under individual private ownership, with the potential for many individual code-enforcement problems for City staff if private property owners should violate terms of any covenant on their land, would not be in the public interest. Instead, it would be in the public interest, and is a far better practice, to consolidate ownership of protected conservation areas, for ease of ongoing management and oversight. *(See Ex. 2, proposed plat illustration, showing a dotted line along southern portions of south lots in the plat, indicating location for toe of slope of the steep slope areas included as part of such lots that will be conserved in some fashion, essentially designated as non-buildable areas on such lots, running through lots 22-29, 44-47, 62-65, 79-82, and 94-96).*

***Conditions that must be satisfied in order to utilize any on-site density transfer provisions.***

37. RMC 22.10.400, captioned “On-site density transfer for critical areas,” reads as follows:

A. An owner of a residential site or property containing critical areas may be permitted to transfer the density attributable to the critical area and associated buffer area or setback to another non-sensitive portion of the same site or property, subject to the limitations of this section and other applicable regulations.

B. Density can be transferred from the critical portion and associated buffer area or setback to the nonsensitive portion of the residential site **subject to the following conditions:** (emphasis added).

1. The basis for the density transfer will be an actual site plan for the site or property as if it did not have the critical area, subject to the provisions of the underlying zoning classification, applicable setbacks, and other standards of the city code or other land development regulations.

2. Based on the above site plan, a portion of the density that could be achieved on the critical portion and associated buffer or setback of the site can be transferred to the nonsensitive portion of the site. The following chart indicates the amount of density that can be transferred, based on the degree of sensitivity of the critical area:



Category of Critical Area	Percent of Density on Critical Area That May Be Transferred on Site
Category I and II Wetlands	25%
High and Very High Geologically Hazardous Area	25%
Seismic Hazard	25%
Category III and IV Wetlands	100%
Low and Medium Geologically Hazardous Area	100%

3. When transferring the density from the critical portion of the site and its associated buffer or setback to the nonsensitive portion of the site, the overall density of the nonsensitive portion of the site may be increased, provided the additional density does not exceed what would be allowed by the next residential zoning classification. In the case of the highest density multifamily zoning classifications, the density may not be increased beyond the current density.

4. The nonwetland portion of the site is not constrained by another environmentally critical or geologically hazardous area regulated by this code. (emphasis added).

5. The nonwetland portion of the site is subject to the lot size and setback requirements of the next residential zoning classification. Land uses and other standards of the city code or other land development regulations shall continue to apply as per the existing zoning classification.

C. An on-site density transfer shall meet the requirements and follow the procedures of:

1. Planned unit development, RMC 23.50.010;
2. Plats and subdivision, RMC Title 24.

D. The fact that development rights have been sold or received, and all related conditions, will be recorded, in a form acceptable to the city attorney, to become a part of the deed of the “sending” and “receiving” properties.

38. As noted above, the Ladera plat is proposed with lot sizes and other design standards that generally meet R-1-10 zoning requirements instead of the R-1-12 zoning standards, relying upon an ambiguous “request” to use R-1-10 lot sizes and related requirements by utilizing the City’s on-site density transfer code. (Ex. 8, Applicant’s response to item 11 on SEPA Checklist, on page 3 of 15, also on page 362 of .pdf file for FULL Staff Report and exhibits).

39. The Staff Report addresses the applicant’s density transfer request as follows: “The application does not request to benefit from on on-site density transfer per-se, instead the application implies a request to benefit from the provisions of 22.10.400.B.5 which states:

*5. The nonwetland portion of the site is subject to the lot size and setback requirements of the next residential zoning classification. Land uses and other standards of the city code or other land development regulations shall continue to apply as per the existing zoning classification.” (Staff Report, discussion of requested On-Site Density Transfer on pages 9 and 10).*

40. In numerous written comments and hearing testimony from local residents, objections were raised to the proposal’s use of smaller lot sizes and other design standards allowed in the R-1-10 zone instead of those that would be required in the R-1-12 zone, where this project site is located. *(See for example, Ex. 12A, Friends of Country Ridge Memo, on pages 17-20).*

41. The applicant changed its position in their rebuttal brief, filed by counsel in accord with direction provided during the public hearing. Specifically, the applicant’s final brief explains that: *“Applicant corrects the record to state that it is relying on subsection B.3, rather than B.5 for its increased density to the extent there is a conflict in the record.” (Ex. 17, page 8, footnote 3).* Again, as shown above, that applicant’s reference to “subsection B.3” is only one of *five* (5) specific “conditions” found in RMC 22.10.400.B that all requests for an on-site density transfer must satisfy. *(See full text of RMC 22.10.400.B.1-5 provided above).*

42. The Examiner finds and concludes that the applicant and several project opponents are wrong in their legal arguments regarding how the provisions of the City’s on-site density transfer code should be applied. Any arguments that an applicant can simply pick and choose any one of items B.1-5 in order to take advantage of modified zoning standards are erroneous and contrary to the plain language used in the code provision at issue, which reads in relevant part as follows:

B. Density can be transferred from the critical portion and associated buffer area or setback to the nonsensitive portion of the residential site **subject to the following conditions**: (emphasis added).

43. The above-referenced code does NOT say that density can be transferred “subject to ANY of the following conditions,” as the applicant and the Staff Report seem to believe.

44. So, the key question in considering the pending plat proposal is whether the applicant’s request to transfer density and modify zoning standards fully satisfies all five of the “conditions” that all such requests are “subject to”. In this matter, the answer is no.

45. The Examiner finds and concludes that far more than a preponderance of unbiased and credible evidence, including WDFW maps, site inspection notes, and comment letter, establish that large portions, if not all, of the area designated for construction of new houses in the Ladera plat lies within critical areas regulated by the City’s Critical Areas Code, found in RMC Chapter 22.10. Accordingly, the applicant’s density-transfer request must be denied, because most, if not all, of nonwetland portions of the Ladera site is constrained by

environmentally critical area regulations. (See RMC 22.10.400.B.4, the condition that mandates that “The nonwetland portion of the site is not constrained by another environmentally critical or geologically hazardous area regulated by this code.” (emphasis added)).

46. Again, the WDFW site visit “clearly documents shrub-steppe habitat on site and that the entire area is WDFW Priority Habitat and a City of Richland Critical Area.” (WDFW comment letter, addressed in findings above). At a minimum, there is no credible dispute that the “Blue Polygon” area in the northeast side of the proposed Ladera plat includes fauna and biotic organisms that indicates shrub steppe habitat. (“The east end of proposed development (Fig 1, blue polygon) supports sage brush, bunch grasses, and pockets of cryptobiotic crust<sup>3</sup> and flowers (balsam root) (Pictures 1-4) which are indicative of shrub steppe.” (WDFW field notes in comment letter, on .pdf pages 407-408).
47. Without any basis in fact or law, the applicant generally argues that subsection B.5 only applies to sites with wetlands and is inapplicable to the Ladera project. (Ex. 17). Presumably, they would make the same argument regarding the applicability of subsection B.4, which also begins with the same language used in subsection B.5, referring to “nonwetland” portions of the site.
48. Nonwetland means nonwetland. It does not mean that any code section beginning with the term “nonwetland” only applies to properties where actual wetlands might be located. To read it in such manner is absurd. It is entirely logical and readily understandable that the Critical Areas code is written in a manner to protect all critical areas, whether it is a wetland, steep slope, a protected habitat, or other environmentally critical or geologically hazardous area regulated by city codes. It is illogical and incongruous with the intent and purpose of the City’s Critical Areas code to read subsection 4 in a manner that only applies to sites with wetlands.
49. The applicant’s closing brief also argues that the term “nonsensitive” is not defined, so it should be read to mean something different than “critical area,” thereby allowing them to transfer density to what they consider to be ‘nonsensitive areas’ and use more lenient zoning standards under their reading of RMC 22.10.400.B.3, or something to this effect. (See Ex.

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<sup>3</sup> While in no way determinative of the outcome of this Decision, but because the environmental documentation in the file did not include a separate description or definition of the unusual term “cryptobiotic crusts” and readers may be curious as to what the term might mean, the Examiner takes official notice of a U.S. National Park Service information sheet describing the term, which notes that “Cryptobiotic Crusts” are known as “desert glue,” and that they play a vital role in desert health. “Basically, they hold the place in place... These sheaths build up in the soil over long periods of time, up to 15 cm deep in some areas. Not only do they protect the soil from blowing away; they also absorb rainfall (reducing flash flood runoff) and provide a huge surface area for nutrients to cling to.” (NPS.gov website, information sheet on “Cryptobiotic Crusts” in Joshua Tree National Park, by Vegetation Specialist Jane Rogers).

17, page 9). While the applicant correctly notes that “development is allowed in critical areas if certain conditions are met,” citing RMC 22.10.210, that is NOT the central issue in this pending application. Instead, the question is whether the request to transfer density and use more lenient zoning standards complies with all conditions found in RMC 22.10.400.B.

50. So, turning back to the argument about the meaning of “nonsensitive areas” – the Examiner finds and concludes that the applicant’s apparent belief that “degraded habitat” is not a sensitive area, so a transfer of density can be made to such “degraded habitat” is incorrect. Instead, the answer can be found in city codes, where the term “Sensitive Areas” is formally defined in RMC 26.80.010, as follows:

“Sensitive Areas” are those areas and ecosystems as defined under Chapter 36.70A RCW, and include:

- A. Wetlands;
- B. Areas with a critical recharging effect on aquifers used for potable waters;
- C. Fish and wildlife habitat conservation areas;
- D. Frequently flooded areas; and
- E. Geologically hazardous areas. (RMC 26.80.010)

51. As provided in RMC 22.10.040, “Critical areas” are areas defined in RCW 36.70A.030(5) including any of the following areas or ecosystems: wetlands, areas with a critical recharging effect on aquifers used for potable water, fish and wildlife habitat conservation areas, frequently flooded areas and geologically hazardous areas.
52. Thus, the terms “critical areas” and “sensitive areas”, though different, are each defined to include the same ecosystems. So, based on the intent and purpose of the City’s Critical Areas codes, found in RMC Ch. 22.10, the Examiner finds and concludes that use of the term “nonsensitive” obviously means a portion of a site that is not constrained by *any* critical area or sensitive area regulations found in City codes.
53. In the event of any conflict among regulations in RMC 22.10 for a particular critical area, those regulations that provide greater protection to a critical area shall apply. (See RMC 22.10.030, which reads in relevant part as follows: “...In the event of any conflict among regulations in this chapter or with any other regulations of the city of Richland for a particular critical area, those regulations that provide greater protection to the critical area shall apply.”).
54. In this matter, the applicant would prefer to pick and choose which subsection of RMC 22.10.400.B, and which words in each subsection, should apply to their proposed plat, which seeks to use R-1-10 zoning standards instead of R-1-12 requirements. As reflected in their written closing arguments, the applicant asserts that some parts of .400.B should apply to their project, but others should not. Such an argument creates a conflict with other parts of .400.B that they prefer to ignore. So, the conflict is resolved in favor of regulations that provide greater protection to the critical area. In this case, that means all 5 subsections of

.400.B are conditions that must be satisfied before an applicant can utilize any of the density transfer provisions found in RMC 22.10.400.

55. Several speakers and written comments argued that the pending application should be denied because they believed that City staff somehow told people that the Ladera site would never be developed until a road was built connecting the site to Dallas Road; or because they or a friend once tried to buy the land themselves, but did not because they heard that a Dallas Road connection might be required and/or could be impossible to obtain; or because they assumed the site was undevelopable or could only be developed with very large lots like those in a neighboring subdivision; and other similar claims involving pieces and parts of such assertions. None of these arguments were supported by credible evidence or any legal authority that would serve as a basis to deny this application.
56. Controlling legal authority also provides that where a government employee is alleged to have told an individual that his/her interpretation or understanding of regulations would apply a certain way to a particular circumstance or project, but such interpretation is later found to not apply, the doctrine of equitable estoppel is strongly disfavored as an avenue for the aggrieved party to obtain relief from the government agency. See *Dept. of Ecology v. Campbell & Gwinn (C&G)*, 146 Wn.2d 1, 43 P.3d 4 (2002).
57. Some speakers and written comments implied or directly asserted that they might file lawsuits against the City if Critical Area codes and other regulations were not enforced in a manner that they deem appropriate. While the Examiner respects and appreciates the dedication and concern expressed by all hearing participants, arguments laced with threats of legal action were not supported by credible evidence or any legal authority that would serve as a basis to deny this application.
58. In fact, such threats had no bearing on the Examiner's decision regarding this application, and hearing participants should be aware of RMC 22.10.430, captioned "No special duty created," which reads as follows:

**RMC 22.10.430 – No special duty created.**

It is the purpose of this chapter to provide for the health, welfare, and safety of the general public, and not to create or otherwise establish or designate any particular class or group of persons who will or should be especially protected or benefited by the terms of this chapter. No provision or term used in this chapter is intended to impose any duty whatsoever upon the city or any of its officers, agents, or employees for whom the implementation or enforcement of this chapter shall be discretionary and not mandatory.

Nothing contained in this chapter is intended to be, nor shall be construed to create or form the basis for any liability on the part of the city or its officers, agents, and employees for any injury or damage resulting from the failure of any premises to abate a nuisance or to comply with the provisions of this chapter or be a reason or a consequence of any inspection, notice, or order, in connection with the implementation or enforcement of this chapter, or by reason of any action of the city related in any manner to enforcement of this chapter by its officers, agents or employees.

59. The applicant's proposed plat design does not meet applicable development regulations for projects in the R-1-12 zone where it is located, and the applicant failed to satisfy all conditions for approval of their request to transfer density and modify development standards under RMC 22.10.400. Thus, it cannot be approved.
60. Based on all evidence, exhibits and testimony in the record, the undersigned Examiner specifically finds that the proposed subdivision of an R-1-12 zoned property, as currently designed generally using R-1-10 zoning standards, is not in the public interest, because it fails to satisfy all approval criteria for a preliminary subdivision.
61. A different application with a design that satisfies zoning and development regulations that apply to the property, could be approved.

#### **V. CONCLUSIONS of LAW.**

1. Based on the Findings as summarized above, the undersigned examiner concludes that the proposed plat is contrary to applicable City comprehensive plan policies, zoning, subdivision, critical area, and development regulations, and cannot be approved.
2. The Ladera plat, as proposed, does not meet applicable lot size, lot width, and other standards applicable to residential developments in the R-1-12 zone where the project is located.
3. As provided in RMC 19.60.095, captioned "Required Findings," no development application for a Type III permit, like this preliminary subdivision application, can be approved unless the decision to approve the permit application is supported by certain findings and conclusions, including without limitation, that: A. The development application is consistent with the adopted comprehensive plan and meets the requirements and intent of the Richland Municipal Code; and C. The development application is beneficial to the public health, safety and welfare and is in the public interest.
4. Because the Ladera plat is not designed in compliance with R-1-12 zoning standards that apply to the property at issue, and because the applicant failed to satisfy all conditions for approval of their request to transfer density and modify development standards under RMC 22.10.400, it cannot be approved.
5. Any finding or other statements in previous or following sections of this document that are deemed Conclusions of Law are hereby adopted as such.

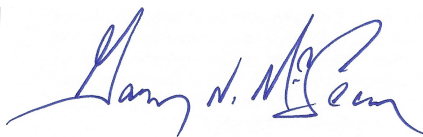
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**VI. DECISION.**

Based upon the preceding Findings of Fact and Conclusions of Law, evidence presented through the course of the open record hearing, all materials contained in the contents of the record, and the Examiner's previous site visits to the area, the undersigned Examiner respectfully DENIES the "Ladera" Preliminary Plat application.

Decision issued: June 18, 2021.

A handwritten signature in blue ink, appearing to read "Gary N. McLean". The signature is fluid and cursive, with a large initial "G" and "M".

Gary N. McLean  
Hearing Examiner for the City of Richland

## **Notice of Rights to Request Reconsideration or Appeal This Decision**

### ***Reconsideration –***

Sec. 2.22(a) of the Richland Hearing Examiner Rules of Procedure reads as follows:

(a) The Hearing Examiner may reconsider a decision or recommendation on an application, if it is filed in writing within 7 calendar days of the date of issuance. Only parties of record have standing to seek reconsideration. Any request for reconsideration shall be served on all parties of record and to any party's designated representative or legal counsel on the same day as the request is delivered to the Hearing Examiner. The Examiner will seek to accept or reject any request for reconsideration within 3 business days of receipt. If the Examiner decides to reconsider a decision, the appeal period will be tolled (placed on hold) until the reconsideration process is complete and a new decision is issued. If the Examiner decides to reconsider a recommendation made to the City Council, the transmittal to the City Council shall be withheld until the reconsideration process is complete and a new recommendation is issued. If the Examiner decides to reconsider a decision or recommendation, all parties of record shall be notified. The Examiner shall set a schedule for other parties to respond in writing to the reconsideration request and shall issue a decision no later than 10 business days following the submittal of written responses. A new appeal period shall run from the date of the Hearing Examiner's Order on Reconsideration.

### ***Appeal –***

The hearing examiner's decision regarding this preliminary plat application shall be final, subject to judicial appeal in the time and manner as provided in RMC 19.70.060 and Ch. 36.70C RCW (*The city's final decision on land use application may be appealed by a party of record with standing to file a land use petition in Benton County Superior Court. Such petition must be filed within 21 days of issuance of the decision*). See RMC 24.12.050(B).

**NOTE:** The Notice provided on this page is only a short summary, and is not a complete explanation of fees, deadlines, and other filing requirements applicable reconsideration or appeals. Individuals should confer with advisors of their choosing and review all relevant codes, including without limitation the city code provisions referenced above and the Land Use Petition Act (Chapter 36.70C RCW) for additional information and details that may apply.