

**BEFORE THE LAND USE HEARING EXAMINER
FOR THE CITY OF BATTLE GROUND, WASHINGTON**

Regarding an application by Achen Development for) **FINAL ORDER**
approval of a preliminary plat to divide a 3.72- acre parcel) **PR41-2020 | LUDIII21-0006**
into 26 lots in the MU-R zone west of SE Grace Avenue,) **(25th Street**
north of SE 28th Circle in the city of Battle Ground) **Townhomes Subdivision)**

A. SUMMARY

1. The applicant, Achen Development, requests approval to divide the 3.72-acre tract located west of SE Grace Avenue and north of SE 28th Circle known as Tax Assessor Parcel 986029-809 (the “site”), into 26 residential lots and four tracts for access, stormwater, parking, and open space.

a. The site and abutting properties to the south and west are zoned MU-R (Mixed Use Residential). Properties to the north are zoned ML (Light Industrial). Properties to the east, across SE Grace Avenue, are zoned R5 (Residential, five units per acre maximum density).

b. The site is currently vacant. The site contains two wetlands: Wetland A, a Category IV wetland in the southeast corner of the site and Wetland B, a portion of a Category III wetland in the northwest portion of the site. Wetland A is exempt from regulation due to its small size and isolation. Wetland B continues offsite onto the adjacent property to the west. The applicant proposed to fill all of the off-site wetlands and mitigate for the impacts to Wetland B by purchasing credits at an off-site wetland mitigation bank.

c. The applicant will construct a new single-family attached dwelling on each of the proposed lots. The city of Battle Ground will provide domestic water and sanitary sewer service to the site. The applicant will collect storm water from impervious areas on the site and convey it to a proposed on-site storm water facility for treatment and detention. The applicant will discharge treated stormwater to the existing ditch on the north side of SE 28th Circle at less than predevelopment rates.

d. The applicant will dedicate right-of-way and construct a new public street, proposed SE 25th Street, as a half-width improvement abutting the north boundary of the site from SE Grace Avenue. The applicant will extend SE 25th Street to the west boundary of the site to allow for further extension to the west when the abutting property redevelops. The applicant further proposed to construct half-width improvements for SE 28th Circle abutting the south boundary of the site. The applicant will extend a new private street, proposed SE 9th Avenue, into the site from SE 25th Street, terminating in a hammerhead turnaround in the southern portion of the site. The applicant will extend a second private street, proposed SE 26th Street, east of SE 9th Avenue to provide access to the lots in the northwest portion of the site. The applicant proposed to construct the private streets within proposed Tract A. The applicant will provide off-street parking areas within proposed Tracts A, C, and D.

2. The city issued a Mitigated Determination of Nonsignificance ("MDNS") for the subdivision pursuant to the State Environmental Policy Act ("SEPA"). The SEPA determination was not appealed and is now final.

3. City of Battle Ground Hearing Examiner Joe Turner (the "examiner") conducted a public hearing to receive testimony and evidence about the application. City staff recommended the examiner approve the preliminary plat subject to conditions. See the Staff Report to the Hearing Examiner dated August 9, 2021 (the "Staff Report") as modified at the hearing. The applicant accepted those findings and conditions, as modified, without exceptions. Other than public service providers and agencies, no one else testified orally or in writing. The only issue in this case is whether the proposed development complies with the wetland and critical area protection requirements of the Code.

4. Based on the findings provided or incorporated herein, the examiner approves the preliminary plat subject to the conditions at the end of this final order.

B. HEARING AND RECORD HIGHLIGHTS

1. The examiner received testimony at an online public hearing about this application on August 16, 2021. All exhibits and records of testimony are filed at the city of Battle Ground. At the beginning of the hearing, the examiner described how the hearing would be conducted and how interested persons could participate. The examiner disclaimed any *ex parte* contacts, bias or conflicts of interest. The following is a summary by the examiner of selected testimony and evidence offered at the public hearing.

2. City planning director Sam Crummett summarized the Staff Report. He noted that the reference to "Exhibit 21" on page 18 of the Staff Report should refer to Exhibit 17. He agreed with the change the applicant proposed to the Staff Report findings and conditions in Exhibit 19.

3. City engineer Ryan Jeynes requested the examiner add a condition of approval requiring the applicant dedicate right-of-way and construct the section of SE 28th Circle abutting the as a public street subject to the city's "Local A" standard.

4. Engineer Michael Andreotti appeared on behalf of the applicant, Achen Development. He accepted the findings and conditions in the Staff Report, as modified by Exhibit 19 and at the hearing. He requested the examiner hold the record open to allow the applicant an opportunity to address a potential error in the traffic analysis.

5. No one else testified at the online hearing. At the conclusion of the hearing the examiner held the record open for three days, until August 19, 2021, to allow the applicant to address the potential error in the traffic analysis.

6. By order dated August 26, 2021, the examiner reopened the record in this case to allow the parties to submit additional evidence and testimony regarding the city's wetland and critical area ordinances. The record was reopened subject to the following schedule:

a. For two weeks, until Wednesday September 9, 2021, for all parties to submit new argument regarding this issue; and

b. For a third week, until Wednesday September 16, 2021, for all parties to respond to whatever was submitted during the prior week.

7. No new testimony or evidence was submitted during the second open record period. Therefore, pursuant to the applicant's request, the examiner closed the record at 5:00 p.m. on September 10, 2021. Exhibits 19-22 were submitted during the open record period.

C. DISCUSSION

1. City staff recommended approval of the preliminary plat, based on the affirmative findings and subject to conditions of approval in the Staff Report, as modified at the hearing. The applicant accepted those findings and conditions, as amended.

2. The examiner adopts the affirmative findings in the Staff Report, as amended, as his own, except to the extent they are inconsistent with the following findings.

3. The applicant proposed to fill all of Wetlands A and B to accommodate the proposed development. Wetland A is exempt from regulation. The examiner finds that the proposed fill of Wetland B is allowed by the Code.

a. The plain language of BGMC 18.270 appears to prohibit most development, including the creation of developable lots, within wetlands or buffers.

i. BGMC 18.270.080.A provides, "Activities within wetland boundaries or the filling of wetlands are generally prohibited subject to the specific standards and exceptions of this section..." BGMC 18.270.080.B-D provide exceptions to the general prohibition for road and utility crossings in all wetlands and for fences, and certain temporary activities in Category III and IV wetlands. This section does not include an exception for the creation of residential lots. Therefore, BGMC 18.270.080.A appears to prohibit the filling of wetlands for the creation of residential lots.

ii. BGMC 18.270.070 provides a similar prohibition on activities within wetland buffers, providing, "Wetland buffers shall remain undeveloped and undisturbed except for ... [stormwater facilities, road and utility crossings, fences, and certain temporary activities]." This section does not include an exception for the creation of residential lots. Therefore, BGMC 18.270.080.A appears to prohibit the creation of lots within wetland buffers.

b. However, wetlands and buffers are “critical areas” subject to the regulations of BGMC 18.260.

i. BGMC Table 18.260-1 expressly allows single-family, multi-family, and commercial/industrial development within wetlands and buffers, subject to a Critical Area Report and compliance with the avoidance, minimization, and mitigation and no net loss of critical area function requirements of BGMC 18.260.

ii. BGMC Table 18.260-1 further provides that “[i]nfrastructure improvements, utilities, public or private roads or drainage systems” are exempt from review and do not need to meet the standards of BGMC 18.260.

iii. BGMC Table 18.260-1 and BGMC Table 18.260.060.C(2) provide that fences within wetlands or buffers “Require Review,” meaning they “[m]ust comply with the standards of [BGMC 18.260] but no special report is needed.”

c. The examiner must interpret the Code to give effect to all provisions, not render any provision meaningless, and avoid construing a statute in a manner that results in “unlikely, absurd, or strained consequences.” *Mason v. Georgia-Pac. Corp.*, 166 Wash. App. 859, 870, 271 P.3d 381 (2012). Construing BGMC 18.270 to prohibit any residential development within wetlands or buffers would render meaningless those portions of BGMC Table 18.260-1 which expressly allow such development, subject to a critical areas report. This interpretation is also consistent with the language of BGMC 18.270.

i. BGMC 18.270.080.A provides that “Activities within wetland boundaries or the filling of wetlands are *generally* prohibited...”

ii. BGMC 18.270.080.B(2) and C(1) provides “All activities in Category I [or Category II] wetlands are prohibited *except* for road, utility and other public purposes where there is no other practicable location or alternative for the activity.”

iii. BGMC 18.270.080.D lists certain uses that are allowed in Category III and IV wetlands and does not include the word “prohibited.”

iv. BGMC 18.270.070 allows stormwater facilities, road and utility crossings, fences, and certain temporary activities within all wetland buffers and does not include the word “prohibited.” BGMC Table 18.260-1 provides that roads, utilities, and drainage facilities are exempt from compliance with BGMC 18.260 and fences are subject to review, but do not require a Critical Area Report.

v. Reading these provisions in conjunction with BGMC Table 18.260-1, it is reasonable to interpret the Code to allow residential, commercial, or industrial development within Category III and IV wetlands and within any wetland

buffer, subject to a Critical Area Report demonstrating compliance with the requirements of BGMC 18.260.

(A) BGMC 18.270.070 allows stormwater facilities, road and utility crossings, fences, and certain temporary activities within wetland buffers and BGMC 18.270.080 allows these uses within Category III and IV wetlands.

(B) BGMC Table 18.260-1 provides that roads, utilities, and drainage facilities are exempt from compliance with BGMC 18.260 and fences are subject to review, but do not require a Critical Area Report.

(C) BGMC Table 18.260-1 allows single-family, multi-family, and commercial/industrial development within wetlands and buffers, subject to a Critical Area Report and compliance with the requirements of BGMC 18.260.

(D) Therefore, although BGMC 18.270 could be more artfully written, the only way to interpret the Code to give effect to all of provisions is to find that single-family, multi-family, and commercial/industrial developments are allowed within Category III and IV wetlands and within all wetland buffers, subject to a Critical Area Report and compliance with the requirements of BGMC 18.260.

d. This interpretation is consistent with:

i. The purposes of the wetland ordinance, which requires balancing the need for the protection of natural resources with private property rights and economic development while ensuring no net loss of wetland acreage and functions. BGMC 18.270.010.A and E;

ii. The purpose of the critical areas ordinance, which requires protection of ecologically sensitive and hazardous areas, their functions and values, while also allowing for reasonable use of private property. BGMC 18.260.010;

iii. The Battle Ground Comprehensive Plan, which provides “The protection of critical areas within the city and its UGA has been balanced against the need for continued economic development and growth. An appropriate balance has been found between these two competing goals.” P. 6-14 of the Comprehensive Plan; and

iv. The Washington State Growth Management Act, RCW 36.70A (the “GMA”). WAC 365-190-020, which implements the GMA provides, in relevant part:

...

(3) [C]lassification and designation of natural resource lands and critical areas is intended to assure the long-term conservation of natural resource lands and the protection of critical areas, and to preclude land uses

and developments which are incompatible with natural resource lands and critical areas...

...

- (6) Precluding incompatible uses and development does not mean a prohibition of all uses or development. Rather, it means governing changes in land uses, new activities, or development that could adversely affect natural resource lands or critical areas. For each type of natural resource land and critical area, counties and cities planning under the act should define classification schemes and prepare development regulations that govern changes in land uses and new activities by prohibiting clearly inappropriate actions and restricting, allowing, or conditioning other activities as appropriate.

e. Wetland B is a Category III wetland, where BGMC Table 18.260-1 expressly allows residential development.

4. Table 6 on page 22 of the applicant's traffic analysis listed the wrong intersection names. During the initial open record period the applicant submitted a revised copy of Table 6 listing the correct intersections. The corrected table did not alter the traffic analysis. Therefore, no changes to the findings or conditions are necessary.

D. CONCLUSION

Based on the above findings and discussion, the examiner concludes that LUDIII21-0006 (25th Street Townhomes Subdivision) should be approved, because it does or can comply with the applicable standards of the BGMC and the RCW, subject to conditions of approval necessary to ensure the final plat and resulting development will comply with the Code.

E. DECISION

Based on the findings, discussion, and conclusions provided or incorporated herein and the public record in this case, the examiner hereby approves PR41-2020 | LUDIII21-0006 (25th Street Townhomes Subdivision), subject to the following conditions of approval:

Conditions of Approval

A. Prior to Engineering Approval:

1. Submit final engineering plans, for review and approval by staff, pertaining to transportation, sewer, water, grading, erosion control, stormwater, driveways, street lighting, and landscaping prepared and stamped by a registered engineer in the state of Washington.

2. Submit final engineering plans:
 - a. Showing adequate half-street improvements, based on pavement testing, for SE Grace Avenue, a “Major Collector – Option 1”, including sidewalk, planter strip, curb and gutter and asphalt.
 - a. Showing right-of-way dedication and half-street improvements, for SE 28th Circle, “Local A”, including sidewalk, planter strip, curb/gutter and asphalt.
 - c. Showing adequate half-street improvements, for SE 25th Street, a “Neighborhood Collector”, including sidewalk, planter strip, curb and gutter and asphalt along the northern property line.
 - d. Showing SE 9th Avenue meeting applicable private street requirements in BGMC 12.116.140 based on five or more lots/units.
 - e. Showing SE 26th Street meeting applicable private street requirements in BGMC 12.116.140 based on 5 or more lots/units.
 - f. Showing access to lots 15-17 meeting applicable private street requirements in BGMC 12.116.130, 12.116.140, and 12.116.150.
 - g. Showing intersection spacing on SE 25th Street meeting the requirements of BGMC12.116.040(B)2, unless the applicant obtains approval of a road modification for a shorter distance.
 - h. Showing additional two feet of ROW dedicated to the City for SE Grace Avenue.
 - i. Containing a combined landscaping and driveway plan.
 - j. Showing sight distance triangles.
 - k. Containing a signing and striping plan.
 - l. Containing a street lighting plan having LED decorative cobra type units for SE Grace Avenue and LED acorn units for the other streets.
 - m. Showing traffic calming devices on all public and private streets per BGMC 12.116.080(B).
 - n. Showing driveways that meet the requirements of BGMC 12.116.243.
 - o. Showing traffic mitigation at SW Eaton Boulevard & SR 503, SW 20th Avenue & SW Eaton Boulevard and Grace Avenue & E. Main Street or indicating that mitigation fees will be paid in lieu of the improvements.

- p. Showing water lines throughout the subdivision and extending to extreme property lines.
 - q. Showing each residential lot having its own individual water service.
 - r. Showing an 8-inch gravity sewer line throughout the subdivision and extending to extreme property lines.
 - s. Showing each residential lot having its own individual sanitary lateral.
 - t. Showing a 6-inch sewer service connection for each proposed commercial building.
 - u. Showing sampling manholes for commercial uses including applicable easement/s.
 - v. Showing minimum 20-foot sewer easement over sewer mainlines not located in public right-of-way.
 - w. Showing a stormwater facility that meets the requirements of BGMC 18.250.
 - x. Showing grading and erosion control in conformance with applicable city standards and standard construction details.
 - y. Adjust plans so the proposed landscape island on SE 9th Avenue allows for 20 feet of fire apparatus access width, unless otherwise approved by the Fire Marshall and city Staff.
 - z. Provide the location of “No-Parking-Fire Lane” signs along at the following locations: along the proposed hammerhead turnaround; both sides of SE 25th Street; east side of Tract C; (1) side of SE 9th Avenue; (1) side of SE 26th St; and the North side of Tract D
 - aa. Clearly identify how the structure(s) proposed on lots 18-28 meet the 150 hose lay access requirement.
 - bb. Identify which structures are proposed to have fire sprinkler coverage
3. Submit a traffic study meeting the City’s requirements per BGMC 12.116.175.
 4. Provide a photometric plan for all access points, intersections, frontage roads out to centerline, and any existing lights to ensure that proposed lights meet IES RP-8-00 standards, prepared by an electrical engineer.

5. Submit a hydrology report that addresses all requirements found in BGMC 18.250.
6. Submit proof of engineering plan approval by Clark Public Utilities for the water improvements.
7. Submit a SWPPP that meets the requirements of the Washington State Department of Ecology.
8. Submit a construction cost estimate for required public and applicable private improvements for review and approval by the City Engineering Department
9. Following the City Engineer's acceptance and approval of the construction cost estimate, pay the required engineering plan review and construction inspection fee that is two (2) percent of the estimated costs of construction.
10. Submit a final wetland mitigation plan.
11. Coordinate with Ecology and the Corps of Engineers for any required permits or reviews.

B. Prior To Construction Of The Site:

1. Receive signed and approved engineering plans from the City of Battle Ground.
2. Receive an approved ROW permit from the City of Battle Ground.
3. Submit a surety bond meeting the requirements of BGMC 12.118.110.
4. Submit a Certificate of Liability Insurance meeting the requirements of BGMC 12.118.120.
5. Erect and conduct erosion control measures consistent with the approved Erosion Control Plan and City of Battle Ground erosion control standards.
6. Submit evidence that an individual on-site has successfully completed formal training in erosion and sediment control by a recognized organization acceptable to the City.
7. Conduct a pre-construction conference with City engineering and planning staff.
Contact the Engineering Department at (360) 342-5069 to schedule an appointment.

C. Prior To Creation Of Impervious Surface:

1. Except roofs, the stormwater treatment and control facilities shall be installed in accordance with the approved final engineered plans and in accordance with the City of Battle Ground stormwater regulations.

D. Prior To Engineering Acceptance:

1. Construct all public improvements, if applicable, and go on a walkthrough with City of Battle Ground Engineering Staff and correct any deficiencies as determined by City staff.
2. A letter shall be provided by the applicant showing that fire flow requirements per BGMC 15.105.180 and 15.105.190 can be met.
3. Submit recorded sewer easement after being reviewed by City Engineering Staff.
4. Provide certification that private streets have been completed per BGMC 12.116.140.
5. Submit a private road maintenance agreement for private streets.
6. Submit to the City of Battle Ground, a two-year/20-percent maintenance bond for all completed and accepted public improvements.
7. Submit to the City of Battle Ground, a recorded stormwater maintenance covenant meeting the requirements of BGMC 18.250.310(B)(2).
8. Submit a Bill of Sale for the sewer system.
9. Submit complete sets of as-built drawings for all required public improvements for streets and roads, stormwater drainage and control, sanitary sewer and water services, as applicable prior to the issuance of the occupancy permit for review and approval by the Engineering Department. Upon acceptance by the Engineering Department, submit prior to the issuance of the occupancy permit, one (1) Mylar set, one (1) full size paper set, two (2) 11x17 paper sets of As-Built record drawings and one (1) compact disc or USB flash drive version of the as-built drawings in AutoCAD, and separate/individual PDF, and TIF format files.
10. Submit a covenant running with the land, for inspection of private on-site stormwater facilities in conformance with the dimensional standard and other requirements specified in BGMC 18.250.320(C) for review by the City of Battle Ground Engineering Department.
11. If LID improvements are incorporated into the project, provide appropriate stormwater covenants.

E. Prior To Final Plat Approval:

1. Construct all required public improvements and gain engineering acceptance or provide appropriate bonding.
2. Construct the mitigation measures for the failing intersection of Grace Avenue & East Main Street or pay the mitigation fees of \$1,721.77.
3. Construct the mitigation measures, 100-foot eastbound right turn lane and a second westbound left turn lane, for the failing intersection of SR 503 & SW Eaton Boulevard or pay the mitigation fee of \$13,799.97.
4. Construct the mitigation measures, second southbound left turn lane and receiving lane on SW Eaton Boulevard, for the failing intersection of SR 503 & SW Eaton Boulevard or pay the mitigation fee of \$13,172.49.
5. Construct the mitigation measures for the failing intersection of SW 20th Avenue & SW Eaton Boulevard or pay the mitigation fee of \$2,291.40.
6. Submit a final plat:
 - a. That shows easements for public utilities not located in the right-of-way.
 - b. With the following note: "Fences higher than 42-inches will not be allowed in the front yards."
 - c. With the following note: "All utilities are to be located outside of the sidewalk section and to be underground where possible."
 - d. With a note specifying that SE Grace Avenue is access controlled and cannot have direct access from lots.
 - e. With a note describing the maintenance responsibilities of each lot owner for the private streets.
 - f. With a note specifying the party/s responsible for long-term maintenance of stormwater facilities.
 - g. With a note specifying the party/s responsible for long-term maintenance of the tracts adjacent to double fronted lots 1-5.
 - h. That shows where any control monuments have been placed.
 - i. That shows the dedication of any public roads.
 - j. Showing Lots 1 and 2 combined and reserved for commercial use, unless the site is rezoned to Residential, in which case lots 1 & 2 may be retained and used for residential uses.

F. Prior to Building Construction:

1. Acquire the required building permits as outlined in Title 15 above.
2. All new structures shall conform to setbacks, parking, and building height requirements of the MU-R zoning district or current zoning in place at the time.
3. Future commercial uses shall be in compliance with Table 17.122.020-1.
4. Residential buildings shall meet the design standards of BGMC 17.106.040 at building permit issuance.
5. Future commercial buildings on lots 1 and 2 shall submit for site plan review.

G. Prior to Certificate of Occupancy:

1. Complete all building permit requirements of the City of Battle Ground Building Division.

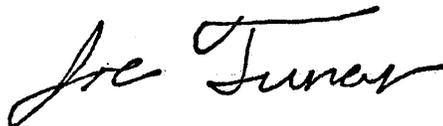
H. Other

1. If any cultural resources are discovered in the course of undertaking the development activity, the State of Office of Historic Preservation and Archaeology and the City of Battle Ground Planning Department must be notified.
2. Adhere to all recommendations in the final wetland mitigation plan.
3. Coordinate any water quality recommendations in reference to Ecology's letter.

APPEAL

This Final order may be appealed to the Washington Superior Court per RCW 36.70C within 21 calendar days after the issuance of the decision.

DATED this 30th day of September 2021.



Joe Turner, AICP
City of Battle Ground Land Use Hearing Examiner