

**TUMWATER HEARING EXAMINER PUBLIC HEARING
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CONVENE: 6:00 p.m.

CASE NUMBER: **Three Lakes Crossing Appeal of Administrative Decision (TUM-22-1101)**

DESCRIPTION OF PROPOSAL: Copper Ridge, LLC is appealing an administrative decision for Three Lakes Crossing Site Development/Grading Permit concerning undergrounding of existing overhead utilities along the frontage of Henderson Boulevard, SE, in conjunction with the Appellant's development of a preliminary plat and planned unit development.

APPELLANT: **Evan Mann Copper Ridge, LLC**
PO Box 73790
Puyallup, WA 98373

PUBLIC HEARING: Hearing Examiner Andrew Reeves with Sound Law Center convened the public hearing at 6:00 p.m. to consider an appeal of an administrative decision for Three Lakes Crossing Site Development/Grading Permit concerning undergrounding of existing overhead utilities along the frontage of Henderson Boulevard SE, in conjunction with the Appellant's development of a preliminary plat and planned unit development.

Examiner Reeves reported the purpose of the hearing is to collect evidence in the form of exhibits and testimony to determine whether the Appellant has met their burden that the City erred in making the determination.

Examiner Reeves reported that prior to the public hearing he received and reviewed a motion for summary judgment and a response consisting of a cross motion for summary judgment. He also received and reviewed 23 exhibits on behalf of the Appellant and eight exhibits on behalf of the City of Tumwater.

Heather Burgess, Attorney, Phillips Burgess PLLC represents the Appellant.

Ms. Burgess noted that Mr. Crews is a common witness and in the interest of time, suggested cross examining Mr. Crews during his testimony rather than calling him to testify twice.

Examiner Reeves recommended Mr. Crews testify with some latitude in terms of the scope of cross-examination.

Jeffrey Myers represents the City of Tumwater in the matter.

Examiner Reeves noted the abbreviated timeline whereby he has not communicated when he plans to issue a decision on the summary judgment in advance of the public hearing. He plans to address the summary judgment immediately as both parties, during the briefing, pointed out factual issues and material facts specific to the project as opposed to what has occurred with respect to the City's interpretation of its code in the past and the matter of the deference the Hearing Examiner should afford as to the City's interpretation of its municipal code, which will have bearing and

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weight on the Examiner's decision. It would be appropriate to deny summary judgment and allow the parties to present testimony on behalf of their witnesses. He asked for any feedback from the attorneys as Mr. Pierce-Wright was prepared to argue a summary judgment.

Ms. Burgess offered no comments.

Mr. Myers supported proceeding with the testimony.

Examiner Reeves added that he plans to elaborate on his decision in his final order and acknowledged the time the parties took to prepare to make arguments.

Examiner Reeves cited the Appellant's submission of Exhibits A1 through A23. He asked Mr. Myers if he had any issue or objections for including the exhibits into the record. Mr. Myers said he does not object to the submission of Exhibit A1 through A20 but would like to reserve A21-A23, as he recently received them and did not have the opportunity to consider potential objections to the admittance of those exhibits. The exhibits included some site plans and a November 4, 2021 letter that included comments on the Three Lakes Crossing preliminary plats feasibility site plan review. It appears the August 19, 2021 exhibit is from a different development. The exhibits also include an email exchange. He does not have any issues surrounding the authenticity of the documents but is unsure as to the relevance of the documents.

Examiner Reeves acknowledged no objection to Exhibits A1 – A20 and admitted them into the records. He tentatively deemed A21-A23 admitted with the understanding that if some testimony is offered that is objectionable, Mr. Myers should raise the objection and he will address the issue at that time. If no such objection occurs and the exhibits are inadvertently not further addressed, he suggested that by de facto, the exhibits would be admitted if there is no reason otherwise.

Examiner Reeves asked Ms. Burgess whether there were any issues with the City's Exhibits C1-C8. Ms. Burgess said she has no issues with respect to the City's exhibits. Examiner Reeves asked whether there were any other matters that need to be addressed prior to receiving testimony. Ms. Burgess advised of the submission of a prehearing legal brief in addition to the summary judgment briefing. Examiner Reeves said he received the brief and thanked her for providing the brief. In terms of the brief prepared for summary judgment, he received a hearing brief and believes Mr. Myers also had a hearing brief independent of the response brief.

Mr. Myers affirmed the submittal of the response brief only, as the issue is primarily a legal question. The brief outlines the City's position.

Examiner Reeves entered Appellant's Exhibits C1-C8 into the record.

Ms. Burgess said she finds no need to offer an opening statement given the legal

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briefing previously submitted and the nature of the proceeding. However, prior to the testimony from the first witness, Exhibit 21 refers to another project name within the header, which could be directly addressed to Mr. Crews, as she believes there is a typographical error in the header and that it pertains to the subject project of the Three Lakes Crossing plat.

Mr. Myers asked whether the correction pertains to the August 19, 2021 letter. Ms Burgess affirmed that it did (Exhibit 21).

Examiner Reeves clarified that the final three exhibits from the Appellant include Exhibits 21 and 22 are various iterations of the internal review by City staff and Exhibit 23 is an email exchange between the Appellant and City staff regarding the review. Ms. Burgess affirmed the Examiner's understanding of the exhibits. She clarified that Mr. Myer's potential objection might pertain to the exhibit applying to a different project, which is not the case.

Mr. Myers noted the Cause Number is the same although the description refers to another plat.

**APPELLANT
TESTIMONY:**

Examiner Reeves administered the oath to Evan Mann with Copper Ridge, LLC.

Evan Mann: I am the Entitlement Manager for Sound Built Homes, owner of Copper Ridge, LLC.

Heather Burgess: Could you explain how long you have served as Entitlement Manager for Sound Built Homes?

Evan Mann: I have been with Sound Built Homes for 3-1/2 years as the Entitlement Manager.

Heather Burgess: Did you work on the entitlements for the project known as Three Lakes Crossing?

Evan Mann: I did, I started in June 2021, and I have been involved from that point through the present time.

Heather Burgess: I know the Examiner recently heard the entitlements in the plat hearing for this particular project; however, please summarize the project for the record.

Evan Mann: The plat is 45-lots of detached single-family homes with a connection to an existing plat to the west and another connection to Henderson Boulevard consisting of a loop road through the site to service the homes. The project includes development of water, sewer, storm systems, roads, and all necessary utilities to serve the homes.

Heather Burgess: Regarding utilities specifically, what is the current electrical service to the property?

Evan Mann: Currently, there is service to several existing homes on the property. They are typical service drops with no transmission or other type of transmission

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lines or other type of service other than for single-family service.

Heather Burgess: When you develop the property into the plat, how are the utilities installed? Will the electrical utilities be underground?

Evan Mann: Yes, as a standard, a 10-foot utility easement is provided adjacent to all through roads in the plat. The easement covers a “joint utility trench.” Typically, the joint trench contains all dry utilities, which are typically power, gas, communications, and other dry utilities except water, sewer, and storm services. The dry utilities are placed within the trench in conduit and buried.

Heather Burgess: Moving to the frontage, there are frontage improvements required along Henderson Boulevard. Is that correct?

Evan Mann: Correct.

Heather Burgess: As part of those frontage improvements, is a new electrical service required?

Evan Mann: No, there is no service being installed along Henderson Boulevard. It is anticipated that power from the overhead pole will be directed underground from a location on the pole into the plat and installed underground. Any transmission or line bringing power into the plat will be underground.

Heather Burgess: Can you briefly describe the frontage improvements required for the plat on Henderson Boulevard?

Evan Mann: Frontage improvements include 13 feet of shoulder widening, construction of curb, gutter, and sidewalk, installation of street trees, lighting, and landscaping.

Heather Burgess: Were the scope of those improvements discussed during the course of the City’s review of the plat application?

Evan Mann: Yes, extensively. It was one of the first discussion points with the City to try and establish what the right-of-way dedication would need to be as it obviously impacts how the site is developed. It was very important from the beginning of the feasibility review in terms of the amount of right-of-way that would need to be dedicated and identifying needed improvements.

Heather Burgess: In terms of improvements, does it pertain to the entirety of the street section in terms of better sidewalks and bike lanes and those types of improvements?

Evan Mann: Yes, improvements are required to the frontage, which is typically from the median or centerline of the road (Henderson) to the site. Usually, the City establishes what will be built in that section from the centerline to the property line and determines how much right-of-way is necessary to establish those improvements, which are typically dedicated as right-of-way to the City.

Heather Burgess: Was Mr. Crews involved in the discussions and review of the preliminary plat?

Evan Mann: Not that I am aware of. Mr. Crew’s involvement started during the

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site development stage.

Heather Burgess: At any point during the discussions with the City in the preliminary plat phase, was there any discussion or requirement raised about undergrounding the existing utilities on Henderson Boulevard?

Evan Mann: No, there was not.

Heather Burgess: Can you describe the frontage improvements that were mentioned and the impact to the existing overhead utilities?

Evan Mann: I think the plans are in Exhibit C4.2 (site civil plan) and there are three poles along the frontage. One pole is located at the northern extent of Henderson Boulevard at the northeast boundary of the property. That pole will be maintained with guide lines for protection.

At the request of Examiner Reeves, Ms. Burgess shared Exhibit A2, the site development plan and a reference sheet.

Evan Mann: Referred to page 9 of the application (a sheet within the civil plan set).

Heather Burgess: I note that only three sheets were included as part of the appeal record. Mr. Mann offered to speak to the site plan. Ms. Burgess shared a copy of the site plan on the screen for the benefit of Examiner Reeves and participants.

Examiner Reeves: Mr. Mann, would you speak to location of the poles?

Evan Mann: Referred to the site plan. The bulk of the project sits along the west side of Henderson Boulevard. At the northeast corner of the plat is lot 35. At that northeast corner of lot 35 adjacent to Henderson Boulevard is an existing pole with a guy wire. Moving south from Lot 35, the second pole is located in the area of an intersection that will be constructed as part of the project located at 68th Avenue Southeast and Henderson Boulevard. The third pole is located at the southeast extent of the plat southeast of Lot 24. The pole will be maintained in place. The only pole proposed for moving is the single pole located at 68th Avenue Southeast and Henderson Boulevard. The pole will be relocated to the west and to the north and placed behind the curb within a planter strip between the curb and the sidewalk.

Examiner Reeves: Where is the location between Lot 30 and Lot 29?

Evan Mann: The location of the pole would be on the southeast corner of Lot 30, just northwest of the intersection.

Examiner Reeves: So, you would have Lot 30 and any kind of required buffer, then the pole, and then the improvements, and then Henderson Boulevard. Is that correct?

Evan Mann: The only reason the pole needs to move is that if left in place it would sit in the middle of paving of the new road improvements.

Examiner Reeves: He asked whether 68th Avenue already extends or is new as part of the development of the plat.

Evan Mann: It is the newest part of the plat.

Heather Burgess: So, in moving the utilities as described, who performs that

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movement?

Evan Mann: Typically, we enter into a contract with Puget Sound Energy (PSE), the service provider in the area. Puget Sound Energy then schedules crews to perform the work. They generate an engineered design first and then perform the work.

Heather Burgess: As part of that engineered design would PSE be replacing any of the existing transmission wires?

Evan Mann: No.

Heather Burgess: So, can you describe for the Examiner what PSE's expected scope of work would be for this?

Evan Mann: Typically, a pole relocation requires installation of a new pole in the new location with lines migrated from the old pole to the new pole with some slack in the line. The new location does not involve a significant move. The old pole is cut off and removed at that point. All utilities are transferred to the new pole. In this case, it would be transferred to one pole with the other poles remaining in place.

Heather Burgess: Do you have an estimate or have you received an estimate from PSE about the amount of the scope of work for the relocation effort would cost?

Evan Mann: We do not have our contract with PSE yet for the relocation effort as the intent was to complete the Hearing Examiner process first. Typically, something of this nature would be approximately \$75,000 to \$100,000.

Heather Burgess: I would like to step back in time and away from the project to review the City's review process leading up to the preliminary plat and later, the site plan review. So, going back process-wise, could you briefly describe for the Examiner, the City's preliminary plat review process that you went through for this project?

Evan Mann: On August 11, 2021, we submitted our feasibility pre-application request. On August 19, 2021, we held a feasibility pre-application meeting that generated after meeting notes that were submitted as part of the package. Following that meeting, we were told that there was a preliminary site plan review followed by a final site plan review. We submitted for our preliminary site plan review on October 15, 2021 and the preliminary site plan review was held on November 4, 2021. Notes were included and are included as an exhibit.

Examiner Reeves: You just touched on one of the exhibits raised as a potential concern in terms of Exhibit A21.

Heather Burgess: I was going to have him go back and cover that. I will screen share Exhibit 21.

Examiner Reeves: Every jurisdiction is a little different. But, Mr. Mann, am I correct in my understanding that the reference to some sort of feasibility site plan review is the very earliest stage often called a pre-app or pre-application meeting with staff that is often prior to notice even of an application being submitted. It is a meeting to discuss the proposed project and review project particulars with City staff

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to obtain a sense of whether the project is feasible to pursue. Is that your understanding of the meeting?

Evan Mann: Correct, it is typically called a pre-app.

Examiner Reeves: Okay, it looks like Exhibit 21 is now being shared and I will let Heather Burgess ask questions related to this.

Heather Burgess: Thank you, I am showing you Appellant's Exhibit 21. Do you recognize this exhibit Mr. Mann?

Evan Mann: I do.

Heather Burgess: If you look at the top, it says Hope plat 40 single-family lots. Can you explain given that name what the relationship of this exhibit is to the Three Lakes Crossing project?

Evan Mann: Yes, at this point in the project during the feasibility we did not have a name for the plat yet, so we referred to it as the landowner's name, Al Hope, at that point in time when we made the application. The application for the feasibility pre-app was under the name of Hope plat. Though I believe shortly after we went through the feasibility, the name changed to what we now know as Three Lakes Crossing.

Heather Burgess: But, Exhibit A21 refers to the pre-application feasibility review that you testified too just a few minutes ago, is that right?

Evan Mann: Correct.

Heather Burgess: Okay. I am going to stop sharing.

Examiner Reeves: Did that clarify your issues surrounding the exhibit, Mr. Myers?

Jeffrey Myers: Yes, it clarifies it.

Examiner Reeves: Okay, great. So, A21 is all set.

Heather Burgess: In the interest of ensuring that we have a complete understanding of the record, I will share again Appellant's Exhibit A22. Do you recognize that exhibit?

Evan Mann: I do.

Heather Burgess: What is this exhibit?

Evan Mann: These are the notes generated after our preliminary site plan review meeting held on November 4, 2021.

Examiner Reeves: If you look at Exhibit 21 versus Exhibit A 22 there are some slight differences, but the area was 9.73, I think. In both cases and the project number was the same and I think it was the name change that went from proposed 40 to 43. Does this all sound accurate to everybody? Clearly, there was some change. Mr. Mann, could you just speak very briefly to obviously the name change but to the number of lots?

Evan Mann: So, through the preliminary planning process, effectively we were refining the site plan based on comments from staff and in this case, there were

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additional lots that were available through density and so we realized those as we were finalizing the plan.

Heather Burgess: So, specifically looking at the pre-application review and the preliminary site plan review that we just went over in terms of the exhibits, was there any discussion of undergrounding the utilities on Henderson Boulevard in the course of either of those reviews?

Evan Mann: No, there wasn't.

Heather Burgess: I am going to share Appellant's Exhibit 23. The exhibit is more challenging to read electronically.

Heather Burgess: Do you recognize this exhibit Mr. Mann?

Evan Mann: I do.

Heather Burgess: It appears to be an email exchange between you and City staff regarding the Henderson Boulevard street section. Is that an accurate description of this exhibit?

Evan Mann: It is. This email came out, I believe it was April 22, which was well into our preliminary plat stage so I think we had already missed a step in there, but the preliminary site plan review followed by a final site plan review meeting and that one didn't have any notes or comments. It was all verbal during a meeting held on November 18, 2021. So, again no undergrounding discussion at that one either and then the preliminary plat application was submitted as part of the review of that plat this email was generated.

Heather Burgess: The difference between that November 2021 review and the two prior reviews that was just discussed was that there were no notes generated from that review, is that correct?

Evan Mann: Correct, and at that meeting, they (the City) had the revised plan and there was a brief conversation on a couple of minor items and I don't even have the red lines, but there were no further comments. We were directly at that point to make our preliminary plat application.

Heather Burgess: Okay, terrific, and the email that is on the screen now is Appellant's Exhibit 23 per that exchange and that further revisions to the design occurred subsequent to that final site plan review, is that right?

Evan Mann: Yes, subsequent to final site plan review and subsequent to preliminary plat application being made.

Heather Burgess: Okay. Before the preliminary plat approval?

Evan Mann: Correct.

Heather Burgess: Okay, and in the discussions surrounding the frontage improvements on Henderson Boulevard as part of this kind of post-formal site plan post application process, was undergrounding of the utilities on Henderson raised by City staff?

Evan Mann: No.

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Heather Burgess: Could you describe for the Examiner what this graphic is that is inserted and shown on the screen in Appellant's Exhibit 23? What does that represent?

Evan Mann: Yes, we are looking at a cross section of the frontage improvements that will be done along Henderson Boulevard. This was reviewed by City staff and we had several conversations with them. I think Matt Webb is on this and Jeff Query so yes, we brought this up as a concern as they asked for an additional 2½ feet of right-of-way dedication. In the discussions with them, we came to a conclusion that they only needed two feet of an easement. So, what you are seeing here is the outcome of the discussion as the original ask was for 40 feet of right-of-way and we didn't agree on that and ultimately it came down to only 37½ feet of right-of-way, but with a 2-foot easement at the back of the sidewalk was necessary. So, we have shown it on our plans.

Heather Burgess: So, then this cross-section that is marked up here as Exhibit 23 is what came forward to the preliminary plat hearing, is that accurate?

Evan Mann: Correct. We revised the plans and that was actually reviewed by the City.

Examiner Reeves: So, the 37½ feet that is being dedicated or was dedicated at this point to the City and that the other 2 feet essentially remains property that is owned technically by the developer, by the applicant, but there is an easement that it remains clear in a way so that there is access for the City to get in as needed to deal with. Is that an accurate way of thinking about how all that played out Mr. Mann?

Evan Mann: That is, it says on the note there - 2 feet of easement to the City for public access and reconstruction and/or grading.

Examiner Reeves: Right, but meaning ownership wise?

Evan Mann: Right.

Examiner Reeves: Okay, just making sure that I am fully aware of what is going on.

Heather Burgess: So, Mr. Mann the process that you have described with the City, it is somewhat iterative in nature, would you agree?

Evan Mann: Yes.

Heather Burgess: Okay, and so the City has an opportunity to review and comment on plans, and you as the applicant would then revise those plans?

Evan Mann: Yes, correct. There is an extensive pre-review followed by a formal application vesting of the project at which point additional review happens and then essentially we bring forward our application to the Hearing Examiner with conditions recommended by staff. In this case, we had a fairly extensive staff report with 46 conditions of approval recommended, which is fairly extensive and detailed. In fact, within that Staff Report, Condition 25 speaks specifically to relocating utilities. So, I think that is important that we note that Condition 25 of the Staff Report speaks directly to relocation.

Heather Burgess: Right, and when you say the Staff Report, I would just like to

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refer the Hearing Examiner to the City's Exhibit 07, which is your decision actually on the preliminary plat, which also has the same Condition 25 that Mr. Mann is referring to in his testimony.

Examiner Reeves: So, in my decision, which I think we had a hearing in June 2022, I issued a decision on July 15, 2022 and the condition that you referenced is Condition 25. I know that Condition 23 may be brought up by others later, but Condition 25 was the one that said any public or private utility relocation necessary to construct the project is the sole responsibility of the project proponent. Is that correct?

Evan Mann: Yes.

Examiner Reeves: Excellent. Okay.

Heather Burgess: And just for the record that is page 19 of the decision within the City's exhibit. Mr. Mann, did you attend the preliminary plat hearing for the approval of the project?

Evan Mann: I did as I represented the project.

Heather Burgess: Okay, and was there any discussion during that hearing or a requirement brought up by the City staff for the undergrounding of the utilities on Henderson Boulevard?

Evan Mann: No, at no point during the preliminary plat process was undergrounding discussed.

Heather Burgess: So, having looked backwards and coming forward to the present day, can you describe for the Examiner the first time that you learned that the City intended to require you to place the existing overhead utility lines along Henderson underground?

Evan Mann: Yes, so we made our civil plan application for engineering review and the letter we received on August 31, 2022 was the very first time the City brought up the request to or the requirement to underground overhead existing facilities/utilities.

Heather Burgess: Just for the record Mr. Examiner, Mr. Mann is referring to Appellant's Exhibit A4, which is a August 31, 2022 engineering comment.

Examiner Reeves: Mr. Mann, I don't recall and I looked back at the decision and I was trying to remember did you bring this up because I do not recall there being a whole lot of controversy related to this project as my decision certainly does not reflect that although there were a few public comments related to other things but nothing related to this issue. Did you, yourself, bring up whether or not undergrounding along Henderson would need to happen? I don't remember, so I thought I would ask as I have a vague recollection of something comparable coming up potentially even with you as an applicant representative but you appeared before me in lots of places in lots of ways and I don't want to impose anything into the record as I did not find the audio quickly available to me so, I was curious. Do you recall if this was ever brought up at the plat hearing because I don't recall that it was?

Evan Mann: So, I will tell you that the reaction to the August 31, 2022 letter was

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one of surprise because it had not come up and we assumed that these would be relocated as needed. It was truly kind of a surprise to see the undergrounding requirement and recognizing again that for our purposes whenever we hear conversion, we know that it is a big number and so we generally work that into our cost equation for our projects immediately. It is a big number and it takes a significant amount of time, so that is always something that if it comes up that we plan for that very, very extensively once we find out.

Examiner Reeves: Okay, so your understanding is that you did not testify or asked for clarification on this issue, which does not decide anything one way or the other, but I just wanted to make sure that I do not impose anything from a different matter. Thank you for clarifying that it was not brought up by either side (during the hearing).

Heather Burgess: I refer to page 4 of Exhibit A4, which is under the street section at paragraph 12 that states, "This project shall be required to underground the existing overhead utilities along Henderson Boulevard. Please address this on the plan set." So, Mr. Mann is it your testimony that this is the first time the City informed you that it would be required?

Evan Mann: Correct.

Heather Burgess: So, having learned that as to your testimony of significant surprise, what did you do next?

Evan Mann: Yes, I reached out to I believe Jared Crews and Alex Baruch, who was the planner on the project, to clarify that we disagree on the reading of the standard and then asked - we basically sent a letter asking for a specific decision so that we could appeal it.

Heather Burgess: I am sharing my screen to reflect Exhibit A6.

Examiner Reeves: Is this the September Jared Crews' letter?

Heather Burgess: Right. So, is the letter that you just testified to Mr. Mann that you received in response to following up with City staff?

Evan Mann: Yes, it is.

Heather Burgess: So, looking specifically at the administrative decision, could you read those two sentences that follow "as follows" within the middle of the page?

Evan Mann: Yes. "After reviewing the applicable codes and guidelines as they relate to the project, the City of Tumwater has decided the requirement to install the existing overhead utilities underground stands. The justification is Chapter 3, Section 3.14 Utility Locations subsection B states, "New and existing facilities shall comply with provisions as set forth in Tumwater Municipal Code 17.12.20 Land Division."

Heather Burgess: So, the section that you just read speaks to the term "install" or "installed" as a term. From your perspective, are you installing electrical power on Henderson Boulevard?

Evan Mann: Absolutely not. Anything there we would be installing would be down

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a pole and underground immediately. The existing line would be relocated not installed.

Heather Burgess: What is your understanding of the word “installing” to mean in this context?

Evan Mann: New services or any new services that are installed. Existing services would be relocated.

Heather Burgess: You mentioned before that there seems to be some understanding about services having to be relocated because it is referenced in your Condition 25 from the preliminary plat approval. Right?

Evan Mann: Right, we anticipated that we would need to move the utilities to make the road frontage improvements.

Heather Burgess: Okay. So, can you explain for the Hearing Examiner what the difference is as a matter of construction between relocating the poles versus installing and undergrounding the utilities along Henderson?

Evan Mann: So, PSE really controls most of that but in the way of costs, undergrounding would be closer to \$300,000 or about \$12,000 in engineering costs from PSE that we pay and somewhere in the neighborhood of \$275,000 in underground relocation costs and then our cost of that would be doing the trenching which could be anywhere from \$10,000 to \$20,000 of trenching and backfill. So, it is upwards of \$300,000 to underground. I am not certain as to why conversion takes so much time by PSE, but they always nearly take triple the amount of time for a conversion completion. I am unsure if it requires a different engineering team to put together the plans, but it takes a significant amount of time to underground existing utilities.

Heather Burgess: So, in terms of the work that is required and what the contract with PSE is, it is not just the additional cost but significant additional time associated with a conversion of this nature, correct?

Evan Mann: Correct, yes.

Examiner Reeves: Just to be clear, you very clearly described what it sounds like a terrifying job earlier, which is putting in a brand new utility pole where 68th is going to be, slack in the lines, put in the new, assuming it was undergrounded, you would have to move the wires to the new pole and then PSE takes out the old pole. Is that what you envision happening.

Evan Mann: Yes.

Examiner Reeves: That would be what the Appellant is seeking. This other process of conversion, my only question clearly would involve things that are being installed underground, similar to what you described earlier within the plat. But, this would be along Henderson Boulevard and I guess my only question to be clear is whether this would require coordinating between your team and their team because unlike the utility pole, which is pretty straightforward even as complicated and dangerous as it might be, here (conversion) I would assume that your team or subcontractors would be the ones that would be trenching out and preparing the improvements and then

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PSE would come in to put the new wire underneath the right-of-way. So you need to coordinate with them and I understand timing wise it might take up to three times longer and cost wise you pointed out is significantly more, but am I correct in understanding ultimately that it is still PSE folks on the ground doing the work, but they need to coordinate with your team to complete it at the right time. Is that an accurate understanding?

Evan Mann: It is, but as it relates to, we understand what the pole relocation effort would look like. I would love to speak to what the power undergrounding construction would look like. So, effectively all of these poles are tensioned with the power that is holding laterally the pole in place. So, now you have to further tension that pole with guy wires to hold the pole up, as it no longer has equal weight on both sides of the pole. Now, if I underground here, I have to back tie that pole because it now has lines pulling the pole.

Examiner Reeves: To clarify that point Mr. Mann, you are essentially saying, here we have three poles with two at the edge of the plat, one in the middle, and that the tension problem that you described would result in undergrounding only in front of one plat, which will create the problem on the other poles remaining. Is that what you are trying to explain?

Evan Mann: Yes, they will want to be pulled by those existing wires that are still overhead, so essentially, you have to now back tie with guy wires. Another item that I failed to mention earlier is that there are other utilities on the poles such as Comcast and others and they each have other costs. The \$300,000 figure is just PSE costs and any other utilities that must be relocated would incur a separate cost.

Examiner Reeves: Although beyond the scope to some degree, but because you brought it up, I will ask whether you are saying that there could or may be cell phone related equipment on the existing poles, and if removed, what would happen to that equipment?

Evan Mann: The pole has different layers of lines with the top lines typically the power lines with other lines for Comcast or other cable providers followed by cell phone lines. They are all hard lines that would be tied in for service. I do not believe there are any wireless or antenna issues. In this case again, we would be undergrounding. If we need to underground, we would remove the center pole and it would entail 675 feet of trench with conduit and that is essentially the construction process as it would entail entrenching the entire frontage and burying conduit with PSE and other utilities pulling their lines through those conduit. It would create significant costs and construction impacts with that process.

Examiner Reeves: Great, thank you.

Heather Burgess: Mr. Mann in terms of the project when we started at the beginning of your testimony looking at the plat map, there is only one pole that actually physically has to be removed because of the access that is being constructed on 68th. Is that right?

Evan Mann: Yes, as of now, the plans as designed would only require or necessitate the move of the one pole.

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Heather Burgess: Okay and I assume the access point for the plat was also designed in compliance with City standards and City input, so it would not be an opportunity for you to avoid moving the pole by moving the location of the access point to the plat to another location?

Evan Mann: The access point really is not the issue, it is the widening and frontage improvements requiring a 13-foot shoulder that would be paved that becomes part of the drive lane. So, it would not matter if the access point were north or south along Henderson as that pole would still be in the drivable surface of the road and would need to be moved to the back of the curb at least.

Heather Burgess: Okay, is there anything else about the City's decision on this matter or the review process that I have not covered that you want to share with the Examiner?

Evan Mann: No, I think that is it.

Heather Burgess: That is all I have for Mr. Mann.

Examiner Reeves: Even if the Appellant were to lose this appeal, that does not actually change the amount of right-of-way or anything else as it truly is a cost and time issue, is that correct Mr. Mann? This would not change substantially what would be required in terms of dedication, etc.

Evan Mann: No, I do not believe it would change the dedication.

Examiner Reeves: Thank you. Mr. Myers may have some cross examination.

Jeffrey Myers: I want to piggyback on the Hearing Examiner's last question. If you were undergrounding the utilities from the northeast corner to the southeast corner on Henderson as the City has asked, there is sufficient right-of-way to accommodate that trench. Is that correct?

Evan Mann: As I understand it, yes, the City would allow that to remain within the City right-of-way.

Jeffrey Myers: And, your testimony was that only one pole has to be moved, but the ones along the right-of-way on Henderson would have to be replaced, correct?

Evan Mann: No, as far as our plans indicate at this time, those poles would be retained in place and protected.

Jeffrey Myers: Okay, do you know if those poles would be sufficient to allow necessary clearance from the required streetlight installations?

Evan Mann: I do not know off the top of my head.

Jeffrey Myers: Have you talked to Puget Sound Energy about that issue?

Evan Mann: Not yet.

Jeffrey Myers: Okay.

Examiner Reeves: Just to ensure I am tracking, so the lighting question by Attorney Myers was about the pole that would be the northern most pole and then the southern pole essentially your question was if those remain in place has the Appellant

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discussed the question of street lighting and if those poles pose any impact, etc.

Jeffrey Myers: He shared his screen displaying a picture of the northeast corner with the existing pole. He asked whether that the pole at this location is correct.

Evan Mann: Affirmed the existing pole at the northeast corner.

Jeffrey Myers: I would like to point out another pole located at the southeast corner followed by a third pole, which is the center pole that as testified has to be removed because it is in the driveway.

Evan Mann: Yes, it would be in the drive lane, correct. He clarified the height of the lines and new poles are always reviewed with PSE as to the height of the streetlights. If those poles needed to be replaced, it still would not be a new installation because the existing lines are half slacked specifically for this type of work. New poles may be required at the north extent and south extent, but it would not be new installation, it would just be poles and the lines would be migrated to the pole.

Jeffrey Myers: If you are successful and if you have to underground that, you would not incur the costs of putting new poles in, correct?

Evan Mann: We don't know if that effectively - if this was undergrounded it opens up quite a few issues and those poles may need to move further north and south depending on tension in the lines at which point the undergrounding could be significantly more than 675 feet of frontage.

Jeffrey Myers: Well, did you account for cost savings when you submitted your declaration that testified about the costs?

Evan Mann: No, we basically assumed we are going to have a cost either way; it will be either the cost to relocate or the cost to underground.

Examiner Reeves: Just to clarify this point, your declaration Mr. Mann in the information that was provided to me pretty much focuses on the one pole that needs to move to create to entrance that becomes the new 68th Street. Did you count or think through the other two poles as Mr. Myers brought up the issue of the possibility of those two poles needing to be moved or replaced based on the other issue with lighting. What you provided did not even account for that potential, is that an accurate way of thinking about it?

Evan Mann: Right, at this point, we do not have the height of the lines and where they fall in relation to the height of any poles or any streetlights along Henderson.

Examiner Reeves: Okay, I know you are not trying to be evasive but I am just saying that what you provided in your declaration only addressed that center of the three, right? You did not address costs or potential additional costs or even less costs if the two other poles needed to be moved or changed out somehow.

Evan Mann: No, it wasn't part of our discussions about the undergrounding or not.

Jeffrey Myers: And, if you were to underground the utilities, who is responsible for digging the trench?

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Evan Mann: We are.

Jeffrey Myers: Okay, and would you use the same trench for any of the transmission lines that are currently on the poles, correct?

Evan Mann: So, any utility that is currently overhead would end up in that same trench?

Jeffrey Myers: Right, okay.

Examiner Reeves: Well that brings up one...but.

Jeffrey Myers: You mentioned that you view this as an iterative process of review by the City?

Evan Mann: Correct.

Jeffrey Myers: And, as an iterative process, I believe it was your testimony that you are submitting new plans based on previous comments and those additional plans do they also involve additional detail each time you make a new submittal?

Evan Mann: Yes.

Jeffrey Myers: Okay, and when you give those additional details might that reveal new issues that generate new comments?

Evan Mann: Yes.

Jeffrey Myers: Okay, do you know when was the first time the City had information concerning the need to move the utility poles on Henderson?

Evan Mann: It is in our preliminary plat. It was part of our preliminary plat application. The existing pole is out in the driveway and so that pole would need to be moved.

Jeffrey Myers: But there was no discussion at all about whether or not undergrounding was required because the pole had to be moved?

Evan Mann: Correct.

Jeffrey Myers: Okay, that's all I have got.

Examiner Reeves: So a question from me that was brought up in relation to what was asked was in terms of the Appellant digging the trench and you affirmed that all utilities would end up in the same trench and the answer was yes. When I broke in and interrupted Heather Burgess, one of things I asked was even if that is true, it is PSE that needs to come in and handle the wires themselves. I guess my additional question is other utilities - call them Comcast and others, are in the same (trench) where their teams need to do it, so you end up with a big open trench and you have different teams of folks dealing with undergrounding their segments of wires. Is that how it would work or is it just PSE because those wires are the really dangerous wires? Do you have any feedback or thoughts if you know the answer, as this is a really obscure question?

Evan Mann: Yes, it is a very convoluted process as there are companies making a living just by coordinating dry utilities. PSE takes the lead and typically moves first

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followed by the remaining utilities. The process allows for 90 days between the utilities, which can extend the process significantly.

Examiner Reeves: So, it is not your team that handles those wires as it would be Comcast or other subcontractors?

Evan Mann: We pay for that.

Examiner Reeves: Certainly, that is true, but it is quite a complicated process and I am just trying to understand the process.

Jeffrey Myers: Now, you also testified, I believe, that the lines from Henderson into the plat are all going to be underground.

Evan Mann: Correct.

Jeffrey Myers: Okay, when those trenches are laid, who puts the wires in those underground facilities inside the plat?

Evan Mann: The utility provider.

Jeffrey Myers: So, is it the same either way?

Evan Mann: Correct. We do not handle their wires, as they do not like us to touch them.

Examiner Reeves: I have no further questions.

Jeffrey Myers: I have no further questions.

Examiner Reeves: Ms. Burgess, do you have a redirect based on the recent testimony?

Heather Burgess: At the conclusion of the cross examination, Mr. Myers discussed how the utilities would be installed from Henderson into the plat. Those are new utility installations is that correct?

Evan Mann: Correct, anything that would be installed in the plat would be considered new utility and would be installed underground.

Heather Burgess: Was that always intended to be underground?

Evan Mann: Yes, it was the intention.

Heather Burgess: There was testimony in response to Mr. Myers' question about clearance for streetlights. Do you recall that testimony?

Evan Mann: Yes.

Heather Burgess: Okay, are there other options available for you during construction to address the clearance issue other than undergrounding the utility?

Evan Mann: There are varieties of options such as wing arms to move the lines laterally away from the streetlights or there are taller poles, which is handled through slack in the lines. The question about costs is somewhat irrelevant as it is not the issue under consideration. The costs of undergrounding are irrelevant in terms of the code requiring undergrounding.

Heather Burgess: You testified earlier that cost is relevant to your company's

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analysis of feasibility of a project, right?

Evan Mann: Absolutely, yes.

Heather Burgess: And so having information about a significant cost early on in the process is relevant to determining whether it is buildable, correct?

Evan Mann: Yes.

Heather Burgess: That is all I had Mr. Examiner.

Examiner Reeves: Just to clarify the last point, you are essentially testifying that in 2021 during the feasibility studies and pre-op meetings that potential cost was something that if you thought would have been a requirement you would have liked to talk about it when you testified during the preliminary plat hearing. If that was a concern in terms of recommended conditions, you might have addressed it. Is that accurate?

Evan Mann: Yes, exactly, I think that it is obviously relevant to the project.

Examiner Reeves: In terms of the code's legal interpretation, you have a particular view on how that code should be represented. You are represented by counsel that has ably made their arguments in briefs but I get your point. I think with that, I am confident that Mr. Mann will remain but Mr. Mann is no longer required to testify. Mr. Myers is that right?

Jeffrey Myers: As far as I am concerned, yes.

RECESS:

Heather Burgess: Same, thank you.

RECONVENE:

Examiner Reeves recessed the meeting at 7:19 p.m. for a break.

CITY

Examiner Reeves reconvened the meeting at 7:30 p.m.

TESTIMONY:

Examiner Reeves reported that Jared Crews was listed as a witness on both lists. Heather Burgess will question the witness first followed by some leeway on cross-examination to afford Mr. Myers to cross as well as question concurrently. Secondly, final Exhibits 21 through 23 were addressed during the testimony related to the exhibit.

Jeffrey Myers: No objections.

Examiner Reeves: If it helps expedite matters, I have read all the exhibits the parties submitted.

Heather Burgess: I call Jared Crews to testify.

Examiner Reeves administered the oath to Jared Crews.

Jared Crews: I am a Private Development Review Engineer for the City of Tumwater.

Heather Burgess: Could you elaborate a little bit about what your position at the City entails with respect to reviewing preliminary plats similar to the one at issue this evening?

Jared Crews: When the private development review team reviews preliminary plats,

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the team considers roadway configuration and how much right-of-way would be dedicated along existing frontage roads, internal roadway layout and dedication for ensuring they meet the minimum and maximum requirements established in City code and are providing connectivity to other adjacent developments or development that might occur in the future. That is the extent of the review during the preliminary plat process.

Heather Burgess: Okay, so back up, as you provided more detail than I was seeking. Specifically, she asked him what his job entailed.

Jared Crews: I review water, sewer, streets, and storm requirements for all private development in the City.

Heather Burgess: And in a development like this, would it include whatever the configuration and requirements were for the frontage improvements, is that right?

Jared Crews: Yes.

Heather Burgess: And then also for the access points for the plat, right?

Jared Crews: Yes.

Heather Burgess: And, the approximate design for stormwater and the sewer and the other utilities serving the site, is that right?

Jared Crews: Yes.

Heather Burgess: And all of that happens during the course of preliminary plat review?

Jared Crews: No.

Heather Burgess: So, you don't look at any of those things during preliminary plat review?

Jared Crews: We might look at... Preliminary plat review wouldn't be the mechanism that my group would look at, specifically water, sewer, and like the specific street requirements, we might look at, say like, the layout. But typically, our first opportunity to comment on those items is during site plan review. As far as I understand, those two processes are different. But, if we are looping site plan together with preliminary plat approval then that might change my answer. So, some clarification might be needed there.

Heather Burgess: Let me go back. You were present for Mr. Mann's testimony earlier, correct?

Jared Crews: Yes.

Heather Burgess: He testified as to the City's review process including, I believe, a couple rounds of site plan review prior to the feasibility review, I believe, and then a preliminary site plan review and then a preliminary plat application. Do you recall that testimony?

Jared Crews: Yes.

Heather Burgess: Okay, is that an accurate description of the City's process?

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Jared Crews: It sounds like it is, yes.

Heather Burgess: Okay, so the term preliminary plat review I am intending to mean the collective results of all of those processes. So, it is part of all of that review together, which I understand, maybe I am mistaken, the site plan review is necessary in order for the preliminary plat to go forward, correct?

Jared Crews: Sure, yes, and in that correction, yes you are right.

Heather Burgess: So those general items are reviewed by you and other members of your department, right?

Jared Crews: Yes.

Heather Burgess: And you are in the Public Works Department?

Jared Crews: Transportation and Engineering Department.

Heather Burgess: Okay, and that's separate from Public Works?

Jared Crews: We used to be Public Works but we had a split about 18 months ago.

Heather Burgess: Okay. How long have you been with the City?

Jared Crews: Going on four years now I believe.

Heather Burgess: What did you do before that?

Jared Crews: I was a student in college.

Heather Burgess: Is Matt Webb also part of your department?

Jared Crews: Yes.

Heather Burgess: Did you have the opportunity to review all the exhibits that were provided to the Appellant before the hearing or are you only familiar with your exhibits, Mr. Crews?

Jared Crews: I am familiar with my own exhibits and the testimony from Evan Mann as well as the attorney. I do not believe I have been able to review all the exhibits.

Heather Burgess: Okay, you heard Mr. Mann's testimony and based on your involvement with the project, you are familiar with the overhead utility configuration that exists on Henderson Boulevard along the frontage of the project, is that accurate?

Jared Crews: Yes.

Heather Burgess: Okay. And you would agree that this project is requiring the relocation of utilities in order to make way for required frontage improvements? So, the poles can't stay where they are and the utilities have to be relocated?

Jared Crews: In one form or another, yes.

Examiner Reeves: My understanding from Evan Mann's testimony was the pole (singular) can't remain where it is at least per his testimony.

Heather Burgess: Understood, I apologize. The "pole" needs to be relocated. But, separate from that, there is no requirement for this project to install new transmission

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lines themselves. I am not talking about the poles but the lines along Henderson Boulevard, is that correct?

Jared Crews: Based on what I am aware of right now, no.

Heather Burgess: So does your team participate in this site plan review process as part of your duties, is that right?

Jared Crews: Yes.

Heather Burgess: Okay, did you participate in this project in the site plan review process or was it somebody else from your department?

Jared Crews: Someone else from my department.

Heather Burgess: Are you familiar with the review comments that were made during that process?

Jared Crews: Yes.

Heather Burgess: Have you had the opportunity or were you present during the earlier discussion of our Exhibits A21 and A22, the feasibility and preliminary site plan review comments? Were you here for that discussion?

Jared Crews: Yes.

Heather Burgess: Okay, would you agree that those comments did not reflect any requirement to underground the utilities as part of that process?

Jared Crews: Yes.

Heather Burgess: I want to share my screen. I know what I am engaging in is risky but I am going to do it again.

Examiner Reeves: I request a point of clarification in terms of site plan review as it could be viewed as a term of art within the law but I think Attorney Burgess just referenced it as the feasibility site plan review process that occurs prior to applying for a preliminary plat. Is that your understanding Mr. Crews?

Jared Crews: Yes.

Examiner Reeves: Asked Ms. Burgess if she intended to ask about as to the extent that sometimes a site plan review also occurs after or co-terminus with a plat. I just want to ensure we are talking about the same thing.

Heather Burgess: Understood. So, the reason I referred him back to Mr. Mann's testimony was because within Exhibit A21, as he testified to is a feasibility review. In Exhibit A22, there is a preliminary site plan review that he testified to and then Mr. Mann testified to a meeting process, which was the formal site plan review, which produced those comments and then a preliminary plat application.

Examiner Reeves: Right, but what I am asking is both in A21 and A22 there are references specifically to feasibility site plan review. I am not saying there was another process that exists, but his understanding is that there is a feasibility site plan review process then the applicant applies for a preliminary plat and then ultimately where this appeal came in was not some other site plan review it was actually for the

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site development permit. Are we all on the same page? I just want to ensure.

Heather Burgess: Yes, we are all on the same page.

Examiner Reeves: Thank you, as you know there are terms of art that in some jurisdictions a site plan review means something different and I just want to ensure we are not messing anything up.

Heather Burgess: That's okay; I have a separate existential crisis about what it means in the City of Tumwater that I will not take up as part of this hearing. So, I'm sharing my screen and this is the City's Exhibit C7, page 19 with highlighted Condition 23. I would like to direct your attention to Condition 25 about the relocation of public or private utility relocation necessary to construct the project is the full responsibility of the project proponent. So, you provided a declaration to Mr. Myers in conjunction with the Summary Judgment. Do you recall that declaration?

Jared Crews: Yes.

Heather Burgess: So, in the declaration, you discuss the project as proposing to relocate the utility pole and overhead utilities as they would conflict with the required improvements along Henderson Boulevard (page 2 of the Declaration). Do you recall that?

Jared Crews: Yes.

Heather Burgess: So, if relocating utilities is discussed in Condition 25, wouldn't that be an opportunity for the City to reference such relocations would need to occur underground?

Jared Crews: Only if we were aware that the utilities need to be located underground, yes.

Heather Burgess: But, if I understand the City's position on this issue as correct, the City is treating relocation as an installation of the utility. Am I right?

Jared Crews: Could you repeat the question?

Heather Burgess: It is my understanding from your Declaration and the decision at hand that the City is treating the relocation of these utilities as an installation that qualifies for undergrounding. Is my understanding correct?

Jared Crews: Yes.

Heather Burgess: Okay, so in that context, wouldn't any relocation, which is specifically discussed in Condition 25, necessarily have to occur underground under the terms of the Development Guide and the subdivision code?

Jared Crews: I think you would probably need to revert back to comment 23, which requires that all engineering designs and construction needs to be per the accordance of the Tumwater Development Guide and WSDOT standards.

Heather Burgess: I did not ask you about Condition 23, I was asking you about Condition 25. So, wouldn't this have been an opportunity, if that is the standard, for the City to specify that this relocation would not only be the responsibility of the project proponent but would be required to be underground?

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Jeffrey Myers: Objection, argumentative.

Examiner Reeves: I understand the objection but I am going to go ahead and let it go to get an answer. But I certainly note the objection but will overrule it.

Jared Crews: If we knew the utilities had been proposed to relocate, we would have commented on that during the site plan review.

Heather Burgess: Again, that is not my question, but I will drop the question in the interest of continuing to expedite your testimony. So, in the course of your position not just for this project, but for other projects, you work on recommended conditions of approval, is that right for preliminary plats?

Jared Crews: Yes.

Heather Burgess: Okay, so I'm scrolling here in the conditions of approval that found their way in this particular plat that have nothing to do with the utility issue and there are a number of them speaking about lot design, garage setback, impervious surface, backflow, and stormwater. You see the ones that I am scrolling through right?

Jared Crews: Nods his head.

Heather Burgess: Okay, wouldn't you agree that several of those subjects and the others here that several of those specifics discussed in the conditions would also be covered by Condition 23 because they are included within the Development Guide?

Jared Crews: Yes.

Heather Burgess: Okay, I am going to stop sharing. I am assuming because it is reflected in your Declaration that you are familiar with Tumwater Municipal Code Section 17.12.200 at issue in this particular appeal?

Jared Crews: Yes.

Heather Burgess: And, would it be correct to say that the chapter applies to design standards for subdivisions?

Jared Crews: Without the exact section...

Heather Burgess: I am happy to display it.

Jared Crews: I have it in front of me now. Yes, the chapter does apply to land division.

Heather Burgess: Okay and specifically then 17.12.200 is inside the subdivision code?

Jared Crews: Yes.

Heather Burgess: And so, this standard that you are applying is specifically codified in the City's subdivision code and it is not just in the Development Guide. Is that your testimony?

Jared Crews: Correct.

Heather Burgess: Okay, and so does a standard derived from this section of code

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apply to subdivision but not to say for example, a commercial project without an accompanying subdivision?

Jeffrey Myers: Objection, seeks legal conclusions.

Examiner Reeves: Well, I think he does deal with these issues so I going to overrule that to the extent that Mr. Crews needs to know what he is applying certain things too. So, I will allow it and will note that I am not bound by the rules of evidence and I appreciate objections but rarely do they win. Go ahead Mr. Crews and answer the question.

Jared Crews: My understanding is that the Development Guide sets the standard and merely references Chapter 17.12.200 specifically in the Municipal Code. So that while 17.12.200 exists under land division it is not only specifically applicable to cases of land division because the Development Guide is where the new and existing language is provided that is the controlling document and 17.12.200 is typically, or is in this circumstance, the standard that is applied.

Heather Burgess: Okay, so can you point to another part of Tumwater code similar to this that you apply for commercial projects without a subdivision that contains this requirement?

Jared Crews: I would need to do some research and a 300+ page document if you would like to give me time to do that.

Heather Burgess: No, if you know off-hand as I am just trying to see if there is a comparable provision of code. So, let me just go back. So, in the hierarchy of code specific to subdivisions and development, is the Development Guide controlling over the code in your opinion in applying it?

Jared Crews: In this circumstance yes.

Heather Burgess: Okay, but regardless of that understanding, this section of code 17.12.200 and the section of the Development Guide that you referenced should apply to any subdivision in the City, is that right?

Jared Crews: Yes.

Examiner Reeves: I am sorry but I got lost in the last minute. If I can break in for clarification, did I miss it or misunderstand as my understanding is that 3.14.B of the Tumwater Development Guide is applicable to, sort of, all development. Is that accurate involving all development that specifically relates to new utilities including both residential and commercial. Is that accurate?

Jared Crews: Yes.

Examiner Reeves: Okay, next, but TMC 17.12.200 would be a subset meaning it is specific to residential preliminary plats. Is it not? Or, is that not accurate as I assumed it was only related to preliminary plats. Is it also related to all development in the City (the TMC and not the Development Guide)?

Jared Crews: Right, I don't think it would be applicable just too residential subdivisions but all cases of subdivision if it falls under 17.12,200 and general design standards.

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Examiner Reeves: Okay, so it could be applicable to the subdivision of land not for residential development which doesn't come before me as often but sometime the City has binding site plans and other forms of development that do involve development. Okay, sorry I think that is where I got lost and I appreciate the clarification. He apologized to Ms. Burgess for interrupting her questioning. He wants to ensure he did not miss an important point.

Heather Burgess: Coming out of all of that Mr. Crews, we can agree that this particular section, 17.12.200, applies to subdivisions and that it is also referenced in the Development Guide? So that would also be applicable to subdivision, is that right?

Jared Crews: Yes.

Heather Burgess: Okay, so then this requirement should apply to other subdivisions that have been approved in the City of Tumwater since it was enacted. Would that be accurate?

Jared Crews: Yes.

Heather Burgess: Okay, and would you agree that there has been more than one subdivision approved in the last 10 years in the City of Tumwater?

Jared Crews: Yes.

Heather Burgess: Okay, were you involved at all in the Habitat Tumwater Town Homes project?

Jared Crews: During the preliminary review, yes. For clarification, I left Tumwater for approximately 10 months for another job and returned.

Heather Burgess: It is my understanding that the Habitat Tumwater Town Homes was a subdivision project. Is that your recollection or understanding?

Jared Crews: Yes, it is currently.

Heather Burgess: Okay, other than Habitat Tumwater, which I will represent to you that had a requirement addressing underground utilities and this subdivision that is at issues in the appeal, could you identify for me another subdivision that this condition has been imposed upon.

Jared Crews: The Craft District project, which is a series of commercial buildings and apartment buildings along Capitol Boulevard, was required to underground. Directly adjacent to the development, the La Quinta project that may or may not have undertaken a consolidation process was also was required to underground utilities. I can cite more projects if you like.

Heather Burgess: No, let's talk about the two. So, specific to the Craft District, if my understanding is correct, the Craft District project involved a development agreement where undergrounding was a condition of the development agreement. Is that accurate?

Jared Crews: That is one of the conditions listed, yes.

Heather Burgess: It is also my understanding that in the context of the Craft

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District, undergrounding was required by the utility in other words, the City imposes one of the schedules available under the franchise agreement to require Puget Sound Energy, at its expense, to underground the transmission lines to serve the Craft District. Is that correct?

Jared Crews: I believe so, yes.

Heather Burgess: So, it wasn't a developed expense.

Jared Crews: In that context, no it would not have been

Examiner Reeves: Just to be clear in terms of the issues under discussion, he believes the project that is being referenced are applicable to Exhibits A14, 15, and 16 related to the Craft District project. Exhibits A17 and 18 relate to the Habitat Town Homes Project. Is that accurate?

Heather Burgess: It is, as I had skipped my references because of your caution that you have read the record. Mr. Crews, is it true that there are different kinds of transmission lines? Some lines carry different voltages and wattage and some are more costly to underground than others. Is that accurate?

Jared Crews: Correct.

Heather Burgess: Do you recall what the type of transmission lines that had to be relocated for the La Quinta project.

Jared Crews: For the La Quinta project, it would have been all power utilities less than the 75 Puget Sound Energy designation, all communication lines, and other power lines.

Heather Burgess: Is the La Quinta development a hotel and not a subdivision? Is that correct?

Jared Crews: I would need to review the La Quinta specifically as they may have been a lot consolidation during that process before he joined the City.

Examiner Reeves: I note that Exhibit A19 is the Hearing Examiner's decision on the La Quinta project in 2014.

Heather Burgess: So, Mr. Crews, our office submitted Exhibit A9, a records request to the City looking for all land user approvals and construction permits which include a condition of approval requiring the undergrounding of existing utilities to serve a residential or commercial project. Would construction permits be the type of development permits required for the Three Lakes project? Is that where those conditions would have come in?

Jared Crews: Yes, we would call it a site development grading permit.

Heather Burgess: And, a grading permit or a site development permit is a type of construction permit, would you agree?

Jared Crews: Yes.

Heather Burgess: Again, so Habitat Tumwater, La Quinta, and the Craft District was mentioned, could you identify any other subdivision project within the City of Tumwater within your knowledge that has had a similar requirement imposed for

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undergrounding the existing utility adjacent to them as opposed to interior to the plat.

Jared Crews: The Flying J Travel site off 93rd Avenue was required to underground.

Heather Burgess: When was that project constructed?

Jared Crews: Within the last 2-1/2 years give or take.

Heather Burgess: Okay.

Examiner Reeves: Perhaps Exhibit A12 relates to the question. If it helps, 93rd Avenue Lathrup Industrial Drive Roadway Improvements. Is that what you are referencing, Mr. Crews? I just want to make sure I am tracking.

Jared Crews: Yes, that would be the project.

Heather Burgess: So, again do you know if that involved a subdivision Mr. Crews?

Jared Crews: That one is a little bit different as it was a tribal property. Their code requirements would have prohibited the City from doing any formal land division on the property. Actually, the City received right-of-way dedication, which is a form of land division if I remember the code correctly. So, yes.

Heather Burgess: But, would the requirements for that project, if you are doing your job in reviewing that project, would you apply the requirements of TMC 17.12.200 to it, or just the Development Guide?

Jared Crews: It would be the Development Guide that would control in that situation from my first look at it probably.

Heather Burgess: Mr. Crews, would you agree – I am going to backup for just a moment. You have been at the City for four years now, correct?

Jared Crews: Correct.

Heather Burgess: So, approximately how many projects have you had the opportunity to work on during that time?

Jared Crews: Hundreds.

Heather Burgess: Would you agree that the City has not consistently interpreted its requirements in the Development Guide to require the undergrounding of utilities for subdivisions as it is being required in this particular matter?

Jared Crews: From the plain reading of the code, yes I would agree.

Heather Burgess: So, you agree that they haven't consistently interpreted it that way?

Jared Crews: Yes.

Heather Burgess: And, why are you agreeing with me about that? What's the basis for your opinion about that issue?

Jared Crews: There are projects over probably 30 years going back to when the municipal code was originally written that if you look at the plain reading of the code, probably should have been required to install those existing overhead lines

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underground.

Heather Burgess: But, to the best of your knowledge they did not do that, is that right?

Jared Crews: In several circumstances, yes.

Heather Burgess: When you say several, can you give me how many? More than five, more than ten?

Jared Crews: It is hard to come up with a number. I would say in the last 30 years, projects that specifically had the opportunity to underground power that would meet the requirements for use to look at it in the first place may be somewhere between 10 to 20 projects that the comment could have been made or the requirement could have been made, but was not.

Examiner Reeves: Mr. Crews, along the same lines, I guess I am trying to think analogously, which is, many jurisdictions have a, sort of complete streets plan where they would like any new plat, any new commercial development, any new project that fronts a public right-of-way, they want to ensure that there are sidewalks. It is not the developer's responsibility to build sidewalks off the project site, but in front of the property they would have to install those sidewalks from point A to point B to the end of the property. And, so you will often end with a checkerboard pattern where there are sidewalks that go from one point to another point and not from another area with the goal in the long-term as future development occurs, the sidewalks will be eventually installed. Are you testifying that your interpretation of the municipal code is such that it would be comparable that you would – a developer would have to underground utilities in the right-of-way or at the edge of the project in the same case? Does that make sense as I hope that makes sense?

Jared Crews: Yes, it does. That is generally where the trigger is for the requirement. The private development review team determines whether a project requires frontage improvements. Often the team loops together the undergrounding of the utilities if it is necessary with those frontage improvements.

Examiner Reeves: Okay, one of the things the Appellant is addressing is whether undergrounding the utilities is required outside of the code to the extent that if the developer is developing the land whether the impacts of development are such that undergrounding is required and/or justified outside of the code provisions.

Jared Crews: I guess what you want to know is that the City might require additional pavement and sidewalks to handle the additional vehicles and pedestrians that are generated from the project. So, you would be wondering if there is a specific safety concern or function concern for requiring undergrounding of power.

Examiner Reeves: It pertains to whether there is a nexus that would require it outside code provisions.

Jared Crews: Yes, there could be a couple of reasons. There might be sight obstructions for utility poles where roads entering and exiting the development would not be able to view oncoming traffic or it could conflict with required improvements, such as street lighting, as it is also an additional safety requirement for projects as

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additional trips would require additional lighting to make the road safer. Then there are obviously, less safety and health-related impacts but beautification of the neighborhood and the corridor that could be required.

Examiner Reeves: None of those reasons were addressed during his review of the preliminary plat, correct?

Jared Crews: None of those concerns were addressed.

Examiner Reeves: And, your sort of requirement in terms of the decision that is before him being appealed, none of these ancillary things were brought up, it was just that the code provision is this and it is a requirement of the code, and we are imposing it even if your testimony indicates that the City has not uniformly required this over 30 years; but you know, your interpretation of the code is that this a requirement and we are going to impose it now. Is that kind of an accurate assessment?

Jared Crews: Right, because when the administrative appeal or when the request for the appeal, the developer did not ask what the safety or other implications were. He simply asked what the code section that required them to underground was. And, to his request, staff responded correctly with the code section – no more and no less.

Examiner Reeves: Okay, thank you. With that I am going to turn you back to Ms. Burgess. Ms. Burgess, please continue as I am sure that it completely threw off your line of questioning. But I am confident you can pick it back up.

Heather Burgess: Mr. Crews, to the extent that there is a desire to beautify the City, those poles are there now, correct - in their current ugly condition?

Jared Crews: Yes.

Heather Burgess: And that was not caused by the applicant's project?

Jared Crews: No.

Heather Burgess: And, you would agree would you not, that there is other methods to address for example, lighting clearance as per Mr. Mann's testimony that different poles could be installed, adding swings, adjusting tension, or other ways to deal with some of the potential issues with the installation that you mentioned. Would you agree?

Jared Crews: Sure.

Heather Burgess: Can you point to any document associated with the preliminary plat or this appeal that explains what the specific nexus is between this project and needing to underground the utilities other than what the code dictates?

Jared Crews: Where the specific requirement is or the need coming from?

Heather Burgess: Right, is there any document in the file or any analysis done by your department as to the specific requirement for this plat other than your interpretation of what the code requires?

Jared Crews: Other than some testimony back-and-forth between Puget Sound Energy, no, relating to how the proposed relocation would still conflict with City

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requirements - no.

Heather Burgess: But, that was before any redesign or these alternatives were considered, right that Mr. Mann testified to?

Jared Crews: Yes.

Heather Burgess: Okay, because I believe, as I understand it correctly the process kind of stopped while this appeal has gone forward so there has not been a final design proposed that you could review for safety, for example using poles?

Jared Crews: Yes.

Heather Burgess: Okay, don't take this the wrong way, Mr. Crews – is this your decision to make in the department, in other words are you the final kind of arbiter of what this section of code means in your department or is there a supervisor or other person who has rendered this interpretation?

Jared Crews: No, it would be reviewed by City staff as a whole. In response to the question, no I'm not the sole person deciding.

Heather Burgess: Okay, so who else is involved in the deciding?

Jared Crews: Other reviewers, my coworkers Jeff and Matt most likely, the Engineering Services Manager, the Transportation Engineering Director, and Community Development Director etc.

Heather Burgess: You said Jeff and Matt. I was hoping you could give me some last names.

Jared Crews: I'm sorry, Jeff Query and Matt Webb.

Examiner Reeves: I apologize, Jeff, that name is less familiar to me as I know Matt Webb. But, Jeff, what was his last name?

Jared Crews: Query, Q U E R Y I believe is how he spells it.

Examiner Reeves: Q U E R Y, like a query one that one makes, what a beautiful fun last name and then Matt Webb and others I assume all the way up to potentially Mike Matlock who I believe is watching. Okay, got it.

Heather Burgess: So, some or all of those staff members in particular I believe I am familiar with Mr. Webb have been with the City for a number of years. Is that correct?

Jared Crews: Yes.

Heather Burgess: Mr. Matlock too, I believe would predate your tenure at the City?

Jared Crews: Slightly, yes.

Heather Burgess: All right, I'm not trying to insult anybody.

Jared Crews: You are fine. I'm often referred to as the "baby" at work.

Heather Burgess: But the point being as I think your testimony was that over the last 30 years, there has been inconsistent application of this provision, but some of those same people that you described as having a role in your process now, were at

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the City during that time. Is that accurate?

Jared Crews: Yes.

Heather Burgess: Okay, I have one final kind of more practical question, so you know, I think the goal here would be if you were applying your code for the reasons that you mentioned, safety, beautification, and things of that nature, your goal would be to kind of achieve a systematic undergrounding of utilities over time, is that accurate?

Jared Crews: For many corridors in the City in the majority of the City, yes.

Heather Burgess: Okay.

Examiner Reeves: Kind of like that complete streets thing I brought up, is that accurate? As everything should have a sidewalk.

Heather Burgess: So, are you aware of any specific undergrounding plan or undergrounding provisions or agreements with Puget Sound Energy as part of the City's franchise agreement that would achieve that objective?

Jared Crews: I know that there was preliminary discussion with PSE sometime ago about an underground management plan but to my knowledge that plan has not been completed.

Heather Burgess: And, you agree would you not that a plan like that would provide a comprehensive method to achieve undergrounding for that utility at least?

Jared Crews: As it relates to – thing about the franchise, yes in short-term to be precise. The thing about the franchise agreement is that it is a specific agreement with Puget Sound Energy that kind of outlines our relationship with them and it is not necessarily something that is applied to private development and land division as a whole.

Heather Burgess: Understood.

Examiner Reeves: Clarifying point there Heather Burgess as I believe your team had a PRA request specific to that issue. Right? This is unrelated to Mr. Crews before I forget, there were a couple of PRA things and that was one of them, correct? And the response was there is no specific plan that is part of the exhibits. Is that where you are going? I just want to ensure I am tracking correctly. You have laid it out clearly, but I want to ensure I am tracking everything. So, we are good?

Heather Burgess: That is correct; I was just making sure that there wasn't anything that had been missed. Tami has said she lost audio.

Examiner Reeves: Tami, we have an issue? Tami Merriman, what is going on? Folks, we are trying to figure what is occurring here. Lost audio, working on troubleshooting. Tami, if you are able to make me the host, I can hit record. One second while we sort this out.

Tami Merriman: Can you hear me now?

Examiner Reeves: I can hear you now, yes.

Tami Merriman: Okay, I lost some audio and I am not sure if it was the phone

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system, but it is back now.

Examiner Reeves: How long ago did that happen? I am confident I heard everything and did not miss anything, but want to ensure there is a complete record. How long ago did you feel that we may have lost something?

Tami Merriman: Maybe a minute or two. Ms. Burgess was questioning Jared. I could see them talking but I could not hear.

Examiner Reeves: I am confident Zoom probably captured it all. Any thoughts from the attorneys as I am confident that it wasn't a Zoom issue but a tech issue with the device used by Tami, but want to ensure everyone feels comfortable moving forward.

Heather Burgess: I am satisfied that it was a local issue as I could hear the whole time and the light was blinking.

Examiner Reeves: I don't have any issue.

Jeffrey Myers: I could hear the whole time. I do have questions about whether or not how long it was out and if it was only out for a minute or so. Tami, do you know what question she was asking when the audio went out for you?

Tami Merriman: To be honest, no, I do not remember.

Examiner Reeves: This is what I am going to propose, I suspect it was a response to me very rudely interrupting Heather Burgess and that said, I think everybody has been tracking and paying close attention and I am confident that again, there is a difference between Zoom recording something versus physically the computer that is being operated. If it becomes an issue later it can be addressed, but I think it is okay. I employ software that creates a transcription of the proceeding and I will be able to double-check the transcription tomorrow to ascertain if there was a break at this point and will advise the parties of such, but believe it is likely okay at this time. Noted for the record that there was a problem. He asked Attorney Burgess whether she has completed her cross examination.

Heather Burgess: I appreciate Mr. Crews and the lines of questioning and his answers and have nothing further for Mr. Crews. Thank you.

Examiner Reeves: Great, so we will call both cross examination and the City's direct of Mr. Crews. Go ahead Mr. Myers.

Jeffrey Myers: Mr. Crews, what was your involvement in preparing, I believe it was Exhibit A2, oh sorry, Exhibit A4, the comments from Tumwater Engineering on this proposal – the engineering comments?

Jared Crews: For the first site development grading review you are talking about and not the...? Yes, I compiled the majority of those comments.

Jeffrey Myers: And Mr. Mann talked about how that was the first time that undergrounding of utilities had been raised. Do you agree with that?

Jared Crews: Yes.

Jeffrey Myers: Okay, can you explain how the issue came up?

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Jared Crews: We reviewed the plan, the site development grading plan, and I noticed that the developer proposed to relocate the conflicting utility pole and after reviewing the code, my interpretation was that the relocation of the development or process, whatever you want to call it, did simply just not call for relocating the pole but actually for undergrounding the pole. Undergrounding the overhead utilities, excuse me.

Jeffrey Myers: The Appellants in this matter have pointed to several opportunities to comment on prior development plans. Can you explain why it wasn't raised earlier in the development review process?

Jared Crews: Because it was not proposed or called out during the earlier process.

Jeffrey Myers: What exactly wasn't proposed or called out in the earlier process?

Jared Crews: The conflicting utility pole was not called out nor was the relocation that they are currently proposing. The relocation of the utility pole was not proposed during the preliminary plat or site plan review process.

Jeffrey Myers: Okay, and is that the center pole that is in what is going to be 68th?

Examiner Reeves: 86th or 68th? Sorry.

Jeffrey Myers: Is it 68th or 86th?

Jared Crews: 68th.

Jeffrey Myers: Okay, in your mind is the relocation of the pole with utility lines and potentially the installation of new poles to address the separation requirement from the street lights, would that constitute an installation of utilities in your mind?

Jared Crews: Yes, it would require new utility poles at a minimum.

Jeffrey Myers: Okay, in your mind would (it) also constitute an upgrading of their utilities?

Jared Crews: Yes.

Jeffrey Myers: How so?

Jared Crews: In my preliminary discussions with Puget Sound Energy on the project, the proposed relocation is not feasible that the developer currently had submitted for design. In my preliminary discussions with Puget Sound Energy, there would need to be an additional new pole installed on the south side of 68th Avenue to accommodate additional overhead lines that serve a residential home on the southeast side of Henderson Boulevard from the development, and also that the City requires street lighting along Henderson Boulevard as part of the frontage improvements and the utility line as it currently exists at its height would conflict with the streetlights. A possible solution would be to install new poles which would be higher than the existing poles to raise the utility lines to meet vertical separation criteria from the required street lighting.

Examiner Reeves: Sorry, Mr. Myers. That threw me as it seems like new information. So, Mr. Crews are you saying that your understanding would be it would not be just replacing a pole or moving a pole to the north of what becomes

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68th? You are now saying that there would potentially be a second pole to the south of 68th. And there is nothing in the evidence, by the way as I am just pointing out, that I have seen that would have told me that. And, if I missed it I apologize as this through me for a loop because this is new to me.

Jared Crews: I think it was included in some of my exhibits from (my) Declaration.

Examiner Reeves: If it was, I apologize as I guess I missed it.

Jared Crews: The Declaration of Crews, so if you look at Exhibit 3, in Exhibit 3 in red you can see where the existing utility line and poles are along Henderson Boulevard and then in blue you can see where they proposed to relocate the utility lines. So what this exhibit is kind of showing if you zoom in, you can see the required street lighting along Henderson Boulevard where the blue lines are the overhead utilities approximately in their new relocated location that would conflict with the street lighting in several areas.

Examiner Reeves: Sure, but to be clear, looking at what I am looking at right now, there is a red box right below the word “Washington” of proposed relocated pole behind future sidewalk, which tracks with what Evan Mann testified to. There isn’t a second pole or overhead power PSE pole to the south that needs to go in.

Jared Crews: Right. This is their proposed design. I coordinated separately with Puget Sound Energy to come up with what would be the most feasible design if it was just a relocation.

Examiner Reeves: And you are saying that PSE told you that this wouldn’t work, is that what your testimony is right now?

Jared Crews: That is correct.

Examiner Reeves: Okay, but there is no exhibits or anything, emails, or nothing from PSE that tells me that in the record at the moment.

Jared Crews: There should have been an exhibit, let’s see...

Examiner Reeves: This is not a gotcha you and I don’t believe thing Jared Crews, it was just something that I was not ready to hear and you know...

Jeffrey Myers: Mr. Crews, perhaps you can look at paragraph 5 of your Declaration.

Jared Crews: Yes, paragraph 5 of my Declaration it does say in coordination with Puget Sound Energy I can read it you would like.

Examiner Reeves: Okay, sorry, maybe I had read it but it is one thing when you read something within several hundred pages versus... okay so you are saying and thank you for sharing this Mr. Myers. So, your understanding is that in addition to the relocated pole that is identified on the screen, correct in the box under “Washington” it shows where there would be a relocated pole to the north of 68th. You are saying that PSE indicated to you that there would need to be a new pole to the south of 68th. Is that correct?

Jared Crews: Yes, that is shown in Exhibit 4.

Jeffrey Myers: Displayed Exhibit C4.

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Examiner Reeves: Okay it is legible and all right, maybe it was there but it had not dawned on me or occurred to me. Has this information been provided to Evan Mann and others already?

Jared Crews: Not to my knowledge that this information has been provided to him.

Examiner Reeves: Thank you for clarifying. And with that, I think you can stop sharing. Heather Burgess, are you tracking as I want to make sure...

Heather Burgess: Yes, but I mean again I would want to get back to the scope of the appeal as the appeal is about what the code says not what the specific design compliance for the applicant's proposed relocation, which is being suggested as prohibited as a matter of the code. So, I don't want to spend too much time speculating about review comments from PS|E that we have never seen or haven't been provided except through a markup from Mr. Crews that came in the context of an appeal. So I think we can move forward.

Examiner Reeves: It was news to me, that is all I am saying and now you are at least tracking with what I'm tracking and we have established Evan Mann hasn't seen it yet. Are we all on the same page?

Heather Burgess: That the material that was just testified too was not part of the administrative decision we appealed, it was not attached, referenced, or documented – none of that! So, interesting but not part of what we appealed.

Examiner Reeves: So beyond the scope, alright I get the argument. Thank you. With that Jeffrey Myers, I will let you continue.

Jeffrey Myers: You testified in response to some of Ms. Burgess' questions that there were perhaps 10 to 20 opportunities to underground that the City had not applied this requirement on, correct?

Jared Crews: Yes.

Jeffrey Myers: Do you know how many of those involved displacement of existing utility poles?

Jared Crews: Where the utility poles had to be relocated?

Jeffrey Myers: Yes.

Jared Crews: Off the top of my head, no. But probably, off the top of my head no.

Jeffrey Myers: Do you know whether any of those involved situations where there had to be new utility poles replaced because of development features, such as frontage improvements?

Jared Crews: Yes.

Jeffrey Myers: And, how many of those?

Jared Crews: Probably all of them.

Jeffrey Myers: But you don't know whether they required moving the poles themselves like this one does?

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Jared Crews: Right, correct.

Jeffrey Myers: Do you know if any of the projects involved distribution lines that could not be undergrounded?

Jared Crews: Yes, there would be, yes.

Jeffrey Myers: So, is it your understanding that the undergrounding of utility provisions in the City's code would not apply to a distribution line that it would be unsafe to underground?

Jared Crews: Correct, we would not apply the requirement to underground the lines that would be unsafe.

Examiner Reeves: Sorry, to clarify that point, distribution line, am I understanding correctly that there are some types of electric power lines, PSE lines, that are so powerful so big that they have their own, you know no local jurisdiction messes with the giant voltage from the dams, is that the idea just to make sure I am clear about what we are talking about?

Jared Crews: Yes.

Examiner Reeves: Okay, please continue Mr. Myers.

Jeffrey Myers: When was it again, that you first learned of that the poles located along Henderson would have to be relocated?

Jared Crews: During the first site development grade submittal.

Jeffrey Myers: And when the Hearing Examiner decision was issued and Ms. Burgess pointed you to Conditions 23 and 25 and asked whether that was an opportunity, had the issue been discussed at all prior to that time?

Jared Crews: No.

Jeffrey Myers: And at the time that was issued, did the City know whether or not the poles had to be relocated?

Jared Crews: No.

Examiner Reeves: To break in one more time, Exhibit A23, Mr. Crews appears to be from – well it is a kind of a back and forth between Evan Mann, Matt Webb, and Alex Baruch who was the planner that ultimately was involved in the decision and then I see Jeff Query, Kirk Wilson, Scott Paul, etc. but I don't see your name but there is an image that shows a sort of arterial. Have you not seen that in advance as I am just curious.

Jared Crews: Could you please show that exhibit?

Examiner Reeves: Could someone share Exhibit A23 as we shared it earlier.

Heather Burgess: I have it up and I can share it.

Examiner Reeves: Thank you. This is perfect, exactly what I am talking about. I am not saying that this decides anything one-way or the other but there is no, well, I would rather think through what this would mean. I guess, Jared Crews, in terms of whether it addresses the issue of undergrounding or not in terms of Henderson

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Boulevard.

Jared Crews: No it doesn't, this simply states what hard improvements are required for the project.

Examiner Reeves: Okay, thank you for clarifying.

Jeffrey Myers: Heather could you leave it up for a second as I would like to ask a couple of questions. The date of this at the top is April 22, 2022. That was before the preliminary plat approval isn't that right?

Jared Crews: Yes.

Jeffrey Myers: So, at that point in time, what would you have known about the need to relocate utility poles?

Jared Crews: We wouldn't have known about the need to relocate utility poles, it was never brought up during site plan review or the preliminary plat process.

Jeffrey Myers: And this diagram is a cross section, correct?

Jared Crews: Yes.

Jeffrey Myers: As opposed to the plans we looked at in your Declaration that was sort of an aerial view of the length of the entire development, correct?

Jared Crews: Yes.

Jeffrey Myers: And, are utility poles or utility lines depicted at all in the cross section that is included in Exhibit A23?

Jared Crews: Is it the exhibit as currently shown?

Jeffrey Myers: Yes.

Jared Crews: No, I don't see any utility poles.

Examiner Reeves: No trenching is shown one way or the other, correct?

Jared Crews: Correct.

Jeffrey Myers: But I believe it was testified earlier that the City allows trenching within the existing right-of-way, which this is a cross section depiction, right?

Jared Crews: Yes.

Examiner Reeves: So rather than me being an angel looking down from the Heavens, now I am cutting a section of earth out and I am standing 10 feet back and looking horizontally that's what I am looking at in terms of a cross section, is that an accurate way to think about it Mr. Crews?

Jared Crews: Yes, it's a slice of the cake.

Jeffrey Myers: Mr. Crews, is there anything in Mr. Mann's testimony that you haven't addressed that you like to respond to?

Jared Crews: Yes, there may be a couple of things. I know that Evan talked a little bit about cost and he later admitted that yes, costs are not generally something that is considered in development projects as the cost is what the cost is. Every project has

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costs and you have to spend money to make money. And yes, Evan is correct that this would add significant cost to the project, but if you look at the project overall and break up the fact that if this is a \$300,000 or \$500,000 cost to the project, you split it up over 44 lots with the lots selling north of \$350,000 or \$400,000 and that number gets real small real quick. The tension issue that Mr. Mann also discussed is probably a non-issue because those existing utility poles along Henderson Boulevard already have tension wires to support them horizontally and likely there would be no additional relocation of those tension wires if minimal at all. I guess the only thing that I would reiterate is that there are site development grading permit first submittal was really the first opportunity we had the chance to comment on the proposed utility relocation.

Jeffrey Myers: Do you know of any development proposals where the City has required undergrounding of existing utility lines where the development did not affect those utility lines in one way shape or form?

Jared Crews: No.

Jeffrey Myers: That's all I have.

Examiner Reeves: Thank you, I am going to hand you back to Heather Burgess momentarily as I would like to think about a theoretical idea, which is – let us assume for a moment that the actual frontage on Henderson Boulevard was only 40 feet or just the entrance. If that was the case, and there is existing utility lines and your interpretation of the code, even if on this side and that side of 40 feet nothing changed but we are putting in a new development under your interpretation, would that 40 feet need to be undergrounded? That's my question.

Jared Crews: Are you looking for succinct yes or no answer or can I explain.

Examiner Reeves: You can touch on it only if a pole needs to move or I am trying to get a sense of the idea.

Jared Crews: Right. I would point back to the development as the Three Lakes Crossing project is a very unique situation where there are poles directly north and directly south of the property limits as they intersect Henderson Boulevard frontage. So he has a direct opportunity to underground the power directly across his frontage. If we had in theory, a 40-foot wide parcel out there with only 40 feet of frontage and they did not have any poles that were impacted directly on their frontage, then no we most likely would not require undergrounding because it would require additional work outside their project scope/limits.

Examiner Reeves: Okay, well that is a very helpful answer. I guess one thought – I have not made up my mind for the attorneys just to be clear. One thought could be if I granted the appeal and said no they do not have to do this, there remains the issue of the City wanting a complete street and undergrounding. I guess just out of curiosity, one thought is that they're not required to do it, but they could offset the costs against other costs that the City is requiring meaning that this was not a requirement of the code but there is some horse trading that could occur to get the benefit the City wants to have powerlines undergrounded not as a requirement as there is no nexus – but again I have not decided anything, I'm just thinking out loud.

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Jared Crews: If I remember my discussions with the Transportation Engineering Director correctly, in order for the City to participate in an undergrounding project, it has to be part of a City-related transportation specific project. There has to be either a City-funded portion of the project or a City transportation aspect assigned to it.

Examiner Reeves: I think that helps. Okay, Heather Burgess may have some additional questions at this point.

Heather Burgess: Mr. Crews, as part of the preliminary plat review process; you review at least preliminary civil plans. Is that right for a project?

Jared Crews: Not in every circumstance, but sometimes yes.

Heather Burgess: Okay, do you know if that was done in this particular case? I believe we have an Exhibit that says it is civil plans, so I believe that was reviewed. Would you agree with that?

Jared Crews: The preliminary civil plans were submitted for review in this particular instance.

Heather Burgess: And the preliminary civil plans have a variety of components including survey items shown on them, improvements, roadways, existing edge of right-of-way for example, and other elements that are surveyed in?

Jared Crews: Yes.

Heather Burgess: Okay, so does that not include the utility pole locations and existing utilities for these frontages? So, in this particular instance – even if the call-out wasn't made for this proposed relocation, wasn't the location of the existing poles reflected on the plans that were reviewed and wouldn't that location have been inside the required expanded frontage that was the subject of so much discussion?

Jeffrey Myers: I am going to object to the form of the question. It is hugely compound and...

Jared Crews: No, I can answer it but she is correct, yes the survey would show it.

Examiner Reeves: Sorry, I have an objection and I have to answer the objection. I am going to overrule to the extent your witness thinks he can answer the question. It is compound and I would like to have it flushed out a little bit. Jared Crews why don't you go ahead and try to answer and then as needed, we will flush it out. So go ahead Jared Crews.

Jared Crews: Heather Burgess is correct. The preliminary site plan, the survey that is included is of the existing improvements, surface elevation, and utility poles. Yes she is correct as to the existing condition out there. You are talking about that utility pole in that plan that is the tip of a pin on a sheet a paper with hundreds of other things going on.

Heather Burgess: I'm not disputing that. Can I share my screen again Mr. Examiner. I am showing the same exhibit.

Jeffrey Myers: I think it is C2.

Examiner Reeves: I am certain it is in the record.

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Heather Burgess: I know that the red items on the exhibit were not on the plans when they would have been reviewed, but aren't the dots that you are talking about as utility poles reflected on this civil site plan?

Jared Crews: Yes.

Heather Burgess: And this was part of the preliminary plat review, right?

Jared Crews: I believe this exhibit was, yes.

Heather Burgess: And so, I realize they are shown as dots but a layperson may not be called upon to understand what they might mean, but in the course of your performance of your job you are called upon to review complex surveys and site plans reflecting these types of improvements, are you not?

Jared Crews: Yes.

Heather Burgess: Okay. I'm going to stop sharing for the last time. And then you testified for Mr. Myers that distribution lines might be treated differently under the code is that accurate?

Jared Crews: Yes, you would have to look up the specific terminology, but I believe distribution lines, the lines in question to be underground or relocated or whatever you want to call it, and I believe the correct verbiage is transmission lines that are the lines that are typically not to be underground.

Heather Burgess: Okay, I just draw your attention to 17.12.200 for underground utilities from your code, which says electrical power and other transmission lines shall be installed underground. So is it transmission lines?

Jared Crews: Sorry, give me a second.

Heather Burgess: No problem. I can share it again as I'm just trying to understand as I do not see in this section of the code, in the disputed section of the Development Guide, 3.14 I believe it is. Is there a specific exception enumerated there for distribution lines as being exempt?

Jared Crews: No, there is not a specific exemption in this code.

Heather Burgess: So, that would be something that you would have to determine if it was appropriate without reference to that exception being in the code, is that accurate?

Jared Crews: Yes, there are other documents we would use to make that determination.

Heather Burgess: And, there is no qualifying language in the sections of code that were cited in the decision that is being appealed for example qualifying that the lines don't have to be put underground if there are safety or other concerns. Does that language specifically appear in that section?

Jared Crews: Correct.

Heather Burgess: Do you know if the term transmission lines or transmission as it appears in the code or the Development Guide is a defined term in either document?

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Jared Crews: On the top of my head I do not know if it is a defined term, I would have to do research for that.

Heather Burgess: Okay.

Heather Burgess: I think that is all I have Mr. Examiner, thank you.

Examiner Reeves: And again, weirdness because both parties had this witness, so I going to see if Attorney Myers had any other follow up for this witness.

Jeffrey Myers: I unfortunately do have a couple of things to follow up based on Heather Burgess' most recent inquiries. I am going to share my screen with Exhibit A2 and show you plans (C.02), which for foundation sake, is the plan that you used to put your comments on showing site features in Exhibit C3 or C4?

Jared Crews: Is that a question to me Jeffrey?

Jeffrey Myers: I'm sorry Exhibit C2. This is the map that you used to put your comments on (Exhibit C2), correct?

Examiner Reeves: I am going to stop you. You keep saying this Exhibit A2 and you are asking whether this was the base exhibit that Jared Crews used to annotate that Heather Burgess just shared screen last time she shared screen.

Jeffrey Myers: Yes.

Examiner Reeves: Just making sure we are all on the same page. Go ahead Jared Crews.

Jared Crews: One clarification, my exhibit was actually from their first submittal of the site development grading plan and this submittal, Exhibit A2, appears to be one of the documents that were submitted as part of the site plan review process. But the survey and the improvements shown on both exhibits are the same.

Jeffrey Myers: Okay, and then Exhibit A2 also has part of the plan sets CO.1 and that is this depiction of the proposed plat, correct?

Jared Crews: Yes.

Jeffrey Myers: And that does not show where the pole is in relation to proposed 68th Avenue SE, does it not?

Jared Crews: It does not.

Jeffrey Myers: Is it shown on the third page, which is plan set page C1.0?

Jared Crews: No.

Jeffrey Myers: That is all I have and I am going to stop sharing.

Examiner Reeves: Okay just to piggyback on that idea, earlier in the hearing, it was acknowledged that I as the Hearing Examiner had a bunch more information that was provided to me as part of the preliminary plat review and a bunch of those plans, etc. were not included. All I am asking Jared Crews is the three things that Jeffrey Meyers just showed. Am I correct in thinking that you probably saw more than just those three pages much like I saw prior to the preliminary plat decision? Is that an

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accurate assessment?

Jared Crews: Correct.

Examiner Reeves: Okay. Jeffrey Meyers did that change anything I just want to make sure you are done and I am going to Heather Burgess one final time and then we will wrap it up and figure out next steps.

Jeffrey Myers: I'm good.

Examiner Reeves: Okay, and then Heather Burgess, anything final based on where we are at this point?

Heather Burgess: I have one, just one more time. I believe I am showing page CO2 just part of the testimony. Now, Mr. Crews can you see the legend that I am highlighting with my mouse?

Jared Crews: Yes.

Heather Burgess: So one of the callouts on the legend would be utility power pole, right?

Jared Crews: Yes,

Heather Burgess: Okay, that's all I have, thank you.

Examiner Reeves: I want to ask one question of Mr. Crews as I think I heard you say this, but because it is such a complicated and legal issue and it could be quickly disposed it would be helpful. In your mind, requiring the undergrounding in this case has nothing to do with the impacts of the preliminary plat as opposed to what the code says needs to happen. Do you track what I am asking?

Jared Crews: Yes, I believe I do. So in this specific instance, the argument is not whether it relates to safety or the improvements or what not but it is whether the code gives the City the right to require the undergrounding.

Examiner Reeves: Well, it would be more than the code requires it versus gives the City the right – if that makes sense.

Jared Crews: I would agree with you.

Examiner Reeves: Meaning there is nothing unique or specific to the Three Lakes Crossing internally to the plat, right? There is nothing – the impacts are not such that you need to... right, it is safety, health, etc. required it is that no it is what the code says and that is the reason as opposed to some other reason, is that an accurate assessment?

Jared Crews: Yes, right, yes.

Examiner Reeves: Okay, and for the attorneys, it finishes Mr. Crews' testimony. Thank you Mr. Crews for your patience and for helping. One thing that I was hoping I would not have to write at length about is RCW 82.02.020, which was addressed by the Appellant and I think that answer (hopefully at least) kind of takes that off the table, but we can talk about it and next steps. Jeff Meyers, it is my understanding that the requirement to underground, based on testimony, was not so much a condition of approval, you know the sort of nexus as opposed to what the code would

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require. Or, am I misunderstanding?

Jeffrey Myers: It is what the code requires. The question is how far does the code go. The code certainly does not require undergrounding of all utilities that are connected to the lines that...

Examiner Reeves: I fully understand where you are going to head with your legal argument; I just want to make sure...you know...

Jeffrey Myers: This is not like a SEPA condition that identifies an impact unique to a development and says you must mitigate that.

Examiner Reeves: Well that is how plat conditions are too, on some level, but okay. So Heather Burgess you had raised this issue and I think in a way if anything it is win to the extent that everybody agrees that this would not be required as part of the Three Lakes preliminary plat, it is only whether – I'm going to have decide who I agree with in terms of how to interpret the code. Heather Burgess, your thoughts?

Heather Burgess: I am not sure I agree as I think what I just heard was an admission that there was nexus or proportionality to the imposition of the code requirement, and the fact that it is in the code as a matter of code doesn't mean that you can't have a requirement imposed on a development that violates RCW 82.02.020, even by operation by code. That is for you. I agree with the parsing of the legal issue in terms of this is not a condition of approval. Indeed, I wish it had been, that would have been great, and that's what we wanted. Right? So I just want to say, you know, I'm not sure it means that the issue is off the table is all I am saying.

Examiner Reeves: Good point Heather Burgess. I believe her point was that whether that issue is resolved could be a further appeal issue beyond the scope of what I deal with. I however do not have the authority and I think everyone can agree that to say that the City's municipal code potentially is violative of RCW Chapter 82.02 and that is the issue you are potentially preserving, correct?

Heather Burgess: Correct, preserving and exhausting my administrative remedy.

Examiner Reeves: Good, nailed it. In terms of the exact matter before us that there is no argument that there is a nexus no known thing required relating specifically related to this project. Do you agree with that?

Heather Burgess: That I do agree with, thank you.

Examiner Reeves: And Jeffrey Meyers do you agree with that to the extent of this particular matter and where we stand?

Jeffrey Myers: I agree with that and I also want to say I don't concede that there was an admission of any kind as Ms. Burgess suggested.

Examiner Reeves: Well, okay.

Jeffrey Myers: But, that can be resolved.

Examiner Reeves: All right, so let me go with next steps as it is late and everybody has lives, this is later than planned and I am glad we started at 6 and not 7 and of, you know, it certainly me being in the wing has a lot to do with it. But, I appreciate everybody's patience. I think I have heard what I need to hear and I think I have got

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really well put together introductory briefing and I think the parties are probably aware that I have a tendency to sort of, request that maybe I get closing briefing and we allow that. I am not going to require it, but any thoughts from our attorneys as opposed to here and now, and it certainly is not required, but there were some sort of curve balls that came up in my mind. But, your thoughts on that Jeff Myers?

Jeffrey Myers: I think that a short closing would be appropriate and I have an appellant brief due on the 23rd.

Examiner Reeves: Ah, the holidays and I don't want to hold anyone up, but I ...

Jeffrey Myers: I don't think it should go more than, you know, five to six pages. I really think it can be short. And, some of the legal principles that we are relying on and I am flexible on when the Examiner wants that to be turned in and what are consistent with Ms. Burgess and Mr. Wright's schedules since they are going to have to write that as well. I'm not going anywhere over the holidays.

Examiner Reeves: My suggestion would be the 30th for cross, you know, both sides at the same time, but Heather Burgess, I want to get your thoughts on where we stand. We know that Evan Mann and his group do not want this to be overly delayed, and that certainly is not my intent, but we are literally smack dab hitting the holiday season. So Heather Burgess, any thoughts on sort of, final thoughts closing briefs, anything to that effect would be helpful.

Heather Burgess: Well, I feel that we had an opportunity to do a pre-hearing brief, we submitted one and it lays out the legal argument which are unchanged despite the course of testimony so I don't think it is necessary as we bear the burden of proof here, so I don't think we need additional legal argument to be candid. I think we put everything we have in the record including responding to the things that were raised by the City on summary judgment because we had the opportunity to do that to start with.

Examiner Reeves: Well, I appreciate that. To be candid, I just can't fathom how me and my team would be able to produce a decision here in the next couple of weeks. There were some things that came up that I thought were somewhat interesting and curve balls that wouldn't hate to hear a little more thought on. So, I'll just make the decision that, you know, either side would be able to produce any kind of brief, a 10-page limit by December 30, 2022 and my intent would then be to produce a decision within two weeks of that. So, I am certainly not trying to overly delay Evan Mann and his team but I also trying to be realistic about, you know, I have people that work with me that actually have lives unlike myself and you know, it's been a hell of a year. Jared Crews, do you have a thought?

Jared Crews: Yes, I mean I know that you know Evan's project is on a timeline and everyday it is not approved its money. But, to the developer's credit, they have resubmitted site development grading plan for a second resubmittal and the City of Tumwater, you know if a developer is interested, we can continue to review those plans and get closer to approval pending obviously the issue of relocating or undergrounding the utilities, which in my mind, will most likely not substantially impact the configuration of the utilities or the plat layout. So, if Evan Mann is still interested, the City can continue to review the site development grading plan and get

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closer to approval and take up less time.

Examiner Reeves: So, Jared Crews and his team will continue to work, understanding that the attorneys are working on another issue, but it does not mean we all have to stop. That is the idea and so I am sure Mr. Mann appreciates that and I think all the parties are pretty reasonable and so I ultimately I am telling everybody that this is my plan. Heather Burgess I do not disagree with you saying that you have already produced great legal work as I have your briefs and you don't need to as it is not required to produce more, but I would allow either side to produce any kind of closing argument brief by noon, Friday, December 30, 2022 no more than 10 pages and again simultaneous submissions and then my team will produce a decision about the 15th of January 2023 or a couple of weeks after that to have a final decision. That is my intent. Anything final based on that for the City, Jeffrey Myers?

Jeffrey Myers: No.

Examiner Reeves: Okay. Heather Burgess?

Heather Burgess: Nope, that works, understand and appreciate the City's willingness to continue to work on review during the pending of the appeal.

Examiner Reeves: There you go and I think we are done. I truly want to say that it is always a pleasure to have Attorney Heather Burgess and Attorney Jeffrey Myers before me. Very excellent professionals and Evan Mann thank you for taking the time and to Jared Crews also for testifying, Tami Merriman for serving in a different role with her clerk hat. We can close the record. I have all the exhibits and everything has been admitted, no additional exhibits are required, and we have identified the opportunity rather than a requirement to provide any closing arguments based on what we heard tonight by December 30, 2022 at noon. The information should be delivered to Melody Valiant, City Clerk, who will ensure his office receives the information followed by a decision issued several weeks later to ensure no delay. As Jared Crews pointed out, the City will keep working on review of the internal aspects of the plat to not further delay things. He wished everyone a wonderful holiday season.

Jeffrey Myers: I would like to acknowledge Christopher Pierce-Wright, as he completed most of the briefing. It was a team effort I'm sure but Mr. Pierce-Wright has done an excellent job with the legal briefing.

Examiner Reeves: Thank you. Mr. Pierce-Wright, as a long-time appellant clerk prior to becoming a Hearing Examiner, I certainly understand being the hard working behind the scene person working closely with colleagues who often receive the credit. Everybody has worked very hard with the best of intentions.

ADJOURNMENT: With there being no further business, Examiner Reeves adjourned the public hearing at 9:13 p.m.