OFFICE OF THE HEARING EXAMINER

CITY OF TACOMA

VBT VIRIDIAN GROVE LLC, a Washington limited liability company, **Applicant/Appellant,** **v.** **CITY OF TACOMA,** a Washington Municipal corporation, through its Planning and Development Services Department, **Respondent.**	**HEX2024-007 (LU23-0208)** **FINDINGS OF FACT, CONCLUSIONS OF LAW AND DECISION**

THIS MATTER came on for hearing before the City of Tacoma Hearing Examiner on June 27, 2024.[1] Applicant/Appellant VBT Viridian Grove LLC ("Appellant" or "Viridian") was represented at the hearing by Attorney William T. Lynn. Respondent City of Tacoma ("Respondent" or "City") was represented by Chief Deputy City Attorney Steve Victor.[2] Witnesses were sworn and testified. Exhibits were submitted and admitted, and arguments were presented and considered.

The following witnesses testified at the hearing (in order of appearance):

Applicant/Appellant:

- Justin Goroch, Civil Engineer, Axea Civil LLC;
- Bill Bowdish, Architect, Ross Deckerman Architects & Associates; and
- Zac Baker, Owner & Applicant Representative, VBT Viridian Grove LLC.

[1] The hearing was conducted, at the parties' agreement, over Zoom, with no cost to any participant. Video, internet, and telephonic access were all available.

[2] Both attorneys were present at a prehearing conference held on June 6, 2024. At the prehearing conference, scheduling and procedural matters were addressed, and the hearing date was scheduled. June 28, 2024 was reserved as a second day of hearing if it were to become necessary. It did not. Instead, the Examiner conducted a post-hearing site visit and survey of the neighborhood pursuant to Hearing Examiner Rule of Procedure ("HEXRP") 1.15.

Respondent

- Larry Harala, Principal Planner, City of Tacoma, Planning and Development Services; and
- Carl Metz, Sr. Planner, Urban Design. City of Tacoma, Planning and Development Services.[3]

From the evidence in the hearing record, the Hearing Examiner makes the following:

FINDINGS OF FACT

Appeal/Party Background

1. This appeal concerns certain real property (further described below) located generally at 5228 South Mason Avenue, Tacoma, WA 98409, and specifically consisting of the following Pierce County Tax Parcels: 0220242083, 0220242084, 0220242085, 0220242217, 0220242243, and 0220242076 (the "Site" or the "Subject Property"). *Baker Testimony, Goroch Testimony, Bowdish Testimony, Harala Testimony, Metz Testimony; Ex. C-1, Ex. A-2~Ex. A-5*.

2. DPS LLC ("DPS") is the current record owner of the Subject Property. DPS, through its representative Zac Baker applied to the City for a Conditional Use Permit (the "CUP") under File No. LU23-0208 in order to facilitate the construction of a multi-family affordable housing project of 103 units on the Subject Property (as further described herein, the "Project"). Appellant Viridian is an affiliate entity of DPS, and has the Subject Property under contract to purchase, making Viridian an equitable owner of the Subject Property.[4] Viridian's primary purpose, as a business entity, is to increase the supply of affordable housing in markets where it is needed. *Baker Testimony; Ex. C-1, Ex. A-2*.

[3] Harala actually testified both before Metz, and after, as the City chose to break up his testimony in this fashion. There was no objection to doing so from the Appellant. Participants in the hearing may be referred to hereafter by last name only for ease of reference and without meaning any disrespect.

[4] From this point forward in this decision, any reference to the Appellant or Viridian also includes DPS unless expressly stated otherwise.

3. The Subject Property is currently split between R-2 Single-Family Dwelling District and R-3 Two-Family Dwelling District zoning designations.[5] Under those current designations, a developer could build approximately 54 residential units on the Subject Property. The CUP was Viridian's chosen avenue for obtaining the greater density of 103 units that Viridian desires for the Project at this time. *Baker Testimony, Harala Testimony; Ex. C-1*.[6]

4. The City is currently in the process of major changes to its zoning regime under what is known as the Home in Tacoma program. Although not a certainty, if the current proposed phase of the Home in Tacoma program gets codified, the density that Viridian seeks on the Subject Property will likely be available without the need for a CUP. Viridian has chosen to not wait for the enactment of the next phase of Home in Tacoma because of financing constraints that effectively require Viridian to take certain actions before the close of the 2024 calendar year relevant to maintaining that financing. The financing in question comes from the State of Washington, Pierce County, and the City, and is available to Viridian because the Project intends to develop affordable housing.[7] Viridian obtained this financing through competitive processes, with Viridian's application being based on a development of 103 units at this location (the Subject Property). The availability of at least some of this financing is further tied to the development of affordable housing in certain designated, limited census tracts within the City of Tacoma, with the Subject Property being in a qualifying location. *Id*., *Ex. A-6, Exs. A-7a~A-7c, Ex. A-8*.

[5] These designations may be referred to hereafter simply as "R-2 and R-3."
[6] The currently buildable unit number was obtained in answer to an emailed question from the Examiner to the parties post hearing.
[7] The characterization of the financing just made is an oversimplification, but it is sufficient for the purposes of this appeal.

5. Viridian sought to obtain additional density (approximately 49 additional units) through the CUP and the "incentive" add-on provision(s) set forth at Tacoma Municipal Code ("TMC") 13.05.010.A.25 that allows "religious organizations and/or nonprofits" to develop property for affordable housing if an additive menu of additional "criteria" are met. Those criteria, their applicability to the Project, and whether the Project meets them, are at the heart of this appeal. *Ex. C-1 and Ex. A thereto*.

6. The City's Planning and Development Services ("PDS") Director (the "Director") issued a "Report and Decision" on the CUP dated the "9th day of May, 2024" (the "Director Decision"). The Director Decision approved the CUP subject to conditions set forth therein. Viridian does not, of course, appeal the approval, but rather appeals the imposition of certain of the conditions, specifically Conditions 1(a), (b), (c) and (d). The basis for Viridian's challenges are addressed in depth in the Conclusions of Law[8] section of this decision, but in short, Viridian challenges the City's authority to impose the challenged conditions, and argued that their imposition makes the Project financially infeasible, thereby killing the Project in contravention of the City's well-established goals of providing more affordable housing in the Tacoma market.

The Project Site and Surrounding Area:

7. The Site is approximately 4.4-acres in total, collectively made up of six parcels, which when combined result in an irregularly shaped, aggregated property. The parcels comprising the Site were originally platted around 1889. One of the Site parcels was previously occupied by a single-family home, together with accessory structures, built in

[8] Conclusion of Law may be abbreviated hereafter as "CoL."

approximately 1908. All were demolished under permits from the City. The Site is currently covered in vegetation including invasive species such as blackberries and ivy, as well as other shrubs, and trees. *Ex. C-1*.

8. As with the Site's zoning, the One Tacoma Comprehensive Plan (the "Comp Plan") bisects the Subject Property into two areas: one approximately 2-acres in size designated Mid-scale Residential, and the remaining 2.4-acre area designated Parks and Open Space. The Director Decision noted that the Urban Form Element of the Comp Plan establishes a goal for Mid-scale Residential designated sites of 15-45 units per acre, which would aim for up to 87 units on the 2-acre portion of the Site under an approved CUP. The Comp Plan does not specify a specific density target for areas designated Parks and Open Space.[9] The Parks and Open Space designation arises primarily from the fact that the Subject Property is currently undeveloped, vegetated space, and has been for some time. The Comp Plan's Open Space designation does not prevent the owner from developing the Subject Property in accordance with the City's applicable land use regulations.[10] The Director Decision notes that the total density proposed for the entire Site is compatible with the One

[9] In the section of the Director Decision titled "Additional Information," the Director stated that:

> The design of the project within the 2.4 acre area of the site designated Parks and Open Space should be sensitive to the open space characteristics of the site and the area surrounding the site. Comprehensive Plan policies call for the protection of open space so that the those [sic] living there can experience nature close to where they live. Further, the design criteria specific to the Infill Pilot Program require the project to be responsive to established patterns, including landscaping and trees, emphasize pedestrian connectivity, and create usable yard spaces. The project should be conditioned to meet applicable criteria and policies.

This "Additional Information" appears to be at least part of the basis for some of the conditions contested in this appeal and will be discussed further in the Conclusions of Law section of this decision.

[10] The City's codified land use regulations are what actually control the development of the Subject Property as opposed to the goals and policies of the Comp Plan, especially where the two may be in conflict. *See Citizens for Mount Vernon v. City of Mount Vernon, 133 Wn.2d 861, 947 P.2d 1208 (1997)(a comprehensive plan is a guide and not a document designed for making specific land use decisions).*

Tacoma Comprehensive Plan guidelines for density. The adjacent properties surrounding the Site to the north and south for several blocks are also designated Mid-scale Residential. The surrounding area land uses are an eclectic mix that includes single and multi-family residential, commercial, and light industrial. As already mentioned above, the current zoning applicable to the Subject Property is both R-2 and R-3. *Id., Ex. A-3*.

9. A Wetland and Fish and Wildlife Habitat Assessment, prepared for a Critical Area Verification (under permit no. LU23-0080) confirmed the presence on the Site of two Oregon White Oak trees (the "White Oaks"), which qualify as Fish and Wildlife Habitat Conservation Area ("FWHCA") management areas. The White Oaks are located along the western edge of Parcel No. 0220242076. Per the approved Critical Area Verification (*Exhibit H to Exhibit C-1*), the FWHCA for each of the White Oaks extends from the trunk of the tree outward to the edge of the critical root zone ("CRZ"). The CRZ is calculated as one foot of CRZ per one inch of tree trunk diameter at breast height ("DBH"). The White Oak located in the northwest corner of the parcel measures 29 inches DBH. As such, it has a CRZ extending 29 feet from the trunk. The other White Oak in the southwest portion measures 20 inches DBH and has a CRZ extending 20 feet from the trunk. The Project site plan indicates that the White Oaks will be protected, but such protection, of necessity, reduces developable building footprint area on the Site. The Director Decision contains a condition requiring protection of these trees. No other critical areas were found on the Site.

10. A flood hazard area is present on part of the Site, primarily in the area proposed

for parking behind proposed Building A.[11] Viridian is not proposing to construct buildings in the flood hazard area, but rather considers the flood area more suitable for surface parking and a "tot lot"/playground at one end, as shown on the site plan (*Ex. A-5a*). City floodplain review staff flagged the parking lot, presumably for scrutiny at the actual development permit stage, noting that impervious surface in that location might have flood control ramifications. *Baker Testimony, Goroch Testimony, Bowdish Testimony, Harala Testimony; Ex. A-2, Ex. A-4*.

11. The Site presents challenging topographical variations that affect or constrain its development in various ways. At the entrance into the Site, the elevation is significantly higher than the grade/elevation of South Mason Avenue and South Tyler Street and then dips back down. As a result of this and the current layout, very little of any development will be visible from either of these public right-of-way areas, which are the closest to the Subject Property. In particular, the surface parking areas will not be visible to the nearest public right-of-way and will not be visible until one has made it approximately 100 feet into the Site. As mentioned, after this initial rise in elevation into the Site, it dips back down, and then rises again heading to the western border. This high-low-high configuration makes developing the Site more challenging than if the topography were flat.[12] *Baker Testimony, Goroch Testimony, Bowdish Testimony; Ex. C-1, Ex. A-2, Ex. A-4, Ex. A-5*.

12. The Site is approximately 2,600 feet northwest of Gray Middle School and 3,200 feet north of Manitou Park Elementary School. *Ex. C-1*.

[11] It should be understood from this point forward in this decision that all aspects of the Project are "proposed" at this writing, even when the word is not used, in order to not have the word "proposed" become tiresomely overused.

[12] It is not entirely uncommon for sites intended for affordable housing to not be ideal for development since the more desirable sites generally get snapped up for market-rate projects.

13. The Site's only direct access to the City's right-of-way system is at South Mason Avenue, a neighborhood collector street. South Mason Avenue is an oil mat road with no sidewalks at present. The segment of South Mason Avenue in front of the Subject Property connects with South Tyler Street almost immediately. South Tyler Street is classed as a 60-foot minor arterial. Sidewalks are present on both sides of South Tyler Street. Undeveloped, unopened South 54th Street right-of-way abuts the Site along its southern boundary. *Ex. C-1, Ex. A-2~Ex. A-5*.

14. Residential uses in the surrounding neighborhood are a mix of single-family, triplex, and multiple family development. An undeveloped, City-owned open space parcel is located approximately 250 feet west of the Site. The approximate 3.5-acre site immediately adjacent to Site to the west is developed with a single-family dwelling near the northern front, and a significant amount of treed area behind. Multi-family development, including a Tacoma Housing Authority project, predominates to the southwest of the Subject Property. *Id*.

15. The Subject Property is located in a high probability area for encountering cultural resources. It is not within a designated Historic District. *Harala Testimony; Ex. C-1*.

16. The nearest available transit to the Subject Property is on South Orchard Street or South Tacoma Way, both of which are nearly one mile from Subject Property. *Goroch Testimony, Bowdish Testimony; Ex. C-1*.

The Project:

17. As referenced above, Viridian applied for the CUP hoping it would enable the construction of 103 affordable multifamily dwelling units on the Subject Property, because the current R-2 and R-3 zoning split does not allow that level of density. Viridian's application

was not for a typical CUP alone, however. As referenced above at Finding of Fact 5,[13] Viridian qualified as a "religious organization[ ] and/or nonprofit[ ]" meeting TMC 13.05.010.A.25's threshold requirement for an affordable housing bonus density, provided that Viridian then develop the Subject Property for affordable housing. Additional requirements/criteria that attach to TMC 13.05.010.A.25 are discussed in more detail at various places below. Among these additional requirements is the following at TMC 13.05.010.A.25.a: "The application criteria and review process shall be the same as the Infill Pilot Program per TMC 13.05.060." *Harala Testimony, Metz Testimony, Baker Testimony, Goroch Testimony, Bowdish Testimony; Ex. C-1, Ex. A-2*.

18. The Project is the first time for this exact pathway to be taken in the on-going Infill Pilot Program enacted by the City Council with the express purpose of increasing infill development. Typically, the program has been used for infill development of a much smaller scale than the Project (e.g., duplexes) that does not need the density bonus sought here. Given the Site area of approximately 4.4 acres, the Project would result in a density of approximately 23 units/acre, which is nearly double the approximately 12 units/acre allowed now under the existing combination R-2, R-3 zoning. *Harala Testimony; Ex. C-1, Ex. A-2*.

19. The Project building layout includes seven buildings to get to the total of 103 units. Viridian intends for residential units in the Project to have a variety of formats, up to and including four-bedroom units, dispersed across the Site, with unit counts ranging from six units in Building G to 22 units in Building A. Due to topography—slopes primarily—the buildings will be a combination of 2 and 3 stories tall with some built into the present slopes,

[13] "Finding of Fact" may be abbreviated as "FoF" hereafter.

having three floors on one side and two on the side with the higher elevation. Also due to topography, the Project includes multiple retaining walls, some as tall as 16 feet in height, but Viridian minimized a perhaps greater utilization of retaining walls, despite the topography, with its intended building placement using the buildings themselves to retain and support existing slopes in certain locations. *Goroch Testimony, Harala Testimony, Baker Testimony, Bowdish Testimony; Ex. C-1, Ex. A-2, Ex. A-5*.

20. Viridian determined that 149 surface parking spaces were the minimum appropriate to serve the Project, even though under the Infill Pilot Program, there is no minimum number of parking stalls required for the Project.[14] For the typical smaller scale of infill projects prior to now, no parking being required would certainly make sense.[15] Viridian settled on 149 spaces due, at least in part to some pre-Director Decision urgings from the City to keep the parking count low. Viridian attempted still to get as close as possible to its lowered target of 1.5 parking spaces per unit.[16] Viridian chose not to go any lower in its proposal because of the number of units and the less-than-conveniently-close availability of public transit. *Goroch Testimony; Ex. A-2, Ex. A-5*.

21. The parties were not in disagreement that there will be a need for on-site parking considering the long distance to public transit, as just set forth above. Largely due to the Site's

[14] This is likely due to at least two things. First, the Infill Pilot Program is more designed for development of a much smaller scale than what the Project proposes. Requiring parking minimums for a duplex or an accessory dwelling unit would seem to be drastic overkill. Second, planning philosophy in recent years has moved away from parking minimums in many settings in order to encourage people to move away from single passenger car trips. In other words, the thinking is that if there is no automobile parking or a scarcity of it, people will, of necessity, move to other methods of transportation such as buses, bicycles, foot, etc. The Examiner is unaware of whether and to what extent these efforts at social engineering are successful, and such was not addressed at the hearing.

[15] Whether it makes the same sense here is a prominent issue to be resolved.

[16] Bowdish testified that in a development such as the Project, where there are 2, 3, and even 4-bedroom units, a parking ratio of 2 to 2.5 units is actually more appropriate. He indicated that the just under 1.5 ratio here could result in a "battle royale" for parking.

topography, but also due in some part to the site plan's layout and the changes made thereto after at least one round of PDS staff input, parking on the Site will not be visible from any nearby public right-of-way.[17] Viridian made revisions to its site plan prior to final application that included changing the orientation of Buildings F and G in order to have them facing the entry drive aisle (instead of parking being visible therefrom), and relocating parking to the rear of these buildings, as well as rearranging open space and locating the tot lot in its current location. The foregoing notwithstanding, the Director determined that the parking is still prominent on the Site under TMC 13.05.060.F.3.c, and needed to be reduced, relocated, or both to minimize the "prominence" of parking on the Site. The Director also found fault with the relocated tot lot as well (among other things). *Goroch Testimony, Harala Testimony; Ex. C-1*.

22. As already referenced, Viridian's witnesses testified at some length about the need for parking and how it is provided on the Site. The Subject Property's location does not allow for off-site parking. Tucking the parking under the buildings, as one option under Condition 1.a. of the Director Decision, would still leave parking visible if the parking replaces the proposed first floor units. Tucking parking creates Americans with Disabilities (ADA) issues in the Project because the more easily ADA accessible/compliant units are intended for the ground floor currently. There are no elevators in the buildings. Alternatively, moving the Project parking entirely underground presents issues with the flood plain and with even more added costs than at-grade structured parking. Any type of structured parking is

[17] The Director Decision used the phrase "adjacent roadways." If "roadways" here means public right-of-way, there really are not any open, public roadways adjacent to the Site when "adjacent" is taken with its usual meaning of two things that touch or have a common border. *See* https://www.merriam-webster.com/dictionary/adjacent. The South 54th Street right-of-way does appear to be adjacent, but the City's right-of-way interest there is inchoate at present.

significantly more expensive than surface parking. Baker testified that he had never done structured parking as part of an affordable housing project. On questioning from the Examiner, he testified that structured parking was likely to cost between $25,000 and $30,000 per stall adding an additional 10% to 12% cost per unit to the Project. Underground parking only increases that cost. Bowdish testified that tucking parking under Buildings would likely result in a loss of at least 14 units from the 103-unit total, all or most of which would likely be ADA units. After the revisions to its site plan referenced at FoF 21, Viridian believed it met CUP standards, not only for parking, but for all CUP criteria, including the Infill Pilot Program criteria applicable to its application. *Goroch Testimony*; *Ex. C-1 at Ex. A.*

23. The Project will be constructed to Evergreen Sustainable Development Standards, which are equivalent to Built Green 3 Star or LEED Bronze. *Ex. C-1*.

24. As referenced, the Site is accessed from a single private accessway (i.e., not public right-of-way) from the non-standard intersection of South Tyler Street and South Mason Avenue. Three buildings would technically front (or at least face on one side) this private internal accessway. The accessway ultimately leads to three parking lots technically fronted by the remaining buildings. As mentioned above, because of the location and topography of the Site, the buildings and parking areas will not be visible from off-site public areas including public right-of way. *Goroch Testimony, Bowdish Testimony; Ex. C-1, Ex. A-4, Ex. A-5*.

25. In the foregoing paragraph, the modifier "technically" is used on the words "front" and "fronted" because the buildings are identical from either main side (the length of

the building) making a true front non-existent here. In other words, internally to the Project, regardless of which side parking is on (if not tucked under) there will be the same number of eyes on the parking lots from the residential units more or less. It seemed during the hearing that City staff was not fully aware of some of the features shown in the color/elevation renderings of the Project and the Buildings in Exhibit A-4 (the "Renderings"), which does depict the two-fronted (or perhaps frontless) feature.[18] The Renderings further depict the intended "garden" residential style of the buildings which is intended to match well with the other residential development in and around the Subject Property. Bowdish explained in some detail the various features presented in the Renderings that are considered good residential design elements, and that also break up the mass of the buildings aesthetically. *Bowdish Testimony; Goroch Testimony, Harala Testimony, Baker Testimony; Ex. A-4*.

26. Viridian intends for the Project to provide much needed "missing middle," affordable housing for the Tacoma market. Viridian intends to have 100% of the units only available to individuals at or below 60% of the Area Medium Income (AMI) for 50 years. Doing so far exceeds the minimum requirements of TMC 13.05.010.A.25.[19] *Harala Testimony, Baker Testimony; Ex. C-1, Ex. A-2*.

[18] Harala seemed to imply in his testimony, that perhaps some aspect(s) of the Director Decision might have been influenced by having the Renderings prior to issuance. Whether that is actually the case, we can only guess. There is some indication in the hearing record that the double-fronted (or frontless) design of the building was known, however, because at least two Panel members (*see FoF 29*) commented on the building façades needing to look more like a building front. That notwithstanding, on direct questioning from the City's legal counsel, Bowdish stated that the Renderings (erroneously referred to as "Exhibit 3") were prepared specifically for the hearing and that neither City staff nor the Panel had seen them prior to the hearing.

[19] Qualifying for the Affordable Housing Bonus CUP requires applicants to provide a minimum of 20% of the total units affordable for a minimum of 15 years at the following affordability rates: (1) Rental units must be affordable at 80% of Area Median Income (AMI). (2) Ownership units must be affordable at 115% of Area Median Income. (3) The general provisions of TMC 1.39 Affordable Housing Incentives and Bonuses Administrative Code shall apply.

27. In addition to retaining the White Oaks (*FoF 9*), the Project will plant an additional 16 Oregon White Oaks, and another 246 trees of other species on the Site. Trees and open space would then cover approximately 39% of the Site. *Ex. C-1, Ex. A-5*.

Notification, Comments, Infill Pilot Procedures:

28. Viridian's application was determined to be complete on December 19, 2023. On January 22, 2023, PDS staff mailed written notice of the application to owners and residents of property within 400 feet of the Site as indicated by the Pierce County Assessor/Treasurer's records, the neighborhood council, and qualified neighborhood groups. A comment period was then opened until February 19, 2024. PDS staff posted a property information sign at the Site within seven days of the notice being mailed out. The public notice was conducted in compliance with TMC 13.05.070's public notice requirements for a Process II permit type. *Ex. C-1*.

29. TMC 13.05.060, section F, of the City's Residential Infill Pilot Program requires convening a special advisory review body (referred to as the "Panel" in the Director Decision and that term is adopted herein) to provide advisory input. Metz testified that the Panel's review comments are not given greater or more weight in the process, but that they have to be considered as part of the TMC mandated process. A Panel is to include city staff and representatives from the Tacoma Planning Commission, as well as someone from the project area neighborhood council. A Panel was convened for the Project and met on March 4, 2024. The Panel received a presentation from City planning staff giving a summary of the Project. Viridian attended this meeting to be available for questions, but Viridian was not asked or

required to make a formal presentation. *Metz Testimony, Harala Testimony; Ex. C-1*.

30. The Panel provided positive advisory input on the intended number of affordable units and Viridian's commitment to maintaining affordable housing for 50 years. That notwithstanding, the Panel members gave a variety of opinions on why they felt the Project did not meet various design criteria. The Panel's various concerns centered around surface parking, the perceived lack of pedestrian connections, the substantial amount of grading required rather than "designing the buildings to interact with the site topography," and a perceived insufficiency of open space. The Director Decision, at paragraph 22 in the "Notification and Comments" section, states that "The panel felt the site was not ideal for this type of proposal,[20] given the design the applicant would like to use, and that the applicant is not being as innovative or responsive to the site itself." *Ex. C-1.*

31. With the Comp Plan's Open Space designation as justification, the Panel recommended protecting more mature tree canopy on the Subject Property. In addition, referencing the "criteria" of TMC 13.05.060.F.3, the Panel recommended:

> relocating parking under buildings; breaking up large parking areas; moving buildings to use the terrain of the site; reducing the size of the buildings; designing prominent entrances; relocating the recreation area to a more central location; and creating more pedestrian connections, including development of a pedestrian path/sidewalk out to and along unimproved South 54th Street alignment to South Cheyenne Street. *See Ex. C-1 and its Exhibit G*.

32. Three written public comments were received related to the Project. During the

[20] Viridian's witnesses testified to the fact that developable sites for affordable housing are not easy to come by. Developable property of any kind in Tacoma's very locked (i.e., being chiefly surrounded by water or other municipalities) geography is hard to come by. It is not a reach to conclude that affordable housing projects are in serious competition for sites with market rate developers. Baker testified that in eight years of professional focus on attempting to develop affordable housing in Pierce County (and other locations around the country), the Subject Property is only the third Pierce County location that seemed to present the financial feasibility necessary to actually move forward with a development.

public comment period planning staff fielded several calls from area residents and provided information on the application. Concerns were expressed regarding the lack of public transit in the area, the proximity of the Bridge Industrial project, possible contamination, and concerns over the approval of more residences in the South Tacoma Groundwater Protection District. Commenters expressed their desire to see the Site developed with lower density residential or remain undeveloped as a passive open space. *Ex. C-1 at its Exhibit F and G*.

33. Residential development is a permitted use in the South Tacoma Groundwater Protection District. In response to inquiry from PDS staff, the Environmental Protection Agency (EPA) indicated that it has no regulatory concerns regarding the Project, nor did it feel the need to otherwise comment on development of the Subject Property. *Ex. C-1*.

34. Along the way to issuance of the Director Decision, Viridian performed and submitted a Traffic Impact Analysis, dated November 9, 2023 (the "TIA"). Based on the traffic impacts of the Project identified in the TIA, the City's Traffic Engineering review staff recommended certain conditions be attached to the CUP approval. Because those conditions are not appealed here, no further discussion is necessary. *Ex. C-1 and Ex. B thereto*.

35. Likewise, a Cultural Resources Discovery Plan, a Preliminary Stormwater Site Plan/Hydrology Report, dated November 2023, and a Preliminary Geotechnical Engineering Report, dated April 23, 2021, were submitted and reviewed, but are not at issue here. *Ex. C-1 at its Exs. C, D and E.*

36. The City also conducted an environmental review of the Project which resulted in the issuance of a Determination of Non-Significance ("DNS") on May 9, 2024. The DNS

was not appealed. *Ex. C-1 at its Attachment. B.*[21]

Applicable Regulation and Policies

37. The Comp Plan's Urban Form Element establishes a goal for Mid-scale Residential designated sites of 15-45 units per acre. Qualities associated with Mid-scale Residential include "Diverse housing types and prices, a range of building heights and scales, walkability, transportation choices, moderate noise and activity levels, generally shared open space and yards, street trees, green features, and complete streets with alleys."[22]

38. The intent of the Affordable Housing Bonus CUP is to provide an optional incentive to religious and/or nonprofit organizations seeking to develop and manage multifamily projects integrating significant affordable housing, while ensuring reasonable compatibility with neighborhood scale and character and limiting negative impacts to the neighborhood.

39. The Director Decision, at Findings 30 through 35, set forth a list of City goals and policies that are relevant to the Project. These are incorporated here by this reference.

40. Any conclusion of law herein which may be more properly deemed or considered a finding of fact is hereby adopted as such.

CONCLUSIONS OF LAW

1. The Hearing Examiner has jurisdiction to hear appeals of decisions from the PDS Director pursuant to Tacoma Municipal Code (again, the "TMC") sections 1.23.050.B.2, 13.05.090.H and 13.05.100. The Examiner's review of the issues in this appeal of the Director Decision is *de novo* pursuant to TMC 1.23.060. Viridian challenges certain conditions

[21] A DNS is issued when no adverse environmental impacts are found after review of the Project.
[22] Urban Form, p. 2-9.

imposed on the approval of the CUP, the language in the TMC looked to as authorization for those conditions, and their effect on the Project. The language of TMC 1.23.060 notwithstanding, determining the meaning of a statute or ordinance is a question of law that is reviewed *de novo* in any event.[23] The PDS Director has the express authority to "Interpret [ ]…the City's land use regulatory codes. *TMC 13.05.080.A.1, TMC 13.05.080.B*. This authority inures to the Hearing Examiner, as necessary, when a Director Decision is appealed.

2. As an equitable owner of the Subject Property, Viridian has standing to bring this appeal.[24] As the party challenging certain conditions in the CUP, Viridian bears the burden of proof by a preponderance "[t]o establish… that the matter [or conditions] is[/are] consistent or inconsistent with applicable legal standards and the lower decision should be reversed or otherwise modified." *TMC 1.23.070*. The "lower decision" here is the Director Decision, and specifically, the Director's decision to condition the CUP approval with Conditions 1(a), (b), (c) and (d).[25]

3. "Preponderance of the evidence" means that the trier of fact is convinced that it is more probable than not that the fact(s) at issue is/are true.[26] The preponderance of the evidence standard is at the low end of the spectrum for burden-of-proof evidentiary standards in the U.S. legal system, and is not particularly difficult to meet.[27]

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[23] *Durant v. State Farm Mut. Auto. Ins. Co.*, 191 Wn.2d 1, 8, 419 P.3d 400, 403 (2018) *citing State v. J.M.*, 144 Wn.2d 472, 480, 28 P.3d 720 (2001). *See also Gronquist v. Dep't of Corr.*, 196 Wn.2d 564, 568, 475 P.3d 497, 500 (2020) ("*De novo review also applies to questions of statutory interpretation."*).

[24] No challenges to Viridian's standing were made as part of the appeal.

[25] *See Appellant's Notice of Appeal*, ⁋ 2.A. specifically referencing these conditions as the ones being challenged.

[26] *Spivey v. City of Bellevue*, 187 Wn.2d 716, 733, 389 P.3d 504, 512 (2017); *State v. Paul,* 64 Wn. App. 801, 807, 828 P.2d 594 (1992).

[27] *In re Custody of C.C.M.*, 149 Wn. App. 184, 202-203, 202 P.3d 971, 980 (2009). Another somewhat recent case referred to it thusly: "The lowest legal standard of proof [in the U.S. legal system] requires the proponent to prove its case by a preponderance of the evidence." *Mansour v. King County*, 131 Wn. App. 255, 266, 128 P.3d 1241, 1246-1247 (2006).

4. At the outset of the hearing, in response to questioning from the Examiner, legal counsel for the parties agreed that the questions presented by this appeal are primarily legal in nature and not factual disputes. As such, the Findings of Fact above are more for context in this decision than they are evidentiary-based findings made from conflicting evidence and assertions. For example, (a) there is no disagreement between the parties regarding the topography of the Site and the challenges the topography presents, (b) there is no disagreement that the surrounding neighborhood is a varied admixture of uses, (c) there is no disagreement that affordable housing is sorely needed in the Tacoma housing market, and (d) there was no disagreement that complying with the conditions of the Director Decision would add significant cost to the Project.[28] This is not an exhaustive list. The parties did not appear to disagree over any material facts during the hearing, either because they do indeed affirmatively agree with each other, or because one side simply does not have the information with which to contest an assertion made by the other side (as in some of Viridian's financial testimony/evidence). The closest the parties came to a factual disagreement was over whether there was adequate opportunity for Viridian to discuss the criteria and conditions at issue here in order to attempt reaching an accord prior to issuance of the Director Decision. Viridian testified that any back and forth over criteria seemed to be stunted when compared to past interaction with PDS staff, while the City seemed to argue that there was ample opportunity to discuss potential conditions prior to issuance of the Director Decision. As noted above in

[28] The City did not affirmatively agree that its conditions would add significant cost, but the City offered no evidence refuting Viridian's evidence in this regard. Harala testified that Viridian had not given the City any information on financial feasibility prior to the hearing. Nonetheless, Viridian proved its claims in this regard by a preponderance at the hearing.

FoF 21, Viridian did make certain revisions to its final application site plan based on City input of some level.[29]

The question for resolution then becomes deciding whether the City correctly interpreted and applied its code and acted properly within its authority in requiring Conditions 1(a), (b), (c) and (d) (hereafter the "Challenged Conditions" for easier reference).[30]

5. Conditional Use Permits are discretionary land use permits that allow for the possibility of conditions being added to an approval and that approval being contingent on the conditions being met, either at the time of the approval, or more typically, as part of the development process. TMC 13.05.010.A.1 states in part that:

> The purpose of the CUP review process is to determine if such a use is appropriate at the proposed location and, ***if appropriate, to identify any additional conditions of approval necessary to mitigate potential adverse impacts and ensure compatibility*** between the conditional use and other existing and allowed uses in the same zoning district and in the vicinity of the subject property." [Emphasis added].

The foregoing code provision specifically references the ability to condition a CUP approval and what those conditions should address—potential adverse impacts and neighborhood compatibility.[31] Conditions must have some tie to this standard or be otherwise authorized by the TMC.

6. An Affordable Housing Bonus CUP must meet the general CUP criteria in TMC 13.05.010.A.2 and the provisions/criteria specific to Residential Infill Pilot Program found in

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[29] It appears these revisions may have come in response to the comments from the Panel, but that was not clear from the hearing record.

[30] The parties made reference, at least in passing, to constitutional issues of vagueness, as well as nexus and proportionality. The possibility of briefing these issues post-hearing was discussed but was ultimately left alone. To the extent these legal concepts come to bear on this appeal, it is only within the context of the TMC's existing provisions regarding interpretation of land use regulations and the application of nexus and proportionality through the TMC's own language.

[31] The Examiner would note here that the City's issuing of the DNS would indicate that no adverse impacts worthy of mitigating conditions were found to arise from the Project on the environmental front.

TMC 13.05.060.F.3. The Director Decision determined that Viridian met the general CUP criteria of TMC 13.05.010.A.2, "Provided the conditions of approval are met…"[32] The Director Decision does not draw clear and specific ties from any TMC 13.05.010.A.2 criteria to any specific Challenged Condition(s) necessarily showing how the imposition of that condition is the determiner for that criteria being met. The same is true in large part for the Residential Infill Pilot Program criteria of TMC 13.05.060.F.3, except when it comes to parking.[33] In any event, the Examiner does not disagree with the Director Decision that the TMC 13.05.010.A.2 general CUP criteria are satisfied, and given that there is no challenge to that part of the Director Decision except insofar as the Challenged Conditions may relate thereto, again, which relation is not entirely clear, there is no need to reanalyze here whether the TMC 13.05.010.A.2 general CUP criteria are satisfied. They are. Whether they are only satisfied by virtue of the Challenged Conditions is another matter.

7. A Conditional Use Permit is, as billed, a ***use*** permit that authorizes (or denies) a use that is not outright permitted at the intended location, such as the added density here. A CUP is not an actual development permit that authorizes the breaking of ground and the construction of structures. Given that, most CUPs end up being a bit (perhaps unavoidably) out over their skis, as the expression goes.[34] The CUP analysis, in order to properly contextualize the applicant's use intentions, conducts a forward-looking, hard-ish review of

[32] The immediately preceding quote is the lead-in to Conclusion 1 of the Director Decision. Thereafter, several of the CUP criteria from TMC 13.05.010.A.2 are analyzed and noted as satisfied, but with provisos such as "If conditioned appropriately…" (Condition 1.a), "Provided the project is conditioned appropriately… (Conclusion 1.b), and "Provided the project is conditioned appropriately… (Conclusion 1.b). These generic phases do not necessarily provide a sufficient tie between some aspect of the Project and the condition authorizing language of TMC 13.05.010.A.1.

[33] The "Conclusions" section of the Director Decision addressing TMC 13.05.060.F.3. is one paragraph long with the lion's share of content being a short summary of the conditions that follow.

[34] Meaning "to do something too early, or before you are ready or prepared." https://dictionary.cambridge.org/us/dictionary/english/get-out-over-skis.

the development intended to follow the CUP as part of deciding whether to approve the conditional use, even though that actual development must be separately permitted at a later point. In other words, the hard-ish review of the intended development is meant to contextualize the application and help in determining whether the actual criteria for the CUP are, or will be, met through the development yet to come. As already stated, the conditional use here is the greater density allowed because of Viridian's status as a non-profit entity and its commitment to the Project being affordable housing.[35]

8. Despite this forward-looking, hard-ish review, the approval of a CUP does not vest the applicant to anything for the future.[36] An approved CUP is an approved CUP; but, it does not vest[37] the applicant to developing anything particular, even though the CUP use is approved, and even though, as here, the City's CUP conditions expressly address the actual development of the Subject Property.

9. Given the foregoing, and in light of the hearing record as a whole, the City's CUP approval is illusory. On its face, the Director Decision approves the greater density of 103 units on the Subject Property, but then conditions the actual development to follow the approval in such a way that the total of 103 units cannot feasibly be built, primarily because of the Site's topography and the costs involved in meeting the Challenged Conditions.[38] This

[35] The Examiner inquired at one point whether there were other aspects of the Project, besides the increased density, that required the CUP. This question was never answered definitively.
[36] *Potala Vill. Kirkland, LLC v. City of Kirkland*, 183 Wn. App. 191, 334 P.3d 1143 (2014), *rev den* 182 Wn.2d 1004, 342 P.3d 326 (2015).
[37] The Examiner misspoke at one point in the hearing referencing vesting in asking a question regarding the City's statement at p. 15, Advisory Comment 1 of the Director Decision, which states: "If the applicant chooses to wait until the Home In Tacoma Code is adopted, and if the density is allowed under Home in Tacoma, the applicant can choose to meet the new code OR comply with the conditions of this CUP."
[38] The Examiner notes here that, although the City has no duty to offer workable revisions to the site plan that would preserve the 103 units of density while still meeting the City's conditions, nothing in the record shows that the City did offer any such workable alternatives. From the record, it appears that the City "approved" the 103 units of density, conditioned as that approval is, and then left it entirely to Viridian to see if it could still make

makes the approval illusory. For its part, Viridian showed by a preponderance of the evidence that the topography (primarily slopes) and other physical limitation of the Site, such as the flood plain, dictate the current layout of the Site. The City presented no evidence to counter Viridian's contentions in regard to the topography dictating the Site layout. The City has no obligation necessarily to propose a different site plan configuration, but when the City's position is that its development regulations require a different configuration, it would make sense for the City to provide input on what that configuration could be. In the absence of viable alternative layouts that still achieve the "approved" density, the approval of 103 units is in name only. The City provided at least some input early on that led to the realignment of Buildings F and G and the relocation of the tot lot (*FoF 21*), but nothing concrete appears to have come from the City after the Panel's wish list of recommendations (*FoF 31*) besides the suggestion/requirement regarding parking. Even the alternative suggestion to break parking up into 22 stall segments did not appear to come with any concrete suggestion of how that would work on the Site and still maintain 103 units of density.[39] At its best, the City's approval seems be more of a denial that only raided approval's wardrobe. There seems to be a strong undercurrent present in the Director Decision that flows from the Panel's comment that "the site was not ideal for this type of proposal." Throughout the hearing and the writing of this decision, the Examiner is left with the recurring question of "What did the Director Decision really even approve?"

10. Viridian also showed by a preponderance that the Challenged Conditions will increase cost to a level that will make the Project infeasible. The City presented no evidence

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103 units somehow work. Along the way, the City acknowledges that it very well might not (e.g., Condition 1.a., "This may also require utilizing smaller buildings.").

[39] FoF 29~31.

to contradict Viridian's contentions in this regard. Additional costs would include, at a minimum, (a) the cost of adding structured parking, and (b) the cost of drastically redesigning the site plan, both of which would be further compounded by the increased difficulty of making the Project financially viable after units are lost as a result.[40] As with the Site configuration, nothing in the TMC necessarily obligates the City to calculate and consider the financial viability of a project in making its determinations. That said, the Project being scrapped because of the high cost of complying with the Challenged Conditions does thwart the many goals and policies of the Comp Plan that promote affordable housing and equal housing opportunity for "all Tacomans." These same policies and goals also suffer damage if ADA units are removed from the Project due to parking or site layout revisions.

11. Viridian argued that the City's criteria that are the presumed basis for the Challenged Conditions are both non-mandatory (i.e., optional or "hortatory"[41]) and are not properly specific enough to inform the applicant of what it has to do to comply (i.e., vague). It used to be commonly taught in legal writing that the helping/auxiliary verb "shall" represents mandatory provisions in writings like statutes, ordinances or contracts,[42] and by contrast, the helping verb "should" simply represents a hortatory provision and is not mandatory. TMC 13.01.010 weighs in that "[t]he word 'shall' is mandatory and not directory."[43] In recent times, the helping verb "must" is more strongly encouraged as the indicator of a mandatory

[40] Again, there's that pesky reality of approving 103 units, without really approving 103 units.
[41] Hortatory means "trying to strongly encourage or persuade someone to do something." https://dictionary.cambridge.org/us/dictionary/english/hortatory
[42] Our courts have generally agreed with this use of "shall" as evidencing a duty. *In re Parenting & Support of C.A.S.*, 25 Wn. App. 2d 21, 27, 522 P.3d 75, 79 (2022)(*By using the word "shall" we presume that the legislature created a duty rather than conferring discretion, unless the statute reflects a contrary intent.*).
[43] Here, "directory" is a synonym of hortatory. Websters defines it as "serving to direct, *specifically* **:** providing advisory but not compulsory guidance." *https://www.merriam-webster.com/dictionary/directory*. TMC 13.01.010 further provides that "For words that are not defined in this chapter, or that do not incorporate a definition by reference, refer to a Webster's Dictionary published within the last ten years." Given that, The Examiner has adhered to Webster's latest online definitions for words from the TMC, for the most part.

obligation because of shall's alternative meaning of showing a future intention to do something.[44] Depending on context, "shall" does not necessarily always indicate a mandatory or obligatory action. It would appear that the City understands these distinctions, as will be shown further below.[45]

12. Hearing examiners generally do not have the authority to rule on constitutional issues, especially when the issue is a facial challenge to the constitutionality validity of an ordinance.[46] Viridian in not making a facial challenge to any TMC provision at issue here. The Hearing Examiner does have the authority to construe the TMC and apply his interpretation in appeals under the *de novo* standard of TMC 1.23.060.

13. Viridian argued, at least in passing, that the "criteria" at issue here, primarily from TMC 13.05.060, were too vague to be enforceable. When the courts are presented with a vagueness challenge to a land use regulation, they judge the ordinance as applied, and not for facial vagueness.[47] This approach is essentially what the Examiner must do here in making a determination as to the applicable CUP criteria's meaning and effect, and ultimately their enforceability.

14. Statutes become void for vagueness if they are "[f]ramed in terms so vague that persons of common intelligence must necessarily guess at [ ][their] meaning and differ as to [ ][their] application.[48] That said, ordinances do not need to "meet impossible standards of

[44] As in "I shall go to the movies this evening." No one is mandatorily requiring the speaker's attendance at the theater; it is simply the speaker's intention to go later.
[45] See https://www.lingoda.com/blog/en/shall-vs-should/**;** https://www.sealfaqs.com/ ?p=1254#:~:text= The%20Supreme%20Court%20of%20the,obligation%20that%20something%20is%20mandatory ("must" is the only word that imposes a legal obligation that something is mandatory).
[46] *See Exendine v. City of Sammamish*, 127 Wn. App. 574, 113 P.3d 494, (2005); *Miller v. City of Sammamish*, 9 Wn. App. 2d 861, 447 P.3d 593 (2019).
[47] Young v. Pierce Cty., 120 Wn. App. 175, 182, 84 P.3d 927, 930 (2004), citing Swoboda v. Town of La Conner, 97 Wn. App. 613, 618-19, 987 P.2d 103 (1999).
[48] *Young*, 120 Wn. App. at 182.

specificity."[49] "When a legislative enactment is challenged on vagueness grounds, the issue is whether the two requirements of procedural due process are met: adequate notice to citizens and adequate standards to prevent arbitrary enforcement."[50] Put slightly differently in affirmative wording, "A land use ordinance that provides fair warning and allows a person of common intelligence to understand the law's meaning does not violate a party's constitutional rights."[51] Viridian contends that the TMC 13.05.060.F.3. criteria do not provide the kind of clarity or fair warning for an applicant to know what needs to be done to comply. Viridian argued further, that the lack of any back-and-forth discussion—at least after the Panel weighed in—cut Viridian off from getting the City feedback necessary to properly interpret the allegedly unclear criteria and achieve compliance, or otherwise address the City's intended conditions prior to issuance of a decision. Ultimately, whether the City afforded enough opportunity for discussion and revision of conditions is not dispositive of the issues in this appeal. Whether it makes sense to do so for either or both of the parties, the Examiner is aware of no codified obligation on the City to engage in such back and forth, however beneficial it might have been.[52]

15. For its part, the City argued that the Challenged Conditions only have to be rationally related to, or rationally derived from the criteria. The City presented no legal authority in support of this argument.[53]

[49] *Young*, 120 Wn. App. at 182, *citing Anderson v. City of Issaquah*, 70 Wn. App. 64, 75, 851 P.2d 744 (1993); *and City of Spokane v. Douglass*, 115 Wn.2d 171, 179, 795 P.2d 693. (1990).
[50] *City of Seattle v. Huff*, 111 Wn.2d 923, 929, 767 P.2d 572 (1989).
[51] *Griffin v. Bd. of Health*, 137 Wn. App. 609, 620, 154 P.3d 296, 301 (2007), *upheld* in *Griffin v. Thurston Cty. Bd. of Health*, 165 Wn.2d 50, 196 P.3d 141 (2008).
[52] And neither party presented any authority stating otherwise.
[53] The City's proposed standard may be more applicable to a substantive due process challenge, but there does not seem to be that kind of challenge present in the appeal issues here.

16. The Examiner turns now to the Challenged Conditions themselves.[54] The Director prefaces the Challenged Conditions with the following statement of purpose or intention: "To create/protect on-site open space, to construct a pedestrian scale project, and to deemphasis [sic] parking, the applicant ***shall do*** the following:…" It is clear that the Director intended for the conditions to be mandatory from the use of "shall." Thereafter follows the most hotly contested Condition 1.a. that states in full:

> Parking spaces ***shall be*** 'tucked under' the buildings and/or surface parking ***shall be*** broken up so that no more than 22 parking spaces are located in any one area (the number of units in the largest building). This ***will require*** relocating parking areas adjacent and in between buildings or behind buildings and relocating some buildings more central to the site. This may also require utilizing smaller buildings. The one exception is the parking lot south of Building F, which is generally tucked in back of site, and may remain as designed. It is likely that not all the desired parking will be accommodated as surface parking. The applicant can choose to reduce parking or locate remaining parking within structures. [Emphasis added].

Here again, it is clear that the Director Decision meant for the tucking under or breaking up of parking to be mandatory by this condition's use of the helping verb "shall."[55]

[54] At one point in the less-than-linear production of this decision, the Examiner intended to go through the TMC 13.05.060.F.3 criteria one by one addressing whether they had been met by Viridian's proposal. That would have been a waste of page space ultimately because whether these criteria were met or not is not at issue in this appeal. The Director Decision determined that the criteria were met, "If conditioned appropriately…" *Director Decision, p. 13*. The appeal itself only challenges the Challenged Conditions. As a result, the analysis turns its focus specifically there instead. In other words, the final determination is whether the CUP can only be approved if the Challenged Conditions are upheld.

[55] Harala testified that structured parking is not required, but that is only so if the site plan can be redesigned to break up parking into no more than 22-space chunks. The wording makes it mandatory that one or the other be done. The Examiner has tried to visualize a site plan that maintains the just under 1.5 (stalls) to 1 (unit) ratio totaling 149 stalls in 22-stall chunks, but he has had little success in terms of visualizing that parking being any less prominent by virtue of being more fragmented. Having to maintain City fire and solid waste access aisles and turnarounds, makes that attempted visualization even more difficult. Perhaps fortunately, solving that site plan conundrum is not necessary to resolve the parking issue presented in this appeal.

17. It is clear from the hearing record that the City looks to TMC 13.05.060.F.3.c for the authority to impose this condition/requirement.[56] TMC 13.05.060.F.3.c provides the following (with contextual lead in language):

> All proposals submitted under the provisions of this section must demonstrate the following:
>
> > c. De-emphasize parking. Parking is not required for projects in the Infill Pilot Program, but if parking is provided, the project ***should*** de-emphasize parking in terms of its prominence on the site and its visibility from the public right-of-way. [Emphasis added].

18. When a legislative body uses certain language in one provision of a statute (or ordinance)[57] and omits that same language in another, the courts (or a hearing examiner) are to presume the legislative body intended a difference in the two provisions.[58] "Another fundamental rule of statutory construction is that the legislature is deemed to intend a different meaning when it uses different terms."[59] When applied here, the foregoing rules lead to the conclusion that, after using the word "must" in TMC 13.05.060.F.3's lead in language ("must demonstrate") and then again in TMC 13.05.060.F.3.b. ("must provide"), the TMC's use of the collocation "should de-emphasize" immediately thereafter in TMC 13.05.060.F.3.c. is presumed intentional and presumed to mean something different than if must or shall were used rather than "should." TMC 13.05.060.F.3.c's provision that parking ***should be*** de-emphasized is not mandatory, but rather hortatory (or directional if you prefer).[60]

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[56] On questioning from the Examiner, Harala testified that TMC 13.05.060.F.3.c. is the "key" criteria for the parking condition, C.1.

[57] "The same rules of statutory construction apply to the interpretation of municipal ordinances as to the interpretation of state statutes." *Tateuchi v. City of Bellevue*, 15 Wn. App. 2d 888, 897-98, 478 P.3d 142, 149 (2020), *quoting City of Seattle v. Green*, 51 Wn.2d 871, 874, 322 P.2d 842 (1958).

[58] *In re Parenting & Support of C.A.S.*, 25 Wn. App. at 28, *citing State v. Beaver*, 148 Wn.2d 338, 343, 60 P.3d 586 (2002).

[59] *State v. Roggenkamp*, 153 Wn.2d 614, 625-26, 106 P.3d 196, 201-02 (2005).

[60] TMC 13.01.010.

19. That said, under this hortatory guidance, Viridian did make revisions to the placement of Buildings F and G in an effort to de-emphasize parking.[61] The City acknowledged this revision and gave its blessing to the parking now located behind Buildings F and G, and further acknowledged that parking in the current configuration would not be visible from the public right-of-way.[62] Exacting further revisions as mandatory, as set forth in the Director Decision Condition 1.a., is not sanctioned under the wording of TMC 13.05.060.F.3.c. Using hortatory language, rather than mandatory language, is certainly done in legislative enactments such as the land use ordinances at issue here. Interpreting an ordinance as hortatory, when hortatory language is used rather than mandatory, does not make those provisions meaningless, superfluous or produce an absurd result, it simply leaves them as aspirational.[63] For better or worse, aspirational policy-like statements get mixed in with otherwise mandatory legislation.

20. Still, the City cannot impose mandatory conditions from hortatory code provisions as its authority. That is what happened here. The City could look alternatively to its general authority to condition CUPs in TMC 13.05.010.A.1 as a basis for Condition 1.a., but it did not do so in the Director Decision, and in any event that path would have to identify why such condition is "necessary to mitigate potential adverse impacts and ensure compatibility between the conditional use and other existing and allowed uses in the same zoning district and in the vicinity of the subject property." Again, the Director Decision does not make this connection. From the hearing record, it appears the concern over parking was more founded on

[61] FoF 21.
[62] FoF 11, 21, 24.
[63] Statutes or ordinances should not be interpreted (or construed) in a way that makes them meaningless, superfluous, or that leads to an absurd result. *Benson v. State*, 4 Wn. App. 2d 21, 419 P.3d 484 (2018). That is not the case here. The Examiner is not really even construing TMC 13.05.060.F.3.c. here; its language is clearly hortatory on its face, even by applying TMC 13.01.010.

the internal aesthetics of the Project. The Examiner does not see a connection with TMC 13.05.010.A.1 in any event given that (a) there is no identified adverse impact from the parking as proposed (except perhaps aesthetically within the Project as opposed to the outside neighborhood), (b) the other multi-family developments in the immediate vicinity use surface parking, (c) both the City and Viridian agree that parking is needed at the Site because of the distance to public transit, and finally (d) the undisputed increase in cost that structured parking and/or a site redesign would add to the Project create perhaps a greater adverse impact, the death of the Project and the loss of its additional affordable housing for the Tacoma market.

21. Again, the CUP only authorizes the conditional use—added density—even though that authorization is made against the substantial context of the Project as currently proposed. Actual development permits will follow. Prior to the issuance of actual development permits, Viridian and the City can certainly engage in discussion around this hortatory provision that encourages the de-emphasis of parking and make revisions, but the City cannot require such under TMC 13.05.060.F.3.c. at present.

22. Turning now to Condition 1.b., it requires the following of the Project:

> Apartments shall be oriented around common open space(s). This may require the use of smaller structures. Specifically, the play area must be relocated where many windows are oriented towards the play area, allowing more eyes on that space. This will require a more central location.

Condition 1.b. presents a mixture of mandatory requirements along with a hortatory suggestion. It begins by requiring that "Apartments *shall be oriented* around common open space(s)," but does not cite to its authority for this mandatory imposition, either through a

Finding or with a TMC citation. This is followed by a "may" statement intimating that Viridian may only be able to fulfill the preceding mandatory provision by reducing building size.[64] The last two sentences veer back into mandatory territory with "must be relocated" and "will require" verbiage adding the helping verb "will" to our already interesting cast. Nowhere in these last bits is the authority for imposing them stated. There are no citations to the TMC, nor are there referential ties to any Findings from the Director Decision that are the basis for these parts of Condition 1.b. Compounding this absence for the Examiner are that (a) the open spaces in the Project already all appear to be available for common use, (b) the two largest open spaces are both already centrally located, with others dispersed throughout the Site, and (c) the tot lot has already been relocated from one more or less central location to another central location.[65]

23. Viridian objected to this condition because the City indicated that what had been revised from the first site plan to the current was not enough. The City needed more centralness and more eyes. There was no indication in the record of what would be enough. Compliance efforts that are received with "Well, that's good, but you need to do more," without stating what the "more" is can make compliance illusory. The condition that "Apartments shall be oriented around common open space(s)" is generic enough for the Examiner to conclude that the current site plan complies with the condition as it currently stands. There is nothing more to be done on this front. If the City's intention was for all open space to be assembled together into one large area in the center of the development with buildings only around the periphery of the open space (and presumably parking all behind that or under the buildings) or something

[64] There goes that 103-unit density again possibly.
[65] FoF 21.

similar, it should have said so with specificity and provided the justification therefor. Likewise, in the current site plan, there are windows oriented toward the tot lot, and it is in a central location. How much more central can the tot lot be in this odd-shaped assemblage that is neither circular, nor square or another geometric shape that would have a true center? What did the City have in mind when it required "many windows" and needed more than what currently presents? Hard to say. It already appears that the tot lot will be visible from many of the windows in the Project. How many windows is enough? The current number seems sufficient for the Examiner to conclude that compliance with this condition, as worded, from the standpoint of addressing a safety concern through "many eyes" on, is achieved through the current site plan. Here, as above, it is difficult to make out from the Director Decision how requiring a different open space orientation and another relocation of the tot are "necessary to mitigate potential adverse impacts and ensure compatibility between the conditional use and other existing and allowed uses in the same zoning district and in the vicinity of the subject property,"[66] because specific adverse impacts and specific compatibility issues are not identified and tied to this condition. Any further gains in these two areas through further tweaking of the site plan would appear to be of very small degree. Since the condition appears intended to somehow exact more centralness and more windows, more precise language was necessary for the condition to withstand challenge.

23. Next up is Condition 1.c. of the Director Decision which reads as follows:

> Retaining walls ***shall be*** limited to six feet in height (similar to a standard fence) and buildings ***shall be*** located a minimum of 15 feet from retaining wall (minimum depth of private yard space). As an alternative, the building can be built "on" the hillside with less grading. [Emphasis added].

[66] TMC 13.05.010.A.1.

Once again, there is an absence of any citation to the TMC for authority for the mandatory conditions here, nor are there any stated ties to factual findings that justify the impositions of Condition 1.c. on the Project. Viridian's legal counsel specifically asked Harala on cross-examination about the City's authority for imposing this condition. Harala responded that the Panel wanted it and the CUP is discretionary so conditions can be imposed. The Panel's role is advisory. It has no authority to impose mandatory conditions. If the Director intended to adopt the Panel's advice, at a minimum, the Director must find authority for such adoption in the TMC, such as an express land use regulation, or at least identify the potential adverse impacts that the condition will mitigate and/or the neighborhood compatibility concern(s) the condition addresses.[67] Harala indicated that the City picked and chose from various retaining wall and setback provisions of the TMC, both residential and commercial, to arrive at Condition 1.c. The Director Decision has no citations to the TMC provisions from which this picking and choosing was made.

24. Here again, strict compliance with Condition 1.c. seems likely to require significant site plan revision that will likely result in the loss of units from the approved 103. If that is not the case, geotechnical issues related to the slopes on the Subject Property and the need for retaining walls can be addressed further in the development permitting process. During that process, if it is possible to address any geotechnical concerns at the Site, while having retaining walls that are six feet high or less, but without requiring material revisions to the site plan and material increases in Project cost, that

[67] *Id*. The best that came from questioning at the hearing was that the City did not want residents of the Project to see nothing but a retaining wall outside their window. While this sort of aesthetic concern is admirable, it is hardly worth killing the Project over. As Viridian argued throughout the proceeding, the Subject Property's unusual topography requires certain approaches that would not be desirable or necessary on a more traditional, flat development site.

should be done.[68] In addition, the Director Decision appears to fail to acknowledge that some buildings in the current site plan are already being built "on the hillside" or into slopes in order to minimize the need for retaining walls, specifically Buildings A, C, D, F and G.[69] Building all the way up the west slope, of course, is out of the question because of the White Oaks.[70] Condition 1.c. is modified in accordance with the Decision section below.

25. The Project site plan, at present, proposes to keep the two existing White Oaks, plant an additional 16 Oregon White Oaks, and add another 246 trees of other species on the Site, for a total of 39% Site coverage with trees and open space. That notwithstanding, Condition 1.d. of the Director Decision requires as follows:

> The applicant ***shall maintain*** and protect 30% of existing mature conifer trees (i.e.; if there are 100 trees on-site, the applicant ***shall maintain*** and protect 30 mature trees.). [sic] Oregon White Oak may be counted towards the 30%. [Emphasis added].[71]

The record indicates that the City's authority for this requirement is the current Comp Plan designation on the 2.4-acre portion of the Site as Open Space, together with the language of TMC 13.05.060.F.3.a(5). As already alluded to above at footnote 10, a comprehensive plan is a guide or land use policy statement; it is not a document designed for making specific land use decisions,[72] even though it is the foundational blueprint for the development regulations that do govern specific permit decisions. Put slightly differently, whether a particular permit

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[68] Yes, this is now hortatory. It is not mandatory unless it can be done without the just set forth site plan revisions and without material additions in cost. For purposes hereof, materiality should be judged on whether changes would require a reduction in the 103 approved units.
[69] FoF 19.
[70] FoF 9.
[71] In light of all the foregoing grammatical/lexical discussion and authorities, the "shalls" here make compliance with this condition mandatory in the Director Decision.
[72] *Citizens for Mount Vernon v. City of Mount Vernon*, 133 Wn.2d 861, 947 P.2d 1208 (1997); *Woods v. Kittitas Cty.*, 162 Wn.2d 597, 613, 174 P.3d 25, 33 (2007).

complies with the Comp Plan or advances its goals is not as material to the decision on that permit as the actual codified land use regulations. This is true even to the point that when there is a conflict between the Comp Plan and the specifically applicable development regulations, the development regulations control.[73] The Comp Plan Open Space designation does not prevent development.[74] As the City acknowledged, this designation is more a recognition of the fact that the Subject Property and some of its surrounding parcels are undeveloped and highly vegetated. The more specific R-2 zoning classification allows for development. The Director Decision even more specifically allows for development of 103 units, but once again, complying with this condition may very well negate the ostensible approval of 103 units of density.

26. TMC 13.05.060.F.3.a(5) states:

> All proposals submitted under the provisions of this section must demonstrate the following:
>
> > a. Responsiveness to the following basic neighborhood patterns established by existing development in the area.
> >
> > (5) Landscaping and trees.

Throughout the hearing record, the City seems to presume that the above language means that the Project must demonstrate responsiveness to the large, treed areas in and around the Subject Property. This is not strictly true from the language itself because the language requires responsiveness to the basic neighborhood pattern of landscaping and trees established by existing ***development*** in the area. The treed areas used for reference in requiring Condition 1.d are largely ***undeveloped***. Again the existing development in the area is a hodgepodge.

[73] *Woods*, 162 Wn.2d at 613.
[74] FoF 8 and 9.

Finding a discernible strict pattern in landscaping in the surrounding area is particularly difficult. Whatever the case, there are a lot of trees in and around the Site, both in developed areas, and those left alone to this point.

27. The foregoing notwithstanding, and although Condition 1.d is listed in all of Viridian's relevant pleadings as one of the Challenged Conditions, Condition 1.d. got almost no air time during the hearing. Upon review of the record, the Examiner does not find that a preponderance of the evidence showed this condition to be erroneous on the bases advanced by Viridian, i.e., that there is no substantial evidence to support it, and that complying with the condition will make the project infeasible. Therefore, Condition 1.d. remains part of the conditions of approval of the CUP as modified in the Decision section below in order for this condition to not make the CUP approval illusory.

28. Harala emphasized in his testimony that the Director did approve 103 units on the Subject Property in the Director Decision.[75] This is hard to square with language such as that found in both Condition 1.a. and 1.b. that states complying with these conditions may require smaller buildings. Complying with the Challenged Conditions, as presented in the CUP, does, by a preponderance, create an illusory approval for Viridian and its Project. For Condition 1.a.'s parking requirement alone, adding ten to twenty percent worth of cost to each units for structured parking or even the perhaps lesser cost of drastically revising the site plan somehow into 22-stall parking packets around the Site cuts deeply into the viability margins of an affordable housing project such as this.

[75] The Examiner acknowledges the difficulty of being the City staff shepherd for a first-instance application of the pilot program to this scale of infill project. That difficulty only increases when you are the one called on to defend a decision that was ultimately not yours, but rather the Director's.

29. At some point in the review process, it would seem that the City could have come to the realization that 103 units will not work for what the City and its Panel would like to see built and conditioned at this Site. The City could then have met with Viridian and informed that only 86 (or however many) units were going to work given the City's intended conditions. Instead, the City approved 103 units with its right hand, while simultaneously taking some units (perhaps all of them in a dead project when costs and timing are factored in) away with its left hand.

DECISION

Based on the foregoing Findings of Fact and Conclusions of Law, the Examiner decides as follows in regard to the Challenged Conditions:

1. The Director Decision's Condition 1.a. fails to withstand Viridian's challenge. The language of the provision the City used as the basis for imposing Condition 1.a. is not mandatory, but rather is hortatory or as the TMC put it, directional. To that end, Viridian cannot be required under TMC 13.05.060.F.3.c. to tuck parking under buildings or break it up in smaller packets, in spite of being encouraged to do so by the Panel and the Director Decision. Despite the City's lack of mandatory authority in TMC 13.05.060.F.3.c., Viridian made pre-Panel revisions to the site plan (*FoF 21*) reducing the overall number of stalls, and locating parking on the Site so that it is not visible from any nearby public right-of-way. These were de-emphasizing measures. Demanding further efforts, at additional significant expense, is not supported by the language "***should*** de-emphasize parking" TMC 13.05.060.F.3.c. The parties are certainly free to continue discussions regarding better parking options as the Project

proceeds forward, but the City cannot require it under the non-mandatory language of TMC 13.05.060.F.3.c.

Because the Director Decision did not identify any potential adverse impact or neighborhood incompatibility and explain how the parking tuck or 22-stall reorganization would mitigate that adverse impact or resolve the incompatibility, TMC 13.05.010.A.1 also provides no basis for these parking conditions, internal Project aesthetic notwithstanding.

2. Condition 1.b. suffers from a lack of specificity that leads to the enervation of what the City may have intended by imposing Condition 1.b. The problem is not knowing what it is the City actually intended aside from wanting more. Here again, Viridian made one round of efforts to get to the place the City intended by rearranging common open space on the Site and relocating the tot lot. The City apparently needed more, but neither Viridian, nor the City's witnesses could establish what that "more" is. The common open space should stay part of the Project in area the same as what is shown on Exhibit A-5a. The tot lot should stay in Exhibit A-5a's central, visible location. If Viridian provides more common open space, or manages to get more windows oriented toward the tot lot, great. But, it is not required to do so by this Decision because the non-specific language of Condition 1.b. is already met.

3. Condition 1.c. fails from a lack of clear authority to require it either through a specific land use regulation or through generally applicable CUP provisions such as TMC 13.05.010.A.1. No adverse impact or neighborhood incompatibility was identified as arising from the retaining walls (only internal aesthetic concerns for Project residents) that needed to be mitigated through the Director's authority in TMC 13.05.010.A.1. Therefore, as stated

above on Conclusion of Law 24, if it is possible to address any geotechnical concerns at the Site, while having retaining walls that are six feet high or less, but without requiring material revisions to the site plan and material increases in Project cost, retaining wall height should be minimized.[76]

4. Despite wording issues present in TMC 13.05.060.F.3.a(5), Viridian did not carry its burden of proof on its challenge to Condition 1.d. To the extent that Viridian addressed this issue, it appeared to only do so in the greater context of all the Challenged Conditions making the Project infeasible. While the Examiner has concluded that Viridian carried its burden to show that the Challenged Conditions collectively make the Project financially infeasible, a preponderance of evidence as to Condition 1.d.'s part in that collectivity was lacking. Given that, Condition 1.d. remains in effect against the backdrop of Viridian's agreement to keep the two existing White Oaks, plant an additional 16 Oregon White Oaks, and add another 246 trees of other species on the Site, for a total of 39% Site coverage with trees and open space, and also against the overarching consideration that maintaining 30% of the existing, mature conifers should not make the Project infeasible (e.g., through costly site plan revisions) or require a reduction from 103 units as approved in the CUP. To the extent that Condition 1.d. can be met without requiring a reduction to the 103 units approved in the CUP, Condition 1.d must be met.

SO DATED this 24 day of July 2024.

JEFF H. CAPELL, Hearing Examiner

[76] Yes, this is now hortatory. It is not mandatory unless it can be done without the just set forth site plan revisions and without material additions in cost. For purposes hereof, materiality should be judged on whether changes would require a reduction in the 103 approved units.

N O T I C E

RECONSIDERATION/APPEAL OF EXAMINER'S DECISION

RECONSIDERATION TO THE OFFICE OF THE HEARING EXAMINER:

Any aggrieved person or entity having standing under the ordinance governing the matter, or as otherwise provided by law, may file a motion with the Office of the Hearing Examiner requesting reconsideration of a decision or recommendation entered by the Examiner. A motion for reconsideration must be in writing and must set forth the alleged errors of procedure, fact, or law and must be filed in the Office of the Hearing Examiner within l4 calendar days of the issuance of the Examiner's decision/recommendation, not counting the day of issuance of the decision/recommendation. If the last day for filing the motion for reconsideration falls on a weekend day or a holiday, the last day for filing shall be the next working day. The requirements set forth herein regarding the time limits for filing of motions for reconsideration and contents of such motions are jurisdictional. Accordingly, motions for reconsideration that are not timely filed with the Office of the Hearing Examiner or do not set forth the alleged errors shall be dismissed by the Examiner. It shall be within the sole discretion of the Examiner to determine whether an opportunity shall be given to other parties for response to a motion for reconsideration. The Examiner, after a review of the matter, shall take such further action as he/she deems appropriate, which may include the issuance of a revised decision/recommendation. (*Tacoma Municipal Code* 1.23.140)

N O T I C E

APPEAL TO SUPERIOR COURT OF EXAMINER'S DECISION:

Pursuant to the Official Code of the City of Tacoma, Section 1.23.160, the Hearing Examiner's decision may be appealable to the Superior Court for the State of Washington. Any court action to set aside, enjoin, review, or otherwise challenge the decision of the Hearing Examiner will likely need to be commenced within 21 days of the entering of the decision by the Examiner, unless otherwise provided by statute.