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TO: Janette M. Bower  
City Clerk  
City of Palmer

FROM: Ronald L. Baird *RLB*

SUBJECT: Appeal of Mountain Rose Estates Condominium Association, Inc.  
Planning and Zoning Commission Resolution 15-008(AM)  
Our File:

DATE: February 18, 2016

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Please find enclosed:

**Original Decision of the Hearing Officer dated February 17, 2016**

BEFORE THE HEARING OFFICER

CITY OF PALMER

In the Matter of the Appeal of Mountain  
Rose Estates Condominium Association Inc.  
from the Planning and Zoning Commission's  
Decision dated September 18, 2015  
Approving a Planned Unit Development,  
Resolution No. 15-008AM/Application for  
PUD

**DECISION OF THE HEARING OFFICER**

This is the decision of the Hearing Officer in the matter of the appeal of Mountain Rose Estates Condominium Association Inc., appellant (“Association”), from the decision of the Palmer Planning and Zoning Commission (“Commission”) approving a Planned Unit Development (“PUD”), Resolution No. 15-008AM. The appellee is the successful applicant below, Valley Residential Services and Lumen Design, LLC (herein collectively “VRS”) as agents for the current property owners. The application<sup>1</sup> was for approval of a development of 22 residential structures containing 88 dwelling units and a community building on a 9.3 acre site described as Parcel B1 of Waiver Resolution Serial No. 2002-142-PWm.<sup>2</sup> The Association is the association of owners within the Mountain Rose Condominium project, an approved PUD which abuts the site of the proposed development along its entire southerly border (“Mountain Rose”).

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<sup>1</sup> R. Tab 43E.

<sup>2</sup> R. Tab 29D.

The Hearing Officer has considered 1) the appeal record prepared by the City Clerk as required by Palmer Municipal Code (“PMC”) 17.98.030 of the materials exchanged with staff and presented to the Commission (“record or “R”), 2) the transcript of the public hearing of the Commission (“Tr.”) and 3) the written briefs submitted pursuant to PMC 17.98.040. The hearing required by PMC 17.98.060 was held.<sup>3</sup>

### **1. EXHIBITS OF THE ASSOCIATION**

The first issue presented is a procedural one raised by the objection of VRS to the materials attached to the opening brief of the Association. None of the materials are contained within the record. The first three items are essentially statements of individuals prepared specifically for the appeal and the last two are documents. PMC 17.98.070 directs the hearing officer to hear an appeal “solely” on the record and the “testimony” received at the appeal hearing. Though PMC 17.98.040(D) contemplates the attachment of “exhibits” to the briefs, in context this means materials from the record, not new items. The Hearing Officer therefore has not considered the exhibits to the Association’s opening brief.

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<sup>3</sup> Contrary to the Hearing Officer’s representation at the hearing, not all of the appeal hearing was captured by the recording system and available to him during deliberation. A gap exists beginning part-way through the opening presentation of the Association’s counsel and continuing through the Hearing Officer’s initial questions of VRS’ counsel. The Hearing Officer has relied on his notes and memory for this content.

## 2. SCOPE OF REVIEW

AS 29.40.050 requires that municipalities that exercise land use regulation authority provide an appeal process from initial land use decisions. The appeal process here is to an attorney serving as a hearing officer.<sup>4</sup> PMC 17.98.070 defines the standards of review to be applied by the hearing officer. The hearing officer may substitute his or her judgment on legal issues including interpretation or construction of ordinances.<sup>5</sup> Commission findings of fact are considered true if supported by substantial evidence.<sup>6</sup> Substantial evidence means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.<sup>7</sup> Under PMC 17.98.070(C) and (D), the hearing officer shall defer to the judgment of the Commission regarding disputed issues or findings of fact unless a substitution of his or her independent judgment is made. These two subsections are in conflict with each other, offer no express guidance as to when the hearing officer is to either defer or substitute judgment, and are therefore ambiguous.

The Association urges reliance on court decisions relating to judicial review of administrative decisions. This appeal, however, is part of the administrative process, not the judicial one.<sup>8</sup> Cases discussing judicial review are relevant only by analogy at best.

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<sup>4</sup> PMC 17.98.010.

<sup>5</sup> PMC 17.98.070(B).

<sup>6</sup> PMC 17.98.070(C).

<sup>7</sup> *Id.*

<sup>8</sup> *Balough v. Fairbanks North Star Borough*, 995 P.2d 245, 256 (Alaska 2000); *State v. Lundgren Pacific Construction Co.*, 603 P.2d 889,992 (Alaska 1979); *Keiner v. City of Anchorage*, 378 P.2d 406, 410 (Alaska 1963).

Related to the ambiguity in PMC 17.98.070 is the Association's argument that the Hearing Officer may hear the matter de novo, that is, he may consider the application completely anew. Unlike the Alaska superior court review of administrative action, however, there is no ordinance equivalent of Alaska Rule of Appellate Procedure 609(b), which expressly authorizes an entirely new process for consideration of the matter. Such a proceeding for the kind of administrative matters for which appeal is allowed under the City's code would result in duplication of work for staff and delay the administrative process. Anyone dissatisfied with a Commission decision would be encouraged to simply seek a second view from the hearing officer. Nothing is achieved by this delay and burden. The notion is also inconsistent with the overall concept of an appeal set out in Chapter 17.98 read as a whole. The Hearing Officer therefore does not address the Commission decision entirely anew and considers only the alleged deficiencies in that decision as raised by the Association's brief. Aspects of the Commission's decision not disputed by the Association are considered resolved.

However, there may be cases where a new finding by the hearing officer can enable a final decision on appeal which either grants or denies a land use entitlement. In such cases, if they exist, substitution of judgment by the hearing officer would actually expedite the administrative process rather than delay it. Under PMC 17.98.070, such substitution would have to be based on substantial evidence in the record.

As more fully explained below, this appeal can be resolved without having the Hearing Officer exercise any discretion he may have to make new findings of fact to

support either denial or approval of the application. Resolution of the ambiguity in PMC 17.98.070 is therefore not necessary to decide this appeal.

### **3. STANDARDS FOR APPROVAL OF A PUD GENERALLY**

PMC 17.84.050 requires that a PUD meet all of the standards for approval of a conditional use permit specified by PMC 17.72.050 and seven additional specific standards. The Commission made written findings on each of these conditions which are in the record.<sup>9</sup> Before turning to these individually, several comments applicable to them all are necessary.

The City's process for approval of a PUD like that for many other land use entitlements both of the City and other planning agencies has two stages. The first stage requires presentation to the Commission of an application for preliminary approval. Notice of this application is provided to property owners within a certain distance from the property involved and the Commission must hold a public hearing.<sup>10</sup> The Commission may approve the application with conditions.<sup>11</sup> The Commission's decision may be appealed to a hearing officer including an appeal by a neighboring property owner.<sup>12</sup> Assuming the project obtains preliminary approval, it is then given a period of time to submit final plans for final approval.<sup>13</sup> Final approval is by the commission but notice of the final application is not required to be given to nearby property owners and a public

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<sup>9</sup> R. Tab 2(b).

<sup>10</sup> PMC 17.84.070.

<sup>11</sup> PMC 17.84.090(C).

<sup>12</sup> PMC 17.84.090(D).

<sup>13</sup> PMC 17.84.100.

hearing is not required.<sup>14</sup> Final approval is granted only if all conditions of approval provided in the preliminary approval have been met.<sup>15</sup>

Determining whether a particular issue related to an entitlement application under this type of scheme is appropriately addressed with finality at the preliminary stage or later by a condition of approval addressed in a final application is not easy. Two standards here which are not at issue, 17.84.050(E) and (G), quite clearly concern post preliminary stage matters to be addressed with the final application. The remaining specific standards of 17.84.050 and all of the conditional use standards cannot be generally characterized. But caution must be used in allowing these factors to be addressed by a condition to approval since to do so removes them from the further attention of parties other than the applicant and potentially circumvents the appeal right of those parties. This difficulty means that, as the VRS put it below, “it was not easy to determine exactly what level of detail is required.”<sup>16</sup> The specific resolution of this difficulty as to the several conditions which are in dispute is addressed below.

In this case, the Hearing Officer’s review of compliance with the standards is hampered by the failure of both VRS in the application and the Association in its briefing to address them on a standard by standard basis. Similarly, staff’s suggestion that, in determining compliance, the Hearing Officer should look beyond specific findings of the

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<sup>14</sup> PMC 17.84.100(D).

<sup>15</sup> PMC 17.84.100(B).

<sup>16</sup> R. Tab 33c.

Commission to its decision as a whole, while true, is both burdensome and creates the potential of rewriting the Commission's decision rather than deferring to it.

The Association complains<sup>17</sup> generally that the Commission simply adopted the staff's proposed findings on the standards which were drafted prior to the public hearing.<sup>18</sup> This does raise a reasonable inference that the Commission simply ignored the information received at the public hearing. And the Association is also persuasive that an agency decision which ignores an important factor in its decision acts arbitrarily.<sup>19</sup> However, a corollary to the requirement that the Commission base its findings only substantial evidence is that it is not required to consider factors for which there is not substantial evidence in the record. Reversal or remand is not required when the Commission does not consider factors not supported by substantial evidence.

Finally, VRS points to individual commissioner comments to support the contention that the Commission gave appropriate consideration to one or more items.<sup>20</sup> But this is problematic when these comments are not incorporated into a written finding adopted by the whole Commission. Absent this step, the comments cannot with assurance be considered the finding of the Commission.

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<sup>17</sup> Opening Brief at 4.

<sup>18</sup> Some planning agencies receive draft staff findings prior to the hearing, make oral revisions after the close of the hearing and vote on the application. Staff is then given the opportunity to prepare revised written findings which are then presented and voted upon at a subsequent meeting. The practice, in the Hearing Officer's experience, is not universal.

<sup>19</sup> *Southeast Alaska Conservation Council, Inc. v. State*, 665 P.2d 544549 (Alaska 1983); *State v. 0.644 Acres, More or Less*, 613 P.2d 829, 833 (Alaska 1980).

<sup>20</sup> Appellee Brief at 7, 13, 17.

#### 4. CONDITIONAL USE STANDARDS<sup>21</sup>

##### A. Preservation Of The Value, Spirit, Character And Integrity Of The Surrounding Area.

The Association argues that “the proposed PUD is incompatible with the existing neighborhood uses.”<sup>22</sup> The Association’s brief does not reference a specific standard to which this argument relates but it seems to be most relevant to standard A of the conditional use standards which requires that the use preserve the value, spirit, character and integrity of the surrounding area. The Association cites the “fear that the residents of Mountain Rose Estates have that the PUD will be a home to the unemployed, drug and criminal element of the Valley and elsewhere in its brief argues that the PUD will become a “project or ghetto like development.”<sup>23</sup> The Association asserts that “[r]eason and history indicate that . . . [these] . . . concerns are well taken.”<sup>24</sup> The Association asserts that the PUD will “depress land values in the Mountain Rose Estates.”<sup>25</sup>

The record provides no support for these sweeping generalizations. It is true that numerous oral and written comments of residents of Mountain Rose state these fears.<sup>26</sup> But none of them claimed to have personal knowledge of any similar development either in the Valley or elsewhere. The only public comment from someone claiming knowledge of a similar development asserted that that development fitted in well with the surrounding

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<sup>21</sup> PMC 17.72.050 (A), (B), (C), (D), and (E).

<sup>22</sup> Appellant’s Opening Brief at 9.

<sup>23</sup> *Id.* at 5, 8.

<sup>24</sup> *Id.* at 10.

<sup>25</sup> *Id.*

<sup>26</sup> R. Tab 10 and Tr. 31

area.<sup>27</sup> The Association's argument and the testimony of its members is little more than an appeal to class stereotyping and prejudice. The Commission was not required to consider these concerns.<sup>28</sup>

The other concern of the Mountain Rose residents related to this standard was that there would be children in the proposed PUD whereas theirs is a 55 year and older community.<sup>29</sup> Children are usually regarded as one of a community's most precious resources. They are present in most residential developments except those restricted by private covenant as presumably is the case with the Association's development or assisted living or nursing care facilities. The PUD does not propose to concentrate children in an occupancy like that for a school. VRS provided an occupancy load calculation in its application and there is nothing to support any conclusion that the density of children in the PUD will be any greater than other residential zones. Greater dwelling density is not by itself disqualifying. If that were the case, no PUD could ever meet the standard.

The Commission's finding (Fact 1) notes the mix of land uses in the surrounding areas including apartment buildings. The existence of these uses is undisputed and is substantial evidence of the character of the neighborhood. The Commission's finding that this standard was met is affirmed.

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<sup>27</sup> Testimony of David Rose, Tr. 26.

<sup>28</sup> VRS's responded to these fears by contending that the project would be well-managed and screen applicants based on middle, not low income. These contentions need not be addressed because the fears to which they respond were not supported by substantial evidence.

<sup>29</sup> *See, e.g.* testimony of Keith Morberg, Tr. 19.

**B. Fulfillment Of All Other Requirements Of Title 17.**

The Association has made no argument concerning this standard and the Commission's finding that this standard was met (Fact 2) is affirmed.

**C. The Use Will Not Be Harmful To The Public Health, Safety, Convenience And Comfort.**

Much of the Association's argument addressed in section 4A above might also apply to this standard. It is rejected as a basis for reversing the Commission's decision on this standard for the same reasons expressed above.

The Association argues in addition that as a result of the PUD, the residents of Mountain Rose "will become the hunting grounds for the criminal and drug element that often resides in such complexes."<sup>30</sup> Again, there is no evidence in the record to support this allegation. It is true that one resident referenced "a recent study out of Indiana that the authors concluded that there seems to be something about high density residential units that is associated with all types of serious violent crime."<sup>31</sup> But neither the specifics of the study nor the study itself is in the record. And again, no crime information specific to the Valley or even Alaska is in the record. There is not substantial evidence requiring the Commission to consider this claim.

The Association also argues that there might be other sites which better suit the proposed development for this parcel. This standard does not require that the applicant show the proposed site is the best one for the proposed use in the entire community, only

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<sup>30</sup> Opening Brief at 8.

<sup>31</sup> Tr. 31.

that it is a suitable one. The concept of selecting the best site for a use is only imposed by standard E for public uses. Similarly, the Association questions whether there is a need for the project. This standard also does not embody that concept.

The Association also raises concerns about the drainage and traffic impact of the PUD on Mountain Rose. While these concerns arguably implicate this standard, they are best addressed under the more specific standards relating to PUDs discussed below.

The Commission's finding (Fact 3) focuses on the interconnection of the proposed development with existing trails and utilities. No harms allegedly flowing from the PUD other than the ones discussed above are raised in the record. The Commission's finding that this standard was met is affirmed.

#### **D. Sufficient Setbacks, Lot Area, Buffers, Or Other Safeguards Are Provided To Meet The Conditions.**

Standard D requires that sufficient setbacks and other safeguards be provided to meet the conditions. The conditions, in turn, are to maintain the property in character in keeping with the surrounding area and to ensure the compatibility of the conditional use with other uses in the district.<sup>32</sup> The Association makes two objections which implicate this standard not so much by implying that an important factor was overlooked, but rather by disagreeing with the Commission consideration that was provided.

The application proposes a six foot high wood fence at the property line.<sup>33</sup> This type of improvement is typical of what individual property owners might install along their

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<sup>32</sup> PMC 17.72.060.

<sup>33</sup> R. Tab 30a.

rear lot line if the subject property was developed into single family homes with a tier of lots abutting Mountain Rose. In its brief, the Association objects to the proposed fence not as a sufficient privacy barrier but because it is likely to cause “massive” snow drifting on the Mountain Rose parcel.<sup>34</sup> The Mountain Rose property owners who testified, however, sought a higher masonry fence and feared the six foot wood fence would blow down.<sup>35</sup> Given the common use of the wood fence proposed, there was substantial evidence for the Commission’s finding (Fact 4) that the fence would be a sufficient sound and visual barrier and would not itself create further harm.<sup>36</sup>

The second objection of the Association is that because structures in Mountain Rose do not have typical setbacks, the subject property must provide greater ones on its side of the common property line.<sup>37</sup> Presumably the setbacks on Mountain Rose were addressed as adequate when that PUD was approved. Even if they were not, Mountain Rose residents cannot expect greater privacy from the adjacent property owner than their development provides to the other property. And further, the finding actually imposes setback requirements as recommended by staff. The Commission’s decision that the setbacks provided were adequate is supported by substantial evidence.

The Commission’s finding (Fact 4) that Standard D was met is affirmed.

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<sup>34</sup> Opening Brief at 5.

<sup>35</sup> *See, e.g.*, Tr. 20

<sup>36</sup> As to drifting on the proposed street and as it might affect drainage, these concerns should be addressed under PUD standards C and D as discussed below.

<sup>37</sup> Opening Brief at 5, Tr. 20.

**E. If The Permit Is For A Public Use, The Proposed Use Is Located In A Manner Which Will Maximize Public Benefits.**

Standard E relates to public uses. The Commission's finding (Fact 5) that the proposed use is not a public one is affirmed. This standard therefore does not apply.

**5. PUD STANDARDS<sup>38</sup>**

**A. The Development Must Provide Space For Private Use And Reasonable Visual And Acoustical Privacy For Dwelling Units On And Off The Site.**

Standard A requires space for private use and reasonable visual and acoustical privacy for dwelling units on and off the site. The Association raises no issue as to the applicability of this standard within the proposed PUD. As to compliance with this standard as it relates to the Mountain Rose property, this was addressed in section 4(D) of this decision, above. The Commission's finding (Fact 6) is supported by substantial evidence and is affirmed.

**B. The PUD Must Provide Adequate Provisions For Natural Light And Air.**

Standard B requires adequate provisions in the PUD for natural light and air. The Association makes no argument that this standard was not met. The Commission's finding (Fact 7) that this standard was met is affirmed.

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<sup>38</sup> PMC 17.84.050 (A), (B), (C), (D), (E), (F) and (G).

**C. The PUD Must Be Integrated With Surrounding Land Uses And Minimize Any Negative Impacts On Them.**

**1. Integration**

Standard C requires that the PUD must be integrated with surrounding land uses and minimize any negative impacts on them. The meaning of the first part of this standard concerning “integration” with the surrounding land uses is a bit obscure.<sup>39</sup> At the appeal hearing, however, Community Development Director Sandra Garley persuasively explained that the point of this standard is to prevent insertion of a different use into an otherwise homogenous area: an industrial use within a residential area or vice versa. As noted above, the area surrounding the proposed PUD is not homogeneous but rather is developed with a mixture of uses. The Association’s arguments addressed in 4(A) of this decision, above, arguably implicate this standard. But the same analysis provided there demonstrates that the Commission could find this part of Standard C was met. The Commission’s finding (Fact 8) lists the mixture of uses in the surrounding area. As with standard A of the conditional use standards, the fact of these uses is undisputed and provides substantial evidence to support the finding that the proposed PUD will be integrated with surrounding uses. This part of the finding is therefore affirmed.

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<sup>39</sup> Both the Association and VRS seem to agree that this standard or perhaps conditional use standard A require that the PUD be “compatible” with surrounding uses. That word, however, appears in neither standard. The dictionary definition of “integrate” does not include compatible. “Integrate” at Dictionary.com. That definition simply defines the word as “to bring together or incorporate (parts) into a whole.”

## 2. Drainage

The Association argues that the proposed PUD will have inadequate drainage which will adversely impact the Mountain Rose property.<sup>40</sup> In its application, VRS acknowledged that this was an issue when it stated that “[h]istorically, there has (sic) been some drainage issues with the property to the south.”<sup>41</sup> The application promises to study drainage issues using a particular methodology and to provide a report with the final PUD submittal.<sup>42</sup> The application contains a drawing which shows some of the surface drainage being captured on site with “rain gardens” but some being directed to the proposed extension of Commercial Drive immediately to the north of the Mountain Rose parcel.<sup>43</sup> In reviewing this plan, the City’s Public Works Director, Tom Healy, found that it was “not clear where drainage will occur . . . within the south end of the proposed development.”<sup>44</sup> He noted that no drainage structures were shown in this area.<sup>45</sup>

Numerous written comments were received prior to the hearing complaining that the PUD would produce drainage problems within Mountain Rose. Several of these claimed to be based on personal observation of existing conditions.<sup>46</sup> One person testified at the public hearing to the same effect.<sup>47</sup>

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<sup>40</sup> Opening Brief at 8.

<sup>41</sup> R. Tab 43e.

<sup>42</sup> *Id.*

<sup>43</sup> R. Tab 43e, ARE sheets 5 and 6.

<sup>44</sup> R. Tab 41(e)

<sup>45</sup> *Id.*

<sup>46</sup> *See, e.g.*, R. Tab 10(b), 10(c), 10(m), 10(o), 10(p).

<sup>47</sup> Tr. 23.

Chuck Leet, an engineer for VRS, attempted to respond on this issue at the public hearing:

. . . I am very in tune with drainage in this area. . . . There are two dry wells along the north side of Mountain Rose that have been put in the right-of-way what we are now calling a PUE. Those will be replaced with a better source – a better way of getting rid of the drainage. . . . This project, we have looked at it and we are very aware of the drainage. . . . So we plan on taking care of the drainage onsite, 100-year flood onsite.<sup>48</sup>

Other than the unexplained plan for replacing drywells, this testimony offers only the vaguest of assurances that the drainage issue can be satisfactorily resolved.

In summary, there was substantial evidence that the development of the subject parcel would create drainage problems impacting the Mountain Rose property to the south. The Commission’s finding on this standard (Fact 9), however, is completely silent on the subject. The Commission did have an extended and confusing discussion about moving the “rain gardens” or the “public gardens” to the south end of the project to address drainage.<sup>49</sup> As reflected in the adopted Resolution, the amendment treated only the public gardens and there is no evidence supporting the notion that this change would solve the drainage issues.

Staff urges that the Hearing Officer consider all of the findings. But the only other arguably relevant finding is in the finding on standard G (Fact 12) which states in part that “[t]he PUD proposes to use rain gardens and infiltration basins for storm water containment.” And it further states that “applicants are working with Public Works to meet

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<sup>48</sup> Tr. 35.

<sup>49</sup> Tr. 46, 48, and 50.

all City requirements for . . . storm drains.” Similarly, Commissioner Michael Kircher expressed a belief that the public works department would address the issue in the final approval stage.<sup>50</sup> This is a specific application of the argument that some matters can be left to a condition of approval. But the evidence before the Commission raised the possibility that no plan is available which will address the drainage problem at least in a practical way.

The Hearing Officer concludes as a matter of law that on this record, the drainage issue is not addressed by leaving it entirely to the final approval stage. Giving due deference to the Commission, then, the Commission’s treatment of this important issue does not amount to careful consideration of it. In this respect, the Commission failed to consider an important factor in finding standard C was met. Its decision finding that the standard was met was arbitrary. Alternatively, the Commission’s finding, if there was one, that changing the gardens solved the drainage problem, is not supported by substantial evidence. This aspect of the Commission’s decision is reversed and remanded for further consideration as discussed in section 7 of this decision.

At the hearing in the appeal, Norm Gutcher testified concerning the drainage issues. This testimony was credible and somewhat more helpful than Mr. Leet’s at the commission hearing. However, the Hearing Officer declines to rely on this brief explanation to make a finding on drainage saving the application from remand. In addition, there is some unfairness in utilizing Mr. Gutcher’s testimony on appeal to support affirming the decision

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<sup>50</sup> Tr. 50.

while excluding the Association's proffered report of Michael Travis which would support reversal. The testimony of both is better left to the Commission to receive, review and question in the first instance.

**D. The PUD Must Be Shown To Not Overload The Street System Or Result In Unsafe Access Or Danger To Pedestrians And Must Be In Conformance With The City Traffic Study.**

Standard D requires that the PUD be shown to not "overload" the street system, result in unsafe access or danger to pedestrians, and conform to the latest city traffic study. The Association contends that access to and from the public streets is inadequate and dangerous.<sup>51</sup>

The application provides a parking layout, occupancy calculations, and discusses the means of access to be utilized by project residents.<sup>52</sup> As originally proposed, the principle access to the development was to be via an extended Commercial Drive immediately adjacent to Mountain Rose.<sup>53</sup> The application does not provide any qualitative or quantitative estimates of what traffic would be generated by the proposed project. The record is silent concerning any method by which the traffic could be derived from either the number of parking spaces or the occupancy load of the project. The application was sent to Public Works Director Healy for comment. His comments, while generally supportive of the PUD, do not state what the traffic impact of the project would be and do

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<sup>51</sup> Opening Brief at 8.

<sup>52</sup> R. Tab 43(e)(text and Concept Site Plan Page 5), 30(a).

<sup>53</sup> R. Tab 43(e) text under "Access."

not expressly address potential “overloading” of the street system.<sup>54</sup> There is also no discussion of whether there is any applicable “city traffic study.”

Written comments made general complaints about the expected level of traffic<sup>55</sup> The staff report does offer a calculation of the number of parking spaces provided in the development.<sup>56</sup> At the public hearing, one Mountain Rose resident not claiming any expertise estimated there would be “say 100-plus, but it would be 150 cars” which would add to a “saturated” traffic corridor.<sup>57</sup>

The Commission took up the matter and approved an amendment changing the principal point of access from an extended Commercial Drive to Cope Industrial Street via a long “flag pole” connecting this street to the main portion of the lot.<sup>58</sup> This change, while obviously lessening any traffic impact on Mountain Rose, compounds the lack of evidence as to what the traffic impact of the PUD would be since the new principal point of access was not considered at all by the Director Healy.

VRS argued at the appeal hearing that the Hearing Officer should imply from the lack of objection from the public works director that there would be no overloading of the street system. The Hearing Officer may make some factual inferences on review.<sup>59</sup> But it is equally plausible to infer that the matter was overlooked. And as the Association argued in reply, making the VRS’s suggested leap tends to erode the burden of proof on VRS as

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<sup>54</sup> R. Tab 41(e).

<sup>55</sup> R. Tab 10(k), 10(l), 10(n), 10(o), 10(u).

<sup>56</sup> R. Tab 12(b)

<sup>57</sup> Tr. 41.

<sup>58</sup> Tr. 51-2.

<sup>59</sup> PMC 17.98.070(C).

the applicant to demonstrate compliance with all of the standards.<sup>60</sup> Finally, as noted, Director Healy was commenting on the PUD as originally presented with a different point of access.

The treatment of this issue by the professionals advising VRS and by staff may have been based on the unstated notion that, since the proposed PUD is a residential use with presumably much less traffic impact than say a large retailer, no traffic impact analysis was required. There might also have been an assumption that since the new point of access, Cope Industrial, is a collector street, there would be ample capacity of that street to handle the small impact of a residential project. Such unstated assumptions, if made here, do not constitute substantial evidence.<sup>61</sup>

The commission's finding that standard D was met (Fact 9) was not supported by substantial evidence. This aspect of the Commission's decision is reversed and remanded for further consideration as discussed in section 7 of this decision.

#### **E. Compliance With The Requirements Of Chapter 17.64.**

Standard E requires that various features of the project comply with PMC Chapter 17.64. As interpreted by the Hearing Officer, these matters are addressed in the final approval stage. The Association makes no argument that this standard cannot be met at that stage. The Commission's finding (Fact 10) concerning this standard is affirmed.

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<sup>60</sup> PMC 17.84.090(A).

<sup>61</sup> The Hearing Officer does not mean to imply that the kind of expensive, detailed TIA based on field investigations which might be required of a major retailer is necessary for the Commission to address this issue here. The necessary analysis here is left to the applicant, staff, and Commission to resolve with opportunity of the public to comment.

**F. Attractive Mix Of Features.**

Standard F requires that the PUD provide a mix of attractive features. The Association makes no argument that this standard was not met. The Commission’s finding (Fact 11) that this standard was met is affirmed.

**G. Compliance With Current City Standard Specifications.**

Standard G requires that all proposed improvements meet current standard specifications of the City. As interpreted by the Hearing Officer, these matters are addressed in the final approval stage. The Association makes no argument that this standard cannot be met at that stage. The Commission’s finding (Fact 12) concerning this standard is affirmed.

**6. Consistency with the City Comprehensive Development Plan**

The Association argues that the PUD must be denied because it is inconsistent with the City’s “Comprehensive Plan.”<sup>62</sup> The Association references but does not quote several goals in the plan which it indicates are not achieved by the PUD. VRS concedes that there must be consistency with the “City of Palmer Comprehensive Plan” which it finds is embodied in standard G of the PUD standards.<sup>63</sup> It then analyzes several goals of the “plan” which are summarized and possibly quoted.

Director Garley explained at the appeal hearing that the reference in standard G to “current standard specifications of the city” was not intended to include the City’s

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<sup>62</sup> Opening Brief at 11.

<sup>63</sup> Appellee Brief at 14.

comprehensive plan. There is no reference in either the conditional use standards or the PUD standards to consistency with any plan. But the PUD application is required to “demonstrate how the PUD conforms to . . . the city comprehensive development plan . . . .”<sup>64</sup> And PMC 17.84.090(C) directs:

After the public hearing, the commission may approve, approve with conditions, or deny a PUD plan according to the plan’s consistency with the city comprehensive development plan and these regulations. (Emphasis added.)

Why this requirement is placed here and not in either the standards for conditional uses or the specific standards for PUDs is not clear.

AS 29.40.030 requires that all municipal governments exercising land use regulatory authority must have a comprehensive plan. AS 29.40.040 requires that land use regulatory ordinances must be in accordance with and implement the plan.<sup>65</sup> Absent an attack on an ordinance itself, if a particular application complies with the relevant ordinances, it can arguably be presumed to be consistent with the plan. A separate analysis of consistency with the plan would thus be duplicative and unnecessary. The Alaska Supreme Court, however, has never so held and courts in other jurisdictions are divided.<sup>66</sup>

To determine consistency with a plan, a two-step analysis is required. First the plan must be scrutinized to determine which of its provisions, if any, might be relevant to the particular action at issue. Second, those provisions must be analyzed to see how the action

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<sup>64</sup> PMC 17.84.080(B).

<sup>65</sup> See, also, *Lazy Mountain Land Club v. Matanuska-Susitna Borough Board of Adjustment and Appeals*, 904 P.2d 373, 377-378 (Alaska 1995).

<sup>66</sup> See cases collected at 1 A. Rathkopf and D. Rathkopf, *The Law of Zoning and Planning*, §14:30 (2015).

affects them. Plan language is aspirational and general. Depending on the length and complexity of the plan, all of this analysis can be tedious and burdensome.

Despite all these considerations, the ordinance here expressly commands a determination of consistency with the plan. The Hearing Officer concludes as a matter of law that the applicant for a PUD must demonstrate and the Commission must find based on substantial evidence that the PUD is consistent with the City's "comprehensive development plan."

The application here, like with the discussion of standards, does not contain a specific section containing the two-step analysis of consistency with any plan.<sup>67</sup> The record contains no document designated as a "comprehensive development plan" or an excerpt from one.<sup>68</sup> The staff report states only a general conclusion that "[b]ased on the information provided by the applicant, . . . the proposed planned unit development . . . is consistent with and in conformance with the Palmer Comprehensive Plan."<sup>69</sup> At the hearing below, Director Garley referenced the same general conclusion.<sup>70</sup> The Commission's discussion after the hearing makes no reference to any comprehensive plan.<sup>71</sup> The Commission's written finding, Resolution 15-008(AM), contains no discussion of any comprehensive development plan not even the general statement from the staff

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<sup>67</sup> R. Tab 43.

<sup>68</sup> *See, Lazy Mountain Land Club, supra*, discussing which of several documents might constitute the relevant plan in that case.

<sup>69</sup> R. Tab 12(b).

<sup>70</sup> Tr. 11.

<sup>71</sup> Tr. 41-56.

report.<sup>72</sup> Contrary to VRS's assertion<sup>73</sup>, there is no "Finding of Fact 13" directed at this topic.

The Commission failed to consider the consistency of the PUD with any comprehensive plan which was required by the ordinance and its decision was arbitrary in this respect. There is no substantial evidence in the record supporting any conclusion about consistency with any plan. This aspect of the Commission's decision is reversed and remanded for further consideration as discussed in section 7 of this decision.

### **7. Decision and Remedy**

The Commission's decision to approve the PUD is affirmed in part and reversed and remanded in part.<sup>74</sup> The decision of the Hearing Officer is based on conclusions of law and no findings of fact by the Hearing Officer are required.<sup>75</sup> This decision is not a final decision for purposes of judicial review but will become final following the Commission's decision on remand, provided no appeal is again timely filed to the Hearing Officer.<sup>76</sup> All matters not remanded to the Commission will become final for purposes of judicial review at that time. The parties will have 30 calendar days from the expiration of said time period to appeal to the superior court.<sup>77</sup>

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<sup>72</sup> R. Tab

<sup>73</sup> Appellee Brief at 14.

<sup>74</sup> PMC 17.98.080(B).

<sup>75</sup> PMC 17.98.080(C).

<sup>76</sup> PMC 17.98.080(E).

<sup>77</sup> PMC 17.98.080(F).

On remand, the matters set forth above on which the Commission has been affirmed shall not be reopened or reconsidered. As to the issues on which remand has been ordered discussed in parts 5(C)(2), 5(D) and 6 of this decision, above, there is insufficient evidence in the record on these material issues to the decision of the case.<sup>78</sup> The applicant shall be allowed a reasonable time to be specified by the Director to supplement and revise its application to address these issues. Staff shall circulate the supplemented and revised application for comment as would be done with a new application. A second public hearing limited to these matters shall be noticed to the public in accordance with PMC 17.80.030. Staff shall prepare a report. The Commission shall hold the hearing and adopt a written decision limited to the specified matters. The Commission shall act on the case in accordance with this decision in the minimum time allowed by the circumstances.<sup>79</sup> This case shall take precedence over all other matters on the Commission's agenda except other matters on remand from a hearing officer.<sup>80</sup>

  
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Ronald L. Baird  
Hearing Officer  
February 17, 2016

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<sup>78</sup> PMC 17.98.090 (A).

<sup>79</sup> PMC 17.98.090(B).

<sup>80</sup> *Id.*