

**BEFORE the HEARING EXAMINER for the  
CITY of BOTHELL**

**DECISION**

FILE NUMBER: SUB2016-09378

APPLICANT: <sup>1</sup> Holy Hills Development, LLC [*sic*]  
Giovanny Espinoza, Governor  
19003 80<sup>th</sup> Avenue NE  
Kenmore, WA 98028

TYPE OF CASE: Major modification of the approved *Hollyhills Division 9* preliminary subdivision: Revision of Condition 5

STAFF RECOMMENDATION: Approve

EXAMINER DECISION: GRANT subject to slight revision of suggested replacement language

DATE OF DECISION: October 3, 2022

**INTRODUCTION <sup>2</sup>**

Holy Hills Development, LLC (“Espinoza”) seeks a major modification of the approved *Hollyhills Division 9* preliminary subdivision to replace Condition 5. <sup>3</sup>

Espinoza filed the major modification application on August 3, 2022. (Exhibits MM 1, PDF 3; MM 2 <sup>4</sup>) The Bothell Department of Community Development (“DCD”) determined that the application was complete w

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<sup>1</sup> The applicant’s name and mailing address are incorrectly stated on the DCD staff report. (Testimony; see also Exhibit MM 2)

<sup>2</sup> Any statement in this section deemed to be either a Finding of Fact or a Conclusion of Law is hereby adopted as such.

<sup>3</sup> The Department of Community Development (“DCD”) convinced Espinoza to seek a companion Planned Unit Development (“PUD”) modification, to which DCD assigned file number PUD2022-21013, in the belief that preliminary PUD approval must have been granted (for reasons elaborated on in hearing testimony) when the preliminary subdivision approval was granted in 2017. (Testimony) There is no evidence that any PUD application was involved in the 2017 proceedings or that any preliminary PUD approval was ever granted for the *Hollyhills Division 9* property. The current record contains virtually none of the code-required PUD application submittals. A major modification cannot be granted to something that doesn’t exist. Therefore, the Examiner concluded that he had no jurisdiction over the purported companion PUD application. It will not be addressed further.

<sup>4</sup> This major modification application has been processed by DCD under the same file number used during the 2016-2017 preliminary subdivision application process. In numbering the exhibits for this proceeding DCD did not make allowances for the exhibits entered into the original preliminary subdivision hearing record. Thus, the current exhibit numbers duplicate exhibit numbers used in 2017. To eliminate the duplication, the Examiner directed DCD to preface each of the new exhibits

hen filed. (Exhibit MM 8, PDF 2) DCD issued a Notice of Application/Determination of Completeness on August 23, 2022. (Exhibits MM 8 – 10a)

The subject property is located on the north side of NE 192<sup>nd</sup> Place between 129<sup>th</sup> Court NE and the Hollyhills Community Center in the Bloomberg Hill subarea planning neighborhood. Its Assessor’s Parcel Number is 3395401030. (Exhibit MM 2)

The Bothell Hearing Examiner (“Examiner”) physically viewed the subject property on July 18, 2017, prior to the 2017 preliminary subdivision hearing (Exhibit MM 4, PDF 2) and via Google Earth prior to the current hearing: Aerial imagery dated August 14, 2020; Street View imagery dated June 2019.

The Examiner held a hybrid open record hearing on September 28, 2022: In-person participation was available at the City Hall (There were no in-person participants. (Testimony)); remote participation was available through the “Zoom” platform. DCD gave notice of the hearing as required by the Bothell Municipal Code (“BMC”). (Exhibits MM 15 – MM 17)

The following exhibits were entered into the hearing record during the hearing:

Exhibits MM 1 – MM 20:	As enumerated on the Exhibit List prepared by DCD prior to the hearing
Exhibit MM 21:	Comment from Ramona Estay, September 20, 2022
Exhibit MM 22:	Comment from Sara Andrew, September 26, 2022
Exhibit MM 23:	Comment from Amy Adams, undated

Section 11.12.008 BMC calls for decisions on preliminary subdivision applications to be rendered within 90 calendar days, subject to tolling for certain specified reasons. The hearing was held well prior to the 90<sup>th</sup> day.

The action taken herein and the requirements, limitations and/or conditions imposed by this decision are, to the best of the Examiner’s knowledge or belief, only such as are lawful and within the authority of the Examiner to take pursuant to applicable law and policy.

## FINDINGS OF FACT

1. Modifications of approved preliminary subdivisions are allowed pursuant to the provisions of BMC 15.08.050. Modifications are grouped into two categories, minor and major, examples of which are

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with “MM” (major modification). Thus, the exhibits in this modification proceeding start with “Exhibit MM 1” and increment by integers thereafter.)

Exhibit citations are provided for the reader’s benefit and indicate: 1) The source of a quote or specific fact; and/or 2) The major document(s) upon which a stated fact is based. While the Examiner considers all relevant documents in the record, typically only major documents are cited. Citations to exhibits that are available electronically in PDF use PDF page numbers, not source document page numbers. The Examiner’s Decision is based upon all documents in the record.

listed in the BMC. “Changes to conditions of approval” is one of the listed major modifications. [BMC 15.08.050(B)(3)]

Espinoza asks that Condition 5, which essentially requires that *Hollyhills Division 9* be incorporated into the Hollyhills Home Owners Association (“Association”), be replaced with a condition allowing *Hollyhills Division 9* to establish its own Home Owners Association (“HOA”).

- 2.<sup>5</sup> *Hollyhills Division 9* (“*Division 9*”) is fundamentally a small, simple, straight-forward preliminary subdivision application which finds itself in an interesting and somewhat complex regulatory environment.

*Division 9* represents completion of the *Hollyhills* Planned Unit Development (“PUD”). The *Hollyhills* manufactured housing (mobile home) project encompassed 80± acres when it was approved by King County in 1968 (before the area became a part of the City of Bothell). King County approved *Hollyhills Division 1* (“*Division 1*”) in 1969. (Exhibits 6.1; 6.3; 36) A set of Covenants, Conditions, and restrictions (“CC&Rs”) were adopted for *Division 1* at that time. (Exhibit 6.2) The CC&Rs were amended in 1974 to include *Division 2*. (Exhibit 6.2) In the Spring of 1979, the then developer of *Hollyhills* and the City of Bothell entered into an agreement for annexation of *Hollyhills* into the City. Later in 1979 the then developer of *Hollyhills* went to court to clarify the standards which would apply to future development of the project. The court held that future development within *Hollyhills* was to be treated as a PUD. (Exhibit 6.7) *Hollyhills* was subsequently annexed into the City of Bothell which, over the years, approved *Divisions 2 – 8*. (Testimony) The CC&Rs were completely rewritten in 1980 and expanded to include *Divisions 3* and *4* and certain specified common areas. The rewritten CC&Rs specified that future *Divisions 5 – 8* would automatically become subject to the CC&Rs upon recordation of a final plat of each *Division*. (Exhibit 6.2)

3. *Division 9* is composed of two parcels. The majority of the site is Tract A in *Division 1*. (Exhibits 7, unnumbered pp. 3 and 5; 25) Tract A was reserved as a “Commercial Area” under the 1969 CC&Rs. (Exhibit 6.2, 1969 CC&Rs, § I.7) The 1980 CC&Rs did several things to the “Commercial Area.” First, they removed the commercial-only restriction to allow for residential development of the area. Second, they changed the legal description to a metes and bounds format. And third, the metes and bounds description increased the size of the Commercial Area to a total of about two acres. (Exhibits 6.2, 1980 CC&Rs, §§ I.9 and IV.3; 6.4)

The area added to the Commercial Area by the 1980 CC&Rs became Parcel B of a 1992 short subdivision (SPL0009-92) approved by the City of Bothell and recorded in 1994. (Exhibits 7, unnumbered p. 3; 37) Parcel B is the second parcel in *Division 9*. Parcel A in the short subdivision is

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<sup>5</sup> Findings of Fact 2 – 4 herein are verbatim copies of Findings of Fact 1 – 3 in the 2017 preliminary subdivision Decision, Exhibit MM 4, with a few grammatical and non-substantive changes (enclosed in brackets) in Finding of Fact 4 to reflect the passage of time and changes in property ownership. The exhibits referenced in Findings of Fact 2 – 4 are from the 2017 proceeding.

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owned by the Hollyhills Owners Association (“Association”) and is used as a storage area for owners’ RVs, etc. (Exhibit 1, p. 4)

4. The current *Hollyhills* CC&Rs provide that Tract A has no membership or voting rights in the Association, and is not subject to Association assessments or maintenance responsibilities. (Exhibit 6.2, Arts. IV, V, VII, and VIII)

The [2017] Applicant[, Hollyhills Investments, LLC,] purchased the *Division 9* property in 2015. (Exhibit 8) The [2017] Applicant [] subsequently had discussions and correspondence with the Association regarding integrating *Division 9* into the Association. (Exhibits 20 – 23; testimony) The [2017] Applicant’s desire [was] to fully integrate *Division 9* into the rest of *Hollyhills*. (Testimony) The Association appear[ed] to be amenable to this result.

5. The preliminary subdivision of *Hollyhills Division 9* was approved on July 24, 2017. (Exhibit MM 4) State law requires that

a final plat meeting all requirements of this chapter shall be submitted to the legislative body of the city, town, or county for approval ... within five years of the date of preliminary plat approval if the date of preliminary plat approval is on or after January 1, 2015.

[RCW 58.17.140(3)(a)] Espinoza filed an application for final plat approval with DCD on July 29, 2021, within the five-year period. (Testimony) The final plat has yet to be approved and recorded due to lack of compliance with Condition 5.

6. Condition 5 of the *Hollyhills Division 9* preliminary subdivision approval reads as follows:

Prior to final plat consideration by the hearing body, the applicant shall incorporate and assimilate the lands, lots and improvements in this subdivision into the broader *Hollyhills Mobile Estates P.U.D.* homeowners association for all purposes to which the *Hollyhills Mobile Estates P.U.D.* conditions, covenants and restrictions apply. The recording of amended CC&Rs for the *Hollyhills Mobile Estates P.U.D.* incorporating *Hollyhills Division 9* into the broader association shall be deemed sufficient evidence of such incorporation and assimilation.

(Exhibit MM 4, PDF 11) Condition 5 was DCD’s Recommended Condition 6. (The Examiner consolidated DCD Recommended Conditions 1 and 2 into one condition, thus Recommended Condition 6 became Condition 5.) The 2017 Applicant did not object to any of DCD’s Recommended Conditions. (Exhibit MM 4, PDF 5, Finding of Fact 11)

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7. Espinoza purchased the *Holly Hills Division 9* property and development rights in 2018 or 2019.<sup>6</sup> Espinoza testified that he did not pay much attention to the preliminary subdivision conditions of approval when he purchased the property.<sup>7</sup> Espinoza's agents were not involved in the 2017 preliminary subdivision process. (Testimony)
8. The hearing record contains no indication of any contact between the 2017 Applicant and the Association regarding Condition 5 (merger of the HOAs) after preliminary approval of *Hollyhills Division 9* in 2017. There may have been some contact, but it is not documented in this record.

In or around July 2021, while site work was underway, City staff called Espinoza's attention to Condition 5. Prior to that, Espinoza had done nothing about compliance with Condition 5. (Exhibit MM 5; and testimony)

9. Espinoza's consultants and Association members have differing takes on aspects of the dialogue that occurred between the two parties after July 2021. (Exhibits MM 5; MM 18; and testimony) There apparently were several contacts between Espinoza's agents and Association members and its agent(s). Espinoza gave the Association \$5,000 to pay for preparation and mailing of a ballot to Association members regarding joining the two HOAs. Suffice it to say, no ballot has been prepared and the Association has not yet asked its members to vote on the question of whether to allow *Hollyhills Division 9* to join the Association. Under Association bylaws, 75% of the 499 members (374) would have to vote in favor for the proposal to pass. No hearing participant suggested that the Association could expect to get 374 of its members to even return ballots were they to be sent out. (Exhibit MM 5; and testimony)

One Association member pointed out that even if the HOAs start out as separate entities, they could agree to merge at some time in the future. (Testimony)

10. All improvements required to record the final plat of *Hollyhills Division 9* have been completed and all preliminary subdivision conditions, except Condition 5, have been met. (Testimony)
11. One abutting property owner has the same concern now as she had in 2017 regarding stability of a hillside behind her lot. (Exhibit MM 21) Testimony was presented in the 2017 hearing which satisfied her concerns. (Exhibit MM 4, PDF 5, Finding of Fact 12) The requested major modification has nothing to do with grading or drainage.
12. DCD has proposed replacement language for Condition 5. (Exhibit MM 1, PDF 7) Espinoza did not object to the proposed replacement language.

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<sup>6</sup> Espinoza testified that he purchased the property in 2019. Amy Adams, a former member of the Association Board of Directors ("Board"), testified that Espinoza purchased the property in 2018 according to King County records. The conflicting testimony is inconsequential to the outcome of this case.

<sup>7</sup> Espinoza testified that he didn't read the 2017 Decision until 2022. (Testimony)

13. Any Conclusion of Law deemed to be a Finding of Fact is hereby adopted as such.

## LEGAL FRAMEWORK <sup>8</sup>

The Examiner is legally required to decide this case within the framework created by the following principles:

### Authority

A major modification of an approved preliminary subdivision is a Type III application which is subject to an open record hearing before the Examiner. The Examiner makes a final decision on the application which is subject to the right of reconsideration and appeal to Superior Court. [BMC 11.04.003; BMC 15.08.050(B)]

### Review Criteria

The BMC contains no review criteria for modifications of approved preliminary subdivisions. In the absence of special review criteria, the review criteria for preliminary subdivisions, as set forth at BMC 15.08.030, apply:

#### **15.08.030 - Criteria for approval**

The Hearing Body shall make an inquiry into the public use and interest proposed to be served by the establishment of the subdivision and/or dedication and shall consider:

(A) Whether the preliminary plat conforms to Chapter 15.16 BMC, General Requirements for Subdivision Approval;

(B) Whether appropriate provisions are made for, but not limited to, the public health, safety and general welfare, for open spaces, drainage ways, streets, roads, alleys, other public ways, transit stops, potable water supplies, sanitary wastes, parks and recreation, playgrounds, schools and schoolgrounds, and shall consider all relevant facts, including sidewalks and other planning features that assure safe walking conditions for students who only walk to and from school; and

(C) Whether the public interest will be served by the subdivision and dedication (if applicable).

(Bold heading in original) The requirements within Chapter 15.16 BMC include “conformity with any applicable zoning ordinance, comprehensive plan or other existing land use controls” [BMC 15.16.010(A)] and “compliance with Chapter 17.03 BMC, Concurrency” [BMC 15.16.010(B)].

A “consistency determination” is also required for every project application.

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<sup>8</sup> Any statement in this section deemed to be either a Finding of Fact or a Conclusion of Law is hereby adopted as such.

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Consistency. During project permit application review, [Bothell] shall first determine whether the items listed in this subsection are defined in [Bothell's] development regulations applicable to the proposed project. In the absence of applicable development regulations, [Bothell] shall determine whether the items listed in this subsection are defined in [Bothell's] adopted comprehensive plan. The applicable regulations or plans shall be determinative of the following:

1. The type of land use permitted at the site, including uses that may be allowed under certain circumstances, if the criteria for their approval have been satisfied;
2. The level of development, such as units per acre, density of residential development in urban growth areas, or other measures of density;
3. Availability and adequacy of infrastructure and public facilities identified in the comprehensive plan, if the plan or development regulations provide for funding these facilities as required by chapter 36.70A RCW; and
4. Character of the development, such as, but not limited to, density and/or intensity of the proposed development, dimensional standards, building height, bulk and scale, architectural features, site design and layout requirements, landscaping, preservation of open space, critical area regulations, and other [Bothell's] development standards.

[BMC 11.10.001(B)]

Vested Rights

Bothell has enacted a vested rights provision.

A. Applications for Type I, II, III, and IVB applications, and for any subsequent building permits arising therefrom, except those which seek variance from or exception to land use regulations and substantive and procedural SEPA decisions, shall be reviewed under the development regulations in effect when a fully completed application for such approval is submitted to the Community Development Director. The Director's issuance of a notice of complete application as provided in [Chapter 11.04 BMC] shall cause an application to be conclusively deemed vested as provided herein. This vesting provision shall apply to all complete applications filed after September 1, 1999.

B. Applications for subdivisions that propose to create offspring lots within a parent site comprising existing detached condominiums or attached townhouses for which a grading or building permit has been issued shall vest to the site development requirements and standards in effect at the time such grading or building permit application was determined to be complete by the City.

[BMC 11.04.010] Special vesting rules apply to applications for major modification of approved preliminary subdivisions:

C. Projects requesting a major modification shall vest only to those provisions of the preliminary subdivision not requested to be modified.

[BMC 15.08.050(C)] The preliminary subdivision's vesting date is December 6, 2016.

#### Standard of Review

The standard of review is preponderance of the evidence. The applicant has the burden of proof.

#### Scope of Consideration

The Examiner has considered: all of the evidence and testimony; applicable adopted laws, ordinances, plans, and policies; and the pleadings, positions, and arguments of the parties of record.

### CONCLUSIONS OF LAW

1. The only issue now before the Examiner is whether Condition 5 should be deleted or replaced with a condition that does not require merger of the HOAs. All other subdivision requirements were addressed and resolved in the 2017 proceedings. Conclusions of Law regarding those other issues are not required in this proceeding. Because the requested modification would not alter the density or nature of the development, a "consistency determination" is not required.
2. With respect to Condition 5, the Examiner concluded as follows in 2017:

The preponderance of the evidence shows that the proposed subdivision, conditioned as set forth herein, will serve the public interest as required by BMC 15.08.030(C), but only if *Division 9* is fully integrated into the *Hollyhills* CC&Rs and Association. It would make little sense to create a new homeowners association for 12 lots within the larger *Hollyhills* Association. DCD-Recommended Condition 6 is entirely appropriate.

(Exhibit MM 4, PDF 8, Conclusion of Law 4) In a perfect world that Conclusion of Law would still be valid. However, the evidence in this record indicates that this is not a perfect world. Admittedly, neither the 2017 Applicant nor Espinoza did anything about Condition 5 until in or around July, 2021. But in the ensuing year the Association has been unable to conduct a vote to determine whether its members are willing to include *Hollyhills Division 9* in the Association – even though Espinoza gave the Association \$5,000 to defray costs associated with such a vote.

3. No private entity should hold veto power over a land development solely because of a condition of approval imposed on that development. Condition 5 was first suggested by DCD and agreed to by the



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2017 Applicant, apparently in the belief that the Association was supportive of joining the two HOAs. The Examiner's 2017 Conclusion of Law 4 was predicated on those facts. The events that have transpired (or not transpired, depending on one's view point) since July 2017 lead the Examiner to now conclude that 2017 Conclusion of Law 4 is no longer supportable. The public interest is not served by continuing a stalemate that prevents final approval of an otherwise fully developed subdivision.

4. In place of 2017 Conclusion of Law 4, the Examiner now concludes that the preponderance of the evidence shows that the proposed subdivision, conditioned as set forth herein, will serve the public interest as required by BMC 15.08.030(C). While it would be ideal if *Hollyhills Division 9* were fully integrated into the *Hollyhills* CC&Rs and Association, there is simply no evidence that merger could be achieved in the current situation. A separate HOA must be accepted. There will always be the opportunity for the two HOAs to merge at some time in the future, if and when both parties find it in their best interests to do so.
5. The replacement condition proposed by DCD (See Exhibit MM 1, PDF 8.) is acceptable with some minor changes to improve clarity. Those changes were discussed during the hearing. In addition, the Examiner will replace the word "applicant" in its two occurrences with the word "plattor" to make clear that the condition applies to whomever is recording the final plat, whether that be Espinoza or a successor party.
6. Any Finding of Fact deemed to be a Conclusion of Law is hereby adopted as such.

**DECISION**

Based upon the preceding Findings of Fact and Conclusions of Law, the testimony and evidence submitted at the open record hearing, and the Examiner's site view, the Examiner **GRANTS MAJOR MODIFICATION** of the approved *Hollyhills Division 9* preliminary subdivision **AS FOLLOWS:**

Condition of approval 5 is replaced with the following text:

Prior to final plat consideration, the Plattor shall create and assimilate all lands, lots and shared tracts within the outer boundaries of *Hollyhills Division 9* into the *Hollyhills Division 9* Home Owners Association. The Plattor shall create Articles of Incorporation and Covenants, Conditions, and Restrictions (CC&Rs) for *Division 9*. These articles shall include maintenance responsibilities for those lands incorporated into *Hollyhills Division 9*.

Decision issued October 3, 2022.

ls/ *John E. Galt*

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John E. Galt  
Hearing Examiner

**HEARING PARTICIPANTS <sup>9</sup>**

Amanda Davis  
Amy Adams  
Ross Rongner

Tony Sosebee  
Betty Wade  
Giovanny Espinoza

**NOTICE of RIGHT of RECONSIDERATION**

This Decision is final subject to the right of any party of record to file a written petition for reconsideration within 10 calendar days following the issuance of this Decision in accordance with the procedures of BMC 11.12.009. See BMC 11.12.009 for additional information and requirements regarding reconsideration.

**NOTICE of RIGHT of APPEAL**

This Decision is final subject to the right of a party of record with standing, as provided in RCW 36.70C.060, to file a land use petition in Superior Court in accordance with the procedures of BMC 11.14.008. Any appeal must be filed within 21 days following the issuance of this Decision. See BMC 11.14.008 for additional information and requirements regarding judicial appeals.

The following statement is provided pursuant to RCW 36.70B.130: “Affected property owners may request a change in valuation for property tax purposes notwithstanding any program of revaluation.”

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<sup>9</sup> The official Parties of Record register is maintained by the City’s Hearing Clerk.