CITY OF RICHLAND
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NOTICE OF DECISION

PURSUANT TO RICHLAND MUNICIPAL CODE SECTION 19.60.080 NOTICE IS HEREBY GIVEN THAT THE CITY OF RICHLAND HEARINGS EXAMINER, ON JANUARY 20, 2023 DENIED THE PRELIMINARY PLAT OF VILLA VISTA TOWNHOMES (CITY FILE NO. S2021-102).

DESCRIPTION OF ACTION: Preliminary plat of "Villa Vista Townhomes" subdividing approximately 13.31-acres into 68 residential lots for attached single-family townhomes.

SEPA REVIEW: The probable significant adverse environmental impacts of the proposed project have been adequately addressed in the Planned Action Ordinance [RMC 19.50.030 (B)] and as described in the Badger Mountain South Planned Action Consistency Determination for Villa Vista preliminary plat dated May 28, 2021. The City issued a PACD for the revised application on July 19, 2022.

DENIAL: The Hearing Examiner Decision to DENY the project constitutes the City's final action.

PROJECT LOCATION: The project site is located along the north side of Trowbridge Boulevard, approximately 1,050-feet east of Dallas Road in the Badger Mountain South master planned community (APN 1-32982BP4732021).

APPEALS: Appeals to the above-described action may be made to the Benton County Superior Court by any Party of Record. Appeals must be filed within 21 days of issuance of this notice, which is January 25, 2023.

Mike Stevens
Planning Manager

January 25, 2023
Date

Before Hearing Examiner
Gary N. McLean

BEFORE THE HEARING EXAMINER
FOR THE CITY OF RICHLAND

Regarding an Application for Preliminary Plat Approval, to divide 13+ acres into 68 residential lots for attached single-family townhomes on a site designated as "Specialty Retail District" in the Badger Mountain South master planned community, submitted by **NOR AM INVESTMENT**, LLC Applicant, *(The site is generally located to the north of Trowbridge Boulevard, about 1,050-feet east of Dallas Road in the Badger Mountain South master planned community, on Parcel No. 1-32982BP4732021, in the City of Richland)*	**File No. S-2021-102** **DECISION DENYING "VILLA VISTA" PRELIMINARY PLAT APPLICATION**

I. SUMMARY OF DECISION.

The application fails to satisfy relevant approval criteria, including without limitation the specific "intent" language for the Specialty Retail District where it is located. Based on the entire record and as explained below, the applicant's proposal is not in the public interest and cannot be approved.

II. CONTENTS OF RECORD.

Copies of all materials in the record and a digital audio recording of the open-record hearing conducted for this application are maintained by the City and may be requested by using the City's Public Records online portal or other methods for requesting records as described in the City's Public Records Disclosure Policy No. 0260.

GARY N. MCLEAN
HEARING EXAMINER FOR THE CITY OF RICHLAND
CITY HALL – 505 SWIFT BOULEVARD
RICHLAND, WASHINGTON 99352

Exhibits: *Final Staff Report.* City of Richland Development Services Division Staff Report to the Hearing Examiner regarding the "Villa Vista Townhomes" Preliminary Plat, File No. S2021-102, dated October 10, 2022, issued following Remand, with ten attached exhibits, as identified and numbered as Exhibits 13-22 [continuing numbers from initial Staff Report] on page 17 of such report. (*148 pages in .pdf file of materials, with report on pages 1-17*). Attached exhibits listed as follows:

13. Applicant Narrative Regarding Remand Order
13A. Hearing Brief, from appellant's counsel.
14. Updated Preliminary Plat
15. Updated Master Agreement Consistency Recommendation (MACR)
16. Updated Master Agreement Consistency Determination (MACD)
17. Updated Planned Action Consistency Determination (PACD)
18. Public Notices & Affidavits
19. Public Comments
20. Agency Comments
21. RMC 23.48
22. Continuance Request (September 12, 2022 to October 10, 2022)

Post-hearing Exhibits authorized by the Examiner during the hearing on October 10, 2022:

13B. .pdf copy of Applicant's slides presented at the public hearing.
13C. Email from applicant's counsel, confirming that Mr. White would not be submitting an additional written comment, as allowed during the hearing.

14A. Revised Preliminary Plat site plan, showing proposed property line for project to be developed in 2-phases.

19A. Written Public Comments from:

i. Kelly Monteblanco, West Vineyard resident, realtor, expressing general concerns and reasons why she believes the developer cannot be trusted, that vision and intent for BMS community has not been fulfilled; and

ii. Heather Nicholson, BMS resident, detailing concerns that Intent of Specialty District has not been satisfied.

Remand Order. Issued by the Hearing Examiner, dated September 29, 2021, based on issues that prevented approval at such time. *(9 pages)*;

Initial Staff Report. City of Richland Development Services Division Staff Report to the Hearing Examiner regarding the "Villa Vista Townhomes" Preliminary Plat, File No. S2021-102, dated June 14, 2021, with Exhibits 1-

12 as identified and numbered on page 30 of such report (*592 pages in .pdf file of materials, with report on pages 1-30*), modified by written email request from Staff, cc'ing the applicant, on June 14, 2021, which read: *"Please add the requirement for an inadvertent discovery plan, as requested by DAHP, as condition #66."* Attached exhibits listed as follows:

1. Application
2. Preliminary Plat Survey
3. Traffic Impact Analysis
4. Master Agreement Consistency Recommendation (MACR)
5. Master Agreement Consistency Determination (MACD)
6. Planned Action Consistency Determination (PACD)
7. Planned Action Ordinance
8. Public Notices & Affidavits
9. Public Comments
10. Agency Comments
11. LUDR Land Use Map
12. Site Photos

Post Hearing Exhibit 9A, as authorized during the initial public hearing. Written comment from Russell Pfeiffer, as representative of homeowners in the adjacent West Vineyard neighborhood, a part of the BMS community, dated June 27, 2021, detailing opposition to application, including failure to meet intent of Special Retail District. *(59 pages in .pdf file).*

23. Public Works Department memo dated November 9, 2021, detailing specific transportation improvement projects funded by Traffic Impact Fees collected in Traffic Impact Zone 3, where the proposed plat and other parts of the BMS community are located. Previously included as an exhibit in other BMS projects (Goose Ridge, File No. S2021-107; and South Orchard, File No. S2021-104).[1] **Added by the Examiner to complete the record, as the applicant failed to submit a letter from the City Traffic Engineer summarizing traffic mitigation measures and how they can be funded as required in Sec. 7.2 of the Master Agreement.*

[1] This document was not included in the application materials, or the supplemental post-remand materials included in Ex. 13, or the Staff Report, but has been added into the record by the Examiner to complete the record on the issue of transportation improvements, and their funding sources, as required by Sec. 7.2 of the Master Agreement. The record is now closed, and this Decision is in order. *(See H.Ex. Rule 1.14(d) re: official notice of records; and Rule 1.17, reopening to supplement record, which apply to exhibits numbered 23-26).*

24. NorAm (the applicant's) proposed changes to Section 4, Specialty Retail District, of the LUDR, included as part of NorAm's application to amend the LUDR, made to the City in 2021, transmitted to the Examiner by Mr. Stevens on Jan. 17, 2022, to include as part of this record, as determined by the Examiner. NOTE: does not request any amendments regarding Intent of the Specialty Retail District.

25. Copy of Staff Report from the City's Planning Manager to the Planning Commission, dated January 26, 2022, summarizing proposed amendments to the BMS LUDR, none of which include requests to modify the Intent language for Specialty Retail District, available for public access on the City's website, for Planning Commission materials. Includes detailed summary of prior amendments to language in the LUDR, first adopted in 2010, which occurred in 2012, 2014, 2015, and 2016 – NOTE: none of the amendments to the LUDR amended any of the Intent language used for the Specialty Retail District. Further, the dates that amendments have been adopted are noted on the copy of the LUDR appearing on the City's website, available for review by the public, listed as follows: "Land Use and Development Regulations", Exhibit C to Master Agreement Dated December 7, 2010; Amended Dates: June 19, 2012; April 15, 2014; March 3, 2015; and May 17, 2016.

26. City of Richland Resolution Nos. 48-12; 25-14; 29-15; and 111-16, in which none of the amendments to the LUDR amended any of the Intent language used for the Specialty Retail District.

Testimony/Comments: The following persons were sworn and provided testimony under oath during the initial open-record hearing on June 14, 2021:

1. Shane O'Neill, Senior Planner, for the City of Richland;
2. Darrin Sweeney, for the applicant;
3. Russ Pfeiffer, local resident, spoke for fellow residents in the West Vineyard neighborhood, expressed concerns about application, loss of amenities, no wine village related features as required for the Specialty Retail District;
4. Lynn Affleck, local resident, spoke for Vineyard Estate Lane homeowners;
5. Steve Sevall, local resident, expressed concern that BMS residents are not seeing what they were promised;
6. Kelly Knurbein, local resident, concurred with other local resident concerns, mentioned that people paid a premium to live in the BMS community,

The following persons were sworn and provided testimony under oath during the continued open-record hearing following the Remand on October 10, 2022:

1. Mike Stevens, Planning Manager, for the City of Richland;
2. Reuben Schutz, applicant's attorney, coordinated the applicant team presentation, and offered legal arguments on the applicant's behalf;
3. Darrin Sweeney, applicant's primary representative, has worked with Nor Am for about 2 years, previously employed by the City of Richland. Summarized applicant's position as explained in Ex. 13, responded to public comments, answered questions;
4. Daniel Bruchman, real estate broker, offered testimony for the applicant, summarizing applicant efforts to find partners, wineries, etc. to develop wine village in BMS, expressed opinion that wine village may not be feasible, that destination winery might be better;
5. Cheryl Ebsworth, consultant for the applicant, presented slides summarizing proposed preliminary plat, explained that proposal is to occur in 2-phases;
6. Daniel Sanner, BMS resident, parents reside nearby in BMS as well, active in his community, helped set up neighborhood watch, created online group for all of BMS community with 250-300 members, summarized written comments from local citizens who oppose this residential proposal on this site, expressed concerns about proposal, that 1,000 acres are available elsewhere in the BMS community for residences, better for residential, that there should be no rush for residential on this site, that this site should wait for a cornerstone type of development;
7. Staci West, BMS resident, expressed detailed concerns proposal, including need to meet intent and purpose of the area at issue, what the applicant calls "open-space", transportation needs;
8. Kelly Monteblanco, West Vineyard resident, says BMS map has not been amended, that she has never interpreted the LUDR the way the applicant suggests; generally argued that failure to sell the land does not mean there's been a change to justify proposal; says developer made a liar out of her and other realtors who used the LUDR and BMS documents to find buyers; says people paid premiums for the land and homes to live in BMS;
9. Heather Nicholson, BMS resident, explained that the Intent for the Specialty Retail District is part of a Contract, and the contract relied on intent, starting with Sec. 1.A of the LUDR; noted that the City Council can change the LUDR, but the Intent for the Specialty Retail District has not changed; her written comments are included as part of Ex. 19A;
10. Charles Jackson, local resident, asked that the project be guided by the Intent or the district, citing to portions of the LUDR regarding Intent for the area at issue;

11. Bennette Sanner, local BMS resident, expressed familiarity with the LUDR, asked question about timing of projects and what is coming in the community, so she can follow along easier;
12. Melissa Kasper, BMS resident, explained that she is upset with changes to the site, implying project is different from what she was told would be in BMS, what she expected based on what is referenced in the LUDR;
13. Grant Howard, local resident, expressed concern because he bought land and built home in the West Village neighborhood, bought home looking forward to seeing master plan with its unique ideas fulfilled, based on a bill-of-goods to come, disappointed that what he was told when he moved there may not be going forward, and hoped City would look at money invested by residents based on intent in plan;
14. Kelly Knurbein, local resident, in West Village neighborhood, expressed disappointment with applicant comment about "you can't have Lakefront property without the lake" explaining that she and other residents are not getting benefits of the community that they expected when they purchased homes in the area, supported other comments from neighbors;
15. Tara Gibson, local resident, explained that Intent was a big part of why she built a home in the BMS community;
16. Jennifer Parker, local resident, feels that retail is important for the site, instead of residential.

* For this application, the Examiner takes official notice of sworn testimony provided by Pete Rogalski, P.E., Public Works Director, and Carlo D'Alessandro, P.E., Transportation and Development Manager for the City of Richland Public Works Department, during the public hearing held on November 8, 2021 before the Hearing Examiner for the Goose Ridge II preliminary plat application (File No. S2021-107) by a different applicant, which is also located in the BMS community, which testimony was also included as part of the record for the South Orchard Preliminary Plat Decision (File No. S2021-104), submitted by the same applicant as in this matter, NorAm. During their testimony, Mr. Rogalski and Mr. D'Alessandro offered credible and unrebutted evidence that trip counts used to determine if transportation improvements are "triggered" so construction should move forward are based upon building permits issued, not lots approved in final subdivisions, so the 1,000-unit threshold and others referenced in some comments have not been or will not be met until such time as 1,000 building permits are issued for new homes in the BMS community. Mr. Rogalski also confirmed that the City's transportation impact fees collected for each building permit in the proposed plat will be sufficient to proportionally fund transportation system improvements needed to mitigate impacts of the BMS project, and that the pending TIA will be used to refresh the list of transportation improvements needed for the BMS community, which is all located in a specific impact fee area, known as "zone 3".

III. APPLICABLE LAW.

Under applicable provisions of the Richland Municipal Code (RMC), a preliminary plat application is first subject to review and approval by city staff with respect to the engineering elements of said plat, then the Hearing Examiner is responsible for conducting an open record public hearing followed by a final written Decision. A preliminary plat application is a Type III procedure. RMC 19.20.010(C)(1).

As explained in RMC 24.12.050(A), the hearing examiner shall consider any preliminary plat application and shall conduct an open record public hearing in accordance with Chapter 19.60 RMC. After the public hearing and review of materials in the record, the hearing examiner shall determine whether the preliminary plat is in accordance with the comprehensive plan and other applicable code requirements and shall either make a decision of approval or disapproval. The same provision of the city's code (RMC 24.12.050(A)) provides that any approval of the preliminary plat shall not be given by the hearing examiner without the prior review and approval of the city manager or their designee with respect to the engineering elements of said plat including the following:

> 1. Adequacy of proposed street, alley, right-of-way, easement, lighting, fire protection, drainage, and utility provisions;
>
> 2. Adequacy and accuracy of land survey data;
>
> 3. The submittal by the applicant of a plan for the construction of a system of street lights within the area proposed for platting, including a timetable for installation; provided, that in no event shall such a plan be approved that provides for the dedication of such a system of lighting to the city later than the occupancy of any of the dwellings within the subdivision.

The City's decision criteria for preliminary plat approval are substantially similar to state subdivision mandates found in RCW 58.17.110(2)[2] and reads as follows:

> ***Richland Municipal Code 24.12.053 Preliminary plat – Required findings.***
>
> *The hearing examiner shall not approve any preliminary plat application, unless the approval is accompanied by written findings that:*
>
> *A. The preliminary plat conforms to the requirements of this title;*

[2] "A proposed subdivision and dedication shall not be approved unless the city, town, or county legislative body makes written findings that: (a) Appropriate provisions are made for the public health, safety, and general welfare and for such open spaces, drainage ways, streets or roads, alleys, other public ways, transit stops, potable water supplies, sanitary wastes, parks and recreation, playgrounds, schools and school grounds and all other relevant facts, including sidewalks and other planning features that assure safe walking conditions for students who only walk to and from school; and (b) the public use and interest will be served by the platting of such subdivision and dedication. (emphasis added). If it finds that the proposed subdivision and dedication make such appropriate provisions and that the public use and interest will be served, then the legislative body shall approve the proposed subdivision and dedication. []" RCW 58.17.110(2).

B. Appropriate provisions are made for the public health, safety and general welfare and for such open spaces, drainage ways, streets or roads, alleys, other public ways, transit stops, potable water supplies, sanitary wastes, parks and recreation, playgrounds, schools and school grounds and all other relevant facts, including sidewalks and other planning features that assure safe walking conditions for students who only walk to and from school;

C. The public use and interest will be served by the platting of such subdivision and dedication (emphasis added); and

D. The application is consistent with the requirements of RMC 19.60.095.

And, RMC 19.60.095 mandates the following additional findings:

19.60.095 Required findings.

No development application for a Type II or Type III permit shall be approved by the city of Richland unless the decision to approve the permit application is supported by the following findings and conclusions:

A. The development application is consistent with the adopted comprehensive plan and meets the requirements and intent of the Richland Municipal Code.

B. Impacts of the development have been appropriately identified and mitigated under Chapter 22.09 RMC.

C. The development application is beneficial to the public health, safety and welfare and is in the public interest. (emphasis added).

D. The development does not lower the level of service of transportation facilities below the level of service D, as identified in the comprehensive plan; provided, that if a development application is projected to decrease the level of service lower than level of service D, the development may still be approved if improvements or strategies to raise the level of service above the minimum level of service are made concurrent with development. For the purposes of this section, "concurrent with development" means that required improvements or strategies are in place at the time of occupancy of the project, or a financial commitment is in place to complete the required improvements within six years of approval of the development. (emphasis added).

E. Any conditions attached to a project approval are as a direct result of the impacts of the development proposal and are reasonably needed to mitigate the impacts of the development proposal.

The burden of proof rests with the applicant, and any decision to approve or deny a preliminary plat must be supported by a preponderance of evidence. *RMC 19.60.060 and Hearing Examiner Rules of Procedure, Sec. 3.08.* The application must be supported by proof that it conforms to the applicable elements of the city's development regulations, comprehensive plan and that any significant adverse environmental impacts have been adequately addressed. RMC 19.60.060.

The hearing examiner's decision regarding this preliminary plat application shall be final, subject to judicial appeal in the time and manner as provided in RMC 19.70.060 and Ch. 36.70C RCW *(The city's final decision on land use application may be appealed by a party of record with standing to file a land use petition in Benton County Superior Court.*

Such petition must be filed within 21 days of issuance of the decision). See RMC 24.12.050(B).

IV. ISSUE PRESENTED.

Whether a preponderance of evidence demonstrates that the applicant has satisfied their burden of proof to satisfy the criteria for preliminary plat approval?

Short Answer: No.

V. FINDINGS OF FACT.

Upon consideration of the Staff Report, exhibits, public hearing testimony, follow-up research and review of applicable codes, plans, policies, controlling legal instruments, including without limitation the Badger Mountain South LUDR provisions, this Decision is now in order. Based on all the evidence, testimony, codes, policies, regulations, and other information contained in the Record, the Examiner issues the following findings, conclusions and Decision denying the pending preliminary plat application as set forth below.

1. Any statements in previous or following sections of this document that are deemed findings are hereby adopted as such. Captions should not be construed to modify the language of any finding, as they are only provided to identify some of the key topics at issue in this application.

2. Nor Am Investment, LLC, is the applicant and owner of the parcel(s) of property addressed in this preliminary plat application. *(Staff Reports, page 1).*

3. The project site is part of the larger Badger Mountain South master planned community and is subject to review and compliance with applicable provisions of city development regulations as well as the Land Use and Development Regulations (LUDR) for the Badger Mountain South master planned community.

4. The Badger Mountain South master planned community is intended to be a "walkable and sustainable community" with a range of housing types, mixed-use neighborhoods, up to 5,000 dwelling units, businesses and other commercial activities, all subject to specially adopted Land Use and Development Regulations (LUDR) for the area. *(LUDR, 1.A, Intent, and 1.B, Purpose).*

5. Of special relevance to this project, there is no dispute that the property addressed in this application is entirely located in the "Specialty Retail" (BMS-SD-SR) District of the BMS community. *(See LUDR, Sec. 1.F, subsection 1.f; BMS map, showing Districts and boundaries, with Legend, on page 2-2 of the LUDR, Sections 2.A and 2.B).*

6. In 2021, the city received the pending application for a Preliminary Plat known as the Villa Vista Townhomes project, assigned File No. S2021-102. Based upon the record established at the initial public hearing on June 14, 2021, the Hearing Examiner found that the proposal could not be approved because it failed to meet applicable city requirements and LUDR provisions and remanded the application for additional information and revisions needed to satisfy relevant standards and approval criteria. *(Remand Order, dated September 29, 2021).*

7. On or about June 17, 2022, the Applicant submitted additional application materials, included as *Exhibits 13-17,* in the Final Staff Report. There is no dispute that the applicant's post-remand materials, included in the record as Exhibit 13, did not include, and have never been supplemented to include, any letter described in Ex. 13, item 8, which reads as follows "8. The City of Richland Traffic Engineer will provide a letter outlining the traffic mitigations required for this project as required in the Master Agreement Section 7.2." Without such letter, the application could be denied because it fails to address transportation infrastructure issues as required by the Master Agreement. Nevertheless, the Examiner is fully informed on the subject to transportation improvements associated with the BMS community, and reopened the record and added a new Ex. 23, which is a Public Works Department memo dated November 9, 2021, detailing specific transportation improvement projects funded by Traffic Impact Fees collected in Traffic Impact Zone 3, where the proposed plat and other parts of the BMS community are located. This document was previously included as an exhibit in other BMS matters within the jurisdiction of the hearing examiner. *(See Goose Ridge, File No. S2021-107; and South Orchard, File No. S2021-104).*[3]

7A. Following review of the revised application materials, city staff deemed the materials complete for purposes of further review and acceptance on or about the same date it mailed, posted, and published Notices of the revised Application and Public Hearing for the matter in June and August of 2021, with an agreed continuance granted to an October hearing date due to an illness experienced by a necessary participant. *(Final Staff Report, page 5; Exs. 18 and 22, copies of notices and confirmation materials, including continuance).*

8. All applicant submittals, written comments from current homeowners in the Badger Mountain South community, and testimony received following notices issued for both hearing dates, are included in the record and have been thoroughly reviewed and considered in issuing this Decision.

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[3] See H.Ex. Rule 1.14(d) re: official notice of records; and Rule 1.17, reopening to supplement record.

Proposal.

9. The original Staff Report explains that the applicant filed a preliminary plat application (Exhibit 1) to divide approximately 13.31 acres into 68 single-family residential lots and four (4) tracts, to be known as the plat of Villa Vista Townhomes (File No. S2021- 102). The plat proposes creating four residential blocks with two (2) looped private shared-driveways together with four (4) tracts for small parking lots designated for guest parking. The project site lies north of Trowbridge Blvd. and south of the future westerly extension of Bellaview Street. The entire site is located in the Specialty Retail (BMS_SR) District of the Badger Mountain South master planned community. All lots are planned to be served by a contiguous network of public roadways. The dividing east/west roadway (Sotto Street) dead-ends in a cul-de-sac on the east end; thereby providing no connection to the adjacent plat of BMS 4-Plexes. *(Original Staff Report, page 2).*

9A. The entire site is residential. The project does not incorporate or designate a gathering place for group events, festivals and other community-wide activities, nor does it provide sites for vineyards, wine caves, wineries, tasting rooms, wine making, other specialty brewing and craft distilling, the sale of other agricultural-related products, education, retail and hospitality that support this focus, and it omits any meaningful explanation as to how the proposed development in the Specialty Retail District (with only residential housing) fulfills the LUDR's expressed intent for such sites to develop with an integrated site and amenity design in order to become a community gathering place with its own distinct style. *LUDR, Sec. 1.F, subsection 1.f; LUDR, Sec. 4.B.1.*

Badger Mountain Subarea Plan.

10. As explained above, the project site is part of the larger Badger Mountain South community, which is addressed in a portion of the City's Comprehensive Plan known as the Badger Mountain Subarea Plan (BMSP).[4] The BMSP, adopted and not revised since 2010, includes a section describing the City's intent and vision for a Badger Mountain Specialty Retail commercial land use designation for certain areas in the Badger Mountain community, which reads as follows:

Badger Mountain Specialty Retail:

The Badger Mountain Specialty Retail (BMSR) commercial designation is identified for areas that will be developed to have a particular draw for tourists or other visitors, while also providing goods

[4] "The Badger Mountain Subarea Plan is an appendix to the City of Richland Comprehensive Plan and is designed to identify the City of Richland's future growth opportunities presented in the 1,998-acre area located south and east of the Badger Mountain Centennial Preserve and north of I-82." *(BMSP, Introduction, on page 4).*

and services to the local population. This land use designation is only found within the Badger Mountain South area. It is intended that areas identified as BMSR be developed according to distinct design standards found in the related Badger Mountain South Development Agreement to ensure that a sense of cohesiveness is achieved through coordinated use of building materials, landscaping, signage and lighting. Its location near the freeway interchange will allow the creation of an attractive and inviting entry to South Richland and will concentrate the impact from more auto-oriented uses away from the primary residential neighborhoods.

The area identified as BMSR is being planned to develop as the Badger Mountain South Wine Village and would include a variety of uses and employers such as a wine business incubator, other wineries, demonstration vineyards, boutique hotel, other retail, and goods and services associated with wineries and hospitality in general. The concept plan also includes a public gathering plaza, outdoor amphitheater and sustainable design demonstration features. The build out of the Badger Mountain South Wine Village would occur in stages dependent upon market conditions.

(Badger Mountain Subarea Plan, part of the City's Comprehensive Plan, on page 29).

11. The nonresidential land use classifications in the Badger Mountain Subarea – like the Specialty Retail commercial designation – are intended to accommodate the needs of the new residents, the need for additional services within Richland and other nearby cities, as well as accommodating tourists and other visitors over the 20-year planning timeline. *(BMSP, Sec. 5.4, on page 26).*

12. The Plan estimates that only 28-acres will be used for Specialty Retail Commercial Land Uses, just 12% of the 225-acres designated for commercial uses in the almost 2,000+acre Badger Mountain Subarea. *(BMSP, Table 5: Badger Mountain Subarea Commercial Land Use Summary, on page 27).*

13. In other words, there are literally THOUSANDS of acres designated for residential uses in the Badger Mountain subarea, like that proposed in this application. The Examiner notes that the BMS Master Plan only applies to a smaller area, but testimony from local residents, and testimony by Mr. Sweeney, confirmed that about 1,000 acres of vacant land remain available for residential development in the BMS community.

Master Agreement Between the City of Richland and Nor Am Investment, LLC Regarding the Community Known as Badger Mountain South.

14. There is no dispute that the pending application is subject to terms of a contract between the City of Richland and Nor Am Investment, LLC, the applicant in this matter. That document is identified as Contract No. 143-15, currently captioned *"Amended and Restated Master Agreement Between the City of Richland and Nor Am Investment, LLC Regarding the Community Known as Badger Mountain South",* a complete copy of which is maintained and available for public review on the City's website page for the Badger Mountain South Community. In this Decision, the contract is referenced as the 'Master Agreement".

15. Since 2015, the only substantive amendment to the Master Agreement took place in 2017, when Nor Am requested that the isolated Sunshine Ridge plat should be removed from the master planned area, which request was approved by the City in Resolution No. 179, adopted on September 19, 2017.

16. The term of the Master Agreement contract between the parties runs through February 8, 2035. *(Master Agreement, Sec. 5.1).*

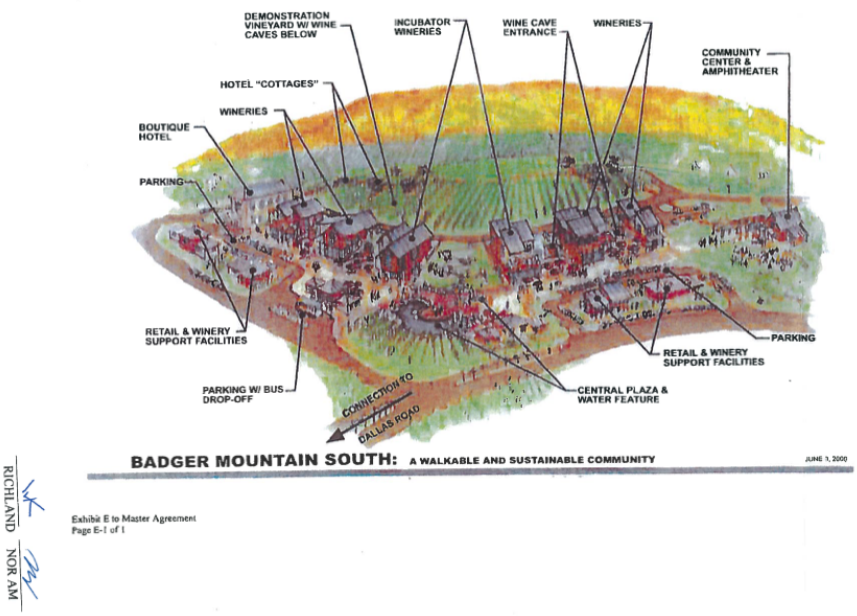
17. The Master Agreement includes language where Nor Am acknowledges that it has done a thorough feasibility analysis, and that the City makes no guarantees or warranties regarding the suitability or financial viability of development addressed in the Master Agreement. That term of the contract reads as follows:

> 30.2 Nor Am acknowledges that it has done a thorough feasibility analysis of the development model that it has proposed and acknowledges that the City does not make any guarantees or warranties, express or implied with regards to the suitability for development of the Badger Mountain South property or the financial viability of the development that would occur pursuant to the Master Agreement. NorAm is relying on their own analysis of the market conditions and availability of infrastructure at an affordable cost and agrees that it will not bring a claim against the City if its economic expectations are not realized.

(Master Agreement, Sec. 30.2, on page 21).

18. The Master Agreement includes detailed exhibits, that are incorporated as part of such agreement, including without limitation Exhibit C, the Land Use Development Regulations (LUDR) for the BMS community [addressed in other portions of this Decision], and Exhibit E, a 'Wine Village Conceptual Drawing" that is republished below:

EXHIBIT E
TO
MASTER AGREEMENT
WINE VILLAGE CONCEPTUAL DRAWING



RICHLAND NOR AM

Exhibit E to Master Agreement
Page E-1 of 1

19. The LUDR portion of the Master Agreement includes maps and illustrations, with legends, showing eight land use districts in the Badger Mountain South community, including the BMS-SD-SR: Specialty Retail District, where the pending project site is located. *(See LUDR, on page 2-2, map of land use districts in BMS and legend provided in Sections 2.A and 2.B).*

20. "The LUDR is graphic-intense and includes standards for site design and sustainability as well as graphic direction for height, siting, and building elements." *(LUDR, Sec. 1.A, captioned "Intent", last sentence in Sec. 3).*

21. As noted by multiple Badger Mountain homeowners who appeared during the public hearing or submitted public comments regarding this project, the LUDR includes graphic-intense pages showing open spaces, mixed uses, and themed development, including one labeled as an "illustrative sketch" showing a view of a "Specialty Retail Village", which closely resembles the "wine village" illustration included as Exhibit E to the Master Agreement. In fact, it appears to be derived from the same sketch used as Ex. E. Recognizing that the LUDR is "graphic-intense", it is worth republishing the image that appears immediately above Sec. 4.B.1 of the LUDR, captioned "Special District – Specialty Retail Intent":

(LUDR, on page 4.2, image appearing immediately above Sec. 4.B.1).

22. The Master Agreement also includes a section addressing potential improvements in the Specialty Retail District, which reads as follows:

16. **CITY'S CONTRIBUTION TO SPECIAL DISTRICT-SPECIALTY RETAIL IMPROVEMENTS.**

16.1 The Port of Kennewick is considering investing in the Specialty Retail District in Badger Mountain South in order to construct a world class pedestrian-oriented destination village, which will include numerous uses related to the agricultural products of the region, including wines and grapes (See LUDR, Exhibit C). It is also intended to include class rooms, meeting areas, hotel, restaurants, and other related uses, all centered around a common pedestrian corridor. The City is also desirous of investing funds to stimulate tourism and economic development. If the City invests lodging tax revenues in improvements to this district in order to stimulate tourism, then the amount of lodging taxes generated from Badger Mountain South shall not be used in the annual revenue calculation required by paragraph 15.2.

16.2 The parties intend to enter into further agreements regarding the preparation of a master site plan for the specialty retail area, and the design and construction of certain improvements within the specialty retail area, including a business incubator building, a public meeting area, and related public facilities. It is contemplated that that the agreement will be a three party agreement between the City, the Port of Kennewick, and Nor Am and will include an investment by all parties.

16.3 It is anticipated that the Master Site Plan will be completed by September, 2011, and construction will occur in 2012 and 2013.

23. In this application, the applicant is essentially arguing that the terms of Section 16 have not been fulfilled, so its obligation to fulfill the Intent of the Specialty Retail District as provided in the LUDR, particularly Sec. 4.B.1, should be excused, but the Examiner is without authority to revise contracts approved by the Richland City Council.

24. Even if the applicant's arguments were accepted as valid, that it may be economically difficult at this time to develop the site with the wine village concept described in the Master Agreement contract, or as a less-specific "Specialty Retail Village" shown and described in the LUDR, under Washington law, economic hardship is not an excuse to fulfill terms of a mutually negotiated contract. In return for the Master Agreement, the applicant received numerous modifications to otherwise applicable City codes and standards, in return for pledges that the master planned community would achieve the vision expressed in such Agreement. The same portions of the specific intent for the Specialty Retail District is repeated in at least two places in the LUDR, at Sec. 1.F.1.f, "It is intended to develop with an integrated site and amenity design in order to become a community gathering place with its own distinct style. *LUDR, Sec. 1.F, subsection 1.f;* and Sec. 4.B.1, "[the Specialty Retail District] is intended to: a. Provide a gathering place for group events, festivals and other community-wide activities."

25. In its written materials and witness testimony, the applicant is essentially arguing that it can build anything on the list of allowed uses throughout the entire Specialty Retail district, free of any consideration of the Intent for such district. They did not even attempt to modify their proposal so that the Intent, as well as allowed uses, could be integrated into this project in some fashion. The Intent, and allowed uses, should not be read as mutually exclusive of one another. The Intent of the Specialty Retail District applies independently, and parallel with, the permitted use list exclusively relied-upon by the applicant.

Contract terms should be fulfilled.

26. The applicant argues that because residential townhouses might be an allowed use in the Specialty Retail District, then their proposal must be approved. This argument ignores the fact that this property is subject to the contractual obligations, including fulfilment of the very specific intent language addressing development in the Specialty Retail District. Nor Am's approach seems to be: this townhouse-only project is a "Specialty Retail" project – so "trust us". Under similar circumstances where contractual obligations applied to a development project in addition to regular zoning regulations, and an applicant wanted to ignore certain contract conditions, essentially saying "trust us", courts have ruled that the local jurisdiction would be well within its rights to deny such application. *(See Donwood, Inc. v. Spokane Cty., 90 Wn.App. 389, 957 P.2d 775 (1998)).*

27. A preponderance of unrebutted evidence in the record established that this project site, is the last, or almost the last, undeveloped land in the Specialty Retail District where the specific Intent of such district can be fulfilled. While the applicant's representative explained that this development site has been chosen for development as housing at this time because it is cheaper and more economically viable to do so at this time (Nor Am already installed utilities and other infrastructure around this site, but have not done so in many, many other large portions of vacant land that are specifically designated for residential/housing uses, making this site less expensive to develop at this moment), such arguments are analogous to a situation where one party claims that a contractual obligation cannot or will not be fulfilled because it is too expensive, but largely because the situation results from their own actions. *(See Pac. Cty. v. Sherwood Pac., 17 Wn. App. 790, 567 P.2d 642 (1977), citing Wolk v. Bonthius, 13 Wn.2d 217, 124 P.2d 553 (1942), (A party to a contract cannot avail himself of nonperformance where the nonperformance is caused by his acts).*

28. There is no dispute that the applicant has had wide discretion to determine where and when to develop lands within the master planned community. By choosing to concentrate utilities, like significant sewer infrastructure, in some areas and not others at this point, they do not justify building only residential structures on this site without fulfilling the expressed intent detailed in the LUDR for the Specialty Retail District.

29. Impossibility of performance, which excuses a party's performance of a contract, is not the legal equivalent of subjective inability to perform. *Liner v. Armstrong Homes of Bremerton*, 19 Wn. App. 921, 579 P.2d 367 (1978). The doctrine encompasses both strict impossibility and impracticality due to extreme and unreasonable difficulty, expense, injury or loss. *Id., citing Oneal v. Colton Consol. School* Dist. *306,* 16 Wn. App. 488, 557 P.2d 11 (1976); *Scott Paper Co. v. Burlington Northern, Inc.,* 13 Wn. App. 341, 534 P.2d 1031 (1975); Restatement of Contracts § 454 (1932). *See also Cannon v. Huhndorf,*67 Wn.2d 778, 409 P.2d 865 (1966). The mere fact that a contract's performance becomes more difficult or expensive than originally anticipated, does not justify setting it aside. *Id, citing Westland Constr. Co., Inc. v. Chris Berg, Inc.,* 35 Wn.2d 824, 215 P.2d 683 (1950); *J.D. Harms, Inc. v. Meade,* 186 Wash. 287, 57 P.2d 1052 (1936); *McBride v. Callahan,* 173 Wash. 609, 24 P.2d 105 (1933); *White v. Mitchell,* 123 Wash. 630, 213 P. 10 (1923); Restatement of Contracts § 467 (1932).

30. It has long been recognized in Washington that when a party by their contract assumes an unqualified duty, they are bound to perform if possible, notwithstanding the occurrence of an unexpected, yet foreseeable event, against which they might have guarded in their contract. *Liner, citing J.D. Harms, Inc. v. Meade, supra; McBride v. Callahan, supra; White v. Mitchell, supra; Brown v. Ehlinger,* 90 Wash. 585, 156 P. 544 (1916).

31. Here, the applicant (Nor Am) committed itself to develop the site in accord with the intent and vision expressed in the Master Agreement. They did not condition their performance on financial participation by the Port of Kennewick, the City of Richland, or any other entity. Quite the opposite – because here, the Master Agreement includes specific language where Nor Am acknowledges that it has done a thorough feasibility analysis, and that the City makes no guarantees or warranties regarding the suitability or financial viability of development addressed in the Master Agreement. *(Master Agreement, Sec. 30.2).*

32. Although the applicant may have contemplated withholding development of a Specialty Retail Village in the Specialty Retail District until the City or some other entity provided financial support of some sort, they made no provision for the contingency that City or Port financial participation might not occur. The vision and intent of the Specialty Retail District as a unique area of special significance to the entire BMS community is a matter of contractual detail. *J.D. Harms, Inc. v. Meade, supra*.

33. If the use of the Specialty Retail District for commercial uses described in the Master Agreement and the LUDR was contingent on financial participation by the City or some other entity, this fact could have been expressed in the contract. By failing to condition their obligation to develop the Specialty Retail District in a manner that is consistent with its intent expressed in the Master Agreement and the LUDR, Nor Am assumed the risk that City or other funding sources would not be available to make projects more financially lucrative for the developer.

34. The Examiner recognizes that market conditions for various development projects change over time, and that denial of this project and awaiting a proposal that makes some effort to meaningfully fulfill the applicant's contractual responsibility to satisfy the clear intent of the Specialty Retail District might be more expensive or difficult at this moment. However, the applicant has not shown that their performance [satisfying the intent of the Specialty Retail District] is either impossible or economically impractical. This is even more so given that the term of the Master Agreement runs through 2035. There may be time to see the intent fulfilled. Obviously, the parties might agree on changes regarding the vision and intent for the area, but that is a contract issue, and not within the Examiner's jurisdiction. Many BMS residents expressed their desire to see the Master Agreement vision and intent fulfilled, as that was a large reason why they chose to purchase homes in the community.

Intent of Specialty Retail District, as specified in the LUDR.

35. As noted in the Remand Order, for this application, there is also insufficient evidence in this record to demonstrate that the proposed plat in any way fulfills the "intent" of the BMS Special District where it is located, specifically the Specialty Retail District (BMS-SD-SR).

36. For example, the LUDR for all development proposals in the BMS Specialty Retail District includes the following passages, that are among many that demonstrate how this pending application has not adequately addressed whether and how it complies with all provisions of the LUDR, including without limitation, how it fulfills the specific "intent" to be considered for all projects in the Specialty Retail District

> **BMS-SD-SR District. The Special District - Specialty Retail** is intended to be an area for commercial activity that provides an attraction for local, regional and state-wide visitors by accommodating the growing interest in local and regional agricultural products, in particular the state wine industry. It allows wineries and wine making, other retail and commercial, as well as hospitality uses and services. It is intended to develop with an integrated site and amenity design in order to become a community gathering place with its own distinct style. *(LUDR Sec. 1.F, Subsection 1.f.*
>
> **BMS-SD-SR: SPECIALTY RETAIL**
>
> The Specialty Retail Special District is intended to support the growing interest in local and regional agricultural products, in particular the local wine industry. *(LUDR, part of Sec. 2.A).*
>
> Note: Special Districts are not regulated by Building Type. See Section 4 for District intent and standards. See also 8.C for Common Design Standards applicable to all Districts. *(LUDR, Sec. 2.D).*
>
> Section 4 identifies the standards and requirements for each Special District within Badger Mountain South. *(Sec. 4, Special District Standards, preface at index, on page 4-1).*
>
> **4.A INTRODUCTION.** This section of the LUDR identifies the Special District development standards. Special Districts are unique areas that by intent, function, disposition or configuration play an important role in establishing the vision of the Badger Mountain South community. (emphasis added).

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The Special Districts are identified in Section 2.B – Regulating Plan for Land Use and Urban Form, with the following color-legend:

Special District - Specialty Retail (BMS-SD-SR)
Special District - Commercial Mixed-Use (BMS-SD-CMU)
Special District - Destination Retail (BMS-SD-DR)

Because of the unique nature of the Special Districts, development within these areas is guided by the intent, guidelines and/or standards as follows for each District. (emphasis added).

Although the Special Districts are not regulated by Building Types, the Common Design Standards in Section 8.C are applicable to these Districts.

(LUDR, Sec. 4.A, Introduction).

4.B.1. SPECIAL DISTRICT - SPECIALTY RETAIL INTENT

The Special District - Specialty Retail (BMS-SD-SR) is intended to support and provide development opportunities for the growing interest in local and regional agricultural products, in particular the local wine industry. As such it serves both the City of Richland as well as the region.

It is also intended to:

1. Provide a gathering place for group events, festivals and other community-wide activities;
2. Provide sites for: vineyards, wine caves, wineries, tasting rooms, wine making, other specialty brewing and craft distilling, the sale of other agricultural-related products, education, retail and hospitality that support this focus; and
3. Showcase innovative sustainable design features in both building and site design.

(LUDR, Sec. 4.B.1).

37. While some comments in the record generally indicate that the applicant may be under the impression that previous plat approvals in the same district should serve as a basis to justify this application, which completely ignores the "intent" of projects in the Specialty Retail District, such an assumption would be a mistake. Even if previous plat approvals did not focus on some provisions in the LUDR, such a circumstance does not excuse the requirement to comply with applicable LUDR provisions in any subsequent application(s).

38. Based on well-established common law, the proper action on a land use decision cannot be foreclosed because of a possible past error or failure to apply or enforce a provision of applicable development requirements. The BMS LUDR provisions and their full effect should not be forfeited by the action or inaction of any staff member or government official that may have been in disregard or oversight of a City code section or LUDR provision. The public has an interest in zoning that cannot thus be set at naught. (*See* analysis provided in *Dykstra v. Skagit County*, 97 Wn. App. 670, 985 P.2d 424 (Div. 1, 1999), petition for rvw. denied, 140 Wn.2d 1016, 5 P.3d 8 (2000); citing *City of Mercer Island v. Steinmann*, 9 Wn. App. 479, 483, 513 P.2d 80 (1973), and *Buechel v. Department of Ecology,* 125 Wn.2d 196,

211, 884 P.2d 910 (1994). The Washington Supreme Court even applied this rationale in the context of water rights, where the Department of Ecology originally acted ultra vires in measuring a water right, it did not act arbitrarily and capriciously in abandoning an unlawful practice and switching to new practice. *See Department of Ecology v. Theodoratus*, 135 Wn.2d 582, 957 P.2d 1241 (1998).

39. With respect to this application, the intent language for the Specialty Retail District is elevated in its significance based on facts in this record, that establish how the 13+ acres covered by the proposed plat are likely to be the last truly vacant portions of land in the BMS-SD-SR "Specialty Retail" District of the greater BMS master planned community. To date, the property owner and primary developer of properties in the Specialty Retail District has yet to present an application for any proposal that would directly achieve the intent for such district, as set forth in Sec. 4.B.1 of the LUDR.

40. Approving a standard townhouse project as proposed, that appears to be substantially absent of any design features or amenities listed in the "intent" section of the LUDR (Sec. 4.B.1), based on arguments from the applicant that such intent language should not be applied anymore for the special district where it is located, would not be in the public interest.

41. Again, the LUDR is part of a Contract. While it may include provisions addressing intent as well as lists of allowed uses, building types, and the like, all of the provisions are part of the same contract. The intent and allowed uses should apply in parallel with one another. In this instance, the applicant is proposing to swallow the intent fully with a single residential use absent any other items intended for the Specialty Retail District. See LUDR, Sec. 1.F, 1.f, and Sec. 4.B.1.

Intent of the Specialty Retail District has not Changed.

42. There is no dispute that the applicant, Nor Am, has requested and received approval of numerous amendments to the LUDR since it was first adopted in 2010. However, an exhaustive review of all resolutions and public records addressing amendments to the LUDR establish that the City Council has never adopted any changes to the language addressing the very specific Intent for the Specialty Retail District.

43. A legislative body, including a City Council, is presumed to be familiar with its prior enactments and interpretations of same.[5] And, where a legislative body leaves an enactment unchanged in the face of an official decision or action interpreting or applying such enactment, courts can conclude that if the legislative body wanted to change terms of its

[5] *Leonard v. City of Bothell*, 87 Wash. 2d 847, 853 (1976); *State v. George,* 161 Wash. 2d 203, 211, 164 P.3d 506, 510 (2007); *State v. Ose,* 156 Wash. 2d 140, 148 (2005).

enactment it would have expressly amended relevant language to do so rather than leave it unchanged.[6]

44. Every time the LUDR provisions addressing the Badger Mountain community have been amended – in 2012, 2014, 2015, and 2016 – the language re: "intent" in the Specialty Retail District has never changed. *(See summary of LUDR amendments described in Ex. 25, and the four Resolutions included as part of Ex. 26).* The same is true for the Master Agreement itself, which was amended and restated in 2015, and amended in 2017, always leaving the exact same language addressing the City's intent and vision for the Specialty Retail District in the Badger Mountain South community. If the City Council meant to abandon or change its intent, it could have done so. It never has.

45. Based on the Richland City Council's actions since at least 2012, essentially ratifying, confirming, and moving forward with language in the LUDR expressing a very specific intent for development in the Specialty Retail District, that the applicant now seeks to ignore, the Examiner finds and concludes that the City Council intends for proposals in the Specialty Retail District to fulfill language included in LUDR Sec. 4.B.1, Specialty Retail Intent, and not simply include dense residential housing preferred by Nor Am, to the exclusion of development opportunities that accomplish specific intent found in Sec. 4.B.1.

46. Because the City Council has repeatedly acted in a manner that leaves the Specialty Retail District Intent language unchanged, in the Master Agreement as well as the LUDR, as well as the Remand Order interpreting and requiring fulfillment of the Intent language found in the LUDR, the Examiner finds and concludes that if the city council wanted to change the intent of the LUDR, then it would have expressly amended the LUDR rather than leave the specific intent for the Specialty Retail District unchanged. See *Friends of Snoqualmie Valley v. King Cnty. Boundary Review Bd.,* 118 Wash. 2d 488, 496-97 (1992). Staff and the Examiner do not hold legal authority to amend contracts, codes, or policies, so it is in the public interest to accept the words of intent for what they say and mean, instead of ignoring them, which would be to the detriment of Badger Mountain residents who provided many written comments and public testimony, hoping to someday see the vision and intent of their master planned community fulfilled, instead of abandoned via a preliminary plat decision.

47. The remedy is not to abandon the City's long-standing intent language for the Specialty Retail District, as written in the Master Agreement and the LUDR – but would be instead to seek a legislative change to such instruments. See *Friends of Cedar Park Neighborhood v. City of Seattle,* 156 Wn. App. 633, 234 P.3d 214 (Div. I, 2010). The City has broad discretion to consider, approve, or decline such requests. The overwhelming number of written

[6] *Friends of Snoqualmie Valley v. King Cnty. Boundary Review Bd.,* 118 Wash. 2d 488, 496-97 (1992).

comments and sworn testimony from homeowners in the BMS community seek to see the intent and vision of the Master Agreement and LUDR fulfilled instead of abandoned.

Master Agreement Consistency Recommendation is not a rubber stamp.

48. As explained in the Staff Report, any plat application in the BMS community requires a Master Agreement Consistency Recommendation (MACR) from the Master Plan Administrator for the Badger Mountain South master planned community. Lawrence J. White is the Master Plan Administrator. Mr. White is listed as the Governor and Registered Agent for the applicant in this matter, Nor Am Investment, LLC, on the Washington Secretary of State's corporate registration filings. There is no dispute that Mr. White recommended approval of this pending plat application, finding that it meets "the intent of the Special District development standards" – without ever mentioning the express language used in LUDR Sec. 4.B.1, captioned "Special District – Special Retail Intent." *(Ex. 15).* Given his position as the owner, applicant, and Master Plan Administrator, it is not unreasonable to find that some form of bias may be in play with respect to the recommendation issued for this project.

49. Mr. White's recommendation for this townhouse-only proposal seeks to excuse its fulfillment of the specific intent found in LUDR Sec. 4.B.1 for the Specialty Retail District by arguing that Section 16 of the Master Agreement "outlines how the original intent (LUDR Section 4.B) of the Specialty Retail District was created" and noting steps that Nor Am has taken fulfill such intent. He claims that Nor Am has tried unsuccessfully to secure partners for a wine village "in the 8 years since the Port of Kennewick and the City of Richland backed out of their commitments in the Master Agreement." *(Ex. 15).*

50. As noted elsewhere in this Decision, the Master Agreement has at least a 20-year term, expiring in 2035, and includes specific language where Nor Am acknowledges that it has done a thorough feasibility analysis, and that the City makes no guarantees or warranties regarding the suitability or financial viability of development addressed in the Master Agreement. *(Master Agreement, Sections 5.1 and 30.2).* Given such language in the contract, the Examiner finds and concludes that Mr. White's implication that "commitments" were made and somehow their failure to come about serves to legally modify the "original intent" for the Specialty Retail District, as found in LUDR Sec. 4.B, including without limitation Sec. 4.B.1, is contrary to the contract itself, unsupported by a preponderance of evidence, and without merit. The parties to the Master Agreement are the City and Nor Am, no others, and Nor Am acknowledged that it undertook a feasibility analysis, and the City made no guarantees or warranties regarding financial viability in the contract.

51. The applicant essentially argues that because there are no partners to invest in a specialty retail village concept in the Specialty Retail District, there is nothing further for it to do other than build homes on the land. Thus, the applicant appears to conclude, no

obstacles preclude developing the entire site, i.e. the last part of the Specialty Retail District, with homes instead a mix of uses that might fulfill the intent of the district.

52. To accept the applicant's argument would require the Examiner to close his eyes to the obvious interrelation of this project upon the entire BMS community. Development in the BMS area is described as having a very specific vision. The question, therefore, is whether development in the BMS community should be authorized to occur in a manner than prevents fulfillment of the intent for the Specialty Retail District. The frustrating effect of piecemeal residential development allowed to occupy the last available Specialty Retail land compels the Examiner to find and conclude that this application is not in the public interest, and the application should not be allowed to ignore the intent of the special district where it would be sited.

53. The coercive effect that construction of this residential-only project could negatively impact other parts of the BMS community is obvious. If the current entirely residential townhouse-only construction activity is allowed to occur on the last remaining vacant 13-acres designated to fulfill the intent of the Specialty Retail District, it is obvious the entire BMS community will be affected. There is no other part of the BMS area where the same intent is envisioned.

54. The City Council, in approving the BMS Master Agreement contract, sought to see the intent of such agreement fulfilled, recognizing that it may not occur overnight, given its term that runs through 2035.

55. Numerous public comments credibly explained how perhaps a thousand acres or more remains undeveloped and available for purely residential townhouse proposals like the one involved in this application. There is no urgency for any exclusively residential development on this site that would in any way excuse the applicant's obligation to establish how the project fulfills the intent of the Specialty Retail District where it is located.

56. Approving this application would lower the public's confidence in City planning instruments and contracts. To permit the piecemeal development preferred by the applicant – who wears two hats, sometimes as an applicant/developer and as the Master Plan Administrator tasked with issuing a recommendation for every plat application in the BMS Community – would lower the detailed and very specific intent and purposes expressed in the BMS Master Agreement and the LUDR to the status of mere aspirations. The result would be frustration rather than fulfillment of the parties' mutually negotiated and clearly expressed intent that appear in the BMS Master Agreement and terms of the LUDR. This project will have a significant effect upon the entire BMS Master Planned Community. "Special Districts are unique areas that by intent, function, deposition or configuration plat an important role in establishing the vision of the Badger Mountain South community." LUDR, Sec. 4.A.

57. Based on the record as a whole, and contract language found in the Master Agreement and well as the LUDR, the Examiner finds and concludes that it is in the public interest to consider the City's specific intent for the BMS Specialty Retail District in deciding whether this application should be approved as submitted.

58. While deference is due to the recommendations and determinations made by Staff and the Master Plan Administrator, substantial weight, like judicial deference to agency decisions, is neither unlimited nor does it approximate a rubber stamp. See *Swinomish Indian Tribal Cmty. v. W. Wash. Growth Mgmt. Hearings Bd.*, 161 Wn.2d 415, 435 n.8, 166 P.3d 1198 (2007); and *Concerned Friends of Ferry County v. Ferry County,* 191 Wn. App. 803, 365 P.3d 207 (Div. II, 2015).

59. In this application, the Examiner finds and concludes that the Master Agreement and the LUDR, and the record taken as a whole, mandate that the Intent of the Specialty Retail District must be considered and that failing to apply the Intent for this application would be a mistake. It would be clearly erroneous to find that the Intent language found in Sec. 4.B.1 should not apply to this application.

60. An administrative determination will not be accorded deference if the agency's interpretation conflicts with the relevant statute." *See Cowiche Canyon Conservancy v. Bosely*, 118 Wn.2d 801, 815, 828 P.2d 549 (1992). By analogy, in this matter, the Master Agreement includes very specific language expressing the parties' intent as to what type of development should occur in the Specialty Retail District; and the LUDR is even more specific as to the type of development opportunities should be included in such District. The Examiner is without authority to erase these provisions from any of these documents, adopted and approved by the Richland City Council after extensive public processes over the years. Further, this applicant has had ample opportunities to raise the same arguments it raises here, but it has never requested that the City modify the "Specialty Retail District" Intent language.

61. Based on the entire record taken as a whole, the Examiner finds and concludes that the consistency recommendations and determinations issued for the application were in error – to the extent they deemed the proposal to be consistent with intent language applicable to projects in the Specialty Retail District. This application is not consistent with the Intent language in the LUDR for development proposals in the Specialty Retail District. As such, the application is not in the public interest and must be denied.

62. Because the weight of the evidence shows that the application is not in the public interest, any recommendation of approval from the Master Plan Administrator or Staff is clearly erroneous.

63. The credibility of the master agreement compliance recommendation for this project is greatly diminished by the two hats worn by the Master Plan Administrator, as both the

applicant and the author of the recommendation included in the record. At least one BMS homeowner expressed concerns about such possible bias and requested an independent review. This public hearing process provides a bit of a check, as explained above, as deference to recommendations does not mean the decision-maker gives such recommendations a rubber stamp.

64. The Examiner has processed multiple applications for projects in the BMS community, most all of which include a master agreement consistency recommendation from Mr. White, as the Master Plan Administrator.

65. While all other findings and conclusions in this Decision stand as written without need to rely upon or receive support from this finding, the Examiner takes official notice of a previous recommendation issued by the Master Plan Administrator in 2019, where Mr. White expressly noted that the BMS Special District-Specialty Retail area "is intended to support and provide development opportunities for the growing interest in local and regional agricultural products", citing Sec. 4.B in the LUDR, and went on to acknowledge that such area "does not allow for easy conversion to housing". That letter is dated January 8, 2019, from the applicant, Lawrence J White, Master Plan Administrator for the Badger Mountain South master planned community, initially denying the request for a Master Agreement Consistency Recommendation (MACR) for the original "Goose Ridge I" application, first named 'Monson Family Estates', [*plat later revised and approved] included in the Goose Ridge hearing file, File No. S2018-104, as Ex. 14, and reads in relevant part as follows:

> There are several solutions to [the applicant's] density issue. One would be to put housing into the portion of Veneto Villaggio that falls within West Vineyard. This is problematic for several reasons. Most of the West Vineyard portion of Veneto Villaggio is already developed as housing, a vineyard that is required to stay green space, or approved as the above mentioned 4-plex plat. The remaining area is a BMS Special District-Specialty Retail area and "is intended to support and provide development opportunities for the growing interest in local and regional agricultural products" (4.B in the LUDR). This area is part of a Binding Site Plan that does not allow for easy conversion to housing and also it is not owned by Monson Development making it impossible to require Monson Development to achieve the minimum count on property not owned. *(emphasis added).*

66. In contrast with the previous letter issued for the Monson Development proposal, the applicant is now essentially claiming that the Specialty Retail District can easily be converted to housing-only.

67. The credibility of the consistency recommendation letter for this application (Ex. 15) is also diminished by the fact that it fails to ever address the specific "Specialty Retail Intent"

language found in Sec. 4.B.1 of the LUDR. Instead, it cherry picks very general language from other, more general sections of the LUDR, and then focuses on the use, without seeking to address how the use fulfills the "Specialty Retail Intent" provisions in the LUDR. Given how the consistency recommendation letter (Ex. 15) is phrased so as to omit any explanation as to how the application fulfills the "Specialty Retail Intent" language found in Sec. 4.B.1 of the LUDR, the Examiner finds and concludes that such recommendation is not credible.

68. There is no dispute that multiple BMS homeowners submitted comments generally expressing concerns that they are not seeing fulfillment of the BMS Master Agreement vision, and that some feel they were somehow misled by BMS promotional materials from realtors, developers, or others. Given such evidence, it was especially disappointing to hear comments from the applicant's hearing representative to the effect that houses in a wine village are hard to sell without grapes, as one reason why the developer planted a 7-acre vineyard in the area, going on to say something to the effect that is it hard to sell lakefront property without a lake. The applicant's sincerity and credibility in arguing how it has acted in good faith to fulfill the Master Agreement is diminished by such remark. Essentially, the remark implies that a 7-acre vineyard should be sufficient to demonstrate fulfillment of the Master Agreement and LUDR intent language. Such a position is not credible and runs contrary to specific language in the LUDR listing a number of amenities – other than a vineyard – like gathering places, retail venues, sites for sale of agricultural-related products, that are intended for inclusion in the Specialty Retail District under LUDR Sec. 4.B.1. The applicant's take this or leave it townhouse-only proposal does nothing to quell the "bait and switch" concerns expressed by many local residents.

69. Comments that may imply a fake lake is used to lure buyers to lakefront property, or by analogy a small plot of grapes is used to draw buyers to a supposed wine village community, places public trust in jeopardy, and substantially undercuts the credibility of the applicant's arguments and testimony seeking to show good faith in how it has approached development proposals within the BMS master planned community.

70. Based on the Record provided to the Examiner, the applicant has not met its burden of proof to demonstrate that its preliminary plat application merits approval.

71. The applicant's proposed plat is not consistent with applicable provisions of the LUDR and cannot be approved.

72. Based on all evidence, exhibits and testimony in the record, the undersigned Examiner specifically finds that the proposed subdivision is not in the public interest.

73. A different application for a project that fulfills all applicable provisions of the Master Agreement and the LUDR for the Specialty Retail District could be approved.

VI. CONCLUSIONS OF LAW.

1. Based on the Findings as summarized above, the undersigned examiner concludes that the proposed plat is contrary to applicable City comprehensive plan policies (the Badger Mountain Subarea Plan), the BMS Master Agreement, and LUDR provisions, and cannot be approved.

2. As provided in RMC 19.60.095, captioned "Required Findings," no development application for a Type III permit, like this preliminary subdivision application, can be approved unless the decision to approve the permit application is supported by certain findings and conclusions, including without limitation, that: A. The development application is consistent with the adopted comprehensive plan and meets the requirements and intent of the Richland Municipal Code; and C. The development application is beneficial to the public health, safety and welfare and is in the public interest. Based on all findings, the Examiner concludes that this application is not in the public interest.

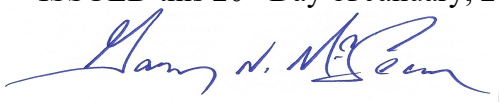
3. Because the Villa Vista Townhome project is not designed in compliance with Master Agreement and LUDR provisions that apply to the property at issue, and because it is not in the public interest, it cannot be approved.

4. Any finding or other statements in previous or following sections of this document that are deemed Conclusions of Law are hereby adopted as such.

VII. DECISION.

Based upon the preceding Findings of Fact and Conclusions of Law, evidence presented through the course of the open record hearing, all materials contained in the contents of the record, and the Examiner's site visits to the area, the undersigned Examiner respectfully DENIES the *"Villa Vista Townhomes"* Preliminary Plat application.

ISSUED this 20th Day of January, 2023



Gary N. McLean
Hearing Examiner

Notice of Rights to Request Reconsideration or Appeal This Decision

Reconsideration –

Sec. 2.22(a) of the Richland Hearing Examiner Rules of Procedure reads as follows:

> (a) The Hearing Examiner may reconsider a decision or recommendation on an application, if it is filed in writing within 7 calendar days of the date of issuance. Only parties of record have standing to seek reconsideration. Any request for reconsideration shall be served on all parties of record and to any party's designated representative or legal counsel on the same day as the request is delivered to the Hearing Examiner. The Examiner will seek to accept or reject any request for reconsideration within 3 business days of receipt. If the Examiner decides to reconsider a decision, the appeal period will be tolled (placed on hold) until the reconsideration process is complete and a new decision is issued. If the Examiner decides to reconsider a recommendation made to the City Council, the transmittal to the City Council shall be withheld until the reconsideration process is complete and a new recommendation is issued. If the Examiner decides to reconsider a decision or recommendation, all parties of record shall be notified. The Examiner shall set a schedule for other parties to respond in writing to the reconsideration request and shall issue a decision no later than 10 business days following the submittal of written responses. A new appeal period shall run from the date of the Hearing Examiner's Order on Reconsideration.

Appeal –

The hearing examiner's decision regarding this preliminary plat application shall be final, subject to judicial appeal in the time and manner as provided in RMC 19.70.060 and Ch. 36.70C RCW *(The city's final decision on land use application may be appealed by a party of record with standing to file a land use petition in Benton County Superior Court. Such petition must be filed within 21 days of issuance of the decision). See RMC 24.12.050(B).*

> **NOTE:** The Notice provided on this page is only a short summary, and is not a complete explanation of fees, deadlines, and other filing requirements applicable reconsideration or appeals. Individuals should confer with advisors of their choosing and review all relevant codes, including without limitation the city code provisions referenced above and the Land Use Petition Act (Chapter 36.70C RCW) for additional information and details that may apply.

GARY N. MCLEAN
HEARING EXAMINER FOR THE CITY OF RICHLAND
CITY HALL – 505 SWIFT BOULEVARD
RICHLAND, WASHINGTON 99352