

**SAN JUAN COUNTY  
HEARING EXAMINER**

**FINDINGS, CONCLUSIONS AND DECISION**

Applicant(s): Beaverton Ventures LLC; Stan Wong and Peggy Fong;  
Christopher and Cynthia Burke

Agent: Francine Shaw  
Law Office of Stephanie Johnson O'Day  
P.O. Box 2112  
Friday Harbor, WA 98250

File No.: PBSP00-12-0001

Request: Conditional Use Permit (CUP)

Parcel No: 351449101006

Location: Beaverton Valley Road one mile from Friday Harbor  
San Juan Island, WA

Summary of Proposal: Redivision of industrial parcel into 13 condominium units..

Land Use Designation: Rural General Use

Public Hearing Date: July ~~12~~<sub>11</sub>, 2012

Application Policies and Regulations: SJCC 18.70.090

Decision: The application is approved subject to conditions.

1 **BEFORE THE HEARING EXAMINER FOR THE COUNTY**  
2 **OF SAN JUAN**

3 Phil Olbrechts, Hearing Examiner

4 RE: Beaverton Ventures LLC  
5 Binding Site Plan  
6 PBSP00-12-0001

**FINDINGS OF FACT, CONCLUSIONS  
OF LAW AND FINAL DECISION**

7 **INTRODUCTION**

8 The Applicants have applied for binding site plan approval to divide a parcel of  
9 property within an existing business park into thirteen "airspace" condominium units  
10 granting exclusive surface use and development rights that constitute a division of  
11 land for subdivision purposes. The binding site plan is approved, subject to  
12 conditions.

11 **TESTIMONY**

12 Francine Shaw stated that the applicant is protesting having to submit an application for  
13 a binding site plan. They request that the project be dismissed based on the hearing  
14 examiner's rules. The hearing examiner should be concerned with whether a project  
15 conforms to the criteria of approval under an applicable ordinance. The applicant does  
16 not believe the binding site plan ordinance is applicable which gives the hearing  
17 examiner the authority to dismiss the project. The binding site plan is not applicable  
18 because there is an existing condominium unit (condo F) which was created through a  
19 binding site plan process in the 2000s. Currently, the applicant is attempting to divide  
20 the existing condominium unit into 13 smaller condominiums. There will be no land  
21 division in the process. The underlying land will be owned by the same people who  
22 own the entire unit. If there is no land division, then the application is not subject to  
23 RCW 58.17. A binding site plan was already approved for the existing condominium.  
24 The applicant has already recorded, under the applicable law (RCW64.34), a survey and  
25 declaration creating the condominiums. There would be no purpose for RCW 64.34 if  
all condominiums had to undergo a binding site plan process. The applicant has  
provided a detailed explanation of why RCW58.17 doesn't apply in their application  
materials. There has been a history established by the Community and Planning  
Development Department of not subjecting the creation of condominiums without land  
division to RCW58.17. A 2007 letter from Ron Hendrickson details a similar case that  
occurred regarding Orcas Golf Course. Condominium sites (airspace sites) were  
created for the construction of residences without the BSP in that 2007 case. Even if a  
basement is built, or airspace is used, the underlying land is still owned by the same  
property owners. Airspace condominiums are characterized by metes and bounds land  
description, until the structures are actually built. There is a metes and bounds land  
description, but that does not make it a lot.

1 Ms. Shaw testified that the prosecuting attorney's interpretation of the binding site  
2 plan's applicability to this project came after the prior Community Planning and  
3 Development Department decision in 2007. The attorney's interpretation is an "after-  
4 the-fact" policy. Thus, the project should be vested under the 2007 interpretation. In  
5 2007, the planning department issued their first interpretation. In 2009, the applicant  
6 filed the survey under RCW 64.34. In 2010, the planning department decided to change  
7 how they handled applications of this type. RWC58.17 is very specific and limits the  
8 type of cases in which a binding site plan can be used. The applicant understands San  
9 Juan County's wish to regulate condominiums, but an incorrect interpretation of  
10 RCW58.17 is not the method to go about providing this regulation. There are other  
11 "checks and balances" in county code which will ensure the property's impacts will be  
12 assessed. This property is located in the rural general-use district, thus when the  
13 condominiums are sold and developed it is very likely the owner of the condominium  
14 will have to apply for a conditional use permit to develop the land. Furthermore, there  
15 is a building permit process that will have to be followed. RCW58.17 notes that the  
16 county can have a binding site plan process, but this plan cannot be any more than what  
17 is allowed by state law. The county code goes beyond what is allowed by state law.  
18 San Juan County Code states that if any provisions of the SJCC conflict with provisions  
19 of RCW58.17, RCW shall prevail. She submitted the Strauss v. Woolley case about  
20 condominium creation as exhibit 17. In that case, a manufactured home park was  
21 purchased and divided into lots to build condominiums upon. In Strauss, lots were  
22 being created, but, in the Beaverton case, no lots will be created.

14 Mike Carlson testified that he originally developed the property and owns two of the  
15 lots. The property had 4 lots with a total of approximately 12 acres. Three of the lots  
16 became residential lots, and one lot became a business park lot that has a binding site  
17 plan. A stormwater system was created that included all of the property in the  
18 commercial zone. The stormwater system is based on the entire lot being impervious.  
19 The infrastructure was designed to be a class-A system (right now it is class-b). The  
20 sewage system was built to handle any water allocated to all of the lots. The county has  
21 challenged the ability of the sewer system to handle the build-ups. However, he noted,  
22 the water allocation is limited, thus controlling the amount of sewage despite multiple  
23 owners. He understood the applicants' plans for the lot when he sold them the property.  
24 Some uses may not even require water such as several condominium owners using one  
25 bathroom. The largest user was 175 gallons a day when a company was watering new  
plants (the number went down after several months). Even if a company that needed  
more water, such as a car wash, bought space, it would be the responsibility of the  
company to find, buy, and store any extra water it required. According to Mr. Carlson,  
the county previously told him that he could further subdivide the condominium units.  
He has done this with one unit, splitting it with the San Juan Community Theater. This  
divide happened within a building, but the theater is subject to the septic, paving, and  
other infrastructure constraints for the lot in which they own airspace.

1 Mary Stone, real estate attorney, stated that she has been creating airspace  
2 condominiums in San Juan County since 1990 when the Washington Condominium Act  
3 became effective. A binding site plan is not required for a condominium unless you are  
4 subjecting a portion of the parcel to the condominium regime. The memorandum  
5 written by the prosecuting attorney, Randy Gaylord, leaves out the phrase "a portion of  
6 a parcel." Prior to 1990, there was no provision for phasing, thus an amendment was  
7 added to RCW 58.17. The amendment stated that if a portion of a parcel was going to  
8 be subjected to a condominium regime then that is considered a land division. The  
9 Strauss case decision states that you must have a site plan if you are creating a  
10 condominium. However, having a site plan for every condominium would be  
11 redundant. An airspace condominium unit is not described as a metes and bounds  
12 description. Once a condominium unit has been created it is described by its unit name  
13 according to the declaration and survey map. Airspace condominiums have upper and  
14 lower boundaries and benchmark elevations, differentiating them from traditional  
15 condominiums. Additionally, they should not be described as lots because they are only  
16 units. The business park which the applicant's property is within has previously  
17 constructed a large building encompassing three units. A binding site plan was not  
18 required for this previous condominium divide. Even if these were single-family  
19 homes, there would be other checks and balances to ensure proper infrastructure and  
20 support (i.e. conditional use permits, building permits, etc.).

21 Christopher Burke stated that he and his wife are small-business owners who invested  
22 in Unit F four years ago. Two years ago they started the process of expanding their  
23 business on the property. The process has cost them 41,700 dollars. They have made  
24 many phone calls attempting to find out more information about the binding site plan  
25 requirement, but have been given no clear answers. They employ a dozen people on the  
island and would like to employ more; however, this process is wasting their money so  
they are not able to hire anyone.

Cynthia Burke testified that she and Christopher own 4 businesses in the community.  
The money they have spent on this long process was money they wanted to use to  
further expand their business.

Ms. Shaw read a written statement written by Peggy Fong and Stanley Wong, Ex. 19.  
According to Ms. Shaw, this is not a land division. Unit F was created through a  
binding site plan process as required by RCW58.17. RCW 64.34 provides a process for  
dividing existing condominiums into additional lots. An airspace condominium  
division is no different than creating condominiums in an apartment building. She  
stressed that the land will not be sold, only the airspace. The condominium has been  
approved through a binding site plan previously. Once the airspace is sold to various  
owners, conditional use permits will be required because of the rural-general use  
districting.

## EXHIBITS

1		
2	Exhibit 1	Preliminary binding site plan
3	Exhibit 2	Conditional use permit HE 22-03
4	Exhibit 3	Prosecuting Attorney's opinion dated April 12, 2010
5	Exhibit 4	May 5, 2010 Prosecuting Attorney opinion
6	Exhibit 5	Conditional use permit staff report 03CU0004
7	Exhibit 6	Staff report for file 04BSP002 and site plan
8	Exhibit 7	Letter from Francine Shaw dated July 18, 2011
9	Exhibit 8	Letter from Rene Beliveau dated August 5 , 2011
10	Exhibit 9	SJCC 18.10.030(B)
11	Exhibit 10	RCW 64.34.020(9)
12	Exhibit 11	Definition of Condominium and real property
13	Exhibit 12	RCW 64.34.200
14	Exhibit 13	Real estate treatise excerpt on Airspace
15	Exhibit 14	Unit F Declaration of Covenant
16	Exhibit 15	March 5, 2007 Hendrickson Administrative Interpretation
17	Exhibit 16	SJCC 16 18.70.090
18	Exhibit 17	Strauss v. Sedro Woolley
19	Exhibit 18	RCW64.34.28
20	Exhibit 19	Written Statement from Peggy Fong and Stanley Wong
21	Exhibit 20	SJCC 18.10.020
22	Exhibit 21	Hearing Examiner Rules and Procedures
23	Exhibit 22	6/20/12 staff report for PBSP00-12-0001

## FINDINGS OF FACT

### Procedural:

1 1. Applicant. Beaverton Ventures, Inc.; Stan Wong and Peggy Fong; Christopher  
and Cynthia Burke

2 2. Hearing. The Hearing Examiner conducted a hearing on the subject  
3 application on July 11, 2012 at 10:00 am in the Islander's Bank Annex, 225 Blair  
4 Ave., Friday Harbor.

5 **Substantive:**

6 3. Site and Proposal Description. The Applicants propose to subdivide a  
7 parcel of unspecified size into thirteen "airspace" condominium units that extend ten  
8 feet below and forty feet above the unit surface lines identified in the binding site  
9 plan, Ex. 1. Eight of the units will be about 1000 square feet each and five will be  
about 1250-1300 feet each. Each unit will have parking on the street side of each unit  
of an unspecified number of stalls. Access and walkways will be shared.

10 The application constitutes a "redivision" of a larger site plan application approved  
11 under 04BSP002. As shown in the site plan for 04BSP002, Ex. 6, the parent site plan  
12 was divided into eleven condominium units labeled A-K to be used for commercial or  
13 light industrial use. Three additional lots were designated for residential use. Unit F  
is the site of the current binding site plan proposal. It was approved for light  
industrial or storage use.

14 Prior to approval of 04BSP002 the general uses proposed for the site were also  
15 approved as a conditional use by the Hearing Examiner in 03CU004, issued July 11,  
2003.

16 The project site is located at an elevation of approximately 40 feet at Beaverton  
17 Valley Road to about 110 feet to the middle and south edges of the property. The  
north portion of the site slopes down toward Beaverton Valley Road.

18 4. Characteristics of the Area. Friday Harbor West Airport is located along  
19 the east boundary of the business park. Two 5-acre home sites lie to the west. The  
20 northern of these two residential sites is a multi-unit low-income housing  
21 development. There is a single-family residence to the south facing away from these  
parcels. Beaverton Valley Road borders the northern parcel line.

22 5. Adverse Impacts of Proposed Use. The record contains very little  
23 information on the impacts of the project or its infrastructure needs. Part of this lack  
24 of information is based upon the fact that the Applicants at this time are unable to  
25 propose any specific use or buildings and part is also attributable to the fact that the  
site has already gone through prior binding site plan and conditional use review. The  
staff reports and decisions of the prior binding site plan application and conditional  
use permit strongly suggest that the impacts and infrastructure needs of the prior  
binding site plan have been adequately addressed, but there is virtually no

1 information on whether the significant redivision of Unit F will create additional  
2 impacts and whether the infrastructure needs of the site of the whole are sufficiently  
3 addressed at this stage of development. Mike Carlson testified that the stormwater  
4 system for Unit F has been designed on the premise that the entire site will be  
5 composed of impervious surface and the staff report confirms this. The staff report  
6 notes at p. 3 that the proposal is providing urban governmental services, including a  
7 water system, sewage treatment facilities and a stormwater management system. The  
8 site plan, Ex. 1, identifies the areas assigned to parking and the number of stalls and  
9 landscaping will be determined at building permit review when more specific uses  
10 and buildings are proposed. The site plan for the parent binding site plan, Ex. 6,  
11 shows that the parent site plan included an extensive amount of open space and that  
12 this likely meets the open space requirements for the current application, although  
13 there is no specific information on how much open space is included and whether  
14 staff considers this open space to meet the open space requirements of the current  
15 application.

10 The information outlined above comprises all of the information submitted into the  
11 record on the impacts and infrastructure needs of the project. This information,  
12 especially the prior land use review for the area, strongly suggests that the proposal is  
13 adequately mitigated and will be served by adequate infrastructure. The extensive  
14 conditions of approval recommended by staff evidence a thorough staff evaluation  
15 that addresses most or all of the project impacts and infrastructure needs, but beyond  
16 the conditions themselves the information and evidence considered by staff in its  
17 evaluation was not submitted into the record.

15 The public and the examiner should have more information than this, so that it can be  
16 more particularly determined that all mitigation and infrastructure needs that must be  
17 addressed at this stage of review are incorporated into the final binding site plan.  
18 Preliminary utility plans should have been provided to show that there are locations  
19 available to place utility facilities that serve the proposal as a whole and to also  
20 generally identify what infrastructure needs to be constructed prior to the recording of  
21 binding final site plan as opposed to building permit issuance. Similarly a  
22 preliminary landscaping plan should have been provided to show what landscaping,  
23 such as perimeter screening, must be completed prior to the recording of the final  
24 binding site plan as opposed to building permit review. Mike Carlson testified that  
25 the County had issues with the adequacy of sewer service, but beyond this no  
information was provided as to what these problems were and whether they should be  
addressed at this stage of review. Public works should have provide some evaluation  
of the space set aside for vehicle circulation, concluding that the space is sufficient  
for roads that meet County standards and provide for safe circulation.

24 The conditions of approval delegate all of the missing analysis identified above to  
25 staff since the record does not contain enough information for the Examiner to make  
any meaningful determinations on these issues. Staff has probably already done most

1 if not all of this type of review, but since there is no indication of this in the record  
beyond the recommended conditions it cannot be presumed it has been done.

2 As conditioned by this decision, which includes further staff review that may or may  
3 not have already been done, the infrastructure needs of the project are met and  
4 impacts adequately addressed.

## 5 CONCLUSIONS OF LAW

### 6 Procedural:

7 1. Authority of Hearing Examiner. The hearing examiner is authorized to  
8 conduct hearings and issue final decisions on binding site plan applications involving  
more than four lots. San Juan County Code (“SJCC”) 18.80.020 Table 8.1.

9 The “greyest” issue of this case is whether the Examiner has the authority to address  
10 the Applicants’ contention that they are not required to apply for binding site plan  
11 approval for the sale of their condominium units. They argue that the creation of the  
units doesn’t involve a division of land that requires subdivision approval. At first  
12 blush this doesn’t appear germane to the issue before the Examiner, which is whether  
the application conforms to binding site plan criteria. The issue raised by the  
13 Applicants could be construed as a compliance issue, which comes into play if they  
14 try to sell the units without binding site plan or subdivision approval. However, it  
must be taken into account that the Applicants seek authorization to divide Unit F into  
15 airspace units that take up the space ten feet below ground and forty feet above. A  
binding site plan only authorizes the division of land. If the airspace units proposed  
16 by the Applicants don’t constitute a division of land as argued by the Applicants, the  
units could not be authorized by binding site plan approval. For these reasons the  
17 Examiner has the authority and must determine whether the condominium units  
proposed by the Applicants constitutes a division of land that can be approved by the  
18 binding site process.

19 As an aside it should also be noted that in addressing the land division issue the  
Examiner is not assessing the validity of San Juan County regulations. Arguably  
20 there are provisions in Chapter 18.70 SJCC that mandate that condominium  
developments go through binding site plan review. The Examiner has no authority to  
21 invalidate these code provisions. However, SJCC 18.10.020 provides that Chapter  
58.17 RCW shall supersede any conflicting provisions of Chapter 18.70 SJCC. Since  
22 the code itself provides that it is superseded by Chapter 58.17 RCW, the Examiner  
must delve into the requirements of state subdivision law.  
23

### 24 Substantive:

25 2. Zoning Designations. Rural General Use

1           3.           Whether the Proposal Constitutes a Division of Land for Subdivision  
2 Purposes. The condominium project proposed by the Applicants constitutes a  
3 division of land that requires subdivision or binding site plan approval.

4 As previously noted, a primary issue of concern for the Applicants is whether their  
5 proposed condominium project constitutes a division of land. The Applicants  
6 contend that the condominium units created by their proposal don't constitute a  
7 division of land and therefore no binding site plan is necessary to sell the units to  
8 third parties.

9 The significance of the land division issue is tied to the statutory definition of  
10 subdivisions and short subdivisions. RCW 58.17.030 requires subdivision review and  
11 approval for all subdivisions and short subdivisions. A subdivision and short  
12 subdivision are both defined by RCW 58.17.020 as "*a division or redivision of land*  
13 *into ... lots, tracts, parcels, sites, or divisions for the purpose of sale, lease, or*  
14 *transfer of ownership....*" (emphasis added). The Applicants contend an airspace  
15 condominium project doesn't divide land, because the underlying land is still held in  
16 the single ownership of the condominium declarants. Although the airspace units  
17 proposed by the Applicants takes up the space that extends ten feet below and forty  
18 feet above the areas identified on the condominium survey, the remaining property  
19 interest is still owned undivided by the declarants. The Applicants essentially  
20 contend that this remaining undivided property interest constitutes the "land" for  
21 purposes of the subdivision statutes and that since this interest isn't divided, no  
22 subdivision review is required.

23 There has only been one court opinion that has directly addressed the meaning of  
24 "land" within the subdivision statutes. *See Island County v. Dillingham Development*  
25 *Co.*, 93 Wn.2d 215 (1983). *Island County* involved the interpretation of RCW  
58.17.040(2), which exempted the division of "land" into five acre parcels or greater  
from subdivision review. The property owners in that case tried to use the exemption  
in a case where the bulk of the proposed lots were submerged under a lake. Island  
County argued that the submerged portions of the proposed lots couldn't be counted  
towards the five acre minimum lots size because those portions didn't qualify as  
"land". The Court resorted to a Black's Law Dictionary definition of land, which  
defined land as follows:

26           "*Land*" includes not only the soil or earth, but also things of a permanent  
27 nature affixed thereto or found therein, whether by nature, as water, trees,  
28 grass, herbage, other natural or perennial products, growing crops or  
29 trees, mineral under the surface, or by the hand of man, as buildings,  
30 fixtures, fences, bridges, as well as works constructed for use of water,  
31 such as dikes, canals, etc.

32 92 Wn.2d at 224.

1 From this definition the Court concluded that “land” includes submerged lands.

2 Although the *Island County* case doesn’t directly address whether the Declarant’s  
3 remaining interest constitutes the “land” for purposes of the subdivision statutes, it  
4 does show that the term is loosely defined such that within those broad parameters  
5 public policy considerations and corresponding legislative intent plays a  
6 determinative role. On its face the definition certainly doesn’t compel the definition  
7 advocated by the Applicants. The fact that a condominium interest isn’t defined by a  
8 metes and bounds legal description, as testified by Mary Stone<sup>1</sup>, is of no consequence  
9 in this broad definition. The units created by the Applicants transfer exclusive  
10 ownership and development rights of surface soils and buildings up to 40 feet. One  
11 would be hard pressed to argue that this doesn’t constitute a transfer of ownership in  
12 “land” as contemplated by the definition employed by the *Island County* court.

13 The policy basis and legislative intent of the subdivision statutes makes it very clear  
14 that “land” is being divided under the subdivision statutes with “bare ground”  
15 condominium units as proposed by the Applicants. Washington subdivision statutes  
16 have been used as means of ensuring adequate infrastructure for new development  
17 since 1937. Under these subdivision statutes, no division of land is authorized unless  
18 a city or county can make a finding that adequate infrastructure is available or will  
19 be made to serve the subdivision and that the public health, safety and welfare is  
20 served by the subdivision. Although there is no case law on the issue, over the years  
21 it has become accepted that a division of land doesn’t incorporate multi-family  
22 structures (recall that subdivisions include the leasing of portions of land), because  
23 that involves the division of a building as opposed to its land (the *Island County*  
24 definition notwithstanding). As a consequence, conditional use permits and site plan  
25 review are used to mitigate the impacts of multi-family and like structures. The  
combination of subdivision/conditional use/site plan review remains the cornerstone  
of addressing the infrastructure needs and impacts created by new development.

18 The first condominium statutes were adopted in 1963. If the Applicants’ position is  
19 to be accepted, in authorizing condominiums the legislature concurrently intended to  
20 exempt condominium projects from any public review or impact assessment or  
21 mitigation. Ms. Stone at hearing acknowledged that a “bare ground” condominium  
22 project could be composed of detached single-family residences. In short, a project  
23 composed of hundreds of single family homes could be structured as a condominium  
24 and thereby completely avoid any subdivision or binding site plan review. Even  
25 though the impacts on the community could be identical to those of a subdivision

---

<sup>1</sup> In her testimony, Ms. Stone raised an interesting point that the approval of residential developments under the binding site process authorized by RCW 58.17.040(7) is limited to situations where a condominium project only takes up a portion of a parcel of property. This may preclude the binding site plan approval of residential divisions of land that take up the entirety of a parcel and in those cases only subdivision review would be allowed. This issue need not be addressed in this application because RCW 58.17.040(4) and SJCC 18.70.090 authorizes binding site plan review for industrial subdivisions.

1 with the same number of homes, under the Applicants' interpretation the filing of a  
2 declaration of covenant and compliance with the condominium laws would be  
3 sufficient in itself to move forward to building permit applications. A declaration of  
4 covenant and the laws associated with it, of course, do not address impacts to the  
5 surrounding community and do not provide an opportunity for public and government  
6 review of development projects that could have a profound impact on a community.

7 It is patently absurd to conclude that the legislature intended in 1963 that the  
8 condominium statutes designed to regulate form of ownership would substitute for or  
9 supersede the public land use review of land divisions. In terms of infrastructure  
10 needs and mitigation of impact, there is no justifiable reason to distinguish between a  
11 property division that transfers an entire fee interest in a parcel of property to that  
12 which is "limited" to "airspace", which in reality provides for exclusive rights to  
13 develop and occupy a segment of land. Viewed in the context and the purposes of the  
14 subdivision statutes, there is no question that the transfer of "airspace" including bare  
15 ground to a third party is a division of land that necessitates subdivision review.

16 The premise that condominium laws do not substitute for land use review was well  
17 stated in Washington Practice, as follows:

18 *Around the country the question has arisen about whether land-use  
19 regulations, chiefly zoning, apply to condominiums in the same way they would  
20 apply to similar structures, usually rental apartment houses. In appearance, an  
21 apartment house is not apt to be distinguishable from a residential  
22 condominium; the essential difference is in the method of ownership. Zoning  
23 ordinances are likely to speak of 'multi-unit' dwellings or 'apartments' but are  
24 not likely to speak specifically of condominiums. Where the question has  
25 arisen, the courts have held that zoning for apartment houses applies to  
26 similarly configured condominiums. **Their reasoning, which is based upon  
27 sound zoning law principles, is that zoning speaks to the kind of use made  
28 of land, not to its form of ownership.** The Uniform Condominium Act adopts  
29 the same rule, that 'a zoning, subdivision, building code, or other real property  
30 law, ordinance or regulation may not ... impose any requirement upon a  
31 condominium which it would not impose upon a physically identical  
32 development under a different form of ownership.'*

33 Wash Practice, Volume 18, Section 12.7 (citations omitted)(emphasis added).

34 Related to this issue, the Applicants also argued at hearing that subjecting the  
35 proposed condominiums to binding site plan review would violate RCW  
36 64.34.050(1), which as noted in the Washington Practice excerpt above prohibits a  
37 municipality from imposing requirements upon a condominium project that it  
38 wouldn't impose upon a physically identical development under a different form of  
39 ownership. As concluded above, the Applicants proposal involves the division of  
40 land. Any other developer who didn't employ the condominium process but who also

1 proposed to divide his land for purposes of developing a physically identical  
2 industrial park would also be required to go through the subdivision or binding site  
3 plan process. Requiring a binding site plan of the Applicants is necessary to ensure  
4 equal, not disparate, treatment.

5 The Applicants have testified extensively about the added cost and redundancies  
6 involved in another binding site plan review. It is true that much of the infrastructure  
7 needs of the project have been addressed at the prior binding site plan review and  
8 there is little left to review under the current submission. The Applicants could have  
9 avoided this review entirely by incorporating their 13 newly proposed airspace units  
10 into the previously approved binding site plan application. The County may be able  
11 to adopt regulations that simplify the review of binding site plan "re-divisions" or  
12 binding site plans of this moderate size, but beyond this state law understandably  
13 requires some level of review whenever new lots of record are proposed.

14 4. Permit Review Criteria. The applicable permitting criteria for this  
15 application are elusive. Typically, a binding site plan ordinance provides that in order  
16 to acquire approval the applicant must establish (1) conformance to the zoning code;  
17 (2) conformance to the comprehensive plan; (3) conformance to some subdivision  
18 design standards; (4) adequacy of infrastructure; and (5) no adverse impacts. These  
19 wide ranging standards enable a county or city to apply whatever site development  
20 standards and policies may be applicable to a proposal. The SJCC provides no such  
21 list of review criteria. The staff appear to take the position that all of these standards  
22 impliedly apply to binding site plan review, since the staff report applies whatever  
23 development standard or comprehensive plan policy is implicated by the proposal.

24 The Examiner's authority to rule upon or condition a binding site plan application,  
25 however, is strictly limited to what standards the code states must be met to secure  
binding site plan approval. The closest provision that can be found that qualifies as a  
review criteria is SJCC 18.70.090(B), which identifies the design and development  
standards applicable to binding site plan review. Most notably, although SJCC  
18.70.090(B) requires conformance to a wide range of zoning code and subdivision  
development standards, it doesn't authorize the application of all of them.  
Consequently, the binding site plan review in this decision will be limited to  
application of the standards expressly authorized by SJCC 18.70.090(B). One of  
those standards is the subdivision design standards of SJCC 18.70.060, so the  
conclusions below will address several provisions from the subdivision code. All  
applicable development standards will be quoted in italics below and applied via  
corresponding conclusions of law.

**SJCC 18.70.090(B)(1):** *The project as a whole shall comply with the density,  
dimension and open space standards of SJCC 18.60.050, and the subdivision design  
and development standards of SJCC 18.70.060. Individual lots created by the binding  
site plan are not required to meet these standards in relation to other lots within the  
area of the binding site plan.*

1 5. The criterion is met. As to compliance with 18.60.050, there are few density,  
2 dimension and open space standards that apply at this stage of review. No density  
3 standards apply because there is no residential development. There is apparently no  
4 minimum lot size that applies within the RGU zone. No specific buildings have yet  
5 been proposed so it is not possible at this stage of development to assess compliance  
6 with setbacks and impervious surface standards. It appears that the 30% open space  
7 requirement has already been met in the binding site approval that create Unit F.  
8 Given that staff finds compliance with the open space requirement and the apparent  
9 compliance with this requirement at prior binding site plan approval, compliance is  
10 found at this stage of review as well. Compliance with SJCC 18.70.060 is addressed  
11 with individual conclusions of law below.

8 **SJCC 18.70.090(B)(2):** *Unified Site Design. The binding site plan shall ensure that  
9 the collective proposal functions as a single site with respect to, but not limited to, lot  
10 access, interior circulation, open space, landscaping; water, sewer and drainage  
11 facilities; facility maintenance and parking.*

11 6. There is only a nominal amount of information addressing this criterion in the  
12 record. It is one of the most important factors to consider in review of the binding site  
13 plan application. The main point of the criterion is to assure that the site is considered  
14 as a whole when considering factors such as landscaping and utilities. Delegating this  
15 function to individual building permit review may not work in all instances. For  
16 example, if landscaping is required along the perimeter of the property to shield the  
17 industrial uses from adjoining residential uses, it may not be possible to completely  
18 landscape the perimeter on a building permit by building permit basis without  
19 illegally requiring a lot owner to landscape more than their fair share of the perimeter.  
20 The same situation applies with utility trunk lines – it may not be possible to require  
21 the first building permit applicant of the site to extend a utility trunk to the site that is  
22 sized to serve the entire binding site plan since that would significantly exceeds the  
23 need created by the individual permit applicant. As discussed in Finding of Fact No.  
24 5, some preliminary design information is necessary to ensure that infrastructure  
25 requirements are properly allocated between binding site plan and building permit  
review.

21 Staff has probably concluded that the prior site plan approval has already addressed  
22 most of the infrastructure needs of the development in conjunction with what can be  
23 addressed at the building permit stage. It is recognized that the conditional use permit  
24 for this project required the submission of parking and landscaping plans with the  
25 parent binding site plan application. Staff may have relied upon information such as  
this to conclude that no further plans are necessary. There is no way of knowing if this  
is the case because no such prior plans have been submitted into the record of this  
application and staff and the Applicant make few references to prior review.  
Normally a binding site plan application with such little information on utilities,  
landscaping or other required improvements would be denied. However, given that

1 this review is largely redundant of the prior site plan approval, the review of this issue  
2 will be delegated to staff through the conditions of approval.

3 **SJCC 18.70.090(B)(3):** *The binding site plan may provide for sharing of open space,*  
4 *parking, access, and other improvements among contiguous properties subject to the*  
5 *binding site plan.*

6 7. The open space exterior to Unit F is shared with contiguous properties and the  
7 "T" formation of the interior road suggests a connection to the adjoining lot to the  
8 south.

9 **SJCC 18.70.090(B)(4):** *When a binding site plan is being considered concurrently*  
10 *with another land use or development application for the site, the administrator will*  
11 *incorporate all conditions and limitations imposed on the concurrent application into*  
12 *the binding site plan.*

13 8. The current application is not being considered concurrently with any other  
14 applications, but nonetheless the prior binding site plan approval (04BSP002) as well  
15 as the conditional use permit (O3CU004) that authorized the uses of the site included  
16 conditions necessary to satisfy the criteria of this application. For this reason, the  
17 conditions of approval will incorporate the conditions of approval of the conditional  
18 use permit and prior binding site plan to the extent applicable.

19 **SJCC 18.70.060(B)(2):** *Clustering. The administrator shall encourage clustering of*  
20 *units and lots in land division proposals, and shall inform applicants of alternatives to*  
21 *standard land division. Clustering may not be used to create lots smaller than the*  
22 *allowed minimum lot sizes where established by SJCC 18.70.010(E) or in applicable*  
23 *subarea plans. The sanitarian shall consider an approved water system or a proven*  
24 *common well supply in lieu of individual wells on clustered lots.*

25 9. The prior binding site plan approval has accomplished a degree of clustering,  
where Units A-J are placed in close proximity to each other and surrounded by a large  
amount of open space. This same open space envelopes the subject binding site plan  
on two sides.

**SJCC 18.70.060(B)(3):** *Conforming to Natural Features and Topography. To the*  
*greatest degree possible, all subdivisions shall be designed to conform to the natural*  
*features of the land. Problems such as eroding cliffs or other potentially hazardous*  
*conditions must be divided with the general welfare and safety of persons and*  
*property in mind.*

10. The staff report notes that the north portion of the property slopes towards  
Beaverton Valley road and that there is an elevation variance of 70 feet across the  
property, but beyond this no topographical information is provided and the criterion is

1 not addressed by staff or the Applicant. The conditions of approval will require that  
2 staff assure compliance with this requirement.

3 **SJCC 18.70.060(B)(4): Usable Construction Area.** *All proposed lots shall provide a*  
4 *usable area for the construction of a dwelling unit, approved sewage system, and an*  
5 *approved water supply.*

6 11. The staff report notes that an approved water system exists and sewer service for  
7 Units A-K has already been considered and approved in the prior binding site plan  
8 approval. The conditions of approval, as discussed in Conclusion of Law No. 6, will  
9 require staff to determine whether the proposal is adequately designed to  
10 accommodate sewer for Unit F individually as a single site.

11 **SJCC 18.70.060(B)(5): Division of Lots by Roads.** *Individual lots shall not be*  
12 *divided by roads or road rights-of-way. Where a pre-existing road divides a lot where*  
13 *there is no alternative to such a division the administrator may grant a discretionary*  
14 *exception.*

15 12. There are no proposed lots divided by any roads.

16 **SJCC 18.70.060(B)(6): Buffers and Setbacks.** *All subdivisions shall meet the setback*  
17 *requirements and other density, dimension, and open space standards of SJCC*  
18 *18.60.050, and the landscaping and screening requirements of SJCC 18.60.160.*

19 13. As previously concluded, as conditioned the proposal complies with SJCC  
20 18.60.050. As previously discussed in Conclusion of Law No. 6, the conditions of  
21 approval require staff to assess whether any landscaping needs to be addressed at this  
22 stage of review as opposed to building permit review or the review already conducted  
23 in the prior binding site plan approval.

24 **SJCC 18.70.060(B)(10): Conservation Design Requirements.** *All land divisions in*  
25 *resource land, conservancy, and rural designations (outside of areas of more intensive*  
26 *rural development), and all shoreline areas shall protect open space and scenic*  
27 *resources as well as natural resources by meeting the following design and*  
28 *development requirements: ...*

29 14. Open space has already been found to be sufficient for the Unit A-J project in the  
30 prior binding site plan approval. The redivision of one of the lots surrounded by that  
31 open space should not result in any changes to open space requirements.

32 **SJCC 18.70.060(C)(1)(a):** *All roads serving two or more lots shall comply with the*  
33 *road design and construction standards specified in SJCC 18.60.080(A), (B) and (C).*

34 15. The only road standard in SJCC 18.60.080(A), (B) and (C) applicable to the  
35 proposal is the requirement of SJCC 18.60.080(A) that road design shall conform to

1 the San Juan County Scenic Roads Manual. This will be made a condition of  
2 approval.

3 **SJCC 18.70.060(C)(1)(b):** *A drainage analysis shall be performed in conformance*  
4 *with SJCC 18.60.070, and drainage systems shall be designed to the standards in*  
5 *subsection (B) of this section and SJCC 18.60.070.*

6 16. As conditioned.

7 **SJCC 18.70.060(E):** *Health Standards. The following health standards apply to all*  
8 *subdivisions and short subdivisions:*

9 1. *Water. All land divisions shall comply with the requirements of the San Juan*  
10 *County health and community services department for water (SJCC Title 13).*

11 2. *Sewer. All land divisions shall comply with the requirements of the San Juan*  
12 *County health and community services department for sewer (SJCC Title 13).*

13 3. *Storm Drainage. Stormwater flows from the subdivision shall not adversely affect*  
14 *critical aquifer recharge areas. All subdivisions and short subdivisions must meet*  
15 *critical area regulations for aquifer recharge (see Chapter 18.30 SJCC).*

16 17. As conditioned.

17 **SJCC 18.70.060(F):** *Fire and Utility Standards. All subdivisions and short*  
18 *subdivisions must meet the fire protection improvement standards contained in*  
19 *Chapter 13.08 SJCC.*

20 18. As conditioned.

## 21 **DECISION**

22 The proposed project is consistent with all the criteria for a binding site plan, subject  
23 to the following conditions of approval:

- 24 1. If not done so already, as required by SJCC 18.70.090(B)(2), staff shall assess  
25 whether the proposal functions as a single site with respect to, but not limited to,  
lot access, interior circulation, landscaping; water, sewer and drainage facilities;  
and facility maintenance. As discussed in Conclusion of Law No. 6 and Finding  
of Fact No. 5, this means that staff must assure that any required improvements or  
mitigation of the project that have not already been addressed in prior land use  
review or that will not be adequately addressed in future building permit review  
will be addressed at this stage of review. If any deficiencies are found that are not  
already addressed by the conditions of approval of this decision, staff shall require  
the Applicants to submit plans for improvements that will satisfy the requirements  
of SJCC 18.70.090(B)(2) and these improvements shall be constructed prior to

1 recording of a final binding site plan unless security is provided to the extent  
2 authorized by County regulations.

- 3 2. The conditions of approval of the binding site plan (04BSP002) and conditional  
4 use permit (O3CU004) shall be considered conditions of this binding site plan to  
5 the extent applicable.
- 6 3. Staff shall investigate whether the proposed development is compatible with  
7 natural topography as required by SJCC 18.70.060(B)(3) and require design  
8 modifications as necessary to achieve compliance.
- 9 4. Road design shall be in conformance to the San Juan County Scenic Roads  
10 Manual as required by 18.60.080(A).
- 11 5. A drainage analysis shall be performed in conformance with SJCC 18.60.070, and  
12 drainage systems shall be designed to the standards in SJCC 18.70.060(B) and  
13 SJCC 18.60.070.
- 14 6. The binding site plan shall comply with the requirements of the San Juan County  
15 health and community services department for water (SJCC Title 13), the  
16 requirements of the San Juan County health and community services department  
17 for sewer (SJCC Title 13), and the critical area regulations for aquifer recharge  
18 (Chapter 18.30 SJCC).
- 19 7. The Applicant shall schedule a site inspection with staff upon completion of the  
20 project to verify compliance with this decision and applicable regulations.
- 21 8. This preliminary Binding Site Plan approval allows the development of 13 units  
22 from Unit F of Olerin Business Park. The condominium will include 13 air-space  
23 condominium sites with shared infrastructure, access and walkways. Preliminary  
24 BSP approval shall expire if the BSP is not recorded within 60 months of the  
25 written date of approval. The final BSP application shall be submitted to the  
Community Development and Planning Department at least 90 days in advance of  
the expiration date.
9. The final BSP shall be prepared in accordance with SJCC 18.70.090.
10. The final BSP shall be designed substantially in conformance with the  
preliminary BSP of record. No increase in density or number of lots shall occur  
without the submittal and approval of the appropriate land division application.

1 11. The air-space condominium sites may be offered for sale consistent with Chapter  
2 64.34 RCW, Condominium Act.

3  
4 12. Utility easements shall be illustrated on the face of the final binding site plan.

5 13. The final binding site plan shall illustrate required setbacks as provided in SJCC  
6 18.60, Table 6.2, adjacent to and within the perimeter boundaries of the project  
7 site.

8 14. A copy of a current Certificate of Title shall be furnished to the Community  
9 Development and Planning Department prior to final BSP approval.

10 15. Binding site plan roads and any other private road connecting with the binding  
11 site plan road shall be built as specified in SJCC 18.60.100, unless variances are  
12 obtained.

13 16. Maintenance of the roads, wells or other water sources, water distribution  
14 systems, utilities, landscaping and open space areas shall be through provision of  
15 a maintenance agreement submitted to and approved by the Community  
16 Development and Planning Department, then recorded with the final BSP  
17 approval. All owners of the condominium units shall participate in the agreement.

18 17. The Permanent Stormwater Control Plan and the Construction Stormwater  
19 Pollution Prevention Plan dated March 2004, written by William R. Gossett for  
20 Thomas C. Starr & Associates, Inc. remains in effect.

21 18. All lots shall be served by the existing water system.

22 19. A sanitary setback for the community well shall be shown on the final BSP.

23 20. The proposal must meet the fire protection improvement standards contained in  
24 SJCC 13.08. A fire protection plan shall be submitted for review and approval by  
25 the San Juan County fire marshal and the district fire chief prior to final BSP  
approval.

- 1 21. Prior to the issuance of any building permit the fire protection shall be installed,  
2 inspected and approved by the San Juan County fire marshal and the district fire  
3 chief.
- 4 22. All survey standards and requirements shall be complied with pursuant to SJCC  
5 18.70.070(F)(2).
- 6 23. The development shall be designed, constructed and maintained in a manner to  
7 ensure as much undisturbed land, trees and natural vegetation and open space  
8 value as practicable.
- 9 24. If during excavation or development of the site an area of potential archaeological  
10 significance is uncovered, all activity in the immediate vicinity of the find must be  
11 halted immediately, and the Administrator must be notified at once.
- 12 25. Utility service lines and secondary connections shall be placed underground,  
13 unless approved otherwise by the permitting agency. Environmental impacts  
14 resulting from installation or maintenance of utilities shall be minimized. Areas  
15 disturbed during construction shall be replanted with native vegetation and  
16 maintained until firmly established. Clearing shall be confined to that necessary  
17 to allow installation and to prevent interference by vegetation once the system is  
18 in operation.
- 19 26. Exterior lighting shall be energy efficient and shielded or recessed so that direct  
20 glare and reflection are contained within the boundaries of the parcel. Exterior  
21 lighting shall be directed downward and away from adjoining properties and  
22 rights-of-way. No lighting shall blink, flash or be of unusually high intensity or  
23 brightness. All lighting fixtures shall be appropriate in scale, intensity, and height  
24 to the use they are serving. Any lighting installed in parking areas shall be of  
25 direct cutoff design so that the source is not visible from adjacent properties.  
Decorative lighting shall be limited to incandescent lamps with a maximum of 25  
watts per bulb and 500 watts overall.
27. All plant material proposed by the applicant to be installed on site shall be  
completed prior to final BSP approval. The plant material shall be of a species  
that is indigenous to the area of the island in which the site is located. Exotic non-  
native species are prohibited.
28. Roads, street, and access drives within Unit F shall meet the requirements  
specified in SJCC 18.60.080, and Table 6.3 in SJCC 18.60.100.

1  
2 29. A Declaration of Condominium and the Condominium Association Rules and  
3 Regulations shall be developed by the applicant and approved by the Community  
4 Development and Planning Department prior to final BSP approval. These will  
5 be recorded with the County Auditor's Office upon final approval.

6  
7 30. The following conditions shall be shown as restrictions on the face of the final  
8 binding site plan:

9 A. All development and use of the land described herein shall be in  
10 accordance with this binding site plan, as it may be amended, with the approval of  
11 the city, town or county having jurisdiction over the development of such land,  
12 and in accordance with such other governmental permits, approvals, regulations,  
13 requirements, and restrictions that may be imposed upon such land and the  
14 development and use thereof. Upon completion, the improvements on the land  
15 shall be included in one or more condominiums or owned by an association or  
16 other legal entity in which the owners of units therein or their owners' association  
17 have a membership or other legal or beneficial interest. This binding site plan  
18 shall be binding upon all now or hereafter having any interest in the land  
19 described herein.

20 B. All road rights-of-way and all easements are privately owned; the County  
21 is not responsible for the construction or maintenance of any roads or easements  
22 within the subdivision.

23 C. All common areas are dedicated to the condominium owners within the  
24 binding site plan.

25 D. Conditions of use, maintenance, and restrictions on redevelopment of  
shared open space, parking, access and other improvements shall be identified on  
the binding site plan.

Dated this 26th day of July, 2012.



Phil Olbrechts  
County of San Juan Hearing Examiner

**Effective Date, Appeal Right, and Valuation Notices**

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25

Hearing examiner decisions become effective when mailed or such later date in accordance with the laws and ordinance requirements governing the matter under consideration. SJCC 2.22.170. Before becoming effective, shoreline permits may be subject to review and approval by the Washington Department of Ecology pursuant to RCW 90.58.140, WAC 173-27-130 and SJCC 18.80.110.

This land use decision is final and in accordance with Section 3.70 of the San Juan County Charter, such decisions are not subject to administrative appeal to the San Juan County Council. See also, SJCC 2.22.100

Depending on the subject matter, this decision may be appealable to the San Juan County Superior Court or to the Washington State shorelines hearings board. State law provides short deadlines and strict procedures for appeals and failure to timely comply with filing and service requirement may result in dismissal of the appeal. See RCW 36.70C and RCW 90.58. Persons seeking to file an appeal are encouraged to promptly review appeal deadlines and procedural requirements and consult with a private attorney.

Affected property owners may request a change in valuation for property tax purposes notwithstanding any program of revaluation.