



## **RESOLUTION NO. 2011-14**

A RESOLUTION OF THE CITY COUNCIL OF THE CITY OF POULSBO, WASHINGTON, APPROVING THE REQUEST FOR AN EXTENSION OF THE VALHALLA VILLAGE BINDING SITE PLAN (located on the east side of Viking Avenue in Poulsbo, 1000 feet south of the intersection with SR 305).

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**WHEREAS**, the City approved the binding site plan for Valhalla Village on August 16, 2006; and

**WHEREAS**, in 2009, Kitsap Bank foreclosed upon the property subject to the Valhalla Village binding site plan; and

**WHEREAS**, on June 16, 2011, Larry Grohn of Kitsap Bank requested an extension of the Valhalla Village binding site plan approval; and

**WHEREAS**, on July 20, 2011, the Poulsbo City Council voted to deny the extension for Valhalla Village's Binding Site Plan approval; and

**WHEREAS**, on July 29, 2011, the attorney for Kitsap Bank, David Mann of Gendler and Mann, wrote to the City Council, asking the Council to reconsider its decision; and

**WHEREAS**, on August 10, 2011, the Poulsbo City Attorney, James Haney, of Ogden Murphy Wallace, wrote to Mr. Mann, responding to his letter of July 29, 2011; and

**WHEREAS**, on August 10, 2011, the City received a copy of a Summons and Land Use Petition from Kitsap Bank's attorney, naming the City as a respondent in a lawsuit appealing the City Council's vote on the extension request; and

**WHEREAS**, on September 21, 2011, the Poulsbo City Council considered this Resolution and entered findings of fact and conclusions of law supporting the denial during a regular City Council meeting;

NOW, THEREFORE, THE CITY COUNCIL OF THE CITY OF POULSBO, WASHINGTON, HEREBY RESOLVES AS FOLLOWS:

### **FINDINGS, CONCLUSIONS AND DECISION**

Section 1. Procedure. Under Poulsbo Municipal Code Section 17.18.120, the Poulsbo City Council "may, upon a request being filed thirty days prior to expiration and for good cause, grant a one-time extension [of a binding site plan] not to exceed one year."

Section 2. Exhibits. The following documents were entered into the record for the extension request:

| <u>Exhibit</u> | <u>Date</u>     | <u>Description</u>   | <u>Submitted by</u> |
|----------------|-----------------|--|---------------------|
| 1              | July 16, 2011   | Vicinity Map of Valhalla Village   | City                |
| 2              | July 16, 2011   | Approved Binding Site Plan for Valhalla Village                                  | City                |
| 3              | June 16, 2011   | E-mail from Larry Grohn Kitsap Bank.   |                     |
| 4              | July 16, 2011   | Trustee's Deed (28 pages)  | City                |
| 5              | July 20, 2011   | Composite of Three Projects with 150 Ft. Wetland Buffer Impact.                  | City                |
| 6              | July 18, 2011   | City of Poulsbo Staff Report   | City                |
| 7              | July 29, 2011   | Letter to City of Poulsbo City Council from David Mann, attorney for Kitsap Bank | Kitsap Bank         |
| 8              | August 10, 2011 | Letter to David Mann from James Haney, City Attorney                             | City                |
| 9              | 2011            | Minutes of Poulsbo City Council Meeting of July 20, 2011                         | City                |
| 10             | August 10, 2011 | Summons and Land Use Petition filed by Kitsap Bank                               | Appellant           |
| 11             | 2010            | All Legislative Reports regarding amendments to RCW 58.17.140 in 2010 (13 pages) | City                |
| 12             |                 | Copy of Poulsbo Municipal Code Section 17.18.120 and 110                         | City                |
| 13             |                 | Copy of Poulsbo Municipal Code Section 16.20.230) CAO on wetland buffers)        | City                |

Section 3. Facts. The Council finds:

A. *Location.* The Valhalla Village Binding Site Plan is located on the east side of Viking Avenue, 1000 feet south of the intersection with SR305, in Poulsbo.

B. *Description.* The Valhalla Village project, approved on August 16, 2006, consists of 20 single-family detached condominium homes with common ownership of the tract. Total area of the site is 2.83 acres.

C. *Zoning.* The property is zoned Residential High, which would allow 10-14 dwelling units per acre, or up to 39 units.

D. *Wetlands.* The property has limited developable area (1.91 acres) due to the existence of wetlands on the eastern third of the property, which is protected by a 40 foot wetland buffer. Stormwater detention was proposed for the underground tank located under the tot lot, which releases into a bioswale in the wetland buffer.

E. *Approval of Binding Site Plan.* The Valhalla Village Binding Site Plan was issued on August 16, 2006.

F. *Compliance with PMC Section 17.18.110.* Under PMC Section 17.18.110:

a binding site plan shall remain valid if construction is commenced within five years from the date of approval (by securing a building permit and construction has commenced), or the binding site plan shall become null and void unless an extension has been granted. . . .

No building permit or grading permit application was submitted, and no site development has commenced in the interim since the project was approved.

G. *Change in Critical Areas Ordinance.* At the time the Valhalla Village Binding Site Plan was approved, the City's Critical Areas Ordinance required that the Category I wetland on the property be protected by a 40 foot wetland buffer. On July 18, 2007 [Ord. 2007-24], the City amended the Critical Areas Ordinance (specifically, PMC Section 16.20), and application of the existing standards from that Ordinance would require a 150 foot wetland buffer around a Category I wetland, with a habitat score of 20-28 points (PMC 16.20.230). Under the current CAO, sewer lines may be located within a wetland buffer if replanted via a mitigation plan. Two adjoining properties Brighthaven (File # 12-18-06-1) and Vikings Landing (File #04-18-06-1), in conjunction with Valhalla Village, were proposing a connected and shared development of private sewer line in order to utilize gravity sewer to a lower elevation connection in Viking Avenue. If the projects were not connected, a sewer alternative could be to pump up directly to Viking Avenue.

H. *Neighboring Developments.* The following is the status of the development of the two properties adjoining the Valhalla Village Binding Site Plan:

1. Brighthaven (to the north) site plan was approved on June 24, 2008 to construct 50 attached condominium townhouse residences on the 4.6 acre site. No subdivision into lots was proposed, and a site plan (which does not vest) expires on June 24, 2013 (PMC Section 18.68.090). A 40 foot wetland buffer and additional 15 foot construction setback were approved. Stormwater is directed to a detention pond. Although a building permit application was reviewed concurrently to vest the project, the BP expired and no construction has commenced, so the project has lost any wetland buffer vested status. Resubmittal of the application under the current Critical Areas Ordinance would likely eliminate 21 units.

2. Vikings Landing (to the south) is a short plat and PUD approved in September 2007 for the 6.38 acre property. The short plat created two lots and delineated the 40 foot wetland buffer. The wetland buffer is vested with the short plat (which does not expire). Lot A at 5.94 acres is for the 18 unit PUD with three 6-unit condominium buildings. Lot B at .44 acres is for a single family residence. The PUD includes .59 acres developed and landscaped open space for the recreation amenities. A detention vault (under the driveway) and bioswale are proposed for stormwater

management for the PUD. This project is furthest along, having submitted construction drawings which are approved (but they have not paid for and picked up the drawings).

I. *Foreclosure.* Kitsap Bank foreclosed on the property subject to the Valhalla Village Binding Site Plan on December 23, 2009. See, Exhibit 4. There was no development activity on the property prior to foreclosure and none after foreclosure.

J. *Extension Request.* On June 16, 2011, Larry Grohn of Kitsap Bank wrote an e-mail to Linda Mueller of the Poulsbo Planning Department and requested that the City Council extend the Valhalla Village Binding Site Plan, pursuant to PMC Section 17.18.120. The e-mail provided the following as support for the request: "I am sure you understand the state of the current Real Estate market and the need for additional time to complete a development like this one." See, Ex. 3.

At the July 20, 2011 City Council meeting on the extension request, Mr. Grohn explained: "we all understand where the economy is . . . how depressed the real estate market is" and that "the market for this kind of project is terrible – you know that, I know that." In addition, Mr. Grohn stated that the purpose of the extension was so that Kitsap Bank could find a developer for the property, but he presented no evidence that the Bank has actively attempted to obtain a developer during the time that it has owned the property. Mr. Grohn provided no evidence as to the likelihood that the Bank would be able to find a developer within the requested one year extension. Instead, Mr. Grohn stated that the Bank would make efforts to find a developer and if a developer was not found within the one year extension period, " we would have to be back here talking to you guys . . . about what we do next."<sup>1</sup>

The Bank's attorney Mann confirms that the "state of the real estate market" is the only "good cause" presented in support of the extension request. (See, Ex. 8.) He notes that the City's code is "considerably different" for binding site plans than for preliminary plats. For example, in order to obtain an extension of a preliminary plat, the developer must show that he/she has made a "good faith effort" to complete the plat within five years and Mr. Mann observes that there is no similar requirement exists for binding site plans. (*Id.*) He further notes that "PMC Section 17.08.210(B) grants the City Council complete discretion to grant an extension, including discretion to add or change conditions. No such discretion exists for binding site plans under PMC 17.18.110." (*Id.*) Finally, he argues that the Council's "willful and knowing rejection of a good cause request for a one-year extension in order to impose additional restrictions on Kitsap Bank's reasonable use of its property is arbitrary and capricious and violates Kitsap Bank's right to substantive due process." (*Id.*)

In the Land Use Petition filed by Kitsap Bank, the Bank claims that "the City Council "erred as a matter of law in concluding that the statutory seven year extension for completion of plats did not apply to binding site plans." (Land Use Petition, Ex. 10, paragraph 7.3, p. 3.) The specific statute is not identified.

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<sup>1</sup> See, PMC Section 17.18.120, which provides that any extension of a binding site plan is a "one-time extension not to exceed one year."

Section 4. Applicable law.

The City Council's decision to grant a one-time extension of one year for a binding site plan is discretionary. Under PMC Section 17.18.120, the Council *may* grant such extension for "good cause."

The use of the word "may" allows the City Council to use its discretion in deciding whether or not to approve the binding site plan extension. *Stegriy v. King County Board of Appeals*, 39 Wash. App. 346, 354, 693 P.2d 183 (1984).<sup>2</sup>

Section 5. Decision.

The request of Kitsap Bank for a one-time extension of the Valhalla Village Binding Site Plan is APPROVED.

RESOLVED this 21st day of September, 2011.

APPROVED:

  
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BECKY ERICKSON, MAYOR

ATTEST/AUTHENTICATED:

  
\_\_\_\_\_  
JILL A. BOLTZ, CITY CLERK

FILED WITH THE CITY CLERK: 09/15/2011  
PASSED BY THE CITY COUNCIL: 09/21/2011  
RESOLUTION NO. 2011-14

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

**APPEAL:** This is the final decision of the City. Appeals may be filed pursuant to chapter 36.70C RCW.

<sup>2</sup> Ordinance No. 2007-56, Section 13, adopted in 2007, provides that a "binding site plan *shall* remain valid if construction is commenced within five years of the date of approval . . ." In Section 13 of the same Ordinance, the Council adopted what is now codified as PMC Section 17.18.120, which provides that "the city council *may*, upon a request being filed thirty days prior to expiration and for good cause, grant a one-time extension not to exceed one year." "When different words are used in the same statute or ordinance, it is presumed that a different meaning was intended to attach to each word. [Citations omitted.] Thus, the word "may" in subdivision 4 permits [the agency] to use its discretion . . ." *Stegriy v. King County Board of Appeals*, 39 Wash. App. at 354.