Lathrop, Winbauer, Harrel, Slothower & Denison L.L.P.

Attorneys at Law

Post Office Box 1088, 201 West Seventh Avenue, Ellensburg, WA 98926

F. Steven Lathrop, P.S.
John P. Winbauer
Susan K. Harrel
Jeff Slothower
James T. Denison, Jr.
Christopher P. Taylor

Tel (509) 925-6916
Fax (509) 962-8093

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Mr. Andrew L. Kottkamp, Esq.
Hearings Examiner, Kittitas County
Kottkamp & Yedinak PLLC
P.O. Box 1667
Wenatchee, WA 98807-1667

RE: Tumbling Ridge PUD Rezone (Z-07-16) and Preliminary Plat (P-07-61)

Dear Mr. Kottkamp:

This office represents Suncadia, LLC and is providing comment and opposition to the above-referenced projects. Suncadia's comments are broken into three sections. Section 1 provides background information. Section 2 explains in detail why the proposed rezone from R-3 to Planned Unit Development does not meet the requirements of KCC 17.98.020 and should be denied. Section 3 provides reasons for the plat to be denied in the event the rezone is approved and also, in the event the Hearings Examiner determines the rezone and plat should be approved, suggests certain conditions.

This matter has been pending for some time. The Board of County Commissioners at their December 2, 2008 meeting remanded this to the Hearings Examiner for a new public hearing. Suncadia understands the Hearings Examiner will be presented with all documents that were part of the record prior to December 2, 2008. Suncadia has provided comments on several occasions in the past. In order to provide clarity and for ease of reference Suncadia intends to incorporate as exhibits its prior comment letters.[1] Suncadia requests this letter and all exhibits be made part of the record in this matter.

Representatives of Suncadia and I will be present at the hearing before the Hearings Examiner currently set for January 22, 2009 to answer questions and provide further input.

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[1] Exhibit 1 - July 3, 2008 letter from attorney Joe Mentor with exhibits
Exhibit 2 - July 22, 2008 letter from Suncadia attorney, F. Steven Lathrop
Exhibit 3 - August 12, 2008 letter from Joe Mentor, Jr., attorney for water rights attorney for Suncadia with exhibits

I. BACKGROUND

A. MPR Planning, Environmental Review and Approvals.

An application for the Suncadia (formally known as "MountainStar") Master Planned Resort (MPR) was submitted to Kittitas County in March, 1997. The proposal was to develop a 6,225-acre site in upper Kittitas County for use as a four-season destination resort.[2] The MPR would be developed in three general phases. Proposed land uses and activities included a wide range of recreational facilities (including golf courses), resort facilities (lodges/conference center, shops and restaurants), open space (comprising 80 percent of the total site), residential units, in a variety of types, totaling 4,650 residential units, later reduced by agreement to 3,785[3], and utilities and roads. The actions and approvals required for the MPR included adoption of a sub-area plan for the MPR site, rezoning of the site to MPR, designation of the MPR as a planned action, execution of a development agreement, and approval of a Conceptual Master Plan.

To support its decisions, and to comply with the requirements of the State Environmental Policy Act (SEPA), Kittitas County prepared a draft and final environmental impact statement (EIS) for the proposed MPR, which were published in July 1999 and April 2000, respectively. The EIS was prepared consistent with the "planned action" provisions of SEPA. The adequacy of the EIS was challenged and upheld in appeals to the Kittitas County Board of County Commissioners (BOCC), the Eastern Washington Growth Management Hearings Board, and Yakima County Superior Court.

The Kittitas County BOCC approved the MPR in October 2000. The package of documents approved by the BOCC included, among other things, a development agreement, development permit and conditions of approval, an ordinance designating MountainStar as a planned action, development standards and design guidelines, and a Conceptual Master Plan Map.[4] These approval documents, along with the EIS, provide the framework for review and approval of plans and development permits for specific MPR phases/sub-phases, divisions, utilities and other resort components. The Development Agreement and the Conditions of Approval designate open space lands. Open space lands include Natural and Managed lands, Perimeter Buffers and Golf Courses.

B. The Property.

The property which is the subject of this combined rezone and plat application is completely surrounded by the MPR. Contrary to the application's assertions, the property is not "within" the MPR, nor is the applicant's property part of the MPR. The access to the property is via Jenkins Drive, a private road. Fee title to most of Jenkins Drive is owned by Suncadia and the project applicants have an easement to use portions of Jenkins Drive to access their property. The Easement and Road Use Agreement is attached hereto as Exhibit 5. Suncadia uses the road to provide secondary and emergency access to the MPR as currently required by Kittitas County.

The easement, at Paragraph 13, provides as follows:

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[2] Maps of the MPR are attached as Exhibits 4A and 4B. Exhibit 4B depicts the open space by type. On each of the maps the property subject to the tumbling Ridge Application is delimitated with a Red circle.

[3] The reduction was the result of a settlement agreement with Ridge, an upper Kittitas County group that initially opposed the project.

[4] These documents are lengthy and voluminous. Kittitas County Community Development Services maintains a complete copy of these approvals.

> The parties hereto agree that in the event one of the parties subdivides their lands, or develops them for future use as associated with recreational or residential activities, that the roads serving said subdivision or development shall be relocated as necessary to provide a transportation route between the developed lands and the nearest county or state road that represents routing commensurate with good land use transportation planning, all land uses considered. Construction or reconstruction costs shall be the account of the developing party. The parties also agree that in such event, the relocated road shall be constructed or reconstructed to the then prevailing county standard. . .

The plain meaning of Paragraph 13 is the applicant, who is developing their property for recreational or residential use, must bring the road up to Kittitas County standards at their own expense.

The Easement and Road Use Agreement also provides for coordinated decision making on road improvements. The applicant does not appear to understand their rights and obligations under the Easement, as they continue to do substandard improvements to the road. In fact, improvements were done to the road by the applicant, without consultation with Suncadia as required under Paragraph 6, in December, 2008. Those improvements failed and as a result last week, during a rapid snow melt, portions of the road in the vicinity where work was done failed with several landslides that impaired Suncadia's ability to use the road as secondary and emergency access. Copies of pictures of the damage to the road are attached as Exhibit 6.

When Suncadia first commented on this application (see Joe Mentor, July 3, 2008 letter pages 2 to 4, Exhibit 1 to this letter) Suncadia argued the SEPA decision is flawed because this application should be considered with the related development occurring on Parcel 2 of the Tumbling Ridge Short Plat. As Suncadia demonstrated in its July 3, 2008 and again in its August 12, 2008, comment letters Parcel 1 and Parcel 2 of the Tumbling Ridge short plat are under the same ownership.[5] The excise tax affidavit signed under oath at the time of the transfer of Parcel 2 to the Nathan and Lisa Weis Family LLC clearly establishes this fact.[6] Even though Suncadia pointed out that an unpermitted development of at least 8 lots was in progress on Parcel 2 (see Exhibit H to Joe Mentor's July 3, 2008 letter), the county ignored that development when it made its flawed SEPA determination. That glaring error on the part of the county and this applicant's lack of candor on the true scope of the developments on Parcel 1 and Parcel 2 of the Tumbling Ridge short plat should be and is fatal to this application. The Tumbling Ridge Short plat expressly limits Parcel 1 and Parcel 2 of the Tumbling Ridge Short Plat to 5000 gallons of water per day. An ineffective LLC "shuffle" does not change or negate the ground water restriction. Under clear authority the only way that restriction can be changed or negated is through a plat amendment process. The applicant's have not sought a plat amendment instead they simply ignore the law and the facts. The fact that the county apparently supports this scheme is especially troubling. The application should be rejected on the basis of the platting requirements alone.

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[5] The map and drawing attached to the plat application depicts Parcel 1 of the Tumbling Ridge Short Plat. Parcel 2 is South of Parcel 1. See also Exhibit A to Joe Mentor's July 3, 2008 comment letter (Exhibit 1 to this letter)

[6] Whether the transfer is effective given the fact that the Nathan and Lisa Weis Family LLC did not exist as a legal entity at the time of the transfer is another issue entirely. (see Exhibits B and C of the Joe mentor July 3, 2008 letter)

C. The Application Process.

This is a combined application seeking a rezone of the property from R-3 to Planned Unit Development and then seeking approval of a plat of the property which would create 14 lots which range in size from .5 acres to .75 acres. Lots of that size, under any standard within the State of Washington, are considered urban or suburban in nature.[7]

The county in order to approve the project would first have to approve the rezone. If the rezone is denied the plat cannot be approved.

If the rezone were to be approved, then one would need to consider the plat in the Planned Unit Development zone. As part of the rezone process, and before development of property which is sought to be covered under the Planned Unit Development zone, an applicant must provide a preliminary development plan. KCC 17.36.030. A preliminary development plan must be approved by the county. Before lot sales or building construction commences, the owner must submit a final development plan for approval by the Board of County Commissioners. KCC 17.36.040. While the applicant in their applications submitted a preliminary development plan which the applicant indicated was "intended" to comply with KCC 17.36.030, that plan has not yet been approved by the Board of County Commissioners, thus the plat is premature because the applicant has provided no information with which an analysis and approval of KCC 17.36.030 and 17.36.040 can occur.

If the plat is approved, the county can condition the plat as it deems appropriate.

The project has been through SEPA. The letter submitted on July3, 2008 by Joe Mentor contains a detailed discussion of the Kittitas County SEPA determination. Contrary to prior assertions made by the applicant, it is inconsequential that no one has appealed the SEPA. Kittitas County's SEPA appeal procedures allow for an appeal on procedural grounds only. Under regulatory reform the substantive deficiencies with this SEPA decision are preserved for an appeal on the underlying land use application decision.

II. THE REZONE FROM R-3 TO PLANNED UNIT DEVELOPMENT DOES NOT MEET THE REZONE CRITERIA SET FORTH IN KCC 17.98.020(7) AND THEREFORE SHOULD BE DENIED.

Kittitas County Code Section 17.98.020(7) sets out seven criteria that must be met before a rezone can be approved. If any one of the seven criteria are not met then the rezone cannot be approved and must be denied. What follows is a detailed analysis of each of the criteria. However, a review of each of the criteria is unnecessary as this rezone does not meet the first criteria and is, in fact, prohibited outright under the Kittitas County Comprehensive Plan. For ease of reference portions of the Kittitas County Comprehensive Plan dealing with the MPR are attached as Exhibit 7.

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[7] See *Concerned Friends of Ferry County and David Robinson, v. Ferry County,* EWGMHB, Case No. 01-1-0019, Third Order on Compliance, (June 14, 2006), where 2.5-acre lot sizes are more urban.

A. The proposed rezone is not compatible with the Kittitas County Comprehensive Plan.

Kittitas County has organized its Comprehensive Plan around a series of goals, policies and objectives (GPO) which the county is constrained to follow in permitting land use activities. This application for rezone to PUD is inconsistent with the following GPOs:

- GPO 2.3 because the rezone would allow urban growth and development in area where roads and services cannot support such growth.
- GPO 2.5 because this rezone encourages residential growth in an area that will increase, and not minimize, the cost of providing utilities and services.
- GPO 2.11 because the property which is the subject of the rezone has inadequate access that will prevent or impair the ability to provide appropriate essential public services.
- GPO 2.190 because the application results in new urban or suburban land uses in the vicinity of the MPR. GPO 2.190 provides as follows: "Except in areas designated for urban growth, new urban or suburban land uses shall be precluded by the county in the vicinity of an MPR." [Emphasis added]. Thus, under the Kittitas County Comprehensive Plan, urban and suburban land uses are precluded in the vicinity of an MPR. The obvious purpose of this comes from a basic tenant of the Growth Management Act which is to prevent sprawl. This property is completely surrounded by the MPR. It was completely surrounded by the MPR when Trendwest (now "Suncadia") went through the permitting process. The then landowner had an opportunity to modify the uses of its land at that point in time and/or otherwise participate in the process. As a result, this Comprehensive Plan prohibition fixes the use the property can be put to and specifically precludes the applicants' desired land use. There is no question that lots of a half acre to .75 acre size are urban and at the very worst, suburban.

  It is especially troubling to Suncadia, which has invested tens of millions of dollars in developing its MPR, that the county would ignore GPO 2.190. The staff report submitted by the county utterly fails to mention this prohibition and demonstrates that the County either does not understand or otherwise know how to apply its own comprehensive plan. This flawed approach by the county is also inconsistent with prior positions of the county in the area. Shortly after the MPR was approved the county denied applications to develop land adjacent to Bullfrog road and South of Interstate 90 relying specifically on the restriction of this GPO. This GPO is fatal to this application.

- GPO 8.1 and 8.4 because this application and the subsequent plat would extend urban services to rural lands.
- GPO 8.46 because the property is not able to support growth given the fact the property is limited, together with Parcel 2 of the Tumbling Ridge Short Plat, which the applicant indicates, despite ongoing development using the same road system, is "not part of this project"[8] to a single 5,000 gallon per day domestic water limitation.

For these reasons the proposed rezone is not only inconsistent with the Kittitas County Comprehensive Plan, it is expressly prohibited by the Kittitas County Comprehensive Plan. The rezone should fail on this basis in and of itself.

[8] See August 12, 2008 letter from Mentor Law Group.

B. The proposed rezone does not bear a substantial relation to public health, safety or welfare.

In the case of *Henderson v. Kittitas County*, 124 Wn. App. 747, 100 P. 3d 842 (2004). Division III of the Washington State Court of Appeals concluded a rezone which implements the Comprehensive Plan bears a substantial relationship to the public health, safety and welfare because a Comprehensive Plan is adopted to promote and facilitate the public health, safety and welfare. It follows that a land use action that is expressly prohibited by the Comprehensive Plan would not bear a substantial relation to public health, safety and welfare and would in fact be detrimental to the public health, safety and welfare.

This rezone also does not bear a substantial relation to public health, safety and welfare because the property sought to be rezoned is isolated, surrounded by the MPR and has inferior road access. If the road can be brought up to county road standards, the rezone will still increase the burdens on local providers of essential services, including the fire district's ability to provide essential public services.

In addition, attached as Exhibit 8 is a study which demonstrates that the cost of providing public services for residential uses exceeds the tax revenue those residences generate. Thus this rezone will create a burden to the welfare of the community because it will increase the cost of essential public services.

C. This rezone has no merit or value for the county or a sub area of the county.

The analysis of this criterion also requires a review of the arguments set forth above on Criteria B. If the proposed land use action does not bear a substantial relation to public health, safety or welfare then there can be no merit of value for the county or a subbasin of the county. If, however, the rezone did bear a substantial relation to the public health, safety or welfare, which this application does not, then the rezone could be denied because there is no merit and value for the county or a sub-area of the county.

This criterion is not met because the property is completely surrounded by the MPR and the Comprehensive Plan specifically prohibits this type of uses in the area because of the impact that it potentially has on the county and this part of the county. As discussed in Section 1 a significant portion of the master planned resort, almost 80%, is made up of open spaces. The portions of the MPR that surround this property are all designated as open spaces. The open spaces were required to be a part of the MPR. One of those purposes of the open space was to mitigate the more intensive development within the MPR. Allowing this more intensive development which the applicant seeks immediately adjacent to open spaces is detrimental to the MPR and the owners of the property within the MPR. The MPR is a designated sub-area of the county.

In the application, the applicant indicated the proposed amendment has merit and value for Kittitas County or a sub area of the county because the property is "uniquely situated within the boundaries of the Suncadia resort MPR and will allow for additional homesites in a desirable location of the county". The property is not within the Suncadia resort MPR boundaries. The property is specifically excluded from the Suncadia resort boundaries and by exclusion under the Comprehensive Plan this type of development is prohibited on this property.

D. The proposed rezone is not appropriate because there are no changes or circumstances, there was not an additional need for property in the proposed zone and the proposed zone is not appropriate for reasonable development of the subject property.

There are no changed circumstances which have occurred since this property was zoned R-3. When the MPR was created the owner of the property at that time, as explained above, had the opportunity of participating in the MPR process to identify other uses for their property.

In the application, the applicant again cites that the property is within the boundaries of the Suncadia master plan resort. The property is not. The applicant then cites to the Office of Financial Management's High Range Population Projection for the county. However, that is inapplicable to this property because the Comprehensive Plan does not allow residential or suburban development to occur on this property because it is in the vicinity of the MPR thus by implication under the comprehensive plan no portion of that population allocation can be attributed to this property.

There is no evidence in the record to indicate there is a need for additional property in this zone. In fact, the MPR provides virtually identical property for residential and recreational uses. The MPR is being developed in phases and portions of the MPR that have been developed, but not sold. In addition, there are significant comparable parcels of property for sale north of the MPR in the vicinity of Roslyn to Salmon la Sac corridor. There is no demonstrated need for additional property.

Lastly, a Planned Unit Development is not appropriate for reasonable development of the property because, as proposed, it allows development which is too intensive given the rural nature of the area. In addition, the road issues discussed above and below become particularly relevant here because it may not be possible to economically bring the road up to Kittitas County road standards to provide for the access sought. Mr. Mentor's comments regarding ground water availability also suggests the zone is not appropriate for development.

E. The proposed rezone is materially detrimental to the use of properties in the immediately vicinity.

As previously noted, this property is surrounded by open space portions of the MPR. At the open record hearing before the Planning Commission, the applicant or the applicant's agent represented to the Planning Commission that individuals who buy property here would have access to the Suncadia open space and trail system. While Suncadia will have a trail system through its open space, that trail system will only be open to the public on a restricted basis. The applicant's statement that these individuals would be able to leave their lots and access the Suncadia open space is a clear demonstration of the problem that will occur if this type of intensive development occurs adjacent to the MPR. People, pets, all terrain vehicles, motorcycles, snowmobiles and mountain bikes will all leave the lots created in the applicant's development and enter onto the MPR open spaces purportedly to access a trail system. The access to that trail system will be strictly controlled, motor vehicles will be prohibited and there will only be designated access points which this property is not. That type of use will be detrimental to the purposes for which the MPR open spaces, as discussed in Section 1, were created.

F. No Adverse Impact to Irrigation Water Deliveries to Other Property.

The last criteria that Kittitas County requires is an analysis that the rezone shall not adversely impact irrigation water deliveries to other properties. Suncadia believes the water withdrawn in the two wells on the property is connected to the surface water. Thus, the withdrawal of this water will impair Suncadia and others senior irrigation water rights and deliveries. (See Joe Mentor's letter of July 3, 2008).

III. PLAT

In order to approve this plat, you must conclude under KCC 16.12.040 that the proposed subdivision conforms to the county Comprehensive Plan in effect at the time it was submitted. Again, the Comprehensive Plan specifically rejects urban and suburban uses in the vicinity of the MPR. Thus, the applicant cannot meet the requirements of KCC 16.12.040.

KCC 16.12.090 requires lot sizes comply with a minimum zoning, health and sanitation codes where applicable. Here, the proposed use of ground water will not meet Washington law. There is not enough water on the property to sustain and support this intensive development. This parcel and the adjoining parcel were created as part of the Tumbling Ridge Short Plat which specifically provides that "pursuant to RCW 90.44.050, the accumulative effect of water withdrawals for the development shall not exceed 5,000 gallons per day." This allocation amounts to 357 gallons per lot with no water allocated to the open space or to the other development ongoing on Parcel 2. While 5000 gallons per day may be enough to meet indoor potable water needs for 14 lots it will not accommodate outdoor irrigation of any type and it will not accommodate the ongoing development on Parcel 2. There is no evidence in the record to demonstrate that adequate fire flows at this remote site will be available given the small amount of water available. Thus, homes will be constructed in this area with no means to provide outdoor irrigation thereby increasing fire danger and further negatively impacting the Suncadia MPR. Therefore, the applicant cannot develop the property at this level of density and still meet the requirements of KCC 16.12.090.

The easement agreement for Jenkins Drive does not allow the easement to be used for utilities. Thus utilities, primarily electrical and phone service, will have to be provided through Washington State Department of Transportation property to the south. The applicant has failed to demonstrate that it has any legal right to bring utilities to the property.

Based on the plat drawing submitted by the applicant with this application, the proposed road layout traverses Jenkins Drive to the north of the northern boundary of the applicant's property and then makes a sharp turn to the south reentering the applicant's property. Based on the map attached to the Road Use and Easement Agreement the applicant's easement terminates at the northern boundary of the applicant's property. Thus the road system proposed is not entirely within the Jenkins Drive easement and would, if constructed as shown, constitute a trespass on Suncadia's property. Presumably, this configuration is proposed due to topography and the need for lesser road gradients, which is further proof that this site is simply not suitable for this development.

In a meeting with Suncadia representatives the applicant, when confronted with this fact, conceded Suncadia is correct and that a portion of the road system would enter onto Suncadia property with no easement rights. Suncadia will not agree, under any circumstances, to grant the applicant additional easement rights to accommodate this road. The applicant indicated it would change its road design,

but has not done so. A plat application that does not show complete, legal access cannot be approved.

All plats in Washington must meet the basic criteria set forth in Chapter 58.17 RCW. (RCW 58.17.030). Thus, this plat must meet the requirements of RCW 58.17.110 which requires appropriate provisions be made for public health, safety and general welfare, for open spaces, drainage ways, streets or roads, alleys, other public ways..." RCW 58.17.110(2) provides a proposed subdivision shall not be approved unless the county legislative body makes written findings that appropriate provisions are made for public health, safety and general welfare, etc. The evidence in the record is that the water supply is inadequate, the road system proposed to be used by the applicant to access the property is not adequate and is outside the applicants legal rights to use Jenkins Drive, the type of land use proposed is specifically prohibited by the Comprehensive Plan, there is no preliminary, let alone final, PUD development plan approval by the BOCC and there is no legal way to bring utilities to the property. As such, appropriate provisions cannot be made for public health, safety and general welfare.

In Suncadia's comment letter of July 3, 2008, Suncadia proposed additional conditions. Suncadia now requests that if you conclude that the property should be rezoned and the plat be allowed, that those conditions be adopted and that the following additional condition be imposed:

1. That the access road to the property be brought up to Kittitas County road standards consistent with the underlying enabling documents which authorize the landowner to utilize Jenkins Drive without compromising or impairing Suncadia's ability to use Jenkins Drive as secondary or emergency access.

Very truly yours,

Jeff Slothower

cc: Client
Dan Valoff, KCDS
Kirk Holmes, KDPW
Applicant