

RECEIVED

MAY 09 2012

DEVELOPMENT SERVICES

May 9, 2012

Rebuttal for Council in Support of Lora Petso and Colin Southcote-Want APPEAL OF SEPA, PRD AND SUBDIVISION APPROVAL OF BURNSTEAD CONSTRUCTION COMPANY WOODWAY ELEMENTARY PLAT/PRD, P-2007-17/PRD-2007-18. APL 20120001.

Rebuttal to Burnstead Response

Response to Burnstead's procedural items:

- 1) There are four remand issues, not three: **The Court of Appeals has also required Burnstead to show (4) compliance with all applicable laws.**¹ Further, because Burnstead has, in its revised application, exceeded the scope of the remand by increasing impervious surfaces and altering the setbacks on interior lots 24 & 25, Burnstead has created, essentially, a new application that should be subject to full review.
- 2) The Sanderlin/Marks appeal and the Miller/Tageos appeal are timely based upon representations of City staff regarding the appeal deadline, and the fact that the appeals concern SEPA issues, which have an additional 7 days for appeal.²
- 3) Apparently, it is admitted that the Petso/Southcote-Want appeal is timely and valid. Instead, the claim here is that I failed to cite to the record showing that the houses don't fit on the lots. The fact that the homes don't fit on the lots is based upon math. Homes that are 64 (or 61) feet deep (see record at 333 and 330) do not fit on lots that are 100 feet deep if the rear setback is 15 feet and the front setback is 25 feet. This is because $64 + 15 + 25 = 104$, which is larger than 100.
- 4) Apparently, it is admitted that the Shelton/Ledger appeal is timely and valid. The complaint here is that they did not offer materials in addition to their appeal. Of course, such materials are not required, "While not required, appellant may submit his or her written arguments. . ." ³

¹ Record at 81.

² ECDC 20.07.004(B).

³ ECDC 20.07.005 (D).

Response to Burnstead's Argument:

A. Council's is in control, and its decision will be given deference by the Courts. D

In section A, Burnstead tries to limit Council's authority to decide this case.

By State Law, Council may not approve the plat unless it makes written findings that (1) appropriate provisions are made for the public health, safety and general welfare, and for drainage ways, streets and roads, and other public ways AND (2) the public use and interest will be served by platting of the subdivision.⁴ ECDC 20.007.005 cannot preempt State law on this issue, especially since ECDC 20.75.080 and ECDC 20.75.085 require the same findings as are required by state law, as well as several additional findings.⁵

In addition, the City Council has considerable discretion to determine what is meant by its ordinances. The case cited by Burnstead, *Chinn v. City of Spokane*, does not stand for the concept that Council must give deference to the Hearing Examiner. It says that the Court will give deference to the Council. "We accord deference to the Council's expertise . . ." For example, if Council determines that space fenced and posted as restricted for wildlife preservation is not "usable" open space within the meaning of the PRD ordinance, that determination will be given deference.

B. There is still no evidence in the record that the drainage plan is adequate.

Burnstead offers no evidence that the drainage plan is adequate, only general staff comments that (1) the drainage approach is conservative, (2) that infiltration is feasible on the site, and (3) that the system is not yet designed. The hearing examiner decision cannot be supported because there is no evidence at all that drainage is adequate.

On the other hand, there is evidence that the drainage ditch will be filled, flooding the Millers and other residences to the West.⁶

There is evidence that no appropriate design infiltration rate has been set, despite the Court of Appeals stating that was essential.⁷

There is evidence of continue inadequate testing since only one test was conducted in the area of the vault although the vault is over 160 feet long, and point drains and drywells were not tested at their actual depth.⁸

There is evidence that the safety factor of 29 must be increased to over 30 due to the increase in impervious surfaces.⁹

⁴ See, for example, RCW 58.17.110(2).

⁵ See ECDC 20.75.

⁶ Record at 951.

⁷ Record at 68, 182, 184.

⁸ Record at 180, 182.

⁹ Record at 121.

There is evidence that the vault overflow is not yet designed.¹⁰

There is evidence that maintenance has not been assured, and that the vault will be difficult/impossible to maintain.¹¹

There is evidence that the lots are too small for infiltration facilities on the lots.¹²

Finally, there is evidence that despite repeated requests from the hearing examiner, no member of City staff would testify that the proposed drainage would work.¹³

C. Drainage is a SEPA issue.

The LUPA appealed all three of the City's land use approvals, SEPA, subdivision, and PRD. While the open space and perimeter buffer issues are unique to the PRD approval, though that approval is needed for the subdivision approval, the failure on drainage rendered all three land use approvals invalid.

There is plenty of evidence of the need for a new SEPA. For example, the original MDNS was based on a checklist stating just 66,000 square feet of impervious surface.¹⁴ We now have 81,000 on the lots alone, even before the road and public walkways are counted. The new hearing examiner eliminated the condition that no more than 35% of each lot include impervious surfaces, and is allowing up to 3000 square feet of impervious surfaces per lot (over 50% of the average lot size).

D. PRD/ADB

Burnstead's attorney repeats an error the hearing examiner made, attempting to claim that the 2007 PRD was approved by the City Council. It was not. In 2007, PRD's were not subject to council review. The Council has full discretion to determine if the PRD complies with our ordinances.

ADB review is required by code and cannot be waived by staff.¹⁵ Since the new plat cannot accommodate 50% of the proposed homes, eviscerates an express condition of the ADB approval, and since Burnstead has, outside the scope of the remand, moved the sides of the homes on lots 24 and 25 to within 10 feet of the street (from 25 feet), ADB review is required.

The home designs are not permitted to be merely conceptual in a PRD, a Planned Residential Development. The PRD application must include the "designated placement,

¹⁰ Record at 183.

¹¹ Record at 180.

¹² Record at 166.

¹³ Record at 910.

¹⁴ Record at 1028.

¹⁵ EDCD 20.35.080(A)(3).

location, and principal dimensions of . . . buildings.”¹⁶ Drawings and text must be submitted that show the “scale, bulk, and architectural character of proposed structures.”¹⁷

Rebuttal to Taraday Response

A. Scope of City Council review.

As noted in the response to Burnstead, the City Council has never approved (or even reviewed this PRD), and there are four issues on appeal: (1) drainage, (2) perimeter buffer, (3) open space, and (4) compliance with all applicable laws.

B. SEPA.

Again, as noted in the response to Burnstead, drainage is a SEPA issue, and was properly challenged in the land use petition before the Court of Appeals. Because all three land use approvals were appealed (SEPA, subdivision, and PRD), and all three require proper drainage, a remand on drainage is a remand of all three issues.

C. Vested Rights.

Neither the City nor Burnstead can waive vested rights. If, as indicated by Taraday, the 1992 code would not provide adequate drainage, the project must be denied or conditioned in a manner that provides adequate drainage.

Is this a deliberate mistake? Burnstead gets an approval assuming a larger vault, then argues that vesting can't be waived and builds a smaller vault.

Rebuttal to Public Works Response

A. Confusion Reigns.

Public works admits that the vault must have an overflow, and has suggested that the overflow be directed to the adjacent park (which already floods) rather than to the existing neighborhood (which already floods). Burnstead has suggested directing overflow to the new facility under Hickman Park.

It is not clear why Burnstead and the City assume that the overflow may go off site. It is Burnstead's responsibility to handle the storm water. It is not the responsibility of either the City or Woodway Meadow's residents.

Obviously, this issue has not been resolved, and the overflow is not shown on the plat. Plainly, the plat is not ready for even preliminary approval. This leads us to the old “we will fix the drainage later argument.”

¹⁶ ECDC 20.35.070(A)(3)(c).

¹⁷ ECDC 20.35.070(A)(4).

B. The “we will fix the drainage later argument.”

Preliminary plats are the basis for project approval or denial. Under our code, the preliminary plat must include the information necessary to properly review the proposal.¹⁸ Burnstead has failed to do this, leading to repeated comments, by experts, in the record such as “The location of the systems within the lot should be included as this could affect the layout of the plat.”¹⁹ With infiltration rates and overflow not determined, there is insufficient information for approval.

Our PRD ordinance requires that the application show the designated placement, location and principal dimensions of . . . utilities.²⁰ In violation of our code, this plat shows no utilities except one portion of the storm system (the vault). Neither Public Works nor the hearing examiner can waive the requirement of code that the location and principal dimensions of utilities be shown in a PRD application.

Our subdivision ordinance requires the applicant to show both existing and proposed drainage facilities, on both the site and the adjacent area.²¹ Again, neither the hearing examiner nor Public Works can waive this requirement. In this case, rather than comply with code, the on-site drainage systems are not shown (because they won’t fit and there has been no testing to make sure the locations actually infiltrate), the new system in Hickman Park is not shown, the existing system on 237th is not shown, the overflow is not shown (apparently because it is illegal to channel it to the Park or the City system under the park, and it will flood existing residents if it is channeled into the existing failed system serving Woodway Meadows), and the existing drainage ditch is not shown (because Burnstead wants to illegally fill it).

C. Maintenance & Testing

The repeated reference to maintenance standards in the current version of ECDC 18.30 is useless since the application is vested to the prior version of ECDC 18.30.

Both the Court of Appeals and the Southwest Edmonds Drainage Basin Plan call for improved maintenance and specific maintenance standards. The 2012 preliminary plat provides a vault even more difficult (impossible) to maintain, and still no maintenance standards.

Rebuttal to Planning Response

A. Perimeter Buffer.

The attempt to satisfy the buffer requirement by reduced setbacks renders 50% of the proposed home designs too large for the lots.

¹⁸ ECDC 20.75.060.

¹⁹ Record at 98.

²⁰ ECDC 20.35.070(A)

²¹ ECDC 20.75.060(P)

In addition, some lots cannot accommodate any of the proposed home design with the new setbacks, for example lot 7 and lot 21.

Because the new proposal lifts the deed restriction requiring landscaped open space on the perimeter, the project no longer complies with ECDC 20.35.040(A)(1) regarding landscaping and greater buffering than a normal subdivision.

B. Open Space.

Tract A, E, and F are not usable open space. Tract A and F cannot be safely used and are occupied by monument signage, and Tract E cannot be used due to the condition that it be fenced and posted for wildlife habitat.

The claim that this is outside the scope of the remand is belied by the hearing examiner's attempt to condition the issue rather than enter a finding. It is now up to council to determine if a dangerous landscaped area holding a monument sign is "usable open space". It is also up to council to determine if an area fenced off and posted as wildlife habitat is "usable open space".

C. The homes don't fit the lots.

As noted previously, PRD stands for planned residential development, and our code calls for coordinated design and requires submission of the home designs and dimensions. This is different from a subdivision, in which the home designs need not be preapproved.

Codes are not construed to be meaningless. The ordinance does not permit the applicant to submit one set of home designs and dimensions to the ADB for approval, then construct something different. The applicant cannot waive the requirement for pre-established home locations, designs and dimensions, and Ms. Brown's comments are irrelevant (they don't prove the point anyway). The ADB condition regarding additional review at the permit stage is prudent given that the applicant showed only one side of the planned homes in the drawings. It does not mean the applicant can propose different homes.

Council needs to step up here and assure that planned residential developments remain planned.

D. Increase of impervious surfaces per lot from 35% to 50%.

The remand was for improved drainage, not to allow an increase in impervious surfaces from 35% per lot to in excess of 50% for the average lot.

This change is outside the scope of the remand, and detrimental to the public.

Further, eliminating the 35% condition also effects other PRD criteria and the prior approval. This is exactly the kind of piecemeal review the Superior Court judge was trying to avoid.

Finally, eliminating the 35% condition is a violation of our zoning code since RS 8 cannot have more than 35% lot coverage. Coverage includes all buildings or structures. Structures include any combination of materials erected permanently on the ground (driveways and walkways). Some combinations of materials erected permanently on the ground are excluded from the definition of structure, but driveways and walkways are not excluded.