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No. 80999-7-I

COURT OF APPEALS, DIVISION I,
OF THE STATE OF WASHINGTON

ABBEY ROAD HOMEOWNERS ASSOCIATION; JOHN STILIN; and SHERRY STILIN,

Petitioners,

and

NEIL BARNETT and MANAJI SUZUKI,

Plaintiffs,

v.

CITY OF REDMOND; EASTSIDE RETIREMENT ASSOCIATION; and EMERALD HEIGHTS,

Respondents.

PETITION FOR REVIEW

Claudia Newman, WSBA #24928
Bricklin & Newman
1424 Fourth Avenue, Suite 500
Seattle, WA 98101-2258
(206) 264-8600

Philip A. Talmadge, WSBA #6973
Gary W. Manca, WSBA #42798
Talmadge/Fitzpatrick
2775 Harbor Avenue SW
Third Floor, Suite C
Seattle, WA 98126
(206) 574-6661

Attorneys for Petitioners

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A. INTRODUCTION

Decades have passed since this Court last addressed the legal standards under the State Environmental Policy Act, RCW 43.21C ("SEPA") for reviewing site-specific land use decisions. Meanwhile, urban development is booming in Washington's metro areas and shows no sign of abating. In fact, the concentration of urban growth is the goal of the Growth Management Act, RCW 36.70A ("GMA"). At this intersection of SEPA and urban development, lower courts and Washington residents need guidance on (1) the standard of review and (2) the legal framework that government decision-makers must use when evaluating these development pressures on existing neighborhoods.

B. IDENTITY OF PETITIONERS

Petitioners Abbey Road Homeowners Association ("Abbey Road"), John Stilin, and Sherry Stilin seek review.

C. COURT OF APPEALS DECISION

Division I filed its opinion on May 24, 2021 and denied reconsideration on June 25. *See* Appendix at A-1 to -21. The trial court's decision is reproduced at A-22 to -38.

D. ISSUE PRESENTED FOR REVIEW

Did the City of Redmond ("City") Hearing Examiner clearly err when she concluded that a large assisted living facility will not have significant adverse aesthetic, view, lighting, and land use impacts under SEPA and thereby did not require an environmental impact statement

("EIS") before the City may approve a conditional use permit ("CUP")?

E. STATEMENT OF THE CASE

Division I's opinion is generally correct in its recitation of the facts and procedure. Op. at 2–6. However, several points bear emphasis.

The Emerald Heights Retirement Community ("Emerald Heights") is located in Education Hill, one of the City's largest and oldest single-family residential neighborhoods. When Emerald Heights was first approved in 1988, its developers placed the largest buildings in the campus's center while preserving and maintaining the existing mature forest around the perimeter of the campus as a permanent 50–80-foot greenbelt buffer. The City recognized that the high-density development, which included commercial uses and large institutional-type buildings, was incompatible with the surrounding low density single-family neighborhood. The City Council conditioned approval of the Emerald Heights campus on the greenbelt buffer and large building setbacks. As a result, the Abbey Road neighborhood and Emerald Heights have lived side-by-side in peaceful harmony for over thirty years.

Nine years ago, Emerald Heights sought a code rezone that would allow it to increase the number of buildings on its campus. In its application, Emerald Heights promised *repeatedly* that it would preserve the greenbelt buffer as it developed new buildings on its property. Relying on that

promise, the Council approved the rezone request and amended its zoning code to allow for increased density on the Emerald Heights property. Abbey Road did not object to the increased density because it appreciated Emerald Heights as a neighbor and could not have imagined that Emerald Heights would break its promise to retain the greenbelt buffer.

Unfortunately, five years after the rezone was approved, Emerald Heights did break its promise. In 2016, Emerald Heights applied for approval of a site-specific development proposal for two buildings, one of which will remove the forested buffer along 176th Ave NE and transform that area into an institutional-looking Assisted Living Building ("Building"). The Building will be a massive, rectangular structure that is nearly the length of a football field. Its scale will dwarf the homes in the surrounding area. It will also significantly and permanently change the use of 176th Ave NE, the roadway between Emerald Heights and the Abbey Road neighborhood. Every single City Council member who voted to approve the 2011 rezone objected to the Building because it was incompatible with, and would significantly change, the character of the surrounding single-family neighborhoods.

Worse yet, with a setback at 15–24 feet, CP 1366, this is the first time that the City has approved a large building with a setback less than 95 feet facing single-family homes in this neighborhood. The Building will serve as a

precedent for approval of similar buildings with small setbacks in the future, in a neighborhood where such setbacks currently average 140 feet.

A second key point is the project at issue is inconsistent with existing zoning. It will require a "CUP," meaning an administrative *exception* to the existing zoning code that was adopted by the elected Council. This only reinforces the exceptional environmental impact of the project

E. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

This Court should address two increasingly important SEPA questions—the standard for reviewing a hearing examiner's decision and the legal standard for a SEPA threshold determination of nonsignificance ("DNS"). RAP 13.4(b)(1), (4). The trial court here was correct: the Hearing Examiner clearly erred in upholding the DNS. As the trial court realized, too many significant environmental impacts attended this project within the meaning of SEPA and its implementing regulations. Review is merited.

(1) The Court of Appeals Misapplied the Clearly Erroneous Test for Overturning a Hearing Examiner Decision

Under the Land Use Petition Act, RCW 36.70C ("LUPA"), appellate review is on the administrative record created before a hearing examiner. *HJS Dev., Inc. v. Pierce County ex rel. Dep't of Planning & Land Servs.*, 148 Wn.2d 451, 467, 61 P.3d 1141 (2003). The reviewing court reverses if the hearing examiner's decision erroneously interpreted the law, was clearly erroneous in applying the law to the facts, or lacked substantial

evidence supporting it. RCW 36.70C.130(1)(b)–(d).

A decision is clearly erroneous when the reviewing court is left with a definite and firm conviction that a mistake has been committed even if some evidence supports the hearing examiner's decision. *Norway Hill Preservation & Protection Ass'n v. King Cty. Council*, 87 Wn.2d 267, 274, 552 P.2d 674 (1976). The clearly erroneous standard requires the court to consider the public policy of the laws that authorize the decision. *Id.* at 272. Consequently, public policy is part of the standard for reviewing a DNS, requiring courts to consider SEPA's policy protecting the public's fundamental rights to "safe, healthful, productive, and aesthetically and culturally pleasing surroundings" against the economic pressures of development. RCW 43.21C.020.

This Court "stands in the shoes of the superior court," *HJS*, 148 Wn.2d at 468 (quotation omitted), and that court did what it was supposed to do under the standard of review. A-22 to -38. Division I should have treated that court's analysis as more than mere cypher. The trial court conducted a very thorough and careful review of a record spanning over 10,000 pages and concluded that the DNS was clearly erroneous. A-37 to -38. Based on that conclusion, the trial court did not reach the Hearing Examiner's approval of the CUP and remanded for a new SEPA threshold determination. A-34, -38.

By contrast, Division I deferred entirely to the Examiner; its review

fell short of what this Court's decisions require under the clearly erroneous standard. Division I's opinion inquired only whether sufficient evidence supported the hearing examiner's decision. Op. at 12. That limited review was error because this Court has long recognized that the clearly erroneous standard calls for "extremely broad" judicial review. *Sisley v. San Juan County*, 89 Wn. 2d 78, 84, 569 P.2d 712 (1977). Under this level of scrutiny, courts engage in "critical review" that is a "more intense" than the arbitrary and capricious standard for other agency decision-making. *Swinomish Indian Tribal Cnty. v. W. Wash. Growth Mgmt. Hearings Bd.*, 161 Wn.2d 415, 435 n.8, 166 P.3d 1198 (2007) (quotation omitted). Even if substantial evidence supports the agency's DNS, courts still must "ensure that an appropriate balance between economic, social, and environmental values is struck." *Polygon Corp. v. City of Seattle*, 90 Wn.2d 59, 69, 578 P.2d 1309 (1978). This imperative "requires a higher degree of judicial scrutiny than is normally appropriate for administrative action." *Id.*

While an agency's judgment might be entitled to some deference, courts still must "examine the entire record and all the evidence in light of the public policy contained in the legislation authorizing the decision." *Polygon*, 90 Wn.2d at 69 (citation omitted). Specifically, elected judges should give such scrutiny to the decisions of Hearing Examiners appointed by the municipality that is pushing forward on the land use action.

Municipalities are under intense pressure to approve permits for new urban development. Indeed, municipalities can even become liable for a developer's damages and attorney fees under RCW 64.40.020 if a permitting agency unlawfully applies SEPA. No similar law compensates Washington citizens whose fundamental right to a healthful environment under SEPA, RCW 43.21C.020(3), has been denied by unlawful government refusals to require an EIS for an impactful new project. So municipalities are better off rubber stamping new urban development, as happened here. But the courts' standard of review is *not* "a rubber stamp." *Swinomish*, 161 Wn.2d at 435 n.8. Because judges are independently elected and insulated from political and economic pressure, they are guardians of the environmental protection policies that lie at the heart of the standard of review. *Polygon*, 90 Wn.2d at 69. Independent judicial scrutiny is particularly necessary as to a CUP-related DNS decision, because more proactive judicial review is necessary to ensure that SEPA's policies are achieved in assessing an exception to existing, legislatively enacted zoning. But courts often seem to defer completely to hearing examiner decisions on SEPA decisions under the "clearly erroneous" test, instead of properly exerting the appropriate scrutiny that the trial court performed here. This Court should grant review to confirm the proper standard for "clearly erroneous review." RAP 13.4(b)(1), (4).

(2) This Court Should Address the Standard for a DNS Under SEPA Because Division I's Decision Conflicts with this Court's Precedents on SEPA and Because SEPA and Growth Management Have Markedly Changed

SEPA overlays and supplements municipal zoning codes. *Polygon*, 90 Wn.2d at 65–66. SEPA "prohibits agency action that would adversely affect the environment until the lead agency's EIS can fully inform that action." *Columbia Riverkeeper v. Port of Vancouver USA*, 188 Wn.2d 80, 93, 392 P.3d 1025 (2017). An EIS is necessary for all "major actions significantly affecting the quality of the environment." RCW 43.21C.030(c). Despite SEPA's importance for environmental protection, this Court has not recently spoken on the circumstances when an agency may allow a developer to forgo an EIS for a proposed development. This Court should grant review to provide this needed guidance.

(a) The Public Policies Advanced by Environmental Impact Statements Depend on the Proper Initial Assessments of Impacts' Significance

Review is merited because Division I's opinion conflicts with SEPA itself and this Court's precedents on the legal framework for the critical first step in the SEPA process—the "threshold determination." RCW 43.21C.033; WAC 197-11-310. At this step, after the lead agency evaluates the proposal and identifies the probable adverse impacts, the agency must issue a formal decision as to whether the proposed project may cause significant adverse environmental impacts. WAC 197-11-310(5). The term "significant" means

"a reasonable likelihood of more than a moderate adverse impact on environmental quality." WAC 197-11-794(1). If the proposal will have "no probable significant adverse environmental impacts," the lead agency may issue a DNS. *Id.*; WAC 197-11-340(1). But if the proposal "may have a probable significant adverse environmental impact," the lead agency must issue "a determination of significance" ("DS"). WAC 197-11-360. If the agency identifies measures that would mitigate the environmental impacts, the agency may issue a "mitigated" DNS ("MDNS"). WAC 197-11-350.

A DNS allows the project applicant to skip an EIS—a consequential event. An EIS must disclose and analyze, among other things, (1) "the environmental impact of the proposed action," (2) "any adverse environmental effects that cannot be avoided should the proposal be implemented," and (3) "alternatives to the proposed action." RCW 43.21C.031. An EIS ensures that the applicant and lead agency have "full environmental information." *Norway Hill*, 87 Wn.2d at 278. With this tool, environmental protection becomes a central consideration for government decision-making. *Id.* at 275; WAC 197-11-400. But without an EIS, a proposal's applicant might sweep environmental harm—and reasonable alternatives—under the rug.

A DNS also allows the applicant to avoid a permit denial or conditions attaching environmental protection measures to the project.

While SEPA does not "dictate a particular substantive result," *Save Our Rural Env't v. Snohomish Cty.*, 99 Wn.2d 363, 371, 662 P.2d 816 (1983), SEPA does confer substantive authority on agencies. Specifically, agencies may deny permits or condition approval on the applicant mitigating the environmental impacts disclosed in the EIS. RCW 43.21C.060; WAC 197-11-660; *Polygon Corp.*, 90 Wn.2d at 64. But this substantive authority is tied to the environmental impacts identified in the EIS. RCW 43.21C.060(1)(a), (1)(f)(i). No EIS, no substantive authority.

All this is to say that the threshold determination—DNS or DS—is the fulcrum of environmental protection for site-specific land use decisions. A DNS is a make-or-break moment because it "ends the environmental review." *Cornelius v. Washington Dep't of Ecology*, 182 Wn.2d 574, 598, 344 P.3d 199 (2015). But Division I did not articulate or apply a legal framework for a DNS that comports with this Court's precedents on SEPA, as discussed more below. This Court should therefore grant review under RAP 13.4(b)(1) and (b)(4) because the stakes involve a legal standard that directly implicates Washingtonians' "fundamental and inalienable right to a healthful environment." RCW 43.21C.010(3).

(b) Guidance Is Needed on the Legal Standard for SEPA Threshold Determinations for Urban Development

Nearly three decades have passed since this Court last addressed the

legal framework for an agency's threshold determination under SEPA for land use decisions.[1] *King Cty. v. Wash. State Boundary Review Bd. for King Cty.*, 122 Wn.2d 648, 653, 860 P.2d 1024 (1993). And there, the controversy was not a site-specific proposal like the one here. *Id.* at 661–64. Not since the 1970s has this Court considered the legal framework for a SEPA threshold determination for site-specific land use decisions. *Polygon*, 90 Wn.2d at 68–69. And since then, urban development has intensified—a trend driven not just by economics and demographics but also by the Legislature's enactments of the GMA and corresponding SEPA reforms.

This Court should consider several facets of the legal framework for SEPA threshold determinations for urban development proposals.[2]

Significant adverse environmental impacts that cannot be mitigated in the short term. Division I's decision endorsed the proposal's plan for a

[1] The Court's recent decisions are not on point. For example, in *Columbia Riverkeeper*, 188 Wn.2d at 85, 91–103, the Court considered the intersection of SEPA with the Energy Facilities Site Locations Act. Another example is *Cornelius*, 182 Wn.2d at 598–99. There, the Court considered the standard for when an agency receives "new information" triggering a new threshold determination decision. In *PT Air Watchers v. State, Department of Ecology*, 179 Wn.2d 919, 319 P.3d 23 (2014), the Court considered the Department of Ecology's DNS for a biomass-burning energy-generation proposal. Because that decision hinged on overlapping statutory regulations under RCW 70 for such projects, it offers little guidance here. In short, no *recent* Supreme Court decision addresses threshold SEPA determinations for urban development like in this case.

[2] Everyone agreed in this case, as they should, that aesthetic effects on the environment may constitute a "significant environmental impact." *See* RCW 43.21C.020(2)(b) (directing agencies to use "all practicable means" to "[a]ssure for all people of Washington … aesthetically and culturally pleasing surroundings"); *Polygon*, 90 Wn.2d at 70 (approving a SEPA determination that account for visual and nonvisual aesthetic impacts).

new vegetated buffer as a justification for the DNS. Op. at 10–11. According to the court, the new plantings would mitigate the Building's height, bulk, and scale as well as the impacts from nighttime lighting and privacy reductions. *Id.* But the trial court rightly concluded that the developer's "proposed planting" would take "many years" to grow in. A-37. And Emerald Heights' own expert testified that even many years from now, the landscaping still will not provide sufficient screening. CP 1431, 1520, 1877-78, 2022. While the proposal's vegetation plan might "increasingly screen the project from neighbors' views over time," the hearing examiner's decision did not account for the short term impacts. CP 10817.

This Court should clarify the legal relevance of short term environmental impacts that might be mitigated in the long term. Consider a proposal to build a new coal-fired power plant that would belch particulates and carbon dioxide into the air for 20 years before a mitigation technology can be added to the plant. By the logic of Division I's opinion and the hearing examiner, SEPA requires consideration only of the coal-fired plant's long term plan, not the environmental harm that would occur in the interim. But that logic conflicts with SEPA, which requires an EIS to account for "the relationship between local *short*-term uses of the environment and the maintenance and enhancement of *long-term* productivity." RCW 43.21C.030(c)(iv) (emphasis added). As this Court has explained, an EIS

must "consider a host of matters, including … *short and long* term consequences." *Eastlake Cmty. Council v. Roanoke Assocs., Inc.*, 82 Wn.2d 475, 493, 513 P.2d 36 (1973) (emphasis added); *see also*, *Polygon*, 90 Wn.2d at 70 (approving a SEPA decision's consideration of a project's "immediate impacts," including construction disruption). If short term environmental impacts must be discussed in an EIS, then logically they cannot be ignored when making the threshold determination whether an EIS is required. Thus, Division I erred in reversing the trial court's decision that hearing examiner failed to adequately account for the short term environmental impacts that would precede the partially effective vegetation screen. RAP 13.4(b)(1).

The legal relevance of a developer's claim that alternative sites would be unbuildable. Division I rejected Abbey Road's argument that, while a building located in the campus's center would not have significant adverse environmental impacts, its placement in the greenbelt without a setback would create such impacts. Op. at 9. Division I seemed to think that SEPA allows a government decision-maker to ignore this kind of location-driven environmental harm if the project has no other feasible location. *Id.* But SEPA regulations explain that "[t]he same proposal may have a significant adverse impact in one location but not in another location." WAC 197-11-330(3)(a). The absence of a reasonable alternative site does not negate this provision—and thus it does not allow decision-makers to

ignore environmental impacts when deciding whether to issue a DNS. Rather, the lack of a buildable alternative is a topic to address in the EIS itself. *See* RCW 43.21C.031(3) (requiring a detailed statement of "alternatives to the proposed action"). Put another way, a developer's claim that alternative sites are unbuildable might be an argument for why a project should ultimately move forward despite the environmental impacts detailed in a proper EIS. But the lack of buildable alternative sites does not permit the developer to skip the EIS altogether. This Court should address this part of the legal framework for SEPA threshold determinations. RAP 13.4(b)(1).

The context for determining whether a proposed urban development will result in probable and significant environmental impacts. Division I held that the hearing examiner properly "considered that the neighborhood contains other large buildings." Op. at 10. But that reasoning conflicts with SEPA regulations' definition of "significant," which requires the agency to consider "context" and "intensity." WAC 197-11-794(2). And "context," says the definition, "may vary with the physical setting." *Id.* Under this definition, an enormous new building replacing a forested greenbelt will have more "significant" impact on its neighbors than would a distant large building. After all, the context and intensity of a next-door project would be different than a distant one. Thus, SEPA's legal framework does not permit a decision-maker to ignore environmental impacts to a project's immediate

surroundings. Division I was wrong, and this Court should consider this aspect of the legal standard. RAP 13.4(b)(1).

When the project's location and context are properly considered here, the clear error is evident. The views of the huge buildings on the Emerald Heights campus have been obscured by a vegetated buffer along 176th Ave NE for thirty years, with all the buildings setback at a minimum distance of 130 feet. Never before in the Education Hill neighborhood has a large building been built at the close range of 15–24 feet. CP 1698–99. Removing the greenbelt and locating this large structure in this location with such a small setback will cause significant adverse impacts to the area. The continuum of mature, mixed forest, that characterizes Education Hill will also be broken in a large section. CP 1661. The trial court carefully reviewed the evidence in the record, and based on that review, concluded that "there is a reasonable likelihood of more than a moderate adverse impact on aesthetics, et. al. with the view of the buildings replacing the view of the trees and all that flows from that replacement." A-36. The Building's unexpected visual impact will impact everyone who drives, walks, and lives along 176th Ave NE. CP 8714.

A proposal's adverse environmental impacts adding to pre-existing environmental impacts. Relatedly, by citing the neighborhood's "other large buildings," op. at 10, Division I's decision also creates a legal environment where one impact-creating project can open the floodgates to more such

projects being built without environmental review. Division I's opinion seems to assume that environmental impacts cannot be significant if similar impacts already exist. But this Court has held that a critical factor for determining the significance of an environmental impact is "the extent to which the action will cause adverse environmental effects *in excess of* those created by *existing* uses in the area." *Norway Hill,* 87 Wn.2d at 277 (quotation omitted) (emphasis added). Simply put, SEPA does not permit government decision-makers to ignore environmental impacts just because existing uses already have similar impacts. The example of a proposal for a new coal-fired power plant is again instructive. A pre-existing plant might already emit particulates and carbon dioxide into the air. But while a new plant would have similar impacts, they would be "in excess of those created by existing uses." *Id.* (quotation omitted). As this Court recognized long ago, "[t]he cumulative impact from other similar projects may be taken into account." *Polygon,* 90 Wn.2d at 69–70 (citation omitted); *see also,* WAC 197-11-330(3)(b) ("The absolute quantitative effects of a proposal … may result in a significant adverse impact regardless of the nature of the existing environment …."). In short, the existence of significant environmental impacts emanating from one project does not create a de-facto license for proposals of similar scope to forgo environmental review. Division I's opinion conflicts with this principle. RAP 13.4(b)(1).

Precedent for future development. Division I's reasoning also clashes with the SEPA requirement that the agency consider whether the proposal will "[e]stablish a precedent for future actions with significant effects." WAC 197-11-330(3)(e)(iv). Division I's opinion focused only on the future development potential for the proposal's specific site. Op. at 12. But nothing in SEPA prohibits the government agency from considering the potential for piggy-backing proposals at other sites in the surrounding area. To the contrary, this Court has construed SEPA as allowing the agency to consider "[a] proposed project's potential for creating pressure to alter *surrounding* land use." *Polygon*, 90 Wn.2d at 69–70 (citation omitted) (emphasis added). For the agency to find significant environmental impacts from this development pressure, the record need not disclose any specific proposals for additional developments. *King County*, 122 Wn.2d at 664. The agency need find only that future additional development is "probable." *Id.*

This case proves that one large building with inadequate screening and setbacks can become a precedent for future large buildings of the same kind. After all, Division I cited the other large buildings in the neighborhood to justify a new building forgoing environmental review. Op. at 10. And now Emerald Heights will introduce a building into the forested greenbelt, abandoning the formula that allowed Emerald Heights to be compatible with its surrounding context. It is forever altering the park-like nature of that

avenue. With this precedent, other developers in Redmond will propose large buildings with small setbacks and point to the Building to argue that their proposals warrant a DNS. By escaping environmental review, new proposals can also bust the existing zoning code, like the Building did here. And if Division I's opinion stands, Emerald Heights will likely do more of the same once it has broken through this initial hurdle of moving into the greenbelt.[3] This Court should grant review to consider, for the first time in decades, how a precedent for future development should figure into local government's threshold determination under SEPA.

How the SEPA threshold determination should account for other land use regulations. Now is the right time for this Court's updated guidance. The GMA requires new development to concentrate in "urban growth areas." *King County*, 122 Wn.2d at 653. As municipalities carry out that mandate, the proper legal framework for their SEPA threshold determinations becomes ever more important.

Plus, on the heels of the GMA's enactment in 1990, the Legislature amended SEPA to streamline the environmental review process for comprehensive planning and land use decisions under the GMA. *See generally*, *Moss v. City of Bellingham*, 109 Wn. App. 6, 15–18, 31 P.3d 703

[3] The record showed that Emerald Heights will develop additional assisted living capacity in the future to meet increased need and contractual obligations with existing independent living residents. CP 2884, 7024-25, 7824, 8464.

(2001), *review denied*, 146 Wn.2d 1017 (2002) (summarizing these regulatory changes). While the Court of Appeals considered this interrelationship between the GMA and SEPA reforms in *Moss*, 109 Wn. App. 6, this Court has not. Before the GMA and these SEPA reforms, this Court had concluded that SEPA allows a permitting agency to refuse an application for new development that otherwise meets all other local land use rules. *Polygon*, 90 Wn.2d at 63. But the amendments to SEPA appear to require the agency to issue a DNS if the agency determines the proposal's significant environmental impacts "are adequately addressed" by the municipality's land use regulations, comprehensive plan requirements, and the like. RCW 43.21C.240(1), (2)(a). And here, the City found that "compliance with tree preservation and replacement regulations adequately mitigates the aesthetic impacts of the project to a point of non-significance." CP 19817. And on appeal, Emerald Heights argued that "this Court need only look to the City's adopted policy determination that compliance with applicable land use regulations constitutes 'adequate analysis of and mitigation for' environmental impacts." Reply Br. at 13 (citing WAC 197-11-158; RZC 21.70.150.A; CP 10816).

But the City and Emerald Heights were wrong. Because development regulations are adopted on a citywide basis, they often cannot, and do not, address the specific adverse impacts of a development proposal.

Thus, SEPA requires agencies to review each project on a case-by-case basis and attach additional SEPA conditions, where appropriate, to mitigate unique adverse significant impacts of each particular project that are not addressed by general legislation. WAC 197-11-158(2).

This Court's guidance is needed on this interplay between SEPA and compliance with a municipality's general land use regulations.

F. CONCLUSION

This case raises critical statewide issues about SEPA's application to site-specific land use decisions. This Court has not given guidance on SEPA threshold determinations for many years. Absent that guidance, lower courts have tended to defer too much to hearing examiner decisions instead of safeguarding SEPA's vital environmental public policies. Here, Division I not only failed to apply the correct level of judicial scrutiny, but also it upheld the DNS despite the contrary authority in SEPA regulations and this Court's precedents. Review is merited. RAP 13.4(b)(1), (b)(4). This Court should reverse the Court of Appeals and reinstate the trial court's ruling in full. Costs on appeal should be awarded to the petitioners.

DATED this 26th day of July 2021.

Respectfully submitted,

/s/ Philip A. Talmadge
Philip A. Talmadge, WSBA #6973
Gary W. Manca, WSBA #42798
Talmadge/Fitzpatrick
2775 Harbor Avenue SW
Third Floor, Suite C
Seattle, WA 98126
(206) 574-6661

Claudia Newman, WSBA #24928
Bricklin & Newman
1424 Fourth Avenue, Suite 500
Seattle, WA 98101-2258
(206) 264-8600

Attorneys for Petitioners

APPENDIX

FILED
5/24/2021
Court of Appeals
Division I
State of Washington

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

ABBEY ROAD HOMEOWNERS ASSOCIATION; NEIL BARNETT; MANAJI SUZUKI; JOHN STILIN; and SHERRY STILIN, Respondents, v. CITY OF REDMOND; EASTSIDE RETIREMENT ASSOCIATION; and EMERALD HEIGHTS, Appellants.	No. 80999-7-I (consolidated with No. 81070-7-I) DIVISION ONE UNPUBLISHED OPINION

APPELWICK, J. — The City approved permits necessary for construction of a large assisted living residence on Emerald Heights's retirement campus. The property is zoned R-6. The building would occupy what is presently a greenbelt abutting 176th Avenue NE in Redmond. The City determined that the construction would not have significant environmental impacts, and issued a determination of DNS under SEPA. The HOA of Abbey Road, a community of single-family residences on the other side of 176th Avenue NE, filed a LUPA appeal of the hearing examiner's determinations to the superior court. The superior court overturned the City's issuance of a DNS, but reserved ruling on the permit issues. Emerald Heights appeals. We reverse.

FACTS

Emerald Heights is a retirement community in the Education Hill neighborhood of the city of Redmond (City). Abbey Road is a community of large single-family residences. The two were developed by the same developer in the 1990s and sit on opposite sides of 176th Avenue Northeast (NE).

Emerald Heights consists of a large number of independent living units, memory care units, assisted living units, and skilled nursing units. The larger main buildings are in the center of the campus. The eastern edge of the property (bordering 176th Avenue NE) is currently a roughly 80 foot deep greenbelt that largely blocks views of the campus buildings.

Abbey Road consists of large single-family homes with yards, mature landscaping, traditional gabled roofs, and consistent exterior materials including lap board siding. The subdivision has a homeowners association (HOA) and covenants, conditions, and restrictions that impose aesthetic controls within the division. The size of homes in Abbey Road are limited to two and one half stories. There is also a minimum roof-slope requirement, as well as a minimum square footage requirement for new homes.

At the time Emerald Heights and Abbey Road were developed, the area was zoned R-4, which imposed a 30 foot height limit on buildings. In order to develop the Emerald Heights campus, the original developers secured a planned unit development (PUD) and special development permit (SPD) in 1988. The PUD and SPD allowed Emerald Heights to exceed the 30 foot maximum, subject to

some conditions. The original PUD and SPD restricted development of large buildings to the central portion of the campus. It also required the retirement center be as far as possible from the neighboring single-family residences.

In 2010, Emerald Heights applied for a development guide amendment to rezone its property from R-4 to R-6 in order to allow additional development on the campus. The Redmond City Council approved the rezone in 2011. The rezone supplanted the PUD conditions.

In 2016, Emerald Heights began the preapplication process for further development on the campus. The proposal at issue here calls for construction of three new buildings: a 44,149 square foot assisted living facility on the eastern side of the campus along 176th Avenue NE and two independent living facilities totaling 70,638 square feet along the southern portion of the campus. The assisted living facility would be about 300 feet long and 37 to 45 feet tall, or about 3 stories in most places. The side of the building that faces 176th Avenue NE will have windows covering the façade. It will be screened by a combination of existing trees and new plantings and landscaping.

Emerald Heights and the City originally proceeded under a "Site Plan Entitlement" (SPE) process. Beginning in August 2016, Emerald Heights worked with the City's Design Review Board (DRB) regarding the project, incorporating its feedback as the proposal developed.

On May 10, 2017, the City sent a letter to nearby residents informing them of the project and inviting them to comment on the proposal. Local residents

expressed considerable interest in the proposal, prompting the City to arrange a meeting between Emerald Heights and the Abbey Road HOA. On June 9, 2017, Emerald Heights hosted a meeting with the HOA to discuss the project and its concerns.

On April 23, 2018, the HOA's attorney sent a letter to the City raising concerns that the SPE process was not sufficient for the proposal. It asserted that a conditional use permit (CUP) was also required. Emerald Heights then applied for a CUP for the project with the City.

After Emerald Heights filed the CUP application, Emerald Heights continued to meet with the DRB and incorporate further changes to the project. The DRB eventually voted to approve the project on September 6, 2018. Through the DRB review process, Emerald Heights agreed to numerous changes to the proposal, including (1) shifting much of the building back an additional eight feet from the property line, (2) shifting back the top two floors on the rest of the building an additional five feet, (3) retaining additional mature trees and removing a walking trail between the building and the street to accommodate more trees, (4) adding trees and increasing their initial size at planting to provide additional screening, (5) removing units from the most visible corner of the building, (6) incorporating residential features like darker colored siding materials, roof parapets, eave overhangs, window bays, and sloped roofs.

Emerald Heights also submitted an environmental impact checklist under the State Environmental Policy Act (SEPA), chapter 43.21C RCW. Emerald

Heights submitted its SEPA application to the City's Technical Committee—the City's SEPA Responsible Official—on June 14, 2018. The technical committee issued a determination of nonsignificance (DNS), followed by a public comment period which ran through August 9, 2018. The HOA appealed the DNS to the Redmond City Hearing Examiner on August 22, 2018.

The technical committee also reviewed the SPE and CUP applications in order to provide recommendations to the hearing examiner on those issues. The technical committee recommended that the hearing examiner approve both permits with conditions.

The hearing examiner conducted a consolidated hearing on all three issues—the SPE, CUP, and DNS—on January 7, 14, and 28. The hearings included argument by counsel and public comment proceedings. The primary issues considered by the hearing examiner included the aesthetic impacts of developing the greenbelt buffer, loss of privacy and views for residents closest to the development, lighting impacts, loss of vegetation and trees, traffic congestion, construction impacts, postconstruction noise from social events, odors from the facilities kitchen, whether the development was incompatible with the surrounding neighborhood, future impacts, and adverse impacts on emergency services.

The hearing examiner granted the CUP and SPE subject to conditions and denied the SEPA appeal. The HOA then filed a land use petition appealing that determination to the King County Superior Court. The superior court determined that the hearing examiner had erred in affirming the DNS. Specifically, it found

that the hearing examiner erred when it determined that the development "[would] not have significant adverse aesthetic, views, privacy, lighting, trees (screening) and land use impacts . . . under SEPA." It did not rule on the SPE or CUP issues.

Emerald Heights and the City appealed. The HOA and certain individual residents of Abbey Road (collectively, HOA) cross appealed.

DISCUSSION

Emerald Heights and the City argue the superior court erred in overturning the hearing examiner's affirmance of the DNS. They also argue the superior court erred in failing to rule on the hearing examiner's decisions on the SPE and CUP. They argue these decisions of the hearing examiner should be affirmed. The HOA assigns no error to the superior court's ruling.[1]

The Land Use Petition Act (LUPA), chapter 36.70C RCW, governs judicial review of land use decisions by local jurisdictions. In a LUPA action, we stand in the shoes of the superior court and review the hearing examiner's action on the basis of the administrative record. Cingular Wireless, LLC v. Thurston County, 131 Wn. App. 756, 767, 129 P.3d 300 (2006).

When reviewing a local decision maker's application of law to the facts, the "clearly erroneous" standard applies. RCW 36.70C.130(1)(d); Cingular Wireless, 131 Wn. App. at 768. A decision is clearly erroneous when the reviewing court is

[1] In its brief, the HOA asked us not to consider whether the hearing examiner was correct in affirming the CUP and SPE if we reverse the superior court's ruling on the DNS. It abandoned that position at oral argument, and encouraged us to overturn the hearing examiner's decision on those issues if we reverse the superior court's ruling on the DNS.

left with a definite and firm conviction that a mistake has been made even if some evidence supports the hearing examiner's decision. Norway Hill Pres. & Prot. Ass'n v. King County Council, 87 Wn.2d 267, 274, 552 P.2d 674 (1976). But, a reviewing court should not substitute its judgment for that of the administrative decision maker. Polygon Corp. v. City of Seattle, 90 Wn.2d 59, 69, 578 P.2d 1309 (1978).

The party seeking relief from a land use decision bears the burden of establishing that the decision-maker's application of the law to the facts was clearly erroneous. Cingular Wireless, 131 Wn. App. at 767-68. Here, that is the HOA.

The hearing examiner's decision must be supported by substantial evidence. RCW 36.70C.130(1)(c). Substantial evidence is evidence that would persuade a fair-minded person of the truth of the statement asserted. Cingular Wireless, 131 Wn. App. at 768. Our deferential review requires that all evidence and reasonable inferences be considered in the light most favorable to the party who prevailed at the highest forum that exercised fact-finding authority. Id. Here, that is Emerald Heights.

I. Determination of Nonsignificance

The appellants argue that the superior court erred in overturning the hearing examiner's affirmance of the DNS. The DNS was issued pursuant to SEPA.

SEPA requires a threshold determination on whether any governmental action will have significant environmental impacts. RCW 43.21C.030; WAC 197-11-310(1). This determination must be documented in either a determination of

significance (DS) or a DNS. WAC 197-11-310(5). A DNS is appropriate where the SEPA responsible official determines there will be no probable significant adverse environmental impacts from a proposal. WAC 197-11-340(1). "Significant" in this context means a reasonable likelihood of a more than moderate adverse impact on environmental quality. WAC 197-11-794(1). Significance involves context and intensity and does not lend itself to a formula or quantifiable test. WAC 197-11-794. Consideration of this and other relevant factors is generally achieved by utilizing the environmental checklist found in WAC 197-11-960. WAC 197-11-315. That checklist contains a section addressing aesthetic concerns. WAC 197-11-960(B)(10).

In applying the clearly erroneous standard to the issuance of a DNS, it is appropriate to consider the broad public policy of consideration of the environmental amenities and values in decision-making by government bodies. Norway Hill, 87 Wn.2d at 272. However, SEPA "does not demand any particular substantive result in governmental decision making." Id. (quoting Stempel v. Dep't of Water Res., 82 Wn.2d 109, 118, 508, P.2d 166 (1973). SEPA requires consideration of environmental factors along with economic and technical considerations. Id.

The HOA's primary argument against the DNS on appeal is that the hearing examiner did not appropriately consider the aesthetic impacts of the building. Among the aesthetic considerations it puts forward are views, privacy, lighting, and screening from trees. Aesthetic considerations—scale, light, traffic, density, and

open space—can be a significant environmental impact, and local decision makers have declined to issue a DNS on that basis. See Victoria Tower P'ship v. City of Seattle, 59 Wn. App. 592, 601-02, 800 P.2d 380 (1990).

A. Location on the Campus

The HOA identifies the location of the proposal as a "foundational cause" of the adverse aesthetic impacts of the proposal. It claims the building would not have significant adverse impacts if it was placed in a different location on the Emerald Heights campus. It argues that, by placing the building so close to 176th Avenue NE, the aesthetics of removing many existing trees and replacing them with a large building would be significant.

The hearing examiner considered this argument. She found that many other portions of the campus were unbuildable due to steep slopes and a stream buffer. The HOA assigned error to this finding, but provided no argument in support of the assignment. We accept the hearing examiner's finding that certain other areas of the campus are unbuildable.

The HOA is correct that the original PUD restricted large buildings to the center of the campus. But, both the hearing examiner and the superior court agreed that the 2011 rezone of the Emerald Heights campus replaced the original 1988 PUD for the campus.[2] The HOA has withdrawn its cross appeal of those determinations.

[2] The HOA nevertheless points to statements from the city council members who approved the 2011 rezone indicating they would not have done so if they had known that large construction would be permitted so close to the perimeter of the

B. Height, Bulk, and Scale

The HOA also contends that the size and scope of the project is simply incongruous with the rest of the neighborhood. The hearing examiner considered this argument. It considered that the height of the building complies with applicable codes. The HOA characterizes this review as being merely "if the project meets the City of Redmond Code requirements, it will not have significant adverse impacts." But, the hearing examiner's reasoning was not so simple. While it considered that the height was within code limits, it also considered the degree to which the view of the building would be obstructed by vegetation.[3] And, it considered that the neighborhood contains other large buildings, including a high school and a church.

C. Lighting and Privacy

The HOA also argues that significant adverse effects will result from the internal lights in the proposed building in the evening. It argues that the building

campus. But, legislative intent cannot be shown by statements of individual legislators. See Woodson v. State, 95 Wn.2d 257, 264, 623 P.2d 683 (1980).

[3] The HOA disputes the level to which the vegetation will actually obstruct the views of the building. It points to the fact that some of the trees are deciduous and will lose their leaves in the winter. It also argues that the evergreen trees that will be planted as part of the project will not be tall enough at the time of planting to provide full screening. It introduced statements from an arborist that the newly planted vegetation would not provide sufficient screening. But, Emerald Heights introduced statements from their landscape architect and another arborist detailing why the screening would be sufficient. The hearing examiner considered the competing testimony in detail, and found that the proposed landscaping buffer would provide sufficient screening. We must accept the hearing examiner's assessment of weight and credibility. Families of Manito v. City of Spokane, 172 Wn. App. 727, 741, 291 P.3d 930 (2013). And, the facts and inferences must be viewed in the light most favorable to Emerald Heights. Id. Contrary testimony does not warrant reversal. Id.

would have 70 or more large windows facing the neighborhood. Because the building would be operational "24 hours a day and 7 days a week," the HOA argues that the light from these windows will affect residents and passersby. But, the windows that face 176th Ave NE are a mix of administrative and residential units. Nothing in the record suggests that all the occupants of residential units will be up all night, or that residents who are awake will not use blinds or curtains to filter light. Some nonresidential areas will also have occupancy sensors to automatically turn the lights off when the room is unoccupied.

In support of its argument, the HOA offered the testimony of a lay witness who prepared a computer-generated design of what he anticipated the lights would look like in the evening. The hearing examiner considered this testimony. The hearing examiner specifically concluded that it was not persuaded that the prepared exhibits were accurate. We must accept that assessment. See Families of Manito v. City of Spokane, 172 Wn. App. 727, 741, 291 P.3d 930 (2013) (reviewing court must accept hearing examiner's assessments of weight and credibility). The hearing examiner also considered that the building would have no exterior light fixtures. And, whatever light that was generated from the interior would be filtered through the vegetated buffer included in the proposal, as well as vegetation on the Abbey Road side of the street. The hearing examiner found that the light impacts would not be significant.

D. Precedent for Future Development

The HOA argues that if this project is approved, it will set a precedent for future development on the campus. It is correct that whether a proposal may serve as a precedent for future development is a valid concern in the issuance of a DNS. WAC 197-11-330(3)(e)(iv). But, it is unclear whether additional development could take place on the campus. Detention ponds impede development to the north, and unbuildable slopes impede development to the west. Emerald Heights sought an R-6 rezone in order to facilitate future development.

The hearing examiner appropriately considered the potential adverse environmental impacts and evidence for and against the issuance of a DNS. But, "on the evidence submitted" she was "not persuaded that being able to see multifamily residential buildings through a vegetated buffer constitutes significant aesthetic impact . . . [c]onsidering the record as a whole." The HOA disagrees with this finding. But, a difference of opinion does not make the hearing examiner's decision wrong. The HOA bears the burden of proving that the hearing examiner's decision was clear error. See Cingular Wireless, 131 Wn. App. at 767. It does not meet that burden here.

We reverse the superior court and affirm the hearing examiner's decision on the City's decision to issue a DNS on the project.

II. SPE and CUP

Emerald Heights asks this court to affirm the hearing examiner's approval of the CUP and SPE. The HOA argues we should find the hearing examiner erred.

Redmond Zoning Code (RZC) art. VI, § 21.76.070 provides criteria that apply to all land use permits. It imposes a requirement of consistency between the proposed project and applicable regulations and the City's Comprehensive Plan (RCP). Id. Additional requirements for a retirement residence are outlined in RZC art. I, § 21.08.370(C)(3)(b).

The HOA makes five primary arguments against the hearing examiner's determination. First, the hearing examiner improperly disregarded community opposition to the project. Second, the proposal is inconsistent with the RCP. Third, the proposal is not compatible with the area. Fourth, the proposal is inconsistent with the City's design standards. Last, the proposal does not meet specific requirements for retirement communities.

We review the hearing examiner's application of law to the facts in this context under the clearly erroneous standard. RCW 36.70C.130(1)(d); Cingular Wireless, 131 Wn. App. at 768. When reviewing a permitting decision such as a CUP, we recognize the broad discretion afforded to local decision makers in determining whether to grant a particular application. Timberlake Christian Fellowship v. King County, 114 Wn. App. 174, 181, 61 P.3d 332 (2002).

A. Community Opposition

First the HOA argues the hearing examiner improperly disregarded community opposition to the project. It argues that the hearing examiner dismissed

public testimony as mere "community opposition" that "deserved no weight in informing her decision." It cites to the following finding of the hearing examiner:

> Project opponents have made their strong feelings clearly understood, they want to continue to see the mature trees along 176th Avenue NE and, equally importantly, to continue not to see multistory retirement residence buildings from the same vantage[.] These types of opinions are not uncommon and are not surprising, no one enjoys losing a favorite view on neighboring property or on a road they frequently travel[.] Project opponents invested a great deal of time and energy to study zoning code requirements and the Comprehensive Plan, and to develop and fill the record with their own interpretations of whether the project complies with required development standards[.] However, as stated at the hearing, land use permits are not decided by popularity contest or by vote[.] While reasonable minds can differ on interpretations of code requirements, based on the record submitted, the undersigned is not persuaded by the code interpretations of project opponents [.] As detailed in the previous conclusions, the evidence as a whole shows compliance with all applicable standards[.] Washington courts have held that community displeasure alone cannot serve as the basis for denial of a permit[.] "While the opposition of the community may be given substantial weight, it cannot alone justify a local land use decision[.]" Based on the record submitted, the permits must be granted.

(Citations omitted) (quoting Sunderland Family Treatment Servs. v. City of Pasco, 127 Wn.2d 782, 797, 903 P.2d 986 (1995)).

The hearing examiner did not disregard the community opposition or dismiss it as irrelevant. To the contrary, the hearing examiner recognized the considerable effort that community members put into putting forth their own reasonable interpretation of the code's requirements. But, the hearing examiner was not persuaded by those interpretations. The hearing examiner did not dismiss the community opposition as "deserv[ing] no weight in informing her decision." Citing Sunderland, she concluded, consistent with case law, that such opposition can be given substantial weight, but cannot alone justify a local land use decision.

We must defer to the hearing examiner's assessments of weight and credibility. The HOA has not met its burden of showing clear error in the hearing examiner's treatment of community opposition.

B. Compliance with Comprehensive Plan

The HOA argues next that the proposal does not comply with the RCP. The hearing examiner is required to analyze a proposal's compliance with the RCP prior to approving a permit. RZC art. VI, § 21.76.070. The HOA agrees that the hearing examiner's analysis should be reviewed under the "clearly erroneous" standard.

The HOA points first to expert analysis from architect Peter Steinbrueck. It claims that Steinbrueck "demonstrated, via legal analysis, that the proposal was inconsistent with at least fifteen policies in the [RCP] that were not mentioned in the City's Technical Report or the Hearing Examiner's decision at all."

The HOA argues that the hearing examiner erred by not addressing these policies in her findings. It is true that the hearing examiner did not enter detailed findings as to each portion of the RCP Steinbrueck referenced. But, the record shows that hearing examiner considered Steinbrueck's arguments. And, it shows that she was not persuaded by Steinbrueck's interpretations of the RCP. The hearing examiner's rejection of code interpretations by project opponents created a sufficient record for appeal. The HOA's argument that such detailed findings were necessary is without merit.

The HOA next points to portions of the RCP that it argues are relevant to the proposal. It argues first that the proposal is inconsistent with RCP policy for the neighborhood of Education Hill (N-EH)-14: "Encourage a mix of housing types, styles, and a range of choices, while maintaining the overall single-family character of established neighborhoods in Education Hill." The HOA concedes that the proposal encourages a mix of housing types. But, it argues that the size and contemporary modern style of the building fails to preserve the single family character of the neighborhood. The hearing examiner was not persuaded by these arguments, finding that the contemporary style was shared by other buildings in the neighborhood. The record supports that finding. While Abbey Road and the broader neighborhood is predominantly single family, there are other large buildings in the neighborhood. And, Emerald Heights had been rezoned from its original R-4 to R-6 to allow this type of residential building.

The HOA also argues the proposal is inconsistent with RCP N-EH-18 and N-EH-19. These policies appear in the section of the plan dedicated to "Cottages and Multiplex[es]." The RCP defines "cottage" as "[a] small detached dwelling unit, not greater than 1,000 square feet in total floor area that is developed at a density greater than the underlying zone." RCP glossary at 5. It defines "multiplex" as "[a] structure that is a two-unit, three-unit, or four-unit attached dwelling, and may also be known as a duplex, triplex, or fourplex." RCP glossary at 13. The proposed assisted living building would be 44,149 square feet and would contain 54 units.

The proposal is not a cottage or a multiplex. This section of the RCP is inapplicable.

The HOA has not met its burden of showing clear error in the hearing examiner's determination that the proposal was consistent with the referenced Comprehensive Plan policies.

C. Compatibility with the Area

The HOA argues the proposal is not compatible with the rest of the area. The hearing examiner is required to consider compatibility with neighborhood character in the issuance of permits. RZC art. VI, 12.76.070(K)(4)(b). The RCP defines "neighborhood character" as

> [t]he various elements of a neighborhood that give it a distinct "personality." Including but not limited to land uses (e.g., residential/commercial mix and population), urban design (e.g. bulk, scale, form), visual resources (e.g. public view corridors and vistas), historic resources (e.g. historic landmarks), natural features (e.g. streams and steep slopes), and physical features (e.g. streets and public places).

RCP glossary at 14. The RCP also describes the character of the Education Hill neighborhood as "primarily residential." RCP N-EH, neighborhood vision at 13-21. A "conditional use . . . may be appropriate on a specific parcel of land within a given zoning district . . . but [is] not appropriate on all parcels within the same zoning district." RZC art. VI, § 21.76.070(K)(1). The hearing examiner's determination of compatibility is a factual determination reviewed under the substantial evidence standard. Timberlake, 114 Wn. App. at 186.

The HOA's primary argument in this regard is that the height, scale, modern design, and location are not compatible with the rest of the neighborhood. It is essentially the same argument it advanced regarding RCP N-EH-14.

The neighborhood contains other large scale buildings, including a high school, church, and other development on the Emerald Heights campus. And, the hearing examiner found that the project had been modified in ways to reduce its apparent size and has screening that exceeds code requirements. Those findings are supported by substantial evidence. The HOA's contention that the mere presence of a large building is incompatible with the character of the neighborhood is belied by the fact that other large "institutional" buildings already exist in the neighborhood.

The hearing examiner also found that the project was compatible with existing development because it has residential-style eaves and windows, materials and colors selected to blend and merge with the surrounding development, exceeded the minimum setback requirements for the majority of the building, and steps were taken to reduce the apparent size of the building. The HOA does not argue that these findings are not supported by substantial evidence, it simply argues that they are not sufficient.

As to the modern design, it may be true that the design differs from the traditional design of Abbey Road homes, but it is consistent with other buildings, most notably the Trailside Building on the southern perimeter of the Emerald Heights campus. The hearing examiner considered the architecture of the

Trailside Building, as well as the fact that its more contemporary design had originally been incorporated at the request of the City. The contemporary style has also been used in many new residential and multifamily designs elsewhere in the neighborhood. The hearing examiner concluded based on these other developments that a contemporary-style building was not "inherently incompatible" with the rest of the neighborhood. That conclusion is supported by substantial evidence.

The HOA has not met its burden of showing the hearing examiner's conclusion that the proposal was compatible with the area is not supported by substantial evidence.

D. Design Standards

The HOA argues that the proposal does not meet the City's design standards. It again points primarily to Steinbrueck's analysis. But, the DRB did its own analysis and concluded that the proposal was compliant with design standards. Steinbrueck expressly disagreed with that analysis. The hearing examiner considered both, and was persuaded that the project complied with applicable requirements.

A difference of opinion is not sufficient to demonstrate clear error of the hearing examiner's determination that the project complied with design standards.

E. Retirement Community Standards

The HOA argues that the proposal does not meet applicable standards for a retirement community primarily because it has an institutional rather than

residential feel, as required by RZC art. I, § 21.08.370(C)(5)(a). But, again, the argument primarily rests on the size of the building. The hearing examiner noted the steps that Emerald Heights took to make the building appear more residential, such as having residential-style eaves and windows. While the building may differ in significant ways from the large single family homes in Abbey Road, it is nevertheless residential in its design and purpose.

The HOA has not demonstrated clear error in the hearing examiner's determination that the building meets applicable retirement community standards.

III. Conclusion

The hearing examiner carefully considered the opposing positions of the HOA and Emerald Heights. It was not persuaded by the HOA's arguments. But, its findings are supported by substantial evidence. The HOA may disagree with this decision, but it has not met its burden of showing a clear error in the hearing examiner's decision. The superior court's finding to the contrary was error.

We reverse.

Appelwick, J.

WE CONCUR:

Chun, J.

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

ABBEY ROAD HOMEOWNERS ASSOCIATION; NEIL BARNETT; MANAJI SUZUKI; JOHN STILIN; and SHERRY STILIN, Respondents, v. CITY OF REDMOND; EASTSIDE RETIREMENT ASSOCIATION; and EMERALD HEIGHTS, Appellants.	No. 80999-7-I (consolidated with No. 81070-7-I) ORDER DENYING MOTION FOR RECONSIDERATION

The respondents, Abbey Road Homeowners Association, Neil Barnett, Manaji Suzuki, and John and Sherry Stilin, filed a motion for reconsideration. The court has considered the motion pursuant to RAP 12.4 and a majority of the panel has determined that the motion should be denied. Now, therefore, it is hereby

ORDERED that the motion for reconsideration is denied.

Appelwick, J.
Judge

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF KING

ABBEY ROAD HOMEOWNERS ASSOCIATION; NEIL BARNETT; MANAJI SUZUKI; JOHN STILIN; and SHERRY STILIN, Petitioners, v. CITY OF REDMOND; EASTSIDE RETIREMENT ASSOCIATION; and EMERALD HEIGHTS, Respondents.	No. 19-2-11548-3 SEA **ORDER ON LUPA APPEAL** [ ] Clerk's Action Required

This case comes before the Court for determination on Petitioner's LUPA appeal of a decision by the City of Redmond Hearing Examiner dated April 1, 2019. The Court heard the argument of counsel on October 18, 2019 and has reviewed the record and pleadings submitted in this matter. The Hearing Examiner's decision approved a conditional use permit (CUP) and site plan entitlement (SPE) to Emerald Heights, allowing a new independent living and assisted living building. The decision also denied an appeal of the State Environmental Policy Act (SEPA) Determination of Nonsignificance (DNS) by the City of Redmond Technical Committee. The Petitioner challenged the Hearing Examiner's Findings, Conclusions, and Decision on the SEPA Appeal, CUP, and SPE.

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KING COUNTY SUPERIOR COURT
516 3rd Avenue
Seattle, WA 98104
(206) 477-1361

The Court hereby makes the following findings and conclusions.

I. FINDINGS OF FACT

1. This action is a Land Use Petition filed under the Land Use Petition Act (LUPA).
2. The Emerald Heights Retirement Community (EHRC) proposes to upgrade and increase its facilities by constructing a 54-unit Assisted Living building at the eastern end of its Redmond campus and construct a new 42-unit Independent Living building at the south end of the campus. The intent of the upgrade is for EHRC to enhance the quality of care for its residents, in particular to allow for private rooms for the nursing facility, rather than the semi-private rooms that now exist. AR 624.
3. EHRC applied for City approval of a CUP and SPE to construct the new buildings on their current campus, but closer to the Abbey Road Neighborhood (ARN) than their previous buildings. EHRC needed the CUP, SPE, and a determination and analysis of significant adverse environmental impacts pursuant to the State Environmental Police Act (SEPA) to proceed with their building proposals.
4. The DNS was issued on July 26, 2018 and appealed on August 22, 2018. A public hearing was held before the hearing examiner.
5. The hearing examiner denied the SEPA appeal and granted the CUP and SPE applications in a decision that encompassed 112 findings of fact and 17 conclusions of law. Both parts of the decision were appealed to this court.

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6. The EHRC and the ARN are both located in the Education Hill Neighborhood of the City of Redmond. AR 9662. The Education Hill Neighborhood is zoned for residential uses. AR 1663-1696, 9665. There is no commercial zoning, mixed use zoning, or industrial zoning in the Education Hill neighborhood. AR 9663-9665. There are five other institutional buildings on Education Hill: Redmond High School, Redmond Middle School, Horace Mann Elementary School, St. Judes Catholic Church, and Hartman Park Pool. AR 333.
7. The ARN is across a public street, 176th Avenue NE, from the EHRC and from the proposed expansion. AR 296, 333, 9757.
8. The ARN has 205 single-family residential homes and was developed between 1990-1993. AR 7272. The homes are generally traditional, have gabled roofs with muted colors, and are limited to two and one-half stories. SEPA 19.
9. The public street that divides these two communities has deciduous street trees on both sides, a six-foot fence covered in ivy on the EHRC side, and mature evergreen trees between the EHRC building which shields the EHRC from view. AR 9757, 296. It is a mature forested neighborhood that feels residential and green due to the significant number of large, mature trees. AR 9665-9666.
10. The neighborhood vision in the Redmond Comprehensive Plan places a priority on protecting the green look and feel of the area, with maintaining the undeveloped area to preserve the woodland views valued by the neighborhood. AR 9663-9665.

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11. The existing mature evergreen trees provide a forested buffer between EHRC and ARN which adds to the obscuring of the retirement community and its larger buildings in all four seasons. AR 145.

12. The other institutional buildings in the area—the schools, pool, and church—serve the neighborhood and all except the church are on public property. SEPA 31, 78. EHRC is gated, fenced, private and not open to the neighborhood. AR 7287-7288. EHRC is dissimilar from the other institutional buildings.

13. The other institutional buildings in the area are setback from their property lines from 95 to 183 feet. AR 334-348. EHRC is currently setback 131 feet from the property line where it faces ARN, with the largest building 278 feet from the nearest home, while the proposed new buildings would be setback 15-24 feet from the property line. AR 345, AR 443, AR 499-504, AR 9402.

14. The ARN has areas set aside to maintain the green, natural feel of the neighborhood with a 7.5 acre native growth protection easement, nature trails, and forested areas. AR 7268-7269.

15. EHRC has a main building with multiple wings, another independent living building, 12 duplex cottages, as well as other buildings. AR 7286, AR 182, AR 144.

16. EHRC was originally approved for development as a retirement community in 1988 by Redmond City Ordinance 1454, but had specific conditions attached. AR 9745-9747. The conditions included the forested buffer on the perimeter and restricting density to the center of the development. AR 187-200, AR 9750-

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9752. The conditions allowed the views of EHRC to be obscured from the street and from the homes in ARN. AR 0503. These conditions were imposed via a PUD, but Ordinance 1454 also had the signature of the applicant, the EHRC representative, stating "Applicant hereby agrees to each of the conditions of this approval." AR 185. The mayor also signed the Final Approval Order, which gave the Special Development and Planned Unit Development Permit the appearance of a contract. AR 185.

17. In 1996, the City of Redmond changed its zoning code to repeal its PUD ordinance and eliminate the PUD procedure as a way to explicitly bind specific parcels of land within a zoning code. Existing PUDs would remain in place, but anything in the future to create a land specific use would be created with a "development agreement."

18. In 2011, EHRC requested City Council approval to rezone their property from R-4 to R-6. AR 141. The rezone, in Ordinance 2607, allowed for an increase in density and for an increase in building height. AR 145, AR 9800-9803. During the rezone process, EHRC represented that they planned to keep the forested buffer around its development. AR 1667-1696. EHRC made statements such as the following: "Emerald Heights is surrounded by a fence with ample landscaping to buffer Emerald Heights from adjoining uses." AR 1669. "Thus, the proposed development will make optimal use of the developed areas while retaining the existing green belts and natural areas around the site." AR 1670. "The current concepts maintain the green belts, nature path and the existing

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green character." AR 1671. ". . . [R]etains the natural green space around the site." AR 1671, *See also Hearing Examiner decision at AR 9415-9516 and EHRC CFO testimony at AR 10188-10191.* It is clear that the forested buffer and centrally located density allows EHRC and the surrounding neighborhood to exist in harmony.

19. Despite these assurances, EHRC did not have a specific building proposal to present to the council and it was clear that any future proposal would need to go through the applicable approval process. AR 9416-9418; *see video of Council meeting.* The lack of a specific proposal was clear throughout the rezone process. While in support of the rezone EHRC strongly implied that the existing forested buffer along 176th Street would remain, EHRC did not provide a specific plan that showed the existing forested buffer would remain. Their implications are not legally binding, although it is unfortunate that EHRC's statements to the City Council were not honored.

20. During this rezone, the City Council could have required a developer agreement to bind EHRC to the promises as outlined above, much in the same way the 1988 City Council created the PUD to limit the nature of the original EHRC development. The City Council did not bind EHRC to their assurances during the rezone using the tools they had at their disposal in 2011.

21. City Council members submitted letters to the hearing examiner in this LUPA claiming they relied upon the EHRC representations of keeping the vegetation in approving the 2011 rezone. However, it is unclear to this Court why the City

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Council failed to require a developer agreement to maintain the existing forested buffer and require density to be in the center of the EHRC campus if that was the intent in 2011.

22. The new EHRC buildings will remove 181 mature trees. AR 9389. While EHRC plans to replant some trees, there was conflicting testimony about the long-term success of those new trees and the new trees' ability to obscure the buildings. AR 655-657, AR 9390. This Court defers to the Hearing Examiner's decision that the proposed new landscaping would be maintained by professionals and is likely to succeed. AR 9391-9392. Even if the new plantings survive, the trees will not be the same as the current forested buffer, will not obscure the view of EHRC from the road or neighboring houses in the same way as before, and will take years to achieve the same maturity.

23. Alternative sites were considered by EHRC, but ultimately EHRC determined that other sites were too expensive to build, had too many disruptions for the current residents, or did not provide the appropriate connections for assisted living residents. AR 775-791. The current proposal seems to minimize all of EHRC's concerns.

24. The new buildings are a contemporary modern design, more consistent with other buildings on EHRC than with the ARN. AR 506; 5128-29; 9489. This by itself does not make the EHRC proposal incompatible, but is one factual area to consider.

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25. ARN contested that the building proposal was consistent with Redmond Comprehensive Plan policies. Redmond's Comprehensive Plan includes goals of maintaining "Redmond as a green city with an abundance of trees, forested areas, open space, parks . . ." AR 9655. ARN primarily offered Peter Steinbrueck's testimony and report to show how the EHRC proposed development was inconsistent with the Comprehensive Plan and with the Education Hill Policies. AR 9696-9712. In particular, Mr. Steinbrueck asserted the technical review and design review was not of the appropriate level of intensity, the need for a clear and convincing finding that a retirement resident is consistent with the character of the surrounding neighborhood, and failure to appropriately follow and analyze the Design Standards Checklist. In sum, the ARN asserted the proposed building was too large, too close to surrounding homes, and eliminated too many trees to be consistent with the Redmond Comprehensive Plan and Education Hill Neighborhood Policies.

26. The City of Redmond Technical Committee was the lead agency for review of the EHRC building proposal and issued a DNS. ARN provided testimony primarily concerning the removal of the forested buffer which would result in the loss of privacy and views for the neighbors closest to the development, the alteration of views for all entering the neighborhood, incompatibility with the character of the single-family home neighborhood, and the light impacts from the buildings blocking light and emitting light. While other allegations of error were submitted (traffic, noxious odors, emergency services, etc.), the thrust of

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ARN appeal was the location of the new building on the perimeter of the EHRC property would fundamentally change the views for the surrounding neighborhood and those who entered the neighborhood.

II. CONCLUSIONS OF LAW

1. The Court reviews this LUPA under RCW 36.70C statutory framework. Pursuant to RCW 36.70C.130(1), the Hearing Examiner's Decision must be reversed if:

> (a) The body or officer that made the land use decision engaged in unlawful procedure or failed to follow prescribed process, unless the error was harmless;
> (b) The land use decision is an erroneous interpretation of the law, after allowing for such deference as is due the construction of a law by a local jurisdiction with expertise;
> (c) The land use decision is not supported by evidence that is substantial when viewed in the light of the whole record before the court;
> (d) The land use decision is a clearly erroneous application of the law to the facts;
> (e) The land use decision is outside the authority or jurisdiction of the body or officer making the decision; or
> (f) The land use decision violates the constitutional rights of the party seeking relief.

2. The Court reviews the Hearing Examiner's legal conclusions de novo. RCW 36.70C.130(1)(b). *Ellensburg Cement Products, Inc. v. Kittitas County,* 179 Wn.2d 737 (2014); *Schofield v. Spokane County*, 96 Wn. App. 581 (1999).

3. The Court reviews the Hearing Examiner's application of facts to the law using the clearly erroneous standard. RCW 36.70C.130(c); *Cingular Wireless, LLC v. Thurston County,* 131 Wn. App. 756 (2006). Standard (c) is a factual

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determination by a hearing examiner that is reviewed to determine if substantial evidence supports the hearing examiner's finding. *Id.* A decision is clearly erroneous when the Court is left with a definite and firm conviction that a mistake has been committed, despite the fact that evidence may exist to support the examiner's finding. *Norway Hill Preservation and Protection Association v. King County Council,* 87 Wn.2d 267 (1976); *Cougar Mountain Assocs. v. King County*, 111 Wn.2d 742 (1988).

4. The repeal of PUD process in Ordinance 1901 did not eliminate the PUD that restricted EHRC's development of their property. As stated in Ordinance 1901, already existing PUDs remained in full force and effect, were enforceable according to their terms unless and until they were repealed. Absent a repeal or a rezone, the current EHRC building proposal would be inconsistent with the conditions of the prior 1988 PUD and the prior Ordinance 1454.

5. Nevertheless, this Court agrees with the Hearing Examiner's legal conclusion that the 1988 PUD overlay no longer restricts the EHRC property. As the PUD is a zoning action, any rezoning necessarily extinguishes a PUD. When the 2011 City Council adopted Ordinance 2607, rezoning the EHRC property from a R-4 to a R-6, it was repealing any PUD that otherwise restricted the property. This Court does not find the rezone to be a repeal by implication, but an explicit repeal of prior zoning ordinances. In other words, the only way to extinguish the PUD on EHRC was to rezone the EHRC property, which is exactly what the City Council did in 2011 via Ordinance 2607. It was unnecessary for the City

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Council to explicitly state the PUD was being extinguished as the very act of rezoning is explicit repeal of the existing PUD zoning.

6. While former City Council members submitted letters indicating their intent in approving the 2011 rezone, which they now state was based on a belief that the forested buffer would remain, after-the-fact statements cannot be used to prove legislative intent. *Woodson v. State,* 95 Wn.2d 257 (1980). Moreover, as noted in the findings of fact, there were tools available to the 2011 City Council members to ensure development restrictions were in place. The City Council failed to utilize these tools. Whether the City Council failed to utilize the available tools to continue the PUD because they relied upon EHRC's statements, failed to realize the prior PUD would not continue, or had no intention of binding the property is unknown. This Court cannot read legislative intent into the City Council's reasons for failing to bind the property from the letters submitted.

7. The conditions of the Special Development Permit (SDP) were signed and agreed to by EHRC in the final approval order. The Redmond Code in effect at the time required that the final approval order "shall be recorded as a covenant appearing on the deed to the property." AR 9787. The final approval order was part of the SDP process in 1988 and is an applicant's acknowledgement of the conditions imposed on the property through the SDP process. RCDG 20C.20.235(70)(c); AR 9786-87. While the final approval order looks like a contract, it is otherwise inconsistent with a concomitant agreement, and ARN

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was not a party to the final approval order. Only EHRC and the City would be parties, with those parties able to modify any conditions. Moreover, even covenants that run with the land can be modified and the Redmond codes allowed covenants to be modified by Hearing Examiners.

8. The Hearing Examiner has the jurisdiction to approve a CUP if the applicant demonstrates that the CUP is consistent with the Redmond Zoning Code and the Comprehensive Plan; the use is compatible with the character, appearance, quality of development, and physical characteristics of the property and immediate vicinity; the location, size, and height of buildings, structures, walls and fences, and screening vegetation do not hinder neighborhood circulation or discourage permitted development or use of neighboring property; the type of use, hours of operation, and appropriateness of the use in relation to adjacent uses minimize unusual hazards or characteristics of the use that would have adverse impacts. RZC 21.76.070.K. EHRC had the burden of proving their application is consistent with the regulations.

9. Review of the Hearing Examiner's findings and conclusions regarding the development proposal's consistency with the Comprehensive Plan is reviewed under the clearly erroneous standard. It is an application of the facts to the laws. RCW 36.70C.130(1)(c).

10. This Court is reserving ruling on the Hearing Examiner's finding that EHRC proposal is consistent with the Redmond Comprehensive Plan. In light of Conclusions 11-15 below regarding the SEPA appeal, this Court does not need

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to reach the issue of the consistency with the Comprehensive Plan. The Court finds this issue to be similar to the SEPA issues of aesthetics, et al, when considering whether the building proposal as it currently exists is incompatible with the Education Hill neighborhood; whether the bulk, scale, and location of the buildings violate the Comprehensive Plan; whether the level of review was appropriate; and the overall compatibility with the neighborhood. Because the Court is concluding a more thorough SEPA review is necessary, the Court is declining to reach the issue of whether the Hearing Examiner erred in finding compatibility with the Redmond Comprehensive Plan.

11. The SEPA threshold determination is whether a building proposal is likely to have a probable significant adverse environmental impact. WAC 197-11-330. This Court reviews the Hearing Examiner's finding and conclusion of the City's determination of DNA under the clear error standard of review. *Cougar Mountain Assocs. v. King County*, 111 Wn.2d at 747. The appellate courts have found significant impacts in cases with major opposition to a project, a major change in the use of a large area, or the perception of "accelerating development." *Id.* at 750 (citations omitted).

12. An Environmental Impact Statement (EIS) is required for actions that significantly affect the quality of the environment. The lead agency (Technical Committee) under WAC 197-11-330, 197-11-794 determines if an EIS is required, taking into account:

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(a) The same proposal may have a significant adverse impact in one location but not in another location;

(b) The absolute quantitative effects of a proposal are also important, and may result in a significant adverse impact regardless of the nature of the existing environment;

(c) Several marginal impacts when considered together may result in a significant adverse impact;

(d) For some proposals, it may be impossible to forecast the environmental impacts with precision, often because some variables cannot be predicted or values cannot be quantified.

(e) A proposal may to a significant degree:

(i) Adversely affect environmentally sensitive or special areas, such as loss or destruction of historic, scientific, and cultural resources, parks, prime farmlands, wetland, wild and scenic rivers, or wilderness;

(ii) Adversely affect endangered or threatened species or their habitat;

(iii) Conflict with local, state, or federal laws or requirements for the protection of the environment; and

(iv) Establish a precedent for future actions with significant effects, involves unique and unknown risks to the environment, or may affect public health or safety.

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13. The Hearing Examiner, and thus this Court, reviewed the SEPA appeal in this case for significant adverse environmental impacts to air, aesthetics, light, noise, traffic and public services.

14. This Court finds the Hearing Examiner erred when she concluded the Emerald Heights proposal will not have significant adverse aesthetic, views, privacy lighting, trees (screening) and land use impacts to ARN under SEPA. There is a reasonable likelihood of more than a moderate adverse impact on aesthetics, et al, with the view of the buildings replacing the view of the trees and all that flows from that replacement. The effects put together leave this Court with the firm impression that a mistake has been made as to the Technical Committee and Hearing Examiner's determination that the proposal is appropriately DNS. The size of the proposed buildings, along with its location, are wholly incongruous with the rest of the neighborhood. While EHRC made many modifications to their initial proposal in an attempt to address community concerns, the size of the building at the proposed location make the modifications insufficient. This Court holds the SEPA appeal should have been granted and an EIS be required for a further determination of mitigation of the significant adverse impacts or a Determination of Significance for if the impacts cannot be mitigated.

15. This Court has given deference to the findings of the Hearing Examiner and the Technical Committee. Further, this Court understands that both the Hearing Examiner and the Technical Committee worked very hard to balance the

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competing priorities of EHRC and ARN. This Court recognizes the Technical Committee worked with EHRC for two years to make project revisions to address the aesthetic concerns as best as they could. This Court further recognizes the days of testimony the Hearing Examiner considered and the careful thought she put into her ruling. While the height of the building is not incongruous, the length, scale, and mass of the building is unlike anything else in the neighborhood. The proposed plantings are stated to provide 80% screening, yet that would not be for many years and is not the same as the existing screening. Statements by the Hearing Examiner to the contrary are in error. The Technical Committee's determination that impacts to private views are less significant to public views is reasonable, yet the views that are being impacted are to more than just the private residences in the area. Any visitor to the area will lose the beautiful and tranquil feeling of this part of the Education Hill neighborhood. This Court has the benefit of viewing the record as a whole, and even under the clear error standard of review, the Court finds that the SEPA appeal should have been granted.

16. The Court agrees with the Hearing Examiner as to the traffic and noxious odor parts of the SEPA appeal that the Petitioners' position is not supported. The reversal of the SEPA appeal is based on the adverse impacts to the aesthetic and light impacts on the ARN.

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This Court hereby REMANDS this case to the responsible official for further action in compliance with SEPA to either mitigate the significant adverse impacts of EHRC proposal or to issue a determination of significance for the building proposal if the impacts cannot be mitigated.

DATED this 27th day of December, 2019.

Judge Melinda J. Young

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(206) 477-1361

DECLARATION OF SERVICE

On said day below I electronically served a true and accurate copy of the ***Petition for Review*** in Court of Appeals, Division I Cause No. 81252-1-I to the following:

George Richard Hill
Katie Kendall
McCullouch Hill, PS
701 – 5th Avenue, Suite 6600
Seattle, WA 98104-7006

Janes Haney
Katherine Hambley
Ogden Murphy Wallace, PLLC
901 – 5th Avenue, Suite 3500
Seattle, WA 98164-2059

Claudia Newman, WSBA #24928
Bricklin & Newman
1424 Fourth Avenue, Suite 500
Seattle, WA 98101-2258

Copy electronically served via appellate portal to:
Court of Appeals, Division I
Clerk's Office

I declare under penalty of perjury under the laws of the State of Washington and the United States that the foregoing is true and correct.

DATED: July 26, 2021, at Seattle, Washington.

/s/ Matt J. Albers
Matt J. Albers, Paralegal
Talmadge/Fitzpatrick

TALMADGE/FITZPATRICK

July 26, 2021 - 9:25 AM

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Filed with Court:	Court of Appeals Division I
Appellate Court Case Number:	80999-7
Appellate Court Case Title:	Abbey Road Homeowners Assn., et al, Resps/X-Apps v. Eastside Retirement Assn., et al, Apps/X-Resps

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Filing on Behalf of: Philip Albert Talmadge - Email: phil@tal-fitzlaw.com (Alternate Email: matt@tal-fitzlaw.com)

Address:
2775 Harbor Avenue SW
Third Floor Ste C
Seattle, WA, 98126
Phone: (206) 574-6661

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