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

Appeal of King Co. Superior Court #15-2-18594-2SEA

WILLIAM E. BUCHAN, INC., a Washington corporation,
Petitioner/Appellant/Cross Respondent,

vs.

THE CITY OF SAMMAMISH, a Washington municipal corporation,
CHESTNUT ESTATES NEIGHBORS; TOM AND CHRISTIE
MALCHOW, a marital community; BRENT and RHEA ASLIN, a marital
community; SUNIL and MINA MISTRY, a marital community; AJAY and
USHA KISHINCHANDANI, a marital community; THOMAS and
GEETHA PETERSON, a marital community; VIJAY GAJJALA &
DARSHINI JOIS, a marital community; JERAME & KATIE THURIK, a
marital community; WALTER T. PEREYRA, an individual; and FRIENDS
OF PINE LAKE, a Washington nonprofit corporation,

Respondents/Cross Appellants.

APPELLANT BUCHAN'S OPENING BRIEF
***AMENDED**

*(To correct line spacing to meet Court requirements.)
Per Court's Request. No changes to content.

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COURT OF APPEALS
STATE OF WASHINGTON

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TABLE OF CONTENTS

I. NATURE OF THE CASE 1

II. ASSIGNMENTS OF ERROR..... 2

III. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR..... 3

IV. STATEMENT OF THE CASE 4

 A. Buchan’s Proposed Plat Alteration of Chestnut Estates Tracts K, N and O, Relocating and Expanding Dedicated Open Space..... 5

 B. Chestnut Estates West Preliminary Plat Application and City Staff Review Process 8

 C. Hearing Examiner Review and Land Use Decision 14

 D. The Superior Court Reversed the Hearing Examiner’s Land Use Decision, Ruling that Buchan’s Chestnut Estates Plat Alteration Was Legal and Remanding..... 16

V. ARGUMENT 19

 A. Standards of Review Under the Land Use Petition Act and Rules Confining Hearing Examiner Authority 19

 B. The Preliminary Plat Application Should Be Remanded to City Staff and Buchan for Further Review Upon Final Decision on the Plat Alteration..... 22

 C. Preliminary Plat Application Vesting Laws and City Code Required Remand of the Preliminary Plat Application, Not Denial 24

 D. The Hearing Examiner Improperly Based His Decision Regarding the PWS Variation Appeal on His Speculation as to the Potential for Future Roadway Connections Unrelated to the Impacts of the Preliminary Plat (Land Use Decision, Holding D)..... 28

 1. *The Examiner Improperly Decided the Variation Appeal Based on Speculation as to Future Developments and Public Road Extensions* 29

 2. *The Examiner Should Have Analyzed the Variation Based on the City Engineer’s Uncontroverted Sound Engineering Judgment*..... 30

 E. The Hearing Examiner Erroneously Dismissed Buchan’s Appeal of Conditions Requiring Improvements to Roads Offsite From Chestnut Estates West (Land Use Decision, Holding E) 35

 1. *Buchan Cannot be Required to Construct Offsite Road Improvements are Unrelated to or Disproportionate to the Impacts of the Chestnut Estates West Subdivision* 35

2.	<i>The Examiner’s Advisory Comments Regarding Offsite Road Improvements Were Unrelated to his Decision on the Preliminary Plat</i>	41
F.	The Hearing Examiner Exceeded his Authority by Commenting in an Advisory Capacity on the Preliminary Plat Application	42
1.	<i>The Examiner’s Discussion of the Area History and Development Under the Guise of Evaluating Site Access Demonstrates the Impropriety of His Advisory Opinions</i>	45
2.	<i>The Examiner Improperly Elevated His Personal Opinion and Perceptions as to Unwritten Policy and Legislative Priorities Over the City Code and Expert Evidence</i>	48
a.	<u>The 15-Foot Landslide Buffers is Expressly Allowed Under City Code and Supported by Uncontested Engineering Analysis From Both Buchan and Outside, Peer Engineering Review on Behalf of the City</u>	49
b.	<u>The Examiner Had No Authority to Opine in an Advisory Capacity that City Staff Should Consider Requiring Wider Critical Area Buffers for Ebright Creek Than Those Adopted in City Code</u>	51
c.	<u>The Examiner’s Advisory Remarks Regarding the General Location of Chestnut Estates West’s New Open Spaces Were Not Based on City Code Standards and Were Excessively Vague</u>	51
VI.	CONCLUSION	53

TABLE OF AUTHORITIES

CASE LAW

<i>Adams v. Thurston County</i> , 70 Wn. App. 471, 855 P.2d 284 (1993).....	23
<i>Albee v. Town of Yarrow Point</i> , 74 Wn.2d 453, P.2d 340 (1968).....	47
<i>Anderson v. City of Issaquah</i> , 70 Wn. App. 64, 851 P.2d 744 (1993).....	20
<i>Benchmark Land Company v. City of Battle Ground</i> , 146 Wn.2d 685, 49 P.3d 860 (2002).....	20, 21, 36
<i>Biermann v. City of Spokane</i> , 90 Wn. App. 816, 960 P.2d 434, <i>review denied</i> 137 Wn.2d 1004 (1998).....	21
<i>Burien Bark v. King County</i> , 106 Wn.2d 868, 725 P.2d 994 (1986).....	20, 49
<i>Burton v. Clark County.</i> , 91 Wn. App. 505, 958 P.2d 343 (1998).....	29, 30, 36
<i>Cathcart-Maltby-Clearview Cmty. Council v. Snohomish County</i> , 96 Wn.2d 201, 634 P.2d 853 (1981).....	44
<i>Chaussee v. Snohomish Cty. Council</i> , 38 Wn. App. 630, 689 P.2d 1084 (1984).....	20, 43
<i>Citizens' Alliance for Property Rights v. Sims</i> , 145 Wn. App. 649, 187 P.3d 786 (2008).....	36
<i>Cobb v. Snohomish County</i> , 64 Wn. App. 451, 829 P.2d 169 (1991).....	36
<i>Development Services of America, Inc. v. City of Seattle</i> , 138 Wn.2d 107, 979 P.2d 387 (1999).....	25
<i>Dolan v. Tigard</i> , 512 U.S. 374, 114 S.Ct. 2309, 129 L.Ed.2d 304 (1994).....	36
<i>Durland v. San Juan County</i> , 174 Wn. App. 1, P.3d 757 (2012).....	43
<i>Erickson & Associates, Inc. v. McLerran</i> , 123 Wn.2d 864, 872 P.2d 1090 (1994).....	25

<i>HJS Development, Inc. v. Pierce County ex rel. Dept. of Planning and Land Services</i> , 148 Wash.2d 451, 61 P.3d 1141 (2003).....	19
<i>In re King County Hearing Examiner</i> , 135 Wn. App. 312, 144 P.3d 345 (2006).....	20, 44
<i>Isla Verde International Holdings, Inc. v. City of Camas</i> , 146 Wn.2d 740, 49 P.3d 867 (2002).....	36, 37
<i>Keifer v. King County</i> , 89 Wn.2d 369, 572 P.2d 408 (1977).....	47
<i>Kenart & Assoc. v. Skagit County</i> , 37 Wn. App. 295, 680 P.2d 439, review denied 101 Wn.2d 1021 (1984).....	21
<i>Knight v. City of Yelm</i> , 173 Wn.2d 325, 267 P.3d 973 (2011).....	9, 25
<i>Luxembourg Group v. Snohomish County</i> , 76 Wn. App. 502, 887 P.2d 446 (1995).....	29, 47
<i>Maranatha Mining v. Pierce County</i> , 59 Wn. App. 795, 801 P.2d 985 (1990).....	21
<i>Morin v. Johnson</i> , 49 Wn.2d 275, 300 P.2d 569 (1956).....	25
<i>Noble Manor v. Pierce County</i> , 133 Wn.2d 269, 943 P.2d 1378 (1997).....	25
<i>Norco Construction Inc. v. King County</i> , 97 Wn.2d 680, 649 P.2d 103 (1982).....	21, 25, 49
<i>Rody v. Hollis</i> , 81 Wn.2d 88, 500 P.2d 97 (1972).....	43
<i>Sleasman v. City of Lacey</i> , 159 Wn.2d 639, 151 P.3d 990 (2007).....	25, 41
<i>Southwick, Inc. v. City of Lacey</i> , 58 Wn. App. 886, 795 P.2d 712 (1990).....	37
<i>State v. Munson</i> , 23 Wn. App. 522, 597 P.2d 440 (1979).....	20
<i>Sunderland Family Treatment Services v. City of Pasco</i> , 127 Wn.2d 782, 903 P.2d 986 (1995).....	21
<i>Thornton Creek Legal Defense Fund v. City of Seattle</i> , 113 Wn. App. 34, 52 P.3d 522, review denied 149 Wn.2d 1013 (2002).....	21

<i>United Development Corp. v. Mill Creek</i> , 106 Wn. App. 681, 26 P.3d 943 (2001)	36, 38
<i>Unlimited v. Kitsap County</i> , 50 Wn. App. 723, 750 P.2d 651 (1988).....	29
<i>Wellington River Hollow, LLC v. King County</i> , 121 Wn. App. 224, 54 P.3d 213, <i>review denied</i> , 149 Wn.2d 1014 (2003).....	2
<i>Yarrow First Associates v. Town of Clyde Hill.</i> , 66 Wn.2d 371, 403 P.2d 49 (1965).....	47

STATUTES

Chapter 36.70C RCW 19
RCW 36.70C.130 20, 21
Chapter 43.21C RCW 43
RCW 58.17.033 25
RCW 58.17.110 36
RCW 58.17.140 9, 26
RCW 58.17.215 7, 17
RCW 82.02.020 35, 36, 38

SAMMAMISH MUNICIPAL CODE

SMC 19A.16.070 7
SMC 20.05.040 26
SMC 20.05.080 26, 27
SMC 20.10.070 43
SMC 21A.25.030 9
SMC 21A.50.260 49, 50

OTHER

PWS 10.170 passim
PWS 15.100 33

I. NATURE OF THE CASE

This case involves a City of Sammamish Land Use Decision pertaining to William E Buchan, Inc.'s (Buchan) two development applications, a plat alteration and a preliminary plat. The Hearing Examiner denied the plat alteration and, on that basis alone, also denied the preliminary plat. The hearing process was emotional and delved deep into parochial interests of the adjacent neighborhood and local environmentalists, leading the Examiner to weigh in with advisory opinions regarding selective aspects of the preliminary plat, even though he recognized those were moot as a result of his plat alteration denial. In doing so, the Examiner exceeded his authority, eviscerating the preliminary plat's vested rights and causing unnecessary confusion.

Buchan prevailed on the plat alteration aspect of the Land Use Decision at Superior Court and does not appeal that. Following thorough review, the Superior Court properly concluded the plat alteration is consistent with the Sammamish City Code and state law and explained that a plat alteration such as Buchan's would be in the public interest since it "would unquestionably enhance open space...."¹ The Court remanded the Land Use Decision for further processing but did not completely address the Examiner's advisory conclusions.

¹*Order on Appeal of Land Use Petition dated July 14, 2015, p. 3, CP 006507.*

Through this appeal, Buchan shows why the Examiner should have remanded the preliminary plat to City staff for further processing. It is essential for the parties to have clear instruction as to the preliminary plat, particularly in light of the Superior Court's ruling. Further, Buchan herein demonstrates the Examiner's lack of authority to issue advisory conclusions and how his doing so resulted in an unnecessary, confusing and incomplete analysis. Consequently, Buchan is also forced herein to address whether those advisory conclusions have any precedential effect on the preliminary plat application.

II. ASSIGNMENTS OF ERROR

Assignments of error regarding the Superior Court's findings and conclusions are not required for a Land Use Petition appeal.² Therefore these assignments address only the Land Use Decision. The Hearing Examiner erred by:

1. Denying the Plat Alteration (the Superior Court found this holding to be erroneous, reversed the Land Use Decision on this basis and remanded; Buchan does not brief this assignment of error as Buchan does not appeal the Superior Court's decision on this basis);
2. Dismissing the Preliminary Plat application rather than remanding it to City Staff to determine whether the Preliminary Plat application could be revised consistent with his ruling and City Code;
3. Issuing an advisory opinion on moot issues;
4. Improperly substituted his judgment in place of Sammamish Code standards, and the City's expert engineering analyses;
5. Reversing the Public Works Variations;

²*Wellington River Hollow, LLC v. King County*, 121 Wn. App. 224, 230, 54 P.3d 213, fn. 3, *review denied*, 149 Wn.2d 1014 (2003).

6. Failing to apply adopted Public Works criteria and give deference to the expertise of the City Engineer; and
7. Issuing advisory conclusions regarding landslide buffers, stream buffers and subdivision layout without legal precedent or substantial evidence.

III. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Should the denial of the Preliminary Plat be reversed and remanded to the City for processing because it was based on the erroneous denial of the Plat Alteration, which the Superior Court reversed and remanded?
2. Did the Hearing Examiner erroneously grant a portion of the Neighbors' appeal of the Public Works Variation?
3. Did the Hearing Examiner erroneously deny Buchan's appeal of the Public Works Variation?
4. Did the Hearing Examiner erroneously deny the Chestnut Estates West Preliminary Plat because he engaged in unlawful procedure and exceeded his authority by issuing an advisory opinion on moot issues?
5. Did the Hearing Examiner improperly substitute his personal opinion in place of code standards and the uncontroverted sound judgment of the City Engineer and expert engineering professionals?
6. Did the Examiner improperly base his decision on the Variations on speculation as to future developments and public road extensions?
7. Did the Examiner improperly issue advisory opinions regarding landslide buffers, stream buffers and subdivision layout?
7. Should the Court strike the Examiner's findings and conclusions regarding the Chestnut Estates West Preliminary Plat?
8. Should the Court remand the Chestnut Estates West Preliminary Plat application for further processing consistent with the Superior Court's decision regarding the Plat Alteration?

IV. STATEMENT OF THE CASE³

The Land Use Decision at issue combined two, interrelated applications: (1) a plat alteration for open space tracts located in the existing Chestnut Estates subdivision (“Plat Alteration”) and (2) a new preliminary plat (the first step to subdividing property) known as Chestnut Estates West (“Preliminary Plat”). These two applications are interrelated: the property subject to the Plat Alteration is part of a larger property subject to the Preliminary Plat. However, as discussed herein denial of one application did not necessarily require denial of the other. In light of heightened local interest and opinions regarding the property, the City consolidated the two applications into a single permit review and hearing process so that the Hearing Examiner would have a complete record and the public ample opportunity to comment and participate.

The record for the Land Use Decision contains an atypically long history and dense set of facts. The factual background set forth herein is intended to provide the Court with an overview of the properties and applications involved, but does not address many aspects of the Preliminary

³ The exhibits submitted to the Hearing Examiner during the open record hearing process are in the Certified Appeal Board Record (“CABR”) and do not have separate Clerk’s Papers designations. Based on Buchan’s understanding of Court preference, citations to exhibits in the CABR are to the open record hearing exhibit number and bates stamped pagination as indexed in the First Amended Certification of the Record of the City of Sammamish, CP 003814-3848.

Plat reports, analyses or testimony, because that information goes beyond the issues under appeal.

A. Buchan's Proposed Plat Alteration of Chestnut Estates Tracts K, N and O, Relocating and Expanding Dedicated Open Space.

Buchan was the joint-developer of the Chestnut Estates subdivision, which contained 33 residential lots located east of Ebright Creek, as well as several sensitive area, buffer, open space, and other reserved tracts on either side of that creek.⁴ Buchan has been developing and selling the residential lots, but Buchan retained ownership of Tracts D and E (reserved for future right of way use, at the end of the cul-de-sac at SE 8th Place), K (open space tract), M (sensitive area protection area), and N (reserved tract that was the area for the two western lots).⁵ Tracts K, M and N are located west of Ebright Creek, thereby separated from the Chestnut Estates the residential lots by the creek and ravine.⁶

Tract D is located at the western cul-de-sac terminus of SE 8th Street, adjacent to Ebright Creek.⁷ Tract D can legally be converted into

⁴See, CABR, Ex. S-203, Findings 7 and 9, Bates No. 000893; CABR, Ex. S-238, Bates Nos. 002207 - 002216.

⁵CABR, Ex. S-203, Findings 7 and 9, Bates No. 000893; CABR, Ex. S-238, p. 4, Bates No. 002210; CABR Ex. B-265, p. 7, Bates No. 004187.5. For the Court's reference, CABR, Ex. S-238, p.1, Bates No. 002207, shows a map of these Tracts and CABR, Ex. S-211.b, Bates No. 001405, shows the entire Chestnut Estates West layout with the area of the Tracts highlighted in the map in the lower right-hand corner.

⁶CABR, Ex. S-214, Bates No. 001483.

⁷CABR, Ex. S-238, Bates No. 002210; CABR Ex. S-203, Finding 61(d), Bates No. 000901.

public right-of-way to connect SE 8th Place to the Chestnut Estates West subdivision by way of bridging Ebright Creek. This extension of SE 8th Place was selected by City Staff as “feasible access in terms of land acquisition and connection to existing public right-of-way.”⁸

Chestnut Estates endured several years of hearings and legal challenges by opponents to the project, including Friends of Pine Lake and Walter Pereyra.⁹ Ultimately, it was approved and Buchan has been building and selling homes on the recorded lots.

Buchan also owns property located immediately adjacent to Chestnut Estates Tracts K, N and O, i.e. the tracts located on the west side of Ebright Creek. Buchan’s property, as well as these tracts, are physically separated from and inaccessible by the homes in Chestnut Estates. In looking at the best way develop its property west of Ebright Creek, Buchan realized it could create a win-win situation by moving Tract K north, increasing its size by roughly ten percent, and thereby use a single, contiguously flat area to cluster homes without being bisected by Track K.¹⁰ This uninterrupted, flat area for clustered development of homes would be consistent with the City’s adopted R-1 zoning, discussed below. The

⁸CABR, Ex. S-203, Finding 61(d), Bates No. 000901.

⁹CABR, Ex. S-212, p. 3, Bates No. 001409.

¹⁰CABR, Ex. B-265, p. 7, Bates No. 004187.5.

replacement area for Tract K would be immediately north of its current location, along the same axis and having the same proximity and orientation with Ebright Creek.¹¹

If Buchan left Tract K in its current location, Tract K would lie in the center of the only flat, developable area; residential lots would entirely surround Tract K, making it more tempting for residents to use it as active recreational open space, for example, rather than passive, natural open space. While Chestnut Estates did not protect Tract K as passive open space, it was clear from public comment that is strongly preferred. By moving Tract K north, Buchan could increase Tract K's size, protect it as permanent passive, natural open space and link Tract K to undeveloped open spaces.

To accomplish this, Buchan submitted a Plat Alteration application, which also included minor open space adjustments and right-of-way related alterations related to Chestnut Estates Tracts D, E, N, and O, all of which Buchan owns.¹² As was discussed before Superior Court, Plat Alterations are permitted under RCW 58.17.215 and Sammamish Municipal Code ("SMC or City Code") 19A.16.070.

¹¹CABR, Ex. S-211.b, Bates Nos. 001405 - 06.

¹²See, CABR, Ex. S-204, Bates Nos. 000917 – 000918.

B. Chestnut Estates West Preliminary Plat Application and City Staff Review Process.

The second application at issue is Buchan’s Chestnut Estates West Preliminary Plat.¹³ The Preliminary Plat application proposes 30 residential lots clustered on a small portion of a larger, 85.5-acre property (referred to herein as the “Chestnut Estates West Property” or the “Property”). The Chestnut Estates West Property is irregularly shaped, largely undeveloped land, consisting of areas that are relatively flat and steep slopes running into wetlands and streams.¹⁴ To the east is Ebright Creek, which is set within a ravine, and beyond that the Chestnut Estates lots. *Id.* The Property has one plateau location that is unconstrained by critical areas, relatively flat and well suited for residential development.¹⁵ The remainder is constrained by wetland areas and buffers; wildlife corridors; a critical aquifer recharge area; landslide hazard areas; and an erosion hazard overlay.¹⁶

The Chestnut Estates West Property is zoned R-1, Residential 1 dwelling unit per acre.¹⁷ The purpose of R-1 zoning is to provide lower density for particular areas of the City while still ensuring some level of residential development consistent with the City’s urban nature. The R-1

¹³*Id.*

¹⁴CABR., Ex. S-203, Findings 6 and 13, Bates Nos. 000893 and 000894.

¹⁵CABR, Ex. S-211.a, Bates Nos. 001397-99.

¹⁶CABR, Ex. S-203, p. 1, Bates No. 000891.

¹⁷*Id.*, Finding 29, Bates No. 000896.

zoning requires that homes be clustered together and away from critical areas, with at least 50 percent of the site reserved as open space.¹⁸

Over several years, Buchan actively worked with City Staff to answer questions, provide additional information, and resolve concerns and issues, some of which were raised during the public comment period.¹⁹ It was no surprise, based on the Chestnut Estate experience, that Chestnut Estates West would have a high degree of targeted interest by particular parties. As a result, City Staff closely scrutinized every aspect of the Chestnut Estates West application. The process for this 30-lot Preliminary Plat application included substantive modifications to address City questions and public concerns, whereby Buchan increased buffering of Ebright Creek and made extensive stormwater design changes.²⁰ Such preliminary plat applications are commonly modified as they go through review.²¹

During the years of review, Buchan provided comprehensive technical reporting and analysis regarding all aspects of the proposed development, going far beyond what might normally be required for a preliminary plat. For example, Buchan submitted multiple geotechnical

¹⁸*Id.*, Finding 32, Bates No. 000897; SMC 21A.25.030(A).

¹⁹*Nelson Testimony*, Transcript, April 22, 2015, CP. 000430-456.

²⁰*Id.*, Findings 73 and 74, Bates No. 000903.

²¹*Knight v. City of Yelm*, 173 Wn.2d 325, 344, 267 P.3d 973 (2011); RCW 58.17.140(1).

reports, based on extensive in-office and field evaluations, including site test boring work, addressed landslide hazard areas related to steep topography, and landslide hazard areas related to underlying site geology, erosion hazard areas, and no-disturbance areas.²² Critical area reports and supplements issued based on extensive City requests for information addressed wetland areas, streams, and fish and wildlife habitat, based on a combination of GPS, topographical and aerial photography, and site surveys.²³ The critical areas report was used in understanding and locating critical area, open space and recreational space tracts.²⁴ The traffic impact study considered technical, safety, and other functional criteria in support of the overall subdivision design and public works standards variations.²⁵

City Staff also put enormous effort into determining how the Chestnut Estates West developable area might be accessed. After years of evaluating whether any other means of accessing the Property were possible, City Staff ultimately concluded that building a bridge across Ebright Creek, thereby extending the public roadway of SE 8th Place, was

²²CABR, Ex. S-203, Finding 42, Bates No. 000898; Ex. S-218.a, Bates Nos. 001831-001892; Ex. S-218.b, Bates No. 001893-001898; and Ex. S-219.c, Bates Nos. 001899-001902.

²³CABR, Ex. S-203, Finding 15, Bates No. 000894; CABR, Ex. S-215.a, Bates Nos. 001485-1630; S-215.b, Bates Nos. 001631-001816.

²⁴*See, Id.*

²⁵*See, Id.*

the only available means to access the property.²⁶ This would mean that the Chestnut Estates West roads would connect to the public roads in Chestnut Estates. Buchan proposed the Chestnut Estates West network as a finite, loop so that only Chestnut West traffic would drive over the City's public roads through Chestnut Estates.

The City, in addition to performing its own review, retained an outside geotechnical engineer as a consultant to review the proposed bridge crossing.²⁷ Following review of 17 reports, documents and analysis, the independent consultant recommended approval of the proposed bridge and stormwater improvements, with conditions.²⁸

Because of the nature of such infill development in urban areas, City Staff commonly reviews and approves developments which connect to existing City streets. To do so in this case, City Staff required Buchan to apply for three PWS variations to: (1) reduce the right-of-way and cross-section width of the new streets in Chestnut Estates West (consistent with the City's interest in environmental benefits such as less impervious surfaces); (2) reduce the cross-section width and composition of the access street as it crosses the bridge (to reduce environmental impacts, and

²⁶See, CABR, Ex. S-203, Finding 61, Bates No. 000901.

²⁷CABR, Ex. S-203, Finding 47, Bates No. 000899; CABR Ex. S-226, Bates No. 001989-1992.

²⁸*Id.*

construction and maintenance costs); and (3) allow the use of the public roads in Chestnut Estates for access with certain upgrades (collectively, the “Variations”).²⁹ The City Engineer approved these Variations, subject to multiple conditions including requirements to upgrade certain portions of the roads in Chestnut Estates.³⁰ The record demonstrates that the City Engineer diligently reviewed the Variations against the approval criteria in PWS 10.170.³¹ The City Engineer approved the requested Variations, concluding:

I have determined that the approval of this Variations, as conditioned, is based upon sound engineering judgment, and that requirements for safety, environmental considerations, function, appearance, and maintainability are fully met and the Variations is in the best interest of the public.³²

The City Engineer went on to describe its analysis of function and safety resulting from the Variations and the conditions imposed. The City Engineer also required Buchan to construct extensive improvements to SE 8th Place and SE 8th Street in Chestnut Estates, including replacing rolled curbs with vertical curbs, installing new sidewalks, and adding/replacing of street trees.³³

²⁹CABR, Ex. A-206.1, Bates Nos. 000027-28; CABR Ex. A-206.2 Bates Nos. 000029-34.

³⁰*Id.*

³¹CABR, Ex. A-206.2, Bates Nos. 000029-34; PWS 10.170, CP 004032.

³²CABR, Ex. A-206.2, p. 2, Bates No. 000030.

³³CABR, Ex. B-265, p. 12, Bates No. 004187.10.

A few Chestnut Estates residents, calling themselves the “Chestnut Estates Neighbors,” appealed the Variations.³⁴ They oppose connection of the Chestnut Estates West roads to SE 8th Place and SE 8th Street, even though those are public roads; they are fearful that the City may, some day, attempt to expand the public road system to connect more roads to SE 8th Place and SE 8th Street, thereby generating more traffic in their neighborhood.

Buchan also appealed the same Variations, arguing that the improvements which the City Engineer required were unnecessary for safety or traffic flow, and were not proportionate to the impacts of the Chestnut Estates West traffic.³⁵

The City issued a State Environmental Policy Act (“SEPA”) threshold Mitigated Determination of Non-Significance (“MDNS”) for the project.³⁶ Chestnut Estates Neighbors, Walter T. Pereyra, and Friends of Pine Lake appealed the MDNS to the City’s Hearing Examiner.³⁷

The City’s recommendation, SEPA determination and Public Works Standards (“PWS”) Variations were the result of several years of City Staff

³⁴CABR, Ex. A-203, Bates No. 000007-10.

³⁵CABR, Ex. A-206, Bates Nos. 000021-26.

³⁶CABR, Ex. A-201, Bates Nos. 000001-2; CABR Ex. A-206.2, Bates Nos. 000029-34.

³⁷CABR, Ex. A-202, Bates Nos. 000003-6; CABR Ex. A-203, Bates Nos. 000007-10; CABR Ex. A-205, Bates Nos. 000013-20; CABR Ex. A207, Bates Nos. 000035-38.

review, Buchan's efforts to provide requested information and studies going far beyond what would be normally required for such a project. The particularly lengthy City staff report contains a complete description of the site and area history, as well as detailed examination of the project, all of which the Examiner incorporated into his Land Use Decision in full.³⁸

C. Hearing Examiner Review and Land Use Decision.

The Examiner held an open record hearing over several days, totaling 86 hours, on both the Plat Alteration and the Chestnut Estates West Preliminary Plat.³⁹ Buchan and City Staff provided expert witness testimony with respect to every aspect of the applications and described the extensive review process undertaken, including the substantive site design changes made to address City questions and public concerns. The interested neighborhood groups and individuals, appellants in that hearing, testified as to history about the area and personal reflections on their own efforts to improve Ebright Creek's ability to accommodate salmon runs. However, for the most part, their expert testimony did not refute testimony by Buchan and the City, or demonstrate why City Code was insufficient to provide protection of critical areas; rather their testimony emphasized the value of the R-1 zoning, critical area regulations and need for more funding for

³⁸*Land Use Decision*, Finding A.5, CP 000025-26.

³⁹*Land Use Decision*, Introduction, pp. 3 – 4, CP 000018-19.

restoration of degraded streams and creeks within the City. That testimony was largely irrelevant since Buchan was not requesting a rezone; the Chestnut Estates West subdivision was designed consistent with the R-1 zoning, which the City applies to properties where it wants clustered development.

The Examiner issued his Land Use Decision on July 14, 2015.⁴⁰ In that Decision, the Examiner denied Buchan's Plat Alteration as a matter of law.⁴¹ The Examiner concluded that because he denied the Plat Alteration, there was no way he could approve the Chestnut Estates West Preliminary Plat.⁴² He also concluded that there was no reason to remand the Preliminary Plat because he felt his Plat Alteration decision would force Buchan to have to submit an entirely new application.⁴³ The Examiner provided no explanation or analysis for why this was the case, even though Sammamish City Code and Washington State common law readily allow Buchan to modify a preliminary plat application, and the Examiner's powers include remanding an application for further modification.

The Examiner recognized that his denial of the Plat Alteration meant that any rulings on the Preliminary Plat were moot. As a result, he did not

⁴⁰CP 000016 – 59.

⁴¹*Land Use Decision*, Conclusion B.9, CP 000052.

⁴²*Id.*

⁴³*Land Use Decision*, Conclusion E.15, CP 000072.

issue a complete decision on the Chestnut Estates West Preliminary Plat. However, he did decide to selectively rule on the SEPA and Variations appeals and to issue conclusions regarding aspects of the Preliminary Plat that he found to be of interest.

The Examiner should have remanded the Preliminary Plat for further processing consistent with his decision. Buchan and City Staff would have been able to evaluate whether modifications to the Preliminary Plat application would be possible based on the Plat Alteration decision. In his Decision, the Examiner vastly overstepped his authority, engaged in unlawful procedure, failed to follow his prescribed processes, made significant and pivotal errors of law, failed to support his conclusions with substantial evidence, erroneously applied the law to the facts, and violated Buchan's constitutional rights.

D. The Superior Court Reversed the Hearing Examiner's Land Use Decision, Ruling that Buchan's Chestnut Estates Plat Alteration Was Legal.

Buchan timely appealed the Land Use Decision to Superior Court. After extensive briefing and a half day hearing on the merits, the Superior Court found largely in favor of Buchan, holding that the Examiner's denial of the Plat Alteration was erroneous as a matter of law ("Order on Land Use Petition").⁴⁴ The Court found that the Plat Alteration was appropriate

⁴⁴*Order on Appeal of Land Use Petition dated July 14, 2015*, pp. 2-3, CP 006506– 6507.

and lawful under both Sammamish City Code and RCW 58.17.215. Further, the Court recognized that Buchan's Plat Alteration, which significantly added dedicated open space, would result in a net benefit to the public's health, safety and welfare.⁴⁵ The Superior Court found the Examiner's Decision in this essential respect was based on an erroneous interpretation of law and reversed the Land Use Decision.⁴⁶ Because Buchan does not appeal the Superior Court's decision in this respect, having been the prevailing party, Buchan does not provide briefing regarding the Plat Alteration. Buchan respectfully relies on its briefing submitted to the Superior Court regarding the same and will respond in the event cross-appellants submit briefing thereon.

The Superior Court then recognized that the Examiner's erroneous denial of the Plat Alteration was the only basis the Hearing Examiner used to deny the Preliminary Plat application.⁴⁷ She also noted that the Examiner nonetheless addressed some, but not all, issues that were moot. The Court found his ruling on those moot issues was not "highly inappropriate."⁴⁸

Finally, the Superior Court upheld the Land Use Decision with respect to the SEPA and the Public Works Variations, finding the

⁴⁵*Id.*, p. 3, CP 006507.

⁴⁶*Id.*

⁴⁷*Id.*

⁴⁸ *Id.*, p. 4, CP 006508.

Examiner's Holdings A through E⁴⁹ were supported by substantial evidence and were not clearly erroneous.⁵⁰ Critically, neither the Hearing Examiner nor the Superior Court have ever viewed Holdings A through E of the Land Use Decision as bases for denial of the Chestnut Estates West Preliminary Plat. Instead, Holdings A through E warranted a remand for further City Staff review, reissuance of the SEPA determination, and re-evaluation of the Variations based on the Examiner's decision.

Beyond the foregoing, the Superior Court did not substantively address the conclusions the Examiner made related to select aspects of the Chestnut Estates West Preliminary Plat. It is undetermined whether the Examiner's conclusions regarding isolated and admittedly moot aspects of the Preliminary Plat were erroneous.

The Superior Court remanded the entire case for further proceedings. Because the Examiner denied the Preliminary Plat only on the basis of his erroneous Plat Alteration denial, the only appropriate recourse now is, and should always have been, a remand of the Preliminary Plat application for further processing by City Staff. That remand should proceed after the Examiner issues a decision on the merits of the Plat

⁴⁹ *Land Use Decision*, p. 43, CP 000058.

⁵⁰ *Id.*; *Order on Reconsideration*, CP 006531-34.

Alteration application, recognizing that Plat Alteration is allowed as a matter of law and is in the public's interest.

V. ARGUMENT

A. Standards of Review Under the Land Use Petition Act and Rules Confining Hearing Examiner Authority.

This Court's review of the Land Use Petition constitutes appellate review based on the administrative record that was created by the highest level decision maker at the local jurisdiction, in this case the Hearing Examiner.⁵¹ This Court reviews the record before the Examiner, and the Examiner's findings of fact and conclusions questions of law to determine whether they were supported by fact and law.⁵²

This Court may grant relief under the Land Use Petition Act ("LUPA"), Chapter 36.70C RCW, where the petitioner establishes that the land use decision at issue violates one of the following standards:

(a) The body or officer that made the land use decision engaged in unlawful procedure or failed to follow a 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 light of the whole record before the court;

(d) The land use decision is a clearly erroneous application of the law to the facts;

⁵¹ *HJS Development, Inc. v. Pierce County ex rel. Dept. of Planning and Land Services*, 148 Wash.2d 451, 467, 61 P.3d 1141 (2003).

⁵² *Id.*

(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.

RCW 36.70C.130(1). As is demonstrated below, the Land Use

Decision violated these standards in several aspects.

The standard legal principles tied to the above Land Use Petition are discussed at length in various recent cases.⁵³ Beyond these standards, there are also several useful principles that govern a hearing examiner's review and the bases upon which a Land Use Decision can be made.

The Hearing Examiner may "exercise only those powers conferred either expressly or by necessary implication."⁵⁴ The Examiner does not have the power to adjudicate in any equitable capacity.⁵⁵ The Examiner's authority is strictly limited to that which is given in the local regulations.⁵⁶

A Land Use Decision must be based on regulatory requirements that are (a) expressly adopted in city code or other written policies or regulations, and (b) contain clear standards which are neither vague nor overly subjective.⁵⁷

⁵³ See e.g. *Benchmark Land Company v. City of Battle Ground*, 146 Wn.2d 685, 694, 49 P.3d 860 (2002).

⁵⁴ *Chaussee v. Snohomish County Council*, 38 Wn. App. 630, 636, 689 P.2d 1084 (1984) (citing *State v. Munson*, 23 Wn. App. 522, 524, 597 P.2d 440 (1979)).

⁵⁵ *Chaussee*, 38 Wn. App. at 638.

⁵⁶ *In re King County Hearing Examiner*, 135 Wn. App. 312, 319-320, 144 P.3d 345 (2006).

⁵⁷ *Anderson v. City of Issaquah*, 70 Wn. App. 64, 851 P.2d 744 (1993); *Burien Bark v. King County*, 106 Wn.2d 868, 725 P.2d 994 (1986).

A Hearing Examiner's factual determinations are not invariably correct; Washington Courts have had no trouble ruling that a land use decision was not based on substantial evidence.⁵⁸ A court should only uphold a factual finding if it is supported by substantial evidence in the record.⁵⁹ And Examiner's reliance on speculation, doubts or disappointment, as opposed to confirmed expert findings, are not legally appropriate bases for a land use decision.⁶⁰

Finally, a land use decision cannot be based on subjective, political or localized considerations that are not written into existing regulations; the City must first adopt such regulations and policies.⁶¹ Otherwise, if a hearing examiner can dictate his or her own subjective agenda for each project irrespective of adopted standards, no developer could intelligently conform an application to those unwritten requirements and expectations.⁶²

⁵⁸See e.g. *Benchmark*, 146 Wn.2d at 694; *Biermann v. City of Spokane*, 90 Wn. App. 816, 821, 960 P.2d 434, review denied 137 Wn.2d 1004 (1998).

⁵⁹RCW 36.70C.130(1)(c); *Thornton Creek Legal Defense Fund v. City of Seattle*, 113 Wn. App. 34, 52 P.3d 522, review denied 149 Wn.2d 1013 (2002).

⁶⁰*Maranatha Mining v. Pierce County*, 59 Wn. App. 795, 804, 801 P.2d 985 (1990); see also *Sunderland Family Treatment Services v. City of Pasco*, 127 Wn.2d 782, 787, 903 P.2d 986 (1995); *Kenart & Assoc. v. Skagit County*, 37 Wn. App. 295, 680 P.2d 439, review denied 101 Wn.2d 1021 (1984).

⁶¹*Norco Construction Inc. v. King County*, 97 Wn.2d 680, 690, 649 P.2d 103 (1982).

⁶²*Id.*, at 688-689.

B. The Preliminary Plat Application Should Be Remanded to City Staff and Buchan for Further Review Upon Final Decision on the Plat Alteration.

The Superior Court primarily devoted its Order on Land Use Petition to a discussion of the Examiner's flawed analysis of the Plat Alteration, concluding that the Chestnut Estates plat could indeed be altered. The Court went so far as to explain how Buchan's Plat Alteration would be in the public's interest.⁶³ As discussed above, the Examiner's only basis for denying the Preliminary Plat application was his denial of the Plat Alteration. Since the Examiner erred in doing so, the Superior Court then properly remanded the entire Land Use Decision, that is, on both the Plat Alteration and the Preliminary Plat applications, to the City for further processing consistent with her ruling.

As to the remaining issues under appeal, the Superior Court only substantively addressed the Examiner's Holdings A through E at the end of the Land Use Decision.⁶⁴ The Superior Court simply affirmed Paragraphs A through E of the Examiner's Decision, saying only that "they are supported by substantial evidence and are not clearly erroneous."⁶⁵ While

⁶³This issue equates to Holding F of the *Land Use Decision*. *Land Use Decision*, p. 43, CP 000058.

⁶⁴*Id.* There is a typo in the *Land Use Decision* for Holding G, which erroneously is labelled a second Holding "D". Avoiding the confusion that would be created by this typo, the last Holding in the *Land Use Decision* is referred to herein as Holding G.

⁶⁵ The Examiner's rulings on Holdings D and E are discussed later in this brief.

Buchan disagrees with the Court's decision as to Holdings D and E, Buchan recognizes the Superior Court's ruling was internally logical as Holdings A through E warrant remand for further processing by City Staff, not denial of the Preliminary Plat.⁶⁶ The Court did not need to address Holdings F or G (denying the Plat Alteration and dismissing the Preliminary Plat on that basis) because she already did so in reversing the Examiner's denial of the Plat Alteration.

The Holdings in the Land Use Decision that the Superior Court affirmed are summarized as follows:

- **Holding A** in the Land Use Decision dismissed Friends' SEPA appeal in its entirety. That Holding was not appealed and is final.
- **Holdings B and C** granted Neighbors' SEPA Appeal Issue 3 and Pereyra's SEPA Appeal Issue 2.9, because the mitigation required by the City's SEPA responsible official was "indefinite and vague." These Holdings were not appealed as they only result in a remand of the Preliminary Plat application to City Staff for reissuance to clarify the SEPA determination. SEPA cannot be used to circumvent a project's vested rights.⁶⁷ A decision on a SEPA determination, as here, results in a remand of the application, preserving its vested rights.
- **Holdings D and E** addressed the Public Works Variations. Holding D upheld Neighbors' appeal of the Variations based on the Examiner's opinion that the City Engineer should have considered the potential effect of future connections to public roads. Holding E dismissed Buchan's appeal of the improvements required under the Variations, logically since the Examiner had already ruled on the

⁶⁶ See below discussion.

⁶⁷ *Adams v. Thurston County*, 70 Wn. App. 471, 855 P.2d 284 (1993).

Variations under Holding D. Neither Holding D nor E warrant denial of the Preliminary Plat, but rather should have been remanded to the City Engineer to reconsider its Variations decision and issue a new one.

None of these Holdings warrant denial of the Preliminary Plat application; instead, remand for further City processing was the only correct outcome and is consistent with the Superior Court's decision.

C. Preliminary Plat Application Vesting Laws and City Code Required Remand of the Preliminary Plat Application, Not Denial.

The Superior Court's reversal of the Examiner's Plat Alteration denial necessarily reverses the Preliminary Plat denial; at most it should be remanded to City Staff to address the SEPA determination and Public Works Variations to the extent required by this Court. The Examiner's denial of the Preliminary Plat was expressly based only on his denial of the Plat Alteration (which the Superior Court reversed and remanded):

B.9. Since Chestnut Estates Tract K cannot be changed to non-open space, the plat alteration must be denied. ***Without the plat alteration, the plat cannot be approved.***⁶⁸

The Examiner's decision to dismiss the Preliminary Plat, rather than remand it back to the City to determine whether Buchan can revise it to comply with City Code, improperly stripped Buchan of its vested rights.

⁶⁸*Land Use Decision*, p.37, CP 00052 (*emphasis added*); see also *Land Use Decision*, Conclusion E.15, p. 43, CP 00052.

Statutory and common law has long protected the vested rights of preliminary plat applications under RCW 58.17.033. Washington's vested rights doctrine gives developers certainty and predictability in the land use regulations that would govern their applications.⁶⁹ Protecting an application's vesting under RCW 58.17.033 is essential.⁷⁰ This is because zoning ordinances are in derogation of a property owner's right to use property towards its highest utility, and so must be construed in favor of the property owner and cannot be extended through implication.⁷¹ Requiring an applicant to submit a new preliminary plat application, under different city codes invariably would require substantial changes to the application, increased costs for such new design, starting city review from scratch and commonly more expensive infrastructure requirements and even lost lots.⁷²

Washington Courts have readily recognized that the preliminary plat process anticipates modifications to an application.⁷³ Consistent with the application's vested rights, a Hearing Examiner should return a preliminary

⁶⁹*Erickson & Associates, Inc. v. McLerran*, 123 Wn.2d 864, 867-68, 872 P.2d 1090, 1092-93 (1994).

⁷⁰*Noble Manor v. Pierce County*, 133 Wn.2d 269, 943 P.2d 1378 (1997).

⁷¹*Sleasman v. City of Lacey*, 159 Wn.2d 639, 151 P.3d 990 (2007); *Development Services of America, Inc. v. City of Seattle*, 138 Wn.2d 107, 979 P.2d 387 (1999); *Morin v. Johnson*, 49 Wn.2d 275, 300 P.2d 569 (1956); *Norco*, 97 Wn.2d at 685.

⁷²See e.g. *Noble Manor*, *supra*.

⁷³*Knight*, 173 Wn.2d at 344.

plat to an applicant for modification or correction whenever that is feasible.⁷⁴

Sammamish City Code foresees modifications to an application and mandates that if the City requires those changes (including through the Examiner), the City cannot use them to take away an application's vesting: "Modifications **required by the City to a pending application shall not be deemed a new application.**"⁷⁵ City Code recognizes this expressly:

A permit application is complete for purposes of this section when it meets the procedural submission requirements of the department and is sufficient for continued processing even though additional information may be required or **project modifications may be undertaken subsequently**. The determination of completeness shall not preclude the department from requesting additional information or studies either at the time of notice of completeness or subsequently if new or additional information is required or **substantial changes in the proposed action occur**, as determined by the department.⁷⁶

Under this ordinance, City Staff may continue to request information about, and modifications, to a preliminary plat application as they process the application. Similarly, an Examiner may require modifications, but cannot jeopardize the application's vested rights.

⁷⁴RCW 58.17.140(1).

⁷⁵SMC 20.05.080(1) (*emphasis added*).

⁷⁶SMC 20.05.040(1) (*emphasis added*).

The City Code proscribes those specific circumstances when a modification would result in a new application for purposes of vesting and who makes that determination:

An applicant-requested modification occurring either before or after issuance of the permit shall be deemed a new application **when such modification would result in a substantial change in a project's review requirements, as determined by the department.**⁷⁷

The Examiner's dismissal of the Preliminary Plat application nullifies the foregoing vested rights law, the City Code provisions that govern vesting of applications, and allocation of jurisdiction between City Staff and the Examiner.

When the Examiner both rejected the Plat Alteration and addressed selective aspects of the Preliminary Plat, the proposed configuration of lots and infrastructure therein necessitated further modification by Buchan and review by City Staff. Under SMC 20.05.080(2), City Staff decides if the application can be modified or if a new application is required, not the Examiner. This is logical because the Examiner was not in a position to know whether or how Buchan could modify the Preliminary Plat application as a result of his Plat Alteration decision. Without that evaluation, there was simply no way for the Examiner to know whether the Preliminary Plat

⁷⁷SMC 20.05.080(2) (*emphasis added*).

application could be modified or not. Therefore, the Examiner's analysis of the Preliminary Plat application should have ended with his decision on the Plat Alteration; he should have remanded the Preliminary Plat application for further processing, a new SEPA determination and a new Variations decision before reviewing further.

Now that the Superior Court has remanded the Plat Alteration to the City, by the Examiner's reasoning the Preliminary Plat denial is automatically reversed. The Examiner must now issue a decision on the merits of the Plat Alteration. Depending on that decision and on this Court's decision regarding the substantive issues addressed later in this brief, the Preliminary Plat application should be remanded for further City Staff review.

D. The Hearing Examiner Improperly Based His Decision Regarding the PWS Variation Appeal on His Speculation as to the Potential for Future Roadway Connections Unrelated to the Impacts of the Preliminary Plat (Land Use Decision, Holding D).

The Examiner erred when he partially granted the Neighbors appeal of the Public Works Variation.⁷⁸ The Examiner erroneously granted Neighbors appeal of the Public Works Variation because "Public Works did not consider future extension of the street system when exercising its

⁷⁸*Land Use Decision*, Holding E, p. 43 (granting Neighbors Appeal issue #2), CP 000058.

‘engineering judgment’.”⁷⁹ Based on this conclusion, the Examiner also dismissed Neighbors’ other appeal issues regarding the Variations and Buchan’s appeal of same for being moot.⁸⁰ The Examiner did not explain why he decided those remaining appeal issues were not worth his review although others apparently were, as discussed below.

1. *The Examiner Improperly Decided the Variation Appeal Based on Speculation as to Future Developments and Public Road Extensions.*

Longstanding Washington common law prohibits the Examiner from relying on speculation as to future road connections in order to condition or deny the Chestnut Estates West preliminary plat.⁸¹ Under each of these cases, the Court required the jurisdiction to demonstrate how the analysis of unrelated, speculative development had any relationship to the proposed preliminary plat under review. The *Burton*, *Luxembourg* and *Unlimited* Courts all concluded consistently that a jurisdiction cannot base an exaction or land use decision on consideration of unrelated, speculative development.

As the *Burton* Court explained, the Examiner “may not rely on the future unless the record furnishes a basis for inferring what the foreseeable

⁷⁹*Id.*, Conclusion D.8, CP 000109.

⁸⁰*Id.*

⁸¹*Burton v. Clark Cty.*, 91 Wn. App. 505, 524-25, 958 P.2d 343, 355 (1998); *Luxembourg Group v. Snohomish County*, 76 Wn. App. 502, 887 P.2d 446 (1995); *Unlimited v. Kitsap County*, 50 Wn. App. 723, 750 P.2d 651 (1988).

future holds.”⁸² *Burton* firmly rejects the Examiner’s attempt to condition or deny the Chestnut Estates West preliminary plat on the basis of whether it will open up the possibility of future public road extensions.⁸³ Further, City Staff clearly stated there were no plans for any extensions of the City street system and there was no other access that could be extended to the Property without some sort of legislative process.⁸⁴ Ironically, even City staff attempted unsuccessfully to find other roadway connections to serve the Property, clear evidence that there was no nefarious intent by City staff to hide future public road extension plans.⁸⁵

The Examiner’s conclusion that the City Engineer should have considered future extensions is not based on any evidence in the record; nor does the Examiner identify any possible future roadway extension that was left unconsidered.

2. *The Examiner Should Have Analyzed the Variation Based on the City Engineer’s Uncontroverted Sound Engineering Judgment.*

While the Examiner addressed other considerations such as the widths of existing public roads and his perception as to how Buchan should have acted and worked with the Neighbors when selling homes in Chestnut

⁸²*Burton*, 91 Wn. App. at 524-25.

⁸³*Id.*, at 520-23.

⁸⁴*Maxim Testimony*, Transcript, May 26, 2015, pp. 2023-2030, CP 002426 - 2434.

⁸⁵*Id.*

Estates, the Examiner did not rely on those opinions for any purpose.⁸⁶ To the contrary, despite voicing his opinions, he then made those irrelevant by concluding those comments were moot.⁸⁷ As discussed below, the Examiner's confusing advisory opinions in Conclusions D.4-D.7 exceeded the Examiner's jurisdiction.

Further, those opinions were not based on any expert evidence in the record, let alone substantial evidence. To the contrary, the City Engineer's engineering conclusions, supported by traffic reports and Buchan's expert engineers, demonstrated that the existing public roads through Chestnut Estates meet safety and functional criteria to accommodate the additional traffic from Chestnut Estates West.⁸⁸ The City's Engineer and Buchan's expert transportation and civil engineer all agreed that the existing public roads could both safely and functionally accommodate the roadway connection of Chestnut Estates West to SE 8th Place and SE 8th Street. The uncontroverted evidence belies the Examiner's summary dismissal of the City Engineer's professional judgment.

Buchan was required to apply for the Variations because the only means of access to the Property is by bridging Ebright Creek and connecting

⁸⁶*Land Use Decision*, Conclusions D.4-D.7, CP 000106-000109.

⁸⁷*Id.*, Conclusion D.8, CP 000109.

⁸⁸CABR, Ex. S-227, Bates Nos. 001993 - 002054; Hobbs Testimony, Transcript, April 29, 2015, pp. 1435 – 1436, CP 001834 – 001835.

to the existing public roads in Chestnut Estates (namely SE 8th Place and SE 8th Street). The City Engineer determined that:

A bridge over Ebright Creek to connect the proposed subdivision to the public right-of-way was evaluated in terms of impacts to Ebright Creek and the adjacent development of Chestnut Estates. This access was shown to be the **only feasible access** in terms of land acquisition and connection to existing public right-of-way.⁸⁹

Hence, the City required Buchan to apply for Variations from the City's Public Works Standards (the PWS) to (1) reduce the right-of-way and cross-section width of the new streets in Chestnut Estates West; (2) reduce the cross-section width and composition of the access street as it crosses the bridge; and (3) allow use of the existing roads in Chestnut Estates as access.⁹⁰ The City's PWS provide:

Variations to these Standards may be authorized by the City engineer only upon submittal and approval of information, plans, and/or design data by the engineer which indicated that the requested variation is based upon sound engineering judgment, and that requirements for safety, environmental considerations, function, appearance, and maintainability are fully met and the variation is in the best interest of the public.⁹¹

Pursuant to PWS 10.170, the City Engineer applied this set of decisional criteria in a thorough review.⁹² The variation process enabled

⁸⁹CABR, Ex. S-203, Finding 61, Bates No. 000901 (*internal citations omitted, emphasis added*).

⁹⁰CABR, Ex. A-206.1, Bates Nos. 000027-28; Ex. A-206.2 Bates Nos. 000029-34.

⁹¹PWS 10.170, CP 004032.

⁹²CABR, Ex. A-206.2, pp. 1–2, Bates Nos. 000029-34.

the City Engineer to evaluate how SE 8th Place and SE 8th Street in Chestnut Estates would functionally operate as access to the Chestnut Estates West subdivision, given these streets were built to older King County road standards.⁹³

The City Engineer analyzed environmental impacts due to impervious surface created by widening of streets; the function and safety and 11-foot and 12-foot travel lanes; safety accommodations based on traffic lanes and volumes; and rolled curbs versus vertical curbs.⁹⁴ The City Engineer thoroughly reviewed the function and safety of using the existing 22-foot wide street for the projected traffic volumes. He concluded that:

the 11 and 12-ft travel lanes on SE 8th Place and SE 8th Street, respectively, adequately allow for the safe accommodation of two way traffic for the projected traffic volumes (648 average daily trips).⁹⁵

The City Engineer also pointed out that “the current City local road standard requires 10-ft travel lanes.”⁹⁶ The City Engineer also carefully considered the approval criteria in relation to each other and the circumstances presented.⁹⁷ For instance, a widening of streets, in and of

93Id.; PWS 10.170, CP 004032; PWS 15.100, CP 004033.

94See, CABR, Ex. A-206.2, p. 2, Bates No. 000030.

95Id.

96Id.

97Id.

itself, may be detrimental to the environment due to increased impervious surfaces, particularly where there is no functional need.

As the record shows, the City Engineer engaged in extensive review and careful analysis in coming to this conclusion and determining the appropriate conditions necessary to mitigate. The City Engineer discussed the decision criteria for a Variation under PWS 10.170, including sound engineering judgment, safety, environmental considerations, appearance, function, maintainability, and the best interest of the public.⁹⁸ These approval criteria include both enumerated technical requirements and a need to apply sound engineering judgment, which the City Engineer utilized in his decision. As such, the City Engineer determined:

while not meeting the full pavement width of the standard local road section, the criteria in PWS 10.170 for a variation are fully satisfied by the proposed roadway as conditioned below. The use of SE 8th Place and SE 8th Street...is in the best interest of the public. It provides for safe passage of vehicles and pedestrians while not increasing the ROW width.⁹⁹

Without evidentiary support and inconsistent with the PWS, the Examiner improperly substituted his personal opinion that the City Engineer should have conducted an evaluation of future connections despite the overwhelming evidence of the City Engineer's careful and thorough

⁹⁸*Id.*, p. 1, Bates No. 000029.

⁹⁹*Id.*

review.¹⁰⁰ None of the Examiner's conclusions analyzed the PWS variation against these criteria.¹⁰¹ The Examiner erred in not basing his decision on the uncontested expert evidence and sound engineering judgment of the City Engineer.

E. The Hearing Examiner Erroneously Dismissed Buchan's Appeal of Conditions Requiring Improvements to Roads Offsite From Chestnut Estates West (Land Use Decision, Holding E).

The Examiner also improperly dismissed Buchan's appeal of the Variations based on his opinion regarding what improvements Buchan should make to SE 8th Place and SE 8th Street. In doing so, the Examiner improperly allocated the burdens of proof between the City and Buchan, and failed to ensure that the improvements required met RCW 82.02.020. Moreover, the Examiner's determinations are inconsistent with the City's pattern of applying its policies and other contemporaneous decisions by the Examiner.

1. Buchan Cannot be Required to Construct Offsite Road Improvements are Unrelated to or Disproportionate to the Impacts of the Chestnut Estates West Subdivision.

Buchan appealed the City's PWS Variation conditions requiring Buchan to replace all rolled curb with vertical curb and gutter; construct sidewalks on both sides of the streets; modify all driveway aprons in the

¹⁰⁰Land Use Decision, Conclusion D.3, CP 000106.

¹⁰¹See, *Id.*, Conclusions D.1 through D.8, CP 000105 - 000109.

older Chestnut Estates to accommodate new ADA standards; and maintain or replace street trees. Buchan appealed these conditions because the City did not tie these conditions to any impacts of the proposed subdivision.

As noted above, to be lawful, any condition on development must be reasonably necessary as a direct result of the proposed plat and be roughly proportionate to those direct impacts.¹⁰²

This general standard was originally based on a constitutional analysis but has since been imported into state law to be applied against any condition or mitigation measure.¹⁰³ Such conditions or mitigations must be evaluated for compliance with RCW 82.02.020.¹⁰⁴ RCW 82.020.020 prohibits a city from imposing direct or indirect taxes, fees or charges on development, whether monetary or reservations of land.¹⁰⁵ The statutory prohibition is intended “to stop the imposition of general social costs on

¹⁰²*Burton*, 91 Wn. App. at 520; *see also Citizens' Alliance for Property Rights v. Sims*, 145 Wn. App. 649, 665, 187 P.3d 786 (2008); *Isla Verde International Holdings, Inc. v. City of Camas*, 146 Wn.2d 740, 760, 49 P.3d 867 (2002); and *Dolan v. Tigard*, 512 U.S. 374, 114 S.Ct. 2309, 129 L.Ed.2d 304 (1994).

¹⁰³RCW 82.02.020.

¹⁰⁴*Cobb v. Snohomish County*, 64 Wn. App. 451, 456, 829 P.2d 169 (1991) (RCW 82.02.020 limits City ability to impose intersection improvement requirements under RCW 58.17.110); *United Development Corp. v. Mill Creek*, 106 Wn. App. 681, 699, 26 P.3d 943 (2001) (mitigation measure requiring frontage improvements subject to RCW 82.02.020); *Benchmark*, 146 Wn.2d at 696.

¹⁰⁵*See, e.g., Sims*, 145 Wn. App. at 649 (prohibition on clearing more than 35 to 50 percent of property); *Isla Verde Int'l Holdings*, 146 Wn.2d at 760 (30 percent of land set aside for open space).

developers, while at the same time allowing the continued imposition of costs that are directly attributable to the development.”¹⁰⁶

The Examiner did not find fault with the transportation experts’ conclusions that SE 8th Place and SE 8th Street can safely accommodate the traffic from Chestnut Estates West based on the conditions that the City was recommending. As both Buchan’s traffic expert and the City’s traffic expert testified, there is ample capacity on SE 8th Place and SE 8th Street to add the Chestnut Estates West traffic without any safety or road capacity concern.¹⁰⁷ The addition of Chestnut Estates West traffic would mean that, at the very busiest time of day, there would be a maximum of one car every two minutes.¹⁰⁸ City Staff determined it was not in the interests of the City or any party to require Buchan to widen SE 8th Place and SE 8th Street.¹⁰⁹

Instead, the Examiner simply did not believe the City would enforce its No Parking restrictions, for example, and based on his personal skepticism, he felt that would make traffic unable to flow ‘smoothly.’¹¹⁰

¹⁰⁶*Isla Verde*, 146 Wn.2d at 760, n. 14 (quoting *Southwick, Inc. v. City of Lacey*, 58 Wn. App. 886, 893–94, 795 P.2d 712 (1990)).

¹⁰⁷In fact City Staff noted that the 36-foot wide pavement sections of SE 8th Place and SE 8th Street are commonly considered too wide and antiquated standards. *Transcript*, June 30, 2015, p. 3003, lines 7-13.

¹⁰⁸*Hobbs Testimony*, *Transcript*, April 29, 2015, pp. 1435 – 1436, CP 001834 – 001835.

¹⁰⁹*Transcript*, June 30, 2015, pp. 2736 – 2737, CP 003145 - 003146.

¹¹⁰*Land Use Decision*, p. 39, Conclusion D.5, CP 000107. Ironically in the *Conner-Jarvis decision*, Conclusion C.3, CP 003791, the Examiner found loss of street parking was an insufficient basis to deny a Variation. See footnotes 117-119, below.

The Examiner focused on the intent of the original road when it was built rather than what traffic would use it now and its safety.¹¹¹ The Examiner never determined whether the Variation met the requirements of RCW 82.02.020 and longstanding common law requiring the City to demonstrate that the improvements are proportionate to the impacts of the Chestnut Estates West subdivision traffic.

Perhaps most relevant to the instant issue is *United Development Corp. v. City of Mill Creek (UDC)*.¹¹² Therein, the Court found that the City of Mill Creek could not impose drainage improvements along a project's frontage absent Mill Creek's demonstration of need for such improvements based on the project impacts. Mill Creek's belief that those drainage improvements were a "good idea" was insufficient justification for the requirement.¹¹³

In the case at hand, the City apparently believed changing the road parameters to a vertical curb and adding more sidewalks or walking paths were "good ideas." However, the City did not demonstrate that making those changes would be necessary as the result of impacts created by Chestnut Estates West. While curb replacement may seem simple on paper,

¹¹¹*Id.*, Conclusion D.6, CP 000107.

¹¹²106 Wn. App. 681, 26 P.3d 943 (2001).

¹¹³*Id.*, 106 Wn. App. at 699.

it is a far more complicated and expensive process in construction due to ADA requirements, right-of-way availability and slopes.

Additionally, the requirement for Buchan to replace sidewalks on the existing streets was not based on the Chestnut Estates West traffic impacts, but instead is improperly on the City's desire to bring up to Code the existing public roads built pursuant to King County road standards under which Chestnut Estates was designed and constructed. This justification was also squarely rejected by the *UDC* Court.¹¹⁴ The traffic studies prepared for Chestnut Estates West show that elements of safety, function, maintainability, environmental considerations, and public interest do not justify upgrades to the existing roads.¹¹⁵ But rather than applying the legal standards to the evidence and evaluating the impacts of the Chestnut Estates West subdivision, the Examiner focused on his personal speculation on how the roads would function and the fact that Buchan was involved in Chestnut Estates and now is the developer of Chestnut Estates West.¹¹⁶

The Examiner's review of the Buchan's appeal of the Variation was inconsistent the Examiner's review of Variations under other, contemporaneous preliminary plat applications. Within the same general

¹¹⁴*Id.*

¹¹⁵CABR, Ex. S-227, Bates Nos. 001993 - 002054; *Hobbs Testimony*, Transcript, April 29, 2015, pp. 1438 – 1439, CP 001837 – 001838.

¹¹⁶*Land Use Decision*, p. 39, Conclusions D.5 and D.6, CP 000107.

timeframe as this Land Use Decision, the Examiner issued decisions on at least three other preliminary plats which connected their new public roads to existing public roads built under the prior King County road standards.¹¹⁷ The Examiner did not require any of those other, contemporaneous subdivisions to upgrade the existing, offsite roads to meet the City's current standards, even though those roads also lacked parking strips, sidewalks and vertical curbs.

In these other preliminary plat decisions, the Examiner reviewed the respective Public Works Variations to determine whether the City Engineer properly applied the PWS Variation based on his sound engineering judgment¹¹⁸ This is the correct standard to apply, rather than substituting his own judgment for that of the City Engineer. Also in those cases, the Examiner readily accepted and accommodated the fact that “[v]ery few streets within the City meet current City standards. Most streets which existed before adoption of the PWS do not meet City standards (unless they have been upgraded over time as properties along them are developed or redeveloped).”¹¹⁹

¹¹⁷CABR, Ex. B-223, Bates Nos. 003748 – 003759; CABR, Ex. B-224, Bates Nos. 003760 – 003762; *Conner-Jarvis Preliminary Plat Decision*, CP 003714 – 003812 (specifically Section C of Conclusions, CP 003790-003793).

¹¹⁸*Conner-Jarvis Preliminary Plat Decision*, Conclusion C.6, CP 003795

¹¹⁹*Id.*, Finding H.32, CP 003771.

Finally, these contemporaneous decisions show the Examiner's decision regarding the Chestnut Estates West Variations does not fit within any past pattern of enforcement and was not a matter of existing policy.¹²⁰

2. *The Examiner's Advisory Comments Regarding Offsite Road Improvements Were Unrelated to his Decision on the Preliminary Plat.*

Chestnut Estates West does not create any impact that would warrant, let alone be proportionate to, the improvements that the City wanted to exact from Buchan as a condition of development under the Variation.¹²¹ But rather than requiring the City to demonstrate what impacts City Staff felt warranted these conditions, the Examiner dismissed Buchan's appeal as moot.¹²² Again, as discussed below, it appears that the Examiner randomly chose what issues he wanted to issue advisory opinions on and which he did not. The Examiner did not rely on his Conclusions D.4 and D.5 for his reversal of the Public Works variation; their relevance to his ultimate decision is unclear. By remanding the Variations with respect to the Neighbors' appeal, but not ruling on Buchan's appeal, the Examiner gave City staff incomplete instructions as to how to handle the Variations

¹²⁰*Sleasman*, 159 Wn.2d at 646.

¹²¹CABR, Ex. S-227, Bates Nos. 001993 - 002054; *Hobbs Testimony*, Transcript, April 29, 2015, pp. 1438 – 1439, CP 001837 – 001838.

¹²²*Land Use Decision*, Conclusion D.8, CP 000109. The Examiner never explained why he chose to address some matters that were moot but not others.

upon remand, and left the parties with a confusing and inconclusive Land Use Decision.

Even if this Court were to uphold the Examiner's review in this regard,¹²³ the Chestnut Estates West Preliminary Plat should be remanded for modification, i.e. for City Staff to recommend road improvement conditions pertaining to SE 8th Place and SE 8th Street in a manner that proportionately addresses the impacts of Chestnut Estates West.

F. The Hearing Examiner Exceeded his Authority by Commenting in an Advisory Capacity on the Preliminary Plat Application.

The Hearing Examiner exceeded his authority by providing advisory comments and opinions on the selective aspects of the Preliminary Plat even though he himself recognized that doing so addressed moot issues. The Examiner acknowledged that "Moot issues are not normally addressed."¹²⁴ The Examiner expressly acknowledged that his decision on the Plat Alteration meant there would have to be changes to the Chestnut Estates West Preliminary Plat, which would make his comments on that application moot. Yet, nonetheless he engaged in a lengthy discussion of those moot issues without justification or authority.

¹²³*Land Use Decision*, Holding D, CP 000058.

¹²⁴*Land Use Decision*, Conclusion A.3, CP 000050.

The Examiner does not have common law power to adjudicate matters such as equity and injunctive relief; he may only exercise that power expressly granted to him by the Sammamish City Council.¹²⁵ As the *Chaussee* Court recognized, a hearing examiner is not required to be an attorney and “would lack the legal expertise to handle such questions.”¹²⁶

Because an Examiner has only quasi-judicial powers, any grant of authority to the Examiner “must be accompanied by reasonable standards that define in general terms what is to be done and the administrative body that is to do it.”¹²⁷ In Sammamish, the Hearing Examiner’s authority is limited:

The examiner’s decision may be to grant or deny the application or appeal, or the examiner may grant the application or appeal with such conditions, modifications, and restrictions as the examiner finds necessary to make the application or appeal compatible with the environment and carry out applicable state laws and regulations, including Chapter 43.21C RCW and the regulations, policies, objectives, and goals of the interim comprehensive plan or neighborhood plans, the development code, the subdivision code, and other official laws, policies and objectives of the City of Sammamish.¹²⁸

Sammamish Code does not allow the Examiner to provide advisory opinions or rule on moot issues or applications. Washington courts have

¹²⁵*Chaussee*, 38 Wn. App. at 636; *Durland v. San Juan County*, 174 Wn. App. 1, 10, footnote 6, 298 P.3d 757 (2012).

¹²⁶*Chaussee*, 38 Wn. App. at 638.

¹²⁷*Rody v. Hollis*, 81 Wn.2d 88, 91, 500 P.2d 97 (1972).

¹²⁸SMC 20.10.070(2).

rejected other hearing examiner's attempts to exceed their limited authority.¹²⁹ In *In re King County Hearing Examiner*, a hearing examiner similarly issued a determination that exceeded his authority. The court was decisive in ruling that a Hearing Examiner may not “usurp” the limited authority given him by the local jurisdiction; his authority is strictly limited to that which is given in the local regulations.¹³⁰

Likewise here, the Examiner should have stopped when he reached his decision on the Plat Alteration. When he decided that his denial of the Plat Alteration necessitated denial of the Chestnut Estates West Preliminary Plat, he had no reason or jurisdiction to go further and address some aspects of the Preliminary Plat, but not others. While his denial of the Preliminary Plat was erroneous for the reasons set forth above, his subjective advisory conclusions on moot issues were also erroneous.

Even if the Examiner has authority to engage in advisory opinions regarding moot issues, he should only do so if the issues are of continuing or substantial interest.¹³¹ Given the very specific nature of the Preliminary Plat application before the Examiner, this standard simply was not met.

¹²⁹*In re King County Hearing Examiner*, 135 Wn. App. 312, 319-320, 144 P.3d 345 (2006).

¹³⁰*Id.*

¹³¹*Cathcart-Maltby-Clearview Cmty. Council v. Snohomish County*, 96 Wn.2d 201, 208, 634

P.2d 853 (1981).

Finally, the Examiner did not explain why he selectively chose to address some aspects of the preliminary Plat, and some aspects of the area's history, but not others. For example, the Examiner stated that he was dismissing Neighbors appeal issues regarding the Variations and Buchan's appeal of same for being moot, as discussed above.¹³² Yet, before doing so he engaged in a discussion about the Variations and his personal feelings regarding connection of the Chestnut Estates West roads to the existing public road network.¹³³ The Examiner did not explain why he decided some issues were not worth his review while others were.

1. The Examiner's Discussion of the Area History and Development Under the Guise of Evaluating Site Access Demonstrates the Impropriety of His Advisory Opinions.

The Examiner's conclusions regarding the relationship of the Preliminary Plat to the City's road system is a good example of why the Examiner's engagement through issuing advisory opinions not only exceeds his jurisdiction but is unnecessarily confusing.

Confusingly, the Examiner concluded that the Chestnut Estates West Property is landlocked while simultaneously recognizing that the Property can connect to the City's public road system, SE 8th Place, by

¹³²*Land Use Decision*, Conclusion D.8, CP 000109.

¹³³*Id.*, Conclusions D.4-D.7, CP 000053-000054.

means of Tract D.¹³⁴ The Property is **not** landlocked because it can be accessed through an extension of a public right-of-way via SE 8th Place using Tract D of Chestnut Estates, reserved by Buchan for future use including for public right-of-way.¹³⁵ In briefing to Superior Court, Buchan extensively discussed both the inaccuracies of the Examiner's review, and Buchan's concerns regarding the effects of his exploration into the Examiner's ad lib opinions regarding this access question.¹³⁶

Fairly, the City conceded to Superior Court that the Examiner *did not* deny Buchan access via existing City streets:

The Hearing Examiner and Petitioner Buchan ***do not disagree*** on the facts surrounding access to Chestnut Estates West. . .

The only difference between the Hearing Examiner's use of the facts and Buchan's is that Buchan looks to the future while the Hearing Examiner looks at what currently exists. Petitioner explained that "the Property is not landlocked because it can be accessed through an extension of a public right-of-way, SE 8th Place using Tract D of Chestnut Estates". Petitioner's Brief at 59. The Hearing Examiner, however, recognized that this extension and dedication of Tract D has not taken place, thus leaving Buchan's property landlocked. Decision Conclusions E.2, p. 40. ***The Hearing Examiner did not deny access. Rather, access does not currently exist.***¹³⁷

¹³⁴*Id.*, Finding A.2, CP 000049; Conclusions E. 1, E.2, and E.3, CP 000055.

¹³⁵*Id.*, Conclusion of Law, E.2, CP 000055.

¹³⁶*Petitioner's Prehearing Brief*, CP 00597-003812; *Petitioners' Prehearing Reply Brief*, CP 00-6465-006497.

¹³⁷*City's Prehearing Brief to Superior Court*, pp. 19-20, CP 004000-004001 (emphasis added). Apart from the City's concession, there would also have been no legal basis for the Examiner to preclude a connection between the Chestnut Estates West Property and SE 8th. The Supreme Court determined decades ago that land "dedicated as a street is thereby

The question, as the City puts it, is merely a matter of timing. Buchan has not *yet* dedicated Tract D to the City as public right-of-way. That is properly done after the Chestnut Estates West plat is complete and Buchan and the City record final documents establishing the rights-of-way (which are shown on a final plat map and other recorded dedications materials). It would have been illogical for Buchan to dedicate Tract D years ago when there was no application proposed for Chestnut Estates West. Likewise it would be an excessive exaction for the City to have required Buchan to dedicate right of way over Tract D before Buchan had even applied for the Chestnut Estates West subdivision.¹³⁸

Since there was no ultimate disagreement that the Chestnut Estates West Property can be connected to the existing public road system, the Examiner's lengthy exploration of the history of access and Buchan's subdivision development was unnecessary and confusing. Instead, had the Examiner issued an actual Preliminary Plat decision, he would have not

devoted to a general or public use, held in trust for the public and for the convenience of public travel." *Albee v. Town of Yarrow Point*, 74 Wn.2d 453, 458, 445 P.2d 340, 344 (1968). The Supreme Court has clearly determined that right of access "to a public right-of-way is a property right." *Keifer v. King County*, 89 Wn.2d 369, 372, 572 P.2d 408 (1977) (if that right is taken or damaged, compensation may be required under the Washington State Constitution). A city's power to regulate public streets does not mean a city has the power to prohibit or block their use. *Yarrow First Associates v. Town of Clyde Hill*, 66 Wn.2d 371, 376, 403 P.2d 49 (1965). To the contrary, Buchan has an absolute legal right to use existing public streets, including SE 8th, to access the Chestnut Estates West property; the only question is subject to what conditions.

¹³⁸*Luxembourg*, 76 Wn. App. 502

needed to delve into this advisory capacity but instead focus only on the City Code requirements related to designing and constructing that roadway system.

This is a good example of how the Examiner failed to issue a decision on the Chestnut Estates West Preliminary Plat, but instead improperly engaged in an advisory review of his opinions as to the area generally, the history related to the different subdivisions, the identity of the developer (Buchan) and how he feels the subdivisions should have been developed. This is not appropriate territory for a hearing examiner to explore. Instead, the Examiner should either have remanded Preliminary Plat without advisory commentary on moot issues, or issued a complete decision on the merits of the entire application, without regard to Buchan's identity, the prior development history of Chestnut Estates or who owns the adjoining property.

2. *The Examiner Improperly Elevated His Personal Opinion and Perceptions as to Unwritten Policy and Legislative Priorities Over the City Code and Expert Evidence.*

In issuing his advisory opinion on landslide buffers, stream buffers and open spaces, the Examiner again focused on his personal opinions rather than reviewing the Preliminary Plat under adopted City Code and based on the uncontested conclusions of expert engineers. The Examiner relied on his perception about what he believed the City Council thought

about Ebright Creek rather than what the City Council adopted in City Code as the actual critical area regulations.

The Examiner had no authority to rely on personal opinions or a desire generally to impose more environmental constraints, i.e. exactions, beyond those provided under adopted City Code.¹³⁹ Likewise, the Examiner erred in reaching conclusions that are not based on identified, adopted City policy or regulation.¹⁴⁰ The Examiner should have reviewed the City Code and relied on the uncontested expert opinions of professional engineers.

- a. The 15-Foot Landslide Buffers is Expressly Allowed Under City Code and Supported by Uncontested Engineering Analysis From Both Buchan and Outside, Peer Engineering Review on Behalf of the City.

City Code expressly allows buffers for landslide areas to be reduced to a minimum of 15 feet when supported by a critical areas study by licensed civil engineers.¹⁴¹ The Code requires a factual, engineering-based evaluation.¹⁴² Buchan submitted multiple factual, engineering-based evaluations of the landslide buffers both related to the Preliminary Plat layout as a whole and specifically as that related to the bridge.¹⁴³ The City

¹³⁹*Norco Construction*, 97 Wn.2d at 689-690.

¹⁴⁰*Burien Bark*, 106 Wn.2d 868.

¹⁴¹SMC 21A.50.260(2).

¹⁴²*Id.*

¹⁴³*See e.g.* Ex. S-218.a, Bates No. 001831-001892; Ex. S-218.b, Bates No. 001893-001898; and Ex. S-219.c, Bates No. 001899-001902.

relied on its internal expert engineer as well as an independent engineering expert for its review. Both the City engineer and its expert consultant agreed with Buchan's engineer that the landslide area general buffer can safely be reduced.¹⁴⁴ Since one major purpose of that evaluation was to determine how long the bridge should be, the expert engineer opinions provided lengthy testimony concluding that applying a 15-foot buffer to build the bridge would be safe and "geotechnically appropriate."¹⁴⁵

The Examiner did not disagree with the substance of these expert opinions. Instead, the Examiner rejected the engineered 15-foot buffer, deciding instead that the area should have greater environmental protections than the City Council had adopted in City Code and because he felt a 15-foot buffer just was not desirable.¹⁴⁶ The Examiner admitted that a 15-foot buffer was safe and appropriate per the geotechnical engineers, but then went on to say that he believes the 15-foot buffer is not consistent with City policy.¹⁴⁷ Yet the Examiner never identified that policy or why it would override the evidentiary, engineering based determinations made pursuant to SMC 21A.50.260(2).

¹⁴⁴CABR, Ex. S-203, Findings 17, 45, and 46, Bates Nos. 000895 and 000899.

¹⁴⁵*Byers Testimony*, Transcript, April 29, 2015, p. 1157, CP 001555.

¹⁴⁶*Land Use Decision*, Conclusions E.4, E.5, and E.6, CP 000055- 000056.

¹⁴⁷*Id.*, Conclusion E.6, CP 000056.

- b. The Examiner Had No Authority to Opine in an Advisory Capacity that City Staff Should Consider Requiring Wider Critical Area Buffers for Ebright Creek Than Those Adopted in City Code.

The Examiner also concluded that the stream buffers for Ebright Creek should be even *wider* than the required by City Code.¹⁴⁸ He felt that Ebright Creek held “special significance” to the City Council in ways beyond what City Code requires.¹⁴⁹ Again, the Examiner never cites to any adopted policy or regulation that directs the Examiner to treat Ebright Creek differently from the other creeks and streams in the City.

The City Council already added protections for Ebright Creek beyond the stream buffers by imposing the R-1 zoning. Ebright Creek is a longstanding feature within the City, and the environmental studies pertaining to the Creek have long been in existence. The environmental nature of Ebright Creek is the reason why, the City Council adopted the widest buffers available for Ebright Creek and zoned the Property R-1. The Examiner should never have engaged in such an advisory capacity on matters that clearly would prejudice future development plans.

- c. The Examiner’s Advisory Remarks Regarding the General Location of Chestnut Estates West’s New Open Spaces Were Not Based on City Code Standards and Were Excessively Vague.

¹⁴⁸*Id.*, Conclusion E.10, CP 000057.

¹⁴⁹*Id.*, Conclusion E.5, CP 000058.

As a final example, the Examiner issued advisory opinions regarding the new open space arrangement in Chestnut Estates West.¹⁵⁰ The Examiner entirely failed to consider the Property's basic topographical and critical area restrictions that dictate where open spaces must be located and contain only one developable where residential lots can be located.¹⁵¹ Instead, the Examiner advised Buchan to find a 'better balance', not a concept in City Code, between the east and west sides of the Property. The Examiner's advice as to how Buchan should design its subdivision has no basis in Sammamish Code; the Examiner has no place suggesting subdivision design. The Examiner's role is not to speculate about how to better design a subdivision, but instead to determine if the Preliminary Plat meets the vested-to Sammamish regulations. This is yet again an advisory conclusion that should be reversed.

The Examiner should have entered his findings and conclusions and then remanded the matter for further modification or else imposed conditions requiring a certain bridge length. Buchan respectfully requests the Court to reverse the Examiner's conclusions and remand with instructions.

¹⁵⁰*Id.*, Conclusion E.5, CP 000055. This Conclusion addressed the location of newly created open spaces as part of Chestnut Estates West, distinct from the relocated and expanded open spaces that the Plat Alteration would have provided.

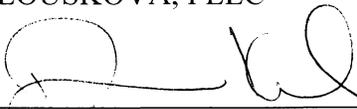
¹⁵¹*See e.g.* CABR, Ex. S-211.a, Bates Nos. 001397-99.

VI. CONCLUSION

Based on the foregoing, Buchan respectfully requests this Court to conclude that the Chestnut Estates preliminary plat should have been, and should now be, remanded to City staff and Buchan for further modification as may be allowed under statute and City Code. Additionally, Buchan respectfully requests this Court to rule that the Hearing Examiner lacked authority to issue advisory comments and opinions regarding the preliminary plat and reverse the Land Use Decision on that basis.

DATED this 4th day of October, 2016.

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