

63338-4

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CASE NO. 63338-4-I

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

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FRIENDS OF CEDAR PARK NEIGHBORHOOD

Appellant,

v.

CITY OF SEATTLE and WIDGEON, LLC

Respondents.

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**REPLY BRIEF OF APPELLANT**

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## I. INTRODUCTION

In this case the City of Seattle interpreted *Carlson v. Town of Beaux Arts Village* as standing for the proposition that if an applicant can exploit a technical loophole in subdivision law then the City has no choice but to approve it. In *Carlson*, the court merely approved the subdivision of a single 20,673 s.f. lot into two lots meeting the 10,000 s.f. minimum, one of which (the rear lot) was a relatively common flag-shaped lot that surrounded the new lot for the existing residence.

In this case, the City of Seattle has taken the position that *Carlson* mandates that it approve subdivided lots manufactured from two separate lots connected by a narrow strip of land, even if the connecting strip is one-billionth (0.000000001) of an inch wide. This is an absurd result stemming from the City's extension of *Carlson*. This Court, however, can distinguish *Carlson* so that there is some meaning left in the public use and interest requirement of RCW 58.17.110.<sup>1</sup>

This case also involves review of a City decision dealing with the adequacy of drainage in a critical area steep slope above the Burke Gilman

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<sup>1</sup> The public use and interest requirement of RCW 58.17.110 is incorporated in the short subdivision context by RCW 58.17.060.

Trail. The record shows that the City Hearing Examiner was clearly erroneous in her decision. It will also be seen that the Hearing Examiner, in her rush on this issue, made a decision not supported by substantial evidence.

Thirdly, the Hearing Examiner, in her haste to move the case along, made a decision to avoid compliance with subdivision requirements concerning the calculation of lot division. She ignored uncontroverted testimony that this scheme simply does not comply with the City's short subdivision law. Thus, her decision was clearly erroneous and not supported by substantial evidence.

## II. ARGUMENT

### **A. The *Norco* and *Carlson* Cases have Led to the Graphically Illustrated Absurd Result of Over Extending the *Carlson* Decision.**

Both Respondents in their response briefs make it clear that the City of Seattle ("City") interprets *Norco Construction v. King County*, 97 Wn.2d 680, 649 P.2d 103 (1982) and *Carlson v. Town of Beaux Arts Village*, 41 Wn. App. 402, 704 P.2d 663 (1985) to allow absurd results. The City's position is that developers can use strips of land as little as 0.000000001 inch to connect non-adjacent tracts of land to make one

parcel. Day 1 VRP 205:5-15; Day 1 VRP 249:19-251:25. This particular scheme allows applicants to avoid using existing procedures that provide processing and scrutiny needed to review subdivisions that create such non-typical lot densities.

The suggested short subdivision in this case helps show the absurdity of the City's position. The approved subdivision is located on a designated critical area steep slope above the Burke Gillman Trail. It is undisputed that frequent slides occur from water flows. Day 2 VRP 46:23-47:16.

Thus, this is the case for this Court to decide whether it is time to more clearly define the extent to which *Norco* and *Carlson* are to be extended to enable loopholes that undermine the intent of the land use code and thereby lead to absurd results contrary to the public interest.

1. The *Norco* and *Carlson* decisions have led the City of Seattle to totally ignore the public use and interest requirement of RCW 58.17.110 in a manner that threatens further slides onto the Burke Gilman Trail.

The question of how to apply the public use and interest requirement in the subdivision context can be presented as follows: Is subdivision law in this state merely a proscriptive regulation like the US

tax code? In other words, does the law provide that everything is allowed no matter how absurd or dangerous the result until it's expressly prohibited?

This is a serious issue, since closing each loophole is not easily done in a City like Seattle or other cities where codes would need to be constantly updated by already overwhelmed city councils. This is unlike the US tax code where the Internal Revenue Service can close absurd loopholes by regulatory action. The City of Seattle Department of Planning and Development ("DPD") cannot do that.

The one way DPD, the city equivalent of the IRS, might have avoided the unanticipated development on steep slopes above the slide prone Burke Gilman Trail, was by means of the public use and interest requirement found in RCW 58.17. Further clarification of *Carlson* could restore some ability of the City of Seattle to avoid dangerous and absurd results such as a 0.000000001 inch connector strip in a steep slope critical area that routinely slides onto the Burke Gillman Trail.

*Norco* and *Carlson* have led to the quandary at the center of this matter. Here, the City of Seattle land use code ("Code") contains regulations for concentrated development, similar to what Widgeon

proposes. *See, e.g.,* SMC 23.44; SMC 23.22.062. Those regulations, understandably, involve greater scrutiny and process than that required of normal short plats. Widgeon has found that it can use the City's application of *Norco* and *Carlson* to circumvent such regulations by means of a loophole in the Code.

In the instant matter, the Code does not provide a minimum lot width or any provisions that specifically prohibit use of a 0.000000001 inch connector strip for manufacturing one lot out of two non-adjacent parcels. What has become a *Norco*-and-*Carlson*-enabled loophole allows a land owner to avoid more appropriate regulations, which contain more process and protection when an applicant attempts to concentrate development on a small lot.

Widgeon believes that *Norco* and *Carlson* mean that the purpose and intent of the Code are irrelevant and that the City is legally bound to approve this "creative-in-the-extreme" (or in Cedar Parks' word "absurd") subdivision because in absence of a Code prohibition, anything goes. The City agrees that nothing in the Code prohibits Widgeon's scheme.

Thus, one does not need to develop a hypothetical example of an absurd result from an over extension of *Norco* and *Carlson*. This case

arises from those precedents and the corresponding absurd result is before this Court.

2. The City's response brief demonstrates why this short subdivision does not serve the public use and interest.

The City appears to acknowledge that the shapes of the proposed lots are "bizarre," and agrees that the DPD Planner called the short plat "creative-in-the-extreme." City Br. at 23-24. The City, however, asserts that such characterizations are "irrelevant." City Br. 24:1-5.

In its brief, the City cited the testimony of DPD Planner Catherine McCoy who stated that even a lot shape one-billionth of an inch wide would be legal. City Br. at 24; Day 1 VRP 205:3-13. City of Seattle Planner and Attorney Bill Mills testified that there are "no minimum width or depth standards," meaning that lot shapes one billionth of an inch wide would be legal under this interpretation. Day 1 VRP 251:10-25.

The City's belief that connector strips one billionth of an inch wide are allowable supports Cedar Park's contention that the City is solely focused on the standard of whether the Code contains a prohibition against a particular scheme. City Br. at 23-24 (admitting that there are no standards and therefore even bizarre lots are allowed).

Ironically, the City states in its brief that a "purpose of the minimum lot area standards [is] 'to allow predictable neighborhood development.'" City Br. at 25-26 (quoting Mr. Mills). The City's position shows why it is time to redefine the public use and interest and to stop such outlandish practices.

The City admits that the lots are considered "bizarre" and "creative-in-the-extreme" while, at the same time, saying that the intent of the Code's minimum lot areas is to have predictable neighborhood development. Obviously, bizarre and creative in the extreme lots linked together with a practically invisible 0.000000001 of an inch strip do not lead to predictable neighborhood development.

The City claims that DPD based its public use and interest determination upon finding that the subdivision would "preserve environmentally critical areas," "advance the broader community," and provide "additional housing opportunities." City Br. 27. First, preserving environmentally critical areas ("ECAs") is required by the Code, so that finding is superfluous. Further, it is questionable that the adjacent ECA will actually be benefited by development of four lots, which would

quadruple the impervious surfaces of houses, driveways, walks, patios, etc., thereby significantly altering the site's natural drainage pattern.

Second, the City's alleged finding that the subdivision would "advance the broader community" is essentially an immeasurable and meaningless platitude. It is also an example of circular reasoning, as it states in different terms the same premise (advance the broader community) as the conclusion (serve the public use and interest).

Third, any short subdivision in a residential area will by definition produce additional lots for houses, so the statement "additional housing opportunities" is also without meaning. It essentially means that the subdivision of land is good because it produces additional lots for houses (another example of circular reasoning). However, there is nothing in this statement that supports four lots over three lots or two lots.

3. Widgeon's connector strips are functionally useless pieces of land.

DPD Planner Catherine McCoy identified no functional purpose for the connector strips. Day 1 VRP 205:14-207:7. The six-inch connector strips are too narrow for human use or occupancy. *Id.* Without the connector strips Parcels A and B on the west portion of the short plat would fail to meet the minimum lot size required by the site's zoning. The

sole purpose for the connector strips is to artificially harness the environmentally critical area at the east end of the site so that an additional building can be placed on the west end of the site.

4. Widgeon misstates the definition of a “loophole.”

Widgeon states:

Cedar Park's main argument is that the proposed lot configuration is based on a ‘loophole’ in the Code, and is thus inconsistent with the intent of the Code. However, throughout the Hearing Examiner and Superior Court proceedings, Cedar Park was challenged to identify any Code provision that prohibited the proposed lot configuration. It could not do so.

Widgeon at 30.

Widgeon's statement shows a misunderstanding of the meaning of the word “loophole.” The Merriam-Webster dictionary defines a “loophole” as "an ambiguity or omission in the text through which the intent of a statute, contract, or obligation may be avoided." MERRIAM-WEBSTER ONLINE DICTIONARY (2009). Similarly, BLACK’S LAW DICTIONARY defines loophole as "An ambiguity, omission, or exception (as in a law or other legal document) that provides a way to avoid a rule without violating its literal requirements; esp. a tax code provision that allows a taxpayer to

legally avoid or reduce income taxes." BLACK'S LAW DICTIONARY (8th ed. 2004).

Consistent with the definition of loophole, and contrary to Widgeon's understanding of that word, the fact that there is no prohibition in the Code demonstrates how Widgeon is using a loophole to avoid the intended application of the Code.

5. Contrary to Widgeon's argument, Prof. Ochsner's well-documented illustrations are of great probative value in understanding the absurdity of the City's position.

In its opening brief, Cedar Park demonstrated the bizarre results that stem from the City ignoring what would be the normal interpretation of the public use and interest in favor of the interpretation it asserts grew out of *Norco* and *Carlson*. Cedar Park Br. at 42, n. 19. This was in part illustrated by Exhibits CP 376 and 378, which offered a visual representation of highly unconventional lot shapes made possible by Widgeon's suggested interpretation. Widgeon, in its response brief, suggests that these Exhibits are of "limited probative value." Widgeon Br. at 38.

Professor Ochsner testified that CP 376 was based on lot widths in Cedar Park in the vicinity of the proposed short plat and that the widths

and lengths were based on the Cedar Park lot pattern. Day 1 VRP 75:7-77:15. Widgeon and the City have offered not one shred of evidence or argument that the exhibits do not show exactly what is allowed. Professor Ochsner testified that CP 376 showed how acceptance of "lots" composed of separate parcels connected by six-inch or even narrower connector strips could be used by a clever applicant to produce higher density development by using snake-like connector strips and purchasing vacant hillside parcels. *Id.*

Mr. Bill Mills could not refute Prof. Ochsner's argument that such a configuration would be allowed under the SMC. Day 2 VRP 79:17-80:9. Mr. Mills found nothing in a configuration with snake-like connector strips that would disallow it. Day 2 VRP 80:8-9 ("I don't think I could conclude one way or the other."). This indicates that the DPD's attitude and the Hearing Examiner's decision reflect the belief that the letter, and not the intent, of the Code is all that must be considered.

Prof. Ochsner's testimony with regard to CP 378 showed a "hypothetical block of lots" with lots "50-feet wide by 120-feet long." Each would be "6,000 square feet." Ochsner explained:

If these lots were in a 5,000 square foot zone, each of the lots would have excess area. So using the six-inch connector strip theory of how you can create lots, you could take one of the lots and propose to divide it into two pieces as shown here (indicating) in the upper right-hand corner. Then using six-inch connector strips, if you could acquire from other property owners the back parts of their lots that are undeveloped, you could create the so called lots that meet the minimum 5,000 square foot requirements of the zone....

Day 1 VRP 78:22-79:11

Ochsner testified that the diagram showed how lots created using six-inch connector strips could undermine an area's existing zoning. VRP

Day 1 79:12-25.

Again, Mr. Mills could not refute Prof. Ochsner's argument that such a configuration would be allowed under the Code. Day 2 VRP 79:17-80:9. Mr. Mills found nothing in a configuration with connector strips linking pieces taken from several lots to put together a "lot" or "lots" meeting zoning minimum that would disallow it. Day 2 VRP 80:3-25 ("If they were proposed in a short plat application, we would consider them.")

6. The issue of interpreting the requirements of *Norco* and *Carlson* has been reserved for the appellate level.

The Hearing Examiner and the superior court made known that they were not able to make a "public use and interest" ruling involving

*Norco* and *Carlson*. This Court, however, is an appropriate body to give clarification to those cases.

Cedar Park, in its opening brief, suggested a redefined rule that would prevent the exploitation of loopholes to the disadvantage of the greater community. Cedar Park opening brief at IV.E.10. We urge this Court to adopt that new definition or to fashion its own.

**B. The Hearing Examiner's Decision on Drainage Adequacy is Not Supported by Substantial Evidence.**

Widgeon and the City rely heavily on deference to the Hearing Examiner's decision, and assert that the Examiner properly found adequate drainage existed. Widgeon Br. at 13; City Br. at 8. Substantial evidence does not exist to support such a statement nor does it support the Hearing Examiner's conclusion.

1. LUPA does not require this Court to uphold decisions that are not supported by substantial evidence.

Under the Land Use Petition Act ("LUPA"), the court may grant relief if "the land use decision is not supported by evidence that is substantial when viewed in light of the whole record before the court." RCW 36.70C.130(c). "Substantial evidence is evidence sufficient to convince a rational, unprejudiced person." *Griffin v. Thurston County*,

165 Wn.2d 50, 55, 196 P.3d 141, 143 (2008). As Cedar Park has shown and will again show here, the Examiner's decision is not supported by evidence sufficient to convince a rational, unprejudiced person.

2. The City and Widgeon tout their witnesses as experts, but their testimony shows they knew little of conditions at the site.

Widgeon asserts that "[t]here is stark contrast between the lay testimony of Cedar Park's witnesses, and that of the expert testimony provided by the City and Widgeon." Widgeon Br. at 15. This statement is accurate, but not in the sense that Widgeon intends.

Unlike Widgeon's and the City's witnesses, Cedar Park's testimony included witnesses familiar with the area, its drainage patterns, and the danger that this proposed subdivision will exacerbate existing landslide problems. On the other hand, the City's and Widgeon's witnesses were unfamiliar with drainage in the area and did virtually no analysis to determine how water from the four proposed lots would drain.

The City's and Widgeon's response briefs reference drainage testimony from three witnesses: Geotechnical Advisor Donald Tubbs, Geotech Engineer William Bou, and DPD Planner Catherine McCoy.

Though Dr. Tubbs' resume indicates that he has experience with surface water and groundwater hydrology, the scope of services for the Widgeon geotechnical report do not include a review of drainage. CP 427. In his testimony before the Examiner, Dr. Tubbs testified he was "not qualified to speak on the downstream adequacy of drainage system along 42nd" and that he would be "concerned" to learn that there were drainage problems in the area. Day 2 VRP 59:4-6 and 62:1-13. He was right to be concerned.

Ample testimony before the Examiner indicates that if Widgeon's short plat drains to the ditch and culvert system along 42nd Avenue NE, increased runoff will be added to the existing inadequate system of shallow ditches and culverts. CP 585; Day 2 RP 123:2-124:3. Observation shows that some culverts become clogged with silt. CP 585; Day 2 RP 130:4-5. The intake drainage grates have actually spewed out water in heavy rains. Day 2 RP 124:4-16. During Seattle's many heavy rains, water often sheet flows across the street, downhill from west to east, flowing toward the steep landslide-prone slope and the Burke-Gilman Trail. Day 1 VRP 37:21-38:6.

Dr. Tubbs' concern was not picked up by the Examiner. This Court should remand the matter based on Dr. Tubbs' testimony alone.

Mr. Bou primarily testified that he read and approved Dr. Tubbs' report. Day 2 VRP 18 ("I have to go with what's shown on the plans and what's shown on the submittal by the applicant (inaudible) report"). Mr. Bou had not even visited the project site. Day 2 VRP 19:10-17. In sum, Mr. Bou relied on Dr. Tubbs' report, which did not evaluate drainage.

When Ms. McCoy was questioned about drainage at the site she stated, "I am not an expert, again, in drainage or geotechnical issues." Day 1 VRP 209:17-19 (emphasis added). She also stated, that "I have not seen the plans and I have not seen the drainage system." Day 1 VRP 210:25-211:1 (emphasis added).

3. In contrast, Cedar Park's witnesses had expertise to evaluate drainage and were familiar with drainage in the area.

Widgeon characterized Cedar Park's experts as "two neighborhood residents." Widgeon Br. at 16. Cedar Park's witnesses have significantly more expertise through a combination of practical and academic experience. *See* CP 407 and 211-14. In fact, Cedar Park's experts were very familiar with the City's drainage requirements and, unlike Widgeon's

and the City's witnesses, they had firsthand knowledge of the actual drainage system in place at the site. *See, e.g.*, Day 1 VRP.

Cedar Park's experts included Rolfe Kellor, AICP, who has professional degrees in Landscape Architecture and in Urban Planning. CP 407. Mr. Kellor has worked in urban planning for over 40 years, including as a staff member of city planning agencies. *Id.* As a planner and landscape architect, Mr. Kellor has done feasibility and analysis for many projects including drainage assessment and preliminary drainage design. Day 1 VRP 168:14-25. Mr. Kellor is very familiar with City requirements for drainage. Mr. Kellor, who resides at 12522 39th Avenue NE, has firsthand knowledge of the drainage and landslide conditions in the Cedar Park neighborhood, including in the vicinity of the proposed short plat. Day 1 VRP 170:13-14.

Cedar Park's second expert, Prof. Jeffrey Ochsner, FAIA, is currently Associate Dean in the UW College of Built Environments and holds positions in the Departments of Architecture, Urban Design & Planning, and Landscape Architecture. CP 211-214. Prof. Ochsner has been a registered architect for 29 years. *Id.*

Prior to his career as a professor, he worked in architectural and planning practice, both as an employee and as owner of his own firm, during which time he was involved in design projects in ten different states. Day 2 VRP 116:10-117:24. Prof. Ochsner also has experience as a beginning surveyor. Day 2 VRP 116:10-11. Prof. Ochsner lives at 13226 42nd Avenue NE, and has firsthand knowledge of the drainage and landslide conditions in the Cedar Park neighborhood, especially in the vicinity of the proposed short plat. Day 1 VRP 13:14-15.

Both Mr. Kellor and Prof. Ochsner have seen the site and its vicinity in all kinds of weather, including the significant rainfall events of the 2007 and 2008 winter seasons. Day 1 172:12-17; Day 2 VRP 126:18-20.

The Examiner gave insufficient weight to Cedar Park's experts when she deemed them "lay witnesses." CP 16. This alone should lead to remand. It shows that the Examiner held an unsupportable allegiance to the City's position, ignored the only credible testimony, and issued a decision not supported by substantial evidence.

The only sworn testimony provided at the Hearing regarding drainage conditions in the site vicinity was provided by Cedar Park's

expert witnesses, Mr. Kellor and Prof. Ochsner. Only Cedar Park's expert witnesses provided information about what happens in the vicinity during significant rainfall events. Day 1 VRP 172:12-17; Day 2 VRP 126:18-20.

As became obvious from their testimony at the hearing, the DPD and Widgeon reviewers had very little awareness of drainage in the area.

4. The proposed drainage for the subdivision remains inadequate.

The City states that "[t]he Examiner properly found adequate drainage existed." City Br. at 8. Widgeon states that "substantial evidence supports the Examiner's conclusion that adequate provision has been made for drainage control." Widgeon Br. at 13.

There is no evidence in the record to support the Examiner's finding, as required by RCW 58.17.110 and SMC 23.24.040 A.3, that drainage for the short plat is adequate.

The author of the Director's Decision, Ms. McCoy, was unaware that there was no storm sewer in 42nd Avenue. Day 1 VRP 210:18-211:1. Dr. Tubbs created a geotechnical report, not a drainage report for Widgeon. CP 427-436. He gave no testimony as to drainage conditions adjacent to the site or in the vicinity. Day 2 VRP 43-64.

Mr. Bou primarily testified that he read and approved Dr. Tubbs' report. Day 1 VRP 18. He had not visited the project site. Day 1 VRP 19:10-17. In addition, Mr. Bou did not know whether a storm sewer line existed at the site. Day 2 VRP 22:24-23:4.

Testimony at the hearing established that no storm sewer line exists at the site and that drainage is limited to a patchwork system of shallow ditches and culverts. The Examiner attempted to correct DPD's inadequate drainage requirement by re-authoring it:

The drainage plan must demonstrate detention of all water from, roofs and other impervious surfaces on site and discharge to the ditch and culvert system on the west side of 42nd Avenue Northeast or, if acceptable to DPD, either conveyance to the **existing sewer** or infiltration at least 50 feet from the top of the steep slope.

CP 18-19 (emphasis added). There is no existing sewer line on 42nd Avenue Northeast.

In essence, the Examiner is shielding the critical issue from public scrutiny, and putting off until another day how to solve the problem. Again, her lack of knowledge is shown by reference to an existing sewer that does not exist. This court should remand and order the Examiner to see that this problem is confronted in a common sense way.

**C. The Hearing Examiner Erred by Failing to Properly Deduct Shared Vehicular Access from the Parent Lot Before Calculating the Number of Lots Allowed Through Subdivision.**

The short subdivision requirements contained in the Seattle Municipal Code section Chapter 25.09 (Regulations for Environmentally Critical Areas) state as follows: "In computing the number of lots a parcel in a single family zone may contain, the Director shall exclude... Easements and/or fee simple property used for shared vehicular access to proposed lots that are required under Section 23.53.005." SMC 25.09.240 E.1.

Widgeon's response brief fails to address the complete requirements of SMC 25.09.240 E 1. *See* Widgeon Br. at 26-29. In fact, Widgeon never provides the language for the Code section at all, seemingly content to rely on deference. The City's response brief quotes the Code section but then fails to apply it in such a way that each word is given meaning. *See* City Br. at 18.

The City states that "[t]he Code does not require...that potential, yet unproposed easement areas for an individual's vehicular access be excluded." City Br. at 18 (emphasis removed). On the contrary, SMC 25.09.240 E.1 specifically requires the exclusion of "fee simple property

used for shared vehicular access," not merely applicant-selected easement dimensions.<sup>2</sup>

"Statutes must be interpreted and construed so that all the language used is given effect, with no portion rendered meaningless or superfluous." *Lakemont Ridge Homeowners Ass'n v. Lakemont Ridge Ltd. Partnership*, 156 Wn.2d 696, 698-99, 131 P.3d 905 (2006) (citations omitted). The City's interpretation would read the "shared vehicular access" portion of the provision out of the Code.

A review of Cedar Park's Illustrative Exhibits 1 and 2<sup>3</sup> shows placement of structures in strict conformance with Code minimums, and turning radii derived strictly from the provisions of the Code.

Widgeon claims that "DPD Land Use Planner Bill Mills...painstakingly refuted each of Cedar Park's arguments before the Hearing Examiner." Widgeon Br. at 27. However, Mr. Mills cited the

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<sup>2</sup> The rationale for also deducting fee simple property used for shared vehicular access seems clearly aimed at applicants who may seek to draw undersized easements, as here, in order to maximize the number of potential lots.

<sup>3</sup> Illustrative Exhibits 1 and 2 are documents that were prepared as illustrative exhibits in Superior Court proceedings. Cedar Park supplemented its designation of clerk's papers on July 15, 2009 in order for this document to be included in the record on appeal.

wrong portions of the Code because he relied on parking lot standards, and not the requirements for residential driveways and garages. Day 1 VRP 242:17-243:4. This is another example of the Examiner unjustifiably granting more weight to the City's witness than Cedar Park's witnesses. See Section II.B.3 *supra*.

Mr. Mills testified about driveways and vehicular movement when there is no evidence that he has any expertise in geometry, site planning, or vehicular movements. Nonetheless, the Examiner accepted Mr. Mills' testimony over that of Prof. Ochsner, who has over 25 years of experience in design and who did his homework on the calculations and presented those calculations to the Examiner. His calculations have not been refuted. The Examiner made an erroneous interpretation of the law and misapplied that law to the facts when she depended on Mr. Mills' erroneous calculations in making her decision.

Widgeon and the City have provided no evidence showing that there is adequate square footage for four legal lots after deduction of both the easement and shared vehicular access as required by SMC 25.09.240

E.1. Cedar Park has demonstrated through Illustrative Exhibits 1 and 2<sup>4</sup> that it is physically and legally impossible to subdivide the property into four legal lots when both the easement and shared vehicular access areas are properly deducted. *See Cedar Park Opening Br. at IV.C.5.*

Accordingly, this Court should rule that the proposed subdivision with four lots fails to comply with SMC 25.09.240 E.1 and must be remanded to DPD for proper processing. Alternatively, the Court should rule that it is impossible for the Examiner and DPD to determine if the proposed subdivision meets the requirements of SMC 25.09.240 E.1 unless and until a site plan is submitted. A simple remand would allow the Examiner to remand to DPD for further evidence in the form of a site plan.

Widgeon would then need to submit a site plan with both the easement and shared vehicular access clearly delineated, so that the appropriate calculations can be made as required by SMC 25.09.240 E.1. The subdivision cannot and should not be approved unless the actual site

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<sup>4</sup> *See Footnote 3 supra.*

plan shows conclusively that the requirements of SMC 25.09.240 E.1 are met.

### III. CONCLUSION

We ask this Court to distinguish and limit *Carlson* in any of the ways suggested to the Examiner and then to this Court in Cedar Park's opening brief at Section IV.E.10.

We also ask this Court remand this matter to the Examiner, requiring that it be remanded to DPD for completion of a drainage plan and reissuance of an approval so that it can stand the test of public scrutiny before the Examiner, if that is what the public chooses.

We finally ask for remand to the Examiner to remand to DPD to enter a detailed analysis of how the subdivision meets the requirements to of SMC 25.09.240 E.1 and issue a new approval on that analysis. That decision should also be subject to public review by an appeal to the Examiner, if the public so chooses.

DATED this 17<sup>th</sup> day of September, 2009.

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

FRIENDS OF CEDAR PARK  
NEIGHBORHOOD

Appellant,

v.

CITY OF SEATTLE and  
WIDGEON, LLC

Respondents.

No. 63338-4-I

CERTIFICATE OF SERVICE

I, Sharon Kendall, hereby certify as follows:

I am employed with The Buck Law Group, PLLC. I am over the age of 18 years, a citizen of the United States, not a party to this action, and competent to be a witness herein. On the date indicated below, I caused to be served REPLY BRIEF OF APPELLANT and CERTIFICATE OF SERVICE upon the following counsel of record *via* hand delivery by legal messenger:

Elizabeth E. Anderson  
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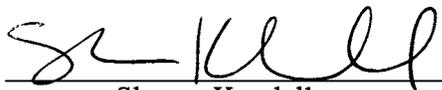
CERTIFICATE OF SERVICE – 1

**The Buck Law Group, PLLC**  
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I certify under penalty of perjury under the laws of the State of  
Washington that the foregoing is true and correct.

DATED this 17<sup>th</sup> day of September, 2009.

THE BUCK LAW GROUP, PLLC

By   
Sharon Kendall

CERTIFICATE OF SERVICE – 2

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