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Case No. 64496-3-I

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

BURNSTEAD CONSTRUCTION CO.,
Appellant,

v.

LORA PETSO and CITY OF EDMONDS,
Respondents.

BRIEF OF RESPONDENT LORA PETSO

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I. INTRODUCTION

In this case, the Superior Court Judge found three significant errors in the City's land use approvals. (1) The hearing examiner misunderstood the facts and the law regarding storm drainage. (2) The hearing examiner failed to require a perimeter buffer on all four sides of the project. (3) The hearing examiner failed to require 10% usable open space not including perimeter buffer and critical areas.

Due to the errors, the proposal does not comply with SEPA or Edmonds Code, and it is within the *discretion* of the Superior Court judge to reverse the land use approvals. *See* RCW 36.70C.140 ("The court may affirm or reverse the land use decision under review or remand it for modification or further proceedings").

After repeated briefing and oral argument regarding the possibility of conditions or a limited remand, the Superior Court judge reversed the land use approvals. The Order on Motion to Clarify, (attached hereto as Appendix 3), states "(1) It has not been shown that conditions can remedy all these defects. (2) It has not been shown that changes in the configuration necessitated by the conditions will not create other code noncompliance. (3) Approval on other issues assumed a proposal configured in a certain way, and it is not possible to know on the limited

review the Respondent proposed whether any changed proposal would still have been approved as to the other issues if configured differently.”

Discretionary decisions within a Court’s statutory authority are not altered on appeal absent a showing of abuse of discretion. Since the Appellant (“the developer”) has not shown, or even argued, that the Judge abused her discretion in ordering a reversal of the hearing examiner’s decision, the Superior Court decision should be affirmed.

II. COUNTER STATEMENT OF ISSUES

This Court’s review of legal issues 1, 2, and 3, under RCW 36.70C.130, is of the hearing examiner’s decision, and based on the administrative record. See *HJS Dev., Inc. v. Pierce County*, 148 Wn.2d 151, 61 P.3d 1141 (2003). Only issue 4 involves a review of the Superior Court.

Legal Issue No. 1. Drainage. Whether the hearing examiner erred in finding that the proposed drainage complied with all applicable laws in that she completely misunderstood the drainage proposed.

Legal Issue No. 2. Perimeter Buffer. Whether the hearing examiner erred in approving the plat attached hereto as Appendix 2 in that Edmonds Code requires a perimeter buffer, and the plat attached hereto as Appendix 2 does not include a perimeter buffer on all four sides of the plat.

Legal Issue No. 3. Open Space. Whether the hearing examiner erred in approving the plat attached hereto as Appendix 2 in that Edmonds Code requires at

least 10% usable open space not counting perimeter buffer areas, and the plat attached hereto as Appendix 2 shows less than 10% usable open space not counting perimeter buffer areas.

Legal Issue No. 4. Whether the Superior Court's reversal of the land use application is contrary to Washington Law and inequitable, even though the Land Use Petition Act specifically permits the Court to reverse erroneous land use approvals

III. COUNTER STATEMENT OF THE CASE

The developer proposes to convert two playfields in Edmonds to a 27 lot Planned Residential Development ("PRD"). The property is zoned RS-8, which ordinarily requires a minimum lot size of at least 8,000 square feet. CP at 749. Since the developer is proposing lots as small as 5,700 square feet, the project must comply with the provisions of the PRD ordinance, as well as the usual SEPA and subdivision requirements.

The subject site is rectangular, and is largely occupied by the two full sized athletic fields. CP at 747. A drainage ditch is located in the northwest corner of the site. CP at 1430. A Fish and Wildlife Habitat Conservation area ("FWHCA") is located on the northeast corner. CP at 721, 750.

At the time of the initial hearing, the site was bordered on the north and east by property planned to be developed as a City Park, with walkways, trails, and a playground. The site is bordered on the south and

west by the Woodway Meadows neighborhood. Woodway Meadows is developed with lots in excess of 8,000 square feet, underground utilities, and well spaced homes. CP at 779, 907.

Woodway Meadows is downstream from the site, and already floods significantly several times each year. The following excerpt from the testimony of resident Kevin Clarke at the hearing on June 21, 2007, describes the problem with the neighborhood drainage system:

I am not opposed to this development . . . I've lived in this neighborhood since 1984 . . . Every year since we have lived there, several times a year, the cul-de-sac floods to the point where at least a half dozen residents are unable to get into our homes, and two of the residents . . . our properties flood significantly to where there's significant damage that's created, even to the point where water goes into his home. We have been working with the City of Edmonds since our annexation to this area in 1995 to fix this stormwater problem and they have been very diligent in trying everything to fix this problem, which included creating and installing a new underground storage vault in an excess right of way that is off 107th Place West. It still continues to flood, and the reality is, and Mr. Don Fiene is who we have been working with, he's acknowledged to our neighborhood that our system has failed. The drainage system in our current subdivision that services over 50 homes has failed. . . . And so this neighborhood, this whole community, including the elementary school, has suffered from some type of underground water migration or some type of drainage issue where the water has never been able to absorb into the soils . . . And it's a real problem, and we fight it. Right now there are times of the year where ambulance, a fire truck, a police car, they can't get down there to service. If somebody's having a heart attack, they couldn't get in there. We can't even get to our homes

without hiking across each other's yards to get to our front doors.

(Emphasis added) CP at 1533-1534

The next excerpt, from the testimony of resident Rick Miller at the same hearing, describes the use of the existing drainage ditch.

I don't know if you are aware of it, but there's a ditch and a drainage area to the very northwest portion of that property. Those area fill up or become near filled during the very heavy rains, and I'm very concerned about what will be done in the grading process. . . I would like to ask that you and/or the City require that the elevation of that property not be raised at all at this point so there's no impact of water draining into the adjacent homes.

CP at 1531

Proper review of the land use application was marred by a variety of procedural irregularities, and the resulting plats¹ do not comply with Edmonds Codes.

Plat attached as Appendix 1.

The plat attached hereto as Appendix 1 was the subject of the initial hearing examiner proceeding on June 21, 2007. That plat had previously been approved by the Architectural Design Board (ADB) as, among other things, meeting the requirements of the PRD ordinance (including both the single family design criteria and the 10% usable open space requirement). CP at 770.

¹ Both plats are attached hereto, as Appendix 1 and Appendix 2.

In a decision dated July 20, 2007, the hearing examiner approved this plat for subdivision, but “REMANDED” it to the “applicant” for compliance with PRD ordinance in regard to perimeter design. CP 1596-1634. Further environmental documentation was also requested, although both SEPA appeals were denied.

On August 2, 2007, I filed an appeal to City Council of the subdivision approval. CP at 1652.

On August 8, 2007 City staff issued a memorandum with the subject “interpretation regarding perimeter setbacks.” In it, staff suggested that the required perimeter buffer should be allowed to overlay the entire back yard of perimeter lots because requiring an additional perimeter buffer in addition to the back yard “would most likely result in no one ever constructing a PRD with such a burdensome standard.” CP 1710-1711.

On August 28, 2007, argument was presented to the City Council on my appeal of the subdivision and SEPA approvals. CP 1935-1944. No decision was made at that time, and the proceeding was continued.

Plat attached as Appendix 2.

On August 31, a “remand” hearing was conducted using the plat attached hereto as Appendix 2. CP 1760. This plat shows a perimeter buffer on two sides of the plat that includes the entire back yards of 11 of the homes. The argument was made that the backyard setback could be the

perimeter buffer if structures were prohibited in that area. CP at 1763. This plat also drew over 1,000 square feet of what was previously countable open space in Tract A into the buffer area. At the remand hearing, the hearing examiner refused to accept testimony or argument regarding the loss of over 1,000 square feet of open space in the second plat. See section IV.D.1 below.

On September 11, 2007, the hearing examiner, relying in part on the Black's Law Dictionary definition of a "buffer-zone" as an area of land separating two different zones, decided that the perimeter buffer may not overlay the rear yard set-back. CP at 1765. She noted that allowing the buffer to overlay the rear yard set back would unduly burden future property owners in the reasonable use and enjoyment of their rear yard by preventing structures such as storage sheds, decks, and children's play equipment. CP at 1765. She even noticed that allowing the overlay would effectively negate one of the City Council's two methods of satisfying the perimeter buffer requirement. CP at 1765-1766.

Back to the Plat attached as Appendix 1.

On September 18, 2007, the City Council concluded its deliberations on my appeal of the SEPA and subdivision approvals. By a 4-3 vote, the City Council upheld the land use approvals, expressly contingent on the applicant obtaining PRD approval. CP at 1971, 1979.

The developer was particularly diligent in requiring no reference to the PRD proceeding, so the Council was unaware of the proposal to deny ordinary use of the backyard on lots 1 through 11.

Now, back to the Plat attached as Appendix 2.

On September 25, 2007, the developer filed a request for reconsideration of the hearing examiner's September 11, denial of the PRD. Among other things, the developer argued that that the hearing examiner could not interpret the perimeter buffer provision because it was plain on its face. See CP at 1788-1795.

On September 28, 2007, the Hearing Examiner changed her mind, and allowed the buffer area to overlay the entire back yards of homes 1 to 11. CP at 1797-1800.

To summarize the plat situation, the plat approved by the hearing examiner for the PRD perimeter buffer is attached hereto as Appendix 2. This plat does not include 10% usable open space not including perimeter buffers because in this plat the developer drew more than 1,000 feet of what had been counted as open space into the perimeter buffer. This plat, which also encumbered the entire back yard of 11 of the proposed homes, was never seen by either the ADB or the City Council.

Because the land use proposal would flood my neighborhood, and was not code compliant, this LUPA was filed in October 2007. The

Superior Court found significant errors regarding drainage, perimeter buffer, and open space. (Additional errors were found, but many were considered harmless, and others, such as the failure to require undergrounding of utilities, could easily be corrected with conditions.) CP at 192. Despite repeated briefing and argument in both the spring and fall of 2009, the developer was unable to show that either conditions or a limited remand could address the drainage, perimeter buffer and open space errors, so the Superior Court reversed the land use approvals (SEPA, subdivision and PRD).

IV. ARGUMENT

Two of the errors contributing to the Superior Court's reversal of the land use approvals are apparent on the face of the plat attached as Appendix 2. (1) The plat does not have the required perimeter buffer on all four sides, and (2) the plat does not have the required minimum of 10% usable open space not counting perimeter buffers. Since LUPA specifically authorizes the Superior Court to reverse erroneous land use approvals, the decision of the Superior Court should be affirmed.

A. Standard of Review. The Standard of Review, and even the person whose decision is being reviewed, varies among the issues presented. “Deference” is not a standard of review.

In general, review of legal issues is de novo, issues of fact are reviewed for substantial evidence, and procedural and equitable determinations are reviewed for abuse of discretion.

1. The standard of review of hearing examiner determinations under RCW 36.70C.130 varies between de novo review, the clearly erroneous test, and review for substantial evidence.

The applicable standard of review of hearing examiner determinations under RCW 36.70C.130² is clearly set forth in the 2006 opinion in *Cingular Wireless, L.L.C. v. Thurston County*, 131 Wn. App. 756, 129 P.3d 300 (2006).

² RCW 36.70C.130 provides that (1) The superior court, acting without a jury, shall review the record and such supplemental evidence as is permitted under RCW 36.70C.120. The court may grant relief only if the party seeking relief has carried the burden of establishing that one of the standards set forth in (a) through (f) of this subsection has been met. The standards are:

- (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;
- (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.

Standards (a), (b), (e), and (f), present questions of law the court reviews de novo. *Cingular at 768*. Standards (a), (b), (e) and (f) include claims of unlawful procedure, error of law, erroneous interpretation of the law, and constitutional issues of due process.

The clearly erroneous test applies to standard (d), application of the law to the facts. *Cingular at 768*. The test is whether the Court is left with a definite and firm conviction that a mistake has been committed. *Cingular at 768*.

Standard (c) involves review for substantial evidence. *Cingular at 768*. Substantial evidence is evidence that would persuade a fair minded person of the truth of the statement asserted. *Cingular at 768*.

“Deference” and “harmless error” are not standards of review. In fact, when I looked up the developer’s citation to *City of University Place v. McGuire*, 144 Wn.2d 640, 647, 30 P.3d 453 (2001), I couldn’t even find the phrase “harmless error” on the page. The citation to *City of Bellevue v. Lorang*, 140 Wn.2d 19, 32, 992 P.2d 496 (2000) is also unpersuasive. The case is actually talking about some constitutional issue regarding a jury instruction.

2. The Standard of review of the SEPA determination is the clearly erroneous test

A SEPA threshold determination is reviewed under the clearly erroneous test. *Moss v. City of Bellingham*, 109 Wn.App. 6, 13, 31 P.3d 703 (2001). As stated above, the test is whether the Court is left with a definite and firm conviction that a mistake has been committed.

3. The Standard of review of the Superior Court Judge's choice of remedy under RCW 36.70C.140, is for abuse of discretion.

RCW 36.70A.140 gives the Superior Court authority to affirm, reverse, remand for modification and/or remand for further proceedings. This is a discretionary decision, a choice.

Discretionary decisions of the superior court are reviewed under the abuse of discretion standard, even in LUPA cases. See e.g. *Quality Rock Products v. Thurston County*, 126 Wn.App. 250, 108 P.3d 805 (2005) and *Sleasman v. City of Lacey*, 159 Wn.2d 639, 643, 151 P.3d 990 (2007), (review of order of dismissal), *Exendine v. City of Sammamish*, 127 Wn.App 574, 113 P.3d 494 (2005) (review of request to introduce new evidence); *Grandmaster Sheng-Yan Lu v. King County*, 110 Wn.App. 92, 38 P.3d 1040 (2002), *Shaw v. City of Des Moines*, 109 Wn.App. 896, 37 P.3d 1255 (2002) (review of decision to vacate a judgment), *Willapa v. Grays Harbor Oyster Grower's Ass'n v. Moby Dick Corp.*, 115 Wn.App

417, 62 P.3d 912 (2003) (review of assessment of transcription costs), *Thornton Creek Legal Defense Fund v. City of Seattle*, 113 Wn.App 34, 52 P.3d 522 (2002) (review of decision to exclude evidence), *Isla Verde Intern. Holdings, Inc. v. City of Camas*, 99 Wn. App 127, 990 P.2d 429 (1999) (review of motion for reconsideration).

A trial court abuses its discretion only if its decision is manifestly unreasonable or is based on untenable grounds or untenable reasons. *In re Personal Restraint of Duncan*, 167 W.2d 398, 219 P.3d 666 (2009). The decision is manifestly unreasonable only if the trial court adopts a view that no reasonable person would take. *Id.* The decision is based on untenable grounds or reasons only if the court applies the wrong legal standard or relies on unsupported facts. *Id.*

B. Legal Issue/Assignment of Error 1: Drainage. Whether the hearing examiner erred in finding that the proposed drainage complied with all applicable laws in that she misunderstood the drainage proposal.

The issue of whether adequate drainage is provided is not determined solely only on whether a vault has been designed to accommodate the 100 year 24 hour storm assuming maximum infiltration and using an antiquated (1992) storm water manual. The proposal is also subject to SEPA (no significant adverse environmental impacts), the City subdivision ordinance (minimize off site impacts), and the Southwest

Edmonds Drainage Plan (absent site specific testing, 6" is generally considered sustainable in this part of town; more facilities are needed, not less).

While the hearing examiner made several errors regarding drainage, the most obvious mistake was her belief that storm water would be retained on site since she believed the developer was proposing a larger facility than would be considered sustainable under the Southwest Edmonds Drainage Plan. She was entirely incorrect. Not only was the developer's facility not larger than contemplated by the Plan, it was actually the smallest possible facility that could be considered based on the soil types in this area.

There is no way to know what the hearing examiner would have done if she had known that the proposed facility was smaller, not larger, than what would be considered sustainable under the Plan. It seems likely that if she had realized that the facility was significantly smaller, not larger, than what was considered sustainable under the drainage plan, she would have upheld the SEPA appeals.

1. Adequate drainage is required by SEPA

SEPA requires study and mitigation of probable significant adverse environmental impacts. *Moss v. City of Bellingham*, 109 Wn.App 613, 31

P.3d 703 (2001). In this case flooding is not merely probable, but certain.

See item 5 below.

SEPA review is not left for later, but must occur as soon as impacts can be determined, and prior to committing to a course of action. WAC 197-11-055. For a SEPA determination to stand, it must be shown that the City considered environmental factors and had sufficient information to make a determination. *Anderson v. Pierce County*, 86 Wn.App. 290, 936 P3d 432 (1997).

2. Adequate drainage is required by Comprehensive Plan

The Edmonds Comprehensive Plan contains numerous provisions requiring adequate drainage, and an entire subarea plan documenting the need for additional drainage facilities in this part of town. CP at 1234. (private property must be protected from adverse impacts of development including noise, **drainage**, traffic, slides, etc), (new development must be compatible with the natural constraints of slopes, soils, geology, vegetation, and **drainage**). The overriding policy is to ensure that those public facilities and services necessary to support the development shall be adequate to serve the development at the time the development is available for occupancy and use without decreasing current service levels below locally established minimum standards. CP at 1226. In this part of

Edmonds, current service levels are already below locally established minimum standards, and an entire sub-area plan has been adopted to address drainage in this neighborhood. See Southwest Edmonds Drainage Basin Study. CP at 1416 to 1517.

The developer's argument that the project need not comply with the comprehensive plan based *Lakeside Indus. v. Thurston County*, 119 Wn.App 886, 83 P.3d 433 (2004) fails. When applicable development regulations invoke comprehensive plan compliance as a condition of approval, a proposal must satisfy both the development regulations and the comprehensive plan, both general requirements and specific requirements. *Cingular Wireless, L.L.C. v. Thurston County*, 131 Wn.App. 756, 770-771 (2006), *Weyerhaeuser v. Pierce County*, 124 Wn.2d 26 (1994). In this case, the Edmonds subdivision ordinance itself requires comprehensive plan compliance, ECDC 20.75.080(B), and both the zoning ordinance and the PRD ordinance list implementation of the comprehensive plan as a goal.³

According to the City engineer, the rule from the comprehensive plan is "it did say the 6 inch as an average to be used for the long term

³ ECDC 20.75.080(B) ("Comprehensive Plan. The proposal is consistent with the provisions of the Edmonds Comprehensive Plan, or other adopted city policy, and is in the public interest."); ECDC 16.00.010(A) ("To assist in the implementation of the adopted comprehensive plan for the physical development of the city by regulating and providing for existing uses and planning for the future as specified in the comprehensive plan"), ECDC 20.35.010(L) (Implement policies of the comprehensive plan.").

infiltration rate. But it also said it could vary between 2 and 10 and that you should do a site specific analysis.” CP at 1584.

3. Adequate drainage is required by Subdivision and PRD regulations

Subdivision laws in general carry the purpose of facilitating provision for storm drainage. The Edmonds Code is even more specific requiring that the developer “minimize offsite impacts on drainage.”

ECDC 20.75.085(A)(4).⁴

4. The existing neighborhood already floods significantly, and the developer plans to make it worse.

The record is clear that the existing neighborhood already floods significantly. Please review, if necessary, the testimony of Rick Miller and Kevin Clarke quoted in section III above.

Rather than keep storm water on site, the developer plans to fill the existing drainage ditch, thus flooding the Miller’s and other properties to the west. In response to Mr. Miller’s concerns that the drainage ditch not be filled, the developer replied “We’re not proposing to really raise the site, except for a little bit along the western boundary, where there is an

⁴ ECDC 20.75.085: “Review Criteria. The following criteria shall be used to review proposed subdivisions:

A. Environmental. . . .

4. The proposal shall be designed to minimize off-site impacts on drainage, views and so forth.

existing storm drainage type swale there.” CP at 1532. That is, of course, exactly what Mr. Miller was worried about since his home is adjacent to the drainage ditch.

Rather than keep storm water on site, overflow from the undersized vault is planned to enter the existing failed system that serves the entire neighborhood. See AR at 14, attached as Appendix 4. The following testimony from the City Engineer at the June 20, 2007 hearing illustrates:

Ms. Petso: Now, why would you have the emergency overflow go out on 237th where it already floods Kevin’s house? Because you can be sure that if this new project is flooding, Kevin’s house is already under stress, if not under water.

Mr. Fiene: It has no where else. I mean, it really has nowhere else to go. CP at 1584.

The failure to provide for maintenance of the vault makes things even worse. The covenants speak of City maintenance, but testimony indicated homeowner maintenance of the vault. CP at 1284, 1585. Since it is Woodway Meadows that will flood if the facility is not maintained, it is inappropriate to even consider leaving maintenance up to the new homeowners. They may decide they have better things to do with their money.

Between proposing the smallest possible vault, providing no maintenance, and filling the existing drainage ditch, the developer has

pretty well maximized significant adverse environmental impacts and offsite flooding. The only way to surpass this effort would be to truck in additional water to pump into Woodway Meadows.

5. The developer concedes that the hearing examiner committed clear error in that she mistakenly believed that the developer was providing a drainage vault superior to the vault deemed sustainable by the Southwest Edmonds Drainage Plan.

The developer admits the hearing examiner got it wrong.

In the brief at page 26, the developer identifies the hearing examiner's error that "Burnstead's proposed drainage facility, sized using an infiltration level of 10, was better able to handle excess water with a margin of error than a vault sized at an infiltration level of 6." The proposed facility is indeed smaller, not larger, than a facility sized at an infiltration level of 6. The proposed facility would be less able to handle excess water, not better able to handle it.

This is clear error, and it is conceded.

Viewing the record as a whole, I also note that is clear error to forget to consider the effect of eliminating the existing drainage ditch, to permit overflow to a neighborhood that already floods, to fail to do any vault testing on site, to fail to do any testing at the location of the proposed vault, and to fail to provide for maintenance of the facility.

6. The developer's argument that the error is "irrelevant" and "dicta" fails in that the error affects the central issue under SEPA and city codes: the adequacy of the proposed drainage.

Obviously, it is neither irrelevant or dicta that the trier of fact misunderstood the primary determination she made: Whether the proposed vault is large enough to retain storm water on site, or whether water is likely to overflow into the existing failed system in Woodway Meadows.

The hearing examiner approved the project with the belief that the proposed vault was sized in excess of the requirements of the drainage basin study when, in fact, it was smaller. It is, in fact, the smallest possible vault that could be proposed for the soil type in this part of town.

As the Superior Court judge repeatedly noted, there is no way to guess what the hearing examiner would have done if she had understood the proposed facility was smaller, not larger, than what was considered sustainable under the drainage plan.

It is also neither irrelevant or dicta that the trier of fact forgot to evaluate the effect of eliminating the existing drainage ditch, permitted vault overflow to be directed to an existing system that already floods, failed to required testing at the site of the proposed vault, and failed to provide for maintenance of the facility.

7. The Developers argument that drainage need not be evaluated until final plat approval fails under SEPA, the PRD ordinance, and common sense.

As stated above, SEPA requires evaluation of environmental impacts at the earliest point those impacts can be determined, and before committing to a course of action.⁵ In this case, the impacts are already known, and should be evaluated. Instead, the City engineer says he doesn't really get SEPA:

Ms. Petso: Are you comfortable with the fact that none of their infiltration testing is at the location where they're going to put the infiltration thing, facility.

Mr. Fiene: We'll review that, you know, when it comes to that point during the storm drainage report, when it's submitted to the city.

Ms. Petso: Can I ask why we shouldn't review that in an environmental impact statement?

Mr. Fiene: Once again, I'm not an environmental impact statement expert. CP at 1584.

Common sense also dictates that drainage be properly addressed with the preliminary plat. The fatal flaws with waiting till later to evaluate drainage were pointed out by at least three neighbors at the hearing. I, the Miller's, and the Clarke's all have been living with the flooding for over 20 years. We know you can't fix it later.

Even Mr. Schaeffer of the ADB expressed his concern about drainage, noting that it would be a problem if they approve this project, and then find out later that the drainage vault is too small. His concern was

⁵ As noted in the developer's brief at page 28, the PRD ordinance requires evaluating and addressing drainage even prior to a formal application.

that at that point, there wouldn't be enough room for a larger facility. See AR at 65-68, attached as Appendix 5.

C. Legal Issue/Assignment of Error 2: Perimeter Buffer. Whether the hearing examiner erred in approving the plat attached hereto as Appendix 2 in that Edmonds Code requires a perimeter buffer, and the plat attached hereto as Appendix 2 does not include a perimeter buffer on all four sides of the plat.

The developer's argument that the hearing examiner interpretation is entitled to deference fails because unambiguous code provisions are not subject to interpretation. In fact, since the developer actually briefed for the hearing examiner the argument that the City's perimeter buffer code provision was unambiguous and not subject to interpretation by the hearing examiner, it is contradictory to have the developer now urge deference to the hearing examiner interpretation of the very same code provision. See CP 1014-1021.

1. Under LUPA, statutory construction is a question of law reviewed de novo. If the statute (or City code) is unambiguous, it is given its plain meaning.

Under LUPA, the meaning of a local code is a question of law reviewed de novo under the "error of law" standard. *Faben Point v. Mercer Island*, 102 Wn.App. 775, 778, 11 P.3d 322 (2000). "When a statute is unambiguous, construction is not necessary and the plain meaning controls." *Id.*

Deference to the local authority is limited to such “deference as is due,” and does not extend to contradicting the plain language of the code. See, e.g. *Faben at 779* (“we decline Pacific Properties’ invitation to venture beyond the plain words of the ordinance”); *Sylvester v. Pierce County*, 148 Wn.App. 813, 201 P.3d 381 (2009) (we grant ‘such deference as is due the construction of a law by a local jurisdiction with expertise,’ so long as that interpretation is not contrary to the statutes’ plain language).

The code provision at issue herein, ECDC 20.35.050(C), reads as follows:

C. Perimeter Design. The design of the perimeter buffer shall either:

1. Comply with the bulk zoning criteria applicable to zone by providing the same front, side and rear yard setbacks for all lots adjacent to the perimeter of the development; and/or
2. Provide a landscape buffer, open space or passive use recreational area of a depth from the exterior property line at least equal to the depth of the rear yard setback applicable to the zone. If such a buffer is provided, interior setbacks may be flexible and shall be determined pursuant to ECDC 20.35.030. When the exterior property line abuts a public way, a buffer at least equal to the depth of the front yard required for the underlying zone shall be provided.

2. The plain meaning of the word perimeter is the entire boundary of a closed figure. Two sides of a rectangle is not a perimeter.

According to my Webster’s Dictionary, “Perimeter” means the boundary of a closed plane figure. Webster’s New Collegiate Dictionary,

1973, page 852. This is its ordinary meaning. In the case of a rectangle, the perimeter includes four sides, not just two.

The Superior Court judge captured the essence of this issue in her decision: “The ordinance clearly provides that if regular setbacks are to be avoided, the PRD must have a 15 foot perimeter buffer, open space or passive use recreation area.” CP at 195. She continues, “[t]he code does not say only those sides of the project adjacent to other residential development need to be buffered. Nor does it say that sides adjacent to public property or parks do not need to be buffered.” CP at 195. If the homes are “clustered,” a perimeter buffer is required.

The Superior Court judge continues: “This code provision is unambiguous and not subject to change by interpretation by a judge or hearing examiner.” CP at 195. That is current law. See, *Belleau Woods II, LLC v. City of Bellingham*, 150 Wn.App. 228, 208 P.3d 5 (2009).

3. Even if interpretation were permitted, the code language itself conveys the clear intent that public areas receive greater, not lesser buffering.

The Superior Court judge also correctly noted that to find that less buffering was intended adjacent to public property contradicts the express language of the code. “The same code indicates the perimeter along a public way shall be required to be wider.” CP at 196. After providing for a buffer of a depth equal to the depth of the rear yard setback applicable to

the zone (in this case 15 feet), the code goes on to provide greater buffering (in this case 25 feet) “when the exterior property line abuts a public way.”

4. Even if interpretation were permitted, the legislative history demonstrates an intent that the perimeter buffer go all the way around a PRD.

The minutes of the Edmonds City Council meeting of March 18, 2003 read as follows:

Councilmember Petso inquired about whether buffering would be provided around the perimeter of PRD’s, recalling some previous PRD’s had a larger buffer on one side due to a critical area and no buffering on the other sides. Mr. Chave answered the perimeter applied to the entire perimeter. CP at 1732

5. The developer’s argument about relying on the hearing examiner fails because misinterpretation of an ordinance by those charged with enforcing it does not alter its meaning or create a different ordinance.

The developer is not being “punished” for relying on the hearing examiner’s interpretation, after all his initial plat had no perimeter buffer at all.

The developer is simply being required to comply with the code. “Misunderstanding or misinterpretation of a statute or ordinance by those charged with its enforcement does not alter its meaning or create a substitute enactment.” *Faben Point* at 781. Current residents of the area

and all future users of the park are entitled to a code compliant project, with a perimeter buffer.

D. Legal Issue/Assignment of Error 3: Open Space. Whether the hearing examiner erred in approving the plat attached hereto as Appendix 2 in that Edmonds Code requires at least 10% usable open space not counting perimeter buffer areas, and the plat attached hereto as Appendix 2 shows less than 10% usable open space not counting perimeter buffer areas.

The developer's argument that the perimeter buffer on tract A may be counted in calculating the 10% usable open space fails because the developer admits the code requires PRD's to have "10% open space, not including landscape buffers or critical areas." Appellant's brief at 34.

1. In this case, the administrative record shows that the hearing examiner approved the open space on the plat attached hereto as Appendix 1, but did not ever evaluate open space under the plat attached hereto as Appendix 2.

The hearing examiner refused to consider open space under the second plat, telling me to "save it for the Court." I was forced to file this LUPA to even have the issue evaluated.

MS. PETS0: On a proposed plat that's been submitted, [inaudible], revised one, if you look in Open Space Area A, you'll see that the -- about 1,000 square feet of Open Space Area A are now within the perimeter buffer. Our ordinance applies --

THE HEARING EXAMINER: But it's still part of Tract A, so we're not going to go there. So, if you don't have anything else --

MS. PETS0: You know --

THE HEARING EXAMINER: Sorry, Ms. Petso. If

you don't have anything else to put forward on the perimeter buffer and the Code provision that we're looking at -- **I don't want to look at open space.** I don't want to look at impervious surface. I don't want to look at the drainage or anything else.

MS. CUNNINGHAM: We're here -- we're here to take --

THE HEARING EXAMINER: [Inaudible] buffer.

MS. PETSO: I understand that. I think that you're forcing the LUPA because the open space total does not allow to count --

THE HEARING EXAMINER: Okay.

MS. PETSO: -- the perimeter buffer --

THE HEARING EXAMINER: Okay.

MS. PETSO: -- that you -- and in the revised plat, the open space counts 1,000 square feet of perimeter buffer which drops it below the requirements --

THE HEARING EXAMINER: Okay. Ms. Petso, *you can save that argument for the Court if you'd like to.* But right now, like I said, the perimeter buffer, that's the issue on remand. So, I don't want to hear anything else about any other aspect of the plat which has already been approved [inaudible].

MS. PETSO: In your reconsideration document you indicated that should the perimeter buffer resolution suggest referral to an ADB, cause changes in the plat that would cause referral to an ADB, that you would then do that. Now, if I'm allowed to present to you an issue that would cause referral to the ADB, i.e., another 1,000 feet of open space for the --

THE HEARING EXAMINER: [Inaudible] to the ADB is if I decide the perimeter buffer needs to change, which means their whole plat needs to be realigned. Then it's going to go back to the ADB, and it's going to --

MS. PETSO: No.

THE HEARING EXAMINER: -- come through this whole process [inaudible].

MS. PETSO: They drew 1,000 square feet of their existing open space in the buffer, and buffer can't count under our ordinance as the ten-percent open

space requirement.

THE HEARING EXAMINER: Okay. I -- you know, unless you have anything else, your testimony on this is over because I'm not going to sit here and argue with you about what points [inaudible].

Thank you. Anybody else from the public?

*8/31/2007 transcript p.26 line 3 to p.28 line7
(emphasis added)*

2. The developer concedes that “the City’s code requires PRD’s to have 10% usable open space, not including landscape buffers or critical areas” and that designating 1,020 square feet of Tract A as perimeter buffer drops the plat below the requirement.

The developer concedes that “the City’s code requires PRD’s to have 10% usable open space, not including landscape buffers or critical areas.” Brief at 34.

The first plat, attached as Appendix 1, shows 25,185 square feet of what the developer believes to be usable open space. (I continue to believe that Tract A and F may not be counted since they are not “usable” and Tract E may not be counted since it meets the code definition of a “critical area. CP at 1610.)”

It has been agreed throughout this proceeding that 10% of the site is 24,423. It is also agreed that the second plat, attached as Appendix 2, shows that at least 1,020 square feet of what was open space in the first plat was drawn into the perimeter buffer on Tract A.

Since it is agreed that “the City’s code requires PRD’s to have 10% usable open space, not including landscape buffers or critical areas” (see quote above), the project lost 1,020 square feet of countable open space when the perimeter buffer was drawn on the plat.

Mathematically, this takes the open space below the 10% required.
 $25,185 - 1,020 = 24,165$. $24,165 < 24,423$.

3. New arguments need not be accepted at the Appellate Court level under RAP 2.5.

After two years of litigation in which the developer claimed that the plat complied with code, the developer now claims that the plat just has a little mistake in the drawing. The new claim appears to be that maybe Tract A doesn’t need a perimeter buffer at all, and that the line drawn on the plat, by the developer, is actually, now, a mistake.

Of course, a real drafting mistake could have been correct in 2007 when the error was pointed out. It is inequitable to waste my time and money for 2 years of litigation (and taxpayer time and money as well) and then claim, in 2010, at the Appellate Court level, that this is just a drafting mistake. The court should refuse to even consider this argument under RAP 2.5.⁶

⁶ RULE 2.5(a) Errors Raised for First Time on Review. The appellate court may refuse to review any claim of error which was not raised in the trial court. However, a party may raise the following claimed errors for the first time in the appellate court: (1) lack of trial

The argument that Tract A need not have a perimeter buffer was never raised at Superior Court or decided by the Judge. It was not necessary for the Superior Court judge to rule on whether Tract A was required to have a perimeter buffer designated because Tract A did have a perimeter buffer designated. That designation, alone, dropped the plat below the 10% usable open space requirement. The Judge even stated that she did not have to reach a conclusion on my argument that Tract E was a critical area and also should not count toward open space since the perimeter buffer on Tract A alone rendered the open space insufficient. CP at 198-199.

4. Even if the Court considers the new arguments, “mistake” does not provide relief from the requirements of code, and the code interpretation does not say that perimeter buffer areas may count toward the requirement of 10% usable open space.

A drafting “mistake” does not change the fact that the plat, on its face, fails to provide 10% usable open space not counting perimeter buffers.

court jurisdiction, (2) failure to establish facts upon which relief can be granted, and (3) manifest error affecting a constitutional right. A party or the court may raise at any time the question of appellate court jurisdiction. A party may present a ground for affirming a trial court decision which was not presented to the trial court if the record has been sufficiently developed to fairly consider the ground. A party may raise a claim of error which was not raised by the party in the trial court if another party on the same side of the case has raised the claim of error in the trial court.

The “code interpretation” cited by the developer at page 36 of the brief was apparently intended to allow the perimeter buffer to overlay the entire rear yards of lots 1 through 11. It does not alter the code requirement of 10% usable open space not counting perimeter buffers.

In fact, the quotation provided in the brief is not even the code interpretation, it is part of the staff analysis. The actual code interpretation follows:

In order to provide flexible setback zoning standards within a PRD pursuant to ECDC 20.35.050(C), the PRD must provide one of the following:

1. A landscape buffer equivalent to the rear yard setback or the applicable zone district, or
2. An open space area equivalent to the rear yard setback of the applicable zone district, or
3. A passive use recreation area equivalent to the rear yard setback of the applicable zone district.

A condition will be required to be placed upon the recorded planned residential development document prohibiting construction of structures within the designated landscape buffer, open space area, or passive recreation area on the perimeter lots. CP at 1711

The actual code interpretation can hardly be read to allow the perimeter buffer to overlay the back yards in lots 1 through 11, much less alter the code requirement of 10% usable open space not counting perimeter buffers.

E. Legal Issue/Assignment of Error 4: Whether the Superior Court's reversal of the land use application is contrary to Washington Law and inequitable, even though the Land Use Petition Act specifically authorizes the Court to reverse erroneous land use approvals.

Plainly, reversal of the land use approvals is not contrary to Washington law since reversal is specifically permitted by law. Plainly reversal of the land use approvals is not inequitable since the plats do not comply with Edmonds Codes.

1. This court has no authority to alter the Superior Court's remedy absent a showing of abuse of discretion.

Choice of remedy by a Superior Court judge is reviewed for abuse of discretion. See Section A.3, standard of review.

Here, the developer does not even argue that the Judge abused her discretion.

2. Reversal of the land use approvals is not contrary to Washington Law, but specifically permitted by RCW 36.70C.140.

The developer concedes that LUPA give the superior court "the authority to: (1) affirm, (2) reverse, (3) remand for modification; or (4) remand for further proceedings." The court chose to reverse.

3. Even if Pre-LUPA case law were somehow applicable, the Judge considered that law, and the reversal decision is consistent with that law.

To date, the Appellate Court has not been able to locate transcripts of the hearings on proposed orders (spring 2009), or on the Motion for Clarification (fall 2009). For now, I'll have to rely on the document entitled Petitioner's Response to Late Submission by Respondent's.

Reversal is easily supported by the law provided by Respondents, cases cited therein, and the circumstances of this case. In *Loveless v. Yantis*, 82 Wn.2d 754 (1973), the court denied the preliminary plat since it contained zoning violations on its face (height limits). "We therefore conclude the plat cannot be granted preliminary approval since on its face it violates the controlling zoning ordinances." *Loveless* at 762.

Respondents provided as Exhibit 5 *Friends of the Law v. King County*, 123 Wn.2d 518 (1994). *Friends* correctly cites *Loveless*, discussed above, for the proposition that a "preliminary plat must be rejected if it contains clear zoning violations." Respondents' exhibit 5 at page 6. Ultimately, *Friends*, was distinguished from *Loveless*, and the *Friends* plat was allowed because there was "a sufficient amount of "right of way" that would remain open space allowing the minimum lot sizes to be met" and "specific conditions were imposed governing the location of streets, the reduction of the number of lots, and for meeting all requirement of the "G" zone." Respondents' exhibit 5 at page 7, *Friends* at 528. Of particular importance is that "It is unchallenged that compliance with the mandated conditions will result in compliance with all of the requirements of the "G" zone."

That is not the case here. Our case, like *Loveless*, contains zoning violations on the face of the plat (the minimum lot size is insufficient without a PRD approval, and the plat shows insufficient open space and buffering for PRD approval). Unlike *Friends*, the applicant here has failed to identify sufficient open space or buffering on the plat, or even within the conditions of approval, to cure the defects. Here, I do not agree that compliance with the hearing examiner's conditions will result in compliance

with all of the requirements of PRD approval and zoning ordinances. It won't!

When the applicant was asked how the perimeter buffer would be dealt with, the reply was essentially that it's only a preliminary plat; things don't have to be finalized. Strangely, this came from the same attorney who submitted the *Friends* case to the Court. *Friends* clearly places the burden **on the applicant** to demonstrate that its **preliminary plat**, as conditioned, can comply with the applicable laws. Sure the plat may be modified later, but in *Friends* the applicant at least made a threshold showing that the plat submitted could comply if the conditions were met. Here, the only showing we have is that a different plat could have been submitted that would have complied; and a suggestion that the Court remand with a request that the Respondents actually follow the code this time. That is not sufficient under *Loveless* and *Friends*, nor is it sufficient to protect the petitioner and public.

When the applicant was asked how we'd get the necessary open space the answer was: in several ways. When the Court pointed out that the open space had already been improperly counted by the City, the applicant suggested that we assume the City would properly enforce the requirement at final approval. Again, it is very odd that these words came from the same attorney who submitted ECDC 20.35.080(B) to the court, since that provision, submitted as Exhibit 2, repeatedly limits final PRD review to consistency with the preliminary PRD. If the Respondents have their way, we will never have a preliminary PRD. It is equally odd that the same attorney also submitted, as Exhibit 6, *Marantha Mining, Inc. v. Pierce County*, 59 Wn.App. 795 (1990), which overtly approves not remanding to an entity that has already demonstrated a lack of desire to reach the correct result.

When the Court asked about drainage, the applicant casually suggested a "broad" order. Apparently the applicant still does not appreciate that drainage is an actual and significant problem in this area. Any order must be very carefully crafted to require more than just that the hearing examiner correctly understand infiltration rates. Testing must occur where drainage facilities will actually

be located. Consideration must be given as to whether the Comprehensive Plan even allows elimination of the existing wetland/drainage ditch or requires evaluation using something more recent than a 17 year old drainage manual. If maintenance cannot be assured, then excess storm water must remain on the site so that a failure in maintenance does not impact existing homes. Finally, now that we know there will be tons of changes to the plat, we must also, somehow, take that into account in evaluating drainage.

In *Friends*, it was “unchallenged that compliance with the mandated conditions would result in compliance” with the zoning. Here it has been determined that the plat does not comply, and is not conditioned in a manner that assures compliance. A new plat is required.

CP at 152-153.

Both plats in this case contain zoning violations on the face of the plat (the minimum lot size is insufficient without a PRD approval, and the plats show insufficient open space and/or buffering for PRD approval).

Reversal is an appropriate remedy.

4. Remand for modification is inappropriate in that conditions cannot cure the errors. This Court cannot test drainage and design a facility, or choose for the developer how to comply with the perimeter buffer requirement or provide additional open space.

As noted by the Superior Court judge, it has not been shown that conditions can remedy all the defects.

Perhaps the SEPA issue provides an example. The SEPA approvals were in error, and a modification or remand for “strict compliance with ECDC Chapter 18.30” as suggested on page 40 of the developer’s brief in no way repairs the error. SEPA is about identifying and avoiding

significant adverse environmental impacts; it is not merely about the 100 year 24 hour storm requirement of ECDC Chapter 18.30. Further, SEPA is done before committing to an action, not at the final plat stage. Even the proposal to fill the existing drainage ditch, which also implicates both the subdivision ordinance and comprehensive plan compliance, cannot be evaluated only under ECDC Chapter 18.30.

5. A limited remand for further proceedings is inappropriate in that the project approvals are interrelated. It has already been demonstrated in this case that solving one area of non-compliance can create non-compliance in another area.

The Superior Court judge ruled that it has not been shown that changes in the configuration necessitated by the conditions will not create other code non-compliance.

This situation has already been demonstrated in this case when the addition of the perimeter buffer to the South side of the plat reduced the open space (not counting perimeter buffer areas) below the 10% requirement. Nonetheless, the developer continues to argue for a “limited” remand at page 46 of the brief.

Finally, the Superior Court judge observed that approval on other issues was based on the plat attached hereto as Appendix 1 and the plat attached hereto as Appendix 2. It is impossible to know if those approvals would be given for the conditioned or remanded plat. If the developer

wished to comply with the perimeter buffer requirement by precluding normal use of the back yard on 21 of the 27 homes, instead of just on 11 of the 27 homes, it is possible that the City Council might decide that the subdivision was not really in the public interest.

As another example, the developer suggests in his opening brief at page 14 note 1 that “An alternative for Burnstead under the City code would be for Burnstead to build narrower homes that meet internal plat setback regulations and simply forgo the PRD altogether.” No, that is not an alternative. Because the underlying zoning requires 8,000 square foot lots, City Council approval of the subdivision was expressly conditioned on approval of the PRD.

The case law citations on page 43 of developer’s brief are irrelevant. All cases are pre-LUPA, and also unrelated to the issues herein. Also, in this case, we are not deprived of agency expertise, as, perhaps would be the situation in an INS case. Finally, this case involves not merely lack of substantial evidence or an adequate record, but also clear errors of law.

6. It is not inequitable to finally put an end to piecemeal review and require that a code compliant proposal be submitted.

There is no inequity in requiring a code compliant proposal. There is considerable inequity, and judicial inefficiency, in allowing continued

attempts to avoid code through piecemeal approvals, and an amazing determination to flood the homes in Woodway Meadows. No doubt the City can avoid liability for damages via some form of release from the developer, and no doubt the developer can take the money and run via some shell corporation. Equity, however, demands adequate drainage and a code compliant plat.

V. CONCLUSION

This appeal is not about whether the proposal complies with Edmonds Code (plainly it does not). This appeal is not about whether the Judge has the authority to reverse the hearing examiner's land use approvals (plainly she does).

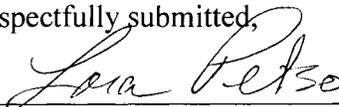
The developer chose to submit an application that did not comply with the Edmonds Community Development Code. The developer chose not to correct the application when the public pointed out the errors.

The Superior Court Judge was correct. A new application, with a code compliant proposal, is needed.

This Court should affirm.

April 30, 2010

Respectfully submitted,



Lora L. Petso, pro se, WSBA 17277
Respondent