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

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**FRIENDS OF CEDAR PARK NEIGHBORHOOD,**

**Appellant,**

**vs.**

**CITY OF SEATTLE and WIDGEON, LLC,**

**Respondents.**

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**RESPONSE BRIEF OF RESPONDENT WIDGEON, LLC**

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## I. INTRODUCTION

This case concerns the proposal by Respondent Widgeon, LLC (“Widgeon”) to subdivide one very large parcel in a developed single family neighborhood in northeast Seattle into four lots. Each of the new lots would exceed the minimum required lot size for the zone. Nonetheless, relying on a variety of arguments, Appellant Friends of Cedar Park (“Cedar Park”) has sought to reduce the number of lots.

Cedar Park’s arguments to this Court are identical to the arguments it raised before both the Seattle Hearing Examiner and King County Superior Court. There is nothing new in Cedar Park’s Brief. Each of its arguments was considered by the Seattle Hearing Examiner over a two-day hearing with multiple witnesses that also involved over 150 pages of briefing. The Examiner weighed the expertise and credibility of the experts who testified on drainage and slope issues for the City of Seattle and for Widgeon, versus the lay testimony offered by Cedar Park. In turn, the Honorable Judge Kallas reviewed the entire record and considered the same arguments. Judge Kallas found that the City had not erred in approving Widgeon’s subdivision and the subdivision met all criteria for approval.

Cedar Park casts its appeal as one of necessity in order to have the City follow subdivision law. Actually, the opposite is true. The proposed

subdivision meets all City of Seattle standards. What Cedar Park wants is for the law to be different. Cedar Park's goal from the outset of this dispute has been to overturn prior decisions of the Washington Supreme Court and Court of Appeals that have limited the circumstances when a subdivision can be denied. Since the 1980s it has been settled law that an irregular lot shape is not a basis for subdivision denial, and reliance on a generalized "public interest" test to deny a subdivision is highly suspect when the subdivision meets all specific code standards. The City of Seattle has respected and implemented those Court decisions over subsequent decades in numerous decisions on short subdivisions.

Cedar Park's attempt to overturn settled law is particularly remarkable given that the record does not show there would be any harm from the irregular shape of two of the proposed lots. The western two lots include both a flat area along the street and the steep slope area on the eastern part of the site. Consistent with City regulations, the steep slope area on the east would not be developed in any way and the four houses would be located on the western, flat area of the site.

Widgeon acknowledges that Cedar Park would prefer to limit the number of new houses on its block. However, the proposed subdivision meets all criteria for approval in existing law, including as interpreted by this Court and the Supreme Court, and the appeal should be denied.

## **II. WIDGEON'S AMENDMENT TO CEDAR PARK'S ASSIGNMENTS OF ERROR**

Item C in Cedar Park's Assignments of Error does not reflect the citation to authority on page 35 of its Brief. Item C refers only to the state statute and not the implementing provision in the Seattle Municipal Code ("SMC"). Therefore, Item C in Cedar Park's Assignments of Error should read as follows (new text is underlined): "The Examiner erred by approving the short subdivision despite its failure to meet the public interest requirement of RCW 58.17.110(2) and the public interests requirement of SMC 23.24.040 A.4."

## **III. WIDGEON'S STATEMENT OF THE CASE**

The procedural history of this case is as follows. Widgeon filed a subdivision application, supported by a geotechnical report that addressed soil stability and drainage issues. The City of Seattle Department of Planning and Development ("DPD") reviewed the proposal, found it met all City requirements, and issued a decision approving the subdivision with conditions. Cedar Park appealed that decision to the Seattle Hearing Examiner. The hearing before the Examiner lasted two days and was followed by extensive briefing. The Examiner affirmed the DPD approval of the subdivision, although she revised the condition of approval related to drainage control. Cedar Park then appealed the Examiner's decision to King County Superior Court, raising the same issues it had raised before

the Examiner. The Superior Court denied Cedar Park's Land Use Petition and ruled for the City and Widgeon on all issues. Cedar Park then appealed the Superior Court decision to this Court.

Widgeon proposes to subdivide a 40,015-square-foot parcel of land into four lots. CP 112, Findings and Decision of the Hearing Examiner for the City of Seattle ("Examiner's Decision"), Finding of Fact Nos. 1 and 9. The property is presently developed with a single family home. CP 113, Examiner's Decision, Finding of Fact No. 5. The zoning is Single Family with a minimum lot size of 9,600 square feet. Each of the four lots would exceed the minimum lot size for the zone and could be developed with a new single family residence in the future. CP 112-13, Examiner's Decision, Finding of Fact Nos. 2 and 9.

**A. DRAINAGE**

Lots along the east side of 42nd Avenue N.E. typically have a somewhat flat area along the street where many of the existing residences have been built, and then to the east, the lots slope down to the Burke Gilman Trail. CP 113, Examiner's Decision, Finding of Fact Nos. 4 and 5. On the Widgeon parcel, there is a relatively level area next to the street, and then further to the east, there is an upper slope area, a moderately sloping bench, and then a lower slope area that ends at the Burke Gilman Trail. *Id.*

Under City of Seattle regulations, the steep slope areas of the subject parcel may not be developed, and so new houses can be developed only on the relatively level portion near the street. Consistent with City requirements, all development would be located at least 15 feet from the top of the closest steep slope (*see, e.g.*, “15 ft wide steep slope buffer” on CP 371.) Also, the new houses would be at least 100 feet away from the lower steep slope area. CP 114, Examiner’s Decision, Finding of Fact No. 12. In addition, Widgeon is required to execute and record a covenant noting the “no build” areas on the four parcels, and permanent visible markers must be installed in the field to delineate the “no build” areas. CP 424-25, DPD decision listing conditions of short subdivision approval.

The soil stability and drainage impacts of the proposal were evaluated in a report (CP 427-36) by Dr. Donald W. Tubbs, a Geotechnical Engineer with over 30 years of experience. Day 2, Verbatim Report of Proceedings (“RP”) 44:8.<sup>1</sup> Dr. Tubbs’s report was also reviewed, signed and stamped by Mr. Charles P. Couvrette, a Professional Engineer who also has 30 years of experience. CP 430; RP 48:7-9. Their report concluded as follows: “It is our opinion that the property is suitable

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<sup>1</sup> The hearing before the Seattle Hearing Examiner was held on July 16 and 18, 2008. As noted in the Index to Clerk’s Papers, the transcripts for these two days of hearing have sub numbers of 16 and 17. Citations are to “Day 1” or “Day 2” and then to the page and line number of the transcript for that day.

for the proposed development using appropriate conventional design and construction procedures.” CP 429. The Tubbs/Couvrette report did address drainage and recommended that all water from future houses be directed away from the steep slope. *Id.* This report was independently reviewed by a DPD Geotechnical Engineer with 23 years of experience who found the analysis and conclusions to be “very feasible.” Day 2 RP 7:8-9 and 15:3.

In addition, DPD’s Drainage Reviewer, Kevin Donnelly, also reviewed the proposal. He noted that: “New construction will be required to provide detained discharge to the ditch and culvert system on the west side of 42nd Ave NE.” CP 469. Mr. Donnelly noted that no revisions to the short subdivision were needed. *Id.*

The DPD decision required as a condition of short subdivision approval that “a drainage control plan prepared by a licensed civil engineer meeting the requirements of the City’s Stormwater, Grading and Drainage Control Code” be submitted for DPD review and approval prior to recording of the short subdivision, and also prior to issuance of any building permit for new houses on the property. CP 424-25. There was a difference in the description of the required drainage system between the DPD decision and the geotechnical report that was brought to the Hearing Examiner’s attention. She eliminated the discrepancy by rewording the

condition of approval and imposing the revised version of the condition through her decision. CP 117, Examiner's Decision, Conclusion No. 2, and re-worded condition of approval CP 119-20.

In its appeal to the Hearing Examiner, Cedar Park challenged the Determination of Non-Significance issued by DPD pursuant to the State Environmental Policy Act ("SEPA"). That Determination found, after analysis of technical reports, that there would be no significant impacts on the environment, including soil stability, drainage, and land use, from the subdivision proposal. CP 421-23. At the appeal hearing, Cedar Park's counsel stated that it was dropping its SEPA challenge to the subdivision. CP 115, Examiner's Decision, Finding of Fact No. 19. Thus, the City's Determination that the proposal will not have significant environmental impacts is final.

At the hearing before the Examiner, Cedar Park did not call any expert witnesses on soil stability or drainage issues. Instead, Cedar Park's case consisted of a couple of neighbors testifying as to *existing* drainage conditions in the neighborhood. As those witnesses had no familiarity with City of Seattle drainage requirements for new construction or experience designing drainage control systems, they offered nothing to demonstrate that drainage from the *future* homes would have an adverse *impact* on slopes. As the Examiner noted:

The Appellant's lay witnesses on drainage gave useful information about their observations of stormwater drainage in the neighborhood. But the drainage study, Exhibit 26, and testimony from the Applicant's and City's geotechnical engineers establish that water from future houses and other impervious surfaces on the site will not drain directly onto the steep slope or result in slope instability.

CP 117, Examiner's Decision, Conclusion No. 3.

**B. SHARED VEHICULAR ACCESS**

Section 23.53.005 of the Seattle Municipal Code (also referred to as the Seattle Land Use Code) requires that new lots abut either a street or an easement meeting the standards of SMC 23.53.025.<sup>2</sup> The easement standards in SMC 23.53.025 establish a 10-foot width for vehicle access easements serving one or two single family dwellings, unless the Fire Chief requires a 12-foot width. Since the Fire Department did not require a 12-foot width for the proposed easement (Day 2 RP 67:7-9), the easement is only required to be 10 feet in width.

The Widgeon subdivision complies with this City requirement. Two of the proposed lots directly abut a street, 42nd Avenue N.E. The other two lots are served by a 10-foot-wide access and utility easement that connects them to 42nd Avenue N.E. CP 113-14, Examiner's

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<sup>2</sup> Consistent with RAP 10.4(c), applicable statutes and regulations to be construed appear in the Appendix to this brief.

Decision, Finding of Fact No. 10, and CP 371 (plat drawing showing layout of lots and fully dimensioned easement).

**C. LOT CONFIGURATION**

One of the City Land Use Planners responsible for reviewing the short subdivision, Catherine McCoy, specifically studied the pattern of lot and house development in the neighborhood, noted how varied it was, and testified that lot sizes in the vicinity range from 6,000 to 80,000 square feet. Day 2 RP 73:6-13. Ms. McCoy noted that there were “many” irregularly shaped lots within 1,500 feet of the Widgeon site. *Id.*

The record includes evidence of other land use approvals for similar developments in the immediate vicinity, where four houses would be developed on the western part of a parcel near the street, with preservation of the steep slope on the eastern portion of the parcel. One example is at 13558 39th Avenue N.E. (approved by the Hearing Examiner after review of an appeal by the Cedar Park Neighborhood Coalition, *see* CP 566-77). Another example is at 13034 39th Avenue N.E. (approved by the Hearing Examiner after review of an appeal by the Cedar Park Hillside Association, *see* CP 558-62). A map in the record shows the close proximity of these other, four-house proposals in relation to the four-house proposal on the Widgeon property at 13216 42nd Avenue N.E. *See* CP 581.

## IV. ARGUMENT

### A. STANDARD OF REVIEW

Cedar Park relies on three LUPA standards *for relief* to argue that the Hearing Examiner's decision should be overturned. Brief of Appellant at 5. However, the Brief does not discuss this Court's standard *of review* or the deference that is due to the factual determinations of the Hearing Examiner.

In reviewing a case under the Land Use Petition Act ("LUPA"), this Court reviews the administrative record before the local jurisdiction's officer with the highest level of authority to make the final determination. *HJS Dev., Inc. v. Pierce County*, 148 Wn.2d 451, 467, 61 P.3d 1141 (2003). The finder of fact and final local decision maker in this case was the Seattle Hearing Examiner. SMC 23.76.022. Therefore, this Court in its appellate capacity reviews the record before the Examiner.

Relief may be granted only if the Appellant carries the burden of establishing that one of the LUPA standards for relief in RCW 36.70C.130(1) has been met. RCW 36.70C.130(1) states that the burden of proof is on the Appellant. The standard of review varies depending upon which statutory basis is claimed for the granting of relief. *Peste v. Mason County*, 133 Wn. App. 456, 466-67, 136 P.3d 140 (2006).

On the drainage issue, Cedar Park claims that the Examiner's decision is not supported by substantial evidence. Brief of Appellant at 20. For this type of claim, the Court reviews the Examiner's factual determinations for substantial evidence. *Peste* at 466. "[S]ubstantial evidence' is evidence sufficient to convince an unprejudiced, rational person that a finding is true. *Peste* at 477 (quoting *Isla Verde Int'l Holdings, Inc. v. City of Camas*, 146 Wn.2d 740, 751-52, 49 P.3d 867 (2002)). The factual review under the substantial evidence test is deferential, requiring the Court to "view all the evidence and reasonable inferences in the light most favorable to the party who prevailed in the highest forum that exercised fact finding authority . . . ." *Peste* at 477 (quoting *Freeburg v. City of Seattle*, 71 Wn. App. 367, 371-72, 859 P.2d 610 (1993)). Also under the substantial evidence standard of review, the reviewing Court "defers to the fact-finder's assessment of witness credibility." *Sunderland Family Treatment Servs. v. City of Pasco*, 127 Wn.2d 782, 801, 903 P.2d 986 (1995). The City and Widgeon prevailed before the Hearing Examiner. Thus, the evidence and resulting reasonable inferences, and the Examiner's assessment of witness credibility, are all to be reviewed in the City and Widgeon's favor, and Cedar Park has a very high burden of proof.

On the issues of shared vehicle access and whether the proposed lot configuration is in the public use and interest(s), Cedar Park claims that the Examiner's decision is an erroneous interpretation of the law and a clearly erroneous application of the law to the facts. Brief of Appellant at 23 and 39, respectively. Regarding the claim of an erroneous interpretation of the law, statutory construction is a question of law that the Court reviews *de novo*. *Sleasman v. City of Lacey*, 159 Wn.2d 639, 642, 151 P.3d 990 (2007).

The LUPA standard for relief requires that deference be given to the local government's interpretation of its ordinance in certain circumstances. Under RCW 36.70C.130(1)(b), relief may be granted only when: "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.*" (Emphasis added). An unambiguous ordinance is applied according to its plain meaning, and only ambiguous ordinances will be construed. *Sleasman* at 643. In the case of an ambiguous ordinance, deference is due to the local government's interpretation of its ordinances. *Faben Point Neighbors v. City of Mercer Island*, 102 Wn. App. 775, 778, 11 P.3d 322 (2000). This principle, that deference is owed to the expertise of government agencies in interpreting ambiguous ordinances, is well established in our case law. Thus, to the

extent the ordinances at issue in this case are considered ambiguous, deference is due to the DPD and Examiner's interpretation of the City's Code.

Finally, as to the claim of a clearly erroneous application of the law to the facts, the Court may overturn the Examiner's decision only if, based on the record, the Court is left with the definite and firm conviction that a mistake has been committed. *Peste* at 477. Under this claim for relief, the Court will also defer to the factual determinations of the Hearing Examiner. *Id.*; *Citizens to Preserve Pioneer Park, L.L.C. v. City of Mercer Island*, 106 Wn. App. 461, 474, 24 P.3d 1079, *reconsideration denied* (2001). Thus, again, Cedar Park has a very high burden of proof to overturn the Examiner's Decision.

**B. SUBSTANTIAL EVIDENCE SUPPORTS THE EXAMINER'S CONCLUSION THAT ADEQUATE DRAINAGE CONTROLS HAVE BEEN REQUIRED.**

Widgeon's overall position is that substantial evidence supports the Examiner's conclusion that adequate provision has been made for drainage control. The Hearing Examiner considered the lay testimony of Cedar Park witnesses, and the expert testimony of the City and Widgeon. The Examiner also relied on the written decision of the City's Drainage Reviewer that no changes to the subdivision were required, and she clarified a condition requiring City approval of a drainage control plan in

compliance with all City codes and requirements before the subdivision is recorded or houses built. Cedar Park has never been able to prove that compliance with City codes and requirements is inadequate to address drainage from the four houses.

The evidence considered by the Examiner and the Examiner's decision will be discussed in detail below to respond to Cedar Park. However, before doing so, it is important to correct some misstatements in the Brief of Appellant.

**1. Cedar Park Misstates How Drainage Will Be Handled.**

Cedar Park asserts that drainage from the four new houses will drain "over the landslide prone area." Brief of Appellant at 2. This is not the case. Cedar Park's record citations do not support that claim, for the very reason that it is untrue. First, the reference to CP 423 is erroneous as neither there or elsewhere does the DPD decision state that water will drain over the steep slope area located on the eastern part of the site. To the contrary, the DPD decision notes that drainage would be diverted to the 42nd Avenue N.E. right-of way (which lies to the west of the site). CP 423. The other reference in Cedar Park's Brief is to "Day 1 RP 55:25-56:6." Brief of Appellant at 2-3. Drainage is not even discussed there. Even if the correct reference is to Day 2, testimony there likewise does not

support Cedar Park's assertion that drainage from the four houses would drain *over* the landslide prone area. It will not. CP 423.

Cedar Park wrongly implies (Brief of Appellant at 20) that Widgeon originally proposed discharging water into a landslide area. Again, this is not the case. Widgeon has never proposed that water be discharged over the steep slope areas on the eastern part of the site. Cedar Park can cite nothing in the record for that notion, nor do they even try. As documented herein, Widgeon's Geotechnical Engineer recommended that water be discharged away from the steep slope, and that recommendation has been incorporated into the subdivision approval.

***2. A Comparison of Witness Expertise on Soil Stability and Drainage Issues Supports the Examiner's Reliance on City and Widgeon Expert Testimony.***

There is a stark contrast between the lay testimony of Cedar Park's witnesses, and that of the expert testimony provided by the City and Widgeon. The latter have a combined 83 years of experience with issues of soil stability, geohydrology, and drainage. The unequivocal and unanimous expert testimony was that there was no cause for concern that drainage from four new houses would affect the stability of steep slope areas because drainage from the homes and other impervious surfaces will be directed away from steep slope areas. Day 2 RP 50-51(Widgeon

expert, Dr. Donald W. Tubbs) and 18-19 (City expert, William Bou, Civil Engineer).

A direct comparison of the credentials of Cedar Park's lay witnesses to the credentials of City and Widgeon expert witnesses is instructive. Cedar Park called two neighborhood residents as witnesses about existing drainage conditions in the neighborhood: Jeffrey Ochsner and Rolf Kellor. Mr. Ochsner has expertise in architectural history but has no degree in geology, is not licensed as a geologist, geotechnical engineer or geohydrologist, and has never designed a drainage system. *See* Day 2 RP 125-127 (voir dire by Widgeon's counsel). The Hearing Examiner ruled that he was not a drainage expert.<sup>3</sup> Day 2 RP 127:3-4. Cedar Park's counsel took no exception to that ruling, and in fact, after the ruling, said "Okay." *Id.* at 127:8.

Cedar Park's other neighborhood resident witness was Mr. Rolf Kellor. Mr. Kellor has a Masters in Urban Planning but holds no degree in geology, is not licensed as a geologist, geotechnical engineer or geohydrologist, and does not design drainage systems himself. He instead agreed that this task is best left to professionals. Day 1 RP 177-178.

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<sup>3</sup> Following voir dire of Mr. Ochsner, Widgeon's counsel stated: "I don't have any objection to this [Ochsner testimony] coming in. But he is not a drainage expert." Day 2 RP 126:25 - 127:1-2. The Hearing Examiner then stated: "Understood. It comes in with that caveat." Day 2 RP 127:3-4.

In contrast to Cedar Park's witnesses, Widgeon called Dr. Donald W. Tubbs. His résumé is at CP 471-74, and his Ph.D. dissertation on the history of slides in Seattle is at CP 476-527. Dr. Tubbs has a Ph.D. in Geology and is a licensed and registered Geologist and Engineering Geologist in both Washington and Oregon. As documented in his résumé, Dr. Tubbs has over 30 years' experience in engineering geology, applied geomorphology, geologic hazard evaluation, surface water hydrology, and groundwater hydrology. His 1975 dissertation mapped geologic hazards in the City of Seattle and was referred to by name in the City's Ordinance on Environmentally Critical Areas. It was the factual basis for the City's map of potential landslide areas (Day 2 RP 33:14-17). Dr. Tubbs has provided over 100 geotechnical engineering reports to the City of Seattle on private projects and has been retained by the City as the geotechnical engineer on the City's own projects. Day 2 RP 47:11-23.

The City also called an expert at the hearing to testify about soil stability and drainage control. William Bou is a licensed Civil Engineer who worked first in the private sector for 15 years and for the past eight years has served as the City's Geotechnical Engineer, in charge of reviewing and making decisions on the adequacy of geotechnical reports on development proposals. Day 2 RP 47:4-23.

As the finder of fact, the Hearing Examiner was in the unique position of being able to best judge the expertise and credibility of witnesses. As described previously under the Standard of Review, the Examiner's evaluation of the witnesses is entitled to deference by this Court. Given the disparity in expertise between Cedar Park's witnesses and those of Widgeon and the City, the Examiner's reliance on the Widgeon and City experts was totally appropriate and supports Widgeon's contention that substantial evidence supports the Examiner's conclusion that adequate drainage controls have been required.

***3. Cedar Fork's Critique of the City's Drainage Review Ignores the Facts.***

Cedar Park claims that the Widgeon geotechnical report (CP 427-36) did not evaluate drainage conditions or impacts. Apparently because the report does not use the word "*drainage*," Cedar Park concludes that the topic of drainage was never part of the analysis done by these professional engineers. This strained argument is belied by the facts in the record.

First, the geotechnical report is based on in-person observations of the site and surroundings over a seven-month period ("[G]eologic reconnaissance of the site and adjacent areas [was conducted] on several occasions between April and October, 2006 . . . ." CP 427) as well as

subsurface explorations of the soils on the site. The main purpose of the report was to evaluate whether the soils on the site are suitable for the construction of four homes and site improvements, and whether construction will have any adverse impacts on slope stability. The report definitely does consider drainage issues. The report recommends that “all water” from roofs and other impervious surfaces be handled in a particular way to prevent that water from draining onto the steep slope areas on the eastern part of the site. CP 429. To fault the geotechnical report for using the word “*water*” rather than “*drainage*” is trivial.

Moreover, a significant part of Dr. Tubbs’s 30-year career has been devoted to an evaluation of the particular relationship between water and slope stability. His dissertation study on the “Causes, Mechanisms and Prediction of Landsliding in Seattle” documented the correlation between slides and major precipitation (CP 509-25) and clearly observed that uncontrolled runoff from roofs and paved areas are a major contributor to slides. CP 524.

Indeed, based in part on the work of Dr. Tubbs, the City subsequently developed regulations for Environmentally Critical Areas to prevent development on steep slopes. It is precisely because steep slopes can be unstable when uncontrolled water drains on them that no development is allowed in the steep slope areas on the site. That is why

the geotechnical report recommended that all water be directed away from steep slope areas on the site. Dr. Tubbs was actually well aware of the importance of drainage issues, and the geotechnical report thus made appropriate recommendations in the Widgeon case. With those recommendations followed, which they must be because they are incorporated into the conditions of subdivision approval, the professionals have no concern that the proposed development would cause soil instability (Day 2 RP 52:23-25 - 53:1-7). Dr. Tubbs also observed that reducing the number of proposed houses would make no difference as to soil stability; no impact is still no impact. *Id.* at 53:24-25 - 54:1-4.

Cedar Park also tries to fault Dr. Tubbs for not having a more complete understanding of the existing drainage facilities in the neighborhood. Brief of Appellant at 10-11. Cedar Park misconstrues Dr. Tubbs's role. Dr. Tubbs is not the individual who will design the specific drainage system for the houses; that is the responsibility of the licensed civil engineer who prepares the subsequent drainage control plan for City review prior to recording of the subdivision and construction of houses. At the subdivision review stage, Dr. Tubbs properly evaluated whether there was any reason that the proposed subdivision and four houses should not be approved. He and his licensed Geotechnical Engineer found the site suitable for the proposed development and

recommended that water be directed away from the steep slopes. That level of analysis is appropriate for the purposes of the geotechnical report.

Cedar Park then tries to fault the City Geotechnical Reviewer, William Bou, for not making a site visit or knowing the details of the existing drainage facilities in the neighborhood. Brief of Appellant at 14. Mr. Bou reviewed the project for soil stability issues and whether drainage would contribute to soil instability. It was certainly reasonable for Mr. Bou to rely on the site investigations done by Dr. Tubbs, who after all, had created the City's map of landslide hazard areas and who had done his own site investigations related to this specific subdivision proposal.

It was also reasonable for Mr. Bou to rely on the review by Mr. Donnelly, DPD's Drainage Reviewer, as to drainage issues since Mr. Donnelly is responsible for the City's drainage review. Mr. Donnelly reviewed the subdivision and concluded that no changes to the subdivision were required. He further noted that water would need to be detained prior to discharge. CP 469. Mr. Donnelly's review comments have been incorporated into the Hearing Examiner's decision as requirements that must be met. CP 119, Examiner's Decision, "Conditions-Short Subdivision."<sup>4</sup>

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<sup>4</sup> Interestingly, Cedar Park does not assign fault to Kevin Donnelly, who conducted the actual drainage review. The only concern Cedar Park expresses here is the allegation that Mr. Donnelly's recommendation for detention of the water prior to discharge from

Finally, Cedar Park tries to fault Ms. McCoy, the Land Use Planner who wrote the DPD decision reviewed by the Examiner, because Cedar Park felt she did not properly appreciate existing drainage conditions in the neighborhood. However, Ms. McCoy had done a site visit, observed existing conditions, talked to neighbors, considered the emails written by neighbors expressing drainage concerns, and discussed drainage controls with the City's Drainage Reviewer. Day 1 RP 198:7-13; 209:16-17; and 227:6-11. As Ms. McCoy stated, the review of the subdivision "was not conducted in a vacuum."<sup>5</sup> Day 1 RP 227:11. Cedar Park cannot sustain its burden of proof by picking at the City's review and reviewers.

Indeed, there was nothing in the lay testimony of Cedar Park's witnesses that prompted the Widgeon and City experts (who testified after Cedar Park's witnesses) to modify their analyses and conclusions.

Dr. Tubbs testified that drainage from the proposal would not adversely

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the site was not fully incorporated into the conditions of approval in the DPD decision. Brief of Appellant at 12. However, this concern became moot when the Hearing Examiner's decision revised and clarified the wording of the DPD drainage condition of approval to require detention of water prior to discharge. CP 119, Examiner's Decision, "Conditions-Short Subdivision."

<sup>5</sup> Ms. McCoy may have imperfectly referred to the ditch and culvert system in 42nd Avenue N.E. as a "drainage collection line" in the DPD condition of subdivision approval, but this was immaterial because the Examiner reworded the condition of approval to substitute Mr. Donnelly's phrase of "ditch and culvert system" in lieu of Ms. McCoy's own phrase. The substance is the same: water must be directed away from the steep slope areas to the east and must instead be directed into the system on the west side of 42nd Avenue N.E.

affect slope stability as long as it was discharged away from the slope.

Day 2 RP 54:1-3 and 50:2-12. Mr. Bou reached the same conclusion:

Drainage from the impervious surfaces on the Widgeon property would not cause on-site, nearby, or even distant impacts on slope stability, notwithstanding neighbors' comments about how drainage from existing development (*i.e.*, drainage from their own and other neighbors' houses) sometimes flows across 42nd Avenue N.E. The Examiner summarized

Mr. Bou's testimony on this point as follows:

DPD's geotechnical engineer also reviewed the Applicant's [Widgeon's] geotechnical report and agreed with the report's recommendations on construction and drainage measures to maintain slope stability. . . . He was not concerned by the possibility that some water from 42nd Avenue NE drains across the site and adjacent properties because it would originate at least 500 yards away from the slope rather than being discharged directly onto it.

CP 114, Examiner's Decision, Finding of Fact No. 15. In weighing Cedar Park's lay critique of the City's drainage review against the geotechnical report and the expert testimony of Widgeon and the City, this Court should easily conclude that there is substantial evidence to support the Examiner's own conclusion that adequate drainage controls have been required.

**4. *The Examiner's Reliance on the City's Codes Is Adequate and Appropriate Drainage Control.***

Cedar Park notes that the Examiner's clarification of the drainage condition of subdivision approval is "an improvement" (Brief of Appellant at 18), but still finds it unsatisfactory. In essence, Cedar Park is not sure whether compliance with the City's Stormwater, Grading, and Drainage Control Code will be adequate to control drainage from the Widgeon property. On the one hand, Cedar Park notes that "a complete drainage system" design will be required in order to implement the City Drainage Reviewer's requirements. Brief of Appellant at 18. On the other, based entirely on lay testimony from Ochsner and Kellor, Cedar Park speculates that it may be difficult to meet the Drainage Reviewer's requirements (Brief of Appellant at 19), which have been incorporated into the Hearing Examiner's reworded condition of subdivision approval. But all of the expert testimony and evidence from Dr. Tubbs, his Geotechnical Engineer, the City's Geotechnical Engineer, and the City's Drainage Reviewer unanimously concluded that adequate provision had been made for drainage control.

Cedar Park offers nothing persuasive to overcome the substantial evidence supporting the Examiner's decision that adequate provision has been made for drainage control. The Examiner incorporated the Drainage

Reviewer's comment that water from the Widgeon site be detained first before discharge. In addition, water will be directed away from steep slope areas, with the particulars of the drainage design to be determined based on approval of a drainage control plan before recording of the subdivision or construction of homes. CP 119-20. The required drainage control plan must be prepared by a licensed civil engineer and meet the requirements of the City's Stormwater, Grading and Drainage Control Code. *Id.* Cedar Park never offers any evidence that compliance with the drainage condition imposed by the Examiner is inadequate to control drainage from the site.

Finally, the approach of first doing conceptual drainage review before a decision on the subdivision, to be followed by a detailed drainage control plan at subsequent permit phases, is certainly not unique to the Widgeon subdivision. Two other land use appeals heard by the Examiner in this very neighborhood involved proposals for construction of four houses on a single parcel, wherein neighbors raised very similar concerns about drainage. In each case, the Examiner concluded that compliance with the City's Stormwater, Grading and Drainage Code would adequately address the drainage impacts of four houses. (CP 558-62, 562, Conclusions 11 and 12; and CP 566-77, 573, Conclusion 8 ". . . impacts will be mitigated at the building permit stage through the City's drainage

regulations.”) These decisions further support Widgeon’s contention that there is substantial evidence in the record for the Examiner’s decision.

**C. THE EXAMINER’S CONCLUSION THAT THE SHARED VEHICLE ACCESS COMPLIES WITH THE SEATTLE CODE IS A PROPER INTERPRETATION AND APPLICATION OF THE LAW.**

Just as it did before the Hearing Examiner and the Superior Court, Cedar Park once again puts forth its own diagrams of turning radii for cars, based on wholly hypothetical assumptions about where houses and garages could be situated on each of the four lots. Brief of Appellant at 28-32, and “Illustrative Exhibits” attached to its Superior Court brief. Cedar Park never made these arguments out of a concern for traffic or pedestrian safety. Instead, Cedar Park wants to reduce the number of lots in the subdivision. Brief of Appellant at 33. Because Section 25.09.240 E.1 of the Seattle Municipal Code requires a subdivision applicant to deduct the area of a vehicle access easement from the computation of the number of lots allowed, Cedar Park argues that the easement is actually needed for all four lots and thus must be 20 feet wide. If a 20-foot-wide easement is deducted, the result would be only three lots, rather than the four proposed and approved.

As with the other two issues in this case, there is not a single new argument in Cedar Park’s Brief. Cedar Park argued the same contentions in detail to both the Hearing Examiner and the Superior Court. DPD Land

Use Planner Bill Mills, who has 18 years of experience with DPD, specializes in Land Use Code interpretation, and has a law degree (Day 1 RP 232:1-14), painstakingly refuted each of Cedar Park's arguments before the Hearing Examiner. Mr. Mills cast considerable doubt on Cedar Park's exhibits and its reliance on driveway turning radii. Day 1 RP 238-44 "In fact, hardly anyone backs out of their garage in the configuration shown by the exhibits that Professor Ochsner brought out. . . . They do not need that kind of radius to maneuver in." *Id.* at 243:2-11. Mr. Mills also provided a detailed written refutation of Appellant's access arguments in his closing argument. CP 191-93.

The Examiner entered a Finding of Fact on exactly how the size of the easement area was determined, and how with deduction of that area, four lots were allowed. CP 114, Examiner's Decision, Finding of Fact No. 16. The Examiner took note of all Cedar Park's assumptions about hypothetical garages and concluded as follows: "The Appellant's argument is built on speculation and does not reflect the only possible configuration of development on the lots." CP 117, Examiner's Decision, Finding of Fact No. 4. There was ample information in the record to support the Examiner's determination that the proposed lots meet all access standards in the Land Use Code, and that four lots are allowed. *Id.*; CP 114, Examiner's Decision, Finding of Fact No. 16.

Cedar Park once again claims that there was no information on the subdivision drawings about shared vehicular access. Brief of Appellant at 21. However, the drawings specifically show that two lots abut 42nd Avenue N.E. and that the other two lots have access from a very specifically depicted and dimensioned 10-foot wide easement. CP 371.

And while Cedar Park claims that Widgeon never “illustrated” how it could comply with Code requirements for access (Brief of Appellant at 26), the subdivision drawing itself shows that future lots either abut a street or abut a 10-foot easement, as required by SMC 23.53.005 and .025. There was simply no basis to require Widgeon to provide more detailed information about possible house, garage, and driveway locations because it is obvious from the face of the subdivision drawing that Code access standards have been met. As noted above, the Code requires that lots either abut a street or an easement that is 10 feet wide. Two of the lots abut 42nd Avenue N.E., a street, and the other two gain access to that street via a 10-foot easement. Cedar Park completely ignores that the lots themselves meet Code access standards. Instead, Cedar Park manufactures a parade of potential home, garage, and driveway locations that hypothetically would not comply with Code standards. Cedar Park is forced to engage in such speculation because otherwise it has no argument to make on this claim. Its entire argument

that the Examiner misinterpreted and applied the Code is based on speculative concepts of future houses, rather than the reality that the lots meet all Code access standards.

Cedar Park's arguments are nonsensical. One could always hypothesize a house, driveway, and garage layout that does not meet the Code. Just because one can diagram a non-Code-compliant house does not mean that a house that does comply with the Code is impossible to build. In fact, DPD review demonstrated that a house can be located on each of the two lots abutting 42nd Avenue N.E., and a house can be located on each of the lots served by an easement. CP 57-8. DPD certainly has considerable expertise in interpreting and applying the Land Use Code, and Cedar Park's witnesses offered nothing to overcome that.

Cedar Park's conceptual diagrams were considered by the Hearing Examiner and Superior Court but were found not to be persuasive. The Examiner concluded that the lots met Code access standards, and again, deference is due to the Examiner's factual determinations and assessment of witness credibility. *Peste, supra*, at 477; *Sunderland, supra*, at 801. Cedar Park has not met its burden of proof to show an error of interpretation or application of the law.

**D. THE EXAMINER’S CONCLUSION THAT THE PROPOSED LOT CONFIGURATION IS IN THE PUBLIC USE AND INTERESTS IS A PROPER INTERPRETATION AND APPLICATION OF THE LAW.**

**1. *The Land Use Code Does Not Prohibit the Proposed Lot Configuration, and the Proposed Density Is Anticipated and Allowed by the Code.***

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. Cedar Park’s main witness acknowledged that the issue of lot configuration could be attacked only by relying on the general “public interests” factor, since there was no Code standard that prohibited the lot configuration. Day 1 RP 136:10-15.

Although Cedar Park claims that nothing in the Seattle Municipal Code specifically *permits* the proposed lot configuration (Brief of Appellant at 39), that argument reflects a misunderstanding about how codes are written. Land use codes do not attempt to describe every conceivable lot configuration that meets required standards, since configurations will vary widely depending on street layout and natural features. By the same token, codes do not specify every conceivable shape that a house may take. Rather, the Seattle Municipal Code defines

the outer standards for what is permitted, and especially in single family zones, a wide variety of house shapes and styles is allowed. One need not find an exact description in the code of his or her dream house in order to be able to build it. Thus, it is of no consequence that the Code does not specifically permit this exact lot configuration; the key point is that the Code nowhere *prohibits* the proposed lot configuration.

It is through this regulatory framework that the Court must address Cedar Park's contention that the proposed lot configuration is contrary to the intent of the Code, since no actual Code standard is at issue. Cedar Park asserts that no one could have predicted that this large parcel could be divided into four lots. However, the Hearing Examiner readily refuted that point of view. She noted that in the course of subdivision review, Cedar Park never challenged that the steep slope areas on the eastern part of the property count toward the 9,600 square foot minimum lot size. CP 665 (decision on Cedar Park motion at CP 769-71). Moreover, the Examiner's analysis was that the density allowed on the property through the subdivision was precisely the density allowed by Code. Commenting on Cedar Park's argument that the proposal compromised the predictability provided by the minimum lot sizes in the Code, the Examiner stated as follows:

However, this short subdivision does not increase density in the zone. As discussed above, the original parcel contains sufficient square footage for four lots of at least 9600 square feet. Because a significant amount of the property is occupied by a steep slope ECA, and because the Code expressly allows inclusion of the ECA in lot area calculation in this case, the density may appear to exceed SF 9600, but it does not actually do so.

CP 118, Examiner's Decision, Conclusion No. 7. In other words, it was indeed predictable under the Code that this large parcel could be divided into four lots — that is exactly the density anticipated by both the intent and the letter of the Code.

Also relevant is that neighbors who testified as witnesses for Cedar Park knew that other proposals for four houses on one former large parcel have previously been approved in this very neighborhood. (One of Cedar Park's witnesses even acknowledged that at least one of those prior proposals could serve as "precedent.") Day 1 RP 188:18-20. The development pattern proposed by Widgeon — four houses on the western portions of a parcel, with preservation of a steep slope on the eastern portion — is the same as that already approved in this very neighborhood. *See* Hearing Examiner decisions on two other Cedar Park developments on 39th Avenue N.E. CP 558-62 and 566-77. When evidence of those four-house proposals was put in the record, there was no objection, nor was rebuttal offered. Thus, the record indisputably establishes that there

are other, similar proposals with the same density, approved in this same neighborhood. The notion that the proposed subdivision somehow exploits a “loophole” and results in unintended development simply has no support in the record.

The issue of whether to approve irregular lot shapes is not new in Seattle. As DPD Planner McCoy observed: “We do see irregularly shaped lots. That is not uncommon.” Day 1 RP 212:20-24. There was also the exchange between Widgeon’s counsel and DPD Planner Mills:

Q: Is the issue of whether to approve irregular lot lines a new one?

A: No, it’s not.

Q: Is it unique to the short subdivision at issue here?

A: No it’s not. We’ve had discussions in the past about irregularly shaped lots.

Day 2 RP 81:1-7.<sup>6</sup>

The City did not blithely approve the unusual lot configuration of the Widgeon subdivision without careful deliberation. DPD’s Bill Mills explained the City’s permit process clearly at the hearing. He noted that DPD had made sure that each of the proposed lots had a building area that

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<sup>6</sup> Four different short subdivisions approved by the City with irregular lot shapes were entered into the record. They include lots of very irregular shape (CP 539 and 540), and two with one-foot strips (CP 544 and 556). These examples of approved subdivisions demonstrate that a wide variety of lot shapes and configurations have consistently been found by the City to be in the public use and interests.

was suitable for development, without any need to vary Code standards. Day 1 RP 245:20-25 - 246:1-3. Allowing the creation of new lots that meet all Code standards is certainly not an “absurd” result as complained of by Cedar Park. Brief of Appellant at 38-39. Since each lot was suitable for development of a home, and access was consistent with Code standards, there was nothing that caused concern about having the front two lots divided into two areas, with a very narrow connection between them.<sup>7</sup> (Under City regulations, the portion of each of the front two lots, east of their narrow panhandles, is located entirely in a “no disturbance” area, in any event.) DPD and the Hearing Examiner’s reasoned conclusion that the lot configuration is allowed cannot be overcome by Cedar Park.

**2. *The City Considered the “Public Interests” to Be a Multi-Faceted Inquiry When Determining That the Public Interests Would Be Served by the Subdivision.***

State subdivision law directs local government to “inquire into the public use and interest” and make findings as to “whether the public use and interest will be served” by the division of land. RCW 58.17.110.

When the provisions of state subdivision law were incorporated into Section 23.24.040 of the City’s Code, the City changed the phrase “public

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<sup>7</sup> Although not a subdivision case, *Talbot v. Gray* considered whether a five-foot corridor was part of a “lot” under the Seattle Municipal Code. The Court found that the corridor was within the property lines bordering the lot, and was thus properly considered part of the lot. 11 Wn. App. 807, 811, 525 P.2d 801, *review denied* (1975).

interest” to “public *interests*” (“whether the public use and interests are served” by subdivision). Cedar Park completely ignores the difference in wording. Brief of Appellant at 35. Legislative history is not available to explain the reason for the change, but the change suggests that the City’s position is that there is not one single public interest at stake, but multiple considerations. This principle is reinforced by the testimony of the DPD Planner, Catherine McCoy, that the phrase “public interests” is broader than just the interests of nearby neighbors or a single neighborhood. Day 1 RP 198:19-24.

Cedar Park sets up a straw man by misstating DPD’ and the Hearing Examiner’s position on “public interests” and then arguing that the misstated position is wrong. Cedar Park tries to characterize DPD’ and the Hearing Examiner’s position as a belief that any subdivision is in the public interests as long as it is not prohibited by Land Use Code standards. Brief of Appellant at 35-36. Although Cedar Park’s counsel probed the issue in cross examination to try to get the DPD planner to agree with that, the DPD planner repeatedly noted that there are more facets to the “public interests” than simply compliance with the Code. Here is an example of that exchange from the hearing:

Q from Cedar Park’s Counsel: The view of interpreting what’s in the public interest is met if you have a creative in

the extreme configuration that you can't find something that prohibits?

A from McCoy: The short plat meets the provision of the development standards even though the configuration is unique and unusual.

Q from Cedar Park's Counsel: And what I'm trying to ask you is: In the department's view, that is the end of the public interest inquiry?

A from McCoy: That is not the end of it. That is part of what I mentioned earlier. It includes development standards – meeting development standards, fulfilling the need for housing and serving the needs of a broader city wide community, not just a neighborhood, a single family neighborhood.

Day 1 RP 228:18-25 - 229:1-8.

In particular, Ms. McCoy noted that the proposed subdivision “allows for the platting of a suitable lot and allows future development of housing within the city limits.” Day 1 RP 199:3-5. In addition to creating new housing opportunities, Ms. McCoy noted that the public use and interests would be served because the division of land was occurring in such a way as to protect the steep slope areas on the site. *Id.* at 6-7. The other City planner involved with the case, Bill Mills, concurred that the proposed division was in the “public use and interests” because housing opportunities are provided while still protecting steep slope areas. Day 1 RP 245:10-19. Moreover, in deciding that the subdivision was in the

“public use and interests,” Ms. McCoy explained that she considered the comments of neighbors. Day 1 RP 227:6-12.

Finally, there is nothing suspect about the City concluding that a proposal that meets all Code standards is in the public use and interests. After all, the general purpose of the Land Use Code is “to protect and promote public health, safety and general welfare through a set of regulations and procedures for the use of land which are consistent with and implement the City’s Comprehensive Plan.” SMC 23.20.020. Therefore, it is logical to conclude that a subdivision meeting all Code standards is in the public interest. DPD found that the subdivision increased housing opportunities in the City on suitable lots, while still protecting steep slope areas. The issue of whether the subdivision was in the public interests was appropriately considered and decided.

**3. *Cedar Park Cannot Show Any Actual Harm from the Proposed Lot Configuration.***

Cedar Park takes exception to the configuration of the proposed lots. However, there is nothing in Seattle’s Code that prohibits the proposed lot configuration. In the absence of any express prohibition of the proposed lot configuration, Cedar Park’s allegation deserves a hard look to determine if it meets its burden of proof to show that public interests are impaired by the proposed configuration. Cedar Park has not

met that burden of proof and cannot show any *actual harm* from the proposed lot configuration.

Most of the testimony on this issue came from a resident (Mr. Ochsner) who has lived in the neighborhood for about two years. Day 2 RP 117:24-25. He developed several sketches – deemed “purely hypothetical” even by his own testimony – of possible lot configurations using various types of connections between parcels. Day 1 RP 76:25, CP 374-78. Those sketches lacked any dimensions, information on parcel size, description of access, location of steep slopes, or depiction of where house pads would be located. With so much information lacking, DPD’s Mr. Mills testified that it was not possible to say whether the lot configurations depicted by Mr. Ochsner could be approved by the City or not. Day 2 RP 80:1-11. Thus, they were of very limited probative value and relevance.

Cedar Park claims that the strips of land connecting the parcels are “functionless.” Brief of Appellant at 42-43. However, Mr. Mills noted there is no Code requirement that each part of a parcel be functional. Day 2 RP 88:13-25. The Hearing Examiner considered the identical Cedar Park argument and agreed with DPD. CP 119, Examiner’s Decision, Conclusion No. 9. Certainly, in approving a subdivision, DPD does not require a land owner or potential future homeowner to identify the

function, purpose or personal utility of every square inch of a lot, nor does DPD require that every square inch be accessible. Cedar Park's argument of nonfunctionality is not persuasive.

The only other alleged harm from the lot configuration identified by Cedar Park is that the strips of land connecting the parcels are not wide enough to allow maintenance of the steep slope areas on the eastern portions of the front lots. Brief of Appellant at 40-42. This entire argument rests on a presumption that there will be a lack of access to the steep slope areas. However, as noted by Mr. Mills, the granting of pedestrian easements within the subdivision for maintenance of the steep slope would address Cedar Park's concerns, and such a pedestrian easement would not be deducted from the calculation of the number of lots; under SMC 25.09.240 E.1, only *vehicular* access easements are deducted. Day 2 RP 86:25 - 87:1-15. And as also observed by Mr. Mills, removal of vegetation from steep slope areas is strictly regulated both by Code and by the conditions imposed in the DPD decision, so only minimal maintenance of those areas would be allowed in any event. Day 2 RP 86:13-20; CP 424 (DPD Decision).

Cedar Park cites the testimony of Mr. Kellor to the effect that twice a year he does "substantial maintenance" to the steep slope areas on his lot. Brief of Appellant at 42. It is not at all clear whether the

vegetation removal done by Mr. Kellor complies with the limitations of the City's Code. The Examiner, who has extensive familiarity with City Codes, did not ignore Mr. Kellor's testimony as alleged by Cedar Park (Brief of Appellant at 42); she simply noted that City Code provides for only "very limited" maintenance of steep slope areas." CP 119, Examiner's Decision, Conclusion No. 9. The Examiner noted that maintenance needs could be addressed by pedestrian easements or by direct access from the Burke Gilman trail at the bottom of the lots. *Id.* Cedar Park does not meet its burden of proof to show these mechanisms to be inadequate for the limited slope maintenance that is allowed. Therefore, Cedar Park has not shown any harm from the lot configuration, and thus, has not shown any error in interpretation or application of the law.

**4. *The Request for This Court to Overrule or Modify Washington Law Should Be Rejected.***

Cedar Park makes the extraordinary request that this Court "modify" Washington case law on how the "public interest" factor is to be applied. Brief of Appellant at 44-47.<sup>8</sup> Cedar Park's position seems to be that even if a subdivision meets all specific code requirements, and

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<sup>8</sup> Cedar Park made identical arguments to the Hearing Examiner. "The Appellant made it clear from the outset of this appeal that its primary concern was with the irregularly shaped lots allowed by this short subdivision, and stated its intent to challenge existing case law on the use of the public interest criterion alone to deny a subdivision or short subdivision." CP 119, Examiner's Decision, Conclusion No. 10.

whether or not an actual harm can be shown from a proposed lot configuration, the general “public interest” factor can be used to deny a subdivision. Washington land use experts have considered this issue and rejected such an argument.

Washington court decisions on the role of the “public use and interest” criterion in subdivision review (also known as “plat” review) have been analyzed by Professor William Stoebuck of the University of Washington Law School and John Weaver. Their conclusion is as follows:

The legislative body may not approve the preliminary plat unless it finds “that the public and interest will be served.” However, under Washington judicial decisions, there is grave doubt whether a plat may be disapproved on the broad “public interest” ground alone if the applicant meets all formal requirements for approval.

17 William Stoebuck & John Weaver, *Washington Practice Series, Real Estate: Property Law* § 5.3, at 282 (2d ed. 2005).

The key cases relied on for that conclusion are *Norco Construction, Inc. 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).

In *Norco*, the King County Council failed to act on a subdivision application within the statutorily required 90-day period, even though the

application met all zoning requirements in effect during the 90 days. The Council was also considering a new comprehensive plan for the area that would have enlarged lot sizes, and the County argued that the policy direction in the plan under consideration could be taken into account as part of the “public use and interest.” The Supreme Court flatly rejected this argument and held that conformance with adopted land use regulations limits the local government discretion to deny a subdivision on general grounds. The Court noted that reliance on the general criteria of “public use and interest” and “public health, safety and general welfare” would be improper:

But to interpret these terms as conferring unlimited discretion upon the Council would make the other sections of the platting statute meaningless and place plat applicants in the untenable position of having no basis for determining how they could comply with the law.

*Norco*, 97 Wn.2d at 688.

This Court faced similar issues in *Carlson*. *Carlson* is directly on point in the instant case, as it also related to lot configuration issues. In *Carlson*, the Town of Beaux Arts Village denied a short subdivision application that would have resulted in the division of one single-family lot into two lots, creating an “irregularly-angled, flag-shaped lot which would surround the new lot for the existing residence.” 41 Wn. App. at

407.<sup>9</sup> The Town's basis for denial was that the proposed subdivision was "not in the best interests" of the Town. *Id.* On appeal, this Court noted that the Carlsons had complied with all of the applicable subdivision requirements, and that the Town had no ordinance prohibiting irregularly shaped lots. Therefore, denial of the application was overturned. Stoebuck and Weaver describe the "rule" from *Carlson* as follows: "The court of appeals overturned the decision, announcing the rule that an application may not be rejected on the general ground if the applicant meets all stated local requirements." Stoebuck & Weaver, *supra*, at 287.

The Washington Legislature has indeed enacted additional land use laws since the time of *Norco* and *Carlson*, most notably the Growth Management Act ("GMA"). However, the GMA itself requires continuing review and evaluation of land use policies and regulations, and most importantly, that plans, policies and regulations be consistent with each other and that development regulations implement the comprehensive plan. RCW 36.70A.040 and .130. Therefore, through the GMA, there is consistency between plans, policies and regulations, and it is the regulations themselves which govern subdivision approval. *See also* RCW 36.70B.030 which states that if local development regulations

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<sup>9</sup> Cedar Park claims that the lots in *Carlson* were "familiar flag or panhandle" configurations. Brief of Appellant at 46. However, nothing in the *Carlson* opinion suggests that the Court's analysis depended on the lots in the case being "flag lots." Indeed, the Court noted that the lots were also "irregularly-angled." *Carlson* at 407.

determine allowable density in urban growth areas, then that density is not subject to challenge during local project review. (“Subdivisions” are specifically covered by RCW ch. 36.70B pursuant to RCW 36.70B.020(4)).

Rather than being “hamstrung” or forced to approve subdivisions that are not in the public use and interest as claimed by Cedar Park (Brief of Appellant at 45), the City could decide to change its regulations to prevent what it found objectionable. As noted previously, the issue of irregular lot shape has been around for a very long time. Had the City believed it necessary to change its regulations to prohibit certain lot configurations, it could have done so. It did not, and in the absence of a specific regulation prohibiting the proposed lot configuration here, and given that all other criteria are met, this subdivision cannot be denied, as held in *Carlson*.

As for the two other bases cited by Cedar Park for limiting or distinguishing *Norco* and *Carlson*, neither has merit for the reasons discussed previously. In sum, the proposed lots have suitable house pads and access meeting all City requirements, and allowing four new houses that comply with all City requirements is not an absurd result. Moreover, maintenance of steep slope areas is possible by easements or access to

steep slope areas can be obtained from below the slope via the Burke Gilman Trail, so there is no harm from the proposed lot configuration.

For over 20 years, the above cases have been seminal to local government review of subdivisions, and their vitality continues. As supported by expert commentary, these cases establish the following bedrock principles:

- Reliance on the general “public interest” criterion to deny a subdivision is highly suspect where the subdivision meets all specific standards in local codes.
- If a local code includes no prohibition on irregular lot shape, then irregular lot shape may not be a basis for denial under the general “public interest” criterion.

Finally, Washington court decisions also establish that community displeasure with a proposal can be taken into consideration but is an insufficient basis for denial. In *Kenart & Associates v. Skagit County*, 37 Wn. App. 295, 680 P.2d 439 (1984), Skagit County denied an application for a planned unit development and subdivision based on findings that the public interest would not be served by the approval. However, the Court expressed concern that the denial was as a result of “community displeasure” rather than factual findings. *Id.* at 303. The denial was overturned and the plat remanded for further consideration by

the County. *Id. Accord Marantha Mining, Inc. v. Pierce County*, 59 Wn. App. 795, 805, 801 P.2d 985 (1990) (County Council’s denial of application for unclassified use permit was overturned, in part because “the council based its decision on community displeasure and not on reasons backed by policies and standards as the law requires.”) Although Cedar Park residents sent many e-mails and letters to the City expressing opposition to the Widgeon subdivision, that is not sufficient evidence to justify subdivision denial, as held in *Kenart* and *Marantha Mining*.

***5. Cedar Park’s Proposal for a New Public Use and Interest Test Is Not Meaningful.***

At the conclusion of the hearing, the Examiner asked the parties to address in closing argument what circumstances, if any, could justify use of the generalized “public interests” factor to deny a subdivision. Thoughtful consideration was given to that issue. Widgeon noted that if a city determined that a proposal had unacceptable environmental impacts under SEPA, that could be a basis to conclude that a subdivision was not in the “public interests.” CP 170-71. However, Widgeon also noted that in the instant case, Cedar Park abandoned its SEPA appeal, and the record simply does not provide any factual basis to conclude that the subdivision should be denied. *Id.*

Cedar Park provided to the Hearing Examiner its own vague “proposal” for how the “public interests” factor could be construed (*see* CP 158-59), and in identical wording, makes the same proposal to this Court. Brief of Appellant at 49. For example, Cedar Park suggests that a subdivision can be evaluated based on whether there is “support” for it in the Code, whether the lot configuration is “attempting to achieve something” not expressly allowed, or whether there are “substantial concerns raised about public interest issues” that the City did not fully respond to. These are vague references that provide no predictability to anyone. Even if these suggestions had merit, the record in this case does not support a conclusion that the Widgeon subdivision is contrary to the “public interests.”

If Cedar Park wants to prohibit certain lot shapes or configurations in future subdivisions, then it can pursue a change to the Seattle Code. However, in the absence of a current Code requirement that prohibits the lot configuration proposed here, and in the absence of any showing of harm from Widgeon’s subdivision, Cedar Park’s desire to have a different law or different interpretation of “public interests” is not a basis for denial of the Widgeon subdivision. This is the lesson from our Supreme Court as established in *Norco*.

**E. WIDGEON SHOULD BE AWARDED ITS ATTORNEYS' FEES AND COSTS ON APPEAL.**

RCW 4.84.370 provides that the appellate court “shall award” attorneys’ fees on appeal to the prevailing party in a land use case if that party:

- prevailed before the local government that made the land use decision, and
- prevailed in all prior judicial proceedings.

This Court has held that the award of fees is “mandatory.” *Moss v. City of Bellingham*, 109 Wn. App. 6, 30, 31 P.3d 703 (2001).

In this case, Widgeon prevailed in the appeal brought by Cedar Park before the Seattle Hearing Examiner and prevailed in Superior Court. If Widgeon is the prevailing or substantially prevailing party on appeal, it will have satisfied the statutory conditions that entitle it to an award of attorneys’ fees.

Pursuant to RCW 4.84.370, Widgeon requests the Court to award it the attorneys’ fees and costs incurred on appeal.

**V. CONCLUSION**

All of Cedar Park’s issues were thoroughly considered by the Seattle Hearing Examiner. The Examiner issued a reasoned decision approving the short subdivision. That decision involves no errors in

interpretation or application of the law and is supported by substantial evidence. The appeal should be denied and the Examiner's decision should be affirmed by this Court.

RESPECTFULLY SUBMITTED this 17<sup>th</sup> day of August, 2009.

HILLIS CLARK MARTIN & PETERSON, P.S.

By Melody B. McCutcheon  
Melody B. McCutcheon, WSBA #18112  
Attorneys for Respondent  
Widgeon, LLC

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# APPENDIX

sidewalks and other planning features that assure safe walking conditions for students who only walk to and from school; and (b) whether the public interest will be served by the subdivision and dedication.

(2) A proposed subdivision and dedication shall not be approved unless the city, town, or county legislative body makes written findings that: (a) Appropriate provisions are made for the public health, safety, and general welfare and for such open spaces, drainage ways, streets or roads, alleys, other public ways, transit stops, potable water supplies, sanitary wastes, parks and recreation, playgrounds, schools and schoolgrounds and all other relevant facts, including sidewalks and other planning features that assure safe walking conditions for students who only walk to and from school; and (b) the public use and interest will be served by the platting of such subdivision and dedication. If it finds that the proposed subdivision and dedication make such appropriate provisions and that the public use and interest will be served, then the legislative body shall approve the proposed subdivision and dedication. Dedication of land to any public body, provision of public improvements to serve the subdivision, and/or impact fees imposed under RCW 82.02.050 through 82.02.090 may be required as a condition of subdivision approval. Dedications shall be clearly shown on the final plat. No dedication, provision of public improvements, or impact fees imposed under RCW 82.02.050 through 82.02.090 shall be allowed that constitutes an unconstitutional taking of private property. The legislative body shall not as a condition to the approval of any subdivision require a release from damages to be procured from other property owners.

(3) If the preliminary plat includes a dedication of a public park with an area of less than two acres and the donor has designated that the park be named in honor of a deceased individual of good character, the city, town, or county legislative body must adopt the designated name. [1995 c 32 § 3; 1990 1st ex.s. c 17 § 52; 1989 c 330 § 3; 1974 ex.s. c 134 § 5; 1969 ex.s. c 271 § 11.]

**Severability—Part, section headings not law—1990 1st ex.s. c 17:** See RCW 36.70A.900 and 36.70A.901.

**58.17.110 Approval or disapproval of subdivision and dedication—Factors to be considered—Conditions for approval—Finding—Release from damages.** (1) The city, town, or county legislative body shall inquire into the public use and interest proposed to be served by the establishment of the subdivision and dedication. It shall determine: (a) If appropriate provisions are made for, but not limited to, the public health, safety, and general welfare, for open spaces, drainage ways, streets or roads, alleys, other public ways, transit stops, potable water supplies, sanitary wastes, parks and recreation, playgrounds, schools and schoolgrounds, and shall consider all other relevant facts, including

**23.24.040 Criteria for approval.**

A. The Director shall, after conferring with appropriate officials, use the following criteria to determine whether to grant, condition or deny a short plat:

1. Conformance to the applicable Land Use Code provisions, as modified by this chapter;

2. Adequacy of access for pedestrians, vehicles, utilities and fire protection as provided in Section 23.53.005, Access to lots, and Section 23.53.006, Pedestrian access and circulation;

3. Adequacy of drainage, water supply and sanitary sewage disposal;

4. Whether the public use and interests are served by permitting the proposed division of land;

5. Conformance to the applicable provisions of Section 25.09.240, Short subdivisions and subdivisions, in environmentally critical areas;

6. Whether the proposed division of land is designed to maximize the retention of existing trees;

7. Conformance to the provisions of Section 23.24.045, Unit lot subdivisions, when the short subdivision is for the purpose of creating separate lots of record for the construction and/or transfer of title of townhouses, cottage housing, clustered housing, or single-family housing; and

8. Conformance to the provisions of Section 23.24.046, Multiple single-family dwelling units on a single-family lot, when the short subdivision is for the purpose of creating two (2) or more lots from one (1) lot with more than one (1) existing single-family dwelling unit.

**23.52.006 Effect of not meeting transportation concurrency LOS standards.**

If a proposed use or development does not meet the LOS standards at one (1) or more applicable screenline(s), the proposed use or development may be approved if the Director concludes that an improvement(s) will be completed and/or a strategy(ies) will be implemented that will result in the proposed use or development meeting the LOS standard(s) at all applicable screenline(s) at the time of development, or that a financial commitment is in place to complete the improvement(s) and/or implement the strategy(ies) within six (6) years. Eligible improvements or strategies may be funded by the City, by other government agencies, by the applicant, or by another person or entity. (Ord. 117383 § 9 (part), 1994.)

**Chapter 23.53  
REQUIREMENTS FOR STREETS, ALLEYS, AND  
EASEMENTS**

**Sections:**

- 23.53.004 Requirements and design criteria.**
- 23.53.005 Access to lots.**
- 23.53.006 Pedestrian access and circulation.**
- 23.53.010 Improvement requirements for new streets in all zones.**
- 23.53.015 Improvement requirements for existing streets in residential and commercial zones.**
- 23.53.020 Improvement requirements for existing streets in industrial zones.**
- 23.53.025 Access easement standards.**
- 23.53.030 Alley improvements in all zones.**
- 23.53.035 Structural building overhangs.**

**23.53.004 Requirements and design criteria.**

Where, because of specific site conditions, the requirements of this chapter do not protect public health, safety and welfare, the Director of Transportation and the Director of Planning and Development together may impose different or additional right-of-way improvement requirements consistent with the Right-of-Way Improvements Manual. (Ord. 122205, § 6, 2006.)

**23.53.005 Access to lots.**

**A. Street or Private Easement Abutment Required.**

1. For residential uses, at least ten (10) feet of a lot line shall abut on a street or on a private permanent vehicle access easement meeting the standards of Section 23.53.025; or the provisions of Section 23.53.025 F for pedestrian access easements shall be met.

2. For nonresidential uses which do not provide any parking spaces, at least five (5) feet of a lot line shall abut on a street or on a private permanent vehicle access easement meeting the standards of Section 23.53.025.

3. For nonresidential uses and live-work units that provide parking spaces, an amount of lot line sufficient to provide the required driveway width shall abut on a street or on a private permanent vehicle access easement to a street meeting the standards of Section 23.53.025.

**B. New Easements.** When a new private easement is proposed for vehicular access to a lot, the Director may instead require access by a street when one (1) or more of the following conditions exist:

1. Where access by easement would compromise the goals of the Land Use Code to provide for adequate light, air and usable open space between structures;

2. If the improvement of a dedicated street is necessary or desirable to facilitate adequate water supply for domestic water purposes or for fire protection, or to facilitate adequate storm drainage;

3. If improvement of a dedicated street is necessary or desirable in order to provide on-street parking for overflow conditions;

4. Where it is demonstrated that potential safety hazards would result from multiple access points between existing and future developments onto a roadway without curbs and with limited sight lines;

5. If the dedication and improvement of a street would provide better and/or more identifiable access for the public or for emergency vehicles; or

6. Where a potential exists for extending the street system.

(Ord. 121196 § 19, 2003; Ord. 115568 § 4, 1991; Ord. 115326 § 26(part), 1990.)

3. Curbcut width from the easement to the street shall be the minimum necessary for safety and access.

B. Vehicle Access Easements Serving at Least Three (3) but Fewer Than Five (5) Single-Family Dwelling Units.

1. Easement width shall be a minimum of twenty (20) feet;

2. The easement shall provide a hard-surfaced roadway at least twenty (20) feet wide;

3. No maximum easement length shall be set. If the easement is over six hundred (600) feet long, a fire hydrant may be required by the Director;

4. A turnaround shall be provided unless the easement extends from street to street;

5. Curbcut width from the easement to the street shall be the minimum necessary for safety and access.

C. Vehicle Access Easements Serving at Least Five (5) but Fewer Than Ten (10) Single-Family Dwelling Units, or at Least Three (3) but Fewer than Ten (10) Multifamily Units.

1. Easement width, surfaced width, length, turn around and curbcut width shall be as required in subsection B;

2. No single-family structure shall be closer than five (5) feet to the easement.

D. Vehicle Access Easements Serving Ten (10) or more Residential Units.

1. Easement width shall be a minimum of thirty-two (32) feet;

2. The easement shall provide a surfaced roadway at least twenty-four (24) feet wide;

3. No maximum length shall be set. If the easement is over six hundred (600) feet long, a fire hydrant may be required by the Director;

4. A turnaround shall be provided unless the easement extends from street to street;

5. Curbcut width from the easement to the street shall be the minimum necessary for safety access;

6. No single-family structure shall be located closer than ten (10) feet to an easement;

7. One (1) pedestrian walkway shall be provided, extending the length of the easement.

E. Vehicle Access Easements Serving Nonresidential or Live-work Uses.

1. For nonresidential or live-work uses providing fewer than ten (10) parking spaces, the easement shall meet the requirements of subsection C.

2. For nonresidential or live-work uses providing ten (10) or more parking spaces, the easement shall meet the requirements of subsection D.

F. Pedestrian Access Easements. Where a lot proposed for a residential use abuts an alley but does not abut a street and the provisions of the zone require access by vehicles from the alley, or where the alley access is an exercised option, an easement providing pedestrian access to a street from the lot shall be provided meeting the following standards:

1. Easement width shall be a minimum of five (5) feet;

### **23.53.025 Access easement standards.**

When access by easement has been approved by the Director, the easement shall meet the following standards. Surfacing of easements, pedestrian walkways required within easements, and turnaround dimensions shall meet the requirements of the Right-of-Way Improvements Manual.

A. Vehicle Access Easements Serving One (1) or Two (2) Single-Family Dwelling Units or One (1) Duplex.

1. Easement width shall be a minimum of ten (10) feet, or twelve (12) feet if required by the Fire Chief due to distance of the structure from the easement.

2. No maximum easement length shall be set. If easement length is more than one hundred fifty (150) feet, a vehicle turnaround shall be provided.

2. Easements serving one (1) or two (2) dwelling units shall provide a paved pedestrian walkway at least three (3) feet wide;

3. Easements serving three (3) or more dwelling units shall provide a paved pedestrian walkway at least five (5) feet wide;

4. Easements over one hundred (100) feet in length shall provide lighting at intervals not to exceed fifty (50) feet. Lighting placement shall not exceed fifteen (15) feet in height;

5. Pedestrian access easements shall not exceed two hundred (200) feet in length.

G. Vertical Clearance Above Easements. When an easement serves fewer than ten (10) residential units and crosses a residentially zoned lot, portions of structures may be built over the easement provided that a minimum vertical clearance of sixteen and one-half (16 ½) feet is maintained above the surface of the easement roadway and a minimum turning path radius in accordance with Section 23.54.030 C is maintained. (See Exhibit 23.53.025 A.)

H. Exceptions From Access Easement Standards. The Director, in consultation with the Fire Chief, may modify the requirements for easement width and surfacing for properties located in environmentally critical areas or their buffers when it is determined that:

1. Such modification(s) would reduce adverse effects to identified environmentally critical areas or buffers; and

2. Adequate access and provisions for fire protection can be provided for structures served by the easement.

(Ord. 122205, § 10, 2006; Ord. 122050 § 14, 2006; Ord. 121196 § 21, 2003; Ord. 118414 § 38, 1996; Ord. 117263 § 49, 1994; Ord. 115568 § 8, 1991; Ord. 115326 § 26(part), 1990.)

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

FRIENDS OF CEDAR PARK  
NEIGHBORHOOD,

Appellant,

v.

CITY OF SEATTLE and  
WIDGEON, LLC,

Respondents.

Case No. 6338-4-I

CERTIFICATE OF SERVICE

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STATE OF WASHINGTON  
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I, Vicki J. Hadley, hereby certify as follows:

I am employed at Hillis Clark Martin & Peterson. I am over the age of eighteen (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 RESPONSE BRIEF OF RESPONDENT WIDGEON, LLC and this CERTIFICATE OF SERVICE upon the following counsel of record via hand delivery by legal messenger:

*Certificate of Service – Page 1*

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PETERSON, P.S.

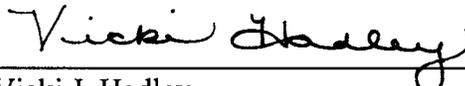
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I certify under penalty of perjury under the laws of the State of  
Washington that the foregoing is true and correct.

DATED: August 17, 2009.

  
\_\_\_\_\_  
Vicki J. Hadley