

63524-7

63524-7

No. 63524-7-I

(Snohomish County Superior Court No. 08-2-08223-5)

WASHINGTON STATE COURT OF APPEALS
DIVISION ONE

DONNA and FRED BRESKE, wife and husband and the marital
community composed thereof,

Petitioners/Appellants,

vs.

CITY OF EDMONDS, a Washington municipal corporation,

Respondent.

BRIEF OF APPELLANTS

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I. INTRODUCTION

This case originally involved whether Appellants Donna and Fred Breske (the “Breskes”), had the right to construct a single-family residence on their legal building lot located within the City of Edmonds (“City’), without having to simultaneously provide stormwater detention for all of the impervious surfaces on the remaining 19 lots contained in their decades-old, surrounding subdivision. Specifically, the Hearing Examiner noted the sole, narrow issue presented for her review as follows:

Counsel for both parties verbally agreed that the issue before the Examiner was limited to the determination of whether the City properly interpreted and applied [City stormwater regulations] to a building permit application submitted by Appellants for the proposed [residential] development of [their] Lot.

CP 918; *see also* CP 869. The Breskes received an adverse decision from the Hearing Examiner. That adverse decision was subsequently appealed to Snohomish County Superior Court pursuant to the Land Use Petition Act (“LUPA”), chapter 36.70C RCW. Aside from affirming the Hearing Examiner, however, the trial court unfortunately entered a much more expansive Final Order that went well beyond the narrow remedy provision provided for by LUPA.

The Breskes are seeking closure from what has been stressful and

taxing litigation. *For this reason, although they still disagree with the Hearing Examiner's decision, in this appeal the Breskes no longer contest that decision.* Instead, the Breskes would simply like to be able to ensure that at some time in the presumably distant future, either themselves, their heirs, or their successors in interest may be able to construct a single-family residence that is compliant with the City Code.

The Breskes remain concerned, however, that this very modest desire could be frustrated by the future application of the principles of collateral estoppel, issue preclusion, or other similar doctrines to the Final Order issued by the Superior Court — an order that clearly went beyond the narrow remedy provision of LUPA and made declarations of rights that could have a lasting adverse impact on the Breskes. Accordingly, as detailed further herein, the Breskes respectfully request that the Court vacate the Final Order issued by the trial court.

II.
ASSIGNMENTS OF ERROR AND ISSUES RELATED
TO ASSIGNMENTS OF ERROR

1. The Breskes assign error to the Final Order entered by the trial court on April 23, 2009, including paragraphs 1, 2, 3, 4, 5, 8, 9, 10, and 12. A copy of the Final Order is attached hereto as Appendix A.

The issues related to this assignment of error are as follows:

A. Whether the trial court erred in making declarations of rights rather than confining its ruling to an affirmance of the Hearing Examiner decision pursuant to RCW 36.70C.140?

B. Whether the trial court erred in construing the plat dedication language?

C. Whether the trial court erred in declaring that no taking occurred based on the plat dedication language and other information?

III. STATEMENT OF THE CASE

The following facts are limited to those that are necessary to provide the context for the limited issues presented here on appeal:

A. The Property

On July 24, 1961, the Plat of Preview Homes Westgate Village (“Westgate Village”) was recorded with the Snohomish County auditor by its developer, Bjorn Thue sen. CP 213 (plat). Westgate Village consists of 20 residential lots, ranging from approximately 8,000 to 9,500 square feet each. *Id.* Westgate Village was annexed into the City of Edmonds (“City”) that same year. CP 619-21 (annexing ordinance). This appeal concerns Lot 1 owned by the Breskes.

The dedication on the face of the plat for Westgate Village addresses drainage, among other issues, and states in its entirety as

follows:

KNOW ALL MEN BY THESE PRESENTS, that we, the undersigned, owners in fee simple, do hereby declare this plat and dedicate to the use of the public forever all roads and ways shown with the right to make necessary slopes for cuts or fills and install necessary drainage upon the tracts of land shown on this plat, in the reasonable original grading of all roads shown hereon. The County, or its successors, shall have the right to continue to drain said roads and ways over and across any lot or lots where water might take a natural course after said roads and ways are graded in. No land drainage shall be diverted to public roads rights of way, nor shall it be blocked from draining along its normal course. Any enclosing of drainage waters in culverts or drains, or rerouting across lots shall be done by and at the expense of the land owner.

CP 213 (plat).

Notably, nothing on the plat, including the above dedication singled out Lot 1 for any purpose distinct from the other lots, including drainage. *Id.* For example, Lot 1 was not labeled as a tract or designated for stormwater detention to serve the entire 20-lot subdivision. *Id.*

In 1962, the year following recording of the plat, the City insisted for the first time that Mr. Thuesen use Lot 1 for stormwater routing. CP 246-47. Although not required by any plat condition or other legal restriction, it appears Mr. Thuesen at least passively acceded to the City's requests as the subdivision's infrastructure was ultimately completed and homes were built with the stormwater draining to Lot 1 in an informal

fashion.

In 1975, the City did a field investigation and entered a note into its file and on the “as built plans” for Westgate Village that Lot 1 was operating as drainage retention for the subdivision. CP 228, 230. The City’s file note provided “it is recommended that no building permit be issued on this lot *until storm sewers are installed in the area to remove the drainage.*” CP 228 (emphasis added).

Later in 1975, the City offered to Mr. Thuesen a restrictive covenant that recognized Lot 1 as a legal building lot but proposed that Mr. Thuesen agree that no construction or grading would be allowed on Lot 1 until storm sewers were built to drain water away from Lot 1. CP 223-24. The title restriction would have: (1) effectively altered the language of the plat, which did not single out Lot 1 for special drainage purposes; and (2) expanded the dedication to apply to stormwater for the lots in the subdivision, not just the roads. Tellingly, Mr. Thuesen did not agree to record such a title restriction. On a subsequent occasion, the City again offered a similar deed. Again, Mr. Thuesen did not agree to the City’s attempts to legally restrict Lot 1. CP 220-21.

The only material that exists from Mr. Thuesen is a letter from 1986, in which he recognized that although Lot 1 was being used at that

time for storm drainage for the roads of the entire subdivision, he was anxious for the City to install storm sewers so that he could proceed with building on Lot 1. CP 218.

There is no correspondence indicating that Mr. Thuesen did anything but agree that Westgate Village's stormwater could temporarily be detained on Lot 1 until storm sewers, what we now would call stormwater conveyance systems, were built to serve the area. The title report for Lot 1 reflects the foregoing. CP 131 (indicating that the plat dedication language constitutes the only encumbrance on Lot 1).

B. The Breskes' Due Diligence

On November 2, 2006, the Breskes entered into a purchase and sale agreement for Lot 1. CP 822. The Breskes immediately began their due diligence before closing on the purchase, included performing site reconnaissance, analyzing drainage system maps, and meeting with City engineering staff to discuss construction of a single-family residence. *Id.*

Donna Breske is a licensed Professional Engineer practicing in the City of Edmonds with experience in small-site development, such as building permits for single family residences. CP 745.

During their investigations, the Breskes discovered that sometime in approximately 2001 or 2002, the City connected Westgate Village to

the City's stormwater conveyance system by constructing public facilities that they believed were adequately sized to convey all runoff from Westgate Village as a whole, including Lot 1. CP 822; 826; 610. The Breskes closed on their purchase of Lot 1, for a purchase price of \$220,000, reflecting Lot 1's use for a single-family residence. CP 822, 131.

The Breskes subsequently filed a building permit application for a single-family home on Lot 1, which included a drainage plan for a drainage detention system to serve the new impervious surface to be created by their proposed development of Lot 1. CP 249-52; 455-56. The Breskes believed that this complied with all applicable City stormwater regulations.

After a prolonged series of exchanges with City Staff, it became clear that the City regarded Lot 1 as having an "historic and natural role" in drainage, CP 254, and that the City wanted to convert Lot 1 into a de facto permanent stormwater detention facility to serve the Westgate Village subdivision. CP 155. City Staff and the City Attorney acknowledged, however, that there was no permanent restriction on Westgate Village or on Lot 1's title requiring Lot 1 to serve as the drainage repository for Westgate Village. CP 303. Despite the Breskes'

best efforts to resolve this issue with the City, the permit application eventually expired. CP 420-21; 429. Accordingly, the Breskes were constrained to submit a second single-family building permit application. CP 447-74.

The second application also included a storm drainage plan proposing on-site detention only for less than 4,000 square feet of new impervious surface that the Breskes contended was consistent with the requirements and design in the City's stormwater regulations, specifically Policy #E72. CP 455-56.

City staff again simplistically concluded the drainage plan was inadequate because it did not provide for detention of all the impervious surfaces in the Westgate Village Plat. CP 502. Before a meeting could even be held to discuss the matter, the Public Works Director terminated all discussion, and informed the Breskes to file an appeal to the City's Hearing Examiner. CP 532-35.

C. City Hearing Examiner Review

The Breskes subsequently appealed to the Hearing Examiner, and a public hearing was held. *See* CP 1030-1218 (July 17, 2008 Transcript); CP 932-1029 (Aug. 5, 2008 Transcript). In written and oral testimony before the Hearing Examiner, the City advanced multiple arguments to

justify its position. Ultimately, the Hearing Examiner issued her Findings, Conclusions and Decision on August 26, 2008, denying Breskes' request for approval of the building permit and upholding the City's position. CP 865-82. Critically, the Examiner limited her Decision to the issue of how the City stormwater regulations should be interpreted within the context of the building permit. CP 879; 918. A subsequent order on Reconsideration was issued that modified the original decision but did not change the final conclusions. CP 916-24.

D. LUPA Decision

The adverse Hearing Examiner decision was subsequently appealed to Snohomish County Superior Court pursuant to the Land Use Petition Act ("LUPA"), chapter 36.70C RCW. CP 1219-61.

Aside from affirming the Hearing Examiner, however, the trial court unfortunately entered a much more expansive Final Order that went well beyond the limited remedy provision in LUPA.

For example, although typical orders on LUPA simply either affirm or deny the decision issued by the administrative body below, the trial court entered a detailed four-page Final Order that appears to make numerous declarations of the rights of the parties.

At this point, the Breskes sought closure from what has been

stressful and taxing litigation. Accordingly, they made the difficult decision that, although they still disagreed with the Hearing Examiner's decision, they could accept it because, combined with the City's representations, a single-family residence could still potentially be built on Lot 1 under certain conditions. However, because the Final Order by the trial court contains problematic declarations of rights, this appeal was pursued. CP 4-8 (Notice of Appeal).

IV. ARGUMENT

A. Standard of Review

Here on appeal, “[w]hen reviewing a superior court’s decision on a land use petition, the appellate court stands in the shoes of the superior court.” *Citizens to Preserve Pioneer Park LLC v. City of Mercer Island*, 106 Wn. App. 461, 470 (2001) (citing *Biermann v. City of Spokane*, 90 Wn. App. 816, 821 (1998)). The appellate court applies the LUPA standards directly to the administrative record that was before the Hearing Examiner. *Griffin v. Thurston County*, 165 Wn.2d 50, 54-55 (2008) (citing *Isla Verde Int’l Holdings, Inc. v. City of Camas*, 146 Wn.2d 740, 751 (2002)). The appellate court reviews the findings of the hearing examiner and does not give deference to the superior court’s findings, if any. *Griffin*, 165 Wn.2d at 55. Here, however, the Breskes no longer

challenge the Hearing Examiner's decision, which is typically the subject of this Court's review in a LUPA case.

Instead, the Breskes must, as a matter of fundamental fairness and due process, be entitled to challenge the Final Order of the superior court because the declarations therein could potentially give rise to issues regarding collateral estoppel, issue preclusion, and other similar doctrines. In this case, it would appear that typical standards of review would apply, namely that the trial court committed an error of law.

B. The Superior Court's Final Order Overstepped the Narrow Remedy Provision Under LUPA and Went Beyond the Very Arguments Presented By the Parties

The trial court erred by overstepping the narrow confines of review that may be conducted under LUPA and made potentially harmful declarations of rights not contemplated or requested by any party.

The standards for granting relief under LUPA are set forth in RCW 36.70C.130(1), which reads in relevant part as follows:

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.

RCW 36.70C.130(1) (emphasis added).

RCW 36.70C.140 limits the manner in which the trial court issues an order under LUPA: “[t]he Court may **affirm or reverse** the land use decision under review or remand it for modification or further proceedings.” Inasmuch as the trial court is directed by statute to merely affirm or reverse the trial court, it is not surprising that findings and conclusions, for example, are not required to be entered and are in fact considered surplusage. *Griffin*, 165 Wn.2d at 55; *see also Spokane County Fire Prot. Dist. No. 8 v. Spokane County Boundary Rev. Bd.*, 27 Wn. App.

491, 493 (1980) (“findings of fact and conclusions of law are not ‘required’ when a trial court reviews an administrative record and does not take evidence.”).

This case presents a fitting example of why such surplusage is problematic. If the Final Order on the LUPA decision by the superior court had been limited to merely affirming the Hearing Examiner decision, the applicability of the Order would be limited to the specific context of the permit application under review.

Similarly, if the trial court had merely provided reasoning, then the situation might be different. But here, the Final Order proclaims the statements as an order that is declared and decreed. Recall that the sole issue for review, as explained by the Hearing Examiner related to the interpretation of the City Code *within the context of the Breskes’ permit*:

[o]n both hearing dates, Counsel for both parties verbally agreed that **the issue before the Examiner was limited to the determination of whether the City property interpreted or applied [the City Stormwater regulations] to the building permit application submitted by Appellants for the proposed development of Lot 1.**

CP 918 (emphasis added). Without the trial court’s surplusage, concerns regarding the applicability of collateral estoppel, claim preclusion, and other similar doctrines to future proceedings would be significantly, if not

entirely, diminished as the decision is permit specific.

In addition to including surplusage, the Final Order contains problematic declarations that not only appear incorrect, but also go beyond the relief requested by either party. For example, the Final Order erroneously interpreted the language of the plat to essentially grant either ownership of Lot 1 to the County (*i.e.* the City's predecessors in interest) or to impose a *permanent* servitude on the property for stormwater drainage. In particular, the Final Order commenced this analysis by quoting the following plat language:

KNOW ALL MEN BY THESE PRESENTS, that we, the undersigned, owners in fee simple, do hereby declare this plat and dedicate to the use of the public forever all roads and ways shown with the right to make necessary slopes for cuts or fills and install necessary drainage upon the tracts of land shown on this plat, in the reasonable original grading of all roads shown hereon. The County, or its successors, shall have the right to continue to drain said roads and ways over and across any lot or lots where water might take a natural course after said roads and ways are graded in. No land drainage shall be diverted to public roads rights of way, nor shall it be blocked from draining along its normal course. Any enclosing of drainage waters in culverts or drains, or rerouting across lots shall be done by and at the expense of the land owner.

CP 6. Based upon this plat language, the Final Order made the following erroneous statement:

This language dedicates and gives the county a

right to have this property for stormwater drainage.

*Id.*¹ This conclusion permeates the Final Order, resulting I further conclusions and declarations, including paragraphs 2, 3, 4, 5, 8, 9, 10, and 12.

Read literally, and in context with the judge's oral ruling, this finding threatens to seriously interfere with any future building plans for Lot 1, inasmuch as it appears to either grant ownership of Lot 1 to the County or to impose a *permanent* servitude on the property for stormwater drainage. Not even the City urged for such an extreme result. For example, the City made it very clear that the City did not have ownership of Lot 1, that Lot 1 could potentially be developed in the future, and that the plat language itself was not a permanent barrier.

They've [*i.e.* the Breskes] always been advised [by the City] that, A, **the property is potentially developable**, but B, the cost of effectuating that development would be relatively high given the historic use and current use of the property as a retention and infiltration facility for the surrounding plat.

VRP 52.

¹ See also VRP 64 (Oral Ruling: "This is a case where there is language in the plat which dedicates and gives the county a right to have this property.").

The City has always - - never contended that there is a formal deed restriction, just like it's never contended that lot 1 is categorically unbuildable. There is no requirement under the state subdivision statute that would have required a formal dedication to occur as a means of addressing stormwater from the plat.

VRP 54.

The City has never told the Breskes that development on the site is prohibited. Instead, the city's consistent position has been that the property can be developed, but any development must meet the city's stormwater standards.

VRP 55.

The Breskes agree with the City that Lot 1 is not burdened by a particular deed restriction, and that the property can be developed. For this reason, it appears that the aforementioned declaration in the Final Order exceeds anything argued by the parties. Should the Breskes, their heirs, or successors in interest attempt to develop this parcel presumably many years from now, this finding should not be an obstacle to doing so inasmuch as it goes beyond the positions advocated by the parties.

Moreover, a review of the specific dedication language on the plat leads to the same conclusion. The basic rules of contract interpretation apply when construing a plat. The Court interprets a plat as any other writing, by construing it as a whole and rejecting none of the lines or

words as meaningless if that can be avoided. *Cummins v. King County*, 72 Wn.2d 624, 627 (1967). The intention of the dedicator is controlling and is generally to be determined from all of the marks and lines appearing on the plat itself. *Roeder Co. v. Burlington N., Inc.*, 105 Wn.2d 269, 273 (1986); *Frye v. King Cy.*, 151 Wash. 179, 182 (1929). The intention of the dedicator is to be “adduced from the plat itself, where possible, as that furnishes the best evidence thereof.” *Frye*, 151 Wash. at 182; *see also Rainier Ave. Corp. v. Seattle*, 80 Wash.2d 362 (1972).

The declaration in the Final Order and the oral ruling are greatly overbroad when the specific words of the plat dedication are carefully considered. The language “dedicate to the use of the public forever” applies to the “roads and ways” along with “the right to make necessary slopes for cuts or fills” and “install the necessary drainage upon the tracts of land shown on this plat, in the reasonable original grading of all roads shown hereon.” CP 213. This language is limited to the original grading of the roads and for a right to install necessary drainage therefore. Thus, the dedication language does not provide a further right to later install drainage.

The plat language then turns to saying that successors to the County, here the City, shall have the right to “continue to drain said roads

and ways,” but that phrase is clearly limited to the roads on this plat and not any drainage within the basin. CP 213. Next, the right to drain is “**over and across** any lot or lots where water might take a natural course after said roads and ways are graded.” CP 213 (emphasis added). Over and across does not contemplate any right to temporary or permanent detention of water on a lot, but only the ability to have the water cross the lot. But, this right to the City is then importantly qualified in the last sentence by declaring that: “Any enclosing of drainage waters in culverts or drain, or rerouting across lots shall be done by and at the expense of the land owner.” CP 213. This qualifying language affords the property owner some ability to put the drainage waters into a pipe and reroute the drainage as long as the water continues its “natural course” and at the property owner’s expense.

In summary, the plat dedication language does afford the City some right to continue draining lots only in this plat, and only as the water takes its natural course, but still affords the property owner the ability to reroute the drainage. Carefully considered, this plat dedication language cannot reasonably be read to mean the expansive and problematic declaration made by the trial court: “This language dedicates and gives the county a right to have this property for stormwater drainage.” CP 6. The

trial court's erroneous declaration threatens to permanently change the rights of the parties, and the trial court's conclusion is wrong.

C. The Trial Court Erred on Breskes' Takings Claim

The Breskes' appeal is limited in scope. The Final Order contains conflicting conclusions in declaring that the takings claim is not ripe and also declaring that there is no takings claim, except that a taking would have occurred but for the plat dedication. CP 7. These conflicting declarations are in error and require vacation of the Final Order. The Breske's claim in Superior Court was limited to a challenge to the Hearing Examiner decision and was not an independent claim for taking of property. The Final Order threatens to permanently decide Breskes' property rights based on an erroneous interpretation of the plat dedication, when all the Breskes asked for was reversal of the Hearing Examiner decision.

The sole cause of action pled in Superior Court was the LUPA claim. CP 1219-61. The Land Use Petition was not accompanied by a Complaint that contained a separate cause of action for a taking/inverse condemnation. *Id.* A decision may be overturned on a LUPA appeal if "[t]he land use decision violates the constitutional rights of the party seeking relief." RCW 36.70C.130 (1)(f). In Superior Court, Breske challenged the Hearing Examiner decision as failing nexus and rough proportionality—the twin tests

that make up the unconstitutional conditions branch of taking claims. CP 90 (citing *Burton v. Clark County*, 91 Wn. App. 505 (1998)). The Breskes' made related arguments all directed at challenging the Hearing Examiner decision, and the request for relief in Superior Court was limited to a request for reversal of the Hearing Examiner decision. CP 99.

The Final Order goes beyond affirming the Hearing Examiner decision and declares essentially that the plat dedication condition precludes a takings claim as follows:

10. The Petitioners have not demonstrated that the City has inversely condemned their property. There would be inverse condemnation but for the plat language.

CP 7. The basis of that declaration is flawed as described above, namely that the plat decision does not give the City a permanent right to use Lot 1 for drainage. The declaration in paragraph 10 that no taking occurred was based on the erroneous conclusion about the plat dedication. Thus, the declaration of no taking in the Final Order is flawed.

The Breskes have effectively conceded in this appeal that the Hearing Examiner decision stands. But, the Breskes have not conceded that the plat dedication language allows the City to preclude all reasonable use of Lot 1, and thus take Lot 1 without paying just compensation. *Powers v. Skagit County*, 67 Wn. App. 180 (1992). If the Breskes were seeking to

prove destruction of all economical viable use, rather than an unconstitutional taking, then the Breskes would ordinarily have to obtain a “final governmental decision regarding permitted uses of land” in order to have a ripe takings claim. *Bellevue 120th Assocs. v. City of Bellevue*, 65 Wn. App. 594, 597 (1992). The Final Order states as much in paragraph 9, but then inconsistently goes on to say that no taking occurred in paragraph 10. CP 7. The City conceded below that the Breskes could apply for a variance and that Lot 1 was potentially developable. Br. of Respt. City of Edmonds at 35 and 43. Those concessions preclude any conclusion that no taking could occur, and thus, the Final Order goes too far in its declaration.

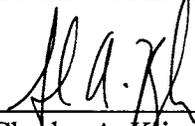
V. CONCLUSION

As indicated herein, the Final Order issued by the Superior Court went beyond the narrow remedy provision of LUPA and made declarations of rights that could undoubtedly have a lasting adverse impact on the Breskes. For the reasons stated herein, the Breskes respectfully request that the court vacate the Final Order of the superior court dated April 23, 2009.

RESPECTFULLY submitted this 16th day of April, 2010.

GROEN STEPHENS & KLINGE LLP

By:



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DECLARATION OF SERVICE

I, Samuel A. Rodabough, declare:

I am a citizen of the United States, a resident of the State of Washington, and an employee of Groen Stephens & Klinge LLP. I am over twenty-one years of age, not a party to this action, and am competent to be a witness herein.

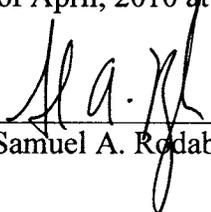
On April 16, 2010, I caused a true and correct copy of the foregoing document to be served on the following person via the following means:

Joseph Zachary Lell
Ogden Murphy Wallace PLLC
1601 5th Ave Ste 2100
Seattle, WA 98101-1686

- Hand Delivery via Legal Messenger
- First Class U.S. Mail
- Federal Express Overnight
- Electronic Mail
- Other _____

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

Executed this 16th day of April, 2010 at Bellevue, Washington.



Samuel A. Rodabough

APPENDIX A

**CERTIFIED
COPY**

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**IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR SNOHOMISH COUNTY**

DONNA and FRED BRESKE, wife and husband,
and the marital community composed thereof,

Petitioners,

v.

CITY OF EDMONDS, a Washington municipal
corporation,

Respondent.

NO. 08-2-08223-5

~~PROPOSED~~ FINAL ORDER



THIS MATTER came before the Court on the Petitioners' Land Use Petition Act appeal of the August 26, 2008 Findings, Conclusions and Decision of the City of Edmonds Hearing Examiner, as modified by the Hearing Examiner's Decision on Reconsideration dated September 26, 2008. The Court, having reviewed and considered the pleadings, briefing and administrative record admitted herein, as well as the oral arguments of the parties, and being fully advised and informed; NOW, THEREFORE,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED AS FOLLOWS:

1. The dedication on the face of the Plat of Preview Homes Westgate Village provides in relevant part as follows:

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Know all men by these presents, that we, the undersigned owners in fee simple, do hereby declare this plat and dedicate to the use of the public forever all roads and ways shown thereon, with the right to make necessary slopes for cuts or fills and install necessary drainage upon the tracts of land shown on this plat, in the reasonable original grading of all roads shown hereon. The County, or its successors, shall have the right to continue to drain said roads and ways over and across any lot or lots where water might take a natural course after said roads and ways are graded in. No land drainage shall be diverted to public road rights of way, nor shall it be blocked from drainage along its normal course. Any enclosing of drainage waters in culverts or drains, or rerouting across lots shall be done by and at the expense of the land owner.

This language dedicates and gives the county a right to have this property for stormwater drainage. The language does not specifically identify a particular lot within the plat, but the operative part of the language is precise: it refers to "lot or lots", and it then provides that both right-of-way waters and waters that drain according to the normal course would be allowed to divert to such lot or lots. This language is legally binding on the Petitioners' property.

2. This is not a case where a landowner is being required to make a dedication or easement on behalf of another group of property owners. The arguments that would flow from that scenario are inapplicable here.

3. Throughout the relevant historical period, Snohomish County, the City of Edmonds and the Petitioners' predecessors in title all acted in accordance with the assumption that Petitioners' property, Lot 1 of the Plat of Preview Homes Westgate Village, had been designated as the stormwater repository for the surrounding plat. Written correspondence to and from the original subdivider further confirms this assumption and pattern of behavior. The Petitioners' predecessor(s) in title also received a tax benefit from valuation and assessment of Lot 1 by Snohomish County at one thousand dollars.

4. The Petitioners were informed by City staff about the historical drainage function of Lot 1 before they purchased the property, and were likewise made aware of the requirements

1 imposed by the City's stormwater regulations at that time.

2 5. Substantial evidence supports the conclusion that Lot 1 was dedicated to serve as
3 the drainage system of the Plat of Preview Homes Westgate Village. This conclusion is not
4 dependent exclusively on topography of the underlying property and the language on the face of
5 the plat itself. It is confirmed by correspondence within the administrative record, the
6 installation of drainage infrastructure within the plat, and the historical pattern of behavior by and
7 between the relevant parties. There is no legal requirement that Lot 1 must be specifically
8 identified and/or dedicated on the face of the plat for this purpose.

9 6. The specific stormwater runoff standard governing the proposed development of
10 Lot 1 is ECDC 18.30.060(A)(1)(a). This ordinance provision is unambiguous, and it prohibits
11 the post-development rate of storm runoff from exceeding the predevelopment rate. The Hearing
12 Examiner accurately characterized this requirement as a "no net increase" standard.

13 7. The court affirms the legality of the City's stormwater regulations and the manner
14 in which they were applied in this case. It is lawful for the City to make a stormwater
15 management plan a condition of building permit issuance.

16 8. With respect to grandfathering, the City's regulations do not relate back in time,
17 but the plat language unequivocally reserves the right to drain over time. This reservation of
18 right is not altered by a change in landowners or plans.

19 9. Because of the historic use of Lot 1 as a drainage facility for at least 40 years,
20 there is no unconstitutional taking. Moreover, because the Petitioners have not exhausted their
21 administrative remedies, their takings claim is not ripe.

22 10. The Petitioners have not demonstrated that the City has inversely condemned their
23 property. There would be inverse condemnation under these circumstances but for the plat
24 language.

25 11. The Petitioners have not demonstrated that the City violated their right to
26 substantive due process.

1 12. Neither Lot 1 itself nor the larger drainage system of the Westgate Village plat is a
2 "pre-existing deficiency". The function of Lot 1 as a drainage facility is a historical use.

3 13. The Court gives no credence to the Shell Creek Sub-Basin Analysis prepared by
4 Petitioner Donna Breske. Because this study was authored by Ms. Breske rather than by a
5 neutral, independent professional, the analysis is presumptively self-interested.

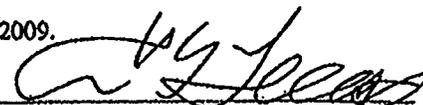
6 14. Substantial evidence in the record supports the conclusion that Lot 1 must
7 continue to detain stormwater for the Westgate Village plat.

8 **IT IS FURTHER ORDERED, ADJUDGED AND DECREED AS FOLLOWS:**

9 15. The Hearing Examiner's decision is supported by substantial evidence and is not
10 clearly erroneous.

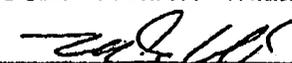
11 16. The Petitioners have not satisfied their burden of demonstrating that the Hearing
12 Examiner's decision meets one or more of the standards for relief set forth at RCW 36.70C.130.
13 The Petitioners' land use petition is accordingly DENIED.

14 DONE IN OPEN COURT this ^{23RD} day of April, 2009.

15 
16 JUDGE ERIC Z. LUCAS

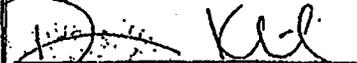
17 Presented By:

18 OGDEN MURPHY WALLACE, P.L.L.C.

19 
20 J. Zachary Lell, WSBA #28744
21 Attorneys for Respondent
City of Edmonds

22 Approved as to Form Only;
23 Notice of Presentation Waived:

24 JOHNS MONROE MITSUNAGA, PLLC

25 
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Attorneys for Petitioners Breske

FINAL ORDER - 4