

No. 64496-3-1

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

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**Burnstead Construction Co.,**

**Appellant,**

**v.**

**Lora Petso and City of Edmonds**

**Respondents.**

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**Opening Brief**

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## **I. Assignments of Error**

### **A. Assignments of Error.**

- No. 1. The Superior Court Erred in Reversing the Hearing Examiner's Determination that Burnstead's Stormwater Drainage Plan Meets Legal Requirements and Would Not Cause Probable Significant Adverse Impacts.
- No. 2. The Superior Court Erred in Reversing the Hearing Examiner's Determination that the Perimeter Buffer Shown on the PRD Map Meets City Code Requirements, as Interpreted by the City.
- No. 3. The Superior Court Erred in Finding that the Proposed Plat Did Not Provide Sufficient Open Space to Comply with City Code, as Interpreted by the City.
- No. 4. The Superior Court Erred in Reversing the Hearing Examiner's Decision, Rather Than Remanding This Matter with Conditions or for Further Proceedings Before the Hearing Examiner.

### **B. Issues Pertaining to Assignments of Error**

- No. 1. Whether the Hearing Examiner's Decision that Burnstead's Preliminary Stormwater Drainage Proposal Meets Legal Requirements Should Be Upheld, Despite a Factual Error in Her Findings, in Light of the Administrative Record as a Whole.
- No. 2. Whether the Superior Court Erred in Failing to Give Deference to the Hearing Examiner's Interpretation of the City's Perimeter Buffer Code Provision, Which Only Requires Buffering on the Sides of a Project that Abut Other Developed Properties.
- No. 3. Whether the Superior Court Erred in Finding that Tract A, Designated Open Space, Must be Enlarged and Must Not Overlap a Perimeter Buffer Design.

No. 4 Whether the Superior Court's Reversal of the Hearing Examiner is Contrary to Washington Law and Inequitable in This Case.

## **II. Statement of the Case**

### **A. Brief Introduction**

In the summer of 2006, appellant Burnstead Construction, Inc. ("Burnstead") purchased a former elementary school playfield site from the Edmonds School District to redevelop as a residential subdivision. In March 2007, Burnstead filed applications with the City of Edmonds (the "City") for a 27 lot preliminary plat and planned residential development ("PRD") on the property. Among other proposed plat elements relevant to this appeal, Burnstead's proposal includes a planned stormwater detention/retention system that was designed by a professional engineer, which would retain an amount of water equal to or exceeding the amount that the site would retain without housing development during a 24-hour, 100-year design storm. Based on site specific geological data, the engineers assume that water falling on the site in its current undeveloped (former playfield) state would infiltrate the ground at a rate of 10 inches per hours. (The testing actually showed the infiltration rate to be 11 to 14 inches per hour, but the engineers used a more conservative design infiltration rate to provide an additional margin of safety.) The planned system would use a large underground vault (over 15,800 cubic feet, e.g.,

16 feet wide, 10 feet deep, and 100 feet long) to capture, hold, and slowly release water that will run off streets and other developed areas rather than infiltrate into the undeveloped ground. The system also incorporates smaller infiltration systems on each lot, to which roof and lot drains will be routed.

In addition, Burnstead proposed, through the PRD process, to modify interior lot setbacks between houses, creating a denser plat interior with correspondingly more open space elsewhere. Modern growth management principles encourage increased housing density, but the City's PRD code requires Burnstead to provide open space amenities to "balance" and buffer older, less dense neighborhoods from the increased internal plat density. Therefore, Burnstead proposed a "perimeter buffer" (an area where structures are prohibited, and that is protected by deed restriction) at least 15 feet wide along the plat's southern and western boundaries. However, under the City's interpretation of its code, the perimeter buffer was not required on the northern boundary, a former utility right of way, or the easterly boundary, because both adjacent properties are now City parklands, and there is no "existing residential development" to buffer. Burnstead also proposed open space areas equal to 10% of the proposed plat. However, and again consistent with the City's interpretation of its code requirements, the open space areas

designated by Burnstead were all on the perimeter of the proposed plat, in order to also satisfy the perimeter buffer requirement.

At the conclusion of the City's administrative environmental review and land use decision-making processes in October 2007, Ms. Lora Petso (a neighbor and attorney acting pro se) brought an action before the Snohomish County Superior Court pursuant to the *Land Use Petition Act* ("*LUPA*"), *Chapter 36.70C RCW*, challenging the City Hearing Examiner's approval of Burnstead's preliminary plat and PRD. Although LUPA actions are required by statute to be expeditious, the LUPA action took two years to complete.

Ms. Petso took the shotgun approach, and alleged some 52 issues of error with this small preliminary plat. Of the issues of error alleged in Ms. Petso's initial brief, the superior court affirmed the City Hearing Examiner's decision on all but these three: (1) the proposed "perimeter" buffer only encumbered two of the plat's four sides; (2) the open space was not sufficient because it included (but should not have included) area that should be in the perimeter buffer; and (3) the Hearing Examiner had misunderstood (or misstated) a mathematical calculation concerning the water infiltration rate of soil in a City planning document and its relevance to the proposed stormwater drainage system's design. The superior court upheld the remainder of the Hearing Examiner's decision. Nevertheless,

the superior court *reversed* the Hearing Examiner's decision, even though Burnstead and the City requested either (1) a remand with modification to address the alleged errors through the process to achieve final plat approval or (2) a remand back to the Hearing Examiner for further proceedings, if needed.

**B. The Facts and Procedural Background**

**1. Burnstead's Proposal.**

The subject property (the "Property") is a single parcel of land totaling approximately 5.61 acres and located at 23708 – 104th Avenue West in the City of Edmonds, County of Snohomish. *See* the Clerk's Papers ("CP") at 1602. Burnstead purchased the Property from the Edmonds School District (the "School District"). The School District had developed the property as an athletic facility for the former Old Woodway Elementary School. CP at 828.

The Property is zoned RS-8 and designated as "Single-Family-Urban 1" by the City of Edmonds Comprehensive Plan. CP at 828. The zoning allows 5.5 residential dwelling units per acre. "For a PRD, density is calculated as total Gross area/minimum lot size of the RS-8 zone or, for this proposal, 224,227/8,000 for a density of 30.53 or [31] lots." CP at 1604. Burnstead proposed to subdivide the Property into 27 residential

lots and five separate tracts for open and recreational space, private driveways and stormwater drainage. CP at 1602.

## **2. The Administrative Proceeding.**

In March 2007, Burnstead submitted an application for a preliminary plat and PRD to the City. CP at 694. The City determined that the application was complete on April 5, 2007. CP at 703. The City issued a State Environmental Policy Act ("SEPA") Mitigated Determination of Non-Significance ("MDNS") for the project on April 19, 2007. CP at 709-710. The MDNS concluded that the proposed development would not cause probable significant environmental impacts as long as Burnstead implemented a series of mitigation measures. CP at 709-710. Lora Petso appealed the MDNS. CP at 1057.

An open record public hearing was held on June 21, 2007, before the City Hearing Examiner ("Hearing Examiner") with regard to Burnstead's preliminary plat application, the PRD request and the SEPA appeals. CP at 1596-97, 1519-1594. The Hearing Examiner heard from 21 individuals at the hearing, including an extended presentation by Ms. Petso. CP at 1599-1660. In addition to oral testimony, a number of individuals, including Ms. Petso, also submitted written materials at the hearing. CP at 1599.

On July 20, 2007, the Hearing Examiner issued a forty-three page ruling titled "Findings, Conclusion and Decision." CP at 1596-1634. She approved the preliminary plat subject to various conditions (including requiring additional documentation from Burnstead stating that the project satisfied the applicable perimeter buffering requirements). CP at 1630-34; 1624-25. The Hearing Examiner dismissed the SEPA appeals. CP at 1629. In all, the Hearing Examiner issued 57 separate findings of fact, eight conclusions in support of her approval of the preliminary plat for formal subdivision, six conclusions in support of her decision on the PRD, and three-and-a-half pages of conclusions supporting her denial of the SEPA appeal. CP at 1602-1629. Ms. Petso filed a Request for Reconsideration of the Hearing Examiner's decision, which was denied by Order of August 8, 2007. CP at 1678-1686, 1691-1694.

The Hearing Examiner held a limited hearing on the perimeter buffer issue on August 31, 2007. CP at 1758-59. The City of Edmonds Development Services Director had issued a formal interpretation of the perimeter buffer requirement of Edmonds City Code ("ECDC") 20.35.050(C)(2), reflecting the City's prior interpretation and administration of that code provision. CP at 1709-1710. On September 28, 2007, the Hearing Examiner – granting deference to the City's interpretation – found that Burnstead's proposal met the City's PRD

perimeter buffer requirements. CP at 1797-1801. Ms. Petso's request for reconsideration was addressed and denied by the Hearing Examiner. CP at 1814-16.

**3. Ms. Petso's Appeal to the Edmonds City Council.**

On August 2, 2007, Ms. Petso appealed the Hearing Examiner's approval of the preliminary plat approval to the Edmonds City Council. CP at 1651-1666. The City regulations provide for the City Council review of preliminary plat decisions, but do not provide for review of challenges to the Hearing Examiner's decisions regarding a PRD or SEPA MDNS. CP at 1846; ECDC 20.35.080(A)(4). In accordance with Chapter 20.105 ECDC, the City Council held a closed record appeal proceeding on August 28, 2007, regarding the preliminary plat approval. The City Council concurred with recommendations of the Mayor and staff to uphold the Hearing Examiner's approval of the preliminary plat and on September 25, 2007, issued findings and conclusions that the preliminary plat, as conditioned, satisfied the City code and was consistent with the City's Comprehensive Plan. CP at 1991.

**4. Ms. Petso's Appeal to the Superior Court.**

**a. LUPA Action Filed: October 2007.**

On October 12, 2007, Ms. Petso sought judicial review of the Hearing Examiner's decision approving the PRD and the City Council's

decision to uphold the preliminary plat approval in Snohomish County Superior Court, Cause No. 07-2-08017-0, pursuant to LUPA Chapter 36.70C RCW. CP at 2099-2113.

Thereafter, Ms. Petso filed her opening brief on January 22, 2008, which asserted over 50. Ms. Petso attached documents outside the administrative record to supplement the record on appeal, even though she did not follow the proper LUPA procedure by requesting discovery or record supplementation at the prehearing conference, nor had she requested nor secured other prior superior court permission to do so. CP at 602-686. Burnstead filed its response on February 4, 2008, and also filed a motion to strike the supplemental documents, which was heard on February 28, 2008, together with the scheduled LUPA appeal hearing. CP at 557-601, 511-514. Burnstead and the City initially objected to the submission of the new materials; however, after over an hour of argument, they acquiesced to the introduction of some of the documents. *See* LUPA Hearing Transcript ("TR 02.28.08").

**b. Arguments on LUPA Petition: February and May 2008**

At the hearing, Ms. Petso presented several hours of argument. *See* TR 02.28.08 at CP 368-487. Due to the length of Ms. Petso's argument, the court continued response arguments by Burnstead and the

City, which did not occur until nearly three months later, on May 23, 2008. *See* Argument on Merits Transcript dated May 23, 2008 ("TR 05.23.08"). Although the City and Burnstead objected to the extra-record evidence Ms. Petso had submitted, the bulk of which dealt with emails from which Ms. Petso argued Hearing Examiner bias, by the end of the arguments on May 23, 2008, it had become clear that the superior court desired additional information as to Ms. Petso's claim of appearance of fairness violations by the Hearing Examiner. Burnstead and the City acquiesced to this expansion of the scope of the appeal and requested a short discovery period to provide supplemental evidence for the record to prove that the Hearing Examiner did not violate the doctrine. TR 05.23.08 at 240-248.

**c. Appearance of Fairness Motions: July 2008 – November 2008**

After a two-month detour for discovery on the appearance of fairness allegations, the parties filed motions to supplement the record on July 31, 2008. Ms. Petso attempted, and succeeded in some instances, to supplement the record with irrelevant documents and forcing the City and Burnstead to respond to specious arguments. To provide an example of the types of arguments that the superior court required Burnstead to respond to, at one point Ms. Petso argued that the Hearing Examiner was

biased in favor of Burnstead because she lived in a home built in a subdivision in which Burnstead had also built homes – although Burnstead had not built the Hearing Examiner's home, and the Hearing Examiner had purchased the home many years before Burnstead had had filed its preliminary plat and PRD applications. *See* Transcript dated August 8, 2008 ("TR 08.08.08") at 5:3-10:9; 25:25-56:11.

Arguments on the motions to supplement were held on August 20, 2008. *See* TR 08.08.08. The superior court then scheduled briefing and a November 14, 2008, oral argument (another three-month delay) on the appearance of fairness issue. *See* Transcript dated November 14, 2008 ("TR 11.14.08"). At that point, an entire year had lapsed from commencement of the "expedited" LUPA action.

**d. Memorandum Decision Issued: February 25, 2009; Findings of Fact, Conclusions of Law Issued: October 25, 2009**

The superior court issued its memorandum decision on February 25, 2009. CP at 171-200. Having had the matter under advisement for another three-and-a-half months, the superior court ultimately found no appearance of fairness violation (CP at 176), and found in favor of the City and Burnstead on all but the three issues in this appeal. Arguments on the proposed order were held on April 3, 2009. *See* Presentation/Argument Transcript dated April 3, 2009 ("TR 04.03.09").

However, the superior court did not issue its findings of fact, conclusions of law and order on decision until six-and-a-half months later, on October 25, 2009 (eight months after the superior court's memorandum decision). CP at 125-29. With regard to stormwater drainage, the superior court found as follows: "The Hearing Examiner's findings and conclusions that drainage is adequately dealt with cannot stand because they are not based on substantial evidence and erroneously apply the law to erroneous facts." CP at 127. With regard to perimeter buffer, the superior court found:

The hearing examiner incorrectly interpreted the law when she read in exceptions to the perimeter buffer PRD requirements that are not in the code. Burnstead's final map clarifying where it intended, to place the landscape buffer had no buffer on two sides of this proposal. The PRD proposal failed to comply with the mandatory provision of EDCD 20.35.060(C) and should not have been approved. The hearing examiner is reversed on this issue.

CP at 128. With regard to open space, the superior court held: "The Hearing Examiner erred in allowing the developer to count part of the required landscape perimeter buffer as open space on Tract A and in concluding that the proposal met the open space requirement. The Hearing Examiner is reversed on the PRD approval for this reason." CP at 128. Finally, the court stated: "The Hearing Examiner is affirmed as to all other issues raised in this appeal as set forth in the Court's

Memorandum Decision of February 2009 which is hereby incorporated by reference." CP at 128.

Given that the superior court reversed as to three issues, but affirmed as to all remaining issues, the City filed a motion for clarification, seeking further guidance as to what should be done at the administrative level. This motion was heard on November 13, 2009. CP at 120-124; *See* Motion to Clarify Transcript dated November 13, 2009 ("TR 11.13.09") At that hearing Burnstead and the City argued that the appropriate remedy under RCW 36.70C.140 was to either remand to the City with modifications or remand to the Hearing Examiner for further proceedings consistent with the court's memorandum decision, and that it would be inequitable – and contrary to Washington law – for the court to simply reverse the Hearing Examiner's decision. *See generally* TR 11.13.09. Given the delays, administrative and litigation burdens and changed economic situation, Burnstead was willing to simply acquiesce to the superior court's substantive conclusions, even if they were erroneous, because the costs of acquiescence far outweighed the cost of further delays. Therefore, Burnstead (with the City's support) proposed that the superior court's concerns (a) with perimeter buffer could be resolved by a provision in the court's order that if Burnstead proceeds with the PRD

development using modified setback requirements,<sup>1</sup> Burnstead must provide a perimeter buffer on all four sides of the project, (b) with open space by order requiring that Burnstead meet the 10% open space requirement of ECDC 20.35.050(D), without counting perimeter buffer areas toward the 10% requirement, and (c) with Burnstead's drainage plan, by order requiring that as part of final engineering, Burnstead perform additional soils tests to determine the actual water infiltration rate at the vault area and for Burnstead's and the City's engineers and inspectors to confirm that the final system design and installation meets the requirements set forth in ECDC Chapter 18.30. *See* TR 11.13.09.

The superior court acknowledged that a reversal would be "really wasteful," TR 11.13.09 at 13:17-18, and that at least the "the drainage issue should potentially go back on a remand to see what the fact finder would find now that she has the goof up she had clarified." TR 11.13.09 at 28:17-20. However, ultimately the superior court issued an order reversing the preliminary plat approval, requiring Burnstead to start over on the process that Burnstead had commenced over three years prior. CP at 128; 20-22. Burnstead now appeals the superior court's decisions on the

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<sup>1</sup> An alternative for Burnstead under the City code would be for Burnstead to build narrower homes that meet internal plat setback requirements and simply forego the PRD altogether.

grounds that the superior court erred in its findings and acted contrary to Washington law in reversing the Hearing Examiner.

### **III. Summary of Argument**

The superior court's findings of error with respect to the City's open space and perimeter buffer requirements fail to give deference to the City's and Hearing Examiner's reasonable interpretation of City code, and are contrary to LUPA. The superior court's concerns with the drainage plan reflect a fundamental misunderstanding of the facts and the law, taking one legally irrelevant misstatement of the Hearing Examiner, ignoring the actual, professional engineering testimony and other evidence, and reversing when there is literally *no* competent expert evidence from Ms. Petso (or anyone else) in the record to contradict the professional, engineering evidence stating that the plan meets code requirements and will not exacerbate preexisting drainage problems.

But even if the superior court's findings of error are upheld, the bigger problem in this case is the superior court's inequitable remedy decision. Especially in light of the superior court's management of this case, Burnstead has now endured more than three years of process to pursue this simple plat. Burnstead is willing to acquiesce if need be to an order requiring plat modifications to address the concerns that the superior court identified. If there is a lack of substantial evidence on any particular

issue, the proper remedy, under the great weight of authority, is to remand to the Hearing Examiner to take additional evidence on that limited issue. It is inequitable to Burnstead, and a waste of administrative and judicial resources, to simply toss out the decision and prior proceedings and force Burnstead to start over. Furthermore, it is unfair to the applicant and the City if an applicant cannot rely on the City's and Hearing Examiner's interpretation of City code. Burnstead is asking this Court to reverse the superior court's three findings of error, or in the alternative, if this Court upholds the findings of error, that this Court either remand with modification to the City so that this plat can continue through the process to final engineering or that this Court remand to the Hearing Examiner for further proceedings consistent with this Court's order.

#### **IV. Argument**

This Court's review of the superior court's LUPA decision in this case is de novo. This Court stands in the shoes of the superior court; the superior courts decisions with respect to facts, law and remedies are not in any way controlling. *See HJS Dev., Inc. v. Pierce County ex rel. Dep't of Planning & Land Servs.*, 148 Wn.2d 451, 468, 61 P.3d 1141 (2003). Under RCW 36.70C.130, relief may only be granted if "the party seeking relief [Ms. Petso] has carried the burden of establishing that one of the

standards set forth in (a) through (f) of this subsection has been met." The relevant standards are:

\* \* \*

(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;

\* \* \*

RCW 36.70C.130. LUPA "reflects a clear legislative intention that [Washington's courts] give substantial deference to both legal and factual determinations of local jurisdictions with expertise in land use regulation." *Timberlake Christian Fellowship v. King County*, 114 Wn. App. 174, 180, 61 P.3d 332 (2002). Courts in LUPA proceedings must view the evidence as a whole and with reasonable inferences "in the light most favorable to the party that prevailed in the highest forum exercising fact finding authority." *Schofield v. Spokane County*, 96 Wn. App. 581, 586, 980 P.2d 277 (1999). Here, the applicant, Burnstead, was the prevailing party before the Hearing Examiner, the highest forum with fact-finding authority in these proceedings. Ms. Petso bears the burden of showing that the Hearing Examiner erred. *See Quality Rock Prods., Inc. v.*

*Thurston County*, 139 Wn. App. 125, 159 P.3d 1, review denied 163 Wn.2d 1018, 180 P.3d 1292 (2008).

The Hearing Examiner, in making her decision, considered oral testimony from many parties and witnesses, reviewed project specific documents as well as supporting documents and analysis, and entered 57 findings of fact and 12 pages of conclusions of law. Burnstead respectfully requests that this Court review the record created before the Hearing Examiner, give substantial weight to the Hearing Examiner's findings of fact and deference to the local jurisdiction's expertise in interpreting its own ordinances, and only overturn the Hearing Examiner's approval if it is clearly erroneous on a point that is not harmless error. *See City of Univ. Place v. McGuire*, 144 Wn.2d 640, 647, 30 P.3d 453 (2001). "A decision is clearly erroneous only when the court is left with the definite and firm conviction that a mistake has been made." *City of Medina v. T-Mobile USA, Inc.*, 123 Wn. App. 19, 24, 95 P.2d 377 (2004). Furthermore, harmless error is one that is "not prejudicial to the substantial rights of the party assigning [error]" and does not affect the outcome of the case. *City of Bellevue v. Lorang*, 140 Wn.2d 19, 32, 992 P.2d 496 (2000) (quoting *State v. Smith*, 131 Wn.2d 258, 263-64, 930 P.2d 917 (1997)). Finally, Burnstead respectfully requests that this Court appropriately fashion relief for any error that may exist to avoid further

waste and duplication of administrative and court resources, and unnecessary and unfair damage and delay to Burnstead in the completion of its development application processes.

**A. The Administrative Record Is Replete with Uncontroverted Evidence Showing that Burnstead's Stormwater Drainage Plan Meets the City's Code Requirements (Assignment of Error No. 1).**

The Hearing Examiner's decision to approve Burnstead's preliminary drainage proposal is supported by substantial evidence in the administrative record, and the superior court erred in finding to the contrary. The superior court held that the "Hearing Examiner's findings and conclusions that drainage is adequately dealt with cannot stand because they are not based on substantial evidence and erroneously apply the law to erroneous facts." The superior court's decision is based on one mistake in the Hearing Examiner's decision that is irrelevant as to whether Burnstead's proposed system meets legal requirements to manage post-development stormwater at the site—namely, the Hearing Examiner's erroneous finding that "Burnstead's proposed drainage facility, sized using an infiltration level of 10, was better able to handle excess water with a margin of error than a vault sized at an infiltration level of 6."

Under LUPA, the superior court may not overturn a hearing examiner's decision unless the party seeking relief proves that the "decision is not supported by evidence that is substantial when viewed in

light of the whole record before the court," or that the "decision is a clearly erroneous application of the law to the facts." *See* RCW 36.70C.130(1)(c), (d). Moreover, the evidence and reasonable inferences are to be viewed as a whole "in the light most favorable to [Burnstead, as] the party that prevailed in the highest forum exercising fact finding authority [the Hearing Examiner's hearing]." *Schofield v. Spokane County*, 96 Wn. App. 581, 586, 980 P.2d 277 (1999). Here, there is ample evidence in the administrative record (including expert engineering reports and testimony), that Burnstead's *preliminary* stormwater drainage proposal is appropriate, and that the Hearing Examiner's mistaken statement regarding infiltration rates is a dictum, irrelevant and at most harmless error.

Burnstead hired civil engineers to design a preliminary drainage system and an environmental geologist/hydrogeologist to perform site specific geological testing to determine the appropriate water infiltration rate that the engineers should use to design as system should to replace lost infiltration capacity. CP at 859-903. These experts determined that, with geologic tests showing that the infiltration rate was between 11 and 14 inches per hour, it was appropriate, with an appropriate additional margin of safety, to use an infiltration rate of 10 inches per hour as the design assumption for the stormwater system. CP at 865. The 10-inch-

per-hour assumption is a more conservative assumption, because if water is absorbed less quickly, more of it can pond or run off the surface. The lower the "inch-per-hour" design assumption, the bigger and more robust the drainage system will need to be. A Preliminary Storm Drainage Report was prepared for the site on February 28, 2007. CP at 859. The City staff found the plan compliant with applicable requirements. CP at 827-841.

At the June 21, 2007 hearing before the Hearing Examiner, the City's engineer – Mr. Fiene – testified that he has a "good understanding of the drainage issues in the area surrounding the project" and that the "code requirement is that Burnstead take [] care of their drainage." CP at 108. The "City is dealing with the drainage problem [of the surrounding area]." CP at 108. Ms. Petso questioned Mr. Fiene about whether Burnstead's plan met the Southwest Edmonds Drainage Plan ("SW Edmonds DP") guidelines. CP at 109. The SW Edmonds DP is a City plan to address, over time, existing drainage problems in a broader area including and surrounding Burnstead's project. CP at 1627; 1416-1517. Mr. Fiene testified that "it did say the 6 inch as an average to be used for the long term infiltration rate. But, it also said it could vary between 2 and 10 and that you should do a site specific analysis. And that's what we'll hold Burnstead to." CP at 109. Mr. Fiene acknowledged that the

Burnstead project was within the SW Edmonds DP study area, but reiterated that it was just "a study." It did not "do infiltration rate analysis in every individual site throughout the area. It's an overall for the area to give us some benchmark on what to be looking for." CP at 109. When asked if Mr. Fiene was "comfortable with the fact that none of their infiltration testing is at the location where they're going to put the infiltration [ ] facility", Mr. Fiene responded that the City would review it "when it comes to that point during the [final] storm drainage report, when it's submitted to the City." CP at 109.

The Hearing Examiner reviewed the preliminary expert reports as well as other relevant evidence and testimony, including specifically the testimony of the City drainage engineer. She made nine separate findings of fact regarding storm drainage and three paragraphs of conclusions. The relevant findings of fact include:

31. Testimony was received in regard to stormwater drainage issues, both on the subject property and within the surrounding community. All parties - the Applicant, the City, and members of the public - stated that public infiltration facilities within the area have historically had problems with handling the stormwater conveyed to it. Testimony of Mr. Miller; Testimony of Mr. Clarke; Testimony of Mr. Sanderlin; Testimony of Mr. Fiene; Testimony of Ms. Brown; Testimony of Ms. Hernandez; Testimony of Mr. Hertrich.

32. Associated Earth Sciences [AES] conducted infiltration testing based on the 2005 King County Surface

Water Design Manual. The subject property is relatively level but slopes to the south and west. . . . On-site exploration pits denoted poorly developed, surficial organic topsoil with a thickness of up to 0.5 feet above approximately three feet of fill consisting generally of loose to medium dense, moist sand with variable silt and gravel contents, which is then underlain by Vashon Outwash. Plat Exhibit A(5), Appendix - AES Stormwater Infiltration Testing; Testimony of Mr. Kindred.

. . . .

34. Exploration pits provided measured infiltration rates ranging from 11.4 inches per hour to 14.4 inches per hour. AES determined that based on the soil composition, measured infiltration rates, and applying a 3.5 safety factor for infiltration and 80 percent for capacity, an infiltration rate of 10 inches per hour may be utilized for stormwater design. The Applicant retained the Blue Line Group to prepare a Drainage and Erosion Control Plan [DECP]. The proposed stormwater collection, infiltration, and treatment system would conform to the 1992 DOE Manual with all on-site and upstream runoff from landscaped areas, roads, and driveways being treated and conveyed to an on-site underground infiltration facility located in Tract C. A system of catch basins and piping, to collect and convey stormwater runoff is proposed. The vault would be sized to infiltrate the 100-year, 24-year storm event at a rate of 10 inches per hour with a safety factor of 3.5, consistent with ECDC 18.30.060. Roof and footing drains would be infiltrated on each individual lot. Hydrological modeling, based on group "B" soils and a Type 1A storm, demonstrated a required storage volume of 15,673 cubic feet for a 100-year storm event. The storage capacity of the proposed vault is 15,840 cubic feet. Based on this design, subsurface explorations, and infiltration testing, AES opined that the potential for standing water and uncontrolled runoff would be significantly reduced. Plat Exhibit A(4), Utility Plan; Plat Exhibit A(5), Section 3; Plat Exhibit A(14); SEPA Exhibit B(1), AES Comments; Testimony of Mr. Kindred.

35. Water quality treatment would be provided via a Vortechs System which provides for 80 percent or greater of Total Suspended Solids [TSS] removal, including floating hydrocarbons, from the on-site and off-site tributary stormwater runoff. Plat Exhibit A(5), Section 3; Plat Exhibit A(14).

36. In conjunction with the preparation of the DECP, the Applicant performed analysis of both the downstream drainage path and the upstream basin. An off-site tributary drainage basin was delineated to contain adjacent properties to the north (both city and privately-owned) with stormwater runoff from this area include within the drainage analysis. Current downstream now follows grass lined drainage swales that are located along the western and southern property lines and, if not fully infiltrated, continues southwesterly along the fence line of two privately-owned parcels to a public storm system located at 237 Place. This storm system drains west/south along 107th Place to a public infiltration facility just beyond the road's terminus at a cul-de-sac. Plat Exhibit A(5), Section 2; Testimony of Ms. Stewart; Testimony of Mr. Fiene; Testimony of Ms. Hernandez; Testimony of Mr. Clarke; Testimony of Mr. Kindred.

....

38. The SW Edmonds DP, dated March 2002, was developed to evaluate drainage problems and recommend/develop solutions to mitigate these problems within a 300-acre area located in SW Edmonds. The subject property is depicted on Figures 2.1 and 4.11. .... The SW Edmonds DP recognizes the significant drainage problems experienced in this area and sets forth several recommendations including, the installation of drywells, catch basins with overflow pipeline connections, or a new infiltration facility. The SW Edmonds DP notes that on-site soils are suitable for infiltration rates between 2 to 10 inches per hour, with 6 inches per hour considered sustainable. SEPA Exhibit F, SW Edmonds DP, Pages 4-2-4-4, 4-9 - 4-11; Figures 2.1 and 4.11.

CP at 1610-1613. The legal conclusions are as follows:

The Applicant reviewed soil types, infiltration rates, topography, and drainage basin flows prior to developing a proposed stormwater infiltration system based on standards established by the City of Edmonds and on industry-accepted methodology. The Record reflects that drainage issues pertained to the flow of stormwater of site. With the proposed design, stormwater runoff will be retained on-site, thereby potentially eliminating off-site impacts.

ECDC Chapter 18.30 sets forth the rules and regulations for stormwater management within the City with ECDC 18.30.100 providing maintenance requirements. The Applicant's proposed design meets standards required by the City and is designed for a 100-year, 24-hour storm event with infiltration at 10 inches per hour, ***which is in excess of the rate recommended by the SW Edmonds DP.*** Utilization of the Votechs Water Quality System will add in the removal of sediment, thereby permitting better performance of the system.

. . . [A]lthough ECDC 15.05.000(C) states that "Edmonds Drainage Basin Studies" are incorporated by reference into the City's Comprehensive Plan, this does not transform the recommendations provided for in the SW Edmonds DP in to mandatory requirements.

CP at 1627 (emphasis added). Among all of the above findings and conclusions (and a host of others regarding drainage but unrelated to system design), the superior court reversed the Hearing Examiner's drainage system decision due to one mistaken statement, highlighted above. The Hearing Examiner stated: "The Applicant's proposed design meets standards required by the City and is designed for a 100-year, 24-hour storm event with infiltration at 10 inches per hour, *which is in excess of the rate recommended by the SW Edmonds DP.*" CP at 1627 (emphasis added). It is true (and there is no competent evidence in the record to the

contrary) that the "Applicant's proposed design meets standards required by the City and is designed for a 100-year, 24-hour storm event with infiltration at 10 inches per hour." It is not accurate that 10 inches per hour is in "excess of the rate recommended by the SW Edmonds DP." Instead, the 10 inches per hour is *within* the rate recommended by the SW Edmonds DP, which the Hearing Examiner correctly recites in finding No. 38: "The SW Edmonds DP notes that on-site soils are suitable for infiltration rates between 2 to 10 inches per hour, with 6 inches per hour considered sustainable." CP at 1612.

The Hearing Examiner's incorrect statement is a dictum and irrelevant. As confirmed by the City's engineer, the SW Edmonds DP was prepared in March 2002 to "evaluate drainage problems in the project area." CP at 1422. It was not prepared specifically for the Burnstead site. Instead, the SW Edmonds DP study area encompassed 300 acres, from the Town of Woodway to the City of Shoreline to 100th Avenue Way and Edmonds Way in the City of Edmonds. CP at 1422. As the Hearing Examiner noted, the SW Edmonds DP's recommendations are not mandatory requirements for Burnstead's drainage system design. CP at 1627. It is simply a planning guide, and its general recommendations are and should be superseded by site specific studies (whether they dictate more conservative action or demonstrate less robust systems will provide

the stormwater management the City's code requires). Therefore, because, based on site specific drainage information, Burnstead's system will be designed and confirmed to meet City drainage code requirements, whether Burnstead's stormwater drainage proposal is within or exceeds the guidelines of the SW Edmonds DP is irrelevant. In any event, Burnstead's proposed system is consistent with the SW Edmonds DP "general recommendation" of utilizing infiltration rates between 2 to 10 inches per hour. *See Lakeside Indus. v. Thurston County*, 119 Wn. App. 886, 894-895, 83 P.3d 433 (2004) ("because a comprehensive plan is a guide and not a document designed for making specific land use decisions, conflicts concerning a proposed use are resolved in favor of the more specific regulations") (citing *Citizens for Mount Vernon v. City of Mount Vernon*, 133 Wn.2d 861, 873, 947 P.2d 1208 (1997) ).

Burnstead's stormwater drainage plan was not designed and cannot be confidently designed using the generic infiltration guidelines of the SW Edmonds DP. Instead, drainage code compliance is determined by specific engineering standards set forth in Chapter 18.30 of Edmonds City Code based on site specific geological information. Further, as the City Engineer, Mr. Fiene, pointed out in his testimony, it is important to note that plat and PRD applications go through two stages: a preliminary review and final review. E.g., ECDC 20.35.080. At preliminary PRD

review, the applicant is required to submit *preliminary* plans of the proposal. ECDC 20.35.080(1). While such "potential problems as drainage . . . should be identified and addressed before the proposal is submitted for formal review," final drainage engineering is not required until after preliminary PRD approval. At final PRD:

[t]he applicant shall submit the final development plan to the development services director, conforming to the preliminary plan as approved, and all applicable conditions of that approval. The planning manager shall review the plan along with the city engineer and make a final decision. The plan shall contain *final, precise* drawings of all the information required by ECDC 20.35.030. The applicant shall also submit all covenants, homeowners' association papers, maintenance agreements, and other relevant legal documents.

ECDC 20.35.080(B)(1) (emphasis added). Burnstead is not required to develop the complete plat engineering plans until after preliminary approval, and they are subject to further review as noted by Mr. Fiene during his testimony. CP at 109. At the final review, the City will require that Burnstead's final drainage plan meets all of the specific engineering requirements of Chapter 18.30 ECDC. The City's engineers may require additional site specific information regarding the stormwater infiltration rate immediately over the vault, and if new information shows a more conservative design assumption is required, the City will require Burnstead to build an even larger vault. However, at this preliminary

stage, both Burnstead's experts and the City's engineer have opined that the planned drainage system will adequately manage stormwater drainage resulting from the Project and will not adversely affect the surrounding area. CP at 859-903; 1627; 109; 1531-1533. In fact, because the system will be designed using a conservative margin of safety, it may even reduce some of the preexisting drainage problems in the surrounding neighborhood (although Burnstead is not legally responsible for creating or fixing those problems). CP at 1533.

Drainage facilities are complex systems designed by professionals. The City, the Hearing Examiner, the court and the public rely on the professional work of the expert engineers. The City's code provides specific standards (all with margins of safety) to which the system must be designed by those engineers. *See* Chapter 18.30 ECDC. If the system meets those criteria, the drainage design will be approved; if not, the drainage system will not be approved. There is no evidence in the record to contradict Burnstead's and the City's expert testimony or evidence that its planned system meets the City's requirements. There is no evidence that Burnstead's stormwater drainage system would be insufficient to handle the drainage created by Burnstead's Project. On the contrary, there is substantial, uncontroverted evidence in the record demonstrating that Burnstead's preliminary drainage plan meets code requirements and that a

final engineering plan will be designed by professional engineers to detailed code requirements and reviewed by City engineers and inspectors to ensure such compliance. The Hearing Examiner's conclusion that the plan meets code should be affirmed. There is no evidence that the system, designed pursuant to the City's drainage code, will not protect the surrounding neighborhood from adverse drainage caused by Burnstead's development proposal.

**B. The Hearing Examiner's Interpretation that the Purpose of the Perimeter Buffer Is to Buffer New Developments From Old, and that Burnstead Is Not Required to Place Perimeter Buffers on the Two Sides of Its Project that Abut Undeveloped Property Is Entitled to Deference (Assignment of Error No. 2).**

The superior court failed to accord proper deference to the Hearing Examiner's interpretation of the law. At the superior court, Ms. Petso asserted two errors in the Hearing Examiner's finding that Burnstead Construction's perimeter buffer complied with ECDC 20.35.050(C). CP at 641. First, she argued that the lot setbacks of 15 feet could not be "double-counted" as both a setback and a perimeter buffer. This argument was rejected by the superior court and not appealed by Ms. Petso. CP at 195-197. Second, Ms. Petso argued that the perimeter buffer was not sufficient because it was not depicted on the plat as being on all four sides of the Project. The superior court agreed with Ms. Petso on this point and held:

The hearing examiner incorrectly interpreted the law when she read in exceptions to the perimeter buffer PRD requirements that are not in the code. Burnstead's final map clarifying where it intended to place the landscape buffer had no buffer on two sides of this proposal. The PRD proposal failed to comply with the mandatory provision of EDCD 20.35.060(C) and should not have been approved. The hearing examiner is reversed on this issue.

CP at 128. The superior court's finding is error (and at most any error is harmless because the setback area may be "double-counted" as a perimeter buffer as long as conditions are imposed on the other two sides of the plat prohibiting structures such as tool sheds and playhouses in the setbacks).

The superior court's order of reversal was error.

ECDC 20.35.050 provides, in pertinent part:

**Decision criteria for PRDs.** Because PRDs provide incentives to applicants by allowing for flexibility from the bulk zoning requirements, a clear benefit should be realized by the public. To ensure that there will be a benefit to the public, a PRD which seeks alternative bulk standards shall be approved, or approved with conditions, only if the proposal meets the following criteria:

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

exterior property line abuts a public way, a buffer at least equal to the depth of the front yard required for the underlying zone shall be provided.

Burnstead proposal utilizes an open space landscape buffer as allowed by the City's Code and the City's interpretation. All buildable lots (lots 1-21) include a 15-foot open space rear yard setback, and those on the south and west plat boundaries also specify that the setback area must be preserved as a perimeter landscape buffer. CP at 1649. The perimeter buffer is physically shaded on the preliminary plat on the two sides (south and west) that abut other developed properties.

The other two sides of the plat abut undeveloped properties. To the north is an old utility easement that is now a city-owned park and to the east there is also city-owned park. CP at 1630. The Hearing Examiner held that:

the intent of this perimeter buffer is to screen the PRD from lower density residential development. Given this, the Hearing Examiner concludes that such a buffer would not necessarily be required along the northern border of the site, due to the BPA easement serving this purpose, or along the eastern boarder of the site, adjacent to the city-owned parcel.

CP at 1630. The perimeter buffer is not shaded on those two sides because Burnstead was informed by the City (and the City's direction was approved by the Hearing Examiner) that a buffer is not needed on those two sides because there was no reason to "buffer" open undeveloped

property. The City had found this to be in compliance with City code. CP at 827-841. Burnstead should not be penalized for relying on the City's and the Hearing Examiner's interpretation of City code.

However, given that the 15-foot setback may be used as the perimeter buffer, CP at 195-197, the issue could be made moot simply by imposing deed restrictions on lots 12-21 to maintain the rear-yard setback areas on those lots as unobstructed open space, and by shading those areas on the preliminary plat. Burnstead is willing to do so. (As discussed more fully below, Tracts A, E and F are already designated as open space areas and do not require an additional open space "buffer.")

ECDC 20.35.090(C)(1)(c) requires that at final approval, "[a]ll drawings presented in the preliminary development stage shall be presented in detailed form, i.e., landscaping, circulation, utilities, building location, etc." If this Court orders the perimeter buffer to be imposed on the north and west boundaries, Burnstead will be required to show the buffer on the final PRD, because the final PRD may not "[r]educe any of the landscape buffers in width or density or quality of proposed landscaping." ECDC 20.35.090(D)(1)(d).

**C. The Superior Court Erred in Finding that Tract A, Which Is Designated as Open Space, Requires a Perimeter Buffer (Assignment of Error No. 3).**

The superior court's finding of error with regard to open space misinterprets the code, misunderstands Burnstead's proposal and the Hearing Examiner's conditions placed upon it, and again is at worst a harmless error easily remedied. The City's code requires PRDs to have 10% open space, not including landscape buffers or critical areas. The code provision states in full:

D. Open Space and Recreation. Usable open space and recreation facilities shall be provided and effectively integrated into the overall development of a PRD and surrounding uses and consistent with ECDC 20.35.060(B)(6). “Usable open space” means common space developed and perpetually maintained at the cost of the development. *At least 10 percent of the gross lot area and not less than 500 square feet, whichever is greater, shall be set aside as a part of every PRD with five or more lots.* Examples of usable open space include playgrounds, tot lots, garden space, passive recreational sites such as viewing platforms, patios or outdoor cooking and dining areas. *Required landscape buffers and critical areas except for trails which comply with the critical areas ordinance shall not be counted toward satisfaction of the usable open space requirement.*

ECDC 20.35.050(D) (emphasis added). Ten percent of Burnstead's project is 24,423 square feet. CP at 128. Burnstead's map shows 25,185 square feet of open space, including 4,913 square feet on Tract A. CP at 128; 1649.

The preliminary plat map erroneously showed a perimeter buffer on Tract A. The superior court held that because the preliminary plat map shows a "perimeter buffer" (a shaded area) running along the southern edge of Tract A, and because landscape buffers cannot be counted as open space, that the 15 x 68 feet of "perimeter buffer" along the edge of Tract A cannot count toward open space. CP at 1649. The superior court's finding on this point is understandable, but an error nonetheless. This is because under City code, a perimeter buffer cannot count as open space (so the rear yards of lots 1 through 11, designated as a perimeter buffer, do not count toward Burnstead's open space requirements), but open space tracts located on the perimeter of a plat do not require an additional perimeter buffer to protect neighboring development. Tract A is completely designated as an open space, and because Burnstead is utilizing open space landscape buffers, where no structures are allowed from the ground up, "buffering" would be redundant, unnecessary, and contrary to competing growth management and PRD goals of creating opportunities for more dense urban infill development.

Unfortunately, Burnstead's plat drawing mistakenly shows the shaded perimeter buffer on the southerly plat boundary continuing across the southerly perimeter of Tract A; that shading was in error. It was not Burnstead's intention, nor is it required by the City's code, to show a

landscape buffer on Tract A. Because Tract A as well as Tracts E and F are designated open space areas, they are not required to be "buffered," and by the City's code definition, they qualify as open space because they do not contain any structures. ECDC 21.75.030. The superior court erred in interpreting this provision to require the perimeter of Tract A to be used for a perimeter buffer and not counted toward open space.

In reaching its conclusion, the superior court again disregarded a formal code interpretation issued by the City stating that the open space nature of Burnstead's landscape buffers count toward open space.

Specifically, the City's formal interpretation states:

Should a PRD propose establishing an open space area on perimeter lots of the PRD, which would prohibit construction of structures, the PRD would meet the intent of both the definition of open space as outlined in ECDC 21.75.030 and the [perimeter buffer] requirement of ECDC 20.35.050(C). This area could be landscaped but could not contain any structures.

CP at 1710. Again, the City's interpretation of the City's code is entitled to deference, and it can only be overturned if the interpretation is clearly erroneous. RCW 36.70C.130(1)(d); *see also City of Univ. Place*, 144 Wn.2d at 647. Here, the City's code interpretation is consistent with the City's historical application of the code provision, CP at 1799, and is also consistent with the plain language and purpose of the code. The superior court's finding to the contrary was in error.

**D. A Complete Reversal of the Hearing Examiner Is Contrary to Washington Law and Not Warranted in this Case. It Was Not an Equitable Remedy – Especially After the LUPA Action Was Litigated for Two Years and the Court Affirmed on All but Three Issues (Assignment of Error No. 4).**

Burnstead believes that the superior court's error findings were wrong for all the reasons stated above. However, the bigger issue on this appeal is the unnecessary and inequitable harm caused to Burnstead by the judge's remedy – reversal. Assuming *arguendo* that this Court upholds any or all of the superior court's findings of error regarding drainage, perimeter buffering and open spaces, the superior court's decision to *reverse* the preliminary plat approval was unjustified, inequitable and contrary to Washington law. It is a waste of administrative and judicial resources (a waste the superior court itself pondered during the hearing on the City's motion to clarify, TR 11.13.09 at 13:17-18, to require the plat procedure to begin anew when the Hearing Examiner's decision was affirmed on all but three minor issues, and the minor errors can be easily remedied. Reversal under these circumstances is also contrary to the legislature's intent in enacting LUPA in the first place. Burnstead should not be required to start the development process over when the superior court affirmed all but three of 52 issues, especially given the prolonged, multi-year proceeding Burnstead has already endured before the superior court. Any errors can be addressed quickly and in a straightforward

manner through a remand to the City with instructions for modifications to the final plat and PRD. If this Court believes that evidence is lacking on any important point, such evidence that can be developed through a limited remand to the Hearing Examiner for further, limited administrative proceedings on those specific issues.

**1. If This Court Affirms the Superior Court's Finding(s) of Error, the Proper Remedy Is Remand with Modification.**

As argued to the superior court on April 3, 2009 and November 13, 2009, remand for modification is the proper remedy and comports with the statutory purpose of LUPA: to *expedite* land use proceedings. RCW 36.70C.010. LUPA specifically gives courts (and on appeal, this Court) the authority to: (1) affirm; (2) reverse; (3) remand for modification; or (4) remand for further proceedings. RCW 36.70C.140. LUPA states that if a court decides to remand for modification, it may "make such an order as it finds necessary to preserve the interests of the parties and the public pending" either further proceedings *or pending action by the local jurisdiction. Id.* This Court has the authority to remand the matter to the City for modification of the plat and PRD prior to final plat approval to correct any or all of the three alleged errors.

Preliminary plats by their very nature are conceptual and subject to refinement and modification. The Washington Supreme Court noted in

*Friends of the Law v. King County*, 123 Wn.2d 518, 528-29, 169 P.2d

1056 (1994), that:

A preliminary plat application is meant to give local governments and the public an approximate picture of how the final subdivision will look. It is expected that modifications will be made during the give and take of the approval process. Although it is up to local governments to decide what level of specificity they will require from a developer in its initial application . . . .

(Emphasis added.) The processes cannot be so "odious that completion is nearly impossible". *Id.* at 529. "If the applicant can show that its plat, with the proper conditions and modifications, will comply with those laws, it will be approved." *Id.* Here, the preliminary plat should be approved (with additional court-imposed conditions to address any of the Hearing Examiner's errors) and be allowed to proceed to final plat where specific design plans will be submitted and further evaluated. Burnstead's proposal still has a number of steps to complete to achieve final plat approval. Any or all of the three errors identified by the superior court can be fully addressed, if necessary, during those still required processes. This result would be consistent with LUPA and with the City's code, which allows for all of the errors to be corrected on the final development plan. ECDC 20.35.080.

**a. Burnstead's Stormwater Drainage Plan Can Be Modified through the process to achieve final plat approval.**

The final engineering plans will be prepared by professional engineers to detailed code requirements and reviewed by City engineers to assure such compliance. Any alleged errors found on stormwater drainage can be remedied by modified conditions (proposed by the City and Burnstead to the superior court) stating that:

- (1) The plan be designed by licensed professional engineers to comply with City code, and reviewed by City engineers to ensure that the final drainage plan complies with the strict requirements set forth in ECDC Chapter 18.30. This will be done with the understanding that a system designed assuming that soil with a ten inch per hour water infiltration rate does not produce a facility with more detention and retention capacity than a facility designed to provide the same detention and retention where the soil's water infiltration rate is only six inches per hour.
- (2) The City requires Burnstead to provide additional soils testing directly over the vault, (which is consistent with ECDC 18.30.070) – that provides that special inspection and/or testing can be required if necessary before final plat approval), and design the system to provide drainage detention and retention using that site specific information.
- (3) The property owners are responsible for the maintenance and upkeep of the drainage facility in accordance with the City's mandate at ECDC 18.30.100(D).

**b. Burnstead's Plat Can Be Modified To Show The Perimeter Buffer On All Four Sides Of The Project.**

This alleged error can be easily dealt with through the process to achieve final plat approval. Burnstead's final plat drawings can be modified to show that the perimeter buffer will be established on all four sides of the Project, and that lots 12-21 will have the same deed restrictions placed upon them as are already required for lots 1-11, prohibiting any structures within the perimeter buffer area.

As noted above, precise and final plat drawings are not required until final engineering/plat approval. At that point, the plan will be deemed to be in substantial compliance with the plan given preliminary approval so long as it does not "[r]educe any of the landscape buffers in width or density or quality of proposed landscaping." ECDC 20.35.090(D)(1)(d).

**c. Burnstead's Open Space Designation Can Be Modified to Require 10% Open Space, Not to Including the Perimeter Buffer.**

If this Court finds that the open space tract at issue – Tract A – must include a buffer, this error can easily be remedied by a modification stating that Tract A must have a perimeter buffer, and that the space used for the perimeter buffer may not be counted toward the 10% open space requirement of ECDC 20.35.050(D). This modification can be addressed

through the process to achieve final plat approval. Pursuant to the City's code, as long as the modification does not "[r]educe the area set aside for common open space," it will be deemed to be in substantial compliance with the plan given preliminary approval. ECDC 20.35.090(D)(1)(b).

Furthermore, the City's code gives many examples of usable open space and, as such, there are many ways Burnstead can create additional open space to meet the 10% requirement without counting the perimeter buffer. Burnstead acknowledges that if this Court were to reject the City's interpretation of its code, and find both that a perimeter buffer is required on the north and east plat boundaries, and that the open space tracts on those boundaries must be modified to add additional space to replace the space required to be dedicated to perimeter buffers, it is conceivable Burnstead might need to sacrifice a proposed lot to provide the requisite quantity of open space. If so, Burnstead will do that; if not, it will not. Again, if the Court believes more open space is required, the most direct way to rectify this error is for this Court to order that Burnstead's final plat comply with ECDC 20.35.050(D), and provide 10% open space, not including any area that is within the perimeter buffer.

## **2. Remand for Further Proceedings**

In the alternative, assuming *arguendo* that this Court holds that one or more of the superior court's findings of error were correct, and this

Court determines that direct a remand to the City for modification of the preliminary plat and PRD prior to final plat approval is not the appropriate remedy, Burnstead respectfully submits that proper, equitable remedy is to remand the applications to the Hearing Examiner for further proceedings consistent with this Court's order, as authorized by RCW 36.70C.140.

When a land use decision is overturned on appeal, "the ordinary remedy is remand for reconsideration." *Sunderland Family Treatment Servs. v. City of Pasco*, 127 Wn.2d 782, 798, 903 P.2d 986 (1995) (citing *Levine v. Jefferson County*, 116 Wn.2d 575, 582-83, 807 P.2d 363 (1991) (Brachtenbach, J., concurring)); *Snider v. County Bd. of Comm'rs*, 85 Wn. App. 371, 377, 932 P.2d 704 (1997) ("it is not this court's function to substitute its judgment for that of the Board, nor was this the function of the superior court"); *Wash. Pub. Employees Ass'n v. Community Coll. Dist. 9*, 31 Wn. App. 203, 212, 642 P.2d 1248 (1982) (if the agency record is insufficient, "the weight of authority dictates that the reviewing court remand the case to the administrative agency"). The legislature in 1995 enacted LUPA to reform, streamline and expedite judicial review of land use decisions such as plat approvals. RCW 36.70C.010.

**a. Stormwater Drainage**

If a decision is not supported by substantial evidence, remand is appropriate so that the record can properly be developed. *See Fla. Power*

*& Light Co. v. Lorion*, 470 U.S. 729, 744 (1985) ("If the record before the agency does not support the agency action, if the agency has not considered all relevant factors, or if the reviewing court simply cannot evaluate the challenged agency action on the basis of the record before it, the proper course, except in rare circumstances, is to remand to the agency for additional investigation or explanation."); *see also Sunderland*, 127 Wn.2d at 798 (stating that remand was "especially appropriate" when the record is not sufficiently developed); *Wash. Pub. Employees Ass'n*, 31 Wn. App. at 213 (stating that remands are granted "to supply deficiencies in the record . . . or to supply findings in place of those attacked as invalid"). Here, the superior court ruled that the Hearing Examiner's finding regarding drainage was not supported by substantial evidence. If the superior court's ruling was correct (which Burnstead disputes), the issue should have been remanded so that the Hearing Examiner could either supply deficiencies in the record or supply findings in place of those determined to be invalid.

**b. Perimeter Buffer and Open Space**

Furthermore, if a decision is based upon an inappropriate legal standard, remand is the most straightforward process to permit the Hearing Examiner to apply the appropriate legal standard in rendering a decision. *See INS v. Orlando Ventura*, 537 U.S. 12, 16-17 (2002) (stating that

remand allows agency to "bring its expertise to bear upon the matter"); *Wash. Pub. Employees Ass'n.*, 31 Wn. App. at 213 ("[w]hen an administrative agency applies an inappropriate legal standard, the weight of authority dictates that the reviewing court remand the case to the administrative agency with instructions to apply the appropriate legal standard."). Here, the superior court ruled that the Hearing Examiner's findings regarding perimeter buffering and open space requirements were based upon erroneous legal interpretations. Even if the superior court's rulings were correct, the issues should have been remanded.

Notably, in the Order on Motion to Clarify, the superior court's reasoning that remand to the City to impose modifications was not appropriate actually demonstrates the contrary, why she should have ordered a limited remand to the Hearing Examiner, because it found:

- (1) It has not been shown that conditions can remedy all these defects.
- (2) It has not been shown that changes in the configuration necessitated by the conditions will not create other code noncompliance;
- (3) Approval on other issues assumed a proposal configured in a certain way, and it is not possible to know on the limited review [of] the Respondents propos[al] whether any changed proposal would have still been approved as to other issues if configured differently.

CP at 20-22. These rulings demonstrate that the superior court refused to remand because it did not believe the record was sufficiently developed.

However, remand is "especially appropriate" when the record is not sufficiently developed, *Sunderland*, 127 Wn.2d at 798, as remand allows the Hearing Examiner to supply deficiencies in the record and findings in place of those attacked as invalid. *Wash. Pub. Employees Ass'n*, 31 Wn. App. at 213.

## **V. Conclusion**

The Hearing Examiner's decision to approve the preliminary plat and PRD should be affirmed. Ms. Petso cannot meet her burden of proof to the contrary. As demonstrated above, the superior court erred in finding that Burnstead's stormwater drainage plan was not supported by substantial evidence in the administrative record. The superior court also erred in failing to give proper deference to the City's interpretation of its own code provisions relating to the perimeter buffering and the open space requirements. More egregious, however, is the superior court's finding that these three errors merited reversal of the preliminary plat and PRD approvals, rather than a simple remand to the City for plat and PRD modifications or to the Hearing Examiner for further limited proceedings. The superior court's remedy ruling is extremely unfair and damaging to Burnstead and will waste significant time, and administrative and judicial resources and is unfair to the City because an applicant cannot rely on the City's interpretation of its own Code, making it difficult to submit any

proposal. If Burnstead is required to submit a new proposal, Ms. Petso (or others) will almost certainly re-argue (and subsequently attempt to appeal) many of the issues already affirmed during the superior court's two-year LUPA appeal process. In the interim, Burnstead's land will remain undeveloped, and its process-and delay-related losses will continue to mount. That result would be patently unfair to Burnstead and of no benefit to the City, the courts or the public. Such an inequitable remedy is contrary to Washington law. This Court should affirm the Hearing Examiner's approval of the PRD, or in the alternative order an appropriate remand.

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