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No. 64496-3-1

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

Burnstead Construction Co.,

Appellant,

v.

Lora Petso and City of Edmonds,

Respondents.

Reply Brief

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DIVISION ONE
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I. Introduction

As set forth in Burnstead's Opening Brief ("Opening Brief") and the following reply, Ms. Petso has failed to meet her burden of proof and the superior court erred in finding fault with Burnstead's preliminary proposal for drainage, open space and perimeter buffer. More importantly, however, even if this Court finds error in one of these narrow issues, the appropriate remedy is remand for modification or for further proceedings, not reversal.

II. Argument

A. Standard of Review

This Court's review of this appeal is *de novo*. The superior court was not a fact finder for the purpose of any of the issues on appeal and, therefore, its decision, including the remedy, is not granted any deference. In any event, the superior court's decision to reverse this land use petition was manifestly unreasonable and therefore an abuse of "discretion."

1. When Reviewing a LUPA Petition, the Superior Court Is Acting in an Appellate Capacity and Its Decision Is Not Entitled to Deference

The purpose of the standard of review is to "reflect[] the difference between the appellate court's role and the trial court's role. [Normally, t]he trial court finds the facts and applies the law to the facts. The appellate process is geared to decide legal, not factual, questions."

Washington State Bar Ass'n, *Washington Appellate Practice Deskbook* § 18.2 (3d ed. 2005). While a superior court typically acts as a trial court and decides questions of fact, a superior court's review of a land use decision under LUPA "constitutes appellate review." *HJS Dev., Inc. v. Pierce County ex rel. Dep't of Planning & Land Servs.*, 148 Wn.2d 451, 467, 61 P.3d 1141 (2003); *see also Wellington River Hollow, LLC v. King County*, 121 Wn.App. 224, 230 n.3, 54 P.3d 213 (2002) ("Where, as here, the superior court is required to serve in an appellate capacity to an administrative action but issues findings of fact and conclusions of law, this court simply disregards such findings and conclusions as surplusage"); *Sunderland Family Treatment Servs. v. City of Pasco*, 107 Wn.App. 109, 117, 26 P.3d 955 (2001) ("By petitioning under LUPA, a party seeks judicial review by asking the superior court to exercise appellate jurisdiction"); RCW 36.70C.010 (stating that the purpose of LUPA is to reform the judicial review of land use decisions "by establishing uniform, expedited appeal procedures . . .") (emphasis added).

Accordingly, "[w]hen reviewing a superior court's decision on a land use petition, the appellate court stands in the shoes of the superior court." *HJS Dev., Inc.*, 148 Wn.2d at 468 (internal quotation marks omitted). Here, the superior court decision, including its choice of remedy, was, under RCW 36.70C.140, a "decision on a land use petition."

Therefore, the appellate court stands in the shoes of the superior court, reviews the Hearing Examiner's decision *de novo*, and makes a decision under RCW 36.70C.140 without deference to the superior court's decision.

Ms. Petso argues that there should be a different standard of review for the superior court's chosen remedy, and in her brief she tries to characterize the superior court as a "trial court." Her argument mischaracterizes the superior court's role in this LUPA appeal, and is not supported by case law. The superior court did not act as a fact finder with regard to the issues on appeal, and this Court reviews the Hearing Examiner's decisions *de novo*. Contrary to Ms. Petso's arguments, the appellate court in *Thornton Creek Legal Defense Fund v. City of Seattle*, 113 Wn.App. 34, 52 P.3d 522 (2002), specifically found that it "sit[s] in the same position as the superior court and appl[ies] the LUPA standards of review directly to the Hearing Examiner's Decision," 113 Wn.App. at 47, but it also reviewed whether the superior court's decision to exclude evidence was an abuse of discretion. 113 Wn.App. at 58. *Thornton Creek* demonstrates that an appellate court reviews the merits of a LUPA appeal *de novo*; however, certain procedural or discovery matters decided by the superior court may be reviewed under an abuse-of-discretion standard.

The cases cited by Ms. Petso simply highlight this fact – that certain procedural and discovery issues can be reviewed under an abuse-

of-discretion standard. For example, the following cases involved procedural decisions of the trial court in the course of a LUPA case, rather than a review of the underlying LUPA decision; in these cases, the trial court's decision is typically reviewed under the abuse-of-discretion standard: *Quality Rock Products v. Thurston County*, 126 Wn.App. 250, 108 P.3d 805 (2005) (whether service was proper under CR 4 and RCW 36.70C.040 and whether a party could amend a caption under CR 15(c)); *Isla Verde Int'l Holdings, Inc. v. City of Camas*, 99 Wn.App. 127, 990 P.2d 429 (1999) (review of denial of motion for reconsideration under CR 59); *Shaw v. City of Des Moines*, 109 Wn.App. 896, 37 P.3d 1255 (2002) (review of decision to vacate judgment under CR 60); *Grandmaster Sheng-Yan Lu v. King County*, 110 Wn.App. 92, 38 P.3d 1040 (2002) (whether party was entitled to declaratory judgment under chapter 7.24 RCW). The following cases involved evidentiary matters, also typically reviewed under the abuse-of-discretion standard: *Exendine v. City of Sammamish*, 127 Wn.App. 574, 113 P.3d 494 (2005) (whether superior court erred in denying request to supplement record); *Thornton Creek Legal Defense Fund v. City of Seattle*, 113 Wn.App. 34, 52 P.3d 522 (2002) (review of decision to exclude evidence). Finally, *Willapa v. Grays Harbor Oyster Growers Ass'n v. Moby Dick Corp.*, 115 Wn.App. 417, 62 P.3d 912 (2003), involved the assessment of costs for the

preparation of the record, a matter unrelated to the merits of the land use decision.

In sum, superior courts exercise appellate jurisdiction in LUPA cases, and this Court stands in the shoes of the superior court on appeal and decides the issues *de novo*, including what remedies are available pursuant to statute. Moreover, the appellate court, which reviews the same record as the superior court on the issues on appeal, is in as good a position as the lower court to decide the appropriate remedy. Thus, while Ms. Petso is correct in arguing that a superior court in a LUPA appeal has "discretion" to remand or reverse under RCW 36.70C.140, this Court has the same discretion in its *de novo* review.

2. Even Reviewing for Abuse of Discretion, the Superior Court Erred by Not Remanding

A "trial court" abuses its discretion if its decision is (i) manifestly unreasonable, (ii) based on untenable grounds, or (iii) based on untenable reasons. *In re Personal Restraint of Duncan*, 167 Wn.2d 398, 402, 219 P.3d 666 (2009); *In re Marriage of Littlefield*, 133 Wn.2d 39, 46-47, 940 P.2d 1362 (1997).

A court's decision is manifestly unreasonable if it is outside the range of acceptable choices, given the facts and the applicable legal standard; it is based on untenable grounds if the factual findings are unsupported by the record; it is based on

untenable reasons if it is based on an incorrect standard or the facts do not meet the requirements of the correct standard.

In re Marriage of Littlefield, 133 Wn.2d at 47.

Here, the superior court's decision to reverse was "manifestly unreasonable" for the reasons provided in the Opening Brief, namely that (i) the purpose of LUPA is to expedite appeals; (ii) the Hearing Examiner's decision was overwhelmingly upheld; and (iii) the ordinary remedy for alleged errors found by the superior court is to remand for reconsideration.

The superior court's decision was based on "untenable reasons" because it did not follow the correct standards for appellate review of a Hearing Examiner's decision. Although RCW 36.70C.140 does not provide explicit standards for a court's decision whether to reverse or remand for an error, case law does. As stated in the Opening Brief, 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). Remand is "especially appropriate" when the record is not sufficiently developed. *Id.* Remand is also appropriate when a Hearing Examiner applies the wrong legal standard. *See Wash. Pub. Employees Ass'n v. Cmty. Coll. Dist. 9*, 31 Wn.App. 203, 212-213, 642 P.2d 1248 (1982) ("[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"). If this Court agrees with Ms. Petso that "[t]here is no way to know what the hearing examiner would have done if she had known that the proposed facility was smaller, not larger, than what would be considered sustainable under the Plan",¹ the appropriate remedy is to remand to the Examiner so as to allow the record to be fully developed in that regard. A reversal would be an abuse of discretion and contrary to Washington law.

B. Burnstead's Drainage Proposal Is Appropriate

There is substantial evidence in the administrative record to uphold the Hearing Examiner's approval of Burnstead's preliminary drainage proposal. Throughout the process, Ms. Petso has presented no drainage engineer or other expert evidence to uphold any of her drainage arguments or to refute the experts whose opinions are in the record. Furthermore, the record shows that the Hearing Examiner did not "completely misunderstand[and] the drainage propos[al]". More importantly, the test is not whether the Hearing Examiner erred in a statement she made. Instead, Ms. Petso, as the LUPA appellant, carries the burden before this Court of proving that the Hearing Examiner's decision – that development of the

¹ Ms. Petso's Response Brief at page 14.

plat and planned residential development ("PRD") drainage system would not exacerbate preexisting drainage problems being experienced by nearby properties for reasons unrelated to the proposed plat, and that legally, the City could not require Burnstead to fix those unrelated problems as a condition of approval – was unsupported and in error. Ms. Petso cannot demonstrate that that decision was "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). As set forth more fully in the Opening Brief, the record here contains ample evidence from experts, both via engineering reports and testimony, that Burnstead's *preliminary* stormwater drainage proposal is appropriate. See CP at 859-903 (Burnstead's Preliminary Storm Drainage Report); CP at 705-706 (Letter from BlueLine); CP at 827-841 (City's Findings, Conclusions and Recommendations); CP at 44-119 (transcript of 06/21/07 hearing); CP at 1610-1613, 1627 (Hearing Examiner's Findings Conclusions & Decision). The neighborhood's preexisting drainage concerns are unfortunate, but legally irrelevant to Burnstead's development obligations.

Ms. Petso's serial assertions regarding such topics as SEPA compliance, the City's comprehensive plan, and the non-existent drainage ditch are addressed below.

1. The City's SEPA Determination Regarding Burnstead's Drainage Proposal Was Not Clearly Erroneous

Ms. Petso claims that the City's SEPA review was somehow flawed and that, while a remand is somehow otherwise inappropriate, additional SEPA review was needed for Burnstead's Project. To begin with, the superior court did not find any error in the City's SEPA review of Burnstead's drainage proposal, CP at 200-201; Ms. Petso did not appeal that determination and is therefore precluded from arguing SEPA issues here.

Second, with regard to the specific issue of drainage as it relates to SEPA, the City found that any potential adverse environmental impacts of Burnstead's drainage plan would be mitigated by installation of a drainage system designed to the 1992 Washington State Department of Ecology ("DOE") Manual adopted by the City at ECDC 18.30.100(A). *See* WAC-197-11-330(1)(c) (the City is to "[c]onsider mitigation measures which an agency or the applicant will implement as part of the proposal, including any mitigation measures required by development regulations, comprehensive plans, or other existing environmental rules or laws"); WAC-197-11-350(1). As noted by City staff in its June 8, 2007 Findings, Conclusions, and Recommendations: "The City has code sections that address [drainage] and SEPA is not necessary to deal with them. SEPA is

not intended to duplicate requirements already mandated by other City codes." CP at 1023; *see also* the MDNS at CP at 1052-1055.

Further, the City had no authority to impose on Burnstead the duty to build a system bigger than needed to control the drainage from development of Burnstead's plat/PRD to help resolve unrelated, preexisting drainage complaints on adjacent properties. To the contrary, were the City to attempt to do so, its actions would be unconstitutional under well-established U.S. Supreme Court and Washington State Supreme Court precedent. Ms. Petso misconstrues the two cases she cites for the SEPA standard of review: *Moss v. City of Bellingham*, 109 Wn.App. 6, 14, 31 P.3d 703, 708 (2001); *Anderson v. Pierce County*, 86 Wn.App. 290, 936 P.3d 432 (1997). In fact, these cases make clear that the environmental review process and protection are left to the sound discretion of the appropriate agency, not a reviewing court. *See Anderson*, 86 Wn.App. at 302. An agency's threshold determination under SEPA is reviewed under the "clearly erroneous" standard. *Id.*; *Moss*, 109 Wn.App. at 13. A determination is clearly erroneous when the court – or hearing examiner – "is left with the definite and firm conviction that a mistake has been committed." *Anderson*, 86 Wn.App. at 302. An agency's issuance of a mitigated determination of non-significance (MDNS) must be accorded "substantial weight" by reviewing courts as well as by hearing examiners.

Id. at 303 (hearing examiner did not err in giving "substantial weight" to county's utilization of MDNS process); *see also* RCW 43.21C.090 ("In any action involving an attack on a determination by a governmental agency . . . the decision of the governmental agency shall be accorded substantial weight") (emphasis added). Therefore, as an example, even if the Hearing Examiner did get mixed up about the effect of smaller (versus larger) infiltration rates, there is nothing in the record to suggest that the City's responsible official made that mistake, or that the MDNS was clearly erroneous, especially if the City's administrative decision is afforded "substantial weight."

Moreover, "SEPA does not demand a particular substantive result in government decision making; rather, it ensures that environmental values are given appropriate consideration." *Moss v. City of Bellingham*, 109 Wn.App. at 14 (citations omitted). Here, the City performed an environmental assessment, gave appropriate consideration to the potential drainage impacts of Burnstead's proposal to redevelop its property, and determined that any potential adverse impacts would be adequately mitigated through the installation of a drainage system designed in compliance with the 1992 Washington State DOE Manual adopted by the City at ECDC 18.30.100(A). The Hearing Examiner gave appropriate deference to the City's MDNS. The superior court found no SEPA error.

Ms. Petso did not appeal that aspect of the superior court's decision. Her SEPA arguments should be ignored.

2. Burnstead's Proposal Complies With the Comprehensive Plan

Ms. Petso's comprehensive-plan-violation arguments are wrong in two respects. First, she mischaracterizes the role of the comprehensive plan in drainage planning in general, and development of a drainage plan for Burnstead's development proposal in particular. In fact, Burnstead plans to build a system to meet goals of the comprehensive plan and the Southwest Edmonds Drainage Plan ("SW Edmonds DP"), even though such planning instruments are just that – planning guides and not documents used for design. *See Lakeside Indus. v. Thurston County*, 119 Wn.App. 886, 894-895, 83 P.3d 433 (2004) (citing *Citizens for Mount Vernon v. City of Mount Vernon*, 133 Wn.2d 861, 873, 947 P.2d 1208 (1997)). The SW Edmonds DP is simply a planning guide, but it does include *general* drainage recommendations, such as utilizing infiltration rates between 2 to 10 inches per hour. CP at 1416-1517, 1437. The Burnstead engineer's general proposal to use a 10-inch-per-hour infiltration rate is consistent with the comprehensive plan, and was based on a site-specific geotechnical investigation. CP at 865. Ms. Petso argues, without expert investigation of her own, that Burnstead's preliminary

drainage plan investigations were not thorough enough. The City of Edmonds drainage code (1992 DOE manual) specifically dictates the sizing requirements of the onsite stormwater conveyance, storage, infiltration, and treatment facility to be designed at final engineering where all detailed engineering is required. ECDC Chapter 18.30. This rigorous, expensive design process does not occur until the preliminary plat has been approved. The City cannot approve an engineering design that does not meet the City's drainage code.

Burnstead's proposed infiltration rate falls within the range designated by the comprehensive plan, CP at 865, but more importantly, the infiltration rate was proposed with site-specific information that the City had not obtained when the SW Edmonds DP was written. To date, Burnstead's plan has been – and following preliminary plat/PRD approval, will continue to be – designed to handle drainage based on the specific characteristics of the site as well as the location and characteristics of the homes, streets and other elements of Burnstead's development proposal, applying a conservative margin of safety.

Furthermore, contrary to Ms. Petso's assertion, Burnstead does not plan to "fill the existing drainage ditch, thus flooding the Miller's and other

properties to the west."² As addressed in detail in the Opening Brief, there is no evidence that Burnstead's stormwater drainage system would be insufficient to handle the drainage created by Burnstead's Project or exacerbate any downstream drainage problems. In fact, Burnstead and City engineers testified that redevelopment of the site would modestly reduce offsite drainage problems downstream, because the system will retain or detain water that currently runs uncontrolled off the hardpan surface of the ballfields. CP at 1533. While Burnstead has no legal obligation to solve the preexisting drainage complaints reported by the adjacent property owners, its system would provide modest benefits. The City cannot constitutionally require Burnstead to do more.

3. Homeowner Maintenance of the Drainage System Is Required by City Code

Ms. Petso's next argument is that the City and Burnstead should not leave maintenance of Burnstead's planned drainage system up to

² Ms. Petso's Response Brief at page 17. *See also* page 19. Before the trial court and Hearing Examiner, Ms. Petso alleged that what she now calls a ditch was a regulated stream or wetland. Burnstead's wetland expert performed a site inspection and found no critical areas, no streams, no ditches meeting the definition of wetlands, and no wetlands. CP at 881-882; CP at 805-806. In fact, Burnstead's wetland expert stated that:

It appears the area [Petitioner is] referring to is an excavated hole located in this vicinity. This area was investigated and was found to contain no wetland characteristics nor does it have a defined channel or demonstrate any evidence of the passage of water. This area does not meet the criteria for a stream.

CP at 806. The Hearing Examiner agreed, stating: "Nothing within the Record supports the assertion that the drainage swales . . . can be classified as an intermittent stream." CP at 1628. The City's engineer also agreed. CP at 1628.

homeowners following development and sale of the homes because those new homeowners cannot be trusted to comply with their legal obligations. This argument is without merit and contrary to the Edmonds City Code. ECDC 18.30.100(D) *requires* property owners to be responsible for the maintenance, operation or repair of stormwater drainage systems. It states in full:

D. Compliance. Property owners are responsible for the maintenance, operation or repair of storm water drainage systems and BMPs. Property owners shall maintain, operate and repair these facilities in compliance with the requirements of this chapter and the Storm Water Management Manual. [Ord. 3013 § 1, 1995.]

C. Burnstead's Perimeter Buffer Meets City Code as Interpreted by the City

The City interpreted its Code to only require the buffer to be on two sides of the Project – those sides that abut other developments.³ CP at 1709-1710. The Hearing Examiner gave this interpretation deference, CP at 1799-1801, and the superior court, as an appellate court, was required to do the same. RCW 36.70C.130(1)(b); *see also City of Univ. Place v. McGuire*, 144 Wn.2d 640, 647, 30 P.3d 453 (2001). Burnstead drew its preliminary plat to meet the City's interpretation of its Code. However, if this Court finds error in the City's interpretation and requires buffering on

³ Ms. Petso's argument on page 22 of her Response Brief is unclear, as her reference to the record at CP at 1014-1021 is incorrect.

the two sides of the Project that do not abut developments, then the 15-foot setback on lots 12-21 may be used as the perimeter buffer the same as the setback is currently shown on lots 1-11, by shading those areas on the preliminary plat and adding the appropriate deed restrictions to all lots 1-21. CP at 195-197. Tracts A, E and F are already designated as open-space areas, CP at 1649, and do not require an additional open-space "buffer."

Ms. Petso attempts to mislead this Court into believing that the other two sides of the Project are along "public ways" and therefore require *additional* buffering.⁴ This is not true. ECDC 20.35.050(C)(2) provides in part that "[w]hen 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." (Emphasis added.) Neither the northern border nor the eastern border of the Project abuts a public way. The northern boundary of the Project is a former utility easement, now part of a City park, and the eastern boundary is adjacent to what is now that same City park. CP at 1630. The superior court ruled that a park is not a public way. CP at 196. Ms. Petso did not appeal that ruling, so it cannot be raised here.

⁴ Ms. Petso's Response Brief at pages 24-25.

The bottom line regarding the perimeter buffer is that the superior court erred in failing to give proper deference to the City's interpretation and historical application of its Code to not require buffering on undeveloped sides of a project. CP at 1799. Even if this Court upholds the superior court's ruling in this regard, the alleged error can be easily rectified at final PRD approval by modifying Burnstead's plat drawings to show the perimeter buffer on all four sides of the Project. This Court can remand for modification; no remand for further proceedings is necessary.

D. Burnstead's Open-Space Designations Meet City Code

Ms. Petso's allegations that there are two plats for Burnstead's development proposal is without merit and should be stricken as outside the scope of issues raised by Burnstead's appeal. At the superior court level, Ms. Petso argued that the City's various decisions resulted in "two plats" with different front-yard setbacks and buffers, and that the City somehow wrongfully approved those two plats. Ms. Petso lost that argument, and the superior court ruled that "[s]ubstantial evidence supports a conclusion that it was not two different plats approved." CP at 184. Ms. Petso did not cross-appeal this issue, and Burnstead requests that her "two plat" allegations and argument be stricken. Again, Burnstead's development proposal is at a "preliminary" approval stage, and plat drawings are routinely revised throughout the development

process, in modest ways, for clarification and to account for changes.

Precise, final engineering plans are not developed until after preliminary plat approval, and final plat drawings are not required until final plat approval. ECDC 20.35.080(B)(1).

Ms. Petso's argument that Burnstead is somehow wasting her time by acknowledging its Tract A open-space mistake is ironic, given the procedural history of this case. The appellate court sits in the shoes of the superior court to decide these issues *de novo*. Burnstead's plat drawings are currently "preliminary" and are not intended or required to be precise until final plat approval. ECDC 20.35.080(B)(1). Tract A, Tract E and Tract F are fully 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.

On page 30 of Ms. Petso's response, she states that the "Judge even stated that she did not have to reach a conclusion on [Ms. Petso's] argument that Tract E was a critical area and also should not count toward open space since the perimeter buffer on Tract A alone rendered the open space insufficient." Ms. Petso failed to point out that the superior court went on to dismiss Ms. Petso's arguments:

Petitioner also argues that Tract E cannot count as usable open space because "it was found to be a critical area." As the over

counting on Tract A already causes the amount of open space to be less than 10% it is not necessary for me to definitively determine this. If all or a portion of Tract E is a critical area that critical area cannot be used to count for the 10% open space requirement. ECDC 20.35.050(D). *Petitioner does not clarify whether this argument is based on her incorrect assumption the Hearing Examiner found tract E to be a FWHCA, the fact the property is adjacent to a FWHCA, or issues having to do with slope. Absent adequate briefing clarifying what Petitioner's basis is for the claim Tract E is a critical area, I am unable to determine it and therefore do not grant her appeal on that issue due to inadequate briefing.*

(Emphasis added.) This is one of many examples in the record where Ms. Petso's arguments often confuse issues and repeat, or misstate as established fact, allegations that have been the subject of prior Hearing Examiner or superior court rulings against her.

The Hearing Examiner found that Tract E was not a critical area. CP at 1765. The Hearing Examiner further found that Burnstead, by agreeing to keep Tract E as a mostly natural tract, would protect the FWHCA that the Hearing Examiner determined was located north of the property. CP at 1761. Ms. Petso appealed this determination to the superior court; the superior court denied her appeal on this issue, and Ms. Petso did not appeal this ruling. Ms. Petso's argument is yet another

attempt to reargue an issue she lost below. Tract E is a not critical area. However, Burnstead does propose it be maintained as a naturally kept, open-space tract. The superior court erred in interpreting the open space provision to require that the perimeter of Tract A be used for a perimeter buffer and not be counted toward open space.

More importantly, as with drainage and perimeter buffer issues, even a finding of insufficient open space is not grounds for the superior court to have reversed Burnstead's entire proposal. As set forth more fully in Burnstead's Opening Brief, open space can be addressed by increasing the size of any of the open space tracts or by reducing the lot count – either of which is acceptable during the final engineering and PRD approval process. 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) (emphasis added).

III. Conclusion

There is substantial evidence in the administrative record that Burnstead's drainage proposal will meet City code, will be designed in accordance with the specific testing and design requirements for Burnstead's site, and will not adversely impact the surrounding community. The Hearing Examiner's mistake regarding infiltration rates

is unfortunate, but *dicta*. If, however, this Court finds that the record is not fully developed, the appropriate remedy is remand for further proceedings, not reversal.

The City's formal interpretation and application of its perimeter buffer and open-space provisions are entitled to deference, and Burnstead's proposal meets City code as formally interpreted by the City and as approved by the Hearing Examiner. If, however, this Court finds that the City's interpretations are incorrect, then the appropriate remedy is to remand Burnstead's proposal for modification consistent with this Court's ruling. Not only is reversal a waste of administrative and judicial resources, as the superior court acknowledged, it is also extremely inequitable and financially burdensome to Burnstead.

Burnstead respectfully requests that this Court grant Burnstead's appeal, and uphold the Hearing Examiner's approval of Burnstead's PRD/preliminary plat. In the alternative, Burnstead requests that this Court fashion an appropriate, equitable remedy to allow correction of any errors through further administrative proceedings before the City or Hearing Examiner.

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