

63338-4

63388-4

CASE NO. 63338-4-I

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

FRIENDS OF CEDAR PARK NEIGHBORHOOD

Appellant,

v.

CITY OF SEATTLE and WIDGEON, LLC

Respondents.

BRIEF OF APPELLANT

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I. INTRODUCTION

This case involves a “creative-in-the-extreme” short subdivision approved by the City of Seattle Department of Planning and Development (the “City” or “DPD”) and the City of Seattle Hearing Examiner. CP 634-43, 112-20. The short subdivision is unlawful for three reasons. First, the drainage requirements are inadequate and may result in substantially increased water flows over a landslide-prone area adjacent to Seattle’s Burke Gilman Trail, thereby creating an unacceptable danger to the neighborhood and the public. Second, the City failed to properly apply Seattle Municipal Code (“SMC” or the “Code”) Section 25.09.240 E.1, which limits the number of lots that can be created through subdivision by requiring the subtraction of easements and/or fee simple property used for shared vehicular access to the subdivided lots. Third, the lot configuration undermines the intent of its zoned minimum lot size standards and violates the public use and interest requirement of RCW 58.17.110(2).¹

As this brief will show, this case illustrates the City's failure to follow its codes and to appropriately consider the evidence before it. This matter arrives at this Court because it is the last resort for concerned neighbor-

¹ As incorporated by the short subdivision requirements of RCW 58.17.060(1).

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hood citizens attempting to achieve compliance with the law.

II. ASSIGNMENTS OF ERROR

A. The Examiner erred by failing to place adequate conditions on approval of the short subdivision's drainage requirements in accordance with RCW 58.17.110 and SMC 23.24.040 A.3.

B. The Examiner erred by failing to properly interpret and apply SMC 25.09.240 E.1 to the subject short subdivision.

C. The Examiner erred by approving the short subdivision despite its failure to meet the public interest requirement of RCW 58.17.110(2).

III. STATEMENT OF THE CASE

The subject property lies at the top of a designated landslide area above the Burke Gilman Trail. CP 417. There are active landslides onto the trail. *Id.* Widgeon seeks to subdivide the existing 40,015 square foot single family lot into four new lots. CP 416.

A. DRAINAGE

Widgeon seeks to quadruple the number of lots at the existing single family site, thereby quadrupling the amount of impervious surfaces will also be quadrupled and increasing the amount of water drained over the landslide prone area. CP 423; Day 1 Verbatim Report of Proceedings

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(“RP”) 55:25-56:6. Increased drainage over a landslide prone area increases the risk of landslides, which endanger the nearby property owners and members of the public traveling on the Burke Gilman Trail. CP 363-69²; Day 2 RP 55:23-58:2.

During the public comment period, the City received over 80 comments on the project, thirty-seven (37) of which addressed the issues of erosion, landslides, runoff, drainage or flooding. CP 217-352.

In its decision to approve Widgeon's short subdivision, the City required Widgeon to pump water into “drainage collection lines” on 42nd Avenue NE. CP 425. As the City eventually learned at hearing, there are no “drainage collection lines” on 42nd Avenue NE. CP 16; Day 1 RP 32:24-33:4.

The Hearing Examiner affirmed the City's decision, but added a non-appealable condition that, prior to issuance of a Master Use Permit, requires Widgeon to submit a drainage plan that would “demonstrate detention of all water from roofs and other impervious surfaces on site and discharge to the ditch and culvert system on the west side of 42nd Avenue

² CP 363-69 are photographs of damage caused by a landslide in May 2008. These photographs are attached hereto as **Appendix A**.

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NE or, if acceptable to DPD, either conveyance to the existing sewer or infiltration at least 50 feet from the top of the steep slope.” CP 18-19.

B. SHARED VEHICULAR ACCESS

Widgeon's subdivision plan calls for a ten-foot wide easement serving four lots. CP 645. The easement is necessary because the internal lots are contained completely within the other two lots and therefore do not abut a roadway. *See id.*

C. LOT CONFIGURATION

The City's staff described the proposed subdivision as “creative-in-the-extreme” and “[n]ot a pretty site.” CP 467. The subdivision attempts to create four lots by linking two noncontiguous parcels of land using a six-inch connecting strip that spans approximately 194 feet. CP 237, 645. The slender connecting strip is 1/200 of the width of the parent lot. CP 645.

Because the six-inch connecting strip is so miniscule when compared to the lot width, Widgeon submitted subdivision plans that showed a not-to-scale, detailed sketch of the tiny strips. CP 645. Had Widgeon not provided that detail, the front and back parcels would have appeared to be completely separate (i.e., noncontiguous), which would have violated the Code. *See e.g.*, CP 237 (highlighting the two sections of lot A).

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IV. ARGUMENT

A. STANDARD OF REVIEW

The Land Use Petition Act ("LUPA") states that the party seeking relief has the burden of establishing that one of several standards for granting relief is met. RCW 36.70C.130(1). Petitioners seek relief under three of the LUPA standards:

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;

The land use decision is not supported by evidence that is substantial when viewed in light of the whole record before the court;

The land use decision is a clearly erroneous application of the law to the facts.

RCW 36.70C.130(1)(b)-(d).

B. DPD'S DRAINAGE ANALYSIS AND THE HEARING EXAMINER'S CONDITIONS DO NOT MEET THE REQUIREMENTS OF STATE AND LOCAL LAW

1. Under State and Local Short Subdivision Law, the Local Jurisdiction Must Determine Whether Subdivided Property Will Have Adequate Drainage

Washington subdivision law requires that DPD make written findings that "appropriate provisions are made for...drainage ways." RCW 58.17.110 (standards incorporated by RCW 58.17.060). Accordingly,

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Seattle Municipal Code requires that the Director of DPD determine whether to grant, condition, or deny a short plat based on adequacy of drainage. SMC 23.24.040 A.3.

2. The Topography of the Cedar Park Neighborhood Shows a Stepped Bluff Sloping East Toward the Burke Gilman Trail and Lake Washington

The proposed short subdivision at 13216 42nd Avenue NE is located in the Cedar Park neighborhood of northeast Seattle. CP 581, 354.³ In general terms, the area is a stepped bluff facing east toward Lake Washington. CP 585, 431. The top of the slope, at about 280 feet above Lake Washington, is generally along 39th Avenue NE. CP 585. One hundred to 400 feet east of 39th Avenue NE, the land slopes steeply down to a bench (a somewhat more level, but still sloped area). CP 585. 42nd Avenue NE runs along the center of this bench and from 42nd, lots slope downward toward the east. CP 585.

From 42nd Avenue NE, the land slopes to the Burke-Gilman Trail about 400 feet to the east. CP 581, 585. The Trail has an elevation about 20 feet above the Lake, and the parallel street, Riviera Place NE is about 10 to 12 feet above the Lake. CP 585. Waterfront properties along Rivie-

³ CP 354 is an aerial photograph of the neighborhood and is attached as **Appendix B**.

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ra Place NE slope eastward from there into the lake. CP 585, 581, 356.

42nd Avenue NE, the key street in this case, runs north to south along the intermediate bench. CP 581, 585. It varies from a low elevation of 100 feet above Lake Washington, roughly at NE 130th Street, to a high elevation of nearly 170 feet above Lake Washington at 13224 and 13226 42nd Avenue NE. CP 581, 585. 13224 42nd Avenue NE is the adjacent north property to Widgeon's proposed Short Plat. CP 585.

Thus, at the site of Widgeon's proposed short plat, the land slopes downward toward the east and south. *Id.* The west end of the proposed short subdivision at 42nd Avenue NE is 78 feet above the low point of 42nd at 130th Street. CP 581, 585. The easternmost 165 feet of the proposed short subdivision is a steep slope that drops 130 feet from its peak to its base at the Burke-Gilman Trail. CP 372.

3. Widgeon's Proposed Short Subdivision is in an Environmentally Critical Landslide Area

The site of Widgeon's proposed short subdivision (13216 42nd Avenue NE) intersects an Environmentally Critical Area ("ECA"). The eastern portion of the site contains steep slope, potential slide, and known slide areas that are adjacent to the heavily traveled Burke-Gilman Trail. CP

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416-17. The steep slope is part of a continuous steep slope and slide-prone area that extends north and south of Widgeon's lot. *Id.*; CP 585.

a. The Public Submitted Over 80 Comments to DPD During Review, 37 of Which Addressed the Area's Drainage and Landslide Problems

During the public comment period, DPD received well over 80 different letters, e-mails, and other communications. These public comments included 37 communications that addressed the issues of erosion, landslides, runoff, drainage or flooding. CP 217-352. Exemplary selections from these comments indicate that DPD was well-warned of the drainage problems and potential for slides in the area.

Comments by James Harvey, who lives at 12514 42nd Avenue NE, are indicative: "The existing lot is in an 'environmentally critical area'....it is also a 'potential slide area. There is nothing 'potential' about this area in terms of slides. Annually, in recent years, the Burke-Gilman Trail in the Cedar Park neighborhood has had to cope with run-off and slides from this hazard." CP 229-30; *see also* CP 363-69 (attached as Appendix A; photos from recent landslide near the subject lot).

Comments by Lara and Joe Pizzorno, who live at 4220 NE 135th Street, showed the problems residents have had with runoff from proper-

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ties above them: "We live at the bottom on N.E. 135th St...and have experienced the effects of excessive, uncontrolled runoff. The city has made some changes to our street to help, but we have had to spend more than \$250,000...to build retaining walls...." CP 239-40.

Additionally, the Greater Lake City Community Council wrote: "Further, we are more than surprised at DPD seriously considering this proposal given the moratorium that was placed on several developments after serious landslides occurred on steep slopes all over the city of Seattle in recent years. This puts other homes, property, and lives at risk." CP 338-39.

b. Even After the Official Comment Period, DPD was Notified of Ongoing Landslide Problems in the Vicinity of the Proposed Short Subdivision

On December 2 and December 3, 2007, the Seattle area experienced significant rainfall resulting in flooding and landslides all over the city. After the storm, Cedar Park resident Sandra Perkins, who lives at 13226 42nd Avenue NE, submitted additional information to DPD, describing "multiple slides that have occurred along the steep slope parallel to the Burke-Gilman Trail on and/or adjacent to the property proposed for the short plat." She noted and described slides adjacent to the Trail and in-

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cluded a map showing the slide locations. CP 346-48.⁴

c. Landslides in the Cedar Park Neighborhood Have Persisted in the Wake of DPD's Decision

After the April 10, 2008 DPD decision was issued, slide problems continued in the area. On May 26, 2008, a landslide took place above 13544 Riviera Place NE, near the subject parcel. CP 363-69. This slide, in which a large tree fell, blocked both the Burke-Gilman Trail and Riviera Place NE, and hit a nearby house, took place even though there had been no recent rainfall. This landslide shows the continuing problem of slope stability and the continuing danger from landslides in the area. *See id.* (photographs showing damage from the landslide near the subject parcel).

4. DPD's Review and Subsequent Decision on Drainage Issues Show Ignorance of Drainage in the Area

a. Widgeon Submitted a Geotechnical Report that Never Evaluated Drainage

As part of the Short Plat Review process, Widgeon submitted a geotechnical report prepared by TubbsGeosciences dated March 21, 2008. CP 427-36. This report presents "observations and conclusions regarding geotechnical conditions." CP 427. TubbsGeosciences observed and evaluated the existing site geology, soil conditions, slope stability, making

⁴ CP 348 is attached as **Appendix C**.

recommendations based on those observations, and evaluations.

TubbsGeosciences did not evaluate drainage conditions or existing drainage infrastructure at the site or in the vicinity. In fact, the word “drainage” never even appears in the TubbsGeosciences report. That fatal limitation shows up in TubbsGeosciences’ recommendation “that all water from roofs and other impervious surfaces be conveyed to the existing sewer, or be infiltrated at least 50 feet from the top of the steep slope.” CP 429 (emphasis added).

The limited nature of TubbsGeosciences’ investigation is reflected in this recommendation. The only sewer mentioned in the report is the sanitary-only sewer on the east end of the subject property. However, it is general city policy not to add storm water runoff to sanitary-only sewers. What TubbsGeosciences failed to realize is that there is no “existing sewer.” In fact, in sworn testimony, Donald Tubbs admitted that there is no such storm sewer line. *See* Day 2 RP 59-60.

b. DPD's Geotechnical Correction Notices Did Not Request Any Additional Drainage Analysis

The DPD Geotechnical Reviewer, William Bou, issued two Correction Notices dated January 15, 2008 and March 20, 2008 during his review of

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the TubbsGeosciences Report. Day 2 RP 10:13-23. The only request he made regarding the Report was that it be "stamped by a licensed Civil Engineer in the State of Washington."⁵

c. DPD's Drainage Reviewer Issued a Report that was Ultimately Ignored by the DPD Decision

The DPD Drainage Reviewer, Kevin Donnelly, issued his "Sewer and Drainage Review Comments" on August 2, 2007. CP 469. Under "Drainage," the "Comments" state: "We have no records of the current method of stormwater control. New construction will be required to provide detained discharge to the ditch and culvert system on the west side of 42nd Ave NE." *Id.* Thus, Mr. Donnelly's review recognized the need for detained discharge, and specifically called for it. As will be seen, DPD ignored Mr. Donnelly's report.

d. DPD's Decision Required Surface Water to be Diverted to a Drainage System that Does Not Exist

The DPD Decision issued April 10, 2008 was authored by Catherine McCoy, the DPD Planner assigned to carry out the review of Widgeon's proposed short plat. CP 416-25. Despite the statements made in Mr.

⁵ In the March 20, 2008 Correction Notice, William Bou also requested that the steep slope area be delineated on the plans and that physical markers be provided at the site to show where the slope begins. He also asked Widgeon to complete a non-disturbance covenant for the slope. Mr. Bou at no point realized there was no "existing sewer."

Donnelly's Review, the Director's Decision required the "diversion of all water from roofs and other impervious surfaces to drainage collection lines in the 42nd Avenue Northeast right-of-way, in concurrence with the recommendations of the geotechnical report (TubbsGeosciences, dated March 21, 2008)." CP 424 (emphasis added).

Ms. McCoy, despite several letters warning of the problem and despite Mr. Donnelly's report, wholly misunderstood the area's drainage problem. She knew there was a problem and yet ordered that water be discharged to a nonexistent system.

In spite of 37 public comments warning of the existing drainage problems and the danger to the public from landslides, it appears from the DPD decision that DPD never investigated the adequacy of drainage in the area. As drafted, the DPD decision failed to meet the requirements of SMC 23.24.040 A.3 (adequacy of drainage) and RCW 58.17.060 (written findings that appropriate drainage ways have been provided).

5. The Hearing Examiner Failed to Adequately Address the Site's Drainage Issues

As noted above, DPD's decision included a non-appealable condition requiring that Widgeon submit a drainage control plan that demonstrates

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“diversion of all water from roofs and other impervious surfaces to drainage collection lines in the 42nd Avenue Northeast right-of-way...” CP 424. At the Hearing, DPD planner Catherine McCoy testified that she stood by that condition.⁶ But later, under cross-examination, she admitted that she had never actually seen the drainage system. Day 1 RP 210:18-211:1.

In his testimony, Mr. Bou indicated that he never visited the project site and that he did not review the drainage connection issues, but rather he relied on DPD’s drainage reviewer. Day 2 RP 14:14-22. Mr. Bou further testified that he did not know what stormwater collection system existed in 42nd Avenue NE. Day 2 RP 22:25-23:21.

Testimony at the Hearing made evident the carelessness of DPD’s review and the Director's Decision. DPD Planner Catherine McCoy, who was responsible for preparing the decision, did not understand the drainage situation on 42nd Avenue NE, and, in preparing the decision, she failed to follow the recommendations of DPDs’ Drainage Reviewer.

Undisputed testimony indicates that if Widgeon's short plat drains to the ditch and culvert system along 42nd Avenue NE, then increased runoff

⁶ Day 1 RP 210:16-17.

will be added to the existing inadequate system. Along 42nd Avenue NE there is only a patch-quilt system of ditches and culverts. CP 585; Day 2 RP 123:2-124:3. Some culverts are clogged with silt. CP 585: Day 2 RP 130:4-5. Some intake drainage grates actually spew out water in heavy rains. Day 2 RP 124:4-16. Water routinely sheet drains across the street, downhill from west to east, flowing toward the steep landslide-prone slope and the Burke-Gilman Trail. Day 1 RP 37:21-38:6.

6. The Hearing Examiner's Decision is Not Supported by Substantial Evidence

In her Decision, the Hearing Examiner stated, "The Appellant did point out a discrepancy between the Director's Condition and DPD's recommendation on drainage, and the condition will be modified to eliminate this discrepancy." CP 117. The Hearing Examiner issued the following "Non-appealable" condition:

Submit for approval by DPD a drainage control plan prepared by a licensed civil engineer meeting the requirements of the City's Stormwater, Grading and Drainage Control Code. The drainage plan must demonstrate detention of all water from roofs and other impervious surfaces on site and discharge to the ditch and culvert system on the west side of 42nd Avenue Northeast, or, if acceptable to DPD, either conveyance to the existing sewer or infiltration at least 50 feet from the top of the steep slope.

CP 119-20.

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While Hearing Examiner's decision appears to correct the drainage loophole offered by the Director's Decision, it creates a new loophole by suggesting that the requirements stated by Drainage Reviewer Kevin Donnelly are optional. CP 469. By including the statement following the words, "or, if acceptable to DPD" the Hearing Examiner has reopened the possibility that a plan may be accepted that does not comply with Mr. Donnelly's sewer and drainage review, thereby subjecting the neighborhood to further uncertainty with regard to the important issue of drainage. The condition stated by the Hearing Examiner is not supported by evidence that is substantial when viewed in light of the whole record before the court. *See* RCW 36.70C.130(1)(c).

The Hearing Examiner made this error because she was mistaken in her characterization of the TubbsGeosciences Report. CP 427-36. In her Conclusion of Law No. 3, the Hearing Examiner identified the TubbsGeosciences Report as "the drainage study." CP 117. The TubbsGeosciences Report was not a drainage study; it was a study of geology and soils conditions, not drainage.

The Report is self-described as including "observations and conclusions regarding geotechnical conditions." The scope of work described in

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the Report (and quoted above) never used the word "drainage." There are no descriptions of existing drainage patterns or drainage infrastructure, nor are there clear statements of required drainage improvements. In fact, Dr. Tubbs, the author of the report, testified "I don't deal with drainage. Day 2 RP 35:22. The Hearing Examiner erroneously misconstrued the Geotechnical Report and its conclusions. It is not a drainage report.

The Hearing Examiner misconstrued the testimony from the City's and Widgeon's witnesses. She wrote: "testimony from Widgeon's and City's geotechnical engineers establish that water from future houses and other impervious surfaces on the site will not drain directly onto the steep slope or result in slope instability." *Id.* This statement is not supported by substantial evidence in the record.

Neither Mr. Bou nor Dr. Tubbs testified about what the runoff "will" do. All they were able to do was to *make recommendations* that the water not flow directly onto the steep slope. Neither Mr. Bou nor Dr. Tubbs is a drainage designer. Their reviews consisted of making recommendations. Until a drainage system is designed and reviewed for compliance with the requirements stated by DPD Drainage and Sewer Reviewer Kevin Donnelly, it is impossible to know what the runoff from future houses will do.

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7. Additional Conditions and Requirements are Needed to Adequately Address the Serious Drainage Problems at the Site

The Examiner's response to the evidence raised in the hearing was to impose a condition that is an improvement on the DPD Decision, but nonetheless remains inadequate. The Examiner misconstrued the reports and testimony of Widgeon's and City's experts as dealing with drainage, when they dealt only with geotechnical conditions. A drainage solution that will collect all runoff from all impervious surfaces that Widgeon may build as a result of the short plat must still be prepared and reviewed.

The condition imposed by the Hearing Examiner does not address the question of the adequacy for the existing drainage system in the area to handle the runoff provided by Widgeon's subdivided properties. CP 119-20. No investigation of neighborhood drainage by drainage experts has been made. Given the serious problems reported in the area, such an investigation is required under the drainage adequacy requirements of SMC 23.24.040 A.3.

To address the requirements of Kevin Donnelly's Drainage Review, Widgeon must provide a complete drainage system design including a detention system adequate for all runoff produced by all impervious surfaces

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on the site. CP 469. Since no water is allowed to drain onto the steep slope, all roofs, driveways, walks, patios and any other hardscape must all be served by the drainage system.

This is an especially challenging requirement, as the lot slopes from west to east, which means water naturally drains toward the steep slope and away from 42nd Avenue NE (the proposed drainage corridor). CP 585, 358, 372.⁷ New impervious surfaces such as driveways, walks, and other hardscape will compound this problem because they will likely follow the natural slope of the land.

The drainage system design will need to move water uphill as much as 200 to 220 feet from the east end of the site to the west end of the site at 42nd Avenue NE. Drainage detention systems are prone to failure due to lack of maintenance, siltation, broken pumps, electrical blackouts and similar problems. Should the system fail, runoff would be suddenly intensified and directed toward the steep slope. *See* Testimony of Rolfe Kellor, Day 1 RP 169:21-171:16. Even if the system does not fail, its runoff will be added to the already inadequate neighborhood drainage system. *See*

⁷ CP 358 is an aerial photograph showing the site of the proposed short subdivision. The existing single family home can be seen near the center of the photograph. CP 358 is attached as **Appendix D**.

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Testimony of Jeffrey Ochsner, Day 2 RP 120:7-132:14.

On August 12, 2008, the Examiner imposed the new condition to deal with runoff. CP 119-20. Since this condition arose on the date of the decision, Appellants have been denied an opportunity to comment. Although drainage and detention are a critical environmental issue in this case, DPD and Widgeon have dealt with this issue in a woeful manner. They have demonstrated through both commissions and omissions that they cannot be relied upon to protect the public's interest. *See* Section IV.B.4, *supra*.

DPD and Widgeon, despite 37 comment letters, proposed a disastrous plan for discharging water from an addition of three new homes on the top of a well-documented landslide area. DPD approved a proposal that failed to require detention and would have immediately discharged all runoff into the primitive ditch and culvert system on the west side of 42nd Avenue NE. CP 416-25. This disastrous proposal was avoided only by the public bringing this issue before the Hearing Examiner. The Hearing Examiner's attempted solution fails to cure the problem and it is not supported by evidence that is substantial when viewed in light of the whole record.

For these reasons, Petitioner asks that the decision be remanded to be modified so that there is an opportunity to review DPD's and Widgeon's

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next attempt to deal with runoff and drainage. Any such drainage plan should be subject to the right of Appellant to review and comment.

C. DPD AND THE HEARING EXAMINER MISCALCULATED THE NUMBER OF ALLOWABLE LOTS BY FAILING TO PROPERLY SUBTRACT THE AREAS USED FOR EASEMENTS AND SHARED VEHICULAR ACCESS

1. Shared Vehicular Access Must be Properly Calculated Before a Short Subdivision May be Granted

The Decision of the Director of DPD, as upheld by the Hearing Examiner, fails to take account of the full requirements of SMC 25.09.240 E.1, a unique code provision, which requires deduction of easement area and deduction of the area for "shared vehicular access over fee simple property" before calculating whether a proposed short plat meets the minimum zoning requirements.⁸ Widgeon provided no information about shared vehicular access and both DPD and the Hearing Examiner failed to require Widgeon to provide this information.

In her findings, the Hearing Examiner asserted, "At the short subdivision stage, the location of houses, garages and driveways on the lots is often unknown, as it is here." CP 117. The Examiner therefore indicates

⁸ For example, in a 5,000 sq. ft. minimum lot zone, a 20,000 sq. ft. lot with a 200 sq. ft. area used for shared vehicular access cannot be divided into four lots because 20,000 sq. ft. - 200 sq. ft. = 19,800 sq. ft., which cannot mathematically be divided into four lots, each a minimum of 5,000 sq. ft.

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that Widgeon has not shown (and DPD has not required) any information regarding the layout of houses, driveways and garages. Therefore, no information about "shared vehicular access over fee simple property" has been provided or reviewed. Although the Code gives the City the legal authority to request such information if needed to make a determination of the adequacy of a short plat, neither DPD nor the Hearing Examiner required Widgeon to provide information about "shared vehicular access over fee simple property."

As a result of the decision of DPD, as upheld by the Hearing Examiner, determination of whether "shared vehicular access over fee simple property" meets the requirements of SMC 25.09.240 E.1 is deferred, and will be made at the building permit stage. However, by that time, Widgeon may well have sold the lots in the short plat and it may be "downstream owners" who will find that they have purchased lots in a short plat that fails to meet all the requirements of the SMC.

2. The Examiner's Decision Creates an Unworkable Procedure Unintended by the Code

The Decision of the Director of DPD, as upheld by the Hearing Examiner, allows approval of Widgeon's short subdivisions before establish-

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ing compliance with all Code requirements. This opens up a procedural nightmare that allows substandard lots to be platted in advance of discovering their legality. It could also subject unwitting future lot owners to unforeseeable enforcement proceedings.

The Examiner's ruling provided that the short subdivision is to be approved now without determining if the proposed lots fully meet the requirements of the Code, leaving the final determination to be made later when application is made for a building permit. In other words, the Examiner has ruled that the land can be subdivided and, at some future date, the legality of the subdivision can be determined. This is an illogical, untenable, and erroneous interpretation and application of the Code.

The Hearing Examiner's decision creates a procedural nightmare. Should the short subdivision be approved, Widgeon could sell the resulting lots to multiple purchasers. When those purchasers apply for building permits, they may find that the lots they purchased do not meet the requirements of the SMC. This may force the City to grant variances to "downstream" owners. Alternatively, the neighbors may be required to bring legal action against these "downstream" owners who seek to build on substandard lots. This is an erroneous interpretation of the law. The

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only way to prevent this legal quagmire is to overturn the decision of the Hearing Examiner and remand the case to require that Widgeon demonstrate that the lots fully meet Code requirements.

3. DPD Normally Requires an Applicant to Submit Sufficient Information to Determine Whether the Application Conforms with the Land Use Code

In order to avoid the problem of approving a short subdivision that is later (at the building permit stage), found to be illegal, DPD normally requires short subdivisions to meet the letter of the Code prior to issuing its approval. Of course, conditioning approval of a project based on its lawfulness is normal operating procedure, and before the Hearing Examiner, DPD Planner William Mills confirmed that DPD would not approve a short plat that would require a variance at a later stage of the development process. Day 2 RP 90:7-11.

The City must require Widgeon to provide sufficient information at the short subdivision review stage in order to determine if the lots meet the requirements of the SMC, which includes the unique subdivision calculation requirements of SMC 25.09.240 E.1.

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4. Under the Code, Shared Vehicular Access to Proposed Lots Must be Deducted Prior to Determining Whether Minimum Lot Size Requirements Can be Met

Widgeon's proposed short subdivision will create four lots (Parcels A, B, C, D) from a parent lot that intersects an Environmentally Critical Area ("ECA"). The subdivision must, therefore, be evaluated for compliance with SMC 25.09.240 E.1, which states:

In computing the number of lots a parcel in a single family zone may contain, the Director shall exclude the following areas: Easements and/or fee simple property used for shared vehicular access to proposed lots that are required under Section 23.53.005.

This provision is unique to short plats intersecting ECAs. No other short plats allowed under the Code must pass this specific Code requirement. Because this requirement is unique to short subdivisions that intersect ECAs, it requires more thorough analysis of proposed site development than is typically required for non-ECA short subdivisions.

The provision of SMC 25.09.240 E.1 is unique because it specifically requires that Widgeon address both "easements" and "fee simple property used for shared vehicular access." The effect of this provision is clear: any applicant seeking approval of a short subdivision is not allowed to draw an undersized easement so that extra lots will be approved.

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Because both "easements" and "shared vehicular access over fee simple property" must be addressed, an applicant must show how both easements and shared vehicular access will be configured. Without such information, it is impossible to make a complete evaluation of whether any proposed short plat on a lot intersecting an ECA meets the full requirement of SMC 25.09.240 E.1.

In the instant matter, Widgeon and DPD never applied this mandatory Code calculation. There is simply no justification for the failure to apply this Code provision. First, Widgeon did not provide and DPD did not require any information about planned layouts of "shared vehicular access." Therefore, DPD never reviewed any evidence showing that the "shared vehicular access" requirement could be met. Second, while there is substantial testimony by Appellant concerning the difficulty of Widgeon to meet the provision of SMC 25.09.240 E.1, testimony by Widgeon and by the City was composed of assertions without any supporting evidence. Neither Widgeon nor the City ever provided an actual site layout for review and Widgeon has never illustrated how it can meet the requirement of SMC 25.09.240 E.1.

Under the Code, DPD has the authority to require an applicant to pro-

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vide necessary documentation showing how its application will meet the Code, but here it never did so. SMC 23.76.010 E.2 states this clearly:

A Master Use Permit application is complete for purposes of this section when it meets the submittal requirements established by the Director in subsection D of this section and is sufficient for continued processing even though additional information may be required or project modifications may be undertaken subsequently. The determination of completeness shall not preclude the Director from requesting additional information or studies either at the time the application is determined complete or subsequently, if additional information is required to complete review of the application or substantial changes in the permit application are proposed.

(Emphasis added).

The Hearing Examiner stated in her decision "At the short subdivision stage, the location of houses, garages and driveways on the lots is often unknown..." CP 117. This statement ignores SMC 23.76.010 E.2, which authorizes DPD to request site plan information (such as location of houses, garages and driveways) necessary to complete the analyses required by SMC 25.09.240 E.1.

5. Once Shared Vehicular Access has been Properly Deducted from the Parent Lot, there is Insufficient Lot Area to Subdivide into Four Lots

Because Widgeon provided no information showing that the easement drawn on the proposed short plat is adequate, and provided no information

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at all about "shared vehicular access," Appellant has explored a series of hypothetical arrangements of structures on proposed Parcels A,B,C,D based on Code requirements.

In her decision, Hearing Examiner claims that Appellant's analysis of easements and shared vehicular access was "built on speculation." CP 117. The Hearing Examiner claims that the Appellant "assumes a specific turning radius." *Id.* These two statements are factually incorrect.

Appellant's arguments are based on the turning radius specified in the SMC for driveways for single-family residential properties. *See* SMC 23.54.030; Day 2 RP 114:5-115:14.⁹ Appellant also based analysis on standard setbacks required by the Land Use Code. None of these measurements or diagrams is "assumed" or "speculative."

It should be noted here that Widgeon, DPD, and the Hearing Examiner have all failed to demonstrate how the shared vehicular access will operate to allow this subdivision. This has left Appellant with the task of proving a negative (i.e., how the shared vehicular access cannot meet the Code).

⁹ Appellant also used a diagram from *Architectural Graphic Standards* to help show space required for vehicle backing out of garages. As explained by Appellant's Expert Witness in the Hearing, this is a standard reference diagram. Neither the City nor Widgeon objected to introduction of this diagram.

As explained in Appellant's Closing Argument, Widgeon will likely construct (at the west ends of Parcels C and D) garages typically provided with single-family houses in Seattle. If these garages are free-standing accessory structures they can be placed just 5 feet east of the west property lines of Parcels C and D. If attached to houses, then they must be placed at least 12 feet east of the west property line due to Yard Requirements of the SMC. The document attached as **Appendix E** shows a free-standing accessory structure garage on Parcel C just five feet east of the west property line of Parcel C.¹⁰ As shown, the easement provided on the short plat (which extends only 20 feet into Parcels C and D) extends only 15 feet in front of the garage on Parcel C (and the similar garage on parcel D). The document attached as **Appendix F** shows a garage connected to a house on Parcel C: therefore the garage is located 12 feet east of the west property line of Parcel C.¹¹ As shown, the easement provided on the short plat (which extends only 20 feet into Parcels C and D) extends only eight feet in front of the garages on Parcels C and D, if the garages are not free-

¹⁰ Appendix E is a document that was prepared as an illustrative exhibit in Superior Court proceedings. Appellant supplemented its designation of clerk's papers on July 15, 2009 in order for this document to be included in the record on appeal.

¹¹ Appendix F is a document that was prepared as an illustrative exhibit in Superior Court proceedings. Appellant supplemented its designation of clerk's papers on July 15, 2009 in order for this document to be included in the record on appeal.

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standing.

The curves shown in Appendices E and F are the minimum driveway curvatures (turning radii) required in single-family residential areas copied from SMC 23.54.030 B. These curves for residential driveways are not hypothetical or speculative and clearly show that they extend beyond the bounds of the easement as drawn. Even if this extra area is not included in the easement, it must count as “shared vehicular access over fee simple property.” Common practice, of course, is not to build drives to garages precisely on these curves, but to provide aprons (large paved areas) in front of garage doors to allow for a variety of turning behavior—all such areas would be considered “shared vehicular access.” A full mathematical analysis of the area required was provided in Appellant's closing argument. CP 140-42.

Normal practice for residential development provides wider easement area in locations where turning and access is required to garages. At the Hearing, Widgeon introduced a development project showing such a configuration: Hearing Examiner's approval of a four-house cluster project at

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13558 39th Avenue NE. CP 566-77.¹² The site plan of that project shows four houses--two facing north, two facing south, with an easement that is 12 feet wide. The four houses all have inward-facing garages.

In this example of a short plat introduced at the hearing by Widgeon, at each garage the easement widens by nine feet. Where two garages are opposite each other the total width of the easement is 30 feet. Widening the easement to 30 feet where two garages face each other accommodates the shared vehicular access overlap. Thus, the site plan of the four-house cluster at 13558 39th Avenue NE, introduced by Widgeon, supports Appellant's contention that Widgeon has drawn an undersized easement for the short plat at 13216 42nd Avenue NE and that "shared vehicular access" must include additional area.

As shown in Appendices E and F, shared vehicular access to Parcels C and D will be significant. Widgeon's easement, at 10 feet wide and extending only 20 feet onto Parcels C and D, is undersized. Even with the position most favorable to Widgeon (as shown in Appendix E) an area of

¹² Although that project was approved as a cluster development (not a short plat), was built on two parent lots, not one, and has a total site width of 120 feet, and is located in a 7200 sq.ft. zone (all differences from the Widgeon's proposed subdivision), its site plan is a useful reference for easements.

720 sq. ft. will be necessary to accommodate "shared vehicular access."¹³

The difference, 570 sq. ft., must be added to the area of the access easement shown in calculating whether the proposed short subdivision meets the requirements of SMC 25.09.240 E.1.

The total easement area shown on the proposed short plat is 1,318.25 sq. ft. Adding 570 sq. ft. produces a total area of 1,888.25 sq. ft. When this area is deducted from the area of the parent lot (40,014 sq. ft.) the area left (38,126.25 sq. ft.) is insufficient to create four lots under the 9,600 sq. ft. zoning.¹⁴

In her decision, Hearing Examiner erred in suggesting DPD's closing argument demonstrated that Widgeon could meet the requirements of SMC 25.09.240 E.1. DPD's closing argument cited portions of the SMC that do not apply, such as dimensions of parking lot spaces and aisles and ignored the driveway turning radius diagrams that are specifically required

¹³ In Appellant's Closing Argument, the full details of the mathematical analysis of these areas are presented. The measurements were supported not only by the example of the other development project, but also by the diagram from *Architectural Graphic Standards*.

¹⁴ If Widgeon's garages are connected to houses, then the yard size rules of SMC 23.44.014 D.6 would require that the garage on Parcel C or Parcel D be placed at least twelve feet (12'-0") east of the west property line of Parcel C or Parcel D considerably lengthening the required easement or extending the shared vehicular access over fee-simple property thereby increasing the area to be deducted under SMC 25.09.240 E.1.

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by SMC 24.53.030 for residential driveways. DPD's argument is not only based on the wrong provisions in the SMC, it is simply incorrect. CP 94-97.

6. To Serve the Four Lots, the Code Requires a 20-foot Easement, Rather than the Provided, Undersized 10-foot Easement

Widgeon's short subdivision plan shows a 10-foot wide "access and utility easement to benefit all parcels." CP 371; *see also* CP 636, 418. The Code, however, requires that vehicle access easements serving three to four lots "shall be a minimum of twenty (20) feet" and "a turnaround shall be provided." SMC 23.53.025 B. Widgeon's proposed access easement is 10 feet wide and does not provide any turnaround. If the easement were 20 feet wide, its resultant square footage, once subtracted from the parent lot, would allow for only three subdivided lots.

In summary, DPD's decision, as upheld by the Hearing Examiner, unlawfully allows substandard lots to be platted by failing to require that Widgeon demonstrate that it can meet the standards of SMC 25.09.240 E.1. The Hearing Examiner's decision argues that since the locations of driveways and garages are often not known at the short subdivision stage, a review of the whether the layout of driveways and garages meets the re-

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quirements of the SMC can be made only at the building permit stage. The Hearing Examiner's treatment of Widgeon's proposed short plat ignores the legal authority of the Director of DPD under SMC 23.76.010 E.2 to require Widgeon to submit whatever information is necessary to evaluate fully whether the proposed short subdivision meets the requirements of SMC 25.09.240 E.1. Under Code requirements, standard reference documents, and common practice in the area, Widgeon will not be able to propose a development that meets the requirements of SMC 25.09.240 E.1. The Court should remand this matter with instructions to the Hearing Examiner and DPD that they must require Widgeon to demonstrate at the short subdivision review stage that its proposed short subdivision meets all provisions of the Code, including the full language of SMC 25.09.240 E.1.

D. THE SHORT SUBDIVISION FAILS TO SERVE THE PUBLIC USE AND INTEREST, AS REQUIRED BY STATE AND LOCAL LAW

1. State and Local Law Require that the Short Subdivision Serve the Public Use and Interest

RCW 58.17.060 directs cities, towns, and counties to adopt regulations and procedures for approving short subdivisions. It then states:

Such regulations shall be adopted by ordinance and shall provide that a short plat and short subdivision may be approved

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only if written findings that are appropriate, as provided in RCW 58.17.110, are made by the administrative personnel...

In accordance with RCW 58.17.110, a local jurisdiction cannot approve a short subdivision without the making “written findings that...the public use and interest will be served by the platting of such subdivision and dedication.” RCW 58.17.110(2). The Seattle Municipal Code requires compliance with these provisions. SMC 23.20.008. This same public use and interest requirement is also specifically found in SMC 23.24.040 A.4, which requires the Director of DPD to determine “[w]hether the public use and interests are served by permitting the proposed division of land.”

2. DPD’S Application of the Code Renders the Public Use and Interest Requirement Meaningless

DPD interprets the public use and interest requirement to mean that unless there is a specific prohibition in the Code against an element of the proposed subdivision, the public use and interest will be considered served. DPD’s decision includes no findings, but rather it merely states that the Code criteria have been met and then concludes that the public use and interest are served. It appears to be the position of DPD and the Hearing Examiner that no matter how offensive a short subdivision is to the

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public interest (in a practical sense), it will always serve the public interest (in a legal sense) as long as it does not run afoul of a prohibitive section of the Code. In other words, no loophole, no matter how offensive to the public interest, will ever be the basis for denying a short plat application.

3. Widgeon has Proposed an Extraordinarily Bizarre Lot Configuration that Overbuilds the Site and Thwarts the Intent of the Code

The subdivision application proposed a bizarre lot configuration in order to utilize the unbuildable ECA area as a portion of otherwise totally separate "lots." CP 371, 374.¹⁵ The two "lots" proposed for the western portion of the site were joined with the two "lots" at the far eastern portion of the site to create Parcels A and B. *See* CP 371-72 (Widgeon's proposed Short Plat). The separate lots were joined together by six-inch strips of land that span 194 feet along the north and south lot lines to create a "dumbbell" configuration. Widgeon used this scheme to fulfill its minimum zoning requirements (9,600 sq. ft.).

While the decision on the application was pending, DPD received over 80 comments on the application.¹⁶ The comments nearly all challenged

¹⁵ CP 374 is attached as **Appendix G**.

¹⁶ Only one comment, from the landowner's wife, was positive.

the validity of this bizarre platting scheme.¹⁷ See CP 217-352.

As discussed in Section IV.B.2 herein, the eastern 40 percent of the site is in a steep slope governed by the Environmentally Critical Area ("ECA") ordinance. Widgeon seeks to transfer development rights from the eastern environmentally critical area, leapfrogging Parcels C and D, in order to transfer density to the two furthest west "lots." Widgeon seeks to do this by using two six-inch strips of land to create the two "dumbbell lots," Parcels A and B. The six-inch connecting strips allow Parcels A and B to leapfrog Parcels C and D. CP 371, 374.

The six-inch connecting strips appear to be new in the annals of planning. DPD Planner Catherine McCoy and DPD Deputy Director Alan Justad engaged in an e-mail exchange regarding these lots in Widgeon's short plat. Ms. McCoy wrote: "To meet the minimal lot requirements--creative-in-the-extreme, you could say....You ought to see this one." CP 467. Mr. Justad responded "Not a pretty site." *Id.*

The six-inch connector strips of Parcel A and B do not provide access

¹⁷ Many of the citizen comments describe Parcels A and B as two discontinuous pieces of land. These descriptions missed the six-inch strips connecting the east and west portions of Parcel A and the east and west portions of Parcel B because the six-inch connecting strips are so minute that the sealed short plat drawing that was available during the public comment period did make them appear invisible or nonexistent. See CP 359-61.

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to the eastern portion of the lots and are too narrow for human occupancy or human use. *See* testimony of William Mills, Day 1 RP 205:2-207:9.

They are functionally useless.

According to DPD, the six-inch connector strips are "legal" because they are not obviously prohibited by the Code. Applying the Code using this logic leads to an absurd result, made clear by DPD's testimony that a connecting strip that is one-billionth of an inch would also be "legal."

Mr. Mills' testified as follows:

Q. Okay. And do you agree that the connection could be one billionth of an inch?

A. I don't think the Code sets a specific minimum width or depth standard on a lot.

Day 1 RP 249:16-19. In her answers, DPD Planner Catherine McCoy agreed with Mr. Mills and went further:

Q. And under the Seattle codes, rather than six inches, that could be one billionth of an inch; is that correct?

A. There is nothing in the provisions that states the width or depth or the size or shape of lots.

Q. So I'm hoping to get a yes or no answer. So it could be one billionth of an inch, and that would just as well satisfy DPD?

A. Well, based on code, the answer to that question would be yes.

Day 1 RP 205:3-13.

Statutes are not to be interpreted in such a way as to lead to an absurd

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result. *Point Allen Service Area v. Washington State Dept. of Health*, 128 Wn. App. 290, 299, 115 P.3d 373, 377 (2005) (explaining the well-known principle that “statutes should be read to avoid absurd results, because it is presumed that the legislature did not intend absurd results.”). The public use and interest is not served by this short subdivision, and the Hearing Examiner's decision to approve of it based upon DPD's interpretation and application of the Code is an erroneous interpretation of the law and is a clearly erroneous application of the law to the facts.

4. DPD and the Examiner's Interpretation and Application of the Code is Contrary to the Intent and Purpose for the Code's Required Minimum Lot Sizes

As shown at the hearing, Mr. Mills is knowledgeable about the provisions of the SMC, but he could not point to a single provision in the Code that contemplates a lot shape like the one proposed by Widgeon. Day 1 RP 251:10-25.

Though increased density appears to be DPD's rationale for allowing the proposed subdivision, under cross examination Mr. Mills admitted that the purpose of minimum lots sizes is to provide "predictability of neighborhood development for a particular area." Day 1 RP 247:24-248:1.

In this case, neighbors could not have predicted the subdivision of a

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40,015 square foot property (nearly half of which is unbuildable due to the ECA and related buffers) into four lots, two of which include in their lot areas the unusable ECA portion of the property by means of literally useless six-inch strips of land that span 194 feet. DPD's rationale, affirmed by the Hearing Examiner, for allowing such a subdivision is that the Code does not specifically limit how small connecting strips can be.

In other words, DPD proposes to allow development that contravenes the *intent* of the Code as long as it does not technically break the *letter* of the Code, even to the absurdity of allowing lots with strips that are only one billionth of an inch wide. By affirming the City's decision in this regard, the Examiner's decision is an erroneous interpretation of the law and is against the public use and interest. This short plat contravenes the intent of the Code and supplants the public's reasonable expectation for density in the area. It does not meet the public use and interest.

5. The Configuration of Lots A and B are Contrary to the Public Interest Because They Severely Restrict the Owners' Ability to Maintain Their Properties

The "dumbbell" configuration of Parcels A and B creates lots with two portions 194 feet apart, connected only by six-inch strips. As noted *supra* in Section IV.D.3, the two six-inch strips are too narrow to be traversed by

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the owner of either Parcel. The residences on Parcels A and B will be built on the west portions of Parcels A and B. CP 360, 371. As the short plat is currently configured, the only legal access for the owners of Parcels A and B to the east half of their property will be to go around via the Burke-Gilman Trail to access their property from the east. And the steep slope on the east portion of Parcels A and B is so steep and inaccessible that the surveyor did not provide contours for that portion of the property. CP 361 (survey).

Even if access to the eastern portions of the Parcels A and B is granted (the owners of Parcels C and D might give permission to cross their properties), the configuration of the lots calls to mind the familiar proverb, "Out of sight, out of mind." The owners of Parcels A and B will not be able to see the east portions of their own property from the west portions. The houses on Parcels C and D will block the view, as will the fact that eastern parts of Parcels A and B will be down the hill—invisible from the west portions of Parcels A and B.

In addition to the general maintenance concerns, SMC 10.52.030 lists detailed rules and regulations about expected maintenance of property by owners. Allowing this development would conflict with this section of the

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Code, and could lead to potential litigation to hold the city liable for granting a permit in direct conflict with the Seattle Municipal Code.

In her decision, the Hearing Examiner made light of the need to maintain the east portions of Parcels A and B. She wrote, "In any event the use and maintenance of an ECA would normally be very limited." CP 18 (at ¶ 9). In this statement, the Hearing Examiner ignores the testimony of expert witnesses who live in the neighborhood and experience the maintenance issues of similar slopes every day. Mr. Rolfe Kellor testified:

I might add that I do live on a similar lot, so I know that the maintenance requirements for those steep lots are quite substantial. You do have to go out there at least a couple times a year and do some pretty substantial maintenance to avoid the conditions that are not allowed by the City and King County codes just to clean the area up.

Day 1 RP 160:19-161:1

The Hearing Examiner simply ignored this testimony. Her decision is not supported by substantial evidence.

6. The Public Use and Interest are Not Served by the Subterfuge of Functionless Six-Inch Connector Strips

RCW 58.17.110(2) requires that "public use and interest be served" by the subdivision of land. SMC 23.24.040 A.4 requires determination of "[w]hether the public use and interests are served" by proposed subdivi-

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sion of land.

As shown above, Widgeon's short plat does not serve the public use and interests. The six-inch connector strips of Parcels A and B are too narrow for human occupancy and/or human use. These strips are a legal subterfuge that serve only to connect two noncontiguous parcels without allowing passage between them.

The six-inch strips serve no purpose other than as an attempted loophole to try to claim that two separate pieces of land can be combined to create one lot.¹⁸ To allow such a subterfuge to continue is clearly not in the public interest and is an erroneous interpretation of the law and a clearly erroneous application of the law to the facts.¹⁹

¹⁸ See testimony of Catherine McCoy struggling to imagine any actual use for the 194 foot six-inch strips. Day 1 RP 205:14-207:7.

¹⁹ At the Hearing, Prof. Ochsner presented two examples where the concept of the six-inch connector strips might be extended. One example shows how an applicant could purchase unused hillside from an adjacent owner in order to concentrate development and increase the number of developable lots. See CP 376, which is attached as **Appendix H**. The second example showed how an applicant could purchase unused portions of lots in a conventional Seattle block and link them by using connector strips to increase the number of developable lots. See CP 378, which is attached as **Appendix I**. These examples, which illustrate how a creative applicant can undermine the rationale for minimum lot sizes, further highlight the absurdity of DPD's and the Examiner's interpretation and application of the Code.

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7. The Two Cases Relied on by DPD and the Examiner to Justify Their Lack of Power are Distinguishable and Should Nonetheless be Modified to Conform with the Modern Realities of Land Use Planning

Widgeon cites *Norco Construction v. King County* and/or *Carlson v. Town of Beaux Arts Village* for the proposition that the public use and interest can be defined only through prohibitive land use code provisions. 97 Wn.2d 680, 649 P.2d 103 (1982); 41 Wn. App. 402, 704 P.2d 663 (1985). *Norco* and *Carlson* are distinguishable for three reasons.

First, *Norco* and *Carlson* were decided in a completely different land use environment than exists today. The cases were decided in 1982 and 1985 respectively, well in advance of the enactment of the GMA by the state legislature in 1990 and the City of Seattle Comprehensive Plan, first adopted in 1994. Both the GMA and the Seattle Comprehensive Plan sharpen and focus the City of Seattle's adoption of land use code provisions and similar land use decisions. Thus, while no specific public policies were available to guide the public interest query in the 1980s, today we have state policies and city policies specifically aimed at guiding land use in Washington.

Second, Widgeon is arguing for an interpretation that will undoubtedly-

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ly, and ironically, harm rather than serve the public use and interest.

Widgeon's interpretation would allow Widgeon and future applicants to exploit loopholes while leaving the public with no recourse other than attempting to continuously patch up loopholes in the code through legislative changes. Architect Mark Von Walter explained the danger of such an interpretation when asked how he would explain the term "loophole."

[S]ome loopholes are just conveniences, say a tax loophole. If I could find a tax loophole so I didn't have to pay quite as much tax, somebody can close the loophole later and it just goes away.

What scares me when I think about a land use loophole is that it's permanent. It's forever. Once these lots get established, that loophole doesn't go away. It can't be legislated out of the way. Even more dangerous, it becomes a precedent . . . So I think from a land use standpoint, a loophole is a very dangerous thing.

Day 1 RP 187:25-189:1.

The *Norco* and *Carlson* rationale sought to keep local governments from exercising unfettered discretion when determining land use applications. It is unlikely that the intent of those decisions was to hamstring local governments, leaving them without recourse when development applications clearly thwart the policies and intent of the GMA and the local land use regulations. Such an interpretation would itself be inapposite to the public use and interest.

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The third and final reason for distinguishing *Norco* and *Carlson* is that a basic rule of statutory construction requires that statutes not be read in a manner that leads to absurd results. Here, Widgeon proposes that the Code be interpreted so that lots can be formed in a way that serve no function, and that would be inaccessible to their owners except by means of trespass or license. In other words, Widgeon argues that the Code allows configurations that thwart the intent of neighborhood minimum lot sizes and functionally provide for single lots formed from noncontiguous pieces of land. The *Norco* and *Carlson* decisions were not issued to require local governments to “rubber stamp” permit applications that use chicanery to thwart the intent of the land use code.

8. DPD has Overextended the Holding of the *Carlson* Case

In *Carlson*, the Town of Beaux Arts attempted to prevent a short plat in a familiar “flag” or “panhandle” configuration. Such configurations are routinely used in short plats when a long lot is divided into two shorter lots back-to-back; the back lot (the lot away from the street) is configured with a 10- to 12-foot wide “panhandle” that serves as a driveway that provides access past the front lot to the public street.

The Court found the exercise of authority by the Town of Beaux Arts

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to be arbitrary and capricious because “flag” or “panhandle” lots are a familiar pattern of short platting. The *Carlson* court could not have anticipated the extent to which future developers would attempt to stretch the language of the Court's decision. Now, over twenty years later, a developer is attempting to use the language of the *Carlson* decision to achieve an absurd result and one that flagrantly undermines the intent of land use regulations.

Widgeon's proposed "dumbbell lots" are configured so that an owner cannot even walk from one end of his/her property to the other. There is nothing in the *Carlson* decision to suggest that the Court wanted to achieve this result. To suggest that the Court was intending to allow platting of land in configurations too narrow for human occupancy and human use is to overextend the *Carlson* Court's reasoning.

Nothing in the *Carlson* case suggests that the Court intended to allow bizarre lot configurations that undermine the intent of applicable ordinances and the intent of statewide subdivision law, both of which anticipate some amount of continuity on an individual lot to meet the minimum square footage requirements. Such an interpretation would itself be inapposite to the public use and interest, and cannot rationally be supported.

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9. Local Jurisdictions Rely on the *Norco* and *Carlson* Cases to Justify Poor Land Use Planning and this Court Should Give Further Guidance on the Subject of the Public Use and Interest

This is the case to rein in the City's interpretation of *Norco* and *Carlson*, which has led to mischief and absurdity in the instant case. Appellants urge this Court to review the record, see the absurdity of the City's interpretation of these cases, and take appropriate action.

10. The *Norco* and *Carlson* Cases Need to be More Narrowly Defined

The Director is required by SMC 23.24.040 A.4 to base a short plat decision in part on "[w]hether the public use and interest are served" by the proposed short plat. To date, DPD, following court decisions involving similar language in RCW 58.17.110, has interpreted this public use and interest requirement to mean only that no patent violation of the Code is evident. "Statutes must be interpreted and construed so that all the language used is given effect, with no portion rendered meaningless or superfluous." *Lakemont Ridge Homeowners Ass'n v. Lakemont Ridge Ltd. Partnership*, 156 Wn.2d 696, 698-99, 131 P.3d 905 (2006) (citations omitted). Here, DPD's interpretation renders the "public interest" criteria meaningless, and it is essentially "read out of" the Code.

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The proper interpretation is that the separate “public use and interest” criteria of SMC 23.24.040 A.4 contains a separate, more subtle test. In this case, the short plat does not serve the public use and interest, and the appeal should be granted.

The Examiner invited a proposed public use and interest test. Appellant’s proposal is as follows. Factors to be considered in this case, and that should be considered in the future when applying the public use and interest criteria, are:

- (1) Whether the short plat finds any support, not just a lack of prohibition, in the Code;
- (2) Whether the plat configuration is attempting to achieve something that is otherwise allowed by the SMC in a direct way (in this case, transfer of development rights);
- (3) Whether it is clearly contrary to the explicit language of the City of Seattle Comprehensive Plan, such as those found in the Urban Village Element, section A-2;
- (4) Whether it is clearly contrary to the language or purposes of the Code;
- (5) Whether the interpretation can lead to absurd and unintended results;
- (6) Whether the plat results in unmitigated negative environmental impacts, such as erosion, and slope stability on the identified environmentally critical areas;
- (7) Whether there were substantial concerns raised about public interest issues that DPD did not respond to with findings showing how DPD considered and weighed them;
- (8) Whether the plat is supported by using what can be fairly described as “loopholes” in the SMC.

The burden will remain with the appellant to make showings such as

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these. In this case, such a showing has been made.

V. CONCLUSION

For the foregoing reasons, the Examiner's decision should be reversed and the matter should be remanded to DPD to ensure (1) adequate drainage is provided to the site, (2) the shared vehicular access area is properly calculated pursuant to SMC 25.09.240 E.1, and (3) that the public use and interest are truly served by the short subdivision.

RESPECTFULLY SUBMITTED this 17th day of July, 2009.

THE BUCK LAW GROUP, PLLC

By 
Peter L. Buck, WSBA #5060
Randall P. Olsen, WSBA #38488
Attorneys for Appellant Friends
of Cedar Park Neighborhood

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APPENDIX A

APPENDIX A

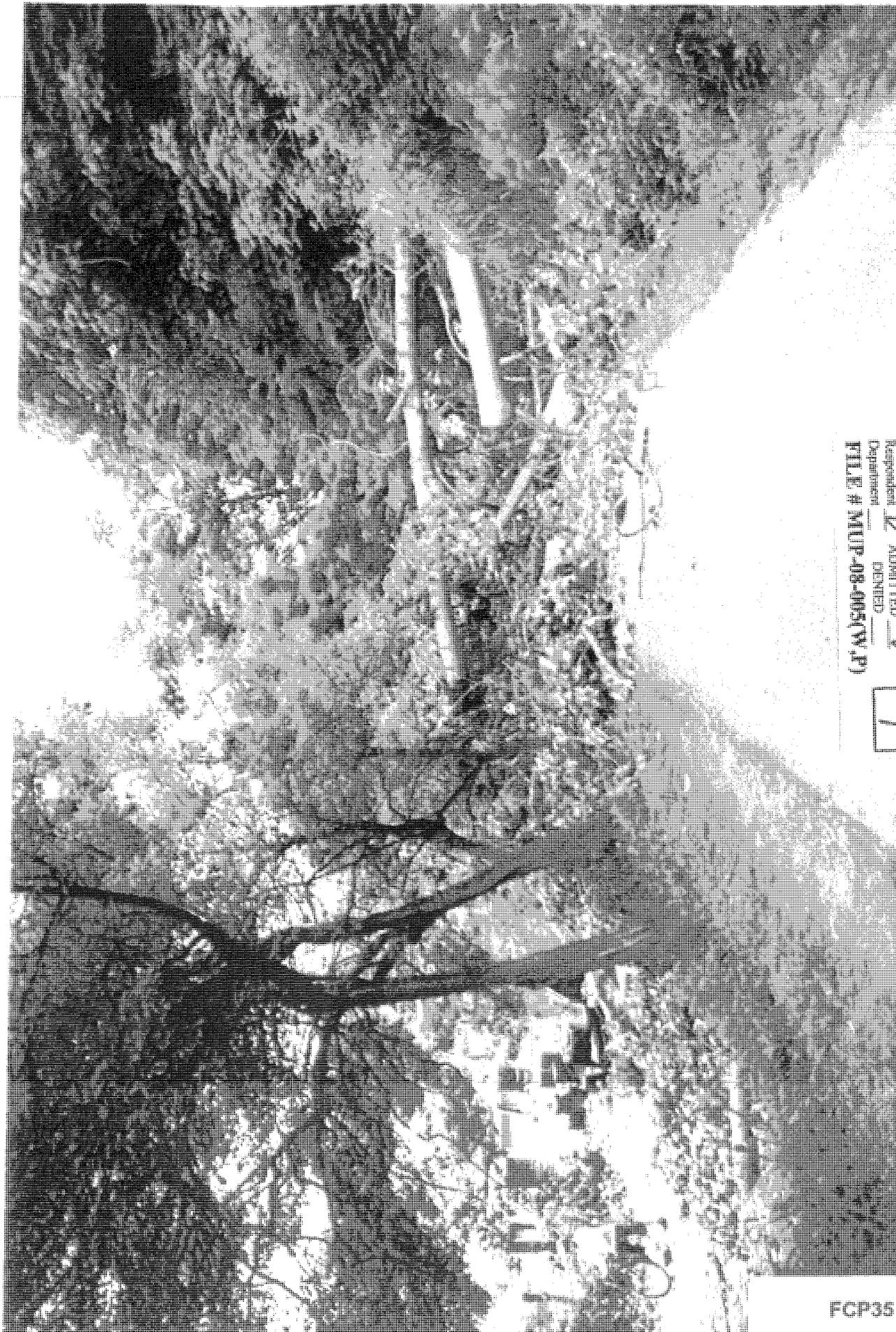
City of Seattle Hearing Examiner

EXHIBIT

Appellant ADMITTED
Independent DENIED
Department

FILE # MUP-08-005(W.P)

7



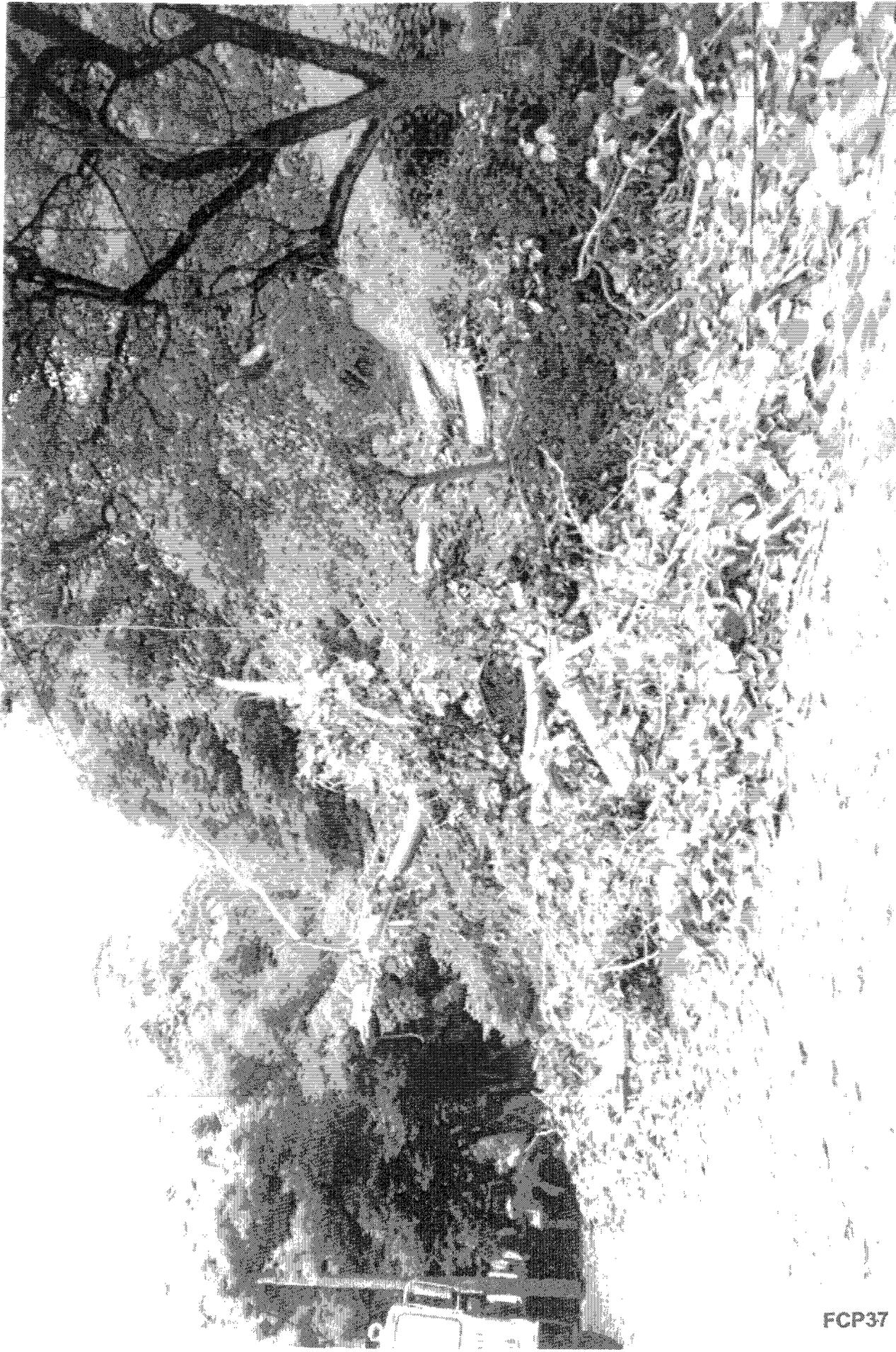
FCP35



FCP36

CP 364

00309



FCP37

CP 365

00310



FCP38

CP 366

00311



FCP39

CP 367

00312



FCP40

CP 368

00313



FCP41

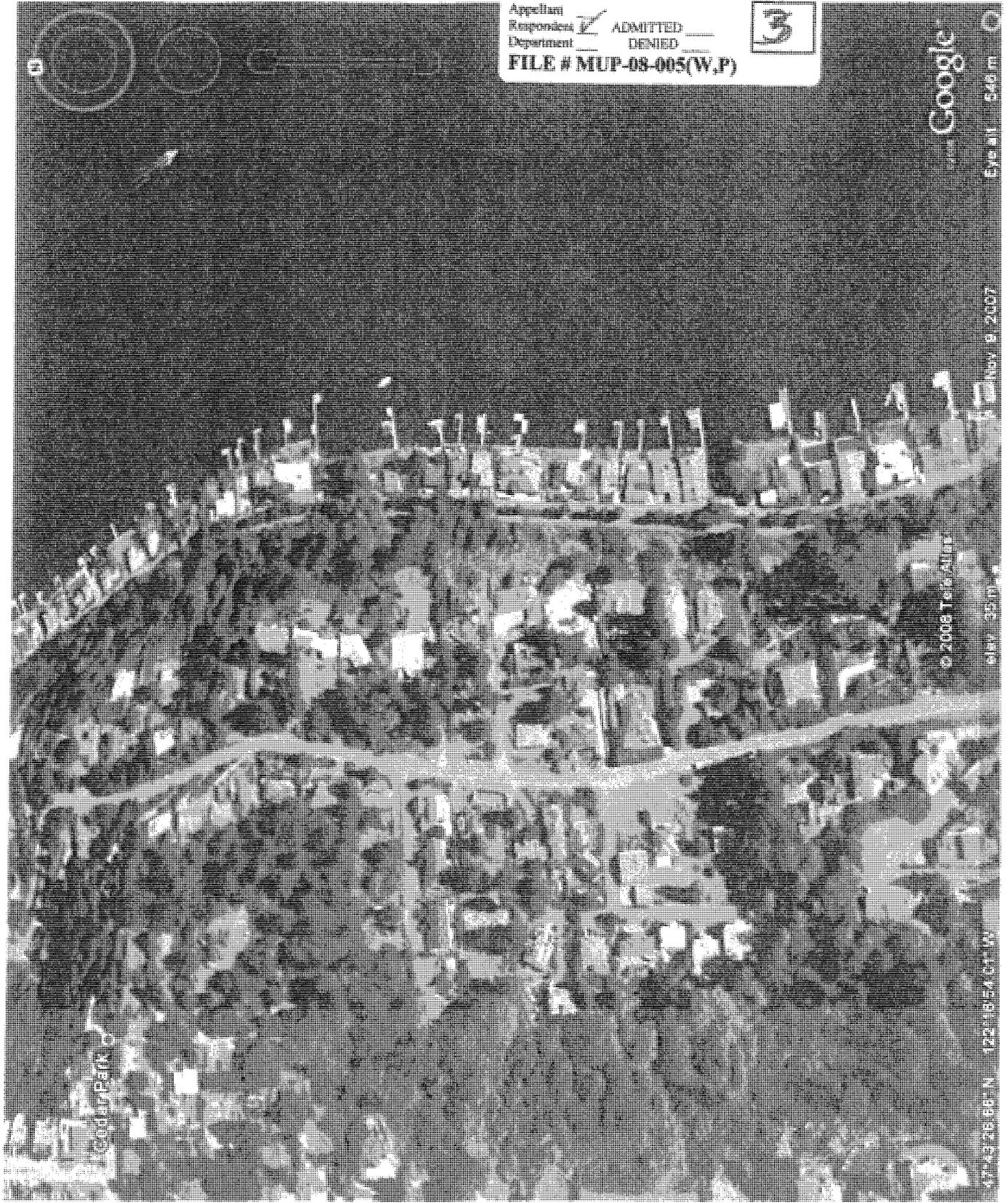
APPENDIX B

APPENDIX B

EXHIBIT

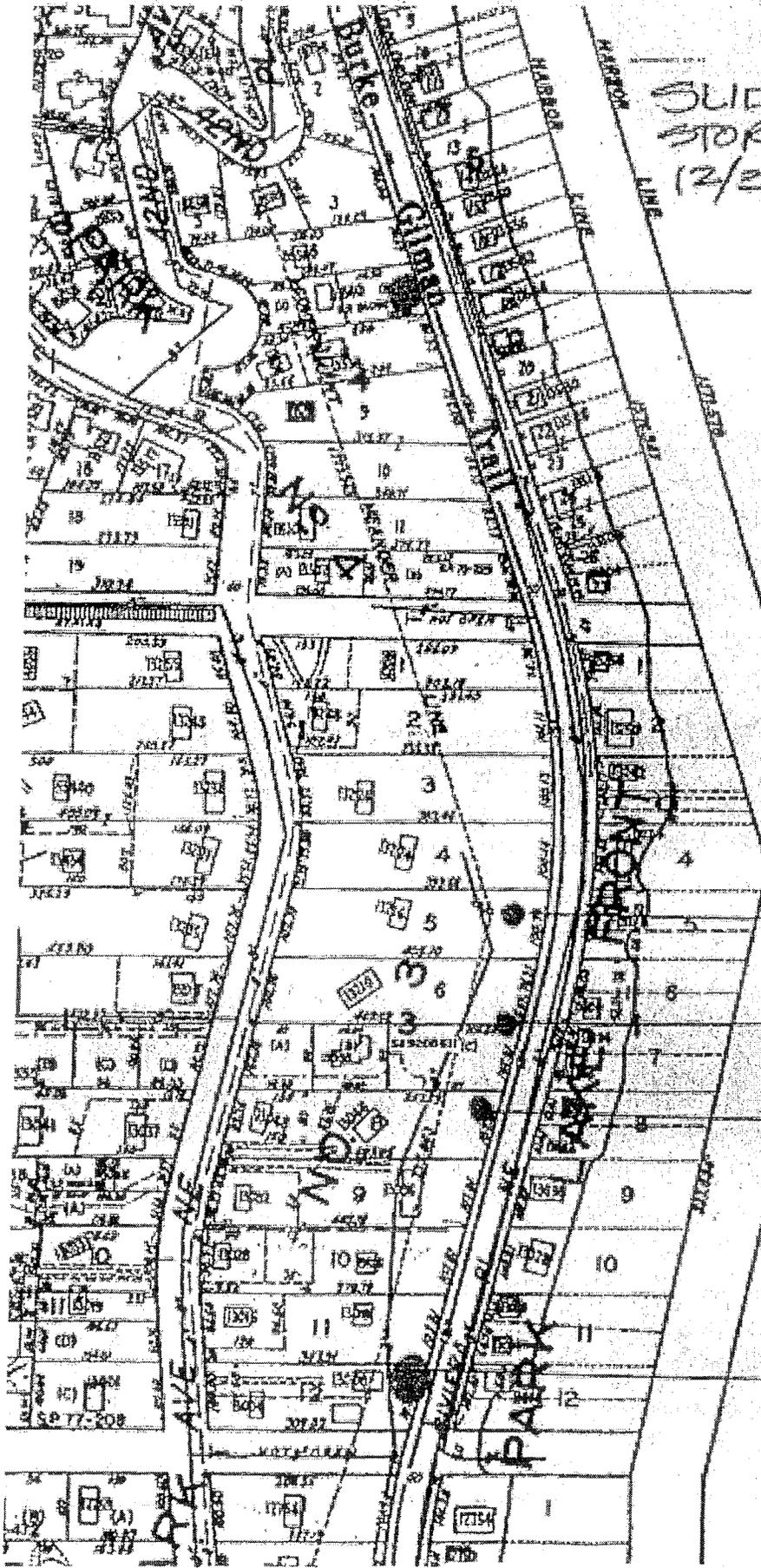
Appellant _____
Respondent ADMITTED _____
Department _____ DENIED _____
FILE # MUP-08-005(W,P)

3



APPENDIX C

APPENDIX C



SLIDES FROM
STORM 12/2/07 to
12/3/07

LARGE
SLIDE -
BLOCKED
TRAIL

SLIDE
HIGHER
ON STEEP
SLOPE

SLIDE
NEAR
TRAIL

SLIDE
NEAR
TRAIL

LARGE
SLIDE
BLOCKED
TRAIL

APPENDIX D

APPENDIX D



City of Seattle Hearing Examiner
EXHIBIT
Appellant _____
Respondent ADMITTED _____
Department _____ DENIED _____
FILE # MUP-08-005 (w.p.)

5

FCP34

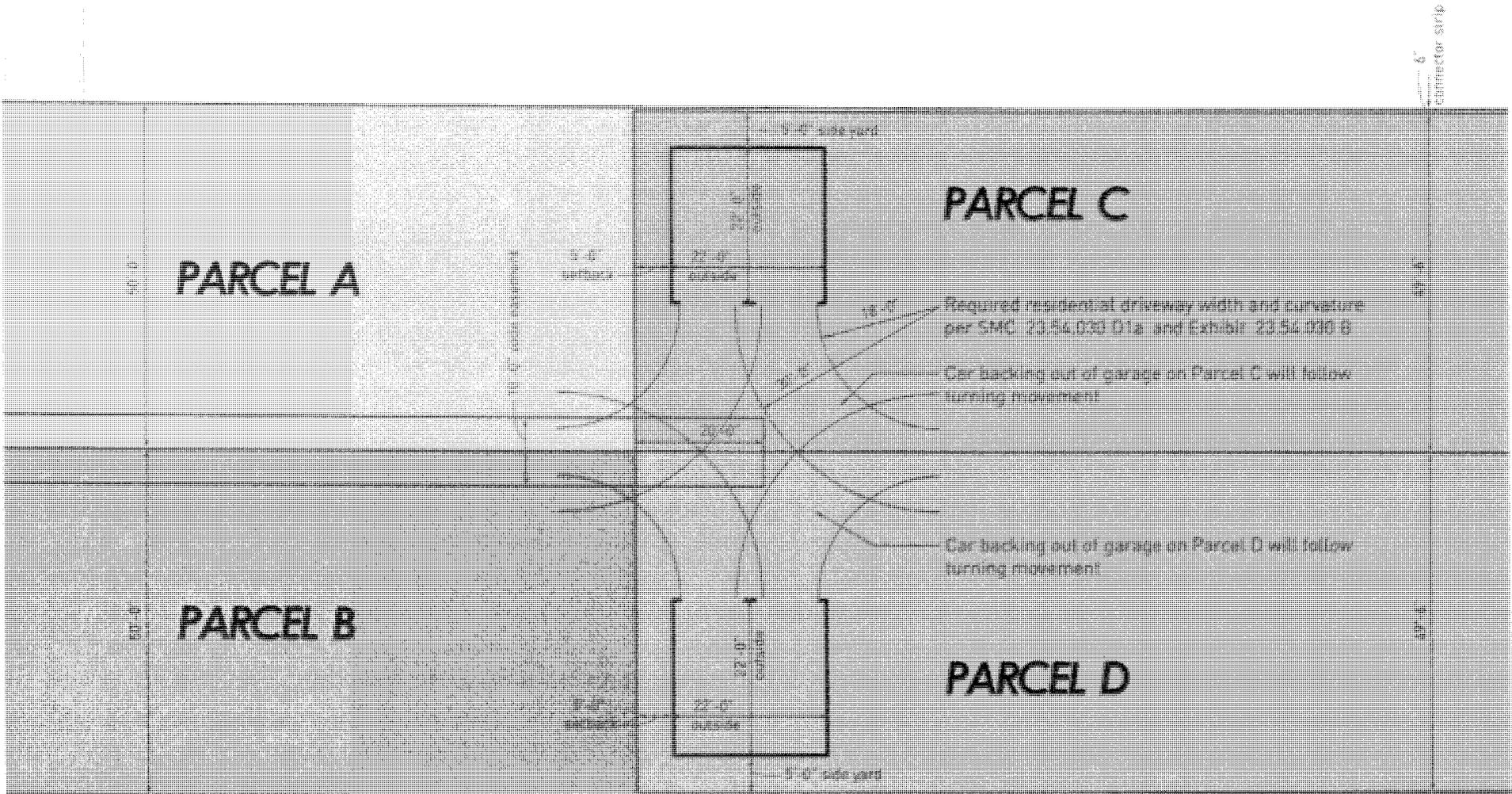
CP 358

00304

APPENDIX E

APPENDIX E

This illustrative exhibit was prepared by Professor Jeffrey Ochsner. It is based solely on the Code sections referenced in the diagram and the lots as they exist as demonstrated time and again throughout the record.



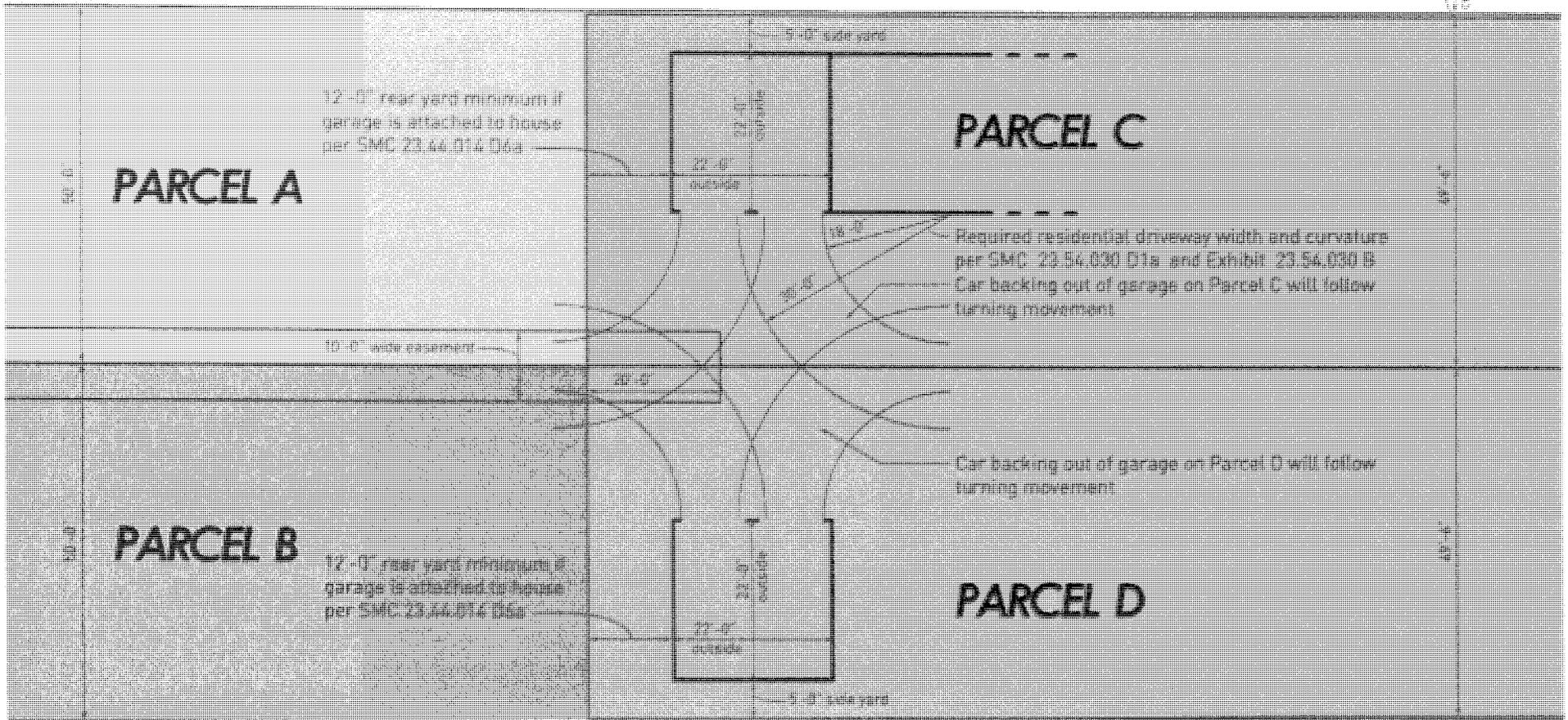
ILLUSTRATIVE EXHIBIT 1:

Diagram showing placement of freestanding 2-car garage on Parcel C and Parcel D and showing residential driveway width and curvature (turning radii) minimums per SMC. Note that easement is inadequate so that significant area of "shared vehicular access" occurs outside easement shown on applicant's short subdivision.

APPENDIX F

APPENDIX F

This illustrative exhibit was prepared by Professor Jeffrey Ochsner. It is based solely on the Code sections referenced in the diagram and the lots as they exist as demonstrated time and again throughout the record.



ILLUSTRATIVE EXHIBIT 2:

Diagram showing placement of 2-car garages attached to residence on Parcel C and Parcel D and showing residential driveway width and curvature (turning radii) minimums per SMC. Note that easement is inadequate so that significant area of "shared vehicular access" occurs outside easement shown on applicant's short subdivision.

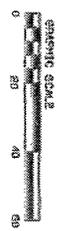
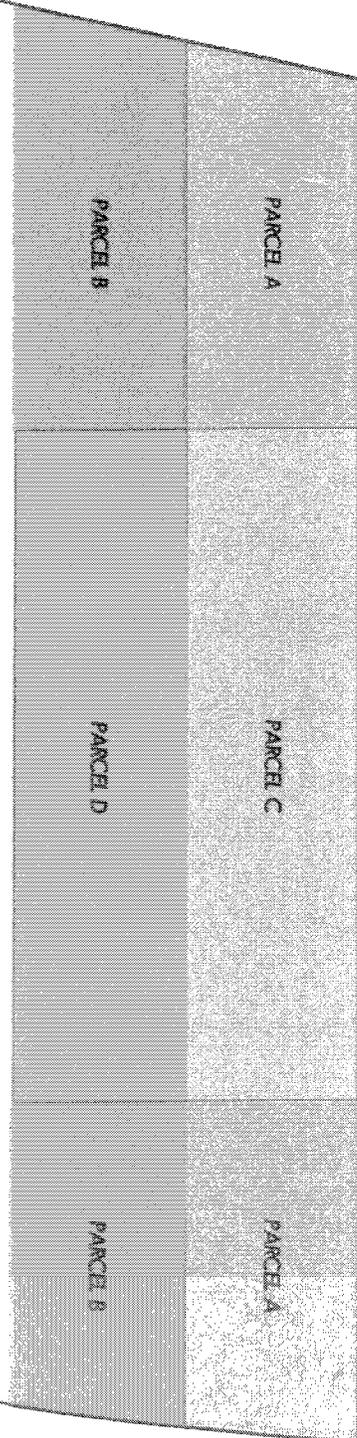
6' connector strip

6' connector strip

APPENDIX G

APPENDIX G

42ND AVE N.E.



City of Seattle Hearing Examiner

EXHIBIT

Appellant
 Respondent ADMITTED
 Department DENIED

9

FILE # MUP-08-005(W,P)

BURKE GILMAN TRAIL

RIVIERA PLACE N.E.

00317

FCP1

APPENDIX H

APPENDIX H

EXHIBIT

Appellant ADMITTED
Respondent DENIED
Department

10

FILE # WLP-08-005(w,P)



APPENDIX I

APPENDIX I

<p>City of Seattle Hearing Examiner EXHIBIT</p> <p>Appellant <input checked="" type="checkbox"/> ADMITTED <input checked="" type="checkbox"/> <input type="checkbox"/> 11 Respondent <input type="checkbox"/> DENIED <input type="checkbox"/></p> <p>Department _____</p> <p>FILE # <u>MUP-08-005 (4D)</u></p>		

FCP3

FILED
COURT OF APPEALS DIVISION I
STATE OF WASHINGTON
2009 JUL 17 PM 2:50

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

FRIENDS OF CEDAR PARK
NEIGHBORHOOD

Appellant,

v.

CITY OF SEATTLE and
WIDGEON, LLC

Respondents.

No. 63338-4-I

CERTIFICATE OF SERVICE

I, Kevin A. March, hereby certify as follows:

I am a paralegal employed at The Buck Law Group, PLLC. I am over the age of 18 years, a citizen of the United States, not a party to this action, and competent to be a witness herein. On the date indicated below, I caused to be served BRIEF OF APPELLANT and CERTIFICATE OF SERVICE upon the following counsel of record

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via hand delivery by legal messenger:

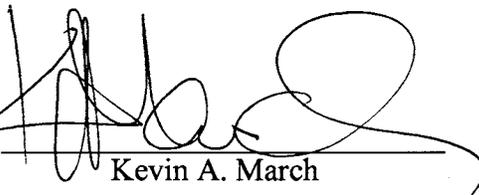
Elizabeth E. Anderson
Seattle City Attorney
600 4th Ave, 4th Floor
Seattle, WA 98104

Melody B. McCutcheon
Hillis Clark Martin & Peterson
1221 Second Avenue, Suite 500
Seattle, WA 98101

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

DATED this 17th day of July, 2009.

THE BUCK LAW GROUP, PLLC

By 
Kevin A. March

CERTIFICATE OF SERVICE – 2

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