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Case No. 63338-4-1

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

FRIENDS OF CEDAR PARK NEIGHBORHOOD,

Petitioner/Appellant,

v.

CITY OF SEATTLE and WIDGEON, LLC

Respondents.

BRIEF OF RESPONDENT THE CITY OF SEATTLE

THOMAS A. CARR
Seattle City Attorney

Elizabeth E. Anderson, WSBA #34036
Assistant City Attorney
*Attorneys for Respondent
The City of Seattle*

Seattle City Attorney's Office
600 – 4th Avenue, 4th Floor
P.O. Box 94769
Seattle, Washington 98124-4769
(206) 684-8200

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I. INTRODUCTION

At issue in this appeal, is the City of Seattle Hearing Examiner's (Examiner) decision affirming, with one modification, the Department of Planning and Development's (DPD or Department) approval of Respondent Widgeon, LLC's (Widgeon) short subdivision, which would divide a 40,000 square foot parcel zoned Single-Family 9,600 (SF 9,600) into four lots.¹ On review under the Land Use Petition Act, the King County Superior Court affirmed the decision of the Examiner,² and this appeal ensued.

Contrary to Neighbor's assertions, the City's decision to approve Widgeon's short subdivision was appropriate: the City adequately considered drainage, it accurately calculated the number of lots allowed in accordance with SMC 25.09.240(E)(1), and properly determined that Widgeon's short subdivision served the public use and interest.

¹ See CP 18:

"The Director's decision approving the short subdivision is **MODIFIED** as follows, and as modified, is **AFFIRMED**:"

Prior to Issuance of a Master Use Permit

The owner(s) and/or responsible party(s) shall:

1. 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 the site and discharge to the ditch and culvert system on the west side of 42nd Ave. 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."

² CP 802-803.

The Department, the Examiner, and the Superior Court all reached the correct result. Because Neighbor again fails to meet its burden of proving the City's decision violates any LUPA standard of review in the current appeal, the City respectfully asks this Court to affirm the City's decision.

II. COUNTER-STATEMENT OF FACTS

The City incorporates by reference Respondent Widgeon LLC's statement of facts.

III. ARGUMENT

A. Standard of Review.

Land use decisions, including the Examiner's decision affirming the Department's approval of Widgeon's short subdivision, are reviewed under the Land Use Petition Act (LUPA).³ The City agrees with Neighbor that a reviewing court may grant relief only if the party seeking relief carries the burden of establishing that one of the standards set forth in RCW 36.70C.130(1) (a) through (f) of this subsection has been met. Here, Neighbor alleges that the City's decision was erroneous under three of those standards, (b), (c), and (d), as follows:

³ RCW 36.70C.010 and RCW 36.70C.130.

(b) The land use decision is an erroneous interpretation of the law, after allowing for such deference as is due the construction of a law by a local jurisdiction with expertise;

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

(d) The land use decision is a clearly erroneous application of the law to the facts;

Throughout their brief, however, Neighbor does not clearly articulate under which standard it is entitled to relief and fails to meet its burden. Further, Neighbor's burden is high, given that this court is required to give substantial deference to the City's decision. RCW 36.70C.130(1) "reflects a clear legislative intention that this court give substantial deference to both legal and factual determinations of local jurisdictions with expertise in land use regulation."⁴ Because Neighbor fails to satisfy its burden, this Court should affirm the Examiner's decision.

B. DPD's drainage review and the Examiner's condition satisfy the requirements of state and local subdivision law.

Neighbor alleges that DPD's analysis and the Examiner's decision fail to adequately address drainage requirements of state and local

⁴ *Timberlake Christian Fellowship v. King County*, 114 Wn. App. 174, 180, 61 P.3d 332 (2002), *review denied*, sub nom. *Citizens for a Responsible Rural Area Dev. v. King County*, 149 Wn.2d 1013, 69 P.3d 874 (2003).

subdivision law, and that the Examiner's decision is not supported by substantial evidence.⁵ However, Neighbor fails to carry its burden. To the contrary, the evidence in the record makes clear that the Department's decision complies with state and local subdivision law and that the proposal was properly approved.

Under the "substantial evidence" standard, the Court may overturn the Examiner's findings of fact only if there is "a sufficient quantity of evidence to persuade a fair-minded person" that the Examiner erred.⁶ Under this standard, the Court must "view the evidence and any reasonable inferences in the light most favorable to the party that prevailed in the highest forum exercising fact finding authority"— here, the Examiner.⁷ Under this standard, the Court must also defer to the Examiner's findings of fact, and assessment of witness credibility.⁸ Here, deference to the Examiner's factual determinations is especially appropriate because the Examiner had to weigh the expert testimony of

⁵ Neighbor's Brief, pp. 5-21.

⁶ *Schofield*, 96 Wn. App. at 586 (quoting *City of Redmond v. Central Puget Sound Growth Management Hearings Bd.*, 136 Wn.2d 38, 46, 959 P.2d 1091 (1998)); see also *Wenatchee Sportsmen Ass'n v. Chelan County*, 141 Wn.2d 169, 176, 4 P.3d 123 (2000).

⁷ *Isla Verde Int'l Holdings, Inc. v. City of Camas*, 99 Wn. App. 127 at 134 (quoting *Schofield v. Spokane County*, 96 Wn. App. 581 at 586-87).

⁸ See *Isla Verde Int'l Holdings, Inc. v. City of Camas*, 99 Wn. App. 127, 134, 990 P.2d 429 (1999), *aff'd on other grounds*, 146 Wn.2d 740, 49 P.3d 867 (2002); *Schofield v. Spokane County*, 96 Wn. App. 581, 586, 980 P.2d 277 (1999) [findings of fact] and *Sunderland Family Treatment Services v. City of Pasco*, 127 Wn.2d 782, 788, 903 P.2d 986 (1995).

City staff and the City's expert, Dr. Tubbs, versus the lay testimony offered by Neighbor.⁹

Neighbor is correct that in determining whether to grant, condition, or deny a short plat, the City must consider the adequacy of drainage.¹⁰ Contrary to Neighbor's assertions, however, the record contains sufficient evidence "to persuade a fair-minded person of the truth or correctness" of the City's determinations that: (1) the proposed drainage is adequate, and (2) the short subdivision will not adversely impact the steep slope area of the property.¹¹

1. The City was well aware of the site characteristics and drainage issues in the area and still determined that drainage was adequate.

Both DPD's and the Examiner's decision show extensive awareness of the site characteristics and drainage issues in the area, including those issues raised through public comment.¹² The City agrees with Neighbor that the site has a significant change in elevation and that

⁹ Neighbor's allegation that the Examiner acted arbitrarily and capriciously must be ignored. As discussed above, LUPA does not include an arbitrary and capricious standard. If, the Court entertains Neighbor's allegation, however, the most relevant LUPA standard would be that the Examiner's decision was not supported by substantial evidence.

¹⁰ See SMC 23.24.040(A)(3); see also RCW 58.17.060; RCW 58.17.110(2).

¹¹ See *City of Redmond v. Central Puget Sound Growth Management Hearings Bd.*, 136 Wn.2d 38, 46, 959 P.2d 1091 (1998); *Ponderosa Neighborhood Ass'n v. Spokane County*, 141 Wn. App. 1031 (2007)(holding that the Hearing Examiner's decision that drainage was adequate and findings regarding slope stability were based on substantial evidence, despite some conflicting evidence).

¹² DPD's Decision at CP 417-418, and Examiner's Decision at CP 12-13 and CP 16.

the proposal is located on land designated ECA.¹³ DPD, however, thoroughly considered all of this information – including the topography and the environmentally critical nature of the property – in reviewing Widgeon’s proposal and considered all of the public comment received.¹⁴ Neighbor cites to no contrary evidence.

2. DPD performs only *conceptual* drainage review when approving a short subdivision; review of the specific details of the drainage plan will occur only when more detailed plans are submitted as part of building permit review.

Neighbor also alleges that DPD’s Drainage Reviewer, Mr. Connelly, who reviewed the Widgeon proposal and issued comments on August 2, 2007, was ignored in the DPD decision.¹⁵ This charge is false and appears to stem from a misunderstanding regarding the City’s drainage review per Code.

The City’s expert testified that only a conceptual review of a project, including conceptual review of drainage, occurs at the time DPD considers a Master User Permit application, including the short subdivision application. Detailed drainage review will occur only at the time DPD considers the building permit application.¹⁶ Before the Hearing Examiner, the City’s experts testified that: (1) short subdivision approval

¹³ Neighbor’s Brief, pp. 6-8.

¹⁴ CP 417-418, CP 112-113.

¹⁵ Neighbor’s Brief, p. 12.

¹⁶ Report of Proceedings (RP), Day Two (July 18, 2008), Bou, p. 25:13-27:23.

does not constitute building permit approval, (2) short subdivision approval does not involve any construction, fill, or diversion of water to the slope, and (3) construction, if it occurs, would be at least 100 feet away from the less-stable lower steep slope.¹⁷ Widgeon has not yet submitted, and the City has not yet reviewed, building permits for homes on these lots.¹⁸

3. The City's conceptual drainage review was sufficient.

Conceptual drainage review, as DPD performed prior to approving Widgeon's short subdivision, is sufficient to comply with state and local law.¹⁹ State and local subdivision laws provide that adequacy of drainage must be considered and that written findings must be made, but does not specify how extensive such consideration must be. Here, the City identified that drainage could be an issue, given the steep slope and nature of area, and recognized that steps would need to be taken to ensure drainage was adequate – although some details remain to be decided, the City's experts, Mr. Donnelly and Mr. Bou, concluded that drainage would be adequate and DPD made written findings of this determination in its decision approving Widgeon's short subdivision. As described below,

¹⁷ CP 114, No. 12, and *see also* RP, Day Two (July 18, 2008), Bou, p 14:23-15:4; p.18:17-22; RP, Day Two (July 18, 2008).

¹⁸ RP, Day One (July 16, 2008), McCoy, p 196:12-18; CP 114, No. 15.

¹⁹ RCW 58.17.060, .110 and SMC 23.24.040(A)(3).

consideration of drainage was sufficient for purpose of making a decision on Widgeon's short subdivision application. The Examiner properly found adequate drainage existed.²⁰

With respect to the adequacy of drainage, the City's drainage reviewer, Mr. Donnelly, reviewed and approved the proposal. As part of his review, he did not request any revisions to the application and did not recommend any short plat conditions. He noted, however, that any *new construction* will be required "to provide detained discharge to the ditch and culvert system on the west side of 42nd Ave. NE."²¹ Based on Mr. Donnelly's review, the Department found that adequate drainage existed.²²

With respect to slope stability, the Department's former geotechnical engineer, Mr. Bou, testified that he reviewed the proposal and concluded that the short subdivision will not have adverse effects on the steep slope critical area.²³ Mr. Bou further testified that the adequacy of existing drainage facilities on 42nd Ave. NE made no difference in the geotechnical analysis and that he found no concerns regarding drainage onto the steep slope east of 42nd Ave. NE.²⁴ The proposal and geotechnical report submitted to the City complied with the City's

²⁰ CP 117, No. 3.

²¹ CP 469. This requirement will come into play when applicant submits a building permit. *See also* SMC 22.802.020(A).

²² CP 421.

²³ Recorded Proceedings (RP), Day Two (July 18, 2008), p.18:19-19:2.

²⁴ *Id.*

geotechnical Code and standards. Moreover, the City had already reviewed the drainage component of the proposal and, if the DPD drainage reviewer, Mr. Donnelly, needed additional information, he would have issued his own correction notice. This is consistent with Mr. Bou's testimony before the Examiner.²⁵

Similarly, Widgeon's geotechnical engineer, Dr. Tubbs, testified that the proposed short subdivision and later-built homes, homes that would be located outside the steep slope area and its buffer, will not, with implementation of standard building and drainage control measures, adversely affect soil stability.²⁶ Dr. Tubbs recommended that "all water from roofs and other impervious surfaces be conveyed to the existing sewer line or be infiltrated at least 50 feet away from the top of the slope."²⁷ The Department included this recommendation as a condition in its decision. Although Neighbor asserts that there is no existing sewer line,²⁸ even if that is correct, there is substantial evidence in the record that drainage is adequate and the steep slope is not impacted. Regardless of exactly where the water goes, so long it will go *someplace other than the steep slope* – whether this be a ditch and culvert system on 42nd, an

²⁵ RP, Day 2 p. 14:14-22.

²⁶ RP, Day Two (July 18, 2008), Bou, p 14:23-15:4; p.18:17-22; RP, Day Two (July 18, 2008), Dr. Tubbs, p. 51:1-14; *see also* CP 427-436, geotechnical report, prepared by Dr. Tubbs, based on his surface and subsurface investigation of the soil conditions on site.

²⁷ CP 429.

²⁸ Neighbor's Brief, pp. 12-14.

existing stormwater sewer, or detained and discharged in some other manner – the drainage is adequate. As discussed, the specific details of where the drainage will go will be decided at the building permit stage. Mr. Bou, who reviewed the geotechnical report, found Dr. Tubb’s recommendations “very proper” and “very feasible.”²⁹ The Examiner found Mr. Bou’s testimony credible and under the “substantial evidence standard”, the reviewing court must defer to this assessment.³⁰

Neighbor asserts that the geotechnical report never evaluated drainage and therefore the City’s decision was not supported by substantial evidence.³¹ This is incorrect. Although the *geotechnical* report only evaluated drainage with respect to how drainage may affect the site geology, soil conditions, and slope stability of the site, the report did make a recommendation regarding drainage.³² Even though Dr. Tubbs testified that “I don’t do drainage,” his report speaks for itself – it addresses drainage by making a recommendation regarding management of drainage to better ensure slope stability. Further, the City need not rely on this report for drainage, because Mr. Donnelly did his own independent review.

²⁹ RP, Day Two (July 18, 2008), Mr. Bou, p. 14:23-15:4.

³⁰ *Sunderland*, 127 Wn.2d at 788.

³¹ Neighbor’s Brief, pp. 10-11.

³² CP 424.

At the hearing before the Examiner, Neighbor noted the differences in wording between Mr. Donnelly's recommendations and the condition language in Ms. McCoy's decision. To address this, the Hearing Examiner revised the wording of the condition of approval and imposed the revised condition on the subdivision as part of her decision.³³ As currently imposed, a drainage plan prepared by a licensed civil engineer must be prepared and approved by DPD that includes detention of all water from roofs and other impervious surfaces, and then discharge of that water to the ditch and culvert system on 42nd Ave. NE, the existing sewer, or infiltration 50 feet from the top of the steep slope. The Examiner's condition appropriately leaves the *details* of the drainage plan up to DPD, who has extensive expertise in that area. Upon building plan review, DPD can determine the most appropriate manner for managing drainage.

Neighbor even acknowledges that the Examiner's decision appears to correct the alleged drainage discrepancy between Mr. Donnelly's recommendation and DPD's decision.³⁴ Neighbors continue to allege, however, that more should be required. Neighbor, in large part, relies on the testimony of two of its witnesses, Rolfe Kellor and Jeffery Ochsner, to argue that the Examiner erred by affirming the Department's

³³ CP 116, 118.

³⁴ Neighbor's Brief, p. 16.

determination that drainage was adequate.³⁵ These witnesses live in the Cedar Park neighborhood and testified regarding their observations of existing storm water drainage in the neighborhood, but neither individual is an engineer or has expertise in geotechnical or drainage issues.³⁶ This testimony comes from lay witnesses who testify as to *existing drainage conditions*, not how drainage from the future homes may or may not impact drainage. Neighbor does not cite to evidence that concentration, collection, and diversion of surface water will result from the short subdivision approval because no evidence exists that this will in fact occur. Therefore, their lay opinions do not demonstrate that drainage from the future homes would have an impact on the steep slope or in any way show that the City's finding of adequate drainage was not based on substantial evidence.

Neighbor also argues that the Examiner's decision regarding drainage, specifically the imposition of a new condition to deal with runoff,³⁷ was not supported by substantial evidence because it suggests that Mr. Donnelly's recommendation is optional. The Examiner required that an appropriate drainage plan be installed – given the unknowns, she

³⁵ Neighbor's Brief, pp. 14-15.

³⁶ RP, Day One (July 16, 2008), Ochsner, p. 23:5-17; Kellor, p. 177:11-178:6.

³⁷ Neighbor's Brief at 15-16, citing CP 117 and 119-120.

left the decision to the expert, DPD, to decide how best to address drainage at the time Widgeon applies for a building permit.

Under the substantial evidence standard used in LUPA and other appellate review, it does not matter that other evidence might contradict the supporting evidence.³⁸ Even if an appellate court would prefer to resolve an actual dispute differently, it must affirm the factual conclusion below.³⁹ There is sufficient evidence in the record to persuade a fair-minded person of the correctness of the Examiner's decision regarding drainage; Neighbors have failed to establish otherwise.

4. Neighbor's procedural complaints are not supported either factually or legally and are not a basis for relief under LUPA.

Neighbor attempts to link its substantive complaints about the adequacy of drainage and stability of the slope with allegations that the Department made procedural errors in approving the short subdivision, including ignoring the drainage problem by: (1) disregarding public

³⁸ *In re marriage of Burrill*, 113 Wn. App. 863, 868, 56 P.3d 993 (2002), *rev. denied*, 149 Wn.2d 1007, 67 P.3d 1096 (2003); *State ex rel. Evergreen Freedom Found. v. Washington Educ. Ass'n*, 111 Wn. App. 586, 613, 49 P.3d 894 (2002), *rev. denied*, 148 Wn.2d 1010, 66 P.3d 639 (2003).

³⁹ *Beeson v. Atlantic-Richfield, Co.*, 88 Wn.2d 499, 563 P.2d 822 (1977); *Keever & Associates, Inc. v. Randall*, 129 Wn. App. 733, 737, 119 P.3d 926 (2005), *rev. denied*, 157 Wn.2d 1009, 139 P.3d 349 (2006); *Spinelli v. Economy Stations, Inc.*, 71 Wn.2d 503, 510, 429 P.2d 240 (1967)(stating that "under the 'substantial evidence standard,' we will not substitute our views on disputed facts.")

comments,⁴⁰ and (2) disregarding Mr. Donnelly's comments regarding detained storage of storm water.⁴¹

First, Neighbor failed to allege a procedural error in its LUPA petition.⁴² Even if Neighbor had raised the procedural issue in its petition, which it did not, Neighbor has cited no requirement that the Department either solicit, consider, or respond to public comments when determining whether drainage is adequate. In addition to failing to raise the allegation that the Department failed to follow a prescribed process,⁴³ Neighbor cannot meet its burden of proof.

Second, these procedural complaints are not factually supported. Even if the Department opted not to follow recommendations raised by citizens via public comment, this would not prove that the Department ignored or disregarded them. As discussed in detail above, there is substantial evidence in the record that drainage and soil stability were considered and deemed to be adequately protected by DPD's conditions. Moreover, the Department did not ignore Mr. Donnelly's recommendations; as explained above, these recommendations will be applied at the construction phase of the project. Mr. Donnelly explicitly

⁴⁰ Neighbor's Brief, pp. 8-9; 13.

⁴¹ Neighbor's Brief, p. 14.

⁴² See Neighbor's brief, p. 5, seeking relief only under RCW 36.70C.130(1) (b), (c), and (d), *not* under RCW 36.70C.130(a), for procedural errors.

⁴³ RCW 36.70C.130(1)(a).

noted that “*new construction* will be required to provide detained discharge to the ditch and culvert system on the west side of 42nd Ave. NE.”⁴⁴ It is clear that Mr. Donnelly did not intend for his recommendation to be implemented at the short subdivision stage, rather, it was to be implemented for *new construction*.

Finally, Neighbor suggests that they have been denied a right to comment on drainage and that they should have an ongoing role in reviewing the specific design of the drainage systems for individual houses, despite the fact that they have no expertise in that area.⁴⁵ Neighbor had the opportunity to comment when DPD sought public comment and has had further opportunity to voice its concerns during both its administrative and judicial appeals.

Moreover, Neighbor’s request for ongoing neighbor review is not required by the Stormwater, Grading and Drainage Control Code, is inappropriate given Neighbor’s lack of expertise in the area and is simply not warranted. The Department routinely considers these types of drainage issues and has expertise in applying the Stormwater, Grading and Drainage Control Code, based in part on the Department’s review of hundreds of permit applications a year. Moreover, Neighbor provides no

⁴⁴ CP 469 (emphasis added).

⁴⁵ Neighbor’s Brief, pp. 18-20.

basis to impose such an exceptional condition, which is not required by Code. Neighbor's proposal for another public review of the drainage system should be rejected.

C. The City properly calculated the number of allowable lots, in accordance with SMC 25.09.240(E)(1).

1. The City conducted a thorough and complete review of Widgeon's short plat application.

The Department reviewed Widgeon's short plat and concluded that it met the requirements of chapter 23.24 (short plats),⁴⁶ and SMC 25.09.240(E)(1).⁴⁷ Although the City agrees with Neighbor that the Department *could* have required additional information regarding the location of structures and driveways,⁴⁸ and that other planners have required such information on other projects, DPD's determination that it did not need to request additional information was well reasoned and supported by substantial evidence. As acknowledged by Neighbor,⁴⁹ this information is *not required* as part of a short subdivision application nor is it required by Code. Moreover, as a matter of general practice, the City

⁴⁶ CP 421, *see* subsection entitled "Summary-short subdivision".

⁴⁷ CP 418 (*see* No. 2 of Decision, addressing adequacy of access for vehicles, utilities and fire protection as provided under SMC 23.53.005); CP 360 and CP 371, (short plat plans where both sets of short plat drawing show the ten foot wide "access and utility easement.")

⁴⁸ Neighbor's Brief at pp. 37:18-25 and 38:1-9.

⁴⁹ Neighbor's Brief, p. 22, providing that "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."

does not require building footprints be identified on a short plat application.⁵⁰

Neighbor alleges that the City improperly computed the number of lots that Widgeon's parcel could contain after excluding shared vehicular access.⁵¹ This is also factually wrong. As part of the short subdivision review, the City properly computed the number of lots and concluded that four lots were authorized.⁵² Although Neighbor alleges that the Department failed to evaluate whether SMC 25.09.240(E)(1) was met,⁵³ Department staff testified before the Examiner that such calculation *did* occur as part of subdivision review, as required by SMC 25.09.240(E)(1).⁵⁴ The total shared easement area, 1,318 square feet, was deducted from the total lot area, 40,015 square feet, leaving approximately 38,674 square feet. The Director divided this number by the minimum lot area of 9,600 sq. feet and determined that four lots would be allowed.⁵⁵

⁵⁰ See CP 535-537 (MUP for two-lot short plat); CP 543-548 (short plat of five-lot short plat); CP 550-555 (MUP and Plat for two-lot short plat). Note that each of these projects involves "dumbbell" shaped lots, none of which show the building envelope on the plat map.

⁵¹ See Neighbor's Brief, e.g., p. 36:2-3.

⁵² CP416-425 (Decision addressing SMC 25.09.240, whereby planner Catherine McCoy states "review of the proposal indicated that all of the requirements and restrictions of the ECA regulations for short subdivisions have been met (SMC 25.09.240), subject to the conditions at the end of this report.")

⁵³ Neighbor's Brief, p. 26.

⁵⁴ RP, Day Two (July 16, 2008), at p. 236:17-25; 237:1-25; see also CP 114 and 116-117.

⁵⁵ *Id.*

This analysis occurred as part of the short subdivision review and was not “ignored” as alleged by Neighbor.⁵⁶

2. Under SMC 25.09.240(E)(1), areas used for *shared* vehicular access are required to be and were properly excluded in calculating the number of allowable lots.

Neighbor’s allegation that the City miscalculated the number of allowable lots is based on a fundamental misinterpretation of the City’s Code. Neighbor appears to argue that *all* easements must be deducted from the total lot area if a parcel contains a steep slope, but this is incorrect.

As provided by Neighbors, SMC 25.09.240(E)(1) (emphasis added) 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.

Contrary to Neighbor’s improper interpretation, however, DPD only excludes easements and fee simple property used for shared vehicular access to proposed lots. The Code does not require, as Neighbor attempts to argue, that potential, yet unproposed easement areas for an individual’s vehicular access be excluded. The City properly excluded areas for

⁵⁶ See Neighbor’s Brief, pp. 26-27.

easements for shared vehicular access and determined that sufficient lot area existed to create four lots.⁵⁷

3. The ten-foot easement shown on Widgeon's short plat is adequate, so no more area need be deducted in the lot calculation.

Neighbor's argument that the ten-foot easement reflected on Widgeon's short plat is inadequate is also founded on a misinterpretation of the Code. A careful reading of the Code shows that a "vehicular easement" is only the area used to cross a servient lot.⁵⁸ At the point that only one landowner uses it as a driveway, it is not a vehicular easement and is not considered part of such easement.

A long-time Department planner, Mr. Mills, testified before the Examiner as to how the shared easement is calculated, as compared to a driveway under the Code.⁵⁹ Here, only the portions of a driveway set aside for use by multiple owners for access to their specific separate lots are easements.⁶⁰ The front two lots of Widgeon's short subdivision, which front on a street, are not actually *served* by the easement since they have

⁵⁷ See Neighbor's Brief, pp. 25, 27.

⁵⁸ SMC 23.53.025.

⁵⁹ RP, Day One, July 16, 2008, Bill Mills, at pp. 236:17-25; 237:1-11; 238:3-17; 239:15-25; and 240:1-7.

⁶⁰ SMC 23.84A.008 provides that "Driveway" means "that portion of street, alley or private property which provides access to, but not within, an off-street parking facility from a curb cut." SMC 23.84A.010 provides that "Easement" means "a grant by a property owner to specific persons or to the public to use land for a specific purpose or purposes." The easement standards are at SMC 23.53.025 and 25.09.240.

street frontage and the capability of direct access to the street.⁶¹ Only the rear lots need the easement to reach the street. Therefore, DPD and the Examiner properly concluded that the easements serving the rear two lots only need to be ten feet wide, in accordance with SMC 23.53.025(A).

4. No vehicle turn-around was required, so no additional area need be excluded from the lot calculation.

Neighbor's argument that a vehicle turn around should have been required⁶² is also inconsistent with the Code.⁶³ SMC 25.53.025(A) provides that "a vehicle turn around shall be provided," but only "if the easement length is more than 150 feet." Here, the easement is 130 feet long, so no turn around is required.⁶⁴ Neighbor's allegations that the City erred in calculating the "shared vehicular access" and lot sizes is factually wrong, inconsistent with the Code, and fail to satisfy Neighbor's burden on this issue. Moreover, Neighbor fails to contravene the substantial evidence in the record that the proposal was evaluated and complied with SMC 25.09.240(E)(1).

⁶¹ RP, Day One, July 16, 2008, Bill Mills, at pp. 238:3-2; 239:15-25; and 240:1-7.

⁶² Neighbor's Brief, p. 33.

⁶³ SMC 25.53.025(A).

⁶⁴ CP 371.

5. The Examiner properly interpreted and applied the law.

Neighbor attempts to show that the Examiner misinterpreted the law by relying on hypothetical examples and scenarios. These examples were contained in Neighbor's superior court brief and were also presented to the Examiner, to argue that the City failed to comply with SMC 25.09.240(E)(1), because the shared vehicular access used in calculating lot size was allegedly inadequate.⁶⁵ However, as discussed above, these hypotheticals are based on a number misinterpretations of the Code, as well as several unproven assumptions, including that two-car garages will be built,⁶⁶ that the garages will be a minimum square footage,⁶⁷ the locations of the garages on site,⁶⁸ and that an additional portion of the driveway will have to be shared based on Neighbor's turning radius calculations.⁶⁹ Based on these hypotheticals, Neighbor concludes that the area DPD excluded in its calculation of allowable lots is undersized.⁷⁰ However, there is **no** evidence that any of these assumptions or

⁶⁵ Neighbor's Brief, pp. 28-29.

⁶⁶ Neighbor's Brief, at p. 39:22-23 and 40:1.

⁶⁷ *Id.* at 40:20-24.

⁶⁸ *Id.* at 40:3-16.

⁶⁹ *Id.* Neighbor's Brief, pp. 30-31, Appendices E & F.

⁷⁰ Neighbor's Brief, p. 30.

hypotheticals will prove to be true.⁷¹ These hypotheticals are based on speculation, as Widgeon has not yet submitted building and grading permit applications and plans. The Department does not have an application to review and, even if it did, that review is not part of the appellate record. The City established before the Examiner and, Neighbor has not presented any contrary evidence, that Neighbor's hypotheticals do not reflect the only possible development configuration on the site.⁷²

D. Widgeon's short subdivision serves the public use and interest and appropriate written findings were made.

The City agrees with Neighbor that state and local subdivision law require that a local jurisdiction must make written findings that the public use and interest will be served by such subdivision.⁷³ The Department made these required findings in its Decision as follows: "The public use and interest are served by the proposal since all applicable criteria are met and the proposal creates the potential for additional housing opportunities

⁷¹ There is no evidence in the record that the proposed development would have a turning radius of greater than 35 percent and, therefore, must comply with SMC 23.54.030(B) and SMC 23.54.030(D)(1)(a). *See also* RP, Day One, July 16, 2008, Bill Mills, at pp. 241:21-25, 242:1-13 and 243:1-11.

⁷² RP, Day One, July 16, 2008, Bill Mills, at pp 241:4-20, 242:5-25, 243:1-11.

⁷³ See RCW 58.17.110, .060 and SMC 23.24.040. State law requires local government to "inquire into the public use and interest" and make findings as to "whether the public use and interest will be served" by the division of land. RCW 58.17.110. This standard is incorporated into short plats through RCW 58.17.060 and also were incorporated into the City's Land Use Code, at which time the City expanded the phrase "public interest" to "public interests" in SMC 23.24.040(A)(4).

in the City.”⁷⁴ The Examiner also found that the public use and interests were served by Widgeon’s short subdivision.⁷⁵

1. The SMC does not contain lot shape standards; unusual-shaped lots are permitted if the minimum Code standards are met.

Neighbor asserts that the short plat, which contains two unusual-shaped lots, is “bizarre”⁷⁶ and that, as a result, the subdivision does not satisfy the public use and interest requirements of RCW 58.17.110(2) or SMC 23.24.040(A)(4). Although the shape of the lots on Widgeon’s short plat is a bit unusual, based on a review of the Code and the record, Neighbor’s claim is without merit.

The SMC allows a lot to be subdivided into nine or fewer lots if a proposal complies with all relevant Code requirements; in this case, so long as it complies with relevant portions of chapter 23.24 SMC (short plats), SMC 25.09.240 (ECA), 23.53.005 (access to lots), and 23.44.014 (yards). Here, the proposed short plat complied with all relevant Code requirements and was appropriately approved.

In support of its allegation that the short plat is “bizarre,” Neighbor relies on the Department planner Ms. McCoy, who stated the lots were

⁷⁴ CP 421; *see also* CP 419, No. 4, where DPD finds that “the public use and interest are served by permitting the proposed division of land.”

⁷⁵ CP 118, No. 7.

⁷⁶ Neighbor’s Brief, p. 36.

“creative-in-the-extreme.”⁷⁷ However, it is irrelevant how the design of the short plat has been characterized by neighbors, the City planner or the applicant, so long as the proposal complies with the Code, including the requirement that the subdivision serves the public use and interest, as discussed in detail below. Although the Seattle Municipal Code does require minimum lot *size*, there are no standards specifically related to the *shape* of a lot. As a result, subdivision under the SMC has resulted in some odd-shaped lots.⁷⁸ Regardless of their shape, even if “bizarre,” lots are allowed under the SMC so long as the proposals comply with the Code.

Neighbor also argues that the Department erred in approving the Applicant’s short plat, because there is no limit to how narrow portions of a lot could be and still be allowed by DPD.⁷⁹ While it is theoretically possible that the Department may approve a proposed short plat which used even thinner strips than those proposed by Widgeon if such a proposal meets all the relevant Code requirements, the Department cannot speculate on what could be approved without a project proposal to review. Moreover, the issue before the Court is not a hypothetical future development – the issue is whether Neighbor has carried its burden to

⁷⁷ Neighbor’s Brief, p. 27, lines 11 and 14, respectively.

⁷⁸ See e.g., CP 535-537, CP 550-556, CP 558-562, CP 566-577.

⁷⁹ Neighbor’s Brief, pp. 38-39.

establish that the City erred when it approved Widgeon's short subdivision.

Neighbor's substantive complaints about how the Department applied the land use Code and approved a short plat with "bizarre" lot configurations fails to meet their burden of leaving this Court with the definite and firm conviction that the decision is an erroneous interpretation of the law or that the City misapplied that law or based its decision on insubstantial evidence.

2. Widgeon's short subdivision is also consistent with the intent and purpose of the SMC and serves the public interest.

It is undisputed that Neighbor could not identify a single Code provision that prohibited the proposed lot configuration.⁸⁰ Rather, Neighbor alleges that the short subdivision violates the purpose and intent of the minimum lot area requirement.⁸¹ A "purpose" or "intent" of the minimum lot area requirement is not codified; however, Mr. Mills, a long-time Department employee, testified that a purpose of the minimum lot

⁸⁰ RP, Day One (July 16, 2008), 136:10-137:4 where Neighbor's primary witness stated that the issue of lot configuration could only be attacked by relying on the general "public interests" factor, since there was no Code standard that prohibited the lot configuration.

⁸¹ Neighbor's Brief, pp. 39-40.

area standards was “to allow predictable neighborhood development.”⁸² The minimum lot area requirement, however, is clear and unambiguous.⁸³ Therefore, any legislative history or uncodified policy that is relied on by Neighbor is irrelevant and cannot serve to meet Neighbor’s burden of proving that the short subdivision approval “is an erroneous interpretation of the law”.⁸⁴ Regardless, Neighbor fails to establish that the proposal is not in the public use and interests.

3. The City’s evaluation of the public use and interest requirement was proper.

First, Neighbor inaccurately characterizes the Department’s interpretation of the public use and interest requirement. Neighbor alleges that unless there is a specific prohibition in the Code against an element in a proposed subdivision, DPD will determine that the public use and interest is served. However, the record shows that the Department based

⁸² RP, Day One (July 16, 2008), 247:4-248:1 The general purpose of all Land Use Code requirements is “to protect and promote public health, safety and general welfare through a set of regulations and procedures for the use of land which are consistent with and implement the City’s Comprehensive Plan.” SMC 23.02.020.

⁸³ Under the minimum lot area requirement for lots that are zoned Single Family 9,600 (SF 9,600), “lots must be at least 9,600 square feet in area.” SMC 23.44.010. See RCW 36.70B.040(1) (cities must render decisions on the basis of applicable development regulations); *Shoop v. Kittitas County*, 65 P.3d 1194, (2003) (“It is inappropriate to look to the legislative history of a statute, where the intent can clearly be divined from the plain language of the statute”); *Kitsap County v. Mattress Outlet*, 149 Wn.2d 29, 36, 153 Wn.2d 506, 509, 104 P.3d 1280 (2005) (“Municipal ordinances are interpreted using the same rules as state statutes.”) See also Neighbor’s Brief, p. 35:12-14 where Neighbor states “when Code language is clear and explicit, the assertions of opinion about intent of Code provisions is not relevant.”

⁸⁴ RCW 36.70C.120(1)(b).

its determination that the public use and interests were served on several factors in addition to compliance with specific Code provisions. For example, DPD planner Ms. McCoy testified that DPD's determination was also based on the rationale that the subdivision would provide additional housing opportunities, advance the broader community, and preserve environmentally critical areas.⁸⁵ The City's determination that Widgeon's subdivision served the public use and interest was properly founded and Neighbor's argument fails.

Second, Neighbor argues that the Widgeon's short subdivision does not serve the public use and interest because the Code attempts to "transfer development rights" from the eastern ECA area "in order to transfer density to the two furthest west 'lots'"⁸⁶ This claim is also without merit, because the subdivision complies with the Code and allows development on each newly created lot *without* transferring any development rights. As previously discussed, development is not permitted on the ECA portion of the land included in Widgeon's subdivision. It is not contrary to the intent of the Code to allow Widgeon to configure its short plat in a manner that allows development on only the western portions of two of the resulting lots and it certainly does not

⁸⁵ RP, Day One, July 16, 2008, Catherine McCoy, at p. 199:3-7.

⁸⁶ Neighbor's Brief, p. 37.

constitute the transfer of development rights, since this configuration allows only one unit per lot.

Neighbor also argues that the development is contrary to the public use and interests because property owners of Parcels A and B will have severely limited access to eastern portions of lots thereby restricting property owners' ability to maintain their properties.⁸⁷ This argument is also without merit, because SMC 23.53.005 does not require that every single portion of a lot be accessible for vehicles, utilities or fire protection. Rather, the short plat criteria require that *access to the lot(s)* be established for vehicles, utilities, or fire protection. There is sufficient evidence that the proposal complies with the land use Code, including access requirements.⁸⁸ Moreover, contrary to Neighbor's allegations,⁸⁹ the Examiner properly concluded that maintenance of vegetation and trees in environmentally critical area (ECA) is limited.⁹⁰

Moreover, there is no requirement that a property owner use every portion of a lot, or that every portion of a lot be "functional" in order to find that the public use and interest is served by the proposal. Nothing in

⁸⁷ Neighbor's Brief, p. 27: 17-18.

⁸⁸ CP 416-421 (The Department Decision in particular CP 418, which specifically addresses adequacy of access for vehicles, utilities and fire protection); CP 427-436 (geotechnical report); CP 438-440 (arborist report); CP 442-449 (wetlands report); CP452-465 (SEPA checklist); and CP 469 (Sewer and Drainage comments from Drainage Reviewer Kevin Donnelly).

⁸⁹ Neighbor's Brief, pp. 41-42.

⁹⁰ See SMC 25.09.320.

the Code requires that all portions of a lot must serve some purpose or allow human occupancy.⁹¹ Even so, in the present case, if access is desired or necessary, a land owner may still access the eastern portion of Parcels A or B via the Burke-Gilman Trail or through an easement from a neighboring property owner. This argument is insufficient to satisfy Neighbor's heavy burden.

4. Washington case law supports the Examiner's interpretation of the public use and interest requirement.

Finally, Neighbor alleges that previous Washington Supreme Court and Court of Appeals decisions regarding denial of a subdivisions based on the public use and interest are incorrect and distinguishable.⁹² The Examiner, however, correctly interpreted the law by concluding the short subdivision was in the public use and interests.

Washington case law is clear that an irregularly-shaped lot, in the absence of lot shape standards, is not a basis to deny a subdivision and that reliance on the general "public interest" standard as a basis to deny a subdivision will face increased scrutiny when the subdivision meets all Code standards.⁹³

⁹¹ See, e.g. SMC 23.44.014 (requiring yards in single-family residential zones), and SMC 25.09.180 (prohibiting development in steep slope areas).

⁹² Neighbor's Brief, pp. 44-48.

⁹³ *Norco Construction, Inc. v. King County*, 97 Wn.2d 680, 649 P.2d 103 (1982), *Carlson v. Town of Beaux Arts Village*, 41 Wn. App. 402, 704 P.2d 663 (1985).

In *Norco*, Norco requested a writ of mandamus to compel King County Council to act on a plat application that it did not act on within the statutory 90-day limit, even though the application met all zoning requirements in effect during the 90-day period.⁹⁴ The County argued that it could consider a proposed change to its Comprehensive Plan that would enlarge lot sizes including in the area of the subdivision as part of the “public use and interest.” The Supreme Court rejected this argument, holding, among other things, that reliance on the general criteria of “public use and interest” and “public health, safety and general welfare” was not appropriate where the proposed Comprehensive Plan changes had not been adopted.⁹⁵

Division One addresses a similar issue in *Carlson*. In *Carlson*, the Town of Beaux Arts Village denied a short subdivision application which would have divided a single-family lot into two lots that created an “irregularly-angled, flag-shaped lot.”⁹⁶ The Town based its denial on grounds that the proposed subdivision was “not in the best interests” of the Town.⁹⁷ On appeal, the Court noted that the Carlsons had complied with

⁹⁴ *Norco Construction, Inc. v. King County*, 97 Wn.2d 680, 649 P.2d 103 (1982).

⁹⁵ *Id.* at 688 whereby Court stated, “But to interpret these terms as conferring unlimited discretion upon the Council would make the other sections of the platting statute meaningless and place plat applicants in the untenable position of having no basis for determining how they could comply with the law.”

⁹⁶ 41 Wn. App. at 407.

⁹⁷ *Id.*

all of the enacted applicable subdivision requirements, and that the Town had no ordinance prohibiting irregularly shaped lots. Therefore, the Court held that denial of the application was arbitrary and capricious and overturned it.

Neighbor's argument that *Carlson* should be limited is not persuasive. As an initial matter, nothing in *Carlson* suggests that the analysis depended on the shape of the lots being "flag lots." Additionally, the record contains no evidence about the "typical" width of flag lots; thus, Neighbor's attempt to distinguish the facts of *Carlson* is without merit.

Moreover, Neighbor again alleges that distinguishing *Carlson* and *Norco* is necessary, so that local jurisdictions don't have to approve development that "clearly thwarts the policies and intent of the GMA and local land use regulations."⁹⁸ As discussed above, Neighbor fails to establish that Widgeon's short subdivision thwarts any land use regulations or its policies.⁹⁹

Finally, while additional land use laws have been adopted since *Carlson*, those land use laws have been incorporated into municipal regulations, as required by the Growth Management Act under RCW

⁹⁸ Neighbor's Brief, p. 45.

⁹⁹ Neighbor fails to brief the issue of GMA policy and intent, so it is waived and cannot be raised.

36.70A.130(1)(d). Consequently, it is up to the City to decide whether regulations must be modified to conform to new land use law. To date, the City has not adopted a lot shape standard that prohibits the proposed lot configuration here. Therefore, Neighbor has failed to establish the holding in *Carlson* does not apply.

In sum, Washington case law is clear that an irregularly-shape lot, in the absence of lot shape standards, is not a basis to deny a subdivision; moreover, reliance on the “public interest” standard as grounds to deny a subdivision is even more problematic when the subdivision meets all enacted Code standards. In order for the Court to find the proposed short subdivision should be denied on the basis of the public use and interests, Neighbor must have shown with actual and substantive evidence that the direct impact of allowing four houses is contrary to the public interests; Neighbor has failed to prove this. Therefore, this Court should affirm the Examiner’s decision.

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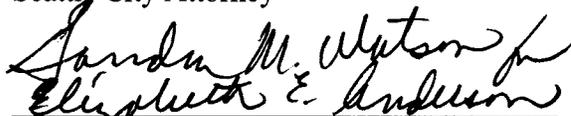
IV. CONCLUSION

For the reasons stated above, the court should affirm the Superior Court's and Hearing Examiner's decisions.

DATED this 17th day of August, 2009.

THOMAS A. CARR
Seattle City Attorney

By:



ELIZABETH E. ANDERSON, WSBA #34036

ERIN E. FERGUSON, WSBA #39545

Attorneys for Respondent

The City of Seattle

CERTIFICATE OF SERVICE

I certify under penalty of perjury under the laws of the State of Washington that, on this date, I caused a copy of the **Brief of Respondent The City of Seattle** to be served via messenger on the following parties:

Peter L. Buck
Randall P. Olsen
The Buck Law Group, PLLC
2030 – 1st Ave., Suite 201
Seattle, WA 98121-2183

Melody B. McCutcheon
Hillis Clark Martin & Petersen, P.S.
1221 – 2nd Ave., Suite 500
Seattle, WA 98101-2925

the foregoing being the last known address of the above-named parties.

Dated this 17th day of August, 2009.


ROSIE LEE HAILEY

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