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BEFORE THE HEARING EXAMINER FOR THE CITY OF EDMONDS

Phil Olbrechts, Hearing Examiner

RE: Tom and Lin Hillman PLN20120033	Order on Reconsideration
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The City and the Applicant have requested reconsideration of the final decision on the above-captioned matter. The reconsideration requests are based upon the mistaken impression that new evidence can be considered after the close of the hearing. The rule against consideration of new evidence significantly affects the arguments made in the reconsideration requests as well as the remedies sought in those requests. For those reasons all parties of record (anyone who participated in the hearing) will be given an opportunity to comment on the reconsideration requests taking into account the “no new evidence” rule. Comments are due April 22, 2013. Details on submission are provided at the end of this order under “Order on Reconsideration”.

Background

A final decision on the above-captioned matter was issued on March 28, 2013. Both the City and the Applicant submitted requests for reconsideration on April 8, 2013. The requests for reconsideration were mailed to all parties of record by the City on April 9, 2013. The applicants submitted a modification to their request on April 10, 2013, which stated as follows:

We hereby retract the portion of the last sentence of item D regarding tree removal that included the names of two of our neighbors. We did not receive their permission to use their names and regret that we included them.

The April 10, 2013 is accepted as part of the applicants’ reconsideration request.

The requests for reconsideration primarily focus upon Conditions No. 1 and 2 of the final decision in this matter, which address wetland filling and stormwater controls, respectively. Other matters were also addressed in the reconsideration request. There is no need for additional argument on those additional matters and they will be addressed in the final Decision on Reconsideration.

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No New Evidence Rule

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Although there has not yet been a court opinion that directly addresses the issue, it is widely recognized and accepted that no new evidence is permitted once a hearing is closed. This requirement derives from the Regulatory Reform Act, Chapter 36.70B RCW. RCW 36.70B.050(2) provides that a permit application shall be subject to no more than one “open record hearing”. An “open record hearing” is defined by RCW 36.70B.020(3) to constitute a hearing that creates the administrative record for the review of a permit application. As further detailed in the definition, the administrative record is composed of the “...testimony and submission of evidence and information...”. Judicial review of a permitting decision is limited to this administrative record, subject to some limited exceptions. *See* RCW 36.70C.120.

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The purpose of the one hearing rule is to reduce the considerable amount of time and expense involved in multiple public hearings as well as to reduce public confusion as to when and how to provide timely comments on land use proposals. *See* RCW 36.70B.010. For this reason, when a hearing is announced as closed that is the end of the hearing and no new evidence can be considered from that point forward. There are four reasons for this interpretation: (1) allowing new evidence after the close of a hearing would serve to completely undermine the one hearing limitation, by opening the door to multiple additional hearings under the guise of “re-opening” the initial hearing; (2) in order to further the objective of reducing public confusion, the announcement of the close of a hearing should serve as a reliable assurance to the public that no new evidence will be considered so that from that point forward hearing participants no longer need to be vigilant about monitoring the decision making process to rebut newly admitted evidence; (3) permit decisions must be based upon the administrative record only since the courts reviewing those decisions limit their consideration to the administrative record -- the announcement that a hearing is closed serves as an announcement that the compilation of the administrative record is completed and that no new evidence will be considered; and (4) the consideration of new evidence after the close of a hearing would probably be considered to qualify as an *ex parte* communication that is prohibited by the appearance of fairness doctrine. *See* RCW 42.36.060.

“No New Evidence” and Condition No. 1

The “no new evidence” rule sometimes presents a dilemma in situations where the administrative record contains insufficient information to support a finding of compliance with applicable permit criteria. The applicant has the burden of proof in establishing that all criteria are satisfied and a permit cannot be approved unless a finding can be made that all criteria are satisfied. Consequently, when the administrative record does not contain enough evidence to establish compliance with a permit criterion, the permit cannot be approved. The natural inclination under such circumstances is to request additional information from the hearing parties, but such a request would be barred by the “no new evidence rule”. Denial of the permit

1 application in many cases is the only option.

2 Denial due to insufficient information is a harsh result given that the permit may
3 actually comply with applicable permit criteria. The reversal can be avoided through
4 the adoption of conditions of approval that require staff verification of limited
5 information and/or minor modifications to the proposal as necessary to assure
6 compliance with permitting criteria. That is why Condition No. 1 was imposed in this
7 case.

8 Condition No. 1 was imposed because the applicant failed to justify the proposed
9 filling of wetlands under the City's reasonable use criteria. Under the city's critical
10 area regulations, an encroachment into a wetland should arguably only be authorized
11 as a measure of last resort where no other options for reasonable use of land are
12 available. In this case it appears that most, if not all, of the portion of the home
13 encroaching into the home could be moved to the second floor of the home in lieu of
14 the proposed vaulted ceilings. The wetland encroachment could potentially be further
15 reduced by displacing the home further to the north into the stream buffer. The only
16 justification provided in response to the examiner's repeated inquiries on this issue
17 was that the applicants wished to avoid an odd shaped home and that they needed a
18 rambler as they advanced in age (despite the fact that the home already has a second
19 story). Neither of these reasons comes close to supporting a finding that the filling of
20 a Class III wetland is necessary for reasonable use of the land.

21 Although the applicants did not provide any adequate justification for the filling of a
22 wetland, it is very possible that such justification exists. It is possible that further
23 encroachment into the stream buffer would cause more environmental damage than
24 avoiding wetland fill, or perhaps the displacement of living space to the second floor
25 would make little difference because almost all of the proposed fill would still be
needed for a safe driveway. There may well be other very good reasons for retaining
the design "as is". Those reasons are just not evident in the record. The final
decision on this case recognizes that staff may have already considered all of these
factors and expressly states that no further inquiry or modification of the project is
necessary if that is the case.

As noted in the City's request for reconsideration, the delegation of some fact finding
to the conditions of approval as contemplated in Condition No. 1 is problematical
because the notice and appeal process for the staff's implementation of conditions of
approval differs from that which applies to the original variance and reasonable use
decisions. That argument is of limited persuasiveness because the implementation of
any condition of approval requires some interpretation and fact finding by staff. The
issue is ultimately a matter of degree, where a condition of approval could delegate so
much decision making authority to staff that it violates code provisions that require the
examiner rather than staff to make the final decision.

For Condition No. 1 staff have essentially argued that they have been delegated too
much decision making authority because the condition is not sufficiently specific.

1 Condition No. 1 is more specific than the reasonable use criteria that staff were
2 comfortable in applying for their staff recommendation. Condition No. 1 also restricts
3 the staff's decision making authority to moving the limited portion of the home
4 located in the Class III wetland to the second story of the home or further northward.
5 It is debatable whether or not the parameters of Condition No.1 do in fact constitute an
6 improper delegation of authority. If staff is correct in this position, there are three
7 remaining options: (1) deny the application; (2) formulate a more specific condition
8 that doesn't improperly delegate decision making authority; or (3) identify evidence in
9 the record that supports a determination that the wetland should be filled as proposed.
10 The consideration of new evidence as suggested by staff in their reconsideration
11 request is not an option since that would violate the "no new evidence" rule.

12 In regards to providing for a more specific condition, staff suggested in its
13 reconsideration request that the examiner identify how much space should be
14 displaced out of the wetland. This cannot be done without knowing the design options
15 for the driveway, the impacts to the stream buffer and the amount of space available
16 for development on the second floor of the home.

17 **Condition No. 2 – Stormwater Monitoring**

18 In their request for reconsideration, the City and applicants have made some
19 compelling arguments for the elimination of the stormwater monitoring condition.
20 The code basis for this monitoring condition are the reasonable use and variance
21 criteria that require the minimization of impacts to surrounding properties and the
22 public health, safety and welfare. The home, and hence its associated stormwater
23 impacts, could not be built as proposed but-for the approval of the variance and
24 reasonable use applications. The City has adopted extensive stormwater regulations
25 that are usually found adequate to address stormwater impacts. However, in this case
surrounding property owners have presented evidence that the stormwater issues in
their vicinity are unique and severe. The proposal could exacerbate this situation by
allowing the placement of a home in buffers and critical areas that are in part protected
by the City's critical area regulations in order to prevent adverse stormwater impacts.
The City's comprehensive plan recognizes this function by providing at p. 83 that "*the
natural drainage system (i.e. streams, ponds, and marshes) shall not be filled or
permanently culverted except where no alternative exists.*"¹ The requirement of a
monitoring plan to ensure that the City's stormwater regulations effectively addresses
this fairly unique situation is an arguably reasonable means of ensuring that approval
of the variance doesn't adversely affect the public or surrounding properties.

26 **Applicant's Presentation of New Evidence in Reconsideration Request**

27 In their reconsideration request the applicants submitted numerous comments that

¹ Legal authority, such as City regulations, court opinions and adopted comprehensive plan policies, are not subject to the "no new evidence" rule. Examiners are allowed to take "judicial notice" of legal authority.

1 appear to contain information that was not submitted into the record. The applicants
2 claim that this additional information was necessary in order to address documents
3 that they did not have time to review at the hearing. However, the applicants did not
4 object to entry of the documents into the record when they were admitted as exhibits
5 nor did they request any additional time for review and comment prior to the close of
6 the hearing. For these reasons, the applicants were given a fair opportunity to review
7 all exhibits entered into the record and no additional evidence may be submitted
8 subsequent to the close of the hearing. Any evidence submitted after the close of the
9 hearing is barred from consideration.

6 **Investment Backed Expectations**

7 COL No. 10 of the final decision on this matter noted that the purchase price is
8 irrelevant under the City's definition of reasonable use. For clarification, this
9 conclusion was addressing the issue of whether a home should be considered a
10 minimum reasonable use for the Hillman property. Under the City's reasonable use
11 definition, the applicants are entitled to build a home on their property no matter how
12 little they spent in purchasing the property. However, the purchase price is still a
13 relevant consideration on the size of the home. "Investment backed expectations" (i.e.
14 purchase price) is one factor considered in assessing reasonable use and takings and
15 due process claims. See *Presbytery of Seattle v. King County*, 114 Wn.2d 320, 330, 787 P.2d 907
(1990); *Buechel v. D.O.E.*, 125 Wn.2d 196 (1994). The applicants may be at somewhat
16 of a disadvantage in arguing that they are entitled to a home of comparable size to
17 others in their neighborhood if they paid significantly less than their neighbors for
18 their property because of the presence of wetlands and their sole reason for filling
19 those wetlands is house size.

16 **ORDER ON RECONSIDERATION**

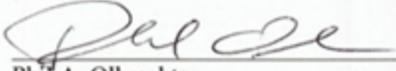
- 17 A. All persons (including the applicants and the City) who have submitted written or
18 oral comment on the above-captioned Hillman variance and reasonable use
19 requests prior to the close of the hearing may provide a written response to the
20 April 8, 2013 reconsideration requests from the City and applicants as well as this
21 reconsideration order. Any such written responses are due by 5:00 pm, April 22,
22 2013 and should be received by Jen Machuga at the City of Edmonds.
- 23 B. Comments may be submitted to Ms. Machuga by email at
24 Jen.Machuga@edmondswa.gov, or delivered or mailed to her at City of Edmonds,
25 Planning Division, 121 - 5th Avenue North, Edmonds, WA 98020.
- 26 C. No new evidence shall be allowed and all comments must be based upon evidence
27 admitted into the record prior to the close of the hearing on March 15, 2013.
- 28 D. If any public comments (i.e. not those from staff or the applicant) are received by
29 March 15, 2013, the applicant and/or staff may reply to those comments by 5:00
30 pm, April 23, 2013.

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E. Comments shall be limited to the reconsideration issues pertaining to Condition No. 1 (wetland filling) and Condition No. 2 (stormwater monitoring) of the final decision on this matter.

F. In its reconsideration response due April 22, 2013, the applicants are also invited to identify the evidence in the record it used to make its comments in its April 8, 2013 reconsideration request. As previously noted, any information not taken from the record of this proceeding cannot be considered.

Dated this 16th day of April, 2013.



Phil A. Olbrechts

Edmonds Hearing Examiner