

May 25, 2012

Ms. Lora Petso
Colin Southcote-Want
10616 – 237th Place S.W.
Edmonds, WA 98020

Re: Your e-mail to Kernen Lien dated May 24, 2012
Your two requests for public records dated May 24, 2012

Dear Ms. Petso:

In an e-mail today addressed to Mr. Lien, Associate Planner for the City of Edmonds, you assert that the City Council “failed to fully disclose all ex parte contacts in our appeal of the Burnstead project.” You have asked that “the City provide, prior to entering a final decision, the full text of all written communications with decisionmakers.” You are “most concerned with emails to and from Councilmember Buckshnis and a communication to all council that based on some case in Spokane council must give deference to the applicant.” In two public records requests submitted to the City today, you are asking to review “all e-mails to or from Councilmember Buckshnis from September 1, 2011 to May 24, 2012” and “all communications regarding the Burnstead project.” Each of these requests will be discussed below.

There appears to be a misunderstanding of the procedure for addressing appearance of fairness, conflict of interest and ex parte matters. It is not a process of discovery. Instead, the chair of the decisionmaking body asks, at the outset of the hearing and each continued hearing, whether the decisionmakers have any appearance of fairness, conflict of interest or ex parte matters to disclose. If any decisionmaker has something to disclose, they use this opportunity to do so. Any member of the public may also challenge any of the decisionmakers on appearance of fairness grounds. As you are aware, members of the public took advantage of this process and made several objections, all of which will appear in the findings of fact and conclusions of law.

The draft findings of fact and conclusions of law will be presented to the City Council, and prior to the time that they consider them, the chair of the decisionmaking body will again ask whether any of the decisionmakers have any appearance of fairness, conflict of interest or ex parte matters to disclose. The decisionmakers will have an opportunity to disclose and the public will again have an opportunity to challenge any decisionmaker on appearance of fairness or conflict of interest grounds.

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I am not aware of any procedure that requires the Council to “provide, prior to entering a final decision, the full text of all written communications with decisionmakers.” The Public Records Act allows you to make a Public Records Act request for identifiable documents (and I suggest that your request needs to be clarified as to which written communications are meant, the subject matter and time frame). The City will be responding to your request in greater detail. However, nothing requires the City to delay consideration or entry of the findings of fact and conclusions in a land use matter until such time as the appellants obtain documents responsive to a Public Records Act request, and satisfy themselves as to the non-existence of any prohibited ex parte communications.

Furthermore, it should be noted that even if an ex parte communication is disclosed, there is no authority to suggest that an appellant is allowed to demand a rebuttal to each communication and to specify the amount of time necessary for such rebuttal. By way of an example, if one decisionmaker disclosed that an opponent or proponent of the project complimented the decisionmaker on the astute questions she asked during the oral argument portion of the hearing, no rebuttal is required to this statement.

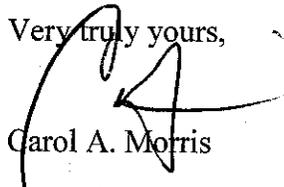
Similarly, if there was some legal authority submitted to the council, this would not require any rebuttal because it is not an appearance of fairness issue. As you are aware, all of the appellants and the applicant were provided an opportunity to submit written argument to the Council, which could include legal authority. If you believe that the findings and conclusions ultimately entered by the Council rely on erroneous legal authority, there is a remedy – an appeal to superior court.

So that there is no question regarding the draft findings of fact and conclusions I submitted to the City Council regarding the Woodway Elementary Closed Record Hearing, I am attaching a copy to this letter. As you can see, it does nothing more than quote from the appeals, briefs, Hearing Examiner decision and case law. There are no cases finding that the Council was required to “give deference to the applicant,” and none from Spokane.

Finally, I suggest that if you have any further questions or concerns on this subject that you wait until the Council meeting in which the findings of fact and conclusions of law are addressed, instead of sending e-mails to the City. Thank you.

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Very truly yours,



Carol A. Morris

Enclosure

cc: City Council, City of Edmonds
Jeff Taraday, City Attorney
Kernen Lien, Associate Planner, City of Edmonds
Appellants Richard and Darlene Miller
Appellants Cliff Sanderlin and Heather Marks
Appellants Ira Shelton and Kathie Ledger
Appellant Constantinos and Sophia Tagios
Attorneys for Applicants, David B. Johnston and
Kevin B. Hansen, Livengood Fitzgerald & Alskog, PLLC

WORKSHEET
DRAFT FINDINGS OF FACT AND CONCLUSIONS OF LAW
WOODWAY ELEMENTARY PLAT
REMAND HEARING

1. **Appearance of Fairness.** At the outset of the closed record hearing, the Mayor must ask that all decision-makers disclose any appearance of fairness, ex parte communications and conflict of interest matters.

What is the appearance of fairness doctrine? “Quasi-judicial hearings . . . must be conducted so as to give the appearance of fairness and impartiality. The court has stated that the appearance of fairness doctrine is satisfied if a reasonably prudent and disinterested observer would conclude that all parties obtained a fair, impartial and neutral hearing.”¹

What kind of challenges can be made under the doctrine? “A decision maker may be challenged under this doctrine for ‘prejudgment concerning issues of fact about parties in a particular case . . . [or] partiality evidencing a personal bias or personal prejudice signifying an attitude for or against a party as distinguished from issues of law or policy.’”²

What is the test for an appearance of fairness violation? “Would a disinterested person, having been apprised of the totality of a board member’s *personal* interest in a matter being acted upon, be reasonably justified in thinking that partiality may exist?”³

What is a person claiming an appearance of fairness violation required to show? “Specific evidence of a violation, not speculation.”⁴ “Prejudgment and bias are to be distinguished from the ideological or policy leanings of a decision maker.”⁵

What are ex parte contacts? Communications outside of the public hearing between the decision makers and the opponents or proponents of the project/application.⁶

¹ *Organization to Preserve Agricultural Lands v. Adams County*, 128 Wn.2d 869, 890, 913 P.2d 793 (1996); RCW 42.36.010.

² *Buell v. City of Bremerton*, 80 Wn.2d 518, 524, 495 P.2d 1358 (1972).

³ *Lake Forest Park v. State Shorelines Hearings Board*, 76 Wash. App. 212, 216, 884 P.2d 614 (1994).

⁴ *Id.*

⁵ *Organization to Preserve Agricultural Lands v. Adams County*, 128 Wn.2d 869, 890, 913 P.2d 793 (1996).

⁶ RCW 42.36.060.

Must I disclose all ex parte contacts? Yes, all ex parte contacts must be disclosed at the beginning of each public hearing and continuation of the public hearing, so that anyone may timely raise a challenge.⁷ “A decision maker who engages in prohibited ex parte communications can validly participate in a decision on the proposal only if he or she places on the record the substance of any written or oral ex parte communications.”⁸

Is there a cure for ex parte contacts? Yes, a decision maker may validly participate in the decision if he/she places on the record the substance of any written or oral ex parte communications concerning the decision and a public announcement is made of the parties’ right to rebut the substance of the communication.⁹

Do I have to make this announcement if I have received a written communication from a citizen, but this written communication has already been made part of the administrative record? No.¹⁰

What is a “conflict of interest” that must be disclosed? “A [decision maker] to whom some private benefit may come as the result of some public action, should not be a participant in that action. The private benefit may be direct or indirect and in either case, the possibility, not the actuality of a conflict of interest should govern. A [decision maker] experiencing a conflict of interest should declare his interest publicly and if he is a voting member he should abstain from voting on the matter.”¹¹

What is “bias” that would prevent a decision maker from participating in the decision? At least three types of bias have been recognized as grounds for disqualification of persons performing quasi-judicial functions. These are prejudgment concerning issues of fact about parties in a particular case, partiality evidencing a personal bias or personal prejudice signifying an attitude for or against a party as distinguished from issues of law or policy; and . . . an interest whereby one stands to gain or lose by a decision either way.”¹²

If I feel that I must disqualify myself, how do I do it? At the outset of the hearing, announce the reason you believe you should recuse yourself from voting. Be specific, such as “I live within 500 feet of the property involved in the application, and I do not believe that I can be impartial.” Then, wait until all of the decision makers have made all of their disclosures under the appearance of fairness doctrine, ex parte contacts and conflict of interest. If there is still a quorum, leave

⁷ RCW 42.36.060 and .080.

⁸ *OPAL v. Adams County*, 128 Wn.2d 869, 887, 913 P2s 793 (1996).

⁹ RCW 42.36.060.

¹⁰ RCW 42.36.060(2).

¹¹ *Buell v. Bremerton*, 80 Wn.2d 518, 524, 495 P.2d 1358 (1972); RCW 42.23.070.

¹² *Buell*, 80 Wn.2d at 524.

the room and do not reappear until the vote on the decision has been made.

What happens if there is no quorum? In the event of a challenge to a member or members of the decision-making body which would cause a lack of a quorum or would result in a failure to obtain a majority vote as required by law, "any challenged member(s) shall be permitted to fully participate in the proceeding as though the challenge had not occurred, if the member or members publicly disclose the basis for the disqualification prior to rendering a decision. Such participation shall not subject the decision to a challenge by reason of the violation of the appearance of fairness doctrine."¹³

2. Public Notice. – The decision makers should inquire of the Clerk whether the City's noticing provisions were satisfied for the Council's closed record hearing.¹⁴

3. List of Exhibits. The administrative record consists of the exhibits listed in the Hearing Examiner's decision dated February 2, 2012, p. 3. In addition, any documents that were submitted into the record since that time must also be included, such as:¹⁵

Hearing Examiner's Decision 2-2-12

- a. City's Request for Reconsideration, 3-15-12.
- b. Hearing Examiner's Order on Request for Reconsideration 3-19-12.

Appeals

- c. Appeal of SEPA, PRD and Subdivision Approval from L. Petso and C. Southcote-Want, 3-30-12.
- d. Appeal of SEPA, PRD and Subdivision Approval from I. Shelton and K. Ledger, 4-2-12.
- e. Appeal of PRD of Burnstead Construction Co. from C. Sanderlin and H. Marks, 4-3-12.
- f. Appeal of SEPA, PRD and Subdivision Approval from R. and D. Miller and C. and S. Tagios, 4-3-12.
- g. E-mail from L. Petso to K. Lien dated 4-27-12.

Appeal Briefs

- h. Brief of C. Sanderlin & H. Marks 4-27-12.
- j. Brief of R. and D. Miller and C. and S. Taglos, 4-26-12.
- k. Brief of L. Petso dated 4-27-12.

Response to Appeals

- l. Burnstead's Response to Appeals, 5-4-12.
- m. City Staff's Analysis of Legal Issues from J. Taraday, 5-4-12.
- n. Memo from K. Lien, Associate Planner, 5-4-12.
- o. Memo from Public Works Staff, 5-4-12.

Rebuttals

¹³ RCW 42.36.090.

¹⁴ According to ECDC 20.07.004(F).

¹⁵ This is not a complete list, but is only preliminary.

- p. Response to Rebuttals of Our Appeal, C. Sanderlin & H. Marks 5-9-12.
- q. Rebuttal to Burnstead Response, L. Petso & C. Southcote Want 5-9-12.

4. Timeliness of Appeals. “An appeal must be filed within 14 days after the issuance of the hearing body’s decision. . . . Appeals, including fees, must be received by the city’s development services department by mail or by personal delivery at or before 4:00 p.m. on the last business day of the appeal period. Appeals received by mail after 4:00 p.m. on the last day of the appeal period will not be accepted, no matter when such appeals were mailed to postmarked.”¹⁶

“For purposes of computing the time for filing an appeal, the day the hearing body’s decision is issued shall not be counted.”¹⁷

Appeal Issue: Burnstead Construction Company has raised the issue that the Sanderlin and Miller Appeals were untimely and must be dismissed.¹⁸ Burnstead notes that Hearing Examiner’s Order on Reconsideration was issued on March 19, 2012. The Sanderlin Appeal and Miller Appeal were received on April 3, 2012.

Response from Sanderlin and Marks: “We were given the deadline of April 3, 2012 by Kiernen Lien, of the Edmonds Planning Department.”¹⁹ In an e-mail dated March 22, 2012 to Darlene Miller, K. Lien states that the appeal must be filed within 14 days of the decision, and “the date the decision was mailed is the date of issuance was March 20, so the appeal deadline is 4 p.m. on April 3rd.”

5. Council’s Jurisdiction on Closed Record Appeal on Remand.

The Burnstead Construction Company is proposing to subdivide 5.61 acres and develop a 27 lot single family preliminary plat/Planned Residential Development with four open space tracts and two joint use driveways serving two homes each. The applicant received preliminary approval from the City of Edmonds in 2007. This decision was appealed to Superior Court and again appealed to the Court of appeals. The Court of Appeals remanded the plat/PRD for further proceedings before the Hearing Examiner, limiting the proceedings before the Hearing Examiner to the issues concerning: a) the drainage plan, b) the perimeter buffer, and c) open space, while affirming the applicant’s burden on remand to demonstrate compliance with all applicable laws current at the time of vesting.

The Hearing Examiner approved the revised PRD and preliminary plat applications with conditions.

¹⁶ ECDC Section 20.07.004(B).

¹⁷ ECDC Section 20.07.004(C).

¹⁸ Burnstead Response to Appeals, pages 2-3.

¹⁹ Sanderlin & Marks’ Response to Rebuttals, No. 1 on p. 1.

Does the City Council have the authority to address any of the appeal issues that are unrelated to: the drainage plan, the perimeter buffer and open space? No. The Council's jurisdiction is limited by the Court of Appeals' decision in *Petso et al. v. Burnstead Construction Co.*, Division I, filed April 4, 2011.

6. Oral Presentations. The oral presentations at the closed record hearing are limited to the Director (or representative) and other parties of record, including the appellant.²⁰

Oral presentations may be limited in time, as long as all parties are given equal time.

Oral presentations may be limited by relevance -- to the Council's jurisdiction in the closed record hearing, or, to the drainage plan, the perimeter buffer and open space.

Oral presentations should center on the alleged error made by the Hearing Examiner, with specific references to the administrative record to support the allegations of error.

7. Council's Determination in Closed Record Hearing. The City Council "shall determine whether the decision made by the hearing body/officer is clearly erroneous given the evidence in the record."²¹ The Council shall affirm, modify or reverse the decision of the Hearing Examiner.²² Because this is a closed record hearing, the Council can't base its decision on evidence that is presented for the first time in the appeal. Therefore, if the Council decides to modify or reverse the decision of the Hearing Examiner, it must identify the portion of the record upon which such modification or reversal is based.

8. Appeal legal issues.

A. Is Burnstead required to comply with the City's Comprehensive Plan if it is not consistent with City and/or Washington state codes?²³

The Hearing Examiner held that "the storm drainage system was significantly revised from 2007 to reflect a more conservative storm water infiltration rate and changes to infiltration testing locations and methodologies. The City testified that they are satisfied the Applicant's preliminary stormwater design is adequate to meet ECDC 18.30 and the vested 1992 Ecology storm water manual. No opposing expert testimony was offered. As conditioned, the stormwater impacts will be mitigated and the requirements of ECDC 18.30 will be satisfied. . . ."²⁴

The Hearing Examiner further clarified in the Order on Reconsideration, p. 2-3.

Appellants argue that the plan to raise the grade and remove the existing drainage

²⁰ ECDC Section 20.07.005(G).

²¹ ECDC Section 20.07.005(H).

²² ECDC Section 20.07.005(H).

²³ Appeal issue in Appeal filed by Miller and Tagios, 4-3-12.

²⁴ Findings, Conclusions and Decision, paragraph 1, p. 22 (3-7-12).

ditch in the NW part of the property is not in compliance with the intent of the City of Edmonds' Comprehensive Plan adopted on March 15, 2005 and again on December 22, 2011.

Applicable law: "Generally, a specific zoning ordinance will prevail over an inconsistent comprehensive plan. . . . Because a comprehensive plan is a guide and not a document designed for making specific land use decisions, conflicts concerning a proposed use are resolved in favor of the more specific regulations. . . . Thus, to the extent the comprehensive plan prohibits a use that the zoning code prohibits, the use is permitted. . . . But where the zoning code expressly requires a site plan to comply with a comprehensive plan, the proposed use must satisfy both the zoning code and the comprehensive plan."²⁵

B. Have the Appellants shown that the drainage plan is inadequate, and that the Hearing Examiner erred by conditionally approving the revised application, based on a preliminary stormwater design?

Although the Hearing Examiner addressed these issues in the Decision and Order on Reconsideration, the Hearing Examiner noted that "the stormwater design at this phase is preliminary and that the Applicant's burden at this preliminary phase is to provide a 'feasible' stormwater design. The civil construction plans will be reviewed during the final design of the utility improvements for compliance with the City's stormwater code (then current ECDC 18.30). . . . The final design of the stormwater system is not at issue here."²⁶

Applicable law: "A preliminary plat application is meant to give local governments and the public an approximate picture of how the final subdivision will look. It is to be expected that modifications will be made during the give and take during the approval process. . . . The applicant must make a threshold showing that the completed development is able to comply with applicable zoning ordinances and health regulations."²⁷

"While the process anticipates negotiations and modifications, the preliminary plat process is not merely an insignificant stage of the proceedings without real consequence. . . . Any modifications included in a conditional approval of the preliminary plat are binding on the party seeking approval and the local decision-making body granting conditional approval. . . . A local decision-making body cannot conditionally approve a preliminary plat and then disapprove a final plat application for a project that conforms to the conditions of the preliminary approval."²⁸

²⁵ *Lakeside Industries v. Thurston County*, 119 Wash. App. 886, 894-5, 83 P.3d 433 (2004).

²⁶ Order on Reconsideration, p. 2-3, No. 1.

²⁷ *Knight v. City of Yelm*, 173 Wn.2d 325, 267 P.3d 973 (2011).

²⁸ *Knight of City of Yelm*, 173 Wn.2d 325, 344, 267 P.3d 973 (2011).

C. Has SEPA adequately addressed the storm water drainage issue?

Applicable law. The Court of Appeals did not include SEPA issues within the scope of the remand.

D. Did the Hearing Examiner correctly determine that the Applicant was vested to the 1992 Ecology stormwater manual?

Applicable law. Under RCW 58.17.033, a proposed division of land shall be considered under the subdivision or short subdivision ordinance and zoning or other land use control ordinances in effect on the land at the time a fully completed application for preliminary plat approval of the subdivision has been submitted to the City.

Here, Burnstead's application is vested to the regulations in place at the time the completed preliminary plat application was submitted. As the court held in *East County Reclamation Co. v. Bjornsen*, 125 Wash. App. 432, 440, 105 P.3d 94 (2005):

If an applicant wishes to take advantage of a change in the law allowing a previously prohibited land use, it may do so by withdrawing its original application and submitting another. But it may not select which laws will govern his application.²⁹

E. Did the Hearing Examiner err in finding that the elimination of the perimeter buffer in the revised application complied with applicable law?

F. Did the Hearing Examiner err in finding that the revised application complied with the open space requirements of the Code?

9. Burden of Proof is on the Applicant. "The preliminary plat application cannot be approved if the applicant cannot show that its plat is able to comply with all relevant requirements."³⁰ "The purpose of a preliminary plat is to secure approval of the general 'design' of the proposed subdivision and to determine whether the public use and interest will be served by the platting."³¹ "Matters which are specified by regulation or ordinance need not be considered unless conditions or infirmities appear or exist which would preclude any possibility of approval of the plat."³²

²⁹ *East County Reclamation*, 125 Wash. App. at 440.

³⁰ RCW 58.17.195; *Friends of the Law v. King County*, 123 Wash.2d 518, 869 P.2d 1056 (1994).

³¹ *Topping v. Pierce County Board of Commissioners*, 29 Wash. App. 781, 783, 630 P.2d 1385 (1981).

³² *Id.*, 29 Wn. App. at 783

10. Findings of Fact. [to be added]

11. Conclusions. [to be added]

12. Decision. [to be added]