

RECEIVED

APR 27 2012

DEVELOPMENT SERVICES

April 27, 2012

Argument for Council in Support of Lora Petso APPEAL OF SEPA, PRD AND SUBDIVISION APPROVAL OF BURNSTEAD CONSTRUCTION COMPANY WOODWAY ELEMENTARY PLAT/PRD, P-2007-17/PRD-2007-18. APL 20120001.

Council is in control

The City Council is required by law to “inquire into the public use and interest proposed to be served by the establishment of the subdivision.”¹

The City Council (not staff or the hearing examiner or the developer or the lawyers or even the engineers) shall determine if appropriate provisions are made for, among other things, the public health, safety and general welfare, drainage ways, streets and roads, and other public ways.²

The City Council shall determine whether the public interest will be served by the subdivision.³

The City Council may not approve the plat unless it makes written findings that (1) appropriate provisions are made for the public health, safety and general welfare, and for drainage ways, streets and roads, and other public ways AND (2) the public use and interest will be served by the platting of the subdivision.⁴

Drainage overview

Council will not be able to find adequate provision for storm drainage for a variety of reasons including but not limited to:

- (1) Burnstead plans to fill the existing wetland/drainage ditch and raise the level of their parcel.⁵ As a result, storm water from the steep slope presently absorbed by the vegetation in the wetland/drainage ditch will flow onto the Miller and Tagios properties.⁶

¹ See, for example, RCW 58.17.110(1).

² See, for example, RCW 58.17.110(1)

³ See, for example, RCW 58.17.110(1)

⁴ See, for example, RCW 58.17.110(2).

⁵ See, testimony of Nicole Hernandez. Record at 953.

⁶ See testimony of Rick Miller containing a courteous request to retain the ditch to avoid flooding the neighbors. Record at 951. The location of the ditch is shown in the record at 649. A letter from the Miller's to the Edmonds School District dated 7/7/1983, requesting that the ditch be re-dug to avoid flooding a number of homes is in the record at 560. A photo of the ditch taken around 2007 shows that it has evolved into a rain garden/wetland, with vegetation that now absorbs much of the water. Record at 636.

- (2) The drainage vault is still too small due to use of a 30 year old drainage manual, errors in the drainage work, and illegal application of the vested rights doctrine (discussed below). Note: any vault sized according to the 1992 drainage manual will always be undersized since that manual allows the assumption that the vault is completely empty when the design storm hits. Additional errors in the drainage work apart from the illegal application of the vested rights doctrine (discussed below) include, but are not limited to, failure to set an appropriate design infiltration rate⁷ despite the Court of Appeals stating that it is essential to do so⁸, failure to provide adequate vault testing⁹ along the length of the vault despite the fact that the Court of Appeals identified inadequate testing as an additional problem¹⁰, failure to test the point drains or drywells at the actual depth¹¹, failure to do any testing at the depth for individual lot facilities¹², and use of the 80/20 approximation instead of actual soil types.¹³ With the increase in impervious surfaces to over half the site, the adjustment factor must be increased to something over 30¹⁴.
- (3) The Courts both held that maintenance of the vault is critical, and specific standards must be provided for in the preliminary plat.¹⁵ The Southwest Edmonds Drainage Basin Plan calls for heightened maintenance in this part of town. Instead, no standards were discussed or are provided¹⁶, and the evidence shows that the vault is of a type that is difficult to maintain¹⁷. Actually, it is impossible to legally maintain the vault since it is not deep enough. OSHA confined space regulations would not permit entry for the work.
- (4) Depending on which part of the record you read, vault overflow is either to the existing Woodway Meadows system that already floods¹⁸, or it is not designed yet¹⁹. As noted by the City, the overflow system must be shown on the plat.²⁰
- (5) The planned infiltration on individual lots is not possible due to the small size of the lots. The 1992 drainage code requires the individual infiltration systems to be 10 feet from any structure or property line. Due to the small lot sizes, only a narrow 5 foot by 40 foot strip across the front yards of perimeter lots would be available for a facility. Since that area will be needed for driveways and walkways, and may not have suitable soils, there is likely to be no infiltration on the perimeter lots. The interior

⁷ Record at 182, 184.

⁸ Record at 68.

⁹ Record at 180.

¹⁰ Record at 68.

¹¹ Record at 180, 182.

¹² Record at 176.

¹³ Record at 183.

¹⁴ Record at 121.

¹⁵ Record at 607.

¹⁶ Record at 180.

¹⁷ Record at 180.

¹⁸ Record at 168.

¹⁹ Record at 184.

²⁰ ECDC 20.75.060, ECDC 20.75.060(P).

lots do not have any space that is both 10 feet from a structure and 10 feet from a property line, so there will be no infiltration on those lots. As noted in the comments from the City, the proposed location of these facilities should have been shown on the preliminary plat since they may affect plat layout.²¹

In conclusion, there is no evidence that the plat makes adequate provision for drainage. I've listened to the tape from the hearing. Neither of the City employees who addressed drainage could assure that the proposed drainage is adequate. Roughly transcribed, the exchange with Jerry Schuster is as follows:

Hearing Examiner: Is it your opinion that the development as proposed will not affect adjacent properties in terms of storm water.

(Long Pause)

Hearing Examiner: (Rephrases the question hoping for an affirmative answer.)

Jerry Schuster: If designed, constructed and maintained correctly it will not.

The exchange with Jeanie McConnell also contains no assurances that the drainage provisions are adequate:

Hearing Examiner: Is it conceivable at the civil stage you might find that infiltration is in fact not feasible . . .

No audible answer.

In contrast, there is evidence that the plat fails to show information necessary to properly review the proposal (paraphrasing):

Jerry Schuster: It should be designed for roof and driveway runoff to go to the vault on Tract C.

Hearing Examiner: Is that the way the current stormwater is proposed to be?

Jerry Schuster: Um, it is a preliminary plat and they haven't gone into that detail.

Hearing Examiner: I'm wondering if that is something that needs to be conditioned here . . .

Jerry Schuster: Um, . . . inaudible. . .

(long pause)

²¹ Record at 98.

(Note: Our subdivision code also requires that the project minimize offsite impacts to drainage²². Filling the drainage ditch to flood the Tagios and Miller residences does not minimizing offsite impacts. Combining an undersized vault with inadequate maintenance and overflow that is channeled to an area that already floods does not minimizing offsite impacts. Increasing impervious surfaces on each lot from 35% to 50% by improperly eliminating condition 9 does not minimizing offsite impacts.)

(Note also that the entire drainage plan is inconsistent with our comprehensive plan and the Southwest Edmonds Drainage Basin study. City plans call for additional drainage facilities, but Burnstead proposes the elimination of the wetland/drainage ditch. City plans call for smaller distributed facilities, but Burnstead proposes a single massive facility. City plans call for heightened maintenance in this part of town, but Burnstead proposes a facility that is difficult/impossible to maintain.)

Illegal Application of Vested Rights doctrine

Burnstead is claiming vesting under a 30 year old drainage manual, the 1992 manual. However, the drainage expert actually testified that they would not follow the 1992 requirements²³ in designing the individual lot infiltration systems. That is not allowed under Washington law.²⁴ You don't get to pick and choose. If you claim the 1992 manual, you follow the 1992 manual.

The reports indicate that the 1992 manual was not followed for the testing or vault design.²⁵ Again, this is illegal. Requirements for closed depression analysis²⁶ were also ignored.

Lack of SEPA review (on drainage or anything else)

The hearing examiner erred in relying on the invalidated MDNS to replace the SEPA review she was obligated to perform.²⁷ She mistakenly thought that the MDNS was valid, but, as the Court of Appeals noted, the MDNS had been reversed by the Superior Court.²⁸ The Court of Appeals also found the MDNS invalid, in part, and remanded to the hearing examiner.²⁹

By eliminating condition 9, the City illegally³⁰ increased the impervious surface allowed on each lot from 35% (about 60,000 square feet over all 27 lots) to 3,000 square feet per lot (over 80,000 square feet over all 27 lots). The environmental impacts of the project have significantly increased in several areas (for example: drainage, climate change, visual impacts).

²² ECDC 20.75.085(A)(4).

²³ Record at 625.

²⁴ East County Reclamation v. Bjornson, 105 P.3d. 94 (2005).

²⁵ Record at 150.

²⁶ Record at 622.

²⁷ Record at 10-11. "Additionally, the SEPA MDNS issued on April 19, 2007 appeals were denied. Subsequent decisions by the Superior and Appellate courts have upheld the SEPA decision.

²⁸ Record at 64. "The decision reversed the City's approval of the MDNS, preliminary plat approval, and PRD approval."

²⁹ Record at 69. "In sum, Petso has met her burden to demonstrate that the Hearing Examiner decision on the drainage plan is incorrect, in part. We discuss the appropriate remedy for this later in this opinion."

³⁰ This increase is outside the scope of the remand authority and in violation of ECDC 16. .

Other SEPA items need updated because we now have Hickman Park, which alters conditions for pedestrians, parking, traffic, and the Fish and Wildlife Habitat Conservation Area. The FWHCA is identified in the SEPA checklist³¹, the applicant's narrative³², and the City's critical area map³³. Yet, the City has failed to perform SEPA or apply the critical areas ordinance.

Also, the Superior Court noted that a condition should be imposed prohibiting a variance from the requirement for underground wiring.

Finally, it is now known that, due to misplaced fencing, mature vegetation in the backyards of homes along the West side of the plat will be lost. The loss should be evaluated under SEPA.

(Note: The ADB, the first hearing examiner, and the Superior Court relied on the 35% impervious surface limitation in ruling on the issue of compliance with ECDC 20.35.040 regarding compatibility. Again, prior approvals have been lost in the changes).

Non-compliance with PRD ordinance

The council cannot approve the project without compliance with the PRD ordinance and other applicable law.

The preliminary plat does not comply with the PRD ordinance in a variety of ways, including but not limited to the following:

- (1) The 2012 plat, including the revised setbacks and the deletion of a condition of ADB approval, was not reviewed by the ADB. Under our PRD ordinance, particularly ECDC 20.35.080(3), a plat may not be approved without ADB review. There is no exception to the requirement for ADB approval of the plat.
- (2) The 2012 plat eviscerates a condition imposed by the ADB in 2007. This is one of the errors the Superior Court judge was trying to prevent when she reversed the 2007 approvals. She stated that: Approval on other issues assumed a proposal configured in a certain way, and it is not possible to know on the limited review the Respondents proposed whether any changed proposal would have still been approved as to other issues if configured differently.
- (3) The 2012 plat renders 50% of the home designs unable to fit any of the 21 perimeter lots. The ADB approved four home designs. With the change in the plat to 25 foot front setbacks and 15 foot rear setbacks, two of the four designs cannot fit on the perimeter lots. Most lots are 100 feet deep, or less, and with 25 foot front setbacks and 15 foot rear setbacks, the two homes over 60 feet deep just won't fit. Maybe we will get lucky, and the builder will at least alternate the two remaining home styles around the perimeter if the plat is approved. Otherwise, people trying to enjoy Hickman Park are going to be looking at the backs of four identical homes. Ick.

³¹ Record at 664.

³² Record at 663.

³³ Record at 666.

Actually, since the new setbacks render the buildable area on lot 21 just 49 feet deep, none of the homes fit on that lot, so Hickman Park users will actually only have to look at 3 identical homes and an unbuildable vacant lot. The ADB would not have approved the project with just two home designs. This situation defeats the intent of the PRD ordinance.³⁴

- (4) Some lots are rendered unbuildable in the new plat. See analysis of lot 21 in item 3 above. None of the homes will fit on lot 7 either with the new setbacks. The ADB would not have approved the project with unbuildable lots. (Note: this is illegal under subdivision laws also, lots are supposed to be buildable³⁵).
- (5) The project increases the density, and thus constitutes an illegal rezone, and does not comply with the requirement of ECDC 20.35.030(B) that “In no event shall use of a PRD result in . . . density in excess of the maximum established by the Comprehensive Plan and zoning ordinances.” Our zoning ordinance requires at least 8000 square foot lots, which in this case provides a maximum of 24 homes. The proposal is for 27 homes, a density increase of 3 homes over what the zoning code permits.
- (6) The project does not meet the landscape and buffering requirement of ECDC 20.35.040(A)(1). The code requires landscaping AND greater buffering than with a normal subdivision. The deed restriction that ensured permanent landscaping has been removed in the 2012 plat. There is no longer “greater buffering” than would otherwise be provided in a normal subdivision.
- (7) The project does not meet ECDC 20.35.040(A)(2) regarding safe site access. Testimony was provided that due to the frequent use of 237th for parking for families with very young children, the site no longer had “safe” site access.
- (8) The 2012 plat does not meet ECDC 20.35.040(A)(3) because the ADB has not approved the use of only two home designs on the perimeter lots. Use of just two designs on a 21 home perimeter is not consistent with the purposes of the PRD ordinance. The ordinance call for coordinated design of a variety of homes. Also, the ordinance requires “planned” residential development, with home designs submitted in advance. It does not permit a subdivision style post approval free for all.
- (9) The 2012 plat does not meet ECDC 20.35.040(C) because it does not reduce building sizes from what is otherwise allowed, or minimize visual impact through landscape or other buffering techniques. See (6) above for the discussion regarding the elimination of the deed restriction to assure landscaping is maintained, and the SEPA section for the discussion regarding the increase in impervious surfaces to 3000 square feet per lot which will increase the sizes of the buildings. The City has not conditioned approval on undergrounding of utilities, so a variance may obtained. The adjacent

³⁴ ECDC 20.35 010(B), (D), (E).

³⁵ ECDC 20.75.085(B)(1)

neighborhood has underground wires, and, as noted by the Superior Court, the same should be required here. Such a requirement would also benefit users of Hickman Park.

- (10) The 2012 plat does not meet ECDC 20.35.040(D) because it needlessly destroys over 36% of the trees on the site, including some previously thought to be on private properties to the West, and endangers many of the remaining trees with a retaining wall. It also destroys the wetland/drainage ditch, which has become a natural area filled with vegetation. The code requires the project to preserve unique natural features, not destroy them.
- (11) The 2012 plat does not meet ECDC 20.35.040(E) because it does not reduce impervious surfaces (impervious surfaces are increased from the 2007 plat with the change from 35% impervious surface per lot to 3000 square feet per lot), and because it includes street parking rather than on-site or common parking facilities.
- (12) The 2012 plat does not meet the identified criteria in ECDC 20.35.050(A). Criteria 1 is not met because there was no ADB review of the plat, and the proposed homes do not comply with ECDC 20.35.060. Criteria 3 is not met because there are no shared driveways or alternate materials, and impervious surfaces have been increased. Criteria 5 is not met because the project does not preserve, enhance or rehabilitate significant natural features. In fact, it needlessly destroys 36% of the mature trees, and endangers many others with a retaining wall.
- (13) The 2012 plat does not meet ECDC 20.35.050(B) because drainage and access are inadequate.
- (14) The 2012 plat does not meet ECDC 20.35.050(D) regarding open space because Tracts A and F are not usable open space due to safety issues, Tract E is not usable open space due to restriction as a wildlife area, and Tract E may not be counted toward the 10% usable open space requirement since it is a critical area.
- (15) The 2012 plat does not meet ECDC 20.35.060(A)(1)(b), ECDC 20.35.060(A)(4), and ECDC 20.35.060(B)(3), because the only two homes that fit the lots actually emphasize the garage. One home has the garage occupy more than half the front of the home³⁶, the other home extends the garage toward the street in a manner that makes the garage the dominant factor³⁷. The City admits that homes on some lots will not properly relate to the street.
- (16) The 2012 plat does not meet ECDC 20.35.060(B)(1) because the lot sizes provide no ability to retain significant natural features. Merging lots 16 and 17, and lots 18 and 19, might allow site design that retains significant features.

³⁶ Record at 331.

³⁷ Record at 332.

- (17) The 2012 plat does not meet ECDC 20.35.060(B)(6) because the critical area has not been protected, and usable open space is insufficient.

Non-compliance with zoning ordinance

The plat does not comply with the zoning ordinance for reasons including, but not limited to: (1) The minimum lot size of 8,000 square feet is not met and PRD requirements are not satisfied, and (2) the 35% coverage maximum of ECDC 16.20.030 has been altered to 3,000 square feet per lot (approximately 50% per lot).

Additional Non-compliance

In addition to the forgoing, the plat does not comply with the following: (1) the transportation plan policy limiting cul-de-sac roads to 600 feet in length, (2) the critical areas ordinance regarding steep slopes and FWHCA's, and (3) the subdivision requirement to minimize grading.³⁸

Conclusion

The proposal will flood existing homes, take property and mature trees from existing residences, and cut 36% of the trees in a Fish and Wildlife Habitat Conservation Area. It does not make adequate provision for drainage, and is not in the public interest.



Lora Petso

³⁸ ECDC 20.75.085(A)(2).