

# EDMONDS CITY COUNCIL APPROVED MINUTES

## May 15, 2012

The Edmonds City Council meeting was called to order at 6:31 p.m. by Mayor Earling in the Council Chambers, 250 5<sup>th</sup> Avenue North, Edmonds.

### ELECTED OFFICIALS PRESENT

Dave Earling, Mayor  
Strom Peterson, Council President  
Frank Yamamoto, Councilmember  
Joan Bloom, Councilmember  
Michael Plunkett, Councilmember  
Lora Petso, Councilmember  
Adrienne Fraley-Monillas, Councilmember  
Diane Buckshnis, Councilmember

### ALSO PRESENT

Alex Springer, Student Representative

### STAFF PRESENT

Al Compaan, Police Chief  
Jim Lawless, Assistant Police Chief  
Stephen Clifton, Community Services/Economic  
Development Director  
Phil Williams, Public Works Director  
Shawn Hunstock, Finance Director  
Carl Nelson, CIO  
Jerry Shuster, Stormwater Eng. Program Mgr.  
Leonard Yarberry, Building Official  
Rob English, City Engineer  
Jeanie McConnell, Engineering Program Mgr. 1  
Kernen Lien, Associate Planner  
Jeff Taraday, City Attorney  
Sandy Chase, City Clerk  
Jana Spellman, Senior Executive Council Asst.  
Jeannie Dines, Recorder

### Training Related to Closed Record Review Procedures

Mayor Earling explained this agenda item had been added because several Councilmembers have never participated in a closed record proceeding. Attorney Carol Morris, who will be representing the City Council tonight regarding the closed record hearing, was invited to make a presentation to the Council regarding closed record review procedures.

Councilmember Petso advised she would participate in this portion of the meeting with the other appellants. She left the dais at 6:32 p.m.

Ms. Morris explained she has been a City Attorney for over 20 years and only represents cities and municipalities. The information she will provide is part of a training session she gives to cities in the insurance pool and she handles land use litigation for them. Because this training session is immediately prior to a closed record hearing, she cautioned the Council not to ask questions that are specific to that application.

She explained quasi-judicial land use applications include a public hearing and are applications where Councilmembers act as judges. Rather than acting in a legislative capacity setting policy, in this instance the Council is involved in the application of law to facts. Examples of quasi-judicial processes include conditional use permits, variances, and preliminary plats. The Appearance of Fairness Doctrine applies.

Quasi-judicial applications have deadlines for processing and can be appealed to Superior Court. If appealed to Superior Court, there is a non-deferential review by a judge. In a non-deferential review, the

standards of review are not deferential to the City's decision; there are specific standards of judicial review. For instance, whether there is substantial evidence in the record to support the decision or is the decision clearly erroneous and a mistake has been made. Those are the standards a judge will use when reviewing the decision to determine whether it should be reversed, modified or affirmed. Appeals to Superior Court are based on the administrative record. Therefore it is very important tonight that the proceedings conform to the standards. There is no testimony on an appeal to court; the administrative record is forwarded to the court. The administrative record includes all the documents in the application file to date in addition to transcripts of the hearings.

When an open record public hearing or closed record hearing occurs, at the outset of the meeting the Mayor will ask Councilmembers/decision-makers whether they have any Appearance of Fairness, conflict of interest or ex parte contacts to disclose. The Appearance of Fairness Doctrine requires that the hearing not only be fair but appear to be fair. Quasi-judicial hearings must be conducted so as to give the appearance of fairness and impartiality. The courts have stated 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.

Next Ms. Morris described challenges under the Appearance of Fairness Doctrine. A decision-maker can be challenged under the doctrine for pre-judgment concerning issues of fact about parties in a particular case or partiality evincing a personal bias or personal prejudice which signifies an attitude for or against a party as distinguished between issues of law or policy. The test is something a decision-maker asks themselves, would a disinterested person having been apprised of the totality of my personal interest involved in this matter be reasonably justified in thinking that partiality may exist. She clarified the test is not whether the decision-maker thinks the Appearance of Fairness Doctrine has been violated, it is whether someone else would be reasonably justified in thinking that partiality may exist. A person making a challenge that expects the court to uphold a violation must show specific evidence of a violation, not speculation. Prejudgment and bias are to be distinguished from ideological or policy leanings of the decision-maker.

She explained ex parte contacts are communications that a decision-maker had with an opponent or proponent of a project outside the public hearing. It does not include communications with staff unless the staff is the proponent/opponent of a project. Any communications with the applicants, appellants, opponents or proponents outside the public hearing constitute an ex parte contact. Decision-makers must disclose ex-parte contacts at the outset of the hearing. The decision-maker describes the substance of the communication and then the public is allowed to rebut that information. For example if a decision-maker discloses they received a letter that is not part of the record, the opponents/proponents may want to see the letter and have an opportunity to rebut the information in the letter prior to the public hearing. A decision-maker who engages in prohibited ex parte communication can still participate in a decision as long as he/she places on the record the substance of any written or oral ex parte communications.

With regard to conflict of interest, Ms. Morris explained a decision-maker to whom a private benefit may come as a result of some public action should not be a participant in that action. The private benefit may be direct or indirect and the possibility, not the actuality of a conflict of interest, should govern. A decision-maker experiencing a conflict of interest should declare his/her interest publically and if a voting member, abstain from voting on the matter. An example of a conflict of interest is someone who is an employee of a developer and the developer is developing property and when the property is sold, the developer will obtain substantial profit and perhaps the employee will also profit.

The courts have identified at least three types of bias that would prevent a decision-maker from participating in a decision, 1) prejudgment concerning issues of fact about a party, 2) partiality evidencing personal bias or personal prejudice, or 3) an interest whereby one stands to gain or lose by a decision. For example if a decision-maker owns property located next door to property purchased by Costco and he/she

understands from their knowledge of other Costcos that there will be a substantial traffic problem as a result of the new Costco. In that situation the decision-maker should step down and not participate because it is likely they will have a bias with regard to that application.

Once a decision-maker has disqualified themselves under the Appearance of Fairness Doctrine, they must leave the room. There have been allegations that when a Councilmember remains in the room after they have disqualified themselves, perhaps they are giving signals to other Councilmembers with regard to how to vote. In the event there is no quorum because so many Councilmembers have disqualified themselves, the Councilmembers return, participate and vote to a decision. If that occurs, the decision cannot be challenged on Appearance of Fairness grounds. The courts have held there needs to be a decision at the local level; materials cannot simply be forwarded to the court for a final decision on an application.

Ms. Morris explained there are no damages if a court finds there is a violation of the Appearance of Fairness Doctrine, the court invalidates the decision and the hearing must be conducted again. She noted that could be a substantial setback if there were continued hearings, there was a long process and a number of attorneys were involved.

Ms. Morris reminded decision-makers a record is being kept of the proceedings and everything that is said is being recorded and may need to be transcribed later. She cited the importance of being clear on the record and being specific about locations on a map or identifying exhibits so the judge will know what is being discussed. She cautioned against rustling papers, making jokes, having sidebar conversations with other Councilmembers, or making offhand remarks.

Ms. Morris explained in a closed record hearing, no new evidence can be introduced. Parties giving oral argument must reference the portion of the record they are discussing. If the Council chooses to modify or overturn the hearing examiner's decision on closed record appeal, it must be done based on evidence in the record.

Ms. Morris explained occasionally during a close record hearing, the Council will be confronted with a legal issue and may want to discuss it with the attorney but not during open session and does not hold an executive session to ask a minor question. She suggested in that instance the Councilmember ask for a break to ask a question of the attorney. She noted other than questions related to liability, Councilmembers should feel free to ask questions of the attorney during the hearing. She encouraged the Council to deliberate on the code and evidence in the record and to provide as much explanation as possible. The Council's final decision will include Findings of Fact and Conclusions of Law which have standards of adequacy. The courts have held that the Council's Findings and Conclusions are subject to the same requirements of Findings of Fact drawn up by a trial court. Therefore findings must be substantial, refer to the record whenever necessary and include the necessary legal analysis. Based on deliberations, the attorney for the Council can draft Findings of Fact and Conclusions that are more detailed than the wording of the motion. The City Council then has an opportunity to review the Findings and Conclusions to ensure they are consistent with their decision prior to adoption.

With regard to the prevention of disputes and litigation on quasi-judicial applications, Ms. Morris emphasized the importance of following the code. If the Council identifies a problem with the code during the process, code amendments can be docketed for later and the Council follows the code as written during the quasi-judicial process. A 21-day appeal period follows the Council's adoption of Findings of Fact and Conclusions. She cautioned Councilmembers not to talk to anyone about the matter until the end of the appeal period.

Councilmember Plunkett asked if Appearance of Fairness issues arise with regard to matters unrelated to the subject at hand such as campaign contributions. Ms. Morris answered campaign contributions can

certainly be disclosed but a person challenging on the Appearance of Fairness Doctrine would have to show actual bias as a result of the campaign contribution. An example of a campaign contribution violation would be a Council candidate advertised to everyone that he was running for City Council because he opposed a particular development project and if he was on the Council he would deny it. He was then elected to the Council and was prevented from participating due to prejudgment bias.

Councilmember Plunkett asked whether campaign contributions should be disclosed. Ms. Morris answered absolutely.

The training concluded at 6:55 p.m. Councilmember Petso returned to the dais.

Mayor Earling reconvened the regular City Council meeting at 7:06 p.m. Prior to the flag salute, he asked for a moment of silence for Planning Manager Rob Chave's wife who passed away this morning.

**1. APPROVAL OF AGENDA**

**COUNCILMEMBER BUCKSHNIS MOVED, SECONDED BY COUNCILMEMBER FRALEY-MONILLAS, TO APPROVE THE AGENDA IN CONTENT AND ORDER. MOTION CARRIED UNANIMOUSLY.**

**2. APPROVAL OF CONSENT AGENDA ITEMS**

Councilmember Fraley-Monillas requested Item K be removed from the Consent Agenda.

**COUNCILMEMBER PETSO MOVED, SECONDED BY COUNCILMEMBER YAMAMOTO, TO APPROVE THE REMAINDER OF THE CONSENT AGENDA. MOTION CARRIED UNANIMOUSLY. The agenda items approved are as follows:**

- A. ROLL CALL**
- B. APPROVAL OF CITY COUNCIL MEETING MINUTES OF MAY 1, 2012.**
- C. APPROVAL OF CITY COUNCIL MEETING MINUTES OF MAY 8, 2012.**
- D. APPROVAL OF CLAIM CHECKS #131860 THROUGH #132104 DATED MAY 10, 2012 FOR \$809,823.07. APPROVAL OF PAYROLL DIRECT DEPOSIT AND CHECKS #51321 THROUGH #51349 FOR THE PERIOD APRIL 16, 2012 THROUGH APRIL 30, 2012 FOR \$451,565.54 AND BENEFIT CHECKS & WIRE PAYMENTS OF \$193,034.87 - TOTALING \$644,600.41.**
- E. ACKNOWLEDGE RECEIPT OF A CLAIM FOR DAMAGES FROM DEBI HUMANN (AMOUNT UNDETERMINED) AND LAURA PITTMAN (AMOUNT UNDETERMINED).**
- F. AUTHORIZATION FOR MAYOR TO SIGN RESOLUTION NO. 1275 DESIGNATING AGENTS FOR PURPOSES OF OBTAINING EMERGENCY DISASTER ASSISTANCE FUNDS.**
- G. AUTHORIZATION TO APPROVE A PERMANENT EASEMENT BETWEEN THE CITIES OF LYNNWOOD AND EDMONDS FOR N. TALBOT ROAD DRAINAGE PROJECT.**
- H. AUTHORIZATION TO APPROVE A SANITARY SEWER EASEMENT REVISION FOR THE STELLA'S LANDING PROPERTY.**
- I. AUTHORIZATION TO SELL TWO (2) SURPLUS FORD CROWN VICTORIA PATROL VEHICLES TO THE CITY OF TENINO, WASHINGTON.**

- J. DAWSON PLACE CHILD INTERVIEW SPECIALIST.
- L. ADOPTION OF ORDINANCE NO. 3884 AMENDING EDMONDS CITY CODE (ECC) 8.48 AND ORDINANCE NO. 3885 AMENDING ECC 8.52 (PARKING).
- M. ADOPTION OF ORDINANCE NO. 3886 - 2012 MAY BUDGET AMENDMENT
- N. RESOLUTION NO. 1274 - THANKING ALEX SPRINGER FOR HIS SERVICE AS A STUDENT REPRESENTATIVE

**ITEM K: TRANSFER OF MARINE 16 TO FIRE DISTRICT 1 (FD1)**

Councilmember Fraley-Monillas asked the value of Marine 16 and whether the City was compensated for the transfer of the boat. Assistant Police Chief Jim Lawless explained the boat was purchased via a federal grant as a joint asset. The City had no expenditure for the boat when it was purchased. It was a dual purpose vessel, available to police and fire. Marine 16 is the only piece of equipment that did not transfer to FD1 when they took over fire services. There was no exchange of funds; the utilization of the boat will remain the same but the maintenance costs will transfer to FD1.

Councilmember Fraley-Monillas asked the value of the boat. Assistant Chief Lawless answered the cost when purchased was approximately \$300,000. No research was done regarding its current value; the boat will be transferred to FD1 the same as other fire equipment. Councilmember Fraley-Monillas asked whether the boat could still be used for the benefit of Edmonds citizens. Assistant Chief Lawless agreed, explaining via the parameters of the grant, the boat is a regional asset on call from Seattle to the border. That remains the same and FD1 and the Edmonds Police Department will utilize it in the same manner they do today.

**COUNCILMEMBER FRALEY-MONILLAS MOVED, SECONDED BY COUNCIL PRESIDENT PETERSON, TO APPROVE ITEM K. MOTION CARRIED UNANIMOUSLY.**

**3. COMMUNITY SERVICE ANNOUNCEMENT - MEMORIAL DAY EVENT**

**Dale Hoggins, Edmonds Cemetery Board**, on behalf of the Cemetery Board, invited the public to attend the 30<sup>th</sup> annual Memorial Day Ceremony on Monday, May 28 at 11:00 a.m. at the Edmonds Memorial Cemetery and Columbarium to honor those who died while serving our country during time of war as well as all veterans, current military personnel and their families. Army Specialist Joshua Martin, age 20, Lynnwood, has been added to the list of Snohomish County military casualties since 9/11/2011. Army PFC Bowe Bergdahl is still a POW. This year's ceremony pays special recognition to the attack on Pearl Harbor, December 7, 1941. This year's special guest is Erwin Schmidt, longtime Snohomish County resident and Pearl Harbor survivor.

Mr. Hoggins provided a reminder that this is an outdoor event, rain or shine. He encouraged attendees to bring their own chairs and allow time to walk from parking outside the cemetery. American Sign Language interpreters from Seattle Community College will be present. The cemetery is located at 820 15<sup>th</sup> Street SW, Edmonds. He invited anyone seeking additional information to contact him.

Mayor Earling thanked Mr. Hoggins for his continued service in organizing this event.

**4. PRESENTATION OF RESOLUTION AND PLAQUE TO ALEX SPRINGER, STUDENT REPRESENTATIVE.**

Council President Peterson read a resolution commending Alex Springer for his service as Student Representative on the City Council during the fall, winter and spring of 2011 and 2012. He presented

Student Representative Springer a clock and expressed his appreciation for his enthusiasm, his thoughtful questions, and for engaging his peers in the strategic plan. He wished him the very best.

Student Representative Springer explained this fall he plans to attend Massachusetts Institute of Technology in Cambridge, Massachusetts to study biological engineering. After graduating from college, he hopes to continue his involvement in city government, hopefully as a City Councilmember.

**5. PROCLAMATION IN HONOR OF NATIONAL POLICE WEEK, MAY 13-19, 2012.**

Mayor Earling explained last night he and other Councilmembers attended the Police Department's annual awards ceremony. He then read a proclamation in honor of National Police Week, May 13-19, 2012 and presented the proclamation to Police Chief Al Compaan.

Chief Compaan thanked the Council for their support of the members of the Edmonds Police Department. He commented that there was a wonderful turnout at last night's awards ceremony to recognize employees and members of the community who made special contributions to law enforcement during the past year. Sergeant Karl Roth was named Officer of the Year for his contributions to traffic safety and Domestic Violence Coordinator Kari Hovorka was awarded Civilian Employee of the Year. On behalf of the men and women of the Edmonds Police Department, he thanked the City Council and the community for their support.

Mayor Earling acknowledged a Police Officer and Police Explorer in the audience.

**6. AUDIENCE COMMENTS**

**Bob Rinehart, Edmonds**, announced the Jazz Connection on Saturday, May 26 from 9:00 a.m. to 5:00 p.m. with a jam session following at the Masonic Center. This event, hosted by the Edmonds Daybreakers Rotary Club, has been held for over ten years. There is no admission charge for the Jazz Connection and features very fine student musicians from high schools in this area and throughout the region. Big bands play at the Masonic Center, jazz combos at the Edmonds Theater and jazz choral groups at the convention center. He thanked the Hazel Miller Foundation for their support.

**Al Rutledge, Edmonds**, referred to the exploration of a Metropolitan Park District, recalling he raised that issue in March 2002 and it had been brought up at least 3 times over the past 10 years. Next, he announced a car show to benefit the food bank on July 14 at Top Foods.

**7. MONTHLY GENERAL FUND UPDATE**

Finance Director Shawn Hunstock explained the monthly General Fund update, is typically on the Consent Agenda but was scheduled on the Council agenda to highlight changes to the reporting. Beginning with the March General Fund update, information regarding department expenditures will be included. The monthly and quarterly reports were discussed at the Finance Committee meeting and Councilmembers Buckshnis and Yamamoto as well as citizens provided input regarding the reports. He welcomed the Council's as well as citizens' input regarding the content of the reports. The monthly General Fund update, the quarterly reports as well as the annual reports will be available on the Finance Department's webpage.

Councilmember Buckshnis thanked Mr. Hunstock for the progressive work he has done. These reports will assist citizens in seeing the General Fund in a very graphic way. The intent is to educate citizens regarding how the General Fund operates and this is an example of a job well done.

**8. AUTHORIZATION TO ADVERTISE FOR CONSTRUCTION BIDS FOR THE MAIN ST. IMPROVEMENT PROJECT (5TH AVE TO 6TH AVE).**

Public Works Director Phil Williams provided photographs of sidewalks on Main Street between 5<sup>th</sup> and 6<sup>th</sup> where sidewalk panels have been raised by the roots of the European Hornbeam trees creating significant trip and safety hazards. The Main Street Improvement Project includes the following:

- 12-foot sidewalks replacing the existing 10-foot sidewalks
- Street lights (16 LED Sternbergs)
- 18 new street trees (14 Bohall Maples and 4 October Glory Maples)
- Mid-block pedestrian crossing (6-inch elevation)
- Relocation of overhead electrical utility service on the south side of Main
- Street pavement reconstruction
- Waterline replacement (1920's cast iron)
- Stormwater improvements
- Artistic flower poles (4)
- Street furniture (bike rack, solid waste and benches)

Mr. Williams displayed a drawing showing tree locations, wider sidewalks, mid-block crossing, new street lights and new trees. The locations of street trees have been negotiated with the property and business owners. Parallel parking will remain on both sides. To limit impacts, the property/business owners decided the best timing for the project would be after the summer festivals and to have it completed prior to the start of the Christmas shopping season before Thanksgiving. That timing will be efficient, cheaper and seems to meet the needs of adjacent property owners. A traffic control plan is included in the bid package to route traffic around this block during construction.

Mr. Williams reviewed the project budget:

- Estimated total project cost: \$1.6 million
  - Includes approximately \$259,000 in design
  - Change order #1 (May 22 Council Agenda)
- Available funding: \$1.56 million
  - Federal grant: \$725,000
  - State CTED grant: \$500,000
  - Storm and water utility funding: \$330,000

Mr. Williams reviewed the project schedule:

May:	Finalize design documents
June:	Advertise for construction bids
July:	Council award
September 10 – November 16:	Construction

Councilmember Bloom asked about the difference between the estimated cost and the available funding. Mr. Williams explained the estimated cost is an engineer's cost estimate. The actual cost is unknown until bids are received. It is not uncommon for there to be a difference between available funds and the projected cost estimate. He was hopeful bids would be lower than the cost estimate. There is one alternate in the bid package for the infiltration part of the stormwater; the treatment could be done without infiltration. That will allow the scope of the project to be reduced if bids are higher than available funds.

Councilmember Bloom asked the likelihood of discovering something unexpected and how cost overruns would be covered. Mr. Williams answered the estimated project cost includes a 10% contingency. He anticipated the scope of any surprises would be limited because there is reasonable geotechnical information of what exists under the street and the utility locations. Surprises that could arise are weather-related delays or voids under the sidewalk. The project includes a \$10,000 allowance for voids under the sidewalk.

Councilmember Buckshnis asked Mr. Williams to comment on the new change order policy. Mr. Williams explained the City has a new change order policy whereby any significant changes in the project that meet the threshold will be brought to Council Committee and then full Council for authorization. He anticipated when the contract is awarded there will be a management reserve and if that becomes an issue, it will be discussed with Council.

Student Representative Springer observed the project includes sharrows and asked whether there would be pavement markings. Mr. Williams answered the sharrows will be marked with the standard MUTCD formatted markings to accommodate bicycles and automobiles. Calming the traffic will make it a much more comfortable experience for bicycles and automobiles on this block. Student Representative Springer asked how impacts to the sidewalk from the new street trees will be avoided. Mr. Williams answered the Bohall Maples are well behaved street trees and will be planted with root ball protectors to prevent problems with the roots. The previous trees, European Hornbeam, have shallow roots and tend to lift sidewalks.

**COUNCILMEMBER BUCKSHNIS MOVED, SECONDED BY COUNCIL PRESIDENT PETERSON, TO AUTHORIZE STAFF TO ADVERTISE FOR CONSTRUCTION BIDS FOR THE MAIN STREET PROJECT.**

Councilmember Plunkett commented he inserted the Main Street project in the budget five years ago but had no idea how it would be funded. Staff told him to be patient; they would find the funds for the project. This is a wonderful example of what staff is capable of accomplishing. This is the last piece of downtown to be improved and completes the wider sidewalks and the great pedestrian look of Edmonds.

**MOTION CARRIED UNANIMOUSLY.**

**9. RECONSIDERATION OF ORDINANCE NO. 3883 - ADOPTING REVISED GENERAL FACILITIES CHARGES FOR THE CITY'S WATER, SEWER AND STORM WATER UTILITIES**

Council President Peterson explained this ordinance was passed 4-2 by the Council and the Mayor exercised his veto power. The ordinance adjusts the general facilities charges for the City's water, sewer and stormwater utilities with a 50%/25%/25% implementation of the increase over three years.

**COUNCILMEMBER PETSO MOVED, SECONDED BY COUNCILMEMBER FRALEY-MONILLAS, TO APPROVE ORDINANCE NO. 3883, ADOPTING REVISED GENERAL FACILITIES CHARGES FOR THE CITY'S WATER, SEWER AND STORM WATER UTILITIES.**

Council President Peterson advised overriding a veto requires a super majority vote of the Council (at least five Councilmembers voting in favor).

**MOTION CARRIED (6-1), COUNCILMEMBER PLUNKETT VOTING NO.**

**10. CLOSED RECORD REVIEW - PROJECT DESCRIPTION: THE APPLICANT HAS APPLIED FOR A 27-LOT PRELIMINARY PLAT AND PLANNED RESIDENTIAL DEVELOPMENT (PRD) AT 23700 104TH AVE W, PARCEL NUMBER 27033600304800. THE CITY OF EDMONDS GRANTED PRELIMINARY APPROVAL OF THE 27-LOT PRELIMINARY PLAT AND PRD IN 2007. THE APPROVAL WAS APPEALED AND THE APPELLATE COURT REMANDED THE APPLICATIONS TO THE HEARING EXAMINER FOR FURTHER PROCEEDINGS ON THE DRAINAGE PLAN, PERIMETER BUFFER AND OPEN SPACE MATTERS. FOLLOWING A PUBLIC HEARING BEFORE THE HEARING EXAMINER ON FEBRUARY 9, 2012, THE HEARING EXAMINER GRANTED APPROVAL OF THE PRELIMINARY PLAT AND PRD. THE HEARING EXAMINER'S DECISION HAS BEEN APPEALED TO CITY COUNCIL FOR A CLOSED RECORD REVIEW. APPLICANT: BURNSTEAD CONSTRUCTION COMPANY, FILE NO.: P-2007-17 AND PRD-2007-18 / APPEAL NOS.: APL20120001 - APL20120004. APPELLANTS: LORA PETSO AND COLIN SOUTHCOTE-WANT (APL20120001); IRA**

**SHELTON AND KATHIE LEDGER (APL20120002); CLIFF SANDERLIN AND HEATHER MARKS (APL20120003); DARLENE MILLER, RICHARD MILLER, CONSTANTINOS TAGIOS, AND SOPHIA TAGIOS (APL20120004)**

Councilmember Petso advised she will be participating as a citizen on this item. She left the Council dais and joined the appellants at 7:52 p.m.

Mayor Earling described the format for the hearing, explaining there are three tables, one for the appellants, one for the applicant and one for staff. City Attorney Jeff Taraday is seated with staff and will represent the interest of the City. The Council hired an attorney with experience in this type of procedural matters, Carol Morris, and she will advise the Council and Mayor.

Mayor Earling reviewed the proposed procedures for the closed record review. The purpose of the closed record hearing is for the City Council to address an appeal of the hearing examiner's conditional approval decision on the Woodway Elementary preliminary plat PRD remand. He opened the closed record public hearing.

Mayor Earling explained the City Clerk will keep a record of the proceedings. When permitted to speak, speakers should begin by stating their name and address and speak clearly to ensure all parties are on record. The hearing is not open to public testimony; this is a hearing on appeals filed by Lora Petso and Colin Southcote-Want, Richard and Darlene Miller, Constantinos and Sophia Tagios, Cliff Sanderlin and Heather Marks, and Ira Shelton and Kathie Ledger. The hearing is not an open record hearing and there will be no opportunity during the closed record hearing for public testimony other than from those who have participated at some point in the process. Oral argument from appellants and parties of record will be taken. Parties of record include the applicant, any person who testified in the open record public hearing on the application and any person who originally submitted written comments regarding the application at the open record public hearing.

The Appearance of Fairness Doctrine requires that this hearing be fair in form, substance and appearance. The hearing must be fair and also appear to be fair. He asked whether any member of the decision-making body had engaged in communication with opponents or proponents on issues of this appeal outside the public hearing process.

Councilmembers Plunkett, Yamamoto, Bloom and Fraley-Monillas and Council President Peterson had no disclosures. Councilmember Buckshnis disclosed Ms. Petso called her twice on May 2, 2012 and left a message regarding the selection of Carol Morris as an attorney. That morning Councilmember Buckshnis had forwarded an email from Jeff Taraday to Councilmembers with Ms. Morris' website. She later spoke with Ms. Petso and it was determined it was okay that she knew the name of the attorney. Ms. Petso began to talk about Ms. Morris' employment history and Councilmember Buckshnis indicated she did not want to talk about it.

Mayor Earling disclosed after he was elected when the matter was going to the hearing examiner, he received an email from Mr. Sanderlin and the Millers asking what they should do. He informed them to allow the hearing examiner to speak.

Mayor Earling asked whether any member of the Council had a conflict of interest or believed he/she could not hear and consider this application in a fair and objective manner.

Councilmembers Fraley-Monillas, Bloom, Buckshnis, and Yamamoto and Council President Peterson indicated they did not have any conflict of interest and could hear the matter in a fair and objective manner. Councilmember Plunkett disclosed he had contributed to Ms. Petso's campaigns several times. She has run three times for office, one time against him. He received campaign contributions from Mr.

Sanderlin and Ms. Marks in at least three of his five campaigns. He believed he could hear the matter fairly and impartially.

Mayor Earling disclosed Mr. Sanderlin endorsed him but he did not recall whether he contributed to his campaign.

Councilmember Bloom disclosed Mr. Sanderlin and Ms. Marks contributed to her campaign and doorbelled for her.

Councilmember Buckshnis disclosed Mr. Sanderlin and Ms. Marks contributed to her campaign.

Mayor Earling asked whether there were any objections to his or the participation of any Councilmember as a decision-maker in this hearing.

**Finis Tupper, Edmonds**, commented the presentation the Council had prior to the meeting was appropriate. He displayed the agenda memo for this item, referring to the second paragraph that states recommendation from the Mayor and Staff: uphold the hearing examiner's decision. He stated this was clearly prejudgment bias. He referred to the second page of the agenda memo that states on May 11, 2012 at 7:54 a.m. Mayor Earling reviewed and approved the agenda memo. Mr. Tupper requested Mayor Earling recuse himself from this hearing and not participate.

Mayor Earling requested Ms. Morris' input. Ms. Morris asked whether Mayor Earling made the recommendation or whether it was a form statement. Mayor Earling responded it is a common practice that the Mayor recommends along with staff many agenda items. If the record states that, that is what he did although it was not necessarily with the intent of clouding his ability to participate in the hearing. Ms. Morris asked whether he could remain impartial. Mayor Earling answered he could.

**Lora Petso, Edmonds**, agreed with Mr. Tupper's challenge. She pointed out Agenda Item 9 did not include a recommendation from the Mayor and staff. She preferred this item had also not included a recommendation because she agreed it created an appearance of prejudgment bias. She was also concerned due to her and Mayor Earling's involvement in the Growth Management Hearings Board decision involving Mayor Earling, herself, the same property and similar issues. She believed that decision creates a tremendous opportunity for information not in the 1,000 page record for this item to be inadvertently used in the course of the hearing. She requested Mayor Earling recuse himself and allow Council President Peterson to conduct the meeting.

Ms. Morris asked Mayor Earling to repeat his conclusion in the order issued in the Growth Management Hearings Board decision and the statement he made with regard to Ms. Petso's comments on his ability to be impartial. Mayor Earling agreed the Growth Management Hearings Board decision was on the same piece of property. The issue before the Hearings Board was the matter of jurisdiction of the three parties and how the transfer of public property took place between the school district, Snohomish County and the City, an issue dramatically different than those in the closed record hearing. Ms. Petso challenged his participating in that hearing; her basis was that he had supported her opponent in the last election which was true. However that did not cloud his ability to make an impartial judgment on the issue before the Growth Management Hearings Board. Included in his response order to Ms. Petso, he pointed out in the last meeting when both of them left the Council she had complimented him on his ability to be fair in his deliberations. Ms. Morris read the comment made by Ms. Petso from the December 16, 2003 City Council meeting minutes, that Councilmember Earling was a model Council President, fair, not manipulative, not critical, just did a great job. Ms. Morris asked Mayor Earling whether he believed he could be impartial in light of the issue Ms. Petso has raised. Mayor Earling answered yes.

**Colin Southcoat-Want, Edmonds**, referred to the presentation by Ms. Morris regarding the Appearance of Fairness Doctrine, commenting this is clearly unfair. He was distraught by Ms. Morris' asking Mayor Earling leading questions. He referred to the Mayor's recommendation in the agenda memo, uphold the hearing examiner's decision, and asked Mayor Earling to recuse himself.

**Cliff Sanderlin, Edmonds**, agreed with the previous statements requesting that Mayor Earling recuse himself. He viewed this as an extension of the violation of their due process rights throughout this entire procedure, dating back to when staff sent them a 100 page report containing very complex material and expected them to digest it, formulate their position and return to a hearing within less than a week. He stated having Ms. Morris in the room speaking was also a violation of their rights.

**Roger Hertrich, Edmonds**, challenged Mayor Earling's participation. He stated it was obvious that any reasonable person would say Mayor Earling's mind had already been made up by the comment in the agenda memo. He was concerned if the matter proceeded to court, Mayor Earling's participation would jeopardize the City's position and increase the City's liability. He requested Mayor Earling recuse himself and allow Council President Peterson to conduct the hearing.

**Al Rutledge, Edmonds**, commented he had attended the District Court meetings. He commented on the appeal of hearing examiner decisions to the City Council.

**Cliff Sanderlin, Edmonds**, provided another reason for Mayor Earling to recuse himself and further evidence of the violation of their due process rights, they were only told three hours before this hearing about the format of the hearing and how much time they would have to speak. The applicants will only have a total of 40 minutes to speak. Considering they spent \$365 for each appeal, that is \$36.50/minute they are allowed to speak. Due to the short turnaround time, he believed Mayor Earling should not participate in this process.

Mayor Earling declared a five minute recess. The meeting was reconvened at 8:22 p.m.

Mayor Earling explained he spoke with the attorney and the Council President during the recess and came to the conclusion that he will step down. He explained most of the charges leveled against him are bogus. In particular bringing up the Growth Management Hearings Board, Ms. Petso certainly knows that is a separate issue decided on a completely different set of circumstances. The reason he was stepping down was only on one issue, the common form he approves for any agenda item other than those that come from the City Council. The agenda memo referenced by Ms. Petso that did not have a recommendation from the Mayor and staff was an item that came from the City Council. The recommendation from the Mayor and staff on agenda items is done numerous times for each Council agenda and in this instance perhaps he should have thought it through before placing the item on the Council agenda. Because he did that, it is a fair question to ask and he is willing to step down. The other charges leveled are absolutely unfounded. He relayed that Ms. Morris did not believe the charges against him would be found objectionable under the Appearance of Fairness Doctrine and in her view he could participate. To avoid clouding the issue, he will step down.

Mayor Earling declared a brief recess and left the dais at 8:28 p.m. Council President Peterson reconvened the meeting at 8:32 p.m.

Council President Peterson explained in the interest of time, oral argument from the appellants, applicants and parties of record would be limited to a total of 80 minutes. The Council's jurisdiction in this closed record hearing is to address the same issues as the hearing examiner, the drainage plan, the perimeter buffer and open space. He proposed oral argument be divided as follows:

- Staff Presentation: 10 minutes
- Drainage: 20 minutes each for oral argument from the appellants and applicants

- Perimeter buffer: 10 minutes each for oral argument from the appellants and applicants
- Open space: 10 minutes each for oral argument from the appellants and applicants
- Parties of Record: 3 minutes each

Councilmembers did not object to the above timelines.

#### Staff Presentation

Associate Planner Kernen Lien explained this application has been through a long review process. The application is for a 27-lot subdivision and Planned Residential Development (PRD). It was originally applied for on February 28, 2007. An open record hearing was held on SEPA appeal, the subdivision and PRD before the hearing examiner. Another hearing examiner hearing was held as well as a hearing examiner remand to address the perimeter buffer. The hearing examiner's decision was appealed to City Council and the City Council heard a closed record review on this application in 2007. The City Council upheld the hearing examiner's decision and it was appealed to Superior Court and again to appellate court who remanded the application back to the City to consider three items: storm drainage, perimeter buffer and open space. On February 9, 2012 a public hearing was held before the hearing examiner on those three remand items. That decision has been appealed to City Council.

With regard to storm drainage, Mr. Lien explained the previous storm drainage report was remanded for two main reasons, 1) there appeared to be a misunderstanding of the infiltration rate used by the hearing examiner related to vault sizing of the stormwater system, and 2) it was unclear who would be responsible for maintenance of the storm drainage system. The previous infiltration had been designed with an infiltration rate of 10 inches/hour. The proposed infiltration rate under the revised storm drainage report has been designed using a more conservative 2.3 inches/hour infiltration rate based on new infiltration tests including one at the proposed location of the infiltration vault. Staff found the preliminary design infiltration parameters satisfies the appellate court's recommendations for a proper designed infiltration rate obtained from infiltration tests done at the site of the proposed facility. This method of determining the infiltration rate meets or exceeds the standard to which the applicant is vested. Additional infiltration tests at the proposed location of the vault will be required at the final design phase.

With regard to maintenance of the storm drainage system, Mr. Lien explained the standard practice for all development is for the final drainage plan to include a commitment for proper maintenance by the developer to the applicable drainage standards. A performance bond is placed on the stormwater system requiring the developer to properly maintain the system for two years and the system will be inspected annually. After the bonding period is complete, the system is inspected and if it meets the City's standards, the bond is released and maintenance of the facility is the responsibility of the property owners. The final plat will have covenants, conditions and restrictions that will, 1) allow the City to regularly inspect the stormwater management system, and 2) bind all the owners of the lots and their successors to maintain the plat's stormwater management system in accordance with the City's maintenance standards.

To that end, the hearing examiner added the following specific conditions of approval:

4. The recorded documents shall include access easement on Tract C as identified in Exhibit 1 of Attachment 2012-3 and/or all final locations of storm drainage facilities to the City of Edmonds for the purpose of accessing and inspecting the storm drainage facility or facilities. The City shall use enforcement actions as appropriate to ensure all necessary maintenance is completed in a timely fashion.
5. The recording documents shall reflect the responsibility for long term maintenance of all stormwater and open space facilities rests with the homeowners association and that each lot owner within the plat is jointly and separately liable.

With regard to the perimeter buffer, Mr. Lien explained the perimeter buffer design is addressed in ECDC 20.35.050(c) and states the design of the perimeter buffer shall either comply with all the zoning criteria

applicable to the zone by providing same front, side and rear yard setbacks for all lots adjacent to the perimeter of the development and/or provide a landscape buffer, open space or passive use recreation area the depth from the exterior property line at least equal to the depth of the rear yard setback applicable to the zone. On the original application, Burnstead requested reduced street and side setbacks on all perimeter lots. Since they were requesting the reduced side setbacks, a perimeter buffer was required. The appellate court found the proposed perimeter buffer non-compliant because it was only proposed on two sides of the development; the court found a perimeter buffer should be on all sides and remanded the perimeter buffer issue. On the remand application, Burnstead chose to apply standard RS-8 zoning setbacks for all perimeter lots. Since the standard RS-8 zoning setback was applied, they complied with ECDC 20.35.050(c)(1) and a perimeter buffer is not required.

With regard to open space, the parameters for open space are addressed in ECDC 20.35.050(b) which requires at least 10% of gross lot area be set aside as open space. The subject property is 5.61 acres or 244,227 square feet; 24,423 square feet of open space must be provided. The proposal includes four open space tracts, Tract A, C, E and F totaling 25,185 square feet of open space which meets the 10% requirement. Mr. Lien identified the open space tracts on a map. On the original application, the perimeter buffer was along one side that overlapped Tract A. The appellate court found the open space was not compliant because ECDC 20.35.050(b) indicates the required landscape buffers cannot be counted toward open space. Because the application at that time double counted the open space, the appellate court remanded the open space. On remand, the applicant chose to apply standard RS-8 setbacks, thereby eliminating the requirement for a perimeter buffer and eliminating the conflict of double counting the open space.

Mr. Lien concluded staff feels the applicant has addressed the remand issues and recommended approval to the hearing examiner. It was his recommendation that the hearing examiner's decision be upheld that the Mayor approved on the agenda memo.

Councilmember Buckshnis referred to the map, observing the size of Tract A is 4,913 square feet and inquiring about the 37' stated on the map. Lien responded the 37' is measuring the length of the curve at that location. Councilmember Buckshnis asked if open space must be contiguous or whether it could be in separate tracts. Mr. Lien responded the code does not specifically state it must be contiguous open space. He referenced ECDC 20.35.050(d), open space requirements, which states at least 10% of the gross lot area and not less than 500 square feet shall be set aside for every PRD of 5 or more lots. All the proposed open space tracts are at least 500 square feet.

Councilmember Buckshnis asked if it is common practice for a two year bond for drainage system maintenance before it becomes the responsibility of the HOA. Mr. Lien answered yes. Councilmember Buckshnis inquired about the change in the infiltration rate and asked if that was done after the first remand. Mr. Lien answered the stormwater report that went through the appeal to Superior Court and appellate court had the 10 inches/hour infiltration rate. The drainage report was redone as part of the remand and included an infiltration rate of 2.3 inches/hour. Councilmember Buckshnis asked if that was a common industry standard, noting that staff stated it meets or exceeds the standard. Mr. Lien stated yes.

Councilmember Fraley-Monillas inquired about the perimeter buffer, observing it was initially proposed on two sides rather than on all sides. Mr. Lien referred to the plat map explaining the perimeter buffer was originally only proposed on the west and south side. The layout of the lots and road, dimension of the lots, everything is the same on the remand application and the original application. The only change is that the standard RS-8 setbacks were applied to the exterior lots which eliminated the requirement for the perimeter buffer.

Councilmember Bloom asked Mr. Lien to explain what an impervious surface is. Mr. Lien read the definition of impervious surface in the hearing examiner's decision on page 23 of the record, condition of

approval #2, Impervious surface means a hard surface area that either prevents or retards the entry of water into the soil mantle as it occurs under natural conditions prior to development, resulting in storm water runoff from the surface in greater quantities or at an increased rate of flow compared to storm water runoff characteristics under natural conditions prior to development. Common impervious surfaces include (but are not limited to) rooftops, walkways, patios, driveways, parking lots or storage areas, concrete or asphalt paving, gravel roads, packed earthen materials, and oiled macadam or other surface that similarly impede the natural infiltration of storm water. Open, uncovered retention/detention facilities shall not be considered impervious surfaces for purposes of determining whether the thresholds for application of minimum requirements are exceeded. However, open, uncovered retention/detention facilities shall be considered impervious surfaces for purposes of runoff modeling. Outdoor swimming pools shall be considered impervious surfaces in all situations.

Councilmember Bloom questioned impervious surface and the coverage issue, whether all impervious surfaces are used to determine coverage. Stormwater Program Manager Jerry Shuster responded there is a difference between lot coverage and impervious surface coverage. Mr. Lien explained the City does not have a maximum impervious surface regulation. The zoning code has maximum coverage regulations related to structures. His response to the appellant argument includes definitions for impervious surface. He read from the current code, impervious surface means a constructed hard surface area that either prevents or retards the entry of water into the soil. Impervious surfaces include (but are not limited to) rooftops, patios, storage areas, concrete, asphalt, brick, gravel, oiled, packed earthen or other surfaces that similarly impede the natural infiltration of stormwater. Coverage means the total ground coverage of all buildings or structures on a site measured from the outside of external walls or supporting members or from a point 2½ feet in from the outside edge of a cantilevered roof whichever covers the greatest area. He also provided the definition of structure, Structure means a combination of materials constructed and erected permanent on the ground or has a permanent location on the ground. Not included are residential fences less than 6 feet in height, retaining walls, rockeries, and similar improvements of minor character less than 3 feet in height.

Mr. Lien explained the RS-8 zone has a maximum lot coverage of 35% related to structures. Impervious surface includes all roofs versus coverage which measures 2½ feet in from the edge of the roof and therefore does not include all impervious surface. A structure is something constructed and erected permanently on the ground; the dictionary definition of erect is something in a vertical position. Applicants are required to provide both the structural coverage calculation as well as the impervious surface calculation and they are not the same.

#### Appellant - Drainage

Ms. Petso asked if there would be time allotted for rebuttal. Council President Peterson answered rebuttal time was not included. There will be time at the end of the presentations for Council questions of staff, the appellant and the applicant.

Ms. Petso commented that the plat, application, the process, everything has been so badly mangled that she wanted to shoot it. She requested it be reversed and start over with modern drainage codes and modern laws. There are a variety of due process violations, no SEPA, no ADB review, it is an illegal rezone, and there are changes to the setbacks that are outside the scope of the remand. The staff presentation did not mention that the setback on Lots 24 and 25 were also changed although there is no possible relationship between that change and the three remand issues, drainage, perimeter buffer and open space. She noted this hearing was restricted to those three issues yet the City and the applicant have already violated that. The applicant also moved the side of two houses to within 10 feet of the sidewalk.

Ms. Petso commented there is no evidence that drainage is adequate as required by every applicable law. SEPA requires no significant adverse environmental impacts. The state and local subdivision ordinances require a subdivision not be approved unless there are adequate provisions for drainage. Even the PRD

ordinance has a drainage provision. The local subdivision ordinance has a provision that states the proposal must minimize offsite impacts to drainage. They won at the Court of Appeals and the court said drainage must be improved. Staff eliminated a condition that limited impervious surface to 35%; the new hearing examiner replaced it with 3,000 square feet per lot which is approximately 49%. She summarized the appellants lost ground by winning, going from 35% impervious surface on lots to nearly 50%.

Ms. Petso explained there is no evidence in the record that could be used to make a finding that drainage is adequate. Staff provided documentation that this is a conservative approach but this neighborhood already floods which would indicate an approach beyond conservative, a system that works, is needed. Staff has said infiltration is feasible which is not that all water will be kept on site, only that theoretically in this area some infiltration is possible. Part of the preliminary plat review is that they are required to provide sufficient information for the Council to make its decision and cannot say it will be fixed later. However, that is what has been done. For example, the overflow pipe is on 237<sup>th</sup>, the street she lives on in Woodway Meadows. It does not show whether the overflow will flow into her neighborhood and flood in the usual place or be routed to the drainage facility under Hickman Park. Staff was confused by this and requested reconsideration of the hearing examiner decision for clarity. She stated the water cannot go down 237<sup>th</sup>, that area already floods. Staff made the suggestion that the water be dumped into Hickman Park but that also already floods during rains. She referred to photographs of standing water on the soccer fields that overflows onto 237<sup>th</sup>.

Ms. Petso referred to a rough transcript of the February 9, 2012 hearing examiner on pages 910-912. There was no testimony by staff or the applicant that the drainage system will work. AES's representation that it will work is wrong; AES specifically said do not use 2.3 inches/hour, only that 10 inches/hour was wrong and more testing needed to be done.

Despite the order of the court of appeals stating that infiltration rate and safety factor was essential, the evidence shows that a proper infiltration rate and safety factor have not been determined. The rate of 2.3 inches/hour has not been settled on. Ms. Petso referred to pages 182, 184, 167, and 840. The reason this bothers the appellants is because the infiltration vault fills the entire available space. If further testing indicates the infiltration rate should be 2.1 inches/hour, there is no space for a larger or deeper vault. She pointed out the soil log indicates a depth of 6 feet for the vault, below that there is clay, heavy soils that do not infiltrate.

The court of appeals stated that there needed to be adequate testing; in the record a single vault test to a depth of 9 feet for a vault of this size, 140 feet long, is declared to be inadequate by the experts. She referenced pages 97, 131, 132, 155 and 156. There is also no testing of point drains or dry wells, therefore the applicant has not demonstrated adequate drainage which is stated on pages 180 and 182.

The applicant testified they wanted to test on each lot for a place for a local facility to take the burden off the main facility. The lots are so small there is nowhere to place such a facility, they have not conducted those tests and when the applicant said they would do it on the perimeter lots as well, staff said that made no sense.

Ms. Petso further stated the maintenance of the storm facility is inadequate; it is dependent on the HOA, no standards are specified in the plat or the City's ordinances. A Public Works memo stated the maintenance standards are stated in the modern version of the drainage code, leading her to assume standards are not included in the previous version of the drainage code. The proposed vault is a type that is difficult if not impossible to maintain. The vault needs to be shoveled out but OSHA defined space regulations will not let a person enter a vault that is only 6 feet deep. The Southwest Edmonds Drainage Basin Plan asks for heightened maintenance in this area, not difficult to maintain.

Ms. Petso concluded the applicant will likely state they can do it later. They cannot fix it later due to the size constraints and on final plat approval the Council can only hold the applicant to what is in the preliminary plat. If the preliminary plat states this vault is big enough, the Council will not be able to make them have a larger vault. She pointed out the applicant stated she did not hire an expert. She did not need an expert as she was using clear errors of staff and AES. She summarized she did not have an expert for the other court appeals and both determined drainage was inadequate. The PRD ordinance also has a requirement for minimizing impervious surfaces. Allowing impervious surfaces to go from 35% per lot to 50% was not minimizing impervious surfaces.

**Constantinos Tagios, Edmonds**, advised he was also representing **Richard and Darlene Miller** who are out of town. Mr. Tagios explained he and the Millers have lived there for 32 years and they experience flooding problems. When it rains, water is not absorbed into the ground, there is no percolation. He has a drain system in his yard to take water out to 107<sup>th</sup> and the Burnstead property. It was unknown what will happen when that area is graded and built on, whether water from that site will flow onto their property. The Millers have a French ditch that goes to the Burnstead property. He questioned whether development of the site would double their flooding problem and worried that eventually their houses will be flooded. When it rains, it takes 5-6 days for the water to subside via evaporation rather than percolation. He commented on top soil he and the Millers added to their yards, when it rains the only place the water has to go is the drain pipes and French ditch. He asked what the City planned to do to remedy the problem that would be created by the new development.

**Ira Shelton, Edmonds**, displayed a photograph of flooding at the corner of 237<sup>th</sup> Place SW and 104<sup>th</sup> Avenue. Mr. Taraday advised this photograph is part of the appeal and is not part of the record. The record for this hearing is the documentation the hearing examiner considered. The photograph was submitted after the hearing examiner made her decision and therefore is not part of the record.

**David Johnson, Livengood Fitzgerald and Alskog, representing Burnstead**, also objected to submission of the photograph.

Mr. Taraday explained this photograph would be new evidence because it was not submitted to the hearing examiner. Under the closed record appeals chapter, no new testimony or other evidence will be accepted by the City Council except new information required to rebut the substance of an ex parte communication and relevant information that in the opinion of the City Council was improperly excluded by the hearing body or officer. Unless this was offered to the hearing examiner and excluded which he did not think it was, it should not be accepted by the City Council. Ms. Morris agreed the photograph cannot be submitted as it is new evidence.

Mr. Shelton read the comments he and his wife submitted related to the hearing examiner's decision and provided information they gleaned from the massive document they were required to review. He displayed the volume of documentation, commenting its size illustrated the amount of stress the homeowners have been under for the past eight months. Their appeal to the hearing examiner included a failure to correctly apply the PRD requirements including but not limited to the requirements related to density. The Burnstead development appears to effectively constitute a rezoning of part of the neighborhood rather than a PRD. He referred to the map of the proposed development, pointing out the density of homes in the development is much greater than the density of homes in the surrounding area.

Councilmember Buckshnis asked if this was relevant to drainage. Mr. Shelton replied yes, density and drainage are connected. He stated one of the things the appellants found most objectionable in the email outlining the amount of time they would have was that the delineation of each topic area prevented them from showing a connection between effects of the development on their lives. That is impossible because some of the elements they objected to are connected and cannot be addressed as standalone realities.

Mr. Shelton continued, stating the density of the development is inconsistent with the surrounding neighborhood, Sherwood School and the area south of Edmonds Way. Development is so tight that some homes have shared driveways. He identified their home on the map, explaining three other homes will border their property.

Mr. Shelton relayed another of their concerns, a lack of safety and efficient site access including but not limited to traffic safety and fire safety. With regard to drainage, he referred to the geologist report that examined the soil under the proposed plat. One of the geologist's conclusions was the soil under the plat is dense enough to support homes but not too dense to allow for percolation of water downward. He noted it is obvious during times of rain that there is very little percolation and a lot of runoff. The assertion that anything other than a robust system will work is preposterous. Even after Hickman Park was developed with a very robust drainage system, there is still water overflowing into the street. They are uncomfortable and angry with allowing the final parameters of the drainage system to be determined later.

Mr. Shelton pointed out the height of the northeast corner of the plat will be increased which he feared will create much faster and more forceful drainage southward toward his property. He concluded they have serious misgivings and doubts about the ability of the drainage system to work as currently constituted. Another issue is the recommended vertical shafts drilled to the infiltration level will not be done.

Council President Peterson advised the time for the appellant's oral argument regarding drainage had expired.

Councilmember Plunkett referred to Ms. Petso's indication that the applicant needs to prove drainage is adequate. He asked what that was based on. Ms. Petso explained the state and local subdivision ordinance require a Council not approve a subdivision unless it is shown that there is adequate provision for public services including drainage. The Council also has to find that the proposed subdivision would be in the public interest. The applicant has not provided any basis to make a finding.

Councilmember Plunkett noted adequate provision is not the same as proof. Ms. Petso summarized there is no evidence at all that the drainage will be adequate. There is evidence they want to study it later.

Councilmember Fraley-Monillas asked who AES is. Mr. Johnston answered it is Associated Earth Sciences. Councilmember Fraley-Monillas asked how vaults are maintained. Mr. Shuster answered there are various kinds of vaults; detention vaults hold water and the water flows out into a pipe system. This is an infiltration vault which is basically an open bottom vault; stormwater enters the vault and infiltrates into the ground. The most important maintenance provision for an infiltration vault is not the vault itself but ensuring there is something upstream of the vault to catch soils and solids so that they do not enter the vault and take up space.

Councilmember Fraley-Monillas asked how to test for drainage. Mr. Shuster answered soils are tested at the level of soil where the water will be injected. A test is done by digging down to find the layer of soil that can take water, pouring water into it and measuring how fast it infiltrates. Councilmember Fraley-Monillas asked if that is done in one place or multiple places. Mr. Shuster replied it depends on the size of the facility. The applicable standards have guidelines regarding the number of test holes based on the size of the facility.

Councilmember Buckshnis referred to Ms. Petso's indication that the applicant used outdated drainage codes, the 1992 Stormwater Management Manual for Puget Sound Basin Department of Ecology. She asked if Ms. Petso felt that was inadequate. Ms. Petso answered yes; the 1992 Stormwater Manual allows the assumption that the vault is empty when a storm hits which is fairly rare in this climate. The application was apparently completed in time for the 1992 Stormwater Manual to be applicable. The

record reflects her challenge of a “mix and match hodgepodge” being a violation of the Vested Right Doctrine. The City has used a variety of manuals rather than as required under the Vested Rights Doctrine, if the application is vested under the 1992 Stormwater Manual, the City should use that manual throughout. The City’s response has been that would be totally inadequate. In her opinion that has led to a procedural nightmare because the application is vested under the 1992 drainage code. Councilmember Buckshnis summarized Ms. Petso’s position was that the 2005 King County Surface Water Design Manual could be utilized for the infiltration rate. Ms. Petso answered that was her position; the hearing examiner disagreed.

#### Applicant - Drainage

Mr. Johnston explained staff has addressed the issue of drainage in a thoughtful manner. The other changes Burnstead made to the plat in order to meet City code were made because this has been a uniquely frustrating land use experience. Burnstead Construction has been in business for 50 years and has an excellent reputation. Burnstead is not a developer that comes into a community and builds in an unethical manner or does not fulfill its obligations. This litigation has been underway since March 2007 at considerable cost to Burnstead as well as the City in attorney’s fees and staff time.

Mr. Johnston referred to the importance of the rule of law and that the Council, acting in the capacity of judges, understand what the code provides for and that Burnstead has the right to develop their property if they meet code. The standard of review is very important; the standard of review in this case is the Council would have to find that the hearing examiner’s decision was clearly erroneous given the record. The definition of clearly erroneous is the Council has a definite and firm conviction that a mistake has been committed. The hearing examiner was very thorough and thoughtful in her decision. City staff supported that decision with the analysis that is required, not in an emotional way that deals with personal experiences but in an objective way. The hearing examiner echoed staff’s recommendation, not because of prejudice but that was what the code provides for and Burnstead changed the plat to address the remand issues.

To Ms. Petso’s statement that there is no evidence, Mr. Johnston pointed out the experts in stormwater drainage have concluded that this project meets City code. There was a review by City staff in conjunction with Burnstead’s consultants. Anecdotal stories of flooding do not hold the weight of experts and do not meet the standard of clearly erroneous, that the hearing examiner clearly was wrong in relying on expert opinions from drainage experts versus anecdotal stories from neighbors who obviously do not want development next to them. The preliminary plat provides for maintenance of that system. There will be a performance bond for two years and covenants, conditions and restrictions as well as easements. The City has the mechanism to enforce maintenance requirements.

Mr. Johnston emphasized this is preliminary plat approval, not final engineering. There is a great deal of work to be done; details regarding the final plat and how drainage is ultimately addressed will come later. The Council must consider the preliminary plat requirements, not sweeping statements that none of the issues have been addressed and will not be addressed later.

**Tiffany Brown, Burnstead**, commented it has been a long few years. She assured they were concerned about neighbors but it is difficult when Burnstead has spent this amount of time following the code. Burnstead agrees with staff’s recommendation and has put an extensive amount of research and expertise behind their review. They are concerned about the neighboring properties and that is the reason for the extensive amount of work they have done to ensure they are protected and that Burnstead does what the code requires.

Councilmember Plunkett referred to Ms. Petso’s assertion that the drainage is inadequate and Burnstead’s assertion that drainage meets the standards for preliminary plat. He asked the standard for preliminary plat. **Rob Long, Project Drainage Engineer, Blue Land Group, representing Burnstead**, explained

the level of design and detail on this project is beyond the standard typically done in preliminary design. They have done extensive analysis of soils, infiltration rate design and sizing. They typically, and as has been done for this project, do storm modeling to size the drainage facility and ensure areas are identified within the proposed development to handle the storm facilities. Details such as exact elevations and the size of the control structure are typically worked out at the final engineering level. For this project they have designed the facility to the 1000<sup>th</sup> of an inch of staged storage. The drainage analysis was originally done at 10 inches/hour and has been revised to 2.3 inches/hour to provide safety factors recommended by the soils engineer and geotech. They used a conservative approach; the design also includes flow from an area to the north and the system has been sized to accept and infiltrate that.

Mr. Long explained the standard they are designing to is a 100 year storm event in accordance with the 1992 DOE manual. They also added a correction factor that the manual recommends of 29% to account for back-to-back storms and anomalies per recommendations in the manual. Other conservative approaches included in the preliminary sizing are they did not take credit for individual dry wells that will be designed and installed at final engineering. Those are smaller infiltration systems that will be placed on each individual lot. The sizing assumes all runoff from the lots goes to the vault.

Councilmember Plunkett asked the standard for drainage for preliminary plat and what has Burnstead done above and beyond the standard. Mr. Long answered per RCW the standard for preliminary plat is a neat and approximate drawing. There are criteria for designing storm drainage for a 2-year, 10-year and 100-year storms. They designed the system to fully infiltrate a 2-year, 10-year and 100-year storm as well as included the safety factors as recommended by the 1992 DOE manual. Councilmember Plunkett asked if the manual is the standard for preliminary plat. Mr. Long answered the manual states the criteria.

Councilmember Plunkett observed the requirement is a neat drawing and a certain year storm. Burnstead has designed the system to meet those storm criteria. Mr. Long answered yes. Councilmember Plunkett asked the minimum that must be met. Mr. Long explained the code outlines the criteria of the drainage system design, matching 2-year, 10-year and 100-year storm events. The City code allows a site to be developed and the drainage to be released from the site at the existing conditions in a 2-year, 10-year and 100-year storm. Their design proposes not to release anything from the site in a 2-year, 10-year and 100-year storm. Councilmember Plunkett summarized the appellant contends the drainage is inadequate and that the applicant cannot prove it is adequate but the applicant indicates the site will release nothing in a storm event.

Councilmember Yamamoto asked whether the three remand items were at code or did they require revision. Ms. Brown answered everything was designed to code the way it was interpreted by staff and by the applicant. It was also to code based on the Development Services Director's interpretation of the code. Superior Court determined one of the items could have been interpreted differently and the applicant made revisions based on the court's interpretation. The revision was made by removing the perimeter buffer from two sides and utilizing the underlying RS-8 setback.

Councilmember Buckshnis observed the applicant used the 1992 DOE manual. She asked whether the 2005 King County Surface Water Design Manual was used for any of the design. Mr. Long answered the 2005 manual was used for the evaluation of infiltration rate of soils. The 2005 King County manual provides a much more descriptive and detailed procedure to determine the rate. The 2005 King County manual is more restrictive and provides a more conservative evaluation of soils. Councilmember Buckshnis asked whether using two different manuals was problematic. Mr. Long answered not in evaluating infiltration rates. Councilmember Buckshnis asked if the most conservative manual is utilized. Mr. Long answered the manual that the code requires is what is usually used.

Councilmember Buckshnis referred to Mr. Long's indication that each house would have its own dry well and asked how big they would be and whether that was stated in the documentation. Mr. Long answered it

is covered prescriptively; there is currently no design but they will be included in the design at final engineering for each individual lot. The exact system has not yet been determined; they can be done in a circular pit well or a strip trench. The newer manual has size criteria related to rooftops; generally it is 10 feet of linear trench for every 700 square feet of rooftop or a 4-foot diameter by 4-foot deep pit of rock for every 700 square feet or rooftop. Councilmember Buckshnis observed those would help with runoff. Mr. Long agreed little water would enter the vault from rooftops.

Councilmember Buckshnis asked if the 6-foot vault was standard and whether it was difficult to clean out. Mr. Long replied the vault system is an upside-down vault with an open, gravel bottom. The 6-foot is an interpretation by the appellant based on the volume of storage the applicant proposed. The actual height inside the vault will be at least 7 feet and only 6 feet will be used for storage. Ms. Petso objected, stating that evidence was not in the record. Mr. Long noted the drainage report states the volume of water storage is 6 feet.

Councilmember Plunkett referred to Ms. Petso's statement that testing remains inadequate which he assumed meant testing of the drainage. He asked whether the applicant was required to test the drainage system under the preliminary plat standard. Mr. Johnston responded there is nothing in the appellate court decision regarding testing. The appellate court remand was on three issues, one of those was storm drainage. There was no finding by the appellate court of faulty testing or testing requirements.

Councilmember Plunkett asked if there were any standards in the preliminary plat design for testing the drainage system. Mr. Long answered they do analysis and testing of the soils to understand how they can be utilized. There are no specific criteria at preliminary plat that the design must be tested. Councilmember Plunkett asked if the system must be tested during final engineering. Mr. Long answered some evaluation has been done in the preliminary plat and there will be extensive testing done in final engineering.

To clarify, Mr. Taraday observed Councilmember Plunkett was asking about the reference made regarding failure to test. There is a statement in the court of appeals opinion, page 68 of the record, that states this mistake is compounded by the fact that Burnstead's stormwater infiltration studies do not include any infiltration tests at the site of the proposed vault. His understanding was that the test the court of appeals said was not done was done following the remand in the location of the infiltration vault to evaluate the soils. The test found the soils were adequate and resulted in the design rate of 2.3 inches/hour. Adequate means the storm drainage requirements in the code can be met by the soils in the location of the vault.

Ms. Morris referred to the legal standard; the hearing examiner's order on reconsideration does note that the stormwater design at this phase is preliminary and the applicant's burden at this preliminary phase is to provide a feasible stormwater design. The applicable law is that the preliminary plat application is meant to give local government and the public an approximate picture of how the final subdivision will look. It is expected that modifications will be made during the give and take approval process. The applicant must make a threshold showing that the completed development is able to comply with applicable zoning ordinances and health regulations. She cited *Knight v. City of Yelm* where the court stated the 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 preliminary approval. So while the hearing examiner is saying this application has a preliminary stormwater design that is feasible, the law states the applicant must make a threshold showing that it meets the applicable ordinances. If the Council approves the preliminary plat, at final plat the Council would not be able to deny it if it does not comply at that point.

Ms. Morris agreed the applicant did not have to provide a final stormwater design at preliminary plat. However, the preliminary stormwater design cannot be so sketchy that it is totally different at final plat

and the Council cannot approve it. The applicant must make a threshold showing that the complete development is able to comply with applicable regulations even though it is not a final stormwater plan.

Councilmember Plunkett asked the applicant if they met that standard. Mr. Long answered they did. Mr. Shuster agreed.

Councilmember Fraley-Monillas asked for a further description of the individual lot drains. Mr. Long stated there are different types; he anticipated a trench or pit system would be used. The pit drywell is typically a 48-inch hole filled with drain rock and roof drains are connected to the pit. Because these will not be the primary stormwater control, there will be an overflow into the main drainage system and into the drainage vault. A trench is very similar to the pit, typically 2-3 feet deep with a 2 foot ribbon of drain rock that allows water to dissipate into the soils. That would also have an overflow connected to the main system. One of the advantages of individual drains is it spreads the dispersion of water in the ground throughout the development prior to leading to the main system.

**AT 10:00 P.M., COUNCILMEMBER FRALEY-MONILLAS MOVED, SECONDED BY COUNCILMEMBER PLUNKETT, TO EXTEND THE MEETING FOR ONE HOUR. MOTION CARRIED UNANIMOUSLY.**

Councilmember Buckshnis commented she did not see the individual lot drainage system in the documents. Mr. Long answered it is included in the storm drainage report. Mr. Taraday pointed out there is no condition of approval from the hearing examiner that individual dry wells be included as part of final plat. The Council could impose that as a condition of final plat approval and apparently it is assumed as part of the drainage report. Mr. Lien referenced the storm drainage report on page 105 that states final engineering will include individual infiltration systems for some if not all the roof areas. An image of the individual systems is provided on page 166 of the record.

Councilmember Fraley-Monillas summarized the individual lot drains are not a requirement but the applicant has indicated they will install them. Ms. Brown answered during engineering design they will be looked at. She explained at preliminary plat an applicant needs to prove the threshold and do what they have done. They have gone above and beyond what normally is done at the preliminary plat stage due to the sensitivity of this plat to ensure the neighbors are heard. The final engineering process will go into much more detail. The applicant needs to know how many lots, the location of streets, etc. before an engineer can design it. The drainage report mentions individual lot drains and other things the applicant can do. Tests have been done in the location where the vault will be located. She assured they cannot proceed haphazardly; they still have to provide more information and get a permit. Dry wells are options that can be considered and done on an individual lot basis.

Ms. Petso objected, stating the record does not indicate testing has been done at the location of point drains. Ms. Brown responded they can still do further testing at final engineering but the applicant needs to know where the lots will be. The applicant does not know what the plat looks like until it is approved. She clarified the detention facility does not take in account any individual dry wells; if they are not installed, there is still adequate drainage provided.

Councilmember Bloom referred to Ms. Petso's statement that the allowable impervious surface increased by order of the hearing examiner from 35% to 50%. Mr. Lien referred to Condition #9 of the original hearing examiner decision, no individual lot shall exceed 35% impervious lot coverage. Impervious coverage includes residence footprints, driveways, patios and sidewalks. As part of the remand the drainage report used 3,000 square feet of impervious surface per lot in their calculations. Councilmember Bloom asked why the allowable impervious surface increased from 35% to 50% after the most recent remand to the hearing examiner. Mr. Lien referred to page 23 of the record, with the 3,000 square feet impervious surface per lot, the percentage ranges from 35.9 to 52.6. The City does not have a maximum

impervious coverage requirement in its code. There is a maximum coverage requirement. Condition #9 was replaced with Condition #2 of the new decision, no individual lot or tract shall exceed 3,000 square feet of impervious surface area. That was based on the revised storm drainage report that showed infiltration was feasible at these levels.

Councilmember Bloom asked if there logically would be increased drainage issues with an increase from 35% to 50% impervious surface. Mr. Lien explained engineers used information regarding impervious surface in the right-of-way, in the open space, on individual lots, etc. in their calculations to determine the size of the vault. Given these assumptions on impervious surface, the applicant has a vault that will fit in Tract C and will infiltrate as described.

Councilmember Bloom observed the original hearing examiner decision imposed a limit of 35% impervious surface but it was changed to up to 52% on some lots. Mr. Lien explained that was based on the impervious surface calculations in the revised storm drainage report. The impervious surface calculations in this report were different than the impervious surface calculations in the previous report. This report found infiltration is feasible at this location assuming these impervious surface numbers. The plat was conditioned to limit impervious area to 3,000 square feet per lot.

Councilmember Bloom asked if infiltration testing was done on each individual lot. Mr. Lien explained infiltration tests were not done at each dry well on each individual lot. The stormwater report for the preliminary plat assumed that all drainage from all the roofs on individual lots would go to the main detention system in Tract C. At final plat, tests will be done at individual locations. Ms. Petso suggested page 134 illustrated the test pit locations on site and one off-site.

Council President Peterson asked if the City's code required an amount of testing at preliminary plat. Mr. Taraday answered the City's code does not specify a certain number of test pits. The code to which this project is developed incorporates the 1992 DOE manual. That manual requires one core sample for a certain number of square feet. Mr. Shuster explained the 1992 DOE manual states one core sample is required per 5,000 square feet of vault area. This vault is 6,500 square feet. The manual also requires a minimum of three core samples. One was done during preliminary plat to demonstrate feasibility; the applicant will be required to do additional testing during the final design process. Mr. Lien displayed the map on page 153 of the record, identifying the new pit that was dug at the site of the infiltration vault within Tract C. The squares on the map are previous pits.

Councilmember Bloom acknowledged the project was vested under the 1992 DOE manual. She asked how the standards in the 1992 DOE manual differed from the 2005 King County manual. Mr. Shuster answered the first drainage design he saw was completed per the 1992 DOE manual except for the determination of the infiltration rate which was determined using the 2005 King County manual. That was okay with him because the newer manual had the benefit of 13 years of experience in operation of these facilities and methods evolve to better designs. The infiltration determination using the 2005 King County manual requires digging a hole, pouring water in the ground, and measuring the rate at the point where the facility will be located. It also has several correction/safety factors from the field to the design. The 1992 DOE manual considers the soil type and a chart in the manual identifies the infiltration rate which is then divided by 2. The method of actually pouring water into the ground is superior to determining the infiltration rate.

Councilmember Bloom asked if there were any other factors in the 1992 DOE manual compared to the 2005 King County manual that would provide greater assurance the drainage would be addressed. Mr. Shuster answered the models used in the 1992 DOE manual to size the vault differ from the model used in the 2005 King County manual. The 1992 DOE manual has a volumetric factor whereby the size of the vault is increased based on the amount of impervious surface. That factor also addresses uncertainties such as whether the vault is empty or full when the storm hits. The model in the newer 2005 King County

manual takes those things into account without a correction factor. Councilmember Bloom asked if he would prefer the model in the 2005 King County manual. Mr. Shuster answered he did not have a preference. He pointed out the infiltration rate is the most important factor in the design. Using a more advanced manual with a better method is good.

Councilmember Bloom referred to Ms. Petso's comment about overflow and a pipe to 237<sup>th</sup>. Mr. Shuster explained a vault or any other stormwater facility is sized for a certain storm event/volume of water. If that is exceeded and the water has no place to go and there is no overflow, the system itself could be damaged. The overflow must be a controlled overflow and should not overflow onto other properties or into a stream system causing erosion and stability problems. Southwest Edmonds does not have an outlet of a surface stream. There needs to be an overflow to protect the vault and neighboring properties. All overflows go to the street because the street is a better place to store water than people's homes.

Councilmember Bloom referenced comments regarding drainage issues at Hickman Park and asked why there are serious drainage issues at Hickman Park. Mr. Shuster answered he would not characterize them as serious. The park may have some ponding likely due to the sod or soil at the surface that is restricting infiltration. He suggested having Parks Maintenance Supervisor Rich Lindsay punch holes in the sod to solve flooding there. Ms. Petso objected to Mr. Shuster's answer as that information is not in the record.

Council President Peterson asked for guidance regarding Council questions, noting Hickman Park has nothing to do with the hearing examiner's remand. Ms. Morris answered the Council may ask whatever question they like. When the Council makes its final decision, the decision cannot be based on information outside the record.

Council President Peterson relayed a question as to whether the Council would make a decision regarding each issue. His understanding was the Council's decision would be to either uphold the hearing examiner's decision, reject the decision or modify the decision. Ms. Morris recommended the Council wait until the end of the hearing to make its decision as there are other issues raised in the rebuttal briefs that need to be addressed in a comprehensive manner.

Council President Peterson declared a brief recess.

#### Appellant – Perimeter Buffer

Ms. Petso referred to staff's testimony regarding protecting the drainage vault and protecting the new homes, pointing out the existing homes are not protected. She was unclear why the overflow from the Burnstead site had to be channeled into their neighborhood. With regard to the perimeter buffer, Ms. Petso explained the original plat had a perimeter buffer on two sides. She pointed out to the court of appeals that a perimeter is four sides of a rectangle; the court agreed and remanded the perimeter buffer. When they attempted to alter the perimeter buffer, they eliminated a plat condition that required the landscaping be maintained on two sides of the plat, the sides adjacent to the existing residential areas, the east and south sides of the plat. That deed restriction on those perimeter lots was relied upon by the Superior Court in finding that one of the other buffering requirements was met. She summarized when changes are made to meet one question, something else is fouled up. The reason the per lot impervious surface went from 35% to 50% was the houses would not have fit on the lots without 3,000 square feet.

Ms. Petso pointed out the PRD approval cannot be granted since the proposal renders 50% of the proposed homes too large for the lots. In order to satisfy the perimeter buffer, the applicant has used full front and rear setbacks on the perimeter lots, 15 feet in the back and 25 feet in front. Most of the lots are approximately 100 feet deep, some are smaller. A 100 foot lot, less 40 feet for setbacks, will not accommodate a home more than 60 feet deep. Two of the homes approved by the ADB are more than 60 feet deep, one is 61 and another is 64. The PRD ordinance usually calls for a variety of planned homes, instead Ira Shelton and Kathie Ledger will be looking at three identical homes or perhaps a clever

alteration of the style. She summarized this was a violation of the PRD ordinance requirement for a coordinated design and is the reason ADB review is required. It is in violation of the ADB conditions of approval. She noted one of the ADB's conditions of approval was the houses be allowed to encroach slightly closer to the street. The cover story for that was neighborhood feel; it may be because the ADB realized the 61 and 64 foot house would need to encroach into the setbacks. Staff has removed that ADB condition for the perimeter lots even though ADB approval was conditioned on it.

Ms. Petso referred to page 483, noting the appellants were promised if the design of the home changed, it would go back to the ADB for review. That has never been done. On page 372 and 390, the first hearing examiner indicated the variety of housing styles and the proposed homes were important and relevant to her decision. The City's PRD ordinance requires the location and dimensions of proposed homes be shown and that drawings and text showing the bulk and architectural character be provided. The applicant now indicates it was conceptual. Ms. Petso commented that was allowed in a subdivision; the PRD ordinance requires the applicant show the proposed homes and that they will be evaluated according to the criteria in the code. In addition to the fact that half the homes can no longer fit on most of the lots, Ms. Petso stated some of the lots such as Lots 7 and 21 have become entirely undevelopable. She urged the Council not to approve a subdivision where the homes did not fit on the lots.

Mr. Shelton referred to the assertion that direct observation of standing water should be invalidated because it is anecdotal. In science, direct observation is the preferred means of proof; inference is secondary. Using a mathematical model to extrapolate a result is inferential reasoning and is not as valid as direct observation.

Ms. Petso offered to play a portion of the testimony from the prior hearing regarding drainage. The recording was not audible to those present. Council President Peterson noted the audio portion of the hearing was included as part of the record. Ms. Petso advised this portion is at approximately 56 minutes and is approximately 2½ minutes long. A rough transcript is included in the record at pages 9, 10, 11 and 12. She wanted the Council to hear the enthusiasm with which the hearing examiner pushed staff to say the drainage is adequate and the reluctance of staff to say that it is. She encouraged the Council to listen to the audio.

#### Applicant - Perimeter Buffer

Mr. Johnston agreed with staff's conclusion that the perimeter buffer condition is no longer required. Burnstead changed their plat after remand in an effort to obtain approval and work with the City as a compromise to their plat. Burnstead changed the application to provide the RS-8 setbacks on the perimeter lots which complies with ECDC 20.35.050(c). He summarized Burnstead made a change to their application, it meets code and they are entitled to approval.

In response to Ms. Petso, Ms. Brown pointed out the impervious surface was changed to 3,000 square feet because that is what the storm drainage design is based on. Even the more conservative approach is based on 3,000 square feet of impervious surface per lot.

With regard Ms. Petso's comment that the sketches of the homes Burnstead presented to the ADB would not fit on the lots, Ms. Brown pointed out those were sketches, they were not submitting for a building permit and the sketches are not to scale. The sketches were a design presentation to the ADB so they could understand what Burnstead's product will look like and to allow Burnstead to incorporate any critique or suggestions made by the ADB. The one suggestion the ADB made, encroaching slightly into the front yard setback, was removed because Burnstead is now incorporating standard RS-8 setbacks. They would happily accept the ability to encroach into the front yard setback.

Ms. Brown explained they are trying hard to meet the City's code the way it is written. She hired all the experts to ensure the engineering studies were done the way the code requests. She was frustrated because

regardless of what she did to meet the City's code, she was encountering resistance. She wanted to do what the staff has asked her to do. She was not sure what more could be done except meet the City's code which she was confident they had done by removing the perimeter buffer due to the misinterpretation of the code by staff. She assured that removing the perimeter buffer did not mean they were not complying with the rest of the City's code. She was frustrated that taking a "cartoon rendering" and showing it would not fit on a lot was an acceptable argument.

Councilmember Fraley-Monillas asked Ms. Petso how she knew that Lots 7 and 21 could not be developed. Ms. Petso answered 40 feet of setback was required on perimeter lots. She identified Lot 7 on the map, explaining the depth of the lot less 40 feet for setbacks left an amount that was smaller than the depth of the smallest house. She recalled the smallest house was 50-53 feet deep. With a full setback in front and back, none of the home designs fit on the space that remains. She identified Lot 21 on the map, stating the same was true for that lot.

Councilmember Fraley-Monillas asked the applicant the same question. Ms. Brown responded Burnstead would not develop a lot they could not build on. She acknowledged they had to abide by the setbacks on the approved preliminary plat. The house will be designed to meet the setback and they will submit a building permit for that house. Burnstead has not submitted building permits and she was unsure where Ms. Petso obtained the measurements other than from the cartoon rendering or sketch that was provided to the ADB so that they could understand what their elevations, trim, garages, porches, etc. look like. No floor plans or definite dimensions were presented to the ADB. Mr. Johnston pointed out that was not required as part of the ADB process.

Councilmember Fraley-Monillas referred to Ms. Petso's comment that 50% of the homes were too large for the lots. Ms. Petso responded the cartoon renderings that are required by the code in ECDC 20.35.070(a)(c)(3) and 20.35.070(a)(4) show one of the homes has a depth of 64 feet and another home with a depth of 61 feet. In the plat, a typical lot depth is 100 feet. On perimeter lots such as Lot 19 which appears to be the standard 100 x 60 foot lot, a 64-foot deep house would not fit using a 15 foot back yard setback and a 25 foot front setback. She summarized 50% of the homes would not fit on most of the lots; Lot 11 might be able to fit the larger home design. The lots behind the Millers and the Shelton/Ledger and along the park are a smaller depth and will only fit the smaller houses.

Councilmember Fraley-Monillas asked the applicant the same question. Ms. Brown responded those renderings are not to scale. When they submit for building permit, they will abide by the setbacks that are approved on the preliminary plat and modify the floor plans to fit.

Councilmember Yamamoto asked how Ms. Petso determined the lot and house sizes. Ms. Petso responded the code requires the applicant to submit drawings and text showing scale, bulk and architectural character of the homes. There are four pictures of the four homes on pages 330 and 333. The dimensions of the homes are shown in the corner of the pictures.

Council President Peterson asked if the code required that final designs must be submitted at preliminary plat. Mr. Lien answered that is not typically done for a PRD. The record clearly showed these homes were not meant to be the homes that would be developed. Ms. Petso objected, stating that information was not in the record and it was also inconsistent with the hearing examiner decision. Mr. Lien referred to page 322 of the record, explaining the staff report to the ADB notes that the housing types submitted were artistic renderings. Testimony to the ADB by Tiffany Brown on page 341 of the record notes exhibits were put forward of homes to give the Board an idea of what they were thinking. The ADB's recommendations (page 343) indicate further approvals specific to design will occur and state a variety of materials or building forms must be used on all sides of the homes and building plans for individual lots must be evaluated at the time of building permit application for consistency with ECDC 20.35.060. Condition #10 of the original hearing examiner decision indicated final building design shall endeavor to

locate the residences on the southern portion of the lot (page 397). The hearing examiner's remand decision notes it is clear from the record that building designs were meant to be conceptual in nature and are not binding to final design (page 19).

Councilmember Buckshnis observed the lots sizes are generally 6,000, recalling RS-8 requires 8,000 square foot lots. Mr. Lien answered a PRD allows an alteration of the lot size. Councilmember Buckshnis observed the smallest lot was 6,000 square feet and the smallest house was 2 stories and 2,855 square feet which seemed to fit. Mr. Lien explained if the preliminary plat is approved, at the time of building permit, the house will be reviewed to ensure it meets the setbacks and the ADB recommendations. Four specific houses were not approved for this development; the City would not want only four designs on twenty-seven different lots. Councilmember Buckshnis concludes most of the lots were 6,000 square feet and the houses ranged from 2,500 to 3,100 square feet. Ms. Brown agreed the houses would fit.

Councilmember Plunkett observed Ms. Petso seemed to be saying the code required something at this stage above and beyond what staff and the applicant say is required. Staff and the applicant are saying concept and ideas are required at this stage. He asked if Ms. Petso believed that more was required at this point. Ms. Petso answered that was exactly what the code requires. This was also agreed to by the prior hearing examiner at pages 327, 390 and 483. As the Council listens to what Mr. Lien states the current hearing examiner said, she urged the Council to keep in mind that is the decision the appellants are appealing. The appellants contend that the City's code for PRDs is not to plat a lot and sell it like a subdivision; the City's code for a PRD is a planned development. She recalled other PRD plat maps show the home footprint on the lot; Burnstead's plat map does not.

Councilmember Plunkett asked what staff was seeing differently, they are reading the same language. Ms. Petso responded the staff works for the Mayor.

**AT 11:00 P.M., COUNCILMEMBER PLUNKETT MOVED, SECONDED BY FRALEY TO EXTEND THE MEETING FOR ONE HOUR. MOTION CARRIED UNANIMOUSLY.**

Councilmember Plunkett observed Ms. Petso was saying the preliminary plat needed to be more than concept. He asked if it was simply a different interpretation of the language. Mr. Lien responded this is how the language has been interpreted for all PRDs that have been developed in the City. Similar to the discussion regarding the drainage, these are preliminary home designs. The ADB looks at certain design criteria and when they submit for a building permit, the applicant must meet the design criteria. The specific homes are not approved by the ADB. The record at page 338 shows general placement of the homes on the lots. What has been historically done with regard to PRDs at this stage is conceptual design. When they submit for building permits for the individual lots, the design is reviewed to ensure it meets the criteria, setbacks, and other conditions of the PRD.

Councilmember Fraley-Monillas referred to Ms. Petso's comment that staff works for the Mayor, pointing out there have been 3 different mayors since 2007 when this situation began. She asked if Ms. Petso was suggesting that three different mayors have coerced staff in some manner. Ms. Petso responded the prior hearing examiner ruled that these were the home designs that had to be developed on the site and that if the designs changed, during the remand process for example, she would refer this back to the ADB. The home designs must be approved by the ADB that is one of the differences between the PRD process and a subdivision. The prior hearing examiner had the correct interpretation and the current hearing examiner is interpreting it differently. She believed the interpretation of the City's code is up to the Council and the court will give the Council significant deference in how they choose to interpret the requirement that the applicant submit home designs to the ADB. If the Council thought the ADB wanted to be shown nice home designs and then the applicant builds rubbish, then renderings could be called cartoons.

Councilmember Fraley-Monillas reiterated her point that there have been 3 mayors since 2007. Ms. Petso responded it is a matter of interpretation. Not all three mayors would have interpreted it the same way nor is the staff the same as when the process began. Councilmember Fraley-Monillas asked whether Ms. Petso believed it was the office of the mayor that was directing staff to push this through. Ms. Petso responded staff will always report to the office of the mayor and not to Council.

Council President Peterson suggested this line of questioning be discontinued as to whom staff reported was not part of the record. Councilmember Fraley-Monillas commented it was important for the Council to understand what the appellants believe staff is being directed to do.

Ms. Morris indicated she needed to take the 11:45 p.m. ferry. Council President Peterson suggested the Council consider continuing the hearing.

Ms. Brown stated the applicant has no comment on the open space.

Councilmember Buckshnis referred to ECDC 25.35.070(b), the PRD application process, which states description, map, site plan, topography, trees, placement, location, drawings, etc. It also states there is flexibility and sufficient information that the development can change if necessary. She agreed it was a matter of interpretation.

#### Appellant – Open Space

Ms. Petso explained the PRD ordinance also requires usable open space, recognizing that the Council must define usable. For example Tract E is not usable because the legislative history indicates in the record on page 1063 that it must be available to the property owners and not just a native growth protection area. Tract E of the Burnstead development will be fenced and designated for wildlife protection.

Ms. Petso displayed page 663, explaining her other concern about open space on Tract E is that it is within a fish and wildlife conservation area. She displayed page 664, the SEPA checklist that according to the record was prepared by staff that also shows Tract E is within the fish and wildlife conservation area. She referred to a map on page 873 and 2007 finding #26. She summarized the open space is not usable; the hearing examiner restricted it because she wanted it for wildlife preservation.

Ms. Petso referred to the plat map, explaining Tracts A and F are not usable due to lack of safety. The tracts are fully landscaped at the entrance to the plat and occupied by a monument sign and a tiny lawn. She asserted that any attempt to use those parcels would be dangerous. The PRD requirement is subject to the Council's interpretation with regard to useable open space. Her interpretation was that usable open space cannot include dangerous areas or space unusable because it is a wildlife protection area.

Mr. Sanderlin pointed out the developer will need to take property from the landowners on the western border of the property in order to meet their minimum requirements for open space and for the project. The amount they plan to take from a property's backyard ranges from 4 inches at the southwest corner to 16-18 inches. The area the developer plans to take includes mature landscaping.

**Heather Marks, Edmonds**, referred to text on the plat map that indicates property may be taken. She explained critical areas in the code includes the geologic hazard area which is the steep slope in the upper right-hand corner of the map, the wildlife habitat area and the flooded area. She referred to ECDC 23.040 regarding critical areas, B3 and 23.70 regarding frequently flooded areas, 23.80 regarding geologic hazard area and 23.90 regarding the fish and wildlife habitat conservation area. She pointed out there is a 200 foot buffer for all critical areas.

Ms. Marks displayed a plat map over a Google map. Mr. Taraday objected, stating the map was submitted with the appeal statement and was not part of the record.

Ms. Marks summarized the code has not been followed because all areas within the City meeting the definition of one or more critical areas regardless of any formal identification are hereby designated critical areas and are subject to the provisions of this title. The title requires a 200 foot buffer which would eliminate four lots in the wildlife habitat area and more houses in the slide area and in the flooded area. No building is allowed in the 200 foot buffer without state approval. Any areas adjacent to critical areas are subject to regulation and areas to critical areas shall be considered to be within the jurisdiction of these requirements and regulations to support the intent of this title and ensure the protection of the function and values of critical areas. Adjacent shall mean any activity located on a site immediately adjoining a critical area and areas located within 200 feet of a subject parcel containing a jurisdictional critical area.

Ms. Marks concluded taking property from the neighbors will include 30 year old trees and a fence constructed by the school district 35 years ago. She questioned why the developer would be able to destroy landscaping in backyards that have belonged to the property owners for 30-35 years.

Councilmember Plunkett inquired about the issue of taking of property. Council President Peterson responded that is not one of the issues on remand. Ms. Marks commented it was applicable because it is required for Burnstead to meet their open space requirement.

Following a brief discussion, the Council, applicant and appellants were agreeable to continuing the hearing to May 21 at 6:00 p.m. Council President Peterson announced the hearing would be continued to Monday, May 21 at 6:00 p.m.

**11. REPORT ON CITY COUNCIL COMMITTEE MEETINGS OF MAY 8, 2012**

No report given.

**12. MAYOR'S COMMENTS**

No comments provided.

**13. COUNCIL COMMENTS**

No comments provided.

**14. ADJOURN**

With no further business, the Council meeting was adjourned at 11:28 p.m.