BEFORE THE HEARING EXAMINER FOR THE CITY OF LAKEWOOD

RE: Thorne Lane Preliminary Plat, Planned Development District and SEPA Appeal LU-18-00259; LU-18-00260; LU1800258	)	FINDINGS OF FACT, CONCLUSIONS OF LAW AND FINAL DECISION

Summary

The Applicant has applied for preliminary plat and planned development district ("PDD") approval to subdivide 6.58 acres located at 8109 North Thorne Lane SW into twenty single family lots. A SEPA appeal has also been filed by two appellants contesting the issuance of a determination of non-significance (DNS) for the proposal. The PDD and preliminary plat are denied and the SEPA appeal is sustained on aesthetic and compatibility grounds.

Outside of shoreline cases, it is extremely rare that aesthetics and compatibility can serve as a basis for denial of a development proposal. Constitutional limitations on the application of subjective permit criteria such as those requiring compatibility and consistency with neighborhood character limit the enforceability of such terms to circumstances where noncompliance is so stark and clear that no reasonable minds could differ on their application. The proposed PDD presents those unique set of circumstances.

Unfortunately for the Applicant, the location it has chosen for its development presents the requisite circumstances to merit denial under the subjective criteria of PDD review. The proposal is not compatible with its unique surroundings. In point of fact, the Applicant presents a fundamentally sound tract home proposal with PDD amenities that would merit approval in most other residential areas of the City. A review of the City's zoning map, however, reveals that the Applicant's proposed location couldn't be worse for a tract home PDD, regardless of the quality of tract home construction and reasonable efforts to provide PDD amenities such as perimeter buffering and open space. The

residential lots surrounding the proposed development are larger than those found anywhere else in similarly zoned areas of the City. The lots abutting the project site average over 100,000 square feet in area, whereas the proposed lots range in size from 10,000 square feet to 12,715 square feet. Case law is clear that PDD's that authorize modifications to density standards are rezones. The City's PDD criteria reflect the factors that must be taken into account when considering a rezone, including consistency with the comprehensive plan and some degree of compatibility with adjoining zoning and existing development.

Beyond the irreconcilable difference in density, there are also stark differences in neighborhood character. The surrounding neighborhood is part of a hundred-year-old castle estate that has been broken into large lot residential estate development, with lot sizes similar to the 100,000 square foot lots immediately surrounding the project site. Three remaining portions of the castle estate – Thornewood Castle, its carriage house and its gatehouse are interspersed throughout the castle estate grounds and are all listed on the National Historic Register. The gatehouse is located on a lot adjacent to the project site and its landscaping wall extends into the project site. In uncontested testimony from an architect for the SEPA appellants, the quality of the custom home construction for the surrounding homes is high and reflective of its historic surroundings and the high quality of the castle and its gatehouse, in stark contrast to the proposed tract home construction. Residents of this estate development currently enjoy views of large swaths of open space and old growth trees with the homes of their neighbors concealed by strategically placed vegetation that obviates the need to even use curtains for privacy. The tract home development proposed by the Applicant will present a perimeter of an almost continuous wall of tract homes composed of largely blank wooden walls with none of the architectural features that distinguish custom built homes from tract homes.

The proposal is also not consistent with the comprehensive plan as required by PDD criteria. Rezoning the property to the density proposed by the Applicant is clearly antithetical to the comprehensive plan Residential Estate designation of the project site. The Residential Estate designation calls for zoning that preserves historical residential estate development patterns. One of the objectives for this preservation is to maintain a wide range of housing options that addresses the needs of all economic segments of the community. Waterfront properties, such as the project site, are called out for the upper end of this economic range. The proposed development pattern and quality of construction of the PDD is contrary to this comprehensive policy objective. High density tract housing is simply not compatible or consistent with the development pattern of the highly unique surrounding residential estate development.

Finally, it is even debatable whether the proposed development provides for better urban design than would a standard subdivision, as required by the PDD criteria. Two of the primary unique characteristics of the surrounding area are large lot size and heavily wooded open spaces. A standard subdivision would be significantly more compatible with lot size, since the minimum lot size in the applicable R2 zone is 17,000 square feet, which would only enable 14 instead of 20 lots for the project site. Second, the larger lot sizes required for a standard subdivision would trigger tree preservation requirements that don't apply to the smaller lot sizes proposed for the PDD. The lower density of a standard subdivision coupled with more stringent tree retention requirements could arguably be construed as better urban design than that proposed by the Applicant, given the arguably better compatibility of such a design with the lower density, more highly wooded surrounding area.

Testimony

A summary of testimony has bee prepared as a separate document that is available for those who would like a more detailed understanding of the evidence presented at hearing. The summary is not to be considered a part of this decision and is only provided as a convenience to the interested public.

Exhibits

Exhibits 1-45 identified at p. 24 of the staff report were admitted into the record during the October 17, 2019 hearing. The following exhibits were also admitted during the hearing and post-hearing briefing.

Ex. 46:	Comments from West Pierce Fire and Rescue
Ex. 47:	Thorne Lane PDD – Reconciliation of 1937 Easement Location dated 6/14/19
Ex. 48:	PDD Site Plan Exterior Fence Exhibit
Ex. 49:	Record of Survey Boundary Line Adjustment
Ex. 50:	10/16/19 DAHP letter to Rodriguez
Ex. 51:	Galen Wright CV
Ex. 52:	Grant Middleton CV
Ex. 53:	Gregory Heath CV
Ex. 54:	Scott Clark CV
Ex. 55:	Kevin McFarland CV
Ex. 56:	James Mayer Resume
Ex. 57:	Jane Wiegand Resume
Ex. 58:	September 10, 2018 email from Mayer to DAHP
Ex. 59:	PDD Project Vicinity Map dated 10/16/19
Ex. 60:	PDD Surrounding Properties Map dated 10/16/19
Ex. 61:	WSDOT construction drawing of Thorne Lane with red ink annotations
Ex. 62:	WSDOT construction drawings (3) of Thorne Lane
Ex. 63:	Thornewood Castles Surrounding Properties Map dated 10/16/19
Ex. 64:	Thornewood Castle Proximity Exhibit dated 10/16/19
Ex. 65:	Applicant power point
Ex. 66:	10/11/19 Parmiter email chain
Ex. 67:	DeWitt Video of neighborhood
Ex. 68:	Section 2.3.1; 3.2.10 of the Comprehensive Plan
Ex. 69:	10/4/19 emails from Stock to Brunell; 8/26/19 emails from Stock to Rodriquez
Ex. 70:	LMC 18A.02.235B
Ex 71:	Grant of Permanent Easement and Road Maintenance Agreement
Ex. 72:	Undated letter from Lyle Peniston.
Ex. 73:	8/27/19 survey of project site
Ex. 74:	8/13/19 email from Burnell to Stock; 10/11 from Burnell to Stock
Ex. 75:	Neighborhood Site plan superimposing PDD into assessor map

Ex. 76: Zillow listing for 8019 N. Thorne Lane SW
Ex. 77: Appellant DeWitt Annotated Version of Ex. 39, Tab C
Ex. 78: RW-03 Street Design Standard
Ex. 79: Revised SEPA Appeal staff report along with MDNS.
Ex. 80: 10/18/19 email from Ramon Rodriquez to Brunell
Ex. 81: Gate plan
Ex. 82: Wrought Iron Fence Rendering B
Ex 83: Thorne Lane PDD View
Ex. 84: Oakbrook Park PDD
Ex. 85: Harwood Glen PDD
Ex. 86: Emails involving all parties and examiner
Ex. 87: City Closing Argument
Ex. 88: Applicant Closing Argument dated 10/24/19
Ex. 89: Appellant DeWitt Closing Argument
Ex. 90: Appellant Stohr Closing Argument dated 11/4/19
Ex. 91: 11/5/19 letter from Burgess to Examiner
Ex. 92: 11/6/19 letter from Hurst to Examiner
Ex. 93: Applicant Reply dated 11/12/19
Ex. 94: Applicant's List of Comprehensive Plan Citations dated 10/24/19

FINDINGS OF FACT[1]

Procedural:

1. Applicant. Sager Family Homes, P.O. Box 44428, Tacoma, WA 98448.

2. Hearing. A hearing was held on the subject application on October 17, 2019 in the Lakewood City Hall Council Chambers. The record was left open through November 12, 2019 for written closing argument.

Substantive:

3. Project Description. The Applicant has applied for preliminary plat and planned development district ("PDD") approval to subdivide 6.58 acres located at 8109 North Thorne Lane SW into twenty single family lots. A SEPA appeal has also been filed by two appellants contesting the issuance of a determination of non-significance (DNS) for the proposal. The property is currently zoned Residential 2 (R2) and is vacant. Site improvements, landscaping and open space are required as part of the proposal. Access will be provided off a private access road with a hammerhead turnaround from North Thorne Lane SW.

As addressed in more detail in Finding of Fact 6C, there is some valid dispute about the precise amount of open space proposed for the project, but it is currently approximately 20%. The

[1] The findings of fact include conclusions of law when interpretation and/or application of code requirements is necessary to gauge significance of impacts and adequacy of infrastructure and public services.

Applicant will be required to provide precisely 20% or more open space during the course of civil review. Ex. 83 provides the clearest depiction of open space, which is divided into two tracts – Tract A, totaling 49,439 square feet, composed of a large open space area on the northern portion of the project that then runs down the western perimeter of the project site on a strip 20 feet wide and Tract B, serving as a 10,285 square foot tract along the project street frontage. The eastern perimeter of the project site is subject to a 20-foot tree preservation/landscaping enhancement buffer easement. The easement, along with Tract A and Tract B open space, completely surround and buffer the project site from adjoining uses and provide for continuous accessible green space around the entire project site. All significant trees are retained within the 20-foot perimeter of the project site and the Applicant will plant another 164 trees within the 20-foot buffer area as well to provide further buffering to adjacent properties. A wrought iron fence will be placed on the inner edge of the 20-foot perimeter buffer with a stone wall along the project street frontage.

4. Surrounding Area. The majority of the project site abuts six estate zoned and developed large single-family lots as described in detail in Finding of Fact No. 5A. The property located directly across North Thorne Lane SW from the subject property, zoned open space and recreation, is undeveloped and owned by the State of Washington Department of Transportation ("WSDOT").

5. Adverse Impacts. Pertinent impacts are addressed as follows:

A. Compatibility. The proposal is not consistent with existing or intended character, appearance, quality of development and physical characteristics of the immediate vicinity. As is readily evident from the City's zoning map, the proposal is centered in the least densely developed portion of the entirety of the City's R2 zoning. As well established by the SEPA Appellants, the immediate vicinity is unquestionably unique in terms of density of development, quality of construction, historical significance, privacy, vegetation and open space. *See* Adams hearing testimony; written opinion of Dale Harrison, Ex. J to Ex. 21. The project site is surrounded on all sides within the R2 zone with large lot development with lots averaging 101,934 square feet[2]. *See* Ex 75. Mr. Sager testified that the project homes would likely be 2,000-3,000 square feet. Sager Testimony (Day 1) at 11:51:26. In stark contrast, the average home size of abutting properties is 4,470 square feet. Ex. 39 and 75. According to a realtor's estimates, the average market price for surrounding properties is one to two million or more, Ex. K to Ex. 21, with the adjoining DeWitt property to the north under development for a five-million-dollar home. Steve DeWitt Testimony. Mr. Sager testified that he hopes to sell his homes for $750,000 and one of the Appellant's appraisers testified that it would be surprising if the homes sold anywhere near this figure. *See* Sidor testimony.

One of the most compelling documents addressing compatibility are the Applicant's renderings of exterior views of the proposed project perimeter. See Ex. 35 and 83[3]. With or without trees

[2] Adjoining lots under one ownership that accommodate only one home are counted as one lot for purposes of lot averaging.

[3] The most recent renderings of perimeter views don't appear to include the interior rear yard 20 foot no clear zone proposed by the Applicant during the hearing. This additional vegetation may further obscure the homes. However, the Applicant has the burden of proof and given that the Applicant prepared the perimeter view renderings, it is reasonable to

and/or fencing, the closely packed homes present a wall of what almost appears to be a continuous wall of track housing. This solid mass of wood[4] walls and vinyl window siding is the antithesis of the greenery and wide-open spaces that characterizes the surrounding residential estate development as shown in the Ex. 67 video. As testified by Mr. Adams, the existing neighborhood has divided and created a sense of property ownership and borders by split rail fences, well considered landscaping elements that open up view corridors around homes to natural view courses and the strategic placement of fences and landscaping elements where privacy needs to be protected from direct line of sight. Mr. Adams noted that these amenities have probably evolved over decades and is a superior way of demarcating property lines. As noted by the testimony of Joe Soroski, Thorne Lane resident, and Stan Sidor, Appellant appraiser, the residents in the surrounding vicinity don't even see the homes of their neighbors, with views limited to the lake and surrounding vegetation. It is uncontested that the existing homes surrounding the property are of much higher quality – that is readily evident from the Ex. 67 video, the Ex. 65 photographs of surrounding homes and the testimony of Mr. Adams. The high-quality materials of the surrounding homes are in turn more reflective of the historical use of the property as a grand estate for Thornwood Castle, of which the main building and gatehouse were made of brick and other materials associated with estate mansions. The incompatibility of the homes will have lasting negative impacts on the neighbors beyond enjoyment of their property, since as testified by the Appellants' appraiser witness, Stan Sidor, that incompatibility will lower their property values.

B. Historical Impacts. The proposal is associated with some historic resources but will not significantly adversely affect them if agency recommendations are implemented. Specifically, the project site is located within the grounds of the Thornewood Estate. The centerpiece of the Thornewood Estate is the Thornewood Castle, built in 1911. The castle, along with its gatehouse and carriage house, are all listed on the National Register of Historic Places. Thornewood Castle is located approximately 890 feet from the project site, separated by at least four lots. See Ex. 66. The gatehouse is located on a parcel abutting the project site, with a portion of its landscaping wall located in the project site. The Washington State department of Archaeology and Historic Preservation (DAHP) reviewed the proposal and had no concerns on impacts to the castle, given its separation from the project site and the residential character of the proposal. See Ex. 29. However, when DAHP was made aware that a portion of the gatehouse landscaping wall was located on the project site, it recommended that a condition of development approval require maintenance, repair and preservation of the wall. See Ex. 50. DAHP also recommended that vegetation not be planted near the wall that could damage it and also recommended documentation of the remnants of a miniature railroad hobby line. The landscaping wall identified in Ex. 29 is the only historical resource that could be potentially

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conclude that the additional buffering will not significantly reduce the views of the tract homes in the absence of any direct evidence to the contrary.

[4] Mr. Adams testified that the material boards for the project indicate that the exterior of the homes may be cement fiber instead of wood, which in his opinion if of lower quality than wood.

affected by the proposal[5]. Implementation of the DAHP recommendations would be sufficient to prevent any adverse impacts to historical resources were the project to be approved.

C. Critical Areas. There are no critical areas on-site. The only environmental resource that potentially qualified as a critical area was some white oak trees, which can be classified in some circumstances as protected priority habitat. *See* LMC 14.154.020.B1bii

There are twelve (12) Oregon white oaks on the property. Based on a Biological Assessment conducted by Washington Forestry Consultants, Inc., Ex. 8, even though some oak stand characteristics meet the standard for priority habitat, it is the professional opinion of Washington Forestry Consultants, Inc., that the stand of Oregon white oak on the property do not qualify as 'Priority Habitat' due to 1) the lack of any large decadent oaks that by themselves provide significant habitat, 2) the severe disturbance due to the loss of understory component of the habitat, 3) the urbanization of the area and the overgrowth of invasive weeds (both historical and ongoing) 4) the lack of evidence of significant wildlife usage of the trees today, and 5) lack of stands that exceed 1 acre in size. Based upon these factors, Washington Forestry Consultants, Inc. determined that removal of the white oak would result in 'No Effect' to protected species or habitat. There was no expert evidence presented to the contrary on this issue and from the Washington Forest Consultants analysis it is determined that the Oregon white oaks do not qualify as protected priority habitat under the City's critical area regulations.

D. Trees. SEPA Appellants asserted that the removal of old oak and what they characterize as old growth trees creates probable significant impacts. The Applicant's removal of trees is consistent with City tree retention standards and therefore is not found to create any significant adverse impacts.

Based on the tree inventory and assessment/ tree preservation plan conducted by Sound Urban Forestry LLC., there are a total of 286 trees of which 238 are considered significant trees (pursuant to LMC 18A.50.320.A.3.). The Applicant is proposing to remove 131 significant trees mostly within the interior or of the project site. A total of five (5) significant trees are proposed to be removed from Tract A, to allow for utility improvements. A tree removal permit will be required for the removal of the trees located on Tract A, since that tract is not exempt for tree preservation requirements.

Per the Landscaping plan conducted by Nature by Design, the Applicant is proposing to plant 164 trees along the 20' perimeter of the project site. The proposed trees types to be planted are specified in the landscaping plan prepared by Nature by Design (Exhibit 10).

[5] In Ex. 27, DAHP also identified that the project area is listed as being of moderate risk for archaeological resources, and thus recommended that a standard Inadvertent Discovery Plan be followed during ground disturbing activities associated with the project. That recommendation has been implemented as a SEPA mitigation measure in the project DNS. See Ex. 30, p. 11.

6. Adequacy of Infrastructure/Public Services. The project will be served by adequate and appropriate infrastructure and public services. Staff have determined that public facilities have adequate capacity to serve the proposal. Adequacy is more specifically addressed as outlined below:

A. Water and Sewer Service. Water will be provided by the Lakewood Water District and sewer by Pierce County Public Works. See Ex. 36 and 37.

B. Drainage. The preliminary design of the Applicant's stormwater system is found to be consistent with applicable stormwater regulations and for that reason the proposal is found to provide for adequate and appropriate drainage facilities and also to adequately mitigate against drainage impacts. Lakewood has adopted the Stormwater Management Manual for Western Washington, published by the Washington State Department of Ecology. See LMC 12A.03.020. The Manual requires detailed calculations on projected stormwater flows and numerous standards pertaining to water quality treatment to ensure that off-site properties are not impacted by any increases in stormwater runoff and that any waters discharged from the site are cleared of pollutants that could adversely affect public waters and environmental resources. A key requirement is that the Applicant design a stormwater control system that prevents off-site stormwater flows from exceeding pre-development, forested conditions. The Applicant has to submit a detailed drainage report that mathematically establishes that pre-development flow rates are not exceeded. The Applicant's drainage plans will be reviewed by City staff for final plat approval. The requirements of the stormwater manual assure that the proposal will include an adequate and appropriate drainage system that will prevent adverse stormwater impacts to neighbors and the environment.

Section 3c(1) of the SEPA checklist identifies that runoff from the proposed homes will be addressed through on-site infiltration trenches. The SEPA Appellants contend that the groundwater levels of the project site may not be consistent with the proposed infiltration trenches. As testified by a SEPA civil engineer, Nicholas Taylor, in his opinion the stormwater review was lacking. The Applicant's geotechnical report identified that groundwater gets up to 9 feet below ground in May. Mr. Taylor asserted that the seasonal high groundwater level had not been determined as required by the stormwater regulations. He noted this water level is important because improvements dug into the ground such as roadways could enable groundwater contamination if dug down to groundwater levels. Knowing groundwater levels is extremely important in using on-site infiltration, especially in this situation where Pierce County has identified the site as a critical aquifer recharge area, a designation that is not recognized in the Applicant's stormwater materials. The stormwater manual notes that high groundwater levels are present from December 1 through April 30. Mr. Taylor asserted that the stormwater standards require that a minimum of three monitoring wells shall be established to demarcate a three-dimensional groundwater level unless the groundwater is known to be more than 50 feet deep. Mr. Taylor noted there's no indication in the application materials that the required three monitoring wells were employed. Without those monitoring wells the Applicant did not have adequate information to assess groundwater levels even at a conceptual level.

Frank Sawatzki associate civil engineer for City of Lakewood, adequately addressed the concerns raised by Mr. Taylor. As testified by Mr. Sawatzki, for SEPA stormwater issues, public works comments are based upon whether the project could be brought into compliance with application of accepted engineering practices. Mr. Sawatzki based his evaluation upon the guidelines and regulations of the public works standards adopted by LMC 12.03.020. A partial list of guidelines applied was the WSDOT highway run-off manual, Pierce County Stormwater and Site Development Manual, Soil Survey of Pierce County, DOE Stormwater Manual for Western Washington. He also used the geological reports prepared by the Applicant. He found that the Geotech report conclusions are consistent with the type of soils on-site. The report includes the results of seven test pits ranging in depth from 7 to 10 feet. Test pit number 6 encountered glacial till at a depth of nine feet. This falls within the expected variation of the region and does not constitute a significant issue. Pits 4 and 5 encountered water at nine feet, which based upon local climate may rise to eight feet during the wet season. Infiltration depths will be between 2.5 and 5.5 feet. Final design of infiltration systems is feasible even if wet season conditions raise the ground water level to 8 feet. There are also options such bioswales, rain gardens and dispersal trenches that would resolve any infiltration problems. The groundwater level is not an issue at this stage of development. Mr. Sawatzki pointed out that monitoring wells are not a preconstruction requirement unless there is reason to believe that groundwater contamination has already occurred or if pit testing has revealed a hydraulic restriction layer permeable at a rate of 0.3 inches per hour or less, which is not indicated anywhere in the Geotech report. He noted that additional stormwater review will be conducted during site development review.

In cross-examination from Mr. Bricklin, Mr. Sawatzki stated that the depth already approved for infiltration ditches is 5.5 feet. The final depth could be different based upon site development plan review. He asserted there is no minimum separation requirement between the bottom of an infiltration depth and groundwater The potential 2.5 feet of separation may or may not be "tight" from a design standpoint depending upon the type of soils creating the separation. He hasn't made that soils assessment yet for this project – that would be done during site development review. An option other than an infiltration trench would be a bioswale, which is essentially an infiltration trench that treats the stormwater prior to infiltration. He stated for bioswales there's a minimum separation from groundwater of one foot. The other option, a dispersion trench, is also another form of an infiltration trench. If there were an infiltration problem due to proximate groundwater, there is the option of storage or hauling the water off-site. Mr. Sawatzki testified there is plenty of room on the project site for alternative stormwater design. Stormwater facilities can be placed underneath the paved internal road as one option.

Mr. Sawatzki's testimony established that there will be adequate separation between the bottom of infiltration and road facilities and the top of groundwater levels. There likely will be at least 2.5 feet[6] of separation between groundwater levels of the bottom of infiltration

[6] Footnote 21 of the DeWitt closing argument cites to Pierce County Stormwater Management and Site Development Manual - Volume III - Section 2.5.2 Step 2, which requires three-foot separation between the bottom of infiltration basins or trench systems and groundwater. However, 2.5 feet of separation is a worst-case scenario as testified by Mr. Sawatzki.

facilities. Further evaluation will be conducted during civil review. In the unlikely event that groundwater levels are found to be too high for the proposed development, Mr. Sawatzki identified other development options available that could be employed without materially altering the approved preliminary design of the project. Given these factors, the proposed infiltration system is still found to be adequate and appropriate despite the groundwater levels identified in the geotechnical report.

C. Parks/Open Space. LMC 18A.40.590 requires PDD to set-aside 20% of the net development area for open space. It is uncontested that 20% of the net developable area is 53,497.6 sq ft. The Appellant is proposing 53,904 sq ft. See p. 3 of PDD Staff Report. This doesn't leave much room for error and Kevin Stock provided compelling testimony that staff failed to accurately deduct portions of the open space tracts that are encumbered by a road easement. Staff deducted a total of 5,820 square feet from open space Tracts A and B for a road easement adjoining the western edge of the project. Mr. Stock believes that an additional 1,750 feet needed to be deducted for the roadway easement encroachments. This would result in a total of 7,570 square feet of easement deduction, reducing the open space dedication from 20.15% to 19.49%. The difference in easement calculations between the City and Mr. Stock is largely based upon a disagreement over easement width as it runs along the back of Lots 1-7. The City's public works department determined that the easement width along this area is 15 feet. Mr. Stock presented very compelling evidence that the easement width is actually 20 feet. The public works staff who made the 15-foot width determination were not present to defend their interpretation or to rebut Mr. Stock's evidence. Based upon Mr. Stock's evidence alone, it appears likely that Mr. Stock is correct that there is a 20-foot roadway easement along the back of Lots 1-7. Ex. 72 is a copy of a recorded 20-foot easement that appears to run along the back of Lots 1-9. Ex. 73 is a copy of a boundary line adjustment survey which shows the presence of a 15 foot easement along the back of Lots 1-7, with a notation of the 20 foot easement for the same roadway along the back of Lots 8 and 9. As theorized by Mr. Stock, it appears that along the back of Lots 1-7, the 20 foot and 15 foot easements simply overlap and that the notation to the 20 foot easement along the back of Lots 8 and 9 is intended to encompass the 20 foot easement as it goes all the way down to Thorne Lane along the back of Lots 1-7.

In addition to the easement encroachment, there is also a potential easement for a tennis court that might[7] also result in the reduction in Tract A open space. According to comments from

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As further testified by Mr. Sawatzki, there are plenty of other options for handling stormwater for the site that wouldn't necessitate any material redesign of the project site. Given these factors and the expertise demonstrated by Mr. Sawatzki in his testimony, it is still concluded that infiltration is more likely than not appropriate for the project site even with the 3 foot groundwater standard and that if groundwater is found to be too high that sufficient options exist to comply with stormwater standards without necessitating any material redesign of the PDD. Had this project been approved the conditions of approval would explicitly require conformance to the stormwater groundwater/infiltration facility separation requirements with explicit reference to the separation standards identified by the DeWitts.

[7] An Applicant witness, Scott Clark, asserted that if Tract A were subject to an easement for use of a tennis court that the space could still be counted towards the 20% open space since it's a recreational facility. However, it's not clear from the record whether PDD residents would have access to the courts of if there are any other factors that might disqualify it from qualifying as open space.

Applicant's counsel during the hearing, a quiet title action has been filed for the Tract A open space to address access rights to the tennis courts. Counsel for Ms. Stohr noted that the lawsuit seeks quiet title to all of Tract A generally, so this could be construed as encompassing the Mr. Stock's roadway easement issue as well.

Although there is uncertainty as to the whether the Applicant has met the required 20% open space dedication due to the easement encroachments discussed above, as testified by Frank Sawatzki from the City's public works department, the easement issue has only been preliminarily addressed and will be finally resolved during civil review. Scott Clark, an Applicant land use planner, testified there's sufficient room to move lot lines to make up for any open space loss should the Appellant's be correct in their assertions about the roadway and tennis court easement encroachments. At worst, the Applicant would have to lose a lot, which would not result in any need for further public review since reduction in the number lots would not materially increase any adverse impacts of the project. For the same reasons, if landscape buffers are erroneously counted towards the Applicant's 20% as outlined in the DeWitt closing argument, the loss of that open space can also be compensated by, at worst, eliminating a lot.

Mr. Stock also asserts that staff erroneously rounded the amount of proposed open space up from 19.8% to 20%. He asserts that City regulations don't allow rounding up. However, staff did not in fact round up to find that the project meets the 20% open space requirement. Mr. Stock bases his allegation upon a July 29, 2019 email from Ramon Rodriguez, where Mr. Rodriquez finds that the Applicant proposed 19.8% open space at the time, Mr. Rodriguez rounded that figure up to 20%. Mr. Rodriguez's July 29, 2019 calculations were based upon an area of 48,113 square feet for Tract A and 10,305 square feet for Tract B (excluding easement encroachments). Those areas are smaller than those currently proposed. The final proposal includes an area of 49,439 square feet for Tract A and 10,285 square feet for Tract B. See Ex. 11, p. 4. These are calculations prepared by the Applicant's surveyor and Mr. Stock doesn't dispute them. Using these updated figures, staff calculated the proposed open space as 20.15% of developable area. *See* Ex. 69, 10/14/19 Brunell email and p. 3 of PDD staff report. No one is rounding up numbers to meet open space requirements so whether or not rounding is authorized by City regulations does not need to be addressed.

The Appellants also assert in their briefing that landscaping within the open space tracts should be deducted from open space area. That is an issue that was not subject to much briefing by the parties and further clarification is needed from staff as to whether they have addressed the issue in any consistent fashion that would merit any degree of deference. Since this decision denies the PDD application, the issue of whether landscaping qualifies as open space is deferred to another time.

D. Schools. The proposal makes adequate and appropriate provision for schools. State law (specifically RCW 58.17.110(2)) and City regulations require a finding that walking conditions are safe for students walking to and from school. The installation of 5ft sidewalks along the entire property frontage will promote safer streets and routes to school. The nearest bus route is located approximately 0.2 mile away just east of the Spruce Street SW and Union

Avenue SW intersection. Tillicum Elementary is approximately 0.8 miles away from the subject site and there is a bus stop on the Washington Ave SW and Lake Street SW intersection that is utilized for both middle and high school bus transportation, which is approximately 0.6 miles away from the proposed subdivision. Although there is no sidewalk along North Thorne LN SW there is a paved pedestrian shoulder of approximately 10 feet. Sidewalks exist on the remaining distance of travel to the elementary and bus stop for the middle and high schools. Lakewood has not adopted any school impact fees and there is nothing in the record to suggest that the schools that serve the site will not be able to accommodate any increase in demand of school facilities nor any reasonable basis to conclude that school facilities are inadequate.

E. Streets and Traffic. Initial review from the City of Lakewood Public Works Department indicates that the proposal complies with City standards for construction of streets if recommended conditions are adopted, which would be adopted if the project were approved. Public Works staff will review final street design as part of the site development permit process to ensure compliance with any and all road standards for construction of streets, as well as development standards for construction of the required frontage improvements.

A traffic study was prepared by Heath and Associates, Inc. Public Works Engineering assessed the existing conditions surrounding the site, reviewed the Traffic Impact Analysis and determined that the proposed addition of 20 new single family residences would likely have only a minor impact on the existing community and that the number of new trips generated (approximately 189 average weekday trips and 20 PM trips per the TIA published by Heath and Associates) did not warrant the need for any off-site traffic improvements except for the frontage improvements detailed in the Public Works project review comments, Ex. 28. The Heath report also concluded that the proposal has adequate sight distance at the access point. Access to the site is proposed via one new entrance from North Thorne Lane SW. Based on the 30 mph deign speed (25 mph posted speed limit), 295 feet of Entering Sight Distance (ESD) is needed for project residents to safety enter the roadway. Based on preliminary measurements of the proposed access location, sight distance appears to be met with lines of sight exceeding 400 feet in either direction. To the east, horizontal curvature becomes the limiting factor only after sight distance has been exceeded. The roadway is relatively flat with no curvature to the west allowing sight distance of more than 600 feet. No safety issues are anticipated with the location of the proposed access.

Nicholas David Taylor, a civil engineer and SEPA Appellant witness, testified that the frontage improvements fail to comply with the City's street standards. He raised two points, specifically (1) the street frontage fails to include street amenities required for streets classified as civic boulevards, and (2) the 14-foot travel lane required by Public Works, see Ex. 28, should be 20 feet wide. Contrary to Mr. Taylor's position, the proposed street frontage is found to comply with City street standards as determined by the City's public works staff.

As to the civic boulevard issue, the street frontage, specifically the portion of North Thorne Lane fronting the project site, is not found to qualify as a civic boulevard. Mr. Taylor referred

to page 121 of the City's comprehensive plan as designating this frontage as civic boulevard. The page 121 map is not clear as to the location of the boulevard. Parts of North Thorne Lane are clearly designated civic boulevard in page 121 but from the scale of the map it's not possible to ascertain whether this designation extends all the way to project frontage. Frank Sawatzki associate civil engineer for City of Lakewood, testified that the civic boulevard designation ends about 500 feet from the project frontage and is limited to the area on North Thorne Lane between I-5 and Union Ave. Given Mr. Sawatzki's greater familiarity with the City's street standards and lack of more precise testimony from Mr. Taylor on the location of the civic boulevard designation, Mr. Sawatzki's testimony is found more compelling and it is determined that North Thorne Lane frontage does not qualify as a civic boulevard.

As to the travel lane width issue, the proposed 14-foot travel lane is found to comply with City standards. Mr. Taylor and Mr. Sawatzki's both agree that North Thorne Lane qualifies as a collector arterial. Appendix 2, Table 2, Roadway Design Criteria of the Engineering Standards Manual, authorizes through lanes for collector arterials that are 14-16 feet wide. Throughout the hearing the Appellants have asserted that the collector arterial cross-section depicted in RW-03, Ex. 78, an engineering design standard, requires 20-foot travel lanes. As testified by Mr. Sawatzki, the cross-section doesn't depict a 20-foot travel lane, but rather a 20-foot pavement width that includes features such as bicycle lanes in addition to the travel lane. From Mr. Sawatzki's testimony and RW-03 itself, it is clear that RW-03 doesn't require 20-foot travel lanes.

F. Parking. Each house will have 2-3 car garage with an exterior driveway in front of the garage that will accommodate a minimum of 2 additional cars to as much as possibly 4 vehicles depending on vehicle size. City staff determined the proposed parking exceeded minimum parking standards for single-family residences and this conclusion was uncontested.

G. Landscaping. Beyond required Type II street frontage landscaping (20 feet of landscaping per LMC 18A.50.425A2), there is no minimum standard for landscaping for the project. The Applicant proposes a 20-foot landscaping buffer along the entire perimeter of the project site, to be placed on the exterior of a wrought iron fence.

7. SEPA Appeal. The City issued a SEPA DNS for the proposal on September 25, 2019. On October 4, 2019 the SEPA threshold determination was appealed by two parties of record; Hurst Law PLLC, representing Seven and Jennifer DeWitt (Exhibit 41) and Vandeberg Johnson & Gandara, LLP representing Joy Stohr (Exhibit 42). Both appeals were filed prior to the appeal deadline.

Conclusions of Law

1. Authority over Applications and Private Covenants. LMC 18A.02.502 Table 3 classifies preliminary plat applications as Process III applications subject to hearing examiner review. LMC 18A.40.530 and .540 authorizes the hearing examiner to hold hearings and make decisions on PDD applications.

2. Zoning Designations. R2.

3. Burden of Proof. On the PDD and preliminary plat applications, the Applicant has the burden of proof. LMC 18A.02.150. "*The more drastic the change or greater the impact of the proposal on the area, the greater is the burden on the proponent*." LMC 18A.02.150.

4. Review Criteria. LMC 17.14.030 governs the criteria for preliminary plat approval. LMC 18.A.540 governs he criteria for PDD approval. Chapter 197-11 of the Washington Administrative Code governs the criteria for review of SEPA appeals. Applicable criteria are quoted below in italics and applied through corresponding conclusions of law.

PRELIMINARY PLAT

LMC 17.14.030: *A proposed subdivision and dedication shall not be approved unless the Examiner makes written findings that:*
A. Appropriate provisions are made for the public health, safety, and general welfare, for open spaces, drainage ways, streets or streets, alleys, other public ways, transit stops, potable water supplies, sanitary wastes, parks and recreation, playgrounds, schools and school grounds and all other relevant facts, including sidewalks and other planning features that assure safe walking conditions for students who walk to and from school; and
B. The public use and interest will be served by the platting of such subdivision and dedication. If the Examiner finds that the proposed subdivision and dedication make such appropriate provisions and that the public use and interest will be served, then the Examiner shall approve the proposed subdivision and dedication.

4. The criterion is not met. The proposed preliminary plat is not consistent with public health, safety and welfare, nor is it in the public interest. It fails to meet these standards because the increased density proposed under the PDD is not compatible with surrounding use or the comprehensive plan for the reasons identified in the PDD analysis below. Beyond the adverse impacts caused by the proposed density, the proposal does provide for appropriate infrastructure such as streets and water for the reasons identified in Finding of Fact No. 6

PLANNED DEVELOPMENT DISTRICT

LMC 18A.40.540: *A PDD shall only be granted after the Hearing Examiner has reviewed the proposed use and has made written findings that all of the standards and criteria set forth below have been met or can be met subject to conditions of approval:*

A. The PDD is consistent with the comprehensive plan; and

5. The criterion is not met. The proposal is not consistent with the Residential Estate comprehensive plan map designation for the property and is thus not consistent with the comprehensive plan.

As a preliminary issue, the Applicant takes the position in its closing briefing that "*[t]he Hearing Examiner should find that a PDD which meets lot size and design requirements for PDDs in*

the R-2 zoning district is presumed consistent with the City's Comprehensive Plan because the ordinance allowing PDDs within the R-2 zoning district was not timely challenged." *See* Applicant Closing Brief, p. 9. This position effectively eliminates the Council requirement for consistency with the comprehensive plan, which violates the paramount rule of statutory construction that the purpose of statutory construction is to implement legislative intent. See 8 *E. McQuillin, The Law of Municipal Corporations*, § 25.77 at 244-46 (Revised 3d ed.2010); *HJS Dev., Inc. v. Pierce County*, 148 Wn.2d 451, 472 (2003). The City Council presumably had no intent to include a review criterion in its PDD ordinance that would become unenforceable upon the expiration of the appeal period of the ordinance. Reading out the comprehensive plan consistency requirement also violates the statutory rule of construction that meaning must give meaning to every word and the statute must be interpreted as written. *Prosser Hill Coalition v. City of Spokane*, 176 Wn. App. 280, 288 (2013).

The legal reasoning of the Applicant's position is similarly untenable. The Applicant posits that once the appeal period for adoption of the PDD ordinance had expired that the PDD regulations "*clearly allow PDDs with a minimum lot size of 10,000 gsf within the R-2 zoning district*." See Applicant Closing Brief, p. 9. The Applicant is certainly correct that once the GMA appeal period expired that the consistency of the PDD ordinance with the GMA can no longer be challenged, which includes consistency of the PDD ordinance with the comprehensive plan. But the PDD ordinance itself, via LMC 18A.40.540A, requires a proposed PDD development to be consistent with the comprehensive plan. The Appellants are not challenging the consistency of the PDD ordinance with the comprehensive plan. They're in no way revisiting the City Council determination that the PDD ordinance is consistent with the comprehensive plan. Rather, the Appellants are challenging the consistency of the proposed PDD development with the comprehensive plan, which is a review criterion expressly imposed by the PDD ordinance. PDD projects involving lots at or exceeding 10,000 square feet are certainly allowed in the R2 zone as pointed out by the Applicant, but only if they are also consistent with the comprehensive plan and all other review criteria imposed by the PDD ordinance.

In point of fact, the PDD ordinance would have been defective if it hadn't required consistency with the comprehensive plan. The legal effect of approving a planned unit development is an act of rezoning[8]. *See Citizens for Mount Vernon*, 133 Wn.2d 861, 874-75 (1997). As implementing regulations, rezones must be consistent with the comprehensive plan. *See* RCW 36.70A.040. As noted in Section 2.3 of the comprehensive plan itself, "*all zoning*" must be consistent with the comprehensive plan. In practical effect, the Applicant is seeking a site-specific rezone of the property from the R2 district authorizing 2.2 units per acre to the PDD overlay, which authorizes up to 4 units per acre. The requirement of consistency with the comprehensive plan simply requires an analysis of applicable comprehensive plan policies that would apply to any site-specific rezone application.

As argued by the Appellants, the proposal is not consistent with the comprehensive plan because it is not consistent with Comprehensive Plan Policy 2.3.1, which specifies what zoning districts are appropriate for the Residential Estate comprehensive plan designation. For this project, it must be determined whether the 4 du/acre zoning authorized by the PDD ordinance is appropriate

[8] As noted in *Lutz v. Longview*, 83 Wn. 2d 566 (1974), as an act of rezoning, approval is a legislative act that can only be made by the City Council. The LMC does not require legislative approval of its PUDs. If the proposed PDD had been approved, a condition of approval would have required approval by the City Council.

for this designation. Policy 2.3.1 identifies the type of densities appropriate for the Residential Estate designation in pertinent part as follows:

> *2.3.1 Residential Estate*
>
> *The Residential Estate designation provides for large single-family lots in specific areas where a historic pattern of large residential lots and extensive tree coverage exists. Although, retaining these larger properties reduces the amount of developable land in the face of growth, it preserves the historic identity these "residential estates" contribute to the community by providing a range of housing options, preserving significant tree stands, and instilling visual open space into the urban environment. Most importantly, the Residential Estate designation is used to lower densities around lakes and creek corridors in order to prevent additional effects from development upon the lakes, creek habitat and Lakewood Water District wellheads.*

Other sections of the comprehensive plan further reinforce the importance of preserving existing waterfront area development patterns. As recognized in Section 3.0 of the Comp Plan, the "*opportunity to build higher valued homes in a desirable setting on the City's lakes has provided Lakewood with its share of higher-income families, and some of its oldest, most established neighborhoods*." To this end, Comp Plan Policy LU-2.4 encourages "*larger lots on parcels with physical amenity features of the land, such as views, significant vegetation, or steep slopes*." Further, Policy LU-2.3 encourages low density designations to provide opportunities for "*upper-income development*." From these types of policies, it is evident that the City seeks to use its lake front properties as a means of maintaining its upper income segment of housing capacity and that the City sees large lot sizes as furthering this strategy.

The City of Lakewood Future Land Use Map, Figure 2.1 of the Comprehensive Plan, maps out the areas that qualify as Residential Estate. The City Council in turn implemented the Future Land Use Map with its adoption of the City of Lakewood Zoning Map, which assigns either R1 or R2 zoning to all areas designated as Residential Estate by the Future Land Use Map. In making such designations, the City Council had to determine what Residential Estate areas are appropriate for the density authorized by the R1 district and what areas are appropriate for the densities authorized by the R2 district.

The Zoning Map does not identify the Residential Estate areas that are suitable for the densities authorized by the PDD ordinance. That is to be done on a case by case basis by evaluating whether the proposed density is consistent with the PDD approval criteria consistency with the comprehensive plan. In pertinent part, Policy 2.3.1 seeks to retain larger properties to preserve the historic identity of residential estate development. In this regard, Policy 2.3.1 is highly site specific and requires an evaluation of the large lot development patterns of the area to be rezoned to ensure that the pattern is maintained as necessary to preserve historic identity.

Applying Policy 2.3.1, on a general level it is noteworthy that the Applicant proposes a PDD density in the Residential Estate area that has the largest lots subject to that designation. In point of fact, there is no area within areas designated as Residential Estate where there could be a starker contrast in density than that proposed by the Applicant. If there were any place in Residential Estate designated areas where proposed density alone could prevent a project from satisfying PDD criteria,

the location proposed by the Applicant would be the place. Given this factor, it is not surprising that the design amenities offered by the Applicant are not sufficient to mitigate the gross incompatibilities of the proposed density with surrounding large lot development. The wrought iron fencing and perimeter landscaping and open space cannot obscure the near continuous wall of homes identified in Finding of Fact No. 5A that will be visible from adjoining properties once the project is fully developed. As determined in Finding of Fact No. 5A, the PDD is not compatible with surrounding development and for the same reasons fails to preserve historic identify. The lot sizes proposed by the Applicant, even in conjunction with the proposed amenities, are not large enough to preserve this historic identity of surrounding uses. The proposal is not consistent with the Residential Estate designation as contemplated in Policy 2.3.1.

The Applicant presents a long list of other comprehensive plan policies that purportedly support approval of the project. See Ex. 94. The Applicant doesn't identify specifically why these policies support approval, but in general the policies encourage higher density infill development. The Growth Management Act certainly encourages high density development within cities to avoid urban sprawl and to efficiently use public services and infrastructure. Policy 2.3.1 recognizes these benefits but concludes that large lot preservation is more important for Residential Estate areas as follows: *"[a]lthough, retaining these larger properties reduces the amount of developable land in the face of growth, it preserves the historic identity these "residential estates" contribute to the community…*" Even without this express recognition that preservation of historic identity overrides policy support for high density development, a determinative rule of statutory construction is that in case of conflict, specific statutes prevail over more general statutes. *See State of Washington v. Lee*, 199 Wn. Ap. 678, 683 (2016). Policy 2.3.1 applies only to the properties designated as Residential Estate by the Comprehensive Plan. The policies cited by the Applicant for the most part[9] apply to all properties in the City. Consequently, 2.3.1 supersedes any conflicting policies cited by the Applicant.

LMC 18A.40.540(B): *The PDD, by the use of permitted flexibility and variation in design, is a development practice that results in better urban design features than found in traditional development. Net benefit to the City may be demonstrated by one or more of the following:*

1. *Placement, type or reduced bulk of structures, or*
2. *Interconnected usable open space, or*
3. *Recreation facilities, or*
4. *Other public facilities, or*
5. *Conservation of natural features, or*
6. *Conservation of critical areas and critical area buffers beyond, or*

[9] The primary exception is that the Applicant lists Policy 2.3.1 as supporting its position. For the reasons identified in the preceding paragraphs, it is concluded that Policy 2.3.1 does not support the Applicant's proposal.

7. Aesthetic features and harmonious design, or

8. Energy efficient site design or building features, or

9. Use of low impact development techniques;

6. The criterion is not met. The concept of "net benefit" to the City creates a physical contextual standard, since in some parts of the City a subdivision design will create a greater benefit than in others. Unfortunately for the Applicant, physical context matters given the unique characteristics of surrounding properties. For tract housing the Applicant's proposal is unquestionably of high quality and would likely be considered better urban design than standard development in most parts of the City, including the areas zoned for R1 and R2 development. However, given the large lot, highly forested character of the surrounding neighborhood, it is debatable whether that is the case for the location proposed by the Applicant. Given the stark difference in density and quality of home construction between the proposal and surrounding development, under Conclusion of Law No. 3 the Applicant has a heavy burden of proof in establishing a net benefit. Given the uncertainty of the Applicant's position, it must be found that the Applicant has not met its burden of proof in the requirement for better urban design.

The uncertainty in whether or not there's a net benefit arises from the nature of the City's tree retention standards. As noted in Finding of Fact No. 5A, the surrounding properties are characterized by large, heavily wooded lots. Standard subdivisions are subject to tree retention standards, whereas PDDs are not. Consequently, a standard subdivision will likely provide for significantly more trees than the proposed PDD, for a development comprised of 14 lots according to p. 3 of the PDD staff report verses the proposed 20. Given the greater number of trees coupled with the 30% reduction in density for a standard subdivision within the context of the surrounding large lot, heavily wooded area, it is highly debatable whether the amenities proposed by the Applicant is enough to make up the difference to create a net benefit.

The difference in the number of trees on the property between a standard subdivision and the proposed PDD appears to be significant given the information in the record. As noted in Finding of Fact No. 5D, the Applicant will be removing 131 significant trees and is proposing to plant 164 trees along the 20' perimeter of the project site. LMC 18A.50.320B2b requires lots in subdivisions that are over 17,000 in area to retain significant trees and exempts lots less than 17,000 square feet from any tree retention requirements. The minimum lot size in the R2 zone is 17,000 square feet. As indicated, LMC 18A.50.320B2b specifies tree retention standards for lots over and under 17,000 square feet but doesn't specify what applies to lots that are exactly 17,000 square feet. A developer of a standard subdivision in the R2 zone could conceivably make the lots exactly 17, 000 square feet under the arguable position that lots of exactly that size are exempt from tree retention, but given the untenably nature of that position and the unlikelihood that a developer would actually propose its lots to be exactly 17,000 square feet, it is assumed that tree retention standards would apply to the project site for a standard subdivision. For lots subject to tree retention, LMC 18A.50.320B2b requires the retention of all significant trees, essentially to the extent possible without encroaching into necessary development areas. LMC 18A.50.320G1a provides that for nonexempt lots, trees that are removed must be replaced at a 2:1 replacement ratio per diameter of tree removed. Without doing an in-depth analysis of the diameters of trees removed verses the diameters of tree replacement, given the characterization of the trees as old growth by neighbors, it is presumed that the 161 new trees

proposed by the Applicant don't come near the 2:1 replacement ratio required for the significant trees removed.

The connected open space, wrought iron fence and extensive tree buffering when combined certainly are better urban design than a standard subdivision where none[10] of those items would be required for a standard subdivision, but as previously noted, not in the proposed location. As shown in the Applicant's own renderings, a wall of tract housing is still highly visible even with the proposed perimeter buffering. It is difficult to judge whether there would be any material net benefit with those PDD amenities as opposed to having a development that is 30% less dense with a much higher number of trees interspersed throughout, especially with the LMC 18A.50.320B1 tree retention standard that prohibits removal of significant trees within the 20 foot perimeter for standard subdivisions. Given the importance of low-density development and heavy vegetation to the aesthetics of the surrounding landscape, the benefits of the PDD amenities are even further diminished.

Beyond the perimeter buffering, fencing and open space, the Applicant's design does not provide much more than what would be provided in a standard subdivision. As previously noted, the buffering/fencing/open space amenities are already significant and would be sufficient to meet PDD standards in most areas of the City but not at the proposed location. The proposed open space could be more centrally located as testified by Mr. Adams, but the fact that it could be better situated doesn't detract from the fact that no open space would be required or typically proposed in a standard subdivision. Mr. Adams noted that the quality of materials for the proposed homes was not superior to standard subdivision construction. As pointed out by Applicant's counsel, Mr. Adams based his opinion upon upper end tract housing development for projects such as the Issaquah Highlands, which may not be pertinent to the suburban areas of Pierce County. Further, Mr. Sager made a very compelling argument that his homes are of high-quality construction. In any event, whether or not the tract housing is in the upper end of quality construction is largely irrelevant to a net benefit analysis, since the differences between high and low tract home construction are largely insignificant when compared to the quality of construction of the adjoining custom built estate homes valued in the one million to five million dollar range. None of the other better urban design features identified by the Applicant make any significant difference in the net benefit analysis required for the criterion quoted above.

LMC 18A.40.540(C): *The PDD results in no greater burden on present and projected public utilities and services than would result from traditional development and the PDD will be served by adequate public or private facilities including streets, fire protection, and utilities; and*

[10] LMC 18A.50.320B1 requires retention of significant trees within the 20-foot perimeter but doesn't require the additional 161 trees planted there by the Applicant. It should also be recognized that developers removing any significant number of trees in a standard subdivision would likely install numerous required replacement trees within the perimeter since that would likely provide the least interference with development plans and also enhance privacy of the future lot owners.

7. The criterion is met. As determined in Finding of Fact No. 6, the proposal will be served by adequate public and private facilities. The greater density of the PDD means that greater demand will be placed upon public and private facilities[11], but the demand for such facilities is fully mitigated.

LMC 18A.40.540(D): *The perimeter of the PDD is compatible with the existing land use or property that abuts or is directly across the street from the subject property. Compatibility includes but is not limited to size, scale, mass and architectural design of proposed structures; and*

8. The criterion is met depending upon how it's interpreted. The criterion quoted above appears to overlap to a significant degree with LMC 18A.40.540(H), which also requires compatibility, but with the immediate vicinity as opposed to abutting properties. The quoted criterion above focuses upon PDD structures whereas LMC 18A.40.540(H) focuses upon compatibility of design. The "structures" identified in the quoted criterion could be interpreted as only those proposed for the perimeter, since compatibility is required for the perimeter as opposed to the PDD as a whole.

If the requirement for compatibility is limited to the structures proposed for the perimeter the criterion is met. The wrought iron fence proposed by the Applicant is of higher quality than typically found in perimeter fencing as acknowledged[12] by Mr. Adams during his testimony and is consistent with the high-quality construction in the area. The Applicant proposes retention of all existing trees within the buffer area, which is also consistent with the mature treed landscape of the surrounding area. The Applicant also proposes to install numerous less mature trees in the buffer area, which is not consistent with the mature landscaping of the surrounding area, but nonetheless it cannot be reasonably concluded that there is an adverse aesthetic impact associated with the introduction of new trees in the area.

If the requirement for compatibility encompasses the structures within the PDD, specifically the houses, then the "perimeter" is clearly not compatible with surrounding homes for the reasons identified in Finding of Fact No. 5A.

LMC 18A.40.540(E): *Landscaping within and along the perimeter of the PDD is superior to that required by LMC 18A.50.425 and 18A.50.430, and landscaping requirements applicable to specific districts contained in LMC 18A.50.430, and enhances the visual compatibility of the development with the surrounding neighborhood; and*

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[11] It could be argued that making greater demand upon public services is equivalent to greater burden and that hence the criterion is not met. However, taking this position would render the density bonus of PDD provisions completely meaningless, since any time a PDD would qualify for a density bonus it would have to be denied under LMC 18A.40.540(C). In order to harmonize LMC 18A.40.540(C) with the PDD density bonus, it is concluded that a density burden doesn't create a greater burden on public utilities and services if there is adequate capacity and the impacts of demand are fully mitigated.

[12] In his first day of testimony Mr. Adams noted that wrought iron fencing was of higher quality than the wooden fencing proposed by the Applicant at the time. In this second day of testimony Mr. Adams stated he would have to see the specific design to determine whether it was superior design.

9. The criterion is met. LMC 18A.50.430G1exempts single family homes from perimeter landscaping requirements. The Applicant proposes 20-foot landscaping along the perimeter. In addition, at hearing the Applicant revised its proposal to commit to not clear an additional 20 feet of trees along the rear 20 feet of lots 2-7 and lots 15-19. Given that no perimeter landscaping would be required at all, the additional landscaping is superior to that required b LMC 18A.50.425 and 18A.50.430.

LMC 18A.40.540(F): At least one major circulation point is functionally connected to a public right-of-way; and

10. The criterion is met. The lots of the proposal are served by an internal roadway that connects to North Thorne Lane, a public roadway.

LMC 18A.40.540(G): *Open space within the PDD is an integrated part of the project rather than an isolated element of the project; and*

11. The criterion is met. Although the open space isn't centrally located, which would be more ideal, all open space tracts are connected to each other and integrated into the development via a trail on the north end and 20 foot wide open space that surrounds the entire development that can be made accessible from the rear yard of all lots.

LMC 18A.40.540(H): *The design is compatible with and responds to the existing or intended character, appearance, quality of development and physical characteristics of the subject property and immediate vicinity; and*

12. The criterion is not met for the reasons identified in Finding of Fact No. 5A. Great caution must be employed in applying the criterion, since all of its terms are highly subjective. An ordinance violates due process if its terms are so vague that persons of common intelligence must necessarily guess at its meaning and differ as to its application. *See Anderson v. Issaquah*, 70 Wn. App. 64, 75 (1993). In the area of land use, when assessing a vagueness challenge a court looks not only at the face of the ordinance but also at its application to the person who has sought to comply with the ordinance and/or who is alleged to have failed to comply. *Id*. Using this "as applied" standard, the subjective terms of the criterion above should only be used to deny a proposal when compatibility issues are so stark that persons of common intelligence would not disagree as to their application. As noted in the summary of this decision, the Applicant has selected a project location where no one could reasonably conclude that the project is compatible as required by LMC 18A.40.540(H). Staff could only testify that the project was compatible by comparing the project to the surrounding Tillicum planning. See p. 41, DeWitt closing brief. The Thornewood Castle estate is a neighborhood that is separate and distinct from the Tillicum neighborhood as a whole, both in character, historical development and separation by Thornewood Drive. The "immediate vicinity" is the grounds of the Thornewood Castle estate, with particular focus upon the abutting lots that are aesthetically impacted by the proposal. Given these parameters, there would be no question amongst persons of common intelligence that the proposal is incompatible with surrounding development.

LMC 18A.40.540(I): *Roads and streets, whether public or private, within and contiguous to the site comply with guidelines for construction of streets; and*

13. The criterion is met for the reasons identified in Finding of Fact No. 6E.

LMC 18A.40.540(J): *Streets and sidewalks, existing and proposed, are suitable and adequate to carry anticipated traffic within the proposed project and in the vicinity of the proposed project; and*

14. The criterion is met for the reasons identified in Finding of Fact No. 6E.

LMC 18A.40.540(K): *Each phase of the proposed development, as it is planned to be completed, contains the required parking spaces, open space, recreation space, landscaping and utility area necessary for creating and sustaining a desirable and stable environment.*

15. As determined in Finding of Fact No. 6, as mitigated and designed the proposal will be served by adequate and appropriate infrastructure and utilities, including all those required in the criterion above. Some minor modifications during civil review may have to be made to the amount of open space for the reasons identified below.

As outlined in Finding of Fact No. 6C, it is uncertain whether the precise amount of open space proposed by the Applicant satisfies the 20% requirement of LMC 18A.40.590 because of uncertainty in easement rights for road access and tennis court use. As further determined in Finding of Fact No. 6C, the easement issue is properly delegated to civil plan review for final resolution. However, there is one caveat. The Examiner and City staff do not have the authority to adjudicate easement rights. *See Halverson v. Bellevue*, 41 Wn. App. 457 (1985); see also RCW 2.08.010 (superior court has original jurisdiction over cases involving title to real property). In *Halverson*, the court ruled that once the Bellevue City Council was put on notice of an adverse possession claim for property located within a proposed subdivision it was reviewing, the City Council had to cease review. This was because City regulations required the signature of all persons with an ownership interest in the project site for the subdivision application and the extent of the ownership interest was dependent upon an adjudication of adverse possession rights over which the City Council had no jurisdiction to determine. An analogous situation applies in this case – City regulations require 20% open space, but the amount of open space cannot be determined without an adjudication of easement rights over which the Hearing Examiner and City staff have no jurisdiction. It's unclear whether the "claim" to adverse possession in *Halverson* was based upon a filed court action for quiet title, but presumably this was the situation since practically speaking cities and counties cannot be expected to suspend permit review every time someone asserts a property right to a preliminary plat under review. Consequently, to comply with the dictates of *Halverson*, if approved the project would have to be conditioned on suspending civil review[13] upon presentation with an easement rights claim filed in a

[13] There is some mixed evidence in the record that such a claim has already been filed. However, given that any results of such a claim can be accommodated by relatively minor changes to the plat that would not adversely affect neighbors or the environment, there is no prejudice in delaying suspension of review to civil review instead of halting the current public hearing process.

court of competent jurisdiction that could potentially affect the Applicant's ability to comply with the 20% open space requirement.

SEPA APPEAL

16. Review Criteria/Burden of Proof for MDNS. The relevant inquiry for purposes of assessing whether the City correctly issued an MDNS is whether the project as proposed has a probable significant environmental impact. See WAC 197-11-330(1)(b). WAC 197-11-782 defines "probable" as follows:

> *'Probable' means likely or reasonably likely to occur, as in 'a reasonable probability of more than a moderate effect on the quality of the environment' (see WAC 197-11-794). Probable is used to distinguish likely impacts from those that merely have a possibility of occurring but are remote or speculative. This is not meant as a strict statistical probability test.*

If such impacts are created, conditions will have to be added to the DNS to reduce impacts so there are no probable significant adverse environmental impacts. In the alternative, an environmental impact statement would be required for the project. In assessing the validity of a MDNS, the determination made by the City's SEPA responsible official shall be entitled to substantial weight. WAC 197-11-680(3)(a)(viii).

Courts have held that the substantial weight standard mandates application of the "clearly erroneous" standard. *Moss v. City of Bellingham*, 109 Wn. App. 6, 19, 31 P.3d 703, 712 (2001). Under the clearly erroneous standard, reviewing bodies do not substitute their judgments for those of the agency and may invalidate the decision only when left with the definite and firm conviction that a mistake has been committed. *Cougar Mountain Ass'n. v. King County*, 111 Wn.2d 742, 747, 764 P.2d 264 (1988); *Polygon Corp. v. Seattle*, 90 Wn.2d 59, 69, 578 P.2d 1309 (1978); *Ass'n of Rural Residents v. Kitsap County*, 141 Wn.2d 185, 4 P.3d 115 (2000); *Moss*, 109 Wn. App. 13. An appellant does not meet its burden to show an MDNS is clearly erroneous if the evidence shows only that reasonable minds might differ with the decision. To prove that a decision was clearly erroneous, the Appellant must produce affirmative "*facts or evidence in the record demonstrating that the project as mitigated will cause significant environmental impacts warranting an EIS*." *Moss*, 109 Wn. App. at 23-24. Specifically, where an appellant claims a failure to adequately identify or mitigate adverse impacts, the appellant must produce evidence that such significant adverse impacts will occur for a decision to be overturned. *Boehm*, 111 Wn. App. 719-720; *Moss*, 109 Wn. App. at 31. Mere complaints or claims, without the production of affirmative evidence proving that the decision was clearly erroneous, are insufficient to satisfy an appellant's burden of proof as a matter of law. *Id*.

Although the burden on an appellant to overturn an MDNS is relatively high, this does not absolve the City from the responsibility of establishing that it has conducted at least a prima facie review of environmental impacts. As summarized in *Boehm v. City of Vancouver*, 111 Wn. App. 711, 718 (2002):

> *For the MDNS to survive judicial review, the City must demonstrate that it actually considered relevant environmental factors before reaching that decision.*

> *Moreover, the record must demonstrate that the City adequately considered the environmental factors in a manner sufficient to be prima facie compliance with the procedural dictates of SEPA. Further, the decision to issue a MDNS must be based on information sufficient to evaluate the proposal's environmental impact.*

(citations, quotations omitted).

The Findings of Fact often use existing regulations to assess whether an impact should be considered significant. Generally, if an impact is addressed in City regulations and the project complies with those regulations, the impact will not be found to be significant. For cities planning under the Growth Management Act (Ch. 36.70A RCW) ("GMA"), such as Lakewood, the SEPA Responsible Official is entitled to rely on existing plans, laws, and regulations to determine the requirements for environmental analysis, protection, and mitigation of a project under SEPA are met. RCW 43.21C.240(1); WAC 197-11-158. Indeed, SEPA not only allows, but encourages, officials to rely "*as much as possible on existing plans, rules and regulations, filling gaps where needed by imposing mitigation measures under SEPA.*" *Moss v. City of Bellingham*, 109 Wn. App. 6, 14, 31 P.3d 703 (2001).

Pertinent to the use of City regulations in evaluation of impacts, Mr. Bricklin intimated in cross-examination of Ms. Brunell that since lots under 17,000 square feet are exempt from the City's tree retention standards, this means that SEPA must be used to fill in the gap. The 17,000 exempt is not construed as creating a regulatory gap. Rather, it is construed as a legislative determination by the City Council that removal of oak trees in lots less than 17,000 square feet does not result in any significant environmental impacts. Outside of the aesthetic impacts of the proposed tree removal, addressed separately below, there is nothing unique about the project site that necessitates additional tree protection beyond that incorporated into the City's tree retention and critical area regulations.

17. Aesthetic Impacts Significant. The MDNS was issued in error in its determination that the proposal would not create probable significant adverse aesthetic impacts. For the reasons identified in Finding of Fact No. 5A, the wall of homes that will be visible to surrounding property owners is not compatible with surrounding development. Given that the impact is visual, it is construed to be a probable significant adverse aesthetic impact.

Both the Applicant and the City take the position that the type of aesthetic impact created by the proposal as a matter of law are not significant enough or even recognized as probable significant environmental impacts. The City bases its aesthetic analysis upon the aesthetic questions included in the SEPA environmental checklist, which are limited to height, views and proposed measures to reduce aesthetic impacts. Environmental review isn't limited to the impacts identified in the environmental checklist. No SEPA regulation makes that limitation. As noted in Conclusion of Law No. 16, the operative consideration in assessing whether an EIS is required is whether a proposal will create probable significant environmental impacts. The elements of the environment are outlined in detail in WAC 197-11-444. One of those elements, set by WAC 197-11-444(2)(a)(iv) is aesthetic impacts of the built environment. There is no limitation in that regulation to views or building materials. Even if there were such a limitation, no reasonable minds would disagree that the view impacts of the proposal are probable, significant and adverse. Views of heavily treed large open

space from all surrounding lots to the project area will be replaced with a continuous wall of tract housing. The views of the project site are significantly at odds with the character of the surrounding neighborhood and will significantly affect property values and use and enjoyment of the surrounding residential properties.

In its closing argument, the Applicant asserts that a project cannot be denied on aesthetics alone if it is consistent with the underlying zoning, citing to *Plum Creek Timber Co. v. Washington State Forest Practices Appeals Bd.*, 99 Wn. App. 579 (2000). In the Applicant's words, that case held that impacts to aesthetics would not be significant despite the fact that road and timber harvests would be highly visible from adjacent public lands because only a small portion of views would be affected, the property was designated specifically for commercial timber production, and thus there was no expectancy of a continued public view of unlogged property. *Plum Creek* is clearly distinguishable in that the residents surrounding the project site of this case had a legislatively supported expectation that no development would be introduced into their neighborhood that would be incompatible with their neighborhood character or serve to undermine their historical estate development pattern. For the reasons identified in prior Conclusions of Law, these expectations were based upon the City Council approval of Comprehensive Plan Policy 2.3.1 and the PDD review criterion, LMC 18A.40.540(H), requiring compatibility with existing neighborhood character. Both the comprehensive plan and the PDD regulations, as part of the zoning code, are adopted SEPA policies that can be used to evaluate and mitigate environmental impacts. See LMC 14.02.180B1 and B8. The residents of the Thorne Lane community had a valid expectation for views that were compatible with their historic residential estate development pattern. The proposal is not consistent with that expectation.

18. Land Use Impacts Significant. As asserted by the SEPA Appellants, the DNS was erroneously issued because of land use impacts. WAC 197-11-444(2)bi recognizes "relationship to existing land use plans and to estimated population" as an element of the environment. As determined in Conclusions of Law No. 5, the proposal is not consistent with the comprehensive plan Residential Estate designation of the project site. This lack of conformance is due to lack of compatibility, which is a probable significant adverse impact for the reasons identified in Finding of Fact No. 5A.

19. Failure to Include Easements Not a SEPA Issue. Appellant Stohr asserts that the DNS was issued in error on the grounds that the preliminary plat map "fails to include easements of record." See Ex. 42 at 3-4. The failure to provide accurate information on easements does not in itself qualify as an environmental impact subject to SEPA review. See WAC 197-11-444. The accuracy of easement depictions is only pertinent to the extent that it affects the adequacy of information or degree/existence of impacts that are recognized as environmental impacts in WAC 197-11-444. Recreation and parks and recreational facilities are elements of the environment. See WAC 197-11-444(1)(b)(v) and (1)(d)(iv). Easement issues as they affect adequacy of recreational facilities is addressed in the open space analysis of this decision. The SEPA Appellants have not identified any pertinent significant environmental impacts regarding easements.

20. No Other Probable Significant Adverse Impacts/Review Sufficient. The other alleged environmental impacts identified in the SEPA appeals do not qualify as probable significant adverse impacts for the reasons identified in Findings of Fact No. 5 and 6. The environmental review

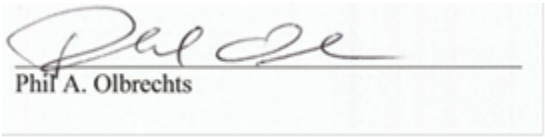
conducted by staff is found to be sufficiently thorough and well documented to evaluate all of the proposal's environmental impacts.

21. Spot Zoning Not a SEPA/PDD/Plat Issue. Page 29 of the DeWitt closing brief asserts that "*[w]hen there is a conflict between the PDD overlay code and the underlying zoning code, the underlying zoning code controls*" citing *Citizens for Mount Vernon*, 133 Wn.2d 861, 876 (1997). That is not what was ruled in the *Mount Vernon* case. The *Mount Vernon* case ruled that a PDD may not be used to vary the density permitted by the underlying zoning district if to do so would qualify as a spot zone. As outlined in in *Lutz v. Longview*, 83 Wn. 2d 566 (1974), a PDD that varies the applicable zoning district density is a rezone and must be approved by the legislative body. *Mount Vernon* simply stands for the proposition that if a PDD is used to rezone property, the rezone may not create a spot zone, which is prohibited for any site-specific amendment to a zoning map. To comply with *Lutz*, if the PDD were approved it would be conditioned on the Applicant acquiring approval of a rezone by the City Council to the densities proposed by the Applicant. The issue of whether the rezone qualifies as a spot zone would be addressed during the rezone review process, since the judicial standards for spot zones apply to rezone actions.

DECISION

The proposed preliminary plat and PDD are denied and the SEPA appeals are sustained for the reasons identified in the Conclusions of Law.

DATED this 26th day of November, 2019.



Hearing Examiner for Lakewood

Appeal Right and Valuation Notices

LMC 18A.02.502 Table 3 provides that final preliminary plat decisions of the Hearing Examiner are subject to appeal to superior court. LMC 18A.40.550(C) provides that PDD decisions are also final. Appeals of final land use decisions to superior court are governed by the Land Use Petition Act ("LUPA"), Chapter 36.70C RCW. SEPA rules contemplate consolidation of any judicial SEPA appeal with the underlying permit approval. *See* WAC 197-11-680(4). LUPA imposes short appeal deadlines with strict service requirements. Persons wishing to file LUPA appeals should consult with an attorney to ensure that LUPA appeal requirements are correctly followed.

Affected property owners may request a change in valuation for property tax purposes notwithstanding any program of revaluation.