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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)

DECISION UPON RECONSIDERATION

Overview

The Applicant has requested that the November 26, 2019 Final Decision of the above-captioned matter be limited to a remand of the SEPA threshold determination. The Final Decision is revised as requested given the Applicant’s desire to explore further SEPA mitigation. However, as discussed below, the PDD and preliminary plat findings and conclusions will have to remain in the Final Decision because the PDD and plat criteria are adopted SEPA policies that were used to support the reversal of the SEPA threshold determination. As clarification, the Final Decision did not require any remand as construed by the Applicant. This Decision Upon Reconsideration converts the Final Decision to a remand decision and thereby renders the Final Decision interlocutory¹, pending final disposition from staff of a reconsideration of the SEPA threshold determination.

In response to the Applicant’s motion for reconsideration, the Dewitt SEPA appellants argued that the motion was untimely. As discussed below, the motion was found to be timely as it was made within five working days of the date the decision was issued to the hearing parties.

As background, the Final Decision sustained the SEPA appeals and denied the plat and PDD applications. No remand of the SEPA decision was required by the Final Decision. Remand was not

¹ See *Stienjes Family Trust v. Thurston County*, 152 Wash. App. 616 (2009), which held that a County Board of Commissioner decision remanding an issue for further hearing examiner review was not a final decision triggering judicial review under the Land Use Petition Act.

1 required under the apparent incorrect understanding that the Applicant had exhausted its options for
2 mitigation of the project and would benefit from the ability to directly appeal the project denial to
3 superior court or in the alternative to apply for a preliminary plat without the density bonus of a PDD
4 application. As identified in this Decision Upon Reconsideration, SEPA review is not required for
5 project denials when there is no avenue for approval, so no further SEPA review was necessary. In
6 its request for reconsideration, the Applicant has indicated that it still has options to explore for
7 mitigation. Given this factor, it is agreed that remand without a denial of the PDD and preliminary
8 plat is the most efficient remedy for resolving the Applicant's application.

9 **Findings of Fact**

10 The Findings of Fact of the Final Decision are supplemented with the following:

- 11 1. The Notice of Decision for the Final Decision is dated December 2, 2019. See Ex. A to Reply To
12 Appellants' Responses To Applicant's Request For Reconsideration.
- 13 2. The Applicant filed its Motion for Reconsideration on December 6, 2019.
- 14 3. An Order Setting Briefing Schedule On Request For Reconsideration was issued by the Examiner
15 on December 13, 2019.
- 16 4. Response briefs were submitted by the Dewitt and Stohr SEPA Appellants on December 23, 2019.
- 17 5. A reply brief from the Applicant was submitted on December 30, 2019.

18 **Exhibits**

19 Applicant's motion for reconsideration, the Examiner's briefing order and the SEPA Appellant
20 responses and Applicant reply are collectively entered into the record as Ex. 95, along with all
21 attachments.

22 **Timeliness**

23 Applicant's motion for reconsideration was timely. The Notice of Decision for the subject PDD
24 application and SEPA appeal was dated December 2, 2019 and the Applicant's request for
25 reconsideration was filed on December 6, 2019, which was within eight business days of the "*date*
26 *the decision is rendered*" as required by LMC 1.36.271 and within five working days of the "*date of*
the initial decision/recommendation" as required by LMC 18A.02.720I. The Dewitts take the
position that the date of the decision for purposes of assessing reconsideration deadline compliance
should be the date the decision was transmitted by the hearing examiner to the City and/or the date
written on the decision. Since the transmittal date to the City is not necessarily the same as the date
of distribution, the DeWitt's interpretation makes the amount of notice hearing parties receive of the
trigger date for the reconsideration deadline dependent upon the fortuitous amount of time it takes
City staff to distribute the decision. To provide fairness and consistency on the amount of notice
received for a reconsideration deadline, the date the decision is rendered for purposes of LMC

1 1.36.271 and the date of the initial decision for purposes of LMC 18A.02.720I is construed as the
2 date of distribution, which is December 2, 2019. The Applicant's December 6, 2019 motion for
3 reconsideration was filed within the requisite five and eight working days of the December 2, 2019
4 decision date.

5 **Remand Not Authorized by Final Decision**

6 Contrary to the apparent understanding of the Appellant, the original decision denying the PDD did
7 not remand the SEPA review for further analysis. No part of the Final Decision expressly authorized
8 or required remand. The Applicant's misunderstanding on this point was reasonable and
9 understandable given that the Final Decision sustained the SEPA appeals and both of those appeals
10 requested remand. However, in sustaining the SEPA appeals the intent was to sustain the allegations
11 that the threshold determination was issued in error, not the remedy requested. Given that the
12 primary reason for denial was the adverse aesthetic impacts created by a "wall" of tract housing, it
13 didn't appear that there's any way to sufficiently eliminate this impact except by reducing density to
14 a level that enables the opening up of view corridors and open spaces in a manner that is consistent
15 with surrounding development. Such a reduction in density would likely necessitate a density closer
16 to the density authorized by the underlying R-2 zone, which according to the staff report would have
17 enabled 14 homes as opposed to the proposed 20. Given these factors, it was determined that the
18 Applicant's most effective and direct avenue for relief in the absence of any effective mitigation was
19 a judicial appeal of the PDD decision or just applying for a straight subdivision. If that were the case,
20 a remand decision would have only served to delay the Applicant's access to the courts for an
21 unnecessary SEPA re-evaluation and perhaps even the preparation of an environmental impact
22 statement.

23 **SEPA Remand Not Required for Project Denial**

24 The operative issue regarding the Applicant's reconsideration request is whether a decision to deny a
25 project must be preceded by complete SEPA review. Under both Washington State Department of
26 Ecology (DOE) and Lakewood SEPA regulations, the answer is no. SEPA review is not required if
the denial doesn't foreclose the consideration of reasonable alternatives. For the DOE rules, WAC
197-11-070 identifies when nonexempt decisions can be made without completed SEPA review. It
provides that a permitting decision cannot be made without a final determination of non-significance
or final environmental impact statement if the decision would have an adverse environmental impact
or limit the choice of reasonable alternatives. Denial of the PDD would not create any adverse
impacts if no effective mitigation could be imposed that would make the project satisfy applicable
PDD criteria. In that case, the result of denial would be no development or development under
straight subdivision laws, which would be the same result if the project were remanded for futile
SEPA review. In similar fashion, in the absence of any mitigation that could achieve compliance,
there would be no limitation in the choice of reasonable alternatives. The only way for the Applicant
to subdivide the property if it can't be done through PDD approval would be through straight
subdivision review, which option would still be available if the project were denied. Consequently,
no additional SEPA review is required by WAC 197-11-070(1) for a decision to deny if no further

1 mitigation can achieve PDD compliance. Such a result is imminently sensible, since requiring
2 environmental review for a project that can't be approved is ultimately a waste of time and money.

3 The same result is acquired under the more direct City regulations pertaining to the same
4 issue. LMC 14.02.170 provides in pertinent part as follows:

5 *If the lead agency determines, after the initial review of a project, that a proposed action*
6 *could not comply with adopted plans, policies, rules or regulations, and where the City has*
7 *authority other than SEPA to deny the proposal, the project can be denied outright without*
8 *making a threshold determination, which denial shall be in writing...*

9 (emphasis added).

10 The hearing examiner review of the proposed PDD qualifies as the “initial review” under LMC
11 14.02.170 because the examiner has original jurisdiction to approve or deny a PDD application. A
12 PDD application “could not comply” with PDD standards if no mitigation could correct
13 noncompliance. As with WAC 197-11-070(1), such a result makes imminent sense, since nothing is
14 to be gained from doing SEPA review for a project that cannot be approved.

15 **SEPA Remand Authorized**

16 Ultimately, the Applicant’s request for an opportunity to make yet another attempt at mitigation
17 aesthetic impacts must be granted. The Applicant has not been given an exhaustive opportunity to
18 explore all mitigation options. It is not immediately apparent what the Applicant could do short of
19 simply applying for a straight subdivision, but if it’s worth it to the Applicant to go through a second
20 round of administrative review, it must be presumed that the Applicant has something meaningful to
21 present. Further, if options are available for effective mitigation, the Applicant is in a good position
22 to work out a mutually agreeable design with neighboring property owners. There is plenty of
23 incentive for both sides to try to work something out, given that if PDD design bonuses are not made
24 available to the Applicant, the Applicant can simply move ahead with a straight subdivision approval
25 without the compatibility requirements that expressly apply to PDDs. In short, the Applicant’s
26 request for reconsideration evidences both a reasonable possibility for effective mitigation along with
incentives for the neighboring property owners to work collaboratively with the Applicant to arrive at
a mutually agreeable design that will be more compatible than a straight subdivision while at the
same time giving the Applicant greater development potential. Beyond these potential benefits of
remand, once the Applicant intimated that it had some additional mitigation options in mind that
could achieve compliance, remand was at that point mandatory. As previously noted, a decision to
deny a project can only be made without completed SEPA review if there is no avenue for approval.
The Applicant’s request for reconsideration now suggests there is such an avenue and the opportunity
for mitigation must be granted.

27 **PDD Findings and Conclusions Adopted as SEPA Policy Findings and Conclusions**

28 The component of the Final Decision denying the PDD and preliminary plat applications will be
29 eliminated as requested by the Applicant, since the Applicant has raised the possibility that further

1 mitigation may still be possible to achieve compliance with PDD review criteria. However, as
2 identified in Conclusion of Law No. 17 of the final decision, the PDD criteria were used as a SEPA
3 policy in assessing the significance of project impacts. Consequently, the PDD and preliminary plat
4 findings and conclusions will be retained for purposes of supporting the SEPA remand required by
5 this Decision Upon Reconsideration.

6 **DECISION**

7 Upon reconsideration, the Final Decision of the above-captioned matter is revised to provide
8 that the SEPA threshold determination is remanded for reconsideration by the SEPA responsible
9 official. The Final Decision is further revised to eliminate any determination that the PDD and
10 preliminary plat applications are denied. However, the findings and conclusions supporting the
11 PDD and preliminary plat denial are retained to support the determination that the SEPA threshold
12 determination should be remanded, since the PDD and preliminary plat review criteria are adopted
13 as SEPA policies².

14 If the SEPA responsible official re-issues a determination of non-significance with new
15 mitigation, that new mitigation shall be addressed in a new PDD and preliminary plat
16 recommendation from staff.


17 If the SEPA responsible official issues a determination of significance, the findings in the
18 environmental impact statement shall be addressed in a new PDD and preliminary plat
19 recommendation from staff.

20 If the SEPA responsible official determines that no alternative mitigation can render the
21 proposal consistent with applicable PDD criteria given the findings and conclusions of the Final
22 Decision, staff may make a recommendation to the examiner that no further SEPA review is
23 required under LMC 14.02.170.

24 Staff resolution of the remand shall be forwarded to the hearing examiner for a final land use
25 decision to be issued after holding a public hearing.

26 This Decision Upon Reconsideration is to be considered interlocutory given the remand
request of the Applicant. A final decision subject to judicial review will be issued after the hearing
examiner holds a public hearing on the remand recommendation forwarded by staff.

DATED this 8th day of January, 2020.


Phil A. Olbrechts

Hearing Examiner for Lakewood

² Conclusion of Law No. 17 of the Final Decision inadvertently omitted reference to the subdivision regulations as another SEPA policy, specifically LMC 14.02.180B9. Nonconformance to preliminary plat criteria should also be considered grounds for reversing the SEPA threshold determination.