

CITY OF BELLEVUE
CITY COUNCIL

Summary Minutes of Regular Session

March 19, 2012
8:00 p.m.

Council Chamber
Bellevue, Washington

PRESENT: Mayor Lee, Deputy Mayor Robertson, and Councilmembers Balducci, Chelminiak, Davidson, Stokes, and Wallace

ABSENT: None.

1. Call to Order

The meeting was called to order at 8:09 p.m., with Mayor Lee presiding.

2. Roll Call, Flag Salute

Upon roll call, all Councilmembers were present. Councilmember Balducci led the flag salute.

3. Communications: Written and Oral

- (a) Andrew Smith spoke in favor of the Hilltop annexation, and commented on his family's participation in the City's parks and recreation programs. He noted the area's 63-year history of protecting the environment and critical habitats. He is looking forward to being a part of Bellevue.
- (b) Jacque Lysons, a Hilltop resident, spoke in favor of the annexation. She explained how the founding of the neighborhood was based strongly on a respect for the environment and wildlife. She spoke in favor of retaining King County's critical areas habitat regulations at this time and gradually moving to Bellevue's regulations. She thanked the Hilltop Annexation Committee and City staff for their efforts to achieve annexation.
- (c) Alex Harris, a Hilltop resident, said that she and Ms. Lysons have been part of the Hilltop Annexation Committee for the past two years. She thanked City staff for working with the neighborhood, and spoke in favor of retaining King County's habitat regulations.
- (d) Steve Kasner spoke regarding the annexation in 2003 of a portion of Eastgate Park. He noted his involvement in the South Bellevue Community Center siting process

approximately five years ago, and the vision at that time to annex the entire park. He encouraged the City to continue to work to annex the remainder of the Eastgate area.

- (e) Eddie Lin, attorney with Perkins Coie, spoke on behalf of the Best Buy store's objection to the design chosen for NE 4th Street. He said that Best Buy representatives have scheduled a meeting with City staff to further discuss their concerns. One concern is that the NE 4th Street extension project was promised as shovel-ready in order to secure federal grants. Alternatives have been studied and discussed since that time. However, Mr. Lin expressed concern that staff is recommending the original design in order to receive the grant funds. He urged the City to look at the alternatives without bias and to consider all factors beyond the federal grant deadline.
 - (f) Alaric Bien, Board Member for the Alliance of Eastside Agencies, shared the story of a Bellevue family in crisis and the ability of the Cultural Navigator program to help. He thanked the Council for its ongoing support of human services providers and programs.
4. Reports of Community Council, Boards and Commissions: None.
5. Report of the City Manager
- (a) Management Brief providing Update on Hilltop Annexation Efforts

City Manager Steve Sarkozy opened discussion on the Hilltop annexation efforts.

Dan Stroh, Planning Director, recalled that the Hilltop area submitted its 10-percent Petition to Annex last fall. Last month, staff reported to the Council regarding ongoing negotiations with the Hilltop Annexation Committee, which is advocating to retain King County's Critical Areas Habitat regulations, at least for an interim period. Critical areas regulations pertaining to streams, wetlands, and geologic hazard areas would still apply.

During the previous discussion, several Councilmembers expressed concern about this request and directed staff to continue with the negotiations. Mr. Stroh referred the Council to page 5-3 of the meeting packet for a revised proposal from the Hilltop community. Mr. Stroh said staff is seeking Council feedback on the proposal, which asks the Council to considering allowing Hilltop to remain under the King County Habitat regulations for an interim period. This would allow residents to have a voice in future revisions to the Critical Areas Ordinance.

Responding to Councilmember Davidson, Mr. Stroh said that King County's and Bellevue's Critical Areas regulations are very similar, and both protect certain species.

Carol Helland, Land Use Director, said City staff met with King County staff during the past week to clarify their understanding about the King County regulations. King County requires a trigger for a clearing and grading permit, which would essentially be the avenue for evaluating critical areas in King County at a similar level as Bellevue. King County requires that anyone requesting clearing and grading modification or development go through a study to identify

whether there is breeding habitat associated with the property. Bellevue defaults to a “safe harbor” habitat context that requires critical areas regulation, and provides the ability to modify that through a report. The management provisions are similar in both jurisdictions, which follow the management techniques of the Washington State Department of Fish and Wildlife.

Responding to Councilmember Davidson, Ms. Helland said that tree cutting regulations differ somewhat, and King County’s provisions are more stringent in some areas. Both allow a process for departing from established standards based on site-specific conditions.

Responding to Dr. Davidson, Ms. Helland said King County refers to breeding and nesting as the primary basis for regulation, and they require a report to identify the presence of the nesting habitat. Both the County and City regulations do not necessarily prevent the removal of trees. However, they require documentation about species of local importance and the care of trees.

In further response, Ms. Helland said trees can be cut, as long as residents follow the management standards for the Washington Department of Fish and Wildlife. Ms. Helland said she would need to find out whether the Hilltop area is part of a formal King County wildlife habitat network.

Deputy Mayor Robertson observed that the distinction between the regulations of the two jurisdictions is not clear to her. Responding to Ms. Robertson about the regulatory thresholds for disturbing land, Ms. Helland said that any clearing and grading activity within the urban growth boundary requires a permit. In Bellevue, the permit threshold is 50 cubic yards if the property is outside of a critical area. For property within a critical area, the trigger is determined on a site-specific basis.

Ms. Robertson requested that staff prepare a matrix to outline and compare the provisions of the two jurisdictions’ regulations. Ms. Helland said staff will provide that to the Council.

Responding to Ms. Robertson, Mr. Stroh recalled that Council previously took action on pre-annexation zoning for the Hilltop area. If the provision regarding Critical Areas Habitat regulations is approved by the Council, it will be necessary to amend the pre-annexation zoning ordinance.

Ms. Robertson questioned why this issue was not addressed earlier, and Mr. Stroh said the issue was not anticipated at that time. In further response, Mr. Stroh confirmed that the Horizon View area requested certain items as well. However, staff advised that there are other ways to address those issues. He said the Hilltop area is somewhat more complex for a number of reasons, including that the residents operate their own water district.

Mr. Stroh reiterated the interest of Hilltop residents in a gradual transition to Bellevue’s habitat regulations, which would allow them the opportunity to participate in providing input during the City’s next update to the Critical Areas Ordinance. He noted that the Hilltop area has been effective in managing its habitat approach for the past 60 years. He said that staff is not making a recommendation but is presenting the residents’ request for Council direction.

Deputy Mayor Robertson reiterated her request for a matrix comparing Bellevue's Code with King County's regulations.

Mayor Lee asked about the City's process and the ability of neighborhood associations to participate in the review and development of habitat management regulations. He questioned how residents' participation would be any different with Bellevue than through King County.

Mr. Stroh explained that King County and the City both have critical areas regulations governing habitat because it is required by the state Growth Management Act. He confirmed that the Hilltop Site Plan Review Committee must currently operate within the regulations set by King County.

Mayor Lee concurred with Ms. Robertson's request for a matrix comparing County and City regulations.

Councilmember Stokes said the Hilltop area has done a good job of managing its trees and preserving the environment. He said the City has made concessions with other areas when annexing, and he supports moving forward, even if it means allowing the Hilltop area to retain King County's regulations for a transitional period.

Councilmember Balducci said she is eager to complete the annexation of all of the City's Potential Annexation Areas (PAAs). She suggested that staff bring back a draft agreement, with alternatives addressing the habitat regulation issue, for Council action.

→ Councilmember Balducci moved to direct staff to bring back the matrix comparing the City and County regulations as well as an agreement with alternatives for Council consideration and action. Deputy Mayor Robertson seconded the motion.

Councilmember Chelminiak expressed support for the motion. He observed that the Council gave due and proper consideration to the items requested by other PAAs as well. He said that Hilltop has been a self-governing community, and it is understandable that residents want to ensure that it is a positive move.

Councilmember Davidson said he will support the motion. He said he would like to understand the Hilltop view wedge map as part of the next discussion.

Councilmember Wallace said he will also support the motion. He observed that there are other neighborhoods with their own protection area easements and tree protection standards.

Responding to Councilmember Chelminiak, Mr. Stroh confirmed that the requested exemption applies only to Habitat regulations, and not to other Critical Areas provisions. While Hilltop residents would prefer to retain King County's habitat regulations indefinitely, they are agreeable to transitioning after a set time period. Mr. Stroh confirmed that a similar transition period was approved for certain provisions when the Factoria area was annexed.

Mayor Lee observed that the Council would like the Hilltop area to be a part of Bellevue. He acknowledged that trust is an important issue in a new relationship, and he could support a transition period for the application of habitat regulations.

→ The motion carried by a vote of 7-0.

(b) [Moved from Agenda Item 11(a)]

Ordinance No. 6048 annexing to the City of Bellevue 786 acres known as the South Bellevue – Eastgate and Tamara Hills Annexation, located south of I-90 in the Newcastle Subarea Potential Annexation Area (PAA), by Direct Petition under RCW 35A.14.120.150.

Deputy City Manager Brad Miyake asked to pull Agenda Item 11(a) from the agenda.

Mr. Stroh said that more work is needed on the Interlocal Agreement with King County. Staff will be back in the upcoming weeks to report on the timing of the final annexation action.

Deputy Mayor Robertson said she is eager to complete the Eastgate and Tamara Hills annexation.

Councilmember Wallace requested a report on the staffing needs related to providing services (e.g., Public Safety) to the annexation area.

Councilmember Balducci questioned the current delay and the implications related to the State sales tax credit. Mr. Stroh said the City will still be eligible for the State sales tax credit, unless the state legislature removes it from the budget.

Ms. Balducci encouraged staff and King County to resolve any outstanding issues and move forward with completing the annexation.

6. Council Business and New Initiatives

Councilmember Balducci attended meetings of the Sound Transit Capital Committee and the Eastside Transportation Partnership. The ETP voted to move five projects forward to the Puget Sound Regional Council (PSRC) to compete for federal funding. This includes the Bellevue Way southbound HOV lane at I-90, while the 120th Avenue NE Stage 2 project was ranked below the funding line.

Councilmember Stokes said he continues to participate in briefings from staff regarding specific departments and issues. He attended the YMCA Eastside fundraising event. He noted that Bellevue is one of the top ten cities in the country (per capita) for philanthropy.

Councilmember Wallace attended meetings of the Human Services Commission, Eastside Pathways, Cascade Water Alliance, Parks and Community Services Board, Planning Commission, and the Eastside Transportation Partnership (ETP). He met with the Washington State Department of Transportation (WSDOT) regarding his recent appointment to the I-405 Executive Team.

Councilmember Chelminiak attended the YMCA fundraising event at the Meydenbauer Center. As the new liaison to the Bellevue Convention Center Authority (BCCA) Board, Mr. Chelminiak met with Meydenbauer Center staff, where he learned that events at the Center raised \$7.4 million for private nonprofits last year. He attended meetings of the Trade Development Alliance and Probation Services Advisory Board.

Councilmember Davidson attended meetings of the Metropolitan Water Pollution Abatement Advisory Committee, MWPAAC's rate and finance subcommittee, Cascade Water Alliance, and, as Chair, the WRIA 8 Salmon Recovery Council. He attended the Police Foundation's fundraising breakfast.

Deputy Mayor Robertson reported that she and Councilmember Wallace attended the Police Foundation fundraiser as well. Ms. Robertson attended meetings of the Parks and Community Services Board, Planning Commission, and the prioritization working group of the Puget Sound Regional Council's (PSRC) Transportation Policy Board.

Mayor Lee reported that he attended the National League of Cities (NLC) conference in Washington, D.C., which included meetings/sessions on public-private partnerships and sustainable communities.

Mayor Lee encouraged the Council and the public to attend the next Neighborhood Forum at City Hall on Thursday, March 29, 7:00-9:00 p.m. The event will present a panel discussion on critical issues facing the community.

7. Approval of the Agenda

- Deputy Mayor Robertson moved to approve the agenda, with the exception of Agenda Item 11(a). Councilmember Stokes seconded the motion.
- The motion to approve the agenda, as amended, carried by a vote of 7-0.

8. Consent Calendar

- Deputy Mayor Robertson moved to approve the Consent Calendar, and Councilmember Chelminiak seconded the motion.
- The motion to approve the Consent Calendar carried by a vote of 7-0, and the following items were approved:

- (a) Minutes of February 27, 2012 Extended Study Session
Minutes of March 5, 2012 Study Session
Minutes of March 5, 2012 Regular Session
- (b) Resolution No. 8373 authorizing execution of a professional services agreement with KPFF Consulting Engineers, in an amount not to exceed \$231,020, to design and permit: 1) modifications to the Meydenbauer Bay Marina to provide the deed-required transient moorage slips; and, 2) replacement of the Clyde Beach Park swim dock.
- (c) Motion to award Bid No. 12034 to Skyline Landscape, as the lowest responsible and responsive bidder, in the amount of \$47,065.75, for replacing the irrigation system at McCormick Park West.
- (d) Ordinance No. 6047 authorizing: 1) execution of a grant agreement with the Washington State Department of Transportation to accept \$5,600,000 in federal Surface Transportation Program grant funds to construct the NE 4th Street Extension from 116th to 120th Avenues NE; 2) execution of a grant agreement with the Transportation Improvement Board to accept \$3,000,000 in state Corridor Program funds toward acquisition of right-of-way for the NE 4th Street Extension project (TIB grant); 3) amending the 2011-2012 general Capital Investment Program (CIP) Plan to increase the appropriation by \$3,000,000 in grant funds.
- (e) Resolution No. 8374 authorizing the City Manager to sign and certify the annual report documents, City of Bellevue 2011 Compliance Report and 2012 Stormwater Management Program, as required by the National Pollutant Discharge Elimination System Phase II Municipal Stormwater Permit, for submittal to the Washington State Department of Ecology.
- (f) Motion to award Bid No. 12030 for 152nd Avenue SE Roadway Subgrade Spot Repairs, to Westwater Construction Company, as the lowest responsible and responsive bidder, in the amount of \$166,200 (CIP Plan No. D-64).

9. Public Hearings

- (a) *Limited public appeal hearing on the Hearing Examiner's Decision on the application of David Shih (Kimberlee Park III) for a Planned Unit Development and Preliminary Conservation Subdivision to divide 7.47 acre parcel into 17 buildable lots, two private road tracts, one drainage tract and four Native Growth Protection Area Tracts. File Nos. 08-135645 LK and 11-103630 LO.
 - (1) Rules and Procedure

City Attorney Lori Riordan provided an overview of the rules governing the limited public appeal hearing on the Hearing Examiner's Decision related to the Kimberlee Park III application. This hearing is limited to the issues decided by the Hearing Examiner after taking testimony during hearings held on June 16, 23, 29, and 30, 2011, on whether to approve the application. The Hearing Examiner issued findings of fact, conclusions of law, and a decision on July 28, 2011, denying the PUD (Planned Unit Development) and preliminary conservation subdivision known as Kimberlee Park III. A second order affirming the decision was issued on August 31, 2011. The site is located at 11050 SE 60th Street in the Newport Hills Subarea.

The applicant/appellants are David Shih and the Shih Family Limited Partnership. Following filing of the appeal, the Kimberlee Park Community Club and individuals Roger and Janelle Chiu, Scott and Risa Traverso, and Barry and Kimberly Wolborsky submitted a Motion to Intervene, which was granted by the City Council on February 6, 2012.

In addition to the oral arguments provided at tonight's meeting and the Hearing Examiner's record, the parties to the appeal were allowed to submit written materials to the City Clerk by 1:00 p.m. on Wednesday, March 14. The City Attorney's Office has reviewed these briefs to ensure that they comply with the Council's Rules, and any information not contained in the Hearing Examiner's record has been redacted. These written materials were provided to Councilmembers with their packets on Thursday, March 15.

City Attorney Riordan advised that the Mayor give Councilmembers the opportunity to disclose, on the record, any ex parte communications they may have had with any of the parties to the appeal, or any others supporting or opposing the application. If ex parte communications are disclosed, the Councilmember should state the names of the persons with whom the communications occurred, whether the communication was written or oral, and the substance of the communication. If a written or voicemail communication exists, they should be put into the record. Parties will be offered the opportunity to rebut the substance of any of the ex parte communications.

Mayor Lee asked Councilmembers to disclose any ex parte communications regarding the Kimberlee Park III application and appeal.

Mayor Lee said he and Mr. Shih have known each other for more than 40 years. However, they have not discussed this matter.

Councilmember Chelminiak said he has not had any ex parte communications.

Councilmember Davidson said he has not had any ex parte communications.

Deputy Mayor Robertson said she has not had any ex parte communications.

Councilmember Balducci said she has not had any ex parte communications.

Councilmember Stokes said he has not had any ex parte communications.

Councilmember Wallace said he has not had any ex parte communications.

→ Councilmember Chelminiak moved to extend the meeting to 10:30 p.m., and Councilmember Davidson seconded the motion.

→ The motion to extend the meeting carried by a vote of 7-0.

Ms. Riordan described the format for the hearing. Following the staff report, the parties will have the opportunity to present their arguments within 15 minutes. The appellants may reserve a portion of their time to be used for rebuttal argument after the conclusion of the intervenors' presentation. The Council may ask questions of any party, staff, or any other person about any matter contained in the record. However, new material not contained in the Hearing Examiner's record may not be presented.

After all argument is presented and the Council has completed its questions and discussion, the Council may render a decision tonight or at a subsequent meeting. Ms. Riordan said that the appellant bears the burden of proof. The Council may grant the appeal or grant the appeal with modifications if the appellants have carried the burden of proof and the City Council finds that the decision of the Hearing Examiner is not supported by material and substantive evidence. In all other cases, the appeal shall be denied. Ms. Riordan said the City Council shall accord substantial weight to the decision of the Hearing Examiner.

Evidence is material if there is a reasonable probability that the presence or absence of the evidence would alter the decision by the fact finder. Evidence is substantial when there is a sufficient quantity of evidence to persuade a fair-minded person of the truth or correctness of the decision.

Responding to Mayor Lee, Rich Hill, legal counsel for Mr. Shih, indicated that he would like to reserve three minutes for rebuttal.

(2) Staff Report

Reilly Pittman, Development Services Planner, reviewed the process to date. The goal of the project is to create 17 new lots for new single-family homes on this site in the Newport Hills Subarea. Approvals were required for a preliminary plat for a conservation subdivision, Planned Unit Development (PUD), and Critical Areas land use permit through the State Environmental Policy Act (SEPA). The project site is adjacent to I-405 and SE 60th Street. The site and vicinity are zoned Single-Family Residential, R-3.5 (3.5 units per acre).

Mr. Pittman explained that the site is adjacent to Kimberlee Park I and Kimberlee Park II, which have lots ranging from 9,542 square feet to 24,590 square feet. Neighbors to the south tend to have larger homes and lots greater than 35,000 square feet. Both neighborhoods are zoned R-3.5

Mr. Pittman showed photos and maps of the area. He noted that a portion of the access to the Kimberlee Park III site on 110th Avenue SE will direct traffic through the existing neighborhood to connect to Lake Washington Boulevard to the east. The project site is 7.47 acres, and 53 percent of the site is encumbered by steep slope critical areas, a stream, and the buffers that protect both of those critical areas. The project proposes to establish more than 54 percent of the site as Native Growth Protection Area tracts. A stream dissects the site.

Mr. Pittman said the application was reviewed as a conservation subdivision because the property contained more than one acre of critical areas. This type of development allows certain zoning dimensional standards to be modified. The conservation subdivision designation reduced the 10,000 square foot lot requirement of the R-3.5 zone to 6,500 square feet. However, the applicant requested, through the PUD, to further reduce the lot area to a minimum of 5,043 square feet, with an average area of 6,449 square feet. The applicant also proposed to reduce the required lot width from 70 feet to a minimum of 45 feet.

Mr. Pittman said no other modifications were requested. The project proposed 17 single-family residential lots for a gross density of two units per acre. The site qualifies for a maximum of 18 units per acre due to the critical areas restrictions. The PUD mechanism allows an applicant to request bonus density, but none was requested in this case.

Mr. Pittman described additional features of the proposal including a private road to access some of the lots, a pedestrian trail connection, and the extension of 110th Avenue SE. The proposed homes meet the minimum height limit for the R-3.5 zone, and the facades facing east toward existing homes vary from one to two floors in height. The home designs were changed to allow for the maintenance of the existing grade. The homes incorporate tiered foundations to better fit the topography of the site, and three house types were proposed.

Mr. Pittman said that, after four public hearings and a request for reconsideration, the Hearing Examiner recommended that the proposed application for the PUD and preliminary plat be denied, but affirmed the SEPA Determination of Non-Significance (DNS). The Hearing Examiner said the basis for denying the PUD was that the applicant failed to carry the burden of proof on the issue of compatibility of the proposed development with neighboring development. The Hearing Examiner stated that the preliminary plat was denied for failure to make appropriate provisions for drainage. Mr. Pittman said that denial of the PUD and the preliminary plat are the subjects of the appeal. The SEPA appeal is not before the Council tonight.

Responding to Deputy Mayor Robertson and Councilmember Chelminiak, Mr. Pittman clarified the elevations of the different facades of the development. Three-story facades face west toward I-405, while one- to two-story facades face the street and existing development.

Responding to Ms. Robertson regarding the Development Services Director's interpretation that found compatibility on the perimeter and in design, Mr. Pittman said this is consistent with past interpretations by the Director with regard to PUDs. He said that this application proposes individual, residential single-family lots. A proposal for attached homes or townhouses would be a different use and would not be considered as compatible. Mr. Pittman said the proposal

provides landscaping around the site perimeter and preserves a large natural area.

Mayor Lee questioned the Hearing Examiner's recommendation to deny the preliminary plat based on the failure to make appropriate provisions for drainage. Mr. Pittman said that, as part of the application for the plat, the Utilities Department completes a preliminary conceptual review to give a preliminary approval to proceed with the development. If the project was approved, the next stage would be for the applicant to submit for utilities permitting and plat infrastructure permitting. This is the point at which the conceptual becomes reality in terms of whether or not the project can be built.

In further response to Mr. Lee, Mr. Pittman said that, after PUD approval, the applicant would have to go through the City's amendment process in order to modify the PUD.

→ Councilmember Balducci moved to extend the meeting until 11:00 p.m., and Mayor Lee seconded the motion.

→ The motion carried by a vote of 7-0.

Deputy Mayor Robertson said that her understanding of preliminary plat approval is to look at the general design and to determine whether it is in the public use and interest. All of the details are then to be worked out before final plat approval. Mr. Pittman confirmed this understanding. Ms. Robertson questioned what would happen if a preliminary plat were granted but the applicant could not later demonstrate that it complied with drainage requirements. Mr. Pittman said the project would not receive final plat approval, and the applicant would have to revise the preliminary approval to reflect a project that meets Code requirements.

(3) Motion to Open the Hearing

→ Councilmember Davidson moved to open the Limited Public Appeal Hearing, and Councilmember Stokes seconded the motion.

→ The motion to open the hearing carried by a vote of 6-0, with Deputy Mayor Robertson temporarily away from the dais.

(4) Argument from Appellants

Richard Hill, McCullough Hill Leary, said he is the attorney for the applicant, David Shih. He noted his previous request to reserve three minutes for rebuttal.

Mr. Hill explained that Mr. Shih would like to build 17 new single-family homes in Newport Hills. The property includes environmentally sensitive areas, and staff recommended the use of the PUD mechanism. As a result of this mechanism, more than half of the site will be protected as Native Growth Protection Areas. The homes will be clustered on the least sensitive portions of the site, and only two departures from the Land Use Code were needed for this PUD. These are lot size and lot width. The homes are consistent with the provisions of the underlying R-3.5 Code

with respect to density, height, and setbacks.

Mr. Hill said that staff recommended approval of the PUD and of the related conservation subdivision. The Hearing Examiner denied both. On appeal, Mr. Shih is asking the City Council to reverse the Hearing Examiner's decision and to adopt staff's recommendation.

Mr. Hill said the appeal raises two legal issues, one related to the PUD and the other to the subdivision. In implementing growth management, many jurisdictions, including Bellevue, have encouraged the use of the PUD mechanism. The clustering of housing on the least sensitive portions of the site allows, on the one hand, open space and environmentally sensitive areas to be protected without, on the other hand, reducing overall residential density.

The Hearing Examiner denied the PUD because he concluded it failed to comply with the compatibility requirements of the Code. Mr. Hill said his decision should be reversed because it is erroneous. City staff conducted a compatibility analysis, which was consistent with past analyses in Bellevue for many years.

Mr. Hill said that Mr. Pittman testified before the Hearing Examiner on June 30 and defined compatibility as "the ability to exist in an integrated and harmonious state." Staff determined that the PUD was compatible based on the following factors: 1) Proposed PUD involves single-family homes meeting the density, setback and height limits of R-3.5 zoning; 2) Proposal includes significant vegetation and preservation of most of the large trees on the site; 3) Proposal requires plat landscaping to enhance vegetation on each lot; 4) Proposal maintains overall single-family density; 5) Proposal maintains a similar road and lot layout pattern as the neighboring development; 6) True lot width and lot areas are reduced, but this is offset by larger setbacks and perimeter landscaping; 7) Due to grade and landscaping, there will be limited or no visibility of the proposed homes from the surrounding neighborhood; and 8) The design proposed is residential in character and responds to the design of the neighboring properties.

Mr. Hill said that determinations of compatibility have been used by City staff for years, and have specifically been upheld in three Hearing Examiner decisions cited in his brief (Parkwood Lanes, Hillside Property, and the Enclave at Fox Glen). The importance of the PUD mechanism in Bellevue is stated explicitly in the Newport Subarea Comprehensive Plan, Policy F-NH-5, "the use of the PUD mechanism is encouraged in Newport Hills to preserve open space and environmentally sensitive areas."

By contrast with the staff analysis, the Hearing Examiner's analysis was unprecedented and legally erroneous. Instead of evaluating whether the proposal was compatible as defined by staff and Hearing Examiner precedent, the Hearing Examiner in this case focused on whether the proposal (from the Hearing Examiner Decision) "exceeded the limits of differentness that can be tolerated in an existing neighborhood." Mr. Hill asserted that this definition was created out of whole cloth. He said he has never seen it anywhere, and it is not related to any definition in the Land Use Code or a dictionary. Relying solely on the fact that the proposed lots were smaller and narrower than the surrounding lots, and that the homes were thereby closer together, the Hearing Examiner found the PUD exceeded the limits of differentness that cannot be tolerated.

Mr. Hill said this is inconsistent with years of staff analysis and past Hearing Examiner decisions, and it strikes at the heart of the City's PUD mechanism, which encourages departure from lot size and width requirements in exchange for the preservation of open space and sensitive areas. Mr. Hill said that, if the decision is affirmed, the use of the PUD mechanism in Bellevue will be dealt a blow, because if there is enough neighborhood opposition, any PUD could be denied. All PUD lots are clustered and have development standards that vary somewhat from surrounding neighborhoods.

Mr. Hill said that Bellevue has never mandated a sameness test for single-family development, and it should not begin to do so now. He said the Hearing Examiner decision should be reversed, and the PUD should be approved.

As to the second issue, Mr. Hill said the Hearing Examiner denied the subdivision because he concluded there was an inadequate provision for drainage. The Hearing Examiner decision should be reversed because he has placed the cart before the horse. The City has a well-defined process for drainage plan review set forth in City Code 20.45A.070, which states: "The review and decision of the City on an application for a subdivision shall consist of the following stages." The stages are listed as review and decision upon the preliminary plat, review and decision upon the engineering plans for the plat improvements, and review and decision upon the final plat. This is the process that the City followed in this case.

The preliminary plat application included the submission of conceptual drainage plans. The City's drainage review determined the project is feasible and that technical details can be worked out when final engineering plans are submitted. Mr. Hill noted that the Hearing Examiner made a finding on this point. The City's approval makes clear that there is an explicit condition that no implied approvals of utilities engineering result from this preliminary plat. The City's approval states that changes to site layout may be required to accommodate utilities, and this condition is also made clear in City Code 20.45A.170. Approval of the plat by the Hearing Examiner does not constitute approval of engineering plans. That decision is made after preliminary plat approval.

Mr. Hill said the Hearing Examiner reversed stages one and two of the process, requiring engineering plans review before preliminary plat approval. He said the Hearing Examiner has no authority to deny a preliminary plat on that basis.

Mr. Hill noted that the project opponents asked a number of questions of the Hearing Examiner. Many are worthy and appropriate to be considered at stage two, as the Code anticipates, which is the stage of reviewing the final engineering plans. All of these questions are pertinent to stage two of the process, but not to stage one.

Mr. Hill emphasized that no construction on this plat will be allowed until review and approval of the engineering plans is completed. He said that the applicant followed the process outlined by the Code. It is inappropriate to penalize the applicant for doing what the Code directs him to do. Mr. Hill said it was inappropriate for the Hearing Examiner to deny the subdivision on the basis

that the applicant was following the Code.

Mr. Hill said it is appropriate for staff, and for the Council in making its decision, to condition the subdivision on compliance with all applicable drainage and Utility Code criteria, including answering the questions raised during the public hearing. However, the Hearing Examiner's decision to deny the subdivision should be reversed.

Mr. Hill thanked the Council for its consideration of this appeal.

(5) Argument from Intervenors

David Bricklin, attorney, spoke on behalf of the intervenors. He said he would like to emphasize the role of the City Council in these proceedings as established by City Code. He said the Council, in this context, is like a judge of a court of appeals. Mr. Bricklin said this is a more limited role than the usual Council role. Lawyers talk about issues of fact and issues of law. Factual issues include, in this case, the compatibility of the project, attention to the storm drainage system, lot size, and vegetation. City Code states that the Council has a very limited role with regard to these issues.

Mr. Bricklin said the record could contain conflicting evidence in terms of testimony on both sides of any issue. As the City Council in an appellate role, the Council is not to go back and consider how they might have decided the issue originally if it had participated in the public hearing. Mr. Bricklin said that the City Council's role is to ensure that there is substantial evidence in the record to support the Hearing Examiner's decision.

Mr. Bricklin said that the evidence in the record clearly demonstrates that the Hearing Examiner's factual findings are supported.

Mr. Bricklin displayed slides of Kimberlee Park I and II, as well as the land proposed for Kimberlee Park III. Development on the latter site is supposed to be compatible with existing development. Mr. Bricklin said there is substantial evidence in the record, including drawings of the proposed housing, to support the Hearing Examiner's factual determination that there is not compatibility.

Mr. Bricklin said that the Hearing Examiner's determination that the PUD should not be approved is not a rejection of PUDs in general. The City has approved other PUDs, most of which were isolated from existing development. The City Code addresses compatibility in a number of areas, and indicates that infill projects should be compatible and consistent with surrounding development. Mr. Bricklin said this applies to the housing design, and not just to lot size or setbacks.

Mr. Bricklin said that Bellevue's Code does not define compatibility as it is defined in the dictionary. Instead it refers to the character, appearance, size, scale, mass, and architectural design of the proposed homes. These are factors that the Hearing Examiner quoted and relied on when he made his factual determination that the proposal is not consistent with existing

development.

Mr. Bricklin said the proposed subdivision has uphill homes looking down on existing development. The landscaping involves a 6-foot sapling every 30 feet, but existing trees are removed. Mr. Bricklin said the Hearing Examiner understood these ramifications and decided that the development was not compatible with existing development. Mr. Bricklin said the housing designs are not compatible, the proposed homes have smaller lots, and there are three-story structures adjacent to large lot development.

Mr. Bricklin said the argument was made in the written material submitted by the applicant that the Hearing Examiner not only put the burden of proof on the applicant to demonstrate compatibility, but that the Hearing Examiner wrongly thought that the applicant had to make that showing at the public hearing, and that the Hearing Examiner ignored the evidence in the written record that preceded the hearing. Mr. Bricklin said this is not the case. Conclusion of Law 13 indicates that the Hearing Examiner referred to the entire record with regard to the lack of evidence in support of compatibility anywhere in the record, not just based on the live testimony.

Mr. Bricklin addressed the stormwater issue. The argument he hears being made is that the applicant and City will look at the stormwater issue later during final design review, and that nothing needs to be done now. Mr. Bricklin said that, while Bellevue's Code does not require final engineering drawings at this point, it requires more than what was presented. The Code requires that the applicant demonstrate that there has been adequate provision made for the treatment of stormwater. Mr. Bricklin the Hearing Examiner quoted that provision and applied it.

The Hearing Examiner said he did not require final engineering drawings but he required adequate provision. Mr. Bricklin said there was too much evidence that adequate provision had not been made in this situation. This included stormwater vaults, which were indicated to be too small. There is evidence that the drainage ways down the steep hillsides would fail. The Hearing Examiner referred to scary hillsides sitting on top of I-405, not where you want stormwater problems. The Hearing Examiner did not require final design drawings, but indicated that the applicant needed more documentation than what was initially submitted.

Mr. Bricklin said that City staff did not visit the site, which is stated in the record. He noted a finding that staff did not have qualifications in stormwater engineering. The Hearing Examiner had the benefit of hearing testimony from two highly qualified hydrogeologists. Mr. Bricklin said the City Council's role is not to take over for the Hearing Examiner, whose job is to listen and consider the evidence and to make a decision.

Mr. Bricklin said the Hearing Examiner found that the stormwater analysis lacked any consideration for containing the volume of water or for managing water quality.

Mr. Bricklin asked that the Hearing Examiner's decision be affirmed.

(6) Rebuttal and Motion to Close Hearing

Mr. Hill said that, with regard to compatibility, staff identified eight issues that it relied on to make its analysis in a way that is consistent with the way staff as applied compatibility on PUDs to date. He said the Hearing Examiner relied on two facts, the lots are narrower and the lots are smaller. That could be said of virtually every PUD that has been approved in Bellevue.

With respect to storm drainage, Mr. Hill said there is no question that there is a conceptual storm drainage plan. However, the City reviewed the conceptual plan and determined that the project is feasible. With regard to the size of the storm vault, the record shows that the reviewer determined that it was sized to substantially increase the storm vault in the stormwater detention trap that is saved in the subdivision. Mr. Hill said the City's plans reviewer was confident that, at stage two, the Code-mandated stage for reviewing this issue, the City Code could and would be complied with. If not, the site layout would need to be modified, or the PUD would have to go back to be reconfigured.

Mr. Hill asked that the Hearing Examiner's decision be reversed. He said the proposed PUD complies with the City's approval of PUDs over the past two decades.

→ Councilmember Chelminiak moved to close the hearing, and Deputy Mayor Robertson seconded the motion.

→ The motion carried by a vote of 7-0.

(7) Council Discussion

Councilmember Balducci asked whether Hearing Examiner decisions are precedent setting. Catherine Drews, Legal Planner, said they are precedent setting within the City.

Ms. Balducci asked whether staff analysis not derived from Code is precedent setting. Ms. Drews said that each project is unique. However, staff's approach has been consistent in how it reviews compatibility issues.

Ms. Balducci questioned whether the fact that staff conducts its analyses in the same way using the same criteria is, in and of itself, binding on future projects. Ms. Drews said she could not say that it is binding, but it is the practice of the Development Services Department.

Responding to Ms. Balducci, Ms. Drews said that past PUD-related Hearing Examiner decisions are available for review. Ms. Drews observed that the closed record applies to the facts and evidentiary findings that the Hearing Examiner makes regarding a specific case.

Councilmember Balducci questioned language that PUDs must be "compatible and respond to the surrounding vicinity." Ms. Drews said the two concepts have different meanings. One speaks to the perimeter of the PUD and its compatibility, and the other relates to the general character of the PUD itself. Ms. Drews explained that the first provision requires that the perimeter of the

PUD be 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. A second provision requires that 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.

Councilmember Balducci observed that PUDs generally have smaller lots than the surrounding area due to the nature of PUDs. Responding to Ms. Balducci, Mr. Pittman said there are smaller lots in other PUDs. Some PUDs are one large lot with attached housing.

Responding to Councilmember Chelminiak, Mr. Pittman confirmed that, typically, conditions on PUDs are applied through the Hearing Examiner process after staff completes its analysis and makes its determination.

Responding to Councilmember Davidson, Ms. Drews said the Council's decision can be appealed to Superior Court.

Deputy Mayor Robertson said she did not find anything in the PUD Code that sets the relative sameness or differentness of the homes. Mr. Pittman confirmed that perimeter character and the general character are the only two PUD decision criteria that speak to character. Responding to Ms. Robertson, Mr. Pittman confirmed that the Code's compatibility reference to size, scale, mass and architectural design applies to the perimeter.

With regard to the process, Ms. Robertson said her understanding of the standard of review is that if the facts and decision of the Hearing Examiner are based on substantial evidence, they stand. She has not heard anyone address issues of law or issues of interpretation of the Code. Her expectation would be that the Council would look at issues of Code interpretation on a de novo basis, without regard to what the Hearing Examiner did on a Code interpretation.

City Attorney Riordan said the Council does not re-weigh the evidence, but a quasi-judicial proceeding does look at conclusions of law de novo. For example, if the Council concluded that there was substantial evidence in the record to agree with the findings of fact that were decided by the Hearing Examiner, it would leave those undisturbed. However, if the Council concluded that the law does not support the conclusions of the Hearing Examiner, the Council would apply what it determined to be the correct standard of law.

Responding to Mayor Lee, Ms. Riordan said the Hearing Examiner's role is to weigh the evidence and to determine credibility based on his or her interaction with the witnesses and parties. Staff members are professionals with certain expertise. However, that does not necessarily mean that the Hearing Examiner would find the staff interpretation of the Code to be correct.

In that context, Ms. Riordan said the City Council's role as the appellate body is to look at the evidence that was presented to the Hearing Examiner, and his or her factual findings based on that evidence. The Council's role is to make a determination about whether there are substantial

facts that would convince a fair-minded person as to the accuracy of the findings. The Council would then determine whether the law supports the legal conclusion that the Hearing Examiner has drawn from the facts established in the record.

Councilmember Stokes observed that staff's work is based on facts, and this work is included in the record. The Hearing Examiner may or may not make a judgment as to their credibility. Ms. Riordan concurred with this understanding.

Mayor Lee questioned whether it is accurate that staff did not visit the site, as mentioned during the earlier arguments. Mr. Pittman said "staff" refers to members of multiple departments, and some do visit a site. As Land Use Planner, he has been to the site numerous times. Other departments might not require a site visit due to more detailed Codes. In further response, Mr. Pittman said he could not determine character compatibility without visiting a site.

Councilmember Stokes noted the complexity of the matter and suggested recessing at this point, and continuing the discussion to another meeting.

Responding to Councilmember Wallace, Mr. Pittman said the Code is not detailed about house design. Mr. Wallace observed that staff and the Hearing Examiner made different determinations about compatibility, and Mr. Pittman concurred.

Responding to Mr. Wallace, Mr. Pittman said the Land Use Code does not contain a definition for compatibility. The PUD decision criteria addresses compatibility with regard to a number of characteristics.

Responding to Mr. Wallace, Ms. Riordan confirmed that the Council is in the position of interpreting compatibility consistent with how it reads the Code.

Mr. Wallace asked whether, if an applicant has a concept design for stormwater and the planner has a reasonable belief that there are opportunities to comply with the Stormwater Code, this is sufficient to move the project forward. Mr. Pittman confirmed that this is handled as conceptual approval, which will be verified during the later engineering and permit stage. The standard Stormwater Code applies to the project.

Mayor Lee noted a Council consensus to defer discussion and potential action to the April 9 Regular Session. He reminded Councilmembers to avoid ex parte communications.

10. Land Use: None.

11. Other Ordinances, Resolutions and Motions

- (a) Ordinance No. 6048 annexing to the City of Bellevue 786 acres known as the South Bellevue – Eastgate and Tamara Hills Annexation, located south of I-90 in the Newcastle Subarea Potential Annexation Area (PAA), by Direct Petition under RCW 35A.14.120.150.

[See Agenda Item 5(b).]

12. Unfinished Business: None.
13. Continued Oral Communications: None.
14. New Business: None.
15. Executive Session: None.
16. Adjournment

At 10:54 p.m., Mayor Lee declared the meeting adjourned.

Myrna L. Basich, MMC
City Clerk

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