

CITY OF BELLEVUE
CITY COUNCIL

Summary Minutes of Regular Session

April 9, 2012
8:00 p.m.

Council Chamber
Bellevue, Washington

PRESENT: Mayor Lee, Deputy Mayor Robertson, and Councilmembers Balducci, Chelminiak, Davidson, Stokes, and Wallace¹

ABSENT: None.

1. Call to Order

The meeting was called to order at 8:12 p.m., with Mayor Lee presiding.

2. Roll Call, Flag Salute

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

(a) Proclaiming April 21 as Arbor Day/Earth Day

Dustin VanNieulande, Park Ranger at Mercer Slough Environmental Education Center, introduced Sarah Foster, Urban and Community Forestry Program Manager for the Washington State Department of Natural Resources.

Ms. Foster presented Bellevue with its 21st Tree City USA Award and 19th Growth Award from the National Arbor Day Foundation. She said that Bellevue has been a national and regional leader in building an urban forestry program. She thanked the City for providing its staff and facilities in support of regional urban forestry programs and meetings. Ms. Foster commended Bellevue's continued preservation and public education activities.

Mayor Lee read a proclamation declaring April 21 as Arbor Day-Earth Day in Bellevue.

3. Communications: Written and Oral

(a) Helen Leuzzi, Executive Director of The Sophia Way, thanked the Council for supporting ARCH (A Regional Coalition for Housing) funding priorities this year. She described the

¹ Councilmember Wallace participated via speakerphone for Agenda Item 10 only.

new Sophia's Place women's shelter at St. Luke's Church in Bellevue. The organization provides overnight shelter for homeless women, including many who are age 50-80. Sophia's Place provides beds so women will no longer have to sleep on the floor. Ms. Leuzzi said that transitional housing provides much-needed hope for these women. She thanked the Council for its ongoing support.

- (b) Sarah Kingman said she attended the City Council meeting three weeks ago and heard several members of the Hilltop area speak of their enthusiasm to join the City of Bellevue, and also about concerns they have surrounding their forested critical areas. She suggested that Hilltop residents should look at how the City has treated other areas that have annexed into Bellevue. She encouraged Hilltop residents to ask hard questions. She asked the Council to consider whether it treats its current strong neighborhood groups with respect and fairness, before asking for the trust of future community leaders.
 - (c) Margot Smith spoke on behalf of a group of residents who she said are intensely interested in local government and land use decisions. She noted that one stated purpose of Bellevue's zoning code is to maintain stability in land use commitments through the harmonious groupings of uses with compatible characteristics. Ms. Smith said the group she represents is interested in the delivery of City services with efficiency, transparency, and integrity. They believe that all government processes must be fair and appear fair.
- 4. Reports of Community Council, Boards and Commissions: None.
 - 5. Report of the City Manager
 - (a) Management Brief presenting Arts Program 2012 Funding Guidelines

City Manager Steve Sarkozy opened discussion regarding the Arts Program 2012 Funding guidelines.

Mary Pat Byrne, Arts Specialist, requested Council direction regarding the funding guidelines for the two main arts programs - Eastside Arts Partnership (EAP) and Special Projects. The Eastside Arts Partnership provides ongoing support for organizations that do all or nearly all of their work in Bellevue. Examples include the Bellevue Arts Museum and the Bellevue Youth Symphony Orchestra. Special Projects funding assists artists or arts groups from anywhere who want to do a project in Bellevue.

Ms. Byrne noted that staff and the Council have worked over the years to continually revise and improve the funding guidelines. She said that staff would like to proceed with releasing the funding guidelines, as used in 2011, and beginning the application process.

Mr. Sarkozy said that, hearing no comments, staff will move forward using the process that has been used in the past.

(b) West Lake Sammamish Parkway Closure and Reopening

Mr. Sarkozy introduced staff to provide an update on the West Lake Sammamish Parkway mudslide and restoration work.

Ron Kessack, Interim Assistant Director of Transportation, described the wall that was constructed to stabilize the slope. The wall is built on private properties, which required the acquisition of easements from the property owners. Mr. Kessack said the residents are pleased with the City's process, the work, and the resulting wall.

Mr. Kessack thanked Utilities Department staff who responded initially to the water line break and mudslide. He thanked Paul Krawczyk, Transportation Project Manager, and Bill Cross, Transportation Inspector, for their work throughout the restoration process.

Mr. Kessack said the road would reopen the following day. However, additional work to restore the properties and install landscaping will continue.

Mayor Lee thanked staff for their work.

6. Council Business and New Initiatives

(a) Council Liaison Recommendations for 2012 Reappointments to the Transportation Commission

→ Deputy Mayor Robertson moved the following reappointments to the Transportation Commission: 1) Victor Bishop to fill a first full term, and to be eligible for reappointment effective May 31, 2016; 2) Dave Jokinen, filling a second term; and 3) Ernesto Simas, filling a second term. Councilmember Stokes seconded the motion.

Ms. Robertson noted that Mayor Lee is the Council liaison to the Transportation Commission and recommends these appointments.

→ The motion for appointments to the Transportation Commission carried by a vote of 6-0.

Mayor Lee thanked the three appointees for their continued willingness to serve on the Transportation Commission,

(b) Council Business

Councilmember Chelminiak attended the Bellevue Convention Center Authority (BCCA) Board meeting, his first as the Council liaison. He noted the Board's interest in how the East Link light rail alignment will affect the convention center property. Meydenbauer Center is working with a transportation consultant and a legal advisor to address light rail-related issues.

Mr. Chelminiak reported that he attended the Municipal League of King County's 2012 Civic Awards event. He was honored to introduce Grant Degginger, former Mayor and Councilmember, who received the award for Public Official of the Year. Mr. Chelminiak noted that John Starbard, who previously worked for the City of Bellevue and is now the Director of the King County Department of Development and Environmental Services, received the award for Public Employee of the Year.

Councilmember Davidson attended meetings of the Regional Water Quality Committee and the Metropolitan Water Pollution Abatement Advisory Committee (MWPAAC) rate and finance subcommittee.

Deputy Mayor Robertson announced that the City recently received a 2012 Green City Award at the annual Residential Recycling Conference.

Ms. Robertson attended meetings of the Puget Sound Regional Council (PSRC) Growth Management Planning Council, Master Builders Association, Bellevue Planning Commission, and Eastgate/I-90 Citizen Advisory Committee.

Ms. Robertson said she met with John Howell, facilitator for the Sound Transit collaborative design process related to the East Link light rail project. She noted that Councilmembers Stokes and Wallace serve on that team as well.

Deputy Mayor Robertson wished everyone well for Easter and Passover.

Councilmember Balducci participated on a panel of senior elected officials who spoke to newly elected officials. She and Councilmember Stokes attended a meeting of the Disability Board. Ms. Balducci attended the Sound Transit Board annual retreat which focused on parking at light rail stations and transit-oriented development (TOD). She attended the Municipal League event, which presented awards to a number of Eastside individuals and agencies including former Mayor Degginger; the King County Library System, whose CEO Bill Ptacek is the Chair of Bellevue's Arts Commission; and State Senators Ed Murray and Steve Litzow. Dow Constantine, King County Executive, received the James R. Ellis Regional Leadership Award.

Ms. Balducci spoke about Andy Conner, a King County Sheriff's Deputy, who was awarded Citizen of the Year. Mr. Conner founded the Genesis Project in South King County to help victims of domestic minor sex trafficking.

Councilmember Stokes reported that he has been working with the East Link collaborative design team mentioned by Deputy Mayor Robertson, which is comprised of three Councilmembers, representatives of the City's Leadership Team and Sound Transit's Board, and staff from both agencies. Mr. Stokes said he has attended two meetings of the Environmental Services Commission, which recently honored outgoing Council liaison Dr. Davidson. Mr. Stokes said he attended the last meeting of the Eastgate/I-90 Citizen Advisory Committee. He encouraged residents to get involved in local planning and neighborhood activities.

Mayor Lee noted the Council's Budget Workshop during last Monday night's meeting. Mr. Lee attended a meeting of the Bridle Trails Community Club. He and Councilmember Chelminiak attended the Global Partnership reception sponsored by the Trade Development Alliance and held at Bellevue City Hall. Mayor Lee attended the I-90 westbound HOV lane opening between Bellevue and Mercer Island. He spoke to attendees of the VisitBellevueWashington event and to a group of students about leadership and public involvement.

Mayor Lee wished everyone a Happy Easter.

7. Approval of the Agenda

→ Deputy Mayor Robertson moved to approve the agenda, and Councilmember Balducci seconded the motion.

→ The motion to approve the agenda carried by a vote of 6-0.

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 6-0, and the following items were approved:

- (a) Minutes of March 12, 2012 Extended Study Session
Minutes of March 19, 2012 Study Session
Minutes of March 19, 2012 Regular Session
- (b) Resolution No. 8375 authorizing execution of a professional services contract with Endelman and Associates PLC, for consulting services to complete the second phase of public space evaluations associated with requirements of the Americans with Disabilities Act (ADA).
- (c) Ordinance No. 6049 authorizing: 1) execution of an agreement between the City and Puget Sound Energy, to accept an energy conservation reimbursement grant in the amount of \$134,981, for a building automation and controls project at City Hall; 2) amending the 2011-2012 Biennial Budget for the Facilities Fund by appropriating unanticipated revenues to that Fund in the amount of \$134,981; and, 3) expenditures from said fund.
- (d) Resolution No. 8376 authorizing: 1) execution of a 2011-2013 successor labor agreement between the City and the Bellevue Police Management Association; and, 2) execution of a Memorandum of Understanding regarding an Unfair Labor Practice claim.

- (e) Resolution No. 8377 authorizing execution of an Interlocal Agreement between Bellevue and the cities and organizations of Edmonds, Kent, Kirkland, Mountlake Terrace, Port of Seattle, Renton, SeaTac, Tukwila, Woodinville, Seattle Parks and Recreation, University of Washington, the USDA Wildlife Services, and the US Fish and Wildlife Service, in the amount of \$2,230, for waterfowl management.
- (f) Resolution Nos. 8378, 8379, and 8380 authorizing entering into agreements recommended by the ARCH Executive Board for the LIHI Downtown Bellevue Apartments in the amount of \$635,000, and for the Imagine Housing South Kirkland TOD in the amount of \$265,000, and for the Sophia's Place Shelter at St. Luke's Church in the amount of \$200,000.
- (g) Resolution No. 8381 authorizing execution of an Interlocal Agreement with Bellevue College, for a period of 20 years, to provide mutual aid and mobilization and the shared use of equipment and technology in the event of a campus emergency or disaster.
- (h) Ordinance No. 6050 authorizing: 1) execution of an Interlocal Agreement with the City of Redmond to accept interlocal contributions of \$300,000 to fund costs associated with a joint pavement overlay project on 148th Avenue NE and 156th Avenue NE in the Overlake area; 2) amendment of the 2011-2012 general Capital Investment Program (CIP) fund to increase the appropriation by \$300,000; and, 3) amendment of the 2011-2017 CIP Plan to increase the budget for the Overlay Program by \$300,000 and authorizing expenditure of said funds (CIP Plan PW-M-1).
- (i) Motion to authorize an application to the FY 2014 Public Works Trust Fund Construction Loan Program in an amount up to \$3.5 million for the NE 4th Street Extension project (CIP Plan No. PW-R-160).
- (j) Resolution No. 8382 authorizing execution of Amendment No. 1 to the professional services agreement for the Coal Creek Parkway Culvert Replacement project with CH2MHill, in an amount not to exceed \$93,000, for engineering services associated with a Parks trail design (CIP Plan Nos. D-103 and P-AD-89).
- (k) Resolution No. 8383 authorizing execution of a professional services agreement with RH2 Engineering, Inc., in an amount not to exceed \$290,000, for engineering services for the Horizon View #3 Water Pump Station Rehabilitation, Predesign and Permitting (CIP Plan No. W-91).
- (l) Motion to award Bid No. 12022 for AC Water Main Replacement (2012) - Phase 1, to Earthwork Enterprises, Inc., in the amount of \$1,267,437.13, as the lowest responsible and responsive bidder (CIP Plan No. W-16).

9. Public Hearings: None.

10. Land Use

- (a) Continuation of Council's consideration of the Appeal of the Hearing Examiner's Decision on the application of David Shih (Kimberlee Park III) for a Planned Unit Development and Preliminary Conservation District

At 9:00 p.m., Mayor Lee noted that Councilmember Wallace had joined the meeting via speakerphone for this agenda item.

Mayor Lee introduced the Council's continued discussion and consideration of the appeal of the Hearing Examiner's Decision on the application of David Shih and the Shih Family Limited Partnership (Kimberlee Park III) for a Planned Unit Development and Preliminary Conservation District. This item is continued from the March 19 Council meeting.

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 matter is considered quasi-judicial under state law. The opportunity for public testimony came before the Hearing Examiner during hearings held on June 16, 23, 29, and 30, 2011, on whether to approve the application. A Limited Public Hearing to take arguments from the parties to the appeal was held and closed on March 19, 2012.

Ms. Riordan explained that quasi-judicial proceedings are matters pending before the City Council, which makes a decision regarding the rights of specific interested parties under the City's regulations. In those situations, the Council must act as judges and maintain fairness and impartiality. Under Council Rules, City Councilmembers are not able to discuss the pending application or appeals with anyone if members of the public contact them directly.

This is a continuation of the Council's discussion on Hearing Examiner's File Nos. 08-135645 LK and 11-103630 LO, the appeals of David Shih and the Shih Family Limited Partnership for a Planned Unit Development and Preliminary Conservation Subdivision known as Kimberlee Park III. 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. A second order affirming the decision was issued on August 31, 2011.

Following the filing of the appeal, the Kimberlee Park Community Club and individuals Roger and Janelle Chiou, Scott and Rita Traverso, and Barry and Kimberly Wolborsky submitted a motion to intervene, which was granted by the Council on February 6, 2012.

The parties to this appeal are the appellants, David Shih and the Shih Family Limited Partnership, and the intervenors, the Kimberlee Park Community Club and individuals Roger and Janelle Chiou, Scott and Rita Traverso, and Barry and Kimberly Wolborsky.

City Attorney Lori Riordan recalled that Councilmembers did not have any ex parte communications to disclose on March 19. Ms. Riordan advised that the Mayor again 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.

All Councilmembers indicated that they did not have ex parte communications to disclose.

Ms. Riordan explained that, before beginning deliberations, the Council may continue to 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. She noted the Hearing Examiner's presence in the audience.

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 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; or the Council may remand the matter for further consideration of issues or to accept additional information into the record. 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.

Ms. Riordan reviewed the Hearing Examiner's basis for denying the application: 1) The applicant failed to meet his burden of proof to show compatibility, and 2) The applicant failed to meet the standard for approval for a preliminary plat by demonstrating the feasibility of the proposed drainage facilities. The Council's role is to decide whether the Hearing Examiner's decision on these two issues is supported by substantial evidence in the record.

Mayor Lee opened the floor for questions and discussion.

Councilmember Chelminiak asked Hearing Examiner Wick Dufford to come forward to respond to questions. Mr. Chelminiak said his questions deal with the compatibility of the application and how it compares to other applications to the City in the past.

Responding to Councilmember Chelminiak, Mr. Dufford said he has been a Hearing Examiner for the City of Bellevue since 1992. He has heard a number of PUD cases and preliminary plat cases, more than a dozen of each. Mr. Dufford said he has lived in Bellevue since 1967.

Mr. Chelminiak noted that Mr. Dufford found PUDs to be compatible in other cases. He questioned how this case is different.

Mr. Dufford clarified that he did not conclude that the application was incompatible. Rather, he concluded that the applicant did not carry the burden of proof to demonstrate compatibility. This is the significant difference between this case and other PUD cases he has heard. Mr. Dufford said that, typically, the applicant's presentation attempts to address all of the approval criteria, as does City staff. In this case, the applicant relied almost entirely on the City's presentation. In the hearing process, the applicant had a very small role. On the other hand, there was a large community interest in the application. Citizens who testified on the record included architects and others who he felt had respectable opinions on what would be compatible with the neighborhood. Mr. Dufford said they were passionate and persuasive about their neighborhood.

Mr. Dufford said this case is not dealing with an absolute standard, but rather, compatibility, which is a value-laden type of judgment. Given the significant public involvement and well-stated testimony by neighbors, and the minor effort made by the applicant, Mr. Dufford said he was left to look at the City's determination. He concluded that neither the applicant or the City carried the burden of proof of convincing him by a preponderance of the evidence that the development met the standard with regard to compatibility.

Mr. Dufford said that the issue of compatibility is a difficult concept to apply. He said he has been reviewing land use cases for a long time, and he has been in rooms full of people in which everyone was against the decision that he subsequently rendered. However, there was something about the quality of the testimony in this case that was different and compelling. Mr. Dufford said that none of the other PUD and preliminary plat cases he has handled have emphasized compatibility to this extent. In general, the PUD has been an upgrade for neighborhoods. However, in this case, that did not appear to be the case.

Councilmember Davidson questioned whether Mr. Dufford determined that the information from residents carried more weight than staff's recommendation based on their review of the City's land use policies and zoning plans.

Mr. Dufford reiterated that he determined that the applicant and the City did not make a convincing case. He noted that the City has made a convincing case in a number of other instances.

Mayor Lee restating his understanding of Mr. Dufford's determination that the applicant did not provide adequate information or carry the burden of proof with regard to compatibility. Responding to Mr. Lee, Mr. Dufford said that his responsibility is to receive and consider the information that is given to him. Mr. Dufford said he could have remanded the case and requested more information, which he has done in other cases. At this point, the Council could remand the matter as well if it determined that would be appropriate.

Councilmember Balducci questioned how "feasibility" (i.e., feasibility of the proposed drainage facilities), which is not in the City Code, was considered in the Hearing Examiner's decision. Mr. Dufford responded that state planning law requires appropriate provisions for many items, including drainage. He explained that appropriate provisions vary by context, and in this context,

the drainage is located on a slope above a major freeway. Little work had been completed to determine whether appropriate drainage was feasible on the slope. He believes that the failure of such a drainage facility over I-405 would be a disaster.

Mayor Lee thanked Mr. Dufford for attending.

Deputy Mayor Robertson said she has looked at the record, the Land Use Code, and the appropriate standards of review. She observed that one of the first things to do as a Council is to look at the standard of review, and whether the findings of fact were supported by material and substantial evidence. The Council can look at the Hearing Examiner's conclusions de novo, however, which means look at them anew or as a matter of first impression.

Ms. Robertson opined that the Hearing Examiner's decision is not supported by substantial evidence in the record, and the Hearing Examiner's decision fails to give the required deference to the staff expertise required of the City's Land Use Code Process I decisions. She said it was interesting that the Hearing Examiner said tonight that he specifically did not find that the application was incompatible, but he felt he needed to be convinced. She believes the Hearing Examiner used the wrong standard because the staff interpretation is entitled to deference under the Land Use Code.

Furthermore, the Examiner's findings fail to include any of the substantial evidence regarding compatibility that was contained in the staff report. There was a great deal of information about compatibility in the staff report, in the attachments, and including responses to comments received from members of the public, as well as the testimony of city planner Reilly Pittman and the testimony of the applicant's architect. Ms. Robertson believes that the Examiner's findings of fact in that regard fails in the face of the record.

Continuing, Ms. Robertson said the Examiner's findings also failed to include any of the substantial evidence regarding the provision for adequate drainage facilities, such as that contained in the staff report, the testimony of the city witnesses, and the motion for reconsideration submitted by city staff.

Ms. Robertson believes that, in addition to determining whether the findings of facts are supported by substantial evidence, the City Council must also address whether the Examiner properly interpreted the City Code. She said that this is not an issue in which the Council decides by determining whether there is substantial evidence in the record. Rather, interpretations of statutes, and in this case, City ordinances, is a question of law reviewed de novo. The courts review conclusions de novo giving substantial weight to an administrative agency's interpretations of the statutes that it administers.

Ms. Robertson said the City is a substantial authority on its Code. The Development Services Director's decision, including the interpretation of the Code, was not followed by the Hearing Examiner. However the Code specifies that the Director's decision was entitled to deference.

Even without the deference, Ms. Robertson said the Hearing Examiner did not follow past Hearing Examiner decisions interpreting the Planned Unit Development Code. The interpretation of the compatibility factor given by the Hearing Examiner in this decision is entirely new to Bellevue. The Code is not new, but this interpretation is new. The Council is the ultimate authority on interpretation of the City Code. Ms. Robertson said she believes that the Hearing Examiner's interpretation in this case is erroneous.

Deputy Mayor Robertson explained that, in looking at the PUD Code, the Director found that the modifications did comply with the criteria of the PUD Code, but the Hearing Examiner disagreed with that. Specifically, under LUC 20.30D.150, D and H were not satisfied, in the Hearing Examiner's opinion. This is the compatibility of the perimeter and the compatibility of the design. The Hearing Examiner found that the development was not compatible with the existing neighborhood, but this is not the correct standard. The correct standard is instead to determine whether the perimeter of the PUD is compatible with the existing land use or property that abuts or is directly across the street from the subject property, and also whether the design is compatible with and in response to the existing or intended character, appearance, quality of development, and physical characteristics of the subject property and immediate vicinity.

Ms. Robertson said the Code does not provide the authority for the Hearing Examiner to make the determination of compatibility of the PUD based on lot size or width. The Hearing Examiner was required to analyze compatibility based on size, scale, mass, and architectural design of proposed structures for the perimeter only. In other words, the Code should be followed rather than expanding the wording of the Code to allow the Examiner to make findings of compatibility of the PUD with the entire existing neighborhood, or to the lot size or width.

Ms. Robertson acknowledged that the lot sizes of the surrounding neighborhoods range from 9,542 square feet to 24,590 square feet, even up to 35,000 square feet, many in excess of the minimum lot size of 6,500. In other words, the surrounding neighborhood developed with traditional zoning and was not developed under a PUD. If the existing zoning lot minimum size of 6,500 square feet was developed here, then even that traditional subdivision would be incompatible with the surrounding neighborhood based upon the interpretation that the Hearing Examiner made here. And that clearly must be in error with our Code, to interpret it this way.

As for the "relative sameness" that was referenced in the record, a lack of differentness of the homes within the PUD, Ms. Robertson said this is not a Code provision that Bellevue allows the Hearing Examiner to use to deny the PUD. Under criteria H of the PUD criteria, the Hearing Examiner can approve the PUD if the design is compatible with and in response to the existing or intended character, appearance, or quality of development, and physical characteristics of the subject property and immediate vicinity. Ms. Robertson observed that the Hearing Examiner cannot invent new definitions or criteria to allow denial under our Code based on "relative sameness."

With regard to the preliminary plat, Deputy Mayor Robertson said the rule is that the preliminary plat application cannot be approved if the applicant cannot show that the plat is able to comply with all relevant requirements. The purpose of a preliminary plat is to secure approval of the

general design of the proposed subdivision and to determine whether the public use interest will be served by the platting. Matters which are specified by regulation or ordinance need not be considered unless conditions or infirmities appear to exist or would preclude any possibility of approval of the plat.

In other words, Ms. Robertson said the applicant could be allowed to present the drainage facility plans for approval of the city engineer after preliminary plat approval, unless there is some evidence in the record, substantial evidence at that, to show the applicant will not be able to obtain approval of the plan. The Code section on platting is consistent with this general state law, and only requires appropriate provision.

Deputy Mayor Robertson observed that it seems as if the standard that was applied was to focus on the effect of the approval, which is that, under 20.45A.170 of our Code, the public improvements must issue, and that such permits are contingent upon compliance with the conditions of the approval, conformance with applicable development standards, and payment of the fee. Final engineering happens after the preferred preliminary plat, and if the project cannot meet the requirements, the final plat is not issued.

Ms. Robertson said she would like to make a couple of general observations: that under City Code, PUDs carry different requirements than plats, in that they require landscaping buffers, even for single-family development, and they also require landscaping to be superior to that required by our Land Use Code chapters 20.20 and 20.25. In this instance, the staff report recommended, and the Hearing Examiner required, a level of perimeter landscaping to provide the required visual buffering between the compatible uses. This site is currently undeveloped and heavily vegetated. Increasing the requirement for retaining or replacing vegetation displaced by the development of the PUD would be responsive to and compatible with the existing physical characteristic of the property.

Ms. Robertson opined that the proposal meets many Comprehensive Plan policies which also apply the definition of compatibility used by the Hearing Examiner. If we use his definition of compatibility, we would effectively be denying the availability of a PUD permit to any applicant adjacent to an architecturally diverse subdivision. She observed that clearly the Code favors the use of the PUD for infill development, especially where critical areas are to be preserved. Ms. Robertson noted that the record, pages 228 to 237, outlines the Comprehensive Plan policies that this has met.

Deputy Mayor Robertson acknowledged that change is difficult when new homes are built, and neighbors may not like the design. But the City of Bellevue does not have design review for single-family homes. In addition to the legal error of the Code interpretation mentioned earlier, Ms. Robertson said she believes that the Hearing Examiner's decision is not supported by substantial evidence in the record, and the Examiner's decision fails to give the required deference to staff expertise required under Land Use Code Process I decisions.

The Examiner's findings fail to include any of the substantial evidence regarding compatibility contained in the staff report, including the responses to comments received from members of the

public, as well as the testimony of city planner Reilly Pittman and of the applicant's architect.

Ms. Robertson opined that the Hearing Examiner's findings fail to include any of the substantial evidence regarding the provision of adequate drainage facilities, such as that contained in the staff report, the testimony of the City's witnesses, and the motion for reconsideration submitted by staff. The Examiner's conclusions of law apply the wrong legal standard for various determinations of compatibility by conflating the meaning of identical with the meaning of compatible, by ignoring the history of the application of the compatibility standard in the PUD Code provisions by staff, and by ignoring the history of legal precedence of determinations of compatibility in other Hearing Examiner decisions on PUD applications.

Deputy Mayor Robertson said that "compatible" under the City's PUD Code refers to being able to exist harmoniously and not in actual conflict with the surrounding properties, and to the site itself and its perimeters. Compatibility for the perimeter is described as including the consideration of size, scale, mass and architectural design of the proposed structure, but it is not described as requiring that the new development be a mirror image of the existing development surrounding the site. Compatibility of the design in subsection H of the Code does not mention structure, and this was another incorrect interpretation by the Hearing Examiner. The Hearing Examiner's interpretation of compatible is inconsistent with our Code, and was inconsistent with other Hearing Examiner decisions in Bellevue, and is the equivalent of an error of law that requires reversal of the Hearing Examiner's decision and the granting of the appeal.

Ms. Robertson said that the Hearing Examiner's conclusions of law apply the wrong legal standard to the question of whether the applicant has made a showing that the preliminary plat application has made adequate provision for drainage ways by imposing additional requirements of more detailed design to demonstrate feasibility. The standard is not feasible – it is appropriate provision. The Hearing Examiner is expecting a greater level of detail than is required at the preliminary plat stage, and by applying this higher standard, the Hearing Examiner made an error of law that requires reversal of the Hearing Examiner's decision and the granting of the appeal.

Councilmember Balducci observed that the case hinges on the concept of compatibility. She said she agrees with the appellant's position that, if compatible means that a development needs to meet all existing Land Use Code requirements, no PUDs would be allowed. The purpose of a PUD is to waive certain requirements in exchange for other amenities or benefits. On the other hand, compatibility cannot mean nothing. The Land Use Code's references to compatibility address size, scale, mass, and architectural design, but do not explicitly address use.

Ms. Balducci recalled that, during the March 19 hearing before the Council, there was testimony that the Hearing Examiner's record contained a great deal of information about compatibility. However, there is not actually very much in the record about compatibility. The record refers to the following characteristics of the proposal: 1) Single-family houses, 2) Detached homes, 3) Not increasing density, 4) Multi-floor, as are some of the existing homes in the area, 5) Pitched roofs, 6) Varying colors, glazing and materials, 7) Attached to a similar road and lot layout pattern, 8) Setbacks are largely conforming, and 9) All have individual driveways with a garage. Ms. Balducci likened this to saying that they all have doors and windows and electrical outlets too.

This is not what she thinks of when considering whether a development is compatible with existing uses. Ms. Balducci opined that the Kimberlee Park III proposal would likely be compatible at Fox Glen, where the City approved a previous PUD.

Ms. Balducci explained that there are no compatibility requirements for the redevelopment of single-family homes. However, a PUD does include compatibility requirements. She sees very little evidence of compatibility in the application which, for example, does not address scale. The proposed development has three stories facing the street, and half of the homes present an imposing façade to the near neighbors. The narrowness and sizing of the lots, as well as the design of the housing structures and landscaping, are not compatible with the neighborhood.

Councilmember Balducci opined that the Hearing Examiner's determination on compatibility was correct. She recalled the Hearing Examiner's testimony that he ruled there was not enough evidence of compatibility; he was not making a judgment about compatibility. Ms. Balducci said she believes there is some evidence of incompatibility. She said the Council is to give substantial weight to the Hearing Examiner's decision, which she feels is supported by the record.

Councilmember Chelminiak said this has been a difficult case. He noted the Hearing Examiner's 20 years of experience in dealing with Bellevue's land use issues. He reiterated the Hearing Examiner's finding that the applicant did not meet the burden of proof with regard to compatibility, even with the assistance of City staff.

Mr. Chelminiak concurred with Councilmember Balducci's reasoning with regard to this issue. He stated that an individual could build the same project proposed by the applicant, if the application did not go through the PUD process. Mr. Chelminiak noted that he is not sure what exactly the intervenors object to about the project. However, the applicant could build the same housing design on as many lots as he could fit onto the property. A project is not required to have lots that are the same size as existing lots.

Mr. Chelminiak opined that the Hearing Examiner is correct in stating that the applicant did not carry the burden of proof with regard to compatibility. When the City goes through the PUD process, the City is giving the developer the opportunity to modify the Codes. With PUDs, the modification applies primarily to lot size. Mr. Chelminiak read the following from the staff report: "The project is compatible with the existing neighborhood because both of them consist of detached homes on individual lots. They have multiple floor structures and pitched roofs." However, the Hearing Examiner determined that there should be some greater level of proof that the project is compatible.

Mr. Chelminiak observed that the architect for the applicant, rather than going into how the proposal matches the Kimberlee Park neighborhood, explained how they made changes based on the economics of the development. The architect said they reduced home sizes slightly to be more in line with what they found to be very common in the Kimberlee Park neighborhood, but then continued to comment on how to design and price the homes for the economy. The proposal barely addressed anything the applicant and developer were doing to make the homes compatible with the neighborhood. The architect later commented on the variation of existing housing types.

However, the applicant's proposal consists of 17 almost identical homes.

Councilmember Chelminiak moved to speak to deference. He observed that he could have reached a conclusion on this matter without the neighborhood being represented by an attorney in the argument before the Council. He said he gives deference to both staff and the Hearing Examiner. However, the law says the Council must give great deference to the Hearing Examiner.

Mr. Chelminiak said he does not see in the record where a case has been made that the proposal is compatible with the surrounding neighborhood. He tends to support the Hearing Examiner. He suggested that, if there are Councilmembers interested in additional information, the Council consider remanding the matter to the Hearing Examiner. Otherwise, he encourages the Council to uphold the decision of the Hearing Examiner.

Councilmember Davidson believes that a property owner should be able to depend on the City's policies (i.e., Comprehensive Plan, zoning, PUD regulations, and the Critical Areas Ordinance). He expressed support for Deputy Mayor Robertson's analysis of the applicable laws and standards. He believes that the applicant/property owner has a right to utilize the City's PUD process, as was recommended by City staff. He will support the appeal.

Councilmember Stokes said this is a difficult case, as it involves essentially trying to balance the property rights of different parties. He does not see any absolutes in this case. He was in favor of allowing the intervenors to be a part of the process. Mr. Stokes noted the longtime experience of the Hearing Examiner and observed that the City's regulations are relatively imprecise.

Mr. Stokes said it is significant that the Hearing Examiner determined that the applicant failed to carry the burden of proof with regard to compatibility. The Examiner testified today that he was not making a judgment about compatibility himself. Mr. Stokes observed that some type of development will ultimately occur on the property. He would have liked to see a better constructed, more sequential, and better developed decision on this matter.

Mr. Stokes commented on the variation of housing types in the Kimberlee Park area. He observed that the matter comes down to personal preferences because the City has no design review for single-family homes. He said he cannot vote to deny the appeal, and he is not sure that remanding the matter would do anything more than prolong the process.

→ At 10:00 p.m., Deputy Mayor Robertson moved to extend the meeting to 10:30 p.m., and Councilmember Balducci seconded the motion.

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

Councilmember Wallace said he concurs with Deputy Mayor Robertson and Councilmembers Davidson and Stokes, and he had nothing more to add.

Mayor Lee said he appreciates the Council's discussion. This is ultimately a subjective decision, and the Council is asked to make a judgment. He concurred with Councilmember Stokes' comment that development will inevitably occur on the property. Mr. Lee said the Deputy Mayor did a good job of articulating the rationale and reasons to support the appeal.

→ Deputy Mayor Robertson moved that the City Attorney be directed to prepare an ordinance that addresses all of the above issues by: (1) including findings supported by the testimony and the documentary submittals of the parties, and that provides information as to the correct legal standards to be applied to the preliminary plat and PUD applications regarding compatibility and adequacy provisions for infrastructure, specifically the drainage systems; (2) that the City Attorney consider including information contained in the Hearing Examiner's record as follows:

From the June 16 hearing transcript, pages 13 to 14; 18 to 19; and 58 to 61.

From the June 30 hearing transcript, pages 38 to 43.

From the staff report dated May 12, 2011, information contained on pages 140 to 141, 155, 198 to 203, 228 to 237 of the Hearing Examiner's report; and additional submittals to the Examiner's report from pages 265 to 267;

(3) that the City Attorney address the issue regarding the appropriate level of perimeter landscaping required for the PUD for the visual buffer in the ordinance, including factual findings taken from the Hearing Examiner's record, both the exhibits and testimony of witnesses, and include an amendment to the condition proposed in the staff report to provide for enhanced landscaping plan;

(4) that the City Attorney include any other factual findings and legal conclusions from the Examiner's record that provide a complete picture of the evidence and testimony available to the Examiner on this application with respect to the issue of compatibility and the proposed drainage system, as well as the perimeter landscaping; and

(5) granting the appeal.

Councilmember Davidson seconded the motion.

Deputy Mayor Robertson said the Council sits as judges and not as policy makers in this matter. She observed that the Code provides for PUDs, and this project fits the PUD definition and description. From her perspective, to not grant the PUD would mean that the City might as well eliminate the PUD section of the Land Use Code. Similarly, preliminary plat regulations provide statutory requirements to be met.

Councilmember Balducci disagreed that denying this PUD would be equivalent to rejecting the whole concept of PUDs. She believes that the City is not required to approve every PUD. She opined that the project does not fit into the neighborhood, and she will be voting against the

motion.

Mayor Lee highlighted that the motion includes consideration of the drainage, perimeter landscaping, and compatibility, so these issues will be addressed further.

→ The motion carried by a vote of 5-2, with Councilmembers Balducci and Chelminiak opposed.

Responding to Councilmember Chelminiak, City Attorney Lori Riordan reminded the public that ex parte communications are prohibited until the Council takes action on the ordinance.

Responding to Councilmember Davidson, Ms. Riordan confirmed that following the vote on the ordinance, there will still be an opportunity one week later for a motion to reconsider. There should be no ex parte communications until that opportunity has passed.

11. Other Ordinances, Resolutions and Motions: None.

12. Unfinished Business: None.

13. Continued Oral Communications: None.

14. New Business: None.

15. Executive Session: None.

16. Adjournment

At 10:11 p.m., Mayor Lee declared the meeting adjourned.

Myrna L. Basich, MMC
City Clerk

kaw