

October 20, 2014

**CITY OF BAINBRIDGE ISLAND, WASHINGTON
HEARING EXAMINER**

ORDER REMANDING APPLICATION FOR FURTHER STUDIES AND DOCUMENTATION

Project: Rolling Sunrise Subdivision

File number: SUB18840

Applicant: BGH Development, LLC
2442 Market Street, #378
Seattle, WA 98107

Location: The project site is located at the south end of Sunrise Drive, immediately south of 10781 Sunrise Drive.

Request: Preliminary long lot subdivision approval to create 7 single-family lots and open space areas in accordance with the City's open space and flexible lot design subdivision provisions.

1. The public hearing on the above referenced preliminary subdivision application was opened on July 23, 2014, at which time exhibits were entered and testimony received from City staff, the applicant and neighborhood residents. The focus of the discussion was the inadequacy of the City's road system serving the applicant's parcel. The hearing was continued until August 21, 2014, based on the objective of obtaining more information concerning site road access. Interim deadlines were set for receipt of documentary information. At the reopened hearing on August 21, 2014, further testimony was received from the applicant, City staff and members of the public. Additional exhibits were entered. The applicant and staff requested and were granted an opportunity to respond in writing to the various comments offered and questions raised.

2. A second notice of continuance issued August 21, 2014, resulted in the submission of a few conceptual details from the applicant as well as further analysis from City staff regarding access issues north of the plat. A number of additional comments were received from neighborhood residents, including a package of legal and technical documents submitted on behalf of Patrick and Barbara Ebert by attorney Alan Wallace and engineer Norm Olson. Since the Ebert documents both raised new issues, including ones concerning the applicable review framework, as well as expanded on matters previously discussed, a further round of comments targeting these issues was authorized.

3. Timely further submissions were received from City staff, the applicant's engineers, the Eberts' representatives and individual neighborhood residents in response to a third notice of continuance dated

September 26, 2014. Based on the record to this point the Examiner has concluded that the application should be remanded to City staff for further specific studies and documentation, as explained below. Primary concerns of the analysis following and the resultant remand order are those aspects of the plat proposal most likely to have direct impacts on neighboring properties and the proper scope and timing of procedures for addressing such impacts. Upon submission of the additional materials specified below the hearing will be reconvened to receive oral testimony on the new information presented.

Roads/Access

4. Answering the question of whether the Rolling Sunrise project should trigger performance of a traffic impact assessment (TIA) mainly involves an interpretation of BIMC 15.40.060, which exempts from the TIA requirement “*a proposed development or improvement that generates less than 50 average daily trips (ADT) or five a.m. or five p.m. peak hour trips per the latest edition of the ITE Trip Generation Manual.*”

5. Focusing on the term “development,” the Eberts' representatives contend the subdivision as a whole is the relevant development proposal to be reviewed and that the trips threshold for a TIA must be applied to all traffic generated by the proposal in its entirety. City staff, on the other hand, argues that each access road is a discrete “improvement” subject to being analyzed separately, such approach being preferable here because the north and south accesses will not connect with one another and their respective traffic loads thus will never aggregate. Staff also suggests that this approach is supported by the level of service methodology contained in the traffic concurrency chapter, BIMC 15.32.

6. The City's argument is persuasive for the most part. The terms “development” and “improvement” have different scopes, implying some level of administrative choice based on the particular circumstances. And BIMC 15.32.030.C specifies that a major function of the TIA is to provide data to support the City's traffic concurrency test, which itself analyzes a proposal's level of service impacts “*along a given roadway or at a particular intersection*” (BIMC 15.32.030.A). In other words, the principal analytical focus is on traffic level of service impacts at specific locations within the road system, not on overall project-generated volumes.

7. Thus, where the proposal design precludes any mixing of traffic from the two separate access points, a level of service analysis based on an aggregation of all project volumes serves no regulatory purpose. But the TIA scope overall is more broadly defined within BIMC 15.40.025 to include “*a thorough review of the immediate and long range effects of the traffic generated by the proposed development or improvement on the city's transportation facilities*” and is to be tailored to the specific project circumstances.

8. The record discloses pervasive sight distance problems in the existing road system both north and south of the project site and includes allegations of similar issues at the proposed site entries. Because any access point impacts would be the direct consequence of plat development, they should be analyzed within a limited-scope TIA. Issues regarding the applicant's incremental contribution to existing road system deficiencies will be discussed below.

Stormwater Management

9. The complicated regulatory framework now governing stormwater management in Western

Washington began to emerge about 1990 and is still evolving as more complete data is generated, more sophisticated analytical methods are developed and more responsive mitigations are devised. Multiple players are involved, including (in addition to the City) federal and state agencies, regional bodies, the County health department and building industry groups. Inevitably, each player has its own perspective on what is important and what needs to be done, usually embodied in documents that may or may not carry some legal weight. In this framework questions of regulatory authority and interpretation are fraught with complexity, and the potential for disagreement or misunderstanding is always high.

10. From a local standpoint, the elephant in the room is the state Department of Ecology's 2005 Stormwater Management Manual for Western Washington ("the Manual"), which has been adopted as a regulatory control by the City pursuant to BIMC 15.20.050.A, subject to a handful of amendments. A more recent 2012 Manual update also exists, but has not yet been adopted by the City. While the 2005 Manual is not regulatory, per se, its adoption by local jurisdictions is, as the saying goes, "an offer that cannot be refused." A local jurisdiction may choose to adopt an alternative stormwater technical manual, but if it does, it must submit such document to Ecology for review, specify how it differs from the DOE Manual and "*demonstrate how the alternative manual is substantively equivalent to Ecology's*" (Manual, Sec. 1.6.4, p. 1-13).

11. In addition to the DOE Manual, in BIMC 15.20.050.C the City has also made formal reference to a second external stormwater document: "*The 2009 Edition of the Low Impact Development (LID) Guidance Manual – A Practical Guide to LID Implementation in Kitsap County is hereby adopted by reference and is hereinafter referred to as the LID manual for use in meeting the relevant sections of the manual.*" This second document (the "LID Manual") was created under the auspices of the Kitsap Home Builders Foundation with the collaborative participation of a large number of other stakeholders in the greater stormwater management enterprise, including Ecology. Next to its cover page it prominently displays a June 2, 2009, letter from Bill Moore of Ecology indicating the Department's review of the Kitsap County LID Guidance Manual and defining the scope of such review:

Ecology did not review the document for equivalency, but based on this review, did find that it is consistent with and complements the guidance in the relevant sections of the *Stormwater Management Manual for Western Washington, 2005* (SMMWW)....

The Kitsap County LID Guidance Manual presents a great compilation of the various LID techniques, their application, and design and a great resource for developers and designer(s) to use.

12. No one disputes that the Rolling Sunrise plat proposes to create more than 10,000 square feet of new impervious surfaces, well in excess of the level that triggers review pursuant to all ten of the Minimum Requirements stated in the Manual. Under both Section 2.4.1 of the Manual and BIMC 15.20.060.C the full menu of Minimum Requirements are mandated whenever a project "*[c]reates or adds 5,000 square feet, or more, of new impervious surface area.*"

13. But the City and the Rolling Sunrise applicant both suggest that if the plat commits to implementing LID Manual best management practices (BMPs), this can operate to reduce the effective impervious area of the project below 5000 square feet and thus exempt the project from having to comply with Minimum Requirements 6 through 10. The City Attorney's memo asserts that "infiltration of 100% of roadway runoff is *possible* as are bioretention or rain gardens to mitigate stormwater runoff

from the home sites (emphasis added).” This language appears to be based on statements within the plat's March 24, 2014, preliminary engineering letter to the effect that runoff from each lot will be “kept on-site to the *maximum extent practical* (emphasis added).” In support of this approach, the applicant's engineers, Browne Wheeler, contend in a letter dated September 19, 2014, that the 2005 Manual “allows impervious areas managed by Low Impact Development (LID) practices to be removed from the impervious area used in threshold determination” and that the City “has adopted a policy that impervious areas conveyed to facilities that infiltrate 100% can be given the same credit for threshold determination.”

14. These assertions were countered by the Eberts' engineer, Norm Olson, whose core contention is that effecting compliance with the Manual necessitates an actual showing of the feasibility of infiltrating 100% of onsite stormwater before preliminary approval of the plat is conferred. The critical focus here is the Minimum Requirement no. 7 flow control standard as applied to the proposed northern tier of lots within Rolling Sunrise, which are uphill from lots with existing septic facilities located adjacent to their common boundary with the plat. Mr. Olson's memos identify resultant issues to be resolved that could result in a significant revision of the plat design if the applicant's undocumented assumptions prove to be untenable. Mr. Olson argues under these facts the Manual requires infiltration feasibility to be clearly demonstrated, not merely assumed as “possible.”

15. Mr. Olson's second memorandum also submits as an attachment a strongly worded email dated October 7, 2014, from Ed O'Brien at Ecology, who is identified as the Technical Lead for the 2005 Manual and listed as a participant in the LID Manual creation process. This email addresses the question of whether the Manual allows a demonstration of infiltration feasibility to simply be assumed:

It was not the intent of the 2005 West. Wash. Stormwater manual to use the infiltration exemption imbedded within M.R.#7 when making threshold determinations. To make a claim that it should be used, and then allow engineers to use whatever methods they want to make that claim is preposterous. It subverts the regulatory intent.

So, don't use the infiltration claim for the threshold determination. Once the project has triggered MR#7, then they have to use the approved engineering methods to demonstrate that they can remove certain surfaces from the modeling requirement...[O]ther LID BMPs, such as bioretention..., must still be entered into the model so that the model predicts their performance.

16. In terms of the City's review framework, the bottom line appears to be this: despite the adoptive reference in BIMC 15.20.050.C, the Kitsap County LID Guidance Manual does not in fact legally alter the requirements for compliance with the 2005 Ecology Manual. First, BIMC 15.20.050.C itself makes no claim to regulatory effect; it merely identifies the LID Manual as a resource. Second, the LID Manual is basically a cook book of potential mitigation strategies. The ongoing experimental nature of the enterprise is recognized (see, e.g., p. 30). While design guidance is offered, it is generalized and acknowledged to be incomplete. For example, regarding bioretention specifically, the LID Manual points out that “[a]dditional design requirements (including infiltration rate testing methods, infiltration rate correction factors, setbacks, and vertical separation from the bottom of the facility to the underlying water table) are presented in the SMMWW 2005.” (LID Manual, p. 137.)

17. But most fundamentally, as noted above the 2005 Manual sets forth rigorous requirements for the regulatory recognition of alternative technical manuals. Ecology review must determine that such

proposed alternative manuals are substantively equivalent to the 2005 Manual. The June 2, 2009, letter from Bill Moore of Ecology quoted above explicitly documents that the LID Manual was not reviewed for equivalency. Accordingly, a commitment to construction in accordance with the Kitsap LID Manual that is unsupported by the technical analysis specified by the DOE Manual cannot be deemed to constitute legally effective substitute compliance with the DOE Manual's Minimum Requirements.

18. Achieving 100% infiltration at the Rolling Sunrise site is probably essential to avoid unacceptable downstream impacts, and the record suggests that the ability of the present plat design to accomplish this may be problematic. The plat application will therefore need to demonstrate the feasibility of attaining compliance with the full menu of 2005 Manual Minimum Requirements prior to preliminary approval in order to meet the approval standards stated at RCW 58.17.110.

Appropriate Provisions

19. The deficiencies of the City's existing road system both north and south of the plat are well documented, and traffic from Rolling Sunrise will make a small additional contribution to these problems. No compelling case has been made for concentrating all traffic at one access and eliminating the other – although, predictably, Hyla area residents tout the undeniable virtues of the Sunrise route and Sunrise residents argue for the obvious superiority of the Hyla access. Area residents also generally prefer retaining the present bucolic one-lane road configuration with its inconveniences to any major two-lane upgrade alternative that may threaten their prized rural ambience. Plus the cost of constructing a major road upgrade far exceeds any burden that can fairly be placed on a single small project, and the City itself has no plans to make such an investment.

20. The Staff's view that the project's traffic impacts should be equitably diluted by spreading them both north and south seems to be the right choice. The City and applicant have come up with a menu of modest upgrades and maintenance actions that they are jointly willing to implement in the expectation that, while systemic problems will remain, the level of improvement will be sufficient to offset the modest increase in traffic impacts that plat development will entail. The essential plan is that both access routes will be brought up to minimum fire safety standards by providing a 12-foot width of driving surface and 13.5 feet of overhead clearance. The improvements along the Hyla route will be performed by the City as maintenance activities while Rolling Sunrise will be mainly responsible for the Sunrise upgrades, which will include two turnouts, some tree removal and reduced speed limits and warning signs in an area where the topography creates a sight distance limitation problem.

21. In the absence of traffic impacts that meet minimum thresholds for compensatory mitigation, the City's authority to require the correction of existing road deficiencies is primarily derived from its police power to regulate threats to public safety. Thus, in addition to impact-based mitigations, most municipalities have described under police power authority a minimum level of facilities necessary to support new development. These typically include at least requirements for water, sewage disposal, electrical power service and access to a minimally sufficient public road. (See, e.g., King County Code Chapter 21A.28.) Curiously, the City of Bainbridge Island appears to have enacted no minimum facility requirement that a development provide basic public road access, which means as a practical matter that review in the preliminary plat framework must rely on RCW 58.17.110.

22. While the Examiner is confident that the modest roster of safety-based upgrades developed by City staff can be imposed successfully under authority of RCW 58.17.110, the better approach is for the

applicant's verbal agreement to make these upgrades to be formalized within a written stipulation. This would both provide clarity as to the respective obligations of the City and the applicant and reduce the potential for future unproductive argument over such elusive legal concepts as appropriate provisions, regulatory nexus and proportionality.

ORDER

A. The Rolling Sunrise preliminary plat application is REMANDED to City staff for completion of the following additional review and documentation:

- (1). Documentation of the application's compliance with Minimum Requirements 1 through 10 of the state Department of Ecology's 2005 Stormwater Management Manual for Western Washington shall be provided. Particular attention should be paid to Minimum Requirement #7. In order to demonstrate the feasibility of the proposed infiltration onsite of 100% of stormwater runoff, site geotechnical conditions will need to be assessed and all post-development surfaces modeled. The plat site plan should be revised, as needed, to accurately depict all required stormwater facilities and their relationship to other plat and relevant offsite development. If 100% of stormwater cannot be infiltrated onsite, downstream flow paths and impacts will need to be described and assessed.
- (2). A limited scope Traffic Impact Assessment shall be performed focused on defining the sight distance requirements at the locations of the project's two proposed connections to the City's public road network, assessing whether such requirements will be met under existing conditions, and proposing mitigations to correct any identified deficiencies.
- (3). A written stipulation between the City and applicant shall be negotiated identifying the various improvements and maintenance activities as proposed within this proceeding for achieving a minimum of 12 feet in driving width and 13.5 feet of overhead clearance on both Sunrise Drive and Hyla Avenue; the responsibilities for the implementation of these measures; and an overall timeline containing applicable deadlines synchronized with the anticipated stages of plat development (including transport onsite of modular units).

B. The documents described above shall be made publicly available as they are completed, with copies provided to the Hearing Examiner's Office and to the Eberts' attorney. Upon issuance of the final required document City staff shall request that the Examiner reopen the public hearing; provided that, such hearing will not be scheduled to reopen before 30 days after the final required document has been issued. The Examiner may promulgate a written order in advance of the reopened hearing restricting testimony to certain specified issues.

ORDERED October 20, 2014.



Stafford L. Smith, Hearing Examiner
City of Bainbridge Island