24-2-00724-31
OR 48
Order
16963998

FILED

2024 JUN 27 PM 2:26

HEIDI PERCY
COUNTY CLERK
SNOHOMISH CO. WASH

1
2
3
4
5
6
7

SUPERIOR COURT OF THE STATE OF WASHINGTON
FOR AND IN THE COUNTY OF SNOHOMISH

8
9
10
11
12
13
14
15
16
17
18
19
20
21

DAVID TYLER **Petitioner/Plaintiff** **v.** **CITY OF MUKILTEO** **Respondent/Defendant** And JAKE DRAKE OF THE BLUELINE GROUP, LLC ON BEHALF OF SEA-PAC HOMES, LLC, AND SUBSEQUENTLY, ATWELL, applicant, SEATTLE PACIFIC HOMES INC. owner and taxpayer for the property, ERICH VOLKSTORF, SYLVIA KAWABATA, EMMI BRANT-ZAWADZKI, JON BOYCE, MARILYN STRAND, Additional Parties	**NO. 24-2-00724-31** **ORDER GRANTING APPEAL AND REMAND**

22
23
24
25

This is an appeal of the decision of a Mukilteo Hearing Examiner of January 5th, 2024. At that time, the city of Mukilteo Hearing Examiner issued two land use decisions, currently being appealed; a SEPA decision of non-significance (DNS), for the preliminary plat of Harbor

Grove, and the other approving the Harbor Grove preliminary plat. The court, having reviewed the records and files herein and having heard oral argument orders as follows:

The appellant appealing a LUPA decision has the burden of demonstrating that the Hearing Examiner erred in one of six LUPA standards. RCW 36.7(c).130(1).

The remedy for failure to follow any of the LUPA standards is remand to the Hearing Examiner.

The six LUPA standards are:

(a) The body or officer that made the land use decision engaged in unlawful procedure or failed to follow a prescribed process, unless the error was harmless;

(b) The land use decision is an erroneous interpretation of the law, after allowing for such deference as is due the construction of a law by a local jurisdiction with expertise;

(c) The land use decision is not supported by evidence that is substantial when viewed in light of the whole record before the court;

(d) The land use decision is a clearly erroneous application of the law to the facts;

(e) The land use decision is outside the authority or jurisdiction of the body or officer making the decision; or

(f) The land use decision violates the constitutional rights of the party seeking relief.

The Hearing Examiner erred in subsections (a) and (b) of the statute issuing the determination of non-significance by not following the procedural requirements of the State Environmental Protection Act (SEPA).

The Hearing Examiner erred by improperly applying the jurisdictional requirements of SEPA. In order to demonstrate a prima facie compliance with SEPA's procedural requirements, the Department had to present evidence that proved (a) that before it made its threshold determination, it conducted an environmental analysis of the proposed subdivision that was sufficient to enable it to prepare high-quality environmental documents; (b) that in fact it did prepare such environmental documents; (c) that it used such environmental documents in making its threshold determination; and (d) that such environmental documents accompanied its recommendation to the Hearing Examiner. The evidence demonstrates that the City did not comply. In order to comply with SEPA, the appellant must show that the City has failed to make its prima facie case and that the city has failed to comply with the minimum requirements of SEPA. This court finds that the error made by the Hearing Examiner was not harmless for the following reasons. *Wild Fish Conservancy v. Washington Department of Fish Wildlife, 198 Wn.2d. 846, 502 P.3d 359 (2022).*

When reviewing the SEPA action, the court is required to consider the public policy and environmental values of SEPA. The record must show that the environmental factors were considered in a manner sufficient to comply with the prima facie requirements. One of the major procedural requirement that was missing was a proper environmental impact statement (EIS). The EIS must meet the standard of *Moss v. City of Bellingham, 109 Wn. App. 6, 31 P.3d 703 (2001)* and WAC 197-11-650 which requires a "high quality document. The term "high-quality document" is not specifically defined. This court finds that a high-quality document requires a substantial report which is evidence-based and scientifically comports with environmental standards. The report must include consideration of specific mitigating factors as well. It must be the type of report that meets the recognized minimum standard for

environmental impact statements. The testimony of Mr. Galuska does not alone comply with the requirement, nor does the simple citing to documents. At testimony, Mr. Galuska admitted that he did not file a report because it was his custom and usage not to file a full report but rather to rely on an aggregate of reports and documents. SEPA requires the city identify adverse impacts in environmental documents that would be used in decision making. Here, those documents were missing. While harmless factual errors under SEPA will not result in remand, here a failure to substantially comply with the SEPA requirements by the city fails to meet the standard. In addition, not only is Mr. Galuska's testimony contradicted by substantial evidence in the record about the environmental impacts, this testimony is an admission of yet another failure to comply with SEPA's procedural requirements. WAC 197-11-158 requires that, in order for an agency to determine that no SEPA mitigation is required because all probable adverse environmental impacts have been mitigated by development regulations, the agency first must identify the proposal's specific adverse impacts, determine that those impacts also have been identified in the development regulations, and place the following language in the threshold determination: "The lead agency has determined that the requirements for environmental analysis, protection, and mitigation measures have been adequately addressed in the development regulations and comprehensive plan adopted under chapter 36.70A RCW, and in other applicable local, state, or federal laws or rules, as provided by RCW 43.21C.240 and WAC 197-11-158." The Department did none of these things, as its own DNS demonstrates on its face. This failure alone is sufficient to demonstrate the Department's failure to comply with SEPA's procedural requirements. As a result, the determination of non-significance is faulty and should be remanded to the Hearing Examiner for further proceedings.

Additional problems cited by the appellant include the following:

1. The petitioner alleges that the subdivision does not approve retaining walls within setback areas where they are prohibited. Setback areas must be 25 feet. Mukilteo Municipal Code (MMC) 15.16.140(C) does not specifically mention retaining walls. It does say that all structures not explicitly listed in MMC 17.08.20 must have a 25-foot setback. Retaining walls are structures. Per Black's Law Dictionary, a structure is defined as any construction or piece of work artificially built up or composed of parts joined together in a definite manner. In other words, any edifice or building of any kind is a structure. MMC 17.08 has adopted a similar definition in defining structure to mean a combination of materials constructed or erected on the ground or water or attached to something having a location on the ground or water." The walls must have a 25-foot setback. These walls did not have a 25-foot setback. Therefore, the Hearing Examiner improperly interpreted the code.

2. The Petitioner argued that the proposed subdivision violates the clearing and grading requirements of MMC Chapter 15.16 by using an average slope calculation. The court does not agree. There is no strict formula as to the calculation of the slope. Therefore, an average calculation is appropriate. The court finds the Hearing Examiner did not err on this issue.

3. The petitioner's argument that the subdivision's proposed stormwater pump system does not comply with the city's development standards is incorrect. The developmental standards section 3.4.3 requires that the emergency overflow provisions of the emergency stormflow provisions must direct water away from all structures without causing failure of those structures and that the impact of the system failure must be analyzed with regard to on-site and off-site impacts. The Hearing Examiner correctly determined that the stormwater system will in fact reduce the

amount of surface water and interflow from the site to abutting properties to the west by approximately 50%. The Hearing Examiner did not er in this respect.

4. The petitioner alleges that the conclusion that preliminary plat does not protect the public use and interest. The court finds that the Hearing Examiner did not err for the following reasons: first the Hearing Examiner expressly made the finding that the public use and interest will be served by the platting of the subdivision (the report of the proceedings on page 44). The Hearing Examiner's conclusions was supported by substantial evidence. The Hearing Examiner found at least one public benefit that supported the determination when he concluded that the stormwater system will eliminate stormwater flow to the east and not increase stormwater flow to the west. This was based on the written report of the applicant's hydrologist Scott Kinkad and Mr. Kinkad's testimony. Although the court finds that the Hearing Examiner misapplied the setback rule, the court agrees that the design of the wall was appropriate as well as the landscaping surrounding the walls.

For the above reasons, the petitioner's LUPA appeal is granted and this case is remanded back to the Hearing Examiner for further determinations specifically under this order.

DATED this 27 day of June, 2023.

RICHARD T. OKRENT
Snohomish County Superior Court Judge