EDMONDS CITY COUNCIL APPROVED MINUTES
May 21, 2012

The Edmonds City Council meeting was called to order at 6:00 p.m. by Mayor Pro Tem Peterson in the Council Chambers, 250 5th Avenue North, Edmonds. The meeting was opened with the flag salute.

ELECTED OFFICIALS PRESENT

Strom Peterson, Mayor Pro Tem
Frank Yamamoto, Councilmember
Joan Bloom, Councilmember
Michael Plunkett, Councilmember
Adrienne Fraley-Monillas, Councilmember
Diane Buckshnis, Councilmember

ELECTED OFFICIALS ABSENT

Dave Earling, Mayor
Lora Petso, Councilmember

STAFF PRESENT

Phil Williams, Public Works Director
Jerry Shuster, Stormwater Eng. Program Mgr.
Rob English, City Engineer
Jeanie McConnell, Engineering Program Mgr.
Kernen Lien, Associated Planner
Carol Morris, City Attorney (representing Council)
Jeff Taraday, City Attorney (representing staff)
Sandy Chase, City Clerk
Jana Spellman, Senior Executive Council Asst.
Jeannie Dines, Recorder

1. APPROVAL OF AGENDA

COUNCILMEMBER BUCKSHNIS MOVED, SECONDED BY COUNCILMEMBER FRALEY-MONILLAS, TO APPROVE THE AGENDA IN CONTENT AND ORDER. MOTION CARRIED UNANIMOUSLY.

2. APPROVAL OF CONSENT AGENDA ITEMS

COUNCILMEMBER FRALEY-MONILLAS MOVED, SECONDED BY COUNCILMEMBER YAMAMOTO, TO APPROVE THE CONSENT AGENDA. MOTION CARRIED UNANIMOUSLY. The agenda items approved are as follows:

A. ROLL CALL

3. CONTINUED FROM THE MAY 15, 2012 CITY COUNCIL MEETING:
CLOSED RECORD REVIEW - PROJECT DESCRIPTION: THE APPLICANT HAS APPLIED FOR A 27-LOT PRELIMINARY PLAT AND PLANNED RESIDENTIAL DEVELOPMENT (PRD) AT 23700 104TH AVE W, PARCEL NUMBER 27033600304800. THE CITY OF EDMONDS GRANTED PRELIMINARY APPROVAL OF THE 27-LOT PRELIMINARY PLAT AND PRD IN 2007. THE APPROVAL WAS APPEALED AND THE APPELLATE COURT REMANDED THE APPLICATIONS TO THE HEARING EXAMINER FOR FURTHER PROCEEDINGS ON THE DRAINAGE PLAN, PERIMETER BUFFER AND OPEN SPACE MATTERS. FOLLOWING A PUBLIC HEARING BEFORE THE HEARING EXAMINER ON FEBRUARY 9, 2012, THE HEARING EXAMINER GRANTED APPROVAL OF THE PRELIMINARY PLAT AND PRD. THE HEARING EXAMINER'S DECISION HAS BEEN APPEALED TO CITY COUNCIL FOR A CLOSED RECORD REVIEW. APPLICANT: BURNSTEAD CONSTRUCTION COMPANY, FILE NO.: P-2007-17 AND PRD-2007-18 / APPEAL NOS.: APL20120001 – APL20120004. APPELLANTS: LORA PETSO AND COLIN SOUTHCOTE-WANT (APL20120001); IRA SHELTON AND KATHIE LEDGER (APL20120002); CLIFF SANDERLIN AND HEATHER MARKS (APL20120003); DARLENE MILLER, RICHARD MILLER, CONSTANTINOS TAGIOS, AND SOPHIA TAGIOS (APL20120004)

Mayor Pro Tem Peterson asked whether any Councilmember had a conflict of interest or ex parte contact to disclose.

Councilmember Fraley-Monillas relayed she has seen email titles that she assumed were related to this project over the past year and therefore did not read them. She did not receive campaign donations from any of the parties. She received an email dated May 20, 2012 that was cc'd to the Council President regarding Ms. Petso and why she was allowed to stay in the room when other Councilmembers have been required to leave the room. Attorney Carol Morris responded when she described the Appearance of Fairness Doctrine at the last meeting and the purpose of disclosures, she stated if any Councilmembers recused themselves from participating in the hearing, they needed to leave the room. Last week Ms. Petso did not recuse herself on Appearance of Fairness Doctrine grounds; she recused herself because she was an appellant. She had to remain in the room to argue her case.

Mayor Pro Tem Peterson asked Councilmember Fraley-Monillas whether she could remain impartial. Councilmember Fraley-Monillas answered she could.

Councilmember Plunkett relayed he received the same email regarding Ms. Petso. He also received three phone calls from Roger Hertrich. Although he believed Mr. Hertrich would know he could not discuss the matter, he nevertheless did not return his calls.

Mayor Pro Tem Peterson asked Councilmember Plunkett whether he could remain impartial. Councilmember Plunkett answered he could.

Councilmembers Bloom and Yamamoto had no disclosures.

Councilmember Buckshnis relayed she received the same email. Dave Page also made a remark in passing, indicating she was very well prepared and that she asked good questions. She did not engage in a conversation with him. Mayor Pro Tem Peterson asked Councilmember Buckshnis whether she could remain impartial. Councilmember Buckshnis answered she could.

Mayor Pro Tem Peterson reported he received the same email. As Council President, he answered the email from purely a procedural point of view, relaying what Ms. Morris described with regard to Ms. Petso stepping down. He indicated that email would not influence his decision.

Mayor Pro Tem Peterson explained there are two attorneys representing the City in this matter. He asked City Attorney Jeff Taraday and Ms. Morris to describe their roles. Ms. Morris explained she is an attorney representing the Council tonight. She advises the Council if they have any questions about procedures and any substantive matters as well as advising the Council on the law related to this appeal. Mr. Taraday explained he is representing the administration tonight in a manner that is consistent with his general representation of the City of Edmonds. His client is the City of Edmonds; tonight he has been asked to play the role of advocate for staff.

Councilmember Bloom observed Mr. Taraday represents the municipal corporation, the City of Edmonds but in this case he was representing the staff and the administration. Mr. Taraday clarified he always represents the municipal corporation. Tonight he is being asked to particularly play the role of advocate for staff. Councilmember Bloom asked him to explain what the municipal corporation is and why his role tonight is different. Mr. Taraday explained the City of Edmonds is a corporate entity, a municipal corporation organized under Title 35A, the laws of the State of Washington. His client is the municipal corporation, not any particular person, Councilmember, or even the entire Council. Ms. Morris' client is also the municipal corporation, they have the same client. They are being asked to play different roles for that client. He has advised staff at certain points along the way when this matter came back to the City on remand. If he were then to give advice to the City Council tonight on the very same matter, a member of

the public could wonder whether the City Council was getting completely unbiased legal advice. In light of that concern, while not an Appearance of Fairness concern because lawyers do not vote, the City Council elected to have a second attorney participate, Ms. Morris, for the purpose of ensuring there was no question whether the legal advice was unbiased.

Ms. Morris observed there were some other questions raised such as the difference between a PRD and subdivision. She explained the City's PRD code describes what PRDs are and the subdivision code in Chapter 20.75 describes what subdivisions are. She read from legal treatises from another case she handled regarding a PRD: A planned residential development technique is used in many jurisdictions throughout the country with different names, planned unit development, planned residential development, planned development district or cluster subdivision. It is a departure from traditional zoning which allows creativity, flexibility and more efficient use of land. A planned unit development or planned residential development is a residential land subdivision of individually owned homes with neighborhood owned open areas and recreational facilities. It is a relatively new approach to a time-proven concept of residential land use. In the cluster technique for developing new residential areas, large open spaces and recreational areas are obtained by intensive use of land for housing in some sectors while preserving other sectors for open space for the benefit of residents. The traditional lot zoning was originally developed to preserve light and air where the land was developed into many small lots, each of which would probably be developed by a different owner or builder. The height, length and width of the envelope are defined for each lot by detailed rules which typically cover setback requirements, side and rear yard specifications, lot coverage or floor area ratio, open space and spacing of more than one building of a single lot. These restrictions do keep some open space and orderliness in the city but offer little chance for imaginative architecture and planning. A subdivision is a method for subdividing the property into lots for individual sale and development.

To the question regarding covenants, conditions and restrictions (CC&R) and whether the City gets involved, Ms. Morris explained typically the subdivision submits the draft CC&Rs for the City Attorney's review and approval as to form. That is done because some of the issues involved in the development of the subdivision will be covered in the CC&Rs. In this case, drainage is an issue that should be covered in the CC&Rs because the homeowners will be required to maintain the drainage facility. Although one would think homeowners would have notice of a private drainage facility with the recording of the subdivision and PRD, however, not a lot of people look at the title report or what is recorded on the plat after they purchase the property. CC&Rs are more frequently reviewed and provide notice to the HOA and Board of the responsibilities of the HOA. The code also requires deed restrictions and covenants for all sites using low impact development (LID) techniques to ensure that stormwater best management practices continue to function. The code also addresses enforcement, inspection and maintenance.

Councilmember Bloom relayed her understanding that private covenants related to tree heights were not enforceable by the City and asked how this was different. Ms. Morris explained prior to final plat approval of a subdivision and PRD, the draft CC&Rs are submitted and the City Attorney reviews them as to form. The City Attorney's review is to ensure all the open space areas and specific items such as maintenance of a drainage facility are addressed in the CC&Rs and whether the CC&Rs state the HOA has the responsibility to maintain, operate and pay for the cost of maintenance of the open space and drainage facility.

Councilmember Bloom asked who ensured the HOA kept the drains clean, etc. Ms. Morris answered the City's code. Section 18.30.090 describes the inspection standards, maintenance standards and 18.30.100 describes the enforcement procedures. Councilmember Bloom observed unlike a covenant related to the height of trees, maintenance of the drainage facility is enforceable by the City. Ms. Morris answered yes. It is included in the CC&Rs to ensure all the homeowners understand their responsibilities. The City will not maintain the facility for the HOA; it is the HOA's responsibility to maintain and pay for inspection and maintenance. Councilmember Bloom asked how failure to maintain the system was pursued. Ms.

Morris answered the City can do that. Councilmember Bloom asked if the City is required to enforce it. Ms. Morris answered the City is never required to enforce its code; cities typically enforce their codes on a complaint basis. She was uncertain how Public Works handled stormwater drainage facilities; they may have systems on a schedule due to the importance of keeping stormwater drainage facilities operable.

Stormwater Engineering Project Manager Jerry Shuster explained the City is required by its state permit to inspect large stormwater facilities such as this on an annual basis. Councilmember Bloom asked whether code enforcement action would be pursued if a maintenance issue was not being addressed or a problem arose. Mr. Shuster explained the HOA would be sent a letter informing them that the facility did not meet current maintenance standards. They would be provided a certain period of time to fix the problem; if they did not, code enforcement would commence.

Councilmember Fraley-Monillas asked how code enforcement would be done. Mr. Shuster explained the HOA would be given a period of time to fix the problem. The system would be re-inspected and if it has not been fixed there are various code enforcement means to make them comply such as fines. Ms. Morris read from the code, after a notice of violation goes out, if they do not comply, additional enforcement action including but not limited to criminal prosecution and the issuance of additional civil penalty and abatement. She summarized the City could abate the nuisance after a while.

Mayor Pro Tem Peterson asked the appellants, applicants and staff to introduce themselves:

Appellants: Kathie Ledger, Ira Shelton, Cliff Sanderlin, Heather Marks, Constantinos Tagios, Richard Miller, Lora Petso and Colin Southcote-Want.
Applicants: David Johnston, Livengood Fitzgerald and Alskog, representing Burnstead Construction; Tiffany Brown, Burnstead Construction; Rob Long, Blue Line Group
Staff: Kernen Lien, Associate Planner; Jerry Shuster, Stormwater Engineering Project Manager; Jeanie McConnell, Engineering Program Manager, and Jeff Taraday, City Attorney.

Councilmember Bloom recalled when the hearing was continued, oral argument regarding the open space had not been concluded. Mayor Pro Tem Peterson stated oral argument had been completed and the Council was asking questions. Mr. Johnston advised the applicant had not had an opportunity to provide oral argument regarding open space. Ms. Morris recalled the applicant had waived their opportunity to provide oral argument regarding open space. Ms. Brown advised they did that in order to finish that evening but the hearing was continued.

Applicant – Open Space

With regard to the boundary line issue one of the appellants raised, Mr. Johnston pointed out that is not an issue on remand or an issue the appellate court addressed in its decision. The hearing examiner concluded the same; on page 9 the hearing examiner stated potential encroachment issues are outside the jurisdiction of the hearing examiner. He summarized boundary line issues are a civil matter and are not part of the plat or an issue on remand.

Ms. Petso objected, stating there is not a great deal of information in the record regarding that issue and most of the argument will not be within the record. Mayor Pro Tem Peterson noted Ms. Petso's objection.

Ms. Brown explained it has been difficult to determine how to explain the open space issue on remand. As stated in the court of appeal's decision, the remand is in regard to the fact that if the PRD buffer remained, it double counted open space calculations for Tract A. She identified the area double counted in Tract A on the plat map. The court's decision stated if the perimeter buffer is around the perimeter buffer of the plat, it will intersect open space areas and identified the area double counted. Burnstead removed the PRD buffer. The only thing that changed on the plat is the shaded area on the plat map. That does not

give the appellant the ability to open arguments that have been addressed by the court of appeals which include the wildlife habitat and open space. Both those arguments were put to rest and denied. The only reason open space is before the Council on remand is the small area that was double counted.

With regard to the area on the west border, Ms. Brown stated she has a survey entered into the record conducted by a professional surveyor, the Parks Department has a survey entered into record, and the school district has a survey on record. She assured they were not encroaching on anything; their fence is on their property. The appellant has not provided a professional survey stating otherwise. If there are encroachment issues, that is not within the Council's jurisdiction.

Ms. Brown stated she did not know what else to do, how many other professionals they could hire. She has not seen anything entered into the record from a professional disputing what staff and her professionals have presented. She commented on the amount of tax dollars spent on this matter; over $100,000 since the court of appeals. There has not been any evidence entered by the appellants disputing their professional, licensed, expert documents, only half-truths about a fence and other statements to confuse the Council. She urged the Council at some point to put weight on staff's and the experts' testimony. She was uncertain what else she could do other than follow the City's code, commenting if the Council did not like the code, tonight was not the place to change it. They are following the code as interpreted by staff for the past six years. She summarized there is nothing in the record that proves their licensed professionals are incorrect.

Councilmember Buckshnis asked the dimensions of Tract A. Ms. Brown answered it is 15 feet by 68 feet. Councilmember Buckshnis observed fences were erected without surveys and there are now issues associated with property lines and there are stakes in other people's yards. Ms. Brown answered the stakes are on their property line. She has three licensed surveys that identify the property boundaries. She was not aware of any boundary line disputes. In other projects people have presented licensed surveys disputing a boundary line and attempts are made to resolve it. She has not received that from the appellants. Mr. Lien referred to page 89 of the record, one of the survey reports, and identified the location of the fence and the surveyed property boundary and places where the fence is on the Burnstead property. He explained RCW 58.17.255 requires that survey discrepancies such as physical appurtenance be disclosed.

Councilmember Bloom asked for an explanation of the purpose of each open space area, noting open space has a specific definition in the PRD regulations. Ms. Brown explained one of the concerns when they first began platting the property five years ago was the stand of trees in the back corner. They protected the trees by retaining them and the area is a usable open space with a trail and undisturbed nature. She identified the park area which will include a tot lot, benches, tables, etc. She identified open spaces at the entry, Tracts A and F, that could include benches.

Note: The next section of the minutes has been prepared verbatim.

Councilmember Bloom: Okay so a question about the, what, one of the things that I read in here and you know there was a lot that I was reading so I apologize for, it was on page 53, number 8, they reference Tract E which is that one in the corner, correct?

Tiffany Brown, Burnstead: Correct.

Councilmember Bloom: Okay and it says that it's a wildlife habitat and it's to have a two-rail, four-foot minimum fence that would not prevent access but is clearly marked that it's a wildlife habitat. What will that sign say, what, what does that mean that it's a wildlife habitat?

Ms. Brown: Usually the cities have, I might defer that to the City because usually that gets to the point of final plat approval and then you're marking things the way the City wants you to mark them. So to reserve it is one thing, I might defer to Kernen on exactly what their signage and what they require.

Planner Kernen Lien: I'm just going to refer to the condition that puts that fence on there. So this is the record at 397, this was condition of approval number 8 from the original hearing examiner's decision: the applicant shall delineate the border of proposed Lot 17 and 18 with Tract E, so those are the lots on both sides of that tract we're talking about, by installing a two-rail fence (minimum height four feet) along the property lines. The fence shall not prohibit access to Tract E. Signage denoting that this is open space intended to provide for wildlife habitat shall be posted conspicuously on the fence. So that's the guidance we had on this so at final that would be something we'd be looking for is what the sign's going to say, what's it going to look like and I think a lot of us have seen signs marking areas like this before.

Ms. Brown: I know in the, sorry, can I elaborate on the way some…

Councilmember Bloom: Oh absolutely.

Ms. Brown: Some of our signs in the past where we have trails or we've been in Indian tribal areas that have like a historical meaning to it, we can tailor the signs. We can do a lot with signs to make them attractive, make them you know for the benefit of the community and obviously marking the area that it is protected. I mean you can get pretty creative with signs today and how they're decorative and usually they're green and white and you know just kind of a marking of nature so, or historical monuments of similar comparison when it comes to putting a marker on something that gives it a meaning, so.

Councilmember Bloom: So it also says that a certified biologist has to be involved in the perimeter landscaping of that? That's also, that's on page 56, number 26, referencing Tract E. So why does a certified biologist have to be involved in the perimeter landscaping?

Ms. Brown: Well a, oh, usually it's to make sure that you're keeping the conditions of the natural habitat itself so you're not just coming in and planting non-native species that's going to interfere with what's already there.

Councilmember Bloom: Okay, and then like, then another question is that's supposed to be maintained by the homeowners association, correct?

Ms. Brown: Yes.

Councilmember Bloom: How are they going to maintain a wildlife preserve?

Ms. Brown: Well you got to make sure that it's not, if, kids aren't camping out in there, you got to make sure that's there's no trash somewhere. The same way the City maintains its own trail that it actually connects to. I mean this is just essentially a tip that comes onto our property and the City owns all, the City park owns all this property back here. So it's the same way they maintain theirs, it's just a matter of making sure the fences haven't collapsed, the signs haven't been vandalized, nobody's back there vandalizing anything. It's the same as what the City's doing and how the park is done.

Councilmember Bloom: Okay, so you know just by my read of the PRD, examples of usable open space include playgrounds, tot lots, garden space, passive recreational sites such as view platforms, viewing platforms, patios or outdoor cooking and dining areas.

Ms. Brown: So this would be your passive…

Councilmember Bloom: Well what I'm, required landscape buffers in critical areas except for trails which comply with the critical areas ordinance shall not be counted towards satisfaction of the useable open space requirement. Is the wildlife preserve not a critical area that would not count towards that? This is what I'm trying to understand. How can, how can a wildlife preserve be maintained by the homeowners association, yet you need a certified biologist to say what kind of landscaping around the perimeter. How can you count that as open space when it's actually a wildlife preserve that, you know it seems to me that open space is supposed to be meant to be useable at any time by anybody who lives in this development.

Ms. Brown: Right. And according to the court of appeals, yes, that is what they decided, that this is still considered open space and it is not part of the critical area protection.

Mr. Lien: Can I elaborate on that a little bit?

Councilmember Bloom: Yes.

Mr. Lien: So with regard to critical areas, this was dealt with extensively last time. There were some reconsideration requests that specifically dealt with whether or not critical areas were on the site. In regards to Tract E, I'm kind of reading from the record at 414 and 415, as for Tract E, as noted with Findings of Fact 26 and 27 infra, this area has been determined not to be a critical area and therefore is available for inclusion with the open space calculation. ECDC 23.90.010(A)(10) includes urban open space and land useful or essential for preserving connections between habitat as critical area for the City. The key word from this definition is the phrase useful or essential for preserving connections between habitats. As noted in the final decision, the BPA easement along the subject property's border provides essential linkage. The approximate 9,000 square feet protrusion from the BPA easement does not serve this purpose and therefore does not meet the definitional requirements. So it was determined that Tract E there itself was not a critical area. The BPA easement along the northern part of the boundary met the definition for a critical area but this tract here did not meet the definition of a critical area, therefore, it could be counted for the open space requirements.

Councilmember Bloom: So wildlife preserves are not critical areas?

Mr. Lien: This is the wooded preserve for their, this Tract E as determined last time did not meet our definition of a critical area.

Councilmember Bloom: So wildlife preserves are not critical areas? That's what you're telling me?

Mr. Lien: This tract…

Councilmember Bloom: It is a wildlife preserve, right?

Mr. Lien: This Tract E is not a critical area per the City of Edmonds definition for critical areas as supported by the record last time.

Councilmember Bloom: Is it supported by the Critical Areas Ordinance?

Mr. Lien: That is correct.

Councilmember Bloom: So the Critical Areas Ordinance does not include wildlife preserves as critical areas?

Mr. Lien: This Tract E, no, it does not meet the City of Edmonds definition for a critical area.

Councilmember Bloom: So it's not a wildlife preserve?

Mr. Lien: So our definition for…

Councilmember Bloom: See this sounds like a catch 22 to me, I'm not quite sure.

Mr. Lien: So we have a definition for a Fish and Wildlife, what's that?

City Attorney Jeff Taraday: I think Kernen is trying to make a distinction between an issue that's on remand and an issue that was decided last time around. What I believe he's saying is that this exact issue was decided by the hearing examiner last time to be not a critical area and that that issue was not remanded to the City Council. So that's what I'm…

Note: This concludes the section of the minutes that were prepared verbatim.

Ms. Petso entered an objection that the court of appeals decided this, stating the court of appeals did not. Mr. Johnston stated this is not an objection, it is testimony and argument by Ms. Petso about what the court of appeals did or did not do. Mayor Pro Tem Peterson noted Ms. Petso's objection.

Mr. Taraday continued, the administration's position of the interpretation of the court of appeals decision and the scope of the remand is the open space issue was remanded due to the conflict between the perimeter buffer and the open space requirement, it was not remanded to re-analyze things the court did not request be re-analyzed. The court did not expressly ask the City to analyze whether the tract in question was/was not a critical area. That was addressed by the hearing examiner in 2007 and the court of appeals did not ask the City to analyze that again.

Councilmember Bloom asked Ms. Morris whether she read that the City's PRD regulations supports this as open space when it is a wildlife preserve. Ms. Morris agreed with Mr. Taraday that the court of appeals did not leave that question open to the Council. The court of appeals decision dealt with the perimeter buffer as it related to open space, not this particular tract.

Councilmember Bloom noted the PRD addresses open space in general, and asked whether the City Council was to follow the PRD regulations. Ms. Morris explained this is a very complicated record. There has been a hearing examiner decision that was on appeal, it went to the court of appeals, the court of appeals remanded three things, it returned to the hearing examiner who made her decision and that decision was appealed to the City Council. The appeal seeks to broaden the court of appeals decision. Her advice was that the Council limit their review to the issues that have been identified by the court of appeals. Although the court of appeals identified open space as one of the issues, the open space issue specifically identified by the court of appeals was not and whether or not this tract was a critical area. The court of appeals asked that the perimeter buffer and double counting issue be addressed. Mr. Taraday responded that was consistent with the administration's interpretation of the court of appeals' decision.

Ms. Morris referred to the court of appeals decision on page 714 of the record, advising the only thing addressed was Tract A which was designated as a landscape buffer and that it could not be double counted as part of the minimum open space requirement. She asked whether anyone could identify where the court of appeals said it could be opened to Tract E. The only place in the court of appeals decision that deals with open space is pages 714-718 which all relate to the perimeter buffer. Mr. Southcote-Want referred to page 81, where it states "We note with respect to this concern that it will still be Burnstead's burden on remand to demonstrate compliance with all applicable law." Ms. Morris observed it was Mr. Southcote-Want's opinion that this sentence at the end of the decision means it is opened up beyond the scope of the decision. She quoted from the court of appeals decision on the same page, "Those

proceedings should be limited to addressing the issues concerning the drainage plan, the perimeter buffer, and open space that we discuss in this opinion."

Mr. Southcote-Want stated Burnstead's burden on remand is to demonstrate compliance with all applicable law. Ms. Morris' advice was this particular tract is outside the Council's scope of review on appeal. Mr. Taraday quoted from the court of appeals decision regarding errors found in the previous hearing examiner's decision, thus the hearing examiner's determination that Burnstead double-counted over 1,000 square feet of Tract A as open space and perimeter buffer was erroneous. He emphasized that was the error that the court of appeals identified and sent back on remand. Mr. Johnston advised that error was completely addressed by removal of the perimeter buffer.

Councilmember Plunkett observed the only open space issue is related to Tract A. Ms. Brown agreed. Mr. Lien explained the perimeter buffer used to be on the west and south sides of the development. He identified where the perimeter buffer overlaid Tract A, the double counting that occurred. Councilmember Plunkett observed the appellant had two points with regard to the open space, 1) safety and 2) usable space. He asked about the appellant's assertion that Tract A was neither usable nor safe. Ms. Brown answered there is curb, gutter and sidewalk around the entire area; it is safe based on the City's code. Usable open space can also be passive; it does not mean a slide would be installed in Tract A out into the right-of-way. Passive use can also be landscaping and places to enjoy without a barbeque or slide.

Councilmember Plunkett asked if curb, gutter and sidewalk meant it was safe. Ms. McConnell answered curb, gutter and sidewalk provided a buffer between what could be a pedestrian area and vehicles in the travel lane. Councilmember Plunkett observed thousands of other lots have curb, gutter and sidewalk and could be referred to as safe. He asked if there was anything in the code that required more safety at an entrance to a development. Mr. Shelton pointed out the entrance to the PRD is directly adjacent to the entrance to the park. Mr. Taraday responded there is nothing in the vested version of 20.35.050(D) about open space being safe or unsafe; it only addresses useable open space, size limitations and examples.

Councilmember Plunkett recalled in reading the code, he saw the word safety. He did not see it in relation to open space. He asked if the appellant could identify where the word safety was in the code. Mr. Lien advised an electronic search for "safe" within the PRD code found it was mentioned three times in 20.35, 1) in 20.35.030(1)(a), building setbacks, an applicant shall comply with the Uniform Building Code separation requirements for fire safety, 2) in 20.35.030(1)(e), street and utility standards, street standards may be established by City Engineer and altered utility standards established by the Public Works Director so long as such alternatives provide the same or greater utility to the public and safety and long term maintenance costs, and 3) 20.35.040(A)(2), providing safe and efficient site access, on site circulation and off street parking.

Councilmember Plunkett asked if safe and efficient site access was applicable to open space. Mr. Taraday reiterated staff's position is that does not relate directly to a remand item. Access is not one of the items the court of appeals asked be considered on remand. Councilmember Plunkett summarized safe was not within the Council's purview. Mr. Taraday referred to the language in 20.35.040(A)(2), advising staff's position is that is outside the scope of the remand. Mr. Southcote-Want again referred to the language that it was Burnstead's burden on remand to demonstrate compliance with all applicable laws; this would be one of the applicable laws. Councilmember Plunkett observed that would be if the Council accepted his supposition which the attorney has suggested otherwise.

Mr. Johnston advised everyone has concern with safety, particularly Burnstead. They met the code provisions with respect to safety. There is an assumption that Tract A is not safe but there is nothing in the record with regard to safety. Mr. Southcote-Want advised there is testimony related to safety issues at the entrance to the PRD.

Councilmember Plunkett agreed the appellants have raised safety issues in the record. Mr. Johnston responded that the appellants saying it is not safe does not mean it is true. Councilmember Plunkett advised it is in the record and therefore something for the Council to consider. Mr. Johnston advised it is something to consider only if the appellants demonstrate via something other than a conclusionary statement that it is not safe versus the applicant showing that they have met the code provisions that the City has for this plat.

Councilmember Buckshnis recalled Ms. Petso stated Tract A was not safe or usable. She asked if the applicant still met the 10% requirement if they took the 15 foot by 68 foot open space out of the perimeter buffer. Ms. Brown answered yes they do.

Councilmember Bloom read from the open space and recreation section of the PRD regulations that usable open space and recreation facilities shall be provided and effectively integrated into the overall development of a PRD and surrounding uses consistent with…usable open space means common space developed and professionally maintained at the cost of the development. Examples of usable open space include playgrounds, tot lots, garden space, passive recreational sites, viewing platforms, patios, or outdoor cooking and dining areas. She questioned how the entrance to the development would be used recreationally in a manner that fit the definition. Ms. Brown answered it would be classified as garden space. Councilmember Bloom asked if garden space meant a community garden. Ms. Brown responded the City's code stated garden space; it was not necessarily a space where fruits and vegetables were grown. It could be landscaping, flowers, etc. Councilmember Bloom pointed out the code states garden space; that is not landscaping. Ms. Brown responded garden space is often landscaping to keep the area attractive and inviting. It is still classified as a usable open space, it is passive.

Councilmember Bloom asked whether Mr. Taraday's or Ms. Morris' interpretation was that garden space meant landscaping features, signs and entrance way. To her, open space was a place where people could hang out. Mr. Taraday responded the code provides several examples of ways to satisfy the open space requirement. The size of Tract A certainly allows for a garden, viewing platform, etc. He acknowledged the residents may not want to play soccer there but from a code interpretation standpoint, there is sufficient space for a viewing platform or a garden. Mr. Lien explained the hearing examiner addressed this question last time. He referred to page 414 which states the applicant submitted a conceptual landscape plan that denotes that both Tracts A and F will be landscaped with lawn, shrubs and trees, essentially creating a garden space in satisfaction with the PRD requirements.

Councilmember Fraley-Monillas commented she was okay with the garden space. She asked the appellants what they believed would be unsafe about a garden space. Mr. Sanderlin answered the appellants were concerned about the safety of the PRD as a whole. One of the things a PRD is not supposed to do is degrade a neighborhood; it is supposed to be an improvement to the neighborhood. The 2012 remand staff report Chapter 8, b2, efficient and safe circulation, a 50-foot right-of-way terminating in a cul-de-sac would serve the new homes and meet public safety requirements without significantly affecting traffic levels or patterns in the neighborhood. He asserted this was untrue; the park did not exist when the PRD was conditionally approved. Even before, there were safety issues with children crossing the intersection to go to Klahaya for swim meets. With the entrance to the PRD planned directly adjacent to the park entrance, there will be small children crossing the street on a blind corner where cars are parked for swim meets. The park has been incredibly successful with a lot of children running in all directions. He summarized the PRD does not meet the requirements for efficient and safe circulation.

Councilmember Fraley-Monillas asked if the City planned to place a crosswalk at that location. Ms. McConnell answered there is typically a crosswalk at an intersection where there are curb ramps on both sides. Councilmember Fraley-Monillas asked if the City intended to place a crosswalk there. Ms. McConnell answered it will definitely be looked at by the traffic engineer when the civil construction drawings are reviewed. The applicant will be required to construct a crosswalk if the civil engineer

determines it is appropriate. The crosswalk will then be turned over to the City when the road is dedicated.

Mr. Sanderlin continued noting his concerns with safety, explaining cars park along the street during the summer and particularly during swim meets. There is also a person living directly across the street in the middle of the curve who is confined to a wheelchair whose safety will be jeopardized. They also are concerned with fire truck access due to the narrowness of the opening. They are very concerned with fire as their residence is adjacent to the forested area.

Councilmember Yamamoto commented the applicant has obviously met all the requirements for open space. Mr. Lien advised it was staff's position that the applicant has met the open space requirements in the code.

Parties of Record Testimony

Ira Shelton, Edmonds, relayed his and his wife's concerns:

1. Burnstead will remove the fence that currently borders their land.
2. Burnstead will destroy 30 feet of their sprinkler system for the gain of 4 inches of their property. It will make their home less safe and leave them open to vandalism and possibly theft. Burnstead has never made any overtures to them or other persons in the neighborhood to find a different solution to the boundary issues. They never discussed any other outcome other than seizing the land they think they own. That does not define them as good neighbors.
3. They live in a closed basin; this is not a typical topographical area. There is no egress of water from the closed basin; water stays within the boundaries and either percolates downward or remains at the surface via ponding. Their goal is a reasonable assumption of responsibility on the part of the builder to produce a robust system for dealing with the water. They have to trust that that will be the outcome without any proof.
4. Based on the evidence and their experience with Burnstead, they feel the PRD should be rewritten so that it is an improvement to the neighborhood.
5. The plat map does not show the entrance to Hickman Park on 237th. Children crossing the street at the 90 degree turn will be in danger.

Kathie Ledger, Edmonds, commented they are very concerned about the safety of the site. When the original plan was put in place, the park did not exist, it was only proposed. The park design does not provide adequate parking resulting in cars parked on both side of the 237th. The soccer fields for small children are located on the southwest side of the park; children run across the street from between parked cars. The children's safety will be further jeopardized by an additional 250 vehicle trips/day. They are also concerned with fire access when cars are parked on both sides of the road. In addition, the cul-de-sac is much longer than is normally allowed in Edmonds. She urged the Council to consider what is new in this situation such as parking on both sides on 237th. She wanted assurance that the drainage plan would work. She questioned where dry wells could be located on each lot. She referred to staff's indication that ponding in Hickman Park could be rectified via aerating the soil; if the PRD is allowed to have 50% coverage she did not believe aeration would be an effective solution. She urged the Council to protect the neighborhood and to request a plan that protects the safety of everyone involved, especially the children.

Al Rutledge, Edmonds, explained he attended all the district court meetings. He commented on the importance of a survey to identify property lines. With regard to open space, he recommended following the City's code with regard to usability. He suggested revising the code to address the issues that arose in this project.

Finis Tupper, Edmonds, suggested it was time for the applicant not to use fuzzy logic and for staff to correctly interpret the code and the appeals court decision. Both the Superior Court and appeals court

ruled that property drainage was a major issue for this development in light of the serious existing drainage problems and additional drainage burden on surrounding properties (pages 68 and 605). The appeals court stated in the remand that selecting a proper infiltration rate and safety for designing a properly sized vault were essential (page 68). The hearing examiner's finding based on staff testimony, January 30, 2012 letter from Jeanie McConnell (page 184) and Jerry Shuster's testimony (hearing examiner order of reconsideration, page 33) was that the stormwater plan only had to be feasible at the preliminary stage and compliance will be required at later civil review. The hearing examiner, relying only on the applicant's expert testimony, chose to ignore citizens' testimony and the SW Edmonds Drainage Plan. The SW Edmonds Drainage Plan is what the appeals court refers to in their remand as well as the Superior Court in their memorandum of law (page 605). Both courts relied on the plan as substantial evidence of the current drainage problems, finding only potential stormwater impacts. The Blue Line report shows the system connects to the Woodway Meadows stormwater system at 234th, flowing west onto 107th and to the end of the cul-de-sac. The hearing examiner's decision is clearly erroneous because she ignored the directive of the appeals court by not deciding a proper and essential infiltration rate and proper sizing for the stormwater vault for the preliminary stormwater drainage plan. RCW 58.17.107 uses the word adequate with regard to drainage. He recommended the Council deny the PRD.

Rick Miller, Edmonds, identified his home on the west side of the development where he has resided for 30 years. His concerns include drainage, the boundary line and safety. With regard to drainage, he explained they have puddling in their yard 4-5 inches deep 10-12 feet in diameter when it rains. There is clay under everything; he did not trust the test pits that had been dug to test the soils, anticipating the situation was much worse than Burnstead indicates. A ditch/swale that flows in a northwest direction has worked well and is often filled. With regard to the fence, their landscaping is very mature including 15 trees and 4 large bushes that likely will be destroyed if the fence is moved the 18 inches they have heard will be required. He commented on the number of trees on the 11 adjacent properties that will be impacted if the fence is moved and the impact on the natural state of the PRD and the existing neighborhood. With regard to safety, cars parked on both sides leaves space for only about1½ vehicle lanes; he was concerned there would be insufficient space for a fire engine or aid unit to pass. He recommended the Council not approve the PRD as current structured as it would have a significant impact on the surrounding community and would not create a good situation for the people buying the new homes in the PRD.

Lora Petso, Edmonds, encouraged the Council to make a ruling regarding usable open space, pointing out although Mr. Lien read the hearing examiner's decision, it has been appealed. Under the City's code open space must be usable and the Council decides whether it is usable. If open space is too dangerous or fully occupied by a monument sign and landscaping, it is not usable. The homes not fitting on the lots is a similar situation. She did not think the intent of the PRD ordinance was to allow a developer to draw something that did not fit on the lot, get ADB approval and switch to something else. It is the Council's decision to determine what the PRD ordinance means. The PRD ordinances states scale, not cartoon. She agreed with Mr. Tupper that the critical issue was drainage and the standard of review which is not a neat drawing or feasible, conservative, or imaginary. The standard of review varies depending on the statute: SEPA says no significant adverse environmental impacts, the state subdivision ordinance states adequate, the City's ordinance says no offsite impacts to drainage. The court of appeals specifically found in this case that setting an adequate infiltration rate is essential; evidence in the record states the correct infiltration rate has not been set. The argument has been that that will be done later. Both the Superior Court and the court of appeals rejected the argument that it could be done later. To the applicant's argument that this is all they usually do, she stated a development is not usually built in an area that floods and has no outlet. She noted the swale that began as a backhoed ditch has become a bioswale over the years which nowadays is the preferred form of drainage.

Colin Southcote-Want, Edmonds, referred to WAC 197.11.340(3)(a) regarding the determination of non-significance (DNS) made 5-6 years ago, states the lead agency shall withdraw the DNS if significant new information indicating the proposal's probable significant adverse impact. He suggested the City withdraw the DNS. He cited the following:

- Page 53, the City's conditions on the application, #1 is the applicant shall demonstrate compliance with ECDC 20.35, requirements for a PRD.
- ECDC 20.35.040(A), cited on page 522, states the proposed PRD shall be compatible with surrounding properties in the following respects: 2) provide safe and efficient site access. He summarized the requirement for a PRD is a safe access which does not exist in the proposed development. Safety issues, particularly with the park and children cross the road, was not considered by the hearing examiner in 2007 or 2012.
- Page 956, verbatim transcript of the first hearing examiner review, the hearing examiner states we are looking at the development impacts of this proposal, not what the City may do with the park. He concluded the hearing did not consider safety issues.
- Page 8, Hearing Examiner Finding Conclusions and Decision, states this decision did not consider the issues of critical areas, the length of the proposed road, the potential encroachments, traffic or parking issues, or the undergrounding of electrical wires. He concluded the traffic issues related to safety had not been considered and therefore do not meet the requirements of the PRD.

Mr. Southcote-Want explained this is new information, not included in the City's SEPA statement. The SEPA statement needs to be changed and the DNS withdrawn.

Constantinos Tagios, Edmonds, explained they have lived in their residence for 32 years and have the same problems his neighbors have and they will never end unless something is done with the new development. He referred to page 953, a statement from Burnstead's expert, not to worry, we're not proposing really to raise the site except for a little bit along the western boundary where there is an existing storm drainage type swale. He referred to page 1028, the SEPA checklist, that claims there will be 66,000 feet of impervious surface; in fact 27 lots at 3,000 square feet per lot is 81,000 square feet. With the road, impervious surface will be over 100,000 square feet. He requested the Council carefully examine the record and make a decision for the little guy.

Heather Marks, Edmonds, commented some parts of this hearing reminded her of the "Wizard of Oz," the scene when they meet the wizard and he says don't pay any attention to the man behind the curtain. When staff gives the Council their interpretation of the code, they are saying don't pay any attention to those people over there with all the codes they are reciting, pay attention to us instead. Staff is only reciting the portions of the code that support their viewpoint. She was impressed with the questions the Council has asked. She referred to Ms. Brown's comment that the HOA would care for the open space the same as the City is caring for the trail in the park. She described the City's maintenance of the trail, pointing out the steep area has been stripped of salal and tree trunks, leaving little to prevent rainwater from washing down the slope. She hoped the HOA would take better care of the land than the City does of their trail. She referred to the trees on Tract E, advising that 15 of the 51 trees will be cut down.

Cliff Sanderlin, Edmonds, commented most of the Councilmembers were not in office when this began in 2007; there is a lot of information to assimilate. The City has made it very difficult for ordinary citizens to have a voice in shaping their community but may be evolving to a point where it is governed by its ordinances and is not a servant to the housing construction industry. In the rebuttal of their appeals, Burnstead Construction has said in essence they held the required hearings so we can check off that box, let's go on to the next box. They have been told repeatedly that the critical area for wildlife corridor and habitat is an issue that was heard and checked off long ago. Never mind that the pileated woodpecker and banded pigeon are listed as species of concern. They were told by the builder and staff that the planning services director can modify or ignore the critical areas ordinance at his/her discretion. He asked why the City has an ordinance for critical areas if staff can summarily ignore it if it does not meet the needs of the

particular builder. He asked why citizens bear the burden of proving the PRD is a bad idea; the builder should have the burden of proving their plan will work which they have not done. Aided and abetted by the building services department, builders are allowed to barge into the community, disregard city and state laws, ram through proposals, keep citizens from speaking and ignore public input, particularly if it does not fit their plans. He urged the Council to reject this PRD.

Roger Hertrich, Edmonds, pointed out this area is a closed depression, a bowl that does not drain. He referred to the court of appeals record on page 64 that states the court (Superior Court) entered Finding of Fact and Conclusions of Law and Decision on October 26, 2009. The decision reversed the City's approval of the MDNS preliminary plat approval and PRD approval. The hearing examiner erred in stating the SEPA was still good. He referred to page 12 where the hearing examiner refers to the Superior Court decision. He pointed out a SEPA was the first step in a development; if that SEPA process has been thrown out, the PRD and subdivision process are invalid. Drainage is a major item in SEPA; the court of appeals stated that was a very important issue. In his opinion it has not been proven that this area will accept the drainage from 27 additional homes. The City's code suggests conditions cannot be worsened by a PRD.

Eric Thuesen, Edmonds, commented the process of getting a preliminary plat approved is a detailed process with rules of law that apply to give all parties due process rights. During the past five years, everyone has had an opportunity to review the record and determine whether it is correct; the appellants have had an opportunity to review the information, present their own experts and determine whether the drainage requirements are satisfied. In his opinion Burnstead has satisfied the three remands and issues other than the three remand items are not open for discussion. Drainage is the biggest of the three remand issues. The appellants argue there is no evidence the tests support the drainage system's size; that is clearly not true, there have been geotech reports and preliminary engineering designs that support it. The appellants have not produced any information from their own experts refuting Burnstead's engineers and what the City determined is proper with regard to perk rates. To the statement that the drainage system does not meet the City's or Washington State codes, again that is untrue. He recalled at the first hearing examiner, Mr. Echelbarger who developed the area where most of the appellants live stated it was formerly a gravel pit. Soils in a gravel pit include sand and gravelly rock which was confirmed by Burnstead's geotech engineer. Perk rates were tested, originally 22 inches/hour and the applicant's design was 10 inches/hour. When it was remanded, the applicant redesigned it to 2.3 inches/hour. Engineering design standards require a 100 year storm design; the applicant revised his design to a 200 year storm. The applicant designed an outflow pipe to the street; the City's engineer testified this is a common technique to protect properties and the infiltration system from damage. To the comment the vault is not maintainable and does not meet OSHA standards, he pointed the vault was designed with an access that is typically cleaned by a vactor truck. A HOA will be created and maintenance requirements recorded on the plat; the homeowners are responsible for maintenance of the plat, providing legal resource for adjacent homeowners if a problem arises. The City has strict standards for correction of storm drainage maintenance issues. He expressed his support for the PRD, finding Burnstead has met the test.

Mayor Pro Tem Peterson declared a brief recess.

Mayor Pro Tem Peterson asked if there were any specific objections from either party to new information that was brought to the hearing.

Mr. Johnston explained the applicant submitted a pleading in response to the appellant's argument. That pleading notes various areas in the appellant's argument where they fail to cite to the record, typically because there was nothing in the record to cite. He asked to preserve all those objections and advised no new objections are necessary.

Ms. Petso asked to preserve all objections, stating there was a great deal that came out in this testimony that was probably not in the record. Specifically she objected to the description of the Superior Court's and Court of Appeals' handling of Tract E and the argument last week by the drainage person that water would be retained on site as there is no testimony regarding that in the record.

Ms. Morris referred to page 2 of the Burnstead response to appeals, where they request that the Sanderlin and Marks appeals be dismissed as untimely. The untimeliness of the appeals has been addressed by Sanderlin and Marks; they were given a deadline by Mr. Lien and in an email from to Darlene Miller he stated the appeal must be filed within 14 days of decision. The date the decision is mailed is the date of issuance which was March 20, 2012; therefore the appeal deadline is April 3 which is when they filed the appeal. Ms. Morris recommended not dismissing the appeals because Mr. Lien's email stated that was the deadline for filing an appeal. Further, it would be difficult to separate out the Sanderlin and Marks appeal issues from the other appeal issues.

Mr. Johnston commented there is nothing in the code that provides for that interpretation. Issuance of the decision is the date the decision was made. The code allows 14 days from issuance of the decision which was April 2; therefore it is a late filing. Ms. Morris recommended not allowing any argument/testimony regarding this point. The applicant and the appellants have had adequate opportunity to brief the issue. She recommended not dismissing the appeal because of the posture of this case where it has gone from the appeal of the hearing examiner, to Superior Court to the Court of Appeals, back to the hearing examiner and another appeal to the Council. If the Council allows the appeals to be dismissed as untimely and there is an appeal that is sustained by the court, it would come back to the Council again, requiring it be addressed a second time. Because of the difficulty of separating the appeal issues, it makes no sense to dismiss the Sanderlin and Marks appeal as untimely.

COUNCILMEMBER BUCKSHNIS MOVED, SECONDED BY COUNCILMEMBER BLOOM, NOT TO DISMISS THE SANDERLIN AND MARKS APPEAL DUE TO TIMELINESS. MOTION CARRIED UNANIMOUSLY.

Ms. Morris relayed the applicant also addressed in their brief that the appellants failed to comply with the requirements for closed record appeal. She again recommended not dismissing the appeal for their failure to meet the requirements because if the appeals are dismissed, on an appeal a judge could find the Council was incorrect. At this point enough information and citations to the record have been received for the Council to make its decisions.

COUNCILMEMBER FRALEY-MONILLAS MOVED, SECONDED BY COUNCILMEMBER BUCKSHNIS, NOT TO DISMISS ANY OF THE APPEALS BASED ON ALLEGED FAILURE TO COMPLY WITH THE REQUIREMENTS FOR CLOSED RECORD APPEALS. MOTION CARRIED UNANIMOUSLY.

Mayor Pro Tem Peterson closed oral argument. He suggested the Council deliberate on each of the remand issues separately.

Drainage

Councilmember Buckshnis recognized drainage is a concern to everyone. She pointed out dry wells for the homes were discussed but they are not a requirement. She asked whether they could make a requirement. Ms. Morris answered yes. Ms. McConnell answered it is possible that dry wells will not work on all lots and the condition should account for that. Councilmember Buckshnis asked why dry wells may not work on all the lots. Mr. Shuster explained Burnstead included an infiltration trench in their preliminary drainage plan. An infiltration trench takes runoff off roofs first to a catch basin, a small underground vault that collects the solids. The water then overflows into a pipe with holes in the bottom surrounded by rocks that provide storage capacity and holds the water until it can infiltrate into the

ground. Councilmember Buckshnis asked whether dry wells also have infiltration. Mr. Shuster explained a dry well is a round vault that the water goes directly into and into the ground. Councilmember Buckshnis asked if that was different than an infiltration trench. Mr. Shuster answered the principle was the same in that the device is designed to infiltrate surface water into the ground.

Councilmember Yamamoto asked whether a two year performance bond was common or was that just what the applicant offered. Ms. McConnell explained when the City approves civil construction drawings, they also approve an engineer's cost estimate that states how much it will cost to construct the improvements. A performance bond must be posted as surety that all those improvements will be constructed. With a development of this size, there is usually two years to construct the development. The performance bond is held for two years. Once the improvements have been completed and accepted by the City, the City would require a maintenance bond, typically 15% of the original performance bond, which is held in place for two years after the release of the initial performance bond. The bond is a guarantee that the improvements continue to function as designed. The City performs an inspection at the end of the two year period prior to release of the maintenance bond. If any issues are found at the time of inspection, the owner or applicant must address the concerns before funds are released. The two year performance bond transitions to a two year maintenance bond after approval of all elements of the development.

Councilmember Plunkett observed the applicant's position is all water will be contained on site. Mr. Long answered yes, the overall infiltration system for the entire project was designed to collect and infiltrate the 100 year design storm completely. Councilmember Plunkett asked if a 100 year storm was above and beyond what the code requires. Mr. Long answered the code requires certain criteria for a 2, 10 and 100-year design storms. It does not specifically require infiltration and zero release for the 2, 10 and 100-year design storm. The requirement is to match the existing pre-development runoff rates from the site. Burnstead is not proposing any release to match the current runoff rate; Burnstead is proposing to contain and infiltrate the 100 year design storm. Mr. Shuster agreed.

Mayor Pro Tem Peterson asked whether in its undeveloped form the site retains 100% of the runoff. Mr. Shuster answered no.

Councilmember Fraley-Monillas asked whether only the water within the development's borders will infiltrated and how much of that water could be expected on the other side of the property line. Mr. Long answered the system does not just include the Burnstead site; it also includes an upstream basin that flows onto the Burnstead site. Mr. Lien referred to page 115 and identified the offsite tributary that flows onto the site. Mr. Long explained the preliminary drainage report estimated the offsite area at 3.35 acres. The site plus flows from the offsite area will be fully contained and release zero flow as designed.

Councilmember Bloom commented she has serious concerns about the drainage issue. In reviewing the documents, it has been brought up many times, remanded to the hearing examiner as well as a flood 10-12 years ago where 107th Place was underwater with water over the road, in yards and under houses. She referred to impervious surface, explaining the PRD defines impervious surface differently than staff referenced in the code. The change to the definition of impervious surface was in regard to constructed buildings, not including roads, driveways, etc., increasing the amount of impervious surface. The PRD language states minimize impervious surfaces and defines impervious surface in a way that includes gravel driveways, etc. not only structures. She asked whether staff could turn to other codes to define impervious surface differently that it is defined in the PRD regulations when it had been remanded to the hearing examiner to consider drainage. Ms. Morris referred to the court of appeals decision, explaining the issues in that decision are so limited that she was unsure whether the Council could consider definitions.

Councilmember Bloom pointed out the drainage issue was remanded to the hearing examiner; impervious surfaces relate to drainage. If water cannot infiltrate through surfaces, it has to go somewhere. It was remanded to the hearing examiner to look at impervious surfaces and as a result, the impervious surfaces increased. Condition 9 in the 2007 hearing examiner decision was that impervious surface coverage be 35%. The final remand to the hearing examiner still identified drainage but as a result of staff recommendation, impervious surface increased in the last hearing examiner to a range of 35.9% - 52.6% coverage depending on the size of the lot. She asked how staff could recommend and how the hearing examiner could feel it followed the PRD language to minimize impervious surface when it was increased considerably. She asked why the hearing examiner accepted the change in the definition of impervious surfaces to structures. Mr. Lien explained there was no change. The PRD standard does not define impervious surface. One of the specific remand items was in regard to drainage. A new drainage report was prepared that assumed 3,000 square feet of impervious surface on each individual lot. The condition was revised to reflect the new stormwater report which limited impervious surface to 3,000 square feet per lot. With regard to how that addresses the PRD standard of reducing impervious surface, the City's code does not have a maximum impervious surface area. The code has a maximum coverage area and a maximum coverage condition is applied to this PRD. The 3,000 square foot maximum impervious coverage places a limit on impervious surface. This issue arose because it was remanded for drainage. The remanded drainage report used 3,000 square feet per lot of impervious surface as well as other impervious surface assumptions. The City used that as the condition for the amount of impervious surface that would be allowed on individual lots.

Councilmember Bloom observed impervious surface was defined as structures only. Mr. Lien explained impervious surface coverage is in the drainage section 18.35.010(5). He read from the vested code, impervious surface means constructed hard surface that either prevents or retards the entry of surface water into the soil. Impervious surfaces include but are not limited to rooftops, patios, storage areas, concrete, asphalt, brick, gravel, oiled or packed earthen, or other surfaces that similarly impede the natural infiltration of stormwater. Open uncovered retention/detention facilities shall not be considered impervious. Mr. Shuster pointed out the lot coverage, 35%, is a subset of the total impervious surface of the lot. The coverage is generally just the building and then there may be walkways, patios and driveways that add to the total impervious area.

Councilmember Bloom reiterated impervious surface was increased from a range of 35.9%-52.6%. She asked what that included and why impervious surface was increased to 52.6% on some lots. Mr. Lien advised the condition from the original hearing examiner condition that still applies, page 339, states the maximum lot coverage is 35%. Impervious surface is any surface that prohibits water from going in; coverage means the total ground coverage of all buildings on site measured from the outside of external walls or support member to 2½ feet inside the outside edge of a cantilevered roof. The definition of structure is a combination of materials constructed and erected permanently on the ground or attached to something having a permanent location on the ground. He pointed out the definition of erected; driveways are not structures in the code. If a driveway were considered a structure, virtually every house in Edmonds would need to apply for a variance because most driveways do not meet setbacks. He reiterated the difference between impervious surface coverage and structural coverage. There is still a condition that limits lots to 35% structural coverage. The new condition also imposes a limit of 3,000 square feet of impervious surface area.

Councilmember Bloom concluded the reason impervious surface on each lot ranges from 35.9%-52.6% is because some lots are smaller. Mr. Lien agreed, explaining buildings cannot cover more than 35%. Councilmember Bloom observed there was an increase in impervious surface on some lots. Mr. Lien answered deleting the condition that limited impervious surface to 35% does increase the impervious surface but it is a remand item because it was based on the stormwater update that was done with the remand.

Councilmember Bloom commented impervious surfaces are what cause drainage problems. Why would some lots be allowed to be covered with 52.6% impervious surface and how could the City be assured the infiltration system will handle that. Mr. Lien answered the storm drainage report assumed 3,000 square feet of impervious surface as well as other impervious surface throughout the development. As designed, Burnstead said they could infiltrate all the water from that impervious surface on site.

Ms. Brown explained when sizing a detention facility, the more impervious surface accommodated, the more safety factor is involved. For example, if she only calculates based on 2,000 square feet of impervious surface per lot, the detention facility is smaller. Calculating a drainage facility based on 3,000 square feet of impervious surface, approximately 800 square feet more than it was before the appeal, increased the size of the drainage facility. The infiltration rate was also increased to 2.3 inches/hour. Based on this appeal, they redesigned the stormwater facility to provide more safety. The 3,000 square feet of impervious surface is what the drainage facility was designed to accommodate. They still must abide by the 35% lot coverage.

Mr. Long explained the original drainage report was based on roof area of 35% lot coverage and took credit for individual infiltration systems lot drains and took those impervious surfaces out of the calculation of the large joint drainage system. The revised drainage report does not take credit for individual infiltration systems and assumes all impervious surfaces and roads would go to the joint system. He summarized the confusion was 35% of the roof area, the maximum roof area on an individual lot is 35%. The impervious surface calculations assumed a maximum roof area of 35%.

Councilmember Bloom commented it seemed the impervious surface was being increased, yet the PRD regulations state minimize impervious surfaces. Ms. Morris recommended the Council limit the scope of their review of the hearing examiner's decision. The Council should focus on whether or not the drainage system as proposed is adequate, not whether the PRD requirements have been met with regard to impervious surface.

Councilmember Bloom observed the Council would be ruling on whether the applicant should make any modifications; one of the modifications she might request was 35% impervious surface on all lots. Ms. Morris asked why that recommendation would be made unless the Council found the drainage system was inadequate. The Council first needs to determine whether the stormwater drainage system is adequate.

Councilmember Bloom comment stormwater drainage was not just about infiltration, it was filtering of water before it reaches Puget Sound. The more impervious surfaces there are, the less filtering of water occurs. Ms. Morris explained that is why the City has adopted stormwater regulations. The Council's decision tonight is whether what the applicant proposed satisfies the code; not whether the stormwater drainage will be filtered by the time it reaches Puget Sound. The issue is whether or not the stormwater drainage plan is adequate; a finding of adequate is whether it complies with the code.

Councilmember Bloom asked Ms. Petso if the system met the standard. Ms. Petso responded plainly not because no one had set an infiltration rate. Ms. Morris reiterated the Council needs to make a decision whether or not there is adequate evidence in the record to support the hearing examiner's decision that the stormwater drainage system is adequate. She read from the hearing examiner's decision, the storm drainage system was significantly revised from 2007 to reflect a more conservative stormwater infiltration rate, changes to infiltration, testing locations and methodologies. The City testified they are satisfied the applicant's preliminary stormwater design is adequate to meet the ECDC 18.30 and the vested 1992 Ecology stormwater manual. The Council needs to find whether there is adequate evidence in the record to support the hearing examiner's decision.

Councilmember Bloom asked what infiltration rate had been determined. Mr. Long answered the final rate was 2.3 inches/hour for this property. Councilmember Bloom asked how that was determined. Mr.

Long answered the first recommendation was 10 inches/hour per their original testing and safety factors. Through the remand, a third-party geotech hired by the City reviewed that and it was revised down to 2.3 inches/hour. He explained a lower number assumes a slower rate of infiltration. In the documentation from the geotech engineer, the rate during field tests ranged from 14-22/inches/hour before any safety factors were added.

Councilmember Fraley-Monillas asked for clarification; 20 inches/hour means water would soak in very fast and water would be dispersed out. Mr. Long answered water would be dispersed out and down. Councilmember Fraley-Monillas assumed 2.3 inches/hour would result in water pooling and not dispersing. Mr. Long clarified the water would still go out and down but at a lower rate. If a higher rate such as 20 inches/hour was assumed and the actual was only 2.3 inches/hour, the system would not be sized large enough to accommodate the flows. Councilmember Fraley-Monillas summarized if 20 inches/hour were used, the system would overflow. Mr. Long agreed, pointing out a lower number is more conservative.

Ms. Morris explained the Council's options are to uphold, reverse or modify the hearing examiner's decision.

Councilmember Bloom recalled Ms. McConnell said a 2-year performance bond was standard. Councilmember Bloom noted this area has flooded in the past and it was kind of guesswork with regard to how well the infiltration will work. She asked if the length of the maintenance bond could be extended beyond two years. Ms. McConnell explained it is typical to require a maintenance bond for a 2-year period. Ms. Morris said at final plat the developer may request a bond in lieu of construction in order to get final plat approval and pull building permits before they have constructed improvements such as a drainage system. The City does not have to allow them to bond in lieu of construction. The Council could state final plat will only be approved if the developer actually constructed. That way the system is installed before building permits are issued and houses constructed. Ms. McConnell agreed that was possible for the performance bond.

Mr. Taraday explained there are two places where the maintenance bond is referenced in the vested code. He read from Section 20.75.120(3) in the vested code: the Director of Public Works shall not accept the improvements for the City of Edmonds until the improvements have been inspected and found satisfactory and the applicant has posted a bond or surety for 15% of the construction cost to guarantee against defects in workmanship and materials for two years from the date of acceptance. He summarized two years is the norm in the code. Ms. Morris stated two years is in state law as well.

Councilmember Bloom asked whether the applicant would agree to a longer maintenance bond to ensure the stormwater system works. Ms. Brown responded state code is two years; she was unsure whether a bonding company would do something outside state code. She explained Burnstead has been in a two-year maintenance bond on another project for ten years because cities do not release them until everything works the way it is supposed to work. Ms. Morris commented even though state law says two years, a developer can agree to something in excess; a bonding company could allow it as long as the developer paid for it.

Councilmember Bloom asked if the applicant would agree to a longer maintenance bond such as ten years. Ms. Brown said she could not answer without speaking to the bonding company; usually the bonding company goes by what is required in City code. She was willing to ask but was uncertain if bonding company would grant it.

Mayor Pro Tem Peterson clarified it is a two-year maintenance bond but it must be released by the Director of Public Works. In the example Ms. Brown cited, the Director has not released the maintenance bond because they are not satisfied. Likewise, the City would have the final say with regard to when the

two years was up. Ms. McConnell explained at the end of the two- year period, the City conducts an inspection of the improvements and if corrections need to be made, the maintenance bond is held and a letter sent to the applicant/owner/HOA identifying the corrections that need to be made. The maintenance bond is not released until those improvements have been made. Mr. Taraday advised if there are no defects at the end of the two-year period, there is nothing in the code that would allow the City to hold the maintenance bond longer than two years.

Ms. Morris suggested that could be a condition of the plat and the applicant asked to investigate whether their bonding company will allow such a bond. When the Council reviews the Findings of Fact and Conclusions, the Council could delete the condition from their final decision if the applicant indicates they cannot obtain a maintenance bond of that duration.

Mayor Pro Tem Peterson questioned at what point the duration of a maintenance bond becomes onerous. Ms. Morris said the code requires a two-year maintenance bond; the Council is considering a bond of a longer duration, the applicant is indicating they may not be able to obtain such a bond. The Council must decide whether that is something they want to add as a condition because the Council is reaching a breaking point where the applicant will appeal the decision.

Councilmember Buckshnis commented there is adequate information in the record regarding infiltration rates and soil types to support the hearing examiner's decision. She favored requiring individual lot systems.

Perimeter Buffer

In response to Ms. Petso's indication that some lots will be undevelopable, Councilmember Buckshnis commented the house designs are 2-story with 2855-3421 square feet and lot sizes range from 5700 to 8361 square feet. She questioned how Ms. Petso determined the houses would not fit on the lots. Ms. Petso answered the setback requirements create a smaller buildable area. A 61-foot deep house will not fit on the buildable area of the lot. Ms. Brown referred to Mr. Lien's quote from the ADB's decision that those renderings are not binding and Burnstead is required to submit building plans at the time of building permit with dimensions that fit on each lots. Councilmember Buckshnis asked whether some houses may be smaller. Ms. Brown answered yes.

Open Space

Councilmember Plunkett asked whether without Tract A they met the open space requirement. Ms. Brown answered no; the applicant needs Tract A to meet the open space requirement.

Councilmember Buckshnis observed without double counting Tract A, the applicant has 10% open space. Ms. Brown agreed, with the entire square footage of Tract A, the applicant meets and exceeds the open space requirement.

Councilmember Buckshnis referred to a landscaping schematic that shows a lot of trees and gardens. Ms. Brown advised the ADB required a 15-foot landscape buffer in the back of all the lots. Mr. Lien clarified a landscape screen was part of the MDNS. The perimeter buffer was a requirement of the PRD; the reduced setback required a perimeter buffer.

Councilmember Fraley-Monillas referred to comments regarding fire trucks and the inability for them to enter and turn around because of the configuration of the open space. She asked whether that had been reviewed by the Fire Department. Ms. McConnell referred to page 345, where Fire Marshal John Westfall gave preliminary approval of the subdivision in 2006 with conditions. The conditions relate to installation of fire hydrants, fire hydrant spacing, street specifications per engineering requirements (engineering does not require anything different than what is proposed) joint use driveways, street names, and addressing of buildings.

Councilmember Fraley-Monillas recalled the appellant mentioned parking is an issue along the street where the open space is located, drivers not being able to make the turn due to the open space at the entrance and sight distance issues due to cars parked along the street. She asked why parking was allowed on 237th. Ms. McConnell responded the City's Traffic Engineer will consider that when the civil construction drawings are reviewed. There could be a requirement for the applicant to paint curbs yellow to prohibit parking such as around the radius of the entrance to the driveway.

Councilmember Fraley-Monillas referred to safety issues expressed with regard to the Tract A open space. She did not see any different safety issues in that area and the adjacent park such as children playing, balls flying, children crossing the street, etc. and asked whether the City has considered that issue. Mayor Pro Tem Peterson cautioned that was not directly related to the remand item. Councilmember Buckshnis referred to the traffic study on page 282.

Councilmember Bloom asked whether the study was done before or after Hickman Park opened. Ms. McConnell answered the study is dated January 30, 2007. Councilmember Buckshnis advised there was a 2009 update. She referred to pages 283-286. Mr. Taraday pointed out traffic studies do not relate to open space.

Councilmember Bloom commented the Council is discussing usable open space; the PRD states create permanent usable and commonly owned open space for both active and passive recreation which serve the development and are maintained at its expense. She did not feel the open space tracts met that definition, particularly when there are safety issues. Ms. Morris pointed out the definition includes garden space. Councilmember Bloom read from the open space requirement: create permanent usable and commonly owned open space for both active and passive recreation. Ms. Morris responded Councilmember Bloom was reading from the purpose section of the PRD which is an intent section. If the Council decided to modify the hearing examiner's decision based on the purpose section, that decision could easily be reversed. The Council needs to first look at the code requirements; if there is a definition of usable open space that includes gardens and landscaping, the Council could not get past that by arguing to a court that the purpose section talks about something different.

Councilmember Bloom concluded the Council could not do any interpretation of the purpose section. Ms. Morris clarified if there is a definition of open space that includes exactly what the applicant is providing, the Council cannot say in this situation it is not considered usable by interpreting the purpose section of the PRD. In her experience, that is likely to be reversed because the code is adopted for the purpose of providing notice regarding what a developer can do. If the Council does not think open space should include garden space, then the code needs to be changed.

Councilmember Plunkett commented the monument area is commonly considered open space in other PRDs in Edmonds and in other cities. He inquired about the definition of usable open space. Mr. Lien referred to 20.35.050(D): usable open space means common space, developed and perpetually maintained at the cost of the development. At least 10% of the gross lot area and not less than 500 square feet, whichever is greater, shall be set aside as part of every PRD of 5 or more lots. Examples of usable open space include playfields, tot lots, garden space, passive recreation sites, viewing platforms, patios and outdoor cooking and dining areas. Councilmember Plunkett recalled in other PRDs in Edmonds the area with the monument sign were considered open space. Mr. Lien agreed the sign was typically located within an open space tract. Councilmember Plunkett summarized if the Council decided not to accept that, they were in danger of having their decision overturned. Ms. Morris agreed, explaining the court will interpret what is written in the code, garden space is listed as an example of open space. The purpose section will only be used to interpret something that is ambiguous.

COUNCILMEMBER FRALEY-MONILLAS MOVED, SECONDED BY COUNCILMEMBER BUCKSHNIS, TO AFFIRM THE HEARING EXAMINER'S DECISION ON REMAND WITH A CONDITION THAT THERE BE A REQUIREMENT FOR INDIVIDUAL LOT DRAINAGE SYSTEMS ON EACH LOT.

COUNCILMEMBER PLUNKETT MOVED, SECONDED BY COUNCILMEMBER BUCKSHNIS, TO AMEND TO REQUIRE A FIVE-YEAR MAINTENANCE BOND ON THE DRAINAGE SYSTEM.

Councilmember Plunkett explained the condition would be subject to what the applicant learns from the bonding company with regard to a five-year maintenance bond.

Councilmember Fraley-Monillas observed it is possible the applicant may not be able to obtain a five-year maintenance bond. She did not want to lock the applicant into a requirement they may not be able to obtain. Ms. Morris explained after the Council approves the motion to affirm the hearing examiner's decision, she will draft Finding of Fact and Conclusions of Law that will be returned to the Council for review. When the Council reviews the Findings, they may learn that the applicant is unable to obtain a five-year bond. The Council could then move the requirement for a five-year bond and return to a two-year bond. She recommended the applicant inform staff whether they were able to obtain a five-year bond.

Councilmember Fraley-Monillas asked whether the HOA could be required to have a maintenance bond. Ms. Morris answered once the developer turns the drainage system over to the HOA, the code will address any enforcement issues. Staff could be directed to do more frequent inspections; if they find any violations, code enforcement action could be taken.

Councilmember Plunkett advised his last day on the Council is June 4. He asked whether the Findings of Fact and Conclusions of Law could be scheduled on the May 29 or May 22 agenda. Ms. Morris advised as soon as she receives the minutes of this meeting, the Findings of Fact and Conclusions of Law will be available the following day.

Mayor Pro Tem Peterson relayed he will support the amendment although he feared it was teetering on the edge of creating something that was onerous and not doable. The Council can confirm whether it was possible at the time the Findings of Fact are adopted.

AMENDMENT CARRIED (5-1), COUNCILMEMBER YAMAMOTO OPPOSED.

COUNCILMEMBER BLOOM MOVED TO AMEND TO ADD A CONDITION THAT THE APPLICANT COULD NOT BOND FOR THE DRAINAGE SYSTEM IN ORDER TO GET FINAL PLAT APPROVAL. MOTION DIED FOR LACK OF A SECOND.

Councilmember Yamamoto expressed support for the motion except for requiring a five-year maintenance bond, finding a two-year maintenance bond reasonable. He pointed out the two-year bond could extend for five years if staff was not satisfied when inspections were done.

Councilmember Plunkett suggested a five year maintenance bond or release at two years with approval of Council. Ms. Morris explained release of a bond is an administrative decision; involving the Council in administrative tasks can be problematic.

Mayor Pro Tem Peterson pointed out it may not be possible to install a dry well on every lot. He suggested adding language that a dry well is not required if it is not doable.

Councilmember Fraley-Monillas commented her intent was not to require a dry well for every single lot and to allow two lots to share a dry well. Ms. Morris suggested requiring individual lot drainage system be installed on a majority of the lots. Councilmember Fraley-Monillas responded that may not be enough of the lots. Ms. Morris commented the Council wanted to require individual lot drainage systems based on their impression that they should be included, not necessarily based on the engineering standard. Councilmember Fraley-Monillas suggested where possible. Ms. Brown suggested where feasible.

Mr. Shuster explained the feasibility per lot will be based on soils and setbacks. He suggested within engineering standards and guidelines. Mr. Taraday suggested engineering feasibility versus financial feasibility. Mr. Shuster assured his review would be engineering feasibility. Councilmember Fraley-Monillas was agreeable to engineering feasibility.

Councilmember Bloom asked how many lots that may be. Ms. Brown answered they are hoping for all lot, but at least 90%.

MOTION CARRIED UNANIMOUSLY.

4. MAYOR'S COMMENTS

Mayor Earling was not present.

5. COUNCIL COMMENTS

Councilmember Fraley-Monillas thanked the citizens who testified and assured the City will be watching.

Councilmember Plunkett complimented the Council for their thoughtful deliberation.

Councilmember Buckshnis reported on this weekend's annual Hutt Park cleanup. She recognized Second Nature and Chuck Hinshaw who took away all the debris. Adopt a Park forms are available from the Parks and Recreation Department.

Mr. Lien asked when the Findings of Fact will be returned to the Council. Mayor Pro Tem Peterson answered he will confer with the City Attorney.

Mayor Pro Tem Peterson thanked the Council, citizens, City staff and Ms. Morris for their efforts.

6. ADJOURN

With no further business, the Council meeting was adjourned at 9:55 p.m.