

David Miller appeal of DPD Short Plat Decision -- Application 3012505 (1401 NE 86th Street)

Short Plats are allowed under Seattle Municipal Code Section 23.24. SMC 23.24.040 sets out the criteria for approval. 23.24.040.A.1 requires “conformance to the applicable Land Use Code provisions, as modified by this chapter.”

The Seattle Department of Planning and Development (DPD) violated this provision, as this development was not made subject to SEPA and Design Review requirements as specified in Seattle’s Land Use Code.

Action Requested

We are asking the Hearing Examiner to reverse the Short Plat decision and remand this development to DPD to conduct an appropriate SEPA and Design Review process. Further, we ask the Hearing Examiner to provide direction to DPD on the remand for SEPA review requiring testing of the development site, school playground, adjacent park, adjacent street, and adjacent parcels for evidence of toxic residue from the improper demolition of the incinerator.

History

Project 6252295, 6252301, and 6257818 involve the building of nine townhome units in multiple structures. The applicants took this 9-unit development through Seattle Public Utilities (SPU), Seattle Department of Transportation (SDOT), the Seattle Fire Department (SFD), and initial discussions with DPD as a 9-unit development. DPD issued a demolition permit for two existing structures based upon replacement with a 9-unit building. Not until building permits for the actual dwellings were obtained did the applicant split them up into two separate projects.

On September 30, 2011, the Maple Leaf Community Council Executive Board (MLCC-EB) brought a timely appeal to DPD’s granting of permit 6257818 for building of four units at 1401 NE 86th Street. The MLCC-EB chose this point in the development process to file an appeal because that application brought the total number of units on the site to nine, exceeding the SEPA threshold. The Hearing Examiner, in a letter dated October 4, 2011 returned our appeal fee check with a letter claiming the Hearing Examiner had no jurisdiction to hear the appeal.

Project 6262346 involved the demolition of a storage shed and a former incinerator. Detailed environmental work was done on the storage incinerator as part of the proposed Waldo Hospital (MUP 3006480) development. The incinerator was found to contain cancer-causing heavy metals and other regulated toxic substances. There was no adequate demolition plan for permit 6262346. We remind you that King County Superior Court Judge Brad Thompson in *Maple Leaf Community Council v. City of Seattle* remanded a DPD decision for land use of this property because of insufficient controls on toxic dust from demolition. A K-12 private school is less than 50 feet away from this building and the demolition and material removal happened while school was in session and children were playing on the playground.

Under MUP Application 3006480, DPD issued a “DNS With Conditions” SEPA determination for a larger project by the same applicant at the same location. In that proposed application, the applicant planned to build five (5) units on roughly the same surface area as the total nine units in the current application. For this lesser development plan, DPD required the following conditions pertinent to construction in the same surface area:

- Seek city approval for the elimination for one parking space north of NE 86th Street
- Three-year minimum follow-up of a professional arborist to check the health and status of nearby Exceptional Trees.
- Other traffic and pedestrian amenities

Appeal information

Briefly, DPD allowed micropermitting/piecemealing in violation of City and State law by allowing the developer to split a 9-unit L2 project into two permits despite the project being physically co-located and functionally related. One impact of not going through SEPA review was the violation of a King County Superior Court order requiring DPD to create a better plan for demolition of buildings on the site. As a direct result of DPD's error, the developer demolished a building containing carcinogenic heavy metals with no control over the spread of the toxic material. This demolition occurred while children were present on the playground of the adjacent school.

A second impact is likely unmitigated significant adverse environmental impacts. In a prior decision covering fewer numbers of units on similar surface area, DPD required specific mitigations.

This project is not exempt from SEPA. This is an issue of micropermitting (also referred to as "piecemealing"), which is against the law. Were it not for DPD allowing the developer to piecemeal the projects, this development would be subject to SEPA and Design Review. Such evasion is not permissible.

SMC 25.05.305.A.2.b provides the relevant language, we've provided the emphasis:

A series of exempt actions that are physically or functionally related to each other, and that together may have a probable significant adverse environmental impact in the judgment of an agency with jurisdiction. If so, that agency shall be the lead agency, unless the agencies with jurisdiction agree that another agency should be the lead agency. Agencies may petition the Department of Ecology to resolve disputes (Section 25.05.946), or may petition the Mayor to resolve disputes between City agencies (Section 25.05.910).

This is perhaps more clear from WAC 197.11.60.3.b referring to the content of environmental review:

(b) Proposals or parts of proposals that are related to each other closely enough to be, in effect, a single course of action shall be evaluated in the same environmental document.

WAC 197.11.60.3.c.i provides clarity on the definition of "related" or "similar" projects:

(i) Proposals are similar if, when viewed with other reasonably foreseeable actions, they have common aspects that provide a basis for evaluating their environmental consequences together, such as common timing, types of impacts, alternatives, or geography.

SMC 25.05.060.C.2 is sometimes used by DPD to defend an unfortunately widespread practice of micropermitting. We note this SMC section does not apply to SEPA review thresholds, but rather to the format of SEPA documents. (Emphasis ours)

2. Proposals or parts of proposals that are related to each other closely enough to be, in effect, a single course of action shall be evaluated in

the same environmental document. (Phased review is allowed under subsection E.) Proposals or parts of proposals are closely related, and they shall be discussed in the same environmental document, if they:

- a. Cannot or will not proceed unless the other proposals (or parts of proposals) are implemented simultaneously with them; or
- b. Are interdependent parts of a larger proposal and depend on the larger proposal as their justification or for their implementation.

We note the header description of SMC 25.05.060 is “Proposals” and SMC 25.05.060 is “Content of Environmental Review.” This section speaks to formatting – specifically whether two proposals are contained in the same SEPA document. The sections of SMC and WAC we cite above provide the actual test for SEPA review.

On this subject, we also note the Washington Administrative Code provides a somewhat more specific take (though again referencing document format). WAC 197.11.60.3.c.i provides clarity on the definition of “related” or “similar” projects:

(i) Proposals are similar if, when viewed with other reasonably foreseeable actions, they have common aspects that provide a basis for evaluating their environmental consequences together, such as common timing, types of impacts, alternatives, or geography.

Finally, we note there is nothing in the record that the two proposals have been considered anything other than one project. There is some pretty specific case law on this subject in *Merkel v. Port of Brownsville* (8 Wn. App. 844, 509 P.2d 390 (1973)). In *Merkel*, the court mandated SEPA review in part because the two proposals in that case were always considered one project.

DPD’s actions violate the letter and intent of City and State law governing SEPA and Design Review for a number of reasons:

- (1) This was always intended to be one 9-unit project. According to documents obtained during a Public Disclosure Request, the developer submitted the project initially as a 9-unit project (see attached). As the project moved through various City departments, it did so as a 9-unit project. It was only when the project reached the permitting stage that it was improperly and illegally piecemealed to avoid SEPA review and Design Review.
- (2) In this case, the developments are physically right next to each other. We note the code says “...functionally OR physically...” related. There is no requirement they be functionally related. DPD cannot simply choose to enforce “functionally” and not “physically”.
- (3) The developments are also functionally related. Development of project 6257818 functionally depends upon the prior development’s creation of a driveway. Were it not for this functional relationship, owners of the four units proposed under this permit would have no way to access the required parking and units.
- (4) The City of Seattle defines any L2 development larger than eight units as de facto requiring SEPA review. DPD may decide AFTER a threshold review there are no significant adverse impacts needing mitigation, though we note mitigations were required by DPD for a lesser five units on the same surface area. DPD does not have the option or authority under the SMC to allow a piecemealing to escape review.

- (5) The City of Seattle defines any L2 development larger than eight units as de facto requiring Design Review. This nine-unit project was not subjected to the Design Review Process
- (6) In this case, King County Superior Court Judge Timothy Bradshaw told DPD demolition on the site had a probable significant adverse environmental impact (*Maple Leaf Community Council vs. City of Seattle and Prescott Development*, 2009, attached). This sets a fixed threshold for the potential of significant adverse environmental impact that DPD willfully ignored in issuing these permits. A SEPA review must be done before DPD can declare no environmental harm exists. It cannot be assumed prior to even a SEPA checklist being completed, especially in light of Judge Bradshaw's prior decision, no environmental harm exists.
- (7) The developer was fully aware of the toxic residue in the incinerator. In seeking the demolition permit, the record appears to indicate they misrepresented the facts (applying for demolition of "two sheds" and not a "shed" and a "former incinerator". While we are aware no SEPA determination was made, we believe SMC 25.05.340.C.1.c provides some insight as to the proper course of action – withdraw the decision and redo the SEPA process.
- (8) It may be DPD decides this particular project has no significant adverse environmental impacts. This is somewhat unlikely given *Maple Leaf Community Council vs. City of Seattle and Prescott Development* and the existence of DPD's own decision specifying mitigations on just 5 units in the same physical area. In any case, such a determination is inappropriate without a filed checklist and the public SEPA process.

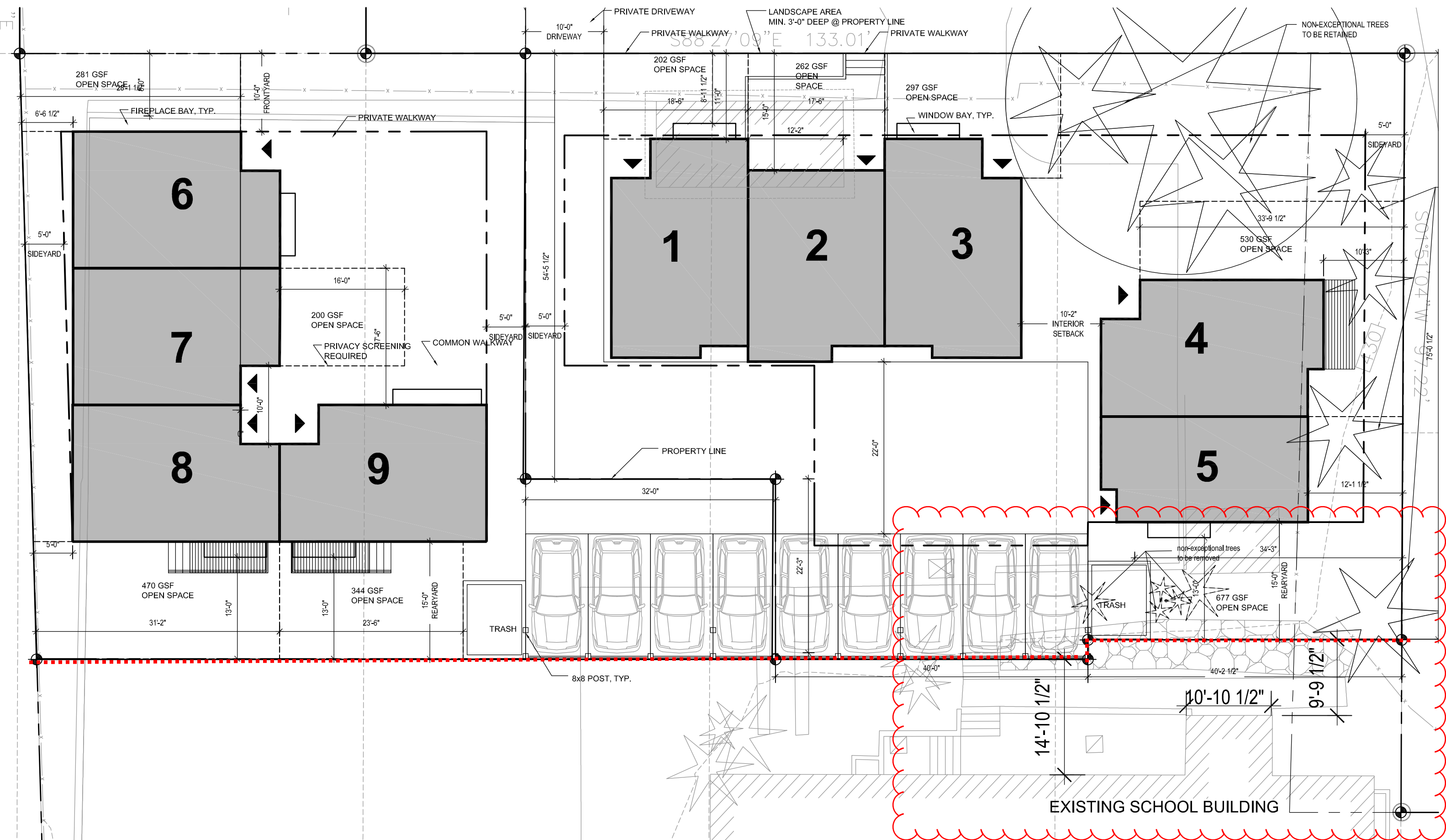


DIAGRAM for LOT BOUNDARY ADJUSTMENT CORRECTION RESPONSE / DPD PROJECT #3011068

SITE PLAN

MAPLE LEAF TOWNHOMES
DPD #300XXXX

SCALE: NTS  06.07.2010

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IN THE SUPERIOR COURT OF
THE STATE OF WASHINGTON FOR KING COUNTY

MAPLE LEAF COMMUNITY COUNCIL
EXECUTIVE BOARD,

Petitioner,

v.

CITY OF SEATTLE, PRESCOTT
DEVELOPMENT, LLC, AND CAMP FIRE
USA PUGET SOUND,

Respondents.

No. 08-2-32517-2 SEA

ORDER ON LAND USE PETITION

This matter came before the above entitled Court on a Land Use Petition Act appeal filed by Petitioner pursuant to chapter 36.70C RCW. The Court heard the oral arguments of counsel for Petitioner and for the Respondents, read all pleadings filed in this matter, reviewed the administrative record of proceedings with exhibits, the Hearing Examiner's decision, and the applicable law at issue and on point.

The standard of review for this action requires a reviewing court to accord substantial weight to the Hearing Examiner's decision. The Petitioner carries the burden of proof and the court may reverse the decision only if it finds the decision clearly erroneous. *Isla Verde Int'l v.*

ORDER AND JUDGMENT

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KING COUNTY SUPERIOR COURT
516 Third Avenue
Seattle, WA 98104

1 *City of Camas*, 146 Wn.2d 740, 49 P.3d 867 (2002); *Boehm v. City of Vancouver*, 111 Wn.App.
2 711, 47 P.3d 137 (2002). The evidence is to be reviewed "in the light most favorable to the party
3 that prevailed at the highest forum exercising fact-finding authority." *Schofield v. Spokane*
4 *County*, 96 Wn. App. 581, 980 P.2d 277 (1999). Finally, this Court may not substitute its
5 judgment for that of Hearing Examiner Watanabe. *Association of Rural Residents v. Kitsap Cty.*
6 141 Wn.2d 185 (2000).

8 The Court hereby finds that it cannot conclude that substantial affirmative evidence
9 establishes that the decision of the Hearing Examiner was clearly erroneous. Accordingly,
10 pursuant RCW 36.70C.130, the Petition may not be granted. Additionally, it is clear that several
11 design review conditions were imposed and are required.¹

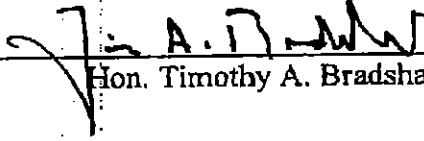
14 It is hereby ORDERED, ADJUDGED, and DECREED that the Hearing Examiner's
15 decision approving the draft plan at issue is upheld, and Petitioner's Land Use Petition Act
16 appeal is dismissed. FURTHER, pursuant RCW 36.70C.140, the Court REMANDS with
17 direction to the Hearing Examiner to fully consider the additional condition of a "circus tent"
18 enclosure² in any final plan.

25 ¹ (1) a stop sign, (2) pavement treatment, and (3) sight triangles at the parking garage exit, along with (4) the
26 prohibition on gates in arbors and (5) departures for required open space.

27 ² As argued by Petitioner, the circus tent would provide "certain protection from the significant environmental harm"
28 to the community. Sr. Land Planner Kemp acknowledged this point in testifying about a circus tent condition. (pp
40-41). Full mitigation is appropriate given the proximity of the site to the Maple Leaf Reservoir.

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Entered on this 29th day of May, 2009.



Hon. Timothy A. Bradshaw

ORDER AND JUDGMENT

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KING COUNTY SUPERIOR COURT
516 Third Avenue
Seattle, WA 98104