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5 IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
6 IN AND FOR THE COUNTY OF KING

7 ABBEY ROAD HOMEOWNERS
8 ASSOCIATION; NEIL BARNETT;
9 MANAJI SUZUKI; JOHN STILIN; and
10 SHERRY STILIN,

11 Petitioners,

12 v.

13 CITY OF REDMOND; EASTSIDE
14 RETIREMENT ASSOCIATION; and
15 EMERALD HEIGHTS,

16 Respondents.

No. 19-2-11548-3 SEA

ORDER ON LUPA APPEAL

[] Clerk's Action Required

17 This case comes before the Court for determination on Petitioner's LUPA appeal of a
18 decision by the City of Redmond Hearing Examiner dated April 1, 2019. The Court heard the
19 argument of counsel on October 18, 2019 and has reviewed the record and pleadings submitted
20 in this matter. The Hearing Examiner's decision approved a conditional use permit (CUP) and
21 site plan entitlement (SPE) to Emerald Heights, allowing a new independent living and assisted
22 living building. The decision also denied an appeal of the State Environmental Policy Act
23 (SEPA) Determination of Nonsignificance (DNS) by the City of Redmond Technical
24 Committee. The Petitioner challenged the Hearing Examiner's Findings, Conclusions, and
25 Decision on the SEPA Appeal, CUP, and SPE.

1 The Court hereby makes the following findings and conclusions.

2 **I. FINDINGS OF FACT**

- 3 1. This action is a Land Use Petition filed under the Land Use Petition Act
4 (LUPA).
- 5 2. The Emerald Heights Retirement Community (EHRC) proposes to upgrade and
6 increase its facilities by constructing a 54-unit Assisted Living building at the
7 eastern end of its Redmond campus and construct a new 42-unit Independent
8 Living building at the south end of the campus. The intent of the upgrade is for
9 EHRC to enhance the quality of care for its residents, in particular to allow for
10 private rooms for the nursing facility, rather than the semi-private rooms that
11 now exist. AR 624.
- 12 3. EHRC applied for City approval of a CUP and SPE to construct the new
13 buildings on their current campus, but closer to the Abbey Road Neighborhood
14 (ARN) than their previous buildings. EHRC needed the CUP, SPE, and a
15 determination and analysis of significant adverse environmental impacts
16 pursuant to the State Environmental Police Act (SEPA) to proceed with their
17 building proposals.
- 18 4. The DNS was issued on July 26, 2018 and appealed on August 22, 2018. A
19 public hearing was held before the hearing examiner.
- 20 5. The hearing examiner denied the SEPA appeal and granted the CUP and SPE
21 applications in a decision that encompassed 112 findings of fact and 17
22 conclusions of law. Both parts of the decision were appealed to this court.
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- 1 6. The EHRC and the ARN are both located in the Education Hill Neighborhood
2 of the City of Redmond. AR 9662. The Education Hill Neighborhood is zoned
3 for residential uses. AR 1663-1696, 9665. There is no commercial zoning,
4 mixed use zoning, or industrial zoning in the Education Hill neighborhood. AR
5 9663-9665. There are five other institutional buildings on Education Hill:
6 Redmond High School, Redmond Middle School, Horace Mann Elementary
7 School, St. Judes Catholic Church, and Hartman Park Pool. AR 333.
8
9 7. The ARN is across a public street, 176th Avenue NE, from the EHRC and from
10 the proposed expansion. AR 296, 333, 9757.
11
12 8. The ARN has 205 single-family residential homes and was developed between
13 1990-1993. AR 7272. The homes are generally traditional, have gabled roofs
14 with muted colors, and are limited to two and one-half stories. SEPA 19.
15
16 9. The public street that divides these two communities has deciduous street trees
17 on both sides, a six-foot fence covered in ivy on the EHRC side, and mature
18 evergreen trees between the EHRC building which shields the EHRC from
19 view. AR 9757, 296. It is a mature forested neighborhood that feels residential
20 and green due to the significant number of large, mature trees. AR 9665-9666.
21
22 10. The neighborhood vision in the Redmond Comprehensive Plan places a priority
23 on protecting the green look and feel of the area, with maintaining the
24 undeveloped area to preserve the woodland views valued by the neighborhood.
25 AR 9663-9665.

- 1 11. The existing mature evergreen trees provide a forested buffer between EHRC
2 and ARN which adds to the obscuring of the retirement community and its
3 larger buildings in all four seasons. AR 145.
- 4
5 12. The other institutional buildings in the area—the schools, pool, and church—
6 serve the neighborhood and all except the church are on public property. SEPA
7 31, 78. EHRC is gated, fenced, private and not open to the neighborhood. AR
8 7287-7288. EHRC is dissimilar from the other institutional buildings.
- 9
10 13. The other institutional buildings in the area are setback from their property lines
11 from 95 to 183 feet. AR 334-348. EHRC is currently setback 131 feet from the
12 property line where it faces ARN, with the largest building 278 feet from the
13 nearest home, while the proposed new buildings would be setback 15-24 feet
14 from the property line. AR 345, AR 443, AR 499-504, AR 9402.
- 15
16 14. The ARN has areas set aside to maintain the green, natural feel of the
17 neighborhood with a 7.5 acre native growth protection easement, nature trails,
18 and forested areas. AR 7268-7269.
- 19
20 15. EHRC has a main building with multiple wings, another independent living
21 building, 12 duplex cottages, as well as other buildings. AR 7286, AR 182, AR
22 144.
- 23
24 16. EHRC was originally approved for development as a retirement community in
25 1988 by Redmond City Ordinance 1454, but had specific conditions attached.
AR 9745-9747. The conditions included the forested buffer on the perimeter
and restricting density to the center of the development. AR 187-200, AR 9750-

1 9752. The conditions allowed the views of EHRC to be obscured from the
2 street and from the homes in ARN. AR 0503. These conditions were imposed
3 via a PUD, but Ordinance 1454 also had the signature of the applicant, the
4 EHRC representative, stating “Applicant hereby agrees to each of the conditions
5 of this approval.” AR 185. The mayor also signed the Final Approval Order,
6 which gave the Special Development and Planned Unit Development Permit the
7 appearance of a contract. AR 185.
8

9 17. In 1996, the City of Redmond changed its zoning code to repeal its PUD
10 ordinance and eliminate the PUD procedure as a way to explicitly bind specific
11 parcels of land within a zoning code. Existing PUDs would remain in place, but
12 anything in the future to create a land specific use would be created with a
13 “development agreement.”
14

15 18. In 2011, EHRC requested City Council approval to rezone their property from
16 R-4 to R-6. AR 141. The rezone, in Ordinance 2607, allowed for an increase in
17 density and for an increase in building height. AR 145, AR 9800-9803. During
18 the rezone process, EHRC represented that they planned to keep the forested
19 buffer around its development. AR 1667-1696. EHRC made statements such
20 as the following: “Emerald Heights is surrounded by a fence with ample
21 landscaping to buffer Emerald Heights from adjoining uses.” AR 1669. “Thus,
22 the proposed development will make optimal use of the developed areas while
23 retaining the existing green belts and natural areas around the site.” AR 1670.
24

25 “The current concepts maintain the green belts, nature path and the existing

1 green character.” AR 1671. “. . . [R]etains the natural green space around the
2 site.” AR 1671, *See also Hearing Examiner decision at AR 9415-9516 and*
3 *EHRC CFO testimony at AR 10188-10191.* It is clear that the forested buffer
4 and centrally located density allows EHRC and the surrounding neighborhood
5 to exist in harmony.
6

7 19. Despite these assurances, EHRC did not have a specific building proposal to
8 present to the council and it was clear that any future proposal would need to go
9 through the applicable approval process. AR 9416-9418; *see video of Council*
10 *meeting.* The lack of a specific proposal was clear throughout the rezone
11 process. While in support of the rezone EHRC strongly implied that the
12 existing forested buffer along 176th Street would remain, EHRC did not provide
13 a specific plan that showed the existing forested buffer would remain. Their
14 implications are not legally binding, although it is unfortunate that EHRC’s
15 statements to the City Council were not honored.
16

17 20. During this rezone, the City Council could have required a developer agreement
18 to bind EHRC to the promises as outlined above, much in the same way the
19 1988 City Council created the PUD to limit the nature of the original EHRC
20 development. The City Council did not bind EHRC to their assurances during
21 the rezone using the tools they had at their disposal in 2011.
22

23 21. City Council members submitted letters to the hearing examiner in this LUPA
24 claiming they relied upon the EHRC representations of keeping the vegetation
25 in approving the 2011 rezone. However, it is unclear to this Court why the City

1 Council failed to require a developer agreement to maintain the existing
2 forested buffer and require density to be in the center of the EHRC campus if
3 that was the intent in 2011.

4
5 22. The new EHRC buildings will remove 181 mature trees. AR 9389. While
6 EHRC plans to replant some trees, there was conflicting testimony about the
7 long-term success of those new trees and the new trees' ability to obscure the
8 buildings. AR 655-657, AR 9390. This Court defers to the Hearing Examiner's
9 decision that the proposed new landscaping would be maintained by
10 professionals and is likely to succeed. AR 9391-9392. Even if the new
11 plantings survive, the trees will not be the same as the current forested buffer,
12 will not obscure the view of EHRC from the road or neighboring houses in the
13 same way as before, and will take years to achieve the same maturity.

14
15 23. Alternative sites were considered by EHRC, but ultimately EHRC determined
16 that other sites were too expensive to build, had too many disruptions for the
17 current residents, or did not provide the appropriate connections for assisted
18 living residents. AR 775-791. The current proposal seems to minimize all of
19 EHRC's concerns.

20
21 24. The new buildings are a contemporary modern design, more consistent with
22 other buildings on EHRC than with the ARN. AR 506; 5128-29; 9489. This by
23 itself does not make the EHRC proposal incompatible, but is one factual area to
24 consider.

25

1 25. ARN contested that the building proposal was consistent with Redmond
2 Comprehensive Plan policies. Redmond's Comprehensive Plan includes goals
3 of maintaining "Redmond as a green city with an abundance of trees, forested
4 areas, open space, parks . . ." AR 9655. ARN primarily offered Peter
5 Steinbrueck's testimony and report to show how the EHRC proposed
6 development was inconsistent with the Comprehensive Plan and with the
7 Education Hill Policies. AR 9696-9712. In particular, Mr. Steinbrueck asserted
8 the technical review and design review was not of the appropriate level of
9 intensity, the need for a clear and convincing finding that a retirement resident
10 is consistent with the character of the surrounding neighborhood, and failure to
11 appropriately follow and analyze the Design Standards Checklist. In sum, the
12 ARN asserted the proposed building was too large, too close to surrounding
13 homes, and eliminated too many trees to be consistent with the Redmond
14 Comprehensive Plan and Education Hill Neighborhood Policies.
15

16
17 26. The City of Redmond Technical Committee was the lead agency for review of
18 the EHRC building proposal and issued a DNS. ARN provided testimony
19 primarily concerning the removal of the forested buffer which would result in
20 the loss of privacy and views for the neighbors closest to the development, the
21 alteration of views for all entering the neighborhood, incompatibility with the
22 character of the single-family home neighborhood, and the light impacts from
23 the buildings blocking light and emitting light. While other allegations of error
24 were submitted (traffic, noxious odors, emergency services, etc.), the thrust of
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1 ARN appeal was the location of the new building on the perimeter of the EHRC
2 property would fundamentally change the views for the surrounding
3 neighborhood and those who entered the neighborhood.
4

5 II. CONCLUSIONS OF LAW

- 6
7 1. The Court reviews this LUPA under RCW 36.70C statutory framework.

8 Pursuant to RCW 36.70C.130(1), the Hearing Examiner's Decision must be
9 reversed if:

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

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

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

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

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

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

- 24 2. The Court reviews the Hearing Examiner's legal conclusions de novo. RCW
25 36.70C.130(1)(b). *Ellensburg Cement Products, Inc. v. Kittitas County*, 179
Wn.2d 737 (2014); *Schofield v. Spokane County*, 96 Wn. App. 581 (1999).

3. The Court reviews the Hearing Examiner's application of facts to the law using
the clearly erroneous standard. RCW 36.70C.130(c); *Cingular Wireless, LLC v.*
Thurston County, 131 Wn. App. 756 (2006). Standard (c) is a factual

1 determination by a hearing examiner that is reviewed to determine if substantial
2 evidence supports the hearing examiner's finding. *Id.* A decision is clearly
3 erroneous when the Court is left with a definite and firm conviction that a
4 mistake has been committed, despite the fact that evidence may exist to support
5 the examiner's finding. *Norway Hill Preservation and Protection Association v.*
6 *King County Council*, 87 Wn.2d 267 (1976); *Cougar Mountain Assocs. v. King*
7 *County*, 111 Wn.2d 742 (1988).

8
9 4. The repeal of PUD process in Ordinance 1901 did not eliminate the PUD that
10 restricted EHRC's development of their property. As stated in Ordinance 1901,
11 already existing PUDs remained in full force and effect, were enforceable
12 according to their terms unless and until they were repealed. Absent a repeal or
13 a rezone, the current EHRC building proposal would be inconsistent with the
14 conditions of the prior 1988 PUD and the prior Ordinance 1454.

15
16 5. Nevertheless, this Court agrees with the Hearing Examiner's legal conclusion
17 that the 1988 PUD overlay no longer restricts the EHRC property. As the PUD
18 is a zoning action, any rezoning necessarily extinguishes a PUD. When the
19 2011 City Council adopted Ordinance 2607, rezoning the EHRC property from
20 a R-4 to a R-6, it was repealing any PUD that otherwise restricted the property.
21 This Court does not find the rezone to be a repeal by implication, but an explicit
22 repeal of prior zoning ordinances. In other words, the only way to extinguish
23 the PUD on EHRC was to rezone the EHRC property, which is exactly what the
24 City Council did in 2011 via Ordinance 2607. It was unnecessary for the City
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1 Council to explicitly state the PUD was being extinguished as the very act of
2 rezoning is explicit repeal of the existing PUD zoning.

- 3 6. While former City Council members submitted letters indicating their intent in
4 approving the 2011 rezone, which they now state was based on a belief that the
5 forested buffer would remain, after-the-fact statements cannot be used to prove
6 legislative intent. *Woodson v. State*, 95 Wn.2d 257 (1980). Moreover, as noted
7 in the findings of fact, there were tools available to the 2011 City Council
8 members to ensure development restrictions were in place. The City Council
9 failed to utilize these tools. Whether the City Council failed to utilize the
10 available tools to continue the PUD because they relied upon EHRC's
11 statements, failed to realize the prior PUD would not continue, or had no
12 intention of binding the property is unknown. This Court cannot read
13 legislative intent into the City Council's reasons for failing to bind the property
14 from the letters submitted.
- 15 7. The conditions of the Special Development Permit (SDP) were signed and
16 agreed to by EHRC in the final approval order. The Redmond Code in effect at
17 the time required that the final approval order "shall be recorded as a covenant
18 appearing on the deed to the property." AR 9787. The final approval order was
19 part of the SDP process in 1988 and is an applicant's acknowledgement of the
20 conditions imposed on the property through the SDP process. RCDG
21 20C.20.235(70)(c); AR 9786-87. While the final approval order looks like a
22 contract, it is otherwise inconsistent with a concomitant agreement, and ARN
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1 was not a party to the final approval order. Only EHRC and the City would be
2 parties, with those parties able to modify any conditions. Moreover, even
3 covenants that run with the land can be modified and the Redmond codes
4 allowed covenants to be modified by Hearing Examiners.
5

6 8. The Hearing Examiner has the jurisdiction to approve a CUP if the applicant
7 demonstrates that the CUP is consistent with the Redmond Zoning Code and the
8 Comprehensive Plan; the use is compatible with the character, appearance,
9 quality of development, and physical characteristics of the property and
10 immediate vicinity; the location, size, and height of buildings, structures, walls
11 and fences, and screening vegetation do not hinder neighborhood circulation or
12 discourage permitted development or use of neighboring property; the type of
13 use, hours of operation, and appropriateness of the use in relation to adjacent
14 uses minimize unusual hazards or characteristics of the use that would have
15 adverse impacts. RZC 21.76.070.K. EHRC had the burden of proving their
16 application is consistent with the regulations.
17

18 9. Review of the Hearing Examiner's findings and conclusions regarding the
19 development proposal's consistency with the Comprehensive Plan is reviewed
20 under the clearly erroneous standard. It is an application of the facts to the
21 laws. RCW 36.70C.130(1)(c).
22

23 10. This Court is reserving ruling on the Hearing Examiner's finding that EHRC
24 proposal is consistent with the Redmond Comprehensive Plan. In light of
25 Conclusions 11-15 below regarding the SEPA appeal, this Court does not need

1 to reach the issue of the consistency with the Comprehensive Plan. The Court
2 finds this issue to be similar to the SEPA issues of aesthetics, et al, when
3 considering whether the building proposal as it currently exists is incompatible
4 with the Education Hill neighborhood; whether the bulk, scale, and location of
5 the buildings violate the Comprehensive Plan; whether the level of review was
6 appropriate; and the overall compatibility with the neighborhood. Because the
7 Court is concluding a more thorough SEPA review is necessary, the Court is
8 declining to reach the issue of whether the Hearing Examiner erred in finding
9 compatibility with the Redmond Comprehensive Plan.
10

11 11. The SEPA threshold determination is whether a building proposal is likely to
12 have a probable significant adverse environmental impact. WAC 197-11-330.
13 This Court reviews the Hearing Examiner's finding and conclusion of the City's
14 determination of DNA under the clear error standard of review. *Cougar*
15 *Mountain Assocs. v. King County*, 111 Wn.2d at 747. The appellate courts have
16 found significant impacts in cases with major opposition to a project, a major
17 change in the use of a large area, or the perception of "accelerating
18 development." *Id.* at 750 (citations omitted).
19

20 12. An Environmental Impact Statement (EIS) is required for actions that
21 significantly affect the quality of the environment. The lead agency (Technical
22 Committee) under WAC 197-11-330, 197-11-794 determines if an EIS is
23 required, taking into account:
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- 1 (a) The same proposal may have a significant adverse impact in one location
2 but not in another location;
- 3 (b) The absolute quantitative effects of a proposal are also important, and may
4 result in a significant adverse impact regardless of the nature of the existing
5 environment;
- 6 (c) Several marginal impacts when considered together may result in a
7 significant adverse impact;
- 8 (d) For some proposals, it may be impossible to forecast the environmental
9 impacts with precision, often because some variables cannot be predicted or
10 values cannot be quantified.
- 11 (e) A proposal may to a significant degree:
- 12 (i) Adversely affect environmentally sensitive or special areas, such as loss
13 or destruction of historic, scientific, and cultural resources, parks,
14 prime farmlands, wetland, wild and scenic rivers, or wilderness;
- 15 (ii) Adversely affect endangered or threatened species or their habitat;
- 16 (iii) Conflict with local, state, or federal laws or requirements for the
17 protection of the environment; and
- 18 (iv) Establish a precedent for future actions with significant effects, involves
19 unique and unknown risks to the environment, or may affect public
20 health or safety.
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1 13. The Hearing Examiner, and thus this Court, reviewed the SEPA appeal in this
2 case for significant adverse environmental impacts to air, aesthetics, light, noise,
3 traffic and public services.

4 14. This Court finds the Hearing Examiner erred when she concluded the Emerald
5 Heights proposal will not have significant adverse aesthetic, views, privacy
6 lighting, trees (screening) and land use impacts to ARN under SEPA. There is a
7 reasonable likelihood of more than a moderate adverse impact on aesthetics, et
8 al, with the view of the buildings replacing the view of the trees and all that
9 flows from that replacement. The effects put together leave this Court with the
10 firm impression that a mistake has been made as to the Technical Committee
11 and Hearing Examiner's determination that the proposal is appropriately DNS.
12 The size of the proposed buildings, along with its location, are wholly
13 incongruous with the rest of the neighborhood. While EHRC made many
14 modifications to their initial proposal in an attempt to address community
15 concerns, the size of the building at the proposed location make the
16 modifications insufficient. This Court holds the SEPA appeal should have been
17 granted and an EIS be required for a further determination of mitigation of the
18 significant adverse impacts or a Determination of Significance for if the impacts
19 cannot be mitigated.
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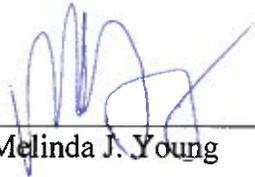
23 15. This Court has given deference to the findings of the Hearing Examiner and the
24 Technical Committee. Further, this Court understands that both the Hearing
25 Examiner and the Technical Committee worked very hard to balance the

1 competing priorities of EHRC and ARN. This Court recognizes the Technical
2 Committee worked with EHRC for two years to make project revisions to
3 address the aesthetic concerns as best as they could. This Court further
4 recognizes the days of testimony the Hearing Examiner considered and the
5 careful thought she put into her ruling. While the height of the building is not
6 incongruous, the length, scale, and mass of the building is unlike anything else
7 in the neighborhood. The proposed plantings are stated to provide 80%
8 screening, yet that would not be for many years and is not the same as the
9 existing screening. Statements by the Hearing Examiner to the contrary are in
10 error. The Technical Committee's determination that impacts to private views
11 are less significant to public views is reasonable, yet the views that are being
12 impacted are to more than just the private residences in the area. Any visitor to
13 the area will lose the beautiful and tranquil feeling of this part of the Education
14 Hill neighborhood. This Court has the benefit of viewing the record as a whole,
15 and even under the clear error standard of review, the Court finds that the SEPA
16 appeal should have been granted.

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19 16. The Court agrees with the Hearing Examiner as to the traffic and noxious odor
20 parts of the SEPA appeal that the Petitioners' position is not supported. The
21 reversal of the SEPA appeal is based on the adverse impacts to the aesthetic and
22 light impacts on the ARN.
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1 This Court hereby REMANDS this case to the responsible official for further action in
2 compliance with SEPA to either mitigate the significant adverse impacts of EHRC proposal or
3 to issue a determination of significance for the building proposal if the impacts cannot be
4 mitigated.
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8 DATED this 27th day of December, 2019.

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11 _____
12 Judge Melinda J. Young
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