

BEFORE THE REDMOND CITY COUNCIL

IN THE MATTER OF THE APPEALS OF)	
JERRY CREEK, WERNER DEGANSEMAN)	
AND SIGMUNDE POTGIETER FROM THE)	File Nos. L070577, L070578
REDMOND HEARING EXAMINER'S)	
DECISION APPROVING THE PEARCE)	
PRELIMINARY PLAT)	FINDINGS,
)	CONCLUSIONS, AND
)	DECISION ON CLOSED
)	RECORD APPEALS
)	

FINDINGS

1. This matter came before the Redmond City Council on closed record appeals from the Redmond Hearing Examiner's approval of the Pearce Preliminary Plat. On December 10, 2007, the Redmond Hearing Examiner issued his Findings of Fact, Conclusions of Law, Decisions, and Recommendation concerning the Pearce Preliminary Plat and Planned Residential Development. The Redmond Hearing Examiner denied SEPA appeals concerning the development filed by Jerry Creek and by Werner Deganseman and Sigmunde Potgieter. The Hearing Examiner approved the preliminary plat and recommended that the Redmond City Council approve the planned residential development.

2. On December 26, 2007, Mr. Creek, Mr. Deganseman, and Ms. Potgieter appealed the Hearing Examiner's decision to the City Council. Mr. Creek's appeal concerned the impacts of the plat on groundwater supply and on a well serving Mr. Creek's property and the property of others in the vicinity. The appeal filed by Mr. Deganseman and Ms. Potgieter challenged the Hearing Examiner's refusal to reverse a decision of the Technical Committee allowing removal of 39 landmark trees in the proposed preliminary plat, the effect of the plat on wildlife, and the potential undermining of trees on their property by drainage from the plat.

3. The City Council heard the appeals on April 15 and May 6, 2008. Oral argument was presented by the appellants, by the developer CamWest Development, Inc., and by the City staff. No new evidence was considered.

4. Prior to oral argument, Councilmember Pat Vache recused himself from participating. All other councilmembers participated in the appeal.

5. Pursuant to RMC 2.04.280, the appellants and the applicant were each given ten minutes to present oral argument on April 15. During its oral argument,

CamWest moved to dismiss Mr. Creek's appeal for lack of jurisdiction. CamWest argued that Mr. Creek's appeal covered the same issues raised in the SEPA appeal that was denied by the Hearing Examiner and that the Examiner's decision on a SEPA appeal is not appealable to the City Council. The City Council orally granted the motion by a vote of 5 to 1 with the understanding that these written findings and conclusions would be brought back later for adoption.

6. In his SEPA appeal before the Hearing Examiner, Mr. Creek argued that the proposed development has the potential to impact both the quality and quantity of water from his well. CamWest submitted a report prepared by Associated Earth Sciences indicating that the proposed development was down gradient from Mr. Creek's well and would therefore have no impact. Mr. Creek testified that he was a civil engineer with significant experience in dealing with water quality and quantity for wells. Mr. Creek contended that there was no "conclusive evidence" in the groundwater report that the applicant's property is down gradient from his well and no guarantee that there would be no impacts. Mr. Creek requested that Hearing Examiner require CamWest and the City to guarantee an ample supply of water to his property by (a) hooking up his water system to the City's water supply at no cost, and (b) perpetually providing City water to him at the same cost as it costs to provide water from the well. The Hearing Examiner denied Mr. Creek's appeal, concluding that Mr. Creek's contentions were not based on scientific inquiry and lacked merit and that there was no legal basis for granting the relief sought.

7. In his appeal to the City Council, Mr. Creek argued that the Hearing Examiner erred in discounting his expertise in groundwater and surface water, that the applicant's groundwater consultant lacked "absolute proof" for his conclusion that the aquifer and well that serves Mr. Creek's property would not be adversely affected by the development, that the Hearing Examiner misstated Mr. Creek's request for a no cost hook-up to City water and water service at an equivalent cost to the well, and that SEPA and the City's development review processes give the Hearing Examiner the authority to grant the relief requested by Mr. Creek.

8. After oral arguments were concluded on April 15, a question was raised by the City Council as to whether the Hearing Examiner's record contained a copy of the applicant's request for a landmark tree preservation exception and the Technical Committee's decision granting the request. After a brief recess in order to ascertain the answer was unsuccessful the matter was set over to May 6.

9. At the May 6, 2008 continued Council proceeding on the closed record appeals, CamWest moved to dismiss that portion of the Deganseman and Potgieter appeal relating to landmark tree removal. There are 57 landmark trees located on the site of Pearce Preliminary Plat. The Technical Committee approved an exception to the landmark tree preservation requirements to allow removal of 39 of the 57 landmark trees. The Hearing Examiner concluded, in his Conclusion 4(a), that the Technical Committee's approval was proper and should not be reversed. Mr. Deganseman and Ms. Potgieter appealed that conclusion. CamWest's argument is that the appeal is improper because

Mr. Deganseman and Ms. Potgieter failed to timely appeal the Technical Committee decision.

10. RCDG 20D.80.20-090 allows the Technical Committee to grant exceptions to the City's tree retention requirements when certain criteria are met. An applicant is required to submit a written request for an exception to the Technical Committee and to provide justification for granting the exception. Exceptions authorizing tree removal are Type I permits under RCDG 20F.30.15-040. Under RCDG 20F.30.30-030, a Type I decision must be in writing and may take the form of a staff report, letter, the permit itself, or other written document. Type I decisions must be appealed in writing within 14 days of issuance.

11. The record considered by the Hearing Examiner in this case does not contain a copy of the applicant's written request for a landmark tree preservation exception, although the applicant's representative, John Harkness, testified at the Hearing Examiner's hearing that the applicant had "submitted an exemption request from the City per their Code." The record also does not contain any written analysis of the exception request by the Technical Committee, although the written Technical Committee Report to the Hearing Examiner indicates that the Technical Committee granted the applicant's request. The date on the Technical Committee Report is November 19, 2007 and the record reflects that it was admitted into evidence by the Hearing Examiner as Exhibit A in the hearing held on that date.

12. CamWest's contention in its motion to dismiss the Deganseman and Potgieter appeal on the landmark tree exception issue is that the Technical Committee staff report to the Hearing Examiner constituted the written Type I decision required by RCDG 20F.30.30-030 and that the failure of Mr. Deganseman and Ms. Potgieter to file a written appeal of that decision within 14 days of the staff report's issuance precludes their appeal. CamWest pointed out that the December 26, 2007 appeal by Mr. Deganseman and Ms. Potgieter was the first time they raised the landmark tree issue in writing and argued that this was untimely compliance with the 14 day appeal requirement.

13. Mr. Deganseman and Ms. Potgieter did not raise the landmark tree removal issue in writing until their December 26, 2007 appeal of the Hearing Examiner's decision. They did, however, raise the issue orally during the November 19, 2007 hearing before the Hearing Examiner. CamWest did not object to the raising of the issue at the hearing and Mr. Harkness testified about the landmark tree preservation exception in the hearing. CamWest's first objection to the consideration of the landmark tree preservation exception by the Hearing Examiner or the City Council came in its motion to dismiss at the May 6 continued closed record appeal proceeding.

14. The City Council orally denied CamWest's motion to dismiss the Deganseman and Potgieter appeal on May 6, 2008, with the understanding that these written findings and conclusions would be brought back later for adoption.

15. Mr. Deganseman and Ms. Potgieter own and reside on property abutting proposed Lots 9-12 and proposed open space Tract F in the southwest quadrant of the Pearce Preliminary Plat. The "Site Plan/Tree Preservation Plan" (Attachment A to the Hearing Examiner's decision) shows that there are currently seven landmark trees on the four lots and one tract (one on Lot 9, three on Tract F, two on Lot 11, and one on Lot 12). There area also eight landmark trees located in the proposed right-of-way for the westernmost internal roadway in the Plat. All but one of these landmark trees (the westernmost landmark tree on open space Tract F) will be removed under the exception granted by the Technical Committee.

16. The "Revised Tree Preservation and Health Evaluation Report" (Attachment 18 to the Technical Committee Report to the Hearing Examiner - Exhibit A to the Examiner's hearing) contains a "Tree Evaluation Data" table listing each significant and landmark tree that will be removed as the result of the development, together with a health evaluation and the justification for removal. The landmark trees approved for removal on Lots 9 and 12 lie within the proposed building pads for those lots. In addition, the landmark tree located on Lot 9 is unhealthy and requires removal because of its condition. The landmark trees approved for removal on Lot 11 are not within the building pad, but the westernmost tree is unhealthy and the easternmost tree is located in area that will be impacted by construction. The easternmost landmark tree on open space Tract F is unhealthy and the westernmost landmark tree will be impacted by construction. Of the eight landmark trees located in the westernmost road right-of-way, four are unhealthy and the other four are proposed for removal due to development impacts.

17. Although Mr. Deganseman and Ms. Potgieter made detailed written arguments in their appeal to the City Council regarding the criteria for Technical Committee approval of landmark tree preservation exceptions, most of these arguments were not presented to the Hearing Examiner. At the Hearing Examiner's hearing, the focus of Mr. Deganseman and Ms. Potgieter's argument concerned the loss of forest habitat and their desire that the forested condition of the CamWest property remain. Mr. Deganseman and Ms. Potgieter did express concern that removal of the landmark trees on Lots 9-12 and Tract F would expose trees on their property to the prevailing winds, thereby creating a "wind snap" danger.

18. According to the "Revised Tree Preservation and Health Evaluation Report" (Attachment 18 to the Technical Committee Report to the Hearing Examiner - Exhibit A to the Examiner's hearing), "wind snap" is a concern for retained trees that are newly exposed to high winds when protective forest cover is removed. Mr. Deganseman and Ms. Potgieter did not present any testimony regarding the susceptibility of any specific tree or tree stand on their property to wind snap as the result of the removal of the landmark trees on lots adjacent to their property, but expressed a general concern regarding that potential.

19. Mr. Deganseman and Ms. Potgieter also argued in their appeal that the removal of landmark trees on the Pearce subdivision property would cause a significant

decrease in the value of their property. No evidence was presented to support this contention.

20. Mr. Deganseman and Ms. Potgieter have also appealed the Hearing Examiner's decision that no special mitigation requirements were necessary for wildlife protection as the result of the development. Specifically, they have appealed the Hearing Examiner's Finding 10 concerning the post-development availability of a significant portion of the hardwood forest habitat and many large trees for wildlife habitat. They argue that the conversion of forested land to building lots will result in a significant reduction in livable wildlife habitat.

21. The Hearing Examiner's Finding 10 was based on a wildlife study prepared for the CamWest by Chad Armour, LLC (Attachment 20 to the Technical Committee Report to the Hearing Examiner - Exhibit A to the Examiner's hearing). The study rated the quality of the habitat as being relatively low based on factors such as size, vegetation community types, community interspersion, priority species presence, priority species habitat use, habitat continuity, forest vegetation layers, forest age, and invasive species presence. The study also noted that the Puget Sound Energy easement to the south of the property would facilitate movement of wildlife to and from other locations. The Hearing Examiner relied on the study and on the retention of more than one-third of the site in open space areas which wildlife could access in concluding that no special mitigation was required.

22. Mr. Deganseman and Ms. Potgieter have also appealed the Hearing Examiner's Conclusion 4(c) concerning the potential undermining of trees on their property by drainage coming from the southwest corner of the Plat. The Hearing Examiner concluded that CamWest would be required to control all stormwater generated at the site according to the stormwater plan which was Attachment 16 to the Technical Committee Report to the Hearing Examiner - Exhibit A to the Examiner's hearing. Mr. Deganseman and Ms. Potgieter argue that this is contrary to the topography in the southwest corner of the site. CamWest and the City staff respond that the City's regulation will require all storm drainage to be collected and detained and that the specifics of this requirement will be determined at the time of civil construction drawing review.

23. Except to the extent modified by the above, the Hearing Examiner's December 10, 2007 findings are hereby adopted by this reference as if set forth in full.

24. Any conclusion of law set forth below or in the Hearing Examiner's December 10, 2007 decision that is more properly deemed to be a finding of fact is hereby adopted as such.

CONCLUSIONS OF LAW

1. The City Council lacks jurisdiction over the appeal filed by Mr. Creek. The Pearce Preliminary Plat is a Type III permit under RCDG 20F.30.15-040. The

Pearce Planned Residential Development is a Type IV permit under that RCDG section. Under RCDG 20F.30.40-015(3) and RCDG 20F.30.45-015(3), the Hearing Examiner's decision on a SEPA appeal is a final decision that is appealable to the superior court, not to the City Council. A comparison of Mr. Creek's SEPA appeal before the Hearing Examiner and his appeal to the City Council reveals a complete commonality of issues. Mr. Creek's appeal to the City Council is an attempt to appeal the Hearing Examiner's decision on his SEPA appeal. The Council lacks jurisdiction over that appeal and it must be dismissed.

8. CamWest's motion to dismiss the landmark tree portion of the Deganseman and Potgieter appeal must be denied for the following reasons:

- a. It is unreasonable to construe a single reference in a staff report to the Hearing Examiner on a Type III and Type IV development approval as an appealable Type I decision. When RCDG says that the Type I decision can take the form of a staff report, the permit itself, or another written document, it is referring to a staff report, permit or document on the Type I approval, not a report, permit or document on another approval. Any other construction of the RCDG is unreasonable.
- b. It is also unreasonable to require citizens who were allowed to challenge the Type I decision without objection during the Type III and Type IV development hearing, who had that challenge denied on the merits by the Hearing Examiner, and who received the Hearing Examiner's standard notice that the decision on the merits could be appealed to the City Council within 14 days of his decision, to have to have filed an appeal within 14 days after issuance of the staff report to preserve their appeal rights.
- c. In this case, if the November 19, 2007 date on the staff report were construed as commencing the appeal period for the Type I decision, the last day for filing an appeal would have been December 3, 2007, 14 days after the Hearing Examiner had heard the challenge on the merits and seven days before the Hearing Examiner rendered a decision on the merits. Construing the RCDG to require that Mr. Deganseman and Ms. Potgieter appeal a Technical Committee decision that was already being considered by the Hearing Examiner and on which he had not yet ruled would be an absurd construction.
- d. CamWest waived any objection to the Council's consideration of the Type I landmark tree preservation exception when it failed to object to the issue being considered by the Hearing Examiner and when it further failed to object to the Council considering the issue until after oral argument had been presented on Mr. Deganseman and Ms. Potgieter's appeal.

The Council has jurisdiction over Mr. Deganseman and Ms. Potgieter's challenge to the landmark tree preservation decision and CamWest's motion to dismiss is denied.

9. The standards for considering Mr. Deganseman and Ms. Potgieter's appeal on the merits are found in RCDG 20F.30.110. Under RCDG 20F.30.40-110(1)(f)(v) and 20F.30.40-110(1)(g)(i), the Council is required to uphold the decision of the Hearing Examiner unless, based on the record, it is determined that the Hearing Examiner's decision is "clearly erroneous" or is "not supported by a preponderance of the evidence." The City Council is required to give the decision of the Hearing Examiner "substantial weight" under RCDG 20F.30.40-110(1)(g)(i).

10. Although the record does not contain CamWest's written application for the landmark tree preservation exception or the Technical Committee's written analysis of that request, the Council nevertheless concludes that the Hearing Examiner's decision to uphold the Technical Committee approval is supported by a preponderance of the evidence and is not clearly erroneous. The "Site Plan/Tree Preservation Plan" (Attachment A to the Hearing Examiner's decision) shows the location of each landmark tree to be removed vis a vis the plat improvements and the building pads for the proposed homes. The Tree Evaluation Data table in the "Revised Tree Preservation and Health Evaluation Report" (Attachment 18 to the Technical Committee's Report to the Hearing Examiner) provides the justification for removing each of the landmark trees approved for removal by the Technical Committee. Seven of the landmark tree removals authorized by the Technical Committee are justified by the unhealthy condition of the trees and the other seven are justified by development of the plat improvements and the homes.

11. Removal of landmark trees because of plat improvements and building pads can be authorized under RCDG 20D.80.20-090. In this case, the Pearce subdivision property is zoned R-4 and CamWest has applied for a PRD in order to allow for clustering and increase density in exchange for preservation of large open space tracts. If the density envisioned by the zoning and PRD regulations is to be achieved on the site, some removal of landmark trees is necessary.

12. Although wind snap is a potential for trees that remain after the removal of landmark trees on the Pearce subdivision property, Mr. Deganseman and Ms. Potgieter did not present any evidence in the Hearing Examiner's hearing of wind snap danger to any specific tree or stand of trees on their property from the removal of the landmark trees on the Pearce subdivision property, half of which were unhealthy. Mr. Deganseman and Ms. Potgieter also did not point to any evidence in the record supporting their claim that removal of the trees would decrease the value of their property. If removal of the landmark trees on the Pearce subdivision property were shown to create a specific wind snap danger to trees on the Deganseman/Potgieter property or if removal were shown to cause a specific decrease in the value of the Deganseman/Potgieter property, this would have a bearing on whether the requirement of RCDG 20D.80.20-090 that the tree preservation exception not be injurious to other property in the vicinity was met. However, in the absence of any such evidence and with the justifications set forth in the

Tree Evaluation Data table, the Council must conclude that the Hearing Examiner's Conclusion 4(a), upholding the Technical Committee's approval of the landmark tree preservation exception, is supported by substantial evidence and is not clearly erroneous. The Deganseman/Potgieter appeal must be denied on the landmark tree removal issue.

13. The Hearing Examiner's Finding 10 concerning impacts to wildlife and his decision not to impose further wildlife mitigation is also supported by a preponderance of the evidence and is not clearly erroneous. The wildlife study prepared by Chad Armour, LLC is credible and could be relied upon by the Hearing Examiner. No expert testimony rebutting the study's conclusions was entered into the record. The Deganseman/Potgieter appeal must therefore be denied as it relates to the Hearing Examiner's Finding 10 and his conclusion that no additional wildlife mitigation was required.

14. The Hearing Examiner's Conclusion 4(c) regarding storm water runoff is supported by a preponderance of the evidence and is not clearly erroneous. RCDG 20D.180.10-100 sets forth the following requirements for the control of storm drainage generated by plats:

- a. All lots shall be provided with adequate storm drainage connected to the storm drainage system of the City or other system approved by the Director of Public Works.
- b. Where a public street is to be dedicated or improved by the applicant as a condition of preliminary approval, the applicant shall provide and dedicate any required storm drainage system in the street.
- c. When appropriate, storm drainage facilities shall include suitable on-site detention and/or retention facilities.
- d. Storm drainage shall be provided in accordance with Chapter 15.24 RMC, Clearing, Grading and Storm Water management and standards and specifications approved by the Director of Public Works.
- e. Easements shall be dedicated as provided in RCDG 20D.180.10-070.

15. The storm water plan for the development and the storm water management conditions of approval indicate that storm water will be controlled through detention ponds and vaults and that the water will be discharged in a manner and at a rate that meets City requirements. The plat will be required to meet all of the requirements of RCDG 20D.180.10-100 and the final system design will be approved by the City at the time of civil construction drawing review. The Hearing Examiner's Conclusion 4(c), in which he concluded that the applicant would have to control all drainage from the developed site, is thus supported by the preponderance of the evidence and was not clearly erroneous.

16. Except as modified by the above, the Hearing Examiner's December 10, 2007 Conclusions of Law are hereby adopted by this reference as if set forth in full.

17. Any finding of fact set forth above or in the Hearing Examiner's December 10, 2007 decision that is more properly deemed a conclusion of law is hereby adopted as such.

DECISION

For all of the reasons set forth above, the Redmond City Council hereby

1. Grants the motion of CamWest and dismisses the appeal of Jerry Creek for lack of jurisdiction;

2. Denies the motion of CamWest and hold that the appeal of Werner Deganseman and Sigmunde Potgieter regarding the landmark tree preservation exception granted by the Technical Committee was properly before the City Council;

3. Holds that the Redmond Hearing Examiner's December 10, 2007 findings, conclusions and decision is supported by a preponderance of the evidence and is not clearly erroneous on any of the appeal issues raised by Mr. Deganseman and Ms. Potgieter; and

4. Denies the appeal of Mr. Deganseman and Ms. Potgieter and upholds the The December 10, 2007 decision of the Redmond Hearing Examiner to approve the Pearce Preliminary Plat in all respects.

ADOPTED by the Redmond City Council at a regular meeting thereof this 20 day of May, 2008.


MAYOR JOHN MARCHIONE

ATTEST/AUTHENTICATED:


CITY CLERK MICHELLE M. MCGEHEE