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5 **BEFORE THE HEARING EXAMINER FOR THE CITY OF BELLEVUE**

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7 In the Matter of the Appeal of a Preliminary
8 Conservation Short Plat and Critical Areas
9 Land Use Permit for 2.37 Acres at 3076
10 Bellevue-Redmond Road and Improvement of
11 164th Ave NE Right of Way.

12
13 **JULIE COPP, MIKE EDDE AND
14 MARTIN SEELIG**

15 Appellants,

16 v.

17 **CITY OF BELLEVUE, and DESIGN
18 BUILT HOMES,**

19 Respondents.

**AAD 19-04 (Julie Copp)
AAD 19-05 (Mike Edde)
AAD 19-06 (Martin Seelig)**

**City Permit File Nos.: 18-103735-LN
and 18-104608-LO**

**FINDINGS OF FACT, CONCLUSIONS
OF LAW AND DECISION**

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21 This matter came on for hearing before the undersigned Hearing Examiner at Bellevue
22 City Hall on July 16 and 17, 2019. The Appellants, Julie Copp, Mike Edde and Martin Seelig
23 represented themselves. The City was represented by Matthew B. McFarland, Assistant City
24 Attorney. Applicant Design Built Homes was represented by Duana T. Kolouskova and Dean
25 Williams of Johns Monroe Mitsunaga Kolouskova, PLLC. Exhibits were admitted, testimony
was taken and argument was made. From the record, the Examiner enters the following:

PROCEDURE

In response to a schedule set forth in a Prehearing Order, five different motions were filed
by the parties prior to the hearing. The Hearing Examiner ruled on these motions and provided
guidance on the scope of the hearing in an Order dated June 28, 2019.

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**CITY OF BELLEVUE
450 – 110th Avenue NE
P. O. Box 90012
Bellevue, WA 98009 9012**

FINDINGS OF FACT

1 1. On April 18, 2019, the City of Bellevue approved a Conservation Short Plat and a
2 Critical Areas Land Use Permit for the Caymus Ridge proposal. On site, the project involves the
3 subdivision of two existing lots totaling 2.37-acres into seven lots, two native growth protection
4 area tracts, one access tract and one tract for storm water retention.

5 2. The project site is located in the BelRed subarea of Bellevue. The property is
6 surrounded by existing single-family homes.

7 3. The Bellevue-Redmond (Bel-Red) Road, a three-lane road classified as a major
8 arterial and runs along the west side of the project property. Historically the property was
9 developed with a house accessed from Bel-Red. The house and the former access have long
10 ceased to exist.

11 4. The property boundary along Bel-Red Road is encumbered by steep slopes and a
12 critical area stream buffer. These are to be placed within Native Growth Protection Area tracts.
13 Under the instant plat proposal, no access to the site will be provided from Bel-Red Road.

14 5. The project calls for providing vehicular access from the east side of the property via
15 164th Avenue NE from NE 30th Street. This access will include what is now unimproved right-
16 of- way on the eastern side of the plat property. The right-of-way is 30 feet in width and extends
17 from NE 30th Street to NE 32nd Street. Within the plat, a private road placed in Tract A and
18 proceeding west from the improved 164th Avenue NE will provide access to the homesite lots.

19 6. Roadway improvements on 164th Avenue NE will include a minimum 20-foot wide
20 pavement width, concrete curb and gutter and a 6-foot wide concrete sidewalk on the west side
21 of the road. These improvements will extend from NE 30th Street to approximately 100 feet
22 north of the project private access road in Tract A.

23 7. At the north end of this section, the road will be blocked off to restrict access except
24 for maintenance vehicles. Beyond that, a maintenance access road, reduced to a 16-foot-wide
25 pavement section, will extend to a dead-end approximately another 110 feet to the north,
connecting there to a two to six-foot-wide soft surface pedestrian trail. The pedestrian trail will
intersect the NE 32nd Street unimproved right-of-way and then proceed easterly along that right-
of-way to 165th Place NE. This will provide a continuous pedestrian route from NE 30th Street to
Ardmore Elementary School.

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1 8. The applicable sidewalk requirements in this situation do not necessitate that
2 sidewalks be built on both sides of 164th Avenue N.E. Under relevant City standards (BCC
3 14.60.190), on a dead-end street, a sidewalk is mandated on only one side.

4 9. The roadway improvements on 164th Avenue NE will include a retaining wall
5 integrated with a concrete jersey barrier constructed on the east side of the street. A two-foot
6 separation from the face of the jersey barrier will be provided to fog line pavement markings.

7 10. Traffic impacts of the project are predicted to be minimal. There are currently three
8 homes between the proposed plat and NE 30th Street along the route of 164th Avenue NE. A new
9 residential driveway on 164th Avenue NE for each of these residences will be constructed. The
10 seven new homes in the plat will not result in a substantial increase in vehicle trips.

11 11. The improvements to 164th Avenue NE will, however, change the long existing
12 status quo on the ground. On the east side of the present paving, neighboring property owners
13 over the years have encroached onto the undeveloped right-of-way. These encroachments will
14 be eliminated by the new road construction. Trees and other vegetation in the right-of-way will
15 be removed.

16 12. For the new road to be built, the retaining wall is necessitated by the topography
17 along the right-of-way. The wall must meet City of Bellevue standards and the City may require
18 third-party structural review. Appellant Copp showed that construction of retaining walls in
19 other situations has produced unsightly results, but there was no convincing demonstration that
20 such results will occur here. There was no showing that the wall is unnecessary.

21 13. The existing right-of-way on 164th Avenue NE belongs to the City. In general,
22 neighboring owners have no right to prevent proposed construction which alters conditions in
23 such a right-of way in order to accommodate a street. However, there is no suggestion that in
24 building the road, either the City or the applicant have somehow obtained permission to inflict
25 harm on neighboring property, including harm to existing trees on such property.

14. The project also includes the extension of the public sewer to connect to existing
sewer facilities to the east. The route will be on the unimproved right-of-way of NE 32nd Street
and then via easement across two private parcels to the subject plat. The diversion through the
private parcels was selected to avoid extensive retaining wall construction and fill. Except for
the passage through the private parcels, the sewer route will coincide with the pedestrian trail.

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1 15. While the City did look at other alternatives for connecting the proposed plat to
2 public sewer, there was no evidence that a feasible alternative is available.

3 16. The route of the sewer connection is thickly forested. Construction of the sewer
4 connection to the plat may affect the stability of trees on this route and necessitate the removal of
5 a number of them. Trail construction along that portion which does not coincide with the sewer
6 route may also affect existing trees.

7 17. The project approval calls for an arborist to review the final trail plan and verify tree
8 protection and retention. The final plan must avoid tree removal where possible and justify any
9 removal that does occur. This review is to occur at the clearing and grading permit level.

10 18. Because of experience involving trees falling on his house, Appellant Seelig seeks
11 assurance of adequate review during the construction process in regard to the effects of sewer
12 and trail building on tree stability. To this end he offered a number of additions to the project
13 conditions. The Applicant accepted some of these and rejected others. The Examiner concurs
14 that suggestions for additional arborist involvement have merit. He agrees with the Applicant
15 that it is inappropriate for Mr. Seelig to become a direct participant in the approval process
16 through individualized notice and consultation.

17 19. Any conclusion herein which may be deemed a finding is hereby adopted as such.

18 CONCLUSIONS OF LAW

19 1. The Hearing Examiner has jurisdiction over these appeals. The parties have been
20 given an opportunity to present their cases. The record herein is therefore closed.

21 2. Short plats are exempt from the threshold determination and environmental impact
22 statement requirements of the State Environmental Policy Act (SEPA). WAC 197-11-800(6)

23 3. Under Bellevue's system this application for a Preliminary Conservation Short Plat
24 Subdivision is a Process II decision. LUC 20.35.015(C). This means that, although there was
25 prior notice and opportunity for written comment, the project approval was made without the
benefit of a prior public hearing. LUC 20.35.230.

4. Procedurally then, the decision in this case was made administratively and thereafter a
hearing could only be obtained by filing an appeal (as was done), thus converting the matter into
a contested case with designated parties. LUC 20.35.250(A).

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1 5. The appellants here would like to continue to be advised of the City's actions on this
2 plat and to make further input before it is finally approved. Unfortunately, there is no readily
3 available process for this kind of participation. Parties can always make public records requests
4 and hope to get information in time to influence the final approval, but there is no established
5 mechanism for the City staff to receive or consider such input.

6 6. An application for preliminary plat approval requires an applicant to present the
7 general layout of his/her proposal and to show that he/she are capable of meeting City standards
8 in carrying it out. Final design and details of construction await the final approval process.

9 7. The Hearing Examiner's decision must be based on the policies of the Comprehensive
10 Plan and the standards set forth in the City code. BCC 3.68.250(B). The approval criteria for a
11 preliminary plat are set forth at LUC 20.45A.130, as follows:

12 The City may approve or approve with modifications a preliminary plat if:

13 A. The preliminary plat makes appropriate provisions for, but not limited to, the
14 public health, safety and general welfare; for open spaces, drainage ways, streets,
15 sidewalks, alleys, other public ways, water supplies, sanitary waste, parks,
16 playgrounds, sites for schools and school grounds; and

17 B. The public use and interest is served by the platting of the subdivision; and

18 C. The preliminary plat appropriately considers the physical characteristics of the
19 proposed subdivision site; and

20 D. The proposal complies with all applicable provisions of the Land Use Code,
21 BCC Title 20, the Utility Codes, BCC Title 24, the City of Bellevue Development
22 Standards and Chapter 58.17 RCW; and

23 E. The proposal is in accord with the Comprehensive Plan, BCC Title 21; and

24 F. Each lot in the proposal can reasonably be developed in conformance with
25 current Land Use Code requirements without requiring a variance; however,
requests for modifications to the requirements of Part 20.25H LUC, where
allowed under the provisions of that part, may be considered together with an
application for preliminary plat so long as the resulting lots may each be
developed without individually requiring a variance; and

1 G. All necessary utilities, streets or access, drainage and improvements are
2 planned to accommodate the potential use of the entire property.

3 8. The Appellants have the burden of proving that one or more of these criteria have not
4 been met. Hearing Examiner Rules of Procedure 1.11(A). The Examiner concludes that, except
5 as the conditions of approval are modified by this decision, the Appellants have failed to meet
6 this burden.

7 9. The requirement for a retaining wall and jersey barrier was not shown to be in excess
8 of the City's power or erroneous under the facts.

9 10. The removal trees within the right-of-way as necessary for the construction of 164th
10 Avenue NE was not shown to be in excess of the City's power or erroneous under the fact.

11 11. The requirement for a sidewalk on only one side of 164th Avenue NE was not shown
12 to be incorrect.

13 12. As to access to the plat from Bel-Red Road, the Examiner has concluded that this
14 possibility is effectively precluded by the Comprehensive Plan, Crossroad Subarea Policies,
15 Policy S-CR-36 and S-CR-41. Moreover, the existence of the critical areas and buffers on this
16 site prevent the use of such access in any event. This conclusion was implicit the Examiner's
17 ruling on Pre-Hearing Motions, dated June 28, 2019.

18 13. Appellant Edde has continued to press his claim regarding the lane alignment on
19 164th Avenue NE. This matter is not ripe for review because the level of detail necessary to
20 evaluate this claim is not required until final engineering. The applicant will be required to meet
21 applicable standards.

22 14. There were complaints that the City did not provide ample opportunity for citizens to
23 meet with its representatives, make their feelings known, and discuss the ins and outs of this
24 proposal. The record discloses a considerable effort by the City to respond to inquiries. But
25 despite this, citizen dissatisfaction with the process was evident throughout these proceedings.
Under the law, neighborhood displeasure is not a legal basis for denial of an application.
Maranatha Mining, Inc. v. Pierce County, 59 Wn. App, 795, 801 P.2d 985 (1990).

15. In this case, however, the problem with involving citizens in the decision largely
appears to be structural. Process II allows City approval of an application such as this one,
without a prior public hearing. Appeals come only after-the-fact. The Hearing Examiner can

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1 only look at whether the City followed the procedures it is required to follow in approving this
2 application. The Examiner concludes that the City met the legal requirements.

3 16. Whether citizen input should be encouraged or allowed at the final plat stage appears
4 to be a question for legislative action. Under the present system there is no mechanism for such
5 input.

6 17. Any finding herein which may be deemed a conclusion is hereby adopted as such.

7 **DECISION**

8 1. Critical Areas Land Use Permit (CALUP) – None of the Appellants made a case
9 regarding the CALUP and thus, to the extent there was an intent to challenge the CALUP such
10 appeals are DENIED.

11 2. Preliminary Conservation Short Plat -- The appeals of Julie Copp and Mike Edde are
12 denied. The appeal of Martin Seelig is denied, except as to the revisions to Conditions of
13 Approval contained in Appendix A hereto. In all other respects, the City's decision on the
14 Preliminary Conservation Short Plat for Caymus Ridge is AFFIRMED.

15 DONE, this 31st day of July, 2019.

16 

17 Wick Dufford, Hearing Examiner

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APPEAL TO SUPERIOR COURT

1 This decision is the final administrative decision of the City. As provided in BCC
2 20.35.045, Process II decisions are final on the day following issuance of a final City decision on
3 the administrative appeal. BCC 20.35.070 explains that a final City decision on a land use
4 permit application (Processes I through III and V) may be appealed to Superior Court by filing a
5 land use petition meeting the requirements set forth in Chapter 36.70C RCW. The petition must
6 be filed and served upon all necessary parties as set forth in state law and within the 21-day time
7 period as set forth in RCW 36.70C.040.
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APPENDIX A

To Bellevue Hearing Examiner's Decision regarding appeals of the Caymus Ridge Preliminary Short Conservation Short Plat --HE File Nos. AAD 19-04, 19-05, 19-06.

Conditions of Approval are Amended as follows: (amended language is underlined)

B. 2. Geotechnical Review

The project geotechnical engineer must review the final construction plans, including all foundation, retaining wall, shoring and vault designs, and sewer boring in NE 32d St. ROW. Included in this review must be geotechnical contingency plans to detail procedures to be followed if impenetrable boulders are encountered. Geotech must obtain arborist approval before any remedial actions are taken. . . .

B. 3. Geotechnical Inspection

The project geotechnical engineer must provide geotechnical inspection during project construction including monitoring and testing soil cuts and fill, subgrades for foundations and footing, utility trench backfill, and any unusual seepage, slope or subgrade conditions, including during boring operations for sewer in NE 32nd St. If roots or other organic materials are encountered during boring, boring must cease immediately and the project arborist consulted to determine detrimental effect on tree stability.

B. 5. Rainy Season Restrictions

[Add to end of condition] Clearing and grading activity in the NE 32n St ROW must cease during the rainy season.

B. 6. Clearing Limits and Temporary Erosion and Sedimentation Control

[Add to end of condition] These measures must also apply to the NE 32nd St. ROW.

B. 7. No Clearing and/or Grading on Building Sites During Plat Construction

[Add to end of condition] Plat infrastructure (utilities) referred to in this section includes sewer boring in the NE 32st St. ROW.

B. 8. Geotechnical Recommendations

The project, including work to be done in the NE 32nd St. ROW, shall be construction per the . . .

B. 9. Tree Protection Requirements

To mitigate adverse impacts to both disturbed and non-disturbed areas and trees to be retained during construction, conformance with BMP T101 for tree protection is required which includes:

- Clearing limits shall be established at the limit of non-disturbed areas and for retained trees within both the developed portion of the site and the NE 32nd St ROW, outside of drip lines. Six-foot chain link fencing with driven posts, or an alternative approved by the Clear and Grade Inspector, shall be installed at the clearing limits prior to initiation of clearing and grading.

B. 8. Final Mitigation Plan

[Add to end of condition] The provisions provided in this Section, Final Mitigation Plan, shall also apply to the NE 32nd St. ROW.

B. 10. Installation Performance Sureties for Mitigation Planting

An installation performance surety is required based on 150 percent of the installed cost of mitigation planting. The amount of the surety is determined by a cost estimate submitted as part of the clearing and grading permit for plat infrastructure, including work to be done on 164th Ave. NE and NE 32nd St. ROW. The installation surety will be released upon successful Land Use inspection of the planting in 164th Ave. NE and the NE 32nd St. ROW.

B. 11. Maintenance Surety and 5-Year Monitoring

A maintenance surety for the mitigation planting is required based on 100 percent of the cost estimate for all costs associated with maintenance and monitoring for 5 years for monitoring, maintenance activity, plant replacement, contingencies. The amount of the surety is determined by a cost estimate submitted as part of the clearing and grading permit for plat infrastructure, including any work to be done on 164th Ave. NE and NE 32nd St ROW. The maintenance surety will be released upon successful completion of the 5-year maintenance and monitoring period and inspection by Land Use.

B. 15. Engineering Plans

[Add to last bullet point under Pedestrian trail]

- Construct a 6-foot wide soft surface pedestrian trail extending from the north end of the maintenance access road on 164th Avenue NE to NE 32nd Street unimproved right-of-way and a two foot wide soft surface pedestrian trail along NE 32nd Street connecting to the intersection of NE 32nd Street and 165th Place NE. Except for the width of the trail, the pedestrian trail shall be constructed City of Bellevue Standard Detail PK-TR-02. Trail alignment will be determined in the field during clearing and grading permit review. A narrower trail will reduce potential adverse effects of trail construction.

Construction of all street and street frontage improvements, including those in the NE 32nd St. ROW, must be completed prior to closing the clear and grade permit and right of way use permit for this project. . . .

C. 4. Tree Preservation

Existing trees contribute substantially to the effectiveness and health of this system. The City of Bellevue urges the applicant to save as many trees as possible. The final short plat shall portray a minimum of 1,201 diameter inches of existing significant trees to remain or greater, as is proposed. A Tree Preservation Plan that portrays the dripline, the diameter size, and common name of each significant tree to be retained, including those in the NE 32nd St. ROW, must be recorded with the *final short plat mylar* (recorded with King County). . . .