



November 3, 2017

MEMORANDUM

TO: Hearing Examiner Galt

FROM: King County DNRP, Applicant for **SSDP2016-00415**

SUBJECT: KING COUNTY RESPONSE TO DPD STAFF REPORT AND
RECOMMENDATION ON **SEGMENT B SSDP2016-00415**

In response to the City of Sammamish's October 4, 2017 Staff Report and Recommendation on SSDP 2016-00415 (Ex. 1) for the Eastlake Sammamish Trail (ELST) Segment B, the applicant, King County, is providing this memo as an outline of the County's concerns regarding certain recommended conditions. For SSDP 2016-00415, the County is requesting the Examiner modify, clarify or strike in their entirety Recommended Conditions 2, 3, 4, 5, 6, 7, 8, 9, 10, 12, 14, and 16. This memo explains the legal deficiencies and facts that warrant substantive changes to these conditions.

I. BACKGROUND

The ELST is an 11-mile regional multi-use trail and alternative transportation corridor, part of which lies within the City of Sammamish. Ex. 6. The ELST has been part of the King County Regional Trail Plan since at least 1992, and has consistently been intended to serve as a major arterial for non-motorized transportation. *See* KC Ex 9, at 0949; King County Regional Trail Inventory and Implementation Guidelines, 2004, at 4. The ELST completes a missing link in the 44-mile long regional trail corridor and provides access to recreation, employment, and

EX 71

Hearing Examiner Galt
11/03/17
Page 2

major business centers in the Cities of Redmond, Sammamish, and Issaquah and . KC Ex. 9 (FEIS) at 0948-0949. Regional trails are intended to serve the widest modes of non-motorized users and made as accessible as possible. As a regional recreation and non-motorized transportation facility, the ELST is an essential public facility under RCW 36.70A.200. *See Cascade Bicycle Club and King County v. City of Lake Forest Park*, CPSGMHB Case No. 07-30010c (Final Decision and Order); *Central Puget Sound Regional Transit Authority v. City of Tukwila*, CPSGMHB Case No. 99-3-0003 (Final Decision and Order); 2016 King County Comprehensive Plan, Nonmotorized Transportation Program, T-231-233; Essential Public Facilities, F-229.

In 2010, the East Lake Sammamish Master Plan Trail and its Final Environmental Impact Study (FEIS), undertaken jointly by King County, the Washington State Department of Transportation and the Federal Highway Administration, determined that improving the regional trail along the existing railroad right-of-way corridor was the preferred alternative. Exs. 1; 9; 10; KC Ex. 9 (FEIS). The FEIS considered a range of trail widths, 27-feet being the “ideal width of the trail to safely accommodate multiple uses,” and 18-feet, with a 12-foot paved area, being the narrowest width considered. KC Ex. 9, 0971. After completion of the FEIS but before construction of the ELST segments, King County made an important design decision for this regional trail project. Rather than construct a 27 foot wide trail, King County decided to construct an 18 foot wide trail (12 foot paved, two foot gravel shoulders and one foot clear zone) along the entire length of the ELST. This design decision was made for two primary reasons: to minimize impacts to the environment, including critical areas and the shoreline, and to minimize impacts to adjacent homeowners, many of whom had requested a narrower width during the public comment period.

Hearing Examiner Galt
11/03/17
Page 3

Consistent with its critical position within the regional trail system, the ELST has been designed to accommodate long-term projected growth and a variety of user groups, including bicyclists, pedestrians (including those with strollers and leashed dogs), runners, wheelchair users, and in-line skaters, all of varying ages and skill levels. With these uses and the relevant safety standards in mind, a 12-foot paved width is necessary to accommodate a high-volume facility that meets current and future needs.

Since 2010, the trail has been completed in segments, with the proposed Segment B being the final link in the 11-mile improvement project. The Segment B SSDP application proposes to improve 3.5 miles of the ELST, creating a 12-foot-wide paved trail, consistent with the “minimum evaluated paved width” in the FEIS and the width approved for all other segments of the ELST. KC Ex. 9 at 0943, 0968, 0971, 1168, 1169; Ex. 6. The proposed project is a Public Recreational Use that is permitted under SMC 25.07.010. As the City’s Staff Report acknowledges, “the Project is considered a preferred water-oriented and water-enjoyment use that is given priority in both the SMA and the SMP.” Ex. 1, at 6.

The permit application currently under review is an SSDP. As such, any conditions should be limited to those necessary to achieve consistency of the project with the Shoreline Management Act (SMA) and the local master program (SMP). WAC 173-27-040; *Sammamish Homeowners et al v. City of Sammamish*, SHB 15-012c (Findings of Fact, Conclusions of Law and Order). Conditions are not appropriate where they exceed this scope of authority, are unreasonable or render a project unviable. *See Taylor Shellfish Farms v. Pierce County*, SHB No. 06-039(c) (limiting conditions to reach “the appropriate balance” between allowing a successful project while addressing environmental concerns); *See Cascade Bicycle Club*, CPSGMHB Case No. 07-30010c.

Trail width is one of the primary sticking points between the City and the County. The proposed design is for a high-volume multi-use regional trail. The proposed 12-foot width is consistent with the City's development regulations for trails, requiring that the trail width be consistent with AASHTO standards for public multi-use paved trails. SMC 21A.20.210(3). The proposed width is also consistent with King County's regional trail standard and other regional trail facilities. *See* KC Ex. 5; King County Regional Trail Inventory and Implementation Guidelines, 2004. The proposed width is consistent with the minimum contemplated in the FEIS. And, insofar as environmental impacts result from the trail width, the County has proposed ample mitigation consistent with the City's code.

For each portion of the ELST, King County has gone to great lengths and great expense to fully evaluate environmental impacts and the need to facilitate safe trail use. This iterative process has involved coordination with City staff and incorporation of City and public input into the project design. The result is a project that is designed to be code compliant, maximize safety, avoid environmental impacts wherever possible, and mitigate for unavoidable impacts.

Safety, however, cannot be easily mitigated. The County has chosen a project design that is consistent with its project requirements, the King County regional trail standard, AASHTO standards and adopts the minimum trail width contemplated in the FEIS. This reflects the County's desire to maintain an appropriate baseline for safe use of a high-volume trail. A 10-foot wide paved trail is not sufficient to safely accommodate a high volume of users under the AASHTO standards, which have been adopted as City regulations. SMC 21A.30.210(3).¹ The County's design of this regional transportation and recreational facility must be safe for multiple

¹ An FEIS alternative that proposed a paved trail width ranging from 10-12 feet was deemed "not a reasonable alternative because of...the failure to safely accommodate the variety of users because it fails to meet accepted design guidelines for a multi-use trail." KC Ex. 9, at 0964.

Hearing Examiner Galt
11/03/17
Page 5

types of users as volumes continue to increase in the future. KC Ex. 9, 1166-68. While trees and critical areas are obviously important to Parks, people's lives and their safety are more important. The public's safe use of the County's regional trail system is of paramount importance and cannot be compromised.

Many of the City's Recommended Conditions turn the "minimum necessary" objective on its head. SMC 25.06.020(5). The County has proposed a 12-foot wide paved trail. The trail is an allowed use, and in fact a preferred use in the shoreline. The City's review obligation is to limit clearing and grading to the "minimum necessary to accommodate the allowed use/development" per SMC 25.06.020(5). The threshold question is: what is the allowed use/development? Once that is determined, this provision requires the applicant to limit the clearing and grading to the "minimum necessary" for the allowed use or development. Here, the City is using the clearing and grading provision to modify the "allowed use/development" which results in an unlawful, arbitrary and overly burdensome application of the City code.

The City's Recommended Conditions do the opposite of accommodate the proposal and, instead, attempt to fundamentally change the project design to avoid impacts that are fully minimized or mitigated under the current proposal in a manner consistent with the Code. The City's approach to review of this application is unreasonable and grossly overburdensome. While the County appreciates the need for several of the Recommended Conditions, some require additional analysis, reporting and design changes that the County believes are redundant with what has already been provided to the City, overreach their regulatory authority, and are duplicative of accommodations the County has already made to incorporate the City's interests. These concerns inform the requested changes to the conditions as discussed below.

II. RECOMMENDED CONDITION 2

King County is requesting modification of Recommended Condition 2, which reads:

An updated survey (conducted no later than one year prior to submittal or resubmittal of any construction permit applications) must be provided at submittal of the Construction Permit application(s) to show all dimensions and locations of all existing and proposed structures and improvements including but not limited to buildings, paved or graveled areas, roads, utilities, septic tanks and drainfields, material stockpiles or surcharge, and stormwater management facilities, as required by WAC 173-27-180(9)(f).

King County's concerns with this Recommended Condition are the lack of legal basis for requiring a new comprehensive survey, as well as the cost and redundancy of conducting a new survey. However, the County recognizes the City's reasonable concern that the survey used for approval of clearing and grading permits be as current and accurate as possible. The County is proposing a revised condition that addresses the concerns of both parties.

The City's stated legal basis for imposing this condition is WAC 173-27-180(9)(f), which requires a survey for a complete SSDP application. The County has already fully complied with this code requirement. A survey complying with WAC 173-27-180(9)(f) was submitted as part of the County's 60% Revised Project Plan Set/Site Plan. Ex. 7 (as updated July 2017). WAC 173-27-180(9)(f) does not authorize or require updating of a survey. Nor does this SSDP application requirement create any obligation related to applications for construction permits.

As a matter of practice, however, the County continually updates its survey through field verification which involves walking the project area, looking for structures and encroachments, and comparing site conditions with the existing survey. Where there are discrepancies, the survey is updated. The County has no objection to submitting its most current survey with the site plans for its clearing and grading applications.

Hearing Examiner Galt
11/03/17
Page 7

The County's concern is that Recommended Condition 2 appears to be requiring a new, comprehensive survey of the project area. This would include, for example, the reassessment of topography which would be costly and would duplicate unchanged conditions. Testimony will show that the cost of the County's existing survey for Inglewood Parking Lot and Segment B was approximately \$270,000. The scope of this condition is overly burdensome. The time and expense that would go into duplicating this effort is wholly unwarranted where the County already intends to keep its survey data current through ongoing field verification.

The County proposes modifying Recommended Condition 2 to read as follows:

Within one year prior to submittal or resubmittal of any clearing and grading permit applications, King County will field verify the accuracy of the existing survey and, where changes are identified, update the site plan to accurately show dimensions and locations of all existing and proposed structures and improvements within or immediately adjacent to the construction limits, including but not limited to buildings, paved or graveled areas, roads, utilities, septic tanks and drainfields, material stockpiles or surcharge, and stormwater management facilities.

III. RECOMMENDED CONDITION 3

King County requests that Recommended Condition 3 be stricken in its entirety.

Recommended Condition 3 reads:

The County shall identify all structures not owned and controlled by the County, and existing within the Project area that were constructed or installed pursuant to a permit that is not revocable by the County ("Permitted Structures"). For each Permitted Structure, if any, the County shall identify where the Project will be modified, narrowed, or relocated to mitigate for conflicts with Permitted Structures.

This recommended condition is beyond the scope of the City's regulatory authority, has no nexus to the shoreline issues being reviewed for this SSDP, is arbitrary, and overly burdensome.

First, all structures within the project area, whether or not owned by the County, are already identified in the County's survey. Any regulatory basis for ensuring accurate

identification of structures within the project area is covered by the County's proposed revision to Recommended Condition 2.

Second, requiring the County to determine whether or not the identified structures were constructed or installed pursuant to a nonrevocable permit is arbitrary, overly burdensome and lacks any reasonable nexus to compliance with the SMP. Cataloging permitted structures is not a reasonable request of a permit applicant. The City, being the permitting jurisdiction, has the information on what permits it has issued for structures within the project area. Conditions placed on a shoreline permit must be "...necessary to assure consistency of the project with the act and the local master program." WAC 173-27-150(2). The City has not pointed to any shoreline regulation that authorizes Recommended Condition 3.

Third, requiring the County to modify, narrow or relocate its project to avoid conflicts with permitted structures is beyond the City's regulatory authority.² The County has provided proof of its ownership of the property within the Project Area.³ Exs. 20, 21. If there is a property dispute regarding a structure within the project area, that is a private dispute that the City has no jurisdiction to adjudicate through an SSDP permit condition.

In summary, Recommended Condition 3 should be stricken because all structures within the Project Area are identified in the survey and existing site plans, imposing a duty on the

² Under the Trails Act, 16 U.S.C. Section 1247(d), the Corridor remains a federally-regulated railroad corridor designated for interim use as a recreational trail through the railbanking process. As with any active railroad line, state and local attempts to control a railbanked corridor are preempted by the Interstate Commerce Commission Termination Act ("ICCTA"), 49 U.S.C. § 10501(b). Under the ICCTA, the jurisdiction of the Surface Transportation Board "over . . . the construction . . . [of] facilities" within a rail corridor "is exclusive." In September of 1998, the STB issued a Notice of Interim Trail Use ("NITU") authorizing interim trail use. To the extent the City of Sammamish is interfering with the County's efforts to build and operate a trail pursuant to the NITU and the STB's exclusive jurisdiction, the City's actions are preempted under federal law.

³ The City deemed the County's information on ownership adequate for purposes of this SSDP. Ex. 26, 002252. A federal court has issued a judgment stating that the project area is in the exclusive ownership and control of the County. USDCWD, Cause No. 2:15-cv-00284-MJP.

Hearing Examiner Galt
11/03/17
Page 9

applicant to identify the permit history of structures in the Project Area is overly burdensome and without a regulatory basis, and the City cannot use SSDP conditions to require project modifications for accommodation of private encroachments on County property.

IV. RECOMMENDED CONDITION 4

King County requests that Recommended Condition 4 be stricken entirely or, in the alternative, clarified and limited. Recommended Condition 4 reads:

For those segments of the Project that are located within the shoreline setback (located at approximately Stations: 600+00, 328+00 through 335+00, 340+00 through 344+00, 356+00 through 357+00, and 374+00 on the plan set provided by the County in Exhibit 7) the County shall update the plan set to depict that no development, including clearing and grading limits, will occur waterward of the current interim trail alignment. In compliance with SMC 25.06.020(1) and SMC 25.06.020(5), this section of the Project must be minimized by either locating expanded improvement landward of the current interim trail alignment or by narrowing the Trail section. No further reduction of the current interim trail shoreline setback will be allowed.

The City's Recommended Condition 4 proposes to preclude any and all environmental impacts, temporary or permanent, waterward of the current trail alignment. The City would require meeting this condition by either redesigning the trail landward or narrowing the trail.

As stated earlier, the County has already gone to great lengths to design a trail that avoids and minimizes environmental impacts. Ex. 55. But the design cannot come at the expense of safety and the County's project goal of providing a high-volume, multi-use regional trail that will meet the needs of commuters and recreational users well into the future. Narrowing the trail beyond the 12-foot wide paved path currently proposed will preclude construction of the facility that has been planned by the County and anticipated regionally. The plans before the Examiner now should be approved without requiring additional modification.

The County is willing, however, to make limited design changes where feasible to avoid permanent impacts in the shoreline setback for the areas designated in Recommended Condition 4. Avoiding all temporary impacts in this area is not possible, nor is it reasonable, considering the physical access and construction constraints of the project area and the goal of avoiding permanent impacts within the setback. Each identified area is discussed below.

At Station 600+00, there are no permanent impacts proposed in the shoreline setback. There will be 346 square feet of temporary impacts within the setback area which are necessary to construct the retaining wall that allows the trail to permanently remain outside the setback. Any realignment of the trail to avoid temporary impacts would cut further into the relatively steep slope to the east, require a new taller retaining wall on the east, impact significant trees east of the retaining wall, require removal of several existing stairs in the vicinity, and necessitate removal of additional trees and add significant costs to project implementation.

At Stations 328+50 to 335+00, the design can be modified to avoid all 406 square feet of permanent impacts to the shoreline setback. However, this may require the replacement of a concrete wall on the landward side of the trail, at additional expense, and the removal of additional significant trees above the wall. There will be temporary impacts within the setback. The design options are limited in this area because of slope stability.

At Stations 340+00 to 344+00, the design can be modified to eliminate all 526 square feet of permanent impacts in the setback. However, this would require removal of the proposed rest area which the City has indicated will be allowed, and may require a new retaining wall. There will be temporary impacts within the setback. Realignment landward would result in the removal of one significant tree, affect several sets of stairs, require a taller retaining wall and

Hearing Examiner Galt
11/03/17
Page 11

would result in additional costs. The waterward area that would be retained is grass, shrubs, a deck, and lake access.

At Stations 356+00 to 357+00 the design will be modified to avoid all 11 square feet or permanent impacts to the shoreline setback. There will be temporary impacts within the setback to construct a retaining wall that allows the trail to permanently remain outside the setback. Realignment would be cost-prohibitive and would increase wetland impacts. The current area waterward of the trail is characterized by grass and shrubs.

At Station 374, there will be temporary impacts for trail construction. Realignment would create landward wetland impacts and additional expense for the applicant, including additional mitigation costs.

The City's proposed wholesale preclusion on temporary clearing and grading impacts within the shoreline setback is inconsistent with its own code, overly burdensome and makes the project infeasible. Mitigation exists for a reason: Projects are not required to avoid all impacts. The City's own code contains mitigation options and allowances for setback reductions. SMC 25.06.020(1); SMC 25.06.020(11). And although the City acknowledges that this is a permitted, preferred water-oriented and water-enjoyment use given priority in both the SMA and the SMP, the City has refused to apply these options to the County's project. SMC 25.07.010. Ex. 1, at 6.

An example of the unreasonable and conflicting nature of this condition is the treatment of rest stops. Rest stops are an allowed use in the shoreline setback. SMC 25.07.090(3)(b); SMC 25.06.020(9)(d). The City has stated that this "public view-access amenity", located within the Setback, "is consistent with SMC 25.06.020(9)(d)." Ex. 1 at 9, 16. At the same time, the City's Recommended Condition precludes all permanent and temporary impacts waterward of the existing interim trail, which would preclude the creation of the rest stop. Moreover, the

overbroad requirement to avoid all temporary impacts within the setback is nonsensical where clearing and grading is necessary to keep permanent impacts outside the setback or facilitate permanent uses like a rest area or VEA. The City's report and condition conflict internally and with their own code. The City's approach, equating "minimum necessary" impacts with "no" impacts, is beyond its authority and is simply untenable. The County, therefore, requests that this condition be stricken as the proposed plans currently avoid, minimize and mitigate project impacts consistently with Code requirements. Alternatively, the County proposes to limit Recommended Condition 4 as follows:

For those segments of the Project that are located within the shoreline setback (located at approximately Stations: 600+00, 328+00 through 335+00, 340+00 through 344+00, 356+00 through 357+00, and 374+00 on the plan set provided by the County in Exhibit 7) the County shall update the plan set to reduce or eliminate permanent impacts waterward of the current interim trail alignment, with the exception of proposed rest stops and access points. No further permanent reduction of the current interim trail shoreline setback will be allowed.

V. RECOMMENDED CONDITION 5

King County requests that Recommended Condition 5 be stricken or modified to account for preexisting conditions. Recommended Condition 5 reads:

For that portion of the Project that is located within the Lake Sammamish Shoreline Setback, the County shall update the Project plans to establish and maintain a Vegetation Enhancement Area (VEA) that is equal to the 15-foot wide portion of the 50-foot Lake Sammamish Shoreline Setback immediately landward of the Ordinary High Water Mark (OHWM). SMC 25.06.020(9) and SMC 25.06.020(10). At least 75 percent of the VEA area must be planted with vegetation consisting of native trees, shrubs, and groundcover designed to improve ecological functions.

The County's mitigation proposal is comprehensive and includes mitigation for any and all impacts within the 50-foot shoreline setback. However, the County is, as discussed below, willing to comply with the additional VEA requirement to the extent feasible and reasonable.

The primary obstacle to compliance with this Recommended Condition is the current established uses within the 15-foot landward of the OHWM. Any SSDP condition must “address an impact that is a result of the proposed development.” *Sammamish Homeowners*, SHB 15-012c, at 20. The applicant cannot be obligated to remedy existing problems or shoreline impacts. Testimony will show that there are approximately 18,000 square feet of the VEA in King County ownership within the project area. Of that area, approximately half is currently developed with riprap and other structures. Of the remaining area, approximately 2,250 square feet are used for community beach and shoreline access. These areas should not be included in any VEA requirement imposed by the Examiner. It is also notable that establishing a VEA would increase the need to clear and grade within the shoreline setback. Creating a VEA would necessarily require temporary impacts, including erosion and sedimentation control measures, within the shoreline setback. This is inconsistent with Recommended Condition 9.

The County asks that the Examiner strike this condition based on the extensive mitigation already proposed by the County and the interest in minimizing impacts within the shoreline setback. If the condition remains, the County asks that it be limited to maintaining vegetation in 75% of the VEA area that is within King County ownership is not impacted by current use, and where the benefits would outweigh the impacts to create the VEA. The County further requests clarification that it may utilize existing native vegetation to meet the 75% requirement. The County proposes to modify Recommended Condition 5 as follows:

For that portion of the Project area that is owned by King County and located within the Lake Sammamish Shoreline Setback, the County shall update the Project plans to establish and maintain a Vegetation Enhancement Area (VEA) that is equal to the 15-foot wide portion of the 50-foot Lake Sammamish Shoreline Setback immediately landward of the Ordinary High Water Mark (OHWM) where it is practicable and where the impacts to the shoreline do not outweigh the benefit of establishing the VEA. SMC 25.06.020(9) and SMC

25.06.020(10) Within that portion of the established VEA that is not in current use, the County shall maintain at least 75 percent of the area with vegetation consisting of native trees, shrubs, and groundcover designed to improve ecological functions.

VI. RECOMMENDED CONDITION 6

King County requests modification of Recommended Condition 6 to reflect any changes proposed to Recommended Condition 5. Recommended Condition 6 reads:

In accordance with SMC 25.07.090(6), an updated and final landscaping plan shall be provided at the time of Construction Permit submittal to ensure that native, self-sustaining vegetation is utilized throughout the Project area and to illustrate conformance with VEA requirements pursuant to SMC 25.06.020(10).

If the VEA requirement remains, Recommended Condition 6 should be revised as follows:

In accordance with SMC 25.07.090(6), an updated and final landscaping plan shall be provided at the time of Clearing and Grading application submittal to ensure that native, self-sustaining vegetation is utilized in conformance with VEA requirements in Condition X.

VII. RECOMMENDED CONDITION 7

The County requests modification of Recommended Condition 7, which reads:

The Project proposes to remove Significant trees; therefore, all tree removal shall be in substantial conformance with the arborist report (Exhibit 61) and tree preservation plans (Exhibit 62) and the City's tree regulations, Chapter 21A.37 SMC. An updated arborist report and tree inventory will be required at submittal of the Construction Permit(s) to account for any growth that occurred since approval of this SSDP.

The County believes portions of Ch. 21A.37 SMC is inapplicable to this project and that the City lacks regulatory authority to require an updated arborist report.

First and foremost, the City's application of Ch. 21A.37 SMC is overbroad. Ch. 21A.37 SMC applies only to significant trees, not all trees. More importantly, the trail expansion is exempt from the City's tree removal, retention and replacement regulations under SMC

Hearing Examiner Galt
11/03/17
Page 15

21A.37.230 because it is entirely within the public right-of-way. Ex. 36, 005310; SMC 21A.27.240; SMC 21A.27.250. The first sentence of Recommended Condition 7 should reflect the limited applicability of Ch. 21A.37 SMC.

As to the second sentence in Recommended Condition 7, the City has cited no authority for requiring an updated arborist report. This request appears unduly onerous and duplicative with work that was done by the applicant **just three months ago**. See Exhibit 61 (arborist report as updated July 17, 2017); Ex 62 (July 2017 Tree Preservation Plan). Requiring the County to incur this cost to update a three month old study is completely unreasonable.

The County proposes the following modifications to Recommended Condition 7:

The Project proposes to remove Significant trees; therefore, all significant tree removal shall be in substantial conformance with the arborist report (Exhibit 61) and tree preservation plans (Exhibit 62). If more than two years elapse between the July 7, 2017 arborist report and submission of a clearing and grading permit application, an updated arborist report and tree inventory will be required at application submittal.

VIII. RECOMMENDED CONDITION 8

King County asks that Recommended Condition 8 be stricken in its entirety because it is over broad, vague and unclear, without regulatory authority, creates requirements that render the project unviable, and results in significantly less tree protection than what King County has currently proposed. Recommended Condition 8 reads as follows:

The Project proposed to remove trees and vegetation. SMC 21A.30.201(3) and SMC 25.06.020(5) require that clearing and grading be the minimum necessary to accommodate the allowed use/development. The proposed Trail width is the primary driver of the amount (width) of clearing and grading required. The extent of clearing and grading directly impacts quantity of trees to be removed. The County shall provide an updated clearing and grading plan that includes adequate tree protection in accordance with SMC 21A.37.270(5). The Trail shall be narrowed as necessary to fully comply with tree protection barrier and grading/grubbing limit restrictions in 21A.37.270(5). The clearing and grading plan shall properly reflect adequate and compliant tree protection barriers and

Hearing Examiner Galt
11/03/17
Page 16

grading/grubbing limits for all trees and vegetation to be retained pursuant to Chapter 21A.37 SMC. No grading or grubbing shall be allowed within the prescriptive tree protection areas as defined by SMC 21A.37.270(5)(b). If adequate and compliant tree protection measures in accordance with SMC 21A.37.270(5) cannot be applied, the tree shall not be counted as retained and must be considered as removed.

This condition is confusing at best. The County understands the requirements of Recommended Condition 8 to be: (1) apply the protection measures in SMC 21A.37.270(5), including tree protection barriers, throughout the project, (2) eliminate all grading and grubbing within the tree protection barriers, and (3) provide an updated clearing and grading plan to show compliance with these requirements. The condition also seeks to require the County to count trees that cannot use protection barriers per SMC 21A.37.270(5) as removed, even where those trees are identified by a qualified arborist as being “protected” or “saved” under the County’s existing plans.

The purported regulatory authority for Recommended Condition 8 is Ch. 21A.37 SMC.⁴ SMC 21A.37.230 states that projects within the public right-of-way are exempt from the removal standards in SMC 21A.27.240 and the retention standards in SMC 21A.27.250. The City has acknowledged that the trail, which is wholly within the right-of-way, qualifies for this exemption. Ex. 36 at 005310. The City, therefore, cannot use these regulations to limit the number of significant trees the County deems necessary for removal to implement its project.

The County has not, however, opted to treat its environmental obligations lightly or take advantage of this exemption. On the contrary, the County has gone above and beyond to design a project that retains as many significant trees as possible and mitigates for those that must be

⁴ The City generally references SMC 25.06.020(5) and SMC 21A.30.201(3) (which the County presumes is referring to 21A.30.210(3)) for the proposition that clearing and grading be the minimum necessary to accommodate the allowed use/development. These regulations do not give the City carte blanche authority to require trail narrowing when the proposed project is compliant with the City’s substantive shoreline and critical area regulations.

Hearing Examiner Galt
11/03/17
Page 17

removed. The County's existing plans, including an arborist report, maximize tree retention along the corridor. Ex. 61; Ex. 62. The evaluations in the County's arborist report are based on an understanding of the level of protection that will be implemented to ensure significant trees are protected during construction. Ex. 6. In April of 2017, the City's direction to the County indicated that a Certified Arborist report would achieve compliance with Ch. 21A.37 SMC. Ex. 36 at 005310. This approach is consistent with SMC 21A.37.270(7) giving the director authority to "approve the use of alternative tree protection and/or preventative techniques if a protected tree will be protected to an equal or greater degree than through the techniques listed above."

The City is now recommending strict application of SMC 21A.37.270(5), requiring the installation of tree protection barriers five feet beyond the drip line, for every significant tree to be protected. Use of a five foot protection barrier at the dripline of a tree along a narrow trail corridor is completely unworkable. As testimony will show, application of the tree protection barrier requirement in SMC 21A.37.270(5) would not result in saving additional trees. On the contrary, the result would be removal of 408 additional significant trees. Even if the trail were narrowed to 10 feet of paved width, application of SMC 21A.37.270(5) would require removal of approximately 370 additional significant trees. Moreover, the County's arborist report provides individualized determinations of each tree and standards on protection measures to be implemented for protection of the maximum number of trees along the entire project area.

The County's existing landscape plan, tree retention plan, arborist report, and mitigation plan are wholly adequate to meet the City's regulations, far more so than the City's own proposal. Recommended Condition 8 is an unreasonable and overly burdensome attempt to constrain and narrow the ELST and thwart its intended purpose as a high-volume regional trail.

Recommended Condition 8 should be stricken entirely for all the above reasons and because it would create much more environmental harm than good.

IX. RECOMMENDED CONDITION 9

King County asks that Recommended Condition 9 be stricken in its entirety because it is redundant, vague and unclear, arbitrary, overly burdensome, and beyond the City's regulatory authority. Nor is it necessary to assure consistency of the project with the act and the local master program." WAC 173-27-150(2).

The Project proposes to impact critical areas regulated under Chapter 21A.50 SMC and Title 25 SMC. Under SMC 21A.30.210(3), SMC 21A.50.135, SMC 25.06.020(1), and SMC 25.06.020(5), clearing and grading shall be the minimum necessary to accommodate the allowed use/development. The proposed Trail width is the primary driver of the amount (width) of clearing and grading required. The extent of clearing and grading directly impacts the extent to which critical areas regulated under Chapter 21A.50 SMC and Title 25 SMC are impacted. The Trail can be narrowed in locations to reduce required clearing and grading limits and correspondingly reduce then minimize impacts to a level that is below what is currently proposed. The County shall provide an updated Critical Areas Study (CAS) and updated clearing and grading plan (Project Plans) that address how Trail narrowing and clearing and grading limits reductions have been implemented in each instance where a critical area regulated under Chapter 21A.50 SMC and Title 25 SMC has been impacted and how the project is compliant with the Project FEIS, SMC 25.06.020(1), SMC 25.06.020(5), SMC 21A.30.210(3), and SMC 21A.50.135. The updated CAS shall also include more specific information about how impacts on shoreline ecological functions are avoided and minimized.

The substantive requirement of Recommended Condition 9 appears to be an obligation for the County to provide an updated Critical Areas Study (CAS) and updated clearing and grading plan (Project Plans) reflecting a narrowed trail and reduced clearing and grading limits. The County has already completed this work to show impacts are being avoided, minimized and mitigated consistently with the City's code. The County provided an updated CAS in July of 2017. Ex. 16. It provided updated clearing and grading plans in July of 2017. Ex. 7. It provided

Hearing Examiner Galt
11/03/17
Page 19

multiple additional documents, at the City's request, to explain how the County's project avoids and minimizes impacts to shoreline ecological functions, and to respond directly to the City's critical areas concerns. Exs. 54, 55, 56. Each of these documents explain how the project is compliant with the Project FEIS, SMC 25.06.020(1), SMC 25.06.020(5), SMC 21A.30.210(3), and SMC 21A.50.135. The County examined varying widths in its EIS, reduced the width from 27 feet to 18 feet of impacts, and has exhaustive, detailed, analysis of how the project, as designed, minimizes impacts to the fullest extent possible without compromising the intended purpose of the trail and necessary safety. Ex. 16; Ex.59, 60.

Despite all of this, the City's Recommended Condition appears to be focused on finding a way to narrow the trail. As discussed above, mitigation exists because not all impacts can be avoided. The allowed project proposal is a 12-foot wide paved trail. Using that footprint as the allowed use, any impacts that will result must be avoided, minimized and/or mitigated. The County's current proposal already avoids, minimizes and mitigates in full compliance with the City's regulations without narrowing the trail.

Moreover, Recommended Condition 9 provides no specific indication as to where along the 3.5 mile corridor would be practical to further avoid critical area impacts. It just assumes that the trail "can be narrowed in locations." There is no support for this vague and burdensome regulation. It is also inaccurate to state that the County has been unwilling to narrow its design. The County has already reduced the trail profile from the maximum to the minimum width contemplated under the FEIS, and is using the minimum AASHTO standards for a multi-use trail. SMC 21A.30.210(3).

Recommended Condition 9 is unreasonable. It is duplicative of the extensive and detailed work already done by the County. It requires arbitrary trail narrowing that is unnecessary to establish compliance with the code and compromises trail safety. It should be stricken entirely.

X. RECOMMENDED CONDITION 10

King County requests modifications to Recommended Condition 10 which reads:

An updated final project mitigation plan meeting the requirements of SMC 21A.50.145 and demonstrating how the proposed mitigation for impacts to shoreline features will ensure no net loss of shoreline ecological functions shall be provided at the time on Construction Permit submittal. To provide the greatest benefit, off site mitigation should be in the same basin as feasible. The County should work with the King County MRP to identify an in lieu site that is most beneficial on a landscape scale. If an in lieu site is available within the East Lake Sammamish Basin, where the impacts will occur, it should be given priority. The updated final project mitigation plan must include a detailed analysis of mitigation compliance with SMC 21A.50.310 and SMC 21A.50.350. If off-site mitigation is proposed the updated final project mitigation plan must demonstrate how it is compliant with SMC 21A.50.310(4) and SMC 21A.20.350. The updated final mitigation plan shall also clearly document significant tree replacements within the shoreline overlay.

The County has proposed to use a mitigation bank for purposes of compliance with SMC 21A.50.310 and SMC 21A.50.350. As testimony will show, communications between King County and MRP indicate clearly that there is no in-lieu site within the East Lake Sammamish Basin. King County requests that Recommended Condition 10 be modified to clarify that mitigation bank will serve the same purpose as an in lieu site.

XI. RECOMMENDED CONDITION 12

King County will provide additional information during this hearing that will make Recommended Condition 12 unnecessary. Recommended Condition 12 reads as follows:

Where fences, retaining walls, or a combination of fence and retaining wall exceed four feet in height, adequate provisions shall be made to allow wildlife passage at intervals along the Trail if existing driveways are not sufficient.

Testimony will show that existing driveways are adequate for wildlife passage at appropriate intervals along the trail. No additional provisions for wildlife passage will be necessary. This condition should be removed.

X. RECOMMENDED CONDITION 14

King County requests clarification of Recommended Condition 14, which reads as follows:

Following complete mitigation installation, the County shall provide to the City an as-built report of the restoration and compensatory mitigation installed for the Project. After the City inspects and approves the as-built report, a required maintenance and monitoring period will begin pursuant to SMC 21A.50.145(7) and in accordance with the final approved Project mitigation plan. A monitoring report shall be prepared by a qualified professional and provided to the City for review by October 31st of each monitoring year for the duration of the maintenance and monitoring period. Due to Project size and complexity, and pursuant to SMC 21A.50.045, the City will require use of an on call consultant to carry out a review of annual mitigation monitoring reports to verify compliance with project goals and performance standards.

King County objects to the last sentence of Recommended Condition 14 as vague and overly burdensome. For financial reasons, King County believes use of an on-call consultant for review of annual mitigation monitoring reports should be limited in scope. The current condition leaves the City's ability to charge the County for on-call services open ended.

X. RECOMMENDED CONDITION 16

King County is requesting modification of Recommended Condition 16, which reads as follows:

Pursuant to WAC 173-27-090, construction shall be commenced on the proposed Trail, Parking Lot, and associated elements within two (2) years of the date that the SSDP is issued (or becomes final following any reconsideration or appeal

periods, if applicable). Authorization to conduct development activities under the SSDP shall terminate five (5) years after the effective date of this permit. The City may authorize a single extension for a period not to exceed one (1) year based on a showing of good cause to the Director of reasonable factors, if a request for extension has been filed before the expiration date, and notice of the proposed extension is given to parties of record and the City.

WAC 173-27-090(1) gives a local jurisdiction discretion to modify the applicable commencement and permit expiration timeframes where there is good cause.

Upon a finding of good cause, based on the requirements and circumstances of the project proposed and consistent with the policy and provisions of the master program and this chapter, local government may adopt different time limits from those set forth in subsections (2) and (3) of this section as a part of action on a substantial development permit.

WAC 173-27-090(4) explains that the 2-year and 5-year timelines do not include:

the time during which a use or activity was not actually pursued due to the pendency of administrative appeals or legal actions or due to the need to obtain any other government permits and approvals for the development that authorize the development to proceed, including all reasonably related administrative or legal actions on any such permits or approvals.

King County is eager to complete the last portion of the ELST, however, we are all aware that this is a unique and complex project, that appeals are likely, and that there are additional permits that the County will need to obtain to begin its project. The City's timeframe for review and approval of this SSDP has already far exceeded the requirements under the City's Code. SMC 20.05.100. Ex. 30. Because of the likelihood that delays will continue in additional permit review and related litigation, the County seeks to safeguard the applicability of its SSDP.

Recommended Condition 16 does not build in additional time to account for the specific circumstances of this project, including challenges that may not fall within the scope of WAC 173-27-090(4). While the County agrees to commence construction within two (2) years of the SSDP effective date, we would like any condition to clearly incorporate the tolling provisions in

Hearing Examiner Galt
11/03/17
Page 23

WAC 173-27-090(4). Regarding the five (5) year duration of the SSDP, the County requests that this be extended to seven (7) years based on the unique nature of this project and the potential for unforeseeable obstacles to prevent completion within the standard five year timeframe.

The County requests that Recommended Condition 16 be modified as follows:

The time requirements of WAC 173-27-090 shall apply, except that, based on the requirements and circumstances of this project, the authorization to conduct development activities under the SSDP shall terminate seven (7) years after the effective date of this permit. All extension and tolling allowances in WAC 173-27-090 will be available to the applicant.

VII. CONCLUSION

The County appreciates the City's efforts to be thorough and comprehensive in its Staff Report. As designed, this project will be a significant benefit to the community, will improve public shoreline access, and will promote safe achievement of regional transportation goals. We are hopeful that with the Examiner's consideration of the legal and factual issues raised in this memo, the Recommended Conditions will be retained, modified or excluded as proposed herein to enable the project to move forward without further delay.

