

## Parsons, Susan

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**From:** Rapp, Reagan S. (Perkins Coie) <RRapp@perkinscoie.com> on behalf of Robinson, Michael C. (Perkins Coie) <MRobinson@perkinscoie.com>  
**Sent:** Thursday, July 13, 2017 4:46 PM  
**To:** Council Clerk – Testimony  
**Cc:** Robinson, Michael C. (Perkins Coie); Reynolds, Allison J. (Perkins Coie); Beckman, Stephanie; De Freitas, Fabio; vic@everetthomesnw.com; 'Michael Peebles (mike.peebles@otak.com)'; li.alligood@otak.com; keith.buisman@otak.com; Greg Summers (gsommers@anchorqea.com)  
**Subject:** City of Portland Case # LU 16-159330 LDS EN  
**Attachments:** 2017.07.13 Lt Mayor Wheeler re second open record period.pdf

Attached please find a letter on behalf of Everett Custom Homes. This is the applicant's submittal prior to the close of the second open record period on Thursday, July 13, 2017 at 5:00 pm. Please place a copy of this submittal into the official record for this matter.

Thank you.

**Michael C. Robinson** | **Perkins Coie LLP**

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July 13, 2017

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**VIA EMAIL ONLY TO: cctestimony@portlandoregon.gov**

Mayor Ted Wheeler  
Portland City Council  
Portland City Hall  
1221 SW Fourth Avenue  
Portland, OR 97204

**Re: City of Portland Case # LU 16-159330 LDS EN; Letter on Behalf of the Applicant  
Against Appeal of Hearings Officer's Decision**

Dear Mayor Wheeler and Members of the Portland City Council:

This office represents Everett Custom Homes, Inc. ("Applicant"), the applicant in this matter. This letter is the Applicant's submittal prior to the close of the second open record period on Thursday, July 13, 2017 at 5:00 p.m. This letter responds to the primary issues identified in the first open record period submittal. The Applicant reserves its right to submit final written argument on July 20, 2017 by 5:00 p.m. Therefore, this letter is relatively brief.

Please place a copy of this submittal into the official record for this matter, and please consider this submittal before making a final decision on the application.

**1. Introduction and Appeal Status.**

The City Council closed the public hearing on June 22, 2017, but left the written record open as follows:

- Until July 6, 2017 at 5:00 p.m. for any person to submit argument and evidence.
- Until July 13, 2017 at 5:00 p.m. for any person to rebut first open record period submittals *without* new evidence.
- Until July 20, 2017 at 5:00 p.m. for the Applicant only to submit final written argument without new evidence.

The City Council is scheduled to consider the matter on August 9, 2017 at 3:30 p.m.

As the City Council considers what decision to make in this appeal, it should keep in mind that this appeal, like any other land use decision, must be decided based on applying the facts to the approval criteria.

**2. New Evidence Submitted by the Appellant After July 6, 2017 Must be Stricken from the Record.**

Appellant Hayhurst Neighborhood Association (the “Appellant” or “Neighborhood”) submitted a letter to this Council dated July 11, 2017. This letter appears to contain new evidence regarding the Safe Routes to Schools (“SR2S”) mapping change for Hayhurst Elementary, including documentation of the Neighborhood’s conversations with City staff. In the letter, the Neighborhood asks City Council to consider this new evidence when making its decision.

To the extent that the Neighborhood’s submission contains new evidence, it must be stricken from the record and cannot be considered by the Council. New evidence in this matter was allowed to be submitted by both sides until July 6, 2017 at 5:00 pm. The Neighborhood’s letter is dated July 11, 2017 and therefore falls outside of this evidentiary period. We request that the Council strike either the entire letter from the record, or the portion of the letter that presents and rely upon new evidence submitted after July 6, 2017.

**3. Responses to Conditions of Approval Proposed by Appellant.**

The Applicant welcomes reasonable conditions of approval to satisfy the neighborhood’s concerns. Unfortunately, some of the conditions that have been proposed by the Appellant are infeasible, ineffective, or would not allow the project to meet the approval criteria. The Applicant is willing to accept conditions 7, 8 and 11, in full or in part, as detailed below.

1. All permits for the SW 48th Avenue improvements be filed and approved (with the Department of State Lands and US Army Corps of Engineers) before any ground-disturbing site construction begins.

*Response:* The Bureau of Environmental Services (“BES”) will require consultation and approval of the appropriate state and federal agencies prior to site disturbance. The Applicant will comply with the BES requirements and this condition is therefore unnecessary.

2. The through street connection for SW Pendleton Street shall be eliminated to reduce the adverse impacts on the site's natural resources, including loss of trees, creation of excessive impervious surfaces, dewatering of wetland area.

*Response:* The through street connection for SW Pendleton Street is required to meet connectivity standards, which are an approval criterion for the project. The Applicant cannot accept this condition of approval because it is inconsistent with the approval criteria.

3. Reduce the total number of lots to reduce significant detrimental impact to identified resources and functional values of the site.

*Response:* A reduction in the number of lots was explored by the Applicant, but will not reduce impacts to resources and functional values in the EC zone. The proposed number of lots is within the allowed density under the Code. Therefore, the Applicant cannot accept this condition.

4. Reduce the overall area of the proposed building footprints on the developable lots to preserve additional trees and reduce the impervious surfaces.

*Response:* The proposed homes will be equipped with gutters that capture stormwater, which will then be routed to treatment infrastructure and either discharged to the wetland or downstream. Therefore, the additional impervious surface created by a larger rather than smaller home footprint will not impact the capture of stormwater and discharge of this water to the wetland and downstream water features. As explained in the Application and Tree Plan, the trees that will be removed on the lots are centrally located and would require removal with a smaller or larger home footprint. This proposed condition of approval is not consistent with the Applicant's proposal and does not reduce the impacts of the project to trees or wetlands and downstream water features. The proposed buildings meet the Code's development requirements, including setbacks and lot coverage.

5. Require preservation of all significant trees outside the final, approved building footprints.

*Response:* Non-exempt trees that are proposed for removal outside of the lot areas must be removed to allow for construction of the right-of-way infrastructure. This infrastructure is required by the Code to satisfy the connectivity approval criteria. Therefore, it is not feasible for the Applicant to agree to this condition.

6. If a road is built, once it is complete, prohibit use of SW 48th Avenue by construction traffic.

*Response:* The Applicant will provide a construction management plan as part of the BDS permit process. While SW 48th Avenue is unlikely to be used for "construction traffic" since it does not lead to the area proposed for development and home building, SW 48th Avenue may be used by construction workers for parking of their vehicles, in conformance with City parking standards.

7. Require a good neighbor agreement for construction traffic, noise, erosion control and construction parking.

*Response:* The Applicant will provide a construction management plan as part of the BDS permit process. The Applicant has experience with construction in City of Portland and will comply with City construction management rules, including work hours and parking. That said, **to ensure that the Applicant and the neighborhood share common expectations regarding the construction process, the Applicant is willing to enter into a good neighbor agreement.**

8. Require photographic documentation of existing conditions on all roadways including SW Pendleton Street and SW 48th Avenue to Cameron Street prior to construction and provide a sufficient bond to cover repair of damage to existing streets during construction.

*Response:* **The Applicant will accept a condition of approval requiring photographic documentation of existing roadways prior to construction.** BES and the Portland Bureau of Transportation ("PBOT") already require a bond prior to Public Works Permit issuance, building permit issuance, or Final Plat approval, whichever comes first. Therefore, the Applicant is not willing to provide a bond or financial assurance beyond those required through the City's standard permitting process.

9. Provide a construction parking plan to indicate that all construction parking will be on site so as not to reduce the capacity of local streets for emergency vehicles and neighborhood use.

*Response:* The Applicant will comply with the City's requirements for construction parking. The Applicant anticipates that all construction parking (with the exception of employee parking) will be on the site.

10. Require "Working wet" demolition of current home and outbuilding, using current technology to complete lead containment.

*Response:* Removal of existing structures will require a Demolition Permit from City, which will require that demolition is completed in accordance with City requirements. This condition of approval is unnecessary and may be contrary to the City's current requirements.

11. Eliminate streetlight on SW 48th Avenue due to the proximity to the EC zone, given the impact on wildlife.

*Response:* This and other streetlights are proposed by the Applicant to satisfy PBOT requirements. **The Applicant will accept this condition if PBOT agrees that the streetlight in this location is not needed. Alternatively, the Applicant would accept a condition to**

**provide shrouding or covering on the light to lessen impacts to wildlife if PBOT would allow such a modification.**

12. Complete all public improvements prior to sale of any lots.

*Response:* Public improvement permitting, construction, and platting will be completed in accordance with City standards. The Applicant is required to submit for a Public Works Permit and provide plans and financial assurances to the satisfaction of PBOT prior to final plat approval. The property is currently a single lot of record and the proposed lots cannot be sold until the final plat, which will create 11 saleable lots of record, is recorded. The City already requires financial assurances from the Applicant to ensure that required public improvements are completed. This condition of approval is unnecessary and could be interpreted as inconsistent with the City's requirements.

13. Storm water runoff shall be treated and discharged on site to protect the wetlands.

*Response:* Stormwater will be treated and discharged in accordance with the stormwater management plan to the wetland and the tributary, as described in the report from Greg Summers submitted to the City on July 6, 2017. The stormwater management plan, which has been approved by BES, will reduce flooding impacts to adjacent roadways and properties and will enhance the quality of water being discharged to the wetland and tributary from the current baseline. The Appellant's proposed condition requires the Applicant to deviate from the approved stormwater management plan and therefore is not acceptable.

### **3. Additional Conditions of Approval Proposed by the Applicant.**

In addition to the Appellant's conditions, the Applicant proposes the following additional conditions of approval to address neighborhood concerns. Please note that the Applicant offers these conditions for the purpose of being a good neighbor but the conditions are not necessary for the City Council to find that the Applicant has satisfied its burden of proof to show that the approval criteria are satisfied by substantial evidence. Condition of Approval 1 was previously proposed in our June 6, 2017 submission and is restated here.

1. Neighbors raised concerns regarding increased traffic of greater speed and volume along the required street extensions. PBOT has opined that traffic calming measures do not appear warranted along this street segment, but the Applicant understands that the neighborhood is concerned about the potential for these conditions to occur. Applicant voluntarily proposes the following condition of approval to facilitate the City's further analysis and installation of traffic calming in the future:

**The Applicant shall deposit into an escrow fund in favor of the City of Portland an amount up to \$10,000, which amount is to be jointly determined by PBOT and the Applicant. These funds may be used at any time by the City of Portland after the Applicant's final plat is recorded to analyze traffic impacts resulting from the connection of SW Pendleton Street, and if necessary, to install traffic calming devices including but not limited to stop signs, other signage, and speed bumps in Pendleton Street or other streets.**

2. The cedar tree located in the right-of-way may be required to be removed in order to allow the street extension to be constructed. However, the Applicant understands that Leslie Hammond, a neighboring property owner, is concerned that removal of this tree may impact the stability of slopes on her property. Therefore, the Applicant would agree to accept a condition that requires it to mitigate any impacts of removal of the cedar tree to the stability of the slopes on Ms. Hammond's property, as follows:

**If removal of the cedar tree in the right-of-way is required by the Portland Bureau of Transportation and Urban Forestry, the Applicant shall mitigate any impact of removal of the tree to the stability of slopes on the adjacent private property owned by Leslie Hammond. This mitigation obligation shall be contingent upon Ms. Hammond providing baseline slope stability data for the property from a reputable geotechnical professional approved by the Applicant prior to tree removal.**

3. Appellants raised significant concerns regarding the health of the wetland and impacts to the EC zone from the proposed development. The wetland currently has several non-native species including Himalayan blackberry (*Rubus armeniacus*) and little diversity in the tree layer. Removal of the blackberry and addition of native trees and shrubs will increase the diversity and overall habitat value of the wetland.

**To further enhance the health of the wetland, the Applicant shall remove blackberry and English ivy from the wetland and replace this removed vegetation with native trees and shrubs.**

#### **4. Safe Routes to Schools for Hayhurst Elementary.**

As explained in a July 3, 2017 memorandum from BDS Planner Stephanie Beckman, the designated SR2S map for Hayhurst Elementary was recently revised by PBOT. The previous SR2S for Hayhurst north and east of the school traversed SW 48th Avenue and a gravel path through private property. The new SRS for Hayhurst, as shown on page six of the Beckman memorandum shows SW Cameron and SW 45th Avenues as the safe routes north and east of the school. The path that crosses private property has been removed from the SR2S.

The HNA submitted a letter on July 11, 2017 which contains new evidence regarding the Neighborhood's work to revise the new SR2S maps. However, as discussed above, because this new evidence was submitted after the close of the evidentiary open record period it must be stricken from the record and cannot be considered by the Council.

Nothing in the PCC or other City plan or ordinance makes the SR2S map or program an approval criterion for land divisions such as the application. To the extent SR2S does apply to the City's consideration of the application, the application is consistent with this program for the reasons explained by PBOT staff in the record. The Subdivision will enhance pedestrian and bicyclist safety and increase, not decrease, the number of safe bicycling and pedestrian routes to and from Hayhurst Elementary School by providing improved public streets and sidewalks.

## **5. Seeps and Springs.**

Opponents have argued that the seep and spring-like water features outside of the environmental tract must be preserved pursuant to PCC Chapter 33.640. However, both the Portland Bureau of Development Services ("BDS") and the Applicant's substantial evidence demonstrate that features in question do not meet the definition of seeps and springs found in PCC Chapter 33.910 in effect on the date this application was submitted. These features therefore cannot not be regulated pursuant to PCC 33.640. The definition contains three elements: an aquifer, water from an aquifer discharging into a stream channel, and that that stream channel then flows into a wetland or other water body. The elements of the definition of seeps and springs in PCC Chapter 33.910 are not present on this site in regards to these water features. Additional evidence submitted by the Appellant's hydrology expert does not contradict the substantial evidence in the record upon which this determination was based.

The City Council must reject the Appellant's request that these features be regulated under PCC Chapter 33.640.

## **6. The 18-Inch Culvert West of SW 48th Avenue is a Private Culvert Not Subject to Improvement by the Applicant**

Aletha and Lincoln Foster and Alvin Iverson submitted testimony regarding potential impacts to the Fosters' property from the required 36-inch culvert that will be installed under SW 48th Avenue to control the velocity of stormwater flows. As explained in detail in the March 21, 2017 Otak memorandum and the Hearings Officer's decision, the Applicant is required to upgrade the culvert to avoid up-stream ponding which currently results in high velocity flows through the existing storm culvert. The overall stormwater plan for the proposal will decrease the amount of stormwater that flows through the SW 48th Avenue culvert by capturing and diverting some stormwater to other locations. This will reduce the flows reaching the Fosters' culvert. The Hearings Officer found that during a 100-year storm event, there might be flooding of the



Fosters' driveway if their private, undersize culvert was not upgraded. However, the Applicant is not required to remedy this existing condition on adjacent private property and this condition does not impact the requirement for the Applicant to install a full-size culvert as part of the stormwater system upgrades.

The record shows that the Portland Bureau of Environmental Services ("BES") has stated that the 18-inch culvert on the Fosters' property is private. The Applicant has no legal ability or obligation to install a 36-inch culvert in that location. The mere fact that the opponents assert that "permits" have been issued for construction of the culvert does not mean that it may be improved or otherwise reconstructed by the Applicant. BES is the best source of substantial evidence on this issue and BES has determined that the culvert is not required to be upgraded by the Applicant.

Mr. Iverson alleges that the installation of a 36-inch culvert would violate PCC Section 17.38.035.C(1). The Hearings Officer found that PCC Section 17.38.035.C(1) is not an approval criterion for the project. This Code section requires that the flow leaving a property be equal to or less than the pre-development stormwater flow and could be met by the proposal even if it did apply. The application before the City Council removes stormwater from the channel leading to this culvert by taking some stormwater to either side of SW Pendleton Street. Therefore, less stormwater will pass through the 18-inch culvert. Additionally, the Applicant also reduces stormwater through the channel under SW 48th Avenue by using low-impact development activities ("LIDA") that contain both a water quality and water retention function. The Applicant's proposed stormwater plan will not cause additional flooding at the 18-inch private culvert. Therefore, this application causes no adverse impacts and, in fact, improves water quality and water quantity flow in the channel under SW 48th Avenue.

For these reasons, the City Council must reject this issue.

## **7. Needed Housing**

This application constitutes a needed housing application under ORS 197.303(1). ORS 197.307(4) provides that a local government may not apply subjective procedures, conditions or standards to a needed housing application nor may the decision have the effect of discouraging or increasing the cost of needed housing. Nothing the City of Portland has done thus far would violate ORS 197.307(4). However, many of the opponent's suggested conditions and arguments regarding the relevant approval criteria run afoul of ORS 197.307(4). The Applicant encourages the City Council to carefully consider the opponents' request and render a decision consistent with the statutory direction for needed housing. As the City Council knows based on the record in this case, the housing crisis is best served by approving subdivisions such as this. Denying subdivisions or reducing the number of lots does nothing to resolve the current housing crisis and

Mayor Ted Wheeler  
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is expressly contrary to ORS 197.307(4) if the decision relies upon the application of subjective criteria.

Very truly yours,



Michael C. Robinson

MCR:rsr

cc: Ms. Stephanie Beckman (via email) (w/encls.)  
Mr. Fabio De Freitas (via email) (w/encls.)  
Mr. Vic Remmers (via email) (w/encls.)  
Mr. Mike Peebles (via email) (w/encls.)  
Ms. Li Alligood (via email) (w/encls.)  
Mr. Keith Buisman (via email) (w/encls.)  
Mr. Greg Summers (via email) (w/encls.)