Exhibit B82

From: Clugston, Michael
To: bill liderengineering.com
Cc: Taraday, Jeff; rdbern@frontier.com; dbernhoft@yahoo.com; joe scordino; Phil Olbrechts
Subject: RE: Edmonds/Bernhoft Appeal -- Ruling Granting City"s Motion to Limit Scope and Dismissing Appeal
Date: Tuesday, September 3, 2024 8:48:46 AM
Attachments: image001.png

Good morning,

1. The last day for reconsideration is Thursday, September 12, by 4:00pm.
2. A request for reconsideration costs $314.00. Submit the reconsideration letter through the MBP portal for file PLN2024-0020 and an invoice will be sent for the fee.
3. You are reading ECDC 20.06.140(E) correctly.

Thanks.

Mike Clugston | Acting Planning Manager
City Hall | 121 5th Ave. N | Edmonds WA 98020
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The Permit Center is open for walk-in service M-F 8:30am to 2pm (closed for lunch 12-1pm). Staff is available via phone, email and/or by appointment during working hours (typically 8-5pm)

From: bill liderengineering.com <bill@liderengineering.com>
Sent: Tuesday, September 3, 2024 8:33 AM
To: Clugston, Michael <Michael.Clugston@edmondswa.gov>
Cc: Taraday, Jeff <jeff@lighthouselawgroup.com>; rdbern@frontier.com; dbernhoft@yahoo.com; joe scordino <joe.scordino@yahoo.com>; Phil Olbrechts <olbrechtslaw@gmail.com>
Subject: RE: Edmonds/Bernhoft Appeal -- Ruling Granting City's Motion to Limit Scope and Dismissing Appeal
Importance: High

Mr. Clugston,

Pursuant to ECDC 20.06.140, Mr. Bernhoft has the right to request reconsideration of the hearing examiner's decision within ten calendar days of the decision, not counting the day of the decision.

Please confirm:

1. The request for reconsideration of the Hearing Examiner's decision in the Bernhoft case must be filed on or before **4:00 pm September 12, 2024.**

2. Pursuant to ECDC 20.06.140(D), what is the required reconsideration fee for filing a timely request for reconsideration?

3. Please confirm that pursuant ECDC 20.06.140(E), that the timely filing of a request for reconsideration shall stay the hearing examiner's decision on the applicable project permit application, or portion thereof, until such time as the hearing examiner issues a decision on reconsideration.

Thank you in advance for your prompt response to this email.

William (Bill) Lider, PE, CESCL
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From: Phil Olbrechts <olbrechtslaw@gmail.com>
Sent: Monday, September 2, 2024 1:49 PM
To: bill liderengineering.com <bill@liderengineering.com>
Cc: Taraday, Jeff <jeff@lighthouselawgroup.com>; rdbern@frontier.com; dbernhoft@yahoo.com; Clugston, Michael <Michael.Clugston@edmondswa.gov>; joe scordino <joe.scordino@yahoo.com>
Subject: Re: Edmonds/Bernhoft Appeal -- Ruling Granting City's Motion to Limit Scope and Dismissing Appeal

Final land use decision on Mr. Bernhoft's appeal is attached. Reconsideration of the decision is governed by ECDC 20.06.140. The appeal hearing scheduled for September 6, 2024 is cancelled.

On Thu, Aug 29, 2024 at 8:45 AM bill liderengineering.com <bill@liderengineering.com> wrote:

> Mr. Olbrechts, Appellant Bernhoft will most certainly be filing a motion for reconsideration, given the misrepresentations by the City with regards to the overall, $7-million proposed project to rectify the problems the City has created in Lower Perrinville Creek of which its fish-killing flow splitter is an integral part.
>
> We suggest that you strike the September 6, 2024 hearing. Mr. Bernhoft will need to check with his expert witnesses as to their availability later in September or October before a new hearing date may be scheduled. We suggest that a new pre-hearing conference be set so that we can orally argue why the scope of our appeal should not be

limited and to schedule a new hearing date.

In the interim, the City is cautioned and reminded that it is illegal for them to do ***any*** sediment removal in Perrinville Creek, without a valid HPA permit.

Also, for future reference, please correct the spelling of my name on future correspondence.

William (Bill) Lider, PE, CESCL
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2526 – 205th Place SW
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From: Phil Olbrechts <olbrechtslaw@gmail.com>
Sent: Thursday, August 29, 2024 7:56 AM
To: bill liderengineering.com <bill@liderengineering.com>
Cc: Taraday, Jeff <jeff@lighthouselawgroup.com>; rdbern@frontier.com; dbernhoft@yahoo.com; Clugston, Michael <Michael.Clugston@edmondswa.gov>; joe scordino <joe.scordino@yahoo.com>
Subject: Re: Edmonds/Bernhoft Appeal -- Ruling Partially Granting City Motion to Narrow Scope--APPLELLANT RESPONSE

To handle this more expeditiously, I do have to recognize that there's no need for response from the City since the Appellant did not clarify how their appeal relates to the scope of the hearing as defined in my 8/26 email. Unless the parties present a legitimate need for more comment I'll go ahead and issue the final ruling probably by Monday morning (I have other decisions to issue before). The final ruling will be based upon the evidence presented in the briefing on the City's motion only. Once issued at that point the Appellant can file their reconsideration request and I'll set up a briefing/comment schedule for the motion if filed. If reconsideration is requested we will likely have to postpone the hearing date.

On Wed, Aug 28, 2024 at 11:15 PM Phil Olbrechts <olbrechtslaw@gmail.com> wrote:

> Thank you Mr. Liderson. Unfortunately your reconsideration request is out of order. It is stricken and will not be considered for the final order to be issued next week. The record was only left open at this point to address how Mr. Bernhoft's appeal addresses the scope of review as limited by my 8/26/24 email. Mr. Taraday is still authorized to address how much Mr. Bernhoft's appeal is pertinent to the scope of review as identified in the 8/26/24 ruling. As I noted in the 8/26/24 email, reconsideration requests can be filed upon receipt of the final order that will be issued next week. A ruling on reconsideration however will likely not issue until after

September 6, 2024 since the City will be entitled to have time to respond to your reconsideration request. If the parties wish to postpone the 9/6/24 hearing a week or two to accommodate the reconsideration process that is an option as identified in my 8/26/24 email.

On Wed, Aug 28, 2024 at 10:48 PM bill liderengineering.com <bill@liderengineering.com> wrote:

> Mr. Olbrechts,
>
> We are in receipt of your August 26, 2024 email below, partially ruling on the City of Edmonds dispositive motion to "limit" the scope of the Bernhoft appeal of the City's SEPA determination of non-significance to allow continuance of its fish-killing flow splitter for another three years. I am responding on behalf of Mr. Bernhoft, who is currently out of state, via email as a final decision is not indicated by your email.
>
> We strongly disagree with the Hearing Examiner's partial ruling. Again the City seeks to stifle a legitimate appeal of their illegal maintenance of a fish-killing structure that no longer functions as a flow splitter to divert high flows into a pipe that cannot even convey a 10-year storm.
>
> In your email you state:
>
> > *The proposal is not part of a larger City proposal because it doesn't meet the test for a larger single proposal as laid out in detail in WAC 197-11-060(3)b, pasted below. Further, as noted by the City, there is no current City proposal or plan for a more comprehensive fix to Perrinville Creek hydrology problems.*
>
> First, the Hearing Examiner is incorrect that there is no proposal for a more comprehensive fix to the Perrinville Creek hydrology problems. In June 2022, the City hired consultant ESA under a $906,919 professional services agreement to model and design of the Lower Perrinville Restoration project to include:
>
> - Removal of sediment/channel realignment downstream of the diversion structure so that an interim reestablishment of flows back to the BNSF culvert is completed. This is because currently all creek flows enter the diversion structure.
> - Replacement of the BNSF culvert with a fish passable culvert.
> - Replacement of the Talbot Road Culvert with a fish passable culvert.
> - Possible decommissioning the diversion structure and any needed rehabilitation of the overflow pipe for conveyance of storm flows that cannot be discharged into the Creek due to grade differentials.
> - Realignment and construction of the stream bed along this reach.
>
> This is documented in Appellant's Exhibit B80, Bates page numbers 917-918, copy attached that will provide as backup to our testimony at hearing, if allowed.
>
> Attached is a copy of Appellant's Exhibit B68, Bates No. 685 showing the City's Engineering Project Status Report for the *Lower Perrinville Creek Restoration Project*. This June 2023 Public Works status report shows an estimate project cost of over $7-million for this project that is currently in pre-design. It was estimated in 2023 that it would be 2 years in design and development before being ready for construction. Yet the City has made little to no progress in moving the project from pre-design to final design. It is simply incorrect to make the statement that, "there is no current City proposal or plan for a more comprehensive fix to Perrinville Creek hydrology problems."

Consultant ESA has prepared a conceptual plan, yet because of budgetary reasons, the City has chosen not to act requiring the continued maintenance of the fish-killing flow splitter for at least another three years, but will likely turn into a much longer time.

Secondly, WAC 197-11-060(3)(b)(ii) states:

> *(ii) Are interdependent parts of a larger proposal and depend on the larger proposal as their justification or for their implementation.*

Continued maintenance of the flow splitter and the proposed restoration of Lower Perrinville Creek are interdependent as the future stream restoration requires the continued maintenance of the illegal, fish-killing flow structure to continue.

The City incorrectly cites *King County v. Friends of Sammamish Valley*, 525 P.3d 214 (Wash. Ct. App. 2023)(baseline zoning conditions must include multiple alleged illegal and unauthorized zoning uses). This is an apples and oranges comparison.

In *KC v. Friends*, the issue was related to the Growth Management Act and rezoning of agricultural land for industrial construction of wineries, etc. While one can argue the merits of rezoning agricultural land for other uses, King County was acting legally, within the authority granted to it under its Charter to make zoning changes.

Here, the City acted unilaterally, without any prior authorization, any environmental review, or approval from WDFW to block-off and dewatered 300-feet of stream channel, in violation of its own Critical Areas Ordinance Title 23 (CAO). Courts treat stormwater and environmental issues differently than zoning issues. In the December 29, 2016 Washington State Supreme Court Ruling *Snohomish County v. Pollution Control Hearings Board*, et.al, Case No. 92805-3 the Court concluded:

> "*We reverse the Court of Appeals and reinstate the Board's order. The legislative history and our precedent demonstrate that the vesting statutes were intended to restrict municipal discretion with respect to local zoning and land use ordinances. Because state and federal law direct the permittees to implement the storm water regulations at issue in this case, the regulations are not the sort of local municipal land use and zoning ordinances the legislature was concerned with. Indeed, the legislature's actions with regard to implementation of Ecology's LID techniques make it clear that the vesting statutes do not preclude compliance with the 2013 Phase I Permit*."

The City cannot claim vesting of their illegal, unpermitted dewatering of 300-feet of Perrinville Creek in order to change the environmental review baseline, just to avoid compliance with City Code, the 2019 Stormwater Management Manual for Western Washinton, its 2019 Phase II Municipal Stormwater Permit, and the HPA permit requirements previously established for maintaining its flow splitter.

While zoning issues are important, no one's property or life safety was threatened as a result of *KC v. Friends* decision; here, the City's rapidly deteriorating and failed culvert that cannot even convey a 10-year storm event under the BNSF mainline tracks, runs the risk of multiple fatalities, major property damage, and a national news level environmental catastrophe in Puget Sound, simply because the City does not wish to allocate the funds necessary to correct the problem that it created.

As such, the Hearing Examiner must consider the ramifications of the City's illegal dewatering and stream diversion under SEPA before dismissing the Bernhoft appeal outright. The City cannot simply set aside its CAO by dewatering a stream, destroying a salmon run, and then speciously claim that their illegal actions have now changed the baseline so that the CAO does not apply in this instance to justify the continuance of its maintenance of its fish-killing flow splitter.

The City failed to address the effects of its "maintenance" to remove rock and sediment on salmon, both adults lured to the attraction water created by the maintenance work as well as the 4,000 juvenile coho placed in the creek in 2023 and 2024 by the Edmonds Stream Team (EST) salmon enhancement Cooperative

Program with Washington Department of Fish and Wildlife. The maintenance work is disrupting and destroying spawning/rearing habitat and will destroy the salmon placed in Perrinville Creek by the EST.

The City's SEPA checklist is erroneous because it does not mention salmon or resident cutthroat that will be impacted by the continued maintenance. The City violated State rules on how a SEPA Checklist is supposed to be completed and how the incomplete or inadequate checklist would affect the DNS.

Many of these issues were raised by Fish Biologist Joe Scordino in his comments to the City prior to its DNS decision. The WAC's referenced by Mr. Scordino in his comment e-mails to Mr. Clugston will be presented at hearing has testimony and evidence to the Hearing Examiner, if we are allowed to do so; and we will document the environmental impacts from the continued maintenance of the fish-killing flow splitter.

The City did not address if or how the maintenance would affect protections afforded to critical areas by State Law such as only doing work during open fish windows and doing maintenance work, "in-the-dry" by sandbagging the stream and diverting the stream around the maintenance work area. Working, in-the-dry is a condition of the City's current HPA permit to maintain the flow splitters that the City has not followed.

Will the City perform "emergency" maintenance outside of open fish windows? If so, what will be the impact to the Perrinville Creek fishery? These maintenance impacts have not been addressed in the City's SEPA determination.

In recent personal conversations with WDFW staff just this week, we have just learned that as a part of any future HPA permit, WDFW will require the City to truck or haul excavated stream bed materials and deposit them at or near the Perrinville Creek outfall, for beach replenishment. This raises a whole host of maintenance related environmental issues that are not addressed in the current SEPA Checklist and DNS, such as:

- How will the excavated materials be transported to the outfall?
- Will they be trucked over the BNSF mainline railroad tracks?
- Will BNSF even allow this operation on their tracks?
- Will the excavated materials be barged to the outfall?
- How will the eel grass beds in Browns Bay be protected from barge traffic or incorrectly placed fill?
- Are there any contractors even willing to barge excavated materials to the outfall risking grounding and damage to their barge if it becomes stuck?
- If a barge is grounded, maritime regulation requires that the barge be inspected by an underwater marine surveyor to assure that the barge is still seaworthy.

None of these issues have even been addressed, discussed, or their impacts even considered. Hence the absolute need to prepare an EIS so that all of these problems can be addressed before they become an environmental disaster.

In conclusion, the City seeks to stifle this appeal by incorrectly limiting the appeal issues to sediment removal from the flow splitters rather than evaluating the entire lower Perrinville Creek restoration project as defined by the City in 2022 and 2023.

We request that the Hearing Examiner allow this appeal to proceed to hearing, per the July 15, 2024 prehearing order with no restrictions on our testimony. The Hearing Examiner can then decide what testimony and evidence he will consider as a part of his final decision.

Once we receive your final, detailed decision on the City's motion to limit our testimony, we will make a decision to request reconsideration of the Hearing Examiner's final decision.

Respectfully,

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From: Phil Olbrechts <olbrechtslaw@gmail.com>
Sent: Monday, August 26, 2024 7:44 PM
To: Taraday, Jeff <jeff@lighthouselawgroup.com>; rdbern@frontier.com; bill liderengineering.com <bill@liderengineering.com>; dbernhoft@yahoo.com; Clugston, Michael <Michael.Clugston@edmondswa.gov>
Subject: Edmonds/Bernhoft Appeal -- Ruling Partially Granting City Motion to Narrow Scope

Parties,

The City's motion to narrow scope on the first of its two requests for relief is granted. The scope of environmental review is limited to the impacts of the proposed maintenance. Impacts caused by the proposal are to be assessed from current environmental conditions as the baseline. The fact that the current baseline may result from alleged illegal activity is immaterial as demonstrated in *King Cnty. v. Friends of Sammamish Valley*, 525 P.3d 214 (Wash. Ct. App. 2023) (baseline zoning conditions must include multiple alleged illegal and unauthorized zoning uses). Fixing existing problems is not pertinent to this appeal. Any mitigation or additional required environmental review is to be limited solely to the impacts of the proposed maintenance and not to problems allegedly caused by the City or anyone else in the past. The proposal is not part of a larger City proposal because it doesn't meet the test for a larger single proposal as laid out in detail in WAC 197-11-060(3)b, pasted below. Further, as noted by the City, there is no current City proposal or plan for a more comprehensive fix to Perrinville Creek hydrology problems. I will issue a much more detailed written legal analysis/ruling on the City's motion once its second grounds for relief is resolved as outlined below.

I've deferred ruling on the City's second request for relief in case the Appellant would like an opportunity to provide further input. The City's second request for relief is essentially dismissal of the appeal. The City requests dismissal because as limited to proper scope, none of the Appellant's appeal issues are germane to project impacts. Since the Appellant didn't have the precise scope of the appeal readily manifest when writing up his appeal, it is fair to give him an opportunity to reformulate his issues as pertinent to the scope of environmental review.

Only one issue raised in the appeal can be readily seen as pertinent so far, i.e. the assertion that maintenance during storm events may be dangerous to City employees. Although there may be a connection to the scope of review on that issue, it's an

outstanding legal issue whether labor conditions are considered to be environmental impacts subject to SEPA review, as opposed to being within the exclusive province of worker protection statutes. In any event, the Appellant may ultimately not even have any interest in pursuing the appeal in this proceeding when limited to maintenance impacts. It is up to the Appellant whether he would like to more narrowly focus his appeal on the scope of review as detailed in the first paragraph above or simply wait for a final ruling on the City's motion. The Appellant and City of course can ask for reconsideration once a final ruling is issued on the City's motion.

If the Appellant would like to identify how his appeal issues relate to maintenance impacts only, he may provide a written clarification by 11:59 pm on 8/28/24. City response would be due by 5 pm 8/30/24. A final ruling from the examiner will likely issue on 9/2/24. Witness and exhibit list deadlines of the prehearing order are deferred to 5 pm 9/4/23. The parties are welcome to agree upon a later appeal hearing date if they'd like more time to see this review process through.

The Appellant's motion to strike the City's motion as untimely is denied. The 11:59 deadline was clearly a pm as could be seen from the City's request to use that time instead of midnight during the comment period on the prehearing order. Evening deadlines are imposed in hearing examiner prehearing orders to give citizen appellants who have to work during the day a little more equal footing. Further, as opposed to court deadlines, there's no court personnel that need to still be in the office after 5 pm to accept evening documents for filing.

WAC 197-11-060(3)b:

(*b) Proposals or parts of proposals that are related to each other closely enough to be, in effect, a single course of action shall be evaluated in the same environmental document. (Phased review is allowed under subsection (5).) Proposals or parts of proposals are closely related, and they shall be discussed in the same environmental document, if they:*

(i) Cannot or will not proceed unless the other proposals (or parts of proposals) are implemented simultaneously with them; or

(ii) Are interdependent parts of a larger proposal and depend on the larger proposal as their justification or for their implementation.