Exhibit B84

THE HEARING EXAMINER OF THE CITY OF EDMONDS

IN RE: Robert Bernhoft DNS Appeal PLN2024-0020	DECISION UPON RECONSIDERATION AUTHORIZING HEARING ON IMPACTS TO DIP PIPE

Summary

Upon reconsideration, Mr. Bernhoft is authorized to move forward on a majority of his appeal issues, specifically: (1) alleged adverse impacts to ductile iron (DIP) pipe under railroad tracks; (2) alleged adverse impacts to fish passage downstream from the flow splitter, both the flow-splitter channel and downstream from the flow splitter along the former stream channel; and (3) alleged adverse impacts to sediment deposition at the mouth of the Perrinville River. Mr. Bernhoft's allegation of alleged adverse impacts caused by an undersized culvert under Talbot Road remains dismissed.

The reason for the significant reversal in the summary judgment ruling is due to an argument that was not raised by Mr. Bernhoft during summary judgment review. Specifically, Mr. Bernhoft did not posit that the baseline conditions for the project was a reduced flow through the flow splitter channel due to the accumulation of sediment at the flow splitter. With the baseline condition correctly framed in this fashion, the impacts of the proposed removal of that sediment thus results in the increase in splitter channel flows, which in turn creates material questions of fact as to the adverse impacts to the DIP, fish passage and sediment deposition.

As the parties are aware, this decision had to be written in one day due to unique time constraints imposed by the Edmonds Community Development code on the reconsideration review process. The Examiner also had to hold almost four hours of hearings on other projects on the same day. For this reason this decision is issued in abbreviated form without legal citations on some clearly establish legal principles and may be amended/corrected over the next ten calendar days. No major revisions are anticipated. The parties may also request clarification by 5 pm October 4, 2024.

Background/Evidence Relied Upon

This Decision Upon Reconsideration is based upon the Notice of Appeal and the briefing and associated declarations/exhibits/motions of the City's summary judgment motion and Mr. Bernhoft's motion for reconsideration.

A decision dismissing the above-captioned appeal via a summary judgment ruling was issued on October 3, 2024. Mr. Bernhoft filed for reconsideration on September 12, 2024. The Examiner asked the parties for input on the new baseline concept identified supra on September 23, 2024 with a deadline for response of 11:59 pm September 25, 2024. ECDC 24.80.110 requires reconsideration decisions to be issued within ten calendar days after request. This made the decision due the day after input from the parties, September 26, 2024.

DIP Impact Review Authorized

Mr. Bernhoft is authorized to pursue his appeal on his contention that the proposal will adversely affect the ductile iron pipe (DIP) located under the BNSF railroad tracks. The proposed maintenance will increase flows through the DIP over baseline conditions. There is a material question of fact as to whether those increased flows will threaten the structural integrity[1] of the DIP and by extension the railroad tracks that run over it. Mr. Bernhoft can litigate that at hearing.

A key issue in resolution of the DIP impacts is whether the proposal will increase adverse impacts over baseline conditions. In its summary judgment motion, the City successfully argued that the impacts pertinent to SEPA review are those generated by the proposal over baseline conditions. Mr. Bernhoft in his appeal and motion briefing identified in detail that the portions of the DIP have "failed" due to saltwater corrosion and that this failure could lead to the collapse of railroad tracks passing over the DIP. Mr. Bernhoft makes clear in his assertions that currently existing conditions have resulted in the

[1] The reference to "structural integrity" includes the creation and expansion of holes in the DIP.

structural problems with the DIP but did not at any point identify how the proposed maintenance would make the situation worse. In the absence of any specific allegation that the proposed maintenance would worsen the DIP situation or any other adverse impact, summary judgment was granted in favor of the City. It was determined that Mr. Bernhoft had not alleged any adverse impact generated by the proposal that was more adverse than existing conditions.

During reconsideration review the Examiner independently determined that base conditions for the DIP potentially would not be the existing DIP flow rate but rather a reduced flow rate due to clogging of the flow splitter. The existing DIP flow rate is attributable to continued maintenance of the flow splitter. Without continued maintenance the flow splitter will allegedly become clogged and lose its function as demonstrated in the Appellant's appeal documents and the purpose of the proposed HPA permit. The last HPA permit for maintaining the flow splitter has recently expired. The baseline condition for the DIP, therefore, is no HPA permit and no maintenance, which in turn means reduced flows to the DIP. Approval of the proposal, therefore, would remove accumulated sediment that clogs the splitter and thereby increase the flow through the DIP over baseline conditions, i.e. DIP reduced flow rates resulting from lack of maintenance. Ultimately the summary judgment ruling was in error because it considered the flow splitter to be a permanently functioning flood control system. The system should have been considered a temporary and currently expired system dependent upon approval of HPA permits to continue its operations.

As previously noted, Mr. Bernhardt never argued framed the current splitter channel flows as temporary. The City never had a fair opportunity to address that position. Consequently, the City and Appellant were given an opportunity during reconsideration to comment on whether the proposal would in fact increase DIP flows and whether these increased flows could affect the structural integrity of the DIP. Both parties did not contest the finding that the proposal would in increase DIP flows. Given that the purpose of the proposed HPA as identified by the City is to maintain flows through the flow splitter, it is logically sound to conclude that the maintenance will do what it's designed to do and the result will be increased DIP flows. At the very least, that determination is based upon a material question of fact that can be further challenged in the appeal hearing if the parties so choose.

As to whether increased flow rates will exacerbate the structural problems of the DIP, there is a material question of fact on that issue as well. In his reply briefing on reconsideration Mr. Lider identified that increased flow rates, in particular during flood events, can cause pressurized water escape through existing DIP holes. This pressurized water can serve to undermine the rock support to the overlaying railroad tracks. Given that no new evidence is allowed during reconsideration review, Mr. Lider's comments are not taken as expert testimony from a professional engineer but rather as hypothetical

facts based upon the record. Even just taken as hypothetical facts, Mr. Lider's comments present a highly plausible impact resulting from increased DIP flows. The scenario presented by Mr. Lider is consistent with the record developed for summary judgment and presents a material question of fact that Mr. Bernhoft can pursue at an appeal hearing.

The City's primary response to the DIP issue is that it wasn't alleged in the Appellant's appeal. The City is correct that the appeal doesn't identify how the proposal will create problems with the DIP, i.e. that it will increase flow ratees. However, the appeal unquestionably identifies impacts to the DIP as an issue of concern. That is sufficient to put the City on notice as to the scope of appeal issues under consideration. Mr. Barnhoft's appeal is found to sufficiently allege the structural integrity of the DIP and overlying railroad tracks as within the scope of his appeal.

Fish Impacts Review Authorized

Mr. Bernhoft is authorized to pursue his claims that the proposal will adversely affect protected[2] fish. The determination that the proposal may increase flows in the flow splitter channel necessarily entails the conclusion that this will decrease flows in the natural channel or some other channel where fish would have freer passage and encounter less damage. As alleged in Mr. Bernhoft's appeal, the natural channel is currently completely blocked with sediments. It's unknown from the record where the flows that currently go into the flow splitter channel will go if the splitter becomes clogged with sediment. The resulting channel from no maintenance (baseline conditions) may very well be just as harmful to fish as maintaining the current flow splitter channel. Given these circumstances, a material question of fact remains as to impacts to fish caused by the continued maintenance of the flow splitter. That is an issue that may be pursued by Mr. Bernhoft at the appeal hearing.

Talbot Road Culvert Still Precluded from Review

The summary judgment ruling still precludes review of flooding and fish impacts caused by the Talbot Road culvert alleged by Mr. Bernhart as of a substandard size. As far as can be ascertained from P. 8 of the slides appended to Mr. Bernhoft's appeal, the culvert at issue is located upstream from the flow splitter. There is nothing to suggest from the record that the proposal's increase in flow rates in the flow splitter channel will have any impact on the flooding or fish impacts allegedly caused by the undersized culvert.

Sediment Redistribution

[2] An outstanding legal issue remains as to whether the City's obligation to avoid impacts to fish is limited to protected (threatened etc.) fish species.

Mr. Bernhoft is authorized to pursue his allegations that the proposal will adversely affect sediment accumulation at the mount of the Perrinville River. Increased flows caused by the proposal down the flow splitter channel potentially will result in less sediment deposition at the mouth of the Perrinville River. As discussed for fish impacts, supra, it's unclear if the proposed maintenance is not done that flows will return to the natural channel. A material question of fact remains as to what impacts, if any, the proposed maintenance will have on sediment deposition and that issue can be pursued by Mr. Bernhoft at the appeal hearing.

Mr. Barnhoft argues that sediment deposition should also be addressed because after issuance of the summary judgment ruling on this case he learned that the department of wildlife would likely require the City to deposit stream bed sediments into the mouth of the Perrinville River as a condition of approval for the City's HPA application. That issue is largely rendered moot by the authorization above to pursue the sediment allegations made in the Notice of Appeal. As part of his case alleging impacts to beach sediment, Mr. Barnhoft can address how that impact should be mitigated and/or why mitigation proposed by the City in the course of the appeal may not be sufficient.

Timely Submission of Summary Judgment Motion

In his reconsideration request Mr. Barnhoft continues to assert that the City's summary judgment motion was untimely because the 11:59 deadline in the prehearing order should have been read as 11:59 as opposed to 11:59 pm. Despite the fact that it was imminently obvious that it was intended to be read as 11:59 pm from the circumstances of the prehearing order, Mr. Barnhoft argues that intent is irrelevant. Such a position is contrary to the universal position of the courts when construing ambiguities in statutes and contracts. Legislative intent is the paramount factor in resolving ambiguity in statutes. *Lynch v. Dept. Labor Industries*, 19 Wn. 2d 802, 809 (1944). Similar priorities apply to interpretation of contracts, where the courts rule that it is their role "*to ascertain the mutual intent of the contracting parties and to give effect* to their intent." Amelco Electric v. Drake Co., 20 Wn. App. 899 (Wash. Ct. App. 1978). Given the City's request to replace the "midnight" deadline with "11:59 pm," and the Examiner's subsequent replacement of "midnight" with "11:59," Mr. Bernhoft cannot seriously claim that he understood the replacement to be "11:59 am."

Even in the absence of any such clear evidence on intent, the City still would have been allowed to submit it's brief later in the day. In the absence of any evidence on intent, the City could have been justifiably confused as to the deadline, which would have excused a submission after noon. In point of fact, any reasonable cause for delay would likely have merited an arguably late submission. Unlike filing deadlines for appeals, deadline set by prehearing orders and other post-filing deadlines are excused for justifiable cause. The examiner cannot purposely waive deadlines such as the deadline for issuing a

reconsideration decision, but deadlines such as those set in prehearing orders can be extended and waived for justifiable cause.

Certificate of Service

Mr. Bernhoft argues that City's summary judgment motion should have been dismissed for failure to include a certificate of service. There is no rule or statute that requires hearing examiner motions to be accompanied by a certificate of service. Such certificates are just used to prove the date of service. In this case there's no question that Mr. Bernhoft was timely served as evidenced by the fact that Mr. Bernhoft responded to it and the fact that it was emailed to Mr. Bernhoft in a timely manner to the email address that has been used by all parties throughout this proceeding.

Dismissal of Entire Appeal

Mr. Barnhoft argued that the Examiner exceeded his authority by dismissing his entire appeal in the summary judgment ruling. The City's motion was somewhat contradictory in requesting both that Mr. Barnhoft's appeal be "limited" while also asking that the DNS be upheld. Mr. Barnhof limited his appeal to challenging the validity of the DNS. If the DNS was upheld as requested by the City, Mr. Barnhoft had nothing further to argue. That is in fact what happened in the summary judgment ruling under the prior understanding of baseline conditions. With the corrected definition of baseline conditions as including an increase in flow splitter channel flows, most of Mr. Barnhoft's appeal issues can still be addressed as outlined in this Decision Upon Reconsideration.

Decision

Upon reconsideration, Mr. Barnhoft may pursue the appeal issues identified in the Summary of this Decision Upon Reconsideration.

ORDERED this 26th day of September 2024.

Phil Olbrechts

City of Edmonds Hearing Examiner