Before Hearing Examiner
Gary N. McLean

**BEFORE THE HEARING EXAMINER**
**FOR THE CITY OF POULSBO**

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| In the Matter of the:<br><br>**The *"Plateau at Liberty Bay"* Planned Residential Development and Preliminary Plat Applications** | ) | **File No. P-12-06-22-02**<br><br>**ORDER DENYING REQUEST FOR RECONSIDERATION** |

## I. BACKGROUND.

On May 29, 2024, the undersigned Hearing Examiner issued a Decision approving the "Plateau at Liberty Bay" Preliminary Plat and Planned Residential Development applications, subject to Conditions of Approval. On June 13, 2024, Jan Wold, an individual who provided testimony during the public hearing and submitted written comments regarding the pending applications, submitted a written request for reconsideration of the Decision. Copies of all materials referenced above are on file with the City and shall be maintained as part of the record for this matter.

## II. DISCUSSION.

The pending request for reconsideration continues arguments and generally refers to materials that were reviewed as part of the hearing record, dealing with topics and issues that were fully discussed and explored as part of the hearing process. Ms. Wold did not provide any additional evidence that was somehow unavailable at the time of hearing. Instead, she relies on speculation, arguments, and written comments that she referenced during the public hearing, mostly restating concerns that she expressed in her papers presented for an appeal of the SEPA MDNS issued for the project – which appeal was rejected because she did not satisfy the City's procedural filing requirements, which include payment of a fee.

The request for reconsideration repeats the same arguments and speculative opposition claims raised by Ms. Wold, which were largely rebutted or appropriately addressed by City

staff during the public hearing, with specific Conditions of Approval imposed on several issues of concern to Ms. Wold.

Reconsideration may not be granted based on any challenges that seek to reopen review of alleged adverse environmental impacts associated with the project. First, the reconsideration request fails to bring forward any material evidence or information that was not available or already addressed at the time of the hearing. Second, Ms. Wold did not properly file an appeal of the SEPA threshold determination issued for this project. And third, Ms. Wold did not show that any alleged impact would rise to the level of a "significant" impact.

The Poulsbo Municipal Code allows for an appeal of a SEPA threshold determination. *See PMC 16.04.250.* Ms. Wold's defective submittal was rejected by the City, and the Examiner is without authority to waive the City's filing requirements that must be satisfied before an appeal can be accepted. This reconsideration request may not be used as a collateral challenge of the SEPA review and threshold determination issued for this project.

Well established Washington caselaw establishes that a collateral attack on previous land use decisions, like SEPA determinations, though masked as something else, like a request for reconsideration, cannot stand. *See* lengthy discussion and summary of relevant caselaw in *Twin Bridge Marine Park, LLC v. Dep't of Ecology,* 162 Wn.2d 825, 175 P.3d 1050 (2008)(summarizes the well-established principle of Washington law that prohibits collateral attacks of prior government decisions to give closure and clarity to interested citizens where agencies and public had sufficient notice to resolve any dispute in court or another forum but did not do so); *See, e.g.*, *Wenatchee Sportsmen Ass'n v. Chelan County*, 141 Wn.2d 169, 4 P.3d 123 (2000) (a challenge to a Chelan County decision concerning residential development permits under the Growth Management Act, chapter 36.70A RCW, must be brought under LUPA); *Skamania County v. Columbia River Gorge Comm'n*, 144 Wn.2d 30, 26 P.3d 241 (2001) (construing a federal act, 16 U.S.C. § 544m(a), no collateral attack on a local final land use decision can be made when no timely appeal is filed); and *Chelan County v. Nykriem,* 146 Wn.2d 904, 931-33, 52 P.3rd 1 (2002)(holding that land use decisions are final after available appeal period expires and cannot be collaterally attacked).

Moving forward, it is worth noting that the exhaustion of administrative remedies doctrine is explicitly incorporated into the Land Use Petition Act (LUPA), barring judicial review of land use decisions where available administrative remedies have not been exhausted. RCW 26.70C.060(2)(d). In other words, just as this reconsideration request cannot be granted based on issues that could have been but were not addressed in any SEPA comments or administrative appeal of the SEPA threshold determination issued for this project application, any future LUPA challenge would also fail if based on issues that could have been addressed in the available administrative appeal that was never pursued.

The state's SEPA statute – at RCW 43.21C.075(4) – expressly mandates: "If a person aggrieved by an agency action has the right to judicial appeal and if an agency has an administrative appeal procedure, such person shall, prior to seeking any judicial review, use such agency procedure if any such procedure is available, unless expressly provided otherwise by state statute." "SEPA does not demand a particular substantive result in government decision making; rather it ensures that environmental values are given appropriate consideration." *Glasser v. City of Seattle,* 139 Wn. App. 728, 742 (2007). For this project, the material issues raised in the pending reconsideration request were already fully vetted, analyzed, reviewed and considered in the staff review process, the Planning Commission review, and as part of the Hearing Examiner's open-record hearing process. While Ms. Wold's issues were considered, they do not serve as a basis to revise or reverse the decision issued approving the project.

Finally, the reconsideration request does not direct attention to any new evidence or controlling legal authority that would serve as a basis to grant the relief requested. Instead, it asks the Examiner to "see my project input for more data", "see the input I have provided during the process...", and makes similar broad statements, essentially throwing all previous arguments and comments at the wall, hoping something will stick. The request for reconsideration is largely based upon the same speculation and expressions of concern raised during the public hearing – mostly unauthenticated, unverified, and scattershot arguments and assertions already raised, or that could have been raised, at the hearing. The "spaghetti approach" is not the best way to seek reconsideration. Hearing Examiners, like judges, must decline to sort through the noodles in search of reasons to grant an appeal or request for reconsideration. *(See discussion in Independent Towers of Wash. v. Washington, 350 F.3d 925, 929 (9th Cir. 2003) noting that "the Seventh Circuit observed in its now familiar maxim, '[j]udges are not like pigs, hunting for truffles buried in briefs[,]' citing United States v. Dunkel, 927 F.2d 955, 956 (7th Cir. 1991); and how the 9th Circuit has repeatedly admonished that courts cannot "manufacture arguments for an appellant").*

The Record for this matter fully supports the decision and conditions of approval. The reconsideration request fails to provide any legal or factual basis to reverse or modify such decision.

## III. ORDER.

Based on the record, the pending Request for Reconsideration is denied.

ISSUED this 21st Day of June, 2024

Gary N. McLean
Hearing Examiner