

**BEFORE the HEARING EXAMINER for the
CITY of LAKE FOREST PARK**

DECISION

FILE NUMBER: 2020-CSDP-0001

APPLICANT: LFP, LLC and Re-Volve, LLC
C/o Michael Pearce
210 NW 52nd Street
Seattle, WA 98107

TYPE OF CASE: Commercial Site Development Permit for an 8-unit townhome development

STAFF RECOMMENDATION: Approve subject to conditions

EXAMINER DECISION: APPROVE subject to conditions

DATE OF DECISION: December 21, 2021

INTRODUCTION ¹

LFP, LLC and Re-Volve, LLC (“Pearce”) filed a Commercial Site Development Permit (“CSDP”) application pursuant to Chapter 16.26 Lake Forest Park Municipal Code (“LFPMC”) on May 22, 2020. (Exhibit 14 ²) The Lake Forest Park Department of Planning and Building (“Planning”) deemed the application to be complete as of August 17, 2020. (Exhibit 1, PDF 3)

Associated with the CSDP are two Type III requests: One to reduce the required setback from a steep slope; the other to reduce a steep slope buffer. (Exhibit 1, PDF 5 & 6) Pearce has requested that those requests be consolidated with the CSDP for processing and decision making. (Testimony)

The subject property is located at 3507 NE 153rd Street. Its Assessor’s Parcel Number is 6744570-0100 (“Parcel 0100”). (Exhibit 14)

The Lake Forest Park Hearing Examiner (“Examiner”) viewed the subject property via Google Earth, aerial imagery dated August 14, 2020, street level imagery dated June, 2019 and October, 2021.

¹ Any statement in this section deemed to be either a Finding of Fact or a Conclusion of Law is hereby adopted as such.
² Exhibit citations are provided for the reader’s benefit and indicate: 1) The source of a quote or specific fact; and/or 2) The major document(s) upon which a stated fact is based. Citations to exhibits that are available electronically in PDF use PDF page numbers, not source document page numbers. While the Examiner considers all relevant documents in the record, typically only major documents are cited. The Examiner’s Decision is based upon all documents in the record.

The Examiner held an open record hearing on December 13, 2021. The hearing was conducted remotely using the “Zoom” platform due to assembly restrictions attendant to the current COVID-19 pandemic. Planning gave notice of the hearing as required by the LFPMC. (Exhibit 9)

Subsection 16.26.040(F)(1) LFPMC requires land use entitlement permit decisions to be issued within 120 net review days. The hearing was held after the 120th net review day. (Exhibit 1, PDF 4) “Any period excluded by agreement of the city and the applicant” is not counted in the 120-day period. [LFPMC 16.26.040(F)(2)(d)] Pearce agreed to waive the timeline. (Testimony)

Exhibits were offered and admitted during the hearing, a list of which is contained in Exhibit 1 at PDF 10.

The action taken herein and the requirements, limitations and/or conditions imposed by this decision are, to the best of the Examiner’s knowledge or belief, only such as are lawful and within the authority of the Examiner to take pursuant to applicable law and policy.

FINDINGS OF FACT

1. Parcel 0100 is a more or less square tract of land covering approximately 0.34 acres. Parcel 0100 is located in the northeast quadrant of the 35th Avenue NE/NE 153rd Street intersection. Since 35th Avenue NE is unopened north of NE 153rd Street, the 35th Avenue NE/NE 153rd Street intersection functions as a right angle turn to the east. (Exhibits 2, PDF 6; 5; 6)
2. Parcel 0100 is a knoll which drops off in all directions, most notably towards the north. A regulated steep slope, about 25 feet high, covers much of the north portion of Parcel 0100; a regulated stream lies off-site to the north. An older (c. 1951) single family residence is situated on the knoll near the center of Parcel 0100. (Exhibits 2, PDF 6 & 27; 5)
3. Acacia Memorial Park (a cemetery) borders the west side of 35th Avenue NE. An old single-family residence lies across NE 153rd Street from Parcel 0100. An apartment complex lies at the end of NE 153rd Street to the east of Parcel 0100. And, at the base of the steep slope to the north of Parcel 0100, lies another apartment development. (Exhibits 1; 6)
4. Pearce proposes to demolish the existing residence and an associated carport (which lies partly within the unopened portion of the 35th Avenue NE right-of-way) and replace them with an 8-unit townhome building.³ While Pearce has not yet developed detailed plans for the building, he does have a concept in mind. The “basement” level, accessed off NE 153rd Street, would consist of a mostly underground parking garage for the residential units above. Pearce envisions each townhome to be three stories with three bedrooms. Four of the units would be in the front, south half of the building with the other four in the back, north half of the structure. His concept envisions a courtyard between the north and south halves of the structure. The proposed building footprint does not intrude

³ The site’s R900 zoning would allow up to 16 dwelling units on Parcel 0100. The site’s critical areas limit the number of units that can be realistically achieved. (Testimony)

into regulated slope and stream buffers any more than does the present residence. The site plan includes extensive landscaping around the new building. The preliminary plans show that the City's tree canopy retention standards will be met. (Exhibits 1; 5; and testimony)

5. Pearce's proposal includes improvements to 35th Avenue NE to provide a hammerhead turnaround in the unopened portion of that right-of-way and frontage improvements to NE 153rd Street. A new water main will be required to serve the building. A deviation from the 2016 King County Surface Water Design Manual has been granted by the City's Development Review Engineer. The deviation will allow a detention vault to provide Level 2 flow control. (Exhibit 1)
6. No testimony or evidence was entered into the record by the general public either in support of or in opposition to the application.
7. Lake Forest Park's State Environmental Policy Act ("SEPA") Responsible Official issued a threshold Determination of Nonsignificance ("DNS") for the proposed townhome development on December 10, 2020. (Exhibit 11) The DNS was not appealed. (Testimony)
8. Planning's Staff Report provides a detailed review of the proposal and its compliance with LFPMC requirements. The Staff Report was not challenged. The Examiner finds that the Staff Report is thorough and accurate subject to a few corrections: The letter sequence in the file number should be "CSDP," not "CDSP;" the steep slope critical areas are in the northwest portion of Parcel 0100, not the northeast portion; the DNS was issued in 2020, not 2021; and the reference to "Exhibit 17" on PDF 7 is erroneous as there is no Exhibit 17 in this record. Subject to those corrections, the analysis in Exhibit 1 is incorporated herein by reference as if set forth at length.
9. The record contains no express recommendations from agencies. However, Planning's Staff Report clearly indicates that extensive agency consultation occurred during processing of the application and informed the current proposal.
10. Planning recommends approval of the CSDP subject to five conditions. (Exhibit 1, PDF 9 & 10) Pearce takes no exception to any of the recommended conditions. (Testimony)
11. Any Conclusion of Law deemed to be a Finding of Fact is hereby adopted as such.

LEGAL FRAMEWORK ⁴

The Examiner is legally required to decide this case within the framework created by the following principles:

Authority

⁴ Any statement in this section deemed to be either a Finding of Fact or a Conclusion of Law is hereby adopted as such.

A CSDP is a Type I application, which is subject to an open record hearing before the Examiner who makes a final decision on the application. The Examiner's decision is subject to the right of reconsideration and appeal to Superior Court. [LFPMC 16.26.030(A), .100, and .110 and Hearing Examiner Rule of Procedure 504]

A Type I application that complies with the applicable decision criteria shall be approved; provided, that the examiner may modify or condition a proposal to ensure conformity with the relevant decision criteria.

[LFPMC 16.26.110(A)]

Review Criteria

The review criteria for a CSDP are set out at LFPMC 18.48.060(A):

The hearing examiner may approve, deny, or approve with conditions an application for a commercial site development. The decision shall be based on the following factors:

1. Conformity with adopted city and state rules and regulations including but not limited to those listed in LFPMC Titles 15, 16, 17 and 18.
2. Consideration of the recommendations or comments of interested parties and those agencies or departments having pertinent expertise or jurisdiction, consistent with the requirements of this title.

Vested Rights

"Vesting" serves to "fix" the regulations against which a development application is judged. [*Potala Village Kirkland, LLC v. City of Kirkland*, 183 Wn. App. 191 (2014), *review denied*, 182 Wn.2d 1004, 342 P.3d (2015)]

In 2014 the State Supreme Court flatly declared: "While it originated at common law, the vested rights doctrine is now statutory." [*Town of Woodway v. Snohomish County*, 180 Wn.2d 165, 173, 322 P.3d 1219 (2014)] The *Potala* court rejected a contention that the filing of a complete shoreline substantial development permit application vested development rights because no statutory provision established vested rights for shoreline permits. [*Supra*, at 196-206]

CSDPs are not the subject of any state vesting statute. If Lake Forest Park had a local vesting ordinance applicable to land use applications, the Examiner would be obliged to follow it as enacted. [*Erickson & Associates v. McLerran*, 123 Wn.2d 864, 872 P.2d 1090 (1994); *Abbey Rd. Grp., LLC v. City of Bonney Lake*, 167 Wn.2d 242, 250, 218 P.3d 180 (2009)] But the City has no such local ordinance. Thus, the Examiner must follow the most current case law.

Under the most current case law, there is no vesting for CSDP applications because there is no statutory provision providing vesting for such applications.

Standard of Review

The standard of review is preponderance of the evidence. The Applicant has the burden of proof.

CONCLUSIONS OF LAW

1. Pearce has developed a preliminary plan for an 8-unit townhome project which meets the requirements for a CSDP. That plan relies upon exceptions from critical area buffer and setback requirements. Planning has analyzed those requests and finds that they meet established criteria for approval. The Examiner concurs: The exceptions will not harm the environment or the surrounding properties.
2. Planning's analysis, adopted by reference above, demonstrates compliance with the two criteria for approval of a CSDP.
3. The Examiner may impose a performance bond

in an amount sufficient to guarantee that development occurs according to the approved CSDP; that all required conditions of approval, including mitigation measures, are to be completed in a manner that complies with conditions of approval; and to guarantee satisfactory workmanship and materials for a period not to exceed five years. The hearing examiner shall establish the conditions of the bond or other security according to the nature of the proposed mitigation, maintenance or monitoring and the likelihood and expense of correcting mitigation or maintenance failures.

[LFPMC 18.48.070(A)] Success of the mitigation plantings (See Exhibit 5, PDF 4) is important given the critical areas exceptions that are being granted. Therefore, the Examiner will require a bond or surety sufficient to guarantee their completion and success.

4. The recommended conditions of approval as set forth in Exhibit 1 are reasonable, supported by the evidence, and capable of accomplishment. The Examiner will revise Recommended Condition 1 to improve clarity.
5. Any Finding of Fact deemed to be a Conclusion of Law is hereby adopted as such.

DECISION

Based upon the preceding Findings of Fact and Conclusions of Law, and the testimony and evidence submitted at the open record hearing, the Examiner hereby **GRANTS** the CSDP and associated Type III applications under file number 2020-CSDP-0001 **SUBJECT TO THE ATTACHED CONDITIONS.**

Decision issued December 21, 2021.

|s| John E. Galt

John E. Galt
Hearing Examiner

HEARING PARTICIPANTS ⁵

Michael Pearce
John Forba

Nick Holland

NOTICE OF RIGHT OF RECONSIDERATION

This Decision is subject to the right of reconsideration pursuant to Hearing Examiner Rule of Procedure 504. Reconsideration may be requested by the applicant, appellant, a party of record, or the City. Reconsideration requests must be filed in writing with the City Clerk within seven (7) calendar days of the date of mailing of this Decision. Any reconsideration request shall specify the error of law or fact, procedural error, or new evidence which could not have been reasonably available at the time of the hearing conducted by the Examiner which forms the basis of the request. Any reconsideration request shall also specify the relief requested. See Hearing Examiner Rule of Procedure 504 for additional information and requirements regarding reconsideration.

NOTICE OF RIGHT OF APPEAL

This Decision becomes final and conclusive as of the eighth calendar day after the date of mailing of the Decision unless reconsideration is timely requested. If reconsideration is timely requested, the Examiner's order granting or denying reconsideration becomes the final and conclusive action for the City. The final action may be reviewed in Superior Court pursuant to the procedures established by Chapter 36.70C RCW, the Land Use Petition Act. Section 36.70C.040 RCW requires that any appeal be properly filed with the Court within 21 days of the issuance of the final City Decision. Please refer to Chapter 36.70C RCW for further guidance regarding judicial appeal procedures.

The following statement is provided pursuant to RCW 36.70B.130: "Affected property owners may request a change in valuation for property tax purposes notwithstanding any program of revaluation."
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⁵ The official Parties of Record register is maintained by the City's Hearing Clerk.

CONDITIONS OF APPROVAL
2020-CSDP-0001
PEARCE TOWNHOME

This CSDP and associated Type III approvals are subject to compliance with all applicable provisions, requirements, and standards of the Lake Forest Park Municipal Code, standards adopted pursuant thereto, and the following special conditions:

1. Exhibit 5 is the approved site plan for these permits. All site work, frontage improvements and construction shall conform with Exhibit 5. The Permittee must apply for and receive all necessary permits from the Lake Forest Park Department of Planning and Building prior to commencing any proposed work.
2. Prior to issuance of construction permits authorizing site grading or other construction work, and pursuant to LFPMC 18.48.070, a financial guarantee, in the form of a bond or assignment of funds, shall be required to guarantee that approved mitigation plans will be undertaken and completed to the City's satisfaction. The amount shall be 150% of the total stated in a Bond Quantity Worksheet.
3. The permittee shall attempt to obtain a temporary construction easement from the property owner to the south of NE 153 ST if construction or staging is required on that property.
4. The permittee shall provide a signage plan and install signage that delineates all critical area buffers prior to receiving a certificate of occupancy.
5. The permittee shall record on the property's title a critical area easement which indicates the presence of critical areas on the property and that they are regulated by Chapter 16.16 LFPMC. The easement shall be recorded upon a newly drafted property title and be recorded prior to receiving a certificate of occupancy.
6. All recommendations within the critical area/geo-tech report (Exhibit 2) shall be followed.