

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

DECISION

FILE NUMBERS: 2015-PAUE-0001 and 2015-CU-0001 ¹

APPLICANT: Lake Forest Park Water District
4029 178th Street NE
Lake Forest Park, WA 98155

TYPE OF CASE: Consolidated: 1) Environmentally Sensitive Areas Public Agency and Utility Exception to build a pump house within a steep slope area; and 2) Conditional Use Permit to construct a utility facility on a residentially zoned lot

STAFF RECOMMENDATION: Approve both applications subject to conditions

EXAMINER DECISION: GRANT both applications subject to conditions

DATE OF DECISION: August 12, 2016

INTRODUCTION ²

Lake Forest Park Water District (LFPWD) filed an Environmentally Sensitive Areas (EnvSA ³) Public Agency and Utility Exception (PAUE) application and a Conditional Use Permit (CUP) application pursuant to Chapter 16.26 Lake Forest Park Municipal Code (LFPMC) on December 4, 2015, to build a pump house within a steep slope area on a residentially zoned lot. (Exhibits 4 and 5 ⁴) The Lake Forest Park Department of Planning and Building (Planning) deemed the applications to be complete as of June 23, 2016. (Exhibit 13.1)

The subject property is located at 18460 47th Place NE.

The Lake Forest Park Hearing Examiner (Examiner) viewed the subject property on August 9, 2016.

¹ Some documents in the record list the file number for the Conditional Use Permit as “2016-CU-0001.” City staff testified that the correct file number is as set forth herein.

² Any statement in this section deemed to be either a Finding of Fact or a Conclusion of Law is hereby adopted as such.

³ “ESA” might seem to be a more logical acronym for “Environmentally Sensitive Areas.” However, the acronym ESA is commonly used to refer to the Federal Endangered Species Act. In order to avoid confusion and/or misunderstanding, the Examiner has coined the acronym “EnvSA.”

⁴ 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. 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 a consolidated open record hearing on August 9, 2016. Planning gave notice of the hearing as required by the LFPMC. (Exhibit 17)

Subsection 16.26.040(F)(1) LFPMC requires land use entitlement permit decisions to be issued within 120 net review days. This decision is being issued within the 120-day period.

Testimony under oath was presented by:

Andrea Flower
Dan Mundall
Mike Dee

Alan Kerley
Catherine Kernan

Exhibits were offered and admitted during the hearing, a list of which is maintained by the Hearing Clerk.

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. The LFPWD (previously known as King County Water District 83) desires to replace an old, substandard pumphouse with a new pumphouse. The proposed location for the new pumphouse is at the top of a slope of greater than 40% with a vertical elevation change of more than 20 feet on a lot which is zoned RS 10,000. (Exhibits 3, 4.8, 4.9, 5.5, 21, 23; testimony)

The City's adopted EnvSA regulations require substantial buffers and building setbacks from steep slopes such as those present at the proposed pumphouse location. [LFPMC 16.16.310] The LFPWD considered an alternate location for the pumphouse on the subject lot ("Alt. B") which would have moved the pumphouse approximately 40 feet further away from the steep slope, but that location would still not have met the steep slope buffer requirement and would likely have caused a noise compliance problem with the adjoining property. (Exhibits 5.7, 8, 21) Therefore, the LFPWD filed the current PAUE application.

City zoning regulations allow public "utilities" to be located on property zoned RS 10,000 upon issuance of a CUP. [LFPMC 18.20.020 and 18.54.048(D)] Since the pumphouse is a public utility facility, the LFPWD also filed the current CUP application.

2. The LFPWD is one of four water purveyors in the City. Its water source is the McKinnon Creek Well Field located along the thread of McKinnon Creek in the northeastern part of the City. The LFPWD draws from four deep wells and eight shallow artesian wells within the well field. The current pump house, which dates from the 1940s-50s, is located about 15 feet from McKinnon Creek and within a wetland associated with the Creek. A second wetland, located along the south

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edge of the well field site is about 50 feet from the proposed pumphouse site. Although that distance is less than the standard buffer width for the type of wetland present, it is within the range where Planning can administratively reduce the buffer width. (Exhibits 1, 7, 21) Therefore, wetland buffer considerations are not before the Examiner in this proceeding.

3. Some LFPWD submittals refer to a proposed storage building. (*e.g.*, Exhibit 5.11) The LFPWD testified that it does not plan to build the storage building within the next three years and that its current application does not seek approval for a storage building. (Testimony) Therefore, the future storage building is also not before the Examiner in this proceeding.
4. The LFPWD has submitted a CUP application with associated descriptive text (Exhibit 4), a PAUE application with associated descriptive text (Exhibit 5), a wetland delineation report (Exhibit 7), a noise impact report (Exhibit 8), a geotechnical report (Exhibit 9), a current site plan for the well field and pumphouse lot (Exhibit 21), its Energy Conservation and Greenhouse Gas Reduction Program (Exhibit 22), and computer-generated perspective drawings of the proposed pumphouse (Exhibit 23).
5. The pumphouse is proposed to be located on a lot near the northwest corner of the 47th Place NE loop whose address is 18460 47th Place NE. The lot is essentially triangular in shape with an approximate 20' x 50' panhandle connecting it to 47th Place NE. A single-family residence was located on the lot from apparently some time in the 1960s until in or around 2008. That residence was demolished in or around 2008 and the lot has been vacant since, except for a gravel drive leading from 47th Place NE to the abutting well field site to the north. The access drive is gated. (Exhibits 3, 18, 19, 21) The LFPWD purchased the lot in or around 2009. (Testimony)
6. The review criteria for a PAUE are set out at LFPWC 16.16.260(C). The five criteria and the facts relating to each follow.

“The hearing examiner shall approve, approve with conditions, or deny the request according to the following criteria:”

- A. “1. There is no other practical alternative to the proposed development with less impact on the sensitive areas;”

Facts: Prior to purchasing the lot, the LFPWD considered moving the pumphouse to a location elsewhere on the well field property. However, wetland and drainage issues prevented that proposal from going forward. The adjoining lot will allow connection to all the necessary well field piping and has no drainage problems. If the pumphouse were moved further east, away from the steep slope, noise from the pumps could not be controlled to meet City standards. (Exhibits 1, 5, 8; and testimony)

- B. “2. The application of this chapter would unreasonably restrict the ability to provide utility services to the public;”

Facts: The LFPWD needs to modernize its pump facility in order to adequately serve its 950± customers. The proposed location is the only reasonable place where a modern pumphouse can be built. (Exhibits 1, 5)

- C. “3. The proposal does not pose an unreasonable threat to the public health, safety, or welfare on or off the development proposal site;”

Facts: The affected slope is stable. (Exhibit 9) The building, as proposed and located, will meet City noise standards. (Exhibit 8) Although the new pumphouse building will have an “office,” there will be no full-time employees on the site. Maintenance workers will visit the site on the same schedule as they presently do. Once constructed, there will be no traffic increase due to the new pumphouse. (Exhibit 5; and testimony)

- D. “4. The proposal attempts to protect and mitigate impacts to the sensitive area functions and values consistent with the best available science with the objective of no net loss of critical area functions and values; and”

Facts: Standard best management practices (BMPs) will be used before and during construction to minimize erosion and sedimentation. BMPs include, but are not limited to, use of silt fences and other temporary erosion control measures, timing of activities, and monitoring by a geotechnical engineer through the process of site preparation. The geotechnical report includes many recommendations intended for the mitigation of impacts to the function and value of the steep slope. All recommendations included in the geotechnical report will be incorporated by proxy into recommended conditions of approval for the PAUE request and/or for the Sensitive Area Work Permit. (Exhibits 1, 9)

The project must comply with City, State, and Federal requirements for mitigation of necessary impacts, specifically regarding removal of the existing pump house which rests upon a known wetland. (Exhibits 1, 7, 21)

- E. “5. The proposal is consistent with other applicable regulations and standards.”

Facts: This proposal must meet all other applicable City, State and Federal codes. Structural details of the building must meet the International Building Code, as adopted by the City. State permits including an HPA and Federal approval (Section 404 permit) may be required prior to removal of the existing pumphouse because it sits on a known wetland. (Exhibits 1, 7, 21)

7. The review criteria for a CUP are set forth at LFPWC 18.54.030. The criteria and the facts relating to each are as follows:

A conditional use may be authorized upon a finding that the proposal conforms to specific development criteria established for that use, if any, and that it meets the following minimum criteria:

A. The proposed use is consistent with the policies and goals of the comprehensive plan;

Facts: Planning has identified numerous Comprehensive Plan policies with which the proposal is consistent. (Exhibits 1.9 and 1.10)

B. The proposed use is not materially detrimental to other property in the neighborhood;

Facts: Vehicular trips will not increase. The distance between the proposed pumphouse and the east property line, together with the pumphouse's structural features (partially underground, masonry construction of above-ground portion, insulated steel roof) will allow the pumphouse to comply with the City's adopted noise regulations. The pumphouse will be about 150 feet back from 47th Place NE. (Exhibits 1, 8, 21, 23)

C. The proposed use will supply goods or services that will satisfy a need of the community;

Facts: Approximately 950 City residents rely on the LFPWD for their domestic water supply. The current old system is not adequately reliable. (Exhibits 1, 4)

D. The proposed use is designed in a manner which is compatible with the character and appearance with the existing or proposed development in the vicinity of the subject property;

Facts: The new pumphouse will be about 32' x 24' with the pumps and pipe gallery in a partial daylight basement and support spaces on the upper floor. The building will have a metal gable roof. From the street, the pumphouse will look much like a two-car garage – but without the garage doors. (Exhibits 5.7, 23)

E. The proposed use is designed in a manner that is compatible with the physical characteristics of the subject property;

Facts: The daylight basement design uses the slope of the site to minimize perceived building height. The placement minimizes tree removal in the immediate vicinity of the pumphouse. (Exhibits 5.7, 21, 23)

F. Any requested modifications to the standards of the underlying zone shall require a variance and be subject to mitigation to minimize or remove any impacts from the modification;

Facts: No modification of standards (other than the PAUE to allow the pumphouse to be built at the top of the slope) has been requested.

G. The proposed use is not in conflict with the health and safety of the community;

Facts: Vehicular trips will not increase. The distance between the proposed pumphouse and the east property line, together with the pumphouse's structural features (partially underground, masonry construction of above-ground portion, insulated steel roof) will allow the pumphouse to comply with the City's adopted noise regulations. The new pumphouse will allow the LFPWD to continue to provide safe drinking water to its customers and includes the ability to install water treatment equipment should the need arise. (Exhibits 1, 4, 5.7, 8, 23; testimony)

H. The proposed use is such that pedestrian and vehicular traffic associated with the use will not be hazardous or conflict with existing and anticipated traffic in the neighborhood;

Facts: Once construction is complete, traffic levels will be the same as currently occurs – about 10 vehicular trips each day. (Exhibit 4)

I. The conditional use will be supported by adequate public facilities or services and will not adversely affect public services to the surrounding area or conditions can be established to mitigate adverse impacts on such facilities;

Facts: The proposed pumphouse will have no adverse effect upon community facilities. The proposed pumphouse will improve the area's public water supply system. (Exhibits 1, 4)

J. The applicant's past performance regarding compliance with permit requirements and conditions of any previously issued land use permit including building permits, conditional uses or variances, shall be considered before approving any new permit.

Facts: The LFPWD has previously obtained permits for utility maintenance activities in the area. Most of the property owned by LFPWD is encumbered with sensitive areas and their buffers. Therefore, the City has had sufficient experience in working with LFPWD through the permitting process. LFPWD has been adequately responsive to City regulations and policies regarding emergency actions and those that involve other agencies. (Exhibit 1)

8. Lake Forest Park's State Environmental Policy Act (SEPA) Responsible Official issued a threshold Determination of Nonsignificance (DNS) for the proposal on July 18, 2016. (Exhibit 16) The DNS was not appealed.
9. Two neighbors participated in the hearing. One (Dee) expressed general concerns regarding the public notice process for land use applications. The other (Kernan) expressed concern regarding

noise, visual appearance, and traffic. (Exhibit 15; and testimony) The Examiner recessed the hearing for fifteen minutes so that the citizens could review all the materials submitted by the LFPWD. When the hearing was reconvened, neither participant offered any rebuttal testimony.

10. Planning recommends that the applications be approved subject to conditions. (Exhibit 1) Planning asked the Examiner to include a condition barring clearing within EnvSAs and their required buffers between October and March. (Testimony)

Planning's "Discussion" (Exhibit 1.13 and 1.14) addresses certain "inconsistencies." One is the number of trees that would have to be removed. The LFPWD's revised site plan indicates that approximately 15 trees would have to be removed, of which one group of three Maples would be removed for the pumphouse *per se*. The remainder of the trees would be associated with the related piping work, most of which will occur on the well field site. (Exhibit 21; and testimony)

Another inconsistency is whether the steep slope upon which the pumphouse will be built exceeds a vertical height of 20 feet. The LFPWD accepts that the slope is more than 20 feet high. (Testimony)

A third inconsistency was a question about the purpose of a "Flushing Hydrant" at the north end of the associated piping. The current plan has removed that hydrant and replaced it with a plugged flange. (Exhibit 21)

A fourth question was whether the east property line is fenced. The LFPWD testified that it is fenced, although much of the fence is covered with vegetation. (Testimony)

Finally, staff questioned the noise that would be generated from idling pick-up trucks. The LFPWD's Energy Conservation and Greenhouse Gas Reduction Program does not allow LFPWD vehicles to idle. (Exhibit 22) Trucks would idle only as long as it took to unlock the access gate and then relock it after driving through. (Testimony)

11. The LFPWD concurs with Planning's analysis and recommended conditions. (Testimony)
12. Any Conclusion of Law deemed to be a Finding of Fact is hereby adopted as such.

LEGAL FRAMEWORK ⁵

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

Authority

⁵ Any statement in this section deemed to be either a Finding of Fact or a Conclusion of Law is hereby adopted as such.

A PAUE is within the Examiner's jurisdiction pursuant to LFPMC 16.16.260(C), but is not expressly "Typed" by LFPMC 16.26.030. A Reasonable Use Exception under LFPMC 16.16.250 is classified as a Type I application. [LFPMC 16.16.030(A)(8)] Given the similarity between the two types of actions and the similarity in code language between LFPMC 16.16.250 and 16.16.260, the Examiner processes a PAUE request as a Type I application.

A CUP is a Type I application. [LFPMC 16.26.030(A)]

Type I applications are 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 16.26.100 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 PAUE are set out at LFPMC 16.16.260(C), quoted in Finding of Fact 6, above.

The review criteria for a CUP are set out at LFPMC 18.54.030, quoted in Finding of Fact 7, above.

The Local Project Review Act [Chapter 36.70B RCW] establishes a mandatory "consistency" review for "project permits", a term defined by the Act to include "building permits, subdivisions, binding site plans, planned unit developments, conditional uses, shoreline substantial development permits, site plan review, permits or approvals required by critical area ordinances, site-specific rezones authorized by a comprehensive plan or subarea plan". [RCW 36.70B.020(4)]

(1) Fundamental land use planning choices made in adopted comprehensive plans and development regulations shall serve as the foundation for project review. The review of a proposed project's consistency with applicable development regulations or, in the absence of applicable regulations the adopted comprehensive plan, under RCW 36.70B.040 shall incorporate the determinations under this section.

(2) During project review, a local government or any subsequent reviewing body shall determine whether the items listed in this subsection are defined in the development regulations applicable to the proposed project or, in the absence of applicable regulations the adopted comprehensive plan. At a minimum, such applicable regulations or plans shall be determinative of the:

(a) Type of land use permitted at the site, including uses that may be allowed under certain circumstances, such as planned unit developments and conditional and special uses, if the criteria for their approval have been satisfied;

- (b) Density of residential development in urban growth areas; and
- (c) Availability and adequacy of public facilities identified in the comprehensive plan, if the plan or development regulations provide for funding of these facilities as required by [the Growth Management Act].

[RCW 36.70B.030]

Vested Rights

The City has no vesting regulations. “Vesting” serves to “fix” the regulations against which a development application is judged. [*Potala Village Kirkland, LLC v. City of Kirkland*, __ Wn. App. __ (Div. I, 2014)]

In the 1950s, the [state] supreme court first adopted the common law vested rights doctrine [for building permit applications]. ... In cases that followed, Washington courts applied the vested rights doctrine to permit applications other than building permit applications. They included conditional use permit applications, grading permit applications, shoreline substantial development permit applications, and septic permit applications.

In 1987, the legislature enacted legislation regarding the vested rights doctrine. The session laws added ... RCW 19.27.095(1) and RCW 58.17.033(1) respectively ... [which] only refer to building permit applications and subdivision applications. ...

Most recently, in *Town of Woodway v. Snohomish County*, the [state] supreme court reiterated that “[w]hile it originated at common law, the vested rights doctrine is now statutory.”

[*Potala*, Slip Opinion 6 – 8 and 11] “With these points in mind, [the *Potala* court held] that the filing of [an] application for [a] shoreline substantial development permit, without filing an application for a building permit, [does] not vest rights to zoning or other land use control ordinances.” [*Potala*, Slip Opinion at 12] The *Potala* court “express[ed] no opinion on whether or to what extent the vested rights doctrine applies to permits other than shoreline substantial development permits. These questions [were] not before [it].” [*Potala*, Slip Opinion at 25] Therefore, whether the vested rights doctrine still applies to CUPs is debatable.

The state’s judicially-created vested rights doctrine has never been applied to applications which seek exception from the established rules (such as Variances, Reasonable Use Exceptions, and PAUEs).

Vesting is not particularly important in this case as the City has made no development regulations changes between the time the application was filed and this date.

Standard of Review

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

CONCLUSIONS OF LAW

1. The preponderance of the evidence, as summarized in Finding of Fact 6, above, demonstrates compliance with the criteria for approval of a PAUE.
2. The preponderance of the evidence, as summarized in Finding of Fact 7, above, demonstrates compliance with the criteria for approval of a CUP.
3. The proposal passes the “consistency” test: A utility facility is allowed in the RS 10,000 zone upon issuance of a CUP; density is not an issue as this is not a residential use; and adequate public facilities are available to support the pumphouse.
4. The recommended conditions of approval as set forth in Exhibit 1 are reasonable, supported by the evidence, and capable of accomplishment with the following changes:
 - A. Both a CUP and a PAUE embody the concept of approval of a specific development proposal on a specific site. Both a CUP and a PAUE evaluation are based upon the specific development plans submitted by the applicant. It is appropriate, therefore, that the conditions of approval clearly identify the plans which are being approved. The Planning recommendation as drafted does not do so. Exhibits 21 and 23 constitute the plans which should be approved. Reference to those exhibits will be incorporated into Recommended Condition 1.
 - B. The additional condition requested by Planning should be added.
 - C. A few minor, non-substantive punctuation revisions to the Recommended Conditions will improve parallel construction, clarity, and flow within the conditions. Such changes will be made.
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:

- A. **GRANTS** the Public Agency Utility Exception under file number 2015-PAUE-0001; and
- B. **GRANTS** the Conditional Use Permit application under file number 2015-CU-0001,

BOTH SUBJECT TO THE ATTACHED CONDITIONS.

Decision issued August 12, 2016.

\s\ John E. Galt (Signed original in official file)

John E. Galt
Hearing Examiner

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."

**CONDITIONS OF APPROVAL
2015-PAUE-0001/2015-CU-0001
Lake Forest Park Water District
McKinnon Creek Pumphouse**

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This consolidated Public Agency Utility Exception and Conditional Use Permit is 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. Exhibits 21 and 23 are the approved site plans. The site plans are valid for a period of three years from the date of approval.
2. Permittee must apply for and receive all necessary permits from the Department of Planning and Building prior to commencing any proposed work. These include, but are not limited to the following: Major Sensitive Area Work, Land Clearing & Grading, Sensitive Area Tree Removal, Side sewer, Building, Mechanical, and Plumbing permits.
3. All work must comply with the City's adopted standards for development and construction, including storm water mitigation, erosion control, zoning, and building.
4. Prior to issuance of any clearing and grading permits: A) The Permittee shall provide a temporary erosion control plan; and B) the Permittee shall submit for review and approval all clearing and grading plans, engineering construction drawings, and other site improvement plans.
5. All import fill material shall be clean and free of environmental hazards and contaminants. Proof of clean import soils shall be submitted to the Planning & Building Department.
6. All trucks shall be inspected and cleaned as necessary before leaving the site in order to ensure that dirt, mud, and other materials are not deposited on public streets. The Permittee shall provide for prompt sweeping or cleanup of any dirt, mud, or other materials deposited by the project's trucks on public streets. Temporary traffic control shall be provided as necessary for safe sweeping or cleanup operations.
7. Before construction begins, the Permittee shall apply for a Sensitive Area Tree Removal permit. The tree removal permit must be issued and tree protection measures inspected before construction may begin. The arborist report associated with this tree permit must address every significant tree that will be impacted or removed by the proposed work. Priority locations for replacement tree plantings shall be 1:1 on the slope according to City Arborist recommendations, and remaining trees shall be planted for the benefit of additional screening between the subject site and adjoining properties. A qualified geotechnical engineer shall review, report, and inspect all tree removal activities, at the owner's expense.
8. There shall be no clearing or grading within environmentally sensitive areas and their regulatory buffers between October and March, inclusive.
9. The Permittee is responsible for obtaining any necessary State and Federal permits and approvals for the project, and is responsible for complying with any conditions of approval placed on these or other state or federal permits or approvals, and for submitting revised drawings to the City for its review and approval, if necessary, to reflect these state or federal conditions of approval.