

Langley Passage Closed Record Hearing

Questions of the Record; Langley Passage (10/19/10)
Council member Robert Waterman
Responses of Langley Critical Area Alliance (LCAA)

Sewer

1. Where in the record is the agreement between the applicant and the Woodside subdivision to tie into the latter's sewer and lift station documented?

There is no evidence in the record that any substantive discussions have taken place between either the City or the developer and the Woodside Homeowners Association. The record does not contain any technical assessment by a qualified party of any issues that may be associated with this proposal. There is no agreement or contract in the record between the Woodside Homeowners Association and either the City or the developer.

Waterline

2. Where is it documented that the City is legally required to explore options for waterline options?

LMC 16.20.80 (A) (1) prohibits all activities and uses in wetlands. *Specific citation: "All activities and uses shall be prohibited in wetlands and streams and their buffers except as expressly provided in this chapter (see 2 and 3, below). All feasible and reasonable measures shall be taken to avoid and minimize impacts to wetlands and streams."*

LMC 16.20.80 (C) (1) (B) sets out the conditions under which a public agency or utility may be granted an exception from the above. *Specific citation: Applications for a utility exception shall be reviewed based on the following criteria: (a) There is no other feasible and reasonable alternative to the proposed development with less impact on the wetland and/or stream and the associated buffer. A description of alternatives considered must be included in the exception requests"*

3. Where in the record are the relative environmental effects to the wetland and buffer of the various waterline options discussed (underground waterline, line raised on pillars, alternative location)?

The record does not contain a qualified technical or scientific evaluation of the different environmental impacts of water line design options.

The record shows that alternative locations have not been considered. Evidence in PAB minutes 6/9/2010 page 11. *Relevant extracts: "Erikson questioned if the City had contacted any individuals east of the proposed project about the placement of the water line. Cort said no. Erickson questioned if the City had done any investigation about the placement of the waterline that did (not) go through a wetland or went through a wetland with less impact. Cort said no."* **Further evidence in PAB minutes 6/9/2010 page 10.** *Relevant extract" Adams questioned if Goodman had spoken with any property owners about the potential of putting a water line through their property. Goodman said no."*

Water to bluff

4. Where does the record document that the City is responsible for exploring alternative routes/mechanisms for conducting any increase in runoff from the development site?

The record shows that the City has long been aware that its generally preferred infiltration approach may not always be the appropriate mechanism for dealing with increased runoff from development. Evidence

in Comprehensive Plan page 125, policy j. *Relevant extract: “Primary emphasis should be on infiltrating storm water on-site, except in those circumstances where water flows to or through steep bluffs.”*

LMC 15.01.445 (F) implements the above policy requiring the City Engineer to make the relevant determination. *Relevant extract: “Infiltration may be restricted or disallowed, as determined by the City Engineer, in those areas designated and defined in LMC as Sensitive Areas.”*

5. Where is it stated what would constitute “best available science” in establishing the pre-and post-development amount of runoff reaching the bluff?

LMC 16.20.015 defines best available science as it applies to critical areas generally. More specifically LMC 16.20.015 (C) sets out the characteristics of a valid scientific process. *Relevant extracts from the criteria are as follows:*

1. *Peer review. The information has been critically reviewed by other persons who are qualified scientific experts in that scientific discipline. The proponents of the information have addressed the criticism of the peer reviewers.*
2. *Methods. The methods used to obtain the information are clearly stated and reproducible. The methods are standardized in the pertinent scientific discipline or, if not, the methods have been appropriately peer-reviewed to assure their reliability and validity*
3. *Logical conclusions and reasonable inferences. The conclusions presented are based on reasonable assumptions supported by other studies and consistent with the general theory underlying the assumptions. The conclusions are logically and reasonably derived from the assumptions and supported by the data presented. Any gaps in information and inconsistencies with other pertinent scientific information are adequately explained;*
4. *Quantitative analysis. The data have been analyzed using appropriate statistical or quantitative methods;*
5. *Context. The information is placed in proper context. The assumptions, analytical techniques, data and conclusions are appropriately framed with respect to the prevailing body of pertinent scientific knowledge; and*
6. *References. The assumptions, analytical techniques, and conclusions are well referenced with citations to relevant, credible literature and other pertinent existing information..”*

Further, LMC 16.20.015 (F) defines what is supposed to happen if there is incomplete scientific information available. *Specific citation: “Where there is an absence of valid scientific information or incomplete scientific information relating to a critical area, leading to uncertainty about the risk to critical area function of permitting an alteration of or impact to the critical area, the Planning Official shall:*

1. *Take a “precautionary or a no-risk approach,” that strictly limits development and land use activities until the uncertainty is sufficiently resolved; and*
2. *Require an effective adaptive management program that relies on scientific methods to evaluate how well regulatory and non-regulatory actions protect the critical area. An adaptive management program is a formal and deliberate scientific approach to taking action and obtaining information in the face of uncertainty.”*

Further DOE Stormwater manual is part of the record. Section 2.6.2 provides some scoping criteria. *Relevant extract: “Development projects that discharge storm water off site shall submit an offsite analysis report that assesses the potential off site water quality, erosion, slope stability, and drainage impact associated with the project and that proposes appropriate mitigation of those impacts. An initial qualitative analysis shall extend downstream for the entire flow path from the project site to the receiving water or up to one mile, whichever is less.”*

The record shows that Langley has adopted the low impact development (LID) manual. The January 2005 edition of the technical Guidance Manual for Puget Sound, section 2.4, pages 19-21 describe the scientific

criteria that need to be applied in evaluating the impact of development on wetlands. Relevant extract at page 20: “Core assessment and management objectives...should...maintain or approximate pre-development hydrology and **hydroperiod** within the wetland” (Emphasis in original). Further extract: “The following steps should be taken....measure existing existing hydroperiods and estimate future hydroperiods resulting from the proposed development.....identify hydrologic pathways into **and out of** wetland” (Emphasis added). Further extract: “total dry period.....should not **increase** or decrease by more than two weeks in any year.” (Emphasis added).

The record does not contain any measurement of the pre-development hydroperiod in this wetland or any proposal that it should be measured over a representative baseline period prior to construction.

The record contains information based on the HWA borings that identifies hydrologic pathways into the wetland, but does not contain any science-based identification of the pathways out of the wetland. See further details in answer to question 6 below.

The record does not propose any monitoring of the wetland to determine if the variance in the total dry period exceeds two weeks in either direction, nor does it propose any remedial action if it is determined that this is the case.

6. The record documents that there is agreement that slides of the bluff have periodically occurred along the north side of Edgecliff Drive. Since slides may reasonably be expected to occur in the future, where in the record is it documented how future slides would be determined to be the direct result of alterations resulting from the proposed development.

The record establishes that none of the mitigation measures proposed by Mr. Cort are intended to monitor the impact of the proposed development on the bluff or to mitigate any impact that may occur. Evidence PAB minutes 6/9/2010 page 4. Relevant extract: “Erikson asked Cort if any if the mitigations included in the MDNS were intended to address impacts to the bluff. Cort said that they were not.”

The record contains a discussion of the options that exist to address this issue. Evidence in PAB minutes 6/2/2010, page 8. Relevant extract “Erickson questioned Reese about the minimum amount information that needed to be developed to determine if there was an impact. Reese said that there were two approaches.

1. Monitor and mitigate. Reese said that this approach was being proposed for the project and would need to be enhanced. Reese explained that it would be hard to observe any change to the drainage because hydrology and climate were always different. Reese said that, to observe any changes, the City would need to collect a lot of data, perhaps using continuous monitoring over a five-year period. Reese said that he would place a flume in the ditch and collect the water every 15 minutes or hour to analyze the impacts; monitor the level of the wetland; and potentially measure groundwater levels.
2. Assume worst and evaluate now. Reese said that an approach that assumed the worse would utilize an increase 728,000 or 820,000 per year and analyze it and to see what would happen if all the water went to the slope or the ditch. Reese said that a hydrogeologist could run a slope stability model to determine the change in the groundwater and the effect on slope stability, and he said that the effect of all the water moving to the drainage system could also be analyzed. Reese said that this approach to the site would be a better way to go in evaluating the site. “

The record shows that Mr. Cort based his proposed mitigation measures on an interpretation of Mr. Varjen’s peer review to the effect that none of the additional water created by this project will migrate to the bluff.. Evidence PAB Minutes 6/2/2010 page 12. Specific extract: “Adams referred to Varljen’s second report, Exhibit 11, which was completed after the drilling of the borings. Adams read the portion of the document that said the infiltrated precipitation would most likely discharge to the wetland and the ditch, and questioned if Cort accepted that characterization as definitive. Cort said that because the City

had the September and December HWA reports, the City had a valid scientific study and a peer-review conducted by someone qualified to review those reports. Adams asked Cort if he believed that all the infiltration that occurred on the site would go into the wetland and the ditch. Cort said that he relied on the reports in making his determination for the project. Adams asked if Cort would change his opinion if it were to be shown that the characterization of the water was incorrect. Cort stated that he wasn't qualified to have his own opinion on the topic. Adams asked if Cort was relying on the assumption that Varljen was correct in creating the mitigation measures for the site. Cort said yes.

The record shows that Mr Varljen is not, in fact, correct in his belief that all the additional water created by the development will end up in the drainage ditch according to the unanimous testimony of the experts of all parties, namely Reese for the appellants, Goodman for the City and Sugar for the applicant.

Evidence PAB minutes 6/2/2010 page 7. *Specific extract: "Adams asked Reese if the work by HWA had shed any light on whether water migrated horizontally to the bluff. Reese said that the work did not shed light on the issue, but he said that he did believe that water moved towards the bluff. Further evidence PAB minutes 6/9/2010 pages 10 and 11. Specific extract: "Adams referred Goodman to Appendix A of LCAA Exhibit 10. Adams questioned if the silt layer on the diagram prevented the water from entering the deeper layers. Goodman said that the layer was less permeable than the surface above it. Adams stated that the triangles in the diagram represented the area that the borings first found water and he questioned if it was a reasonable inference that the area between the triangles and the layer of silt was wet. Goodman said yes, the area should mostly be wet. Adams questioned if the area between the triangles was above or below the top of the bluff. Goodman said that, based on the diagram, the area was below the top of the bluff. Adams questioned how deep the layer was below the top of the bluff. Goodman said that it appeared to be 25 feet. Adams asked Goodman about the depth of the drainage ditch. Goodman said that the ditch was approximately 2.5 feet deep. Adams said that, of the water moving towards the drainage ditch, the top 2.5 feet could reach the ditch, but the other water would not reach the ditch. Adams questioned if Goodman could tell how much water was moving horizontally instead of to the ditch as a result of the borings. Goodman said no." **Further evidence PAB minutes 8/4/2010 page 6.** *Specific extract: "Erickson asked if the ground water level would fluctuate. Sugar said yes the groundwater would fluctuate seasonally. Erickson asked if the entire thickness of the aquifer extended below the ditch. Sugar said that the top layer of the water was probably at or above the top level of the ditch. Erickson asked if the water level could dip down below the bottom level of the ditch in the drier seasons. Sugar said yes. Erickson asked if the additional water from the site would tend to flow out towards the bluff, when the top layer was below the level of the ditch. Sugar said when the water level was below the ground's surface, the surface water would continue as ground water. Erickson asked what the destination of the groundwater would be. Sugar said that the additional water would move down gradient toward the bluff."**

7. Where are the reasons that led the City Staff to "steer" the applicant to consider mitigation via infiltration vs. a tight line to conduct water to the toe of the bluff documented?

The record shows that this advice was given by the City Engineer around October 2007 and was based on his belief that the City preferred low-impact development. Specific evidence PAB minutes 6/9/2010, page 9. *Relevant extract: "Adams questioned at what point the City advised the applicant to move away from the tightline approach. Goodman said that, judging from the letter, it would have been October 2007. Adams questioned who would have given the applicant that advice. Goodman said that it would have either been himself or the planner. Adams asked Goodman why the City determined that the tightline was an inappropriate alternative. Goodman said that the City encouraged the applicant to pursue infiltration because the tightline would cross the wetland and because of the City's preference for low-impact development."*

8. Where in the record is the “wetland mitigation plan” presented? (see May 13, 2020 revised MDNS document).

There is no such plan in the record.

Drainage ditch

9. Where does the record document Island County’s agreement to maintain and/or modify the portion of the drainage ditch east of the Langley City Limits?

The record contains no evidence of any substantive discussions, let alone an agreement, between Island County and the City on this matter. Evidenced in email correspondence between Rolf Seitle and Phil Cohen 5/17/2010 (LCAA Exhibit 29): *Relevant extracts: Seitle “I wonder if you have been contacted by either the developer (Whidbey Neighborhood Partners), Davido Consulting of Langley City Staff regarding this.” Cohen: “I haven’t been contacted by the persons mentioned below.”*

The record contains evidence that it is likely that the County will require some improvements to be made to the drainage ditch. Evidenced further in above email. *Relevant extract “The County’s position is that the development causes no additional flow increase for all storm sizes up to the 100 year storm. If the applicant can’t do that, then the County will ask that an outfall conveyance be created that does handle the increase in flow”.*

10. Where is it documented that “reasonable efforts” were made to quantify the destination of water collecting in the wetland?

The record does not contain any evidence of studies made to determine what portion of water collecting in the wetland eventually discharges to the drainage ditch as opposed to migrating through the aquifer that lies below the wetland to the bluff. However, the record contains a consensus among the experts that some water will migrate to the bluff. Please see the citations offered in response to question 6 above.

The record confirms that the City does not know, at a technical level, what will ultimately happen to the additional water that will end up in the wetland as a result of this development proposal. Evidence PAB minutes 7/14/2010 page 10. *Relevant extract: “Adams said that he did not understand how Goodman could have advised Cort to accept Varljen’s report when the report did not say how the water left the wetland. Goodman said that the water would enter the ditch after being in the wetland. Adams asked what would happen to the water under the wetland. Gage said that he had asked the same question. Goodman repeated his earlier answer and said that the water in the wetland would either evaporate, go into the ditch, stand, or go into the ground. Adams asked whether the water that went into the ground could emerge at the face of the bluff. Goodman said that was a possibility. Adams asked if it was correct to say that, based on the evidence from Varljen, there was no way to say how much water would go out the face of the bluff and how much would go into the ditch. Goodman said that it was not divided up. Adams asked if the City knew how much of the water would travel to the bluff and how much would travel to the ditch at a technical level. Goodman said no.”*

Mitigation

11. Where is it documented that the SEPA Responsible Officer has the option to require mitigation to address possible potential adverse effects for a proposal that is judged to have no probable significant adverse environmental effects?

The SEPA rules as set out in WAC 197-11 document the options that are available to a SEPA official. . If a proposal is not likely to have a significant adverse environmental impact, the appropriate action for the SEPA official is to issue a DNS. (WAC 197-11-734). If it is likely to have a significant adverse

environmental impact, the appropriate action is to issue a DS and require an environmental impact study (WAC 197-11-736).

WAC 197-11-350 states that the purpose of the MDNS is to allow a proposal to be changed before the SEPA official decides whether to issue a DNS or a DS. *Specific citation: "the purpose of this section is to allow clarification or changes to a proposal prior to making the threshold determination."* The inference is that the MDNS is appropriate when the official decides that there is likely to be a significant adverse environmental impact under the current rules but that there is sufficient information already available to specify the additional measures that need to be taken or conditions that need to be imposed to mitigate this impact so that it becomes non-significant.

12. Where is it documented that imposition of mitigations automatically means that the proposal will have probable adverse effects on the environment and prohibit issuing a MDNS?

Same answer as for 11 above. If the purpose of mitigating measures is to reduce an impact to non-significance, the inference is that, absent these measures, the impact must be significant.

Pedestrian facilities

13. Where is it documented that alternative sites exist for park or pedestrian walkways "within one-half mile of Langley Passage"?

Appellants do not know.

Responsibility of SEPA responsible officer

14. Where in the record is it documented that the SEPA Responsible Official adequately considered a tight line alternative for conducting any runoff from the development site?

There are no documents in the record that contain any significant design or engineering effort in relation to a tightline alternative. The record indicates that this was rejected at some date prior to October 2007. Evidence in letter of Clements to Keeler 10/24/2007 (LCAA Exhibit 7. *Relevant extract: "Like Aspect Consulting we too felt that the best means of handling the storm drainage was through the use of the existing downstream drainage course and outfall system. It was only after thoroughly reviewing this option that it became clear that the improvements required to bring the downstream system into compliance with current City and Council design standards were well beyond the financial scope of this singular project". Further extract: "During this meeting the use of on-site infiltration was discussed and the City gave their approval to pursue this alternative."*

The record indicates that Mr. Cort was probably not present at the meeting mentioned above. Evidence PAB minutes 6/2/2010 page 11. *Relevant extract: "Cort said he did not remember the specifics of the conversation and that he might not have been there".*

Nevertheless Cort testified that the City had examined a tightline alternative. Evidence PAB minutes 6/2/2010 page 11. *Relevant extract "Adams asked Cort if the City had looked at the tight line alternative. Cort said the City had but that the City had a sequence in the LMC that had established infiltrating water on-site as the City standard." Further relevant extract: "Cort said that.....he should refer his question to the City Engineer".*

The record indicates that the City Engineer was probably responsible for providing a direction to the applicant to move away from the tightline approach. Evidence PAB Minutes 6/9/2010 page 9. *Relevant extract: "Adams questioned who would have given the applicant that advice. Goodman said it would have been either himself or the planner." Further evidence PAB minutes 7/14/2010 page 12. Relevant*

extract: "Clements said that the meeting consisted of Goodman, the project director and Clements. Clements said he did not remember if Cort was present."

The record indicates that there was a gap in the employment of Cort by the City and that either Alice Schisel or Donna Keeler may have been the planner (and therefore the SEPA Responsible Official) at the time when this decision was made. Evidence PAB minutes 6/2/2010 page 10. *Relevant extract "Cort...noted that Alice Schisel was his predecessor and Donna Keeler was hired as interim planner between his employment terms."*

15. Where is it documented that the SEPA Responsible Official concluded that, as of January 30, 2007, the proposal would have a "probable significant adverse environmental impact on neighboring properties and the Edgecliff bluff? (Initial appeal brief of LCAA, 75.5; May 10, 2010).

LCAA did not state that that this conclusion was reached on or before 30 January 2007. Our reference to that date concerned the rules that Mr. Cort needed to apply in making his decisions in this case and reflected the record establishing that the Langley Passage application was vested on 30 January 2007. Evidence in staff report 3/15/2010, page 20, para 4.

The record shows that the original MDNS, by Mr. Cort's predecessor, was withdrawn on December 22, 2007. Evidence in staff report 3/15/2010, page 20, para 6. Mr. Cort issued his MDNS on 18 March 2009. Consequently, the record establishes that at some date between 22 December 2007 and 18 March 2009, Mr. Cort decided that this proposal had a probable significant adverse environmental impact which needed to be mitigated to the level of non-significance, Evidence in the Mitigated Determination of Non-Significance dated 5/13/2009. *Relevant extract: "The lead agency has determined that this proposal does not have a probable significant adverse impact on the environment so long as certain mitigating measures (identified and explained below) are implemented to reduce potential significant impacts to a level of non-significance."* **Emphasis added.**

Further evidence in PAB minutes of 6/2/2010 pages 10 and 11. *Relevant extract "Adams referred to WAC 197-11-734, dealing with Determinations of Nonsignificance, and said that the fact that Cort did not issue a DNS implied that project would have a significant impact. Cort said that in the City's analysis, they had identified a couple of potential impacts that could have mitigation applied to them to lower them to the level of moderate impact or less. Adams questioned if Cort felt that the project did have a probable significant adverse environmental impact and if that was why he issued a MDNS. Cort said that the project clearly did not merit a DNS.*

16. Where in the record is the SEPA Responsible Official's "worst case scenario" presented?

The record does not contain any evidence that Mr. Cort has evaluated the probability of a worst case scenario involving a bluff failure as a result of increased water migration to, over or through the bluff triggered by this development. Please see the first citation in response to question 6 above.

Respectfully submitted on behalf of LCAA



Robin G Adams
27 September 2010