

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23

BEFORE THE HEARING EXAMINER  
FOR THE CITY OF BURIEN

In the Matter of the Appeals of  
NEIGHBORS OF SEAHURST PARK

No. IEA 2013-01  
No. PLA 13-0712  
No. BLD 13-0080

Of the Emerald Pointe SEPA FEIS and Addendum;  
and Issuance of a Clearing Permit

**STIPULATION AND DECISION  
AFFIRMING CLEARING PERMIT  
AND EIS AND DISMISSING  
APPEAL**

Appellants Neighbors of Seahurst Park, the City of Burien, and Applicant/property owner Westmark Development Corp., Westmark Emerald Pointe LLC, and Nizar Sayani, by and through their attorneys of record, stipulate as follows:

1. This appeal involves a multi-family development project, Emerald Pointe on the Sound (“the Project”), located in the City of Burien adjacent to Seahurst Park.

2. Environmental review of the project was completed in 2008 with the issuance of a Final Environmental Impact Statement (FEIS) in June 2008. An addendum to that FEIS was issued in January 2010. The FEIS and FEIS Addendum identify and discuss appropriate mitigation measures that would avoid or mitigate potential significant, adverse environmental

1 impacts of the Project. On March 11, 2013, the City of Burien issued a clearing permit, Permit  
2 BLD13-0080. The Clearing Permit imposed mitigation measures and conditions to avoid  
3 potential, significant adverse environmental impacts of the Project.

4 3. On April 10, 2013, the Neighbors of Seahurst Park (NoSP) filed an appeal of the  
5 FEIS, FEIS Addendum, and the Clearing Permit. A public hearing was convened on July 8-9,  
6 2013 before the City of Burien Hearing Examiner. The parties presented witnesses and exhibits  
7 were entered into the record.

8 4. Prior to the conclusion of the hearing, Westmark's planning expert, Robert W.  
9 Thorpe, testified that in light of various concerns being raised, Westmark was evaluating a new,  
10 alternative site plan that would future mitigate potential environmental impacts. The hearing  
11 was continued to allow the parties sufficient time to consider the new alternative and resolve  
12 their differences prior to entry of a decision by the City Hearing Examiner. A second  
13 continuance was granted by the City Hearing Examiner.

14 5. During the intervening time, Neighbors of Seahurst Park and Westmark, after  
15 substantial settlement negotiations, reached agreement as to their differences and have entered  
16 into a Settlement Agreement.

17 6. The Applicant has proposed additional voluntary mitigation for the Project, in  
18 the form of changes to the Project set forth in the "Applicant Proposed Additional Voluntary  
19 Mitigation Measures: Alternative 3 - Revised Site Plan." That document incorporates two  
20 attached drawings, Alternative 3 Landscape Planting Plan and Alternative 3 Tree  
21 Retention/Replacement Plan (each dated August 12, 2013 by R.W. Thorpe & Associates).  
22 The proposed Additional Voluntary Mitigation Measures include a Revised Site Plan (as  
23 shown in the Landscape Planting Plan) along with written conditions and mitigation

1 measures. The Additional Voluntary Mitigation Measures shall be incorporated as part of the  
2 proposal and imposed as conditions of the Project's Clearing Permit, building permit, and  
3 other permit approvals.

4 7. In view of the Revised Site Plan and the written conditions and mitigation  
5 measures set forth in the Additional Voluntary Mitigation Measures, the appellant no longer  
6 challenges whether the FEIS and FEIS addendum contain a reasonably thorough discussion of  
7 the Project's probable, significant, adverse environmental impacts. Because there are no other  
8 challenges to the adequacy of the environmental review, that review will be deemed legally  
9 adequate and may therefore serve as the basis for the exercise of substantive SEPA authority  
10 pursuant to RCW 43.21C.060 and WAC 197-11-660. And because there are no other  
11 challenges to the Revised Site Plan and the written conditions and mitigation measures set  
12 forth in the Additional Voluntary Mitigation Measures to be imposed as Clearing Permit  
13 conditions, the clearing permit is deemed valid, too. Neighbors of Seahurst Park waives any  
14 right to appeal the adequacy of the June 2008 Final Environmental Impact Statement, January  
15 2010 Addendum to the Final Environmental Impact Statement, or the reliance by the Project's  
16 Clearing Permit, building permit or other permit on the FEIS and FEIS addendum in any  
17 subsequent proceeding.

18 8. The parties jointly request that the Additional Voluntary Mitigation Measures  
19 with Revised Site Plan be incorporated as written conditions of approval of the Clearing  
20 Permit, and jointly agree that the appeal of the Final Environmental Impact Statement (FEIS),  
21 the Addendum to the FEIS, and the Clearing Permit can be resolved thereby.

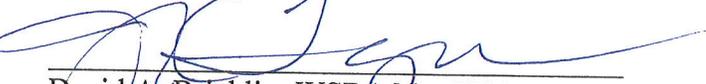
22 9. The parties hereby jointly request that the Hearing Examiner issue the Decision  
23 on Appeal set forth below.

1           10.    The parties jointly request that Hearing Examiner give notice if the Examiner  
2 disapproves of the Decision on Appeal or otherwise disapproves of the resolution of the  
3 appeal as proposed by the parties.

4           Dated this 13<sup>th</sup> day of September, 2013.

5 Mutually agreed and stipulated by:

6 BRICKLIN & NEWMAN, LLP

7 By:   
8       David A. Bricklin, WSBA No. 7583  
9       Julie Ainsworth-Taylor, WSBA No. 36777  
      Attorneys for Appellant

10 CITY OF BURIEN  
11 OFFICE OF THE CITY ATTORNEY

12 By:   
13       Craig D. Knutson, WSBA No. 7540  
      Attorney for the City of Burien

14 KENYON DISEND, PLLC

15 By:   
16       Bob C. Sterbank, WSBA No. 19514  
17       Attorney for the City of Burien

18 GROEN STEPHENS & KLINGE LLP

19 By:   
20       Charles A. Klinge, WSBA No. 26093  
21       Attorney for Applicant Westmark Emerald Pointe et al.

22  
23

1 **DECISION ON APPEAL**

2 This matter comes before the Hearing Examiner pursuant to an appeal by Neighbors of  
3 Seahurst Park challenging the Final Environmental Impact Statement (“FEIS”), the FEIS  
4 Addendum, and the Clearing Permit issued for the Emerald Pointe on Puget Sound project (“the  
5 Project”), and pursuant to the foregoing stipulation by the parties. In addition to the proceedings  
6 on the appeal set forth in the above stipulation, an additional hearing was held on September 13,  
7 2013.

8 **Findings and Conclusions**

9 In light of the above stipulation by the Parties, and statements made at the September  
10 13, 2013 hearing by the Parties’ representatives, the Hearing Examiner for the City of Burien  
11 finds and concludes as follows:

12 1. The Parties have stipulated that, in light of the Revised Site Plan and the  
13 Additional Voluntary Mitigation Measures, the FEIS and FEIS addendum contain a  
14 reasonably thorough discussion of the Project’s probable, significant adverse environmental  
15 impacts, are therefore legally adequate, and may therefore serve as the basis for the exercise  
16 of substantive SEPA authority pursuant to RCW 43.21C.060 and WAC 197-11-660.

17 2. The Parties have also stipulated that the Revised Site Plan and the Additional  
18 Voluntary Mitigation Measures mitigate the Project’s probable, significant, adverse  
19 environmental impacts as raised by the Neighbors of Seahurst Park appeal of the Clearing  
20 Permit, FEIS and FEIS addendum.

21 3. Clearing Permit No. BLD13-0080, as originally conditioned by the City of  
22 Burien, shall remain in full effect.

23

1           4. Pursuant to the above stipulation, and RCW 43.21C.060 and WAC 197-11-  
2 660, the Revised Site Plan and Additional Voluntary Mitigation Measures, as set forth in  
3 Exhibit A attached hereto, are incorporated as conditions of approval for Clearing Permit No.  
4 BLD13-0080.

5           5. Upon incorporation of the Revised Site Plan and Additional Voluntary  
6 Mitigation Measures, Clearing Permit No. BLD 13-0080 is APPROVED.

7           6. In view of the foregoing and the above stipulation of the Parties, the appeal of  
8 the Clearing Permit, FEIS and FEIS addendum by Neighbors of Seahurst Park is DISMISSED  
9 with prejudice.

10          7. The Neighbors of Seahurst Park may not challenge the adequacy of the Final  
11 Environmental Impact Statement and Addendum to the Final Environmental Impact  
12 Statement for the Emerald Pointe on the Sound project, nor the reliance thereon by the  
13 Project's Clearing Permit, building permits or other permits or approvals.

14                   Dated this 13<sup>th</sup> day of September, 2013.

15  
16  
17                   By: Theodore Paul Hunter  
18                                   Theodore Paul Hunter, Hearing Examiner  
  Sound Law Center

**WESTMARK – EMERALD POINTE PROJECT**  
**CITY OF BURIEN Nos. HEA 2013-01, PLA 13-0712, BLD 13-0080**

**APPLICANT PROPOSED ADDITIONAL VOLUNTARY MITIGATION  
MEASURES: ALTERNATIVE 3 - REVISED SITE PLAN**

The Applicant proposes a Revised Site Plan—Alternative 3—and the following conditions as voluntary mitigation measures in addition to the mitigation measures set forth in the Final Environmental Impact Statement (FEIS) (which includes other voluntary mitigation measures). The mitigation measures in the FEIS remain in effect and are supplemented by these additional mitigation measures. The Applicant believes that the FEIS and its mitigation measures are adequate, but the Applicant desires to propose these voluntary mitigation measures to further reduce potential environmental impacts. The Applicant affirms that the Revised Site Plan and conditions which constitute the voluntary mitigation measures will become project requirements, which the Applicant will need to incorporate into project applications. This proposal has been created with input from Neighbors of Seahurst Park (NoSP), which had raised concerns through the appeal to the City Hearing Examiner (No. HEA 13-01).

Alternative 3 differs from Alternative 2, discussed in the EIS, in that the Revised Site Plan proposes to eliminate the two westerly buildings, move the clubhouse to a more central location, and offer alternative stormwater features including infiltration of clean stormwater from roofs. Total rental units remains at 179 (178 rental units, plus 1 caretaker unit) with the units being fit into the remaining five buildings. This removal of buildings will reduce building site coverage by about 30 percent and impervious surface by about 10 percent. The total undisturbed area will be increased by about 15 percent or 1.26 acres. This will allow the applicant to retain most of the significant trees on the western portion of the site making way for preserving the related habitat in that area.

**The Applicant will implement Alternative 3 subject to following additional Mitigation Measures and Conditions:**

I. Revised Site Plan

- A. The Applicant shall construct the Project based on the site design set forth in the Alternative 3 Landscape Planting Plan and Alternative 3 Tree Retention/Replacement Plan (each dated August 12, 2013 by R.W. Thorpe & Associates). Copies of these plans are attached and submitted concurrently as Exhibit 1 (Landscape Planting Plan) and Exhibit 2 (Tree Retention/Replacement Plan) to this document. The Landscape Planting Plan (Exhibit 1) shall constitute the "Revised Site Plan" referenced in this document.
- B. Alternative 3 eliminates the two westerly buildings shown in Alternative 2. The units in the two westerly buildings shown in Alternative 2 shall be relocated into the remaining five buildings.
- C. The Club House, which may include an indoor pool, shall be relocated to be between the new Buildings B & C, as shown on the Alternative 3 Revised Site Plan.
- D. Building permit applications and other permit applications shall be consistent with the Revised Site Plan.
- E. All development, work, or other construction described in these conditions shall only occur after compliance with City of Burien permit requirements.

II. Planting, Re-vegetation, and Tree Replacement

- A. The Applicant shall implement the Alternative 3 Landscape Planting Plan (Exhibit 1) and Alternative 3 Tree Retention/Replacement Plan (Exhibit 2) (each dated August 12, 2013 by R.W. Thorpe & Associates).
- B. The landscape design team shall be comprised only of qualified individuals with expertise in landscape architecture, wetland ecology, and/or native plant botany. Prior to landscaping the project site, Westmark shall make available to NoSP the names and resumes of the landscape design team and a detailed landscape plan which includes the types and quantity of plants to be utilized. For the wetland/wetland buffer enhancement areas, it is understood that the number of plants to be utilized will depend on the number and size of invasive plants being removed.

- C. Native plants shall be emphasized within the project's landscape. Within wetland/wetland buffer areas and adjacent natural areas, only native plants shall be utilized. Rain gardens shall also utilize suitable native plants. Ornamental, non-native plants, when used, shall be limited and only adjacent to residential buildings.
- D. Prior to landscaping the site, Westmark shall remove all invasive plants from the property, including invasive plants located in the wetland and wetland buffer area. The removal of these plants shall be under the supervision of a qualified individual with expertise in native plant botany. Westmark shall inspect the project site, including the wetland and wetland buffer area, annually for a period of five (5) years from the date of invasive plant removal to ensure invasive plants do not return. If invasive plants are discovered, Westmark shall remove those plants at the time of annual inspection.
- E. All significant trees defined as those trees measuring 26 inches DBH that are outside the clearing limits shown on the Clearing Permit and Tree Retention Plan, shall be retained. All retained trees shall be clearly identified by flags or paint markings prior to project development, including clearing. The drip line of all retained trees shall be protected during project development to the extent feasible by placing temporary protective fencing around the tree or utilizing other acceptable best management practices. Westmark shall not remove any trees, regardless of size, outside of the clearing limits, except as necessary for the limited work allowed outside the clearing limits (e.g. trail relocation, dispersal trenches, and sewer line). Outside the clearing limits, Westmark is permitted to remove only those trees which have been determined, by a certified arborist or landscape architect, to be damaged, diseased, and/or unhealthy or are considered a hazard, and may prune trees to maintain health and avoid hazards under such supervision after obtaining required permits from the City of Burien.
- F. As required in the EIS, two (2) trees (replacement trees) of the species used as nesting, foraging and roosting habitat by the pileated woodpecker (i.e. Douglas-fir, western hemlock, and western red cedar) shall be planted for every one significant tree removed (as defined in the EIS significant tree means "the minimum size of tree used by the pileated woodpecker, i.e. a coniferous tree that

- measures at least 26 inches dbh"). Additional replacement trees may be provided. All healthy native vegetation, including trees of all sizes, shall be retained outside the clearing limits.
- G. Monitoring of replacement trees shall be performed annually for a period of four (4) years (two years is recommended in the EIS for planting a ratio of 2:1 replacement trees). The site shall maintain a minimum of 80 percent survival from the time of planting. Any trees in excess of 20 percent of the total listed in the Tree Retention/Replacement Plan that do not survive shall be replaced from the same list at the minimum size originally planted. Owner(s) or their representatives shall prepare an annual report (to include an inventory of trees within the clearing limits and along the east perimeter and photographs) and submit it to the City of Burien and the NoSP annually for not less than four (4) years to ensure that this standard is achieved.
- H. All new vegetation on the site shall conform to AAN standard for nursery stock, and shall include only containerized or ball & burlap materials (no bare root stock).
- I. A qualified native plant expert shall be consulted prior to landscaping the project site so as to determine soil acceptability. A minimum of five representative subsoil samples and one topsoil sample will be submitted to a qualified testing laboratory prior to planting. The expert shall use the soil report and other investigation to make recommendations. The expert shall determine if any on-site stockpiled soil or imported soil is acceptable for use. The expert shall modify plants and/or augment soils to ensure proper conditions to maximize the health and longevity of plants. A copy of the soil report and expert's recommendations shall be provided to the City of Burien and NoSP prior to landscaping the project site.
- J. Use 3 inches of composted mulch in all shrub beds and around groundcover (until such time that groundcover has matured).

- K. All disturbed and created steep slopes (2:1 or greater) shall be hydroseeded and jute netting installed according to the hydroseed mix indicated in the plant schedule on the Landscape Planting Plan (sheet L-1). Use only one-inch caliper deciduous trees or 4-foot tall coniferous trees on steep slopes and plant by hand.
- L. An irrigation system shall be designed, approved and installed prior to planting of new vegetation in the cleared area. New plantings in the wetland buffer area may be hand-watered as necessary for not less than 3 years.
- M. Landscape architect, wetland biologist and/or other qualified person(s) will prepare a Best Management Practices Plan to restrict and/or limit use of fertilizers, pesticides and herbicides on the property. To the extent practicable, natural forms of fertilizers, pesticides, and herbicides will be utilized on the project site. No chemical fertilizer, pesticide, and/or herbicide shall be utilized within the wetland and/or wetland buffer area unless special circumstances, such as a pest infestation that threatens plant health, exist necessitating such use.
- N. Prior to commencing any clearing activity, Westmark shall post with the City of Burien a performance bond in an amount determined by the City to be sufficient to ensure installation of required improvements, including the storm water system and infrastructure necessary to maintain slope stability, and re-vegetation of the site. Westmark shall post a maintenance bond according to City requirements once the improvements are accepted as complete. No clearing or grading shall occur until building permits are issued and bonds are posted per City requirements.

### III. Wetland Buffer

- A. Increased minimum buffer width of approximately 108 feet based on the existing delineated wetland boundary.
  - i. The voluntary buffer of 50 feet with a 15 foot building setback (total 65 feet) as stated in EIS, will be increased to approximately 108 feet from the existing delineated wetland boundary and will include the entire western portion of the site outside the clearing limits. This area will become an enhanced buffer area (with minor alterations only as specified below) to reduce the impact to the wetland as well as enhance the wetland buffer. The enhancement will include removal of invasive species prior to or in

conjunction with installation of new plantings on-site, replanting with native vegetation where invasive plants have been removed, and relocate a portion of the trail that is currently located within this buffer area and restoration of the old trail area. All new vegetation within the buffer shall be planted using hand tools.

- ii. Prior to any work in the buffer area, Westmark shall obtain a new delineation of the wetland boundary on the property. Unless there are special circumstances (e.g. small encroachment on 50 foot area to avoid significant trees), the stormwater dispersal trenches and the trail will be located/relocated outside of the line that is 50 feet from the newly delineated wetland boundary. The limit of grading shown on the Revised Site Plan shall remain as shown and shall not be adjusted for any differences between the newly delineated wetland boundary and prior boundary (whether more or less). The area of the buffer greater than 50 feet from the newly delineated wetland boundary will include some alterations, including rerouting portions of the trail outside of the 50 feet buffer as discussed previously (see plan for location), portions of an underground tight line pipe from the detention vault to level spreader(s), and at least two level spreaders to be located in the field to minimize impacts. Otherwise, all healthy native species in the buffer area outside of the clearing limits shall be retained.
- iii. The average distance between the edge of the wetland and the cleared area is approximately 166 feet (this average was calculated measuring from vertices along the wetland boundary to the cleared area limits and averaging the distances).
- iv. The project shall have a single gated access point to reach the Seahurst Park trail with appropriate signage. Westmark will discourage tenants from creating other access points and will take appropriate steps to ensure utilization of the single access. Fencing/safety rails will be installed at the tops of retaining walls west of the parking areas. This will deter residents and neighbors from creating new trails into the park.

- B. Stormwater treatment will include water quality features prior to being discharged through level spreaders outside of the 50 feet buffer. Dispersion methods will be used in other areas of the development to further reduce the potential to impact the wetland. (see III.A below)
- C. Relocation of portion of existing trail at least 50 feet from wetland edge. This will further reduce the impact to the wetland and provide the opportunity to revegetate the disturbed area of the buffer.
- D. Removal of invasive plant species outside the clearing limits on subject property. No healthy native vegetation shall be removed outside of the clearing limits shown on the Clearing Permit and Tree Retention Plan.
  - i. Invasive species shall be removed outside of the clearing limits, including but not limited to: Japanese Knotweed (*Polygonum cuspidatum*), Himalayan blackberry (*Rubus armeniacus*), English Ivy (*Hedera helix*), Holly (*Ilex aquifolium*), etc.
  - ii. Removal shall be conducted using hand tools.
  - iii. Removal shall occur prior to installation of new plantings on the site or in conjunction with that installation.
- E. Enhancement to include native species from the list below:
  - i. Sword fern (*Polystichum munitum*)
  - ii. Lady fern (*Athyrium filix-femina*)
  - iii. Salmonberry (*Rubus spectabilis*)
  - iv. Red Elderberry (*Sambucus racemosa*)
  - v. Salal (*Gaultheria shallon*)
  - vi. Others as prescribed by design team's wetland biologist.
- F. Revegetation to occur only where invasive plants have been removed and in the location of the existing trail that will be abandoned.
- G. Interpretive signs shall be placed along trail near wetlands to include information regarding wetland plants, wildlife, water quality, hydrology, etc. These signs shall be located approximately every 100 feet (to include a minimum 5 signs).
- H. Westmark will install a bench along the trail at an appropriate spot for viewing the wetlands and the surrounding forest.

- I. Protection during construction – an Erosion and Sediment Control Plan shall be submitted to and approved by the City of Burien prior to any clearing of the project site. No clearing or grading shall occur until building permits are issued and performance bonds are posted per City requirements. Westmark shall post maintenance bonds according to City requirements once the improvements are accepted as complete.

### III. Utilities

- A. Stormwater – The project shall comply with the 2005 King County Surface Water Design Manual. The Applicant shall submit a revised TIR and revised engineered stormwater plan for review and approval by the City of Burien. The revised design moves the vault to a higher elevation and locates it partially under the parking area.
  - i. Two or more dispersal trenches will be used to discharge stormwater from the vault.
  - ii. Stormwater from driveways, parking areas, sidewalks will drain to the proposed vault.
  - iii. Stormwater from the rooftops of Buildings A, B, and E will be directed to a series of rain gardens designed to infiltrate the clean roof water. See Landscape Planting Plan (sheet L-1).
- B. Sewer - The applicant shall construct a new sewer pump station for the subject site. The new pump station will direct flow eastward into an existing 8-inche gravity sewer line situated on 12th Avenue SW. The existing gravity sewer line on 12th Avenue SW is adequate to handle anticipated flow from the proposed 179 units Emerald Pointe project. A Certificate of Sewer Availability issued by the Southwest Suburban Sewer District shall be required prior to building permit issuance.
- C. Water - The following changes to the water distribution system are required before an Approved Water Availability Certificate can be issued. Design and Installation of approximately 380 feet of 12-inch and 600 feet of 8-inch RJDIP in SW 136th St, from the end of the existing 12-inch main in 136th to the east boundary of 1410 SW 137th Street, then South along the property's boundary to SW 137th Street, then West along 137th about 80 feet to connect to existing 6-

inch main in SW 137th, including one hydrant. Design and installation of about 135 feet of 6-inch DIP in 12th Ave SW. (per Water Availability Certificate dated 11/23/2011) A Certificate of Water Availability issued by the applicable water district shall be required prior to building permit issuance.

#### IV. Other

- A. Outdoor lighting will, to the extent feasible, utilize low-wash lighting and be positioned to direct light-wash away from neighboring properties and also away from the wetland and wetland buffer so as to minimize impacts.
- B. Solid waste collection/transfer facility to be moved to the south portion of the site near Building A.
- C. Building roofs are proposed to be flat roofs (rather than 4:12 pitch). Construction materials used in flat roofs will be non-toxic.
- D. Unit count to remain at 179 units (178 plus a manager unit). Westmark and its architect shall have discretion in building design, floor configuration, and unit sizes to accommodate the 179 units as long as the buildings have the same or smaller footprints than the buildings shown on the Revised Site Plan for Buildings A-E and Club House.
- E. At least 270 parking stalls shall be provided (1.5 per unit) plus additional stalls for visitors.
- F. Tenant rules shall provide that no vehicle maintenance involving fluid refill or replacement shall occur on site. A designated area will be provided for vehicle washing which shall be designed with water quality control features to eliminate and/or minimize any impact to the wetland and notice shall be provide to all tenants that vehicle washing may only occur in this area.