REPORT and DECISION of the SNOHOMISH COUNTY HEARING EXAMINER

DATE OF DECISION: August 7, 2008

PLAT/PROJECT NAME: ***SOUNDVIEW AT WARM BEACH***

APPLICANT/
LANDOWNER: Warm Beach Senior Community

FILE NO.: 03-110492-000-00-LU

TYPE OF REQUEST: Major revision to a Conditional Use Permit (CUP), Shoreline Substantial Development Permit (SSDP), and Planned Residential Development (PRD) Official Site Plan for a 100-unit development.

APPEAL**:** FINAL ENIVRIONMENTAL IMPACT STATEMENT (FEIS)

APPELLANTS: WARM BEACH COMMUNITY STEWARDS (Stewards)

DECISION (SUMMARY): **DENIAL WITH PREJUDICE (PURSUANT TO SCC 30.61.220); APPEAL OF FEIS GRANTED**

BASIC INFORMATION

GENERAL LOCATION: At the northwest corner of Marine Drive and 201st Street NW in Section 18, Township 31 North, Range 4 East, W.M., Snohomish County, Washington.

ACREAGE: Parcel # 310418-002-008, -009, and a portion of -023 (20 acres); Parcel # 310418-002-002 (30.9 acres)

NUMBER OF LOTS: 100

DENSITY: 1.96 du/ac (gross)
5.52 du/ac (net)

ZONING: R-5

COMPREHENSIVE PLAN DESIGNATION:
General Policy Plan Designation: Rural Residential-5 (1 du/5 acres)

SHORELINE DESIGNATION: Shoreline Conservancy

UTILITIES:
Water: Private Water System
Sewer: Private Waste Water System

SCHOOL DISTRICT: Stanwood School District No. 401

FIRE DISTRICT: NO.14

PDS STAFF RECOMMENDATION: Approve with preconditions and conditions

INTRODUCTION AND PROCEDURAL HISTORY

The applicant filed the Master Application on December 8, 2003 and the project vested on the same date, according to the Department of Planning and Development Services (PDS). (Exhibit 1)

There have been multiple proceedings in this case. The latest series of hearings and the subject of this decision are the hearings on the merits and the appeal of the Final Environmental Impact Statement (FEIS). The hearing on the merits started with three days of hearings on December 15, 28, and 29, 2005. Deputy Examiner Ed Good, through written decision dated January 20, 2006, granted an appeal of the threshold determination issued in this case and remanded the matter to the Snohomish County SEPA Official for preparation of an environmental impact statement focused on water quality. (Exhibit 287)

PDS issued a FEIS on November 13, 2007. (Exhibit 424) The Hearing Examiner's Office received an appeal of the FEIS from Leon Sams on behalf of the Stewards. (Exhibit 323) After a series of cancellations the hearings were scheduled for May 20, 21, and 22, 2008 before the undersigned Examiner. PDS gave proper public notice of the latest series of open record hearings as required by the County code. Exhibit 428 (Affidavit of Mailing); Exhibit 429 (Affidavit of Notification by Publication); Exhibit 430 (Posting Verification).

The Examiner held open record hearings on May 20, 21, and 22, 2008 as well as June 3, 2008. Witnesses were sworn, testimony was presented, and exhibits were entered at the hearing. The appellant, Stewards, was represented by David Bricklin of Bricklin, Newman, and Dold (Seattle) along with Leon Sams and the help of many of the citizens of Warm Beach. The applicant, Warm Beach Senior Community (WBSC), was represented by Donald Marcy and Sean Howe of Cairncross and Hempelmann (Seattle).

NOTE: The oral transcript is hereby made a part of the record in this matter. For a full and complete record, a verbatim recording of the hearing is available in the Office of the Hearing Examiner.

BACKGROUND FINDINGS OF FACT

Based on all of the evidence of record, the following findings of fact are entered.

1. The master list of exhibits and witnesses which is a part of this file and which exhibits were considered by the Examiner is hereby made a part of this file as if set forth in full herein.

2. Summary of Proposal: The applicant requests approval of a 100-unit Planned Residential Development on a 50.9 acre site within the R-5 zone. The project will include a 36-unit apartment building and 16 four-plexes. An open space tract consisting of a total of 30.9 acres is proposed on a separate noncontiguous lot approximately one-quarter mile away from the parcel. Stormwater runoff will be directed to Port Susan Bay via a closed conveyance system (pipe) running from the site along the Puget Sound bluff approximately ¾ of a mile to a dike pond which eventually drains into First Creek, which in turn drains into Port Susan Bay. Sewage would be piped along the same path to the existing Warm Beach Wastewater Treatment Facility owned/controlled in part by the applicant. The project requires a revision to an existing CUP and a SSDP. The sewage outfall for the project will dump into Second Creek, which also runs directly into the Sound. The project will provide an internal driveway system that connects to 201st Street NW, an existing public road. (Exhibit 172; Testimony of John Cherry, May 20, 2008 hearing)

3. Site Description: The subject property consists of three non-contiguous parcels. *See* Exhibit 521 (development parcels outlined in yellow). The two western parcels are contiguous and are 20 acres in size in total. They are in turn contiguous with the southern boundary of the existing WBSC west of Marine Drive and when cleared, will offer some views of Puget Sound. The 100 residential units are proposed to be located on these two parcels. *See* Exhibit 42B. The parcel presently contains one single-family residence. It also contains a Type 5 stream and an associated Category 3 wetland. Most of the parcel is forested with a variety of fir and deciduous trees and slopes downward from east to west. (Exhibit 172)

   The eastern parcel is approximately 30.9 acres in size and one-quarter mile in distance from the westerly two parcels. It is noncontiguous to the other two parcels. It is located east of the Warm Beach Christian Camp facility and east of Marine Drive. The eastern parcel is forested and contains some wetlands of unknown value. The wetlands have not been delineated; however one exhibit indicates roughly one-third of the parcel may be encumbered by wetlands and their buffers. (*See* Exhibit 27 at 20) The eastern parcel contains rolling topography. (Exhibit 172)

4. Adjacent Zoning/Uses:

   Adjacent zoning and uses in the area was a topic of debate at the hearings. While zoning is readily ascertainable from the maps, the uses on the ground are much more diverse than even the mix of zoning might suggest.

   (A) North of the Parcels. The existing WBSC and rural residential development is directly north of the proposed site. The area is zoned R-5 as well as PRD-20,000, although the Senior Community is actually developed much more densely than the zoning might indicate. Page 22 of the FEIS (Exhibit 424) clearly shows the proposed and existing properties; testimony by Executive Director Dave Fairchild indicated a density of over 5 du/acre on the existing WBSC properties, excluding the nursing home and assisted living facilities. Of course, these properties were developed prior to the enactment of Growth Management Act zoning for this area.

WBSC: The WBSC is a faith-based non-profit organization dedicated to serving the varying housing needs of seniors of all income levels in a rural setting. The WBSC facilities were developed pre-GMA. At the center of the Senior Community is a health care center, including an 81-bed nursing home and an assisted-living facility. Ringing the outside of the community are neighborhoods of cottage-style apartments, some of which are reserved for those with low incomes. Across Marine Drive to the east is Manor Estates, a manufactured home neighborhood for senior residents who need little, if any, assistance. Manor Estates is zoned PRD-20,000.

Farther to the north of WBSC is the Warm Beach Christian Camps and Conference Center. The Camp is not affiliated with WBSC, but both are developed as a ministry of the Pacific Northwest Conference of the Free Methodist Church. The Camp provides camp programs for the entire family, and specializes in horsemanship camp programs. Testimony at the hearing indicated the camp had approximately 80 horses. Both the WBSC and the Camp co-operatively run and pay for the wastewater treatment plant. The Camp property is zoned Forestry and Recreation, which allows 1 dwelling unit per 5 acres. Beyond the camps to the north is agricultural farm land zoned A-10, or one unit per 10 acres.

(B) West/Southwest of the Parcels. The area directly west and southwest of the proposed development has been heavily platted both in the area near the waterfront and along the hillside in the old C.D. Hillmans Birmingham Water Front Addition plat and possibly other old plats along Puget Sound fronting Port Susan Bay. The old plats cover the entirety of the waterside of Beach Drive and extend down Sound View Drive in a similar fashion. There is a small area of larger lots along Sound View Drive on the east side south of the proposed development, but the development pattern then goes back into a very small lot pattern on the east side of Sound View Drive in a large area, due to the old Hillside Addition Plat. Farther to the east, and more due south from the property, the zoning is R-5 and the lot pattern is more consistently a large lot pattern. (Exhibit 275)

As one might expect, development patterns in this area are quite mixed. Housing in the tightly platted areas is typically constrained only by the need to put adequate drainfields and septic systems on the lots; therefore lots may end up as small as ½ acre in those areas. Houses with views of and access to Puget Sound vary from rustic cabins and mobile homes to large mansions. There is no predominating development pattern or style that characterizes these homes. While there are nonconforming lots, the area is designated and zoned rural under the GMA comprehensive plan. There are still many rural uses and attributes here, despite the fact that one could pick out more urban-type attributes from the landscape. What is important is that the County Council has designated this area as rural, thereby intending the new uses to retain rural character from this point onward, despite what may have happened in the past.

(C) South of the Parcels. The majority of lots in the immediate vicinity are large lots zoned R-5. (Exhibit 275)

(D) East of the Parcels. The majority of parcels in the immediate vicinity are large lots zoned R-5, although there is one area where an old substandard plat of very small lots exists to the southeast. *Id.*

5. Public Comment/Issues of Concern in the Record Identified by PDS (separate from the SEPA Process).

Aside from the EIS process, PDS received 85 letters regarding the project. 51 of the letters have expressed support for approval of the project and 34 of the letters have raised concerns regarding the proposal. In Exhibit 172, the staff report identifies these concerns and the PDS response is as follows:

> Concerns regarding the project include traffic volume, including the Christmas Lights festival, drainage impacts, rural densities, additional night-time light pollution, multi-family and commercial uses are not appropriate for this location, the project would increase noise pollution, the proposal is not rural development, the development would cause more air pollution, on-site grading during recent years has increased stormwater runoff, the open space is east of Marine Drive - focusing density near existing residences, the stream proposed as a drainage outfall is used for recreation, sight distance on Marine Drive is limited, Bald eagles will be impacted by the development, the entrance to the project from Beach Drive would be dangerous, open drainage facilities will lead to increased mosquito problems, there is little discussion of the east 30 acres of the site, wildlife habitat will be affected, there is concern that the development will cause landslides on the slope below the site, additional sewage effluent should not be allowed until a long-term discharge location has been found, the project will alter groundwater flows impacting Beach Drive residents.
>
> PDS responds by noting that the Department of Public Works (DPW) has reviewed the proposal and deemed the project concurrent and with conditions, adequately designed, landscape buffering will help to maintain rural character, the project meets the required density limitations, stormwater runoff concerns are being addressed through application of the county drainage code, if mosquito breeding is a problem in drainage treatment ponds, it can be controlled, noise pollution and air pollution are not expected to be significant, no indication has been found that Bald eagle nesting habitat will be impacted, general concerns about wildlife habitat are not addressed by county code, The stormwater control design should not allow additional stormwater down slope, and the Department of Ecology has concluded that the project has adequate sewage treatment capacity and the long-term location for the sewage outfall does not need to be resolved at this time.
>
> Supporters of the proposal note that the WBSC is a pleasant place to live, that the WBSC creates a favorable moral environment, the WBSC creates relatively little traffic, that there is a waiting list for residency in the WBSC, the WBSC provides health care often required by residents, some residents like the rural character of the area, amenities such as community dining create a favorable living environment, the WBSC provides quality, affordable housing, and many residents feel that stormwater runoff and wastewater issues have been adequately addressed.
>
> Most of the comment from project supporters appears to be from self identified residents of the existing WBSC facility. Certain points raised by supporters, such as those relating to amenities, health care, and housing affordability, help to demonstrate how the project is consistent with aspects of the Planned Residential Development code. (Exhibit 172 at 3-4)

In addition, the PDS Staff Report notes that the Stillaguamish Tribe has expressed concern that the subject property is near a historic village site, and that the Tribe has requested that Tribal monitors be on-site during excavation work. *Id.* at 4.

FINDINGS OF FACT AND CONCLUSIONS OF LAW REGARDING THE PROJECT APPLICATION

1. Introduction

The applicant has applied for a major revision to its CUP, a PRD ordinance approval, and SSDP approval. In addition, the Examiner must determine the adequacy of the FEIS. Because revision of the CUP is dependent on the other components of the approval request, the Examiner will address that issue last.

Due to the complexity of the issues, the Examiner will make findings of facts and conclusions of law as to each permit application, instead of the usual format of making all findings of fact first, and providing all conclusions of law in a separate section. The Examiner will provide a Conclusions of Law section that provides a convenient summary of the rulings in this case.

2. GPP Policy LU 6.A.3.

A. Background.

This case is quite unusual because these parcels are the only ones outside the UGA in Snohomish County on which a PRD is permitted under the county's development regulations. In 1996, the applicant obtained a comprehensive plan amendment allowing this special designation, which was amended in 2001 to change parcel numbers. (Exhibit 522 (Amended Ordinance 96-074); Exhibit 262A (Amended Ordinance 01-106))

This case provides a textbook example of why attempting to provide special regulatory exceptions through a docketing process or comprehensive plan process that are then dependent on implementation through development regulations, is a bad idea. In this case, the parties have not only debated whether the criteria have been met, but also what the criteria are. And rightly so. Because under state law, the County is constrained to follow development regulations to approve permits under the normal course of business. (*Citizens for Mt. Vernon v. Mt. Vernon,* 133 Wn.2d 861, 947 P.2d 1208 (1997)). But here, we have a PRD ordinance that refers to a comprehensive plan policy and a comprehensive plan policy that requires adherence to the code. Unfortunately, the code does not appear to have been amended in a manner to specifically accommodate the development contemplated by the policy amendment.

Starting with the comprehensive plan policy, General Policy Plan Policy 6.A.3 (formerly 6.A.7) contains the following specific language pertaining to this proposal:

> *The Warm Beach Health Care Center/Senior Community may be expanded into an area that includes parcels with the following tax account numbers: 183104-1-002, 2-007, 2-008, 2-009, 2-018, and 2-022. Densities within the expansion area may exceed the density allowed by the GPP Future Land Use Map and/or the zoning classification for these parcels but may not exceed 2 dwelling units per acre, provided that a planned residential development (PRD) consistent with this density allowance is approved for the site prior to the issuance of building*

permits. The official site plan required by the PRD shall meet applicable requirements of the zoning code.[1] The following additional requirements shall be met:

(a) no new lots are created;
(b) housing shall be limited to rental housing units for senior citizens;
(c) senior housing does not unduly disrupt or alter the visual character of rural uses in the immediate vicinity; and
(d) impacts concerning traffic, sewage disposal, water supply, and nearby wells are mitigated consistent with county code and policies.

It appears that there was some attempt to make the PRD ordinance consistent with this policy, but there are a number of problems associated with implementation. Relevant provisions of the PRD code that were in effect as of the applicant's date of vesting (December 8, 2003) must also be considered. That code has been included in the record at Exhibit 512. Principal sections that interact with this application include:

30.42B.020 Applicability.

(1) A PRD is permitted only within UGAs in the R-9600, R-8400, R-7,200, LDMR and MR zones; except that a PRD shall not be permitted in the R-9,600 zone within the Lake Stevens UGA.

(2) A retirement apartment or retirement housing PRD is permitted only within the LDMR, MR, NB, PCB, CB, and GC zones.

(3) A PRD is not permitted in the rural area, except in the R-5 zone when consistent with Policy LU 6 A.7 of the comprehensive plan.

(4) Except for the retirement apartment and retirement housing PRDs, the density of the PRD shall be consistent with the land use designation identified in the comprehensive plan.

30.42B.030 Procedure.

(1) Applications for a PRD shall be processed as a Type 2 decision pursuant to chapter 30.72 SCC.

(2) The hearing examiner may approve, approve with conditions, or deny a PRD official site plan. **A PRD official site plan may only be approved when it is found to meet applicable minimum standards of this chapter, and the decision criteria of SCC 30.42B.200.** Applications shall be made according to the submittal requirements checklist provided by the department pursuant to SCC 30.70.030.

30.42B.040 Unit yield and bonus.

(1) For all PRDs, except retirement apartments and retirement housing PRDs, the maximum number of dwelling units permissible shall be 120 percent of the maximum number of units permitted by the underlying zone as determined in SCC 30.42B.040(2), unless adjusted per the provisions of SCC 30.42B.040(3).

(2) The maximum number of dwelling units permitted in a PRD shall be computed as follows:

(a) Determine the net development area on the project site. Net development area is the gross site area (in square feet) less critical areas and their buffers, lakes, and ponds.

[1] When this policy was written in 1996, the PRD Code was Chapter 18.51 SCC and a part of Title 18 SCC, the Snohomish County Zoning Code.

(b) Divide the net development area by the minimum lot area permitted by the underlying zone, or where LDMR and MR standards apply, by 4,000 square feet and 2,000 square feet respectively. For retirement apartment PRDs and retirement housing PRDs in the LDMR zone divide by 4,000 square feet and in the MR zone and commercial zones divide by 2,000 square feet.

(c) Multiply the resulting number of units by 2.2 for retirement housing PRDs, 1.54 for retirement apartment PRDs, and 1.2 for all other PRDs.

(3) In the R-7,200, R-8,400, and R-9,600 zones, the maximum number of dwelling density (number of dwelling units per acre in the net development area) does not exceed seven dwelling units per net acre.

(4) Whenever the calculated number of dwelling units results in a fractional equivalent of 0.5 or more, the fraction shall be rounded up to the next whole number, fractions of less than 0.5 shall be rounded down.

30.42B.100 Design criteria—general.

(1) The design criteria contained in SCC 30.42B.100 through 30.42B.150 are applicable to all PRDs.

(2) Unless specifically modified by this chapter, all requirements of the underlying zone shall apply within the PRD.

30.42R.180.

"Retirement apartments" means dwelling units exclusively designed for and occupied by senior citizen residents 62 years of age or older in accordance with the requirements of state and/or federal programs for senior citizen housing. There is no minimum age requirement for the spouse of a resident who is 62 years of age or older.

30.42R.190

"Retirement housing" means dwellings exclusively designed for and occupied by senior citizen residents 62 years of age or older, in a building with central kitchen facilities providing meals for the residents. There is no minimum age requirement for the spouse of a resident who is 62 years of age or older.

30.91S.340

"Site" means a lot or parcel of land or contiguous combination thereof under the same ownership or control; where a development activity is performed or permitted or on which development is regulated by this title.

Emphasis added. It is now up to the Examiner to determine how the comprehensive plan policy interacts with these code provisions.

The code, at SCC 30.42B.030, states that "a PRD is not permitted in the rural area, except in the R-5 zone when consistent with Policy LU 6 A.7 of the comprehensive plan." Therefore, this case appears to mirror the case of *Cingular Wireless v. Thurston County, 131 Wn. App. 756, 129 P.3d 300 (2006)* where the zoning code required compliance with the comprehensive plan. In that case, the court found that the proposed use had to satisfy both the zoning code and the comprehensive plan. *Id.* at 770. Indeed, that appears to be the intent of the County Council in enacting Policy LU 6 A.7, which states "*The official site plan required by the PRD shall meet applicable requirements of the zoning code."*

B. Findings of Fact and Conclusions of Law with Respect to Policy LU 6.A.3 (formerly Policy LU 6.A.7).

The Examiner will review how the proposed development conforms to each of the requirements of Policy LU 6.A.3 (formerly Policy 6.A.7). The first three are in the text (preamble) of the policy and the remainder are enumerated as (a), (b), (c), and (d).

(Text 1) First, the Examiner finds that the applicant has submitted the proposal under the proposals numbered in the policy; namely, parcels nos. 183104-1-002, 2-008, and 2-009.

(Text 2 and 3) The other two requirements in the text are that a PRD approval, with the PRD Official Site Plan in compliance with the zoning code, must be issued prior to building permit, and that density must not exceed two dwelling units per acre. Both of those questions will be addressed in the discussion of compliance with the PRD ordinance.

(a) *no new lots are created;*

It is uncontested that the proposal meets the first criteria, since the project is a PRD and creates no new lots; (Exhibit 426)

(b) *housing shall be limited to rental housing units for senior citizens;*

The applicant argues that this criteria is met because the units will be "rental" units and not owned by their occupants. (Exhibit 527 at 20) (Testimony of David Fairchild, May 22, 2008) However, these units require their occupants to provide WBSC an entrance fee of $200,000 to $300,000, of which 75% is refundable when the inhabitant departs or dies (to the heirs). *Id.* The occupant must also pay a monthly fee of approximately $1500-$2000 per month. *Id.*

The Examiner is not convinced that given the type of housing that exists at the WBSC now, which consists of low to lower middle income housing for seniors, according to Executive Director's Fairchild testimony, that the Council intended to allow for "higher income" housing for seniors through this code amendment. Mr. Fairchild testified that the purpose of the SoundView project was to attempt to make up for losses that accrue at WBSC due to the fact that approximately 55% of the assisted living and nursing home residents are on Medicaid, as well as 55% of the persons living in apartments other than HUD. *Id.* All 42 of the HUD apartment residents are on Medicaid. He testified that it is "a difficult balance to strike" and that the nursing home loses about one-half million dollars per year. According to Director Fairchild, the difference has to be made up in other businesses. The business plan in adding SoundView is to help make up these losses by adding higher income residents. The idea is that the residents in the SoundView project pay their own way and provide amenities for the residents at the lower end as well. As Director Fairchild stated, "No margin, no mission." *Id.*

The finding related to the Warm Beach policy amendment in Amended Ordinance 96-074 stated:

> The Warm Beach Health Care Facility/Senior Community is an existing facility which has maintained rural character and provides low cost senior housing and medical care in a rural environment. **Its limited expansion, with careful site planning and impact mitigation, is consistent with the goals of the GMACP and the GMA, specifically responding to a need for affordable housing in the rural area for elderly persons**. Adoption of new policy LU 6.A.7 will allow limited expansion of the Warm Beach Senior Center, provided that specific policies are met that will assure that the rural character of the area is maintained in any future development. . . .

> The council finds that the existing development has maintained a rural character and that additional development pursuant to policy LU 6.A.7 will create no significant transportation impacts or a significant increase in density or population growth in the rural area, **and will respond to the need for affordable senior housing in rural areas.** (Exhibit 522 (emphasis added))

The definition of "affordable housing" is contained in Appendix E of the GPP. The definition is adopted from WAC 365-195-210 and is defined as "Residential housing that is rented or owned by a person or household whose monthly gross housing costs, including utilities other than telephone, do not exceed thirty (30%) percent of the household's gross monthly income." An individual would need to have a rather large monthly income greatly exceeding the median income in this county for these units to be considered "affordable" under the definition in the glossary in the GPP. In addition, a senior would have to have $200,000 to $300,000 cash on hand simply to qualify for the rental housing, even if he or she could afford the $1500 to $2000 rental fee per month. The Examiner cannot conclude that this type of housing "responds to the need for affordable senior housing" or is "rental housing units for senior citizens" in the manner the County Council intended. Therefore the Examiner concludes that the proposed SoundView development does not meet criteria (b) of Policy 6.A.3.

> *(c) senior housing does not unduly disrupt or alter the visual character of rural uses in the immediate vicinity; and*

Much testimony was devoted to whether or not the area was truly rural in character. Exhibit 511a is a depiction of some of the larger homes in the Warm Beach neighborhood. Exhibits 261A-D are pictures of the existing WSBC facilities. Exhibit 261E is a picture of a home that apparently provided the inspiration for the design of the buildings in the development. Applicants provided Exhibits 261G-Q to provide evidence of larger scale homes and uses such as the new fire station, suggesting there is no visual character of rural uses in the immediate vicinity to disrupt. Applicants provided pictures of the model of the proposed four-plex buildings at Exhibits 259 A-C, and a visualization of the appearance of the proposed apartment building from Marine Drive. (Exhibit 359D-F)

The development is comprised of 100 units, divided into 16 four-plexes and 36 units in a three-story apartment building on 20 acres. (Exhibit 42B) Also included on the site is a 15,000 square foot community center with kitchen facilities. Although the "site" is 50.9 acres in total, it is not contiguous pieces of land, and all development will be occurring on the parcels, that combined, total 20 acres (Parcels 2-008 and 2-009), with the 30.9 acre parcel being designated as a Native Growth Protection Area (NGPA). (Parcel 1-002). (Exhibit 521) A 30- foot perimeter buffer is being installed around the development with overlapping clusters of shrubs and trees. The issue of the contiguity of the two pieces will be addressed as a part of review of compliance with the PRD code.

The applicant misses the mark when it tries to convince the Examiner that the area is not rural, and therefore the development need not appear rural in nature. The words of the policy are carefully chosen to state that "the senior housing must not unduly disrupt or alter **the visual character of rural uses** in the immediate vicinity". It does not ask the decision maker to determine the character of the area. The Examiner interprets the policy to mean that the development must visually not appear so urban or dense that it would be disruptive to the overall intended rural nature of the area.

The Examiner acknowledges that the Warm Beach area is not a purely rural area at this time. But the GMA did not give us a clean slate. It did give us a direction to go after 1990. The County and its residents are obligated to now follow a plan of development which will steer development in a certain direction. Although this particular development site is a limited exception, the Council acknowledged the obligation and duty to require the development not to disrupt or alter the visual character of rural uses, which the Examiner interprets to require the development not to provide an urban appearance from the roadway.

The Council found the existing development at the "Warm Beach Senior Center" to be rural in nature in its finding (quoted above). Executive Director David Fairchild testified that the current density of the senior community, excluding the nursing home and assisted living facility, is five dwelling units per acre, the same as the proposed density of the SoundView project on the 20-acre site alone.

Although the densities are the same, the proximity of the density to the road is much different. In addition, there are several large, bulky structures set right upon Marine Drive in the proposed PRD layout, whereas in the existing Warm Beach development very little of the existing density can actually be seen or is near Marine Drive. (Compare Exhibit 42B, 263C and 259E with Exhibit 278A and 278C) The dense three-story apartment building structure of the proposed development is completely out of keeping with the intended rural nature of the area. An internal roadway, parking area, a three-story apartment building, along with a large 15,000 square foot community center building are all sitting adjacent to Marine Drive, the most prominent visible edge of the property. Despite the fact that there is a thirty-foot perimeter landscaped buffer including some existing trees that are proposed to remain, it is the Examiner's opinion that this site plan does not meet the Council's intent when it stated that the senior housing must not "unduly disrupt or alter the visual character of rural uses in the immediate vicinity". The Examiner finds that the three-story apartment building by itself and in conjunction with the 15,000 square foot community center, violate this policy.

In addition, the sixteen four-plexes are very dense in appearance on the property. In fairness, so is the existing development at WBSC from the aerial photo. Again, the difference is the exposure from the surrounding access roads. Unfortunately, the SoundView parcel is surrounded on three sides by roads - Marine Drive, 201St NW, and Beach Drive. These dwellings would not be allowed under the PRD code in urban low density zones and yet they are being proposed in the rural zone (although apparently allowed under the PRD code). (*See* former SCC 30.42B.100(4)). Although Exhibits 263A-C, the landscape architectural rendering, provides colors and vegetation that make the development seem to simply fade into the bushes, the Examiner does not believe that the extremely dense development depicted on the site plan (Exhibit 42B) will be well shielded from the public driving by on 201st Street NW by the landscape buffer. Few existing trees will remain, and it will take many years for new trees to grow tall enough to provide an effective buffer, if ever. (Exhibit 42C-G – depicting existing trees that may remain) Virtually no trees will be inside the development. The same is true looking east from Beach Drive. Because of the incline of the hill from Beach Drive, the development will still be densely urban in appearance, despite the fact that the detention pond is at the west end of the development. (Exhibit 263C) This fact too, leads the Examiner to find that overall, the development is too dense in appearance to meet this criteria.

The density requirement in the preamble paragraph, in which the Council stated that density should not exceed two dwelling units per acre, leads the Examiner to believe that the Council intended to see that type of density on the ground. The Examiner does not believe the Council intended to allow development at five dwelling units per acre in multi-family dwellings that would

not be permitted in the PRD code in urban single-family zones. The Examiner finds that the applicant has failed to meet criteria (c) of Policy LU 6.A.3.

> *(d) impacts concerning traffic, sewage disposal, water supply, and nearby wells are mitigated consistent with county code and policies.*

Issues concerning environmental impacts have been addressed under the SEPA appeal portion of the decision.

Summary of Compliance with GPP Policy LU 6.A.3.

The Examiner finds that the applicant has failed to meet criteria (b) and (c) of Policy LU 6.A.3. The issue of compliance with the density provision of the policy is reserved for discussion with the PRD regulation requirements; discussion of certain environmental impacts is reserved for the SEPA appeal portion of this decision.

3. Compliance with the Planned Residential Development (PRD) Ordinance.

A. Contiguity of the Parcels.

The first question that naturally occurs in reviewing this application is whether or not the code permits a PRD to be submitted on two noncontiguous parcels. This PRD proposed "site" is comprised of three parcels: 2-008, 2-009, and 1-002. (Exhibit 521) When the Examiner asked PDS whether any other PRD had ever been approved with noncontiguous parcels, the answer was "no". (Testimony of Darryl Eastin, May 21, 2008) The justification in this case, however, is that despite the fact that the PRD application is only comprised of the three parcels listed above, these parcels are within a larger, cohesive area controlled by a CUP and although the PRD site itself is not a contiguous site, the CUP site is contiguous as it is all under the same ownership and control; therefore it should be treated as if it meets the definition of "site" for purposes of the PRD code.

The Examiner is constrained by the provisions of the County code and cannot read into it words that are not there. The particular proposal being considered here is the PRD application; under the UDC, the definition of the term "site" requires the application being considered to be on a contiguous parcel. SCC 30.915.340. Until this application, it has never been otherwise, according to the testimony of Mr. Eastin. If this application were for a CUP, and the permit covered all of the parcels identified as under the ownership and control of the WBSC, the application would meet the definition of "site" under the code. It is true that we are also looking at a revision to the CUP, but under the provisions of the PRD code, the applicant must meet all provisions of PRD approval.

The consequences of granting this allowance would not be minor. To not require a contiguous parcel is basically allowing a transfer of density from one parcel to another in violation of the code. This exception would provide this applicant a major economic advantage not enjoyed by any other landowner in the County, without any code provision to support it. The County would not normally allow an applicant to transfer density from a lot a couple of blocks away to a view site and allow more density than otherwise permitted under the zoning code to allow the applicant more profit; there is no justification under the code language to allow the same thing to happen here. The applicant argues this is tacitly allowed by the fact that these parcels are all listed in Policy LU 6A.3; yet the policy says nothing about random combinations of parcels in a way that would otherwise violate the PRD code. In addition, the applicant could have legally filed for two separate PRD applications—one on parcels 2-008 and 2-009, and one on parcel 1-002. The fact that the applicant could have easily overcome this difficulty by filing two PRD

applications reinforces the fact that there is no justification for approval of this application. The Examiner will not read into the policy such a strained interpretation, when it can easily be interpreted in harmony with the code. The Examiner can only assume that the applicant chose this proposal to maximize views and proximity to the existing development.

The Examiner is pained that this proposal, brought forward by a nonprofit organization, has gone this far with such a gaping flaw. Not only is this a fairly obvious misreading of the PRD code, it seems to be a deliberate misreading of Policy LU 6.A.3. PDS should not have recommended approval of this proposal, which seemed very obviously problematic given staff's difficulty in coming up with even the weakest of rationales to defend it at the hearing. The Examiner recognizes that the very financial viability of the organization may have been staked upon this proposal. But it violates the code by illegally transferring density from a parcel a quarter mile away to a different, noncontiguous parcel. That is impermissible and patently unfair to all the other landowners in the County who do not enjoy such an advantage. The applicant could have submitted a proposal whereby two PRDs were proposed on the two groups of parcels. That would have been permissible under the PRD code. The proposal must be denied on this basis alone.

B. "Retirement Apartments" or "Retirement Housing"

The question arose at the hearing whether the uses proposed here are "retirement apartments" or "retirement housing" within the meaning of the PRD code. The defining characteristic of both of the definitions are an age requirement of 62 for the dwelling, and "retirement housing" requires central kitchen facilities within the building. *See* Finding of Fact C1. Director Fairchild testified that the SoundView apartments/housing did have a minimum age requirement of 62. The buildings in this proposal have no central kitchen facility within the buildings, but one does exist within the planned community center which is adjoined to the apartment building by a covered walkway.

It appears to the Examiner that these dwellings may fall within the definition of "retirement apartments" within the code and the apartment building may even be considered "retirement housing", although the distinction is not important for the purposes of this decision. However, the applicant chose not to characterize its development as retirement apartments or housing. Under the PRD code, retirement apartments and retirement housing are not permitted in the R-5 zone under SCC 30.42B.020. (Exhibit 512 (Former Chapter 30.42B SCC)) However, under SCC 30.42B.030, a PRD is permitted in R-5 when consistent with Policy LU 6.A.7 (former Policy LU 6.A.7). That policy allows a limited special exception for "rental housing for senior citizens". Given the Council finding in the adopting ordinance, it is apparent the Council intended an expansion of the existing housing stock that the WBSC currently provides, which has the same age requirement. It is a general rule of statutory construction that a specific statute controls over a more general statute when the statutes deal with the same subject matter and to the extent they cannot otherwise be harmonized. (*See Tacoma v. Taxpayers of Tacoma,* 108 Wn.2d 679, 692, 743 P.2d 793 (1987)). The Examiner therefore finds that despite the express prohibition of this type of housing in the PRD code, the Council intended that housing with an age requirement should be allowed on the WBSC parcels listed in the policy. The Examiner understands that this type of housing is typically offered in dense urban zones, and does not make any comment on the appropriateness of the type of development that typically accompanies housing of this definition, in connection with the unique rural surroundings of this area. As the Examiner has already found this site plan does not meet the requirements of Policy 6.A.3 or other requirements of the PRD code, this holding merely provides guidance in future interpretation of these provisions.

C. Applicability of SCC 30.42B.040

A further complicated question, given the Examiner's finding that essentially the specific language of LU 6.A.3 (formerly LU 6..A.7) controls over the more general language of the code, is how to apply the code requirements of SCC 30.42B.040, which measures unit yield and bonus. PDS staff, in the staff reports, simply skips over any analysis of how it might apply. (Exhibit 172 at 13-17; Exhibit 426) Only in the Post-Hearing Brief, after being questioned on the issue, does the staff venture to state that:

> [t]he proposed 100 dwelling unit expansion on 50.9 acres equals 2.0 dwelling units/acre. The policy clearly recognizes that the residential density may exceed the density allowed by the zoning of the listed parcels.
>
> The density allowance stated in LU 6 A.3 is the density the County Council considered appropriate for the future expansion of the existing WBSC. If the Council had intended that SCC 30.42B.040 be used to determine the density allowance for the future expansion of the WBSC, the policy would not have included language that specifies a much greater residential density.

(Exhibit 525 at 2)

If SCC 30.42B.040[2] were applied in this case, and assuming the proposal was not characterized as a retirement apartment PRD, the underlying density permitted in the R-5 zone would be presumably much less than it would be under the present "calculation", although a precise calculation is not possible on this record. Under the code, one must take the gross site area (in square feet) and subtract critical areas, their buffers, lakes and ponds to determine the net development area. Because the applicant has not delineated the wetlands on the 30.9 acre parcel, the net developable area of the parcels is unknown. Even making the assumption the site is 100% developable, however, the maximum density would be:

> 2,217,204 square feet = 50.9 acres (gross site area)
> 2,217,204 sq ft – 0 (critical areas) = 2, 217, 204 sq ft (net developable area)
> 2,217,204 / 200,000 sq ft (minimum lot area for R-5)= 11.086
> 11.086 x 1.2 = 13.3 = 13 units

While this density is certainly not comparable to the density of the existing development of WBSC, the Examiner does not believe that this code section can simply be dismissed as not applicable. Policy LU 6.A,3 (former 6.A.7) simply states that:

> *Densities within the expansion area* ***may exceed the density allowed by the GPP Future Land Use Map and/or the zoning classification for these parcels but may not exceed 2 dwelling units per acre****, provided that a planned residential development (PRD) consistent with this density allowance is approved for the site prior to the issuance of building permits.* (Emphasis added)

[2] Note that this provision would not apply if the application was made as retirement housing under the current code.

As is apparent from the calculation above, these provisions can be read in harmony. First of all, under LU 6.A.3, the density is not required to exceed that allowed by the GPP Future Land Use Map or the zoning classification. It may exceed those densities but may not exceed two dwelling units per acre. It is NOT REQUIRED to be set at two dwelling units per acre, as staff seems to read it. Legislative enactments must be read in harmony to give effect to both whenever possible. (*Tacoma v. Taxpayers, 108 Wn.2d at 692; In re Mayner, 107 Wn.2d 512, 522, 730 P.2d 1321 (1986))* Density could still be calculated under SCC 30.42B.040 and result in a density that comports with the language of the policy which does not mandate any particular density, as long as the density does not exceed two dwelling units per acre.

Because the Examiner has determined that a single PRD application on three noncontiguous parcels was impermissible, the five dwelling units/acre density on the 20-acre parcel exceeds the density limit in the code. It also exceeds the density limit set by Policy LU 6.A.3 (former 6.A.7). SCC 30.42B.040 can be read in harmony with Policy LU 6.A.3 (former 6.A.7), as long as the maximum density does not exceed two dwelling units per acre. While that may not be the type of proposal the applicant wishes to develop, the Examiner is required to implement the code, not ignore it. The application must also be denied on the basis that it fails to meet the requirements of SCC 30.42B.040.

D. Applicability of SCC 30.42B.100, .115

PDS staff did only a conclusory job of stating in the staff report that this application met all the requirements of the underlying zone when not inconsistent with the PRD code, without analyzing them specifically. (Exhibit 172 at 14) The Examiner does not know whether those criteria are met or not because staff did not identify what they are. Then, because the staff's premise is that the "site" contains three noncontiguous lots in violation of the definition of "site" was erroneous, staff calculated open space to include the totally disconnected 30.9 acre parcel that is a quarter mile away. That parcel is so disconnected that the staff never required the applicant to delineate the wetlands and other critical areas on that parcel. The idea was that the second parcel would be placed in an NGPA, but it has been recognized by staff that it could be developed at a later date. The Examiner cannot conclude that any other of the requirements of the application for the PRD site plan are met because the fundamental premise of the application is entirely flawed.

E. The Need for Legislative Re-Evaluation of These Provisions

Because there are multiple bases for denial already identified, the Examiner will not continue listing the difficulties this project presents. Suffice it to say that it is the Examiner's opinion that if this applicant wishes to take this project forward again, there are many more rabbit holes than have been even identified here. If the applicant determines it wishes to attempt another development under this provision, it might want to take a serious look at how to harmonize these very difficult code and policy provisions, or at how it might suggest to the County Council amendments that would make more sense out of these provisions. Conversely the legislative branch may wish to consider amendments to the policy or the PRD regulations to clarify intent, which at this point is rather unclear. The only thing the Examiner can say with certainty is that there are many citizens from the area that would like to be involved in the process this time that, for whatever reason, weren't involved when the original comprehensive plan amendment was passed. (Testimony of Leon Sams, May 21, 2008; David Fairchild, May 22, 2008)

Summary of the Examiner's Decision RE: PRD Application

The Examiner concludes that the PRD application must be denied because the application is on three parcels which combined, create a noncontiguous "site" in violation of the code. This leads to other deficiencies, specifically: (1) density is too high on Parcels 2-008 and 2-009 (the 20-acre piece), which is proposed at five dwelling units per acre, in violation of SCC 30.42B.040 and Policy LU 6.A.3 (formerly Policy LU 6.A.7); (2) other calculations, such as open space, etc. are unknown, but likely all in error because they are premised on a fundamentally flawed application that packs all development on 20 acres and impermissibly places all open space on another parcel. The Examiner does conclude that Policy LU 6.A.3 (formerly Policy LU 6.A.7) allows for age-restricted housing at the WBSC which may trump the requirements of the PRD code, as the Policy specifically identified rental housing for seniors. (The Examiner makes no conclusion with respect to the type of development that may represent, given the unique rural surroundings and policy provisions applicable to WBSC.)

4. The Shoreline Substantial Development Permit.

The project, as proposed, requires issuance of a SSDP by Snohomish County to allow improvements to create a stormwater drainage outfall and a utility connection to the existing sewage treatment plant. The proposal was reviewed by staff under the use regulations for the Conservancy Environment, as well as environmental management and use activity policies, and natural system.

Because this permit was issued for improvements premised on the development that is denied under this decision, it is also denied. The issue raised by the appellants regarding the SSDP will be addressed because it is a separate, independent basis for denial, and one that is an important issue for any eventual development of this parcel.

Appellants Stewards argued that the development, as proposed, violates the following Conservancy Environment policy:

> Utility transmission facilities shall be permitted PROVIDED that they are oriented to crossing the Conservancy Environment area, rather than running along the shoreline area. (Exhibit 172 at 25)

The PDS staff report indicates that "[t]he utility lines take the most direct route across the shoreline area to their respective destinations." (Exhibit 172) It does not provide a substantive discussion of how much of the utility corridor protrudes into the shoreline designation or exactly where the Conservancy Environment is located. Indeed, neither PDS staff nor the applicant has done anything but provided off the cuff opinion regarding that issue. However, both the PDS staff report (Exhibit 172) and the Environmental Checklist (Exhibit 26) appear to assume that the utility corridor is within the shoreline designation.

Probably the best depiction of this utility line can be found in the Habitat Management Plan submitted as a part of the project application. (Exhibit 18 at Figure 17; *see also* Exhibit 424 at 22) The utility line runs for approximately ¾ of a mile along the bluff and down to the waste water treatment facility. The vast majority of the way, the utility corridor runs right though a Category 1, mature forested wetland or its buffer that is tidally influenced. According to the Shoreline Master Program, Port Susan Bay's steep bluff shorelines had the Conservancy Environment applied to the marine upland (defined as any area above the ordinary high water mark) was intended to be extended landward to include all steep bluffs of 15% slope or greater. It also applied Suburban in some areas of Warm Beach it deemed suitable for development,

and in some cases, a combination of designations were applied. (See Environment Designation Map Descriptions). The Environmental Checklist does indicate that:

> The planned underground utility corridor to the north, along Beach Drive, traverses areas (or area within 200 feet of area) designated Suburban, Conservancy and Rural on the master program Map #`12. No impacts to the shoreline are anticipated, since utility lines will be installed underground. (Exhibit 26)

This statement indicates that the applicant made no effort to cross rather than traverse the shoreline to avoid impacts; the applicant indicated that it felt all impacts would be mitigated by the fact that utilities would be installed underground. The Examiner also takes official notice of Map #12, which is a part of the Shoreline Master Program; and which clearly indicates that while the area along Beach Drive is designated Suburban, the entire stretch of shoreline that contains the forested wetland is designated Conservancy. From the maps of the designated utility corridor, it does appear that a significant length of corridor will run along the shoreline within the shoreline designation, even if some of the corridor may technically run on the outside of it at the upland stretch of the corridor. There does not appear to be any attempt to cross the Shoreline Environment as required by the policy, nor has any such rationale been offered, other than vague statements that the corridor is not within the Conservancy Environment.

The Examiner concludes that the application violates this policy. Moreover, even if the violation of the Shoreline Master Program Policy weren't an issue, this utility corridor alignment violates the Critical Areas Ordinance. This utility runs right down the buffer of a Category 1 mature forested wetland or the feature itself (depending on which map is examined), which is a primary association area for threatened fish species. (Exhibit 18 at Figure 17 (pg. 35); *see also* Exhibit 424 at 22) Under the review criteria for evaluating impacts to critical areas and their buffers, the applicant has a duty to avoid or minimize impacts as its first priority. (SCC 30.62.365(1)) Moreover, as applicant's consultant points out, the code's requirement for Native Growth Protection Areas (NGPAs) (which is required for at least 100' around the wetland edge) has a requirement similar to the Conservancy Environment policy:

> "Native Growth Protection Areas" (NGPA) defines those areas which are to be left permanently undisturbed in a substantially natural state and in which no clearing, grading filling, building construction or placement, or road construction of any kind is allowed except the following:
>
> (1) **Crossings for underground utility lines and drainage discharge swales which utilize the shortest alignment possible and for which no alignment that would avoid such a crossing is feasible**; (Exhibit 18 at 20; SCC 30.91N.010 (emphasis added).

There is no evidence in the record that the Examiner could find indicating that the applicant made any attempt to provide an avoidance analysis in compliance with SCC 30.62.365. Indeed, the Examiner queried one of the witnesses regarding why the line could not have been run through the existing WBSC and through the Camp instead of along the hillside. No satisfactory answer was given. Whether this is shoreline jurisdiction or not is really immaterial. Any portion of that utility corridor proposed within the buffer of the Category 1 wetland violates Snohomish County critical areas regulations.

Presently, there must be another existing sewage pipe down the slope which could be upgraded should this parcel be developed in the future. Usage of that pipe instead of building a new one into this sensitive slope is a good example of how impacts to functions and values of critical areas could be avoided. The drainage may be a trickier question, but this resolution is unacceptable.

Summary of the Examiner's Decision RE:
Shoreline Substantial Development Permit Application

The Examiner concludes that the application should be denied because it requests improvements for a project that has been denied. The Examiner concludes that a separate independent basis for denial is that the application violates the following Conservancy Environment Policy:

> Utility transmission facilities shall be permitted PROVIDED that they are oriented to crossing the Conservancy Environment area, rather than running along the shoreline area.

The Examiner also concludes that this application violates the Critical Areas Regulations for the identical reason. Because the utility corridor runs along a buffer of a Category 1 wetland and a primary association area for critical threatened species for along almost all of the shoreline, it violates SCC 30.62.365 and the definition of a NGPA.

5. Appeal filed under the State Environmental Policy Act (SEPA) Regarding EIS Adequacy

The Stewards timely appealed the FEIS issued on this proposal on November 13, 2007. (Exhibit 323) An FEIS is reviewed under the rule of reason standard. (*Glasser v. City of Seattle,* 139 Wn.App. 728, 740, 162 P.3d 1134 (2007)) An EIS is sufficient if it provides a "reasonably thorough discussion of the significant aspects of the probable environmental consequences." Substantial weight is given to the agency's decision. *Id.*

A. Scoping Process Issue.

Deputy Examiner Ed Good granted an appeal of a determination of nonsignificance entered in this case. His decision stated that "[t]he appeal is granted and, accordingly, this matter is remanded to the Snohomish County SEPA Official for preparation of an environmental impact statement focused on water quality." (Exhibit 287 at 7) Mr. Good established in his findings that Port Susan Bay is polluted by multiple contaminants, principally fecal coli form. (Finding of Fact 2, Exhibit 287) Although the findings and conclusions do speak to different possible sources of that pollution, the Order focused on water quality issues generally. Issues covered by the Deputy Examiner in his findings included testimony by representatives of the County's own Surface Water Management Division as staff liaison to the Stillaguamish River Clean Water District Advisory Board, stating that the Board had "advised the County to focus on Warm Beach as part of its long-term clean-up efforts, and that the proposed development may have long-term water quality implications for Warm Beach. . . " (Finding 7) The Deputy Examiner also made a finding regarding the fact that the sewage effluent from the wastewater treatment plant flowed directly to the swimming area on the saltwater beach. (Finding 8) He made reference to a lack of an environmental impact analysis of the stormwater system. (Finding 11) Finally, he also made a finding about the problematic diking pond and the mixing of stormwater and sewage effluent into this already polluted pond that would be discharging into First Creek.

In completing the FEIS, the responsible official seized on one statement in Examiner Good's decision to limit the scope of the EIS to the stormwater issue. (Exhibit 424 at Forward-1) It states that:

> The County has limited the scope of environmental review to the stormwater issue. The area of analysis required by the County is the impact of the proposal's stormwater drainage and proposed stormwater system on the water quality of Port Susan and Warm Beach. Based on the Examiner's finding noted above the water quality analysis also focuses on wastewater treatment and water quantity associated with the proposal. This action is in accordance with WAC 197-11-408(1)(c).

Aside from inadequacy on the merits, Stewards argue that the Responsible Official committed a fundamental flaw in the EIS process by failing to conduct an independent scoping process as required under SEPA. (Exhibit 526 at 14-15) Applicant argues that the assertion is "preposterous", in that review of the Hearing Examiner decision in 2006 (Exhibit 287) leaves no possible conclusion other than the FEIS was to be limited to water quality issues. (Exhibit 527 at 3) Applicants point out that the Deputy Examiner made a finding that the Stewards did not carry their burden of proof as to other issues. *Id.*

In making his ruling on the appeal of the threshold determination, Deputy Examiner Good was constrained to rule on the issue as a Type 1 decision. (*See* SCC 30.61.300) As a Type 1 decision, the Examiner may affirm, may reverse in whole or in part, or may modify the permit or decision being appealed, or may remand the application to the applicable department for further processing. (SCC 30.71.110) In doing so, he found that the decision to issue a DNS was clearly erroneous, at least with respect to the issue of water quality impacts. The matter was remanded to the responsible official for preparation of an environmental impact statement "focused on water quality". (Exhibit 287 at 7)

In remanding the matter, however, the Deputy Examiner did not purport to take the authority away from the responsible official. The Hearing Examiner's role is simply to hear the appeal and determine whether or not the responsible official was clearly erroneous in making his or her determination. It is still up to the responsible official to exercise his/her independent judgment and perform the procedural steps required by SEPA. (*See In re the Jurisdiction of the King County Hearing Examiner,* 135 Wn. App. 312, 321-22, 144 P.3d 345 (2006)) While certainly the decision of the Hearing Examiner may inform the Determination of Significance (DS) process, the SEPA regulations and Snohomish County local SEPA code require the responsible official to determine the issues to be covered in the EIS when he/she issues the DS. (WAC 197-11-360(1)) The responsible official shall then commence scoping by circulating copies of the DS to the applicant, agencies with jurisdiction and expertise, if any, affected tribes, and to the public. (WAC 197-11-360(3))

WAC 197-11-408 and -410 govern the procedures for scoping. Apparently, the responsible official did not feel scoping was necessary given the direction from the Deputy Hearing Examiner's decision. That was unfortunate. The responsible official shirked his/her duty under the law and failed to include critical steps in the SEPA process. Under County code, the content of a draft or FEIS is determined by and is the responsibility of the responsible official. (SCC 30.61.130)

Moreover, as pointed out by appellants, the Deputy Examiner's standard on appeal was clearly erroneous. It could be that through interaction with agencies with expertise or jurisdiction, or with members of the public, the responsible official could have identified significant adverse impacts that were problematic, such as the significant land use conflicts discussed above, several years ago. SEPA is meant to be a dynamic information gathering process that allows environmental impacts and issues to be aired sooner, rather than later. The FEIS is clearly inadequate on this basis.

B. Sewage Outfall Issue.

The Stewards attack the FEIS on the issue of the location of the sewage outfall. They indicate that there is no analysis of how the relocated sewage outfall will address existing water quality concerns. As indicated at the hearing by the testimony of Kelly Glynn and others, the proposal will approximately double the quantity of sewage to be processed by the existing plant. (Testimony of Kelly Glynn, May 21, 2008 Hearing)

The FEIS devoted three pages to water quality issues related to the wastewater treatment plant. (Exhibit 424 at 42-45) The narrative describes the system, which is gravity fed, and tightlined down the bluff to the influent screening building to remove solid particles greater than 1/16 of an inch. It is then transferred to lagoons for settling for 23 days, then to wetlands where various plants, bacteria, insects, and aquatic organisms consume the effluent. The final effluent is then disinfected with chlorine, then dechlorinated. *Id. at 42-43.* There are proposed upgrades that would consist of adding membrane filtration and a UV disinfection, which would supplant the chlorine addition to the water. Daily monitoring to confirm the absence of colony-forming bacteria would establish the Class-A reuse status of the water. *Id.* at 43.

A paragraph in the FEIS addresses the issues with respect to the location of the sewage outfall. According to the FEIS, the current NPDES permit issued by the Department of Ecology required the Waste Water Treatment Plant (WWTP) to relocate the outfall pipe and cease discharge of the effluent to First Creek. The FEIS then goes into an astonishingly simplistic analysis:

> The WWTP is seeking permitting to relocate the reclaimed water pipeline approximately 1,500 feet west of First Channel. All wastewater discharge options, whether it be the current location, the proposed marsh location, Hat Slough, or the main Stillaguamish, ultimately end up in some part of, or arguably all of Port Susan. All of Port Susan is important habitat. The driving question in the upgrade of the Warm Beach WWTP was not, "Where can we find the least-important habitat to discharge sewage?" but rather "How can we create an effluent that is clean enough to have the least amount of impact, wherever it is ultimately discharged? The Camp has voluntarily chosen to pursue a level of treatment that would create an effluent that is cleaner than that of any other discharger in the watershed and that is, on most parameters, cleaner that the water body into which it would be discharged. With that effluent, a discharge location was chosen that minimizes impacts to all involved parties and the environment.

Id. at 43. That is the essence of the analysis given on the water quality effects of the sewage outfall in the FEIS and alternatives for outfall location.

The Stewards point out that the movement of the sewage outfall pipe to the end of the dike presents essentially the same environmental impacts that the location of the present outfall presents, including impacts to people, animals, plants, and fish. Mr. Jerry Kelly, one of the Stewards, is a diver and testified that he has dived around various sewage outfalls (typically in around 30 feet of water) and they create dead zones around the outfall, and the bottom is covered with algae. (Testimony of Jerry Kelly, May 21, 2008) The Stewards counter that the Class A re-use status will make water quality better than most treatment plants. (Testimony of Kelly Glynn, May 21, 2008) Indeed, that appears to be the gist of the analysis in the FEIS. (Exhibit 424 at 43)

Comments to the Draft Environmental Impact Statement (DEIS) allege that the DEIS utterly failed to take into account the impacts of the outfall to water quality or to human health. A letter from the Stillaguamish Tribe Natural Resource Department, authored by Pat Stevenson, summarizes some of the concerns that were highlighted during the hearing:

> While we have been told verbally that wastewater discharge will only occur during high tides, there is no mention of this in the draft EIS. In order to evaluate potential effects on fish habitat, we would like to see a clear description of when wastewater will be discharged, and what measures will be used to ensure that the discharges are matching the design criteria (pumps activated by tidal level, manually operated, etc.?). We are concerned that the discharge location will cause erosion of high quality marsh habitat. Will the physical habitat outside the dikes be monitored and adjustments made (if necessary) to the pumping schedule if impacts are noted? In addition, it is unclear how the increase in nutrients will impact this productive marsh, and we feel this was poorly handled in the draft EIS. How exactly will the proposed discharge location impact listed salmon habitat, and what will the Warm Beach Senior Community do to minimize any impacts?
>
> Furthermore, it is unclear how moving the proposed discharge location will address the concerns of wastewater impacts to tidal channel known as "First Creek". While we are in the process of collecting tidal drift data, all evidence (tidal channels, elevations) indicate that wastewater discharged at the proposed location will still drain into the tidal portion of "First Creek" approximately 2000 feet southwest of the current discharge location. This is still "upstream" of all but one or two houses along Warm Beach. We will know more in the next few weeks as we complete fieldwork to investigate our hypothesis. (Appendix B-1 at 3)

The response in the FEIS to the concern about wastewater discharge is that "[w]astewater discharge at high tide would be verified by review of WWTP permit application. This issue has been resolved at discussions between the Tribe and the WWTP at Warm Beach. See *Section 3.4 Environmental Impacts* in the FEIS for further discussion." (Exhibit 424 at Appendix B at 6) This reference is apparently to the analysis quoted above. The Examiner could find nothing in the 23 pages of text that explicitly referred to an agreement or discussion with the Stillaguamish Tribe.

Mr. Leon Sams, one of Stewards, provided evidence concerning the tidal drift data study performed by the Tribe. They used apples and oranges. They took one set of fruit and set it free from the outfall at the dike pond and down First Creek. The other type was taken to Second Creek at the location of the proposed new sewage outfall and set it free. At all but the very highest tide, both fruits washed up on Warm Beach at the northern edge of Beach Drive, indicating the water of both channels drained out right into the beach recreational area, as

indicated by the Tribe above. (Testimony of Leon Sams, May 20, 2008; CD of Exhibits 507-510 (Leon-Dike Pond-Slide 9))

The Stewards also provided evidence of pollution in Port Susan Bay, of the numerous water quality violations by the existing Warm Beach Wastewater Treatment Plant, and of the use of the swimming beach in the area where the effluent will be carried down the channel. (Exhibits 507-510)

In rebuttal, John Cherry, engineer for the applicant, testified that the applicant did a study with ping pong balls and did not find the same results: In fact, they had gone to deeper waters. He also raised an issue regarding whether the Tribe had launched the fruit from the proper site when it purported to do so from the sewage outfall site. In response to the ping pong study, Mr. Sams indicated he saw no ping pong balls on the beach and postulated that they were so light that they had simply blown away.

Mr. Kelly Glynn testified that the plan was that "under normal conditions" the wastewater treatment plant would not discharge into Second Channel in the summer months, which he defined to be from May to October. (Testimony of Kelly Glynn, May 21, 2008) Instead, the effluent will be used as irrigation water for nearby farm fields. Discharge into Second Channel could occur if the irrigation system was not working or there was some other malfunction in the system. *Id.* The FEIS itself indicates that the effluent will end up back in the same beach bathing area it was in when it was discharged down First Creek. (Exhibit 424 at 43) The FEIS does not indicate that there will not be any discharge from May to October, nor does it indicate that discharge will only occur when the tide is a foot above the pipe and outgoing, as was testified to by Mr. Glynn. Finally, the evidence showed that there was no environmental analysis performed of various alternatives for the sewage outfall. The outfall into a deeper portion of Port Susan Bay was eliminated through a back of the envelope analysis of expense and difficulty of getting a pipe out there. No analysis of the corresponding environmental benefit was performed. (Testimony of Kelly Glynn, May 21, 2008)

Examiner's Conclusion with Respect to the Sewage Outfall Issues

The Stewards claim that the FEIS does not do an adequate job of assessing the impacts of the sewage outfall. The Examiner agrees. This project will add at least 30,000 gallons or at least ½ of the operating capacity of the plant under the current permit, and the environmental effects of this addition of sewage should have been analyzed under SEPA. Apparently, SEPA has not been done on this project, or at least no environmental documents have been adopted to analyze this proposal. While the upgrades to the sewage outfall were apparently done under a different set of permits, the Deputy Examiner found that there were significant impacts resulting from adding effluent to this delicate estuarine environment from the proposed 100-unit development. The issues are legion -- not only swimming in the summer time, but how the release of the effluent may affect salmon and other sensitive species during particularly vulnerable life cycles, how the release of effluent may scour the habitat, how other alternative locations may have more environmental benefits and less environmental impacts, or vice versa, and how emergency conditions might affect water quality. While some were discussed in testimony, they were not discussed in the FEIS, and that is where the evidence should have been presented.

During the hearing, PDS staff indicated to the Examiner that this issue should not be considered as part of this appeal. The Examiner disagrees with this conclusion. First, it is uncontested that the effluent from the development will impact the estuary. In addition, the responsible official did choose to address the issue of the sewage outfall in the FEIS -- "Based on the Examiner's

finding noted above the water quality analysis also focuses on wastewater treatment and water quantity associated with the proposal." (Exhibit 424 at Forward-1) As the Examiner pointed out before, the responsible official is responsible for the content of a draft or final EIS. After including it in the FEIS, the department cannot now argue it shouldn't be there. It is clear that the attempt to analyze these impacts in the FEIS on page 43 is utterly insufficient to provide a "reasonably thorough discussion of the significant aspects of the probable environmental consequences." This FEIS does not even begin to do so. It does not address the impacts; nor does it address the alternatives or the mitigation. Finally, the Supplemental Staff Report even recommended that the project be conditioned to require that the relocation of the sewage outfall be completed and approved by the Department of Ecology (DOE) prior to the issuance of any building permits. The FEIS should be remanded to require the department to complete the EIS to analyze the environmental impacts of the sewage outfall.

C. Water Quality Issues Related to Stormwater Impacts.

Stewards claim two types of stormwater impacts are not adequately addressed by the EIS: 1) discharges directly from the detention ponds during larger storms and 2) discharges from the dike pond at other times.

(1) Background on the Drainage System

John Cherry, the engineer for the project, described the drainage proposed for the project. Water drains to the west off the 20-acre parcel, with about a 10% grade on average. Beyond the boundary of the project site is a single-family lot adjacent to Beach Drive. On the other side of Beach Drive is another lot that is on the bluff overlooking Puget Sound. The surface water and ground water that drains off the hillside naturally drains into the backyards of the people on the hillside under the natural hydraulic regime. (Testimony of John Cherry, May 20, 2008) There is also an existing large drainfield on the subject property from the Senior Center that contributes to the surface and ground water problems on the hillside. *Id.*

As part of the project, the applicant determined to make these problems better. They designed a relatively conventional catch and pipe system that will pick up all of the surface water that is not draining into the on-site stream, and bring it down to two ponds into the site. Because the applicant determined the site is comprised of glacial till soil that is totally impervious, they will be digging terraces and intercepting all the groundwater and bringing it all down the hillside to the detention ponds. The drainage from the existing Senior Community will be put into the pond as well. It will then run through ditches down Beach Drive and through some undersized pipes on private property and into some conveyance pipes for a distance of ¾ of a mile to a dike pond which ultimately empties out into First Creek through a tide gate. *Id.* The applicant feels that because they are taking all the water out of this neighborhood, there is no way it could not make this situation better for the neighborhood. *Id.*

The applicant believes that most of the site is impervious till; however, they are planning to have a geotechnical engineer on site during construction to look for sandy pockets of soil. *Id.* Mr. Cherry testified that if they find these pockets, they will install a liner in the pond, made of PVC material. Maintenance would be performed by existing WBSC staff. *Id.* He indicated that the ponds and drainage system would be constructed before any of the rest of the site is cleared. Finally, there is a French drain that will be installed as a fail safe as a last line of defense, in case some water somehow gets past the drainage system. *Id.*

(2) Failure to Raise Issue of Overflow of Detention Ponds.
Applicant claims that the first issue, regarding overflow or failure of detention ponds, was not properly raised in the Stewards' appeal of the FEIS. Exhibit 527 at 10. The Examiner disagrees. In paragraph 22 of the appeal statement, Stewards state:

> There is considerable concern by downstream residents that the stormwater detention basins may fail, with perhaps loss of life and at minimum flooding and damage to downstream properties. Although many questions were raised by these residents in response to the draft EIS, no new studies or information has been provided in the FEIS to address these issues. (Exhibit 323 at 7)

The Examiner finds that this statement adequately raises the issue of overflow/failure of the detention pond.

(3) Issue of Imperviousness of Glacial Till. Much evidence was entered into the record regarding drainage and geotechnical information relating to drainage. Two geotechnical experts, Theodore Hammer for the applicants (Resume at Exhibit 214), and Ralph Isaacs (Resume at Exhibit 483) for the appellant, testified. In addition, Randolph Sleight, Chief Engineer for PDS also testified. Chief Engineer Sleight has worked in this capacity for over 20 years and has a great deal of local expertise diagnosing slope failure and geological conditions in the Warm Beach area and vicinity.

Mr. Hammer did boring and test pits at the site. His general conclusion, as noted in his report dated January 17, 2005 at 4, is that:

> Based on our geotechnical and engineering investigation, we conclude that the site contains areas where infiltration of stormwater will be feasible and the location of proposed detention facilities (west side) **will be sited within relatively impervious glacial till soils**. Consequently, lining of the detention pond will not be necessary. (Exhibit 233 (emphasis added).

Ralph Isaacs, testifying for the appellants, determined that the test pit results reported by Mr. Hammer indicated weathered till, which is not impervious, but is rather fractured, allowing water to seep through cracks and run downhill. He testified that because 33%-39% of the site will be impervious surface, and the trees will be removed from virtually the rest of the site, that there will be the same amount of water coming down the hillside as there is now, in addition to the amount of water that there is going into the detention pond. (Testimony of Ralph Isaacs, May 21, 2008) In Mr. Isaacs's opinion, it is essential to line the detention pond; otherwise it will leak, and cause flooding of the residents' yards and homes below the ponds. The ponds should have an additional cut off drain below the pond to assure that the line itself is not leaking. In Mr. Isaacs's opinion, the applicant should use geophysics techniques to determine the location of the till. This is a specialized analysis that is confirmed with ground truthing that ranges between $2000 and $5000 in cost. Mr. Isaacs recommends that this analysis be done before the construction phase. *Id.*

When Randolph Sleight testified, he confirmed that in his opinion, the till was not consistently impermeable, but rather was more like Swiss cheese, with holes of sand layers. He testified that he had seen seepage on the bluffs, at three feet down and at 20 feet down. Therefore, he indicated that a liner with welded seams should be put in the detention pond if further tests indicated that impervious till did not underlie the pond area. (Testimony of Randolph Sleight, May 21, 2008)

Examiner's Conclusions as to Issue (C)(3):
This issue should have been thoroughly examined as a part of this proposal for environmental as well as public health and safety reasons. Development on this fragile bluff area and changes to the surface water flow regime need to be carefully analyzed before the first tree is cut. Although there is no positive proof, there is substantial circumstantial proof that the cutting of trees on the subject property to provide a view corridor may have caused flooding directly west across the street on Beach Drive at the Rex family home in December, 2004. Apparently, WBSC "took care" of the problem, although admitting no liability for the flooding. (Testimony of Donna Rex; May 21, 2008) Two of the three experts testifying in this case opined that the till underlying this site is weathered or fractured, meaning seepage of drainage would be possible down below the surface layer. If that is the case, the applicant's predictions of capturing all the volume of runoff off the site is not an accurate picture of what will likely occur should the site be developed.

This issue is not one that should remain in limbo or is minor enough to simply "be taken care of" at construction phase. The environmental consequences of a miscalculation of this nature could be devastating to the homeowners west of this project. The applicant's studies should be subject to scrutiny and public review before the trees are cut, not after. This issue, including whether the detention pond should be lined, should have been thoroughly analyzed in the EIS and been a part of development review prior to public hearing. Failure to do so was in error and the EIS should be remanded for further technical work on this issue.

(4) The Issue of Adequacy of the Detention Ponds. The "overflow" issue is whether or not the drainage system is sized sufficiently to handle the flow that will result from the proposed development. The development, vested on December 8, 2003, is sized under the DOE 1992 Stormwater Manual. There is no dispute that the on-site system meets Snohomish County's existing development regulations.

The FEIS discloses the post-development runoff rates for stormwater from the project site into the detention ponds for the 2-year, 10-year, and 100-year storm events. It does not provide any discussion of any other aspect of the drainage system except for the dike pond. (Exhibit 424 at pp.47-48) In the "Summary of Impacts" section, the FEIS states:

> It is anticipated that the diversion of stormwater from the SoundView hillside to the detention/treatment ponds and the siphon system would reduce ditch flows on Beach Drive and ease the strain on the undersized private drainage system downstream. It may also have a beneficial impact on the effects of groundwater on the drain fields downhill. (*Id.* at 50.)

The Examiner could find no examination of the impacts of the drainage system as it leaves the site and enters the County ditch, or concerning the adequacy of the sizing of the detention ponds.

As testified to by Mr. Sleight, DOE has promulgated a new 2005 Stormwater Manual. The 1992 Stormwater Manual (equivalent) is adopted in the County's drainage regulations as the standards applicant must meet for drainage system requirements. (30.63A.210) As Mr. Sleight testified, the 2005 Manual recognizes the potential for back-to-back storm events, and therefore requires much greater sized detention ponds, because of the potential for overwhelming of the smaller detention ponds in this type of storm event, which happens every few years in Western Washington. Mr. Sleight also testified that DOE expressly requested that the applicant use the 2005 Manual in this case but the applicant declined. Mr. Sleight agreed that this pond was oversized for purposes of treatment of stormwater, but undersized for purposes of detention. *Id.*

Mr. Sleight testified that the drainage is designed to go from the detention pond to a wetland in the northwest corner of the subject property and it will then follow the natural path it follows today—to the County drainage ditch, and down to a drainage pipe on private property which even the applicant admits is undersized for the amount of stormwater that will be going through the pipe. (Testimony of John Cherry, May 2008) Apparently, the property owner refuses to allow the SoundView development to replace the pipe with a larger one. *Id.* Although a 100-year storm event can be handled by the ditch, no analysis was done in the EIS of the consequences of a back-to-back storm event, or larger storm such as those occasionally experienced in Western Washington of a larger magnitude than the 100-year storm event. (Testimony of Randolph Sleight, May 21, 2008) Mr. Sleight indicated that the drainage would likely do what it does today: overtop the ditch and run across the road and toward the homes on the west (bluff) side of the road and potentially cause flooding of those homes, as it has done in the past.

Examiner's Conclusion as to C(4):

This issue presents a difficult one. The 2005 Department of Ecology Manual provides science and accompanying data that will likely show the need for larger sized detention ponds for new development, yet Snohomish County's development regulations have not yet caught up with the 2005 manual. When this type of issue is brought up under SEPA, it is difficult to ignore that science, yet even under SEPA, vesting occurs at the date of application. (*See Adams v. Thurston County,* 70 Wn. App. 471, 481, 855 P.2d 284 (1993)) However, just because an adopted mitigation policy may not be available, is not a reason to ignore the impacts. The lack of adopted mitigation does not mean that the impact will not occur. In this case, the responsible official should not have merely parroted the existing development regulations, but should have acknowledged there could be flooding problems on Beach Drive, as did Mr. Sleight in cross examination, because of an undersized detention pond and an undersized conveyance pipe.

The conveyance system, with its acknowledged "undersized" pipe, appears to violate the County drainage code. SCC 30.63A.210(2)(a) states that:

> Conveyance systems shall accommodate the peak discharge of a 100-year, 24-hour design storm based on post-development site conditions.

Although Mr. Sleight testified that the drainage ditch along Beach Drive can accommodate the 100-year storm event, the repeated reference to the "undersized" pipe leads the Examiner to believe it cannot accommodate the 100-year storm as required by the code. Why this is approvable by PDS despite a history of flooding in even the pre-development condition is beyond the Examiner's comprehension.

The fact is there have been previously documented flooding problems in this section of the drainage ditch and Beach Drive. To simply fail to analyze the problem and blithely assume the development will make the situation better without specific knowledge that the system will not cause flooding and that it does meet regulations is a wholly inadequate response. The extent of possible flooding and the environmental consequences should have been studied as a part of the FEIS. The discussion in the FEIS was no more than a targeted drainage report. The Examiner finds that the FEIS is inadequate on the overflow issue and should be remanded on this issue.

(5) The Issue of the Dike Pond Discharges.

Stewards allege that the FEIS failed to adequately address water quality impacts associated with stormwater discharges from the dike pond into Port Susan, including heavy metals and other deleterious materials typically found in runoff from parking lots and roads. (Exhibit 526 at 20-21) Mr. Sams provided extensive testimony regarding the fact that the dike pond is already extremely polluted, and that DNA studies have indicated that the fecal coli forms in the dike pond are from horse manure, not cow manure, as many had assumed. (Testimony of Leon Sams, May 21, 2008) Mr. Sams indicated that the Warm Beach Camp Facility is the only major horse owner in the area, owning somewhere in the neighborhood of 80 to 100 horses. Although the dike pond presently is the location of the sewage outfall, as well as numerous other pollutants, it discharges into First Creek directly into an area where a canoe dock is located for over 20 canoes, and where children routinely play in the water in the summer, putting mud all over themselves, as testified by many mothers. *Id.* Mr. Sams stated that the community was very disappointed that the WBSC decided to put stormwater runoff in the dike pond.

The FEIS states:

> Impacts on Warm Beach Dike Pond from treated stormwater runoff would include increased peak volumes of the pond by approximately 1.6 percent from the stormwater system. Water would be treated in the two detention/treatment ponds on the proposed site. Temperature and dissolved oxygen alterations would be mitigated for in the design of the two detention/treatment ponds and vegetation planted around them. All design parameters consider water temperature, water quality and stormwater erosion control the highest priority.
>
> Although unlikely due to small volumes of water added to the Warm Beach Dike Pond from the proposed project, impacts to the water quality of Puget Sound from the proposal could include changes in temperature, sedimentation and chemical contamination. Point source pollution is not expected from the development. The volume of stormwater discharge as compared to the volume of the receiving body, Puget Sound, would have an insignificant effect on the temperature. Best Management Practices (BMPs) would be used during construction to minimize/avoid sedimentation and erosion. Road and roof runoff would be collected from

> the upstream development and subjected to water quality improvement prior to discharge. Therefore, non-point pollution is not expected from the proposed project. (Exhibit 424 at 49-50)

No empirical studies of any kind accompany these statements in the FEIS. The applicant provided testimony from Dr. Gary Minton (resume at Exhibit 215), who opined that stormwater conveyed from the stormwater ponds will meet state water quality standards. (Exhibit 527 at 7) Mr. Sleight also testified that the detention ponds would effectively settle out the heavy metals and other contaminants. (Testimony of Randolph Sleight, May 21, 2008)

On the issue of temperature, Dr. Minton testified that additional studies would not be useful, and that the dike pond would probably be warmer than the stormwater discharge. (Exhibit 527 at 7) He also noted that temperature studies in the Thornton Creek watershed in Seattle during the summer months had shown that storm water warmer than Thornton Creek has caused only a minor increase in temperature, and within five hours, the temperatures were back to normal. *Id.* Mr. Sleight also testified that some cooling of the stormwater would also likely be provided by the stormwater conveyance system buried in the ground. (Testimony of Randolph Sleight, May 21, 2008)

Finally, the evidence indicated that the dike pond discharges into First Creek or First Channel, which is critical Chinook rearing habitat. (*See* Exhibit 424, Appendix B-1 Comment Letter #1 at p.3; *see also* Testimony of Frank Scherf, May 21, 2008)

Examiner's Conclusion as to C(5): The information on this issue once again showed the same lack of empirical analysis characterized by all the other issues. While the applicant did bring in a noted expert on the issue to testify, his testimony was not helpful in that he dismissed in a conclusory fashion any of the water quality issues without providing anything other than bare conclusions. In addition, virtually all the opinions offered were mere speculation.

The core of the requirement for an FEIS was for a discussion of water quality impacts to Port Susan from drainage as well as from the sewage outfall. The failure to have anything more than mere speculation in the record unsubstantiated by empirical studies of any kind does not meet the test of EIS adequacy. The EIS must be remanded on this basis.

D. Failure to Include Alternatives in the FEIS.

Although not an extensive part of their presentation, Stewards raised the issue that the FEIS fails to provide reasonable project alternatives. Mr. Sams provided testimony supporting that claim. (Testimony of Leon Sams, May 21, 2008) The appeal document cites to WAC 197-11-440(5)(b), which states that:

> Reasonable alternatives shall include actions that could feasibly attain or approximate a proposal's objectives, but at a lower environmental cost or decreased level of environmental degradation.

The FEIS discusses two alternatives: the No-Action Alternative and the Forested Wetland Alternative. Obviously, the No-Action Alternative would propose no development would occur on site. In the Forested Wetland Alternative, the development would be the same but the discharge of treated stormwater would be accomplished in a shore side forested wetland at the bottom of a steep, wooded slope. *See* Exhibit 424 at p. 21. This wetland is a Category 1 wetland.

Examiner's Conclusion as to D: The Examiner agrees with Stewards that the alternatives in the FEIS are wholly inadequate to meet the rule of reason standard. The alternatives are intended to provide an illumination of the impacts of the proposal:

> Alternatives are one of the basic building blocks of an EIS. They present options in a meaningful way for decision-makers. The EIS examines all areas of probable significant adverse impact associated with the various alternatives including the no-action alternative and the proposal. (SEPA Handbook at 45)

The Forested Wetland Alternative offered here is in direct violation of the drainage code. (*See* SCC 30.63A.240(2)) It is not permissible to discharge storm water runoff into a Category 1 wetland. Therefore, this alternative could not be "feasibly" attained, as required by WAC 197-11- 440(5)(b) and does nothing but make a mockery of the entire EIS process. The FEIS is wholly inadequate in its discussion of reasonable alternatives to the proposal.

Summary of the Examiner's Decision RE:
SEPA Appeal

The Examiner concludes that the Stewards' appeal should be granted. The Stewards have met their burden to show that the EIS is inadequate with respect to:

(A) Scoping Issue -The FEIS is inadequate because the Responsible Official failed to conduct a scoping process as required by WAC 197-11-408 and -410.
(B) Sewage Outfall Issue -The FEIS is inadequate because it fails to analyze the environmental impacts of the sewage outfall.
(C) Water Quality Issues
  (1) Issue of Imperviousness of Glacial Till - The FEIS is inadequate because it fails to analyze the imperviousness of the glacial till and the environmental consequences of how well the site drains.
  (2) Overflow Issue - The extent of possible flooding and the environmental consequences should have been studied as a part of the FEIS. The discussion in the FEIS was no more than a targeted drainage report. The Examiner concludes that the FEIS is inadequate on the overflow issue.
  (3) Water Quality Impacts to Port Susan -The FEIS is inadequate in addressing water quality impacts to Port Susan.
(D) Discussion of Alternatives-The FEIS is wholly inadequate in its discussion of reasonable alternatives to the proposal.

6. Conditional Use Permit Issue

The request for revision to the CUP was premised upon approval of the PRD Official Site Plan and the SSDP. Because both of those permits are denied, the Examiner denies the request for revision to the CUP.

CONCLUSIONS OF LAW

1. The Examiner has original jurisdiction over PRD approvals, revisions to CUP approvals, and SSDP approvals pursuant to Chapter 30.72 SCC and Chapter 2.02 SCC.

2 The Examiner has jurisdiction over EIS adequacy appeals combined with Type 2 decisions pursuant to SCC 30.61.300(4).

3. The Examiner concludes that the applicant has failed to meet criteria (b) and (c) of Policy LU 6.A.3. The issue of compliance with the density provision of the policy is reserved for discussion with the PRD regulation requirements; discussion of environmental impacts is reserved for the SEPA appeal portion of this decision.

4. The Examiner concludes that the PRD application must be denied because the application is on three parcels which combined, create a noncontiguous "site" in violation of the code. This leads to other deficiencies, specifically: (1) density is too high on Parcels 2-008 and 2-009 (the 20-acre piece) at five dwelling units per acre, in violation of SCC 30.42B.040 and Policy LU 6.A.3 (formerly Policy LU 6.A.7); (2) other calculations, such as open space, etc. are unknown, but likely all in error because they are premised on a fundamentally flawed application that packs all development on 20 acres and impermissibly places all open space on another parcel. The Examiner does conclude that Policy LU 6.A.3 (formerly Policy LU 6.A.7) allows for age restricted housing at the WBSC, as the Policy specifically identified rental housing for seniors, which may trump the provisions of the PRD code. (The Examiner makes no conclusion with respect to the type of development that may represent, given the unique rural surroundings and policy provisions applicable to WBSC.)

5. The Examiner concludes that the SSDP application should be denied because it requests improvements for a project that has been denied. The Examiner concludes that a separate independent basis for denial is that the application violates the following Conservancy Environment Policy:

> Utility transmission facilities shall be permitted PROVIDED that they are oriented to crossing the Conservancy Environment area, rather than running along the shoreline area.

The Examiner also concludes that this application violates the critical areas regulations for the identical reason. Because the utility corridor runs along a buffer of a Category 1 wetland and a primary association area for critical threatened species along almost the entire length of the shoreline, it violates SCC 30.62.365 and the definition of a NGPA.

6. The Examiner concludes that the Stewards' appeal of FEIS adequacy should be granted. The Stewards have met their burden to show that the EIS is inadequate with respect to:

(A) Scoping Issue --The FEIS is inadequate because the Responsible Official failed to conduct a scoping process as required by WAC 197-11-408 and -410.

(B) Sewage Outfall Issue -- The FEIS is inadequate because it fails to analyze the environmental impacts of the sewage outfall.

(C) Water Quality Issues

(1) Issue of Imperviousness of Glacial Till -- The FEIS is inadequate because it fails to analyze the imperviousness of the glacial till and the environmental consequences of how well the site drains.

(2) Overflow Issue — The extent of possible flooding and the environmental consequences should have been studied as a part of the FEIS. The discussion in the FEIS was no more than a targeted drainage report. The Examiner concludes that the FEIS is inadequate on the overflow issue.

(3) Water Quality Impacts to Port Susan—The FEIS is inadequate in addressing water quality impacts to Port Susan.

(D) Discussion of Alternatives-The FEIS is wholly inadequate in its discussion of reasonable alternatives to the proposal.

7. The proposal may be denied without preparation of a new EIS pursuant to SCC 30.61.220. The Examiner's decision has provided written findings and conclusions identifying substantial conflict of the proposal with adopted plans, ordinances, regulations and laws, and preparation of a new EIS at this point would only add needless expense. Under SCC 30.61.220(3), the Examiner may deny the application without completion of the SEPA process.

8. Any conclusion in this decision, which should be deemed a finding of fact, is hereby adopted as such and vice versa.

DECISION

Based on the findings of fact and conclusions of law entered above, the decision of the Hearing Examiner on the application is as follows:

The request for a **MAJOR REVISION** to a **CONDITIONAL USE PERMIT**, a **SHORELINE SUBSTANTIAL DEVELOPMENT PERMIT**, and a **PLANNED RESIDENTIAL DEVELOPMENT OFFICIAL SITE PLAN** for a 100-unit development is **DENIED WITH PREJUDICE**. The SEPA appeal is **GRANTED**, but given the fact that the project is denied, no preparation of a new EIS is necessary. SCC 30.61.220.

Decision issued this 7th day of August, 2008.

_____

Barbara Dykes, Hearing Examiner

EXPLANATION OF RECONSIDERATION AND APPEAL PROCEDURES

The decision of the Hearing Examiner is final and conclusive with right of appeal to the County Council. However, reconsideration by the Examiner may also be sought by one or more parties of record. The following paragraphs summarize the reconsideration and appeal processes. For more information about reconsideration and appeal procedures, please see Chapter 30.72 SCC and the respective Examiner and Council Rules of Procedure.

Reconsideration

Any party of record may request reconsideration by the Examiner. A petition for reconsideration must be filed in writing with the Office of the Hearing Examiner, 2nd Floor, County Administration-East Building, 3000 Rockefeller Avenue, Everett, Washington, (Mailing Address: M/S #405, 3000 Rockefeller Avenue, Everett WA 98201) on or before **AUGUST 18, 2008**. There is no fee for filing a petition for reconsideration. **"The petitioner for reconsideration shall mail or otherwise provide a copy of the petition for reconsideration to all parties of record on the date of filing." [SCC 30.72.065]**

A petition for reconsideration does not have to be in a special form but must: contain the name, mailing address and daytime telephone number of the petitioner, together with the signature of the petitioner or of the petitioner's attorney, if any; identify the specific findings, conclusions, actions and/or conditions for which reconsideration is requested; state the relief requested; and, where applicable, identify the specific nature of any newly discovered evidence and/or changes proposed by the applicant.

The grounds for seeking reconsideration are limited to the following:

(a) The Hearing Examiner exceeded the Hearing Examiner's jurisdiction;
(b) The Hearing Examiner failed to follow the applicable procedure in reaching the Hearing Examiner's decision;
(c) The Hearing Examiner committed an error of law;
(d) The Hearing Examiner's findings, conclusions and/or conditions are not supported by the record;
(e) New evidence which could not reasonably have been produced and which is material to the decision is discovered; or
(f) The applicant proposed changes to the application in response to deficiencies identified in the decision.

Petitions for reconsideration will be processed and considered by the Hearing Examiner pursuant to the provisions of SCC 30.72.065. Please include the County file number in any correspondence regarding this case.

Appeal

An appeal to the County Council may be filed by any aggrieved party of record. Where the reconsideration process of SCC 30.72.065 has been invoked, no appeal may be filed until the reconsideration petition has been disposed of by the hearing examiner. An aggrieved party need not file a petition for reconsideration but may file an appeal directly to the County Council. If a petition for reconsideration is filed, issues subsequently raised by that party on appeal to the County Council shall be limited to those issues raised in the petition for reconsideration. Appeals shall be addressed to the Snohomish County Council but shall be filed in writing with the Department of Planning and Development Services, 2nd Floor, County Administration-East Building, 3000 Rockefeller Avenue, Everett, Washington (Mailing address: M/S #604, 3000 Rockefeller Avenue, Everett, WA 98201) on or before **AUGUST 21, 2008** and shall be accompanied by a filing fee in the amount of five hundred dollars ($500.00); PROVIDED, that the filing fee shall not be charged to a department of the County or to other than the first appellant; and PROVIDED FURTHER, that the filing fee shall be refunded in any case where an appeal is dismissed without hearing because of untimely filing, lack of standing, lack of jurisdiction or other procedural defect. [SCC 30.72.070]

An appeal must contain the following items in order to be complete: a detailed statement of the grounds for appeal; a detailed statement of the facts upon which the appeal is based, including citations to specific Hearing Examiner findings, conclusions, exhibits or oral testimony; written arguments in support of the appeal; the name, mailing address and daytime telephone number of each appellant, together with the signature of at least one of the appellants or of the attorney for the appellant(s), if any; the name, mailing address, daytime telephone number and signature of the appellant's agent or representative, if any; and the required filing fee.

The grounds for filing an appeal shall be limited to the following:

(a) The decision exceeded the Hearing Examiner's jurisdiction;
(b) The Hearing Examiner failed to follow the applicable procedure in reaching his decision;
(c) The Hearing Examiner committed an error of law; or
(d) The Hearing Examiner's findings, conclusions and/or conditions are not supported by substantial evidence in the record. [SCC 30.72.080]

Appeals will be processed and considered by the County Council pursuant to the provisions of Chapter 30.72 SCC. Please include the County file number in any correspondence regarding the case.

Staff Distribution:

Department of Planning and Development Services: Darryl Eastin

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." A copy of this Decision is being provided to the Snohomish County Assessor as required by RCW 36.70B.130.