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BEFORE THE

SNOHOMISH COUNTY HEARING EXAMINER

DECISION of the DEPUTY HEARING EXAMINER

In the Matter of the Application of	)	
	)	**FILE NO. 05 122348 SD**
HIGHBRIDGE ROAD, LLC	)	
	)	
34-lot Rural Cluster Subdivision (RCS) on 84.9 acres	)	

DATE OF DECISION: March 14, 2008

PROJECT NAME: *Highbridge Estates*

DECISION (SUMMARY): The proposed 34-lot preliminary plat is **DENIED WITHOUT PREJUDICE,** the appeal from the SEPA threshold determination is **GRANTED**, and the threshold determination is **VACATED** for issuance of a new threshold determination after an application has been submitted making adequate provision for potable water.

BASIC INFORMATION

GENERAL LOCATION: The property is located on both sides of High Bridge Road, ½ mile east of its intersection with Ricci Road, about two miles southwest of the City of Monroe.

ACREAGE: 84.9 acres

NUMBER OF LOTS: 34

AVERAGE LOT SIZE: 46,626 square feet

MINIMUM LOT SIZE: 43,565 square feet

DENSITY: .42 du/ac (gross)

ZONING: R-5

COMPREHENSIVE PLAN DESIGNATION:

General Policy Plan Designation: Rural Residential (1 du/5 acres – Basic)

UTILITIES:

Water:	Individual wells
Sewer:	Individual septic

INTRODUCTION

The applicant filed the Revised Master Application on April 12, 2006 and resubmitted on June 18, 2007. (Exhibits 1 and 57)

The Department of Planning and Development Services (PDS) gave perfected public notice of the open record hearing as required by the county code. (Exhibits 23, 24, 25, 199 and 200)

A SEPA threshold determination of non-significance was issued on February 27, 2007 (Exhibit 22) and re-issued after a resubmitted application had been filed in June 2007. An appeal from that SEPA determination was timely filed by Kathleen J. Gamble. (Exhibit 69).

PUBLIC HEARING

The public hearing commenced on October 23, 2007, at which hearing the Examiner determined that failure of notice required continuing the matter for requisite notice. After perfected notice, the matter was heard on January 10, 15 and 25, 2008 for a total of approximately 13 hours. Witnesses were sworn, testimony was presented, and exhibits were entered at the hearings. The record was held open by agreement of the principal parties through February 4, 2008 for submittal of post-hearing briefs and was extended by agreement of the principal parties to February 11, 2007 because the applicant's attorney was stricken with the flu. The flu struck the undersigned Examiner twice during February for a week each time, adding to the delayed issuance of this decision.

1. The Examiner announced that he had read the PDS staff report, reviewed the file and viewed the area and therefore was generally apprised of the particular request involved.

2. The applicant, Highbridge Road, LLC ("Highbridge"), was represented by its attorney, Patrick J. Mullaney. Snohomish County was represented by Robert Pemberton of the Department of Planning and Development Services. Kathleen J. Gamble represented herself as appellant and as spokesperson for other appellants and neighbors, assisted by Laura Hartman and others. Documents expressing public comments were submitted by John Anderson and Susan Sparks, Judy Anderson, Margaret and Richard Anderson, Joe Balint, Tom Shelley Baunsgard, Keith Berry, Mark Bunje and Carol Gessell, Cherie and Robert Clayton, Beth Cachat, Jean Coleman, Kathleen Gamble, Les Gilbert, Tony Harlich, J. L. Jones, Karen McFadden, Doyle Pearson, Dan and Wendy Reddick, Michael and Janet Ruth, Earl and Virginia Senger, Maxine Tuerk, F. Donald and Ella S. Walker, Wayne Wollard.

NOTE: For a complete record, an electronic recording of this hearing is available in the Office of the Hearing Examiner. 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.

FINDINGS, CONCLUSIONS AND DECISION

FINDINGS OF FACT

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

1. The applicant, Highbridge Road, LLC, filed an application for approval of a preliminary plat as a 34-lot rural cluster subdivision in R-5 zoning on approximately 85 acres, of which approximately 45 acres are to remain as open space. Individual on-site sewage disposal systems and private wells are proposed. The site abuts the south side of the Snoqualmie River in a Conservancy Shoreline environment: thus, a Shoreline Substantial Development Permit will be required for a part of the plat's storm drainage and for some of the proposed, private potable water wells. No lot would be smaller than approximately one acre in size and at least one lot will be as large as 66,042 square feet.

2. There is opposition to the proposal among vicinity residents. Representative of the breadth of the concerns is a list (in an appeal from the SEPA threshold determination) of 10 issues assertedly requiring a SEPA threshold determination of significance. Those issues include:

> "*Project has been approved with 34 individual wells and no certification of adequate potable water availability…"*

3. That issue is pivotal to the decision before the Hearing Examiner. Several options for procuring potable water are discussed in this record. Substantial time may have to pass before the viability of any of the options is known with substantial certainty. Therefore, the layout of the plat cannot be specified at this time. For example, if the plat is phased, it is unknowable now whether the phasing would adhere to now-extant plat drawings because the 100-foot diameter well protection circles may be altered or eliminated depending upon the number and size of lots proposed in each phase and the source of potable water for that phase. Otherwise stated, there is no basis for rendering a decision on the various elements required of a preliminary plat until the potable water issue is fully and finally addressed.

4. On December 4, 2007, the Department of Ecology had written (Exhibit 75) to the County's Bob Pemberton (the Highbridge Estates project manager), stating in part:

> *"We do not believe based on the information before us that a proper finding of potable water supply can be made for the Highbridge Estates project and the SEPA checklist is deficient for failing to so disclose."*

5. The Department of Ecology letter points out (1) that the environmental checklist shows that each of Highbridge Estates' 34 lots is to be served by an individual well, (2) that the 34 lots are in proximity, under common ownership, and share common roads and utility infrastructure, (3) consequently, that RCW 90.44.050 requires that all 34 lots be treated as one group use, and (4) that the group use is entitled to only 5,000 gallons of water per day (approximately enough water for 11 to14 lots) under the ground water exemption based on *State of Washington Department of Ecology v. Campbell & Gwinn et al.,* 146 Wn.2d 1, 43 P.3d 4 (2002). The Examiner notes that that Washington State Supreme Court decision is more recent by three years than the Washington Court of Appeals case of *Haas v. Clark County,* 93 Wash.App 1066 (1999), which arguably held that provision for potable water could be delayed until final plat stage.

6. The Department of Ecology letter notes that Snohomish County is required by RCW 58.17.110 to deny a subdivision unless written findings are made that the subdivision makes appropriate provision for potable water supply and that the public interest will be served. The Examiner notes that all references beginning with RCW 58.17.070 through .110 are to the preliminary plat. The final plat is addressed only in subsequent sections. Thus, RCW 58.17 requires that appropriate provision of potable water must be shown at the preliminary plat stage.

7. There is a noteworthy correlation between the Department of Ecology position expressed in the above-refenced letter of December 4, 2007, and the position on the same issue stated by the Snohomish County Hearing Examiner in a decision issued December 24, 2007 in the matter of a 21-lot preliminary plat known as *Aliea* (File No. 06-128845). There, the Examiner concluded as a matter of law that in *Campbell & Gwinn*:

> "*The Court explicitly rejected the argument that determination of application of the exemption could be delayed until building permit,* ***thereby allowing the question of water availability to bypass preliminary plat approval***. (Emphasis supplied.)

The above-quoted Hearing Examiner's language in *Aliea* is substantially restated more recently in the decisions issued March 11, 2008 in the companion cases of *Highlands Ranch North* and *Highlands Ranch South* (File Nos. 06-102833, 06-102828, respectively).

8. On December 30, 2007, the applicant had been advised by letter of its attorneys (Exhibit 117) of "possible sources" of "some or all" of the potable water needed to serve the Highbridge development. The applicant proposed at the January 15, 2008 hearing to pursue those options.

9. Tom Rowe, Division Manager in the County's Department of Planning & Development Services, appeared at the January 15, 2008 hearing (although not listed in the pre-hearing list of witnesses) and requested that the Examiner accept the applicant's attempt to assemble adequate water for the proposed subdivision. He testified that Exhibits 113 and 114 show how, if easements can be acquired, connection to existing water mains could be made. He referenced the options listed at Exhibit 117. He referenced the letter of December 10, 2007 from Cross Valley Water District (Exhibit 120), giving notice that Cross Valley has no water available to serve Highbridge Estates until the property has been annexed to the district, water mains have been extended and all fees paid. Mr. Rowe's point has to be that when those conditions have been met, Cross Valley might provide potable water to Highbridge Estates. His point cannot be that Cross Valley by that letter commits to provide the water necessary for all 34 lots or any portion of those, for that is not what Exhibit 120 does. He mentions that the applicant might use the existing well to provide water for an initial phase of the proposed subdivision. The application before the Examiner is not for a phased development, however. Mr. Rowe also testified that the applicant might purchase water rights. Mr. Rowe recommended in his testimony that the Examiner accept as adequate a condition that potable water be available before the construction drawings can be approved. That condition is also recommended by the County's Department of Planning & Development Services.

10. The Examiner stated on the record his concern that the ruling requested by Mr. Rowe would set a precedent throughout the County under which subdivisions would be approved based on the possibility that potable water might be obtained. The Examiner expressed doubt that such a ruling would survive scrutiny by the Department of Ecology and requested that a letter from the Department of Ecology on Mr. Rowe's suggestion should be acquired and submitted into the record.

11. The letter requested by the Examiner was acquired: on January 24, 2008 – one day prior to the final hearing on this matter – the Department of Ecology sent a letter (Exhibit 231) to the applicant's attorneys expressing willingness to work with the applicant and the County *"…to ensure adequate provision of a legal potable water supply for the proposed development."* The letter states that it may require a combination of water supply alternatives to meet the water demands of the development. The letter states that a number of options could be explored. Those options include (1) use of an exempt ground water withdrawal within limits of RCW 90.44.050, (2) transfer or change of an existing valid surface or ground water right, or (3) obtaining water service from a nearby purveyor such as Cross Valley Water District.

12. Any finding of fact in this decision which should be deemed a conclusion is hereby adopted as such.

CONCLUSIONS OF LAW

Based on the findings of fact entered above, the following conclusions of law are entered.

1. The Examiner has original jurisdiction over a preliminary subdivision application (a Type 2 process) pursuant to SCC 30.72 and SCC 2.02 and over rural cluster subdivisions pursuant to SCC 30.41C. The Examiner has jurisdiction over an appeal from a SEPA threshold determination (a Type 1 process) pursuant to SCC 30.61. When an appeal of a Type 1 decision related to the Type 2 application has been filed, the open record hearing shall serve as both the appeal hearing and the predecision hearing. (SCC 30.72.050(6).

2. The applicant for a preliminary plat has the burden of proving by a preponderance of the evidence that the application merits approval. (Rule of Procedure 724(a)).

3. Appeal of a threshold determination of non-significance is reviewed under the clearly erroneous standard: i.e., the Examiner may overturn the determination of the SEPA responsible official only if, after having reviewed the entire record, the Examiner is left with the definite and firm conviction that a mistake has been made. The determination made by the SEPA responsible official shall be entitled to substantial weight. The appellant shall have the burden of proof. (SCC 30.61.310)

4. The Examiner must review the subdivision application under RCW 58.17.110, the legal standard for approval of a preliminary subdivision. Pursuant to that enactment, the Examiner must find that the proposed subdivision complies with the established criteria therein, principal among which in this matter is the criterion that the proposed subdivision makes appropriate provision for potable water supplies. No subdivision can go forward without appropriate provision for potable water in a manner that meets the law. A preliminary plat presented without appropriate provision for potable water is prematurely submitted and is incomplete. Note that RCW 19.27.097 provides: "*An application for a water right shall not be sufficient proof of an adequate water supply."* It follows that any SEPA threshold determination issued on such a premature application is itself premature and must be vacated.

5. As shown above, the Examiner is charged under state law with finding that Highbridge Estates makes appropriate provision for potable water supply. It is squarely in the original jurisdiction of the Hearing Examiner to ensure that the provisions of county code and state law are being followed during the preliminary subdivision process. (See 06-125845 citing Island County Code 8.09.060 and Whatcom County Code 21.05.080.) In the instant case, Snohomish County's Examiner follows the pattern of other counties, follows RCW 58.17.110 and follows the Washington State Supreme Court.

6. The Examiner concludes that the options for obtaining potable water for Highbridge Estates which the Washington State Department of Ecology offers to pursue (Exhibit 231) with the applicant must be exhausted prior to submittal of the preliminary subdivision for approval. Failure to do so leaves acquisition of potable water in the realm of speculation so nebulous that the preliminary plat's approval would provide no assurance to the public of potable water at any foreseeable date.

7. A SEPA threshold determination as to a preliminary subdivision offering mere hope of providing for potable water is a determination based on data so incomplete that the determination is clearly erroneous. Specifically, until the source and amount of potable water is known, not even the number of lots can be known. The subdivision might need to be phased. Thus, traffic volumes and routes of internal roads cannot be known. Drainage courses and storm drainage facilities cannot be analyzed. Impacts on the Snoqualmie River cannot be examined. Impacts to existing wells cannot be assessed. Without such data, no Environmental Impact Statement on the actual proposal is possible because the actual proposal is unspecified. Without the benefit of environmental analysis, the Examiner as the decisionmaker is left without adequate environmental information meeting the environmental full disclosure mandate of the State Environmental Policy Act.

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

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 34-lot rural cluster subdivision on 84.9 acres is **DENIED WITHOUT PREJUDICE** pursuant to SCC 30.71.060 and SCC 30.41A.040(2). The SEPA appeal is **GRANTED** and the SEPA threshold determination is **VACATED** for issuance of a new threshold determination after an application has been submitted making adequate provision for potable water.

Decision issued this 14th day of March, 2008.

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Ed Good, Deputy 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 **MARCH 24, 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 **MARCH 28, 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: Robert Pemberton

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.