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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. 06 129958 SD
PEGASUS CAPITAL)	
)	
Preliminary plat for an 18-lot subdivision)	

DATE OF DECISION: February 15, 2008

PLAT/PROJECT NAME: *Pegasus on 164th*

DECISION (SUMMARY): The application is **CONDITIONALLY APPROVED.**

BASIC INFORMATION

GENERAL LOCATION: This project is addressed 607-164th Street SE, Bothell and is located on the north side of 164th Street SE, 700 feet east of its intersection with 3rd Avenue SE, just west of the Mill Creek city limits.

ACREAGE: 10 acres

NUMBER OF LOTS: 18

AVERAGE LOT SIZE: 7,096 square feet

MINIMUM LOT SIZE: 5,083 square feet

DENSITY: 1.76 du/ac (gross)
6.9 du/ac (net)

ZONING: R-9,600

UTILITIES:

Water/Sewer: Alderwood Water and Wastewater District

SCHOOL DISTRICT: Everett No. 2

FIRE DISTRICT: No. 7

INTRODUCTION

The applicant filed the Master Application on January 24, 2007. (Exhibit 1)

The Department of Planning and Development Services (PDS) gave proper public notice of the open record hearing as required by the county code. (Exhibits 16, 17 and 18)

A SEPA determination was made on July 31, 2007. (Exhibit 15) No appeal was filed.

The Examiner held an open record hearing on October 3, 2007, the 91st day of the 120-day decision making period and on remand on December 5, 2007. Witnesses were sworn, testimony was presented, and exhibits were entered at the hearings.

PUBLIC HEARING

The initial public hearing commenced on October 3, 2007 at 9:05 a.m. and ended at 10:16 a.m. A reopened hearing on remand to consider traffic impacts commenced on December 5, 2007 at 10:42 a.m. and concluded at 11:49 a.m. The record was held open through December 12 for receipt of a summary of traffic impacts (Exhibit 35 and 36).

1. The Examiner stated that he had read the PDS staff report, reviewed the file and viewed the area.
2. The applicant, Pegasus Capital, was represented by Kent Shih, Larry Burnstad and Robert Long. Emmanuel Bareither, an owner of the subject site, represented himself. Snohomish County was represented by Bob Pemberton of the Department of Planning and Development Services and Kamal Mahmoud of Engineering Services. Members of the general public appeared and testified, including Jason Peterson, Charles Popik and Kay Rice. Witness Popik had also submitted a letter (Exhibit 19) on behalf of the North Creek Presbyterian Church which abuts the subject site on the immediate east. That letter expresses concern about vegetative visual buffer plans and stormwater drainage.

NOTE: For a complete record, an electronic recording of each 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. The PDS staff report has analyzed the nature of the application, the issues of concern, the application's consistency with adopted codes and policies, land use regulations and the State Environmental Policy Act (SEPA). To the extent that that staff report is consistent with this document, the staff report is hereby adopted by the Examiner as if set forth 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, Pegasus Capital, filed a complete application on March 21, 2007 for an 18-lot subdivision on the north side of 164th Street SE, 700 feet east of 3rd Avenue SE near the city limits of Mill Creek. Of the site's 10 acres, eight are forested. A large wetland covers the northerly half of the site.
2. The original concept was to have vehicular access by way of 161st Street SW but the extensive critical areas block an Army Corps of Engineers Section 404 permit. Thus, the only access available is from 164th Street SE. Each day, the 18 proposed lots will produce 9.57 trips each for a total of 172 trips.
3. In the vicinity, 164th Street SE is a five-lane arterial. It is Snohomish County's principle east-west arterial serving the southwest urban growth area between Lynnwood and Mill Creek. Within three years (by 2010), in the p.m. peak-hour, a car will pass the proposed plat entrance every second. (Specifically, 4,871 cars per hour is 81 cars per minute – actually, more than one car per second.) During that hour, a driver wanting to leave the plat to head east would wait nearly a half-hour (24 minutes) to make that left turn across four lanes of traffic. (Exhibits 7, 35). Trips at year 2013 would be substantially similar. (Exhibit 33)
4. The applicant asserts that that delay “...will only impede trip [sic] exiting the Pegasus site and will have a negligible impact on trips along 164th St. SE.” The Examiner disagrees. Specifically, when that driver who has been waiting for nearly a half-hour sees what appears to be a break in the pattern of one car passing per second, that same moment may be perceived by a competing driver eastbound on 164th Street SE as the moment to turn across the westbound two lanes to enter the Pegasus site. The two turning vehicles would physically have to occupy the same spot in 164th Street SE almost simultaneously and that spot would have two lanes of oncoming westbound traffic bearing down on it at least the posted 35 miles per hour. A vehicle is expected to enter or leave Pegasus every 3.3 minutes in the p.m. daily. (Exhibit 35)
5. Of further concern is the fact that the proposed vehicular ingress/egress is about 75 – 100 feet east of the existing planter island in 164th Street SE. (Exhibit 13F) Due to the plants in the island, an eastbound driver on 164th Street SE intending to turn left across the oncoming two lanes in order to enter Pegasus will have limited visibility of the plat entrance and of any cars in that entrance. That eastbound driver will have to stop very quickly immediately after passing the eastern end of the planter island and will be going down a grade at that time. If that eastbound driver hesitates because a vehicle is in the center turning lane trying to turn left out of the plat, the eastbound driver may be rear-ended.
6. The record about trip distribution indicates that, during the p.m. peak hour, only one driver will want to make a left turn to leave Pegasus to go east toward Mill Creek. In fact, the record indicates that few drivers will try the maneuver and will more likely leave Pegasus by making a right turn to go westbound until a U-turn could be made. (Exhibits 33, 35) Where and with what safety that U-turn might be made during “rush hour” is not addressed. An access plan that requires a driver on an arterial already in arrears to go west in order to make a U-turn to go east has no merit unless compensated by transportation demand management or other trip reduction actions.

7. The relevant portion of 164th Street SE (arterial unit # 218) was declared to be in arrears effective July 18, 2007; i.e., a road at capacity with no scheduled improvements to increase capacity. (Exhibit 7) If an arterial is declared in arrears, development that would impact the arterial with three or more directional peak hour trips would not be approved until that arterial was no longer in arrears. However, by Amended Motion 07-123 (Exhibit 37) passed December 17, 2007, the Snohomish County Council made a determination of ultimate capacity for the subject 164th Street SE/SW after hearings held on November 29, 2007 and ending December 17, 2007. (Note that hearings before the Examiner on this matter began on October 3, 2007 and the record closed on December 12, 2007, thus substantially occurring simultaneously with the County Council's deliberations on the ultimate capacity issue.)
8. The County Council's Amended Motion No. 07-123 points out that the Department of Public Works will complete a transportation demand management plan for this area in 2007 and an access management and circulation plan for this arterial in 2008 and implement that plan in 2009 but that no access management or circulation provisions beyond that already required will be required of new development until that Public Works plan is adopted. The referenced Motion also notes that Public Works will work with all new development that adds trips to 164th Street SE to provide Transportation Demand Management (TDM) measures through (1) site design, (2) programmatic measures and/or (3) TDM payments. The referenced Motion also notes that mitigation is required either through TDM at the 10% level or through meeting the County requirements for transit compatibility. The staff report (Exhibit 30) describes that the trip reduction percentage for this development is 5% of the 17.07 p.m. peak-hour trips totaling \$1,287.75. Because the referenced Council Motion requires that figure to be 10%, that figure doubles to \$2,575.50. That payment is the only TDM action recommended by the staff report as a condition upon approval of the subdivision.
9. Based on a preponderance of the evidence of record as demonstrated by the findings of fact above, the Examiner finds as fact that the TDM payment alone is insufficient traffic impact mitigation in this instance. Therefore, the Examiner concludes that ingress/egress to Pegasus must be right-turn-in only and right-turn-out only until site designs or programmatic measures are in place demonstrating at least a 10% trip reduction percentage for this development and compliance with any access management and circulation plan adopted by Public Works as described at Finding No. 8 immediately above. (See Condition No. E.i. below.)
10. The project would comply with park mitigation requirements under Chapter 30.66A SCC by the payment of \$1,244.49 for each new single-family home.
11. School mitigation requirements under Chapter 30.66C SCC have been reviewed and set forth in the conditions. The Everett School District reports (Exhibit 24) that children of all grade levels will be served by school busses from a stop at the intersection of 164th Street SE and Mill Creek Boulevard. Pedestrian facilities already exist from the subject development to the bus stop location.
12. Two critical areas (wetlands) have been identified on site. One wetland, about one-half acre in size (Category IV) is located in the southern portion of the site. This is an isolated, disturbed wetland which will be replaced. The larger wetland, in the northern portion of the site, is dominated by a red alder overstory, an understory of shrub species and emergent species and a thick layer of moss. This wetland is a highly functional wetland that is part of a larger wetland/wetland buffer complex adjacent to North Creek. This wetland will be preserved with a Native Growth Protection Area buffer and additional wetland creation to mitigate for the loss of the smaller wetland. PDS has reviewed the Critical Areas Report (Exhibit 6) and the Wetland Impact Mitigation Plan (Exhibit 14) and determined that the project complies with the critical areas regulations. Vegetation along the boundary with the adjacent church will be preserved.

13. The PDS Engineering Division has reviewed the concept of the proposed grading and drainage and recommends approval of the project subject to conditions, which would be imposed during full detailed drainage plan review pursuant to Chapter 30.63A SCC.
14. The Snohomish County Health District has no objection to this proposal provided that public water and sewer are furnished. Public water and sewer service and electrical power will be available for this development. (See Exhibit 26.)
15. The property is designated Urban Low Density Residential (ULDR 4-6 du/ac) on the General Policy Plan (GPP) Future Land Use Map (FLUM) and is located within an Urban Growth Area (UGA). Land in that category may be developed at a density of 4-6 du/ac and one of the implementing zones is the R-9,600 zone which is the case here.
16. The proposed use (single-family detached development) is essentially compatible with existing single-family detached developments. Surrounding properties to the west and south are zoned and developed as single-family residential subdivisions at R-9,600 zoning. To the east and north lies the city limits of Mill Creek. A church abuts on the east. Sparsely developed, wooded land abuts on the north.
17. The request complies with the Snohomish County Subdivision Code, Chapter 30.41A SCC as well as the State Subdivision Code, RCW 58.17. The proposed plat complies with the established criteria therein and, as conditioned herein, makes the appropriate provisions for public, health, safety and general welfare, for open spaces, drainage ways, streets or roads, alleys, other public ways, transit stops, potable water supplies, sanitary wastes, parks and recreation, playgrounds, schools and school grounds, and other planning features including safe walking conditions for students.
18. The request is consistent with Section 30.70.100 SCC (Section 32.50.100 SCC), which requires, pursuant to RCW 36.70B.040, that all project permit applications be consistent with the GMACP, and GMA-based county codes.
19. 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 having fully reviewed the PDS staff report, hereby adopts said staff report as properly setting forth the issues, the land use requests, consistency with the existing regulations, policies, principles, conditions and their relationship to the request. It is therefore hereby adopted by the Examiner as a conclusion as if set forth in full herein, in order to avoid needless repetition. Where there is conflict between that staff report and this decision, this decision controls.
2. The request is consistent with the GMACP, GMA-based County codes, the type and character of land use permitted on the site and the permitted density. The request complies with the Snohomish County Subdivision Code, Chapter 30.41A SCC (Title 19 SCC) as well as the State Subdivision Code, RCW 58.17. But for concern about vehicular ingress/egress, the proposed subdivision complies with the established criteria therein and makes the appropriate provisions for public, health, safety and general welfare, for open spaces, drainage ways, streets or roads, alleys, other public ways, transit stops, potable water supplies, sanitary wastes, parks and recreation, playgrounds, schools and school grounds, and other planning features including safe walking conditions for students.

3. As to vehicular ingress/egress, the Examiner concludes as a matter of law that it does not serve the public use and interest as required by RCW 58.17 and SCC 30.41A to (1) add 172 trips per day with peak-hour impacts as shown in the findings of fact above coupled with (2) the existing and anticipated volume of traffic on 164th Street SE in view of (3) the specifics of the Pegasus access design and the existing planter island and gradient of 164th Street SE and (4) the County Council's designation of 164th Street SE as an arterial at ultimate capacity unless the Pegasus application is conditioned to require trip reduction designs and measures as noted at Findings Nos. 8 and 9 above. (See Condition No. E.i. below.)
4. 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 requests for an 18-lot subdivision is hereby **CONDITIONALLY APPROVED**, subject to the following conditions:

CONDITIONS:

- A. The preliminary plat received by PDS on July 2, 2007 (Exhibit 12) shall be the approved plat configuration. Changes to the approved plat are governed by SCC 30.41A.330.
- B. Prior to initiation of any further site work; and/or prior to issuance of any development/construction permits by the county:
 - i. All site development work shall comply with the requirements of the plans and permits approved pursuant to Condition A, above.
 - ii. The plat shall mark with temporary markers in the field the boundary of all Native Growth Protection Areas (NGPA) required by Chapter 30.62 SCC, or the limits of the proposed site disturbance outside of the NGPA, using methods and materials acceptable to the county.
 - iii. A final mitigation plan based on the Critical Areas Report (Exhibit 6) and the Wetland Impact Mitigation Plan (Exhibit 14) shall be submitted for review and approval during the construction review phase of this project.
- C. The following additional restrictions and/or items shall be indicated on the face of the final plat:
 - i. "The lots within this subdivision will be subject to school impact mitigation fees for the Everett School District No. 2 to be determined by the certified amount within the Base Fee Schedule in effect at the time of building permit application, and to be collected prior to building permit issuance, in accordance with the provisions of SCC 30.66C.010. Credit shall be given for one existing parcel. Lot 1 shall receive credit."
 - ii. Chapter 30.66B SCC requires the new lot mitigation payments in the amounts shown below for each single-family residential building permit:

\$2,413.23 per lot for mitigation of impacts on county roads paid to the county,
\$142.08 per lot for transportation demand management paid to the county,
\$221.33 per lot for mitigation of impacts on the City of Mill Creek streets paid to the city. Proof of payment shall be required.

These payments are due prior to or at the time of building permit issuance for each single family residence. Notice of these mitigation payment obligations shall be contained in any deeds involving this subdivision or the lots therein. Once building permit has been issued all mitigation payments for that lot shall be deemed paid.

- iii. All Critical Areas shall be designated Native Growth Protection Areas (NGPA) (unless other agreements have been made) with the following language on the face of the plat;

"All NATIVE GROWTH PROTECTION AREAS shall be left permanently undisturbed in a substantially natural state. No clearing, grading, filling, building construction or placement, or road construction of any kind shall occur, except removal of hazardous trees. The activities as set forth in SCC 30.91N.010 are allowed when approved by the County."

- iv. The developer shall pay the County \$1,244.49 per new dwelling unit as mitigation for parks and recreation impacts in accordance with Chapter 30.66A SCC; provided, however, the developer may elect to postpone payment of the mitigation requirement until issuance of a building permit for that lot. The election to postpone payment shall be noted by a covenant placed on the face of the recorded plat and included in the deed for each affected lot within the subdivision.

D. Prior to recording of the final plat:

- i. Native Growth Protection Area boundaries (NGPA) shall have been permanently marked on the site prior to final inspection by the county, with both NGPA signs and adjacent markers which can be magnetically located (e.g.: rebar, pipe, 20 penny nails, etc.). The platlor may use other permanent methods and materials provided they are first approved by the county. Where an NGPA boundary crosses another boundary (e.g.: lot, tract, plat, road, etc.), a rebar marker with surveyors' cap and license number must be placed at the line crossing.

NGPA signs shall have been placed no greater than 100 feet apart around the perimeter of the NGPA. Minimum placement shall include one Type 1 sign per wetland, and at least one Type 1 sign shall be placed in any lot that borders the NGPA, unless otherwise approved by the county biologist. The design and proposed locations for the NGPA signs shall be submitted to the Land Use Division for review and approval prior to installation.

- ii. The final wetland mitigation plan shall be completely implemented.

E. In conformity with applicable standards and timing requirements:

- i. Vehicular ingress/egress shall be right-turn-in only and right-turn-out only until TDM at the 10% level has been accomplished through TDM payments as specified above herein and through compliance with the Department of Public Works' transportation demand management plan for arterial unit # 218 and compliance with the access management and circulation plan for that arterial unit as called for by County Council Amended Motion No. 07-123. When said compliances have been achieved in the opinion of the Department of Public Works, that Department may authorize left turning movements into or out of Pegasus.

- ii. The preliminary landscape plan (Exhibit 4K) shall be implemented. All required detention facility landscaping shall be installed in accordance with the approved landscape plan.

F. All development activity shall conform to the requirements of Chapter 30.63A SCC.

Nothing in this permit/approval excuses the applicant, owner, lessee, agent, successor or assigns from compliance with any other federal, state or local statutes, ordinances or regulations applicable to this project.

Preliminary plats which are approved by the county are valid for five (5) years from the date of approval and must be recorded within that time period unless an extension has been properly requested and granted pursuant to SCC 30.41A.300.

Decision issued this 15th day of February 2008.

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 **FEBRUARY 25, 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 **FEBRUARY 29, 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: Bob 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.