

**DECISION of the SNOHOMISH  
COUNTY HEARING EXAMINER  
REVISED ON RECONSIDERATION**

DATE OF ORIGINAL ORDER: March 17, 2009  
DATE OF DECISION ISSUED ON RECONSIDERATION: **May 21, 2009**

PLAT/PROJECT NAME: **SEABROOK HEIGHTS**

APPLICANT/  
LANDOWNER: West View Properties, Inc.

FILE NO.: **05-121365-000-00-LU and SD**

TYPE OF REQUEST: Application for 69-unit Planned Residential Development (PRD) Subdivision of 13.29 Acres in Two Phases and Conditional Use Permit (CUP) to allow a Sewer Pump Station in a Tract within the Preliminary Plat

APPEAL: THRESHOLD DETERMINATION- DETERMINATION OF NONSIGNIFICANCE

APPELLANTS: CITY OF LYNNWOOD, CARLIN MCKINLEY, and CITIZENS OF GREATER NORMA BEACH NEIGHBORHOOD (CGNBN)

DECISION (SUMMARY): **APPLICATIONS DENIED WITHOUT PREJUDICE; REMANDED TO THE DEPARTMENT OF PLANNING AND DEVELOPMENT SERVICES (PDS) FOR FURTHER PROCEEDINGS; APPEAL OF DETERMINATION OF NONSIGNIFICANCE GRANTED**

**BASIC INFORMATION**

GENERAL LOCATION: 6716 Fisher Road, Edmonds, located in Section 5, Township 27 North, Range 4 East, W.M., Snohomish County, Washington.

ACREAGE: 13.27 acres

NUMBER OF LOTS: 69

DENSITY: 5.20 du/ac (gross) 9.28 du/ac (net)  
Average lot area: 4687 sq feet Smallest Lot area: 3200 sq feet

ZONING: R-9600

COMPREHENSIVE PLAN DESIGNATION:

General Policy Plan Designation: Urban Low Density Residential (4 du/ per acre)

UTILITIES:

Water/Sewer: Alderwood Water and Wastewater System

SCHOOL DISTRICT: Edmonds

FIRE DISTRICT: No.1

PDS STAFF RECOMMENDATION: Approve with conditions

**INTRODUCTION AND PROCEDURAL HISTORY**

The applicant filed the Master Application and the project vested on March 2, 2006, according to PDS. (Exhibit 1) Resubmittals of the application were received on August 23 2006, January 23, 2007, February 9, 2007, May 1, 2007, March 20, 2008 and October 10, 2008. The conditional use permit (CUP) application was submitted on April 30, 2007. No resubmittals for the CUP application were required. Due to the numerous resubmittals and postponements of the hearing date, 173 days of the 120-day review period will have elapsed as of the hearing date.

The Examiner held an open record hearing on February 23, 26, and 27, 2009 as well as March 2, 2009. Witnesses were sworn, testimony was presented, and exhibits were entered at the hearings. Appellant CGNBN was represented by David Allais with the help of other citizens of Norma Beach. Appellant City of Lynnwood was represented by Dan Lossing of Inslee, Best, Doezie & Ryder, P.S. (Bellevue). Appellant Carlin McKinley was represented by David Bricklin of Bricklin Newman Dold LLP (Seattle), the applicant, West View Properties, Inc., was represented by Randy Boyer, Randy M. Boyer, Inc. (Lynnwood).

**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 is requesting approval of a preliminary plat for a 69-lot subdivision/PRD on 13.27 acres in two phases. The applicant is also requesting approval of a CUP to allow a sewer lift station to be installed in a separate tract within the plat. The lift station is necessary in order to receive sewer service from Alderwood Wastewater District.

The subdivision will result in the creation of 69 new single-family residential building lots. Access will be gained to the north from Fisher Road at two locations. Nine open space tracts are proposed. Three would be Native Growth Protection Area (NGPA) tracts containing steep slopes; and one would be a NGPA tract containing a wetland. Three tracts would be usable open space used for recreation with two of the tracts to be used for stormwater drainage, one of which would also be used for access. The ninth open space tract would be used for the sewer

lift station. The largest of the proposed building lots is 7,375 square feet; the smallest is 3,200. The average lot size is 4,687 square feet. Alderwood Water and Wastewater District would provide both public water and public sewer service.

Proposed Phase I would include 25 building lots and seven open space tracts. The sewer lift station tract and both of the stormwater drainage tracts would be included within Phase I. Phase II would include the remaining 44 lots and two NGPA open space tracts.

The proposed sewer lift station would be installed as part of the public utility system provided by the Alderwood Wastewater District and would have the capacity to serve lots outside the proposed development. The lift station would be designed and constructed in accordance with Alderwood Wastewater District and Washington State Department of Health standards. The design includes the pump station, a backup generator, an emergency holding tank for three (3) hours average daily flow, and the necessary controls and telemetry.

3. Site Description: The subject site is 13.27 acres and consists of three original parcels. One single family residence and garage and another small cabin are currently situated on the site. All structures will be demolished. The site is predominately vegetated with a second growth forest and brush, mostly as mixture of deciduous and coniferous trees. A small area of pasture surrounds the residence. A small Category 3 wetland straddles the southwest boundary of the site. An easement providing paved access to the property abutting the southwest boundary of the proposed plat crosses the southeast corner.

Steep slopes dominate the western and eastern edges of the site, while the area in between is characterized by rolling terrain. The steepest slope gradient reaches 55% along the western slope and 53% along the southeast slope. The soils are classified as Alderwood, Alderwood-Urban and Alderwood-Everett according to the Soil Survey of Snohomish County.

A Boundary Line Adjustment (BLA) has been proposed by the applicant in the northeast portion of the site. The BLA is proposed as a solution to an encroachment of a house along that boundary. The application for the BLA has not yet been submitted.

4. Adjacent Zoning/Uses:

The subject site is within the Urban Growth Area (UGA) and currently zoned R-9600. Larger residential properties, also zoned R-9600, surround the property on all sides. Fisher Road forms the central portion northern boundary of the proposed plat. The unopened right-of-way of 152nd Street SW abuts the southern boundary and the unopened right-of-way of 68th Avenue W abuts the northwestern boundary. Meadowdale Beach County Park lies south of the unopened right-of-way of 152nd Street SW. Carlin McKinley's property and home are immediately to the west and south of the subject property, as demonstrated on Exhibit 176-7 p.1-4.

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

This project has raised a great deal of public concern. Exhibits 36-109 are the initial public comments made in this case. There are a great number more throughout the record. Over twenty citizens testified against the project at the hearing. The concerns center upon the proposed drainage for the development, unstable slopes, impacts to fishery resources and endangered species, the potential impacts of development of the site on nearby Meadowdale Park and Lunds Gulch, traffic, critical areas, and suitability of the density of the development in the neighborhood.

## **FINDINGS OF FACT AND CONCLUSIONS OF LAW REGARDING THE PROJECT APPLICATION**

### 1. Introduction

In this case, there are a number of complex technical issues revolving around drainage along with other issues. Although this case was brought as a SEPA appeal, many of the issues raised by appellants really boil down to and have their roots in code compliance issues. Because code compliance is central to this case, the Examiner will begin with this part of the case.

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. Standard of Review

The Examiner has original jurisdiction over PRDs and preliminary subdivision applications pursuant to Chapter 30.72 SCC and Chapter 2.02 SCC. The legal standard the Examiner must review a preliminary subdivision under the state subdivision code, Chapter 58.17 RCW, is:

whether 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 . . . .

RCW 58.17.110.

The Examiner will address each of the appellants' arguments regarding the PRD official site plan and preliminary plat application. In demonstrating the application meets the approval standard under RCW 58.17.110 and SCC 30.41A.100 and the PRD code under SCC 30.42B.200, the applicant bears the burden of proof, which shall be met by a preponderance of the evidence.

### 3. Conformance to the PRD Code.

#### **A. PRD Applications must comply with the Drainage Code and the Engineering Design and Development Standards (EDDS).**

#### Findings of Fact

##### (1) *Background*

Much of the testimony in this case centered on the drainage system to be used for this development. The proposal for drainage is to collect, treat and detain stormwater runoff from roadways, yards and roofs of future homes. Cartridge filter treatment systems provide water quality, and two underground infiltration galleries provide detention and timed release of runoff into groundwater. (Exhibit 175-J) For water quality, the cartridge filters will provide stormwater treatment to remove pollutants from the six-month, 24-hour storm as required by SCC 30.63A.210 (4) (b). For water quantity, the two infiltration galleries will provide stormwater detention from the 100-year, 24-hour design storm as required by SCC

30.63A.210 (1) (a) (iii). Testimony was that the applicant used the Santa Barbara hydrograph method to calculate the size of the detention facility, as required by SCC 30.63A.210(c) (i).

Every aspect of the drainage design generated controversy and concern. It is undisputed that the soils in this area are Alderwood sandy loam, sandy outwash or advanced outwash with gravel and silt. (Exhibit 175-J Appendix 10) Even the applicant's geotechnical engineer stated, "We noted evidence of slope wasting and movement on the steep, south-facing slopes above Lund's Gulch. These are natural, on-going processes which should be expected to persist. Occasional large-scale failures should be anticipated during adverse weather conditions." (Exhibit 21 at 5)

The other aspect of these soils, aside from their instability, was the rapidity with which they conducted water. The applicant's geotechnical engineer, Khaled Shawish, P.E., testified that he conducted tests at the site at which water infiltrated at the rate of up to 277 inches per hour, with an average rate of 177 inches per hour. A drainage engineer testifying for appellant City of Lynnwood, Robin Kirschbaum, P.E., noted that while under normal circumstances infiltration is considered to provide water quality treatment, the Department of Ecology indicates that there should be no assumption of any water quality treatment for any infiltration rate of greater than two inches per hour.

(2) *Compliance with SCC 30.42B.135(1)*

Appellant Carlin McKinley raises the following issues regarding compliance with the PRD code, which requires through SCC 230.42B.135(1) that "[a]ll on-site detention structures shall be constructed as surface or underground vault facilities. Such construction shall conform to the provisions of chapter 30.63A SCC, including the Snohomish County drainage manual and the EDDS." Chapters 5-14 of the EDDS Manual specifies requirements for drainage infiltration systems:

- (a) **Compliance with EDDS 5-14C (5) (v).** This section requires that all infiltration systems have a minimum setback requirement of 50 feet from any geologically hazardous area as defined in SCC 30.91G.020. This requirement can be reduced if a licensed geotechnical engineer, hydrologist, or other appropriate expert provides sufficient information to justify a setback reduction. Any design requirements or concerns related to steep slopes or other sensitive areas impacts identified by a licensed engineer shall be addressed in the soil study.

Ms. McKinley's witnesses and representatives pointed out that the infiltration galleries, which are located in Tracts 991 and 998, do not meet this setback requirement. If one compares the Steep Slopes map of Exhibit 9 or Exhibit 36F (colored) to Exhibit 170, virtually no part of the infiltration gallery meets the setback from geologically hazardous areas, which include slopes steeper than 15% in the version of the Critical Areas Regulations (CAR) to which the applicant is vested. Former SCC 30.91L.040 states:

"Landslide hazard areas" means areas potentially subject to mass earth movement based on a combination of geologic, topographic, and hydrologic factors, with a vertical height of 10 feet or more. These include the following: (a) Areas of historic landslides as evidenced by landslide deposits, avalanche tracks, and areas susceptible to basal undercutting by streams, rivers or waves; (b) Areas with slopes steeper than 15 percent which intersect geologic contacts with a relatively permeable sediment overlying a relatively impermeable sediment or bedrock, and which contain springs or ground water seeps; (c) Areas located in a canyon or an active alluvial fan, susceptible to inundation by debris flows or catastrophic flooding.

Emphasis added. In reviewing the slope map it is apparent that while many of the slopes are over 33%, some right around the infiltration galleries in particular are less than 33%. That does require analysis of the criteria in SCC 30.91L.040(b), above.

The vast majority of evidence in the record indicates that this area contains very permeable sediment overlying a relatively impermeable sediment or bedrock. Exhibit 13; Exhibit 195 at p. 9-10. Carlin McKinley testified at length regarding the springs at the base of the hill right at the edge of the Seabrook property on the south and west side, as well as the wetland where the groundwater surfaces on the site. McKinley's hydrogeological expert Lynn Doremus states the following in her report:

The geology of the site is known to be unstable, due to the geologic configuration of poorly consolidated Esperance sand geologic formation overlying low permeability transition beds of the Whidbey formation. The relatively recent (in Geologic time) deposition of these sands leaves them in an unconsolidated (or very poorly cemented) condition. The combination of very steep slopes and poorly consolidated sediments and high precipitation rates, common throughout the Puget Sound area are known to result in frequent slope failures. The slopes and hillsides in the Puget Sound area are easily destabilized, and subject to mass movement. Locations well known for their mass movement occurrences in the Puget Sound region that are composed of outwash sands are: Perkins Lane (Seattle), West Seattle northern and western shorelines, and Boeing Creek area of Shoreline (a sinkhole opened at the road intersection in December 1997, caused by rapid stormwater runoff erosion), among many others. In fact, slope movement on or before 1998 (described in the AES reports) occurred in the vicinity of this site, along the sewer alignment near Picnic Point Road, which was the result of construction disturbance to a slope composed of outwash sands.

Exhibit 195 at 2. Under a section entitled, "Seabrook Heights Vicinity Hydrogeology", Ms. Doremus states the following:

Infiltrating groundwater accumulates to form an aquifer, or perched aquifer, which migrates laterally downgradient. Downgradient locations are where groundwater discharges to an above-ground water body: a spring, wetlands, or flowing stream or river. At this site, groundwater discharges along the steeper slopes on the south, and west margins of the site, emerging as springs along those slopes.

Id. at 3. She notes later in the report that the Nelson report submitted by the applicant fails to include in its model calculations for slope stability the presence of the seeps in these areas. Specifically, the report states:

1. Does not calculate the impact of spring discharge at the slope base, and the southwest directed ground gradient, that will direct the increased groundwater from stormwater infiltration to the slopes on the southwest site margin, on the slope stability.
2. Does not account for existing slope failures occurring in Esperance Sand along the length of Lund's Creek and in the surround watershed on the factor of safety for existing conditions.
3. Considers only one slope failure mechanism (rotational slump) for the Seabrook Heights vicinity. Other mechanisms may lead to slope failure, that were not considered in the analysis are: translational failure, lateral spreading, and debris flow.

Id. at 5. Ms. Doremus testified to this evidence in the hearing and concluded that the report was incomplete because it did not account for the existing processes, nor did it account for the impacts of construction (tree removal). Id. at 3-5..

Appellant Carlin McKinley also submitted written and oral testimony from Dr Cristina Bandaragoda who with Robin Kircshbaum, a drainage engineer from Herrera Consultants hired by the City of Lynnwood, both performed independent modeling analyses of the stormwater facility capacity of the infiltration trench system. Exhibit 176, Exhibit 2. Dr. Bandaragoda indicated that her report shows a chart for each of the two infiltration trenches, the East Basin (3.93 acres) and the West Basin (5.67 acres). Exhibit 4 attached to her report shows a chart of monthly peak flows for 10 years of data (1987-1997) and gives a comparison of the peak monthly rates for developed or mitigated flows and for pre-developed conditions at Seabrook Heights West Basin. Under saturated conditions, the East Basin infiltration trench can only be expected to infiltrate 36% of the stormwater, and the West trench 47% of the stormwater.

Dr. Bandaragoda's conclusion was:

The reduction of forested land cover on the Seabrook property will increase the volume of water draining through the land over the land surface. The increased water infiltrating through the hillside poses problems for slope stability. The increased water overflow from the stormwater system poses problems for erosion and pollution control. The topography of Seabrook Heights and the McKinley property, the geology of the area, and observations of seeps and springs downhill of the Seabrook proerpty but uphill of the McKinley property suggest a high risk of flooding, erosion, and landslide hazards. The exact nature of this risk is subject to development designs that are not thoroughly presented, as well as uncertainty in the hydrologic cycle. However, it is clear that the project will increase the risk that the small creek that passes 30 ft. from your home will experience increased flows, flooding, and increased peak flows resulting from changes to the land surface during and after the proposed development. I am also concerned about the risk to Seabrook Height occupants of homes built on fill above an unstable land surface that over time, will become increasingly unstable given the proposed infiltration system.

Exhibit 176 at Exhibit 2. The applicant did not rebut this evidence.

No evidence was presented by the applicant indicating that any study was done to allow a setback reduction. In fact, the applicant's own engineer advised that there should be setbacks for infiltration systems:

[I]t is our opinion that stormwater could be managed through infiltration into subsurface soils. However, we recommend that infiltration systems be set back from the top of steep slopes to allow for subsurface groundwater dispersion and to minimize the potential for slope instability. The criteria used to determine infiltration system setbacks from sloping areas typically include the depth to the natural groundwater table, soil strength, slope angle, and infiltration system characteristics . . . .

(Exhibit 13 at 14) While testimony was provided by the county drainage reviewer that this requirement and much more could be waived later at the construction phase, the Examiner does not find this sufficient justification to allow an important issue such as the location of the infiltration galleries on this sensitive site to simply go forward at this stage without compliance with the code, especially when the plat drawing and the official site plan demonstrate facial noncompliance with this provision.

- (b) **Compliance with EDDS 5-14C(5)(iv).** Both CGNBN and Carlin McKinley alleged that the applicant failed to comply the setback requirement that the infiltration gallery be located a minimum of 30 feet downslope or 100 feet up-slope from any structure and at least 20 feet from an NGPA (large infiltration systems only). As was demonstrated by these appellants, the building footprints as located on the preliminary plat map are within these setbacks. (*Compare* Steep Slopes map Exhibit 9 or Exhibit 36F (colored) to Exhibit 170 p.8.) Applicant's geotechnical engineer stated that he had no concerns about this issue since the infiltration galleries were more than 80 feet deep. This testimony is directly contrary to the statements in the earlier report. (See Exhibit 13)

While the Mr. Shawish stated he had no concerns because of the depth of the infiltration gallery, he did not back that statement up with any analysis. Ms. Kirschbaum, the City of Lynnwood's expert, stated that location of the infiltration galleries so close to the foundations of homes was "of definite concern" and "inadvisable". Other expert testimony indicated that water percolating through the infiltration gallery migrates downward and outward in a cone shape, and could affect nearby foundations. (See Exhibit 195 at 6) The Examiner finds that the applicant has not demonstrated compliance with this portion of the code, nor has it demonstrated why a reduction to the setback would be appropriate. It would be inappropriate to approve the official site plan and preliminary plat showing homes in facial noncompliance with this EDDS provision.

- (c) **Compliance with EDDS 5-14C(5)(8).** Both CGNBN and Carlin McKinley alleged that the applicant failed to comply with the drainage area limitational requirement that the infiltration basin drain an area of five acres maximum. The Targeted Drainage Report describes the collection of runoff as coming from two basins, one that is 5.67 acres in size and one that is 3.93 acres in size. (Exhibit 175-J at Tab 3, p.6) On its face, this calculation indicates that one of the basins violates the limitation established in EDDS 5-14C(5)(8). Some estimates in testimony were even higher, given the fact that the applicant testified that all of the water would be channeled to the west basin, so that in effect, the entire 9.6 acres would be within the west basin. The Examiner finds that the applicant has not demonstrated compliance with this section of the code.
- (d) **Compliance with EDDS 5-14C(5)(vi).** The City of Lynnwood and Carlin McKinley allege that the applicant's infiltration system fails to provide sufficient separation between adjacent infiltration galleries so that respective lines of soil saturation do not intersect. The overlap was pointed out graphically by hydrogeologist Lynn Doremus in her presentation on behalf of appellant Carlin McKinley. (Exhibit 195 p.6) The two vaults are located 150 feet apart. The water migrates downward and outward, as stated above, in a cone shape around the infiltration gallery. This area is termed the zone of saturation. The lines of saturation are assumed to slope away from the design maximum water elevation at 1.5 horizontal to 1 vertical. Under the specific scenario here, the infiltration galleries are required to be at least two hundred feet apart to meet this design maximum water elevation. Under the applicant's design, the zones of saturation of the two galleries overlap for about 35 feet. This overlap of the zones of saturation is not permitted by the EDDS.

In the testimony concerning this matter, both the applicant and PDS did not seem to refute the appellants' analysis, but brush it off as something that can be waived at construction approval. There is no analysis from the applicant regarding why this is not a problem. The Examiner finds that the applicant has failed to demonstrate compliance with this section of the code.

- (e) **Compliance with EDDS 5-14B(4).** All appellants claim that the applicant failed to supply a clear statement of the depth of the maximum seasonal high water table. Although the applicant did provide monitoring wells over two winter seasons, they apparently did not include an analysis of rainfall for comparison to normal amounts and conditions, as required by the rule (at least they did not indicate at the hearing that they did so). The Examiner finds that the applicant failed to demonstrate compliance with this section of the code.

An analysis of rainfall is discretionary until the applicant decides to dig monitoring wells. Once it provides monitoring wells to determine the depth of the seasonal high water table, however, it is REQUIRED to provide an analysis of rainfall for comparison to normal amounts and conditions to allow a determination of whether the measurement of the wells is accurate.

- (f) **Compliance with SCC 30.63A.200(2).** The drainage code requires through this section that mitigation be required for all impacts caused by the development activity, even those that may occur downstream from the development. SCC 30.63A.200(2) states:

(2) Mitigation.

- (a) Mitigation shall be provided for all significant drainage impacts upstream or downstream caused only by the development activity, including any significant drainage impacts identified in a downstream analysis performed in accordance with paragraph (b) of this subsection, to the extent the impacts are caused by the development activity. Avoiding, minimizing, rectifying, or lastly compensating for impacts shall be given preference in that order.

- (b) Downstream and upstream analysis. The applicant shall perform a downstream analysis for at least a quarter mile downstream of the subject property which evaluates potential downstream drainage impacts as well as the adequacy of the downstream drainage facilities to accommodate flows from the development activity and all other upstream sources. The downstream analysis shall include proposed mitigation pursuant to paragraph (a) of this subsection for all significant drainage impacts from the development activity identified in the downstream analysis. The applicant shall include in the downstream analysis a computation of the adequacy of downstream conveyance systems in accordance with SCC 30.63A.210(2)(c), and whenever possible, shall include a visual or photographic inspection of the condition of the downstream drainage system to verify that it will function in accordance with the analysis. If flooding areas, locations of existing severe cumulative drainage impacts, critical areas, lakes, or fisheries resources which may be adversely impacted, or other features where significant drainage impacts may occur as a result of the proposed development activity, are located more than a quarter of a mile downstream of the subject property, the downstream analysis shall also evaluate the potential impacts by the development activity to these areas. If the director determines that a downstream analysis fails to include an evaluation of all such areas located more than a quarter mile downstream of the subject property, the downstream analysis shall be returned to the applicant for revision. (Emphasis added).

Appellants rely on the above language to argue that the applicant should have, but did not provide an extended downstream analysis. They point out that Meadowdale Beach County Park is an area that flooded, and is an area of existing severe cumulative drainage impacts as indicated by the closure of the park last year. These allegations were starkly demonstrated by the pictures and narrative submitted by Duane Uusitalo of Brackett's Landing Foundation, a man who spent over 25 years raising and releasing coho and chum salmon in Lund's Gulch Creek and teaching children at Meadowdale Middle School about salmon. (Exhibit 221; see also Exhibit 220 (demonstrating cumulative drainage impacts.)) In reference to the third criteria in the emphasized language in the quotation above, the appellants also demonstrated that steelhead use Lund's Gulch Creek, in addition to the coho and chum salmon identified by Mr. Uusitalo. Dr. Eliot Drucker, who holds a PhD in biology and is employed by Wild Fish Conservancy, testified that Lund's Gulch Creek supports a population of salmonid fisheries including juvenile rainbow trout/steelhead and coho salmon. The basis of his testimony was actual inspection of diagnostic anatomical features of fish collected and photographed by a Wild Fish Conservancy field crew during a stream survey of lower Lund's Gulch Creek. (Testimony of Dr. Eliot Drucker; Exhibit 176-A)

Dr. Drucker testified that although juvenile rainbow trout and steelhead are indistinguishable, he had two bases for presuming that the fish found in Lund's Gulch Creek were steelhead. First, Lund's Gulch Creek drains directly into Puget Sound. The juveniles were observed at the mouth of the creek and at upstream sites less than 0.4 river miles from its mouth. Given their proximity to Puget Sound, these documented juveniles were more likely than not juvenile steelhead. Second, the Washington State Department of Fish and Wildlife's on-line fish-distribution data repository for Washington State (SalmonScape) indicates that winter-run steelhead have been previously documented on lower Lund's Gulch Creek. (Testimony of Dr. Eliot Drucker; Exhibit 176-A) The Examiner takes official notice that Puget Sound steelhead are listed as a threatened species under the federal Endangered Species Act.

Testimony on all three of these points was unrebutted by the applicant. The Examiner finds that PDS should have required the applicant to comply with SCC 30.63A.210(1)(b). Because the applicant did not provide this extended downstream analysis, the proposal fails to comply with SCC 30.63A.200(2).

#### The Role of the Targeted Drainage Analysis at Preliminary Plat Approval

Pursuant to SCC 30.63A.120(1)(a), a proposed development activity subject to a pre-approval public hearing must submit a targeted drainage plan in accordance with SCC 30.63A.150. An applicant may also voluntarily submit a full drainage plan in accordance with SCC 30.63A.155 for this purpose. SCC 30.63A.150, entitled "Targeted drainage plan submittal requirements", states:

The purpose of the targeted drainage plan submittal requirements is to require a conceptual layout of the proposed drainage system which indicates the nature and extent of the work proposed, and which explains how the drainage system will function with sufficient information to allow the county to determine compliance with the applicable requirements of this chapter and other applicable laws. Targeted drainage plan submittals may also include additional or detailed engineering and design information for a portion of the drainage system.

The PDS staff report in this case gives virtually no useful information about drainage impacts. After referring to the oversized drainage basin (5.67 acres) that does not meet the EDDS requirements, the staff report states that the proposal meets Snohomish County standards. (Exhibit 137 at 7)

At the hearing, the drainage reviewer did testify that he had reviewed the proposal's conformance to the drainage code and EDDS standards, but when it was pointed out that the proposed system did not meet multiple standards of the EDDS or the code, he stated that many of the standards either did not

need to apply or could and would be waived during the construction phase. However, there is no paper trail to support any of these judgments and the reasoning behind them. No waivers were applied for; no waivers were approved. Whatever review was conducted before the hearing was done without benefit of any independent analysis; the reviewer's testimony was that he virtually completely relied on the engineering stamp as testimony that the project met code.

The Examiner does not read the targeted drainage code provision to be so liberal that an applicant can simply facially violate, as indicated above, five of the major infiltration standards, a major substantive provision of the drainage code, and be found to have explained "how the drainage system will function with sufficient information to allow the county to determine compliance with the applicable requirements of this chapter and other applicable laws." SCC 30.63A.150. The drainage review conducted by county staff was not adequate. The open record hearing process is in part to allow the public to review how these systems will work. In this particular case, it is vitally important to the community to understand and be confident that the drainage system proposed by the applicant will work well, based on the information supplied at the public hearing. It is a critical matter of public health, safety and welfare. The PDS drainage reviewer, after having reviewed the drainage portion of a project, must do more than come to a hearing saying simply that the stamped engineering report from the applicant is sufficient, even when the project can be demonstrated to violate numerous standards of the code. The Examiner finds this lack of critical review unacceptable.

A preliminary plat is defined as a "a neat and approximate drawing showing the layout of a proposed subdivision containing all elements required by this title, together with any supporting exhibits which shall furnish a basis for the preliminary approval or disapproval of the proposal." The preliminary plat should contain a neat and approximate drawing of elements required by the title, not of elements "violating" the title. The Examiner concludes the plat and the official site plan ~~must be remanded for further proceedings to completely revise the drainage plan in accordance with this order.~~ do not meet drainage code and EDDS requirements.

### **3. Conformance to the Density Provisions of the Code**

The PRD code provides that maximum number of dwelling units permitted in a PRD shall be computed by determining the net development area on the project site. Under SCC 30.42B.040(2)(a), the net development area is the gross site area (in square feet) less critical areas and their buffers subject to Chapter 30.62 SCC.

In the PDS staff report (Exhibit 137), staff calculated the net developable areas based on a site area for critical areas of 0.34 acres. This appears to only include a wetland on the site and does not include the significant steep slopes that are included on site. Under the 2006 CAR, to which this project is vested, any slope over 15% (which intersect geologic contacts with a relatively permeable sediment overlaying a relatively impermeable sediment or bedrock, and which contain springs or ground water seeps) is a landslide hazard area and a critical area under CAR. There are defined buffers for these slopes in SCC 30.62.210. The PDS staff report was in error and the density calculation in the report was in error because it failed to include any of the slopes over 15% in the calculation, thus it severely underreported the amount of critical areas and buffers.

### **4. Conformance with Open Space Provisions of the PRD Code**

SCC 30.42B.115(2)(c) requires usable open space of no less than 600 square feet per dwelling unit. "Usable open space" cannot include critical areas or their buffers (SCC 30.42B.115(2)(a)(i)), including those slopes that are over 15% as identified by the 2006 code.

Tract 995 and Tract 993 both contain critical areas, and critical areas cannot be classified as usable open space. In addition, a portion of 998 is in a critical area. The applicant has not met its burden of showing that it has met its calculations for usable open space provisions. (See Exhibit 141 at 20) According to the calculations made by staff, 42,000 square feet of usable open space is required for active and passive recreation purposes. Applicant has acknowledged that Tract 993 and Tract 995 have slopes over 15% and they actually intersect seeps. Thus, they meet even the applicant's interpretation of the definition of landslide hazard areas under the former critical areas code.

Under the open space provisions of SCC 30.42B.215, open space is divided into five different categories usable open space, with two of the types being usable open space for recreation purposes and another being critical areas and their required buffers. Tract 995 is 26,442 square feet in size and almost half of it is presently slopes over 33%. (Exhibit 36F) Another good chunk of it is either slopes 15-20% or 25-33%. Tract 993 is all slopes 15-20%. Tract 995 sits directly over Carlin McKinley's home.

Through disturbance of the critical areas tract, the applicant proposes to "develop" a usable open space tract. Under the PRD code, one of the purposes of the code is to "Encourage the preservation of existing natural site features such as trees, topography, and geologic features." SCC 30.42B.010(8). As can be seen on Exhibit 203, an extremely steep erosion hazard and landslide hazard slope will continue out of the NGPA and over into Tract 995, even if the development takes place as proposed. It is a question of intent whether or not the PRD code allows an applicant to take a critical areas tract and disturb it until it is no longer a critical area in order to create usable open space. The intent and wording of the PRD code are clearly otherwise.

Moreover, even if Tract 995 were not critical areas, it still does not qualify as usable open space under the former PRD code. The staff report indicates that

Total open space must contain usable open space to be developed for active and/or passive recreation purposes, in the amount of 600 square feet per dwelling unit. The minimum requirement in this case is 70 units x 600 = 42,000 square feet; the developer has designated 42,781 square feet of the total open space as usable. The required usable open space for Phase I is 15,000 square feet, with 16,339 square feet provided. The required usable open space for Phase II is 41,400 square feet, with 42,781 square feet provided.

The usable open space would be developed with trails, play equipment, picnic areas, and a hydroseeded turf play area.

40% of the required usable open space shall be located in a single open space tract or permanent easement. Tract 998 meets this requirement for Phase I, Tract 995 meets this requirement for Phase II.

No areas of usable open space are less than 20 feet wide as required by SCC 30.42B.115(2)(d), except for segments containing trails. All usable open space is accessible by the trail and sidewalk system within the PRD. Usable open space shall be accessed by all-weather pedestrian pathways and/or sidewalks from all lots and dwellings within the PRD [SCC 30.42B.115(2)(e)]. The proposal complies with these provisions.

Exhibit 137. The Examiner apologizes for the length of the quotation, but it is important for several reasons. Tract 995 is the entirety of the open space for Phase II of the project. It will be developed

with trails, play equipment, a picnic area, and a hydroseeded turf play area, according to the staff report. (Exhibit 137) Likely Tract 998 will be so developed as well, since it is being described as a "neighborhood park". Tract 998's size is 9,284 square feet and serves as part of the open space for Phase I. At the hearing, the applicant claimed that 84% of the usable open space provided was active recreation open space. Testimony of Britt Hiatt, February 26, 2009 at approximately 9:43 a.m.

With Tract 995 at 26,442 square feet, it comprises 63.8% of the usable open space in the project and as noted, all of the usable open space for Phase II. After reviewing the provisions of former SCC 30.42B.115(2), the Examiner finds that even if it were found that it was permissible to take a tract constrained by critical areas and develop it into usable open space, this parcel does not meet other important criteria of the former code. Specifically, the following provisions are not met:

(2) Usable open space shall be provided as a component of total open space and shall be consistent with the following standards:

... (f) Usable open space designed for children shall not be located adjacent to any street designated as a collector/arterial unless properly designed with fencing, located away from street edges and other provisions to ensure adequate child safety. Usable open space designed for children shall be open, accessible, and visible from adjacent dwellings in order to enhance security;

(g) Usable open recreation space shall have the appropriate location, slope, soils, and drainage to be considered for recreational development;

(3) Active recreation uses shall be provided as follows:

(a) A minimum of 30 percent of the required usable open space within PRDs with 10 or more lots or dwelling units shall be developed for active recreation uses. The type(s) of active recreation uses provided shall, to the extent possible, correspond to anticipated needs of the potential residents of the PRD;

... (c) The active recreation facility shall be located on a reasonably level site with slopes no greater than six percent unless the applicant can demonstrate that the recreation facility can function adequately on greater slopes . . . .

To get to the recreational usable open space on Tract 995, users will have to walk down a steep landslide and erosion hazard slope of over 50%. This area is in the very corner of the property, away from all the houses, down the slope and next to a wetland where water will be emitting from the drainage facilities. Seeps are also present on Tract 995. The Examiner does not consider this a secure area for children, given the fact that there is likely no visibility from homes in the development because there will be trees on the slope above, and it will be somewhat dangerous just getting down the hill to the area. Nor does it have the appropriate location, slope, soils and drainage to be considered for recreational development. The evidence in the record speaks repeatedly to the fact that the slopes on the south and the west side of this property are the steepest in the entire development. This area has seepage, and is right next to the wetland and the outlet for the drainage for the property. Given the expert evidence showing the instability of the soils in the greater area, and the fact that the slopes immediately below this tract are even steeper than the one within the tract, the Examiner finds it completely unsuitable for recreational development. Exhibit 176 and 236 (Silver Tip Solutions submittal of Snohomish County Landscape Imaging Map). In addition, SCC 30.42B.115 (3)(c) requires that active recreation facilities be located on a reasonably level site. Neither this tract nor Tract 993 meet this criteria.

PDS incorrectly allowed this tract, as well as Tract 993 to be counted as usable open space; they are critical areas under the code and should be within NGPAs. Without that square footage as usable open space, the application for a PRD cannot be approved.

The geotechnical report did not address issues regarding mitigation to address the very real dangers that may result from grading in this area. This area is directly above Ms. McKinley's house. The geotechnical report did not identify the seeps, or the fact that there have been other landslides in the general area. Exhibit 13; see SCC 30.62.240. (Geotechnical report should include evidence showing faults, significant geologic contacts, landslides, or downslope soil movement on the subject property and adjacent properties). SCC 30.62.210 requires that:

(1) Development activities on landslide hazard areas shall be protected by use of generally accepted proper engineering and construction practices. Unless waived by the director, or the presentation of documentation by the director to support further geotechnical engineering analysis, a geotechnical report, or structural engineering, shall be required to determine proper protective measures.

From the testimony, it is clear that there was no review of the geotechnical report by PDS at all. A drainage reviewer brought it to a geotechnical engineer in the Public Works Engineering Services Department who looked at it for 15 minutes. With all due respect, while that engineer may have expertise in geotechnical engineering, he does not perform development review. He also does not have delegation authority from the director. In essence, there was no review done by the department under the landslide hazard provisions of the code.

It is clear that the applicant cannot meet the usable open space provisions of the PRD code. The Examiner finds upon reconsideration of this point, the PRD and the subdivision should be denied without prejudice on the basis that the application cannot meet the open space requirements of the code, and does not comply with numerous other provisions in the code, as outlined in this decision.

## **5. Compliance with Steep Slope Provisions of the County Code**

The only evidence in the record concerning compliance with the provisions of SCC 30.62.210 is Exhibit 13, a document entitled "Preliminary Geotechnical Engineering Evaluation Fisher Road Residential Development Snohomish County, Washington". This document, dated December 16, 2005, states that the development is feasible from a geotechnical standpoint, provided that the recommendations in the report are incorporated into the design and construction of the project. (Exhibit 13 at 6)

- A. As mentioned previously, one major recommendation of the report is setbacks for infiltration systems from steep slopes. (Exhibit 13 at p. 14) The applicant made no effort to make a showing of how the infiltration galleries would meet the precautionary information set out in the geotechnical report. The applicant failed to meet its burden to show how these infiltration galleries meet the requirements of CAR.
- B. Another major recommendation is a structure setback of 50 feet from the top of steep slopes consisting of native soils. (Exhibit 13 at p.10) The report states that "[a]n effective setback of 50 feet from the face of steep slopes could also be utilized for structures placed closer to the slope by deepening the foundations or using piles for residence support." The report also indicates that such exceptions could only be made on a case-by-case basis. *Id.*

On this site plan, many of the lots appear to violate this recommendation. Although it is difficult to tell, since the slope map lots do not correspond to the current site plan, (compare Exhibit 37F to Exhibit 203) lots 21-30 do not appear to have any land area that would allow for the 50 feet setback, nor would there likely be any area on the top of the slope for a house to be situated. The houses on lots 1-7 and lots 31-35 appear not to meet the setback requirements, and lots 36-39 appear questionable, as do lots 5-11. Again, the applicant made no effort to address this issue in the hearing. Because the applicant failed to address this issue in the hearing and there was no testimony by the county staff indicating geotechnical review of this issue, the Examiner is faced only with an official site plan that appears to violate the recommendations of the applicant's own geotechnical report on its face. The Examiner cannot approve a site plan that violates the report, when no evidence has been put into the record that indicates how this will be addressed. Moreover, the report does not condone in any instance homes placed on lots that area entirely composed of slopes in excess of 33%. Chapter 30.62 SCC provides requirements for mitigation and protective measures for placement of lots in landslide hazard and erosion hazard areas. The grading code only permits grading within a critical area pursuant to a critical area study with mitigation. Without adequate study approval, and mitigation to justify their placements, these lots violate the critical areas code.

There has been no showing that the applicant plans to follow the setbacks outlined in the critical areas code, nor has there been any approval of the mitigation measures. It is remarkable to the Examiner there would be so little concern over potential slope failure when there was such a catastrophic slope failure just a year ago that so greatly impacted the county as well as the city and the neighborhood.

The appellants have a right to know now exactly what the applicant proposes, that the science and modeling the geotechnical work is based on is sound, and what kind of mitigation and protection applicant is planning to provide to assure that slope failure will not happen. This applicant has simply ignored this problem. It cannot ignore the problem any longer. It is a matter of fundamental public health, safety and welfare. Development on this hillside needs to be approached carefully to avoid catastrophes like the one that occurred in December 2007 that closed Meadowdale Park for nine months.

C. One other major recommendation of the geotechnical report (Exhibit 13) is that steep slopes should be protected from erosion. The report states:

Protection of the setback and steep slope areas should be performed as required by Snohomish County. Specifically, we recommend that the setback area and top of the slope not be disturbed or modified through placement of any fill or removal of the existing vegetation. No material of any kind should be placed on the slope or be allowed to reach the slope such as excavation spoils, lawn clippings, and other yard waste, trash, and soil stockpiles. Trees should not be cut down or removed from the slope unless a mitigation plan is developed, such as the replacement of vegetation or erosion protection. Replacement of vegetation should be performed in accordance with Snohomish County Code. Any proposed development within the setback area, other than light decks or patios, should be the subject of a specific geotechnical evaluation. Under no circumstances should water be allowed to concentrate on the slopes.

Again, at this point, the recommendations of the applicant's own geotechnical engineer are not being followed by the applicant. The Snohomish County Critical Areas Ordinance to which the applicant is vested, calls out all slopes over 15% as landslide hazard areas, and this report recommends protection of all existing vegetation on those slopes and setbacks in accordance with the Snohomish County Code. While some of the steep slopes are being put into "NGPAs", many are left unprotected as part of the development. It is completely unclear to the Examiner why this was permitted to happen. There

was no testimony in the record from either the PDS critical areas reviewer or the PDS chief engineering officer to provide any explanation for this site plan, despite a request from the Hearing Examiner for them to appear. The code requires these landslide hazard areas to be identified and protected as critical areas. As the geotechnical engineer indicated, trees should not be cut down or removed from slopes unless a mitigation plan is developed. The applicant has not met its burden to show that CAR, with respect to steep slopes, has been met in the configuration of the official site plan and the preliminary plat.

## **6. Other Issues**

The remaining issue the Examiner will address under code compliance is traffic safety. The Norma Beach Citizens addressed this issue in detail in Exhibits 223 and 224. This project would add roughly double the amount of trips on this road if approved as proposed. The Accident Report indicated repeated collisions with fixed objects along Fisher Road. (Exhibit 224) There was also some testimony about collisions that were not in this Accident Report, although it is hard to characterize unreported data with any accuracy. Under the authority of SCC 30.66B.210, the Examiner requests that the county road engineer consider conducting an Inadequate Road Condition study immediately prior to this project coming to hearing after the conclusion of all remand work.

## **7. Summary of Conclusions Of Law with Respect to Code Compliance Issues**

The Examiner concludes that the applicant has failed to meet its burden to show that:

- A. The drainage system as proposed will meet the county code and regulations, and that approval of the drainage system would be in furtherance of the public health, safety, and welfare. The Examiner has determined, as indicated in this Order, that multiple provisions of the EDDS infiltration standards and a provision of Chapter 30.63A SCC has been violated. These violations were not minor but related in a very substantive way to the layout of the official site plan/preliminary plat, as are the other code compliance issues.
- B. The official site plan was properly submitted under the density provisions, the open space provisions, and critical areas provisions of the code. The calculated density failed to take into account steep slope areas in its density calculations, and the usable open space calculations erroneously included steep slope areas. Both of these errors were in violation of the code. Further, CAR requires that landslide hazard areas be designated and protected as critical areas. The applicant inexplicably mapped and protected some but not all of these areas. ~~Further, the applicant is proposing to cut all vegetation in these areas even though the evidence from his own geotechnical engineer warms against such an action due to slope stability. The Examiner concludes that approval of this official site plan and preliminary plat, in the face of geotechnical engineering recommendations~~ Even if the code could somehow be interpreted to allow these areas to be used as usable open space, both Tract 993 and Tract 995 do not meet the criteria for usable open space, thus making approval of the PRD as proposed impossible. To the contrary, approval of the official site plan and accompanying preliminary subdivision would violate the Examiner's duty to protect the public health, safety and welfare.

~~The Examiner remands these proposals to PDS for further proceedings.~~ denies without prejudice the PRD and the preliminary subdivision application.

## **8. Conditional Use Permit.**

The request for approval of the CUP was premised upon approval of the PRD official site plan and preliminary plat. Because both of those permits are remanded, the Examiner also ~~remands~~ denies without prejudice the request for the CUP without deciding the issues.

**9. Appeal filed under the State Environmental Policy Act (SEPA) of Determination of Nonsignificance (DNS)**

**A. Standard of Review by the Examiner of SEPA Appeal.**

1. The Examiner has appellate jurisdiction over the appeal of the DNS as a Type 1 application pursuant to SCC 30.61.300 and SCC 2.02.100. The appeal was combined with a Type 2 hearing on the PRD and the CUP.
2. The Examiner reviews issues of law regarding SEPA under Chapter 30.61 SCC, Chapter WAC 197-11 and Chapter 43.21C RCW.
3. The State Environmental Policy Act of 1971 was enacted to “promote the policy of fully informed decision making by government bodies when undertaking ‘major actions significantly affecting the quality of the environment.’” RCW 43.21C.090. Prior to undertaking or licensing a land use activity, Snohomish County (or any other permitting authority) must issue what is known as a threshold determination, which is a determination of whether the project is likely to have a “significant adverse impact to the environment.”
4. In this case, PDS issued a DNS. A DNS is issued when the responsible official has determined that the proposal is unlikely to have significant adverse environmental impacts, or that mitigation has been identified that will reduce impacts to a nonsignificant level. (See *Department of Ecology, SEPA Handbook at 29*) Under the SEPA Rules, “significant” is defined as “a reasonable likelihood of more than a moderate adverse impact on environmental quality.” (WAC 197-11-794) As pointed out in the SEPA Handbook, what is significant is “often non-quantifiable. It involves the physical setting, and both the magnitude and duration of impact.”
5. WAC 197-11-158 defines the decision making process the responsible official must undergo in making a threshold determination in a GMA jurisdiction. It states:
  - (1) In reviewing the environmental impacts of a project and making a threshold determination, a GMA county/city may, at its option, determine that the requirements for environmental analysis, protection, and mitigation measures in the GMA county/city’s development regulations and comprehensive plan adopted under chapter 36.70A RCW, and in other applicable local, state, or federal laws or rules, provide adequate analysis of and mitigation for some or all of the specific adverse environmental impacts of the project.
  - (2) In making the determination under subsection (1) of this section, the GMA county/city shall:
    - (a) Review the environmental checklist and other information about the project;

- (b) Identify the specific probable adverse environmental impacts of the project and determine whether the impacts have been:
  - (i) Identified in the comprehensive plan, subarea plan, or applicable development regulations through the planning and environmental review process under chapter 36.70A RCW or this chapter, or in other local, state, or federal rules or laws; and
  - (ii) Adequately addressed in the comprehensive plan, subarea plan, applicable development regulations, or other local, state, or federal rules or laws by:
    - (A) Avoiding or otherwise mitigating the impacts; or
    - (B) The legislative body of the GMA county/city designating as acceptable the impacts associated with certain levels of service, land use designations, development standards, or other land use planning required or allowed by chapter 36.70A RCW;
- (c) Base or condition approval of the project on compliance with the requirements or mitigation measures in the comprehensive plan, subarea plan, applicable development regulations, or other local, state, or federal rules or laws; and
- ...
- (3) Project specific impacts that have not been adequately addressed as described in subsection (2) of this section might be probable significant adverse environmental impacts requiring additional environmental review. Examples of project specific impacts that may not have been adequately addressed include, but are not limited to, impacts resulting from changed conditions, impacts indicated by new information, impacts not reasonably foreseeable in the GMA planning process, or impacts specifically reserved in a plan EIS for project review.
- (4) In deciding whether a project specific adverse environmental impact has been adequately addressed by an existing rule or law of another agency with jurisdiction, the GMA county/city shall consult orally or in writing with that agency and may expressly defer to that agency. In making this deferral, the GMA county/city shall base or condition its project approval on compliance with these other existing rules or laws.
- (5) If a GMA county/city's comprehensive plan, subarea plan, or development regulations adequately address some or all of a project's probable specific adverse environmental impacts, as determined under subsections (1) and (2) of this section, the GMA county/city shall not require additional mitigation under this chapter for those impacts.

- (6) In making the determination in subsection (1) of this section, nothing in this section requires review of the adequacy of the environmental analysis associated with the comprehensive plans and development regulations that are being relied upon to make that determination.
6. Reviewing the responsible official's decision in an appellate role, the Examiner must accord substantial weight to the agency's threshold determination. SCC 30.61.310(3). The appellant has the burden of proof. The Examiner must uphold the responsible official's DNS unless he or she determines that the decision was clearly erroneous, and may only overturn the DNS if, after reviewing the entire record, the Examiner is left with the definite and firm conviction that a mistake has been made. (SCC 30.61.310(1)) (*See Leavitt v. Jefferson County*, 74 Wn. App. 668, 875 P.2d 681 (1994))
  7. The process of the SEPA threshold determination process has been streamlined under the GMA. Through RCW 43.21C.240 and implemented through WAC 197-11-158, the SEPA Rules allow GMA jurisdictions to issue a DNS or MDNS even for projects that might otherwise seem to be large projects that would generate significant impacts, if those projects can be adequately mitigated for under the jurisdiction's GMA development regulations and other SEPA policies. (*See WAC 197-11-158; Moss v. Bellingham*, 109 Wn.App. 6, 18-26, 31 P.3d 703 (2001)(court affirmed MDNS for an 80-lot subdivision)) Therefore, the mere fact that a DNS was issued in this case is not determinative.

If there are significant adverse impacts that are not or cannot be mitigated, an Environmental Impact Statement (EIS) is required. (WAC 197-11-330(4)) A project cannot be approved with a DNS or an MDNS if it has significant adverse environmental impacts that are not mitigated; that can only be done after an EIS is completed. (*See WAC 197-11-340*) It is a procedural requirement of SEPA; significant impacts must be addressed through an EIS, they cannot simply be addressed through a study that "takes the place of an EIS."

## **B. Summary of Appellants' Arguments**

In this case, the appellants' SEPA arguments effectively dovetailed on the code arguments already discussed above. Each appellant's arguments are summarized below:

1. Lynnwood: the development will result in significant impacts altering surface water flow, impacts upon the wetland and the streams, impacts upon fish, and cumulative impacts. (Exhibit 138)
2. Carlin McKinley and Citizens of Greater Norma Beach Neighborhood: the development will result in significant impacts upon fish in Lund's Gulch Creek from sewage, landslides and erosion, stormwater drainage, and cumulative effects. (Exhibit 141)

## **C. Analysis**

### **1. Introduction**

The SEPA arguments became fairly technical but are centered on some fairly basic logic located in the SEPA rules:

- WAC 197-11-080 states that a threshold determination must be based on adequate information.
- WAC 197-11-330 states that the responsible official should independently evaluate the responses of any applicant and indicating the result of its evaluation in the threshold determination.

2. What Analysis Must the Responsible Official Do?

One legal argument that came up in this appeal, raised by the County, is one that the Examiner has already previously addressed. It concerns the duty of the Responsible Official to review a project for significant adverse environmental impacts that may occur even if a project complies with codes adopted by Snohomish County. Snohomish County has placed in its codes provisions that PDS interprets to limit its SEPA authority strictly to compliance with the code. The PDS position is at odds with county code and with state law. The Examiner hopes through this opinion to put this issue to rest once and for all.

An example of a code provision that PDS interprets to limit its SEPA authority strictly to adopted code is SCC 30.63A.060, which states:

**30.63A.060 Relationship to chapter 30.61 SCC.**

When the director, upon consideration of the specific probable adverse environmental impacts of a development activity with regard to on-site and off-site changes to storm water volume, release rate, erosion, sedimentation, and water quality, **determines that the requirements of this chapter and chapters 30.43C, 30.43D, 30.44, 30.62, 30.62A, 30.62B, 30.62C, 30.63B, 30.64, and 30.65 SCC adequately address those impacts**, compliance with those requirements shall constitute adequate analysis of and mitigation for the specific adverse or significant adverse environmental impacts of the development activity with regard to on-site and off-site changes to storm water volume, release rate, erosion, sedimentation, and water quality, **as provided by RCW 43.21C.240.**

(Emphasis added) The first thing that should be identified in this legislation is that the Council intended to give PDS, as the responsible official, a good deal of discretion to determine whether the codes **adequately address** the specific probable environmental impacts of the development activity. **If** they do, only then does the code constitute adequate analysis and mitigation of impacts. But even then, there is the stop-gap proviso, **“as provided in RCW 43.21C.240.”** RCW 43.21C.240 is the state law regulatory reform provision designed to allow development regulations to replace SEPA whenever possible but not entirely. The legislative intent provision attached to RCW 43.21C.240 explains very clearly how SEPA is supposed to work with GMA development regulations:

...

- (d) When a project permit application is filed, an agency should analyze the proposal's environmental impacts, as required by applicable regulations and the environmental review process required by this chapter, in one project review process. The project review process should include land use, environmental, public, and governmental review, as provided by the applicable regulations and the rules adopted under this chapter, so that documents prepared under different requirements can be reviewed together

by the public and other agencies. This project review will provide an agency with the information necessary to make a decision on the proposed project.

- (e) Through this project review process: (i) If the applicable regulations require studies that adequately analyze all of the project's specific probable adverse environmental impacts, additional studies under this chapter will not be necessary on those impacts; (ii) if the applicable regulations require measures that adequately address such environmental impacts, additional measures would likewise not be required under this chapter; and **(iii) if the applicable regulations do not adequately analyze or address a proposal's specific probable adverse environmental impacts, this chapter provides the authority and procedures for additional review.**

- (2) **The legislature intends that a primary role of environmental review under chapter 43.21C RCW is to focus on the gaps and overlaps that may exist in applicable laws and requirements related to a proposed action.** The review of project actions conducted by counties, cities, and towns planning under RCW 36.70A.040 should integrate environmental review with project review. Chapter 43.21C RCW should not be used as a substitute for other land use planning and environmental requirements." (Emphasis added.)

Therefore, it would not be appropriate on the basis of SEPA to simply wholesale substitute the new CAR for the old CAR when an application is vested to the old CAR; but, as indicated in the emphasized language above, there may be specific instances in which a SEPA appellant can demonstrate that there are specific probable adverse environmental impacts from a proposal that cannot be adequately mitigated by the old CAR. Likewise, in this case, the County's drainage regulation relies on an outdated 1992 Department of Ecology Manual; it is not hard to imagine that the appellants could show a specific significant adverse environmental impact resulting from the applicant's reliance on these regulations. Or the drainage reviewer could have determined there would more than likely be significant adverse environmental impacts of this project from drainage to the homes, slopes, and fishery resource in Lund's Gulch Creek, because the existing drainage code did not adequately address impacts, and called for a determination of significance on the project. It would not be enough to simply say the County has outdated regulations; there would have to be a specific significant adverse environmental impact that is not adequately addressed by the existing regulation.

The Examiner has made this holding in two cases now. The SEPA code and its companion provisions are written to comply with state law. PDS has not been interpreting these provisions in accordance with the state law. There is authority under state law to look beyond the county code when there is specific evidence of significant adverse environmental impacts that are not mitigated by county code, and PDS is required under Chapter 30.61 SCC and state law to analyze them and, if necessary, issue a determination of significance.

### 3. Lack of Adequate Information On Drainage

One of the principal claims the appellants made in this case is that the DNS should be overturned because there was a failure by the applicant and the county to evaluate the proposal's surface water flow when it issues from the ground, travels through the wetland, and leaves the site; a failure to evaluate erosion; and a failure to evaluate the effects of these impacts on fish. As stated above, these arguments dovetail with the failure to comply with parts of the drainage code and the EDDS.

The City of Lynnwood presented an expert witness, Robin Kirschbaum, a drainage engineer, who effectively impeached much of the testimony of the applicant's geotechnical engineer and pointed out the issues that the applicant failed to address. Some of the points she made in her testimony were:

- Slope failure was not addressed;
- The wetland in the southwest corner of the property will be in an area where the stormwater runoff will exit the site. The wetland hydroperiod needs to be addressed because of all the stormwater that will flush through the wetland as it exits the site;
- Some of the lots are proposed to be built on fill, which is a concern for stability (this should not occur, as the geotechnical report (Exhibit 13) states that no artificial fill should be placed on the slopes);
- Siting of the infiltration trench next to a fill slope is a concern (as indicated in the geotech report);
- The 175-foot radius of the infiltration mound comes next to the western edge of the wetland;
- Concern about long-term infiltration performance—maintenance would be a major issue; and
- Concerns about landslide failure, fish habitat degradation, and wetland degradation.

Similarly, hydrogeologist Lynn Doremus, an expert witness presented by Carlin McKinley indicated that there was uncertainty about the infiltration galleries because the mounding analysis was faulty. The vaults were only 150 feet apart, when according to code they should have been located 200 feet apart. (Exhibit 195 at 6) The radii of the two galleries were shown to impermissibly intersect in what is called a zone of saturation (a violation of the EDDS standards, as noted above). Even worse, the mound radius of the larger infiltration gallery intersects the steep slopes at about 9-18 feet, on the side overlooking Ms. McKinley's property. (See Exhibit 195)

An equally troubling issue was that of maintenance of the infiltration cartridges and infiltration trench. Under the plan devised by the applicant and agreed to by PDS, the homeowners' association (HOA) would be responsible for maintenance of water quality cartridges, which according to the testimony of Duane Overholser, PDS drainage reviewer, would need replacement every six months at first, and then every year. The HOA would also be responsible for the infiltration galleries, which, if not functioning properly, could cause catastrophic damage to the hillside by simply not functioning and allowing surface water to stream down the hill in some unnatural course most likely causing devastating slides. This possibility was not analyzed by the applicant, but is a virtual certainty if the infiltration galleries fail to work properly, according to many of the experts. ~~Virtually everyone~~ The broad consensus of the experts who testified concerning maintenance of drainage facilities, ~~especially county staff, recognized~~ was that it would be completely irresponsible to put responsibility for maintenance of this system in the care of an HOA.

No real answer was given to the maintenance problem, except that "this is a problem in every case." Testimony of Duane Overholser, February 26, 2009, 10:08. Perhaps it is, but in this case it is a

problem that has major catastrophic consequences. If a system ever comes to pass on this property, it needs to be operated by a public entity or managed by professionals to assure that it stays operational. The risks are far too great to leave to chance.

Based on all the information that was presented at the hearing regarding drainage, particularly the expert testimony of Robin Kirschbaum, Lynn Doremus, Dr. Eliot Drucker, and Dr. Christina Bandaragoda, the Examiner is convinced that PDS' decision to issue a DNS regarding drainage was clearly erroneous in that it was based on inadequate information as required by WAC 197-11-080.

After reviewing the entire record, the Examiner is left with the definite and firm conviction that a mistake has been made. (SCC 30.61.310(1)) As demonstrated above, the drainage system as proposed is likely to have significant adverse environmental impact to the environment by causing dangerous surface runoff, which in turn will cause erosion and slope failure. Fishery, stream and park resources are threatened, as is the life and property of Carlin McKinley. The City of Lynnwood has spent millions, as has Snohomish County, on Meadowdale Beach Park which is a regional oasis and treasure of many citizens in the surrounding area. This, too, is threatened by the lack of adequate information provided by the applicant and sought by PDS in reviewing this project. ~~The Examiner remands the DNS back to the responsible official for re-evaluation in light of this order.~~

The drainage reviewer admitted he did nothing but read the report and rely on the fact that it was stamped by a licensed engineer. For geotechnical review, he had someone from Engineering Services in the Department of Public Works who is a geotechnical engineer review the applicant's report. According to testimony, this individual looked at this report for 15 minutes. With all due respect, PDS has not provided adequate review of this project. As stated in the sections of the decision relating to compliance with the EDDS and the drainage code, the project violates numerous provisions of these regulations. The Examiner has cited numerous instances in which the applicant has failed to provide adequate information as required by WAC 197-11-080. Given these circumstances, the Examiner is convinced, after a thorough review of the record that a mistake has been made, and that the decision by PDS to issue a DNS was clearly erroneous. The evidence at the open record hearing has also demonstrated that substantial development of this property and alteration of the site characteristics as proposed is likely to have significant adverse environmental impacts in the form of possible earth movement and surface water runoff (both water quality and quantity). Under WAC 197-11-080, this application should be remanded to PDS to withdraw the DNS, issue a DS and do an environmental impact statement on potential drainage and geological hazard impacts, as well as cumulative impacts to the watershed. See Finding of Fact (9)(C)(5), *infra*.

#### 4. Lack of Independent Review

The Examiner need not dwell on this issue, but upholds the appeal and finds that the responsible official failed in his duty to conduct an independent review of the checklist as required by WAC 197-11-330(1). After reviewing the entire record, the Examiner is left with the definite and firm conviction that a mistake has been made. SCC 30.61.310(1). There is a duty beyond making sure that an engineer's stamp accompanies the submittal, especially when major questions are being raised about the feasibility of the development. While the Examiner understands that PDS is not in a position to get independent geotechnical review from outside reviewers for every case, it does have expertise in house and in cases such as this one, it can provide review beyond simply accepting the targeted drainage report at virtual face value. The Examiner can only conclude that there was no careful review of the geotechnical report, because the application is at odds with much of that report.

#### 5. Cumulative Impacts

The appellants argue that the Examiner should find that the cumulative effects of stormwater drainage in the Lund's Gulch Creek warrant overturning the DNS in this case. There is certainly stunning evidence of the ravages of the urbanization of this watershed in the record, as testified to by Tom Murdoch, Duane Uusitalo, Robin Kirchsbaum, Lynn Doremus, Dr. Christina Bandaragoda and other experts, as well as evidence in the record such as Exhibit 176-2 and 13, Exhibits 220A-U; Exhibit 221, and much more.

The SEPA WACs indicate that cumulative effects are a matter that is to be addressed as part of an EIS. Therefore, in addressing drainage and geologic hazard impacts in an EIS, cumulative impacts of the urbanization of the watershed and the effects of stormwater runoff to the resources within the watershed must be addressed. The Examiner also notes that cumulative downstream drainage impacts should have been addressed as part of the targeted drainage plan. Now it will be addressed as part of an EIS with public comment.

### **Summary of the Examiner's Order RE: DNS Appeal**

The Examiner concludes that the Appellants' appeals should be granted. The appellants have met their burden, and the Examiner concludes that the decision to issue a DNS in this case was clearly erroneous. After reviewing the entire record, and listening to all the testimony at the hearing, the Examiner is left with the definite and firm conviction that a mistake has been made. The responsible official based the DNS on inadequate drainage and geotechnical information. Further the responsible official did not conduct adequate review of the proposal which led to a multitude of errors, which have been previously outlined in this ~~Order~~ Decision. The Examiner remands ~~this matter~~ the DNS back to the PDS' responsible official ~~for further action consistent with this Order.~~ with instructions to grant a Determination of Significance and prepare an Environmental Impact Statement addressing at least the issues of drainage, geologic hazard impacts, as well as cumulative impacts to the watershed, should the Applicant choose to file a new application for this property.

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 Planned Residential Development Official Site Plan, ~~and Preliminary Plat is~~ REMANDED to PDS for further proceedings and Conditional Use Permit are DENIED WITHOUT PREJUDICE. The SEPA appeals are **GRANTED** and the DNS is REMANDED TO PDS WITH INSTRUCTIONS TO GRANT A DETERMINATION OF SIGNIFICANCE AND PREPARE A LIMITED SCOPE ENVIRONMENTAL IMPACT STATEMENT ON THE ISSUES AS OUTLINED IN THIS DECISION, SHOULD THE APPLICATION BE REFILED.

Order issued this 17th day of March, 2009.

**DECISION ON RECONSIDERATION ISSUED this 21<sup>st</sup> day of May, 2009.**



Barbara Dykes, Hearing Examiner

### **EXPLANATION OF APPEAL PROCEDURES**

An appeal to the County Council of the Decision after reconsideration may be filed by any aggrieved Party of Record. "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." [SCC 30.72.070(2)] 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 East-Administration Building, 3000 Rockefeller Avenue, Everett, Washington (Mailing address: M/S #604,

3000 Rockefeller Avenue, Everett, WA 98201) on or before **JUNE 4, 2009** 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 and PROVIDED FURTHER that the filing fee shall be refunded in any case where an appeal is dismissed in whole without hearing under SCC 30.72.075.

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 are limited to the following:

- (a) the Examiner exceeded his jurisdiction;
- (b) the Examiner failed to follow the applicable procedure in reaching his decision;
- (c) the Examiner committed an error of law or misinterpreted the applicable comprehensive plan, provisions of Snohomish County Code, or other county or state law or regulation; and/or
- (d) the Examiner's findings, conclusions and/or conditions are not supported by the record.

Appeals will 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 this case.

---

---

Distribution:

Parties of Record

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.