

**DECISION of the SNOHOMISH
COUNTY HEARING EXAMINER
PRO TEM
(REMOVED AFTER LIFTING OF THE MORATORIUM)**

DATE OF DECISION: ~~April 1, 2008~~ April 13, 2009

PROJECT NAME: S.A.F.E. 1

APPLICANT/
LANDOWNER: Beryl & June Osborn
22829 - Arlington Heights Rd
Arlington, WA 98223

FILE NO.: 05-125962-000-00-SD

TYPE OF REQUEST: Rural Cluster Subdivision
Lifting of DNR Development Moratorium

DECISION (SUMMARY): ~~REMANDED to the Department of Planning and Development Services for further information and possible re-hearing. The record is kept open pending receipt of such further information from PDS.~~
APPROVED with CONDITIONS

BASIC INFORMATION

GENERAL LOCATION: The property is located at 19019 Jordan Road, Arlington in Section 17, Township 31 North, Range 6 East, W.M., Snohomish County, Washington.

ACREAGE: 48.94

AVERAGE LOT AREA: 22,398 square feet

GROSS DENSITY: .39 du/ac

LOTS: 19

SMALLEST LOT AREA: 20,008 square feet

ZONING: R-5

COMPREHENSIVE PLAN DESIGNATION:

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

UTILITIES:

Water: Snohomish County PUD #1
Sewer: Individual septic

SCHOOL DISTRICT: Arlington No. 16

FIRE DISTRICT: No. 21

INTRODUCTION

The applicant filed the Master Application on November 29, 2006. (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 53, 54 and 55)

A SEPA determination was made on November 30, 2007. (Exhibit 25) No appeal was filed.

The Examiner held a continued open record hearing on March 18, 2008, the 110th day of the 120-day decision making period. Witnesses were sworn, testimony was presented, and exhibits were entered at the hearing.

The Examiner Pro Tem conducted a site visit on March 19, 2008.

PUBLIC HEARING

The public hearing commenced on March 18, 2008 at 1:00 p.m.

1. Examiner Pro Tem James Densley announced that he had read the PDS staff report, reviewed the file and would view the area on March 19, 2008, and therefore was generally apprised of the particular request involved.
2. The applicants, Beryl & June Osborn, were represented by Barbara Jones of Cascade Surveying and Engineering, Inc. Snohomish County was represented by Paul MacCready of PDS.
3. The hearing concluded at 1:24 p.m.

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

FINDINGS, CONCLUSIONS AND DECISION

FINDINGS OF FACT

Based on all 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.

A. **Nature of Request**

2. The applicant is requesting approval of a preliminary rural cluster subdivision of 49 acres for 19 single-family lots as specified in Snohomish County Code (SCC) 30.41C. The property is currently zoned Rural-5 Acre (R-5). The subdivision would result in the creation of 19 new building lots in three clusters. Two tracts would be used for access and utilities to serve the new building lots, and six restricted open space tracts would serve as Native Growth Protection Areas (NGPA), site obscuring buffers, stormwater drainage, and passive recreation. 76% of the site would be contained in open space tracts. Access would be provided directly from Jordan Road at two locations. The largest of the proposed building lots is 29,221 square feet; the smallest is 20,008. The average building lot size would be 22,398 square feet.

B. **Site Description**

3. The subject site comprises two original parcels. It currently contains one single-family residence, a barn and several other out buildings all located in the northwest corner. Two driveways currently access the property. Existing vegetation consists of a conifer forest, mostly Douglas fir and western hemlock, and an understory of flora, such as Oregon grape and salal. Much of the property is pasture land, which is used for grazing animals. Several wetlands are located throughout the site. Jim Creek, an ESA stream, forms the eastern boundary of the proposed development. A Bonneville Power Administration (BPA) transmission line easement transects the center of the site in a north-south direction. The site consists primarily of moderate slopes with several plateau areas. The majority of the slopes range between fifteen and twenty-five percent. The steepest slopes are at the eastern edge of the site along Jim Creek. The Jim Creek ravine slopes to a maximum of 45%. According to the Snohomish County Soil Survey, the soil consists of Tokul gravelly loam and Ragner fine sandy loam. (Exhibit 52)

C. **Adjacent Zoning/Uses**

4. The subject site is outside the urban growth area (UGA) and is currently zoned R-5. It is located on the east side of Jordan Road. The property is surrounded by rural residential lots in areas of mixed forest and pasture. The south fork of the Stillaguamish River lies approximately 500 feet to the west. All of the neighboring property is zoned R-5.

D. **Project Consistency with Adopted Codes and Policies**

5. Parks Mitigation (Chapter 30.66A SCC)

The proposal is within River Meadows District No. 302 and is subject to Chapter 30.66A SCC, which requires payment of \$48.82 per each new single-family residential unit. This payment is an acceptable mitigation for parks and recreation impacts in accordance with County policies.

6. Road System Capacity [SCC 30.66B.310]

A development must mitigate its impact upon the future capacity of the road system by paying a road system impact fee reasonably related to the impacts of the development on arterial roads located in the same transportation service area as the development, at the rate identified in SCC 30.66B.330 for the type and location of the proposed development. This development will generate 172.26 new average daily trips (ADT) and has a road system impact fee of \$45,476.64 (\$2,393.51/unit) based on \$264/ADT, the current fee rate for residential developments outside the urban growth area for Transportation Service Area (TSA) A. Consistent with SCC 30.66B.340, payment of this road system impact is required prior to building permit issuance.

7. Concurrency [SCC 30.66B.120]

PDS has evaluated the subject development for concurrency under the provisions of SCC 30.66B.120 and a preliminary determination has been made that the development is concurrent as of January 17, 2006. The expiration date of the concurrency determination will be six years from the concurrency date, which is January 17, 2012.

The development has been deemed concurrent on the following basis:

Small or Medium-Sized Development in TSA with one or more arterial unit in arrears, SCC 30.66B.160

The subject development is located in TSA A which, as of the date of submittal of the application, had no arterial units in arrears. The subject development generates 13.50 a.m. peak-hour trips and 18.18 p.m. peak-hour trips which is not more than the threshold of 50 peak-hour trips in which case the development would also have to be evaluated under SCC 30.66B.035.

8. Inadequate Road Condition (IRC) [SCC 30.66B.210]

The subject development proposal will not impact any IRC locations identified within TSA A with three or more of its p.m. peak hour trips, nor will it create any. Therefore, it is anticipated that mitigation will not be required with respect to inadequate road conditions and no restrictions to building permit issuance or certificate of occupancy/final inspection will be imposed under this section of Chapter 30.66B SCC.

9. Frontage Improvements [SCC 30.66B.410]

Full rural frontage improvements are required along the subject parcel's frontage on Jordan Road consisting of asphalt concrete pavement eleven feet in width from the roadway centerline with a seven foot paved shoulder. Construction of frontage improvements is required prior to recording unless bonding of improvements is allowed by PDS, in which case construction is required prior to any occupancy of the development.

10. Access and Circulation [SCC 30.66B.420]

All developments are required to provide for access and transportation circulation in accordance with the comprehensive plan and SCC 30.66B.420, design and construct such access in accordance with the EDDS, and improve existing roads that provide access to the development in order to comply with adopted design standards, in accordance with SCC 30.66B.430. The proposal of the applicants complies with the ordinance. Exhibits 24 and 56. There is an existing fence within the proposed right-of-way south of the southern proposed access road. It is a condition of approval that this fence be removed to allow adequate sight distance to the south from the entrance to the southern access point. The County accepts the proposed layout of the two private roads. The County approves the use of the private roads shown on the preliminary plat for the subject development per SCC 30.41A.210(3)(c).

11. Dedication of Right-of-Way [SCC 30.66B.510 and 30.66B.520]

Developments are required to dedicate, establish, or deed right-of-way to the County for road purposes as a condition of approval of the development, when to do so is reasonably necessary as a direct result of a proposed development, for improvement, use or maintenance of the road system serving the development.

The road serving this development, Jordan Rd., is designated as a major collector rural arterial on the County's Arterial Circulation Map. This requires a right-of-way width of forty feet on each side of the right-of-way centerline. Currently, thirty feet of right-of-way exists on the development's side of the right-of-way. Therefore, the development is required to dedicate ten feet of additional right-of-way. This dedication is adequately shown on the site plan. Exhibit 24.

12. State Highway Impacts [SCC 30.66B.710]

The applicant submitted a revised traffic mitigation offer to WSDOT of \$6,545.88, dated April 23, 2007. WSDOT has indicated in comments dated December 25, 2006 that an offer of this amount will satisfy the applicant's traffic mitigation obligation (Exhibit 49).

13. Other Streets and Roads [SCC 30.66B.720]

Mitigation requirements for impacts on streets inside cities and roads in other counties will be established consistent with the terms of interlocal agreements between the County and the other jurisdictions. The proposed development is subject to SEPA and thus is subject to and is effected by the interlocal agreement (ILA) with Arlington. The applicant submitted a revised traffic mitigation offer of \$51,505.96 to the City of Arlington, dated April 25, 2007. Arlington has indicated in comments dated May 30, 2007 that an offer of this amount will satisfy the applicant's traffic mitigation obligation (Exhibit 47).

14. Transportation Demand Management (TDM) [SCC 30.66B.630]

Since this development is outside of the UGA, TDM measures are not required.

15. Pedestrian Facilities [RCW 58.17.110]

The County is required to make findings regarding safe walking conditions for school children who may reside in the subject subdivision. Comments from Arlington School District have been received; dated January 5, 2007, indicating school buses will pick up children from the development at the intersections of Jordan Road and the proposed access roads to the development (Exhibit 45). No off-site improvements are required.

16. School Mitigation (Chapter 30.66C SCC)

Pursuant to Chapter 30.66C SCC, school impact mitigation fees will be determined according to the Base Fee Schedule in effect for the Arlington School District No. 16, at the time of building permit submittal and collected at the time of building permit issuance for the proposed units. Credit is to be given for the two existing lots.

17. Drainage and Grading (Chapters 30.63A and 30.63B SCC)

The subject site has five existing drainage basins, three of which will be developed. The proposal includes collection of the surface runoff from the development and routing that run-off to detention and infiltration facilities located in separate tracts. Those facilities will be designed to meet the quantity control requirements of SCC 30.63A. The requirements for water quality treatment will be fulfilled by providing dead storage ponds in the bottom of the detention ponds and in bio-filtration facilities prior to discharge to infiltration facilities.

Requirements for detention facility landscaping are specified in SCC 30.25.023. Where fencing of a detention facility is required, Type A landscaping, as described in SCC 30.25.017(1), or a living fence at least three feet in height which will grow to at least eight feet in height within three years shall be installed in an area with a minimum width of six feet along the outside edge of the fence. The applicant provided a preliminary landscape plan (Exhibit 23), which was reviewed by staff.

PDS (Engineering) has reviewed the concept offered and is recommending approval of the project, subject to conditions which would be imposed during full drainage plan review pursuant to Chapter 30.63A SCC. Grading quantities are anticipated to be approximately 8,850 cubic yards of cut and fill, primarily for road and drainage facility construction and associated grade transitions on the project areas adjacent to that construction. Water quality would be controlled during construction by use of silt fences and straw bales in accordance with a Temporary Erosion and Sedimentation Control Plan (TESCP) required by Chapter 30.63A SCC.

18. Critical Areas Regulations (Chapter 30.62 SCC)

Two Type 5 streams, five Category 3 wetlands and two Category 4 wetlands are located on the site. Two of the Category 3 wetlands are riparian wetlands associated with the Type 5 streams. The two Category 4 wetlands meet the BMP requirements of SCC 30.62.360(6). A Type 1 ESA stream (Jim Creek) is located in the northeast corner of the site. Steep slopes, those greater than 33 percent are located on the eastern edge of the site and are associated with Jim Creek. A

majority of the critical areas and buffers on the site are heavily impacted from grazing and access by livestock.

The eastern boundary of the proposed development contains Jim Creek, an ESA stream with known Chinook salmon and bull trout habitat. A Habitat Management Plan prepared by GECCO (November 29, 2006) was submitted by the applicant and reviewed by staff (Exhibit 10). SCC 30.62.340 requires a critical area study for any activity allowed under SCC 30.62.350, 30.62.370 or 30.62.400. The applicant is proposing buffer averaging under SCC 30.62.350(1)(c)(i); therefore, a Critical Area Study and Mitigation Plan were prepared by GECCO (revised March 29, 2007) (Exhibit 16). The proposed project will impact wetlands and buffers; therefore, a mitigation plan was submitted within the critical area study. Due to required revisions to the original mitigation plan, the applicant submitted a Revised Mitigation Plan prepared by GECCO dated October 16, 2007 (Exhibit 21). This mitigation plan was reviewed and approved by staff and replaces the mitigation plan that was included in the Critical Area Study and Mitigation Plan, revised March 29, 2007 (Exhibit 16). An Addendum to the Revised Mitigation Plan which was prepared by GECCO dated November 13, 2007 (Exhibit 15). The addendum was reviewed and approved by staff.

The standard buffer for a Type 1 ESA stream is 150 feet per Option A of the Salmonid Habitat Management Plan Administrative Rule (Section 1 – Permanent Protection of Fish and Wildlife Habitat Conservation Area). Section 1 also requires the fish and wildlife habitat conservation area to extend to a point 25 feet beyond the top of adjacent slopes that are 33 percent or greater. In rural areas, the required buffer for a Type 5 stream is 25 feet, the required buffer of a Category 3 wetland is 50 feet and the required buffer for a Category 4 wetland is 25 feet per Table 30.62.310(1). Wetland and wetland buffer impacts are proposed for road improvements to Jordan Road, two access roads into the development and one driveway to a proposed lot. Temporary impacts to buffers are proposed due to road improvements to Jordan Road, proposed access roads, and detention pond outlets.

Based on the mitigation that is proposed, which includes setting aside critical areas and proposed buffers as NGPA (except the BPA transmission line), enhancing 31,079 square feet of degraded wetland, and enhancing 24,037 square feet of degraded wetland buffer, staff believes that the proposed development will increase the functions and values of critical areas and buffer over what would exist if no impacts or limited impacts were proposed. Under SCC 30.62.320, the wetlands, streams, and buffers are not required to be set aside as NGPA and could continue to be used as pasture after development.

The applicant proposes mitigation for the buffer impacts under buffer averaging SCC 30.62.350(1)(c)(i). A total of 37,326 square feet of buffer will be reduced due to impacts and 40,328 square feet of buffer will be added to critical areas. The mitigation proposal has met, if not exceeded, the requirements of SCC 30.62.350(1)(c)(i)(A-C).

Mitigation for the wetland impacts are discussed on Page 4, Paragraph 5 of the revised mitigation (Exhibit 21). According to the approved mitigation plan, a total of 4,066 square feet of Wetland D will be impacted for an access road. The area of wetland that will be impacted is currently grazed by livestock and is of low quality. Out-of-kind mitigation for this impact is proposed through enhancement of 24,713 square feet of Wetland D. SCC 30.62.345(1)(c)

requires that wetland functions and values be replaced in kind at a minimum ratio of one (replacement value) to one (existing value). To meet this requirement, the applicant is only required to create 4,066 square feet of low quality wetland. The proposed mitigation will enhance 24,713 square feet of low quality wetland into a forested/scrub-shrub wetland at a 6:1 ratio. Water storage functions of the wetland will be replaced within the water quality/detention facility as stated in the revised mitigation plan (Page 6, # 3). The mitigation proposal exceeds the requirements of SCC 30.62.345(1)(c).

Two Category 4 “BMP” wetlands are also proposed to be filled. Under SCC 30.62.360(6), development activities are allowed within Category 4 wetlands smaller than 10,000 square feet in size, provided that such activities are conducted pursuant to best management practices. According to SCC 30.62B.090, best management practices are required to mitigate adverse impacts to the function and values of critical areas. Critical areas are defined in SCC 30.91C.340 and include wetlands, but do not include buffers unless they meet the requirement for fish and wildlife habitat conservation areas or primary association area for critical species. These two wetlands have been disturbed by grazing and a cultivated garden area and the buffers are not considered fish and wildlife habitat conservation areas or primary association area for critical species. Mitigation for the proposed wetland impact includes 6,366 square feet of enhancement to Wetland D, creating a forested/scrub-shrub wetland at a 1:1 ratio. Water storage functions of the wetland will be replaced within the water quality/detention facility as stated in the mitigation plan (Page 6, # 3).

Temporary impacts to the buffers of Wetland D and Wetland E are proposed due to road improvements to Jordan Road, proposed access roads, detention pond outlets and the replacement of an existing catch basin. According to the mitigation plan, four trees will be lost within the areas of temporary impact. The areas of temporary impact will be restored with a total of twelve trees and 60 shrubs. In addition, approximately 60 additional trees will be planted within the 24,037 square feet of buffer enhancement along Wetland D. Specific plant species and numbers have been included in Figure 8 of the revised mitigation plan (Page 15)(Exhibit 21). 36 trees will be required to be planted in the buffer. The revised mitigation plan proposes to plant 12 trees within the areas of temporary impacts and another 60 trees would be planted within the buffer of Wetland D, in an area that currently has no trees. A discussion of the relocation of the existing catch basin was provided in the Addendum to the Revised Mitigation Plan prepared by GECCO (November 13, 2007) (Exhibit 15). The applicant has provided adequate mitigation for the temporary impacts to wetland buffer.

The steep slope areas on the site that are classified as erosion hazard areas and as landslide hazard areas have been placed in NGPA or NGPA/E in compliance with SCC 30.62.200(3) and is shown on the preliminary plat.

19. Fire Code (Chapter 30.53A SCC)

PDS sent a request for review document to Fire District # 21 on November 30, 2006. PDS did not receive a response from Fire District # 21.

The Snohomish County Fire Marshall conducted an internal review of the proposed plat and recommended approval of the preliminary plat on January 17, 2007. If a gate is installed at the

entrance of the private roadways, the gate shall be activated by the emergency vehicle opticom strobe that opens the gate automatically with the approach of an emergency vehicle in either direction. In the event of power failure the gate shall open automatically and remain in the open position until the power is restored. The gate shall provide a minimum twenty-foot clear opening for fire apparatus access.

The application complies with the requirements contained in SCC 30.53A, including fire flow and emergency vehicle access.

20. GMA Comprehensive Plan (General Policy Plan, GPP)

The subject property is designated Rural Residential (RR: 1 du/5 acre Basic) on the GPP Future Land Use map, and is located outside the Urban Growth Area (UGA). The implementing zones within this designation are the Rural-5 Acre zone and other zones with a minimum lot size requirement larger than 5 acres. The base density of 1 dwelling unit per 5 acres may be increased consistent with Policy LU 6.B.9. Policy LU 6.B.9 states that within the Rural Residential designation subdivisions may exceed the basic density of 1 lot per 5 acres if the rural cluster subdivision technique is used, all of its criteria and requirements for the maintenance and enhancement of the rural character are met, and the maximum lot yield does not exceed 1 lot per 2.3 acres.

The 19 lots proposed are consistent with the density provisions of Snohomish County's GMA-based zoning regulations under Subtitle 30.2.

21. Zoning (Chapter 30.2 SCC)

This project meets zoning code requirements for lot size, bulk regulations and other zoning code requirements and meets the standards for a rural cluster subdivision as specified in Chapter 30.41C SCC.

22. Subdivision Code (Chapter 30.41A SCC)

The proposed plat also meets Chapter 30.41A SCC requirements. The proposed plat as conditioned also meets the general requirements under Section 30.41A.100 with respect to health, safety and general welfare of the community. As proposed, the subject lots will not be subject to flood, inundation or swamp conditions. The lots as proposed are outside of all regulated flood hazard areas. As conditioned, the plat will meet all SCC 30.41A.210 design standards for roads.

23. Rural Cluster Subdivision Standards (Chapter 30.41C SCC)

The RCS application meets all of the criteria required for preliminary approval listed in SCC 30.41C.200. All utilities shall be located underground. The proposal meets requirements for restricted open space and bulk regulations, lot yield, and bonus residential density.

The proposal complies with the provisions of SCC 30.41C.010 by clustering the lots on the most buildable and least environmentally sensitive portion of the site while retaining approximately 76% (37 acres) of the property in restricted open space; the proposal is considered preferable to traditional lot-by-lot development through its efficient use of the most buildable portion of the site together with the retention of environmentally sensitive areas in permanent open space tracts; the use of the clustering concept provides greater compatibility with the surrounding development by providing buffers between adjoining properties; the use of the clustering concept has reduced the need for impervious surfaces resulting in the protection of groundwater and potential water pollution from erosion and other drainage related problems; the project complies with critical areas regulations, thereby minimizing the loss of the county's environmentally sensitive areas.

The application has been reviewed for compliance with the requirements of SCC 30.41C.200 as follows: critical areas have been identified and designated as Native Growth Protection Areas; and a sight obscuring buffer of native vegetation has been provided, in accordance with the provisions of Table 30.41C.210(1). The access roads shall be constructed to EDDS standards; and all utility lines are to be located underground. Unbuildable land, as defined by Chapter 30.41C SCC, shall be included in Native Growth Protection Areas. No on-going agriculture or forestry uses are proposed within the open space tracts; there are no adjacent designated open spaces which affect the location of the open space in the RCS; an open space management plan has been provided detailing the required maintenance and management tasks for the proposed open space (Exhibit 22); physical separation of clusters is provided; at least 75% of the residential lots abut a required buffer or open space tract; the proposed RCS has been designed in accordance with the natural features of the site, maintains rural character, and maximizes the visibility of the open space tracts from the adjoining road; the proposal is not served by public sanitary sewer. It is not feasible to locate the lot clusters near the interior of the site because of the necessity to protect the centrally located wetlands. The clusters of lots are not located on prominent topographic features; and the site is located within a rural fire district.

The application complies with the provisions of SCC 30.41C.230 and SCC 30.41C.240 based on the following analysis:

Basic lot yield: 2,131,889 square feet/100,000 square feet = 21.32 lots

Total lot yield-rounded = 21 lots

Total lots proposed = 19 lots

24. Plats - Subdivisions – Dedications (Chapter 58.17 RCW)

The plat has been reviewed for conformance with criteria established by RCW 58.17.100, .110, .120, and .195. Such criteria require that the plat conform with applicable zoning ordinances and comprehensive plans, and make appropriate provisions for the 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.

The proposed plat conforms with applicable zoning codes and the comprehensive plan. There is open space provided within the plat in the form of wetland, and buffer areas, the single-family homes on smaller lots will be in character with the existing neighborhood. Provisions for adequate drainage have been made in the conceptual plat design which indicates that the final design can conform to Chapter 30.63A SCC and State DOE drainage standards. The plat, as conditioned, will conform to Chapters 30.66A, B and C SCC, satisfying County requirements with respect to parks and recreation, traffic, roads and walkway design standards, and school mitigation. Sewage disposal will be provided through individual on-site septic systems. The Snohomish Health District reviewed the application and recommended preliminary plat approval on February 26, 2007 (Exhibit 46). Water service will be provided by the Snohomish County PUD #1. The water district provided a letter stating water is available on January 11, 2006 (Exhibit 42a). The Letter of Water Availability was extended by the District January 7, 2013 (Exhibit 42b). Snohomish County PUD #1 provided a letter dated December 7, 2007 indicating the District had sufficient electric system capacity to serve the development (Exhibit 43).

E. **ISSUES RAISED BY COMMENTATORS**

25. Jim Creek and its associated steep slopes, along with most of the wetlands and their buffers will be contained within NGPAs. All development is proposed to be located west of the BPA transmission easement. For those areas directly impacted by the development, a condition has been recommended to implement a mitigation plan that includes additional buffer, wetland and buffer enhancement, and monitoring.
26. The applicant is proposing to extend public water provided by Snohomish County PUD #1 to this development. The District has indicated that public water is available. Therefore, existing wells in the area should not be impacted.
27. Approximately 172 new average daily trips will be generated by this new development. A condition is included that the applicant pays a proportionate share of impact fees to the County to mitigate those traffic impacts. A condition is also included that requires the developer to construct rural frontage improvements along the parcel's frontage on Jordan Road.
28. A Habitat Management Plan prepared by GECCO (November 29, 2006) was submitted by the applicant and reviewed by staff. Chinook salmon and bull trout are the only protected species, i.e. those species listed as endangered or threatened under state or federal law, identified at the subject site. A fish and wildlife habitat conservation area has been shown on the preliminary plat map and is wholly contained within an NGPA open space tract.
29. This development meets the density standards specified in SCC Chapter 30.41C, which regulates rural cluster subdivisions. Rural cluster subdivisions are the preferred type of development in rural areas, as noted in the purpose section of SCC Chapter 30.41C. The purpose section of the rural cluster subdivision chapter (SCC 30.41C.010) states that those developments that meet those standards identified in the chapter produce a development pattern in rural areas that is consistent with rural character and to produce a rural development pattern which will be better than traditional lot-by-lot development on either consolidated lots or unsubdivided property in that it allows for variety in design, placement of buildings, use of open space, more efficient use of the most buildable portion of sites, and retention of the environmentally sensitive and scenic

portions of sites as permanent open space. This proposal complies with all provisions specified in 30.41C SCC.

30. The subject property does not fall within a flood hazard area and, therefore, the development is not subject to 30.65 SCC.
31. Water quality treatment will be fulfilled by providing dead storage ponds in the bottom of the detention ponds and in bio-filtration facilities prior to discharge to infiltration facilities.
32. A letter was received from the Stillaguamish Tribes indicating that the site is located between two known State Office of Archaeology and Historic Preservation (OAHP) sites. The Tribe states that there is a possibility of cultural impact on the Tribe and that an archaeological study be done prior to any excavation. An archaeology site report is required only where known archaeological sites are recorded on the Washington State Department of Archaeology and Historic Preservation's Geographic Information System (SCC 30.32D.200). However, the applicant has volunteered to perform an archeological survey prior to excavation (Exhibit 50).
33. The Bonneville Power Administration (BPA) responded to a request for review from the County by submitting a letter dated June 4, 2007 stating that the agency did not object to the development. They included a landowner's guide explaining compatible uses within the right-of-way (Exhibit 48).

F. Forest Practices Issues

34. A portion of the subject property was logged under an approved forest practices application dated September 17, 2002. The six year development moratorium is in effect on the subject property due to the permitted logging activity. Said moratorium is scheduled to expire in September, 2008. (Exhibit 21, page 3)
35. Up until 2007, the statute required local government to develop a process for lifting the six-year moratorium which includes public notification, procedures for appeals, and public hearings, presumably for applications such as subdivisions. Former RCW 76.09.060(3)(b)(i)(C). In addition, the local government entity was allowed to develop an administrative process for lifting or waiving the six year moratorium for purposes of constructing a single family residence or outbuildings, or both, on a legal lot and building site. Former RCW 76.09.060(3)(b)(i)(D)
36. No hearing or process has been conducted for purposes of lifting the moratorium for a subdivision on this site since no ordinance for setting up such a process has been enacted by the county legislative body.
37. As amended in 2007, RCW 76.09.030 provides a slightly different method for lifting the moratorium. An element of this method requires that DNR notify the local entity that the land owner has resolved any outstanding final orders or decisions issued by the department. The record contains no evidence that such a notification has been issued by DNR

CONCLUSIONS OF LAW

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

1. The Hearing Examiner has jurisdiction to hear this matter and render a decision thereon.
2. The forest practices moratorium is mandated by state law; Snohomish County has no choice but to impose a six-year moratorium when an applicant fails to disclose on a forest practices permit the intent to convert land from forestry to other uses:

For six years after the date of the application the county, city, town, and regional governmental entities **shall deny** any or all applications for permits or approvals, including building permits and subdivision approvals relating to nonforestry uses of land subject to the application;

Id (emphasis added). In 2007, the Legislature re-worked this part of the statute, but kept the same substantive requirement intact:

If a county, city, town, or regional governmental entity receives a notice of conversion to nonforestry use by the department under RCW 76.09.060, then the county, city, town, or regional governmental entity **must deny** all applications for permits or approvals, including building permits and subdivision approvals, relating to nonforestry uses of the land that is the subject of the notification.

RCW 76.09.460 (emphasis added).

3. The pre-2007 statute directed the local government entity, meaning the County Council,...“to develop a process for lifting the six-year moratorium, which shall include public notification, and procedures for appeals and public hearings.” RCW 76.09.060(3)(b)(i)(C). Although PDS has tried to write a hearing process into its administrative rule, this effort falls short of what is mandated by this statute. Only an ordinance amending the UDC will properly place this procedure in the county code with appeal rights, public notice, and appropriate public hearing procedure. Implicit in the structure of the statute is that there must be public notice, a public hearing, and appeal rights regarding lifting a moratorium and allowing subdivision development on a parcel on which a six-year moratorium has been imposed. Without this type of procedure, the county must consider the six year moratorium still in place for purposes of any development except for single family residential, as specified in the statute (unless it has already expired).
4. RCW 76.09.060(3)(b)(i)(D) is quite explicit that the administrative process for lifting the moratorium is only for purposes of allowing single family development. RCW 76.09.060(3)(b)(i)(D). It cannot suffice to lift the moratorium for a subdivision.
5. In 2007, however, the Legislature changed the moratorium provisions of the statute. Whether or not these new provisions apply to the pre-2007 Class 3 permit in this case is a legal question. The Examiner directs PDS to consult with the Prosecuting Attorney about the appropriate procedure for potentially lifting the moratorium in this instance, should that be the route the applicant wishes to take. What is clear is that the appropriate steps have not yet been taken to

lift the moratorium and the Examiner has no choice but to remand the decision to PDS (or deny the application outright). If the applicant chooses to go forward to lift the moratorium, the Examiner needs information concerning the forest practices permit and moratorium in the record, and PDS needs to determine from the Prosecuting Attorney what procedural steps must be taken to lift the moratorium. That may include a public hearing before the Examiner, and it may also include adopting new legislation by the County Council to provide an adequate process that allows for public notice, participation, and appeals. In the event PDS, after due consultation with the Office of the Prosecuting Attorney, determines that the method set out in the 2007 amended statute applies, then that method may be followed. Another method for approval of the project in light of the moratorium is the lapse of time until the moratorium expires by its own terms after six years.

- ~~6. Hence, a pre-condition to entering a decision authorizing the Rural Cluster Subdivision requested in the application is a determination by PDS that the moratorium has either been lifted or expired. The record will be kept open for receipt of such written evidence.~~
 - ~~7. In the event that the applicant and PDS provide the Examiner with such written evidence that the moratorium has either been properly lifted or expired by its own terms, the following conditions shall apply to the granting of the proposed preliminary plat of S.A.F.E. 1 rural cluster subdivision application:~~
6. The applicant has presented appropriate written evidence to the Examiner's office (Exhibit 57) indicating that the moratorium has expired by its own terms; therefore the preliminary plat may be approved pursuant to Examiner Pro Tem James Densley's April 1, 2008 decision.

DECISION

Pursuant to the Examiner's authority under SCC 30.72.060 and 2.02.155(2), the application for preliminary subdivision approval and rural cluster subdivision approval is hereby **GRANTED** subject to the following conditions:

CONDITIONS

- A. The revised preliminary plat/rural cluster subdivision received by PDS on October 18, 2007 (Exhibit 24) shall be the approved plat configuration. Changes to the approved plat are governed by SCC 30.41A.330.
- B. Prior to initiation of any 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 plattor 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 Revised Mitigation Plan for SAFE-1 Subdivision prepared by Gribble Environmental Consulting Co. revised October 16, 2007 (Exhibit 21) and the Addendum to the Revised Mitigation Plan for the SAFE-1 Subdivision prepared by Gribble Environmental Consulting Co. dated November 13, 2007 (Exhibit 15) 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 dwelling units within this development are subject to park impact fees in the amount of \$48.82 per newly approved dwelling unit pursuant to Chapter 30.66A. Payment of these mitigation fees is required prior to building permit issuance; provided that the building permit has been issued within five years after the application is deemed complete. After five years, park impact fees shall be based upon the rate in effect at the time of building permit issuance.”
- ii. “The lots within this subdivision will be subject to school impact mitigation fees for the Arlington School District No. 16 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 two existing parcels. Lots 1 and 3 shall receive credit.”
- iii. “Chapter 30.66B SCC requires the new lot mitigation payments in the amounts shown below for each single-family residential building permit:
\$2,393.51 per lot for mitigation of impacts on County roads paid to the County,
\$344.52 per lot for mitigation of impacts on state highways paid to the County.
\$2,710.84 per lot for mitigation of impacts on City streets for the City of Arlington paid to the City. Proof of payment shall be provided.
These payments are due prior to or at the time of building permit issuance for each single family residence. Notice of these mitigation payments shall be contained in any deeds involving this subdivision or the lots therein. Once building permits have been issued all mitigation payments shall be deemed paid by PDS.”
- iv. 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.”

- v. “If there is a gate installed at the entrance of the private roadways the gate shall be activated by the emergency vehicle opticom strobe that opens the gate automatically with the approach of an emergency vehicle in either direction. In the event of power failure the gate shall open automatically and remain in the open position until the power is restored. The gate shall provide a minimum twenty-foot clear opening for fire apparatus access.”
- vi. “Where existing vegetation fails to meet the intended function of the Vegetated Sight Obscuring Buffer, then supplemental planting of native vegetation shall be made, with the ultimate density of trees at 10 feet on center and shrubs at 3 feet on center. A minimum of 75% of the trees shall be conifers.”

D. Prior to recording of the final plat:

- i. The fence within the proposed right-of-way south of the southern proposed access road shall be removed to allow adequate sight distance to the south from the entrance to the southern access point.
- ii. Rural frontage improvements shall be constructed along the parcel’s frontage on Jordan Road to the satisfaction of the County.
- iii. 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 Development Review & Construction Division for review and approval prior to installation.

- iv. The final mitigation plan shall be completely implemented (additional buffer, wetland and buffer enhancement).

E. In conformity with applicable standards and timing requirements:

- i. The preliminary landscape plan (Exhibit 23) shall be implemented. All required detention facility landscaping shall be installed in accordance with the approved landscape plan.
- ii. The open space management plan (Exhibit 22) shall be implemented by a homeowner’s association.

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

Nothing in this preliminary 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.

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

DECISION

~~The application is **REMANDED** to the Department of Planning and Development Services for further information and possible re-hearing consistent with this decision.~~

Decision issued this ~~1st day of April, 2008~~—13th day of April, 2009.

James Densley, Hearing Examiner Pro Tem

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 **APRIL 11, 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 **APRIL 15, 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: Paul MacCready

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.