

BEFORE THE
SNOHOMISH COUNTY HEARING EXAMINER
AMENDED DECISION of the HEARING EXAMINER PRO TEM

In the Matter of the Application of)
River Estates) **FILE NO. 06-104004 SD**
5-lot Rural Cluster Subdivision (RCS) on 11.9 acres)

DATE OF DECISION: **MARCH 21, 2008**
APPLICANT: H-4 Development, Inc., 1304 Lake Shore Drive, Lake Stevens, WA 98258
PROJECT NAME: River Estates
DECISION (SUMMARY): APPROVED with Conditions

BASIC INFORMATION

GENERAL LOCATION: The subject property is located on the west side of 147th Avenue SE approximately 1200 feet north of its intersection with OK Mill Road on the Pilchuck River, Snohomish in Section 16, Township 29 North, Range 6 East, W.M., Snohomish County, Washington.

ACREAGE: 11.9 acres
NUMBER OF LOTS: 5
AVERAGE LOT SIZE: 30,692 square feet
MINIMUM LOT SIZE: 26,750 square feet
DENSITY: .42 d.u. per acre (gross)
ZONING: R-5

COMPREHENSIVE PLAN DESIGNATION:

General Policy Plan Designation: Rural Residential-5 (RR-5 Basic)

UTILITIES:

Water: Snohomish County PUD, Individual Wells, or Group B Community Water System
Sewer: Individual on-site Septic
Electrical: Snohomish County PUD

SCHOOL DISTRICT: Snohomish School District No. 201

FIRE DISTRICT: Fire District No. 8

INTRODUCTION

The applicant filed a Master Permit Application on August 14, 2006. (Exhibit 1) A revised Master Permit Application was filed on February 23, 2007. (Exhibit 12) The Department of Planning and Development Services (PDS) gave proper public notice of the open record hearing as required by the Snohomish County Code. (Exhibits 21, 22 and 23)

A SEPA “Determination of Nonsignificance” (DNS) was made on September 17, 2007. (See Exhibits 20 and 13) An appeal was filed by Renee Bauman, Chris Lyon and Rod Smith on October 8, 2007. The SEPA appeal was dismissed as untimely by the Hearing Examiner on October 23, 2007 (Exhibit 53)

The Examiner held an open record hearing on December 4, 2007. Witnesses were sworn, testimony was presented, and exhibits were entered at the hearing.

PUBLIC HEARING

The public hearing commenced on December 4, 2007 at 2:00 p.m. and closed on 3:51 p.m.

1. The Examiner announced that she had read the PDS staff report and reviewed the file, and was familiar with the area in the vicinity of the site and, therefore, was generally apprised of the particular request involved.
2. The applicant, H-4 Development, Inc. was represented by Tim Hansen and Merle Ash of Land Technologies, Inc., as well as Bill Foster, attorney. Snohomish County was represented by David Radabaugh of the Department of Planning and Development Services. Several citizens appeared and testified including, Jim Gardner, Chris Lyons, and Rodney Smith.

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, and record of oral testimony received at the open record hearing, which are a part of the file in this matter, and which exhibits and testimony were considered by the Examiner, are hereby incorporated in this decision, as if set forth in full.
2. Roads and Transportation. The Department of Public Works (DPW) reviewed the Master Permit Application request with regard to traffic mitigation and road design standards. That review considered the requirements of Title 13 SCC and Chapter 30.66B SCC as to road system capacity, concurrency, inadequate road conditions, frontage improvements, access and circulation, and dedication/deeding of right-of-way, state highway impacts, impacts on other streets and roads, and Transportation Demand Management.
 - a. Road System Capacity. The impact fee for this proposal is based on the new average daily trips (ADT) generated by single family residences, which is 9.57. This rate comes from the 6th Edition of the ITE Trip Generation Report (code 210). As proposed, the development will consist of 5 lots which generate 47.85 new ADT and has a road system capacity impact fee of \$18,996.45 (\$3,799.29 per lot) based on \$397 per ADT.
 - b. Concurrency. Although there are no documents in the record that show the Department of Public Work's Concurrency Certificate or the date on which it was issued, PDS has represented that under SCC 30.66B.160(2)(a), the DPW has determined that the development is deemed to be "concurrent" for purposes of its impact on arterial units, which determination expires six years from the date that the determination was made. (Exhibit 48). This is based on the fact that there are no arterial units in arrears within TSA B in the vicinity of the development, nor will the development cause any arterial units to fall into arrears, and it does not impact any designated ultimate capacity arterial units. In addition, the development as proposed will generate 3.75 a.m. and 5.05 p.m. peak hour trips, which is below the limit of 50 peak hour trips. The development is therefore not required to be reviewed under SC 30.66B.035.
 - c. Inadequate Road Conditions. Under SCC 30.66B.210, the proposed development does not require the imposition of mitigation for inadequate road conditions because it does not impact any IRC locations identified at this time within TSA B with three or more of its p.m. peak hour trips, nor will it create any.
 - d. Frontage Improvements. Frontage improvements are required to be constructed on any open, constructed and maintained public road. The required improvement shall be constructed in accordance with the EDDS, including correction of horizontal and vertical alignments, if applicable.

In the present case, according to DPW Rule 4222.020(1), full rural frontage improvements are required along the subject parcel's frontage on 147th Street SE. The improvements shall consist of asphalt concrete pavement, having a width of 11 feet from right-of-way centerline with a 7-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.

As to impact fees, 147th Street SE, on which the development's frontage improvements are required, is not in the impact fee cost basis (Appendix D of the Transportation Needs Report). Therefore, credits towards the applicant's impact fee for any frontage improvements that can be used in the ultimate build-out of the road are not applicable.

- e. Access and Circulation. 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.

Access is proposed from 147th Avenue SE via a private road. DPW identified a deficient sight stopping distance from the proposed new road intersection with 147th Avenue SE, which is posted as a 35 mph road, due to the fact that 147th Avenue SE has a rise in it. The applicant requested a deviation from the Stopping Sight Distance (SSD) standard to allow a reduced sight distance, without fixing the road. The standard provides that the SSD for a rural county road with operating speeds of 35 mph is 250 feet. Here, the proposed intersection provides a SSD of only 215 feet from the south, and 196 feet from the north. The access road intersects 147th Avenue SE across the street from an existing elementary school.

The applicant argues that the “hump” in the road which causes the sight distance deficiency is a naturally occurring feature and should have been removed by the School District when the elementary school was constructed. They allege that the proposed subdivision does not cause the sight distance problem. The applicant’s position is that in order to cure the existing sight distance problem, they would be required to regrade 800 linear feet of public road, and make the necessary repairs to it, at an estimated cost of \$150,000 to \$200,000. They argue that this cost is disproportionate to the scope of the proposed new development and puts an unfair burden on a single property owner. The applicant alleges that this does not meet a “nexus of fair proportionality; one small project would be financing a fix of a problem that was created/allowed by others.” (Exhibit 19 at p. 2). As a secondary argument, the applicant suggested that the SSD should be calculated using the school zone speed limit of 20 mph, in which case the SSD would be met in this case.

On July 30, 2007, the County Engineer denied the applicant’s request for an EDDS deviation. (Exhibit 19) However, on September 18, 2007, the County Engineer conditionally approved a deviation request to the required sight distance on the basis that the necessary fix is not proportional to the scope of the project. There is nothing in the record before the Hearing Examiner which reflects this new DPW decision, other than the statement in the PDS Staff Report (Exhibit 48). At the public hearing, DPW stated that the conditional approval of the deviation requires the developer install illumination to the satisfaction of DPW, in order to mitigate for the deficiencies in sight distance.

At the public hearing, the County Engineer asserted that decisions relating to EDDS standards are solely within the purview of the County Engineer and are not subject to review by the Hearing Examiner. This is not the first time that DPW has made such assertions as to the scope of its authority and so the Examiner will address this issue here.

The authority of the County Engineer derives from local ordinances and state law. Under RCW 36.80.030, the County Engineer has the following duties:

The county road engineer shall examine and certify to the [council] all estimates and all bills for labor, materials, provisions, and supplies with respect to county roads, prepare standards of construction of roads and bridges, and perform such other duties as may be required by order of the [council]. He shall have supervision, under the direction of the [council], of establishing, laying out, constructing, altering, improving, repairing, [and] maintaining all county roads of the county. RCW 36.80.030

Accordingly, although the County Engineer has certain authority with respect to preparing road construction standards and is responsible for the functions listed above, that authority is not unlimited, and is subject to the supervision of the County Council.

In Snohomish County, the local authority vested in the County Engineer is found mainly in his authority to administer Title 13 and related transportation regulations, including the Engineering Development and Design Standards (EDDS). The most recent edition of EDDS was adopted in 2003, pursuant to the rulemaking authority vested in the DPW Director by Title 30.82 SCC. As a set of rules, EDDS is subject to council review and approval pursuant to SCC 30.82.065.

Given the requirements of SCC 13.05.010(1) that EDDS must be followed by new developments, the standards found in EDDS relating to site distance must be followed, unless a deviation is granted. Deviations are governed by Chapter 1-05 EDDS. That section provides that the deviation request must be in writing, use the specified form, and provide supporting information demonstrating compliance with four criteria. (The criteria do not include nexus and proportionality grounds raised by the applicant). Chapter 1-05 provides that “The Engineer is the final authority on all deviation requests.” Chapter 1-05 does not provide criteria for public notice, appeal or reconsideration of deviation decisions although, arguably, the Engineer’s decision may be reviewable as a final land use decision subject to the provisions of the Land Use Petition Act (LUPA) (Ch. 36.70C RCW).

The County Engineer would have the Examiner believe that the authority vested in him by state law and local ordinances is exclusive with respect to road standards, although DPW has offers no legal authority for such a position in its Supplemental Staff Report (Exhibit 61). The Examiner finds that this is not the case. Although the Examiner agrees that deviation decisions are solely within the province of the County Engineer under Chapter 1-05 EDDS, the Council has granted the Hearing Examiner broad authority to determine a wide array of issues arising out of new development applications, especially with regard to subdivisions. (See, e.g., Ch. 30.72 SCC, and Ch. 30.41A SCC). With regard to Type 2 permits (such as the one in this case), the Department’s review constitutes recommendations to the hearing examiner, who then makes the final decision. See SCC 30.72.020 and SCC 30.72.025. Here, the applicant is seeking a subdivision under the County’s rural cluster subdivision (RCS) standards set forth in Chapter 30.41C SCC. In addition, the applicant’s proposal must also meet the state and local requirements relating to subdivisions, generally.¹

In delegating its authority to approve a preliminary subdivision, the County Council vested its authority in the hearing examiner to:

... make inquiry into, and determine whether, adequate provisions have been made for *public health, safety and welfare*, including but not limited to, open spaces, drainage ways, *streets, alleys, other public ways, transit stops*, potable water supplies, sanitary wastes, parks and recreation, playgrounds, sites for schools and school grounds, fire protection and *other public facilities*. The Hearing Examiner shall consider all other relevant facts, including the *physical characteristics of the site and sidewalks* and other planning features that assure safe walking conditions for students who walk to and from school to determine whether the public interest will be served by the subdivision and dedication. (Emphasis added) SCC 30.41A.100.

¹ Every subdivision in Washington is required to meet the standards set forth in state law. (See, RCW 58.17.030; 58.17.110)

These provisions implement the state subdivision act found in RCW 58.17.100. As such, the Hearing Examiner clearly has the authority to review whether the development as proposed (including the proposal to deviate from the SSD standard granted by DPW) makes adequate provisions for roads and for the public health, safety and welfare.

Here, there is some information in the record to indicate that adding illumination is adequate to mitigate the safety consequences of inadequate stopping sight distance. The SSD standard applies during daylight and night-time hours. However, EDDS Section 7-02(A)(1) provides that illumination “enhances the visual perception of conditions or features that require additional driver or pedestrian alertness. A properly designed illumination system provides safety for motorists and pedestrians and enhances security for parking facilities.” Illumination of arterials is warranted at unchannelized intersections if channelization warrants are met or if the nighttime accident warrant is met. EDDS at Section 7-02(C)(3).

As noted above, this project will add 47.85 new average daily trips onto 147th Avenue SE. In response to testimony by concerned citizens about the safety of the access road intersection, the Department testified at the open record hearing that it was their opinion that the illumination would improve the safety issues caused by the SSD deficiency and that the applicant had agreed to provide it. The applicant has also argued (Exhibit 19) that the SSD has been incorrectly calculated based on the fact that the school zone lowers speeds to 20 mph on that part of the road. Finally, the Examiner notes that the proposed access road borders the existing driveway for two neighboring parcels, and that it appears that there is already a SSD deficiency at this location with respect to the existing driveway intersection, as well. (See Exhibits 10 and 14A-H) Based on the totality of these facts, the Hearing Examiner finds that the proposed development provides adequate mitigation for the deficient SSD condition. The remaining designs proposed by the applicant for access and circulation within the plat are consistent with the County Code and EDDS. (Exhibit 14).

- f. Dedication of Right-of-Way. A development shall be 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. Here, 147th Street SE is designated as a non-arterial on the County’s Arterial Circulation Map. This requires a right-of-way width of 30 feet on each side of the right-of-way centerline. Currently, 20 feet of right-of-way exists on the development’s side of the right-of-way. Therefore, the development is required to dedicate 10 feet of additional right-of-way. It should be noted that 147th Street SW is not in the impact fee cost basis (Appendix D of the Transportation Needs Report), therefore credit towards the applicant’s impact fee for the right-of-way dedicated that is more than 30 feet from centerline is not applicable.
- g. State Highway Impacts. WSDOT has determined that the subject development will not have a significant adverse impact on any state highways. Therefore, no mitigation is required. The Department has reviewed and concurs with comments from WSDOT. No mitigation for impacts to state highways will be imposed on the development as a condition of approval.
- h. City Streets and Other Roads. This requirement is not applicable because there are no cities with interlocal agreements with Snohomish County whose streets or roads will be impacted by the proposed development.

- i. Transportation Demand Management. This requirement is not applicable because it only applies to development proposals within the Urban Growth Area (UGA). The subject property here is located outside the UGA.
3. Parks. This proposal is within Park District No. 303 and is subject to Chapter 30.66A SCC. However, no payment impact fees are required for this development.
4. Schools. The project has been reviewed for impacts to schools under Chapter 30.66C SCC. The lots within the subdivision are subject to the payment of school impact fees for the Snohomish School District No. 201, to be determined by the certified amount within the Base Fee Schedule in effect at the time of building permit application, and collected prior to issuance of any building permits, in accordance with SCC 30.66C.010. Credit shall be given for one existing parcel, which is credited to Lot 1.
5. Drainage and Grading. Stormwater is to be dispersed onsite or directed to a bioswale system that will release water to an existing 12 inch diameter culvert which drains to the south of the site. Planning and Development Services (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 1,450 cubic yards of cut and 1,450 cubic yards of fill, primarily for road, drainage facility, and home site construction. Water quality shall be controlled during construction by use of silt fences, straw bales and/or other measures as necessary, in accordance with a Temporary Erosion and Sedimentation Control Plan (TESCP) required by Chapter 30.63A SCC.
6. Pedestrian Facilities. Pedestrian facilities adequate to provide safe walking conditions for school children and for the general public may be required as a condition of development pursuant to Ch. 30.41A SCC and RCW 58.17.110. Here, the Snohomish School District has provided information that school children residing in the new subdivision will be bused to area schools, including the elementary school across the street. A bus stop will be located on 147th Avenue SE along the frontage of the development. (Exhibit 61 and 62) Accordingly, no additional pedestrian improvements will be required to provide safe walking conditions for school children.
7. Critical Areas

Fish and Wildlife Habitat Conservation Areas, Wetlands, Geologically Hazardous Areas. Critical areas onsite include a Fish and Wildlife Habitat Conservation Area (FWHCA), the Pilchuck River, which is a Class 1 stream, and a Category 4 wetland, which is shown in Tract 997 on the site plans. There are no geologically hazardous areas on the proposed site. The Pilchuck River supports Chinook Salmon and Bull Trout, both listed and threatened pursuant to the Federal Endangered Species Act. As a result of the ESA-listed species, the required buffer adjacent to the Pilchuck River will average 150 feet. The applicant proposes to fill the existing Category 4 wetland on paper only, and will provide mitigation for the loss of its wetland functions and values, which are primarily storm and flood water storage at a ratio of 1:1. PDS has reviewed the Critical Areas Study and Habitat Management Plan (Exhibit 17) and determined that the project complies with the critical areas regulations.

Frequently Flooded Areas. The Hearing Examiner has the authority to deny a subdivision based on flood, inundation or swamp conditions pursuant to SCC 30.41A.110. The subject property is within the 100-year flood plain of the Pilchuck River. The river bisects the development near the western portion of the property. (Exhibit 17, Map). It is anticipated that the property will be subject to flooding at some point in the future. The base flood elevations are shown in Exhibit 14e. The Department states that the County

Code does not prevent its development and that PDS is not recommending denial of the subdivision based on the potential for flooding. (Exhibit 48 at p. 3) They state that if the subdivision is approved, the development must still comply with the County's Flood Hazard ordinances set forth in Ch. 30.65 SCC. There is nothing in the record that describes this property as a "special flood hazard area" as defined in SCC 30.65.040, which would prohibit its development. Several citizens testified against the development at the open record hearing, based on flooding concerns are present in this neighborhood as a result of the Pilchuck River. Chris Lyons and Rodney Smith presented pictures (Exhibits 59, 60) showing a significant amount of flooding and standing water on parcels adjacent to the proposed development.

There is no question that this area is within the floodplain and will be subject to inundation in the future. However, the Hearing Examiner is loathe to deny the subdivision under SCC 30.41A.110 for flooding, where other provision of the County Code clearly allow development in floodplains so long as the floodproofing and other development standards are met. If the County Council intended to prohibit development of subdivisions such as this one in the floodplain, it could have adopted regulations stating as much. Instead, Chapter 30.65 SCC appears to authorize a wide range of development in places where flooding regularly occurs. Similarly, the County's shoreline regulations set forth in Ch. 30.44 SCC, also allow development within the floodplain, and floodway fringe, so long as the policies of the Shoreline Master Program are met. In the Examiner's opinion, the County Council needs to enact clear guidelines as to what criteria need to be met in order for the Examiner to deny a subdivision on the basis of flood, inundation or swamp conditions. This will protect both the public and the rights of landowners seeking to develop their property. In the absence of such guidelines, and with the apparent legislative intent of the County Council to allow development in the floodplain, this Examiner will not deny the proposed subdivision on that basis. To do so would be an unfair surprise to the landowner who, at this pointing the process, has expended a great deal of time and funds to achieve a proposed preliminary subdivision approval on the reasonable assumption, and recommendation of the Department, that compliance with Chapters 30.65 and 30.44 SCC will mitigate for the impacts of future flooding on this site.

8. Utilities

[Pursuant to the *Final Decision and Order on Reconsideration*, former Finding No. 8 has been stricken in its entirety. An amended Finding is set forth below].

a. Water. It is unclear from the record whether the Applicant intends to furnish water to the subdivision through individual wells (as shown in Exhibit 16), a group B well system (as stated in the staff report), or through extension of water from the Snohomish County PUD (Exhibit 44). Water is available from the PUD subject to the condition that the water main be extended 2,500 feet, the execution of a Developer Extension Agreement, and other conditions. The Snohomish County Health District has reviewed the proposed development for water and is recommending approval of the preliminary plat. (Exhibit 45) In the event that individual wells are used to serve the development, the Examiner finds that the individual use is estimated to be no more than 800 gallons per day and, therefore, no groundwater permit is required under Ch. 90.44 RCW, as the total use for the development falls within the 5,000 gpd residential water withdrawal exemption. Accordingly, water is available to serve the proposed development.

b. Sewage. As to the provision of sewage disposal for the plat, individual on-site septic systems will be provided and have been reviewed by the Environmental Health Division of the Snohomish Health District. (Exhibit 33). The Health District recommends approval of the plat as to the condition of providing adequate sewage disposal, subject to the conditions stated in Exhibit 45. Given that the subject property is within the floodplain, additional protection of sewage facilities may be required pursuant to Ch. 30.65 SCC.

c. Electrical Power. Sufficient electrical power is available to service this development according to the Snohomish County PUD, subject to the conditions stated in their letter dated August 31, 2006. (Exhibit 43) However, the existing district facilities in the area may require upgrading and utility easements and clearance between buildings/structures and the District's facilities may be required.

9. GMA Comprehensive Plan. Four elements of the Snohomish County GMA Comprehensive Plan (GMACP) were adopted pursuant to Ordinance 94-125, which became effective on July 10, 1995. These elements are: the General Policy Plan (GPP); the Transportation Element; the 1995-2000 Capital Facilities Plan; and the Comprehensive Parks & Recreation Plan. On November 27, 1996, effective December 12, 1996, the Council adopted Amended Ordinances 96-074, and 96-071 which amended the map and text of the Snohomish County GMA Comprehensive Plan, and adopted an area-wide rezone within the Urban Growth Areas of the county respectively. This application was complete on August 14, 2006 after the effective date of Amended Ordinances 96-074 and 96-071. This application has been evaluated for consistency with the version of the GMA Comprehensive Plan, which became effective on December 12, 1996, as revised through the completeness date of the application.

The subject property is designated Rural Residential (RR: 1 DU/5 Ac, Basic) on the GPP Future Land Use map, and is located outside of an Urban Growth Area (UGA). It is not located within a mapped Growth Phasing Overlay. According to the GPP, the Rural Residential designation "includes lands which were designated Rural or Residential Estates on pre-GMA subarea comprehensive plans. The implementing zones within this designation are the Rural-5 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 LU6.B.9." PDS finds the requested preliminary plat to be consistent with the General Policy Plan's Rural Residential designation of the property.

The portion of the site west of the right bank of the Pilchuck River is located within the Rural/Urban Transition Area.

The 5 lots proposed are consistent with the density provisions of Snohomish County's GMA-based zoning regulations under Subtitle 30.2 SCC.

10. Zoning. The project meets the zoning code requirements for lot size, including the RCS provisions, bulk regulations, and other zoning code requirements for a RCS in the R-5 zone. The proposed 5-lot subdivision is consistent with the density provisions of the County's zoning regulations set forth in Subtitle 30.2 SCC.
11. Subdivision requirements. The proposal complies with the Snohomish County Subdivision Code, Chapter 30.41A SCC as well as the State Subdivision Code, RCW 58.17. The proposed plat complies with the established criteria therein and 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, pedestrian facilities and other planning features, including a bus stop to safely transport school children to area schools.

12. Rural Cluster Subdivision requirements.

[This Finding has been amended pursuant to the *Final Decision and Order on Reconsideration*]

The subject rural cluster subdivision (RCS) application has been reviewed for conformance with the RCS standards in Chapter 30.41C SCC. The applicant has provided the information required on an RCS development plan and preliminary plat, the latest versions of which were received by PDS on July 11, 2007 (Exhibit 14), and in an open space management plan (Exhibit 15) that is to be implemented by a homeowner's association. 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 45% (5.36 acres) of the property in restricted open space, which amount will be increased when Tract 993 is placed into restricted open space and NGPA; 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; public roads shall be constructed to EDDS standards, or where deviations have been allowed, constructed within standards that provide for the public health, safety and welfare; all utility lines are to be located underground; there is unbuildable land as defined by Chapter 30.41C SCC located on site within the Pilchuck River which will be placed in a NGPA; 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; 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; clusters of lots are located near the interior of the site and are not located on prominent topographic features, to the extent feasible; and the site is located within a rural fire district.

Site obscuring buffer. A sight obscuring buffer of native vegetation shall be provided, or where no native vegetation exists, landscape screening comprised of fast growing, low maintenance native trees and shrubs in accordance with the provisions of Table 30.41C.210(1) SCC. PDS states that the development as proposed provides an inadequate site obscuring buffer. The applicant's proposed plantings are more than 20 feet apart.

At the open record hearing, Merle Ash testified that it appears the reference to Table 30.41C.210(1) as providing the landscaping requirements is in error. The Hearing Examiner agrees. Table 30.41C.210(1) contains no references to landscaping standards and it appears that the reference is the result of a scrivener's error. The only other section of the County Code which provides landscaping standards is Ch.

30.25 SCC. Mr. Ash argues that in this situation, it is appropriate to refer to the most analogous section of the Code to determine the requirements that should be imposed. Mr. Ash suggests that this Code section is SCC 30.25.017. The Applicant argues that this section may guide the exercise of the Hearing Examiner’s discretion, but is not required under the Code. He argued that the RCS falls somewhere in between the requirements of Type A and Type B landscaping schemes described in SCC 30.25.017. ~~The Examiner finds that the applicant is correct in asserting that the Council intended to refer to Ch. 30.25 SCC for the landscaping requirements that should be imposed to achieve the site obscuring buffer for rural cluster subdivisions. However,~~ [T]he Examiner disagrees with the applicant’s assertion that the intent of SCC 30.41C.200(2) is to achieve something less than a full, site obscuring buffer. The landscaping standards described in SCC 30.25.017 for a Type A design refer to a “site obscuring buffer.” In contrast, the Type B landscaping design refers to only a filtered screen or visual separation that is not 100 percent site obscuring. Type B landscaping is installed to “soften the edges of the site or the appearance of building elevations.” SCC 30.25.017(2). Rural cluster subdivisions are required to provide site obscuring buffers. Accordingly, a Type A the landscaping design for this development shall be done in accordance with the standards set forth in SCC 30.25.015(1) through (5) (general landscaping requirements) and in addition, shall provide Type A landscaping as defined in SCC 30.25.017(1) in order to achieve the site obscuring buffer. ~~required to meet this requirement.~~

Lot Yield. The application complies with the provisions of SCC 30.41C.230 and SCC 30.41C.240 based on the following analysis: Basic lot yield: 519,111 square feet/100,000 square feet = 5.19 lots

Total lot yield = 5.19 lots
 Total lot yield-rounded = 5 lots
 Total lots proposed = 5 lots

All of the area on the site west of the right bank of the Pilchuck River is within the Rural/Urban Transition Area (RUTA). Approximately the western third of the site is located within the RUTA. The following criteria apply to open space in the RUTA portion of the site:

- i. The open space tract shall contain 65 percent or more of the gross area of the original parcel(s) as it/they existed at the time the property is subdivided. The open space provisions specified in SCC Table 30.41C.210(1) shall not apply.
- ii. The open space tract shall be configured to such shape and dimensions as to allow for future land division by including sufficient area outside of critical areas and their buffers and allow a future lot configuration with adequate building envelopes on each lot.
- iii. The location of the open space tract in the subdivision or short subdivision shall accommodate future public roadway access to the lot upon redivision and facilitate the clustering of the rural cluster subdivision or short subdivision lots near the periphery of the subdivision or short subdivision boundary as opposed to a central location.
- iv. The open space tract may be used for any use otherwise permitted in restricted open space as specified in SCC 30.41C.210(2)(b)(i), except that no permanent structures shall be allowed.
- v. The open space tract shall be established and maintained in accordance with SCC 30.41C.300(2)(b).
- vi. The open space tract shall not be eligible for further subdivision or short subdivision until it is removed from the rural/urban transition area and located in a UGA.

- vii. All restrictions placed on the open space tract at the time of rural cluster subdivision or short subdivision approval shall be included in a binder on a form provided by the department. The binder shall be filed with the county auditor at the time of recording the subdivision or short subdivision. The binder shall serve both as an acknowledgment of and agreement to abide by the terms and conditions of the subdivision or short subdivision and notice to prospective purchasers of the conditions and restrictions applicable to the open space tract including restriction on redivision of the tract. At least 65 percent of the RUTA area is in interim open space; the plat shall be required to be revised to show at least a portion of the interim open space being outside of NGPA; future lots and access are located at the periphery of the subdivision; the interim open space will have no permanent structures; a single ownership for the interim open space shall be required; and a subdivision binder shall be required.

The area west of the Pilchuck River that falls within the RUTA has been placed into a separate tract known as Tract 993. It is wholly contained within the FEMA designated floodway of the river and is legally unbuildable land under SCC 30.65.230 (special flood hazard areas). Tract 993 is also a critical area within the meaning of Chapter 30.62 SCC (critical areas ordinance). As a critical area, Tract 993 must be placed in a NGPA for permanent protection, despite its inclusion within the RUTA. (SCC 30.62.320) The Hearing Examiner finds that these restrictions render the future use of this tract for urban development legally impossible. As such, the Applicant is excused from compliance with SCC 30.41C.220. Tract 993 shall be removed from interim open space and placed into restricted open space. The Tract shall also be included in a NGPA for permanent protection.

13. The request is consistent with Section 30.70.100 SCC, which requires, pursuant to RCW 36.70B.040, that all project permit applications be consistent with the GMACP and GMA-based county codes.
14. Any finding of fact in this decision which should be deemed a conclusion is hereby adopted as such.

CONCLUSIONS OF LAW

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

1. The Examiner having fully reviewed the PDS staff report (Exhibit 48), hereby adopts said staff report as properly setting forth the issues, the land use requests, consistency with the existing regulations, policies, principles, conditions and their relationship to the request, except as otherwise noted herein. It is therefore hereby adopted by the Examiner as a conclusion as if set forth in full herein, in order to avoid needless repetition.
2. The DPW recommends that the request be approved as to traffic use subject to conditions specified below.
3. PDS recommends that the request be approved as to all other conditions subject to the conditions specified below.
4. Adequate public services exist to serve the proposed development.

5. The request is consistent with the (1) GMACP, GMA-based County codes, (2) the type and character of land use permitted on the site, (3) the permitted density, and (4) the applicable design and development standards.
6. If approved with the recommended conditions, the proposal makes adequate provision for the public health, safety and welfare.
7. Any conclusion in this decision which should be deemed a finding of fact is hereby adopted as such.

DECISION

Based on the Findings of Fact and Conclusions of law entered above, the decision of the Hearing Examiner on the application is as follows:

The River Estates request for a 5-lot **RURAL CLUSTER SUBDIVISION** on 11.9 acres is hereby **CONDITIONALLY APPROVED**, subject to the following pre-conditions and conditions:

APPROVAL of the proposed preliminary plat is recommended subject to the following PRECONDITIONS and CONDITIONS:

PRECONDITIONS

1. A shoreline substantial development permit and flood hazard permits shall be obtained by the applicant.
2. A revised landscape plan shall be provided to PDS for review and approval. The revised plan shall meet the requirements of SCC 30.25.015(1) through (5) and SCC 30.25.017(1) and provide a Type A landscape design. ~~The plan shall provides supplemental plantings in portions of the site obscuring buffer where site obscuring vegetation does not exist. The site obscuring buffer shall include supplemental plantings of native vegetation with the ultimate density of trees at 10 feet on center and shrubs at 3 feet on center. A minimum of 75 percent of the trees shall be conifers.~~
3. The plat shall be revised to remove Tract 993 from interim open space. Instead, Tract 993 shall be placed it into restricted open space and put into a NGPA for permanent protection. In the event that this change affects the density calculations for the development, resulting in a redesign of the subdivision and the addition of more building lots, a new open record hearing may be required. ~~either show the interim open space with a buildable area outside of an NGPA or the applicant shall exclude the RUTA area from the rural cluster density calculations. A change to the density of the rural cluster subdivision, and resulting redesign, may require a new open record hearing.~~
4. The applicant shall obtain approval for individual wells, a the community water system from the Washington State Department of Health, and/or County Health District, or connect to the PUD's public water system.

CONDITIONS

- A. The preliminary plat received by PDS on July 11, 2007 (Exhibit 14), as modified by Preconditions 2 and 3, shall be the approved plat configuration. Changes to the approved plat are governed by SCC 30.41A.330.
- B. Prior to initiation of any further site work; and/or prior to issuance of any development/construction permits by the county:
- i. All site development work shall comply with the requirements of the plans and permits approved pursuant to Condition A, above.
 - ii. The platlor shall mark with temporary markers in the field the boundary of all Native Growth Protection Areas (NGPA) required by Chapter 30.62 SCC, or the limits of the proposed site disturbance outside of the NGPA, using methods and materials acceptable to the county.
 - iii. A final mitigation plan based on the Critical Area Study and Habitat Management Plan for River Estates RC, prepared by Wetland Resources Revision #4 dated June 29, 2007 shall be submitted for review and approval during the construction review phase of this project.
 - iv. Excess construction materials shall be removed from the shoreline area.
- C. The following additional restrictions and/or items shall be indicated on the face of the final plat:
- i. "The lots within this subdivision will be subject to school impact mitigation fees for the Snohomish School District No. 201 to be determined by the certified amount within the Base Fee Schedule in effect at the time of building permit application, and to be collected prior to building permit issuance, in accordance with the provisions of SCC 30.66C.010. Credit shall be given for one existing parcel. Lot 1 shall receive credit."
 - ii. Chapter 30.66B SCC requires the new lot mitigation payments in the amounts shown below for each single-family residential building permit:

\$3,799.29 per lot for mitigation of impacts on county roads paid to the county,

Notice of these mitigation payment obligations shall be contained in any deeds involving this subdivision or the lots therein. Once building permit has been issued all mitigation payments shall be deemed paid.
 - iii. All Critical Areas shall be designated Native Growth Protection Areas (NGPA) (unless other agreements have been made) with the following language on the face of the plat:

"All NATIVE GROWTH PROTECTION AREAS shall be left permanently undisturbed in a substantially natural state. No clearing, grading, filling, building construction or placement, or road construction of any kind shall occur, except removal of hazardous trees. The activities as set forth in SCC 30.91N.010 are allowed when approved by the County."
 - iv. The lots in this subdivision do not qualify as duplex lots per Snohomish County Code.

- v. The landscape buffers shall be maintained as vegetated buffers. The entire buffer width shall be maintained with sight obscuring vegetation.
- ~~vi. "Tract 993 shall remain in a single ownership and is to remain in its natural state. Removal of vegetation and/or construction of permanent structures is prohibited. The open space tract is not eligible for further subdivision until it is removed from the Rural/Urban Transition Area and located in an Urban Growth Area."~~
- vii. All utilities shall be underground.
- viii. "In consideration of the short subdivision access approval, the owners of the lots of the short subdivision, their heirs, successors, and assigns, covenant and agree not to protest the conversion of the thirty [30] foot easement and private road, on the south side of the parcel, to a public road at any time the county determines a public road is necessary, or a public road is required for further development of any lots that have access to said road. The owners of the short subdivision lots, their heirs, successors, and assigns further agree and covenant to provide all necessary authorizations and to execute all necessary conveyance documents, at no cost and expense to the county, to accomplish the dedication and/or conversion of the private road to the county for public road purposes. This covenant touches and concerns the property, runs with the land, and is binding upon all subsequent purchasers, heirs, successors, and assigns. This covenant to provide right-of-way in no way obligates the owners to fund any construction or maintenance of a public road."
- ix. Residential development shall not be approved for which flood control, shoreline protection measures, or bulkheading will be required to protect residential lots unless any required variances are obtained.
- x. Sewage disposal facilities and water supply facilities must be provided in accordance with appropriate governmental health and water quality laws and regulations. Storm drainage facilities must be separated from sewage disposal systems.
- xi. Roads and railroads shall be designed so as to allow a free flow of surface water under them.
- xii. Excess construction materials shall be removed from the shoreline area.

D. Prior to recording of the final plat:

- i. The private internal plat road shall be constructed in accordance with the requirements of PDS.
- ii. Rural frontage improvements shall be constructed along the parcel's frontage on 147th Street SE to the satisfaction of the County.
- iii. Illumination to the satisfaction of DPW shall be provided in order to mitigate for the deficiencies in sight distance.
- iv. Reciprocal easements shall be granted between the two adjoining properties to provide common rights of usage over the proposed private road.

- v. A reciprocal common access easement shall be provided for the adjoining parcels to the south to be granted at such time that the adjoining parcels to the south develops. A similar easement will be required of the parcel to the south at the time of its development.
- vi. 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 plattor may use other permanent methods and materials provided they are first approved by the county. Where an NGPA boundary crosses another boundary (e.g.: lot, tract, plat, road, etc.), a rebar marker with surveyors' cap and license number must be placed at the line crossing.

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

- vii. The final mitigation plan (additional buffer) shall be completely implemented.
- viii. Covenants, deeds and homeowners association bylaws and other documents as appropriate, to be recorded prior to, or simultaneously with, final plat recording shall have been approved as to substance and completeness by the Department of Planning and Development Services, and shall at a minimum:
 - a. Establish all restricted open space as shown on the approved preliminary plat in separate tracts.
 - b. Establish a Homeowner's Association, guaranteeing maintenance of restricted open space in as much as such maintenance is required by the Open Space Management Plan (Exhibit 19).
- ix. A Subdivision Binder shall be recorded pursuant to Snohomish County code 30.41C.220(7).

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

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

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

Dated this 21st day of March, 2008.

Millie Judge, Pro Tem Hearing Examiner

EXPLANATION OF APPEAL PROCEDURES

Reconsideration of this decision is not available according to SCC 30.72.065(5). The following paragraphs provide only a summary of the reconsideration and appeal processes. For the specific appeal requirements, procedures, please see Chapter 30.72 SCC and the respective Hearing Examiner and County Council Rules of Procedure. Staff from the Office of the Hearing Examiner cannot provide you with legal advice. If you need legal advice, please consult with your attorney.

Appeals

An appeal of this decision to the County Council may be filed by any aggrieved party of record within 14 days following the date of this decision. The date of this decision is March 21, 2007.

Appeals shall be addressed to the Snohomish County Council but shall be filed in writing with:

Department of Planning and Development Services
2nd Floor, County Administration-East Building,
M/S #604, 3000 Rockefeller Avenue, Everett, Washington 98201

A filing fee of five hundred dollars (\$500.00) shall be submitted with each appeal (except that a filing fee shall not be charged to a department of the County. Filing fees may 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: David Radabaugh

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.

This decision is binding but will not become effective until the above precondition(s) have been fulfilled and acknowledged by the Department of Planning and Development Services (PDS) on the original of the instant decision. Document(s) required for fulfillment of the precondition(s) must be filed in a complete, executed fashion with PDS not later than _____.

1. "Fulfillment" as used herein means recordation with the County Auditor, approval/acceptance by the County Council and/or Hearing Examiner, and/or such other final action as is appropriate to the particular precondition(s).
2. One and only one six month period will be allowed for resubmittal of any required document(s) which is (are) returned to the applicant for correction.
3. This conditional approval will automatically be null and void if all required precondition(s) have not been fulfilled as set forth above; PROVIDED, that:
 - A. The Examiner may grant a one-time extension of the submittal deadline for not more than twelve (12) months for just cause shown if and only if a written request for such extension is received by the Examiner prior to the expiration of the original time period; and
 - B. The submittal deadline will be extended automatically an amount equal to the number of days involved in any appeal proceedings.

ACKNOWLEDGMENT OF FULFILLMENT OF PRECONDITIONS

The above imposed precondition(s) having been fulfilled by the applicant and/or the successors in interest, the Department of Planning and Development Services hereby states that the instant Decision is effective as of _____, _____.

Certified by:

(Name)

(Title)
