DECISION of the SNOHOMISH COUNTY HEARING EXAMINER

DATE OF ORDER:	September 17, 2008
PLAT/PROJECT NAME:	***Lake Armstrong Creek Rural Cluster Subdivision***
APPLICANT/ LANDOWNER:	Lake Armstrong Creek LLC
APPELLANTS:	Friends of Lake Armstrong Watershed Association
FILE NO.:	05-119515 SD
TYPE OF REQUEST:	34-lot Rural Cluster Subdivision Application; Appeal of a Mitigated Determination of Nonsignficance (MDNS) Issued Under the State Environmental Policy Act (SEPA)
DECISION (SUMMARY):	**Appeal of SEPA Determination GRANTED in part; Rural Cluster Subdivision DENIED WITH PREJUDICE**

BASIC INFORMATION

GENERAL LOCATION:	7303 Lake Armstrong Road, 150 feet northeast of the intersection of Lake Armstrong Road and SR9 in Section 35, Township 32 North, Range 5 East, W.M., Snohomish County, Washington.
ACREAGE:	80.1 acres
NUMBER OF LOTS:	34
AVERAGE LOT AREA:	15,054 square feet
SMALLEST LOT AREA:	9,466 square feet
GROSS DENSITY:	.42 du/ac
NET DENSITY:	2.89 du/ac
ZONING:	Rural-5 Acre (R-5)

COMPREHENSIVE PLAN DESIGNATION:
General Policy Plan Designation: Rural Residential (1 du/5 acre, Basic)

SCHOOL DISTRICT: Arlington School District No. 16

FIRE DISTRICT: No. 18

WATER SOURCE: Community Well

SEWER SERVICE: Sewer Service: Community Drainfield

Planning and Development Services (PDS) RECOMMENDATIONS:

Deny SEPA Appeal
Approve Rural Cluster Subdivision with preconditions and conditions

INTRODUCTION

The Applicant filed the Master Application determined complete on August 14, 2006. (Exhibit 75)

The Hearing Examiner (Examiner) made a site familiarization visit on November 17, 2007 in the morning.

The Department of Planning and Development Services (PDS) gave proper public notice of the open record hearing as required by the county code. (Exhibit 71 (Affidavit of Mailing); Exhibit 72 (Affidavit of Notification by Publication); Exhibit 73 (Posting Verification)).

The Examiner held two hearings with argument only and open record hearings on 9/18/07, 11/20/07, 2/27/08 3/4/08, 3/5/08, 3/19/08, 3/27/08, 4/15/08, and 4/29/08. Witnesses were sworn, testimony and argument was presented, and exhibits were entered at the hearings.

NOTE: The above information reflects the record submitted to the Examiner at the hearing. The oral transcript is hereby made a part of the record in this matter. For a full and complete record, verbatim recordings of the hearing are available in the Office of the Hearing Examiner.

FINDINGS OF FACT

A. GENERAL BACKGROUND

1. The master list of Exhibits and Witnesses are the record in this file. All exhibits were considered by the Examiner and are hereby incorporated by reference, as if set forth in full herein.

2. Summary of the Proposal: The Applicant requests approval of a 34 lot Rural Cluster Subdivision (RCS) on an 80.1 acre site within an R-5 zone. The proposal contains three phases. Lot sizes vary from 9,466 square feet to 22,983 square feet. Open space tracts consisting of a total of 63.6 acres are proposed. The project will provide a new private road that will connect to Lake Armstrong Road, an existing road. Water supply is to be provided by four community wells. A community wastewater septic system is proposed. Associated with this proposal is the formation of a new water and sewer district to manage the community water supply system and the community septic drainfield system. The formation of the water-sewer district was approved by the Snohomish County Council on June 27, 2007 in Motion 07-357. (Exhibit 75 at 3)

3. Site description: The subject property is an 80.1 acre rectangular-shaped parcel. Harvey Armstrong Creek, a Type 1 salmon bearing stream, flows through the western part of the property. There are wetlands associated with Armstrong Creek as well as one Category 3 wetland and one Category 4 wetland in the southern part of the site. Armstrong Creek is located within a 60-foot deep ravine. Armstrong Creek and its associated ravine are forested. Much of the area above the Armstrong Creek ravine has been used as pasture for a number of years. A portion of the most southeastern portion of the site is forested. There is an existing mobile home on the site. There are three barns on the site. One of the barns is presently being remodeled under a permit for a single-family residence. A natural gas transmission line crosses the northeast corner of the subject property. (Exhibit 75)

4. Adjacent zoning and uses: The property to the east and north of the site is zoned R-5 and is used as an active 200-acre tree farm, the Valley Gem Tree Farm, operated by the Grewe family for more than sixty years. One of the parcels to the north contains a single-family residence. The property to the west is zoned Rural Industrial (RI). A portion of the property to the west appears to be associated with a gravel extraction operation. Property to the south is zoned Mineral Conservation (MC). This property contains a gravel extraction operation.

5. Access and Roadway Improvements Proposed : The proposed subdivision is accessed by Lake Armstrong Road, a public road which intersects (or intersected) with State Highway 9.[1] The road leaves the edge of the frontage with the Applicant's property and goes into a classic hairpin curve down a hill at an approximate 17% grade in what is now a 10-foot paved right of way. (*See* Exhibit 76-11) The hillside immediately next to the 10-foot right-of-way is at approximately a 70% slope, at least toward the lower part of the hill. At the top of the hill and crossing the road is the Centennial Trail, although the boundaries of the county right-of-way, which is held by prescription, and the park property are unclear. (Testimony of Ronald Torrence (county surveyor), H.R.[2] 4/15/08, 1:25-1:30) The road ends abruptly at the bottom of the hill at its intersection with Highway 9. All of the information concerning the limitations regarding the County's prescriptive ownership of the right-of-way and the major conflicts that might occur with the County Parks ownership of the Centennial Trail right-of-way at the top of the hill were not even discovered until midway through the hearing process.

The PDS staff recommendation (Exhibit 75) states the following with respect to frontage improvements and off-site roadway improvements:

> 4. Frontage Improvements [SCC 30.66B.410]
>
> The subject property's frontage is located along Lake Armstrong Road. Rural standard frontage improvements are required consisting of 30 feet of pavement. Construction of frontage improvements is required prior to recording of the plat unless bonding of improvements is allowed by PDS, in which case construction is required prior to any occupancy of the development.
>
> 5. Access and Circulation [SCC 30.66B.420]
>
> a. Access is proposed from a private road off Lake Armstrong Road. Lake Armstrong Road is considered a rural subcollector, which requires no more than a maximum road grade of 12 percent, a

[1] Highway 9 was in the process of being moved during the course of the hearing.
[2] H.R. (Hearing Record) - Numbers correspond to the tracking number on the audio recording

> minimum horizontal radius of 275 feet or a 30-foot paved road section. A deviation was approved by the County Engineer on January 8, 2006 for a 22-foot road width and a 3-foot wide sidewalk along the southernmost limit of Lake Armstrong Road from where it intersects SR 9 to the top of the steep grade. The sidewalk is widened to a minimum of 7 feet around the sharp curve at the top of the steep grade and the travel way is widened sufficiently to allow turning movements for delivery trucks with opposing vehicles. A turning movement diagram showing adequate turning radius for delivery trucks was provided in the latest submittal.

The PDS staff report does not mention the fact that a steep embankment is adjacent to the 17% grade extremely narrow road, which is currently retained by an old sandbag wall. (*See* Exhibit 76-11 *Et seq*.) General reference was made by reference to the road access:

> 3. Road
>
> Several comment letters expressed concern regarding the only narrow access road into the Lake Armstrong area. Concern was expressed that no viable second access exists to the Lake Armstrong area. Lake Armstrong Road was characterized as being unsafe and lacking drainage control. A portion of Lake Armstrong Road is a one lane road. The proposed access location for the project is considered by some letter writers to be a bad place for cars to pull out onto Lake Armstrong Road.
>
> PDS responds noting that if the project is approved, the Applicants will be required to widen Lake Armstrong Road. No viable second access into the Lake Armstrong area has been identified. The project will be required to keep the road open during plat construction. The private road access location onto Lake Armstrong Road has been reviewed for its consistency with Snohomish County Engineering Design and Development Standards (EDDS). This access location has been found to be acceptable.
>
> (Exhibit 75 at 3-4)

As a part of the deviation referred to in paragraph 5 above, the Applicant offered a handrail on the walkway and a ”runaway ramp” at the bottom to allow cars that lost their brakes to stop at the bottom of the hill. In the plans at Exhibit 109 Sheet 7/15, there is a drawing of an approximate 20 foot rockery wall with a three foot walkway beside it with an ornamental handrail, as specified in the EDDS Deviation Request that was granted January 8, 2007. It also includes a dirt runaway ramp at the bottom of the hill with a concrete barrier. (Exhibit 92-30) The same deviation, minus the ornamental hand rail and the runaway ramp was denied on September 5, 2006. (Exhibit 92-32) Since none of the required criteria is filled out on either of the deviation forms as required by EDDS 1-05, there is nothing in the record to document DPW’s analysis of the public safety benefits of the ornamental rail and runaway ramp and how that might relate to the lessening of the EDDS standard for the width of the road.

There is no record of the County’s DPW director providing any analysis of the extent of the improvements required according to SCC 30.66B.430, nor is there any request for a modification of EDDS standards pursuant to SCC 30.41A.215.

Finally, there is no record of any request for a deviation regarding the grade requirement for the road, although the road currently is at a 17% grade and the EDDS requirement for this rural subcollector is a maximum of 12%, while the Fire Code is a maximum of 15%. (*See* SCC 30.53A.150 § 902.2.2.6)

6. Pedestrian Facilities—Walkways for Children Attending School

In terms of pedestrian facilities, the school district has indicated that school children from this development would be picked up at the intersection of SR 9 and Lake Armstrong Road. Therefore, adequate walkways will be required from the subdivision along Lake Armstrong Road and down this steep grade right-of-way a part of preliminary plat approval. (*See* Exhibit 57)

B. APPEAL FILED UNDER THE STATE ENVIRONMENTAL POLICY ACT (SEPA) FINDINGS OF FACT AND CONCLUSIONS OF LAW

Background Findings of Fact

1. *MDNS Issued 6/11/07.*

PDS issued a Mitigated Determination of Nonsignficance (MDNS) on this project on June 11, 2007. (Exhibit 2) The lead agency found that the proposal did not have a probable significant adverse impact on the environment. PDS imposed the following condition:

> Prior to the commencement of plat or house construction, the applicant shall notify the Stillaguamish Tribe of when plat and/or house construction shall begin. The Stillaguamish Tribe may have a person on site monitoring construction.

2. *Threshold Determination Challenged by Friends.*

Friends of Lake Armstrong Watershed Association (Friends) filed a timely appeal (Exhibit 1) along with the Declaration of Julia Calhoun in Support of SEPA Appeal Statement (Exhibit 7), alleging the following (summarized) issues:

A. The MDNS fails to define, analyze and appropriately limit the number, size and intensity of uses and structures that are planned for the site.

B. The MDNS fails to preserve and limit the uses of open space.

C. The MDNS fails to adequately analyze potential impacts to the values and functions of environmentally sensitive features including wetlands, streams, steep slopes, floodways, aquatic resources in the fish hatchery and the lake, and adjacent forest lands.

D. The MDNS is clearly erroneous in failing to analyze sufficiently detailed designs of proposed septic system, stormwater runoff and animal waste streams for all of the planned uses to determine their effectiveness in protecting the wetlands, stream, lake and steep slopes. In particular,

E. The MDNS does not include sufficient analysis and mitigation of construction impacts of clearing and grading activities on the adjacent forest open space east of the site.

F. The MDNS does not include sufficient analysis of public services. In particular:

i. Septic. A large on-site sewerage system is proposed to be installed at the top of the slope above the wetlands, stream and lake. The SEPA review did not analyze sufficiently detailed designs of the septic system to determine whether it can effectively treat the waste streams that will be generated by all of the proposed uses, or sufficiently detailed hydrological analyses and modeling to analyze impacts to aquatic resources.

ii. Water rights. The water right for this proposal is limited to 50 gpm so as not to impair water levels in Lake Armstrong Creek or neighboring water rights. The use of 50 gpm water right is limited to "domestic, irrigation and stock-watering" uses. The MDNS fails to identify a water right for all of the other uses and structures that are planned. The MDNS also fails to incorporate appropriate conditions to limit development and water withdrawals as necessary to avoid impacts to basin-wide water resources, including water levels in Lake Armstrong Creek, recharge rates and water availability for neighboring water rights analysis fails to adequately address impacts of contaminants moving from the pit to the adjacent wetlands.

iii. The site plan shows roadways are planned to be located within 100 feet of wells, and livestock areas immediately up gradient from wells.

iv. The MDNS fails to incorporate adequate conditions to protect the wells and public health.

v. The MDNS fails to require improvement of the roadway access (Lake Armstrong Road) prior to development of the site, and fails to require a second access road for emergency ingress and egress.

G. The MDNS fails to adequately disclose and analyze the unavoidable significant impacts of this proposal on the rural character of the surrounding community.

H. The SEPA review did not include an Environmental Impact Statement to disclose any of the unavoidable significant adverse impacts from the planned uses of the Lake Armstrong Creek Development, including the rural character of the surrounding community.

Standard of Review for SEPA Appeal

3. Standard of Review by the Examiner.

A. The Examiner has appellate jurisdiction over the appeal of the MDNS as a Type 1 application pursuant to SCC 30.61.300 and SCC 2.02.100. The appeal was combined with a Type 2 hearing on the RCS.

B. The Examiner reviews issues of law regarding SEPA under Chapter 30.61 SCC, Chapter 197-11 WAC and Chapter 43.21C RCW.

C. The State Environmental Policy Act of 1971 (SEPA) was enacted to "promote the policy of fully informed decision making by government bodies when undertaking 'major actions significantly affecting the quality of the environment.'" (RCW 43.21C.090) Prior to undertaking or licensing a land use activity, Snohomish County (or any other permitting authority) must issue what is known as a threshold determination, which is a determination of whether the project is likely to have a "significant adverse impact to the environment."

D. In this case, PDS issued a Mitigated Determination of Nonsignificance (MDNS). An MDNS is issued when the Responsible Official has determined that the proposal is unlikely to have significant adverse environmental impacts, or that mitigation has been identified that will reduce impacts to a nonsignificant level. (*See Department of Ecology, SEPA Handbook at 29*). Under the SEPA Rules, "significant" is defined as "a reasonable likelihood of more than a moderate adverse impact on environmental quality." (WAC 197-11-794) As pointed out in the SEPA Handbook, what is significant is "…often non-quantifiable. It involves the physical setting, and both the magnitude and duration of impact."

E. WAC 197-11-158 defines the decision making process the Responsible Official must undergo in making a threshold determination in a GMA jurisdiction. It states:

> (1) In reviewing the environmental impacts of a project and making a threshold determination, a GMA county/city may, at its option, determine that the requirements for environmental analysis, protection, and mitigation measures in the GMA county/city's development regulations and comprehensive plan adopted under chapter 36.70A RCW, and in other applicable local, state, or federal laws or rules, provide adequate analysis of and mitigation for some or all of the specific adverse environmental impacts of the project.
>
> (2) In making the determination under subsection (1) of this section, the GMA county/city shall:
>
> (a) Review the environmental checklist and other information about the project;
> (b) Identify the specific probable adverse environmental impacts of the project and determine whether the impacts have been:
>
> (i) Identified in the comprehensive plan, subarea plan, or applicable development regulations through the planning and environmental review process under chapter 36.70A RCW or this chapter, or in other local, state, or federal rules or laws; and

(ii) Adequately addressed in the comprehensive plan, subarea plan, applicable development regulations, or other local, state, or federal rules or laws by:

(A) Avoiding or otherwise mitigating the impacts; or

(B) The legislative body of the GMA county/city designating as acceptable the impacts associated with certain levels of service, land use designations, development standards, or other land use planning required or allowed by chapter 36.70A RCW;

(c) Base or condition approval of the project on compliance with the requirements or mitigation measures in the comprehensive plan, subarea plan, applicable development regulations, or other local, state, or federal rules or laws; and

…

(3) Project specific impacts that have not been adequately addressed as described in subsection (2) of this section might be probable significant adverse environmental impacts requiring additional environmental review. Examples of project specific impacts that may not have been adequately addressed include, but are not limited to, impacts resulting from changed conditions, impacts indicated by new information, impacts not reasonably foreseeable in the GMA planning process, or impacts specifically reserved in a plan EIS for project review.

(4) In deciding whether a project specific adverse environmental impact has been adequately addressed by an existing rule or law of another agency with jurisdiction, the GMA county/city shall consult orally or in writing with that agency and may expressly defer to that agency. In making this deferral, the GMA county/city shall base or condition its project approval on compliance with these other existing rules or laws.

(5) If a GMA county/city's comprehensive plan, subarea plan, or development regulations adequately address some or all of a project's probable specific adverse environmental impacts, as determined under subsections (1) and (2) of this section, the GMA county/city shall not require additional mitigation under this chapter for those impacts.

(6) In making the determination in subsection (1) of this section, nothing in this section requires review of the adequacy of the environmental analysis associated with the comprehensive plans and development regulations that are being relied upon to make that determination.

F. Reviewing the Responsible Official's decision in an appellate role, the Examiner must accord substantial weight to the agency's threshold determination. (SCC 30.61.310(3)) The appellant has the burden of proof. The Examiner must uphold the Responsible Official's MDNS unless he or she determines that the decision was clearly erroneous, and may only overturn the MDNS if, after reviewing the entire record, the Examiner is left with the definite and firm conviction that a mistake has been made. (SCC 30.61.310(1)). (*See Leavitt v. Jefferson County,* 74 Wn. App. 668, 875 P.2d 681 (1994))

G. The process of the SEPA threshold determination process has been streamlined under the GMA. Through RCW 43.21C.240 and implemented through WAC 197-11-158, the SEPA Rules allow GMA jurisdictions to issue a MDNS even for projects that might otherwise seem to be large projects that would generate significant impacts, if those projects can be adequately mitigated under the jurisdiction's GMA development regulations and other SEPA policies. (*See* WAC 197-11-158); (*Moss v. Bellingham, 109 Wn.App. 6, 18-26, 31 P.3d 703 (2001)(court affirmed MDNS for an 80-lot subdivision*)). Therefore, the mere fact that a MDNS was issued in this case is not determinative; rather, the question is whether the County's regulations provide adequate mitigation of the impacts.

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

Findings of Fact and Conclusions of Law on Issues Raised by Appellant

4. Substantive/Procedural Issue: Did the County fail to analyze the number, size, and intensity of planned uses and structures on the site?

A. Findings of Fact

The MDNS described the proposal as follows:

> A 34-lot rural cluster subdivision on a 80.1 acre site within an R-5 zone. The proposal contains three phases. Lot sizes vary from 9,466 square feet to 22,983 square feet. Open space tracts consisting of a total of 63.6 acres are proposed. The project will provide a new private road that will connect to Lake Armstrong Road, an existing road. Water supply is to be provided by a community private well. A community wastewater septic system is proposed. Part of the proposal is the formation of a new water and sewer district to manage the community water supply system and the community septic drainfield system.
>
> Mitigation fees are to be paid in accordance with Chapters 30.66A, B, and C, SCC, for project impacts to community parks, nearby road system traffic and to the Arlington School District No. 16.
>
> An evaluation of the information submitted with the application coupled with an on-site investigation has resulted in a determination that the application complies with Chapter 30.62 (32.10), SCC (Critical Area Regulations) and is consistent with the purpose and objectives of the Chapter in regulation of development activities in Critical Areas to safeguard the public health, safety and welfare.

As part of the rural cluster subdivision requirements, the Applicant is required to submit an Open Space Management Plan (OSMP), which describes the uses to which the open space will be put and how it will be managed. (SCC 30.41C.210(2)) In the OSMP submitted by the Applicant, there is a table describing the intended uses of all the open space tracts in the subdivision. (Exhibit 108 at 3) Some will be used for common area, passive recreation and Native Growth Protection Area (NGPA); others will be used for agricultural and livestock activities. Agricultural activities are further defined by tract on page 5. It indicates that there will be vegetable gardens on Tracts 995, 996, and 998, and on Tracts 990 and 993 there will be: livestock area, barn(s), farm buildings, crop gardens, manure spreading, process kitchen, greenhouse(s), storage facilities, farm kitchen, and farm products stand. The table is introduced by the following language: "The following table represents agricultural activities that will occur within the Open Space Tracts."

Physically attached to the Open Space Management Plan is the "Resource Management Plan" (RMP). (Exhibit 108 at 5) It states that it is not required by the County code nor is it adopted as a regulatory requirement. The document states:

> The overall objective of this Management Plan is to provide a unified system of management to ensure current and future

> beneficial resource production and conservation. The purpose of the plan is to provide the information necessary for the Homeowners Association to manage animals (sheep, horses, chickens, llamas, and honeybees), protect critical areas (Habitat Management) and allow organic agriculture on a portion of this site.

Id. Of importance to the issue brought to by Friends, is the following section of the RMP:

> **Proposed Improvements**
>
> The new residences will be constructed on the eastern portion of the property**. One of the existing barns is being remodeled into a community center. The existing hay barn will be kept and greatly improved. All other structures and current fencing will be removed in preparation for a new horse barn, sheep barn, composting facility, restroom facility, greenhouses, food processing kitchen, farm store, and in the future, a potential horse arena.** Substantial buffers and fencing will protect all sensitive areas. **This project will be a positive addition to the commercial agricultural community, Arlington residents, and the members of the planned community.** This management plan is intended to educate and guide the residents of this planned community about how to promote land stewardship, agriculture, and country living. The agricultural portion of the property is approximately 40 acres to be used as follows:
>
> - Approximately 5 acres for crop production
> - Approximately 30 acres for pasture
> - Approximately 3 acres for high impact mud free area
> - Approximately 2 acres for livestock housing, mud free zone, compost facility, greenhouses and restrooms

Id. (emphasis added)

The Friends also introduced into the record a copy of the internet webpage of the Armstrong Creek Community (Exhibit 7-3). On the first page, the text refers to "The Common House"—which is the renovated barn (currently being remodeled as a single-family home under permit #06-125325-000-00-RK)[3]—and states that it will be "available for guest quarters, meetings, recreation and family events." (Exhibit 7-3) On page two of Exhibit 7-3, the text states:

[3] The Examiner takes official notice of the permit information available on PDS's web site pursuant to HE Rule of Procedure 724(j).

> There are many facilities planned for Armstrong Creek Community including:
>
> - Common House
> - Horse Stables
> - Bed and Breakfast
> - Spa
> - Pool
> - Fitness Room
>
> Construction has begun on the Common House. The Common House will have guest rooms, a large community kitchen, a large meeting room, and offices. Click here for detailed views and floor plans.

The Applicant argues that the application was only for a 34-lot RCS, therefore no other additional structures or uses were required to be reviewed under SEPA. (*See* Exhibit 201 at 23) The SEPA Checklist states:

> Proposal consists of 34 new middle-income, single-family residences. There are no plans for any future additions, expansions or further activity related to or connected with this proposal.

Id.

Applicant's representative Darla Reese from HBA Design Group indicated that one possibility was to simply excise from the record the information about the additional uses. (H.R. 3/28/08 at 11:35) Ms. Reese also indicated that the additional uses and structures were placed in the OSMP at the request of PDS staff, in order to be "transparent".

The PDS Staff Recommendation references future uses in unrestricted open space tracts:

> Future uses being considered in these tracts include a food processing facility, a farm stand, a bed and breakfast, greenhouses, and a shop building for farm machinery maintenance and wood and metal working arts and crafts. None of these uses are formally proposed as part of this plat. Each of the uses would be subject to a future approval. Such approval is not guaranteed. PDS staff would need to review future uses and buildings in light of the development review codes in effect when the uses are proposed. Concerns such as access, water availability and drainage control would need to be considered before such uses could be approved.

Friends argue that the weight of the evidence in the record and the testimony of the owner confirms that the 34-35 residential homesites are "just the tip of the iceberg" for this preliminary plat. (Exhibit 202 at 17) The RCS is part of a much larger proposal, Friends claim, which includes a whole variety of commercial and agricultural uses for this site that will generate impacts that must be analyzed now at the earliest point in the decision-making process. *Id.* As support, they cite the following:

- Applicant's 2006 Project Narrative, describing an intent to create a close-knit community centered around a farm and open space system that will provide the community with farming opportunities. (Exhibit 19)

- The OSMP at page 5, stating that agricultural enterprises "will occur" in the unrestricted open space tracts as noted in the findings.

- The fact that the Preliminary Plat Plan Set (Exhibit 109) shows all of the agricultural activities will be concentrated on just 20 acres of the development site, as opposed to the 40 acres described in the OSMP. (Exhibit 108).

- The Applicant's RMP describing various uses in the unrestricted open space, including a food processing facility, bed and breakfast facility, community center, shop buildings, covered horse arena, barns and livestock housing facilities, manure and composting facilities, mud free areas, high impact areas, etc.

- The fact that uses described in the RMP, specifically the food processing facility and the farm stand, in particular, will increase the "economic viability" of the community. (Exhibit 108, p.6)

- The testimony of Kay Crabtree, confirming that the vision of the development is to intensify agricultural uses in order to create economically viable agricultural enterprises on the site. (H.R. 3/4/08, 7:06)

- The testimony of Jennifer Coleman, Kay Crabtree's daughter, confirming plans to create agricultural educational facilities and crafts and metal-working shops for the development. (H.R. 3/5/08, 9:48)

- The testimony of preliminary plat investor, Martha Lawson, confirming the desire to create a self-contained community in which these agricultural and commercial enterprises will provide farming opportunities for the residents. (H.R. 3/5/08, 10:00)

Friends argue that the lack of analyzing impacts from these intensified agricultural and commercial uses cannot be put off until some future date, as PDS and the Applicant recommend. Friends argue that "[t]he septic system, water system and roadway improvements cannot be redesigned each time one of these planned uses proceeds to permitting. Their impacts must be analyzed now." (Exhibit 202 at 29) In addition, they argue that the County "[f]ailed to analyze the cumulative impacts of the clustered residential uses, agricultural enterprises and commercial uses on environmentally critical areas and on the rural character of the surrounding community," as well as adequate mitigation for those impacts. *Id.* at 30.

B. Conclusions of Law

The issue of whether the other proposed uses should have been analyzed as part of the threshold determination relates to both the timing of environmental review and the certainty of other proposed uses and structures that have been alluded to in documents in the record. WAC 197-11-055 addresses timing of the SEPA process:

(1) Integrating SEPA and agency activities. The SEPA process shall be integrated with agency activities at the earliest possible time to ensure that planning and decisions reflect environmental values, to avoid delays later in the process, and to seek to resolve potential problems.

(2) Timing of review of proposals. The lead agency shall prepare its threshold determination and environmental impact statement (EIS), if required, at the earliest possible point in the planning and decision-making process, when the principal features of a proposal and its environmental impacts can be reasonably identified.

(a) A proposal exists when an agency is presented with an application or has a goal and is actively preparing to make a decision on one or more alternative means of accomplishing that goal and the environmental effects can be meaningfully evaluated.

(i) The fact that proposals may require future agency approvals or environmental review shall not preclude current consideration, as long as proposed future activities are specific enough to allow some evaluation of their probable environmental impacts.

(ii) Preliminary steps or decisions are sometimes needed before an action is sufficiently definite to allow meaningful environmental analysis.

(b) Agencies shall identify the times at which the environmental review shall be conducted either in their procedures or on a case-by-case basis. Agencies may also organize environmental review in phases, as specified in WAC 197-11-060(5).

(c) Appropriate consideration of environmental information shall be completed before an agency commits to a particular course of action (WAC 197-11-070).

(d) A GMA county/city is subject to additional timing requirements (see WAC 197-11-310).

(3) Applications and rule making. The timing of environmental review for applications and for rule making shall be as follows:

(a) At the latest, the lead agency shall begin environmental review, if required, when an application is complete. The lead agency may initiate review earlier and may have informal conferences with Applicants. A final threshold determination or FEIS shall normally precede or

accompany the final staff recommendation, if any, in a quasi-judicial proceeding on an application. Agency procedures shall specify the type and timing of environmental documents that shall be submitted to planning commissions and similar advisory bodies (WAC 197-11-906).

(b) For rule making, the MDNS or DEIS shall normally accompany the proposed rule. An FEIS, if any, shall be issued at least seven days before adoption of a final rule (WAC 197-11-460(4)).

(4) Applicant review at conceptual stage. <u>In general, agencies should adopt procedures for environmental review and for preparation of EISs on private proposals at the conceptual stage rather than the final detailed design stage.</u>

(emphasis added)

Case law interpreting SEPA's requirements has upheld the language of the WAC. *(See Indian Trail Prop. Ass'n v. Spokane, et. al,* 76 Wn. App. 430, 886 P.2d 209 (1994)(SEPA process must commence when principal features of proposal and its environmental impacts could be reasonably identified); *Concerned Taxpayers Opposed to the Modified Mid-South Sequim Bypass, et. al, v. Dept. of Transp., et.al*, 90 Wn. App. 225, 951 P.2d 812 (1998)). In *Concerned Taxpayers,* the court also quoted WAC 197-11-060(3)(3) stating:

> Proposals or parts of proposals that are related to each other closely enough to be, in effect, a single course of action shall be evaluated in the same environmental document. Proposals or parts of proposals that are closely related, and they shall be discussed in the same environmental document, if they:
>
> …
>
> (ii) Are interdependent parts of a larger proposal and depend on the larger proposal as their justification or for their implementation.

The court also stated "Phased review of a project is inappropriate where it would serve only to avoid discussion of cumulative impacts." (*Concerned Taxpayers,* at 231)

In *King County v. King County Boundary Review Board,* 122 Wn.2d 648, 860, P.2d 1024 (1993), the court discussed at length a split in SEPA case law that had developed over the need for an EIS in annexation cases. Some cases took the categorical approach focusing only on whether the proposed action would directly and immediately effect a change in land use, while others engaged in a broader analysis of the probability that land use changes would follow from the proposed action, even if development was not the direct and immediate result of the government action. The latter cases have typically required an EIS, while the former taking the categorical approach, have not. (*King County,* at 662-63) The Supreme Court in *King County* determined that the broader, more fact-sensitive approach is more consistent with the language and purposes of SEPA, including the purpose to consider environmental factors at the earliest stage possible to allow decisions to be based on complete disclosure of environmental consequences. (*King County,* at 663) The court stated:

> Decision making based on complete disclosure would be thwarted if full environmental review could be evaded simply because no land use changes would occur as a direct result of the government action. Even a boundary change, like the one in this case, may begin a process of government action which can "snowball" and acquire virtually unstoppable administrative inertia . . .
>
> Even if adverse environmental effects are discovered later, the inertia generated by the initial government decisions (made without environmental impact statements) may carry the project forward regardless. When government decisions may have such snowballing effect, decision makers need to be apprised of the environmental consequences before the project picks up momentum, not after.
>
> We therefore hold that a proposed land use action is not insulated from full environmental review simply because there are no existing specific proposals to develop the land in question or because there are no immediate land use changes which will flow from the proposed action. Instead, an EIS should be prepared where the responsible agency determines that significant adverse environmental impacts are probable following the governmental action.

(King County, at 664) (emphasis added)

Review of this case law and the record leaves the Examiner convinced that the proposal in this case is not properly defined as merely a 34-lot subdivision. This proposal is more of a "vision" as Kay Crabtree testified, to maintain farming and a way of life amid cluster development. It has a definite economic component which will bring commercial uses to the property. The web site sums it up best, describing the Lake Armstrong Creek Community as an eco-friendly sustainable neighborhood in the following terms:

> Well constructed homes lasting many generations will be built in wooded areas bordering fields of grazing sheep, llamas and horses. Walking trails will lead to a renovated barn, "The Common House," available for guest quarters, meetings, recreation and family events.
>
> Organic gardens will be developed on already existing farmland while nature walks will be enjoyed around the farm's stream and nature preserve pond. Hundreds of acres of public trails including the adjacent Centennial Trail nearby White Horse Trail and Pilchuck Tree Farm can be enjoyed by walkers, bikers and horseback riders.
>
> Because of [sic] it's location, there are many possible opportunities for onsite employment including an organic farm stand, bed & breakfast, and studio space for artisans.
>
> The overall vision of Armstrong Creek Community is preserving the delicate balance of the natural environment with farming activities and a thriving community. Potential residents are individuals and families who are seeking a close-knit "green" community as an alternative to typical commercial developments.
>
> (Exhibit 79-2)

While there is nothing inherently wrong with this vision, it needs to be properly analyzed under SEPA for probable significant adverse impacts to the environment. The combination of commercial, residential, and agricultural uses proposed in this isolated rural area is a very different proposal than a 34-lot subdivision. There will be impacts to adjacent uses, to rural character, to rural infrastructure, and to the environment that are much different than the proposal identified in the checklist.

Buttressing the vision statement from the web page, the OSPM clearly states that a variety of activities will occur in the unrestricted open space. (Exhibit 108 at p.5) The web page clearly indicates that the barn structure is being remodeled into "The Common House", even though the PDS permit (as yet not final) records on file with the County show the barn remodel as a single-family residence (on proposed lot 3). Presumably, the Applicant will need to convert the single-family use permit to some type of community center/community club use/bed and breakfast, which will likely require a conditional use permit. There will presumably be different septic and water requirements, different parking requirements, different fire code requirements, different road improvement requirements, since none of these uses were considered as a part of PDS's traffic review. This community center/Common House, in particular, is such a central part of the proposal that the Examiner refuses to ignore the fact that the Applicant is advertising it with its community kitchen, guest rooms, meeting space and offices. It is not merely conceptual; it is already built.

Other planned uses that may not be quite as concrete as the Common House are still capable of being described with some particularity, as can be seen in both the OSPM and the RMP. While the Applicant's representatives protested that if decisions concerning future uses would be left up the Homeowners' Association, that is contradicted by the RMP, at least concerning livestock. The RMP states:

> This Livestock Management Plan is intended to provide the Lake Armstrong Creek Homeowners Association with information about our livestock plan and how it relates to them. This venture is being designed for economic viability for the benefit of the homeowners and the surrounding community. The implementation of this plan will be done by Forgiven Israel with input from Noah Israel, Kay Crabtree, and the Homeowners Association. The site plan will integrate livestock, residential, and crop activities into a balanced and complimentary relationship with this natural environment. . . . Sheep, horses and llamas are currently being raised on this land. Homeowners may add other species to this list.
>
> . . .
>
> With a cost sharing from the Conservation District we will create 4,000 square feet of high impact area. The high impact areas will be located on different sections of land in conjunction with total pasture renovation. These areas will not be located close to sensitive areas.
>
> . . .
>
> A watering system will be cost shared and designed by The Snohomish Conservation District.
>
> . . .
>
> A manure and compost facility will be constructed on site with a cost share agreement with The Conservation District. The size will accommodate the manure of approximately 100 sheep and 12 or more horses. The manure going

into the facility will have a minimal amount of bedding because we will use a manure vacuum to pick up mostly just the manure, which is the perfect balance of carbon and nitrogen to make superior compost.

. . .

A sheep housing facility will be constructed north to northeast of the existing hay barn covering approximately 3,000 square feet. It will be designed to handle approximately 100 sheep and their future offspring.

. . .

A new horse barn will be constructed approximately 150 feet northeast of the sheep housing. It will be approximately 70 feet by 36 feet in size and will take in all of the considerations of the sheep housing.

. . .

Also, in the long range plan is the construction of a covered horse arena, which will be located south to southeast of newly planned horse barn. This will be approximately 120 feet by 80 feet in size.

. . .

Other Planned Projects

- A food processing facility will be constructed on the property east of the planned horse arena, up against the woods line. This facility may be used by residents of the community, by people in surrounding communities, and commercial food processors. This kitchen will be the heart of this community. It will be a gathering place for people to share their talent and ideas. It will greatly increase the economic viability of this community.

- A farm stand will be constructed as an outlet for products grown and produced on farm and items grown and made by the residents. It will give tremendous exposure to this community and greatly increase its economic viability.

- A Bed and Breakfast will be constructed to accommodate overnight guests. Being located adjacent to the Centennial Trail and near the Whitehorse Trail and Pilchuck Tree Farm we anticipate hosting riders enjoying the trails. We also expect many visitors with interest in our farm's educational opportunities.

- One large or possibly two smaller greenhouse structures approximately 3,000 square feet in size located approximately 250 feet northeast of existing hay barn. It will be used to propagate native and conventional nursery plants and vegetable starts for farm venture and residents.

- A shop building to be used for farm machine repair and maintenance, wood and metal-working and arts and crafts.

(emphasis added)

The Examiner is firmly convinced that a mistake has been made in issuing a threshold determination that did not consider these future structures and uses. While perhaps not all of the SEPA review for all of these uses can be completed at this time, SEPA requires the Responsible Official to review the environmental consequences of decision making at the earliest stage when impacts can be reasonably identified. Allowing environmental review of this decision to exclude all of these other uses at this time would allow a classic piece mealing of SEPA decision making which the rules and the case law all state must be avoided. Once the subdivision decision is made, many of the individual decisions on these uses may be exempt or at most, would be individually considered. Environmental review at preliminary plat approval is the time to look at the "big picture" of the concept of the development, how the unrestricted open space will be used, and what the impacts will be. The Examiner concludes that the decision to issue the threshold determination was clearly erroneous in that PDS defined the proposal too narrowly, by not including the proposed structures and uses that have been demonstrated by Friends to be part of the proposal, including but not limited to, "The Common House" and all other uses described in the RMP.

In terms of issuing the new threshold determination, there will be only one proposal for SEPA purposes even if the Applicant must get a number of permits now or in the future for the variety of uses it seeks to place upon the property. The Responsible Official must use his independent judgment to determine whether or not the proposal is likely to result in significant adverse environmental impacts. (S*ee In re the Jurisdiction of the King County Hearing Examiner,* 135 Wn. App. 312, 321-22, 144 P.3d 345 (2006)) However, given the record developed in this case, Friends have demonstrated that this intensive group of uses packaged together on this site will generate a significant adverse environmental impact that should be studied in an environmental impact statement (EIS).

5. Substantive/Procedural Issue: Did the County fail to consider offsite roadway improvements as a part of the MDNS?

A. Findings of Fact

There is no dispute that the SEPA Checklist and the MDNS did not include review of the off-site road improvements. The description of the proposal in the MDNS does not include the off-site road improvements (Exhibit 7-1 at 1). In describing quantities of grading, the checklist states:

> Approximately 5,000 CY of cut will be required to excavate for the required road sections for the private access roads serving the lots. Approximately 4,000 CY of fill will be required to construct the roads. Fill material will be native excavated material, imported subgrade base rock, and imported road surfacing material.

These quantities of cut and fill match those the staff report identifies for plat construction. Traffic Analyst Smith confirmed, under cross examination, that no analysis had been done of drainage, grading, or other basic site analysis for road construction at this time. (H.R. 3/27/08, 10:25-10:35)

B. Conclusions of Law

The Responsible Official failed to include the off-site roadway improvements as a part of its review under SEPA. There is no possibility of later review mentioned, no addendum process mentioned, no phased review mentioned; this is simply a piece of

the puzzle admittedly left out. While most of the time, this may escape everyone's notice, it is a big issue in this case. This is an extremely substandard roadway and it is the only route that a whole neighborhood of people can take to get to their jobs, and to function in their everyday lives. There is no back road. They have a right to know what is being proposed as a solution for this problematic situation. Instead, the Responsible Official has not even included it as a part of the MDNS, and very little information has even been revealed about the proposed fix until 10 months after the SEPA decision has been made. Even now, there is no geotechnical report completed as required under the Critical Areas Ordinance or drainage report covering this steep hillside. With complicated ownership issues and restrictions, as well as safety issues for those on the Centennial Trail, as well as those using the road, some of the basic feasibility, health, safety, and environmental issues must be ironed out prior to preliminary plat approval, not after.

SEPA is not just a paper exercise, it is a substantive statute designed to provide information not only to decisionmakers but to the public. It also allows them the opportunity to comment on the proposal. Not only is there too little information here to provide any meaningful review, which is a second problem concerning the roadway improvements (which will be addressed as part of the comments on the preliminary plat), but it was simply omitted from review in the MDNS. The Examiner concludes from review of the record that a mistake has been made, and that the issuance of the MDNS is clearly erroneous on this basis. The MDNS is remanded on this basis. The Responsible Official is instructed to include review of the off-site roadway improvements as a part of the proposal.

6. Procedural Issue: Did the County issue the MDNS prematurely?

A. Findings of Fact

Friends argue that the timing of the issuance of the MDNS is such that the bulk of the environmental information submitted during the application was submitted after the MDNS was issued. As evidence, Friends point out, among other things, that:

- The proposed preliminary plat was revised four times after the MDNS was issued on 6/11/07;
- Significant changes regarding critical areas, steep slopes, and wetlands came in through a report from staff biologist Elizabeth Larson in a November 9, 2007 (Ex. 94-F)
- Geotechnical information was only produced in November 2007, and is still not complete.

(Exhibit 202 at 35-36)

The open record hearings conducted by the Examiner provided much in the way of new information. Through eight days of hearings, a great deal of new information was provided on the off-site roadway improvements, roadway ownership issues and County park ownership issues, new information on drainage, critical areas, and proposed

structures and uses. Obviously, none of this information was considered by the Responsible Official in making his SEPA determination.

B. Conclusions of Law

The SEPA process is all about timing. While it is true that the SEPA review process should be done at the earliest stage of decision making, it cannot be issued at too early a time during project review. In this case, the MDNS was issued on June 11, 2007. The open record hearing on this case did not begin until late February 2008. As demonstrated by Friends, a great deal of information has been added to this proposal since the MDNS was issued. In fairness, the appeal was filed on June 25, 2007. However, it is the duty of the Responsible Official to modify or even withdraw the threshold determination if there is significant new information on the proposal. (*See* WAC 197-11-340(2)(f); 197-111-340(3)(a)) The Examiner does not find as a matter of law that a mistake has been made in this matter, as an appeal was filed, and it is likely that the Responsible Official felt that under those circumstances, withdrawal of the MDNS was impossible. However, the Examiner agrees with Friends as a matter of principle that SEPA must follow changes in the permitting process. It is not something to simply "get out of the way" at the beginning of the permitting process. If there are significant changes to the proposal, these changes need to be analyzed under SEPA.

What strikes the Examiner is that the flaw in this case is that the MDNS was issued prematurely. One example of that is the fact that the drainage waiver allowing the Applicant to use the provisions of the low impact development code was not signed until March 4, 2008. (Exhibit 134) If the Applicant had not gotten approval on its drainage waiver until that date, how could the Responsible Official have possibly issued a MDNS on June 11, 2007 stating that the project was in compliance with all *County* regulations and would not generate a significant adverse environmental impact?

The record is replete with evidence that the Responsible Official did not have adequate evidence in front of him to make that judgment at the time the MDNS was issued. SEPA requires more. Because it is a public information statute, the information documenting that the project meets the development regulations must be in the record, it must be available for public comment during the comment period. Otherwise the process is meaningless and thwarts the intent of the Act.

The MDNS is overturned on this issue. There is so much new information in the record that the Responsible Official must withdraw the MDNS and reconsider the entire proposal, as interpreted by this decision, and with all of the new information generated by this decision.

7. Procedural Issue: Was SEPA analysis erroneously deferred to other agencies?

A. Findings of Fact

Friends argue that PDS erroneously deferred SEPA analysis to other agencies with jurisdiction. The specific argument made is that the consulted agencies were not provided full and accurate project information. (Exhibit 202 at 22) Because the full scope of the proposal was not disclosed, the argument goes, none of the consulted agencies were made aware of the full scope of the proposal. Consequently, the necessary infrastructure improvements for the subdivision have not been properly evaluated or sized. *Id.*

As discussed in Issue B.2 above, a number of the proposed uses for the site and the agricultural uses presently existing on the site have not been considered in the MDNS. An e-mail in the record from the Department of Health (DOH) confirms that the representative official reviewing the septic system was not aware of the proposed additional uses or structures. (Exhibit 39) The e-mail states:

> I was unaware of these proposed additional improvements until you brought them to my attention. To date we've reviewed only preliminary information for a large onsite sewage system to serve the residences in this plat. It's my understanding that the developer is proposing (in addition to a 34-unit residential subdivision):
>
> - Bed and breakfast;
> - Livestock and composting/manure management operation;
> - Farming/crop production operation including a commercial food processing facility and farm stand;
> - Commercial nursery operation with greenhouses and restrooms;
> - A shop building for wood/metal working and farm machinery repair;
> - An alternative power generating facility
>
> I understand Snohomish Health District has already permitted a separate onsite sewage system to serve the bed and breakfast.
>
> I expect that most of all these activities will result in generation of additional waste beyond what's generated by residences. I don't know if the developer intends to connect any of these other facilities to the proposed LOSS or serve them with separate onsite sewage systems. Some activities could result in additional nitrogen loading to the environment (depending on design and management practices) and could require pre-treatment and/or special permitting. Regardless, the additional flows and waste

> constituents must be addressed in the engineering design for the LOSS, and some activities might be subject to other agency review (i.e. Snohomish Health District and/or Dept. of Ecology). State and federal law prohibits discharge of industrial waste to a septic and only Dept. of Ecology can permit industrial discharges.
>
> (emphasis added)

The Examiner highlights the information on the bed and breakfast, since this is the first information she has seen about a separate onsite system in the midst of this subdivision. Where is this onsite system? Why has this not been disclosed? The Examiner also notes that the "Common House" meeting facility is not on this list.

The Water System Plan for the subdivision states that "it is submitted for the purpose of creating 35 connections for a new residential development." (Exhibit 125 at page i) The Plan was approved by the DOH, presumably based on the representations made in the Water System Plan. If a commercial septic permit has already been issued for a bed and breakfast business on the property, then at the very least, a commercial connection should have been disclosed in the water plan. In addition, what about the Common House? What about water for the agricultural uses planned with the Conservation District? Those uses do not appear to be included in the Water System Plan, although on-going agricultural uses are clearly part of the intended plan for the property.

Finally, the Examiner notes this section of the staff report:

> The Applicants are proposing a community septic drainfield in Tract 997. The Washington State Department of Health (DOH) regulates community drainfields. DOH has not yet recommended approval of this proposal. PDS cannot find that adequate provision has been made for sanitary waste disposal.
>
> The Applicant has already begun work on one building in the proposed development. This initially came to PDS's attention as a code violation complaint. A building permit for a single-family residence has now been issued for construction on proposed lot 3. <u>This building has an individual septic drainfield. This drainfield is not shown on the proposed plat and has not been considered in the plat review.</u>
>
> (emphasis added)

The SEPA checklist states that sewer will be provided by "community septic system". It says nothing about an individual onsite system, to speak nothing of a commercial-size onsite septic permit for a bed and breakfast. Clearly, there is a need to reconcile these facts. PDS should be asking why a commercial permit, and why is the Applicant not permitting a bed and breakfast, or community center instead of a single-family residence?

Moreover, it should have been reviewed pursuant to SEPA. Even though the single-family permit may have been exempt, when it is part of a larger proposal, such as a subdivision, which is not exempt, its environmental impacts must be reviewed under SEPA. WAC 197-11-305(1)(b)(i).

B. Conclusions of Law

As lead agency, PDS has the responsibility of putting the pieces of the puzzle together. Deferring to agencies with expertise is appropriate, but there should be some sort of response when additional new information such as the fact that the Applicant has applied for a bed and breakfast septic permit; or the fact that Friends have submitted information showing that Applicants are advertising on their website that the remodeled barn they have told the *County* will be a single-family residence is in fact the "Common House", which Applicants advertise as a meeting space/community kitchen/common office space/and guest house. These plans are not speculative; they are as real as the permits that are on the verge of being issued. The septic permit and the building permit were not even discussed as a part of the open record hearing. There is obviously more going on here than the Applicant has let on. It appears to the Examiner that the most likely explanation is that the remodeled barn will serve as the Common House, and it may or may not be on a separate septic system. If so, there are undisclosed impacts regarding drainfield location, etc. in relation to the open space. If not, there are undisclosed impacts regarding the location of the planned bed and breakfast building and septic location which need to be evaluated.

The Examiner notes that the Conditional Use Permit criteria for a permit for a bed and breakfast guesthouse or inn require, *inter alia,* that:

> (g) The Applicant shall submit a letter from the applicable water purveyor and sewer district, if applicable, stating that each of them has the respective capacity to serve the bed and breakfast inn;

(SCC 30.28.040)

The time to assure that adequate water and sewage capacity is available is now, while the state agencies are still involved in the approval process. Once the Water System Plan gains approval by the DOH, the Lake Armstrong Community will be the water purveyor and will self-determine whether or not it can meet its own desired water needs.

The Examiner agrees with Friends that the MDNS was erroneously issued providing too little information to agencies with jurisdiction about the true nature of the proposal. The problem all stems from the fact that the proposal was not adequately defined to include the proposed uses and structures as discussed in Issue B.4. The Responsible Official must look at the proposal from a coherent whole and determine whether all the pieces fit together correctly. In this case, they do not. The Examiner agrees with Friends that although it is appropriate to delegate to agencies with jurisdiction, since Snohomish County has the ultimate approval authority, it is up to the County to assure that these agencies have accurate information before them in evaluating the proposal.

8. Procedural Issue: Did the Responsible Official erroneously defer SEPA analysis and mitigation to development regulations?

A. Findings of Fact

Friends argue that PDS erred in deferring to its development regulations through a disclaimer, without analyzing the project impacts and determining whether the development regulations adequately mitigate for those project impacts. Under WAC 197-11-158, Friends argue, the lead agency must "identify the specific probable adverse impacts of the project and determine whether the impacts have been identified . . . and adequately addressed in the . . . applicable development regulations . . ." If not all of the project's impacts were found to have been addressed by the development regulations,

WAC 197-11-158 mandates additional review. (Exhibit 202 at 24). Friends argue specifically that PDS must pay particular attention to the analysis of project elements that do not comply with current regulations, including: (a) roadway elements that do not meet applicable EDDS standards, and critical area buffers that do not meet the requirements of the current Critical Areas Ordinance. (Exhibit 202 at 39)

(1) Procedural. Friends' argument is procedural in that it argues that the MDNS document is flawed because it lacks the analytical rigor required by SEPA. The SEPA Integration provisions (integrating SEPA and GMA) state that the local government may determine that the requirements for environmental analysis, protection, and mitigation measures provideD in GMA development regulations, provide adequate analysis of, and mitigation for, some or all of the specific adverse environmental impacts of the project. (WAC 197-11-158(1)) If the GMA county opts to perform SEPA review in this manner however, certain requirements follow:

(2) In making the determination under subsection (1) of this section, the GMA county/city shall:

(a) Review the environmental checklist and other information about the project;

(b) Identify the specific probable adverse environmental impacts of the project and determine whether the impacts have been:

(i) Identified in the comprehensive plan, subarea plan, or applicable development regulations through the planning and environmental review process under chapter 36.70A RCW or this chapter, or in other local, state, or federal rules or laws; and

(ii) Adequately addressed in the comprehensive plan, subarea plan, applicable development regulations, or other local, state, or federal rules or laws by:

(A) Avoiding or otherwise mitigating the impacts; or

(B) The legislative body of the GMA county/city designating as acceptable the impacts associated with certain levels of service, land use designations, development standards, or other land use planning required or allowed by chapter 36.70A RCW;

(c) Base or condition approval of the project on compliance with the requirements or mitigation measures in the

comprehensive plan, subarea plan, applicable development regulations, or other local, state, or federal rules or laws; and

(d) Place the following statement in the threshold determination if all of a project's impacts are addressed by other applicable laws and no conditions will be required under SEPA: "The lead agency has determined that the requirements for environmental analysis, protection, and mitigation measures have been adequately addressed in the development regulations and comprehensive plan adopted under chapter 36.70A RCW, and in other applicable local, state, or federal laws or rules, as provided by RCW 43.21C.240 and WAC 197-11-158. Our agency will not require any additional mitigation measures under SEPA."

Friends argue that PDS has not complied with these requirements because it has not adequately disclosed impacts, especially with regard to off-site roadway impacts and critical area impacts.

(2) Roadway Impacts. With respect to off-site roadway impacts, it has already been demonstrated that PDS did not even consider this part of the proposal during its review of the SEPA checklist and SEPA review. Further, as indicated in Finding A.5, the County Engineer granted a deviation to the EDDS, without disclosing any impacts or documenting how the reduction of the paved road surface on the steep hillside by 8 feet would meet the public health and safety standards. Applicant failed to request a modification of the EDDS as required by the subdivision code to make any such deviation effective for preliminary plat approval. Further, the Public Works Director failed to document the extent of the improvements required, and why he did not require a handrail in compliance with EDDS standards. (*See* Finding of Fact C.1) Finally, even if it was considered, the various commercial and agricultural uses were not considered as a part of the proposal and were not factored into the road improvement needs. (Findings and Conclusions B.4.)

There is no credible way to say in the threshold determination that this project meets the County's development regulations for off-site road improvements. It thus follows that under WAC 197-11-158, this part of the proposal must be called out as creating a significant adverse environmental impact given the evidence in the record showing the uncertainty of the location of the right-of-way and the fact that the improvements as proposed by the Applicant have been opined to be injurious to public safety by the most credible road engineer who testified, David Markley.

(3) Critical Areas. With respect to critical areas impacts, Friends argue that since the County has enacted a new Critical Areas Ordinance and engaged in the best available science inquiry pursuant to RCW 36.70A.172, there is environmental information showing that the critical

areas are not adequately protected under the old version of the Critical Areas Ordinance to which the application is vested. Applicants counter that the application is vested to the version of the Critical Areas Regulation enacted prior to October 2007, so that the newer stricter rules do not apply to the application.

The main difference between the two sets of rules as applied to this project is that the buffers to wetlands and smaller streams are smaller in the pre-October 2007 CAR. The buffers on Lake Armstrong Creek are virtually the same. Some tools, such as fencing and buffer enhancement, may be allowable under the new ordinance as averaging tools that were not available under the pre-October 2007 ordinance. The legal significance will be addressed in the Conclusions of Law.

B. Conclusions of Law

Friends argue that SEPA analysis and mitigation is erroneously deferred to the development regulations, specifically in the areas of critical areas impacts and off-site roadway impacts. The lead agency has an affirmative duty to review a proposal under the best information it has to determine environmental impact. In the case of both drainage and critical areas in this County, most projects going through now are vested to development regulations that provide mitigation measures for impacts that are outdated under the most current scientific thinking. This vesting extends to SEPA policies, and the county's adopted development regulations are adopted as SEPA policies. (*See Adams v. Thurston County,* 70 Wn. App. 471, 481, 855 P.2d 284 (1993)) While it is a dilemma under the regulatory regime, the Examiner does not believe that the courts or the Legislature intend SEPA to impose regulatory requirements in conflict with those imposed for a vested application.

Looking at the second question of whether the MDNS properly analyzed off-site roadway impacts, as a procedural matter WAC 197-11-158 provides a clear analytical pathway for integrated SEPA review. Under WAC 197-11-158, SEPA allows a GMA county to find that its development regulations and comprehensive plan provide adequate analysis of and mitigation for some or all of the specific adverse environmental impacts of a project. In doing this, there is a very specific analysis stated in the regulation.

WAC 197-11-158(3) clearly indicates that where the proposal strays outside the boundaries of adopted development regulations (assuming they are current scientific thinking) that significant adverse impacts might be expected to be found. Subsection (3) of WAC 197-11-158 addresses the issue specifically:

(3) Project specific impacts that have not been adequately addressed as described in subsection (2) of this section might be probable significant adverse environmental impacts requiring additional environmental review. Examples of project specific impacts that may not have been adequately addressed include, but are not limited to, impacts resulting from changed conditions, impacts indicated by new information, impacts not reasonably foreseeable in the GMA planning process, or impacts specifically reserved in a plan EIS for project review.

When a project is granted a deviation from standards that is unsupported by the record, as was the case here with the off-site roadway impacts, there might be probable significant environmental

impacts requiring additional review. In the case of off-site roadway impacts, there is much that needs to be addressed. Although some of it may relate to unique SEPA issues, it is more likely a failure to do appropriate review under the development regulations. There was a failure to provide a geotechnical report on the steep slope adjacent to Lake Armstrong Road where the road improvements were to occur. As an area where development activities were to occur as part of the subdivision, that should have been included as part of the critical areas review. All of the land ownership issues between parks, county prescriptive right, and other ownership interests must be addressed as a part of that review to determine where the retaining wall can be built, where the road can be built, so that all necessary structures can fit in the right-of-way that is provided. (See Finding and Conclusion C.1) Finally, there needs to be a design for the road and for the retaining wall that meets EDDS pursuant to SCC 30.41A.210, or a request for a modification pursuant to SCC 30.41A.215 SCC. The administrative deviation criteria does not meet the requirements of SCC 30.41A.215, and therefore cannot be accepted as a modification under the code. Moreover, this deviation is not even justified under its own required terms.

As the staff report states, Lake Armstrong Road is considered a rural subcollector under the EDDS, which requires no more than a maximum road grade of 12%, a minimum horizontal radius of 275 feet, or a 30-foot paved road section, along with a seven-foot paved shoulder. (Exhibit 75) (*See* EDDS at 3-060, 3-07) Side slopes must meet EDDS 4-14, any safety railings for pedestrians must meet EDDS 4-16, and so on. The standard is not that it will make the road better than it was. The standard is that described in the EDDS. If that is not achievable for one or more reasons, a modification must be obtained. Therefore, on remand, it will be up to the Applicant to find a way to either meet those standards or to demonstrate to the Examiner under the modification criteria of SCC 30.41A.215, with the support of PDS and DPW, that a proposed modification meets those criteria and is the best interest of the public health, safety and welfare. If such a proposal can be recommended and approved, then the Examiner would not anticipate significant adverse environmental impacts in terms of this off-site roadway project. However, if PDS cannot recommend approval without a significant compromise to normal safety standards as spelled out in the EDDS—for example, if PDS recommended approval with a 22-foot road with a 17% slope instead of a 30-foot road with a 12% slope because it felt that the cost of improvements were too much of a financial burden on the Applicant, then significant adverse environmental impacts will likely result from approval of this project that must be discussed in an EIS. This is the information that Friends argues should have been examined separately as a part of the SEPA analysis.

The Examiner is firmly convinced that a mistake has been made as to the granting of an MDNS with respect to this project. The appeal is granted on the basis that the MDNS was inadequate in analyzing the impacts of the off-site roadway impacts, and rejected on the grounds that it failed to analysze the impacts to critical areas using best available science. Moreover, based on the status of the information in the record with respect to off-site roadway impacts, the Examiner finds that Friends have demonstrated there are unmitigated significant adverse environmental impacts that need to be addressed in an EIS.

9. The* County *failed to evaluate and analyze impacts to critical areas.

Note: This section includes Mixed Findings of Fact and Conclusions of Law

(1) Harvey Armstrong Creek is already a 303(d) listed creek under the Clean Water Act, meaning it fails to meet federal clean water standards, in this case for fecal coli form. It is also a salmon bearing creek with coho and cutthroat that is hydrologically connected to Lake Armstrong. The development site is an 80.1 acre site, slightly less than half of which is covered with environmentally critical areas and their buffers, including Harvey Armstrong Creek, other streams,

wetlands and steep slopes leading to the creek. Friends argue that the proposal places 34 homes, other unanalyzed commercial and agricultural uses and intensive agricultural uses on the remainder of that area. The restricted open space is only a 20-acre area and will have to support the intensive agricultural uses, the commercial and other proposed uses, as well as drainage, wells and recreational uses for the plat. Friends contend that the SEPA analysis fails to evaluate and analyze all of these types of impacts to the critical areas, to the water quality and impacts to the aquatic resources of Harvey Armstrong Creek.

Friends argue that the County erred in failing to gather basic information that is needed to evaluate impacts to environmentally critical areas, specifically:

- *The County failed to identify the extent of the wetlands across the stream, and the integrated nature of the wetland and stream system that flows through the center of the system all the way from the old well site to Harvey Armstrong Creek.* (Exhibit 202 at 30)

- *The County failed to correctly categorize Wetland #2 as a category 4 instead of a category 3 wetland, and failed to correctly categorize a swale and the old well site, as Katie Walter testified. Friends claim that these natural seeps and drainage ways are defined as Type 5 streams under SCC 30.62.015(26).* (*Id.* at 31)

- *The County failed to investigate the swale at the base of the ravine, as Katie Walter testified. Id.*

Witness Katie Walter, a biologist and natural resource manager with Shannon & Wilson, testified on behalf of Friends.

(2) Ms. Walter testified that the County failed to identify the extent of the wetlands across the stream, and the integrated nature of the wetland and stream system that flows through the center of the system from the old well site to Harvey Armstrong Creek. Specifically, Ms. Walter testified that based on three aerial photos entered in the record as Exhibit 111F, a drainage course is visible from the old well site through Wetland #2 to Wetland #1 and down to Harvey Armstrong Creek. Later versions of the plat map show the lower connection from Wetland #1 to Harvey Armstrong Creek as a Type 5 Stream. (*Compare* Exhibit 102 *with* Exhibit 109 Sheet 2)

Under the County's water typing criteria, a Type 5 stream is defined as 1) less than 2 feet between ordinary high water mark; 2) not used by significant numbers of fish; and 3) all natural waters not classified as Type 1, 2, 3, or 4, or seepage areas, ponds, and drainage ways having short hydroperiods. In the original critical areas report (Exhibit 27), Applicant's consultant, Sarah Blake, stated that a small freshwater emergent wetland had been identified on NWI maps, near Wetland 2 which is or used to be a seasonal spring. (Exhibit 27 at 6) Ms. Blake characterized it as a small depression, about six feet deep with plastic outflow piping near the top of the depression. Since soils and hydrology indicators of a wetland were not found (see Data Plot 11), Ms. Blake did not include it as a wetland. *Id.* The supplemental report done by Hart Crowser confirmed this finding, and stated it was the site of a former dug well historically supported by timbers. The Hart Crowser report did indicate that "[i]t is likely a surface water connection exists between Wetlands 1 and 2 during the wetter portions of the year." (Exhibit 103 at 7; *see also* photograph 5)

Based on the evidence in the record, the Examiner is not convinced that a Type 5 stream currently exists from the old well site to Wetland 2 although one may certainly have existed in the past. Given the likely surface water connection through parts of the year between Wetland 2 and 1, as indicated in the Hart Crowser report and in Ms. Walter's testimony, Friends have provided ample proof of a Type 5 stream between Wetlands 2 and 1. It is likely a distinction without a difference, however, given the holding below.

(3) Ms. Walter also testified that based on the first critical areas report filed by Applicants (Exhibit 27), the evidence in the report indicated that Wetland #2 had been miscategorized as a Category 4 wetland and should be properly categorized as a Category 3 wetland. Under SCC 30.62.300(2)(c), Category 3 wetlands are wetlands which satisfy none of the criteria for Categories 1, 2, or 4 wetlands. Under SCC 30.62.300(2)(d), Category 4 wetlands are non-riparian wetlands less than one acre, with one wetland class and ≥90 percent aerial coverage of any combination of any combination of certain invasive/exotic species listed in Table SCC 30.62.300(2). Two test pits, test pit 10 and 12, indicated the presence of vegetation in sufficient quantity to eliminate it from the criteria for being a category 4 wetland. (H.R. 3/19/08 at 10:10-10:50) (*See* Exhibit 27 at Data Sheets from Test Pit 10 and 12) Despite clear evidence in the test pit log (which indicate percentages of species), the wetland was labeled a Category 4. In addition, the supplemental critical areas report by Hart Crowser (Exhibit 103) indicates that they did not disagree with Ms. Walter's finding:

> We did not specifically make observations to support or refute that the coverage of invasive or exotic species was greater than 90 percent. . . In particular, due to grazing, the vegetation in this area, especially the grass species, was very difficult to identify. As a result we are unable to make a determination of the percent cover of invasive/exotic species in Wetland 2. The category determination of the wetland however, will not substantially impact the management of the wetland or the proposed development.
>
> (Exhibit 103 at 7)

Staff biologist Elizabeth Larson did not specifically refute these findings either, except to say that the County had "no problem" finding grazed wetlands of this size to be Category 4 wetlands (because it is difficult to determine vegetation types), and that it is often true that sample pits can contain upland vegetation if they are a certain distance from the center of the wetland. She stated that she had no way of knowing where the sample was taken, because she did not find a "methods" section in the original critical areas report. (H.R. 3/27/08 9:17-10:00)

The Examiner finds that based on the testimony of Ms. Walter and the findings in the two reports, that this wetland is a Category 3 wetland, in that the original test pits, the best evidence in the record, indicates that there is not 90% invasive/exotic species covering the area, as testified by Ms. Walter, which is the governing criteria of SCC 30.62.300(2)(d). Exhibit 27 does contain a methodology section, which indicates that the wetland delineations were performed using the Department of Ecology Manual and other standard industry methods. Sarah Blake simply made an error in categorizing the wetland in accordance with Snohomish County Code. The delineation as a Category 4 wetland was clearly erroneous, and Friends have shown that it should have been categorized as a Category 3 wetland and buffered accordingly.

(4) As to the swale by the northeast ravine, Ms. Walter testified that the County failed to do basic investigation. (H.R. 3/19/08 at 10:11-10:52) Ms. Larson testified that she investigated the "swale" area during her November 2007 site visit. It should be explained that it is called that because it was so marked that way by the applicant's surveyor, not specifically because of a biological determination. She testified that she looked for a defined channel and saw none. She also looked for a source of water and saw none. From that she concluded that there was not a stream or "swale" present in the area. (H.R. Record 3/27/08 at 9:17-10:00)

The Examiner gives substantial weight to Ms. Larson's testimony and finds it to be sufficient to refute Friend's allegation that the County failed to do sufficient investigation of the site. Ms. Larson, a biologist with expertise in determining such matters, found that no swale existed at the bottom of the ravine.

(5) Friends' next argument is:

- *The County failed to gather basic geologic information that affects slope stability, such as the topography and subsurface conditions of the steep slopes*. (Testimony of Bill Perkins H.R. 3/4/08 between 7:14 and 7:48) (Testimony of Christopher Robertson 4/15/08 between 10:11 and 10:58)

The Examiner has already addressed this argument in that it is undisputed that the County failed to do SEPA analysis on the road. There was no geotechnical analysis done of the slope. (Testimony of T. Hammer, 3/4/08, 6:00 *Et seq.*.) Under the Critical Areas Ordinance, a geotechnical report is required for development activity on or adjacent to landslide hazard areas. (SCC 30.62.210) PDS should have required the Applicant to submit a geotechnical analysis of the slope as a part of its submittal on the project for preliminary plat approval. The failure to do this analysis goes back to a failure under WAC 197-11-158 to provide notice that, at the time of the issuance of the MDNS, it was unknown how and whether the project would meet critical areas requirements for stabilizing the landslide hazard area above the road. As Traffic Analyst Smith testified, SEPA would not be completed after preliminary plat approval; it would simply be completely omitted from the process. (H.R. 3/27/08 9:30-9:50)

This is completely unacceptable; the matter is remanded with a finding of significant adverse environmental impacts as to off-site roadway impacts.

(6) Friends argue that the County erred in failing to gather basic information that is needed to analyze impacts to environmentally critical areas, specifically:

- *The County failed to analyze impacts of intensified livestock uses on wetlands and streams. Id.*

- *The County failed to adequately analyze the hydrologic connection between the wetlands and stream features, as Katie Walter testified. Id.*

- *The County failed to analyze the impacts of stormwater discharging from infiltration trench #1 into the large wetland without the required 100-foot vegetated buffer. Id.*

(7) Friends argue that the County needs to assess the water quality impacts to critical areas of concentrating greater numbers of livestock on less than half the acreage historically

used, and the impacts of intensified livestock grazing on critical areas buffers. (*See* Exhibit 202 at 25-26)

This case presents a very interesting dilemma of the interface between agriculture and residential uses. While it is encouraged in the Rural Cluster Subdivision Ordinance, Friends point out substantial issues that emerge from this mixture of uses. The unrestricted open space will serve as pasture for 100 sheep and 12 horses as well as llamas, according to the RMP. More may be added to the list at the discretion of homeowners. (Exhibit 108 at 15) The wetlands and NGPAs buffering the streams are directly downhill from these uses. As testified to by a number of witnesses, including Steve Swope, Katie Walter, and Gene Peterson, water quality impacts to the critical areas and impacts to aquatic resources will result. Increased water flows from increased water drainage from the development, then flowing through the farm field, will increase sedimentation, degrading the stream, eliminating spawning gravel in Harvey Armstrong Creek and potentially filling the wetlands. However, Friends offer few suggestions for how to reduce the agricultural impacts in the pasture land. Undoubtedly there is a certain carrying capacity for livestock in a 20-acre pasture. Apparently, what was originally envisioned as a 35-acre livestock area has been reduced to a 20-acre pasture. (*Compare* Exhibit 108 at 3 *with* 108 at 9) The Examiner assumes that as farmers, the Applicant will use pasture management techniques that will allow for the sustainable use of the pasture in its reduced size, which presumably would include farming only the number of livestock capable of using the 20-acre pasture. However, that is an unanalyzed impact that is not discussed in the record. Nor was the RMP corrected to fix the error.

a. SCC 30.41C.200(10) requires as part of the Rural Cluster Subdivision application:

> (10) A management plan which details the required maintenance and management tasks and responsibilities [that] may be required by the department for all restricted open space and other open space areas which require continuing maintenance or management;

At a minimum, the OPSM must be consistent with the rest of the application. Because it is not, it is an inconsistency that must be addressed as part of the plat application. However, there are no county regulations addressing management of farming and livestock uses in the context of a Rural Cluster Subdivision. That is a plat compliance issue, not a SEPA issue. What can be addressed is the water quality impacts of the agricultural uses under SEPA.

b. With respect to the water quality impacts and drainage, there is an issue of compliance with the Low Impact Development Technical Guidance Manual. The Applicant has applied for approval of a targeted drainage plan under the Low Impact Development Ordinance, Chapter 30.63C SCC. The Applicant received approval by PDS with conditions. (*See* Exhibit 134) The Applicant proposed full dispersion, although the internal roads of the plat are being constructed of conventional asphalt and runoff is being collected and conveyed via catch basins to a level spreader and then dispersed onto the ground. The application states that "all stormwater runoff will be retained on site by dispersion and infiltration into the porous native soil . . . ." (Exhibit 134 at 2) There are a number of requirements for full dispersion credit (i.e. no other treatment or flow control required) for road projects, which is the main area of contention for impacts in this case. They are:

- Dispersion area must have 6.5 feet of width for every 1-foot width of impervious surface area draining to it. A minimum distance of 100 feet is necessary. (applicable to projects with this soil type)

- Depth to the average annual maximum groundwater elevation should be at least 3 feet.

- Channelized flow must be re-dispersed to produce the longest possible flow path.

- Flows must be evenly dispersed across the dispersion area.

- Flows must be dispersed using rock pads and dispersion techniques as specified in BMP T5.30 of the 2005 SMMWW.

- Approved energy dissipation techniques may be used.

- Limited on-site (associated with the road) flows.

- Length of dispersion area should be equivalent to length of the road.

- Average longitudinal and lateral slopes of the dispersion area should be ≤ 8 percent.

LID Guidance Manual at § 7.2.4(2) at 148. With respect to BMP T5.30 referred to above, pertinent criteria include:

> 6. After being dispersed with rock pads or [dispersion] trenches, flows from ditch discharge points must traverse a minimum of 100 feet of undisturbed native vegetation before. . . entering an existing onsite channel carrying concentrated flows across the road alignment.
>
> 7. Flowpaths from adjacent discharge points must not intersect within the 100-foot flowpath lengths, and dispersed flow from a discharge point must not be intercepted by another discharge point. To enhance the flow control and water quality effects of dispersion, the flowpath shall not exceed 15% slope, and shall be located within designated open space.

(emphasis added)

PDS determined that the application met the requirements for full dispersion as set out in the LID Guidance Manual § 7.2.2 and granted the modification and waiver of SCC 30.63A.250. (Exhibit 92-30)

Friends argue that this application does not meet the requirements of the LID Manual or its required stormwater BMPs and the lack of compliance will generate a significant adverse environmental impact. Specifically, the following points were brought out: in the Applicant's

Targeted Drainage Report, the consultants concluded that compliance with the LID Guidance Manual requirement that stated "[l]ength of dispersion area should be equivalent of the length of the road" was "not practical" (Exhibit 81 § D 2nd page (no page numbers)). The report indicates that this requirement also conflicts with BMP T530's requirement to provide a 100-foot minimum flowpath. The report indicates that the flowpaths proposed for the three level spreaders associated with this project are 270-feet, 260-feet, and 325-feet. When cross-examined regarding this statement in the drainage report, PDS drainage engineer Jack Hurley did not have an answer regarding why the Applicants were not made to comply with this requirement.

It seems to the Examiner that the Applicant must either comply by providing more level spreaders, or allowing natural dispersion as required under 7.2.4(1) as an alternative. The bottom line is that if the criteria of the LID Guidance Manual cannot be met, significant adverse impacts will result from failing to detain and treat the drainage.

As to the Applicant's statement of conflict, there is no conflict between the requirements - there must be a minimum 100-foot flow path and the length of the dispersion area should equal the length of the road, i.e., ≥100 feet. Further, there has been no explanation by the Applicant of the impracticality of meeting the requirement. As testified by Christopher Robertson, other low impact alternatives might have been suitable for private road 1 and 2 given the sandy loam soil in the area of those roads. (H.R. 4/15/08 at 10:40) He testified that in his experience, a pervious pavement or other means of allowing infiltration could work in such areas. In addition, Mr. Robertson's review of the soil logs noted that there was a high likelihood that perched groundwater in the open space area was present within three feet of the surface, in likely violation of another of the LID Guidance Manual requirements. *Id.*

c. Other points of contention included the permeability of the soils in the open space area. While the application for the drainage waiver characterized the areas for dispersion as "porous", Mr. Robertson reviewed the test pits dug by Mr. Hammer and the soil logs contained in Exhibit 7-7, particularly the data on test pit 4, located just to the south of the spreader trench that would be located to the west of the LOSS system drainfield (near the existing barn). (*See* Exhibit 109 Plan Sheet 12/15), and test pit 6, located just north of the spreader trench for Lake Armstrong Road (*See* Exhibit 109 Plan Sheet 12/15). Although these test pits were dug in August, the driest time of the year, according to Mr. Robertson, the soils were characterized as "very wet" or "very saturated". Given the characteristics of both soil pits, Mr. Robertson concluded that there was 1) low permeability soils within the depth of the test pits; 2) the conditions were not favorable for infiltration; and 3) the test pits indicated evidence of seasonal perched groundwater which would not be conducive to infiltration of surface water. (H.R. 4/15/08 at 10:40-11:00)

d. Issues were raised by Friends over the topography of the slopes in the dispersion area and whether they met the criteria of the LID Guidance Manual and BMP Manual for full dispersion. The Applicant in the drainage report again claims there is some conflict between requirement that average longitudinal and lateral slopes of the dispersion area should be less than 8% and the requirement in T5.30 that there be a maximum flowpath slope of 15% (Exhibit 81 § D 2nd page (no page numbers)). Again, the Examiner fails to see any conflict between these two requirements. The average must be less than 8% and under no circumstances greater than 15% in any one location. Under cross examination, Mr. Hurley stated that he did review the topography to determine whether this criteria was met. However, review of the many slope maps in this record reveal that at least the surface water dispersing from the spreader north of Lake Armstrong Road

will most certainly run through areas with slopes greater than 15% (*See* Exhibit 109 Plan Sheet 15/15).

Finally, Friends raised the issue of whether the Applicant met the criteria in BMP T5.30 requiring that the flowpath must traverse a minimum of 100 feet of native vegetation prior to joining an onsite channel—in the case of the spreader next to Lake Armstrong Road and likely the one below the LOSS system, arriving in Wetland #1 and joining the hydrologically connected system that flows into Harvey Armstrong Creek. (Testimony of Jack Hurley, H.R. 3/27/08 12:12 *Et seq.*.) On cross examination, Jack Hurley stated that the open space pasture area does not qualify as "native vegetation" because the vegetation is grass, and not the indigenous, naturally occurring vegetation. The 2005 Stormwater Management Manual for Western Washington defines "native vegetation" as the following:

> Vegetation comprised of plant species, other than noxious weeds, that are indigenous to the coastal region of the Pacific Northwest and which reasonably could have been expected to naturally occur on the site. Examples include trees such as Douglas fir, Western Hemlock, Western Red Cedar, Alder, Big-leaf Maple, and Vine Maple; shrubs such as willow, elderberry, salmonberry and salal; and herbaceous plants such as sword fern, foam flower, and fireweed.

Department of Ecology, 2005 SMMWW: Volume I – Minimum Technical Requirements and Site Planning, Glossary.

Based on Mr. Hurley's testimony and the definition above, the Examiner concurs with this finding. Therefore, as Mr. Hurley testified, the requirement would have to be met by the water flowing through the buffers. Because the buffers are only 75 feet wide, it does not appear that this requirement is met either.

e. Based on the showing made by Friends, the Examiner is convinced that a significant adverse impact will result from the approved drainage modification waiver. The Examiner also notes that even though the MDNS was issued June 11, 2007, this drainage waiver was not issued until March 4, 2008 AFTER the hearings on this project had begun! (Exhibit 134) This project originally went to hearing in November 2007 but was continued until the end of February due to issues with a failure to identify critical areas. The Examiner finds that although there is apparently "no appeal" to the Examiner of the provision that allows the director to provide modifications and deviations from the county code pursuant to SCC 30.63.030, the Examiner retains jurisdiction under the SEPA code to hear appeals of MDNS' and to find that significant adverse impacts from drainage will result from an application. Based on the fact that this waiver was not even approved until well after the MDNS was issued, the MDNS is found to be procedurally clearly erroneous. Moreover, Friends have provided sufficient evidence to convince the Examiner that based on the project's lack of compliance with the full dispersion requirements, particularly with respect to the spreaders as outlined above, there is likely to be a significant adverse environmental impact to water quality should this project be allowed to go forward with this design, such that an EIS is required. Moreover the Examiner concludes there is Friends have provided sufficient evidence to demonstrate that the Applicant has failed to make adequate provision for drainage ways in violation of SCC 30.41A.100(1) and RCW 58.17.110. Further, it (obviously) violates the requirements of the LID Guidance Manual, in violation of SCC 30.63C.030.

10. Groundwater Impacts

Friends make a number of arguments in relation to groundwater. First, they argue that the County erred to gather and analyze basic information about groundwater to assess project impacts to water quality and water quantity, including:

- The County failed to correctly identify the direction and characteristics of groundwater flows, and its effects on potential groundwater transport of nitrates and other contaminants from waste streams to surface waters;
- The County failed to adequately analyze the impacts to groundwater quality, including nitrate contamination from all of the planned uses;
- The County failed to analyze the groundwater withdrawals for all of the uses that have been planned;
- The County failed to analyze the impacts of locating wells too close to Harvey Armstrong Creek.

A. Direction of Groundwater Flow

(1) Findings of Fact

There is much conflicting testimony in the record about the direction of groundwater flow. The first testimony from the Applicant's expert is that the direction of groundwater flow is due south. (Testimony of Douglas Dillenberger (Exhibit 78), H.R. 3/4/08 at 6:28) However, there is evidence in the record in the water right (supplied to the Department of Ecology by the Applicant) that "[t]he groundwater under the subject well is moving slowly in a northwesterly direction." (Exhibit 7-8 at 4) Further, Friends' groundwater expert hydrogeologist Steve Swope (resume at Exhibit 77-3) provided testimony indicating that based on the record, it was impossible to tell what direction the groundwater is flowing. Mr. Swope made calculations based on Mr. Dillenberger's data, and instead of concluding that groundwater flowed south, he concluded that the groundwater flowed northeast. He recorded this information in Exhibit 115B. Mr. Swope testified, however, that he did not believe that was likely the direction of groundwater flow. In rebuttal, Mr. Dillenberger submitted a new exhibit and testimony indicating that he had done new studies that indicated the groundwater flow was in a westerly direction. (Exhibit 167)

Mr. Swope testified that the reason the direction of groundwater flow is so important is because of the potential impacts to downgradient sources. It is impossible to know what the impacts might be without knowing the direction of flow. (H.R. 3/19/08 at 9:07 to 9:43) The importance in this plat is highlighted by the fact that the LOSS system drainfield is due east of Well #2. If the groundwater flows from the septic system directly toward this well, the effluent could mix with the aquifer feeding the well, according to Mr. Dillenberger, Applicant's hydrogeologist. (H.R. 3/4/08 at 6:35 *Et seq.*) If the groundwater flows west as the latest submittal from the Applicant indicates, there are likely significant adverse impacts to water quality in Well #2 from the LOSS system drainfield located immediately east of it.

Further, Friends bring forward evidence regarding nitrate contamination of water in the record, demonstrating wildly different readings that have been provided in the record regarding levels of nitrate in well water samples. Nitrate contamination occurs principally from the presence of

animal and human waste contamination of the water source. Under state rules, 10 mg/l is considered unsafe for human ingestion, and will cause "blue baby" syndrome. (Testimony of Steve Swope, H.R. 3/19/08 at 9:07 to 9:43) Mr. Swope submitted Exhibit 147 indicating five different estimates of nitrate concentrations that were provided by the Applicant in the record in the space of about two months in the record, ranging from .97 mg/l to 7.12 mg/l. Mr. Swope indicated that Mr Dillenberger's original assumption, that there were no nitrates (which he testified to March 4, 2008 6:30 *Et seq.*.) was statistically invalid, and that as a matter of industry standard, there should always be a background assumption of 1.2. (Testimony of Steve Swope, H.R. 3/19/08 at 9:07 to 9:43) With historical agricultural uses, background assumptions should be much higher. *Id.*

(2) Conclusions of Law

It is clear from the record that adequate study has not been done of the groundwater flow on this site or of nitrate contamination. It is certainly not something that was studied as a part of the SEPA analysis. Friends have demonstrated that there are likely significant adverse environmental impacts to water quality such that groundwater flow and potential nitrate contamination must be further studied on this site as a part of an EIS.

B. <u>The County Failed to Analyze the Impacts of Wells Placed Too Close To Armstrong Creek</u>

(1) Findings of Fact

Another issue with respect to water is that Friends point out that in the Split Groundwater Claim issued by DOE and in the Water System Plan approved by DOH (Exhibit 125), Applicants represented only two wells, roughly located where Wells #1 and #4 are presently located on the preliminary plat map (Exhibit 109 at sheet 2/15). (Exhibit 202 at 32) The Split Groundwater Claim states conditions regarding additional well placement on the property, specifically:

> 4. The wells will not have any increased impairment to Armstrong (Harvey) Creek, nor be any closer to Armstrong (Harvey) Creek than Well #1.

(Exhibit 7-8 at p.10)

The Water System Plan similarly states there are only two wells roughly corresponding to Wells #1 and #4 (Exhibit 125 at p.10). As the DOH approval letter states, "DOH's approval is subject to subsequent determinations by the Department of Ecology concerning the water rights for the system, which may require submittal of additional planning documents or other submittals to Department of Health."

(Exhibit 63 at 1)

(2) Conclusions of Law

Wells #2 and #3 are located in clear violation of the condition on the Split Groundwater Claim. Well #2 is adjacent to the NGPA for Harvey Armstrong Creek and the buffer for Wetland #1. Even more troubling, according to the testimony of Steve Swope, is that it is labeled as an irrigation well. That label indicates that use of the well would be concentrated in the summer during periods of low rainfall, and periods of low flow in Harvey Armstrong Creek. That would intensify water quality impacts and produce even greater impacts on the creek because of the

low flow situation. Friends is correct that the County erroneously failed to analyze these impacts. This information must be sent to the agency with jurisdiction, the Department of Ecology, for review and analysis.

C. The Plat Map Fails to Show Fencing to Protect Wellheads from Livestock Grazing

(1) Findings of Fact

In addition, Friends argue that the plat map does not show fencing to protect the wellheads from the water quality impacts of livestock grazing. The DOH indicated that source protection is required to protect the wellheads from access by animals, and "[a]t the very least, the 100' sanitary control area of the well must be protected (by fencing or other protection) from access by animals." (Exhibit 63 at June 1, 2007 letter p.3)

(2) Conclusions of Law

It is true that no fencing is shown. However, given the requirement from the DOH, the Examiner could require it as a condition of plat approval. If the plat comes back for approval, PDS is required to include 100' sanitary control fencing around wellheads as a recommended condition.

D. The County Failed to Analyze the Groundwater Withdrawals for All the Proposed Uses

(1) Findings of Fact

Finally, Friends argue that because the entire project was scoped incorrectly and the commercial and intensified agricultural uses left out of all the calculations regarding water quantity and quality impacts, the project must be sent back for further work to re-examine the impacts based on the new scope of the project. Issues such as nitrate loading, they argue, could change greatly with higher concentrations of animals or other uses could bring different types of constituent loading.

(2) Conclusions of Law

This issue is something to be considered as part of an environmental analysis, on which it may well be more appropriate to allow an agency with expertise, such as the DOH and Ecology to take the lead. However Friends have demonstrated the need to go back and re-evaluate these issues in view of the true nature of the proposal.

C. Preliminary Plat Application

Friends argue that Applicant has failed to meet the general and specific requirements of the Rural Cluster Subdivision code and that Applicant should not get the benefits provided by the density incentive without being made to do the work — which means providing all of the required information and meeting all of the regulatory criteria to assure the development impacts are not externalized to the Harvey-Armstrong watershed and surrounding Lake Armstrong community. (Exhibit 203 at 7-8)

Applicant argues that Friends are asking for detail that is normally provided only at the construction phase of plat review on most of the issues that are contested. It argues that it has

met all the requirements of the code, and that the proposed project fulfills County Council intent of the RCS ordinance by preserving open space and farming while clustering development. Moreover, it is supported by environmental groups, County staff, and supporting agencies, and that this is a classic NIMBY case. (Exhibit 201 at Attachment p.2.)

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

> whether the proposed subdivision complies with the established criteria therein and makes the appropriate provisions for public, health, safety and general welfare, for open spaces, drainage ways, streets or roads, alleys, other public ways, transit stops, potable water supplies, sanitary wastes, parks and recreation, playgrounds, schools and school grounds, and other planning features including safe walking conditions for students . . . .
>
> (RCW 58.17.110)

The Examiner will address each of Friends' arguments regarding the preliminary plat application. In demonstrating the preliminary plat application meets the approval standard under RCW 58.17.110 and SCC 30.41A.100, the Applicant bears the burden of proof, which shall be met by a preponderance of the evidence.

1. Appellant has not demonstrated that adequate provisions have been made for public health safety and the environment with regard to the necessary offsite roadway improvements to Lake Armstrong Road, a substandard County road that serves as the only means of access to the proposed subdivision and to all other residences along the road.

A. Findings of Fact

The Examiner reminds the reader that Findings of Fact have already been made regarding the off-site roadway improvements at Finding A.5. There was a great deal of testimony during the hearings regarding issues with respect to off-site road improvements. The areas of testimony included: 1) the improvements proposed and their relationship to county road/fire safety standards; 2) studies that had/had not or been needed to be done on the hillside in the form of a geotechnical analysis; and 3) analysis of ownership issues both of County right-of-way and Centennial Trail property and how that might relate to the development proposal.

(1) The Improvements

a. <u>The Road.</u> PDS traffic analyst Andrew Smith testified that the subdivision proposal cannot be approved without this off-site road improvement. (H.R. 3/27/08, 10:15) He testified that the improvements to the roadway would not meet EDDS standards, but would rely on a deviation to reduce the road width from the standard (30 feet) down to 22 feet from the hairpin curve down the steep hill to the Highway 9 stop sign. In exchange for the reduction in road width and as part of the deviation request, the Applicant offered to provide a runaway ramp and an ornamental

handrail along the retaining wall/walkway as alternative safety measures. Although the deviation criteria in EDDS 1-05 require an explicit discussion of how the offered deviation will achieve the intended result with comparable or superior design and quality of improvement and how it will not adversely affect safety or operations, the document granting the deviation is nothing but a blank page with a signature of the county engineer. (Exhibit 92.30) In response to criticism of the lack of documentation of the deviation in accordance with the requirements of EDDS 1-05, Exhibit 187 was submitted to the record from Traffic Engineer Jim Bloodgood. It states in part:

> During our meeting on January 8, 2007, Mr. Smith had the current plan set showing the existing road, the surrounding topography and the proposed road section showing the widened road with walkway and runaway ramp. In that meeting, we discussed how the proposed road widening would provide relief to a less than desirable road condition along the steep section of Lake Armstrong Road. In addition, we discussed the low traffic volumes that are expected at the intersection of Lake Armstrong Road and SR 9 after the occupancy of the development and the realignment of SR 9. It was my understanding that there would only be two to three parcels contributing to the north leg of the intersection following the realignment of SR 9. We specified at that time to not approve the realignment of the intersection which would make Lake Armstrong Road the major leg until there was an opportunity to review a full design set.
>
> This deviation was approved because the proposed design provides a safer condition than [sic] is currently exists. The two lanes for traffic and the walkway will allow for cars and pedestrians to move up and down the hill with fewer conflicts. It is our judgment that this deviation meets the requirements of EDDS Section 1-05 Deviation from Standards. We understand that the full design will need to be reviewed by PDS prior to issuance of any permits for construction of the proposed road and wall.

Mr. Smith testified that he didn't consider the other proposed commercial and agricultural uses aside from the proposed subdivision in terms of reviewing the road improvements. In terms of the runaway ramp, he testified that he didn't know whether it was addressed in the EDDS, but thought it was perhaps addressed in the state manual. He stated that he had spoken to the county engineer about it and he "didn't have a problem with it". (H.R. 3/27/08, 10:00) When Mr. Smith was questioned about their use elsewhere in the county, he could not recall any other runaway ramps for regular vehicle usage.

Friends' expert by contrast, David Markley, a road engineer with considerable experience designing roads testified that the ornamental handrail and proposed walkway for children was completely unsafe, and in his opinion would create tort liability for the county if constructed in the manner proposed, because of the likelihood of pinning a child against the wall if a car were to slide in icy conditions. The ornamental handrail would create a false sense of security. (Testimony of David Markley H. R. 3/4/08, 5:17) Likewise, the runaway ramp could potentially cause great damage to cars and to humans in cars, and again a false sense of security.

b. The Retaining Wall. The Applicants propose a retaining wall at Exhibit 109 Plan Sheet 7 of 15 on the Preliminary Plat Plan Sheet. Mr. Smith stated this amount of detail that Applicant submitted was "typical" for a preliminary plat. As found earlier, no SEPA analysis or geotechnical analysis was performed on the steep hillside adjacent to the road, even though a geotechnical report is required under the Critical Areas Ordinance.

Much of the information on the hillside in the record was gathered during the hearing. The Applicant provided some surveys, but the only soil testing done were two test pits done by Mr. Hammer, which were done for testing road stability and designing stormwater facilities and provide little to no geotechnical information regarding surface and subsurface conditions. (Exhibit 7-7) (H.R. 3/4/08 6:11 *Et seq..*)

Friends presented testimony from Christopher Robertson, a geotechnical engineer and Vice President at Shannon & Wilson. (H.R. 4/15/08 10:11-10:58) He testified that the topography on the map is very averaged and doesn't represent what is on the site. He also testified that the "bagged wall" alongside Lake Armstrong Road just above Highway 9 does appear to have bulged from soil creep, as well as seepage from the steep slope. He testified that there is not sufficient subsurface data to analyze the impacts of the road improvement project. As he stated, the information submitted thus far by the Applicant is two shallow test pits, and no explorations along the roadway or explorations to test the type and size of the wall needed to hold back the slope. He testified that he saw no analysis in the SEPA documents of the amount of earth that would need to be excavated or the amount of vegetation that would need to be cleared. He also saw no analysis of the type of retaining wall or the amount of right-of-way that would be needed. Indeed, Mr. Hammer, the Applicant's geotechnical engineer, Mr. Hammer, admitted that no such analysis was done. (H. R. 3/4/08 6:00-6:19)

(2) Location of Right-of-Way

The County owns Lake Armstrong Road by prescription. The boundaries of the County's ownership are unclear, because they are determined by what areas have been maintained. Applicant made no effort to provide clarity on this matter before the hearing. To make matters more confusing, the Centennial Trail property crosses above the steep hillside and eventually across Lake Armstrong Road. This property has special restrictions on it related to the placement of non-trail structures that impair or affect the structural integrity of the property. (*See* Exhibit 166, 175, 173 181) This issue, as far as the Examiner can tell, did not become an issue that staff even looked into until it was raised by Friends sometime in the middle of the hearing.

The Examiner also adopts by reference the detailed proposed finding of fact offered by Friends in Exhibit 203 pg. 18 line 13 to pg.25 line 10. Mr. Robertson testified that the location of the Parks property was not certain, and because of that the retaining wall's location was in question. In addition, in order to know where the wall can be built, the Applicant would have to

know the type, size and location of the wall in relation to property lines in a situation like this one.

In summary, he testified that in his experience the Applicant has not gathered enough information to provide a preliminary investigation into the topography, stability of the slopes to demonstrate the feasibility of a retaining wall structure. There has not been enough geotechnical work done to select a wall type, size and location. Mr. Robertson testified there are a number of different types of walls with different footprints. Some require enormous amounts of excavation, while others, such as a conventional concrete cantilever retaining wall, require very little soil disturbance. (H.R. 4/15/08 at 10:29) He testified that Mr. Hammer, the Applicant's expert, had suggested an *in situ* wall (installed as you make the cut), such as a soldier pile wall with cantilevers. This type of wall, Mr. Robertson testified, has a very small footprint because there are only steel beams that are embedded in the wall cantilevered into the slope with a footprint of two or three feet of area where the beams are put in. Mr. Robertson did testify that the type of wall Mr. Hammer suggested would be appropriate in this case are very expensive—he testified in his experience, the cost has been in the neighborhood of $100-$150 per square foot. In his opinion, it is appropriate for the County to understand at this preliminary plat stage of the project, the requirements related to the geotechnical aspects of the hill and preliminary design concepts appropriate therefor, the cost of the project, and right-of-way constraints (legally and practically).

The Examiner couldn't agree more with the testimony of Mr. Robertson. Although Mr. Hammer provided limited information based on his inquiry, Mr. Robertson's expertise in the field and background in projects of this type gave him far more credibility as an expert witness. In any conventional project with limitations of this sort, it is necessary for the Applicant to do its homework and gather the preliminary information to provide sufficient information to allow the Examiner to find that the access needs for the subdivision have been met. There is substantial uncertainty and ambiguity regarding where the county right-of-way ownership lies and whether or not it is feasible to build a retaining wall in the area that this right-of-way may be located. In addition, without knowing the design, it is impossible to know how the project will affect Parks property. This issue should have been completely worked out long before the project was brought to hearing.

B. Conclusions of Law

(1) PDS and DPW essentially ask the Examiner to defer the public health, safety, and welfare decision on how this off-site roadway will achieve adequate access to them at the construction stage and the administrative agency process. In many situations, where the design of an off-site improvement is a simple road widening or other routine improvement project, that may seem more reasonable. While the Examiner has no trouble deferring to the expertise of engineers, the code process for approval of subdivisions must still be followed. Here, DPW has waived the road standards, without adequate justification in the record, on a road that has been judged by all the experts to be a very dangerous access point, and which is the sole lifeline for the entire Lake Armstrong neighborhood. In violation of the Critical Areas Ordinance, there has been no geotechnical report submitted to support the building of the retaining structure, no soil testing or even knowledge, given the unknown details of ownership of right-of-way, of whether it is feasible to construct such a wall within existing County right-of-way. PDS and DPW didn't even know there might be a significant issue with right-of-way until it was pointed out by Friends in the hearing. On top of it all, what is on record as Applicant's offering for off-site roadway improvements is in one expert's opinion, a recipe for tort liability for the County.

(2) Under SCC 30.41A.210, the Examiner is required to find that:

> (4) All roads shall be designed and constructed in accordance with the EDDS. Additional right-of-way or easement width shall be provided if necessitated by cut or fill slopes.

As required by SCC 30.41A.200, the public use and interest require compliance with the standards set out in this chapter unless a modification is specifically allowed through the preliminary approval process. Modifications may be granted only where allowed by specific code authority.

Design standards modification for roads are specifically governed by SCC 30.41A.215. Under SCC 30.41A.215(1), an Applicant can seek modification of road design standards where it appears there exist extraordinary conditions of topography, access, location, shape size, or other physical feature of the site or adjacent development. Modifications of other requirements may not be applied for or granted unless specifically allowed by the code.

(3) Applicant did not request a modification of the EDDS standards under SCC 30.41A.215. Applicant failed to demonstrate that additional right-of-way would not be needed on this slope, something that might be a significant issue. Applicant did not even ask for a deviation from the maximum road grade, which is 12%. It was originally proposed at the same grade, and then later after the issue was brought up during the hearing by the Examiner, the Applicant offered to ensure the grade would be 15% or less. That still is not adequate to meet the EDDS standard.

(4) DPW, as a part of its analysis of the project, should also have provided an analysis of frontage and off-site improvements as required by SCC 30.66B.430. This analysis is required as a part of preliminary plat approval. (*See Decision of the Snohomish County Hearing Examiner, Mill Creek Campus Case #07-100911).* Because there is no such analysis in the record, there is not adequate justification for the improvements that were required.

(5) **Applicant has failed to make adequate provision for access through offsite roadway improvements. The plat must be denied on this basis.**

2. Applicant has not demonstrated that adequate provisions have been made for public health, safety and the environment with regard to pedestrian facilities.

A. Findings of Fact

The Examiner reminds the reader that Findings of Fact have already been made regarding the off-site pedestrian facilities at Finding A.6. It is undisputed that the ornamental rail submitted by the Applicant does not meet the EDDS requirements. In addition, as indicated above, David Markley testified that Applicant's submitted design, providing a three-foot walkway for pedestrians against the retaining wall with an ornamental handrail was an extremely dangerous design that he believed opened the County to tort liability, should it become part of the public road system. (H.R. 3/4/08, 5:17 *Et seq.*.)

B. Conclusions of Law

Not only is it imperative that this is a safe road for the entire community, but there has to be safe pedestrian facilities so that children can walk to school or catch the bus. The facilities proposed were not adequate. The Applicant needs to go back and do sufficient studies to come up with a competent preliminary design based on hard data that will meet the EDDS or provide the case to the Examiner that the modification "will not adversely affect the health or safety of persons residing or working in the neighborhood . . . and will not be detrimental to the public welfare or injurious to property or improvements . . . ." (SCC 30.41A.215(4)(c))

3. Applicant has not demonstrated that adequate provisions have been made for public health, safety and the environment with regard to critical areas.

A. Failure to Delineate Critical Areas

(1) Findings of Fact

Friends argue that the failure to delineate Wetland #2 as a Category 3 wetland and the Type 5 stream from the old well to Wetland 2 and from Wetland 2 to Wetland 1constituted a failure to properly identify critical areas on site in violation of General Design Standards 1 of SCC 30.41C.200(1).

(2) Conclusions of Law

The Examiner has already addressed these arguments in the context of the SEPA appeal, and agrees with Friends argument, except as to the argument that a Type 5 stream exists from the old well to Wetland 2. The Examiner incorporates by reference the Findings and Conclusions in B.9.A.2 and .3. In any resubmittal, these issues will need to be addressed.

B. Dispersion of Stormwater into Wetlands

(1) Findings of Fact

Friends argue that Applicant has not demonstrated that the preliminary plat will avoid inappropriate dispersion of stormwater into wetlands.

(2) Conclusions of Law

The Examiner has already addressed these arguments in the context of the SEPA appeal, and agrees that Friends have shown that the spreader trenches will disperse stormwater through less than 100 feet of native vegetation before the stormwater reaches wetlands on the property, violating Paragraph 6 of Roadway Dispersion BMP requirements. The Examiner incorporates by reference the Findings and Conclusions in B.9.A.6. Further, Applicant has failed to provide any drainage analysis for the off-site road improvements, where Friends' experts have testified that the slope has demonstrated seepage. Applicant has not adequately provided for drainage.

The plat must be denied because it does not make adequate provisions for drainage.

C. Insufficient Buffers

(1) Findings of Fact

Friends argue that the preliminary plat will result in insufficient wetland and stream buffers. Friends argue that best available science indicates that the buffers to which the project is vested are insufficient to adequately protect the functions and values of critical areas.

(2) Conclusions of Law

While that may be true, under state law the preliminary plat is vested to the development regulations in place when the application was complete. (RCW 58.17.033; *Noble Manor v. Pierce County,* 133 Wn.2d 269,278, 943 P.2d 1378 (1997)) Friends argues that because Applicant has chosen to take advantage of the low impact drainage regulations, it should be made to adhere to the new Critical Areas Regulations (CAR). The LID code, however, expressly addresses that issue by stating that "[a]pplicants who are vested at the time of adoption of the ordinance codified in this chapter may request the use of the provisions of this chapter without losing their vested rights." (SCC 30.63C.030) The LID Code therefore provides a special recognized exemption to allow vested projects to take advantage of it without losing their vested rights status.

D. The preliminary plat does not designate all unbuildable lands as NGPA as required under General Design Standard SCC 30.41C.200(5).

(1) Findings of Fact

Friends point out that Applicant's preliminary plan set sheets 2, 6 and 15 of Exhibit 109 show different information about steep slopes. As a consequence, the preliminary plat shows residential building lots that may be unbuildable NGPAs. Rather than require a new preliminary plat map showing only buildable lots, PDS has required the following preconditions:

A. The slope map shall be revised to clearly delineate various slope classes on the subject property.

B. The plat map shall be revised to place all areas, outside of roadways, with slopes greater than 40 percent in Native Growth Protection Areas. The Applicant shall demonstrate that lots meet the standards of County Code.

(2) Conclusions of Law

Section 5 states that "All unbuildable lands shall be designated as native growth protection areas unless designated as natural resource lands within restricted open space". The Examiner reads that to mean "all" unbuildable lands, not just "some" unbuildable lands. The plat map should have designated all slopes above 40% not contained in the restricted open space area as unbuildable. That should be done prior to preliminary plat approval with adequate slope information.

3. Argument: ***Applicant has not demonstrated that its development proposal meets all of the subdivision design and buffer requirements of the Rural Cluster Subdivision Code.***

Friends argue that the application does not meet many of the design standards and is not consistent with the rural character of the Lake Armstrong neighborhood. (Exhibit 203 at 39) Specifically, Friends quote the Applicant's 2006 narrative statement: "The design of this project is unique in that it is the Applicant's intent to create a close-knit community centered around a farm and open space system that will provide the community with farming and recreational opportunities in the future." Friends argue that Applicant seeks to double the number of residential homes that could otherwise be located on the property in the absence of rural cluster rules while continuing and adding to the current agricultural use of the property. In doing so, they claim the proposed development would intensify the use of the property in a manner that would inevitably put environmental stress on the watershed and the surrounding rural community. They claim it is not the "eco-friendly sustainable neighborhood" it claims to be.

A. Failure to provide a vicinity sketch.

(1) Findings of Fact

Friends argue that Applicant failed to provide a vicinity map meeting the requirements of 30.41C.040 SCC. The Applicant provided a vicinity map identified as Exhibit 30.

(2) Conclusions of Law

The Examiner finds Exhibit 30 sufficient for meeting the vicinity map requirement, although it would have been helpful to provide a small vicinity map on the preliminary plan set, as is often done on plat maps.

B. Buffer to Adjacent Tree Farm.

(1) Findings of Fact

The residential lots are not clustered near the interior of the site to the extent that would appear feasible from the information in the record, as required under SCC 30.41C.200(15). Friends argue that the residential lots are not clustered near the interior of the site, but are instead arranged along the boundary next to Lake Armstrong Road, and along the eastern boundary, right next to an approximately 200-acre tree farm that is in rural zoning, but in active forest management for the last 60 years. Friends argue that although the tree farm is not in a natural resource land designation, it is in the State property tax classification (Exhibit 144), and it meets the definition of natural resource lands in SCC 30.91N.030, which is "lands useful for agriculture, forestry or mineral extraction."

(2) Conclusions of Law

While it is true that it meets the plain language of the definition, the Examiner recognizes that "natural resource lands" is a term of art in GMA parlance that applies only to lands specially designated in the comprehensive plan. Therefore, the fact that the land is not designated as Forestry precludes it from being considered as natural resource land, or imposing the requirement of a 100-foot buffer from the eastern property line. (*See* Table 30.41C.210(1))

C. Location of Clusters in the Interior of Site if feasible.

(1) Findings of Fact

The first issue is whether Applicant has met the design requirements regarding location of clusters. SCC 30.41C.200(15) states:

> Each cluster of lots within the subdivision or short subdivision shall be located near the interior of the site, if feasible, and also located where the cluster and/or the building sites are within existing forested areas of the site; except individual clusters shall be sited as far as possible from adjacent natural resource lands as permitted in chapters 30.32A -30.32 C SCC. Individual clusters shall not be located on ridgelines and other prominent topographic features visible to adjacent and vicinity properties when other locations are available.

Mr. Radabaugh testified that historically, to enforce this provision of the code requiring clusters to be sited in the interior if feasible, staff requires only that the clusters be inside the sight-obscuring buffers. (H.R. 4/15/08 at 4:00)

Applicant answers this argument by stating that the clusters were located this way to preserve the meadow area as farmland and due to the location of the creek and its buffers. Because of the

proposed use of unrestricted open space for agricultural uses, locating lots in the interior of the site is not feasible. (Exhibit 201 at 22) Further, Applicant argues that it has located lots primarily in the existing forested area of the site. *Id.*

(2) Conclusions of Law

The Examiner agrees with Applicant that placing lots in the interior of the lots is not feasible because of the need to use the pasture for agricultural uses. In addition, the lots would be very prominent in appearance from the road if they were sited in the pasture area.

D. Location of Clusters in the Forested Area of Site if Feasible.

(1) Findings of Fact

Design Criteria (15) also calls for placing the building sites within existing forested areas when feasible. Mr. Radabaugh stated that the Applicant had placed many of the lots in the southeast portion of the site, which is a forested area of the site. (H.R. 4/15/08 at 4:00) However, paradoxically, PDS takes the position that there is no requirement that the Applicant needs to retain trees in the forested areas of the site, as the testimony of PDS staff planner David Radabaugh indicates:

D.R: With regard to forested areas and locating clusters in forested areas, the Applicant has done this for the most part as is feasible. They probably could have done so more if they had reduced the size of the lots . . . They would have needed to reduce lot size to push all of the lots into that area. . . .

H.E. It was my understanding . . . are they planning to leave the trees on those lots? Is there a requirement to leave the trees on those lots?

D.R. There is not. There is no requirement for that. It's something staff has sometimes thought is ironic about the Rural Cluster Subdivision Code.

H.E. . . . There's no basis for saying it's in the forested area if the forest is going to go away.

D.R. That has been a dilemma in implementing this particular subsection or clause in the code.

(Testimony of David Radabaugh, H.R. 4/15/08, 4:00-4:05)

The other design standard having to do with placements of lots is SCC 30.41C.200(13). It states:

(13) The rural cluster subdivision or short subdivision shall be designed, to the greatest extent possible, to configure the residential lots in accordance with the natural features of the site and minimize topographic alteration, to maintain rural character, and to maximize the visibility of the open space tracts from adjoining collector roads, arterials, or state and federal highways;

Mr Gene Peterson, testifying for Friends, provided an alternative configuration for illustrative purposes that he opined was more in keeping with the spirit of the ordinance. (Exhibit 154A) These lots are of a smaller lot size, and while technically the design does not meet the requirements of the code, demonstrates that there could be other possible alternatives, especially in this development which does not have to accommodate individual onsite septic systems on each lot because of the community septic system.

Mr. Peterson opined that the lots in Phases 2 and 3, were prominently on the ridge line and would provide, to the eye, a look very similar to 5-acre zoning, only much more developed, since there would be multiple lots stacked in rows along the edge of the property. (*Compare* Exhibit 152A *with* 154 B) Photographs indicating the area of the ridgeline displayed in the background are evidenced in Exhibits 152B and 152D. He opined that his illustrative Exhibit 154A, which grouped the cluster in the forested area, is a design concept much more in keeping with the notion of maintaining rural character and complying with design standard (13) and (15).

(2) Conclusions of Law

The Examiner agrees. It would be much more in keeping with the intent of the RCS code to cluster the lots more in the manner indicated in Exhibit 154A (except that only 30 lots may be in one cluster) and in compliance with design requirements (13) and (15). It is a "shall" requirement of the design standards of the code, and that means it must be enforced by PDS. In addition, in return for the density bonus, the Applicant must be required to keep the lots in a forested condition as a part of the approval of the site plan; the requirement is meaningless otherwise. The Applicant, in this case, has the flexibility to create smaller lots because of the LOSS system; taking lots out of the pasture area would also create more pasture area for agricultural activities. The Applicant has not demonstrated why it could not have reduced lot size and placed more lots in the forested areas and have less lots spread across the edge of the property. Even relocating lots 4-6 and 27-31 would make a big difference in terms of complying with the requirements of Design Criteria 13 and 15.

The staff did not require any type of feasibility analysis from the Applicant in terms of how better to arrange the lots to meet the requirements of Design Standards (13) and (15). The Applicant must be required to demonstrate more than that it has located the lots within sight-obscuring perimeter buffers. They must demonstrate that they have met the detailed locational criteria of these design criteria. In this case, the Examiner finds that the Applicant has not met the last sentence of Design Criteria (15), and that the Applicant must re-design the subdivision to better cluster the lots within the forested area.

E. Sight-obscuring perimeter buffers required under SCC 30.41C.200(2) not wide enough in key areas to minimize conflicts with neighboring uses.

(1) Findings of Fact

Friends' first argument is that the buffer should be wider because of the forestry uses on the eastern border of the property (there is the 200-acre Valley Gem Tree Farm that has been operated by the Grewe family for more than 60 years and is in a property tax assessment classification as designated forest land under Chapter 84.33 RCW) (Exhibit 144,45; Testimony of Dan Grewe, H.R. 3/5/08 10:24) . Friends urge that the bare minimum buffer of 35 feet makes no sense under the circumstances because it did nothing to minimize conflicts between the residential area and the adjacent forest management area. Further, Friends argue that a wider buffer is needed with perimeter

fencing, to clearly mark the boundary between the residential area and the forest management area.

(2) Conclusions of Law

While it is true that the Grewe's forestry use are the same as those in the Natural Resource lands, the code only provides for the large 100-foot buffers for lands designated Natural Resource lands under the GMA comprehensive plan. While this may be an oversight in the code, the Examiner must follow the code.

The Examiner does believe, however, that PDS has the ability to require the Applicant to arrange the averaged buffer in a manner that furthers the intent of the RCS code.

The requirement of SCC 30.41C.200(2) states:

> (2) The transition from any proposed residences within the rural cluster subdivision or short subdivision to uses on adjoining property or adjoining public roadways classified as an arterial (any type) or a non-arterial collector, according to the Snohomish County Arterial Plan and the EDDS, shall be provided with a sight obscuring buffer of native vegetation, or where no native vegetation exists, landscape screening comprised of fast growing, low maintenance, native trees and shrubs in accordance with the requirements of SCC Table 30.41C.210(1). Existing wind resistant vegetation providing such a screen shall be preserved. Between proposed residences and any adjoining natural resource lands, a setback shall be established consistent with the setback shown in SCC Table 30.41C.210 (1);

This perimeter buffer is averaged between a width of 35-50 feet as required by Table 30.41C.210(1). However, as can be seen on Exhibit 109, plan sheet 3 of 15, the areas where the sight-obscuring buffer is the widest in this plat submittal is the area where the Applicant is required to already leave that portion of the parcel in a NGPA. Unfortunately, those areas are not the sides of the property that need the largest perimeter buffer. The area along the eastern and north-northeastern edge, and along the road frontage, are the areas that need the sight-obscuring buffer the most, and those are the areas where only 35 feet of buffer is provided (for the most part).

When questioned by the Examiner about the arrangement of the buffer averaging, staff planner David Radabaugh stated that it was his belief that the RCS code provides no discretion to the department to direct where the sight-obscuring buffer needs to be larger and where it can be smaller. (Testimony of David Radabaugh H.R. 3/19/07, 2:36-2:39)

H.E.: The north side [of the project site]. So even though that seems to be the least sensitive side, you're giving them more area over there.

D.R.: This area fronts onto this side of the property, so in effect, yes…In effect, there's no limit to the amount that can be counted in here.

H.E.: Right, but don't you have the intent of the code to go by in terms of how you require the averaging to work out, you know, to carry out the intent of the code?

D.R.: One of staff's frustration's in implementing this section is the lack of direction in the code.

H.E.: Right. But if the intent of the code is to obscure. . . I mean there is both a lot of talk about a wind-resistant vegetation and the forestry use next door as well as a sight-obscuring buffer for the road, I mean one would logically conclude that you might want to average the buffer so that you had more buffer on those sensitive sides.

D.R.: The code doesn't, in staff's view, doesn't give us direction to, although I might personally think it's wise to, I haven't seen how the code gives us direction to focus the buffers on the more sensitive sides, on what we determine to be the more sensitive sides of the property.

H.R.: You don't think it does given the statements that are in .200 and other parts of the code that talk about that?

D.R.: No, staff has not interpreted it that way, no.

(H.R. 3/19/08, 2:36-2:39)

Despite the fact that the Valley Gem Tree Farm is not a "designated forest land" for GMA purposes, it deserves the greatest amount of protection from intensive residential development next door that can be provided under the Rural Cluster Subdivision Ordinance as it currently exists. The Applicant receives a substantial density bonus under the RCS code and in return it must comply with the letter and intent of the code. Part of the intent section states:

(2) To permit flexibility that will encourage a more creative approach in the development of land in rural areas and will result in a more efficient, aesthetic, and environmentally sound use of land, while harmonizing with adjoining development and preserving the county's attractive rural character;

(3) To encourage the development of cluster housing which provides greater compatibility with surrounding development and land uses in rural areas by providing larger buffer areas;

(SCC 30.41C.010 - emphasis added)

If the Applicant re-designs this application, it must provide at least a 50-foot sight-obscuring buffer along any edge of the property that borders the tree farm, providing the largest edge of the averaged buffer to protect the farm from the intensive uses on the property.

In addition, Design Standard SCC 30.41C.200(13) speaks to designing the rural clusters to maintain rural character, which would suggest obscuring dense cluster development from roadways. This requirement would not apply and the sight-obscuring buffer could be minimized if the Applicant did re-design the application keeping the lots within a forested area and allowing the predominant view to be that of the agricultural open space area and not of housing clusters.

F. Landscape Plan Inadequate.

(1) Findings of Fact

Friends also argue that the landscape plan fails to describe the "fast growing, low maintenance native trees and shrubs" that area required to be planted under SCC 30.41A.200(2).

(2) Conclusions of Law

The Examiner agrees. The landscape plan is Exhibit 109 at plan sheet 14/15. Typically, the landscape plan will have a list of the materials that will be used as a part of the plan sheet. Particularly for the sight-obscuring buffer, it is important for the types of vegetation to be listed on the plan sheet.

4. Applicant has not demonstrated that it has made adequate provisions for agricultural areas in relation to critical areas and residential uses.

A. Conflicting Information Regarding Uses of Unrestricted Open Space

(1) Findings of Fact

Friends make the argument that the record contains many conflicting statements from the Applicant regarding agricultural activities to be conducted in the unrestricted open space area and as a result, the application needs to be sent back to correct these inconsistencies to avoid harm to critical areas and to avoid conflicts with residential uses. Specifically, Friends state:

> The application materials conflict with respect to the size of the area to be devoted to. . . agricultural uses. The preliminary plan sheets indicate that approximately ¼ of the development site (approximately 20 acres) has been reserved for agricultural-related use. (Exh.. 109. The February 2008 revised Resource Management Plan (Exh. 108, p.9) indicates that about 40 acres (1/2 of the development site) will remain available for agriculture on this site. The Resource Management Plan also indicates the possibility of using 6-8 acres of the NGPA for pasturing once a bridge is constructed across Harvey-Armstrong Creek even though livestock are not allowed in the NGPA. Ex. 108, p.14. If left unaddressed as part of the preliminary plat, these inconsistencies will result in more of the site being used for agricultural purposes than intended or allowed under the preliminary plat approval. The application must be denied and sent back so that ambiguities and contradictions in the open-space related documents that will govern use of the site in the future are removed to prevent their misuse in the future.

(Exhibit 203 at 48)

The Applicant's position on the RMP has always been that it is not a required part of the Open Space Management Plan. It is, however, part of that document.

(2) Conclusions of Law

The Examiner views the RMP as a clear statement of the Applicant's intent regarding how it proposes to manage the agricultural activities on the property. It must therefore match up with the requirements of the preliminary plat and any statements that contradict requirements of the preliminary plat must be stricken.

B. Buffer Between Residential and Agricultural Uses Pursuant to SCC 30.41C.200(6)

(1) Findings of Fact

Friends next argue that the vegetated buffers required under SCC 30.41C.200(6) are not wide enough to minimize conflicts between residential and agricultural uses. That design standard requires that:

> When agricultural, forestry, or mineral uses are proposed for the open space area(s), adequate buffers to minimize conflicts between resource and residential uses shall be provided;

The Applicant has proposed 10-foot buffers between the residential tract and the agricultural area. In testimony provided by Friends' planning expert, Gene Peterson, the purpose of the requirement is to afford an adequate physical distance between the residential and the agricultural use to minimize conflict arising from agricultural activity, such as noise, odor, fumes, dust, operation of machinery, storage and disposal of manure, application of organic fertilizer, soil amendments and the like. (H.R. 3/19/08, 11:25-12:56) The Applicant's response was that the homeowners who bought property in this subdivision would know what they were getting into and wouldn't be bothered by farming going on nearby. Again, without direction, planning staff did not feel the code provided sufficient direction to allow them to require a number that would provide appropriate protection.

(2) Conclusions of Law

Although there is no provided number in this section of the code, certainly the code has provided what it considers to be an adequate number for a setback width from adjacent resource farmland - 50 feet. In the absence of any other number, the Examiner believes 50 feet is a buffer width to minimize conflicts that the County Council has already determined to be reasonable. While different buffer widths may be justified in different circumstances, for a farming operation as intensive as this one purports to become, a 50-foot buffer is reasonable. In addition, these buffers must be fenced, or the requirement will be meaningless in a sheep and livestock grazing area.

C. Inadequate Fencing to Protect the Buffer Between the Phase 2 and Phase 3 Clusters.

(1) Findings of Fact

Friends next argue that the preliminary plat provides inadequate fencing to protect the buffer required under SCC 30.41C.200(11) between the Phase 2 and Phase 3 clusters. Under SCC 30.41C.200(11),

> Each rural cluster subdivision or short subdivision shall be divided into physically separated clusters with a maximum of 30 residential lots per cluster. The minimum of physical separation shall consist of a buffer of wind resistant native vegetation with an average width of 75 feet and a minimum width of 50 feet (*See* SCC 30.41C.210(1)).

The Applicant has provided these buffers on the preliminary plat, as can be seen on Exhibit 109. The community septic system tract between Phase 1 and Phase 2 that is well over 75 feet in width serves as the first buffer. It contains a grove of mature cedar trees. The buffer between Phase 2 and Phase 3 clusters is also separated by a 75-foot vegetated buffer, planted with 6-foot native trees and 24" native shrubs.

Friends argue that these buffers must be fenced to protect them from grazing livestock. Otherwise, particularly with the case of grazing sheep, they will quickly become part of the pasture area.

(2) Conclusions of Law

Fencing is already shown around the community drainfield. However, the Examiner agrees with Friends that the Phase2/Phase 3 buffer needs to be fenced to protect it from grazing livestock.

5. Applicant has not demonstrated that it has made adequate provision for sanitary wastes and water supplies.

A. Hydrologic Analyses are Inadequate to Support Plat Approval for Sanitary Waste and Water Supply.

(1) Findings of Fact

Friends argue that the Applicant's hydrologic analyses are inadequate to assess the adequacy of the proposed septic system. Friends argue that discrepancies in evidence regarding direction of groundwater flowing across the site; its elevation, slope and speed; and errors with respect to the concentration of nitrates that will be discharged from the community septic system, need to be corrected and the information sent back to the agencies with jurisdiction over the sanitary waste system and the water supply system.

(2) Conclusions of Law

The Examiner incorporates by reference the holdings from the SEPA decision with respect to groundwater and water quality. Given the previous holdings regarding groundwater and water quality under the SEPA appeal portion of this decision, the Examiner agrees that this information needs to be corrected and re-packaged. Because the true scope of the proposal will need to be examined under SEPA and disclosed to those agencies with jurisdiction over sanitary waste and water supply, it would necessarily follow that those agencies would review corrected information on these issues when reviewing the updated plans during permit review.

B. Failure to Disclose Proposed Uses in Waste Plan to the DOH

(1) Findings of Fact

Friends argue that because the Applicant and the County have failed to include the variety of agricultural and commercial uses that are planned, and failed to inform the DOH of these uses, there is no assurance that the septic systems for the development are appropriate to accommodate all of the waste streams or that the development site can accommodate the waste streams for the residential, agricultural and commercial uses. (Exhibit 203 at 52-53) They cite to the testimony of David Jensen (witness for the Applicant), who admitted that the addition of waste streams from agricultural and commercial activities could result in additional nitrogen loading. (H.R. 3/28/08, 11:08-11:16) In addition, they cite to the e-mail from Richard Benson, DOH Official responsible for approval of the septic system, which indicates DOH did not consider any other use besides residential. (Exhibit 139; *see* SEPA Findings and Conclusions B7)

(2) Conclusions of Law

The Examiner agrees, having already ruled on the identical argument in the SEPA appeal. (SEPA Findings and Conclusions B7). This issue must be addressed through SEPA, and then through plat and presumably permit review. The Examiner also notes that the LOSS system has not been approved, and has only been determined by the DOH to be a "viable option", although more groundwater and hydrogeology studies are required. (Exhibit 136 – last page). Because Applicant does not yet have an approved septic system, the Examiner cannot find it has made adequate provisions for sanitary waste on that basis either.

C. Failure to Disclose Proposed Uses in Waste Plan to the DOH

(1) Findings of Fact

Friends next made the identical argument with respect to the water supply. They argue the DOH was similarly uninformed about planned agricultural and commercial uses of the water system. Without analysis, there is no assurance there is adequate water supply for irrigation water for a community garden, water consumption by livestock and horses, greenhouse uses, water for food processing, and for other agricultural uses. (Exhibit 203 at 53-54)

(2) Conclusions of Law

The Examiner agrees, having already ruled on the identical argument in the SEPA appeal. (SEPA Findings and Conclusions B7). This issue must be addressed through SEPA, and then through plat and presumably permit review.

D. Well Locations Violate Groundwater Claim.

(1) Findings of Fact

Friends next make the argument that the well locations violate the express terms of the water right, which is a similar argument to that made in the SEPA appeal. In the Split Groundwater Claim issued by DOE and in the Water System Plan approved by DOH

(Exhibit 125), Applicants represented only two wells, roughly located where Wells #1 and #4 are presently located on the preliminary plat map (Exhibit 109 at sheet 2/15). (Exhibit 202 at 32) The Split Groundwater Claim does not prohibit additional well placement, but conditions it, specifically stating

> 4. The wells will not have any increased impairment to Armstrong (Harvey) Creek, nor be any closer to Armstrong (Harvey) Creek than Well #1.

(Exhibit 7-8 at p.10 - emphasis added)

The Water System Plan similarly states there are only two wells roughly corresponding to Wells #1 and #4 (Exhibit 125 at p.10). As the DOH approval letter states, "DOH's approval is subject to subsequent determinations by the Department of Ecology concerning the water rights for the system, which may require submittal of additional planning documents or other submittals to the Department of Health." (Exhibit 63 at 1)

Nevertheless, Applicant now shows on the Preliminary Plat Plan Set two additional wells, Well #2 and #3, both of which are located in clear violation of the condition on the Split Groundwater Claim. Well #2 is adjacent to the NGPA for Harvey Armstrong Creek and the buffer for Wetland #1. Well #3 is located adjacent to the south buffer of Wetland #1, also west of Well #1. (Exhibit 109 at Plan Sheet 2 of 15.)

(2) Conclusions of Law

As argued by Friends, there is nothing in the record that indicates that the Department of Ecology has reviewed and approved these wells. The Examiner cannot approve a plan set showing wells that were not approved by the Department of Ecology, when there is evidence in the record showing that they are facially in clear violation of the split groundwater claim.

E. Wellheads Not Protected.

(1) Findings of Fact

Friends also argue that the well sources are not adequately protected because the wells are located in the pasture areas and are not fenced. This, too, was argued as a part of the SEPA appeal. The DOH indicated that source protection is required to protect the wellheads from access by animals, and "[a]t the very least, the 100' sanitary control area of the well must be protected (by fencing or other protection) from access by animals." Exhibit 63 at June 1, 2007 letter p.3.

(2) Conclusions of Law

The Examiner agrees that the Applicant must provide fencing or other means to protect water quality as a requirement of plat approval.

Summary: The plat must be denied on the basis that it does not make adequate provision for water or sanitary waste disposal.

6. Applicant has not demonstrated that it is has made adequate provisions for drainage ways and stormwater.

Friends makes two arguments with respect to drainage and stormwater, one related to off-site roadway improvements and the other related to the Full Dispersion Waiver issued by PDS.

A. Friends first argue that the Applicant's Targeted Drainage Report fails to address stormwater management for the frontage and other off-site roadway improvements on Lake Armstrong Road.

(1) Findings of Fact

The lack of analysis of the off-site roadway improvements has already been discussed in some detail and need not be repeated here. It has already been found that no analysis of drainage requirements was done, just as no geotechnical analysis was done as a part of the off-site roadway improvement proposal. (*See* Preliminary Plat Finding and Conclusion C.1). With respect to frontage improvements, there does not appear to be any discussion in the Targeted Drainage Report or the Staff Report of how drainage will be treated. (*See* Exhibit 81 at D - 2nd page (no page numbers) - indicates that dispersion trenches limited to treating runoff from private roadways onsite).

(2) Conclusions of Law

SCC 30.63A.100(3)(d) indicates that a Targeted Drainage Plan is required if the proposed development activity is subject to environmental review. The off-site and frontage improvements were certainly supposed to be subject to environmental review, although as the record demonstrates, they were not in this case. They should have been analyzed as part of drainage review along with the rest of the project. Friends have demonstrated that the drainage review is as of now, incomplete.

B. Drainage has not been Analyzed for Proposed Uses

(1) Findings of Fact

Friends also argues that the Applicant has not demonstrated that the proposal meets the drainage requirements of the Full Dispersion Waiver with respect to the planned agricultural and commercial uses. (Exhibit 203 at 56) They argue it was error for the County to approve the waiver without considering all of the proposed uses and pertinent facts.

- the dispersion trenches themselves are in unrestricted open space tracts not protected from grazing animals (Testimony of Gene Peterson, H.R. 3/19/08, 11:53 *et. seq*.)
- the areas downgradient of the dispersion trenches are agriculture open space devoted to grazing, and the soil is apparently inadequate for drainage. (Testimony of Chris Robertson, H.R. 4/15/08, 10:45)
- the groundwater may be perched and too close to the surface to be suitable for dispersion or septic drainage.

Applicant also argues that the County must consider the drainage effects of other planned impervious surfaces in the agricultural areas, such as the future barns and shops, and how that will affect the dispersion. (Exhibit 203 at 57)

(2) Conclusions of Law

This issue is part and parcel of the larger issue that the other proposed uses have not been analyzed as part of the proposal under SEPA, nor have they yet been permitted. To the extent that permits have not yet been filed, the sort of specific drainage review that Friends request is premature, but as indicated under SEPA, these items are clearly part of the proposal identified in the RMP and need to be included in the SEPA review.

7. Applicant has failed to provide a neat and approximate drawing showing the layout of a proposed subdivision showing all elements required by code, together with supporting exhibits sufficient to furnish a basis for the preliminary approval of the proposal.

A. Friends argue that the preliminary plat plan set is incomplete, full of mistakes, and inherently contradictory, as well as noncompliant with regulatory criteria and therefore cannot be approved as submitted. (Exhibit 203 at 58)

(1) Findings of Fact

The Examiner has determined there are a great number of issues related to the preliminary plat plan set for which the Applicant has failed to meet its burden of proof, including in providing a design that meets the various criteria of SCC 30.41A.200, making adequate provisions for critical areas, drainage, water, sanitary waste and roads by properly addressing frontage and off-site roadway improvements in accordance with the EDDS, among others. In addition, the failure to properly acknowledge the Common House and its function as a community center has caused PDS to completely mis-analyze the scope of the proposal, both under SEPA and in permit review. The proposal provided on the plan set is not the proposal that Applicant is actually bringing forward, as Friends have clearly demonstrated in the record.

(2) Conclusions of Law

Friends are correct that given the number of major errors, inadequacies, and inconsistencies shown in the proposal on the preliminary plat set forth in Exhibit 109, it cannot possibly be approved as submitted.

B. Preliminary Plat Cannot Be Fixed Through Pre-Conditions and Conditions.

(1) Findings of Fact

Finally, Friends argue that the problems with the preliminary plan set cannot be fixed through preconditions and conditions, and promises to correct during final engineering review. Friends provide two pages of examples of corrections that were offered during the course of the hearings as possible fixes to the preliminary plat due to inconsistencies and problems brought up during the hearings beyond those already admitted by the Applicant and PDS in the list of preconditions and conditions provided in Exhibit 199. (*See* Exhibit 203 at 59-60) Friends argue that this approach, however, at its extreme, allows for the Applicant to simply have a "neat and approximate drawing" approved, giving it the right to develop 34 lots, with every other part of the approval flexible and changeable during the final plat approval process. Friends decry this type of process as

clearly contrary to the subdivision code, as it precludes the opportunity for public review. They point out that the Hearing Examiner Rules of Procedure address the limited applicability of preconditions:

The precondition process is not intended as a substitute for compliance with application submittal and other evidentiary requirements established by county code and/or rule.

Hearing Examiner Rule of Procedure 908.

(2) Conclusions of Law

The Examiner agrees that the preliminary plat must meet the conditions of preliminary plat approval under Chapter 30.41A SCC, 30.41C SCC and Chapter 58.17 RCW in order to go forward. Occasionally, a minor glitch will occur that will preclude preliminary approval, but which has been fully aired and discussed at the public hearing. Those are the type of items which are appropriate for preconditions—for example, a situation where a property meets all the requirements for the six-year moratorium to be lifted under the Forest Practices Act, but the County hasn't received a confirmation in writing from the Department of Natural Resources. No purpose would be served by denying a plat that was ready to go except for that paperwork. Yet under the statute, it may not go forward without it.

This plat is a very different situation. Looking at the preconditions proposed by staff, for example,

A. The slope map shall be revised to clearly delineate various slope classes on the subject property.

B. The plat map shall be revised to place all areas, outside of roadways, with slopes greater than 40 percent in Native Growth Protection Areas. The applicant shall demonstrate that lots meet the standards of County Code.

C. The preliminary plat shall be reconfigured such that temporary road turnarounds are not located within restricted open space tracts.

Staff is asking the Examiner to precondition the plat to request Applicant to supply an accurate slope map, which will allow the NGPAs to be accurately mapped. Another precondition is that "[t]he applicant shall demonstrate the lots shall meet the standards of County Code."

These are fundamental development requirements that must be addressed before the preliminary plat is approved, not after. This type of submittal is not appropriate AFTER the preliminary plat is approved. It is necessary information for preliminary plat approval. In addition, the Applicant has much work to do on the issue of off-site roadway improvements, drainage, critical areas, as well as reconfiguration of the site plan with different perimeter buffers and better site layout. There is far too much work to be done on this plat to justify an approval with preconditions and conditions, or even a remand. This plat must be denied and the Applicant must start over. The Applicant must provide the County with full disclosure of the uses that will occur on the property and allow re-analysis of all the various issues through the new lens showing the proper scope of the project.

While this may seem harsh, it is the Applicant that has brought this on itself. The renovated barn, for example, should have been disclosed as the actual use Applicants intend to use it for, whether it is a bed and breakfast, community center, or whatever. That is not a future use; it is already built. Applicants have put it on a separate commercial septic system. Yet it has not been factored into the traffic improvements or other infrastructure improvements. It is likely a conditional use, yet Applicants have simply wanted it treated as a single-family residence for permitting purposes.

Furthermore, there are wells on the plans that are prohibited by DOE. The low impact drainage system did not meet the technical requirements of the LID Guidance Manual and therefore the plat does not make adequate provision for drainage. The off-site roadway improvements offered do not meet the EDDS standards as required by the subdivision code, nor are they supported by findings required by Chapter 30.66B SCC.

In light of the numerous major flaws in this preliminary plat application, it must be denied with prejudice.

C. Bonding For Off-site Roadway Improvements

(1) Findings of Fact

Friends also argue that bonding for the roadway improvements should be required as a precondition to preliminary plat approval. Friends cite no authority for this, nor does the Examiner find any such authority in the code.

(2) Conclusions of Law

Under SCC 30.66B.440, construction of improvements for subdivisions must occur prior to the recording of final plat, unless bonding of construction is acceptable to the DPW. However, given the interest and concern of Friends in the road construction plan, the Examiner does believe that in bringing this project forward again, the Applicant must work out the details of a construction plan that will provide the neighbors some assurance that there will be continuous access to their homes during the construction process, so that there is more than a mere promise to keep the road open as a condition.

8. The Examiner's decision has provided written findings and conclusions identifying substantial conflict of the proposal with adopted plans, ordinances, regulations and laws, and preparation of a new EIS at this would only add needless expense. Under SCC 30.61.220(3), the Examiner may deny the application without preparation of an EIS pursuant to SCC 30.61.220.

9. Any Finding of Fact in this Order, which should be deemed a Conclusion, is hereby adopted as such.

DECISION

The application for a **RURAL CLUSTER SUBDIVISION** is **DENIED WITH PREJUDICE**,as the application fails to meet the criteria of Chapters 30.41A and 30.41C SCC, as well as Chapter 58.17 RCW, as outlined in this decision. Pursuant to SCC 30.61.220(3), preparation of an Environmental Impact Statement (EIS) is not required.

Order issued this 17th day of September, 2008.

_____
Barbara Dykes, Hearing Examiner

EXPLANATION OF RECONSIDERATION AND APPEAL PROCEDURES

The decision of the Hearing Examiner is final and conclusive with right of appeal to the County Council. However, reconsideration by the Examiner may also be sought by one or more parties of record. The following paragraphs summarize the reconsideration and appeal processes. For more information about reconsideration and appeal procedures, please see Chapter 30.72 SCC and the respective Examiner and Council Rules of Procedure.

Reconsideration

Any party of record may request reconsideration by the Examiner. A petition for reconsideration must be filed in writing with the Office of the Hearing Examiner, 2nd Floor, County Administration-East Building, 3000 Rockefeller Avenue, Everett, Washington, (Mailing Address: M/S #405, 3000 Rockefeller Avenue, Everett WA 98201) on or before **SEPTEMBER 29, 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 **OCTOBER 1, 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/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.