

**DECISION of the SNOHOMISH
COUNTY HEARING EXAMINER
DENYING IN PART AND GRANTING IN PART PETITION
FOR RECONSIDERATION**

DATE OF DECISION: May 29, 2009

PLAT/PROJECT NAME: **LAKE GOODWIN RCS II**

APPLICANT/
LANDOWNER: LGAJV, LLC

FILE NO.: 06-125856-000-00-SD

INTRODUCTION

The applicant filed a petition for reconsideration dated and received by the Hearing Examiner's office on April 20, 2009. (Exhibit 153) The applicant also filed a separate Appearance of Fairness Objection on the same day. (Exhibit 154) The Examiner will issue a separate order responding to the objection.

The Examiner issued an order on May 4, 2009 accepting the petition and calling for comments on the petition by May 14, 2009 from parties of record. (Exhibit 156) The Examiner received comments from numerous parties of record, including the SEPA Appellants 7 Lakes, the Department of Public Works, Robert Landles, expert witness for 7 Lakes, and Ross Kane. (Exhibits 236, 237, and 238) The petition for reconsideration alleges:

- D. The following specific findings conclusions, actions and conditions which are not supported by evidence in the record:
 - 1. GPP policy designation listed on front page of decision;
 - 2. Applicant did not purchase 2000 acres from DNR;
 - 3. Finding that "It [meaning the property for all McNaughton proposals] was historically used for commercial forestry and is all in some stage of tree growth."
 - 4. Finding that "There is informal use of the property by off-road recreational vehicle enthusiasts and for mountain biking and walking trails."
- E. The Examiner to render the decision in light of the decision in *Anderson v. Pierce County*, 86 Wn. App. 290, 305-306, 936 P.2d 432 (1997).
- F. The Examiner's determination that the evidence in the record is significant (in the SEPA context) is in error.
- G. The proposals are not interdependent:
 - 1. The waterline does not establish interdependency between the RCS II plat and all other projects proposed by the Applicant in the vicinity.
 - 2. The road network does not establish interdependency between the RCS II plat and all other projects proposed by the Applicant in the vicinity.

3. The projects were not fragmented into a series of exempt actions, intended to avoid cumulative analysis.
- H. Impacts of the installation of the waterline were properly reviewed under SEPA.
- I. Impacts of light and glare were properly reviewed under SEPA.
- J. Impacts of transportation, including bicycle and pedestrian safety were properly reviewed under SEPA.
1. The sheer number of trips generated is in line with expectations for the area and was reviewed by PDS and considered prior to issuance of the DNS. No competent evidence exists in the record to justify reversing the DNS and declaring the traffic impacts to be “significant.”
 2. The applicant provided and PDS reviewed the only bicycle and pedestrian analysis supported by sound engineering practice. No evidence that an adverse significant impact will be caused by the project was presented by appellants sufficient to overturn the substantial weight that must be accorded PDS’s DNS.
 3. The Examiner’s decision wrongly concludes that a link arterial analysis of 40th approaching the intersection of 40th and SR 531 was not conducted.
 4. If reconsideration is not granted, then the Examiner must clarify the additional analysis requested.
- K. Impacts of aesthetics and land use were properly reviewed under SEPA.
- L. Impacts of critical areas were properly reviewed under SEPA.
- M. Impacts of water quality and quantity were properly reviewed under SEPA.
- N. The plat should be approved, and the deviation issues raised by the Examiner addressed by a condition.

The Examiner will consider each of these arguments below.

ANALYSIS

A. *The following specific findings conclusions, actions and conditions which are not supported by evidence in the record:*

1. *GPP policy designation listed on front page of decision;*

The Hearing Examiner acknowledges that applicant points out a typographical error and appreciates the technical correction. The underlying decision will be corrected to reflect the correct comprehensive plan designation.

2. *Applicant did not purchase 2000 acres from DNR;*

Applicant states that it did not purchase all 2000 acres from DNR and not all of it is “in some stage of tree growth”. They do state that a portion of the property was purchased from DNR. The Examiner will correct the decision.

3. *Finding that “It [meaning the property for all McNaughton proposals] was historically used for commercial forestry and is all in some stage of tree growth.”*

The applicant states that the finding suggests the entire 2000 acres was historically used for commercial forestry, which is untrue and not supported by the record. The Examiner will correct the decision.

4. *Finding that “There is informal use of the property by off-road recreational vehicle enthusiasts and for mountain biking and walking trails.”*

The applicant indicates that this statement is “generally true, . . . but misses the point of additional evidence . . . that such use by trespassers has damaged the existing sensitive areas on the property.”

The Examiner made this statement in the context of “Background Findings of Fact” describing “Adjacent Zoning/Uses”. The Examiner was not determining the extent to which this area may or may not have been damaged by informal recreational use; indeed, the record does not have any definitive evidence on that point, although Janet Curran did testify that there had been some compromise of the wetland systems due to the use by recreational enthusiasts. Such analysis would not have been particularly germane to the discussion in that section of the decision. The request for reconsideration on this point is denied.

B. The Examiner to render the decision in light of the decision in *Anderson v. Pierce County*, 86 Wn. App. 290, 305-306, 936 P.2d 432 (1997).

Applicant asks the Examiner to render a decision in light of the ruling in *Anderson v. Pierce County*, 86 Wn. App. 290, 305-306, 936 P.2d 432 (1997). The holding from *Anderson* is that community displeasure with a project or an individual’s preference for an EIS are “inadequate grounds” for overturning an MDNS. Rather, applicant states, the appellant’s burden of proof is to “cite to any fact or evidence in the record demonstrating that the [project], as mitigated, will cause significant adverse environmental impacts.” Testimony expressing “skepticism about the effectiveness of some mitigation measures is speculative at best and does not provide the basis for holding the MDNS to be ‘clearly erroneous’.” *Id.* The applicant argues that the record contains no facts or evidence that demonstrate either the RCS II project alone or all pending project applications in the vicinity will cause significant adverse environmental impacts.

The Examiner is familiar with the *Anderson* case. The applicant’s “quote” misstates the standard of review for a DNS, even as stated by the court in *Anderson*. The applicant has taken a sentence from the decision speaking directly to issues in the case not dedicated to the standard of review, but rather speaking to the facts of that particular case and a very detailed, fact-specific MDNS issued by Pierce County in that case, with facts completely different than this case. In fact, when the *Anderson* court was talking about the standard of review, it stated:

Based upon independent review of all relevant information and analysis, the responsible official determines whether the proposal is "likely to have a probable significant adverse environmental impact." WAC 197-11--330(1)(b). The responsible official then renders a "determination of significance" (DS) or a "determination of nonsignificance" (DNS). A DS mandates intensified environmental review through preparation of an EIS. WAC 197-11-360. Conversely, a DNS means that no EIS will be required. WAC 197-11-340. It does not mean, however, that environmental review will not be undertaken.

...

C. Standard of Review.

[3-5] Selection of environmental review process and protection is left to the sound discretion of the appropriate governing agency, not this court. We review a decision to issue an MDNS under the "clearly erroneous" standard. Pease Hill Community Group v. County of Spokane, 62 Wn. App. 800, 809, 816 P.2d 37 (1991). A finding is "clearly erroneous" when, although there is evidence to support it, the reviewing court on the record is left with the definite and firm conviction that a mistake has been committed. Norway Hill Preservation & Protection Ass'n v. King County Council, 87 Wn.2d 267, 274, 552 P.2d 674 (1976) (quoting Ancheta v. Daly, 77 Wn.2d 255, 259-60, 461 P.2d 531 (1969)).

Anderson, at 302. The court's citations above are consistent with those of the Examiner's. The Examiner finds that the applicant's desire to change the standard to require the appellant to unequivocally demonstrate that the project WILL cause significant environmental impacts is not the required legal standard. The required legal standard is that the appellant must demonstrate that the agency's decision to issue the DNS was clearly erroneous; that is, after a review of the entire record and in according substantial weight to the agency decision, the appellant must provide the Examiner with evidence that would allow for a "definite and firm conviction" that a mistake has been made. With respect to impacts, the question is whether based upon independent review of all relevant information and analysis, the responsible official has determined whether the proposal is "likely to have a probable significant adverse environmental impact." WAC 197-11--330(1)(b). Under SEPA, "significant" is defined as "a reasonable likelihood of more than a moderate adverse impact on environmental quality". WAC 197-11-794. In the SEPA Handbook, the DOE points out that this analysis involves physical setting, and both the magnitude and the duration of impact.

C. The Examiner's determination that the evidence in the record is significant (in the SEPA context) is in error.

The applicant argues that because PDS has not yet reviewed all the LGAJV projects on a cumulative basis, the Examiner does not have sufficient evidence before her to reach a conclusion that cumulative impacts are significant. Applicant also complains that no specific evidence is cited. Applicant's specific complaints are that the Examiner's conclusions regarding "significance" are: outside the record, exceed the jurisdiction, and usurp the SEPA responsible official's job to evaluate and determine significance of all the projects as a whole.

The applicant itself has failed to point to specific evidence in making this claim. Without specifics and citations, this claim itself is groundless. To the extent it has made specific claims, they are addressed below.

D. The proposals are not interdependent:

1. The waterline does not establish interdependency between the RCS II plat and all other projects proposed by the Applicant in the vicinity.

Much of what the applicant argues on reconsideration is simply a rehash of what was argued at the hearing. The essence of applicant's argument is that the Examiner failed to consider the applicant's evidence that showed there were 10 separate PUD certificates of water availability. It also states that Mr. Giddings estimated the cost of building the waterline would be \$7.7 million, and while that cost may be "higher than normal" spread across 49 lots, it was within the range of where other projects in Mr. Giddings projects in Mr. Giddings' experience had proceeded to construction and sale of final lots. Testimony of B. Giddings. Paraphrased from Applicant's Petition for Reconsideration at p. 6.

The Examiner did not want to get into the fine details of the financial testimony, although the Examiner does find it goes to the interdependency question and not feasibility. However, in reviewing that testimony, since the applicant has raised it, the Examiner notes that the testimony indicated that this waterline would cost somewhere in between \$7,700,000 and \$18,000,000 to construct, which for the RCS II plat alone would run between \$160,000 and \$450,000 per lot. Because even the extreme low end of that cost range seems highly unrealistic in terms of costs for a lot just to get water to it, the Examiner must assume that the waterline is meant for more than just the RCS II plat. In addition, the size of the water line will likely carry much more water than just water for the RCS II. In fact, it is bringing water to ten plats for the applicant (as applicant notes in its Petition for Reconsideration at p. 6). (Exhibit 153) As indicated in the decision, the PUD would not be extending this waterline unless

the applicant was paying for the extension. (Exhibit 89) The development would not be approved without appropriate provision of potable water supply, as supplied by the PUD. Since one cannot proceed without the other, the two are interdependent, and that is true of the PUD and each of the ten developments.

Beyond that, 1) the applicant has always regarded this infrastructure with the infrastructure providers as a cumulative project; 2) it is illogical and unreasonable to, for SEPA purposes, expect PDS and now the Examiner to interpret this set of facts in a piecemeal fashion that ignores the reality of the situation.

The record is replete with evidence of the applicant dealing with the various infrastructure providers, dealing with the public, dealing with the county decision makers, on this set of developments as a unique entity—the Lake Goodwin RCS developments. Water in particular is an issue that makes the proposed RCS developments interdependent because they all rely on a unique water source— a new pipe that will be brought in by the Snohomish County PUD. The PUD will have to amend its comprehensive plan to change its service area boundaries, an action that will require SEPA, to make this extension. Testimony of Ellen Hiatt Watson. Concurrently, SEPA should be done on all ten of these developments to assess the environmental impacts of bringing water to this area. The letter from the PUD demonstrates that it did not contemplate this action as a single action from RCS II, but as a collective action regarding all the ten pending developments.

The financial information, considered because it was brought up by the applicant, was not brought up for feasibility purposes, but was brought up to determine whether the applications are interdependent. The Examiner finds that they are, based on the evidence in the record. The idea of the cost of a minimum water connection at \$160,000 and likely much more, would be cost prohibitive.

2. The road network does not establish interdependency between the RCS II plat and all other projects proposed by the Applicant in the vicinity.

The applicant argues that the Examiner’s determination that the RCS II plat is interdependent with all of applicant’s other projects in the vicinity is not supported in the record. The applicant then attempts to introduce new evidence it failed to introduce into the record to show that 44% of the 585 lots have no connection to any other pending application.

The applicant then indicates the Examiner simply doesn’t understand that DPW provides road stubs for undeveloped road ends, and then opens them up when need arises to provide connectivity to the “interconnected internal road network”. Applicant’s Brief on Reconsideration at p. 10. To the contrary, the Examiner fully understands how the system should work under the EDDS, and how the system does work. None of this makes any mileage in its argument that the Examiner’s decision was in error. Rather, the fact that these developments are part of the connectivity network re-enforces rather than defeats the argument of interdependency.

As far as the WSDOT offers go, the Examiner merely pointed out that the WSDOT offer and fees paid were based on distribution of traffic going to two exists of Interstate 5. Under the development proposal for RCS II alone, however, all traffic goes to only one exit. The rebuttal argument put forth by the applicant was that it didn’t really matter because WSDOT was scoring the proposal as a whole, and even though the approval was technically inaccurate now, it would later be worked out as the other applications received approval.

If there is something improper about reviewing the evidence in the record, the applicant has failed to disclose what it is. The mitigation offered to WSDOT is reliant on the interdependent nature of the roads and plats, what is open and when, and the Examiner is entitled to consider this evidence as a

part of her review of the record. What is wrong with this or what is “dangerous” about this may be something applicant misunderstands.

The applicant also argues that the Examiner “incorrectly faults PDS for not examining cumulative transportation impacts of the multiple LGAJV projects.” Applicant’s Petition for Reconsideration at 11. Appellant argues that Gibson Traffic did supply a cumulative traffic analysis for the ten developments, which was reviewed by PDS and DPW as a part of project review. While that is true, it was not done as a SEPA analysis. That means that the public and agencies with expertise were not given the opportunity to comment upon it. SEPA provides the ability for disclosure. A report done on the substance but without the public process is not a substitute for SEPA.

3. *The projects were not fragmented into a series of exempt actions, intended to avoid cumulative analysis.*

Applicant next quibbles with language that is a part of WAC 197-11-060, accusing the Examiner of finding the RCS II project on its own “exempt” under the phased review provision of -060.

While this argument hardly dignifies discussion, the Examiner will lay out the entirety of WAC 197-11-060 to provide the applicant with a clear picture of how SEPA works. WAC 197-11-060 states:

Content of environmental review.

(1) Environmental review consists of the range of proposed activities, alternatives, and impacts to be analyzed in an environmental document, in accordance with SEPA's goals and policies. This section specifies the content of environmental review common to all environmental documents required under SEPA.

(2) The content of environmental review:

(a) Depends on each particular proposal, on an agency's existing planning and decision-making processes, and on the time when alternatives and impacts can be most meaningfully evaluated;

(b) For the purpose of deciding whether an EIS is required, is specified in the environmental checklist, in WAC 197-11-330 and 197-11-444;

(c) For an environmental impact statement, is considered its "scope" (WAC 197-11-792 and Part Four of these rules);

(d) For any supplemental environmental review, is specified in Part Six.

(3) Proposals.

(a) Agencies shall make certain that the proposal that is the subject of environmental review is properly defined.

(i) Proposals include public projects or proposals by agencies, proposals by applicants, if any, and proposed actions and regulatory decisions of agencies in response to proposals by applicants.

(ii) A proposal by a lead agency or applicant may be put forward as an objective, as several alternative means of accomplishing a goal, or as a particular or preferred course of action.

(iii) Proposals should be described in ways that encourage considering and comparing alternatives. Agencies are encouraged to describe public or nonproject proposals in terms of objectives rather than preferred solutions. A proposal could be described, for example, as "reducing flood damage and achieving better flood control by one or a combination of the following means: Building a new dam; maintenance dredging; use of shoreline and land use controls; purchase of floodprone areas; or relocation assistance."

(b) 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. (Phased review is allowed under subsection (5).) Proposals or parts of proposals are closely related, and they shall be discussed in the same environmental document, if they:

(i) Cannot or will not proceed unless the other proposals (or parts of proposals) are implemented simultaneously with them; or

(ii) Are interdependent parts of a larger proposal and depend on the larger proposal as their justification or for their implementation.

(c) (Optional) Agencies may wish to analyze "similar actions" in a single environmental document.

(i) Proposals are similar if, when viewed with other reasonably foreseeable actions, they have common aspects that provide a basis for evaluating their environmental consequences together, such as common timing, types of impacts, alternatives, or geography. This section does not require agencies or applicants to analyze similar actions in a single environmental document or require applicants to prepare environmental documents on proposals other than their own.

(ii) When preparing environmental documents on similar actions, agencies may find it useful to define the proposals in one of the following ways: (A) Geographically, which may include actions occurring in the same general location, such as a body of water, region, or metropolitan area; or (B) generically, which may include actions which have relevant similarities, such as common timing, impacts, alternatives, methods of implementation, environmental media, or subject matter.

(4) Impacts.

(a) SEPA's procedural provisions require the consideration of "environmental" impacts (see definition of "environment" in WAC 197-11-740 and of "impacts" in WAC 197-11-752), with attention to impacts that are likely, not merely speculative. (See definition of "probable" in WAC 197-11-782 and 197-11-080 on incomplete or unavailable information.)

(b) In assessing the significance of an impact, a lead agency shall not limit its consideration of a proposal's impacts only to those aspects within its jurisdiction, including local or state boundaries (see WAC 197-11-330(3) also).

(c) Agencies shall carefully consider the range of probable impacts, including short-term and long-term effects. Impacts shall include those that are likely to arise or exist over the lifetime of a proposal or, depending on the particular proposal, longer.

(d) A proposal's effects include direct and indirect impacts caused by a proposal. Impacts include those effects resulting from growth caused by a proposal, as well as the likelihood that the present proposal will serve as a precedent for future actions. For example, adoption of a zoning ordinance will encourage or tend to cause particular types of projects or extension of sewer lines would tend to encourage development in previously unsewered areas.

(e) The range of impacts to be analyzed in an EIS (direct, indirect, and cumulative impacts, WAC 197-11-792) may be wider than the impacts for which mitigation measures are required of applicants (WAC 197-11-660). This will depend upon the specific impacts, the extent to which the adverse impacts are attributable to the applicant's proposal, and the capability of applicants or agencies to control the impacts in each situation.

(5) Phased review.

(a) Lead agencies shall determine the appropriate scope and level of detail of environmental review to coincide with meaningful points in their planning and decision-making processes. (See WAC 197-11-055 on timing of environmental review.)

(b) Environmental review may be phased. If used, phased review assists agencies and the public to focus on issues that are ready for decision and exclude from consideration issues already decided or not yet ready. Broader environmental documents may be followed by narrower documents, for example, that incorporate prior general discussion by reference and concentrate solely on the issues specific to that phase of the proposal.

(c) Phased review is appropriate when:

(i) The sequence is from a nonproject document to a document of narrower scope such as a site specific analysis (see, for example, WAC 197-11-443); or

(ii) The sequence is from an environmental document on a specific proposal at an early stage (such as need and site selection) to a subsequent environmental document at a later stage (such as sensitive design impacts).

(d) Phased review is not appropriate when:

(i) The sequence is from a narrow project document to a broad policy document;

(ii) It would merely divide a larger system into exempted fragments or avoid discussion of cumulative impacts; or

(iii) It would segment and avoid present consideration of proposals and their impacts that are required to be evaluated in a single environmental document under WAC 197-11-060 (3)(b) or 197-11-305(1); however, the level of detail and type of environmental review may vary with the nature and timing of proposals and their component parts.

(e) When a lead agency knows it is using phased review, it shall so state in its environmental document.

(f) Agencies shall use the environmental checklist, scoping process, nonproject EISs, incorporation by reference, adoption, and supplemental EISs, and addenda, as appropriate, to avoid duplication and excess paperwork.

(g) Where proposals are related to a large existing or planned network, such as highways, streets, pipelines, or utility lines or systems, the lead agency may analyze in detail the overall network as the present proposal or may select some of the future elements for present detailed consideration. Any phased review shall be logical in relation to the design of the overall system or network, and shall be consistent with this section and WAC 197-11-070.

Emphasis added. The emphasized portions are those that are of particular relevance in this case. It would be a very simple matter for PDS to give each of these applications a DNS and avoid any discussion of cumulative impacts. But that is exactly what WAC 197-11-060(5)(d)(ii) and (iii) proscribes. Because these projects are interdependent and because they do have cumulative impacts on the community, they should not be improperly segmented into ten separate environmental determinations. Here are the important features admitted by the Applicant that support the cumulative analysis:

- Applicant does not dispute that multiple subdivision application have been submitted by the same applicant and that a total of approximately 585 lots on an approximately 2000 acre area have been proposed.
- The applicant admits that the proposed waterline would serve all of the proposed subdivisions currently under review by Snohomish County.
- The applicant does not contest that these projects cannot proceed without the proposed waterline.
- There is common transportation network serving the proposed developments.
- The applicant concedes that no SEPA analysis of the land use impacts of the construction of the waterline has been done.
- No SEPA analysis of the comprehensive plan changes the PUD must make to modify the water service area to serve the proposed McNaughton developments has been accomplished to date.
- Applicant admits that PDS has not yet reviewed all the LGAJV projects on a cumulative basis.

The applicant is trying to avoid its duty to provide a full disclosure of cumulative impacts by piecemealing and segmenting review into 10 separate DNS determinations. This is contrary to the requirements of SEPA, as the evidence in the record clearly demonstrated. The applicant's request for reconsideration on this ground is DENIED.

H. Impacts of the installation of the waterline were properly reviewed under SEPA.

The applicant argues that the Examiner's determination that SEPA review must include analysis of the indirect impacts of the waterline, specifically, induced growth along the water line route is not supported by the record and includes errors of law.

The Examiner included a full analysis of how that determination was supported by WAC 197-11-060, and will not repeat that analysis again. In addition, as appellant 7-Lakes notes in its papers, the Supreme Court has determined that "secondary" impacts must be considered at the threshold determination stage. In *King County v. Washington State Boundary Review Board for King County*, 122 Wn.2d 648, 662-664 (1993), the court determined that SEPA analysis is necessary based on the probability that land use changes will follow the proposed action, even if development is not the direct and immediate result of the government action. The court stated, "Even a boundary change, like the one proposed in this case, may begin a process of government action which can "snowball" and acquire virtually unstoppable administrative inertia."

Applicant is advocating exactly what the Supreme Court rejected in the *King County* case: a categorical approach that allows evasion of environmental review because no land use changes occur directly because of amendment of the PUD's comprehensive plan.

Applicant states that the Examiner must clarify what she expects of PDS in its review in its future SEPA analysis. Perhaps PDS needs to get together with the PUD and discuss this matter as professional planners. The entire area is under special provisions due to the Stillaguamish Instream Flow Rule adopted by the Department of Ecology, and there may be limited water in the future for exempt wells. PDS may want to compare how development using the Instream Flow Rule may differ from using water from the PUD, and look to other possible water sources that may be available in the area. This is not an issue that is simply a matter of zoning buildout as applicant asserts; it is an important resource issue of vital importance. The presence of the water line greatly changes the balance of the resource equation.

I. Impacts of light and glare were properly reviewed under SEPA.

Applicant essentially provides the same argument it did during the hearing regarding light and glare. It is undisputed that the cumulative effects of light and glare were not even considered. In the decision, the Examiner remanded the decision, requiring that PDS require a light and glare analysis of the cumulative impacts of the overall proposal. The lights of 585 new housing units in a rural area, of 5847 ADT (or 5598 ADT) need to be reviewed to contribute to the light pollution in this rural area. Professional planners and scientists have models on how these types of studies are done.

J. Impacts of transportation, including bicycle and pedestrian safety were properly reviewed under SEPA.

- 1. The sheer number of trips generated is in line with expectations for the area and was reviewed by PDS and considered prior to issuance of the DNS. No competent evidence exists in the record to justify reversing the DNS and declaring the traffic impacts to be "significant."**

The applicant argues that the Examiner's order is not supported by the record on the above referenced point. The Department of Public Works also submitted a response indicating it disagreed with the Examiner's findings related to traffic and transportation. The Examiner would therefore like to clarify some of her rulings.

The Examiner stated in the Motion to Dismiss how SEPA is applied, contrary to the method that PDS and DPW seem to apply it. Although the Examiner has stated this conclusion in numerous decisions, she will state it again: While SEPA and the GMA strive to allow GMA development regulations to cover the gamut of SEPA mitigation in most cases, it cannot always be the beginning and end of the analysis. In some cases, there are impacts beyond the stretch of the development regulations. Under WAC 197-11-158, SEPA requires a GMA county to look beyond its development regulations and comprehensive plan if they do not 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 that must be completed:

(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."

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.

The mistake made by PDS and DPW is that they do not follow the law. Despite repeated recitals of this section of WAC 197-11-158, there is no analysis done of any project, except under the development regulations. When asked under oath, the policy position of the department is always that SEPA review is limited to the codes. That is an incorrect position under the law of this state.

In the context of this project, this project applicant did do a cumulative traffic analysis. While this applicant will not be tripping the concurrency wire under the code, it will be putting 5548 trips on this road and using up the available concurrency in this area for the foreseeable future, without doing required improvements under the code to mitigate for any of those trips. This information was supplied by applicant's traffic expert. That in itself is a significant adverse environmental impact. The applicant's developments all have been determined concurrent; now this area will be in arrears, and the next developers will be required to come up with money for improvements to roads in order to develop. While the Examiner commends the applicants for doing the cumulative traffic and .430 analysis, it should have been done as part of a public process, so that the public could comment on it. This analysis could be re-published as a draft environmental impact statement.

DPW is unhappy with the fact that the Examiner has exposed the evidence that this applicant has used up the concurrency in this area. Exhibit 158 at 8. (DPW Response to Reconsideration). However, the statement was made by the applicant's traffic expert, and is a credible piece of evidence to rely upon in considering the facts in the record. DPW also does not understand why the Examiner needs to hear from the Fire Marshall regarding a deviation from the code regarding a decision to not require a through connection for the plat for connectivity and fire safety purposes. The Examiner would like to remind DPW that it is up to the Examiner as approving authority for the preliminary plat to determine whether the purposes of Chapter 30.66B SCC is best served by a deviation for the proposed subdivision. SCC 30.66B.810(2); *see Morrissey v. Snohomish County, et al., Case No. 08-2-04107-5 Memorandum Opinion at 3 (May 21, 2009)*. Furthermore, the Examiner must determine whether the plat is adequately served by fire protection as a part of determining whether adequate provision is made for the public health, safety and welfare.

2. The applicant provided and PDS reviewed the only bicycle and pedestrian analysis supported by sound engineering practice. No evidence that an adverse significant impact will be caused by the project was presented by appellants sufficient to overturn the substantial weight that must be accorded PDS's DNS.

While the applicant decries the need to provide for any bicycle and pedestrian paths, it indicates to the extent they are needed, they can use gravel shoulders. The Examiner is not sure if applicant's representatives have ever ridden a bicycle, but gravel is a very dangerous substrate to ride a bicycle in, especially a road bicycle. Most pedestrians walk far more than a quarter mile, and bicyclists cycle far greater distances than pedestrians walk.

The Examiner takes official notice of this statement in the Transportation Element:

A network of bicycle and pedestrian facilities needs to be provided on a countywide basis. This will allow bicycling and walking as a practical alternative to automobile travel

in some cases. It would also make the broader community more accessible, enjoyable, and safer.

Regulatory measures are needed to implement bicycle supportive designs, plans, and programs. Appropriate bicycle and pedestrian requirements can be included as part of anticipated revisions to zoning, subdivision, short plat, SEPA, and traffic mitigation ordinances. Nonmotorized transportation facilities can be implemented as part of county initiated or development-related road improvements.

Transportation Element at 47 (February 2006). Of course, the Transportation Element itself, as part of the Comprehensive Plan is a SEPA policy. This is exactly the type of gap in the regulations that needs to be addressed in environmental review. Once one of these gaps is identified, it is then incumbent upon the jurisdiction to address the issue as a part of its docket process.

The Examiner also takes official notice of the Bicycle Facility Map for the Transportation Element (FEIS) Bicycle Facility System Map dated February, 2006. It shows proposed bikeways down Lakewood from the I-5, all the way to Frank Waters Road, and connecting to Marine View Drive and running the length of Marine View Drive. They also circle Lake Goodwin. These bike paths are planned as part of the improvements in the next 20-year planning horizon. Providing bike and pedestrian paths in this large community of developments could be necessary to provide safe access to these bike paths and the recreational areas near the developments as well as providing access among the developments themselves. The point is that these questions, in the context of documents like the Bicycle Facility Map should have been looked at in the process of environmental review. The question of whether there is an attraction ¼ of a mile away, is not adequate to determine whether pedestrian or bicycle paths are necessary in today's society. Why DPW finds that an adequate standard is unknown to the Examiner. It is unrealistic in any measure the Examiner knows, except maybe a retirement home.

3. The Examiner's decision wrongly concludes that a link arterial analysis of 40th approaching the intersection of 40th and SR 531 was not conducted.

The applicant states that "the Examiner's lack of understanding of the evidence" cannot be a basis for finding the DNS to be clearly erroneous. To the contrary, the Examiner does understand the evidence. As stated in the decision, there needs to be a review of the link LOS for 40th, since as discovered by Ross Tilghman and confirmed by Edward Koltonowski, the LOS will drop to E at the intersection of SR 531 and 40th NW. As stated by the Examiner, this issue is one which should be analyzed in the cumulative traffic analysis.

K Impacts of aesthetics and land use were properly reviewed under SEPA.

Applicant again attempts to simply re-argue the case without providing any specific support for reconsideration. It simply is unhappy with the notion of a cumulative analysis of the impacts of placing 585 lots into this rural area. The Examiner has stated specifically that PDS has to look at the buildable lands analysis, and the capacity of the area to sustain further rural growth and remain rural. The Examiner also stated that PDS needs to also look at the entire proposal in reference to the comprehensive plan policies on rural character and rural clusters to determine how it might be conditioned to mitigate any adverse impacts from the sheer scale of the development.

L. Impacts of critical areas were properly reviewed under SEPA.

The applicant argues that the Examiner should have considered the testimony of Chris Wright of Raedeke Associates, in which he stated that even viewed cumulatively, there are no significant

environmental impacts associated with critical areas or wildlife fragmentation. His testimony was put on in rebuttal to Mr. Brewer's testimony that there would be significant adverse environmental impacts, given the fact that 90% of the uplands in the development (out of critical areas) would be devoted to development features (impervious surface, yards, driveways, roads, etc.) and would not be available for wildlife habitat.

The Examiner listened to both sides testimony found Mr. Brewer to be more credible, and determined that given the fact that PDS had failed to do a cumulative impact analysis of all the impacts to critical areas and wildlife fragmentation, determined that on this record, the DNS was clearly erroneous, and the DNS must be remanded because there will be significant cumulative impacts to critical areas and wildlife, including but not limited to fragmentation of wildlife habitat.

M. Impacts of water quality and quantity were properly reviewed under SEPA.

Applicant objects to the notion that a cumulative water quality and quantity impact analysis should be completed on its projects. It complains that the water quality problems of Port Susan Bay are from the "sins of the past" and that applicant plans to use the protections of the 1992 DOE Stormwater Manual. Further, applicant states that the bull trout habitat in one of its development areas will be improved as a result of the development.

The water quality and quantity problems of the area are definitely a result of the sins of the past. It is the County's duty to make sure that these developments do not contribute to the problem. The fact that the increased volumes due to clearing weren't accounted for in the amount of runoff is a problem. Will water quality be affected? Mr. Brewer was a very credible expert on the record saying the cumulative impacts to wetlands could be significant.

The County has not reviewed the cumulative impacts to water quality and quantity. That is undisputed fact. The County's review was of a targeted drainage plan for RCS II. The County needs to look for adverse drainage impacts that may reach to Port Susan Bay from these developments and in between. Port Susan Bay is documented to carry threatened species. As noted by speaker Ross Kane, there are numerous efforts underway to restore the water quality in Port Susan Bay by the County, the Stillaguamish Tribe, the state and the federal government. As Speaker Kane and Mr. Brewer also noted, stormwater water runoff is the number one pollutant that is threatening Puget Sound. Even the existing drainage code under SCC 30.63A.200(2)(b) requires a downstream analysis when fisheries resources may be adversely impacted more than a ¼ mile away from the development activity. Given the fact that applicant is proposing developing approximately 2000 acres, it is more than reasonable to call for a drainage study that examines the cumulative effects on water quality and quantity. The county needs to know what type of degradation to wetland functions and values will occur from all of the increased runoff that will be dumped into wetlands as a result of the clearing that is occurring on the uplands. All of this impact must be disclosed as a part of an environmental impact statement, so that the public and agencies with expertise can comment.

N. The plat should be approved, and the deviation issues raised by the Examiner addressed by a condition.

Approval of this plat is premature. A cumulative SEPA analysis must take place prior to allowing this plat to move forward. The Examiner affirms her earlier decision, including the finding that the issuance of the deviation was clearly erroneous.

DECISION

The final decision issued April 9, 2009 shall be modified in accordance with this decision.

The applicant's Petitions for Reconsideration is **DENIED** as to the remainder of the petition.

Decision issued this 29th day of May 2009.



Barbara Dykes, Hearing Examiner

EXPLANATION OF APPEAL PROCEDURES

The order of the Hearing Examiner is not a final decision and there is no right of appeal to the County Council.¹

Distribution:

Parties of Record

The following statement is provided pursuant to RCW 36.70B.130: "Affected property owners may request a change in valuation for property tax purposes notwithstanding any program of revaluation." A copy of this Decision is being provided to the Snohomish County Assessor as required by RCW 36.70B.130.

¹ Scrivener's Error – Corrected 6-2-09
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