DECISION of the SNOHOMISH COUNTY HEARING EXAMINER

DATE OF DECISION: April 26, 2012

PLAT/PROJECT NAME: Gracie's Place

APPLICANT: West Coast Land Investment

LANDOWNER: William and Kamile Pigott
18103 Baldwin Road, Bothell, WA 98012

SEPA APPELLANT: Gravenstein Neighborhood Group

FILE NO.: 05-117888 SD

TYPE OF REQUEST: Preliminary Subdivision Approval
SEPA Appeal

DECISION (SUMMARY): SEPA Appeal is DENIED
Preliminary Subdivision Approval is GRANTED, subject to Conditions

BASIC INFORMATION

LOCATION: On the southeast corner of Baldwin Road and Pippin Road and south of the extension of 3rd Avenue, south of 172nd Place SE in Sections 7 and 18 of Township 27 North, Range 5 East, Section 13, Township 27 North, Range 4 East W.M., Snohomish County, Washington.

ACREAGE: 58.8 acres

NUMBER OF LOTS: 96 lots

AVERAGE LOT SIZE: 5,324 square feet
MINIMUM LOT SIZE: 3,400 square feet
GROSS DENSITY: 1.63 du/ac (8.18 du/acre net)
LOT SIZE AVERAGING: 24,928 square feet

GMACP DESIGNATION: Urban Low Density Residential (ULDR) (4-6 du/acre)

CURRENT ZONING: R-9,600
UTILITIES:
   Water:  Alderwood Water and Sewer District
   Sewer:  Alderwood Water and Sewer District
   Electricity: Snohomish County PUD No. 1

SCHOOL DISTRICT(S):  Edmonds School District No. 15 and Everett School District No. 2
FIRE DISTRICT: Snohomish County Fire District No. 1

PDS STAFF RECOMMENDATION: Approve subject to conditions; Deny SEPA appeal

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

Based on a preponderance of the evidence of record, the following Findings of Fact, Conclusions of Law and Decision are entered.

**FINDINGS OF FACT**

1. **Regulatory Review and Vesting.** A complete application was submitted to Planning and Development Services (PDS) on June 8, 2006, and the application was determined to be complete on July 6, 2006. Between this date and November of 2007, the Applicant was required to resubmit their proposal four separate times before it was deemed adequate for further review. However, beginning in February 2007, the Hearing Examiner’s Office was notified that legal issues had arisen as to the ownership of the plat application, and certain parties requested to postpone the public hearing. The public hearing was delayed as a result until these issues were resolved in January, 2012. (Exhibits 73 through 95) As of the date of the public hearing, 159 days of the 120-day review period had elapsed.

2. **Public Hearing.** A public hearing was held on March 21, 2012. Appearing for the Applicant, West Coast Land Investments, was Nancy Bainbridge Rogers, attorney. Ed Caine, Senior Planner, appeared and testified on behalf of PDS. Julie Taylor appeared on behalf of the Appellants, Gravenstein Neighborhood Group (“GNG”).

3. **The Record.** All of the Exhibits shown on the master list of exhibits (Exhibits 1 through 176) were entered into the record as evidence, along with the testimony of witnesses presented at the Open Record Hearing and the Tape Log. The entire record was considered by the Examiner in reaching this decision.

4. **Public Notice.** The Examiner finds that PDS concurrently gave proper public notice of the open record hearing, SEPA threshold determination, and Traffic Concurrency and Impact Fee Determinations as required by the County Code. (Exhibits 28 through 32)

   **A. Background Information**

5. **Applicant’s Proposal:** West Coast Land Investment is proposing to develop a 96-lot plat in a Residential 9,600 (R-9,600) zone on 58.72 acres utilizing Lot Size Averaging (LSA). The lots will range in size from 5,324 square feet to 3,400 square feet. Lots in the project will have access via the public road system. Water and sewer service will be provided by the Alderwood Water and Wastewater District.
The subject property is an irregularly shaped aggregation of eight tax parcels inside the Urban Growth Area (UGA). The western third of the site is on land sloping towards North Creek to the east. North Creek is located on the eastern portion of the site. The eastern two-thirds of the site include a large Category 1 wetland associated with North Creek. The site also contains two small Category 3 wetlands. The site contains three streams. North Creek is a Type 2 stream that supports Chinook salmon, which are listed as “threatened” under the federal Endangered Species Act. Two Type 5 streams drain through the site to North Creek. The western portion of the site is forested, containing a mix of fir, cedar, maple and alder. The eastern portion of the site contains a mix of trees and scrub/shrub vegetation. Properties to the north, west, and south are zoned R-9,600. A portion of the property to the east of the site is contained within North Creek Park, a large County park, and is zoned Forest and Recreation. The subject property is surrounded by a mix of single family residential uses on lots varying in size from one-third of an acre to five acres.

6. **Issues of Concern:**

   A. **Agency Comments.**

      The City of Mill Creek provided comments on June 28, 2006 in which they recommended that steps be taken to protect the Blue Heron rookery that is in close proximity to the subject development. The City also notified PDS that the traffic impact fees for the development would be $31,872.00. (Exhibit 67)

      Additionally, The Department of Ecology (DOE) requested that a condition be imposed stating, “[t]he applicant shall obtain all necessary state and federal authorizations for stream and wetland impacts prior to beginning any ground disturbing activities or timber harvest.” (Exhibits 104 and 109-1)

   B. **Public Comments.**

      Written comments were received from 93 citizens on a wide range of topics, including concerns about increased traffic in the area, especially with regard to local streets and 164th Street SW, negative environmental, wildlife and aesthetic impacts on the surrounding area, especially North Creek and its adjacent wetlands, Rhody Ridge Arboretum Park, and a Great Blue Heron rookery, the impact on neighborhood character from additional densities, the capacity of utilities and schools to handle the impacts of the development, concerns about the potential for fire hazards, cumulative impacts, geotechnical and drainage concerns. In addition, numerous citizens attended the public hearing on March 21, 2012, and seventeen citizens testified against granting preliminary plat approval for the proposed development.

7. **State Environmental Policy Act Determination**  (Chapter 30.61 SCC--SEPA)

   PDS issued a Determination of Nonsignificance (DNS) for the subject application on November 20, 2007. (Exhibit 28) Notice was properly given of the SEPA determination. (Exhibits 28, 29, 30, 31) PDS issued an Addendum to the DNS to correct errors in the description of the proposal, including the proposed lot sizes and the name of the water and sewer purveyor. It did not change the threshold determination. The DNS was appealed on December 12, 2007 by the GNG. (Exhibit 1)
8. The Appellant’s claims can be summarized as follows:

The Responsible Official erred in issuing the DNS because the Applicant has not submitted the full scope of information necessary for the County to determine that no adverse environmental impacts are probable. The available information establishes that significant adverse environmental impacts will result from the proposed development project and an Environmental Impact Statement (EIS) should have been required. (Exhibit 1) Specifically, GNG focuses on the following issues:

   i. Cumulative Impact Claims. The Responsible Official failed to consider cumulative impacts and the interdependency of other developments (Berry Place, Gracie’s Place 2, Normandie Place, Nichols Short Plat and McDaniel Addition), which collectively will add 124 additional residential lots and accompanying urban infrastructure in the immediate vicinity of the proposed Gracie’s Place 96-lot development.

   ii. Traffic Claims. The Applicant’s analysis of traffic impacts was inadequate when considered independently or as part of the cumulative impacts of the 220 new lots proposed in the vicinity.

   iii. Streams Claims. An EIS is necessary in light of the project’s proximity to streams (North Creek), wetlands and associated buffers of high environmental value. Proposed mitigation buffers are inadequate.

   iv. Wetland Impact Claims. The information provided by the Applicant as to Wetland A (which is directly adjacent to North Creek) and Wetlands B and Z does not ensure adequate protection to the wetlands. Instead, it directly links the project to critical area impacts. The intensity of the impacts is evident from an observation of the site plan, and cumulative intensity of impacts is evident when considering the Gracie’s 2 and Nichols Short Plat development proposals. Finally, the Jay Group incorrectly asserts that stream and wetland impacts from the sewer installation will be temporary. The impacts will be permanent.

   v. Steep Slope and Drainage Impact Claims. Steep slopes exist on the site over 33% in grade and will be disturbed. The SEPA Responsible Official did not have adequate information necessary to assess certain probable environmental impacts of the project, specifically, how much of the site is steeply sloped, where the slopes are in relation to the proposed construction activity, and where slopes are in relation to critical areas. The developer proposes to make significant cuts and fills into the hills on-site which exceed the recommendation of the Applicant’s own engineers. Additionally, the Geotechnical Report is inadequate.

   vi. Recreational, Wildlife and Aesthetic Impacts. There has been no assessment of adverse impact to the wildlife by removal of significant amounts of mature forest, clearing or grading or likely hydrologic changes that will result from the project. Significant habitats include the Rhody Ridge Arboretum, North Creek Park, Great Blue Heron rookery in the immediate vicinity. Replacement of an open space hillside which provides habitat and a rural aesthetic quality to the neighborhood with a 96-lot urban development will adversely impact the aesthetics of the area. There are no recreational or play areas proposed as part of the subject development.

The Appellants request that the Hearing Examiner reverse the threshold determination of the DNS and require issuance of a Determination of Significance (DS), thereby requiring the preparation of an EIS. In the alternative, the Appellant requests that the Examiner utilize SEPA
substantive authority to impose mitigating conditions to increase critical area buffers and improve traffic conditions on roads in the vicinity.

In support of their claims, the Appellant submitted the testimony of Becky Johnson and Diane Riley, along with their legal brief (Exhibit 108), and numerous documents into the record including Exhibits 1, 3 (SEPA Affidavit with Exhibits, including a video at Exhibit 3-V), 4, 53, 54, 55, 109-1, 109-2 and 109-3, 109-4, 168, 170, 171, 172, 173 and 176. Additionally, the record contains letters from 93 citizens, many of whom are part of the Appellant group adding their comments and concerns about the SEPA threshold determination. Finally, the Appellants also rely on the remaining documents in the record relating to the preliminary plat application.

C. CONCURRENcy APPEAL

9. The GNG also filed an appeal of the Concurrency Determination on December 17, 2007. (Exhibits 1, 4) A concurrency determination by the department creates a rebuttable presumption of validity. The Hearing Examiner may vacate a concurrency determination upon a showing that the determination is clearly erroneous. The Department of Public Works' (DPW) professional judgment and expertise shall be entitled to substantial weight. The party challenging the concurrency determination shall have the burden of proof. (SCC 30.66B.185)

10. In the present case, PDS issued its Concurrency Determination based on Final Comments received from Ann Goetz, PDS Transportation Development Reviewer on July 3, 2007 (updated March 12, 2012). (See, Exhibit 155) A "concurrency analysis" is a study to ensure that roads (and other public facilities and services—at the time that proposed new development becomes occupied) are adequate to serve current or future development without decreasing service levels below locally established minimum standards. ¹ Here, the Appellants submitted a memo dated November 30, 2007 from Ross Tilghman of the Tilghman Group, addressing alleged undisclosed traffic impacts resulting from the development proposal, as well as four other proposed developments in the area. (Exhibit 172) In response to the appeal, PDS states that the traffic analysis performed by Mr. Tilghman, and conclusions drawn from that analysis, are based on traffic generated from off-site development projects that have been withdrawn. Therefore, PDS concludes that the conclusions are not valid. (Exhibit 98)

11. The issues raised in the appeal were subsequently abandoned in GNG's opening brief and during the Open Record Hearing on March 21, 2012. Mr. Tilghman did not appear or testify. (See also, Exhibit 108) Accordingly, the Examiner finds that the concurrency appeal should be dismissed.

¹In Washington, concurrency is both a state planning goal and a state-mandated local regulation under the Growth Management Act (GMA). See Concurrency and the State Owned Transportation System, WASH. DEPT OF TRANSP., http://www.wsdot.wa.gov/planning/LandUse/concurrency_state-ownedsystem (2012). The concurrency goal is intended to ensure public facilities and services (such as sewer, water, roads, parks, and schools) are adequate to serve new development at the time of occupancy without decreasing service levels below locally established minimum standards (RCW 36.70A.020(12)). The GMA also defines a specific transportation concurrency requirement. First, local governments must set level of service standards, or minimum benchmarks of performance, for transportation facilities and services. Once the level of service standard is established, the local government must adopt an ordinance to deny proposed developments if they cause the level of service on a locally-owned transportation facility to decline below the adopted standard, unless transportation improvements or strategies to accommodate the impacts of development are made concurrent with development (RCW 36.70A.070(6)(b)). "Concurrent with development" means improvements or strategies are in place at the time of development, or a financial commitment has been made to complete them within six years. Local governments may accommodate development impacts by changing the phasing or timing of new development, improving transportation facilities or services to serve the new development, reducing the level of service standard, or revising their land use policies.
D. PRELIMINARY SUBDIVISION APPROVAL
Compliance with Codes and Policies

12. Park and Recreation Impact Mitigation (Chapter 30.66A SCC) The proposal is within Park District No. 307 and is subject to Chapter 30.66A SCC, which requires payment of $1,244.49 per each new single-family residential unit, to be paid either prior to plat recording or prior to building permit issuance for each unit. Such payment or contribution of in-kind mitigation is acceptable mitigation for parks and recreation impacts in accordance with County policies. The Examiner finds that such payment is acceptable mitigation for parks and recreation impacts in accordance with County policies.

13. Traffic Mitigation and Road Design Standards (Title 13 SCC, & Chapters 30.24 and 30.66B SCC) Any application for approval of or a permit for a development shall be reviewed by the DPW to determine any mitigation requirements that may be applicable for the following: (1) Impact on road system capacity; (2) Impact on specific level-of-service deficiencies; (3) Impact on specific inadequate road condition locations; (4) Frontage improvements requirements; (5) Access and transportation system circulation requirements; (6) Dedication or deeding of right-of-way requirements; (7) Impact on state highways, city streets, and other counties' roads; (8) Transportation demand management measures; and (9) Impact on highways, roads and/or streets from large trucks generated by mineral operations permitted in accordance with chapter 30.31D SCC. (SCC 30.66B.015)

The required analysis has been performed as discussed in further detail below. The Hearing Examiner has considered the impacts of the development in light of the requirements set forth in Chapters 30.66B and 30.24 SCC, Title 13 SCC and the EDDS, and finds that the development proposal, as conditioned based on the information in the record and in the PDS Staff Recommendation, meets the County’s traffic mitigation and road design standards.

(a) Road System Capacity (SCC 30.66B.310), Concurrency (SCC 30.66B.120) and Inadequate Road Conditions (IRC) (SCC 30.66B.210)

The impact fee for this proposal is based on the new average daily trips (ADT) generated by single-family residences, which is 9.57. This rate comes from the 6th Edition of the ITE Trip Generation Report (code 210). As indicated above, the number of new lots that will be created is 96. The development will generate 909.15 new ADT and has a road system capacity impact fee of $242,743.05 ($2,528.57/lot) based on $267.00/ADT.

In terms of concurrency, the subject development is located in TSA D which, as of the date of submittal, had the following arterial units in arrears: 202 and 204. Based on peak-hour trip distributions performed by Gibson Traffic Consultants (Exhibit 17) and reviewed by PDS transportation staff (Exhibit 156), the subject development will not add three or more peak-hour trips to any of the arterial units in arrears.

The development generates 71.25 a.m. peak-hour trips and 95.95 p.m. peak-hour trips which is more than the threshold of 50 peak-hour trips, and thus, the development has also been evaluated under SCC 30.66B.035. Pursuant to SCC 30.66B.035, the Applicant has evaluated the future level-of-service on the road system consistent with the specific traffic study requirements imposed by the DPW, and has found that there are one or more arterial units in arrears in the TSA based on forecast level-of-service conditions. However, the development will not impact any of these arterial units in
arrears with three or more peak-hour trips. Accordingly, the development was found to be concurrent under SCC 30.66B.160(2)(a) on July 27, 2006. (Exhibits 17, 156) The concurrency certificate expires six years after the determination is made, on July 27, 2012.

The PDS Staff Recommendation provides that prior to the expiration date of the development’s concurrency certificate, plat construction permits shall have been obtained, or a new concurrency determination will be required. (Exhibit 75 at Page 6) However, the Hearing Examiner finds that SCC 30.66B.155(3)(a) provides that building permits are not required to be obtained prior to expiration of the concurrency determination, so long as preliminary plat approval was granted prior to the concurrency determination expiration date. Accordingly, no precondition shall be required relating to concurrency.

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

(b) **Frontage Improvements (SCC 30.66B.410)** The subject property’s frontage is located along Baldwin Road. Urban standard frontage improvements are required consisting of 18 feet of pavement widening, curb, gutter, 5-foot planter strip, and 5-foot sidewalk. Construction of frontage improvements is required prior to recording the plat unless bonding of improvements is allowed by PDS, in which case construction is required prior to any occupancy of the development.

(c) **Access and Circulation (SCC 30.66B.420 and Chapter 30.24 SCC)** PDS transportation staff considered the application in light of its proposed access and road circulation, the extent of existing facilities and right-of-way, sight-distances and any needed improvements to any of these items. Their analysis is shown on Pages 2-6 of Exhibit 156, which is incorporated herein by this reference as if set forth in full. The County Engineer and DPW staffs have determined that with the imposition of the conditions set forth in Exhibit 75, the proposed development meets the requirements of SCC 30.66B.420 and Chapter 30.24 SCC.

(d) **Extent of improvements.** DPW Staff determined that Baldwin Road must be improved to a minimum paved width of 20 feet, with a 7-foot paved shoulder walkway on one side (in order to provide safe walking conditions for children walking to the school bus stop), and a one-foot gravel shoulder on the other side from South Bellflower Road. There is a 60-foot wide unopened right-of-way running north/south through the property (John Bailey Road). There are some lots located within the north end of the unopened right-of-way, so a right-of-way vacation request shall be required as a condition of approval of the development. The Applicant proposed to construct improvements to 3rd Avenue SE, specifically they will construct an additional road section with 28 feet of pavement width, vertical curb, 5-foot planters and 5-foot sidewalk along the property’s frontage (along the east side of the road). The DPW has approved these proposed plans. A deviation request for a 15% road grade on Pippin Road was approved. (Exhibits 24A through 24J, and 25) The Applicant presented a revised design that was an improvement to the previous proposal. Id.
In determining the extent of required improvements, DPW considers, among other relevant factors, the criteria set forth in SCC 30.66B.430(a) through (p). (Exhibit 155) The Hearing Examiner has reviewed those factors and finds that the recommended extent of improvements are consistent with SCC 30.66B.430 and the facts set forth in the entire record.

(e) **Right-of-Way Requirements** (SCC 30.66B.510 and 30.66B.520)

There are two roads that require additional right of way as a direct result of the proposed development: Baldwin Road and Third Avenue SE. Baldwin Road is designated as a non-arterial on the County’s Arterial Circulation Map. This requires a right-of-way width of 30 feet on each side of the right-of-way centerline. Twenty feet of right-of-way presently exists on the development’s side of the right-of-way. Therefore, 10 feet of additional right-of-way is required, which has been shown on the plans. Third Avenue SE is designated as a non-arterial on the County’s Arterial Circulation Map. In this case, a right-of-way width sufficient for the required improvements is needed. The plans show a 44.5 foot wide right-of-way proposed for 3rd Avenue NE, which will fit a 28-foot pavement width, vertical curbs on both sides, a 5-foot planter and sidewalk on the east side only. Since all the lots in this development will front on the sidewalk in the cul-de-sac or on the east side of the road, this proposal was found to be acceptable by DPW. (Exhibit 75)

(f) **Impacts to State Highways** (SCC 30.66B.710)

This development is subject to the Washington State Department of Transportation (WSDOT)/County Interlocal Agreement, which became effective on applications determined complete on or after December 21, 1997. The impact mitigation measures may be accomplished through (a) voluntary negotiated construction of improvements, (b) voluntary negotiated payment in lieu of construction, (c) transfer of land from the developer to the State, or (d) a voluntary payment in the amount of $36.00 per ADT. Should the Applicant choose the voluntary payment option to mitigate their impact to the state highway system, the payment is calculated at 909.15 ADT x $36.00/ADT = $32,729.40

A copy of a voluntary offer to the State, signed by the Applicant was included with the application for $1,229.30 based on the Gibson Traffic analysis dated March 31, 2006 showing 67.47 ADT from the proposed development impacting DOT-38 (SR 527 at 186th Place SE), at $18.22 per ADT. Comments dated June 19, 2006 were received from WSDOT indicating agreement with the traffic study, and a copy of the executed agreement was attached to the letter. (Exhibit 62) Payment to WSDOT of $1,229.30 will be required as a condition of approval.

(g) **Impacts to City Streets and Roads** (SCC 30.66B.720)

The DPW will recommend mitigation measures of the development’s direct traffic impact on the city, town or other county roads to the approving authority and the approving authority will impose such measures as a condition of approval of the development in conformance with the terms of the interlocal agreement referred to in SCC 30.61.230 between the County and the other agency. An Interlocal Agreement has been executed between the County and the City of Mill Creek for traffic mitigation for impacts on the City's road system.
A copy of a voluntary offer to pay the City mitigation requirements signed by the Applicant was submitted with the application for the amount of $31,872.00. Comments dated June 19, 2006 have been received from the City of Mill Creek that indicates agreement with the $31,872.00 amount offered for traffic mitigation. (Exhibit 67) There are no other jurisdictions that have an Interlocal Agreement with the County that will be significantly impacted by the subject development.

(h) Transportation Demand Management (TDM) (SCC 30.66B.630)

The County requires TDM of all new developments inside the UGA and developments that impact arterial units designated as ultimate capacity. Sufficient TDM shall be provided to indicate the potential for removing a minimum of 5% of a development’s p.m. Peak Hour Trips (PHT) from the road system. This requirement shall be met by site design requirements provided under SCC 30.66B.630 or SCC 30.66B.630, as applicable, except where the development proposes construction or purchase of specific off-site TDM measures or voluntary payment in lieu of site design, in accordance with SCC 30.66B.645. (SCC 30.66B.650).

It has been determined that the cost of removing one peak hour trip from the road system is approximately $1,500.00. This is based on the average cost of one stall in a park and ride lot and the average cost of one “seat” in a 15-passenger van. (Exhibits 17 and 156) For a development required to provide TDM, the development’s TDM obligation will equal $1,500.00 times the required trip reduction percentage times, the development’s peak hour trip generation. The trip reduction percentage for this development is 5%. The TDM obligation for this development is therefore equivalent to 5% of the 95.95 new PM PHT x $1,500.00, which equals $7,196.25. The Applicant has offered in writing to pay this amount.

14. Pedestrian Facilities (RCW 58.17.110)

The County is required to make findings regarding safe walking conditions for school children who may reside in the subject subdivision. A condition has been included for construction of the pedestrian facilities. Comments dated June 14, 2006 have been received from the Edmonds School District indicating that all grade levels of public school students would be provided with bus service to school. The locations of the bus stops were identified as Bellflower Road and Baldwin Road for the elementary students, North Road and 184th Street SW for the middle school students, and North Road and South Bellflower Road for the high school students. It is likely that the School District was not aware that there is no road or pedestrian connection between the north section (3rd Avenue SE) and the south section (Baldwin Road). (Exhibit 61)

Supplemental comments were provided from the Edmonds School District dated October 9, 2006 (Exhibit 61) addressing the north section of the development that will take access off of 3rd Avenue SE. The School District indicated that the bus stop for all public school grade levels will be located at 3rd Avenue SE and 170th Place SE, which is several blocks north of the development. The off-site section of 3rd Avenue between the north property line of the development and about 173rd Place SE does not have sidewalks along the east side. A paved shoulder walkway will be required along the east side of 3rd Avenue SE between the end of the sidewalk in the development and 170th Place SE where none exist, prior to recording the development.

PDS transportation staff indicated that a sidewalk will be required along the south side of Pippin Road, and is not shown in the detail for that road. It is required both as frontage improvements
and for safe walking conditions for children walking to the bus stops identified by the School District for the south section of the development.

The Everett School District No. 2 indicates that school children from Lots 31 through 48 will be picked-up at Pippin Road and an internal plat road. (Exhibit 63) Since standard urban frontage improvements will be required, including sidewalks, no special conditions will be necessary for provision for safe walking conditions at that location.

15. Mitigation for Impacts to Schools (Chapter 30.66C SCC)

Chapter 30.66C SCC provides for collection of school impact mitigation fees at the time of building permit issuance based upon certified amounts in effect at that time. Pursuant to Chapter 30.66C SCC, school impact mitigation fees will be determined according to the Base Fee Schedule in effect for the Edmonds School District No. 15 (as to Lots 1 through 30 and 49 through 96) and the Everett School District No 2 (as to Lots 31 through 48), at the time of building permit submittal and collected at the time of building permit issuance for the proposed units. Credit is to be given for the two existing lots. PDS has included a recommended condition of approval for inclusion within the project decision to comply with the requirements of Chapter 30.66C SCC. Payment of school impact fees has been included as a condition of approval of the development.

16. Drainage and Land Disturbing Activities (Clearing and Grading) (Chapters 30.63A and 30.63B SCC)

Drainage runoff from the plat road system will be directed to one of three storm water detention vaults and then released to the wetland system on the east side of the subject property. Water quality will be addressed by filter cartridges. Runoff from individual lots will be directed to the wetland on the east side of the subject property. PDS (Engineering) has reviewed the concept offered and is recommending approval of the project, subject to conditions which would be imposed during full drainage plan review pursuant to Chapter 30.63A SCC.

Grading quantities are anticipated to be approximately 125,000 cubic yards of cut and 275,000 cubic yards of fill, primarily for road, drainage facility, and home site construction. Water quality will be controlled during construction by use of silt fences and straw bales or other appropriate stormwater control BMPs in accordance with a Temporary Erosion and Sedimentation Control Plan (TESCP) required by Chapter 30.63A SCC.

17. Critical Areas Regulations (Chapter 30.62 SCC)

The Applicant is proposing a 96 lot subdivision with access taken from 3rd Avenue SE to the north of the subject property. The lots are designed on a ridge above the slope connecting to Wetland A. The stormwater drainage tracts are to be located toward the eastern edge of the development in Tracts 997 and 999 and will discharge down slope adjacent to and within the wetland buffer. A new sanitary sewer will be constructed.

The subject property is undeveloped and located in a fragmented urban environment inside the County's designated UGA. The site slopes to the east towards the North Creek channel, which is located along the east property line. Multiple drainage features are located throughout the site, which flow toward North Creek. The western portion of the site is dominated by a mixed deciduous/conifer forest that transitions into scrub-shrub communities toward the western portion of the site. This includes a structurally diverse vegetation community that provides multiple functions that include habitat features, biologic support, water quality and stormwater
attenuation for North Creek, and a vegetated riparian corridor that is used for wildlife migration. No buildings or structures are located on site. The property is bordered to the north and west by single-family homes. Land to the east and south is undeveloped. The wetlands, which make up the majority of the land area on-site, contain forested, scrub-shrub, and emergent vegetation. The wetland is part of an extensive riparian system that is hydrologically collected to North Creek. (See, Exhibit 23 at p. 8)

The wetland and stream delineation for the subject property was completed by Habitat Technologies, Inc. The classifications, categories and locations of critical areas on site were verified by PDS staff member Tong Tran on May 2, 2005. Wetland identification and delineation was done in accordance with the Washington State Department of Ecology's (WDFW) 1997 Washington State Wetlands Identification and Delineation Manual, as well as the U.S. Army Corps of Engineers' Wetlands Delineation Manual Technical (Report Y-87-1, 1987). The Jay Group, Inc. inspected the site June 5, 2006 and concurred with the critical area assessment and delineations. It. The Jay Group, Inc. again visited the site in October, 2006, with staff from the WDFW to identify an existing heron colony, and discuss management approaches to ensure the protection of the colony. Management recommendations are included in their report. Functions and values assessments were performed for all critical areas and their buffers. (Exhibit 23) The critical areas that were identified are described and protected as follows:

(a) **Stream A – North Creek.** North Creek flows along the eastern edge of the development's property line. The Jay Group determined that North Creek is a Type 2 stream with a primary association with Puget Sound Chinook salmon, Bull trout, and Steelhead trout. This classification is important because it triggers a regulatory requirement found in SCC 30.62.110, that provides specialized protections for ESA-listed species and their habitats. North Creek's overall functions and values are moderate to high, given its size, location, fish and wildlife presence and channel characteristics. The stream itself was characterized as an important feature for fish and wildlife in the surrounding urban landscape. The stream corridor provides an access route to other critical areas and upland habitats. The site contains mature alder and cottonwood forest in the wetland area and mostly Douglas fir in the upland area. (Exhibit 75) However, the stream reach adjacent to the subject property has been previously degraded by past ditching efforts and the presence of invasive reed canary grass. (Exhibit 23 at p. 18)

North Creek is protected by a required 150-foot buffer as a result of the County's Salmonid Habitat Management Plan Administrative Rule ("HMP Rule"). Accordingly, no residential development will occur within these protected areas. The 150-foot buffer must be placed in a permanent, protective area known as a Native Growth Protection Area (NGPA). This is adequately shown on the development plans. (Exhibit 107) Any disturbances to habitat within the NGPA are severely restricted and must provide mitigation at ratios designed to minimize or eliminate impacts. (For example, forested habitat disturbed must be replaced at 2:1 ratios, shrubs at a 5:1:1 ratio). For engineering reasons, the proposed new sewer line will extend into the primary association area of North Creek, requiring the Applicant to prepare a Habitat Management Plan and provide special protection and mitigation. The specifics of the mitigation plan are set forth in Exhibit 23 at pages 20; 25-33.

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2 It should be noted that the Critical Areas Regulations to which this application is vested is former Chapter 30.62 SCC. These regulations used a stream and wetland typing methodology (Type 1 - 5 streams, Category 1- 4 wetlands) that has been replaced in favor of a different methodology adopted by the State Department of Ecology.

3 The HMP Rule was adopted using best available science at the time of the Salmonid listings under the Endangered Species Act.
(b) Streams C and D. Streams C and D were both classified as Type 5 streams (non-fish bearing, seasonal streams). (SCC 30.62; Exhibit 23) The streams provide moderate habitat and screening functions and convey water from adjacent critical areas and provide water to North Creek. (Exhibit 23) Stream C is proposed to be placed in Tract 998 and Stream D will be placed in Tract 996. Type 5 streams are protected with 10-foot buffers on either side from development lots. However, because Stream D flows into Wetland A, which has its own regulatory buffers, the protection shown on the plans is approximately 50-feet on either side of the stream in Tract 996.

(c) Wetland A. Wetland A is a large, Category 1 Wetland which is 1.6 million square feet in size, bordering two-thirds of the development to the east. It is connected to the large wetland/stream system of North Creek that provides important habitat for ESA-listed salmonid species and many other wildlife species. The wetland is located in an urban environment; therefore it is important as a sanctuary habitat. (Exhibit 23 at p. 16) Wetland A also provides many important water quality and flood control functions associated with North Creek. Due to its size, location, undisturbed conditions, structural diversity, and association with ESA-listed species, Wetland A scored moderate-high to high for most of its functions. Id. It is protected by a 75-foot regulatory buffer under the County’s Critical Areas Regulations (CAR), plus a 15-foot building setback. Given its connection to North Creek, Wetland A is also protected by the HMP Rule requirements that restrict effective impervious surfaces and disruption of the hyporheic zone within 300 feet of the ordinary high water mark of North Creek. This includes dewatering, interruption of groundwater exchange, and obstruction of recharge. Additionally, any stormwater that is discharged from the development cannot exceed State Water Quality Standards for Temperature (WAC 173-201A). This restriction applies to the entire project site, not just the area within 300 feet of the ordinary high water mark.

(d) Wetland B. Wetland B is a relatively small wetland located within the buffer area of Wetland A, and is hydrologically connected to Wetland A. A portion of the wetland and buffer have been impacted by the prior construction and maintenance of a trail that runs through the length of the wetland. The remaining area of the wetland is completely vegetated with a structurally and biologically diverse vegetation community. The wetland provides limited water quality and stormwater functions due to its small size. However, because it is located adjacent to Wetland A, it does help provide a continuous habitat corridor for wildlife. (Exhibit 23 at p. 16)

(e) Wetland Z. Wetland Z is a small, 636 square feet, Category 3 wetland protected by a 25 foot buffer. However, the County's regulations allow the filling of such wetlands where mitigation is offered. Wetland Z is proposed to be filled completely and is shown as Lots 82 and 83 on the plans (Exhibit 107). Mitigation is proposed in the form of additional buffer area.

(f) Heron Rookery. The Jay Group, Inc. met with staff from the Washington State Department of Fish and Wildlife (WDFW) on site to locate the presence of a heron colony. The purpose of the visit and subsequent discussions was to address species specific protection measures and to obtain management recommendations from WDFW for the heron. The North Creek Park Great Blue Heron Colony (#447) is located on the northern half of the subject property along the forested, eastern edge of the property as shown in Figure 8 of Exhibit 23 (p. 43).

The State's management recommendations are set forth in Appendix E to Exhibit 23. It provides that permanent protective buffers of at least 820-984 feet from the peripheries of the colony are suggested. The WDFW noted that there is an 800 foot separation between the colony and the proposed construction activities to extend 3rd Avenue SE. The PDS staff biologist stated that this should provide an adequate construction buffer, given the presence of Wetland A, its buffer and NGPA system that will preserve habitat, and the fact that the colony likely forages to the east.
Additionally, WDFW recommended that a 3,281-foot buffer be given to the colony during its nesting season (February 15 to July 31), to protect against activities such as logging, clearing, grading and construction. All but three lots (Lots 79, 92 & 93) are being proposed more than 800 feet away from the colony. PDS staff proposes that given this colony’s likely sensitivity to urban activities, clearing and construction should begin after April 1, after egg laying and early brood rearing, which are the most sensitive times in the heron nesting cycle. *Id.* This prohibition on construction activities during the colony’s sensitive nesting system will avoid such impacts. A condition of development approval restricting logging, clearing, grading or construction of the plat between February 15 and April 1 has been included and accepted by the Applicant.

**Protection and Mitigation of Critical Areas.** The Applicant is avoiding most, but not all, impacts to the critical areas. Impacts to critical areas are allowed pursuant to SCC 30.62.350 for utility lines. A new sewer line is proposed which will impact the western buffer area for Wetland A, a portion of Wetland A, itself, Stream C and Stream D. Stream C will require a new, upgraded culvert, and Stream D will be impacted in an area that is currently undisturbed. Direct impacts to North Creek will be avoided by boring beneath the stream from the edge of the ordinary high water marks.

As a result of the sewer line impacts to Stream C (2,440 square feet of impacts), and impacts to Wetland Z (filling 636 square feet), the Applicant is proposing to preserve 15,988 square feet of permanent vegetative buffer. For the temporary construction impacts associated with the new sewer line, the Applicant will restore 48,456 square feet of wetland area in Wetland A, and restore 3,924 square feet of buffer area by planting native vegetation, trees and shrubs. The restoration project area will be monitored for a period of three years and subject to inspections, reporting, a performance bond of approximately $89,000 and a contingency plan.

A **Critical Areas Report, Habitat Management Plan and Detailed Mitigation Plan** was prepared for the proposed development by the Jay Group. (Exhibit 23) The original plan was submitted on June 8, 2006 and was revised on February 21, 2007. The original plan was revised in five areas to: (1) Capture additional temporary impacts associated with the installation of the proposed sewer line caused by the depth of boring and slopes in some areas along the sewer easement; (2) Include information gained from on-site meetings with WDFW relating to protection and mitigation measures for a heron rookery near the site; (3) Revise the mitigation report and site plans to consistently show 15 feet building setback limits from the proposed additional NGPA located near Lots 92 and 93; (4) Revise the mitigation report to correctly label the lot numbers (1 through 96); and (5) Identify temporary impacts associated with the stormwater outfall from Tract 995 and propose restoration measures for those impacts.

**Geotechnical Requirements – (SCC 30.62.240)** In addition to other work done to identify and assess critical areas, subsurface conditions of the site were explored by Cornerstone Geotechnical, Inc. on December 21 and 22, 2005 and a report meeting the requirements of SCC 30.62.240 was prepared. The consultant excavated 11 test pits using a track hoe. Three more test pits were dug using a hand auger in a follow up visit on January 3, 2006 in an area that the track hoe could not access. (Exhibit 19) The geotechnical consultant determined that the site contained a mixture of soil types, depending upon the location examined.

Soils included surficial topsoil about one foot in depth, with underlying loose to medium silty sand with varying amounts of gravel, one area of fill material presumed to have been deposited with the construction of John Bailey Road, and advance outwash and glacial drift soils. Slight to heavy groundwater was encountered in 6 of 14 test pits at depth below 2.3 feet. Seepage was found primarily in the northern portions of the site where silty soils exist. The consultant concluded that groundwater levels would rise in wetter times of the year, resulting in perched water pockets on top of the till layer of soil. The report notes that they expect that a regional
groundwater table exists within the sandy outwash soils they observed in some areas of the site, which likely recharges the wetlands on site. (Exhibit 19) Landslide, erosion and seismic hazards were evaluated. Id.

The consultant concluded that the site is compatible with the planned development and that the underlying medium dense to very dense glacial deposits are capable of supporting the planned structures and pavements. Id. The geotechnical report provides specific management recommendations for site preparation, grading, foundations, and for managing stormwater drainage on the site. (Exhibit 19 at pp. 7-16) The geotechnical consultant also reviewed the site plan and recommended changes to proposed cuts to lots east of Lot 10 from 1:1 to 2:1 slopes. These management recommendations will be considered during the construction plan review phase by PDS.

Patrick McGraner, Sr. Environmental Planner, PDS, made two site visits on October 9, 2007 and on February 11, 2008. He verified the same critical area boundaries and site conditions as recorded by Mr. Tran, including the presence of steep slopes in some areas.

During the site visit with staff from the WDFW on October 9, 2007, it was determined that the watercourse on the west side of 3rd Avenue SE/Bailey Road is considered to be a roadside ditch under the County’s regulations, but will be regulated by WDFW as a stream (waters of the State) for their regulatory purposes.4

PDS biological staff visited the subject property three times to determine the accuracy of the critical area locations and to meet with field representatives from two state agencies, WDFW and DOE as well as the Applicants and the Applicants’ biological consultants to discuss and address concerns that have been raised by the agencies as well as neighbors and citizens.

The Applicant has located the critical areas in the field as required and has applied the appropriate buffers per SCC 30.62.300 and .310. The critical areas and buffers are proposed to be permanently protected as NGPAs per SCC 30.62.320, which information is adequately shown on the site plans. A Habitat Management Plan was submitted, reviewed and approved and found to be consistent with the requirements of SCC 30.62.100 and .110 and per the Snohomish County Salmonid Habitat Management Plan Administrative Rule. The Applicant contacted WDFW and received guidance with regards to the location of the heron rookery near the proposed development and a timing restriction will be applied as a condition of approval in compliance with SCC 30.62.340(d) and SCC 30.62.345(2)(c). The Applicant supplied a Critical Area Study and Mitigation Plan to address the proposed impacts primarily from the installation of the stormwater outfall spreader trench and the sanitary sewer line.

In summary, the Hearing Examiner finds that an evaluation of the information submitted in the revised application, Critical Areas Study and Habitat Management Plan and Detailed Mitigation Plan (Exhibit 23), Geotechnical Report (Exhibit 19) and three on-site investigations have resulted in a determination by PDS that the application conforms to the requirements of Chapter 30.62 SCC (CAR). Additionally, the Hearing Examiner finds that the Geotechnical Report (Exhibit 19) demonstrates that the subject property is compatible with the planned development,

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4 The Applicant has acknowledged that they are also required to comply with the requirements of the US Army Corps of Engineers' Nationwide Permit No. 39 under Section 404 of the Clean Water Act; the Washington State Department of Ecology's Section 401 Water Quality Certification requirements under the Clean Water Act; the National Marine Fisheries Service and US Fish and Wildlife Service's Section 7 ESA Consultation requirements, the Washington State Department of Fish and Wildlife's Hydraulic Permit Approval process, and possibly the Washington State Department of Natural Resource's Forest Practice Permit requirements. (Exhibit 23)
subject to conformance with certain management recommendations related to site construction and the installation of drainage systems.

18. **Utilities.**

   A. **Water and Sewer.** Potable water and sewer will be supplied by the Alderwood Water and Wastewater District. A Preliminary Certificate of Water and Sewer Availability was received on May 7, 2007. (Exhibit 65) The Snohomish Health District (SHD) recommended approval of the preliminary plat on May 9, 2008. (Exhibit 36)

   B. **Electricity.** The Snohomish County PUD No. 1 notified the County on June 16, 2006, that they can provide electrical service to the development. (Exhibit 68)

   C. **Fire.** The Fire Marshall’s Office reviewed the proposed plat application and found that it met applicable design requirements of the International Fire Code (Chapter 30.53A SCC). (Exhibit 75)

19. **Zoning (Chapter 30.2 SCC)**

   a. **General Zoning Requirements.** This project meets zoning code requirements for lot size, including lot size averaging provisions, bulk regulations and other zoning code requirements.

   b. **Lot Size Averaging.** The proposal has been evaluated for compliance with the lot size averaging (LSA) provisions of SCC 30.23.210, which provide that the minimum lot area of the applicable zone is deemed to have been met if the area in lots, plus critical areas and their buffers and areas designated as open space or recreational uses, if any, divided by the number of lots proposed, is not less than the minimum lot area requirement. In no case shall the density achieved be greater than the gross site area divided by the underlying zoning.

   In determining the appropriate calculation, lots may not be less than 3,000 square feet in area, and any lot having an area less than the minimum zoning requirement must provide a minimum lot width of not less than 40 feet, and right-of-way setbacks of 15 feet, except that garages must be setback 18 feet from the right-of-way (except alleys) and corner lots may reduce one right-of-way setback to no less than 10 feet.

   Lot coverage for this proposed subdivision is a maximum of 55%. The LSA calculation is as follows:

   
   \[
   \text{Area in Lots (51,114 s.f.) + Critical Areas and Buffers (1,649,650 s.f.) + Open Space = (2,160,792 s.f.) ÷ 96 \text{ lots proposed} = 22,508 \text{ square feet}}
   \]

   (Exhibit 75). No lot is less than 3,000 square feet, and all lots comply with minimum lot width and setback requirements. Roadways and surface detention/retention facilities are not counted toward the LSA calculations. PDS has concluded that the proposal is consistent with the LSA provisions of SCC 30.23.210.

20. **Subdivision Code (Chapter 30.41A SCC)**

   The proposed plat meets the requirements of SCC 30.41A.100. As conditioned, the plat will meet all SCC 30.41A.210 design standards for roads. In addition, the subdivision meets all of the County’s transportation and road regulations and design standards. The Examiner finds that all lots as proposed are outside of all regulated flood hazard areas and that none of the lots
are proposed in areas that are subject to flood, inundation or swamp conditions. (SCC 30.41A.110) The Fire Marshall has determined that the project will meet the County’s fire regulations. Accordingly, the Hearing Examiner finds that the proposed plat, as conditioned, also meets the general requirements under SCC 30.41A.100 with respect to health, safety and general welfare of the community.

21. **Plats – Subdivisions – Dedications (Chapter 58.17 RCW)**

The subdivision has been reviewed for conformance with criteria established by RCW 58.17.100, .110, .120, and .195. The criteria require that the plat conform with applicable zoning ordinances and comprehensive plans, and make appropriate provisions for the public health, safety and general welfare, for open spaces, drainage ways, streets or roads, alleys, other public ways, transit stops, potable water supplies, sanitary wastes, parks and recreation, playgrounds, schools and school grounds, and other planning features including safe pedestrian facilities for students.

The proposed subdivision conforms generally with the development regulations of the Unified Development Code (UDC). There is open space provided within the subdivision in the form of wetland and buffer areas. The single-family homes within the subdivision will be in character with other homes in the urban area. Provisions for adequate drainage have been made in the conceptual plat design which indicates that the final design can conform to Chapter 30.63A SCC and Chapter 30.63C SCC. The plat, as conditioned, will conform to Chapters 30.66A, 30.66B and 30.66C SCC, satisfying County requirements with respect to parks and recreation, traffic, roads and walkway design standards, and school mitigation. Adequate drinking water and sewage disposal will be provided by the Alderwood Water and Wastewater District.

22. Any Finding of Fact in this Decision, which should be deemed a Conclusion of Law, is hereby adopted as such.

**CONCLUSIONS OF LAW**

A. **CONCURRENCY APPEAL**

1. According to SCC 30.66B.185, a concurrency determination by the DPW creates a rebuttable presumption of validity. The Hearing Examiner may vacate a concurrency determination upon a showing that the determination is clearly erroneous. The DPW’s professional judgment and expertise shall be entitled to substantial weight. The party challenging the concurrency determination shall have the burden of proof. *Id.*

2. The development was found to be concurrent under SCC 30.66B.160(2)(a) on July 27, 2006. (Exhibits 17 and 156) The concurrency certificate expires six years after the determination is made, on July 27, 2012.

3. GNG presented no evidence to refute the validity of the concurrency determination. Additionally, GNG abandoned the concurrency appeal, as evidenced by their failure to address the appeal in their opening brief and based on statements made during the open record hearing.

4. The Hearing Examiner concludes that the concurrency appeal should be dismissed.
B. SEPA APPEAL

5. The Examiner has original jurisdiction over subdivision applications pursuant to Chapter 30.72 SCC and Chapter 2.02 SCC.

6. The burden of proof is on the Appellants to show by substantial evidence that the SEPA Responsible Official's failed to consider probable, significant adverse environmental impacts. *Indian Trail Property Owner's Assn. v. City of Spokane*, 76 Wn. App. 430 441, 886 P.2d 209 (1994).

7. PDS conducts a threshold process to decide whether an action significantly and adversely affects the quality of the environment. (WAC 197-11-310 through -335). PDS considers mitigation measures the Applicant will implement and any such measures required by regulations, comprehensive plans, or other existing environmental rules or laws. (WAC 197-11-330(1)(c)). *Chuckanut Conservancy v. Dept of Natural Resources*, 156 Wn. App. 274, 232 P.3d 1154 (2010). If such mitigation would allow it to issue a DNS, and the proposal is clarified, changed or conditions to include those measures, then PDS is required to issue a DNS. (WAC 197-11-350(3)).

8. In the present case, the Hearing Examiner concludes that PDS considered the application and all plans, studies and reports submitted by the Applicant in support of the project, as well as agency comments received after circulation of the SEPA Checklist, on-site investigations by staff, and voluntary offers of mitigation proposed by the Applicant designed "...to reduce the overall level of impact below that which is probable, significant and adverse." (Exhibit 28)

9. On review, the Hearing Examiner must give substantial weight to the threshold determination of PDS. See, SCC 30.61.310(3); RCW 43.21C.090; *King County v. CPSGMHB*, 91 Wn. App 1, 30, 951 P.2d 1151 (1998). Here, the Examiner does not substitute her judgment for that of PDS, but may find the decision clearly erroneous only when she is left with the definite and firm conviction that a mistake has been committed. SCC 30.61.310(1); *Cougar Mountain Assocs. v. King County*, 111 Wn.2d 742, 747, 765 P.2d 264 (1988). However, PDS must make a showing that "environmental factors were considered in a manner sufficient to amount to prima facie compliance with the procedural requirements of SEPA." *Juanita Bay Valley Cmty. Ass'n v. City of Kirkland*, 9 Wn. App. 59, 73, 510 P.2d 1140 (1973).

10. The Appellants request that the Hearing Examiner reverse the threshold determination of DNS and require issuance of a DS, thereby requiring the preparation of an Environmental Impact Statement (EIS). In the alternative, the Appellants request that the Examiner utilize SEPA substantive authority to impose mitigating conditions to increase critical area buffers and improve traffic conditions on roads in the vicinity.

11. Bare assertions of environmental impact without corroborating evidence in the SEPA record will not support an exercise of SEPA substantive authority. (See, generally, *Levine v. Jefferson County*, 116 Wn.2d 575, 807 P.2d 363 (1991). In support of their claims, the Appellants submitted the testimony of Becky Johnson and Diane Riley, along with their legal brief (Exhibit 108), and numerous documents into the record including Exhibits 1, 3 (SEPA Affidavit with Exhibits, including a video at Exhibit 3-V), 4, 53, 54, 55, 109-1, 109-2 and 109-3, 109-4, 168, 170, 171, 172, 173 and 176. Additionally, the record contains letters from 93 citizens, many of whom are part of the Appellants' group adding their comments and concerns about the SEPA threshold determination. Finally, the Appellants also rely on the remaining documents in the record relating to the preliminary plat application.
12. Although it is quite understandable that local citizens find it hard to believe that a large subdivision adjacent to North Creek could be declared to have "no significant adverse environmental impact" and does not require an EIS, the law is on the Applicant's side. Prior to the 1990's, this appeal might have had a different result based on the Norway Hill decision. In Norway Hill Pres. & Prot. Ass'n v. King County Council, 87 Wn.2d 267 , 275, 552 P.2d 674 (1976), King County's planning department issued a DNS for a large subdivision consisting of 198 single-family dwellings on a heavily wooded 52-acre site outside the Bothell city limits. Id. at 269. King County planners issued a DNS and recommended approval of the project, subject to certain conditions. After public hearings and several appeals to the King County Council resulting in remands for more study, the Council approved the plat. Id. at 270. On appeal, the Supreme Court found that the project would transform a heavily wooded area into a large subdivision, and held that an EIS was required because "on its face the Norway Vista project will significantly affect the environment." Id. at 278. Although the Court acknowledged that the council had extensively considered the matter and issued its approval without an EIS only after imposing conditions designed to protect the environment, this did not change the result. Nor did the project's consistency with the comprehensive plan. Moss v. City of Bellingham, 109 Wn. App. 6 , 21, 31 P.3d 703 (2001).

13. This 1976 decision announced a rule that was upheld for nearly twenty years, until it was overruled by subsequent legislative enactments. The enactments were known as the 1990 Growth Management Act (GMA) (Ch. 36.70A RCW) and the 1995 Integration of Growth Management Planning and Environmental Review Act. The changes they brought to SEPA were part of a set of recommendations made by the Governor's Task Force on Regulatory Reform.

14. As a result, SEPA and GMA-based permit review is now an integrated, streamlined system, designed to "...avoid duplicative environmental analysis and substantive mitigation of development projects by assigning SEPA a secondary role to (1) more comprehensive environmental analysis in [GMA Comprehensive] plans and their programmatic environmental impact statements and (2) systematic mitigation of adverse environmental impacts through local development regulations and other local, state, and federal environmental laws." [Richard L. Settle, The Washington State Environmental Policy Act: A Legal and Policy Analysis, App. E, at 505 (1995).] In particular, the Integration Act substantially streamlined the threshold determination process for cities and counties planning under GMA. [Moss v. City of Bellingham, 109 Wn. App. 6, 16, 31 P.3d 703 (2001). (See, RCW 43.21C.240; WAC 197-11-158).] It authorized the SEPA responsible official to rely on existing plans, laws and regulations in meeting SEPA requirements.

15. The County is now authorized to determine that its development regulations and GMA Comprehensive Plan policies provide adequate analysis of, and mitigation for, some or all of the specific adverse environmental impacts of the project for purposes of SEPA compliance. Id. (See also, WAC 197-11-158) The County has exercised this authority with regard to many impacts of development. See, for example:

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6 ESHB 1724, enacted as Chapter 347, Laws of Washington (1995); (hereinafter, the "Integration Act").
• SCC 30.62.030(1) (2003 Critical Areas Regulations):

Critical area protective measures required by this chapter shall also constitute adequate mitigation of adverse or significant adverse environmental impacts on critical areas for purposes of [SEPA] chapter 30.61 SCC.

• SCC 30.62A.030 (2007 Critical Areas Regulations):

Critical area protective measures required by this chapter shall also constitute adequate mitigation of adverse or significant adverse environmental impacts on wetlands, fish and wildlife habitat conservation areas and their buffers pursuant to chapter 30.61 SCC, to the extent permitted by RCW 43.21C.240.

• SCC 30.63A.060 (Drainage Code):

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

• SCC 30.62B.030 (Geologically Hazardous Areas):

Critical area protective measures required by this chapter shall also constitute adequate mitigation of adverse or significant adverse environmental impacts on geologically hazardous areas pursuant to chapter 30.61 SCC, to the extent permitted by RCW 43.21C.240

• SCC 30.62C.030 (Critical Aquifer Recharge Areas):

Critical aquifer recharge area protective measures required by this chapter shall also constitute adequate mitigation of adverse or significant adverse environmental impacts pursuant to chapter 30.61 SCC, to the extent permitted by RCW 43.21C.240.

• SCC 30.66B.010 (Concurrency and Road Impact Mitigation):

(1) The requirements of this chapter, together with the comprehensive plan, Title 13 SCC, and other development regulations and policies that may be adopted, constitute the basis for review of development and the imposition of mitigation requirements due to the impacts of development on the transportation system.

(2) Mitigation measures required by this chapter shall constitute adequate mitigation of adverse or significant adverse environmental impacts on the road system for the purposes of chapter 30.61 SCC to the extent that the director
determines the specific impacts of the development are adequately addressed by this title in accordance with chapter 30.61 SCC.

(3) The provisions of this chapter do not limit the ability of the county to impose mitigation requirements for the direct impacts of development on state highways, city streets, or other another county's roads pursuant to SCC 30.66B.710 and .720

16. While simplifying the project review process, WAC 197-11-158 maintains SEPA's function as an environmental full disclosure law by directing decision-makers to decide whether the impacts have fully or partially been addressed or mitigated. 7 Id. According to WAC 197-11-158(1), when all of a project's impacts are addressed by other applicable laws, and no conditions will be required under SEPA, the following statement must be placed in the threshold determination:

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(2)(d).

17. Here, GNG argues that neither the Threshold Determination DNS, nor the Addendum to the DNS, contain the required statement under WAC 197-11-158(1). (Exhibits 28 and 32) The Hearing Examiner concludes that the Appellants are correct on this point. PDS erred procedurally in failing to place this statement in its Threshold Determination.

18. GNG also argues that PDS substantively erred in failing to make an individualized determination of the probable environmental impacts associated with the Gracie's Place development, as required by SEPA. (Appellants' Brief at 6). The Hearing Examiner disagrees. First, GNG's argument that PDS was required to make an individualized SEPA determination ignores the central theme of the legislative findings announced in the adoption of the 1995 Integration Act. (Ch. 347 Section 202(1)-(3), Laws of 1995; RCW 43.21C.240):

GMA local governments clearly are authorized to dispense with both analysis and mitigation of specific adverse environmental impacts of a proposed project under SEPA, if adequate analysis and mitigation of such impacts is provided through GMA plans and development regulations or other applicable local, state or federal environmental laws.” (Emphasis in the original), Richard L. Settle. The Washington State Environmental Policy Act: A Legal and Policy Analysis, App. E, at p. E-12 (2002).

The Legislature created a new “functional equivalence” rule, whereby cities and counties planning under GMA are no longer required to identify each adverse environmental impact and specify and incorporate by reference each regulation they rely upon to mitigation such impacts. As noted above in Conclusion of Law No. 15, Snohomish County has identified regulations that meet the functional equivalence rule, for which no further SEPA individualized determination is required. These include regulations governing development impacts related to critical areas, stormwater drainage, geologically hazardous areas, land disturbing activities, shorelines, flood

7 In addition, under RCW 36.70B.040, local governments must determine a proposed project's consistency with its development regulations or comprehensive plan during project review by considering the type of land use, level of development, infrastructure, and development characteristics. [Moss, supra, at 18.]
hazard areas, traffic concurrency and roads, critical aquifer recharge areas. Where a project meets the analysis and mitigation requirements of each of those regulations, no further SEPA analysis or mitigation is required, and issuance of a DNS is appropriate.

As noted by Settle, "The authorization to use environmental analysis prepared under laws other than SEPA or NEPA without incorporation by reference into a formal SEPA document is a major change under SEPA law." (Id. at p. E-13.) Accordingly, the Hearing Examiner concludes that PDS did not err in issuing the Threshold Determination without specific identification of impacts and mitigation for those impacts addressed by functionally equivalent regulations set forth in Title 30 SCC.

19. Second, the Hearing Examiner concludes that GNG has failed to meet its burden of proof relative to its substantive claims that the Responsible Official lacked adequate information. (Exhibit 1) The record indicates that the project received a great deal of review and was based upon a significant amount of information. In particular, PDS based its DNS decision on the Environmental Checklist (Exhibit 8), and all of the other regulatory reviews that occurred pursuant to Title 30 SCC applicable to the subdivision. (See, Exhibits 7 through 75) PDS also gathered extensive comments from agencies and the public, required site investigations, met with WDFW on-site, and imposed additional mitigation measures on the project before finally recommending approval. (Exhibit 75) The Hearing Examiner concludes that GNG has not demonstrated that the Responsible Official’s threshold determination was clearly erroneous.

21. As to GNG’s second allegation, raising specific substantive complaints of significant adverse environmental impacts requiring an EIS, they have failed to cite any facts or evidence in the record demonstrating that the project as mitigated, will cause significant environmental impacts warranting an EIS, nor did they call any expert witnesses at the appeal hearing to support their claim. Instead, they provide specific areas of concern in their SEPA Affidavit and claim that the project is "unmitigated." (See, Exhibit 3; Appellants’ Brief at 5) This ignores the plain evidence in the record demonstrating that as designed, the project will avoid, mitigate and/or restore impacts associated with the critical areas on-site. Additionally, the argument fails to recognize the functional equivalency rule established by the 1995 Integration Act, which allows the County Council to establish levels of protection and mitigation which are deemed to suffice for purposes of mitigating significant adverse environmental impacts under SEPA.6

22. Related to its second claim, GNG raised five specific issues warranting analysis. The Examiner addresses them each in turn.

(a) Cumulative Impact claims. GNG argues that the Responsible Official failed to consider cumulative impacts and the interdependency of other developments (Berry Place, Gracie’s Place 2, Normandie Place, Nichols Short Plat and McDaniel Addition), which collectively will add 124 additional residential lots and accompanying urban infrastructure in the immediate vicinity of the proposed Gracie’s Place 96-lot development. (Exhibits 1, 3, 53, 54, 55, 107, 108, and 109-3) At the time of the threshold determination, these plats were proposed for development. Today, all parties acknowledged that only Gracie's Place 2 (renamed as the “North Creek Preserve”) is moving forward for development approval. However, the Examiner reviews the

6 "Critical area protective measures required by this chapter shall also constitute adequate mitigation of adverse or significant adverse environmental impacts on critical areas for purposes of chapter 30.61 SCC." SCC 30.62.030(1)
threshold determination based upon the information available to the Responsible Official on November 20, 2007.

The question of whether cumulative impacts must be analyzed in making a threshold determination is a question of law. In making a threshold determination, PDS is required to examine at least two relevant factors: "(1) the extent to which the action will cause adverse environmental effects in excess of those created by existing uses in the area, and (2) the absolute quantitative adverse environmental effects of the action itself, including the cumulative harm that results from its contribution to existing adverse conditions or uses in the affected area." Chuckanut Conservancy v. Dep't of Natural Res., 156 Wn. App. 275, 285 (2010), quoting Norway Hill, 87 Wn.2d at 277 (quoting Narrowsview Pres. Ass'n v. City of Tacoma, 84 Wn.2d 416, 423, 526 P.2d 897 (1974)). However, cumulative impact analysis is not always required. The Court of Appeals held in Boehm v. City of Vancouver, 111 Wn. App. 711, 720, (2002):

As a general proposition, the nature of cumulative impacts is prospective and not retrospective. A cumulative impact analysis need only occur when there is some evidence that the project under review will facilitate future action that will result in additional impacts. (Emphasis Added); Tucker v. Columbia River Gorge Comm'n, 73 Wn. App. 74, 81-83, 867 P.2d 686 (1994). We also hold that the cumulative impact argument must fail unless [the Appellant] can demonstrate that the project is dependent on subsequent proposed development. In SEAPC v. Cammack II Orchards, 49 Wn. App. 609, 744 P.2d 1101 (1987), the plaintiffs challenged the approval of a subdivision, arguing that "the County erred in refusing to consider the development’s future cumulative impact beyond the . . . subdivision." SEAPC, 49 Wn. App. at 614. Division Three of this court excused the county’s refusal to consider future cumulative impacts:

An EIS need not cover subsequent phases if the initial phase under construction is substantially independent of the subsequent . . . phases, and the project would be constructed without regard to future developments. In the instant case, although future development was not totally ruled out, it cannot be said the . . . subdivision was dependent upon subsequent proposed development. SEAPC, 49 Wn. App. at 614-15 (citation omitted).

(Emphasis added); Boehm at 720. In the present case, GNG argues that the extension of sewer to the Gracie's Place subdivision will serve as a catalyst for more development actions in the area. (Appellants' Brief at 2-3). However, they present no evidence that the sewer extension will have such a catalytic effect other than speculation. PDS responds that it was policy decisions of the County Council in adopting the Comprehensive Plan, designating the land inside the UGA, and adopting urban zoning for the area that facilitates future development, not the extension of sewer. (Supplemental PDS Staff Report at 5-6). The Hearing Examiner agrees. Although the Examiner was deeply moved by the 93 citizen letters and public testimony presented at the public hearing decrying the loss of the forested habitat on which this project is proposed, the decision as to whether the subject property should have been designated and zoned for something other than urban development (perhaps placed in long-term conservancy or made part of North Creek Park), was a policy decision for the County Council at the time of adoption of its GMA Comprehensive Plan. Those issues are beyond the purview of this administrative appeal.
Additionally, GNG has failed to present sufficient evidence that the Gracie's Place development is dependent upon other developments in the surrounding area, which would trigger the requirement for cumulative impacts analysis. PDS notes that development applications for Berry’s Place, Nichols’ Short Plat, Normandie Place and McDaniel Addition have all expired. Only the development of the North Creek Preserve (formerly Gracie’s Place 2) is pending. The record clearly demonstrates that Gracie’s Place is not dependent on the development of any of the expired projects or the North Creek Preserve for its approval. The projects are sufficiently independent that each can stand on its own for purposes of project review and approval. Accordingly, the fact that there were/are other projects adjacent to Gracie’s Place does not trigger a cumulative impacts analysis. *Boehm* at 720.

(b) **Critical Areas Claims.** GNG raises claims related to streams, wetlands, steep slopes and drainage impacts associated with the proposed subdivision.

i. **Streams.** With regard to streams, GNG claims that an EIS is necessary in light of the project’s proximity to streams (North Creek), wetlands and associated buffers of high environmental value. They argue that the proposed mitigation buffers are inadequate.

ii. **Wetland.** As to wetlands, GNG argues that the information provided by the Applicant as to Wetland A (which is directly adjacent to North Creek) and Wetlands B and Z does not ensure adequate protection to the wetlands. Instead, they argue that the information “directly links the project to critical area impacts.” (Exhibit 1) They argue that the intensity of the impacts is evident from an observation of the site plan, and cumulative intensity of impacts is evident when considering Gracie’s 2 and Nichols Short Plat development proposals. Finally, GNG argues that the Jay Group incorrectly asserts that stream and wetland impacts from the sewer installation will be temporary; they believe the impacts will be permanent.

iii. **Steep Slope and Drainage Impact Claims.** GNG also argues that steep slopes exist on the site over 33% in grade and will be disturbed. They assert that the SEPA Responsible Official did not have adequate information necessary to assess certain probable environmental impacts of the project, specifically, how much of the site is steeply sloped, where the slopes are in relation to the proposed construction activity, and where slopes are in relation to critical areas. GNG asserts that the developer proposes to make significant cuts and fills into the hills on site which exceed the recommendation of the Applicant’s own engineers. Lastly, GNG argues that the Geotechnical Report is inadequate.

As noted above, based on the functional equivalency rule, RCW 43.21C.240 no longer requires an EIS where the impacts to streams are analyzed and mitigated according to the County’s development regulations. Here, SCC 30.62.030(1) clearly states that “[c]ritical area protective measures required by this chapter shall also constitute adequate mitigation of adverse or significant adverse environmental impacts on critical areas for purposes of chapter 30.61 SCC.”

As set forth in Finding of Fact No. 17, above, PDS had a significant amount of information about the status of the critical areas impacted by this development on which to determine whether the Applicant’s proposals to protect, avoid, mitigate and/or restore impacts to specific critical areas was in accordance with Chapter 30.62 SCC. The Applicant performed several site visits and prepared a *Critical Areas Report, Habitat Management Plan and Detailed Mitigation Plan* for Gracie’s Place (“CAR Plan”) (Exhibit 23). The CAR Plan provides substantial evidence as to the habitat conditions in existence on the subject property and in the adjacent critical areas of Wetland A and North Creek, as well as the North Creek Park Blue Heron Colony.
The Plan provides a detailed assessment of the habitat functions and values of these critical areas as they relate to ESA-listed salmonids, other fish species and wildlife, including the Heron colony. The original critical area delineations and habitat assessments were verified by two different consulting firms, and two separate PDS Biologists after review of the documents and site visits. The location of the heron colony was confirmed by staff from the WDFW after a site visit. A follow-up study performed by Habitat Ecology and Design (formerly The Jay Group, Inc.) on March 6, 2012, after the threshold determination, both confirms the original habitat assessments and demonstrates that impacts to the wetlands from the construction of a sewer line have been further reduced and avoided due to a rerouting of the proposed line away from the wetlands. (Exhibit 121)

In support of its SEPA appeal, GNG submitted photographs, videos and documents (maps, correspondence, DNR permits, and the like), along with personal testimony of its members, documenting the beauty and extent of the largely undisturbed habitat that is found in the area of the subject property and surrounding areas, including North Creek Park. (See, e.g., Exhibits 3, 53, and 54) The information GNG presented is consistent with, and adds richness to, the data collected and documented by the Applicant in its CAR Plan, and relied upon by the Responsible Official. The evidence presented by GNG, however, does not demonstrate that important information about the status of the critical areas was overlooked, omitted or ignored by the Applicant or PDS.

In particular, GNG’s consulting expert, Wayne Daley,9 reviewed the development and concluded that the overall impacts of the project “may be partially compensated for with native vegetation areas that will be established as no touch zones for the individual property owners. A final and critical element is the requirement of the property owners is [sic] prohibiting the use of lawn or yard chemicals (non-organic fertilizer and pesticides).” (Exhibit 55) Although Mr. Daley concludes that “[t]his development will have an impact on the environmental function of the area,” he does not state that the impact will be a significant adverse environmental impact as defined by the State Environmental Policy Act. (RCW 43.21C.0240; WAC 197-11-158) He concludes that the “proposed mitigation will not compensate for the loss of habitat in the areas outside of the existing parks and conservancy areas.”

GNG argues that the protection afforded by the County’s development regulations is not adequate, requiring an EIS and exercise of SEPA substantive authority to impose more protective conditions. However, the County has no such authority as to critical areas. Based on the Integration Act requirements, SCC 30.61.200 provides that if, during project review the County determines under RCW 43.21C.240 that the County’s development regulations provide adequate analysis of, and mitigation for, specific adverse environmental impacts of the project action, the County shall not impose additional mitigation under SEPA. (See, SCC 30.61.200(6)) Here, the Council saw fit to adopt SCC 30.62.030(1) which provides, “[c]ritical area protective measures required by this chapter shall also constitute adequate mitigation of adverse or significant adverse environmental impacts on critical areas for purposes of chapter 30.61 SCC.” Accordingly, once compliance with Ch. 30.61 SCC is achieved, no further mitigation can be imposed using SEPA’s substantive authority.

Even if this were not the case, GNG has not met its burden of proof to show that the County’s critical areas regulations are inadequate. In the present case, the streams and wetlands are protected by enhanced regulatory buffers and stormwater restrictions due to the presence of ESA-listed salmonids, that were adopted using “best available science.” Special requirements

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9 Mr. Daley did not appear and testify at the open record hearing and his report and conclusions were not subjected to cross-examination.
have been put into place to protect the Heron colony from development activity during sensitive breeding and roosting times. GNG offered no specific evidence demonstrating that such protections are inadequate based on best available science. Furthermore, GNG did not address the Applicant’s claims that its vested rights prevent the imposition of regulations that were not in effect on the date it submitted a complete application.

(c) **Traffic claims.** GNG alleges that the Applicant’s analysis of traffic impacts was inadequate when considered independently or as part of the cumulative impacts of the 220 new lots proposed in the vicinity. The Hearing Examiner has already addressed the issue of cumulative impacts. GNG presents independent traffic analysis from traffic consultant Ross Tilghman, Tilghman Group, in support of its claim that the Traffic Report was inadequate. (Exhibit 172) However, Mr. Tilghman did not appear at the public hearing and was not available for cross-examination.

As shown in Finding of Fact No. 13, the review of traffic concurrency and road impacts was extensively studied for compliance with Chapter 30.66B SCC. Ann Goetz and Mark Brown, traffic engineers from PDS testified at the public hearing, along with Edward Koltonowski, Senior Traffic Engineer, Gibson Traffic Consultants. They discussed the requirements of Chapter 30.66B SCC, as it relates to off-site traffic improvements and the required conditions recommended for imposition on the proposed Gracie’s Place subdivision. Mr. Koltonowski provided specific detail as to how concurrency analysis works and demonstrated that the subdivision can meet the requirements of the County’s regulations. (See also, Exhibits 17 and 156) Although numerous citizens testified and wrote letters as to their concerns about changes to traffic in the area, the Applicant demonstrated and (PDS staff confirmed) that the traffic impacts have been adequately disclosed and mitigated by the requirements of the County Code.

Mr. Tilghman’s report does not address compliance with Chapter 30.66B SCC; instead he offers the following opinion:

Concurrence analysis does not provide a substitute for SEPA analysis since it does not address the impact that a project has on non-arterial streets and on individual intersections, and it does not evaluate the delays that may occur on cross-streets. The project’s traffic studies do not satisfy SEPA requirements to identify probable adverse impacts to streets and intersections used by project traffic. (Exhibit 172 at 3).

Mr. Tilghman’s conclusion is in stark contrast to the evidence in the record. The facts reveal that the project was reviewed for its impact on sight distance, the type and nature of roads that should serve the development, both internally and externally, the development’s impacts as to traffic counts and speeds on 3rd Avenue SE, Baldwin Road, Pippin Road, Bellflower and South Bellflower Roads, as well as access and circulation requirements throughout the area, the extent of required improvements, the need for additional right-of-way to widen roads, the provision frontage improvements, and the availability of transit, all based on current and projected conditions. (Exhibits 17, 20, 21, 75 and 156; Testimony of Ann Goetz, Mark Brown, Edward Koltonowski) Contrary to Mr. Tilghman’s assertion as to the need for further SEPA analysis, Chapter 30.66B SCC is one of the regulations that have been identified as a functionally equivalent regulation for purposes of SEPA review. (See, Finding of Fact No. 12; SCC 30.66B.010; Exhibit 118) Accordingly, no further SEPA analysis is required.
(d) **Steep Slope and Drainage Impact Claims.**

GNG asserts that steep slopes exist on the site over 33% in grade and will be disturbed. They argue that the SEPA Responsible Official did not have adequate information necessary to assess certain probable environmental impacts of the project, specifically, how much of the site is steeply sloped, where the slopes are in relation to the proposed construction activity, and where slopes are in relation to critical areas. They assert that the Applicant proposes to make significant cuts and fills into the hills on site which exceed the recommendation of the Applicant’s own engineers. Finally, they argue that the Geotechnical Report is inadequate. (Exhibit 1)

The Hearing Examiner has examined the site plan (Exhibit 24A dated June 8, 2007, Exhibit 25)\(^{10}\) and Geotechnical Report (Exhibit 19) and concludes that there is substantial evidence in the record defining where the slopes are on the subject property in relation to construction activities and critical areas. In particular, the clearing limits are specifically drawn on the site plan, in relation to slopes, critical areas and drainage patterns. (Sheets C4 and C5, Exhibit 24A).

Additionally, the Hearing Examiner concludes that the Geotechnical Report adequately describes the soil types present on site and the erosion hazard areas based on the Soil Conservation Service’s (SCS) *Soil Survey of Snohomish County, Washington*. Unit 3 (the western region of the site), has 15-25 percent slopes and is classified as Alderwood gravelly sandy loam. (Exhibit 19) The Report classified the area as “till” which is consistent with the SCS determination. This portion of the site has a “moderate” erosion hazard. Additionally, Unit 39 (the eastern region of the site in the area of the wetland), where there is little to no slope present, is classified as Norma Loam. *Id.* The Report classified the area as “outwash and till” which is also consistent with the SCS classification. The erosion hazard for this area is listed as “slight.” *Id.* In terms of the landslide hazard, the Hearing Examiner concludes that the Geotechnical Report adequately analyzed the slopes on site. The Report states:

> The core of the site is inferred to be composed of glacially overridden soils. We consider these soils to be of high strength and considered to be stable with regard to deep-seated slope failures. We observed numerous mature evergreen trees growing on the moderate to steep slopes within the site with slight curving that could indicate past surficial soil creeping. Bending of the trees could also be a result of large wind events when the trees were young. There is a potential that the surficial soils on the steeper sections of the slope could slough over time. Any slough events are expected to be surficial, and are affected by surface water and man-made impacts. The risk of sloughing events can be minimized if proper drainage is installed, vegetation on the slope is maintained, and yard waste and other debris are kept off the slopes. Subsurface drains and controlling surface water will be a big benefit to this site. We did not observe any indication of recent sloughing on site.

(Exhibit 19 at p. 6). Specific management recommendations with regard to changing the ratio of proposed cuts and fills on certain lots were made in the Geotechnical Report, along with

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\(^{10}\) The Applicant has submitted an updated copy of the site plan dated June 7, 2007 for the Open Record Hearing dated February 22, 2012. (Exhibit 107) At the time of the SEPA threshold determination, the Site Plan considered by the SEPA Responsible Official was Exhibit 24A. Accordingly, we refer to the earlier document, as the Examiner’s review of the SEPA threshold determination is based on the information that was before the Responsible Official on November 20, 2007. (Exhibit 28)
numerous other site-specific construction recommendations. These issues will be subject to further design review during the construction plan review phase, prior to building permit issuance. Accordingly, the Hearing Examiner concludes that GNG has not shown that the Applicant is refusing to follow the advice of its Geotechnical consultant in designing the site, as alleged in the SEPA appeal.

Lastly, the Appellants presented no expert evidence to support its claim that the Geotechnical Report is inadequate or fails to meet the required elements of SCC 30.62.240. In summary, the Hearing Examiner concludes that GNG has failed to meet its burden of proof to show that Director lacked sufficient information upon which to base a SEPA threshold determination as it relates to steep slopes and erosion issues. (Exhibit 1)

(e) Recreational and Wildlife Claims. GNG argues that there was no assessment of adverse impacts to the wildlife by the removal of significant amount of mature forest, clearing or grading or likely hydrologic changes that will result from the project. They identified significant habitats in the area as including the Rhody Ridge Arboretum, North Creek Park, Great Blue Heron rookery in the immediate vicinity. Finally, they claim that there are no recreational or play areas proposed as part of the subject development.

The Examiner concludes that adverse impacts to wildlife and habitat were considered as part of the project's review under the County's CAR. This issue has been extensively discussed above, and will not be repeated here. Recreational impacts were considered in the SEPA Checklist and impacts were disclosed at Paragraph 12. (Exhibit 8) The Applicant will pay impact fees or provide in-kind mitigation for impacts to parks and recreational opportunities within Park District No. 307 as required by Chapter 30.66A SCC. The Hearing Examiner concludes that GNG failed to demonstrate that the project generates significant adverse environmental impacts as to parks and recreation requiring an EIS.

(f) Aesthetics Claim. Lastly, GNG argues that replacement of an open space hillside which provides habitat and a rural aesthetic quality to the neighborhood with a 96-lot urban development will adversely impact the aesthetics of the area (and therefore an EIS should have been required). The Applicant disclosed in the SEPA Checklist impacts to aesthetics from the proposed development at Paragraph 10. (Exhibit 8) PDS determined that these impacts are not significant adverse environmental impacts in issuing its DNS.

The Courts have addressed aesthetic values as an appropriate component of land use in Anderson v. City of Issaquah, 70 Wn. App. 64, 82, 851 P2d 744 (1993), holding that they require clear guidance to the community. Although environmental values are often difficult to quantify, Washington Courts have upheld shoreline master plans that describe preservation of scenic views in general terms. Bellevue Farm Owners Ass'n v. Shorelines Board, 100 Wn. App. 341, 356-357 (2000). In the present case, the County's development regulations cover certain elements of aesthetic values and provide specific guidance as to noise, air quality, environmental quality, public safety concerns, fire, and flood hazards. However, there are no adopted development standards related to the preservation of scenic views or forested areas for aesthetic purposes.

Similarly, the County's adopted GMA Comprehensive Plan lacks policies that require the preservation of scenic views. Instead, the Land Use Plan Goal for Urban Areas is to "establish development patterns that use urban lands more efficiently." (GMACP at Goal LU 2) The objectives used to meet this goal are clear: "Increase residential densities within UGAs by concentrating and intensifying development in appropriate locations, particularly within designated centers and along identified transit emphasis corridors." (Objective LU 2.A)
GMACP specifically authorizes the use of lot size averaging to maintain densities at 4-6 dwelling units per acre, where critical areas or steep slopes prevent attainment of such densities. (See, GMACP LU Policy 2.A.1)

Although the County has adopted Comprehensive Plan Policies related to the preservation of open space, shorelines and scenic resources, all of those policies are voluntary and aspirational in nature. (See, GMACP Objectives LU 10.A, LU 10.B, and LU 10.C) With regard to development standards, GMACP LU Policy 10.10.B.7 provides that the County “shall consider development of code and site design standards that encourage the preservation of natural and scenic resources.” However, the Hearing Examiner concludes that no such regulations have been adopted. GNG argues that the County should have required an EIS or exercised its substantive authority to preserve scenic views in the area.

However, SEPA is essentially a procedural statute to ensure that environmental impacts and alternatives are properly considered by the decision-makers. It was not designed to usurp local decision-making or to dictate a particular substantive result. Save Our Rural Env’t v. Snohomish County, 99 Wn.2d 363, 371, 662 P.2d 816 (1983). Here, there is no policy or regulatory basis upon which the County can impose conditions to preserve scenic views. Although the County could have adopted policies or taken action to preserve the views and aesthetic values associated with North Creek Park, they have not done so. Instead, the subject property is included in the UGA, designed for intensification and densification of land uses for residential development. Without clear guidance in the County Code or adopted SEPA policies related to aesthetics within the UGA, there is no legal basis under the County’s SEPA substantive authority upon which to base development conditions. (SCC 30.61.230) Accordingly, the Hearing Examiner concludes that this claim must fail.

23. The Hearing Examiner has considered all of the evidence in the record and concludes that the Applicant did submit the full scope of information necessary for the County to make a proper SEPA threshold determination, and that the Responsible Official based the SEPA threshold determination on substantial evidence in the record. Although the Appellant is correct that the required statement described in WAC 197-11-158(1) was omitted from the DNS, it is clear from the evidence in the record that the County did not require additional mitigation of adverse impacts under SEPA. Pursuant to the functional equivalence rule adopted pursuant to the 1995 Integration Act amendments to SEPA, now codified in RCW 43.21C.240, the Hearing Examiner concludes that the omission was harmless error. The Applicant and public were put on notice of which regulations were deemed by the County to suffice for purposes of mitigating impacts under SEPA, when the Council adopted each of those development regulations. Adding the required language in WAC 197-11-158(1) does nothing to change this fact and adds nothing to the process, since the RCW 43.21C.240 already authorizes the County to subordinate the SEPA process in favor of its development regulations.

24. Giving substantial weight to the PDS Director’s SEPA threshold determination, the Hearing Examiner is not left with the “definite and firm conviction that a mistake has been committed” when reviewed against all of the evidence in the record ‘in light of the public policy contained in the legislation authorizing the decision.’ "Cougar Mt. Assocs., Ill Wn.2d at 747 (quoting Polygon, 90 Wn.2d at 69). The Hearing Examiner concludes that GNG has failed to show that the threshold determination was clearly erroneous. The appeal should be denied and the threshold determination should be affirmed.
C. PRELIMINARY SUBDIVISION APPLICATION

25. The Examiner has original jurisdiction over subdivision applications pursuant to Chapter 30.72 SCC and Chapter 2.02 SCC.

26. The Examiner must review the proposed subdivision application under RCW 58.17.110, the legal standard for approval of a preliminary subdivision. The Examiner must find that:

   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 concludes the Applicant has met its burden in showing the established criteria have been met. The proposal is consistent with the state subdivision statute, the GMACP; GMA-based county codes, the type and character of land use permitted on the project site, the permitted density and applicable design and development standards.

27. Given the information provided in the record and the Findings of Fact made above, the Examiner also concludes that the Applicant has met its burden in showing that the subdivision application meets the requirements of Chapter 30.41A SCC.

28. Adequate public services exist to serve this proposal.

29. If approved with the recommended conditions, the proposal will make adequate provisions for the public health, safety, and general welfare.

30. Any Conclusion of Law in this Decision, which should be deemed a Finding of Fact, is hereby adopted as such.

DECISION

Based on the foregoing Findings of Fact and Conclusions of Law, the Hearing Examiner hereby issues the following final decision and order:

1. The SEPA appeal is DENIED.

2. Preliminary Subdivision approval is GRANTED subject to the following conditions:

CONDITIONS

A. The preliminary plat received by PDS on November 13, 2007 (Exhibit 27) shall be the approved plat configuration. Changes to the approved plat are governed by SCC 30.41A.330.

B. Prior to initiation of any further site work; and/or prior to issuance of any development/construction permits by the County:
i. All site development work shall comply with the requirements of the plans and permits approved pursuant to Condition A, above.

ii. The platter shall mark with temporary markers in the field the boundary of all Native Growth Protection Areas (NGPA) required by Chapter 30.62 SCC, or the limits of the proposed site disturbance outside of the NGPA, using methods and materials acceptable to the county.

iii. A final mitigation plan based on the conceptual Critical Areas Report, Habitat Management Plan, and Detailed Mitigation Plan for Gracie’s Place prepared by The Jay Group, Inc. dated June 8, 2006 along with the revised Gracie’s Place Mitigation Plan prepared by The Jay Group, Inc. dated February 20, 2007, and the Addendum to the Critical Areas Report prepared by Habitat Ecology and Design (formerly the Jay Group, Inc.) dated March 6, 2012, shall be submitted for review and approval during the construction review phase of this project.

iv. No logging, clearing, grading or construction of the plat shall occur between February 15 and April 1 per the recommendations of WDFW staff in the e-mail to The Jay Group, Inc. dated October 10, 2006 as submitted to PDS on March 20, 2007.

v. The Applicant shall provide a geotechnical assessment demonstrating the feasibility of constructing the plat infrastructure and lot grading without creating a geological and erosion hazard.

vi. The Applicant shall provide a grading plan demonstrating that each lot will have an accessible area suitable for construction of at least 1,000 square feet located outside any required building setback, unbuildable easement, required buffer or critical areas.

C. The following additional restrictions and/or items shall be indicated on the face of the final plat:

i. “Lots 1 through 30 and 49 through 96 within this subdivision will be subject to school impact mitigation fees for the Edmonds School District No. 15 to be determined by the certified amount within the Base Fee Schedule in effect at the time of building permit application, and to be collected prior to building permit issuance, in accordance with the provisions of SCC 30.66C.010. Credit shall be given for one existing parcel. Lot 22 shall receive credit.”

ii. “Lots 31 through 48 within this subdivision will be subject to school impact mitigation fees for the Everett School District No. 2 to be determined by the certified amount within the Base Fee Schedule in effect at the time of building permit application, and to be collected prior to building permit issuance, in accordance with the provisions of SCC 30.66C.010. Credit shall be given for 1 existing parcel. Lot 31 shall receive credit.”

iii. SCC Title 30.66B requires the new lot mitigation payments in the amounts shown below for each single-family residence building permit:

- $2,528.57 per lot for mitigation of impacts on county roads paid to the County,
- $74.96 per lot for transportation demand management paid to the County for TSA D,
- $332.00 per lot for mitigation of impacts on Mill Creek streets paid to the City,
- $12.81 per lot for mitigation of impacts on state roads (for 67.47 ADT impacting DOT-38 (SR 527 at 186th Place SE, at $18.22 per ADT) paid to the County.

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These payments are due prior to or at the time of each building permit issuance. Notice of these mitigation payments shall be contained in any deeds involving this subdivision, short subdivision of the lots therein or binding site plan. Once building permits have been issued all mitigation payments shall be deemed paid by PDS.

iv. On lots with more than one road frontage, county Engineering Design and Development Standards (EDDS) restricts lot access to the minor road, unless the Department of Public Works grants a formal deviation. No lot shall have direct access on South Danvers Road.

v. 10 feet of right-of-way shall be dedicated along the property's frontage on Baldwin Road, to total 30 feet from the right-of-way centerline.

vi. All Critical Areas shall be designated Native Growth Protection Areas (NGPA) (unless other agreements have been made) with the following language on the face of the plat:

“All NATIVE GROWTH PROTECTION AREAS shall be left permanently undisturbed in a substantially natural state. No clearing, grading, filling, building construction or placement, or road construction of any kind shall occur, except removal of hazardous trees. The activities as set forth in SCC 30.91N.010 are allowed when approved by the County.”

vii. The developer shall pay the County $1,244.49 per new dwelling unit as mitigation for parks and recreation impacts in accordance with Chapter 30.66A SCC; provided, however, the developer may elect to postpone payment of the mitigation requirement until issuance of a building permit for that lot. The election to postpone payment shall be noted by a covenant placed on the face of the recorded plat and included in the deed for each affected lot within the subdivision.

D. Prior to recording of the final plat:

i. Pippin Road (currently unopened right-of-way), must be designed and constructed in accordance with EDDS 3-050 for a public non-arterial urban collector road.

ii. Baldwin Road must be improved to a minimum pavement width of 20 feet between Bellflower Road and the subject development.

iii. The right-of-way vacation for John Bailey Road shall be completed prior to recording the development.

iv. Urban standard frontage improvements shall be constructed along the property's frontage on Baldwin Road, unless bonding of improvements is allowed by PDS, in which case construction is required prior to any occupancy of the development. [SCC 30.66B.410]

v. The construction plans for Gracie’s Place shall facilitate connection to 3rd Avenue SE by the plat of Berry Place if it is determined that the public road through Berry Place will connect to 3rd Avenue SE.

vi. Construction of off-site walkways (designed to EDDS standards) to the nearest bus stop location for the public school students as identified by the Edmonds School District (currently Bellflower Road and Baldwin Road for the elementary students, North Road
and 184th Street SW for the middle school students, and North Road and South Bellflower Road for the high school students) must have been completed along the legal and the most direct route in any location where none exist.

vii. Construction of offsite walkways (designed to EDDS standards) to the nearest bus stop location for the public school students as identified by the Edmonds School District (currently 3rd Avenue SE and 170th Place SE) must have been completed along the legal and the most direct route in any location where none exist.

viii. Native Growth Protection Area boundaries (NGPA) shall have been permanently marked on the site prior to final inspection by the County, with both NGPA signs and adjacent markers which can be magnetically located (e.g.: rebar, pipe, 20 penny nails, etc.). The platter may use other permanent methods and materials provided they are first approved by the county. Where an NGPA boundary crosses another boundary (e.g.: lot, tract, plat, road, etc.), a rebar marker with surveyors’ cap and license number must be placed at the line crossing.

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

iv. The final wetland mitigation plan shall be completed implemented.

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

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

Preliminary plats which are approved by the county are valid for seven (7) years from the date of approval and must be recorded within that time period unless an extension has been properly requested and granted pursuant to SCC 30.41A.300.

Decision issued this 26th day of April, 2012.

[Signature]

Millie Judge, 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 within 10 days from the date of this decision. A petition for reconsideration must be filed in writing with the Office of the Hearing Examiner, 2nd Floor, Robert J. Drewel Building, 3000 Rockefeller Avenue, Everett, Washington, (Mailing Address: M/S No. 405, 3000 Rockefeller Avenue, Everett WA 98201) on or before MAY 7, 2012. 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 within 14 days from the date of this decision. 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 No. 604, 3000 Rockefeller Avenue, Everett, WA 98201) on or before MAY 10, 2012, and shall be accompanied by a filing fee in the amount of five hundred dollars ($500.00) for each appeal filed; PROVIDED, that the fee shall not be charged to a department of the County. The filing fee shall be refunded in any case where an appeal is summarily dismissed in whole without hearing under SCC 30.72.075.
An appeal must contain the following items in order to be complete: a detailed statement of the grounds for appeal; a detailed statement of the facts upon which the appeal is based, including citations to specific Hearing Examiner findings, conclusions, exhibits or oral testimony; written arguments in support of the appeal; the name, mailing address and daytime telephone number of each Appellant, together with the signature of at least one of the Appellants or of the attorney for the Appellant(s), if any; the name, mailing address, daytime telephone number and signature of the Appellant's agent or representative, if any; and the required filing fee.

The grounds for filing an appeal 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: Ed Caine, Howard Knight, Tom Rowe

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.
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CHARLO WANG & GREGORY DIXON
111 172ND PL SE
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SARINA & TAVIS ELLIOTT
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SNO CO DEPT OF PUBLIC WORKS
COUNTY ENGINEER
3000 ROCKEFELLER AVE M/S 607
EVERETT WA 98201

JEFF & MARIT ERNST
18415 BALDWIN RD
BOTHELL WA 98012

THERESA FIGURELLI
316 170TH PL SE
BOTHELL WA 98012

DAVID & LORI GETTS
7 S BELLFLOWER RD
BOTHELL WA 98012

STILLAGUAMISH TRIBE
EDWARD GOODRIDGE
PO BOX 277
ARLINGTON WA 98223-0277

JULIETTE GUILBERT
18324 BALDWIN RD
BOTHELL WA 98012

EVERETT SCHOOL DISTRICT
MICHAEL GUNN
3715 OAKES AVE
EVERETT WA 98201

BRIAN HAGINS
310 165TH PL SE
BOTHELL WA 98012

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18306 BALDWIN RD
BOTHELL WA 98012-6252

PAT & KRISTINE HOLLAND
17116 GRAVENSTEIN RD
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JAMES & JANIS HOLLAND
221 171ST PL SE
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MAX HOVID
13317 29TH AVE SE
MILL CREEK WA 98012

MARK HURSTON
20 172ND PL SW
BOTHELL WA 98012

BECKY JOHNSON
4 172ND PL SW
BOTHELL WA 98012

JILL JOHNSON
209 169TH ST SE
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LOREN JOHNSON
17029 4TH AVE SE
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LINDA KAIN WINKLER
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STEPHEN KASPERSKI
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MASARU KIBUKAWA
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WENDY KISSELL
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BOTHELL WA 98012

CARRIE KLEIN
121 173RD PL SE
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JOHNS MONROE MITSUNAGA
DUANA KOLOUSKOWA
1601 114TH AVE SE SUITE 100
BELLEVUE WA 98004

MARK & CYNTHIA KONECNY
407 170TH PL SE
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JOHN KOSSIK
16511 4TH DR SE
MILL CREEK WA 98012

FLOYD KRAUSS
18116 BALDWIN RD
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DEBRA ANN KRENZLER
432 168th PL SE
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CHRIS & QUINCY LAFRANCE
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DEAN SAKSENA
PO BOX 1107
EVERETT WA 98206-1107

GREGG SARGEANT
221 169TH ST SE
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CHRIS SAVAGE
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ALDERWOOD WATER &
WASTEWATER DIST
DAN SCHEL
3625 156TH ST SW
LYNNWOOD WA 98087-5021

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GAYLE STEBBINGS
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BOThELL WA 98012

PAUL & WENDY WHITE
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BOThELL WA 98012

MANFORD & PEGGY WILIAMSON
18201 BELLFLOWER RD
MILL CREEK WA 98012

RICHARD & GUDRIDUR WILSON
NO ADDRESS GIVEN

EDMONDS SCHOOL DISTRICT
MARK ZANDBERG
20420 68TH AVE W
LYNNWOOD WA 98036-7400

EMAILS:

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Don Scriven
dscrivens@flightspeed.net