

**FINDINGS, CONCLUSIONS AND DECISION
OF THE HEARING EXAMINER OF THE
CITY OF OLYMPIA**

CASE NO: 07-0222 (Preliminary Subdivision Approval for North Cascades Village)

APPLICANT: North Cascades Villages, L.L.C.

SUMMARY OF REQUEST:

The Applicant requests preliminary approval of a subdivision containing 16 single-family lots on a 2.86-acre site, with associated improvements.

LOCATION OF PROPOSAL:

Thurston County Assessor's Tax Parcel Nos. 11830230600 and 11830230500 in Sec. 30, T18N, R1W, W.M.

SUMMARY OF DECISION:

The record is reopened on the issues of school capacity and traffic impacts, as explained in the Decision, below. Apart from these two issues, on which decision is reserved, preliminary subdivision approval is granted, subject to conditions.

HEARING AND RECORD:

The hearing on this application was held before the undersigned Hearing Examiner on December 8, 2008. The record was left open for the submittal of additional evidence and closed on December 19, 2008.

The following exhibits are admitted as part of the record on the subdivision application.

Exhibit 1. Staff Report by Olympia Community Planning and Development Department for Case No. 04-2602, prepared by Kraig Chalem and issued December 3, 2008. This Exhibit includes the eleven-page Staff Report and Attachments A through Z listed on pp. 10 and 11 of the Staff Report.

Exhibit 2. Two photographs of Old Morse Road, with text.

Exhibit 3. Aerial and ground photographs of vicinity, with labels.

Exhibit 4. Drawing showing alternative boundary of tree tract.

Exhibit 5. Integrated Pest Management Plan, dated September 7, 2005.

Exhibit 6. Excerpts from Chapter 4 of the Olympia Engineering Design and Development Standards.

Exhibits 7A, 7B, 7C and 7D. Photographs of Old Morse Road dated 1/1/04, with superimposed dimensions.

Exhibit 8. Aerial photograph.

Exhibit 9. Project drawings from the original application, stamped November 14, 2007.

Exhibit 10. E-mail sent December 9, 2008 from Thomas Bjorgen to the Parties and Staff, with post-hearing instructions.

Exhibit 11. E-mail sent December 11, 2008 from Kraig Chalem to Tom Bjorgen, concerning e-mail sent December 5, 2008 from Terry Potter, which was not offered into the record at the hearing.

Exhibit 12. Post-hearing submission from the Applicant, with letter dated December 17, 2008 from Chris Aldrich to Thomas R. Bjorgen, with attachments.

Exhibit 13. E-mail sent December 23, 2008 from Chris Aldrich to Thomas Bjorgen.

Exhibit 14. E-mail sent January 2, 2009 from Thomas Bjorgen to Kraig Chalem and Chris Aldrich, and e-mail sent January 5, 2009 from Chris Aldrich to Thomas Bjorgen and Kraig Chalem, each relating to Potter e-mail inadvertently omitted from record at the hearing.

Exhibit 15. E-mail sent January 5, 2009 from Chris Aldrich to Thomas Bjorgen and Kraig Chalem, with Applicant's position on Potter e-mail.

Exhibit 16. E-mail sent December 5, 2008 from Terry Potter to Community Planning and Development Department.

Note: Exhibits 13 through 15 were sent after the record closed on December 19, 2008. They are nonetheless admitted, because they either relate to procedural questions or the status of the e-mail from Mr. Potter, which was inadvertently omitted from the record at the hearing. Exhibit 16 is that e-mail, which is relevant and timely and is admitted.

At the hearing, the following individuals testified under oath:

Kraig Chalem, Associate Planner for the City of Olympia
Community Planning and Development Department
837 7th Avenue S.E., P.O. Box 1967
Olympia, WA 98507

Chuck Dower
Community Planning and Development Department
837 7th Avenue S.E., P.O. Box 1967
Olympia, WA 98507

Chris Aldrich
Hatton Godat Pantier
1840 Barnes Boulevard SW
Tumwater, WA 98512

Scott Bergford
Member, North Cascades Villages, L.L.C.
3016 10th Avenue NE Olympia, WA

John Wexler
2928 Shelburne
Olympia, WA

Brent Campbell
3114 Shelburne Court
Olympia, WA

Barry Craig
3035 Old Morse Road
Olympia, WA

Elizabeth Weinandt
3025 Old Morse Road
Olympia, WA

Chandra Wexler
2928 Shelburne
Olympia, WA

Susan Thompson
3109 Shelburne Court
Olympia, WA

Jim Kelly
3115 Shelburne Court
Olympia, WA

After consideration of the testimony and exhibits described above, the Hearing Examiner makes the following findings of fact, conclusions of law, and decision.

FINDINGS OF FACT

A. General description of project and vicinity.

1. The Applicant requests preliminary subdivision approval to divide 2.86 acres into 16 single family lots. The proposed configuration of the lots, streets and associated improvements, along with proposed lot sizes and widths, is shown at Exhibit (Ex.) 1, Attachment (Att.) O, the preliminary site plan. As discussed below, alternative boundaries for the tree tract and Lot 11 have been proposed, which are shown in Ex. 12.

2. The site of the proposed subdivision is zoned Single-family Residential (R 4-8) and is designated the same in the Comprehensive Plan.

3. The project site is bounded on the north by residential lots fronting on 30th Avenue SE. Across 30th Avenue to the north lies residential development. The site is generally bounded by residential development on its other sides.

4. Old Morse Road runs south from 30th Avenue just east of the site. Near the southern end of the project site, Old Morse Road turns 90 degrees to the west becoming Shelburne Way, according to the vicinity map at Ex. 1, Att. M. The proposed new internal subdivision street labeled Shelburne Way in Ex. 1, Att. O would connect to this existing Shelburne Way. The internal subdivision street dead-ends at the plat's west edge. Thus, the sole access to the subdivision would be on Shelburne Way, Old Morse Road and 30th Avenue.

5. As also shown on the vicinity map at Ex. 1, Att. M, the dead-end Shelburne Court extends to the south from Shelburne Way. Thus, those living in the residential development along Shelburne Court would have their sole vehicular access over the same segments of Shelburne Way and Old Morse Road as would be used by the proposed subdivision.

6. Shelburne Way within the subdivision is proposed to have two ten-foot travel lanes, for total of 20 feet of paved surface.

B. Old Morse Road.

7. Old Morse Road is a local access street. According to Engineering Design and Development Standards (EDDS) Chapter 4, Table 1, a local access street serves between 0 and 500 average daily trips per day. Mr. Dower of the Department testified that with the proposed subdivision there would be a total of 325 average daily trips on Old Morse Road, which is within the range for local access streets.

8. Ex. 2, Figure 1 and the photographs at Ex. 7C and 7D are looking north from different locations on Old Morse Road. In each, the stop sign in the distance marks the intersection with 30th Avenue. These photographs, consistently with the testimony, show the pavement width to be approximately 19 feet in the narrower segment of Old Morse.

9. Ex. 2, Figure 2 and the photographs at Ex. 7A and 7B are looking south from different locations on Old Morse Road. These indicate the pavement width is between 19 and 19.5 feet in the narrower segment. In these pictures the apparent end of the road must be its bend to the west to become Shelburne Way, which is also the entrance to the proposed subdivision. Thus, these pictures show that the majority of the portion of Old Morse Road which would be used by the proposed subdivision has a pavement width ranging approximately from 19 to 19.5 feet. Mr. Wexler testified that this narrow portion of Old Morse Road is approximately 150 feet long.

10. Written submissions and testimony from the public stated, in sum, that trucks and larger vehicles cannot meet each other on the narrow portion of Old Morse Road, that cars are often parked on the narrow section of Old Morse, making it difficult to negotiate, and that with these conditions, emergency vehicles may have difficulty in driving on the road.

11. Mr. Dower of the Department testified that Old Morse Road met City standards for Local Access streets and took the position that compliance with these standards conclusively meant that the street would afford adequate emergency vehicle access. Mr. Chalem of the Department testified that he did not know if the Fire Department had reviewed whether Old Morse Road provides adequate emergency access. The written review from the Fire Department does not disclose any examination of the adequacy of Morse Road for emergency access.

12. To obtain more definitive evidence on emergency access on Morse Road, I asked the Department to "obtain a statement from the Olympia Fire Department as to whether it believes there will be adequate access for emergency vehicles on Old Morse Road for those living to the south on Shelburne Court and in the proposed subdivision, with the additional traffic from the proposed subdivision." See Ex. 10. No response to this request was received.

C. Safe walking conditions to school.

13. According to the Staff Report, Ex. 1, p. 3, this subdivision would be served by Pioneer Elementary School, Washington Middle School and Olympia High School.

14. The proposed subdivision is located more than one mile from Pioneer Elementary school and Olympia High School. Therefore, under Olympia School District policy, bus transportation will be provided for students in the proposed subdivision attending those schools. With that, RCW 58.17.110 requires that safe walking conditions to school bus stops be provided. I did not see any evidence showing where these bus stops would likely be located and whether sidewalks extend from them to the subdivision. This decision is conditioned to require that showing.

15. Bus service will not be provided to the closer Washington Middle School. Therefore, it must be determined whether safe walking conditions are present from this subdivision to that school.

16. Sidewalks in the vicinity are shown on Ex. 3 and on Ex. 12, Att. B. Shelburne Way in the proposed subdivision would have sidewalks on both sides, as would Shelburne Way between the subdivision and Old Morse Road. Old Morse has a sidewalk on its east side from Shelburne Way to 30th Avenue and on its west side approximately one-half block from Shelburne Way. A sidewalk runs on the north side of 30th Avenue from its intersection with Old Morse Road to Boulevard Road.

17. Students could cross Boulevard Road on a lighted crosswalk on the north side of its intersection with 30th Avenue. At that point, students would have two optional routes to Washington Middle School. They could proceed directly to the west on Morse Road, which is the continuation of 30th Avenue west of Boulevard Road, and enter the middle school grounds at a chain-link gate. The Applicant states at Ex. 12 that Morse Road west of Boulevard Road is a short dead-end street with limited traffic. Morse Road has no sidewalks on its south side and limited ones on its north, according to Ex. 12, Att. B.

18. The second optional route from the west side of Boulevard Road at 30th Avenue would be to walk south on a six to six and one-half foot wide bicycle lane on the west edge of Boulevard Road approximately 300 feet to the entrance to Washington Middle School. This lane is demarked by an eight-inch wide stripe and symbols. The lane is not otherwise separated physically from the traveled lanes.

19. The Applicant also refers in Ex. 12 to a City website, which indicates that construction of a sidewalk on the west side of Boulevard Road from 30th Avenue to the entrance to Washington Middle School is scheduled to begin in the summer of 2009.

20. Mr. Dower of the Department testified that crosswalks are not needed across

the minor streets over which these walking routes would go. Mr. Dower testified that crosswalks can decrease safety by creating a false sense of security. As noted, a crosswalk is already present over the busy Boulevard Road on this route.

21. The only questionable portion of this walking route is from the west side of Boulevard Road at 30th Avenue to Washington Middle School. If the sidewalk along the west side of Boulevard Road is completed as scheduled, it should be available before any lots in this subdivision are occupied. If it is not, the existing route along Morse Road west of Boulevard appears to provide a safe alternative access. With this, a safe walking route for schoolchildren is provided to Washington Middle School.

22. The Birches Homeowners' Association expressed the concern that the house on the southwest corner of Old Morse and 30th Avenue is close enough to the street to create a blind corner. Without a sidewalk on the west side of Old Morse, the Association states that children may round this corner in the street, thus threatening their safety. See Ex. 1, Att. T. Mr. Craig testified to the contrary that there are no blind spots for those using the existing sidewalk. With sidewalks on the west side of Old Morse Road and on the north side of 30th Avenue, students walking to Washington Middle School have a route that avoids this possibly blind corner.

23. As conditioned, safe walking conditions to school are provided.

D. Stormwater.

24. The proposed facilities for handling stormwater are described in the Stormwater Site Plan at Ex. 1, Att. M. In summary, all runoff from the site would be routed to a treatment and detention pond at the north end of the site, which is projected to discharge through metered release at a rate less than the predeveloped rate during the 25-year storm. The discharge would flow through a number of downstream conveyances and detention ponds before discharging ultimately to a regional detention pond.

25. The Department states that this proposal complies with the Olympia Stormwater Manual, subject to the conditions recommended in the Staff Report. These conditions do not include the recommendation of the Stormwater Site Plan that a segment of 8-inch piping in 30th Avenue be increased to a diameter of 12 inches. This decision is conditioned on the Department's reviewing and requiring that increase if the Department deems it necessary.

26. The Birches Homeowner's Association stated in Ex. 1, Att. T that the storm drain on the southeast corner of Old Morse Road and 30th Avenue becomes clogged with leaves and overwhelmed during heavy rains, causing flooding on Old Morse. The off-site drainage map in Ex. 1, Att. M indicates that discharge from the proposed stormwater facility would not discharge to or through this location. Therefore,

construction of this subdivision should not affect this situation. However, flooding from whatever source could impair emergency access on Old Morse. Therefore, this decision requests the City to make reasonable efforts, consistently with its budgetary limitations, to keep this drain flowing freely.

27. The letter from Mr. and Mrs. Redfield at Ex. 1, Att. S states that the stormwater pond serving Shelburne Court does not retain water well and has forced significant surface and groundwater flows onto properties on 31st Court. Stormwater from this proposed subdivision, though, would discharge to the north, without affecting the stormwater facility serving Shelburne Court. Therefore, any problems with this existing facility do not provide a basis for denying or conditioning the North Cascades proposal.

28. The evidence at this stage of review shows that the proposal complies with the Stormwater Manual and makes appropriate provisions for surface water drainage.

E. Adequacy of school facilities.

29. As noted, the Staff Report states that this subdivision would be served by Pioneer Elementary School, Washington Middle School and Olympia High School.

30. The Olympia School District states that each of these schools is over capacity. Ex. 12, letters of December 10 and December 16, 2008, from Timothy Byrne of the Olympia School District. The letters from the School District state that two other schools are also over capacity for portable units, which implies that the three schools serving this subdivision are not over capacity for portables. *Id.* However, no evidence indicates when or whether the School District plans to install portables at the three schools to increase their capacity.

31. This subdivision is subject to school impact fees under OMC Title 15, which would benefit the public school system. In its response on school capacity, the Olympia School District stated that the current school impact fee rate is \$5042.00 per single-family unit. Ex. 12, letter of December 16, 2008, from Timothy Byrne of the Olympia School District.

F. Tree retention and lot configuration.

32. At a buildable area of 2.62 acres, the Applicant is required by OMC 16.60 to retain 79 tree units. The Applicant proposes to retain trees totaling 94 tree units, thus meeting this requirement.

33. OMC 16.60.070 D requires that at least 75% of the trees required to be retained be placed in a separate deeded tree tract. The Applicant initially proposed to meet this requirement through a tree tract which consisted in part of a separate lot and

in part of an easement over adjacent Lot 11. The Staff properly questioned whether the tree units in the easement area could be deemed to be in a separate deeded tree tract, as required by OMC 16.60.070 D. The Applicant responded in Ex. 12, Att. A by proposing a single tree tract, without an easement, which contains at least 75% of the trees required to be retained. This results in compliance with the 75% requirement.

34. The adjustment to the Tree Tract resulted in a modification to its shared boundary with Lot 11, see Ex. 12, Att. A, proposed by the Applicant. This modification is almost identical to the alternative proposed by the Staff at the hearing. See Ex. 4. The modification proposed by the Applicant results in a street frontage of 30 feet for Lot 11 and gives the lot the shape of a flag lot. However, because Lot 11 retains a street frontage of at least 30 feet, it is not subject to the additional requirements for flag lots in OMC 18.40.060 I 2.

35. The Applicant's proposal in Ex. 12 meets the requirements of the tree ordinance and the requirements concerning lot frontage and configuration.

G. Transportation.

36. Mr. Dower testified that the proposed subdivision would generate 16 p.m. peak trips and 153 average daily trips. This is below the threshold requiring preparation of a Traffic Impact Analysis (TIA). Consequently, one was not prepared. Because a TIA was not prepared, Mr. Dower testified that a concurrency analysis was not carried out.

H. Miscellaneous.

37. Adequate open space is supplied under City standards through open space on the site and at nearby parks and schools.

38. The City has capacity for the domestic water requirements of the proposed subdivision.

39. The City has capacity for the sanitary sewer requirements of the proposed subdivision.

40. The City has capacity for the solid waste requirements of the proposed subdivision.

41. The Applicant is proposing streetside improvements and lot configurations as shown in Ex. 1, Att. O, as modified by Ex. 12, Att. A.

CONCLUSIONS OF LAW

A. General standards governing preliminary subdivision approval.

1. RCW 58.17.110 (1) and (2) set out the basic standards which must be met before preliminary subdivision approval may be granted. They state that

"(1) The city, town, or county legislative body shall inquire into the public use and interest proposed to be served by the establishment of the subdivision and dedication. It shall determine: (a) If appropriate provisions are made for, but not limited to, 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 schoolgrounds, and shall consider all other relevant facts, including sidewalks and other planning features that assure safe walking conditions for students who only walk to and from school; and (b) whether the public interest will be served by the subdivision and dedication.

(2) A proposed subdivision and dedication shall not be approved unless the city, town, or county legislative body makes written findings that: (a) Appropriate provisions are made for the public health, safety, and general welfare and for such open spaces, drainage ways, streets or roads, alleys, other public ways, transit stops, potable water supplies, sanitary wastes, parks and recreation, playgrounds, schools and schoolgrounds and all other relevant facts, including sidewalks and other planning features that assure safe walking conditions for students who only walk to and from school; and (b) the public use and interest will be served by the platting of such subdivision and dedication. If it finds that the proposed subdivision and dedication make such appropriate provisions and that the public use and interest will be served, then the legislative body shall approve the proposed subdivision and dedication . . ."

2. Subdivisions must also be consistent with the Olympia Comprehensive Plan and in compliance with other applicable land use laws, such as the City zoning ordinance.

3. As discussed in detail below, the evidence is insufficient to show compliance with applicable standards in two areas: school capacity and traffic impacts. To ensure that this decision is made on full evidence, preliminary subdivision approval is not denied at this time for these reasons, but the record is reopened to allow the Applicant and other parties to submit supplemental argument evidence in these areas. Apart from these two areas on which decision is reserved, the proposal, as conditioned, is consistent with the Comprehensive Plan, is consistent with the zoning ordinance, and makes appropriate provisions as required by RCW 58.17.110.

B. School capacity.

4. This case presents an important and, as far as I can determine, undecided issue: can a proposed subdivision be found to make "appropriate provisions" for "schools and schoolgrounds", as required by RCW 58.17.110 (2), if it would be served by public schools which are over capacity according to the School District.

5. My initial review of the statutory and case law suggests two prominent sub-issues in resolving this question: first, does an enrollment over a school's capacity alone mean that appropriate provisions for schools are not made; and second, does the payment of school impact fees assure appropriate provisions for schools, even if they are over capacity at the time of the preliminary subdivision decision.

6. On the first issue, one could make the argument that forcing children to attend a school which is over its capacity almost by definition does not make appropriate provisions for schools. On the other hand, exceeding capacity may not in fact adversely affect education in every circumstance. I found only one reported state appellate decision on the first issue, Kenart & Associates v. Skagit County, 37 Wn. App. 295 (1984). In that case, the Board of County Commissioners had denied a proposed planned unit development and subdivision for multiple reasons, among which was "[l]ack of adequate services such as fire protection, police protection, potential capacity problems of schools, particularly Samish Elementary;" , Kenart, 37 Wn. App. at 297. The Court of Appeals reversed. On the issue of schools, the Court stated that

"School capacity is always a legitimate concern but, taken alone, any development could be halted solely on this ground. If no solution exists, then perhaps no further development is appropriate. But the mere fact that more houses mean more children and more children mean greater school capacity is needed, is not the end of the inquiry."

Id. at 302. This language is not terribly precise. It could indicate that lack of capacity alone is not automatically grounds for denial. On the other hand, its statement that "[i]f no solution exists, then perhaps no further development is appropriate" does suggest that some unremedied deficit in capacity could trigger project denial.

7. The second issue draws on the statement in RCW 82.02.050(3) that impact fees:

"(a) Shall only be imposed for system improvements that are reasonably related to the new development;

(b) Shall not exceed a proportionate share of the costs of system improvements that are reasonably related to the new development; and

(c) Shall be used for system improvements that will reasonably benefit the new development."

8. From these characteristics the argument can be made that if school impact fees must reasonably benefit the new development paying them, then they would likely be used to improve capacity at the schools serving that development. The definition of "impact fee" in RCW 82.02.090 (3) and the restrictions on the use of impact fees in OMC 15.04.130 support this argument.

9. On the other hand, our courts have held that impact fees

"need not be spent on infrastructure that would specifically benefit a particular development, but instead need only provide a general benefit to the entire school district."

Wellington River Hollow, L.L.C. v. King County, 113 Wn. App. 574, 587 (2002), rev. den. 149 Wn.2d 1014 (2003); and Pavlina v. City of Vancouver, 122 Wn. App. 520, 527 (2004).

10. Further the Supreme Court in City of Olympia v. Drebeck, 156 Wn.2d 289 (2006), held that a transportation impact fee need not be based on an individualized assessment of the development's impact on the transportation improvements to be funded. Instead, it was enough that the fee be proportionate to the demand for new improvements throughout the jurisdiction and that those improvements throughout the jurisdiction will reasonably benefit the development. Drebeck, 156 Wn.2d at 305-308. These cases appear to mean that there is no legal assurance that the school impact fees paid for North Cascades subdivision would be used to remedy the capacity deficits at the schools serving it.

11. These are difficult, apparently novel issues, which should not be decided without giving the parties the opportunity to express their opinions on them. The record will be reopened for that purpose.

C. Old Morse Road.

12. EDDS 4B.020 requires that the design of City streets conform to the standards set forth in the EDDS. The right-of-way for Local Access streets, according to EDDS Chapter 4, Table 1, is "1 lane-48' for local access streets". Mr. Dower testified that the required amount of right-of-way is present, and no evidence to the contrary was offered.¹ Therefore, it must be concluded that Old Morse Road meets the requirement of the EDDS for dedicated right-of-way.

¹ Right-of-way refers to the width of the easement or property interest owned by the city for the street. It is not necessarily the same as the width of the paved portion.

13. EDDS Chapter 4, Table 1, also states that the lane width for local access streets is "1 lane-12' ". The ambiguity as to whether this notation allows only one lane is resolved by Standard Plan No. 4-2J of the EDDS, which plainly allows a Local Access street to have one lane, as long as an additional width for parking is present. According to Standard Plan No. 4-2J, the minimum lane width is 12 feet and the minimum width for parking is six feet, for a total minimum paved width of 18 feet. As found above, the narrowest paved width on Old Morse is 19 feet. Therefore, Old Morse Road meets the lane width requirements of the EDDS.

14. Standard Plan No. 4-2J, Local Access streets, also states that "a 100' no-parking zone in the center of the block is required for emergency vehicle access (EDDS 4C.070)." EDDS 4C.070, in turn, states

"[o]n local access streets, parking bulb-outs are required for block faces that are greater than 350'. The parking bulb-outs placed at both street ends will define a parking lane. A 100' No Parking zone in the center of the block is also required to accommodate Emergency Vehicle access. Refer to Standard Plan 4-13B for typical block configuration."

15. Old Morse Road has no intersections between 30th Avenue and its 90 degree bend into Shelburne Way, suggesting that the relevant "block face" is no less than this distance. Scaling the preliminary site plan at Ex. 1, Att. O shows the distance on Old Morse Road from 30th Avenue to this bend to be well in excess of 350 feet. Under EDDS 4C.070, this would trigger the requirement for a 100-foot No Parking zone in the middle of the block for emergency access.

16. The Staff did state generally that Old Morse meets Local Access standards. Test. of Dower. However, no evidence was submitted on whether the 100-foot No Parking requirement is met, and the photographs at Ex. 2 and Ex. 7 do not show any such zone. With this, the Applicant has not met its burden of showing that the street standards, specifically those relating to the No Parking zone, are met.

17. Other applicable street standards are found in OMC 16.32.050 A, which states that

"[e]very building hereafter constructed shall be accessible to fire department apparatus by way of access roadways constructed to the standards contained in the Development Guidelines and Public Works Standards² adopted by reference in this code, and capable of supporting the imposed loads of fire apparatus and having a minimum of 13' 6" of vertical clearance."

² These were replaced by the EDDS.

Further standards for access roadways are found in OMC 16.32.050 B, which states that

"[t]he required width of access roadways shall not be obstructed in any manner, including parking vehicles, NO PARKING/FIRE LANE signs and/or other appropriate notice prohibiting obstructions shall be required and shall be maintained",

and in OMC 16.32.050 E, which prescribes a minimum 20-foot width for access roadways serving three or more single family units. OMC 16.32.050 allows the Fire Chief to substitute "fixed fire protective systems" for required roadways "where their standards cannot be met due to impracticality . . ." No claim has been made that it is impractical for Old Morse Road to comply with these standards.

18. Old Morse Road is the sole route for fire apparatus access to the proposed subdivision. Therefore, it must comply with these requirements, including a 20-foot wide paved section.

19. The standards of OMC 16.32.050 directly address the concerns expressed in the public testimony that emergency vehicles will be impeded by the narrowness and congestion on Old Morse Road. No evidence was introduced that these standards are inadequate to provide proper emergency access on Old Morse. Therefore, compliance with the standards of OMC 16.32.050 must be deemed to provide adequate access for emergency vehicles. As just concluded, Old Morse Road does not comply with the 100-foot No Parking zone requirement of EDDS 4C.070 or with the requirements of OMC 16.32.050. This decision is conditioned to require compliance with these standards.

D. Fire access and sprinkling.

20. Fire access along Old Morse Road is discussed above.

21. OMC 16.32.050 C states that

"[t]he access roadway shall be extended to within 150' of all portions of the exterior walls of the first story of any building. Where the access roadway cannot be provided, approved fire protection system or systems shall be provided as required and approved by the chief."

22. Rough scaling of the preliminary site plan at Ex. 1, Att. O, shows that portions of the exterior walls of the residence drawn on Lot 11 are more than 150 feet from Shelburne Way. The precise location of that house, of course, may be modified. To assure compliance with OMC 16.32.050 C, this decision is conditioned to require that approved fire protection systems be provided for the residence on Lot 11 as

required and approved by the Fire Chief, if any portion of its exterior wall is more than 150 feet from Shelburne Way.

23. OMC 16.04.040 and OMC 16.32.140 require that a fully automatic residential fire sprinkler system be installed in all structures in subdivisions in which internal streets are required to be constructed in accordance with the provisions of Chapter 4, Standard Plan 4-2J. The internal street, Shelburne Way, is proposed to be wider than this standard plan. Therefore, this provision does not require the installation of sprinklers.

24. OMC 16.32.150 requires that an approved automatic sprinkler system be installed in

"all buildings where the perimeter access, as required under OMC 16.32.050, access roadways for fire apparatus for fire fighting and rescue operations, cannot be provided due to design and/or location."

It is not clear what is meant by "perimeter access", although the reference to OMC 16.32.050 suggests it means the roadways for fire access treated in that section. The conditions below require Old Morse Road and Shelburne Way to meet the requirements of OMC 16.32.050. Therefore, sprinklers are not required under this provision.

E. Transportation.

25. Because a TIA was not required, the Department and the Applicant take the position that no determination is required as to whether the traffic from the subdivision will cause the level of service (LOS) on a transportation facility to be exceeded.

26. This position, however, has been rejected in a number of Hearing Examiner cases over the past year. The reasons for denying this position are set out in the following Conclusions of Law in the Hearing Examiner decision on the Pattison Street Plat, No. 07-0120, August 21, 2008, which were also incorporated in the Hearing Examiner decision on the Kaiserwood Plat, No. 04-2602, October 29, 2008:

"17. RCW 36.70A.070 (6) (b) requires local jurisdictions subject to the Growth Management Act to adopt ordinances which prohibit development that causes the LOS on a locally owned transportation facility to decline below adopted standards, unless transportation improvements or strategies to accommodate the impacts of development are made concurrent with the development. Under this provision, "concurrent with the development" means that improvements or strategies are in place at the time of development, or that a financial commitment is in place to complete the improvements or strategies within six years. This requirement is commonly known as that of concurrency.

18. Olympia has complied with this requirement through the adoption of Chap. 15.20 OMC. The heart of this ordinance is OMC 15.20.050 H, which states that a finding of concurrency will be made only if the LOS of affected transportation facilities meets or exceeds the adopted minimum. Although not stated explicitly in this ordinance, its purpose of complying with RCW 36.70A.070 plainly implies that development cannot proceed without such a finding.

19. Nowhere in either RCW 36.70A.070 or Chap. 15.20 is there any exemption for projects falling below the threshold for preparing a TIA. OMC 15.20.060 (5) does exempt from the concurrency requirement applications which are exempt under the State Environmental Policy Act (SEPA). This will surely exempt from concurrency some small projects which are also exempt from TIA preparation, but they are not exempted from concurrency because they are exempted from TIA preparation. Projects such as this, which are not exempt from SEPA but are exempt from TIA preparation, are still subject to the requirement of concurrency under RCW 36.70A.070 and Chap. 15.20 OMC."

27. This subdivision may only be approved under RCW 58.17.110 if it makes "appropriate provisions" for streets or roads and if the public use and interest will be served by it. Here, no evidence of any sort has been offered to show what effect the traffic from this subdivision will have on the LOS of affected intersections. In the absence of any evidence as to whether the minimum acceptable LOS will be preserved and whether the concurrency requirements of RCW 36.70A.070 will be met, it cannot be concluded that appropriate provisions are made under RCW 58.17.110. Without that, the subdivision cannot be approved.

28. In the Decision on Reconsideration of the Kaiserwood Plat of December 29, 2008, No. 04-2602, it was brought out that the effect of the proposal on the level of service of intersections was examined at the threshold determination stage under SEPA. With that additional evidence, the Reconsideration Decision held that the evidence showed that concurrency had been examined and that the Kaiserwood proposal would not cause the level of service on any intersection to decline below the adopted minimum.

29. Here, in contrast, no evidence was offered showing any consideration of traffic levels of service through the SEPA process. In fact, the evidence presented indicated that no review of concurrency or levels of service had been carried out at any time.

30. For the reasons expressed in the Conclusions of Law from the decision on the Pattison Street and Kaiserwood subdivisions, set out above, the failure to examine the effect of the proposal on transportation levels of service compels denial of the

subdivision, unless remedied through conditions. However, because evidence offered in the Kaiserwood reconsideration proceeding indicated that a review of levels of service is customarily carried out in SEPA review, fairness requires giving the Department and Applicant the opportunity to determine whether this review was carried out through the SEPA process. The record will be reopened also on that subject.

DECISION

A. The record is reopened to allow the Applicant and other parties to submit supplemental argument and/or evidence on the following issues:

- (i) Can a proposed subdivision be found to make "appropriate provisions" for "schools and schoolgrounds", as required by RCW 58.17.110 (2), if it would be served by public schools which are over capacity according to the School District? In addressing this issue, the Parties are asked to review the preliminary legal analysis on this issue in the Conclusions, above.
- (ii) Was there an examination, through the SEPA process or otherwise, of the effect of the proposed subdivision on levels of service of intersections or streets. If so, please identify the examination and summarize its results.

"Parties" include the Applicant, the Department and any individuals who testified at the hearing. Responses must be limited to the issues just described. Responses shall be in writing and shall be either sent by e-mail or shall physically reach Mr. Chalem, who is functioning as clerk of the proceeding, and me by 5 p.m. on January 28, 2009.

Any factual information (evidence) submitted on these issues must either be by one placed under oath at the hearing, and who remains under oath for this purpose, or by declaration or affidavit.

Mr. Chalem is directed to either e-mail or mail this decision to all parties on the date of this decision.

B. Apart from the issues described in Part A immediately above, on which the decision is reserved, the proposed preliminary subdivision is approved, subject to the following conditions:

- (i) That portion of Old Morse Road between Shelburne Way and 30th Avenue shall be constructed in compliance with the standards of OMC 16.32.050. These standards require, among other elements, a 20-foot wide paved surface capable of supporting the imposed loads of fire apparatus, keeping that surface free of obstructions, including parked vehicles, and posting and maintaining NO PARKING/FIRE LANE signs and/or other appropriate notice prohibiting

obstructions. The Applicant's duty to keep the surface free of obstructions is limited to posting and maintaining noted signage.

(ii) The same portion of Old Morse Road between Shelburne Way and 30th Avenue shall contain the 100-foot no parking zone required by EDDS 4C.070 and discussed in the Conclusions, above, unless the Department determines that compliance with the no parking requirements of OMC 16.32.050, discussed in Condition (i), above, are sufficient to meet this requirement.

(iii) Approved fire protection systems shall be installed in the residence on Lot 11 as required and approved by the Fire Chief, if any portion of its exterior wall is more than 150 feet from Shelburne Way.

(iv) Safe walking conditions, including sidewalks, shall be provided from the proposed subdivision to the school bus stops serving pupils attending Pioneer Elementary or Olympia High schools.

(v) The Department shall review the recommendation of the Stormwater Site Plan that a segment of 8-inch piping in 30th Avenue be increased to a 12-inch diameter. If the Department agrees with this recommendation, the Applicant shall implement it.

(vi) The City is requested to make reasonable efforts, consistently with its budgetary limitations, to keep the storm drain on the southeast corner of Old Morse Road and 30th Avenue flowing freely.

(vii) With the exception of Conditions 14 and 18, the Conditions listed on pp. 7-10 of the Staff Report at Ex. 1 are incorporated by reference. Conditions 14 and 18 are not incorporated. As Mr. Chalem testified at the hearing, the word "should" in the first line of Condition 20 is changed to "shall".

Dated this 16th day of January, 2009.


Thomas R. Bjorgen
Hearing Examiner

Mailed 1/20/09

N.L.