

**SUPPLEMENTAL FINDINGS, CONCLUSIONS AND DECISION
AND DECISION ON RECONSIDERATION
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:

A. By decision issued January 16, 2009, the record was reopened for additional evidence on the issues of school capacity and traffic impacts and preliminary subdivision approval was granted on all other aspects of the application, subject to conditions.

On the issue of school capacity, this proposal makes appropriate provisions for schools.

On the issue of traffic impacts, further analysis is required to determine whether this proposal will cause the level of service on intersections to decline below the adopted minimum.

B. On January 26, 2009 the Community Planning and Development Department filed a motion for reconsideration of the January 16 decision on the issue of whether residential fire sprinklers should be required.

On the basis of the evidence and argument in the motion for reconsideration, residential fire sprinklers should be required in all residences. However, the absence of any indication that the parties were served with this motion and the absence of a response

from the Applicant raises the question whether proper service was made. This decision requires that to be determined.

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.

A decision was issued on January 16, 2009 which, as noted, kept the record open for supplemental evidence on two issues and made a decision on all other aspects of the application. This decision required all submittals on the two issues on which the record was kept open to be filed by January 28, 2009. Exhibits 17 through 19, below, were submitted in response.

On addition, on January 26, 2009 the Department of Planning and Community Development filed a motion for reconsideration of the January 16 decision on the issue of whether residential fire sprinklers should be required. This motion is at Exhibit 20.

Exhibits 1 through 16 were admitted by the January 16, 2009 decision. The following additional Exhibits 17 through 20 and 22 are admitted as part of the post-hearing process just described. Exhibit 21 is not admitted for the reasons given below.

Exhibit 17. Letter dated January 27, 2009 from Brent Campbell to Thomas R. Bjorgen, with attached map. Much of this letter discusses the absence of sidewalks on the west side of Old Morse Road and the standards to which Old Morse Road is currently built. The presence or absence of sidewalks pertains neither to the level of service for traffic nor the provision of school capacity. Therefore, this discussion is beyond the scope of the requested supplemental evidence and cannot be considered. The discussion of standards on Old Morse Road and other aspects of the letter do relate to levels of service and are proper. With this limitation, Exhibit 17 is admitted.

Exhibit 18. Letter dated January 28, 2008 from Susan E. Thomsen to Thomas R. Bjorgen, with attached letter dated January 31, 2008 from Kroydan Chalem to North Cascades Villages, L.L.C. Part of this exhibit attempts to reargue the question of whether the Engineering Design and Development Standards (EDDS) require an alternate access to this subdivision. This issue is beyond the scope of the requested supplemental evidence and cannot be considered. The remainder of the letter arguably pertains to the level of service on Old Morse Road and is proper. With this limitation Exhibit 18 is admitted.

Exhibit 19. Letter dated January 28, 2009 from Chris Aldrich to Thomas R. Bjorgen, with attached e-mail and map from City Transportation Engineer David Smith.

Exhibit 20. Request for Reconsideration from the Department of Planning and Community Development, comprising the following:

- (a) Letter dated January 26, 2009 from Chuck Dower to Kroydan Chalem;
- (b) Standard Street Plans 4-2J and 4-2K;
- (c) Olympia Ordinance No. 6453.

Exhibit 21. Letter dated January 29, 2009 from Timothy Byrne of the Olympia School District to Kraig Chalem. This letter offers evidence, was submitted after the deadline set in the January 16 decision and was not submitted by declaration or affidavit, as required in that decision for responses by those not sworn at the hearing. Therefore, this exhibit is **not admitted**.

Exhibit 22. E-mail sent February 3, 2009 from Larry Hoffman to Thomas Bjorgen. This document is not a submission of additional evidence, but is a procedural inquiry from an attorney just retained by the Applicant. As such, it is properly admitted.

Exhibit 23. E-mail from the Hearing Examiner sent February 16, 2009, with procedural directions.

Exhibit 24. E-mail from the Hearing Examiner sent February 17, 2009, with procedural directions.

No testimony was taken after the close of the hearing on December 8, 2008.

After consideration of the exhibits described above and the decision of January 16, 2009, the Hearing Examiner makes the following supplemental findings of fact, conclusions of law, and decision.

SUPPLEMENTAL FINDINGS OF FACT

A. Post-hearing procedure.

1. On January 16, 2009 the Hearing Examiner issued a decision on the Applicant's request for preliminary subdivision approval. This decision held the record open for supplemental evidence and/or argument on the following two questions:

"(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."

On all other aspects, the January 16th decision granted preliminary subdivision approval subject to conditions.

2. The Applicant submitted supplemental evidence and argument on these two issues through Exhibit 19. Mr. Campbell submitted supplemental evidence and argument through Exhibit 17, and Ms. Thomsen submitted the same through Exhibit 18. The Department offered supplemental evidence on the second, but not the first of these two issues.

3. The Department filed a request for reconsideration of Conclusion of Law 23 and the resulting absence of a requirement that fire sprinkler systems be installed in all the residences in the subdivision.

B. Appropriate provisions for schools.

4. The January 16, 2009 decision made the following Finding of Fact on school capacity:

"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."

The decision also found that this subdivision will pay school impact fees under OMC Title 15, which will benefit the public school system. Those fees are currently assessed at a rate of \$5042.00 per single-family unit.

5. The Applicant states in Ex. 19 that the practice of the School District is to request additional mitigating fees at the SEPA (State Environmental Policy Act) stage if it believes normal impact fees will not satisfactorily address the impacts of a subdivision. The School District made no request for additional fees for this subdivision through the SEPA process.

C. Levels of service of intersections and streets.

6. Perhaps the principal issue treated in the decision of January 16, 2009 in this matter was the adequacy of Old Morse Road. The decision acknowledged the testimony and evidence from nearby residents of the constrictions and occasional blockages on this road and the threat that may pose to public safety. The decision also rejected the position of the Staff that all applicable street standards were met. The decision required full compliance with the EDDS and Olympia Municipal Code (OMC) 16.32.050, including, but not limited to, the following measures:

- (i) increasing the paved surface to 20 feet in width,
- (ii) ensuring that the paved surface is capable of supporting the imposed loads of fire apparatus,
- (iii) keeping the paved surface free of obstructions, including parked vehicles,
- (iv) posting and maintaining NO PARKING/FIRE LANE signs and/or other appropriate notice prohibiting obstructions,
- (v) establishing the 100-foot no parking zone required by EDDS 4C.070, unless the Department determines that compliance with the no parking requirements of OMC 16.32.050 are sufficient to meet this requirement.

7. The standards of OMC 16.32.050 are expressly intended to secure adequate fire access. The evidence did not show that the required compliance with these standards was inadequate to provide proper fire and emergency access to the proposed subdivision or to those living further south on Shelburne Way or Shelburne Court.

8. The decision of January 16, 2009 also held, consistently with prior decisions, that exemption from the requirement to prepare a Transportation Impact Analysis (TIA) did not exempt the proposal from concurrency requirements. Because no evidence was offered to show compliance with concurrency requirements, the decision requested supplemental evidence on whether that issue had been reviewed through SEPA.

9. The Department did not respond whether its SEPA review had included any review of transportation concurrency. The Applicant responded in Ex. 19 that "[t]o our knowledge, the Olympia staff reviewed this project in its current configuration during their SEPA review and found it to meet transportation concurrency." One should be able to easily ascertain and categorically state whether concurrency review has occurred. With that, the qualified response from the Applicant, together with the absence of any response from the Staff, is insufficient to show that this review occurred.

10. The Applicant, however, also submitted as part of Exhibit 19 an analysis by City Transportation Engineer David Smith, showing that traffic from this subdivision would not cause the level of service (LOS) on any Neighborhood Collector street segment to decline below the minimum of LOS D. The Department presented testimony from Mr. Dower at the hearing that the traffic volumes on Old Morse Road, a local access street, would be well within the applicable range of zero to 500 average daily trips per day, even with traffic from this subdivision. See Finding No. 7 in the January 16, 2009 decision. Thus, the evidence shows that concurrency is met for the street segments serving this subdivision.

11. Unless I am misreading it, however, the analysis in Exhibit 19 does not address the effect of this subdivision's traffic on the LOS of any intersections. To meet the concurrency requirements described in the January 16th decision, there must be a review sufficient to show that this subdivision will not cause the LOS of any intersection to decline below the adopted minimum. A full TIA need not be prepared, but at least a review at the level of that in Ex. 19 must be carried out.

D. The motion for reconsideration.

12. Conclusion No. 23 of the January 16, 2009 decision states:

"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."

13. The motion for reconsideration by the Department at Exhibit 20 states that Local Access Street Standard Plan 4-2K was eliminated and replaced by revised Standard Plan 4-2J before the application for preliminary subdivision approval was filed. With that, the Department states, the only local access street section available to the Applicant was 4-2J. Therefore, the Department concludes, OMC 16.04.040 and OMC 16.32.140 require that a fully automatic residential fire sprinkler system be installed in all residences in this subdivision.

SUPPLEMENTAL CONCLUSIONS OF LAW

A. Appropriate provisions for schools.

1. RCW 58.17.110 (2) states that

"[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 . . . schools and schoolgrounds . . ."

2. The decision of January 16, 2009 in this matter points out the difficulty in making this finding when schools are over capacity and also acknowledges the role of school impact fees in making this judgment. See Conclusions of Law 4 through 11, Decision of January 16, 2009.

3. As found, the only evidence admitted on the subject is that the School District requests additional mitigating fees at the SEPA stage if it believes normal impact fees will not satisfactorily address the impacts of a subdivision. Because the School District did not request additional fees for this subdivision at the SEPA stage, it must be concluded on this record that the subdivision's impacts have been mitigated and that appropriate provisions for schools and schoolgrounds have been made.

4. Mr. Hoffman, the Applicant's attorney, requests in Ex. 22 that his client be allowed to address the position on school capacity taken by the School District in Ex. 21. As noted above, Ex. 21 was submitted after the deadline and without the required affidavit or declaration and, for those reasons, was not admitted. For that reason, and because this decision concludes that the proposal makes appropriate provisions for schools without further measures, there is no need for further argument on this issue in this case.

5. Even though it cannot be fully addressed in this case for the reasons just given, the issue of whether over-capacity schools supply the "appropriate provisions" required by RCW 58.17.110, given the payment of impact fees, is a critical matter which should be resolved on full evidence and argument. If the School District presents that for the next subdivision proposed to be served by over-capacity schools, the issue could be decided on full participation from all sides.

B. Levels of service of intersections and streets.

6. Before reaching the substance of this issue, the question of proper notice must be addressed. To give all parties a reasonable time to respond to the request for supplemental evidence, while not unduly delaying final resolution, the decision of January 16, 2009 required responses on the two issues to be submitted by January 28, 12 days later. To ensure that notice of this deadline reached all parties promptly, the decision directed the Staff to "either e-mail or mail this decision to all parties on the date of this decision." Mr. Campbell (Ex. 17) and Ms. Thomsen (Ex. 18) state that the postmark shows that this letter was not mailed until January 22, almost a week later, and that they did not receive it until Saturday January 24.

7. This delay violated the terms of the decision by six days and deprived Mr.

Campbell and Ms. Thomsen of the response time the decision intended to give them. They are correct that four days, two of which are weekend days, is a very short time in which to respond on the two issues. Fortunately, both of them did manage to file detailed responses, thus removing the need for further extensions in the January 28th deadline.

8. Turning to the merits, this subdivision cannot be approved unless sufficient evidence is submitted showing that the traffic it generates will not cause the LOS on streets or intersections to decline below the adopted minimum, unless appropriate mitigating measures are taken. See January 16, 2009 decision and decisions cited therein.

9. As found, the evidence in Exhibit 19 shows that concurrency is met for the capacity of streets. However, to meet the concurrency requirements described in the January 16th decision, there must be a review sufficient to show that this subdivision will not cause the LOS on any intersection to decline below the adopted minimum. A full TIA need not be prepared, but at least a review at the level of that in Exhibit 19 must be carried out. This decision is conditioned to require this.

10. As conditioned, this proposal makes appropriate provisions for streets and transportation and complies with applicable concurrency requirements.

C. The motion for reconsideration.

11. According to OMC 18.75.060 B, a motion for reconsideration must be based on at least one of the following grounds:

"1. Errors of procedure or misinterpretation of fact or law, material to the party seeking reconsideration;

2. Irregularity in the hearing before the Hearing Examiner by which such party was prevented from having a fair hearing; or

3. Clerical mistakes in the final decision and order."

12. The Department's motion for reconsideration does not claim any error of procedure, irregularity preventing a fair hearing, or clerical mistake. The motion does claim certain misinterpretations of fact and law.

13. Conclusion No. 23 of the January 16, 2009 decision relied on the statement by the Applicant in Ex. 1, Att. O that Shelburne Way would be built to Standard Plan 4-2K. The Department points out that Plan 4-2K is no longer available and Shelburne Way must be built to Plan 4-2J.

14. Conclusion No. 23 also rested on my mistaken reading of the width of the paved surfaces required by Plans 4-2J and 4-2K. Each plan requires a curb to curb width of 20 feet.

15. OMC 16.32.140 states that

"fully automatic residential fire sprinkler system shall be designed, installed, tested and maintained per N.F.P.A. (National Fire Protection Association) 13, current edition, RCW 18.160 and the approval of the Fire Chief, in all Group R-3 structures . . . when:

(a) the structures are constructed within subdivisions in which internal streets are required to be constructed in accordance with the provisions of Chapter 4, Standard Plan 4-2J of the Engineering Design and Development Standards, as the same were amended in December, 2006 . . ."

16. The motion for reconsideration, as described above, shows that this subdivision will have internal streets built to Standard Plan 4-2J. The Applicant filed no response to this motion. Therefore, on the basis of the motion for reconsideration alone, it must be concluded that OMC 16.32.140 requires sprinkler systems in all residences in this subdivision.

17. However, OMC 18.75.060 A states that copies of requests for reconsideration "shall be served on all parties of record" and that a party may file an answer to the motion for reconsideration within five days of its filing. This motion does not indicate whether and when it was delivered to the other parties. This Applicant has responded consistently in the past to procedural steps, yet submitted nothing in response to this motion for reconsideration. For these reason, I want to be sure the Applicant received proper notice of this motion before making a final decision on it.

18. To that end, Mr. Chalem or Mr. Dower are directed to inform me and the Applicant by 5 p.m. on February 20, 2009 of when and how they served copies of the motion for reconsideration on the Applicant and the other parties. The Applicant and any other party may also respond as to whether it received any notice. If the Department served the motion in a timely manner, its motion for reconsideration will be granted for the reasons set out above. If the Department did not do so, this reconsideration proceeding must remain open to give the Applicant and any other party a chance to respond to the motion.

19. Mr. Hoffman, the Applicant's attorney, states in Ex. 22 that he is aware of the Department's motion for reconsideration on the sprinkler issue and requests additional time to address the issue. The process just described will achieve that, consistently

with OMC 18.75.060 A. If the Department promptly served the motion, then the Applicant and other parties failed to respond in the five day period set by OMC 18.75.060 A, and no further responses are allowed. If the Department did not promptly serve the motion, then the Applicant and other parties will not be held to the five-day period and will be given an opportunity to respond to the motion.

DECISION

A. Supplemental decision on preliminary subdivision approval.

Preliminary subdivision approval is granted, subject to the following additional conditions:

1. The Applicant shall carry out or engage a review to determine whether this subdivision will cause the LOS on any intersection to decline below the adopted minimum. A full TIA need not be prepared, but at least a review at the level of that in Exhibit 19 must be carried out. The Applicant shall provide this review to the Department and all parties.
2. The Department shall review the Applicant's analysis. If the Department determines that this subdivision will not cause the LOS on any intersection to decline below the adopted minimum, it shall send a letter to that effect to the Applicant and all other parties, and preliminary approval will be deemed granted on the date of that letter. If the Department determines that this subdivision will cause the LOS on any intersection to decline below the adopted minimum, it shall send a letter to that effect to the Applicant and all other parties requiring mitigation by the Applicant to preserve the minimum LOS, and that mitigation shall be deemed a condition of preliminary subdivision approval.
3. The above analyses and determinations need not be submitted to the Hearing Examiner for further review or decision.

All conditions in the decision of January 16, 2009 remain in effect.

B. Decision on motion for reconsideration.

For the reasons set out in the Conclusions, above, the motion for reconsideration should be granted on the basis of the evidence and argument submitted by the Department in Exhibit 20. As also shown in the Conclusions, there is a question as to whether and when the Staff served the motion for reconsideration as required by OMC

18.75.060 A. If that was not properly done, then the Applicant and other parties must be given the opportunity to respond to the motion before it is finally decided.

To that end, the following steps shall be taken,

(a) Mr. Chalem or Mr. Dower shall inform me by e-mail by 5 p.m. on February 20, 2009 of when and how copies of the motion for reconsideration were delivered or transmitted to the Applicant and the other parties. The Applicant and any other party may also respond by that time as to whether it received any notice of the motion for reconsideration.

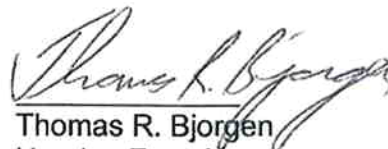
(b) If the Department delivered or transmitted copies of the motion to the Applicant and other parties in a timely manner, I will issue an order granting the motion and requiring fire sprinkler systems in all residences. If not, I'll issue an order allowing prompt responses by the Applicant and parties on that issue.

(c) Mr. Chalem **shall send** this decision to the Applicant and other parties by e-mail by February 18, 2009. If any party has not supplied the Staff with an e-mail address, the Staff shall call or leave a telephone message with them on February 18, stating that a decision containing a deadline of February 20 has been issued and that they may pick it up at the Department's office.

OMC 18.75.060 C states that a motion for reconsideration "is deemed denied unless the Hearing Examiner takes action within 20 days of the filing of the motion for reconsideration." With the President's Day holiday, that period expires on February 17, 2009, the date of this decision. This decision is intended to constitute an action so as to avoid the default decision under OMC 18.75.060 C. To ensure fair notice and an opportunity to be heard, it is necessary to extend consideration a short time as directed immediately above.

Nothing in this decision on the motion for reconsideration affects the steps required by the supplemental decision on preliminary subdivision approval, above.

Dated this 17th day of February, 2009.


Thomas R. Bjorgen
Hearing Examiner

Mailed 2-18-09

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