



COUNTY COMMISSIONERS

Cathy Wolfe  
 District One  
 Sandra Romero  
 District Two  
 Karen Valenzuela  
 District Three

**HEARING EXAMINER**

*Creating Solutions for Our Future*

**BEFORE THE HEARING EXAMINER  
 FOR THURSTON COUNTY**

In the matter of the Appeal of	)	
	)	
<b>Concerned Eastside Neighbors/    Teresa Goen-Burgman, Joe Hanna, et al.</b>	)	<b>APPEAL No. 12-118110VE    Project No. 2009103063</b>
	)	
	)	
	)	<b>Medela Group LLC    Rezone and Comprehensive Plan    Amendment</b>
Of the County's October 11, 2012	)	
<u>SEPA Determination of Non-Significance</u>	)	

**SUMMARY OF RECOMMENDATION**

The Appellants have not met the burden of proving that the County SEPA Responsible Official's environmental threshold determination was in error. The October 11, 2012 determination of non-significance should be upheld and the appeal should be denied.

**SUMMARY OF RECORD**

**Underlying Request**

Medela Group, LLC proposed a Comprehensive Plan Land Use amendment and site-specific rezone from Residential 4 to 8 units per acre (R 4-8) to Residential Multifamily 18 (RM 18) within the City of Olympia Urban Growth Area (UGA). The 9.01-acre property subject to the application is located generally north of Interstate 5, east of Boulevard Street SE, and south of Pacific Avenue SE on an unincorporated island of Thurston County in the vicinity of 8th Avenue SE and Steele Street SE, Olympia, Washington.

Thurston County reviewed the Comprehensive Plan and zoning map amendments for compliance with the requirements of the State Environmental Policy Act (SEPA) and issued a determination of non-significance (DNS) on the proposed non-project action on October 11, 2012.<sup>1</sup>

<sup>1</sup>Under SEPA, "nonproject actions" involve decisions on policies, plans, or programs, including: (i) The adoption or amendment of legislation, ordinances, rules, or regulations that contain standards controlling use or modification of the environment; (ii) The adoption or amendment of comprehensive land use plans or zoning ordinances; (iii) The adoption of any policy, plan, or program that will govern the development of a series of connected actions (WAC 197-11-060), but not including any policy, plan, or program for which approval must be obtained from any federal

## **Appeal**

Teresa Goen-Burgman, Tim Burgman, Lisa Hanna, Joe Hanna, Kathleen Blanchette, Carla Baker, and Deborah Smithingell, known collectively as the Concerned Eastside Neighbors (Appellants), timely appealed the DNS on November 1, 2012.

## **Hearing Date**

After a November 16, 2012 pre-hearing conference to clarify issues and procedures on appeal, the Thurston County Hearing Examiner conducted an open record appeal hearing on the SEPA appeal on February 4, 2013.

## **Testimony**

At the open record appeal hearing, the following individuals presented testimony under oath:

Joe Hanna, Appellant  
Teresa Goes-Burgman, Appellant  
Cynthia Wilson, Thurston County Planning Department  
Christy Osborn, Thurston County Planning Department  
Arthur Saint, Thurston County Public Works  
Ron Niemi, Woodard Bay Works, Inc, Applicant  
Lisa Palazzi, JW Morissette & Associates Inc., Applicant Representative  
Amy Buckler, City of Olympia

## **Attorney Representation**

Jeff Fancher, Deputy Prosecuting Attorney, represented Thurston County.

## **Exhibits**

The following exhibits were admitted in the record of this matter:

- EXHIBIT 1 Appeal of an Administrative Decision, November 1, 2012, submitted by Appellants
- EXHIBIT 2 Long Range Planning Department Staff Report, submitted by the County, with the following attachments:
- |              |  |
|--------------|--|
| Attachment a | Notice of Public Hearing                               |
| Attachment b | SEPA determination issued October 11, 2012             |
| Attachment c | Vicinity Maps (2)                                      |
| Attachment d | Application and SEPA checklist dated November 12, 2009 |
| Attachment e | Appeal received November 1, 2012                       |

---

agency prior to implementation; (iv) Creation of a district or annexations to any city, town or district; (v) Capital budgets; and (vi) Road, street, and highway plans. *WAC 197-11-704(2)(b), emphasis added.*

*Findings, Conclusions, and Recommendation*

*Thurston County Hearing Examiner*

*Concerned Eastside Neighbors/Goes-Burgman, Hanna et al Appeal No. 12-118110VE*

*Medela Group LLC Rezone/Comp Plan Amendment #2009103063*

*page 2 of 18*

Attachment f	Pre-Hearing order November 20, 2012
Attachment g	Thurston County Zoning Map of Medela Property
Attachment h	City of Olympia and UGA Zoning Map of Medela Property
Attachment i	Memo to the Thurston County Planning Commission from Christy Osborn dated November 7, 2012 regarding the City of Olympia Planning Commission Recommendation for the Medela Site Specific comprehensive Plan/Rezone Amendment and Public Hearing Comments, with attachments: <ol style="list-style-type: none"> <li>1. Map of Project site</li> <li>2. Vicinity Map</li> <li>3. Map of Indian Creek</li> <li>4. Land Use Designations</li> <li>5. Neighborhood Collector Street Specifications</li> <li>6. Written Agency Comments on rezone</li> <li>7. Written Public Comments on rezone</li> </ol>
Attachment j	Staff Report for the Thurston County Planning Commission dated September 19, 2012, prepared by Christy Osborn-Medela Olympia/Thurston County Joint Plan Site Specific Land Use Plan and Rezoning Amendment
Attachment k	Staff Report to City of Olympia Planning Commission dated October 22, 2012, prepared by Amy Buckler
Attachment l	Memo to file from Cynthia Wilson dated 11/19, 2012
Attachment m	Aerials and Lidar from Geodata <ol style="list-style-type: none"> <li>1. Aerial, 2012</li> <li>2. Aerial, 2012 with 2 foot contours</li> <li>3. Aerial, 2012 with Wetland, Stream, 100-year Floodplain Overlays</li> <li>4. 2011 Lidar Mapping from Geodata</li> </ol>
Attachment n	Comment Letters <ol style="list-style-type: none"> <li>1. 10/25/2012 Comment letter from Department of Ecology</li> <li>2. 10/10/2012 Comment letter from Bigelow House Preservation Association</li> <li>3. 10/24, 2012 Comment letter from Deborah Smithingell</li> <li>4. 10/24/2012 Comment letter from Tim Burgman</li> <li>5. 10/24/2012 Comment letter from Joe Hanna</li> <li>6. 10/24/2012 Comment letter from Lisa Hanna</li> <li>7. 10/24/2012 Comment letter from Kathleen Blanchette</li> <li>8. 10/25, 2012 Comment letter from Carla Baker</li> <li>9. 10/24/2012 Comment letter from Teresa Goen-Burgman</li> </ol>

- Attachment o January 10, 2013 Summary Report Responding to DNS appeal prepared by Lisa Palazzi, PWS of JW Morrisette and Associates, Inc. P.S. for the Medela group
- Attachment p Professional resume and qualifications for Lisa Palazzi
- Attachment q January 10, 2013, Prairie Habitat and Species Reconnaissance report submitted by Key Mc Murray, Owner, Professional Stream and Wildlife Biologist, Key Environmental Solutions, LLC
- Attachment r Professional resume and qualifications for Key McMurry
- EXHIBIT 3 Summary Report responding to DNS Appeal, Lisa Palazzi, CPSS, PWS of J.W. Morrisette & Associates, Inc. P.S., January 10, 2013, submitted by Applicant
- EXHIBIT 4 Prairie Habitat and Species Recon, Key McMurray, Key Environmental Solutions, LLC, January 8, 2013, submitted by Applicant
- EXHIBIT 5 Professional Resume of Lisa M. Palazzi, submitted by Applicant
- EXHIBIT 6 Professional Resume of Key McMurray, submitted by Applicant
- EXHIBIT 7 Correspondence from Paul Elvig, January 31, 2013, submitted by Appellants
- EXHIBIT 8 Professional Background of Paul M. Elvig, submitted by Appellants
- EXHIBIT 9 Court of Appeals Published Opinion No. 30178-8-III, Spokane County, Headwaters Development Group, LLC. And Red Maple Investment Group, LLC. vs. Eastern Washington Growth Management Hearings Board and Michael and Mary Fenke, Donald Lafferty, Leland and Darlene Lessig, David and Bobbie Masinter, Lawrence McGee, David and Barbara Shields, Bert Walkley and Robert and Camille Watson, filed January 31, 2013, submitted by County
- EXHIBIT 10 Correspondence from Steve Erickson, January 30, 2013, submitted by Applicant
- EXHIBIT 11 Correspondence from Lettie M. Arnold, Masonic Memorial Park, undated, submitted by Applicant
- EXHIBIT 12 Correspondence from Jamie Glasgow, Wild Fish Conservancy NW, January 31, 2013, submitted by Appellants
- EXHIBIT 13 Report: Thurston County, WA Urban Forest Data Development, completed January 2011, prepared by AMEC Earth and Environmental, Inc., submitted by Appellants

- EXHIBIT 14 Air Quality and Land Use Handbook: A Community Health Perspective, April 2005, California Environmental Protection Agency California Air Resources Board, submitted by Appellants
- EXHIBIT 15 Chapter 173-WAC Maximum Environmental Noise Levels, submitted by Appellants
- EXHIBIT 16 Correspondence from Adam Sant, South Puget Sound Salmon Enhancement Group, January 29, 2013, submitted by Appellants
- EXHIBIT 17 Historic Cemetery Burials, submitted by Appellants
- EXHIBIT 18 Color photos submitted by Appellants (46 photos)
- EXHIBIT 19 "A Case For Water Typing in Washington State", a 14-minute video distributed by the Wild Fish Conservancy, submitted by Appellants
- EXHIBIT 20 Sound level measurements, taken by Tracy Burns and Teresa Goen-Burgman, submitted by Appellants
- EXHIBIT 21 "Conservancy, the Lifeblood of Puget Sound", promotional materials prepared by Wild Fish Conservancy, submitted by Appellants
- EXHIBIT 22 Excerpt of DRAFT Mazama Pocket Gopher Status Update and Recovery Plan, prepared by Washington Department of Fish and Wildlife, January 2013, cover and page 81 only, submitted by Appellants
- EXHIBIT 23 PowerPoint presentation slides prepared by Liza Palazzi, submitted by Applicant
- EXHIBIT 24 Four graphics submitted by Lisa Palazzi, referenced in her PowerPoint presentation:
- a. Puget Sound Electric Olympia Service Center Parking Lot Repaving As-Built, dated July 10, 1991
  - b. City of Olympia Pacific Avenue Crossing As-Built, map dated February 1987
  - c. City of Olympia Underground Utility Map (current version available, undated)
  - d. Washington State Department of Transportation map, "As-Built, State Route 5 Plum Street to Pacific Avenue" (15 pages)
- Exhibit 25 Written comments of Ron Niemi, submitted by Applicant

Based on the record developed at hearing, the Hearing Examiner enters the following findings and conclusions.

*Findings, Conclusions, and Recommendation*  
*Thurston County Hearing Examiner*

*Concerned Eastside Neighbors/Goes-Burgman, Hanna et al Appeal No. 12-118110VE*  
*Medela Group LLC Rezone/Comp Plan Amendment #2009103063*

*page 5 of 18*

## FINDINGS

### Site and Vicinity Description

1. On November 12, 2009, the Applicants submitted an application for a Comprehensive Plan Land Use Map amendment and site-specific rezone from Residential 4 to 8 units per acre (R 4-8) to Residential Multifamily 18 (RM 18) within the City of Olympia urban growth area (UGA). The 9.01-acre subject property is located generally north of Interstate 5, east of Boulevard Street SE, and south of Pacific Avenue SE on an unincorporated island of Thurston County near both 8th Avenue SE and Steele Street SE.<sup>2</sup> Medela Group LLC is a partnership made up of the three siblings of the Armstrong family. *Exhibit 2, Attachment D.*
2. The fourteen contiguous parcels are developed with nine low density single-family homes in various conditions. One of the Armstrong sibling Applicants resides in one of the nine homes; the other eight were originally intended to be rental properties. Two are currently uninhabitable. City of Olympia municipal water and sewer provide existing service to the site. *Exhibit 2; Exhibit 2, Attachments D and M; Exhibit 3.*
3. Adjacent to the north of the site is the Forest Memorial Gardens Funeral Home and Cemetery, also within the UGA; zoning to the north is General Commercial. Land to the east is within the City of Olympia, with General Commercial and High Density Corridor zoning designations. Development includes industrial warehouses and the Puget Sound Energy storage yard and offices, which abut the site's eastern boundary. Properties to the south are zoned R4-8 and RM18 in both the City and the UGA. Development to the south consists of a single-family home site at the end of Steele Street and the I5 corridor. Parcels to the west are within the City of Olympia, zoned R4-8, and developed with single-family residences at three to 4.5 units per acre on lots of 5,500 square feet and larger. *Exhibit 2; Exhibit 2, Attachments C and H.*
4. The site is accessed via Boulevard Street SE off of Pacific Avenue SE, which major arterial is approximately one quarter mile from the subject property as the crow flies. From Boulevard Street SE, one may take either 7th Avenue SE or 9th Avenue SE east to Chambers Street SE, which is the western site boundary. Presently, 8th Avenue SE and Steele Street SE provide access to the existing lots within the subject property. *Exhibit 2, page 4; Exhibit 2, Attachments C and G.*
5. Thurston County GeoData maps show a wetland and 100-year floodplain area abutting the site on the Puget Sound Energy parcel to the east, encumbering a portion of the southeastern corner of the subject property. Indian Creek, a fish-bearing stream, is piped under the Puget Sound Energy site just east of the shared boundary. Staff conducted a site visit for the purpose of inspecting the wetland and floodplain/stream area. The exact location of the underground piped creek is currently unknown, but it is assumed to

---

<sup>2</sup> The subject property is comprised of fourteen contiguous tax parcels: 09480045000, 09480046000, 09480048000, 09480049000, 09480050000, 09480051000, 09480052000, 09480053000, 09480054000, 09480056000, 09480057000, 52900100100, 52900200900, and 52900200700. *Exhibit 2, Attachment D.*

daylight into the wetland (which itself is adjacent to I-5) and to then be directed under I-5 in a culvert before joining Moxlie Creek, which flows west and discharges in to Budd Inlet. Both Indian Creek and the wetland are regulated under the Thurston County critical areas ordinance (CAO, Title 24). The on-site area of the wetland and creek and the associated buffer areas would impact the development of the subject property, likely reducing maximum developable density regardless of zoning designation. *Exhibit 2, page 4; Wilson Testimony; Exhibit 2, Attachments L and M.*

Application and Environmental Threshold Determination

6. The application was originally submitted in 2009. At the time, the site was slated to be annexed by the City of Olympia by the end of 2010. However, annexation did not occur and the City has indicated that they are not currently processing any annexations. Because the site is within the UGA, the application was processed jointly by the City and the County via public meetings in the fall of 2012. Once the instant SEPA appeal was filed, the City tabled any action on the proposal pending resolution of the appeal in Thurston County. *Exhibit 2, page 3; Buckler Testimony; Exhibit 3.*
7. According to the application, circumstances surrounding the site have changed over the past 50 years such that a rezone is warranted. The Olympia urban growth area has developed and I-5 was built very near the site. Olympia's Boulevard Road has become an arterial, utility corridors have been developed, and public transit service has been initiated. Within the City of Olympia, Pacific Avenue is an arterial envisioned for greater development intensity. The City's Comprehensive Plan calls for the area to become an urban corridor. The Applicants assert that proximity to high capacity utilities, public transportation, and other alternative commute options renders the site appropriate for responsible higher-density development such that the current zoning designation would not support the highest and best use of the land. The Applicants' representative indicated that the rezone is being processed as part of preparing the property for sale to another party who would develop it. *Exhibit 2, Attachment D; Niemi Testimony; Exhibit 2, Attachment K, Buckler Testimony.*
8. In the City of Olympia's review of the application, City Planning Staff recommended approval of the proposed Comprehensive Plan Land Use Map amendment and rezone, finding the proposal consistent with City of Olympia Comprehensive Plan and Joint Olympia/Thurston County Comprehensive Plan goals and policies including those which aim to:
  - Maintain or improve the character and livability of established neighborhoods;
  - Provide a variety of transportation alternatives to enable less reliance on automobiles;
  - Provide people with opportunities to live closer to work;
  - Create desirable, livable neighborhoods that provide a variety of housing opportunities, accommodate different lifestyles and income levels, and provide a sense of community;

- Provide for a compact growth pattern to efficiently use the remaining buildable land and enable cost effective provision of utilities and services; and
- Encourage well-designed infill development so that Olympia will become more urban.

*Exhibit 2, Attachment K; Buckler Testimony.*

9. The Appellants' concerns regarding impacts to neighborhood character resulting from development of multifamily housing, expressed in letters submitted in the comment period leading up to the City and the County recommendations of rezone approval, were also addressed in the City's Staff report. City Planning Staff noted that the RM-18 zoning regulations address impacts to neighborhood character by providing for buffering between existing single-family districts and multifamily development when the subject property is greater than five acres. The RM-18 standards require townhomes, duplexes, or single-family residences to be located along the boundary of multifamily housing sites greater than five acres that adjoin existing single-family housing. *Exhibit 2, Attachment K.*
10. After completing State Environmental Policy Act (SEPA) review of the proposed non-project action, the County's Responsible Official issued a determination of non-significance (DNS) on October 11, 2012. The DNS noted that "critical areas including Indian Creek and an associated wetland system ... may limit development around this area or require the transfer of density outside of critical areas and buffers." *Exhibit 2, Attachment B, DNS.*

Appeal

11. On November 1, 2012, Appellants submitted an appeal of the DNS arguing as follows (partially paraphrased and condensed):

Court cases have allowed the use of future studies as a mitigating condition. However, agencies are encouraged to obtain the necessary studies to identify probable impacts before a threshold determination is issued. This allows appropriate mitigation to be added to the permit before any construction activities occur. The Appellants believe the following issues should have been studied prior to issuance of the threshold determination:

- Traffic: the identified 937 increased trips do not reflect maximum possible density under the proposal and traffic impacts on the neighborhood have not been fully analyzed
- On-site soils, wetlands, 100-year floodplain: Appellants believe there are wetland areas on-site and the 100-year floodplain has not been identified
- Mazama pocket gopher: Appellants believe the species could be on-site, affecting maximum densities



- Need for retaining walls
- Air pollution and noise pollution: Appellants believe the proposal would increase air and noise pollution to surrounding residences during construction and road upgrades, as well as through removing existing mature trees
- Street upgrades: Appellants assert that necessary street improvements to handle projected traffic would require "taking" of real property from existing residential parcels
- Impacts to historical cemetery and residence: Appellants assert that inadequate analysis of impacts to historical features in the area was reviewed prior to issuance

For these reasons, Appellants request the DNS be withdrawn and an environmental impact statement be required.

*Exhibit 1; Hanna Testimony; Goen-Burgman Testimony; Exhibit 2, Attachment B, DNS.*

12. Written notice of public hearing was mailed to the Appellants and published in The Olympian on January 25, 2013, at least ten days prior to the hearing. *Exhibit 2, page 5; Exhibit 2, Attachment A.*

*Traffic*

13. With the application for Comprehensive Plan Land Use Map amendment and rezone, the Applicant submitted a conceptual development plan showing what a potential development of the site could look like under the proposed zoning.<sup>3</sup> It showed single-family homes in the west portion of the site adjacent to the existing development, with the density gradually increasing to the east towards the PSE property. The conceptual design showed 140 townhome and apartment units, representing development at approximately 15.5 units per acre. Using the industry standard ITE Trip Generation Manual, Thurston County Staff extrapolated that this number of units would generate approximately 937 average new daily vehicle trips and an estimated 86 PM peak hour trips. Both County and City Roads Staff noted that the project would likely trigger the 500 trips per day threshold requiring the streets used for access to be upgraded to Neighborhood Collector standards from their current Local Access standards. City and County Staff noted that prior to any development permit issuance, a full traffic impact analysis would be required to determine the extent of additional traffic, required street improvements, and intersection and pavement capacities, among other road standards. *Exhibit 3; Exhibit 2; Exhibit 2, Attachment I.*

---

<sup>3</sup> The conceptual plan was not offered in evidence.

14. Appellants argued that a full traffic study needed to be conducted prior to issuance of the DNS due to the significant increase in traffic volumes likely to result from development consistent with the proposed rezone and due to significant alteration to the existing local access streets that serve residential development around the project site. *Exhibit 1; Hanna Testimony.*
15. County Planning Staff took the position that a traffic study is premature given that no development proposal has been submitted. *Osborn Testimony; Exhibit 2.* City Planning Staff testified that at the rezone stage, traffic is considered in terms of feasibility rather than identification of mitigation because impacts cannot be known until a proposal is submitted. *Buckler Testimony.*
16. The Applicants acknowledged that a full traffic study would be required at the time development is proposed and that mitigation would be required for traffic from any future development of the site. They agreed with City and County Staff that a traffic impact analysis is not typically undertaken at rezone without a specific development proposal under review. *Niemi Testimony; Exhibit 3.*

*Soil, Slope, Wetland, and Floodplain*

17. Because portions of the site likely contain wetlands and possibly Indian Creek, Appellants argued that lack of detailed soil, wetland, and Indian Creek floodplain studies prior to DNS issuance could result in impacts the critical areas because future development would be too dense. They argued that preliminary information short of "boots on the ground site study" could not provide adequate information upon which to base the DNS. Appellants consulted with Jamie Glasgow, Science and Research Director with Wild Fish Conservancy, regarding their appeal. Mr. Glasgow submitted a letter asserting that failing to require detailed critical areas studies prior to non-project DNS issuance could have the adverse outcome of allowing the Applicants to move forward with inadequate certainty as to how much development their property can sustain in compliance with critical areas regulations. *Exhibit 1; Hanna Testimony; Exhibit 12.*
18. The Appellants did not submit argument or evidence relating to slopes or retaining walls at hearing.
19. The Applicants noted that there are no active landslide areas or other geological hazard areas on-site and the site's soils as mapped are not considered erosion prone by the NRCS. They also noted that slopes would be evaluated for site design purposes once there is a development proposal under consideration and that any grading or engineered retaining walls would be required to satisfy County regulations. *Exhibit 3; Exhibit 23, Slide 5; Palazzi Testimony.*
20. The County responded to the Appellants' critical areas arguments noting that the site was inspected and analyzed to determine if rezoning would cause a significant impact to the on-site critical areas including the creek, the wetland, and the potential for Mazama pocket gopher habitat on-site. Because the CAO would prohibit impacts to critical areas

regardless of density, the County Responsible Official determined that the rezone would result in no significant impacts to the critical areas. All information indicates that there is developable area outside of the sensitive areas capable of being developed to the proposed zoning designation. *Wilson Testimony; Exhibit 2, pages 6-7.*

21. The Applicants acknowledged that a detailed soil study and wetland delineation/creek study would be required when a development proposal is reviewed. They noted that delineation of the wetland boundary and the wetland and creek buffer areas would be required in order to determine the required setbacks from critical areas and thus the size of the development envelope, which would determine the allowed density. *Exhibit 3.*
  
22. To respond to the SEPA appeal, the Applicants commissioned a professionally prepared critical areas and soil survey of the site. The southwestern portion of the site contains two natural swales. According to the Applicant's consultant who conducted the survey, the western of the two swales does not contain wetland hydrology, hydrophytic soils, or wetland vegetation. The eastern of the two swales contains a Palustrine Forested/ Palustrine Scrub/Shrub wetland fed by piped flow from Indian Creek and also by stormwater flows from the adjacent PSE site (and potentially other properties including I-5). Indian Creek is a Type 3 fish-bearing stream requiring a 150-foot buffer based on stream width (measuring its width upstream of Pacific Avenue where it is free flowing). Based on her site visit, the Applicants' consultant estimated that approximately 1/4 acre of the wetland is within the subject property, while the rest is located to the east and south. Preliminary rating of the entire wetland indicates it is a Category 3 wetland with a score of 47 points, including 19 habitat points. Pursuant to the CAO, such a wetland must be provided with a 100-foot buffer. At the time a development proposal is reviewed, the wetland would be accurately delineated. The Applicants' consultant postulated that on-site portions of the stream buffer would fall within the 100-foot wetland buffer.<sup>4</sup> Regardless, the actual square footage of the on-site critical areas would be subtracted from the total site area for the purpose of calculating maximum density. The buffers would be protected from development but would not be subtracted from the site area for the purpose of calculating maximum density. The site visit confirmed that site soils are consistent with existing mapping. The Applicants' consultant concluded from her review of the site that the property is developable. She has no concerns that any critical areas would be adversely impacted by development consistent with the proposed rezone, due to the fact that any development would be required to comply with the County's CAO and other development regulations. *Exhibit 23; Palazzi Testimony.*

#### *Mazama Pocket Gopher*

23. The Appellants argued that the DNS was inappropriately issued without a site study to determine the presence of the Mazama pocket gopher, a species which is a candidate for listing under the federal Endangered Species Act and is designated as threatened by the State. They argued that the gopher survey conducted by the Applicants' consultant was

---

<sup>4</sup> Jamie Glasgow of the Wild Fish Conservancy commented that the creek might require up to a 200-foot buffer. Ms. Palazzi noted that even a 200-foot stream buffer for Indian Creek is likely to fall within the 100-foot buffer for the Category 3 wetland. *Exhibit 23; Palazzi Testimony.*

performed at the wrong time of the year, outside of the optimal April through October window. They noted that the owner of Calvary Cemetery says its site has prairie soils. Appellants contended that no site soil samples were taken prior to DNS issuance. *Exhibit 1; Hanna Testimony.*

24. Per Thurston County GeoData, the sites soils are comprised primarily of Yelm fine sandy loam. *Exhibit 2, Attachment D.*
25. The excerpt of the Washington Department of Fish and Wildlife (WDFW) Draft Mazama Pocket Gopher Status Update and Recovery Plan (January 2013) submitted by Appellants rates the likely presence of the gophers based on soil types. The Draft Plan rates Yelm fine sandy loam as a "D" gopher soil. "D" soils are "gravelly, silt loam, or sandy soils with variable high seasonal water table [and] a small number of gopher occurrences." *Exhibit 22.*
26. Based on the appeal, the Applicants commissioned and submitted a professionally prepared prairie habitat reconnaissance study of the subject property. The study was performed on January 3, 2013, in response to the November 1, 2013 appeal. The study reported that no Mazama pocket gopher mounds, prairie plants, or oaks were observed on-site, while numerous moles were observed. The consultant submitted her professional opinion that no prairie species, including Mazama pocket gophers, exist on-site. The document stated that another site visit would occur in April to survey for then-current gopher presence within the WDFW-recommended window. *Exhibits 4, 6, and 6.a.* Ms. Palazzi reviewed and concurred with the determination that the site did not contain evidence of Mazama pocket gophers or other prairie species/habitats. *Palazzi Testimony; Exhibit 23.*

#### *Noise and Air Pollution*

27. The Environmental Checklists states, at Item 4.b: "The majority of existing grass, trees, and shrub vegetation will be removed as required to facilitate construction of the planned project and replaced by vegetation in accordance with an approved landscape plan." *Exhibit 2, Attachment D, page 7.*
28. The Appellants asserted that the site's mature vegetation acts to shield existing residences in the neighborhood from air and noise pollution caused by I-5 south of the subject property. Citing a Thurston County Urban Forest Data Development report, they noted that urban trees are known to reduce air and noise pollution, in addition to providing other benefits. They argued that removal of the site's mature trees would improperly increase noise and air pollution from I-5 in the neighborhood north of the subject property. Using a sound level measuring device from Radioshack, members of the Appellant team took sound measurements south of the site. According to their measurements, noise from the freeway already exceeds the County's adopted noise standards; they contended that removal of the trees would increase sound levels from the freeway. They noted that noise and air pollution are referenced in the first question of County's supplemental questionnaire form for non-project actions, arguing that this

means noise and air pollution must be studied prior to issuance of environmental threshold determinations in non-project actions. *Exhibit 1; Hanna Testimony; Exhibit 20.*

29. The Applicant noted that the Appellants' sound measurements were not conducted by professionals using professionally calibrated equipment. *Niemi Testimony.* The Appellants conceded this to be true. *Hanna Testimony.*
30. The Applicants contended that air and noise pollution studies are not typically undertaken during the rezone process, but they are sometimes required during design phases when specific development is proposed. No local regulations require noise studies prior to development or prohibit development of residential property adjacent to I-5 or to other residential property. Sometimes noise abatement design is included in developments where known noise sources exist or where the development would result in noise impacts; however, no development proposal has been submitted that can be reviewed to determine whether or not noise abatement is appropriate. *Exhibit 3.*

#### *Street Upgrades Resulting in Taking of Real Property*

31. The Appellants argued that due to traffic volumes that would trigger Neighborhood Collector standards and because neither Chambers Street SE nor 7th Avenue SE have 60 feet of right-of-way, the rezone would result in significant taking of real property on several parcels. Offering photographs taken by group members over the last two months from the edges of the respective rights-of-way, the Appellants contended that several lots would lose their entire yards, that at least three homes would have to be taken down, and that the required road widening would encroach into the adjacent cemetery. *Exhibit 1; Hanna Testimony; Exhibit 18.*
32. The City of Olympia Planning Department has recommended to the City that 9th Avenue SE be reclassified from Local Access to a Neighborhood Collector in conjunction with rezone/ land use map amendment in order to provide access to the subject property for future development. Currently, 9th Avenue SE has a 60-foot right-of-way, which would allow for the improvements required of a Neighborhood Collector. This would also require the portion of Chambers Street SE between 8th and 9th Avenues to be upgraded to Neighborhood Collector. Because anticipated traffic volumes would be expected to exceed capacity for the existing rights-of-way along much of Chambers Street SE and along 7th Avenue SE, measures may be required to channel traffic off of these road segments. Access for development at the proposed new densities might require some deviation from standards along part of the route, such as eliminating a planter strip on one side or other minor deviations. County Public Works Staff testified that a variance could be required, but indicated that access to the site at the proposed densities appears to be feasible. City Planning Staff also testified that access at the proposed density appears to be preliminarily feasible. *Exhibit 2, Attachment K; Saint Testimony; Osborn Testimony; Buckler Testimony.*
33. The County has never used eminent domain powers to acquire private property for the benefit of a private development. It would be a private civil matter between the future

developer and each property owner along the proposed access route as to whether any parcel gives up any real property to accommodate future development of the subject property. *Saint Testimony; Osborn Testimony.*

34. The Applicants noted that there are multiple options for providing site access that do not require the acquisition of additional property. Ninth Avenue SE already has 60 feet of right-of-way. The subject property abuts Chambers Street SE along most of its western boundary; needed right-of-way along Chambers could be dedicated from the site by the future developer. No new off-site land would be required to construct adequate roads. *Exhibit 3; Niemi Testimony.*

*Impacts to Historical Cemetery and Historical Residence on 7th Avenue*

35. The Appellants argued that approval of the rezone would adversely affect the adjacent historical Forest Memorial Gardens cemetery, established prior to statehood, where several Thurston County founding families have been laid to rest. They argued that environmental checklist item 13.b didn't reflect the cemetery or the historical house on 7th Avenue SE nearby, which is on the Olympia Heritage Register. Appellants contended that no cemeteries in Thurston County abut higher density residential development and that the proposed density is not compatible with a cemetery, suggesting that people at graveside services "don't need three stories of apartment windows looking in on their grief". Appellants asserted that farmland should abut cemeteries. *Exhibit 1; Hanna Testimony.*
36. County Planning Staff commented that there is no proposed development or intrusion on the cemetery property or on any historical site. They noted that at the time a specific site plan is reviewed, mitigation such as screening or visual buffers may be required depending on the design of the development. County Staff indicated that their review revealed no significant adverse impacts to historical properties identified from the proposed rezone. *Exhibit 2, page 7.* City Planning Staff testified that protections for historic sites prohibit redevelopment of historic sites, not development of adjacent land and that the City has no concerns about the rezone's potential to impact any historic sites. *Buckler Testimony.*
37. The Applicants argued that many existing cemeteries peacefully exist adjacent to residential and commercial development. Any project-specific impacts to the adjacent historic properties from future site development could be addressed through design. They submitted comments from managers of other Thurston County cemeteries indicating that residential development is more desirable next to cemeteries than vacant land, because in the experience of those commenting, adjacent residential development tends to reduce trespass and vandalism. The Applicants submitted testimony indicating that they have family buried at Forest Memorial Gardens and that they would never do anything to harm the adjacent cemetery. *Niemi Testimony; Exhibit 3; Exhibit 10; Exhibit 11.*

*Final Arguments*

38. As argued by the County in its staff report:

Although this proposed rezone is identified for a specific area, it is considered a non-project action because it is a change in the Comprehensive Plan and there is not a site specific project being evaluated. SEPA review of a rezone evaluates whether the rezoning action will cause a significant adverse impact. There is a range of potential development for a particular zone. ...[F]or any proposed site specific project, additional information will be required based on the specific proposal itself. The number of units may vary as could the location and design of the development. ... Issuing a DNS for the rezone does not allow development of the site. ...[A] site specific SEPA [review] will be required for any development proposal over nine units and any development under that level would still be required to meet all City and County codes and requirements. *TCC 17.09.055*. For the proposed rezone request, the impacts to the elements of the environment were considered and it was determined that for the rezone, there were no significant impacts. At the time of project submittal, specific impacts, reports and mitigation would be evaluated. No project would be approved that could not meet the requirements of the Thurston County code.

*Exhibit 2, page 6.*

39. The Applicants argued in conclusion that the application has been through a complex dual jurisdiction process, resulting in determinations by both the City and the County that the non-project action would not result in any probable significant adverse environmental impacts. The critical areas studies prepared in response to the appeal go beyond the level of detail usually required at the point of rezone and were provided specifically to address the Appellants' concerns, rather than because they are required by any applicable regulations. The Applicants contended that all evidence in the record supports the County's determination that the proposed rezone would not result in probable, significant, adverse environmental impacts. *Niemi Testimony*.
40. In conclusion, the Appellants reiterate that it is not unheard of to do more complete traffic analysis at the rezone level and that for the people living in the neighborhood, it would be nice to know as early as possible what changes will occur to their neighborhood in terms of traffic volumes and road configurations. They disputed that the subject property is within the Urban Corridor associated with Pacific Avenue. They reiterated that those whose property may be affected by road upgrades want to know as soon as possible what impacts to their properties are going to result from higher density development. *Hanna Testimony*.

## CONCLUSIONS

### **Jurisdiction**

The Examiner is authorized to decide appeals of environmental threshold determinations made pursuant to the State Environmental Policy Act pursuant to TCC 2.06.010(E) and TCC 17.09.160(A).

### **SEPA Appeal Criteria and Standards for Review**

The State Environmental Policy Act (Chapter 43.21C RCW or “SEPA”) specifies the environmental review procedures the County must follow for proposals that may have an impact on the environment. One purpose of SEPA is to “insure that presently unquantified environmental amenities and values will be given appropriate consideration in decision making along with economic and technical considerations.” Every proposal that may impact the environment (unless it is exempt from the act) must undergo some level of environmental review. *RCW 43.21C.030 (b)*.

The SEPA threshold determination is a determination as to whether a proposal is “likely to have a probable significant adverse environmental impact.” *WAC 197-11-330*. If the responsible official determines that a proposal will not have a probable, significant adverse environmental impact, a Determination of Non-Significance (DNS) is issued. If the responsible official determines that a proposal *will* have a probable, significant adverse environmental impact, a Determination of Significance (DS) is issued and an Environmental Impact Statement (EIS) must be prepared. SEPA provides a process in which a Mitigated Determination of Non-Significance (MDNS) may be issued to address identified probable significant adverse environmental impacts so that an EIS need not be prepared. *WAC 197-11-350*.

“Significant” as used in SEPA means a reasonable likelihood of more than a moderate adverse impact on the environment. Significance involves context and intensity and does not lend itself to a formula or a quantifiable test. *WAC 197-11-794*. Several marginal impacts when considered together may result in a significant adverse impact. *WAC 197-11-330(3)(c)*.

“Probable” means likely or reasonably likely to occur. The word probable is used to distinguish likely impacts from those that merely have a possibility of occurring, but are remote or speculative. *WAC 197-111-782*.

The lead agency must make its threshold determination “based upon information reasonably sufficient to evaluate the environmental impact of a proposal.” *WAC 197-11-335*.

In deciding whether to require an EIS, the lead agency must consider mitigation measures that the agency or Applicant will implement as part of the proposal, including any mitigation measures required by development regulations, comprehensive plans, or other existing environmental rules or laws. *WAC 197-11-330(1)(c)*. The lead agency’s reliance on existing laws and plans to mitigate some of the environmental impacts of a project need not be disclosed in the MDNS. *Moss v. City of Bellingham*, 109 Wn. App. 6, 21-23 (2001). Use of mitigation to



bring a project into compliance with SEPA, without promulgation of an EIS, has been viewed favorably by Washington Courts. *Anderson v. Pierce County*, 86 Wn. App. 290, 303 (1997).

Clear error is the standard of review applicable to substantive decisions under SEPA. *Cougar Mt. Assocs. v. King County*, 111 Wn.2d 742, 747, 765 P.2d 264 (1988). The determination by the governmental agency is clearly erroneous only if the reviewing tribunal is left with “the definite and firm conviction that a mistake has been committed.” *Id.* at 747 (quoting *Polygon Corp. v. Seattle*, 90 Wn.2d 59, 69, (1978)).

The Hearing Examiner may consider environmental information presented after issuance of the threshold determination in deciding the appeal. The purposes of SEPA are accomplished if the environmental impacts of the development are mitigated below the threshold of significance, even if the mitigation is not identified in the SEPA document. *Moss v. City of Bellingham*, 109 Wn. App. 6, 25 (2001).

The burden of proof is on the Appellant to show that the proposal will have probable, significant adverse environmental impacts. *Boehm v. City of Vancouver*, 111 Wn. App. 711, 719, 47 P.3d 137 (2002).

The procedural determination of the County's Responsible Official shall be accorded substantial weight in appeals. *TCC 17.09.160.I.2; TCC 17.09.160.S; RCW 43.21C.075(3)(d); RCW 43.21C.090.*

### **Conclusions Based on Findings**

1. **Appellants did not show clear error on the part of the County Responsible Official in reaching the determination of non-significance.** The Appellants' concern that detailed studies of specific traffic and critical areas impacts must be done to allow "appropriate mitigation to be added to the permit before any construction activities occur" is not disputed by any party. Assertions that such study can and should be done prior to submittal of an actual development proposal in the present case are misguided. The Appellants have not shown that waiting to review future development for compliance with traffic, road standards, and critical areas regulations (among all other development standards) in place at the time a development application is submitted would a) prevent applicable regulations from being effectively applied at the time of project review or b) be any way inconsistent with current procedural requirements. The Appellants have shown no error. *Findings 3, 4, 5, 13, 15, 16, 19, 20, 21, 22, 24, 25, 26, 30, 32, 33, 34, 36, and 37.*
2. **The County relied on adequate information in reaching its environmental threshold determination.** The Applicants submitted a completed environmental checklist and additional information that the County found adequate to support review of the proposed rezone. Joint City/County public meetings were held to identify concerns with the proposal and many of the appeal issues were submitted in the comments prior to DNS issuance. Using a conceptual site plan designed to show a potential project that could be developed if the rezone were approved, County Staff estimated new traffic generation

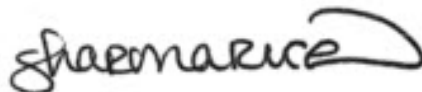
and concluded that road upgrades to provide access to the increased density of development would be feasible. County Planning Staff conducted site visits to verify the critical areas information in the environmental checklist. The nature and scope of information relied on were consistent with the SEPA regulations. WAC 197-11-330(1)(a)(ii). The County's DNS was based on information sufficient to evaluate the impacts of the proposed amendments. The information submitted by the Applicants in response to the appeal, including the "boots on the ground" wetland and creek review done by Ms. Palazzi and the Pocket gopher survey done by Ms. McMurray, corroborate the DNS. Findings 5, 8, 9, 10, 13, 19, 20, 21, 22, 24, 25, 26, 29, 30, 32, 33, 34, 36, and 37.

3. **The Appellants did not demonstrate probable, significant, adverse environmental impacts that would result from the rezone and land use map amendment.** Any future development of the site would be subject to review for compliance with then-applicable regulations. The site would be closely studied for slope, prairie habitat, and the exact extent and location of all critical areas - and all other County requirements - at the time development is proposed. Any development of the site would be constrained by required protections for critical areas. The number of units allowed to be built would be constrained by availability of adequate access. The Appellants' concerns that real property would be forcibly taken by the County or a future developer are misplaced. While they voiced opinions regarding what type of development is appropriate adjacent to cemeteries, the Appellants have not shown any adverse impacts to the cemetery from the proposed rezone. The Appellants' arguments essentially amount to generalized opposition to the proposed increase in density without showing any specific harm. Having failed to show any lack of compliance with applicable plans or regulations, their opposition is not sufficient to stop the owner of the adjacent property from doing what the law allows. Findings 15, 16, 18, 19, 20, 21, 22, 25, 26, 32, 33, 34, 35, 36, 37, 38, 39, and 40; *Sunderland Servs. v. Pasco*, 127 Wn.2d 782, 797 (1995)<sup>5</sup>; *Parkridge v. City of Seattle*, 89 Wn.2d 454, 462 (1978); *Maranatha Mining, Inc. v. Pierce County*, 59 Wn. App. 795 (1990).
4. Any arguments not addressed were deemed unpersuasive.

#### RECOMMENDATION

Based on the preceding findings and conclusions, the October 11, 2012 determination of non-significance should be upheld and the appeal should be denied.

**DECIDED** this 19th day of February 2013.



---

Sharon A. Rice  
Thurston County Hearing Examiner

---

<sup>5</sup> "While the opposition of the community may be given substantial weight, it cannot alone justify a local land use decision." *Sunderland Servs. V. Pasco*, 127 Wn.2d 782, 797 (1995).