CORRECTED DECISION of the SNOHOMISH COUNTY HEARING EXAMINER

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Millie Judge
Hearing Examiner

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DECISION DATE: December 6, 2011
CORRECTED DECISION DATE: December 15, 2011.

PLAT/PROJECT NAME: ***EMBELLA***

APPLICANT/LANDOWNER: Amalani LLC
108 Jackson Street, Suite 300
Seattle, Washington 98104

FILE COPY

FILE NO.: 10-102951 SD

TYPE OF REQUEST(S): MAJOR REVISION TO AN APPROVED PRELIMINARY SUBDIVISION (*Pegasus*) TO INCREASE THE NUMBER OF LOTS FROM 18 TO 35

DECISION (SUMMARY): **REMANDED TO THE DEPARTMENT OF PLANNING AND DEVELOPMENT SERVICES**

LOCATION: 607 – 164th Street SE, Mill Creek WA, 98012. (Located on the north side of 164th Street SE, 700 feet east of its intersection with 3rd Avenue SE, west of Mill Creek in Snohomish County, WA).

PDS STAFF RECOMMENDATION: Approve, subject to Conditions

This matter having come before the Hearing Examiner on December 1, 2011, and the testimony of witnesses having been heard and all exhibits having been admitted into evidence and considered, the Hearing Examiner enters the following Findings of Fact, Conclusions of Law and Decision based on a preponderance of the evidence:

FINDINGS OF FACT

1. The Record. The official record for this proceeding consists of the Exhibits entered into evidence (Exhibits A.1 through L.11), as well as the testimony of witnesses received at the open record hearing. The entire record was admitted into evidence and considered by the Examiner in reaching the decision herein.

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

2. Parties of Record. The Parties of Record are set forth in the Parties of Record Register and include interested parties who testified at the open record hearing.

3. Public Hearing. The Hearing Examiner held an open record hearing on December 1, 2011. Witnesses were sworn, testimony was presented, and exhibits were entered into the record. Bob Pemberton, Randy Middaugh and Mark Brown appeared and testified on behalf of the Snohomish County Department of Planning and Development Services (PDS). Co-owner Barry Margolese, appeared on behalf of the Applicant, along with planner Michael Smith, Edward Koltonowski, and Jeremy Downs. Members of the public who testified included: Dick McGrath, David Dougherty, Laura Heath, Marilyn Scholnik, Roxanna Angel, and Brian Ratzliff, who was represented by planner Reid Shockey, biologist Darcy Miller, and attorney Brad Cattle.

4. Notice. Notice of the application and public hearing were made according to the provisions of SCC 30.70.050(5) and SCC 30.72.030. (Exhibits F.1, F.2, F.3) However, at the start of the public hearing, Brad Cattle raised an objection to the notice provided, stating that the second tax parcel on which the project is proposed was left off of the public notices, as well as the Master Application form. The Examiner reserved ruling on the issue and considers it here. Notice is required pursuant to SCC 30.70.045, 30.70.050(5) and 30.72.030. The Examiner has considered the specific language and requirements of each of those code sections and finds that none of them require the publication of the tax parcel numbers. Accordingly, the objection to inadequate notice is overruled.

   The Examiner was also informed that there is a typographical error on the site location listed in the postcard notice (the description read, "On the north side of 164th Street SW, 700 feet east of its intersection with 3rd Avenue SE, just west of the Mill Creek City limits." The description should have read, "... 164th Street *SE...*", instead of SW. (Exhibit L.2) With regard to the typographical error in the postcard notice, the Hearing Examiner finds that the description of the subject property is a substantive requirement of the notice requirements. The fact that an error occurred could have presented a situation in which public confusion existed as to the subject property, thereby depriving interested parties of adequate notice of the public hearing. However, in contrast, the Examiner notes that numerous members of the public, including neighbors to the project, and the adjacent church received the notice and did not find the typographical error confusing and attended the public hearing. In fact, Brian Ratzliff, the citizen who organized the neighborhood group and made a major presentation at the hearing supported by consultants and an attorney, was not confused by the notice and attended the hearing. Under the specific facts of this case, the Hearing Examiner concludes that the effect of the typographical error was harmless, did not deprive the public of adequate notice of the proceedings, and that notice was provided as required by the County Code.

5. Application Request. Amalani LLC is the owner of certain real property known as tax parcels 270506-003-028-00 and 270506-003-020-00, in unincorporated Snohomish County, Washington (hereinafter, the "subject property"). The Applicant seeks to obtain a major revision to the approved 18-lot preliminary subdivision known as "*Pegasus*". (File No. 06-129958 SD) Approval was granted subject to conditions on February 15, 2008. (Exhibit L.7). The Applicant seeks approval for a 35-lot preliminary subdivision to be known as "*Embella*" on 10.25 acres. PDS informed the Applicant that the proposal is a "new application" pursuant to SCC 30.41A.330 in 2009. (Exhibit L.11) The Applicant's consultant, Michael Smith, argued with PDS staff that the application should not be treated as a new application, but instead should be considered vested pursuant to the *Pegasus* subdivision (which vested in 2007). (Exhibit L.11) PDS staff eventually agreed and reviewed the application against the regulations that were in effect in March of 2007, instead of September, 2010.

6. Site description. The subject property consists of two parcels, one large, rectangular parcel extending from south to north from 164th Street SE, and a small square parcel at the southeast corner of the property situated along 164th Street SE. (It appears that the smaller parcel holds the stormwater pond for the adjacent church). The property is largely forested with mixed conifer/deciduous trees, with the exception of a few farm structures. Approximately 8 acres is still forested and about 2 acres of the property has been cleared near 164th Street. A dilapidated farmhouse was recently removed. The site slopes down gradually from the west to east. There are five (5) wetlands on the subject property. Wetland D is the largest and covers much of the northern portion of the property.

7. Adjacent uses. Surrounding properties to the west and south are zoned and developed as single-family residential subdivisions at R-9600 zoning. To the east and north lie the city limits of Mill Creek. The area to the east is a developed church site. To the north is sparsely developed, wooded land. The property is adjacent to North Creek, a stream which is habitat for threatened Puget Sound Chinook salmon.

8. State Environmental Policy Act Compliance. A SEPA threshold Determination of Nonsignificance (DNS) was made on September 19, 2011. (Exhibit E.2) An appeal of the SEPA determination was filed but dismissed for technical defects on November 23, 2011. (Exhibits K.1 through K.12) Accordingly, the Examiner finds that compliance with the substantive and procedural requirements of SEPA have been met.

9. Issues of Concern

   A. Public Agency Review. The City of Mill Creek disputes the vesting date established for this application and requests traffic mitigation under the current County Code. (Exhibits H.1 and H.2) Mill Creek also requests that the City's design standards be applied to this development and describes some changes to the proposal they would like to see. (Exhibit H.3) No other issues of concern were identified by reviewing agencies.

   B. Citizens. The County received written comments from numerous citizens, including neighboring property owners who raised many concerns with this proposal. (See Exhibits I.1 through I.21 and L.10) The concerns include:

   - The revision now opens a previous dead-end road stub just east of the intersection of 4th Avenue SE and 61st Place SE to increased traffic from 164th and the proposed development. This, coupled with the amount of traffic already on 164th, raises concerns about traffic congestion, noise, air pollution, and traffic safety for motorists, bicyclists, pedestrians and children.

   - The major revision has significantly more impacts to wetlands than the previous proposal. The heavily-wooded site contains wildlife that will also be impacted.

   - The new proposal is too dense, considering the current economy and surplus of housing.

   - The North Creek Presbyterian Church has a special interest in that the project is immediately adjacent to the church site. In particular, a drainage facility for the church is in the southeast corner of the *Embella* site. The church expresses concerns with potential drainage impacts from the

development. The church also expresses concerns about residences of the development using the church parking.

- The *Embella* project is a new application and should be treated as such. It is vested to the laws in effect in September, 2010, not March of 2007 in accordance with SCC 30.41A.330. PDS erred in reviewing the project and it should not be approved.

10. Approval Criteria. Revisions to approved preliminary plats are governed by SCC 30.41A.330. In this case, the meaning of SCC 30.41A.330 is particularly important, because it will determine whether the application was properly reviewed under the correct set of regulations or not. That Section states:

> **30.41A.330 Revisions after preliminary subdivision approval.**
> Approved preliminary subdivisions may be revised prior to installation of improvements and recording of the final subdivision. Revisions that are generally consistent with the approved preliminary subdivision, which do not alter conditions of preliminary approval and do not adversely affect public health, safety, and welfare may be administratively approved by the department; provided that any increase in trip generation or change in access points shall be reviewed pursuant to SCC 30.66B.075. **Any other change shall require processing as a new preliminary subdivision.** Relevant county departments and agencies shall be notified of any administrative revision. A revision does not extend the life or term of the preliminary subdivision approval, which shall run from the original date of preliminary approval.

(Emphasis added)

The Applicant argued that although SCC 30.41A.330 requires PDS to consider the *Embella* proposal as a new application, they should still retain the vested rights applicable to the *Pegasus* plat. Neighbors led by Brad Ratzliff disagree, arguing that the *Embella* project is vested to the laws and local regulations in effect on the date that the new application was deemed to be complete. (Testimony of Reid Shockey).

PDS initially rejected the Applicant's vesting position and sought further explanation. (Email from Bob Pemberton to Michael Smith, Exhibit L.11) Based on further discussions, PDS eventually adopted the Applicant's interpretation of the meaning of SCC 30.41A.330 with regard to the vesting issue. However, no formal Code Interpretation was issued by PDS. (Exhibit K.3) On November 17, 2011, Bob Pemberton explained the Department's position in his request to dismiss Brian Ratzliff's SEPA appeal:

In this case we are processing [sic] as a new preliminary subdivision. The revision application has been treated procedurally as a new application with a notice of application and the application material required to be submitted with the same as would be required of a new application. An entirely new environmental review was undertaken and a new threshold determination was issued. The revision is being taken to a public hearing with a decision to be made by the Hearing Examiner. In

compliance with the code, PDS is processing this application as a new preliminary subdivision.

Id. At the public hearing, Mr. Pemberton admitted that they are processing the application in every respect as a new application, *except as to the date of vesting.* Despite having made a new determination of completeness on September 23, 2010 (Exhibit J), which triggers the vesting date for the new application, PDS treated the application as though it was vested as of the vesting date for the *Pegasus* application (March 21, 2007). (Exhibit L.7) (Testimony of Bob Pemberton)

Brian Ratzliff, a citizen, challenged this determination at the public hearing. Speaking on his behalf, planner Reid Shockey testified that there are many factual differences between the *Pegasus* and *Embella* plat applications including:

- The proposals have different owners;
- The *Embella* proposal has double the amount of lots, a different lot configuration and relies on alleys for access to some lots;
- The *Embella* project relies on lot size averaging and has smaller lots than *Pegasus*;
- The *Embella* project intrudes into Wetland D with a road that makes a connection in to the uphill plat and *Pegasus* does not disturb that large wetland complex;
- The *Embella* project proposes different housing types than *Pegasus*;
- The *Embella* project would intrude into areas on the *Pegasus* plat that are designed as permanently protected Native Growth Protection Areas (NGPAs).

In *Noble Manor v. Pierce County*, 133 Wn.2d 269 (943 P.2d 1378 (1997), the Washington State Supreme Court decided the scope of the "vested rights doctrine," as it relates to subdivision approval. There, the Court stated:

> The resolution of this case turns on the meaning of RCW 58.17.033, the statute codifying the "vested rights doctrine" as it applies to subdivisions and short subdivisions. In Washington, "vesting" refers generally to the notion that a land use application, under the proper conditions, will be considered only under the land use statutes and ordinances in effect at the time of the application's submission. *Friends of the Law v. King County*, 123 Wn.2d 518, 522, 869 P.2d 1056 (1994); *Vashon Island Comm. for Self-Gov't v. Washington State Boundary Review Bd.*, 127 Wn.2d 759, 767-68, 903 P.2d 953 (1995).
>
> At common law, this state's doctrine of vested rights entitled developers to have a land development proposal processed under the regulations in effect at the time a complete building permit application was filed. *Erickson & Assocs., Inc. v. McLerran*, 123 Wn.2d 864, 867-68, 872 P.2d 1090 (1994). The doctrine at common law was extended to a number of different types of permits, but it was never extended to applications for preliminary plat approval or short plat approval. *Friends*, 123 Wn.2d at 522 (citing *Norco Constr., Inc. v. King County*, 97 Wn.2d 680, 684, 649 P.2d 103 (1982)).

In 1987, the Legislature (1) codified the traditional common-law vested rights doctrine regarding vesting upon application of building permits, and (2) enlarged the vesting doctrine to also apply to subdivision and short subdivision applications. LAWS OF 1987, ch. 104; *see Friends*, 123 Wn.2d at 522. The two parts of that statute were codified at RCW 19.27.095 (in the state building code statute) and RCW 58.17.033 (in the plats and subdivision statute).

RCW 58.17.033 states:

(1) A proposed division of land, as defined in RCW 58.17.020, **shall be considered under the subdivision or short subdivision ordinance, and zoning or other land use control ordinances, in effect on the land at the time a fully completed application for preliminary plat approval of the subdivision, or short plat approval of the short subdivision, has been submitted** to the appropriate county, city, or town official.

(2) The requirements for a fully completed application shall be defined by local ordinance.

(3) The limitations imposed by this section shall not restrict conditions imposed under chapter 43.21C RCW.

(Emphasis added)

The Court went on to define the scope of vesting under RCW 58.17.033:

The purpose of the vested rights doctrine is to provide a measure of certainty to developers and to protect their expectations against fluctuating land use policy. *Friends,* 123 Wn.2d at 522 (citing *West Main Assocs. v. City of Bellevue,* 106 Wn.2d 47, 51, 720 P.2d 782 (1986)).

We conclude that when the Legislature extended the vested rights doctrine to plat applications, it intended to give the party filing an application a vested right to have that application processed under the land use laws in effect at the time of the application. Therefore, if the County requires an applicant to apply for a use for the property in the subdivision application, and the applicant discloses the requested use, then the applicant has the right to have the application considered for that use under the laws existing on the date of the application. If all that the Legislature was vesting under the statute was the right to divide land into smaller parcels with no assurance that the land could be developed, no protection would be afforded to the landowner.

Id. at 178, (Emphasis added).

In terms of considering the differences between the *Pegasus* and *Embella* plat proposals, Mr. Ratzliff and his consultant easily demonstrated that there are significant differences between the two development proposals. Here, the Applicant did not propose a 35-lot subdivision with a new road connection through Wetland D. They proposed an 18-lot subdivision with a single access off of 164th Street SE. There are several factual determinations that should be drawn from those differences:

- First, PDS was correct in determining that the *Embella* proposal constituted a major revision to the *Pegasus* plat, which could not be administratively approved by the PDS Director under SCC 30.41A.330.
- Second, the *Embella* proposal must be considered a new preliminary plat application for purposes of processing and vesting under RCW 58.17.033, because the 18-lot *Pegasus* plat application did not disclose all of the uses that are now set forth in the revised 35-lot *Embella* plat application.
- Third, the *Embella* subdivision was vested as of the date of completeness of the new application established by PDS on September 23, 2010.
- Fourth, the application was reviewed under the vesting date of March 21, 2007.
- Fifth, the County's land use regulations set forth in Title 30 SCC changed in the intervening period between March, 2007 and September, 2010, as new regulations were adopted, in particular the Critical Areas Regulations.
- Sixth, the *Embella* plat application was not reviewed by PDS according to the regulations in effect on September 23, 2010, and the Hearing Examiner cannot determine whether the regulations in Title 30 SCC have been met.

11. Subdivision Regulations – Chapter 30.41A SCC.

In reviewing the layout of the lots in the proposed *Embella* plat, the Hearing Examiner finds that Lots 2, 20, 21, and 22 are proposed to be located in critical areas, specifically Wetlands B and C. SCC 30.41A.235 flatly prohibits the placement of lots in critical areas. It states:

> Each new lot shall have an accessible area suitable for construction of at least 1000 square feet and located outside any required building setback, unbuildable easement, required buffer, or critical area, except that for lots in a planned residential development, there is no minimum construction area.

SCC 30.41A.235 (Emphasis added).

The Applicant notes that these are low value wetlands and proposes to fill them and provide mitigation elsewhere on the site under SCC 30.62.370. When asked by the Examiner why the Applicant is not being required to avoid impacts to these wetlands as required by SCC 30.62A.310, Randy Middaugh, PDS Senior Biologist, testified that the "old" Critical Areas Ordinance applies and under *former* SCC 30.62.350(1)(b)(vii), the Applicant is allowed to fill up to one acre of nonriparian Category 3 or 4 wetlands. He stated that PDS has always interpreted SCC 30.62.350 to "trump" the avoidance criteria in SCC 30.62A.310.

Although this interpretation is plausible, *former* Chapter 30.62 SCC does not apply and, even if it did, it cannot be read in a way that renders SCC 30.41A.235 meaningless. In giving effect to the language of a regulation, the Examiner must not render any portion meaningless. *Prison Legal News, Inc. v. Dep't of Corr.*, 154 Wn.2d 628, 644, 115 P.3d 316 (2005). Code provisions related to the same subject matter are to be read together and harmonized. *Cingular Wireless, L.L.C. v. Thurston County*, 131 Wn.2d 756 (2006).

> Under rules of statutory construction, where one statute deals with a subject in general terms and another deals with the same subject in a more detailed way, the two should be harmonized if possible and, if there is any conflict, the specific prevails over the general absent a contrary legislative intent. *Higbee v. Shorewood Osteopathic Hospital*, 105 Wn.2d 33, 37, 711 P.2d 306 (1985) (harmonizing special survival statute with general survival statute); *Pannell v. Thompson*, 91 Wn.2d 591, 597, 589 P.2d 1235 (1979) (specific spending limitation of $6,090,000 prevails over general authorization to make expenditures and general prohibition on reductions in the Department of Social and Health Services spending program).

Id. at 775.

Here, the regulation that should have been considered was Chapter 30.62A SCC (not Chapter 30.62 SCC), the Critical Areas Regulations ("CAR") adopted in 2007. The "new" CAR should have been harmonized with SCC 30.41A.235. Under the new CAR, filling of wetlands are only allowed where they are determined to be "unavoidable." SCC 30.62A.340(2). Here, the *Pegasus* plat was approved with 18 lots. The new *Embella* proposal adds up to 35 lots. However, Lots 2, 20, 21, and 22 can only be located on the plat if wetlands are filled. SCC 30.41A.235 should be read to control the lot design because it prohibits the placement of the lots in critical areas altogether when they are part of a subdivision design. This regulation is more specific than the CAR provisions. Accordingly, the Hearing Examiner finds that the wrong standards were applied to the review of Critical Areas on the site, and Chapter 30.62A SCC clearly applies. The Hearing Examiner further finds that Lots 2, 20, 21 and 22 must be removed as they are located in existing wetlands contrary to the requirements of SCC 30.41A.235.

12. The Hearing Examiner is unable to review the remaining provisions of the subdivision application against the subdivision regulations and other applicable regulations because the wrong set of standards was applied to the application. Additional review must be completed before the application can be approved.

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

CONCLUSIONS OF LAW

1. The Examiner has original jurisdiction over the subdivision application pursuant to Ch. 2.02 SCC and SCC 30.72.020.

2. Having reviewed the notice requirements of SCC 30.70.050(5) and SCC 30.72.030, and the County's published notice, postcard notice and SEPA notice as shown in Exhibits F.1, F.2,

F.3, the Examiner concludes that notice was properly provided in this matter. The Examiner further concludes that there is no legal requirement to list the tax parcels in the public notices and the typographical error on the site address found in the postcard notice was harmless error. Numerous members of the public attended the hearing and participated. No confusion resulted from the typographical error.

3. The Hearing Examiner concludes that PDS was correct in determining that the *Embella* plat proposal constituted a revision of the *Pegasus* preliminary plat that could not be administratively approved. Several significant changes to the proposal (including a doubling of the lots, a new road connection, more impacts to critical areas, additional impervious surfaces, additional density), constitute revisions (1) that are not generally consistent with the approved preliminary subdivision; (2) which do alter the conditions of preliminary approval placed on the *Pegasus* plat, and (3) which may adversely affect public health, safety, and welfare. Accordingly, SCC 30.41A.330 requires the *Embella* application to be treated as a new application according to the plain terms of the regulation.

4. The Applicant argues that SCC 30.41A.330 should be read to mean that only the *processing* of the application is new, but that it retains the vesting of the *Pegasus* plat application. Citing no case law to support this position, the Hearing Examiner finds that this argument must fail. The regulation is unambiguous. It states that the revision is to be treated as a new application. The County Council could have placed limitations in SCC 30. 41A.330 that would have allowed vesting to survive from the earlier application, but they did not do so. The plain meaning of the phrase "new application" means just that – the entire *Embella* application is to be treated as new and the regulations in effect on the date of completeness govern review of the proposal.

   In determining the meaning of a statute, the Examiner's primary objective is to ascertain and carry out the intent of the legislative body (here, the County Council). *Arborwood Idaho, L.L.C. v. City of Kennewick*, 151 Wn.2d 359, 367, 89 P.3d 217 (2004). If the plain language of the ordinance or statute is unambiguous, the Examiner must give effect to that language as an expression of legislative intent. *Dept. of Ecology*, 146 Wn.2d at 9-10. In giving effect to the language of the statute, the Examiner must not render any portion meaningless. *Prison Legal News, Inc.*, *supra*, 154 Wn.2d at 644. We must also avoid an interpretation that would produce an unlikely, absurd, or strained result. *Kilian v. Atkinson*, 147 Wn.2d 16, 21, 50 P.3d 638 (2002). If a statute is unambiguous, the Examiner does not inquire further. *Lake v. Woodcreek Homeowners Ass'n*, 169 Wn.2d 516, 526-27, 243 P.3d 1283 (2010).

   Here, the plain reading of the County's regulations reveals that the *Embella* plat is a new application, with a new vesting date of September 23, 2010. PDS erred in determining that the project was vested to the regulations in effect on March 21, 2007.

5. The Examiner concludes that the application was not reviewed according to the vesting date of September 23, 2010. Therefore, the application is not yet ripe for review by the Hearing Examiner. The project must be remanded to PDS for further processing.

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

DECISION AND ORDER

The *Embella* preliminary plat application is **REMANDED** to PDS for review according to the regulations that were in effect in the Snohomish County Code as of September 23, 2010.

Dated this 15th day of December, 2011.

Millie M. Judge, Hearing Examiner

Staff Distribution:

Department of Planning and Development Services: Bob Pemberton, Howard Knight, Tom Rowe

EXPLANATION OF RECONSIDERATION AND APPEAL PROCEDURES

The decision and order of the Hearing Examiner remanding the application to PDS for further processing is not a final decision on a Type 2 land use application within the meaning of Chapter 30.72 SCC. As such, there is no right of reconsideration or appeal to the County Council authorized under Chapter 30.72 SCC.