

**BEFORE the HEARING EXAMINER for the  
CITY of SAMMAMISH**

<b>DECISION</b>
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FILE NUMBER: PSHP2015-00169

APPELLANT: Huntington Homes, LLC  
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RESPONDENT: City of Sammamish Department of Community Development  
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APPLICANT: Huntington Homes, LLC

TYPE OF CASE: Appeal from denial of a Public Works Standards Variation and from conditions of approval imposed on a short subdivision

EXAMINER DECISION: DISMISS Public Works Standards Variation appeal; GRANT IN PART short subdivision appeal

DATE OF DECISION: October 24, 2016

**INTRODUCTION <sup>1</sup>**

Huntington Homes, LLC (Huntington Homes), one of the Murray Franklyn “Family of Companies,” appeals from denial by the City Engineer of a Public Works Standards Variation and from conditions of approval imposed by the Sammamish Department of Community Development (the Department) on a short subdivision. (Exhibits 9001.1 and 9001.2<sup>2</sup>)

The subject property is located on the east side of 212<sup>th</sup> Avenue SE between SE 8<sup>th</sup> and SE 9<sup>th</sup> Streets.

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<sup>1</sup> Any statement in this section deemed to be either a Finding of Fact or a Conclusion of Law is hereby adopted as such.

<sup>2</sup> Exhibit citations are provided for the reader’s benefit and indicate: 1) The source of a quote or specific fact; and/or 2) The major document(s) upon which a stated fact is based. While the Examiner considers all relevant documents in the record, typically only major documents are cited. The Examiner’s Decision is based upon all documents in the record.

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The Examiner held an open record hearing on October 18, 2016. The City gave notice of the hearing as required by Sammamish Municipal Code (SMC) 20.10.180(2). (Exhibit 9005)

Pursuant to City of Sammamish Hearing Examiner Rule of Procedure (RoP) 224(c) and Exhibit 9003, the Examiner entered the following administrative exhibits into the hearing record:

- Exhibit 9001.1: Appeal form, filed August 12, 2016
- Exhibit 9001.2: Huntington Homes LLC Appeal of Short Plat and Variation Denial, filed August 12, 2016
- Exhibit 9001.3: Findings/Conclusions/Decision, PSHP2015-00169, July 25, 2016
- Exhibit 9001.4: Public Works Denial of Variance Request, March 24, 2016
- Exhibit 9002: Letter, Examiner to Principal Parties, August 16, 2016
- Exhibit 9003: E-mail, Examiner to Principal Parties, August 18, 2016 8:47 p.m. (Hearing date; exhibit numbering)
- Exhibit 9004: E-mail, Examiner to Principal Parties, September 16, 2016 9:32 a.m., with e-mail string among the parties between September 14, 2016 5:19 p.m. and September 16, 2016 9:21 a.m., all regarding rescheduling the hearing
- Exhibit 9005: Notice of Hearing
- Exhibit 9006: E-mail comment from Dan and Katherine Booher, October 8, 2016

Pursuant to RoP 224(d) and Exhibit 9003, the Respondent Department pre-filed Exhibits 1 - 25 and provided an index listing of those exhibits. Appellant Huntington Homes did not object to entry of those exhibits. The Examiner entered those exhibits into the hearing record. Pursuant to RoP 224(i) the Examiner accepted additional exhibits during the hearing from the Department as follows:

- Exhibit 26: Trip Generation Manual, 9<sup>th</sup> Edition, Vol. 2, Institute of Transportation Engineers, cover and pp. 295, 298, and 327
- Exhibit 27: E-mail string, Artech - Levitt - Morgan, June 24 - July 19, 2016 (school bus stop)

Pursuant to RoP 224(e) and Exhibit 9003, Appellant Huntington Homes pre-filed Exhibits 1001 - 1018 and provided an index listing of those exhibits. Appellant Huntington Homes also submitted a Prehearing Brief to which it did not assign an exhibit number; the Examiner assigned Exhibit No. 1019 to the brief. Respondent Department did not object to entry of those exhibits. The Examiner entered those exhibits into the hearing record.

The Deputy City Clerk has the record copy of all exhibit index lists and exhibits.

The action taken herein and the requirements, limitations and/or conditions imposed by this decision are, to the best of the Examiner's knowledge or belief, only such as are lawful and within the authority of the Examiner to take pursuant to applicable law and policy.

## FINDINGS OF FACT

1. On June 30, 2015, Huntington Homes filed a two-lot short subdivision application (commonly known as the Hudson 2-Lot Short Plat) to divide a 2.31 acre parcel which fronts the east side of 212<sup>th</sup> Avenue SE for approximately 276 feet. (Exhibits 1.A; 1.C, Sheet P02 of 6) On November 5, 2015, Huntington Homes submitted a letter request to the City seeking a Variation from the street frontage improvement requirements of the Interim Public Works Standards (PWS). Specifically, Huntington Homes wanted to omit the required planter strip between the curb and sidewalk on the south half of the frontage improvements. (Exhibit 7) On March 24, 2016, the City Engineer issued a letter denying the requested PWS Variation. (Exhibit 18) On April 14, 2016, Huntington Homes asked the City to reconsider its PWS Variation denial and argued that no frontage improvements at all were necessary, but also submitted revised plans depicting conformance with the PWS in order that its application could continue to be processed. (Exhibits 20; 21; 1.C) On July 25, 2016, the Department approved the Hudson 2-Lot Short Plat subject to conditions which include constructing standard frontage improvements as required by the PWS. (Exhibit 1) On August 12, 2016, Huntington Homes filed the appeal which is the subject of this proceeding (the Huntington Homes Appeal). (Exhibits 9001.1 and 9001.2)
2. The Huntington Homes Appeal challenges Findings: General Description/Property Characteristics 7 – 12, Analysis/Conclusions 1, 2, 6, and 7, and Conditions 8, 15, and 19 in the Department’s approval of the Hudson 2-Lot Short Plat; the Huntington Homes Appeal also challenges the PWS Variation denial. (Exhibit 9001.2) The Huntington Homes Appeal alleges 11 errors, all related to the required frontage improvements:
  - A. Appeal Issue A: The frontage improvement requirement is inconsistent with SMC 21A.50.135, which establishes a hierarchy for avoiding/minimizing impacts to environmentally critical areas. (Exhibit 9001.2, p. 3, § IV.A)
  - B. Appeal Issue B: The frontage improvement requirement is not based on substantial evidence. (Exhibit 9001.2, p. 3, § IV.B)
  - C. Appeal Issue C: “The frontage improvement requirement is not necessary as a direct result of, nor proportional to, the impacts of the Hudson short subdivision as required by RCW 82.02.020 et seq. and SMC 19A.08.100.” (Exhibit 9001.2, p. 3, § IV.C)
  - D. Appeal Issue D: The frontage improvement requirement and traffic impact fees are duplicative. (Exhibit 9001.2, p. 3, § IV.D)

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- E. Appeal Issue E: The frontage improvement requirement seeks correction of “existing conditions and/or deficiencies not created or exacerbated by the” Hudson 2-Lot Short Plat. (Exhibit 9001.2, p. 3, § IV.E)
  - F. Appeal Issue F: The City has been inconsistent in its application of frontage improvement requirements. (Exhibit 9001.2, p. 4, § IV.F)
  - G. Appeal Issue G: The frontage improvement requirement “improperly requires” Huntington Homes to obtain a permit from the United States Army Corps of Engineers (USACE) for wetland fill. (Exhibit 9001.2, p. 4, § IV.G)
  - H. Appeal Issue H: The frontage improvement requirement is “not proper because of insufficient right of way [*sic*] for 212<sup>th</sup> Ave. SE due to the existing wetland.” (Exhibit 9001.2, p. 4, § IV.H)
  - I. Appeal Issue I: The frontage improvement requirement and Variation denial are not supported by the PWS, especially PWS10.170, PWS15.110, PWS15.520, PWS Table 1, and PWS Figure 01-03. (Exhibit 9001.2, p. 4, § IV.I)
  - J. Appeal Issue J: “The safe walking for school children provision of RCW 58.17.110 does not justify” either denying the requested Variation or the frontage improvement requirement. (Exhibit 9001.2, p. 4, § IV.J)
3. Huntington Homes wants the Examiner to “eliminat[e] the conditions relating to the Frontage Improvements” or, at the very least, reverse the PWS Variation denial and allow Huntington Homes to eliminate the planter strip in the vicinity of the wetland. (Exhibit 9001.2, p. 4, § V) Huntington Homes does not believe that any frontage improvements at all are necessary. (Exhibits 20; 21; argument of counsel)
4. The basic facts are undisputed:
- A. The subject property is a vacant, 2.31 acre, rectangular site with approximately 276 feet of frontage on the east side of 212<sup>th</sup> Avenue SE. (Exhibit 1.C; and testimony)
  - B. The subject property is zoned R-1. (Exhibit 1, p. 3, Findings: Zoning/Project Review 6)
  - C. A wetland of approximately 800 square feet (SF) is located near the southwest corner of the subject property. The west edge of that wetland is very close to the subject property’s west property line/current east edge of the 212<sup>th</sup> Avenue SE right-of-way. The wetland is classified as Category III with a habitat function score of 18 points. After dedication of 3.5 feet of right-of-way along the west edge of the subject property as required by Condition 14 (See Finding

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of Fact 4.I, below.), approximately 43 SF of the wetland would lie within the right-of-way. (Exhibit 9)

- D. The two proposed lots (Lots 1 and 2), two open space tracts (Tracts B and C), and one sensitive area protection tract (Tract A) comply with all applicable SMC provisions. The approved short plat utilizes a centrally located, shared driveway for the two lots. (Exhibit 1.C)
  - E. 212<sup>th</sup> Avenue SE is a designated collector arterial. (Exhibit 1, p. 2, Findings: General Description/Property Characteristics 7)
  - F. The PWS design standard for a collector arterial calls for 55 to 67 feet of right-of-way containing a center median with an 11 foot wide travel lane, a five foot wide bike lane, six inch curb, a 5 foot wide planter strip, and a six foot wide sidewalk on each side. [PWS Table I and Figure 01-03]
  - G. The 212<sup>th</sup> Avenue SE right-of-way in the vicinity of the subject property is 30 feet wide on the east side of right-of-way centerline and varies between 30 and 40 feet wide on the west side of right-of-way centerline. 212<sup>th</sup> Avenue SE in the vicinity of the subject property currently is a two-lane street with curb, gutter, planter, and sidewalk on the west side and an open ditch on the east side. (Exhibits 1.C; 23)
  - H. Condition 8 of the Department's approval of the Hudson 2-Lot Short Plat requires Huntington Homes to construct frontage improvements on 212<sup>th</sup> Avenue SE to "match the City standard cross section for a collector arterial". (Exhibit 1, p. 12) The Condition requires a "half-street" improvement as depicted in Exhibit 1.C on Sheet P03 of 6.
  - I. Condition 14 of the Department's approval of the Hudson 2-Lot Short Plat requires Huntington Homes to dedicate 3.5 feet of right-of-way along its frontage with 212<sup>th</sup> Avenue SE. (Huntington Homes did not appeal Condition 14.) The additional 3.5 feet of right-of-way is needed in order to construct the frontage improvements required by Condition 8. (Exhibit 1.C, Sheet P03 of 6)
  - J. A traffic impact analysis was not required for the Hudson 2-Lot Short Plat. Projected trip generation was below the SMC threshold (10 or more vehicular trips during the P.M. peak hour) for preparation of such a study. (Testimony)
5. If the PWS Variation as requested by Huntington Homes had been approved, Huntington Homes initially proposed to eliminate the planter strip south of the shared driveway, sliding the sidewalk west to abut the curb. A retaining wall would have been constructed under the east edge of the sidewalk to avoid grading impact on the adjacent wetland and to minimize grading impact on its buffer. That proposal would have resulted in no direct impact to the wetland but would have

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impacted 1,880 SF of the buffer. Huntington Homes proposed to add 1,880 SF of additional, enhanced buffer east of the required buffer as compensatory mitigation. (Exhibits 7; 9)

After the PWS Variation was rejected, the Department required Huntington Homes to revise its plat accordingly. (Exhibit 12<sup>3</sup>) On or about March 28, 2016, (four days after the official PWS Variation denial) Huntington Homes submitted revised materials indicating that the standard sidewalk and planter strip configuration would require filling 43 SF of wetland; the buffer impact area remained at 1,880 SF. Huntington Homes proposed to construct a retaining wall under the east edge of the sidewalk to minimize grading impact on the adjacent wetland and its buffer. The proposal included the creation of 86 SF of new wetland on the east side of the existing wetland and 1,880 SF of additional enhanced buffer east of the required buffer as compensatory mitigation. (Exhibit 1005) The proposed short plat was revised accordingly. (Exhibit 1.C)

As noted in Finding of Fact 3, above, Huntington Homes now opposes any condition requiring construction of frontage improvements.

6. A variety of communications occurred among City staff and between Huntington Homes and City staff/officials between February 5, 2016, and March 24, 2016. On February 11, 2016, Huntington Homes sent an e-mail to the Mayor expressing Huntington Homes' opposition to filling any of the wetland. The E-mail recounted a conversation with the City Engineer where the City Engineer reportedly stated that City Council had told staff not to approve any more PWS Variations and that 212<sup>th</sup> Avenue SE may have to be improved in the future. (Exhibit 13; testimony)

On February 19, 2016, the City's former wetland specialist told the planner handling the application that the on-site wetland was of low quality and low function. She went on to say that "in this case the city's infrastructure needs for road improvements at this location outweigh the unavoidable impacts that these road improvements would cause to this wetland". She advised that the impacts needed to be mitigated in accordance with the provisions of Chapter 21A.50 SMC, Environmentally Critical Areas. (Exhibit 14)

Also on February 19, 2016, the City Engineer told the then Acting Public Works Director that staff had "little concern on saving this wetland to avoid" construction of standard frontage improvements. He said that the requested PWS Variation would benefit only Huntington Homes and would result in a sidewalk that might have to be relocated by the City in the future. (Exhibit 15; testimony)

On March 10, 2016, Huntington Homes wrote to the City Engineer. That letter made three arguments in support of the requested PWS Variation: Wetland impact would be avoided; preserving wetlands

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<sup>3</sup> Exhibit 12 was written before the PWS Variation was officially denied (February 5, 2016 v. March 24, 2016). Exhibit 12 was presumably based on a February 5, 2016, Public Works review memorandum which stated that the PWS Variation was "not acceptable as requested." (Exhibit 11, p. 1) On March 25, 2016, the Department formalized its request that the plans be revised to depict a standard sidewalk/planter strip configuration with commensurate wetland mitigation. (Exhibit 1017)

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should be a higher priority than “street aesthetic”; and eliminating the planter strip would not create pedestrian safety issues. Huntington Homes attached a letter from its transportation consultant (Transpo) setting forth five reasons why the PWS Variation should be approved: Vertical curb is a sufficient vehicle/pedestrian separator; no evidence shows that streets without planter strips are less safe than those with planter strips; numerous examples exist of streets without planter strips where there have been no vehicle-pedestrian accidents; few pedestrians would use the sidewalk near the wetland anyway because there are at present no sidewalks to the north or south on the east side of 212<sup>th</sup> Avenue SE; and elimination of the planter strip would not create a “significant impact to traffic safety or the roadway capacity”. (Exhibit 17)

7. Huntington Homes filed an application for a USACE Section 404 permit on March 21, 2016. As of the Examiner’s hearing date, that application was still pending with USACE. (Exhibits 1006; 1007; and testimony)
8. As previously noted, the City Engineer denied the PWS Variation by letter dated March 24, 2016. The City Engineer noted that PWS Figure 01-03 indicates that the planter strip “[m]ay be eliminated where there is insufficient right-of-way, subject to the City Engineer’s approval.” The City Engineer found that sufficient right-of-way was available to construct a standard street section. (Exhibit 18, p. 2)

The City Engineer also found that the wetland was of low significance and the fill required to construct a standard street section could be easily mitigated within the subject property. <sup>4</sup> (Exhibit 18, p. 2; and testimony)

The City Engineer acknowledged that while it is not unsafe to have the sidewalk adjacent to the curb, “studies ... do show that it is less safe than having a [planter strip] between the curb and edge of sidewalk. What is being proposed is less beneficial to the public ....” (Exhibit 18, p. 2)

The City Engineer found that outside agency permit requirements and timing are irrelevant to consideration of a PWS Variation. (Exhibit 18, p. 2)

The City Engineer denied the requested PWS Variation, concluding that preserving the on-site wetland was “of low concern and does not justify varying from the [PWS] ....” (Exhibit 18, p. 2)

9. The SMC provides that calculation of projected vehicle trips generated by a new development is to use trip generation rates published by the Institute of Transportation Engineers (ITE) or other standard references. [SMC 14.10.020(2)(a)] The traditional independent variable used by ITE for trip generation by a single-family residential development is number of dwelling units. (Exhibit 26, p. 295) The ITE trip generation rate for a single-family detached residence is one trip per hour per dwelling unit during the weekday P.M. peak hour. (Exhibit 26, p. 298) ITE also has calculated a trip

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<sup>4</sup> The wording of this part of the letter is less than ideal. The City Engineer testified as to the intent of his words. The Examiner finds the City Engineer’s explanation to be credible.

generation rate of 2.73 trips per acre for single-family detached residences during the weekday P.M. peak hour.<sup>5</sup> (Exhibit 26, p. 327)

Given the subject 2.31 acre site and the two proposed single-family detached residences, the projected P.M. peak hour trips generated from the development pursuant to the ITE data would be 2 (based on the per dwelling unit measure) or 6 (based on the per acre measure). (Calculated from Exhibits 1.C and 26) The Examiner takes official notice that the 24-hour total average weekday trips (AWDT) for single-family residential developments is about 10 times the peak hour. Based upon the above calculations, AWDT for the proposed Hudson 2-Lot Short Plat would be 20 AWDT or 60 AWDT. Traffic volume on 212<sup>th</sup> Avenue SE in the vicinity of the subject property is approximately 3,600 AWDT. (Testimony) The Hudson 2-Lot Short Plat would thus increase the traffic volume on 212<sup>th</sup> Avenue SE by less than 2%. (Calculated)

10. Under the current PWS, Variations may be applied for in various ways at various times in the development process.<sup>6</sup> Public Works apparently has no standard application form for Variations. Variation requests may be made before a development application is filed, during the review of a development application, or even “in the field” after approval of a development application. PWS Variations have been granted to preserve one or more trees on a parcel abutting a right-of-way, to preserve one or more trees within a right-of-way being developed, and for other reasons. (Exhibits 1009 – 1016; and testimony)
11. Huntington Homes’ opposition to the required frontage improvements was summarized in its prehearing brief:

First, the requirement for frontage improvements on the short plat in a uniform manner without consideration of proportionality under RCW 82.02.020. Second, the requirement for a planter strip as part of the public road improvements despite the consequence that such improvement would require filling of a wetland and federal permitting.

(Exhibit 1019, p. 5, ll. 7 – 10) Huntington Homes argues that the City has presented no evidence to demonstrate that the required frontage improvements are reasonably related to expected project impacts nor proportional to those impacts. Huntington Homes argues that adopted codes (ordinances) specify parameters, but that application of every code must comply with and be justified under RCW 82.02.020. Huntington Homes objects to the notion that required frontage improvements are not dependent upon the number of lots being created. Huntington Homes argues that the required frontage improvements fly in the face of the SMC 21A.50.135(1) requirement to avoid impacts to

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<sup>5</sup> The undersigned Examiner has never seen acreage used as the independent variable in projecting trips associated with single-family residential developments.

<sup>6</sup> The City is in the process of revising the PWS. (This fact is mentioned in Exhibit 17.) Proposed code or standards revisions may not be considered in evaluating a current application, especially one such as a short subdivision which is subject to and benefitted by vested rights.

environmentally critical areas, such as wetlands, where possible and, if not possible, to mitigate necessary impacts. Huntington Homes also argues that the Department has put it in a potentially untenable position: The conditions of short subdivision approval make no provision for the possibility that USACE may deny Huntington Homes' application to fill a portion of the on-site wetland. (Exhibit 1019; argument of counsel)

12. The City Engineer and Huntington Homes' consulting traffic engineer both testified. While each's emphasis was understandably slightly different, both agreed that a sidewalk adjacent to a curb (that is, without a planter strip) is not inherently unsafe, but that the greater the separation between the street and the sidewalk, the safer is the sidewalk. (Testimony)
13. The City initially argues that Huntington Homes' PWS Variation appeal was untimely and should be dismissed. If not dismissed, the City argues that the requested PWS Variation does not meet the criteria of PWS.10.170 for approval. The City argues that provisions in Chapter 21A.50 SMC expressly allow a portion of the on-site wetland to be filled. The City argues that frontage improvements are required under SMC 19A.08.100(4) and that the Hudson 2-Lot Short Plat will add traffic to 212<sup>th</sup> Avenue SE. The City argues that individual itemization of the proportionality of every code requirement for every short subdivision application is not required. The City argues that the USACE permit requirement is outside its jurisdiction. (Exhibit 24; argument of counsel)
14. The record contains one citizen comment supporting the City's position that standard frontage improvements should be required. (Exhibit 9006)
15. Any Conclusion of Law deemed to be a Finding of Fact is hereby adopted as such.

## LEGAL FRAMEWORK <sup>7</sup>

The Examiner is legally required to decide this case within the framework created by the following principles:

### Authority

The Public Works Department's action on a PWS Variation is subject to the right of appeal to the Hearing Examiner under the provisions of Title 20 SMC. [PWS.10.180] The Examiner makes a final decision on the appeal which is subject to the right of reconsideration and appeal to Superior Court. [SMC 20.05.020, 20.10.240, 20.10.250, and 20.10.260]

A short subdivision is a Type 2 land use application. [SMC 20.05.020, Exhibit A] An appeal from the Department's action on a Type 2 land use application requires an open record hearing before the Examiner. The Examiner makes a final decision on the appeal which is subject to the right of reconsideration and appeal to Superior Court. [SMC 20.05.020, 20.10.240, 20.10.250, and 20.10.260]

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<sup>7</sup> Any statement in this section deemed to be either a Finding of Fact or a Conclusion of Law is hereby adopted as such.

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The Examiner's decision may be to grant or deny the application or appeal, or the examiner may grant the application or appeal with such conditions, modifications, and restrictions as the Examiner finds necessary to make the application or appeal compatible with the environment and carry out applicable state laws and regulations, including Chapter 43.21C RCW and the regulations, policies, objectives, and goals of the interim comprehensive plan or neighborhood plans, the development code, the subdivision code, and other official laws, policies and objectives of the City of Sammamish.

[SMC 20.10.070(2)]

Review Criteria

Section 20.10.200 SMC sets forth requirements applicable to all Examiner Decisions:

When the examiner renders a decision . . . , he or she shall make and enter findings of fact and conclusions from the record that support the decision, said findings and conclusions shall set forth and demonstrate the manner in which the decision . . . is consistent with, carries out, and helps implement applicable state laws and regulations and the regulations, policies, objectives, and goals of the interim comprehensive plan, the development code, and other official laws, policies, and objectives of the City of Sammamish, and that the recommendation or decision will not be unreasonably incompatible with or detrimental to affected properties and the general public.

The review criteria for a PWS Variation are set forth at PWS.10.170.

The review criteria for a Type 2 short subdivision are set forth at SMC 19A.08.060.

Vested Rights

Sammamish has enacted a vested rights provision.

Applications for Type 1, 2, 3 and 4 land use decisions, except those that seek variance from or exception to land use regulations and substantive and procedural SEPA decisions shall be considered under the zoning and other land use control ordinances in effect on the date a complete application is filed meeting all the requirements of this chapter. The department's issuance of a notice of complete application as provided in this chapter, or the failure of the department to provide such a notice as provided in this chapter, shall cause an application to be conclusively deemed to be vested as provided herein.

[SMC 20.05.070(1)] Therefore, the Type 2 application involved in this appeal is vested to the development regulations as they existed on August 10, 2015, the date the short subdivision application was deemed to be complete. (Exhibit 1, p. 3, Findings: Zoning/Project Review 4)

Standard of Review

The standard of review is preponderance of the evidence. The appellant has the burden of proof. [RoP 316(a)]

Scope of Consideration

The Examiner has considered: all of the evidence and testimony; applicable adopted laws, ordinances, plans, and policies; and the pleadings, positions, and arguments of the parties of record.

**CONCLUSIONS OF LAW**

*PWS Variation Appeal*

1. “Any person or agency aggrieved by an act or decision [under the PWS] may appeal to the City of Sammamish hearings examiner pursuant to the provisions of [SMC] Title 20, as now enacted or hereafter amended.” [PWS.10.180] Subsection 20.10.080(1) SMC requires that “an appeal, together with the required appeal fee, shall be filed within 21 calendar days from the date of issuance of” the decision being challenged. Nothing in Title 20 SMC provides for any right of reconsideration of a staff administrative action.<sup>8</sup>
2. The City Engineer denied Huntington Homes’ PWS Variation request on March 24, 2016. (Exhibit 18) The 21<sup>st</sup> calendar day after March 24, 2016, was Thursday, April 14, 2016. Huntington Homes filed the subject appeal on August 12, 2016, nearly four months after the code-mandated deadline. (Exhibits 9001.1; 9001.2)
3. Huntington Homes’ PWS Variation appeal was manifestly untimely. The Examiner is required to dismiss an untimely appeal. [SMC 20.10.090: “the examiner shall dismiss an appeal for untimeliness” (emphasis added) ] “When a court lacks jurisdiction, any decision rendered is void; dismissal is the only permissible action the court may take.” [Young v. Clark, 149 Wn.2d 130, 133, 65 P.3d 1192 (2003)]
4. Huntington Homes’ PWS Variation appeal must be dismissed.

*Short Subdivision Appeal*

5. That portion of the Appeal Issues related to the PWS Variation denial will not be addressed as that appeal has been dismissed.
6. Appeal Issue A. Construction of standard frontage improvements does not conflict with SMC 21A.50.135(1). The measures listed in SMC 21A.50.135(1) are listed “in order of preference”. Avoidance is the first listed step, but it is not absolute: “The applicant shall consider reasonable, affirmative steps and make best efforts to avoid critical area impacts.” That is not an absolute

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<sup>8</sup> Section 20.10.260 SMC provides a right of reconsideration of “[a]ny final action by the hearing examiner ...”. That is the only reconsideration provided for within Title 20 SMC.

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mandate to avoid all critical area impacts. [SMC 21A.50.135(1)(a)] Further, SMC 21A.50.135(1) must be read in context with all other provisions of Chapter 21A.50 SMC. Subsection 21A.50.300(1)(a) expressly allows wetlands to be altered if the alteration<sup>9</sup> will “enhance the wildlife habitat ... or other valuable functions of the wetland resulting in a net improvement to the functions of the wetland system”. All evidence in the record indicates that the existing wetland has a low habitat value and that the wetland creation and buffer enlargement/enhancement that is proposed to accompany the sidewalk construction will improve the wetland’s values.<sup>10</sup>

7. Appeal Issue B. There is substantial evidence in the record that the current frontage conditions are substandard, that the proposal will add traffic to 212<sup>th</sup> Avenue SE in front of the subject property, and that the required improvements can be physically constructed.

Huntington Homes relies heavily on the state Supreme Court’s *Benchmark* case to support its position on this issue. [*Benchmark Land Co. v. City of Battle Ground*, 146 Wn.2d 685, 49 P.3d 860 (2002)]

In 1994 Benchmark Land Co. (Benchmark) filed the *Melrose Park* preliminary subdivision application with the City of Battle Ground (Battle Ground) seeking to subdivide 20.25 acres into 56 lots for single-family residential development. The *Melrose Park* site was bordered on the east by North Parkway Avenue and on the south by Onsdorff Boulevard. Benchmark’s initial plat design proposed taking access from both abutting streets and its proposed preliminary plat depicted frontage improvements to both streets. Benchmark later revised the proposed plat to eliminate the access onto North Parkway Avenue but did not at that time remove the depiction of frontage improvements to North Parkway Avenue from the plat.

Battle Ground approved the preliminary subdivision in 1995 but did not enter findings and conclusions to support its approval until 1996. During subdivision construction Benchmark found that the cost of the street improvements would be higher than anticipated and, in the Summer of 1995, rescinded its offer to construct frontage improvements to North Parkway Avenue. Battle Ground’s 1996 findings and conclusions required construction of frontage improvements on North Parkway Avenue.

Benchmark appealed. Battle Ground argued that the frontage improvements were required pursuant to a city ordinance which, in part, required subdivision developers “to construct half-width road improvements ‘to that portion of an access street which abuts the parcel being developed.’” [*Benchmark*, Facts section] The evidence in the record showed that virtually no *Melrose Park* traffic would use the abutting section of North Parkway Avenue, that no school children from *Melrose Park*

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<sup>9</sup> The SMC definition of “alteration” includes filling. [SMC 21A.15.056]

<sup>10</sup> The City also cited to SMC 21A.50.300(1) in support of its position. The Examiner concludes that applicability of that subsection would be a stretch here since it expressly applies to street and utility “crossings” of a wetland. The sidewalk is not really crossing the on-site wetland in the common understanding of crossing.

would walk along that section of the street, and that the street did not meet then-current Battle Ground street standards.

The Court of Appeals reversed the condition following a *Nollan/Dolan* “nexus” and “proportionality” analysis. The Court of Appeals “held that the City failed to show ‘an impact and a solution roughly proportional to the impact.’” The Supreme Court concluded “that there [was] not substantial evidence, as required by RCW 36.70C.130(1)(c), to support the City's decision” and affirmed the Court of Appeals’ decision. Section 82.02.020 RCW was not discussed in the Supreme Court’s decision.

There is a significant factual difference between *Benchmark* and the Hudson 2-Lot Short Plat: The frontage improvement here is on the street from which the development takes all its access. The frontage improvement requirement for Onsdorff Boulevard was not challenged and is not mentioned in *Benchmark*. The Examiner believes that to be an important distinction between *Benchmark* and the present case.

8. Appeal Issue C. This is the primary RCW 82.02.020 issue (although Huntington Homes also raises RCW 82.02.020 in the context of Appeal Issues C, E, and H). Here Huntington Homes relies heavily on the state Court of Appeals *UDC* decision. [*United Development Corporation v. City Of Mill Creek*, 106 Wn. App. 681, 26 P.3d 943, review denied 145 Wn.2d 1002 (2001)]

United Development Corporation (UDC) was the developer of a 1,200 acre mixed-use project in unincorporated Snohomish County known as *Mill Creek*. In 1974 UDC obtained master plan approval for *Mill Creek* from Snohomish County. The master plan required sequential approval of sectors, divisions, and subdivisions, each involving greater detailed planning of smaller and smaller sections of the property. In 1981 UDC and Snohomish County entered into a Road Improvement Agreement (RIA) under which UDC agreed to construct six road projects. In 1983 the City of Mill Creek was incorporated, encompassing all of *Mill Creek*. In or around 1986 UDC was required to complete Mill Creek Boulevard, a major street within *Mill Creek*.

In 1998 UDC sought preliminary subdivision approval of *Mill Creek 23*, a portion of previously approved Sector 6 which bordered on Mill Creek Boulevard. The City approved the proposed subdivision subject to conditions which included payment of traffic and park impact fees and additional improvements to the storm water drainage system which UDC had previously constructed in Mill Creek Boulevard.

UDC appealed those conditions. The Superior Court upheld the traffic and park impact fees, but reversed the requirement for storm water system improvements in Mill Creek Boulevard. UDC appealed the traffic and park fee holdings; the City of Mill Creek cross-appealed the storm water holding. The portion of the Court of Appeals decision relevant here is that pertaining to the storm water drainage improvements.

In that part of its Decision, the Court of Appeals held that “mitigation requirements may be imposed where there is a reasonable and direct relationship between the effects of the proposed development and the required mitigation”, citing RCW 82.02.020. The Court stated that “it is undisputed that *Mill Creek 23* [Italics added] will have no effect upon drainage at the adjacent boulevard.” It also stated that “[t]he City has demonstrated no impact at all.” The Court concluded:

Instead, the City argues that the drainage improvements are a good idea, and therefore can be required as a condition of UDC’s subdivision even though the need for the improvements is not directly related to development of the subdivision. This is not the law, either under the Mill Creek code or the statute. The superior court correctly reversed this requirement.

(All quotes from § 4 of the Decision.) Here again there is a significant difference between *UDC* and the Hudson 2-Lot Short Plat: UDC had built Mill Creek Boulevard in or around 1986 and was being asked to rebuild the storm water drainage facilities in 1988. And there was no evidence of any impact to the storm water facilities from the proposed subdivision. Neither of those situations is present here.

9. Huntington Homes seems to be arguing that no municipal standards may be imposed without first conducting an individualized assessment of impacts under RCW 82.02.020. If that is Huntington Homes’ position, the Examiner respectfully disagrees with it.

In the first place, RCW 82.02.020 is a tax regulation. It prohibits the imposition of “any tax, fee, or charge, either direct or indirect” on land development projects. It “does not preclude dedications of land or easements within the proposed development or plat which the county, city, town, or other municipal corporation can demonstrate are reasonably necessary as a direct result of the proposed development or plat to which the dedication of land or easement is to apply.” And it “does not prohibit voluntary agreements with counties, cities, towns, or other municipal corporations that allow a payment in lieu of a dedication of land or to mitigate a direct impact that has been identified as a consequence of a proposed development, subdivision, or plat.”

The initial question is whether a frontage improvement requirement is a mitigation requirement. If it is, then are standards for streets within a subdivision also a mitigation requirement? And are zoning lot size, setback, and height standards also a mitigation requirement? Must application of every development standard in the municipality be justified by a case-by-case, in-depth analysis of “nexus” and “proportionality” because the standard is a “mitigation” measure? If that is what *UDC* and *Benchmark* stand for, then development predictability as we have known it for decades has just been tossed out the window.

Taken to its (il)logical extreme, such a holding would mean that a city’s street system would be a mish-mash of differing street sections all depending on how many lots were in each development

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fronting a section of the street. The Examiner does not believe that that is what RCW 82.02.020 stands for.

The Examiner does not believe that is what *UDC* and *Benchmark* stand for. The Examiner has often heard the expression “bad facts make bad law.” In *UDC* the city was trying to get UDC to rebuild something it had completed only two years prior; in *Benchmark* the city was trying to get Benchmark to provide frontage improvements on a street which its development was not using. Both are unique sets of circumstances.

The Examiner does not believe that frontage improvement standards are “mitigation” any more than are internal subdivision street standards. Therefore, the Examiner does not believe that they are subject to RCW 82.02.020.

10. Appeal Issue D. The evidence does not support the claim of “duplicate condition”. There is no evidence, notwithstanding the City Engineer’s unartful words in Exhibit 15, that the City has any planned or anticipated project to widen or upgrade 212<sup>th</sup> Avenue SE.
11. Appeal Issue E. See Conclusions of Law 8 and 9, above.
12. Appeal Issue F. The Examiner is required to base his land use decisions upon duly adopted laws and ordinances, and may not consider equitable defenses. [*Chaussee v. Snohomish County*, 38 Wn. App. 630, 638, 689 P.2d 1084 (1984)] An argument that frontage improvement requirements have been “inconsistently and disproportionately” applied by the City is an equitable defense which the Examiner cannot consider.
13. Appeal Issue G. The need to acquire permits from agencies other than the City is irrelevant to the application of City standards. State and Federal permits are often required. For example, every proposal to cross a stream requires a Hydraulic Project Approval from the State Department of Fish and Wildlife. The Examiner has never before heard an applicant claim that it is being harmed because it must also obtain a state permit for part of a project.
14. Appeal Issue H. See Conclusions of Law 8 and 9, above. The SMC and PWS require dedication of a small amount of additional right-of-way (a 3.5 foot wide strip). The site has more than enough land area to allow that dedication without any impact to the development yield. When the required right-of-way is dedicated, sufficient right-of-way will exist to allow the required frontage improvements to be constructed. Impact of those improvements on the small, low value wetland has been addressed in Conclusion of Law 6, above.
15. Appeal Issue I. The frontage improvement requirement does not conflict with PWS.10.170, PWS.15.110, PWS.15.520, PWS Table 1, or PWS Figure 01-03.

PWS.10.170 gives discretion to the City Engineer to approve PWS Variations. That discretion also encompasses the authority to deny PWS Variations. The section requires the City Engineer to employ his/her best engineering judgment. It is undisputed that the more separation between vehicles and pedestrians the better. The City Engineer in this case has exercised his judgment and concluded that reducing the margin of safety would serve no public purpose.

PWS.15.110 requires street frontage improvements as a condition of development. PWS.15.110.C contains two exceptions to that requirement, neither of which applies here.

PWS.15.520 requires planting of street trees. If anything, the City Engineer's denial of the requested PWS Variation furthers compliance with this section because it provides a place for street trees to be planted along the entire frontage of the subject property.

PWS Table 1 contains "Minimum Public Street Design Standards". Those standards require a planter strip. Nothing in the table suggests otherwise or provides for any exceptions.

PWS Figure 01-03 depicts the cross section for a collector arterial. Note 2 on the figure provides that the required planter strip may be eliminated or reduced in width "where there is insufficient right-of-way, subject to City Engineer's approval." Sufficient right-of-way width is available here.

16. Appeal Issue J. The school children safe walking requirement of RCW 58.17.110 has no real bearing on the issues in this appeal.
17. Department Findings/Conclusions/Decision, Findings: General Description/Property Characteristics 7 – 12. Finding 7 includes the statement that Huntington Homes "proposed" standard frontage improvements. While the latest submittal from Huntington Homes does depict such improvements, it was made under protest. It would be more correct to say that standard frontage improvements have been required by the City Engineer. This Finding also discusses Huntington Homes' request for reconsideration of the PWS Variation denial. Since neither the PWS nor the SMC provide a right of reconsideration of a PWS Variation action, this portion of the Finding is misleading. It should be augmented to reflect that no right of reconsideration exists for PWS Variations.

Findings 8 – 10 contain factual statements based upon the record. The Examiner finds no error in any of them.

Finding 11 states that Huntington Homes requested reconsideration of the PWS Variation denial on April 14, 2016. Finding 12 states that the City denied that request for reconsideration on June 9, 2016. Since neither the PWS nor the SMC provide a right of reconsideration of a PWS Variation action, these Findings are misleading. Finding 11 should be augmented to reflect that no right of reconsideration exists for PWS Variations and Finding 12 should simply be deleted.

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18. Department Findings/Conclusions/Decision, Analysis/Conclusions 1. The “Staff response” may be incorrect. Exhibit 27 and testimony indicate that the school district may establish a school bus stop where the shared driveway meets 212<sup>th</sup> Avenue SE. (See also Department Findings/Conclusions-/Decision, Analysis/Conclusions 6 where the Department notes this possibility.) Were it to do so, children from the Hudson 2-Lot Short Plat would not need to walk north to the current school bus stop at 212<sup>th</sup> Avenue SE/NE 8<sup>th</sup> Street. The first portion of the Staff response should be revised to reflect that new information.<sup>11</sup>
19. Department Findings/Conclusions/Decision, Analysis/Conclusions 2. The “Staff response” merely states how code will apply to this development. The Examiner finds no error in it. Further, Huntington Homes did not argue that anything in this Conclusion was incorrect. No change is warranted.
20. Department Findings/Conclusions/Decision, Analysis/Conclusions 6. Unlike Conclusion 1, this Conclusion states that the school district may establish a new school bus stop in front of the Hudson 2-Lot Short Plat. No change is needed to that part of the Staff response. A subsequent paragraph in this Conclusion discusses right-of-way dedication and wetland impact. Given that the PWS Variation appeal has been dismissed, the Examiner finds no error in those discussions. No changes are warranted.
21. Department Findings/Conclusions/Decision, Analysis/Conclusions 7. The “Staff response” merely states how code will apply to this development. The Examiner finds no error in it.
22. Department Findings/Conclusions/Decision, Condition 8. In the Examiner’s experience with the City, subdivision conditions akin to Condition 8 usually conclude with a clause such as “and any variation from the standards approved by the City Engineer.” (See, *e.g.*, PSUB2015-00264, *Cedar Hill*, Examiner Decision dated September 20, 2016, Condition 9.) Such a clause would be appropriate here even though the dismissal of the PWS Variation appeal in this Decision has the effect of leaving the PWS Variation denial in place. Testimony indicates that variations may be requested at virtually any point in the development process. If subsequent circumstances arise which, in the opinion of the City Engineer, warrant approval of a PWS Variation of some sort, the authority to consider and grant such a request should not be blocked by language in the short subdivision decision.
23. Department Findings/Conclusions/Decision, Condition 15. No change to this Condition is warranted: The Condition does not specify the standard to which frontage improvements and off-site improvements must be constructed, it simply requires that any such items be completed prior to final plat approval. Such a requirement is standard.

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<sup>11</sup> No change to the Conditions is required as Condition 11 makes provision for the possibility that a school bus stop might be established in front of the subject property.

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24. Department Findings/Conclusions/Decision, Condition 19. No change to this Condition is warranted. This Condition merely requires that the 3.5 foot wide right-of-way dedication appear on the face of the final plat. Condition 14 requires that the 3.5 foot wide strip be dedicated to the City. Huntington Homes did not appeal Condition 14. Therefore, the dedication will occur and it should be reflected on the final plat.
25. Any Finding of Fact deemed to be a Conclusion of Law is hereby adopted as such.

**DECISION**

Based upon the preceding Findings of Fact and Conclusions of Law, and the testimony and evidence submitted at the open record hearing, the Examiner:

- A. **DISMISSES** Huntington Homes' Interim Public Works Standards appeal due to untimely filing.
- B. **GRANTS IN PART** Huntington Homes' short subdivision appeal. The following sections of the Department's July 25, 2016, Findings/Conclusions/Decision in application PSHP2015-00169 are revised (deletions noted by ~~strike through~~; additions noted by underlining):
- i. Findings: General Description/Property Characteristics 7 is revised to read in full as follows:

212th Ave SE is classified as a collector arterial. The south half of the existing right-of-way frontage has 60 feet of existing right-of-way width, while the north half has 72 feet of existing right-of-way width. Half-Street frontage improvements along the full frontage consistent with a collector arterial standard ~~are proposed~~ have been required by the City Engineer. The platlor requested a formal reconsideration for approval to not include a 5-foot planter strip along the southern portion of the frontage that borders a critical area in order to minimize impact to the delineated Wetland 1. Neither the Interim Public Works Standards nor the SMC provide for reconsideration of Interim Public Works Standards variation actions. The City again rejected the variation request.

- ii. Findings: General Description/Property Characteristics 11 is revised to read in full as follows:

On April 14, 2016 the platlor requested that the City reconsider the denial of a street variation. Neither the Interim Public Works Standards nor the SMC provide for reconsideration of Interim Public Works Standards variation actions.

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- iii. Findings: General Description/Property Characteristics 12 is deleted.
- iv. Department Findings/Conclusions/Decision, Analysis/Conclusions 1, Staff response, is revised to read in full as follows:

*Based on the submitted application there ~~is~~ may be approximately 230 feet of unsafe walking path for school age children. This distance is from the north property line of the subject site to the intersection of 212<sup>th</sup> Avenue SE and SE 8<sup>th</sup> Street; a designated school bus stop. The school district in an email dated July 18<sup>th</sup> 2016 stated that a bus stop may be located in between the newly created lots. The short plat will be conditioned to meet the safety needs of school age children. The platlor has made appropriate provisions for other areas of public health, safety, and the general welfare of the citizens who will live in the proposed short plat. Water and sewer will be served to the newly created lots. The existing Wetland 1 will be set aside in a separate tract with a buffer. Approximately 43 square feet of wetland will be impacted due to required road improvements. The wetland will be filled with approximately 6 cubic feet of fill material. Wetland will be created at a 2:1 ratio resulting in 86 square feet of wetland creation to mitigate for the small amount of wetland fill. The public use and interest will be served by the platting of such subdivision and 3.5 feet of dedication of land for the road. Road improvements will provide for 5 feet of planter strip, curb, and gutter and 6 feet of a concrete pedestrian sidewalk.*

- v. Department Findings/Conclusions/Decision, Condition 8 is revised to read in full as follows:

The improvements along the frontage of 212th Avenue SE shall match the City standard cross section for a collector arterial and any variation from the standards approved by the City Engineer;

In all other respects the appeal is **DENIED**.

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John E. Galt  
Hearing Examiner

**HEARING PARTICIPANTS <sup>12</sup>**

Duana Koloušková, unsworn counsel  
Charlotte Archer, unsworn counsel  
Kevin Jones  
Nell Lund  
Christopher Wright

Kim Adams Pratt, unsworn counsel  
Todd Levitt  
Holli Heavrin  
Andrew Zagars

**NOTICE of RIGHT of RECONSIDERATION**

This Decision is final subject to the right of any party of record to file with the Examiner (in care of the City of Sammamish, ATTN: Lita Hachey, 801 228<sup>th</sup> Avenue SE, Sammamish, WA 98075) a written request for reconsideration within 10 calendar days following the issuance of this Decision in accordance with the procedures of SMC 20.10.260 and Hearing Examiner Rule of Procedure 504. Any request for reconsideration shall specify the error which forms the basis of the request. See SMC 20.10.260 and Hearing Examiner Rule of Procedure 504 for additional information and requirements regarding reconsideration.

A request for reconsideration is not a prerequisite to judicial review of this Decision. [SMC 20.10.260(3)]

**NOTICE of RIGHT of JUDICIAL REVIEW**

This Decision is final and conclusive subject to the right of review in Superior Court in accordance with the procedures of Chapter 36.70C RCW, the Land Use Petition Act.. See Chapter 36.70C RCW and SMC 20.10.250 for additional information and requirements regarding judicial review.

The following statement is provided pursuant to RCW 36.70B.130: “Affected property owners may request a change in valuation for property tax purposes notwithstanding any program of revaluation.”

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<sup>12</sup> The official Parties of Record register is maintained by the City’s Hearing Clerk.