

RECEIVED

AUG 27 2018

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

CITY OF SAMMAMISH

DECISION AFTER REMAND TO THE PARTIES

FILE NOS.: PSUB2016-00026 (Preliminary subdivision)
PAUE2018-00068 (SPWater exception)
PAUE2018-00069 (Public Works exception)

APPELLANTS: Larry & Nancy LeSueur
Jason & Nicole Williams
C/o Brian Telegin
Bricklin & Newman, LLP
1424 Fourth Avenue, Suite 500
Seattle, WA 98101
telegin@bnd-law.com

RESPONDENT: City of Sammamish
C/o Kim Adams Pratt/Alexandra Kenyon
Kenyon Disend, PLLC
11 Front Street South
Issaquah, WA 98027-3820
kim@kenyondisend.com/alexandra@kenyondisend.com

APPLICANTS: Toll Bros., Inc.
C/o Brent Carson/Clara Park
Van Ness Feldman, LLP
719 Second Avenue, Suite 1150
Seattle, WA 98104
brc@vnf.com/cpark@vnf.com

Sammamish Plateau Water & Sewer District
1510 228th Avenue SE
Sammamish, WA 98075
jim.konigsfeld@spwater.org

Department of Public Works
ATTN: Andrew Zagars, PE
C/o Kim Adams Pratt/Alexandra Kenyon
Kenyon Disend, PLLC
11 Front Street South
Issaquah, WA 98027-3820
kim@kenyondisend.com/alexandra@kenyondisend.com

HEARING EXAMINER DECISION AFTER REMAND

RE: PSUB2016-00026 (*Carrier*)

PAUE2018-00068 (Water and sewer PAUE)

PAUE2018-00068 (Road PAUE)

August 27, 2018

Page 2 of 26

TYPE OF CASE: Consolidated: 1) Preliminary subdivision (*Carrier*); 2) Appeals (2) from the State Environmental Policy Act ("SEPA") threshold Determination of Nonsignificance ("DNS") issued for the *Carrier* application; 3) Public Agency and Utility Exception ("PAUE") to place a sewer and a water main through a wetland ("SPWater Exception"); and 4) PAUE to reroute a segment of "Stream B" located within the SE 8th Street right-of-way ("Public Works Exception")

STAFF RECOMMENDATION: Deny SPWater Exception; Approve other applications subject to conditions

EXAMINER DECISION: DISMISS SPWater Exception; APPROVE preliminary subdivision and Public Works Exception subject to conditions; DENY SEPA appeal

DATE OF DECISION: August 27, 2018

INTRODUCTION¹

Toll Brothers, Inc. ("Toll," successor to Toll WA LP²) seeks preliminary approval of *Carrier*, a 35-lot single-family residential subdivision of a 14.1 acre site, owned by Carlson and Carrier, which is zoned R-6. (Exhibits 4; 6; 49³)

The subject property occupies the northeast quadrant of the 214th Avenue SE/SE 8th Street intersection, near Big Rock Park. (Exhibit 6)

Toll filed a Base Land Use Application on January 29, 2016. (Exhibits 1; 4) The Sammamish Department of Community Development (variously the "Department" or the "Respondent") deemed the application to be

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

² Exhibit 80, p. 1

³ 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.

The principal parties ("Principal parties" means and is limited to the applicant(s), the appellant(s), and the respondent(s) to any given application/appeal." [Hearing Examiner Rule of Procedure 108(h)]) used the "Bates" numbering system on some pre-filed exhibits. Where available, the Examiner will use the Bates number (omitting leading zeros), separated from the exhibit number by a ":" to cite specific exhibit pages (e.g.: Exhibit 29:977).

HEARING EXAMINER DECISION AFTER REMAND

RE: PSUB2016-00026 (*Carrier*)

PAUE2018-00068 (Water and sewer PAUE)

PAUE2018-00068 (Road PAUE)

August 27, 2018

Page 3 of 26

complete on February 2, 2016. (Exhibit 11) The Department issued a Notice of Application on or about February 25, 2016. (Exhibit 12)

On February 7, 2017, Larry & Nancy LeSueur (“LeSueur”) and Jason & Nicole Williams (“Williams”) each filed a timely appeal from the SEPA threshold DNS issued by the Department for the *Carrier* application. (Exhibits 9001; 9002) On February 13, 2017, Toll filed a Motion to Dismiss the Appellants’⁴ SEPA appeals. (Exhibit 9006) On February 16, 2017, the Sammamish Hearing Examiner (“Examiner”) denied Toll’s Motion. (Exhibit 9011)

The Examiner viewed the subject property on March 16, 2017.

The Examiner held an open record hearing on March 16, 20, and 21, 2017 (the “2017 Hearing”). The Department gave notice of the 2017 Hearing as required by the Sammamish Municipal Code (“SMC”).⁵ (Exhibit 42.C)

Subsection 20.05.100(1) SMC requires that decisions on preliminary subdivisions be issued within 120 net review days after the application is found to be complete. The 2017 Hearing was held after the 120th net review day. (Testimony) The SMC provides two potential remedies for an untimely decision: A time extension mutually agreed upon by the City and the applicant [SMC 20.05.100(2)] or written notice from the Department explaining why the deadline was not met [SMC 20.05.100(4)]. The Department provided a written explanation. (Exhibit 32)

On April 17, 2017, the Examiner issued a Decision to Return the application and Remand the SEPA determination. (Exhibit 9023) On April 27, 2017, each principal party involved in the case at the time filed a timely Motion for Reconsideration and/or Clarification. (Exhibits 44.1 and 44.2 (Department); 1032 and 1033 (Appellants); 2019 (Toll)) On May 3, 2017, the Examiner issued a Decision – Revised After Reconsideration (the “2017 Revised Decision”). The 2017 Revised Decision was also to Return the application and Remand the SEPA determination, but based on substantially different Findings of Fact and Conclusions of Law. (Exhibits 9024 and 9025)

On February 6, 2018, the Sammamish Plateau Sewer and Water District (“SPWater”) filed a PAUE application to trench a sewer main and a water main through a wetland and stream on the *Carrier* site. (“SPWater Exception;” Exhibits 46; 63; 64; 65) The Department deemed the application to be complete on February 12, 2018. (Exhibit 51)

On February 6, 2018, the Sammamish Department of Public Works (“Public Works”) filed a PAUE application to relocate a segment of a stream which flows from the *Carrier* site in to and along the SE 8th

⁴ Solely to simplify grammatical construction, the appellants will be referred to collectively as the “Appellants” and, where necessary, separately in singular form: “LeSueur” or “Williams.” No disrespect is intended.

⁵ Continuations were announced on the record at the end of each day and did not require further notice.

HEARING EXAMINER DECISION AFTER REMAND

RE: PSUB2016-00026 (*Carrier*)

PAUE2018-00068 (Water and sewer PAUE)

PAUE2018-00068 (Road PAUE)

August 27, 2018

Page 4 of 26

Street roadside ditch. ("Public Works Exception;" Exhibits 74; 75; 93) The Department deemed the application to be complete on February 12, 2018. (Exhibit 51)

The Department issued an updated Notice of Application on February 20, 2018. (Exhibit 51)

The Examiner held an open record hearing on July 30 and August 1, 2018, to consider new information on the issues which gave rise to the 2017 Revised Decision and to consider the two new PAUE applications (the "2018 Hearing"). The Department gave notice of the 2018 Hearing as required by the SMC.⁶ (Exhibits 77; 78)

At the request of the Principal Parties the record was held open for up to two weeks for submittal of written closing statements. (See Exhibit 9027, ¶ 7.) The record closed on August 15, 2018, with submittal of all three closing statements: Exhibits 94, 1086, and 2030.

Pursuant to former Hearing Examiner Rule of Procedure 224 each principal party pre-filed exhibits before the 2017 and 2018 Hearings, all of which were entered into the hearing record. Additional exhibits were entered into the hearing record during the hearing. Each closing statement is considered a part of the hearing record. The Deputy City Clerk maintains the official copy of all entered exhibits together with index lists of all exhibits. The record now consists of:

Exhibits 1 – 94:	Respondent City's exhibits, including the City's Closing Statement
Exhibits 1001 – 1086:	Appellants' exhibits, including the Appellants' Closing Statement
Exhibits 2001 – 2030:	Applicant Toll's exhibits, including Toll's Closing Statement
Exhibits 9001 – 9031:	Administrative exhibits (includes documents submitted by the public during the hearings)

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. Toll proposes to subdivide the subject 14.1 acre site into 35 lots for single-family residential development together with a 7.33 acre critical area protection tract (Proposed Tract D), a 0.75 acre tree retention tract (Proposed Tract H), two 0.32 acre combination storm water control/recreation tracts (Proposed Tracts C and G), three short access/utilities tracts (Proposed Tracts A, B, and E), and a narrow pedestrian access tract (Proposed Tract F). Proposed Tract D will serve to protect two streams (Streams A and B) and two wetlands (Wetlands A and B). Stream B and Wetland B

⁶ The continuation was announced on the record at the end of the first day and did not require further notice.

HEARING EXAMINER DECISION AFTER REMAND

RE: PSUB2016-00026 (*Carrier*)

PAUE2018-00068 (Water and sewer PAUE)

PAUE2018-00068 (Road PAUE)

August 27, 2018

Page 5 of 26

essentially divide the subject property into a west half and an east half. Twenty lots are proposed for the area east of Proposed Tract D (Proposed Lots 1 – 20) with the remaining 15 lots in the area west of Proposed Tract D (Proposed Lots 21 – 35). Frontage improvements to 214th Avenue SE and SE 8th Street are proposed as required by the SMC and applicable Public Works Standards; the SE 8th Street frontage improvements will be offset to the north (at Public Works' request) to preserve a row of stately trees located along the south side of SE 8th Street and will require relocating onto the subject property the segment of Stream B that currently flows within a mown ditch in the SE 8th Street right-of-way. (Exhibits 13.9:165; 14:194; 15.2; 34:1016, 1017; 49; 86; 1012:344 - 346)

Toll originally proposed to provide sewer and water service for the lots east of Proposed Tract D by trenching through Stream B and Wetland B in the northern portion of Proposed Tract D. (Exhibits 4; 14; 22; 29; 46; 69; 2001; and testimony) During the July 30, 2018, hearing Toll stated that it would jack and bore or directional drill the lines beneath Wetland B and Stream B without disturbing either critical area or its regulatory buffer. (Testimony)

2. Sammamish's SEPA Responsible Official issued a threshold DNS for *Carrier* on January 17, 2017. (Exhibit 1:1) The SEPA Responsible Official issued an Addendum to the DNS on June 28, 2018. (Exhibit 80)
3. On February 7, 2017, LeSueur and Williams timely filed their appeals from the SEPA DNS. (Exhibits 9001; 9002) LeSueur and Williams supplemented their appeals, as required by the Examiner, with statements filed on February 27, 2017. (Exhibits 9011 - 9014) The Appellants essentially argue that the Department lacked sufficient information to conclude that installing sewer and water utilities through Proposed Tract D by open trenching would not significantly impact Stream B and Wetland B, that the Department mis-classified Stream B and Wetland B, that the proposed utility plan would not properly facilitate development of properties to the east of the subject property, and that the development would create adverse traffic impacts on SE 8th Street and 218th Avenue SE. (Exhibits 9013; 9014)

The focus of the Appellants' testimony and evidence during the 2018 Hearing was the allegation that the Department mis-classified Wetland B. (Testimony; Statement of counsel)

4. The subject property consists of two abutting parcels. The western two-thirds (approximately 10 acres) is Tax Parcel 1240700035 ("Parcel 0035"); the eastern third (approximately 5 acres) is Tax Parcel 1240700086 ("Parcel 0086"). Parcel 0035 was owned at one time by the French family; it is now owned by the Carlson family. Parcel 0086 is owned by the Carrier family. (Exhibit 4:48; and testimony) Taken together, the two parcels form a large rectangle with approximately 970 feet of frontage on the north side of SE 8th Street and approximately 635 feet of frontage on the east side of 214th Avenue SE. (Exhibit 49)

HEARING EXAMINER DECISION AFTER REMAND

RE: PSUB2016-00026 (*Carrier*)

PAUE2018-00068 (Water and sewer PAUE)

PAUE2018-00068 (Road PAUE)

August 27, 2018

Page 6 of 26

5. LeSueur lives on the one-acre parcel which abuts the east boundary of the subject property with frontage on SE 8th Street. (Exhibit 1016, p. 3; and testimony) Williams lives on an acreage parcel two lots north of LeSueur with frontage on 218th Avenue SE. (Exhibit 1020; and testimony)
6. The subject property is bordered on the north by a single-family residential development known as *Bellaser*a. *Bellaser*a contains 18 residential lots, a storm water detention pond (Tract A) and a critical areas protection tract (Tract B). Based on dates contained on Exhibit 2006:80, it appears that physical development of *Bellaser*a was completed in or around 2006. (Exhibit 2006:80) *Bellaser*a is not a recently approved subdivision, however. Rather, it is a portion of an old, unrecorded subdivision (*Burke & Farrar's Kirkland Addition No. 18*) which was apparently altered through the boundary line adjustment process (Sammamish BLA2000-022) to become what it is today.⁷ Parcels 0035 and 0086 are also parts of the same unrecorded plat. (Exhibit 29:977)
7. The subject property is on the southern/southwestern face of a large, broad, sloping hillside. The elevation change from the northeast corner to the southwest corner is about 64 feet, with much of that drop occurring within about 150 feet of the northeast corner. Parcel 0086 is predominantly open pasture, most recently used for horses, with a small wooded area in its northeast corner and along its SE 8th Street frontage.⁸ Parcel 0035 is almost completely wooded; a single-family residence is nestled in the trees near its southwest corner. (Exhibits 20:513⁹; 25:841 and :859; 2001:4; 29)
8. The subject property contains two streams and two wetlands. Wetland A is located near the western edge of Parcel 0086. Stream A appears to be a dug channel extending from the south end of Wetland A southerly to SE 8th Street. Stream A then crosses beneath SE 8th Street and eventually joins Stream B. (Exhibits 13.6: 134 - 149; 49)

Wetland B and Stream B are the focus of the SEPA appeals. Wetland B begins in *Bellaser*a Tract B and extends southerly through Parcel 0035 more or less to the northern edge of SE 8th Street. Stream B rises somewhere near the northern end of Wetland B and meanders southerly through the wetland to the north side of SE 8th Street, passing through a dug fish pond along its course. Stream B then flows west in a grass-lined roadside ditch within the SE 8th Street right-of-way, crosses beneath 214th Avenue SE and then beneath SE 8th Street, meanders southerly through ponds and wetlands, is joined

⁷ The undersigned became the City's Pro Tem Hearing Examiner in 2002 and heard a number of cases in the years that followed; the undersigned became the City's regular Examiner in 2008. The undersigned found no record of a project called *Bellaser*a in his data base and went on-line to King County ParcelViewer2 to try and determine when the "subdivision" was recorded. It was through that process that the undersigned learned that none of the lots in *Bellaser*a are lots in a recorded plat. Rather, every lot's legal description refers to the 2000 BLA and the unrecorded plat. [Official notice]

⁸ The small horse sheds visible in the aerial photographs and in Photo 7 on Exhibit 25:858 were removed prior to the 2017 Hearing by LeSueur, their owner. (Testimony)

⁹ The "Site" flagged on this graphic is the *Bellaser*a property; the *Carrier* site is immediately south of *Bellaser*a. The graphic does clearly depict the south/southwest aspect of the area's slope.

HEARING EXAMINER DECISION AFTER REMAND

RE: PSUB2016-00026 (*Carrier*)

PAUE2018-00068 (Water and sewer PAUE)

PAUE2018-00068 (Road PAUE)

August 27, 2018

Page 7 of 26

by Stream A, and joins Ebright Creek just south of SE 13th Place. (Exhibits 20:289; 39:1060; 2008:211; 9020)

9. The Revised Decision was based on the absence of sufficient evidence to render a definitive decision on the proper classification of Wetland B and Stream B. (Exhibit 9025)
10. The principal parties now agree that Wetlands A and B must be rated pursuant to the Department of Ecology ("Ecology") Washington State Wetland Rating System for Western Washington, 2014 Update ("2014 Rating System"). (Testimony) A copy of the 2014 Rating System is in the record as Exhibit 55.
11. The rating of Wetland A and Stream A are not in contention in this proceeding.¹⁰ Wetland A is a Category IV¹¹ wetland with a Habitat score of 5. (Exhibit 50, p. 10) Stream A is a Type Ns, seasonal, non-fish bearing stream. (Exhibits 50, p. 3)
12. The classification of Stream B was disputed during the Initial Hearing. (See Exhibit 9023 - 9025.) All principal parties now accept/concede that Stream B is a Type Np water course: A perennial, non-fish bearing stream. (Exhibits 50; 59; 72; and testimony/statement of counsel)
13. The rating of Wetland B was and remains in dispute. That dispute is the major basis of the Appellants' SEPA appeal. When the Examiner issued the Revised Decision he asked

That the wetland experts from WRI, Raedeke, Herrera, TWC, and Ecology (or as many as wish to avail themselves of the opportunity) be allowed by Applicant Toll to together walk the Wetland B/Stream B area of the subject property to allow them to exchange opinions and observations, accompanied by whomever Applicant Toll desires, sufficiently in advance of the hearing date such that each may thoughtfully consider what he/she has seen and heard, and to prepare for the hearing. The purpose of this request is to seek to even the playing field and, just perhaps, find commonality of opinion among five, well-trained, well-educated, well-experienced, and well-respected expert entities.

(Exhibit 9024, p. 6, ¶ A) Unfortunately, the owner of Parcel 0035 declined to allow anyone representing Appellants to enter onto that parcel. (Exhibit 1078) Given that fact, Planning decided

¹⁰ LeSueur at one time suggested that Wetland A extended further east than delineated by Toll, but has since abandoned that argument. (Exhibit 13.6)

¹¹ Ecology uses capitalized Roman numerals for wetland categories (Category I, II, etc.). (Exhibit 1017.C, p. 1) The current SMC uses both Arabic numerals (Category 1, 2, etc.) [SMC 21A.50.290(1) and capitalized Roman numerals [SMC 21A.50.290(2)] for wetland categories. (Exhibit 2011.C, pp. 37 and 38 of 64) The Examiner will use capitalized Roman numerals.

HEARING EXAMINER DECISION AFTER REMAND

RE: PSUB2016-00026 (*Carrier*)

PAUE2018-00068 (Water and sewer PAUE)

PAUE2018-00068 (Road PAUE)

August 27, 2018

Page 8 of 26

that the fairest solution was to have Ecology representatives visit the site without any of the other consultants present. (Exhibit 1041) The Examiner is in full accord with that decision.

Ecology representatives visited the *Carrier* site on April 18, 2018, and reviewed numerous documents from the hearing record (including some that were not entered into the hearing record until the subsequent 2018 Hearing). (Exhibit 71)

14. Ecology concluded that Wetland B is not a headwater wetland. (Exhibit 71) All principal parties now concur with that conclusion. (Exhibit 59; and testimony)
15. The Appellants believe that segmentation of Wetland B is likely appropriate, using the man-made berm at the lower end of the dug pond as the dividing point between the two segments. If Wetland B is segmented thusly, the Appellants believe that it may well rate as a Category II wetland. Toll and the City believe that segmentation of Wetland B is not appropriate. (Testimony)
16. The dug pond is more or less in the middle of Parcel 0035 and surrounded by Wetland B. Water flowing southerly in Stream B through Wetland B is impounded behind a low berm constructed across the stream channel years ago by French. A pair of 6" concrete pipes provides an outlet through the berm. The invert elevations of the pipes are at about 385 feet at their upstream ends and at about 384 feet at their downstream ends. The berm is of such minor height that it did not register at all on the topographic survey of the site. The berm is heavily vegetated; the character of that vegetation is the same or much the same as the character of the vegetation immediately below and on either side of the berm. The site survey indicates that the wetland extends beyond the dug pond on the east and west sides of the pond, narrowest near the presumed location of the berm. (Exhibits 49, Sheet 2 of 13; 1048; 2026, Photos A – D and H; and testimony)

Given the evidence in the record and the guidance in the 2014 Rating System, the Examiner finds that Wetland B should not be segmented for rating purposes.

17. The Appellants' wetland consultant disagrees with the positions of Toll's and the City's wetland consultants regarding a couple of the answers on the 2014 Rating System worksheet. (Exhibit 59; and testimony) Those differences are minor and, unless the wetland were segmented for rating purposes, would not change the ultimate rating.
18. Toll and the City agree that Wetland B is a Category III wetland with a 75-foot required buffer. (Exhibits 50; 59; 72)
19. Based upon the preponderance of the evidence in the entire record, the Examiner finds that Wetland B is a Category III wetland with 6 habitat points.

HEARING EXAMINER DECISION AFTER REMAND

RE: PSUB2016-00026 (*Carrier*)

PAUE2018-00068 (Water and sewer PAUE)

PAUE2018-00068 (Road PAUE)

August 27, 2018

Page 9 of 26

20. The current *Carrier* preliminary plat proposal is based on the 75 foot wide buffer required for a Category III wetland [SMC 21A.50.290(2) ¹²] and the 75 foot wide buffer required for a Type Np stream [SMC 21A.50.330(1)]. The proposed preliminary plat utilizes buffer averaging as allowed by SMC 21A.50.290(7) (wetland buffer averaging) and .330(4) (stream buffer averaging). The proposed design is essentially the same as the originally proposed design (Exhibit 29) with only minor changes to the buffer averaging and mitigation plan. (Exhibits 45; 49; 50)
21. In order to provide water and sewer service to both sides of the subdivision, Toll wants to extend pipes from the end of Tract A on the west to the end of Tract E on the east. (Exhibit 49, Sheet 7 of 13) During the 2017 Hearing Toll proposed to trench across Wetland B and Stream B to install the necessary pipes. (Exhibits 14; 46; 69; and testimony) Toll stated near the beginning of the 2018 Hearing that it had decided to abandon the trenching proposal in favor of boring and jacking or directionally drilling the necessary pipes beneath the wetland and stream. (Testimony)
22. SPWater had filed the SPWater Exception at a time when Toll was still proposing the trenching method of pipe installation. When it became apparent during the 2018 Hearing that Toll was now proposing boring or directional drilling, the Examiner asked for discussion by the principal parties as to whether a PAUE was still necessary. The report and testimony of a highly qualified expert on such techniques (“Staheli”) convinced the Examiner that boring or directional drilling would be highly unlikely to disturb either Wetland B or Stream B because of the depth of the bores, the soil type in the area, and the manner in which the work would be accomplished. (Exhibits 79; 92; and testimony) The Examiner concluded that the concerns raised by the Appellants about the boring and directional drilling options were remote and speculative. The Examiner then ruled that the SPWater Exception was not required and would be dismissed. ¹³ The SPWater Exception was not further considered during the hearing.
23. When Stream B flows off the south end of Parcel 0035, it drops into the mown roadside ditch along the north side of SE 8th Street. (Exhibits 34:1016, 1017; 49; 1012:344 - 346) That ditch/channel/-stream course has to be moved in order to construct required frontage improvements. (SE 8th Street is a designated collector arterial. (Exhibit 15.1, bullet 2, ¶ 2)) Toll proposes to relocate about 160 feet of Stream B (the portion that flows in the roadside ditch) northerly onto the *Carrier* site and establish a buffer on both its north and south sides (something it does not now have). (Exhibits 49, Sheet 4 of 13; 50) The proposed relocation will measurably improve the habitat condition of Stream B. (Exhibit 14:198; 50) Public Works filed the Public Works Exception to obtain approval to relocate Stream B as described. (Exhibits 74;75; 93)

¹² *Carrier* is vested to the version of Chapter 21A.50 SMC that existed prior to March 1, 2017. All citations herein are to that version. Many portions of the text are the same in both versions.

¹³ SPWater stated that it supported denial/dismissal of its application: It had urged use of a trenchless alternative from the beginning. (Testimony)

HEARING EXAMINER DECISION AFTER REMAND

RE: PSUB2016-00026 (*Carrier*)

PAUE2018-00068 (Water and sewer PAUE)

PAUE2018-00068 (Road PAUE)

August 27, 2018

Page 10 of 26

The Appellants do not object to relocation of about 160 feet of Stream B as currently proposed nor to the Public Works Exception to effect that relocation. (Testimony)

24. The record contains evidence that appropriate provisions have been made for open space (Exhibits 45; 49); drainage (Exhibits 20; 45; 49); streets and roads (Exhibit 2; 45; 49); potable water supply (Exhibit 8; 49; 66; 2007); sanitary wastes (Exhibit 8; 49; 66; 2007); parks and recreation (Exhibits 45; 49); playgrounds (Exhibits 45; 49); schools and schoolgrounds (Exhibit 45); and safe walking conditions for children who walk to school (Exhibits 17; 45; 49). The proposed design does not utilize alleys or other public ways. (Exhibit 49) The record contains no request for transit stops.
25. Members of the public, in addition to the Appellants, commented on the *Carrier* proposal during both the 2017 and 2018 Hearings.

Comments from other than the Appellants entered during the 2017 Hearing are contained in Exhibits 13.1 – 13.12 and Exhibits 9019 – 9022. 2017 comments centered on opposition to trenching the utility lines through Wetland B/Stream B, assertions that the environmental fieldwork had not been done adequately; assertions that proposed tree removal would be contrary to City code, assertions that the proposed density would be out of character with the neighborhood, and concerns regarding the effect of drainage discharges on downstream properties.

Comments from other than the Appellants entered during the 2018 Hearing are contained in Exhibits 84 – 88, Exhibit 1059,¹⁴ and Exhibits 9029 – 9031. The first group of 2018 comments generally oppose trenching through Wetland B/Stream B for utility lines, arguing that a better alternative (a lift station) is available. One commenter (Exhibit 86, Riley) had communicated with Toll regarding preservation of two trees in the northwest corner of proposed Lot 17 which are directly behind (south of) the Riley property. Toll responded that it believed those trees could be preserved. The second group of 2018 comments center on questions about Toll's commitment to environmental stewardship, concerns about wetland impacts from the water and sewer line boring/directional drilling, and assertions that SPWater should have chosen/insisted on a different sewer alignment for the future betterment of its customers. The owner of the property east of Proposed Lot 6 (Pleake), through whose property a future sewer line might run between *Carrier* and 218th Avenue SE (See Exhibit 2025), opposes any easement for a future sewer through his property. (Exhibit 9031)

26. A total of 435 significant trees¹⁵ were catalogued on the site, of which 216 were located outside of critical area tracts on the subject property.¹⁶ (Exhibit 21) Current tree retention regulations

¹⁴ Exhibit 1059 is a duplicate of Exhibit 85.

¹⁵ A "significant tree" is a healthy coniferous tree with a diameter of 8" or more measured at breast height ("DBH") and a healthy deciduous tree with a 12" or more DBH. [SMC 21A.15.1333]

¹⁶ Exhibit 21 states that 534 significant trees were catalogued. (Exhibit 21:544) However, the report then states that 99 of those trees were dead, diseased, or dangerous. (*Id.*) Thus, according to the SMC definition of a significant tree, only 435 were catalogued on the entire site.

HEARING EXAMINER DECISION AFTER REMAND

RE: PSUB2016-00026 (*Carrier*)

PAUE2018-00068 (Water and sewer PAUE)

PAUE2018-00068 (Road PAUE)

August 27, 2018

Page 11 of 26

essentially require that 50% of significant trees located in certain erosion hazard areas be retained regardless of zoning classification plus 35% of significant trees outside of critical areas and their buffers be retained in a development on land zoned R-6. [SMC 21A.37.250(1)] Incentives are available for preservation of a greater number of trees in specified circumstances. [SMC 21A.37.270(4)] All significant trees that are removed must be replaced at specified ratios. [SMC 21A.37.280]

Toll proposes to retain all significant trees within regulated critical areas and their buffers plus 92 significant trees elsewhere on site (123 trees with retention credits counted), which equates to 43% retention when earned retention credits are applied. 167 significant trees are proposed to be removed, triggering the replacement requirements of SMC 21A.37.280. 310 replacement trees are proposed to be planted. Most of the retained trees outside of the critical areas are located in Proposed Tract H; most of the replacement trees will be planted in critical area buffers. (Exhibit 49, Sheets 10 – 12 of 13)

Toll's tree retention/replacement plan complies with the applicable City tree retention regulations. (Exhibit 45, p. 22, fifth "bullet")

27. Toll requested three variations from the applicable Public Works Standards. (Exhibit 28) On February 27, 2017, Public Works approved all three requested variations. (Exhibit 42.B)
28. The Department prepared a new Staff Findings and Recommendations report for the 2018 Hearing. (Exhibit 45) The Department recommends approval of the preliminary subdivision, denial of the SPWater Exception, and approval of the Public Works Exception. The Department recommends 29 conditions of approval. (Exhibit 45, pp. 27 – 29)

Exhibit 42 (a March 16, 2017, memorandum from the Department to the Examiner) recommended changes to Recommended Conditions 3, 4, and 11 as contained in Exhibit 1, the Department's original Staff Findings and Recommendations report. Original Recommended Conditions 3, 4, and 11 are now Recommended Conditions 5, 6, and 13 in the new report. Recommended Conditions 5, 6, and 13 do not reflect the changes requested by the Department in Exhibit 42. The changes requested in Exhibit 42 remain applicable.

29. Toll requested an additional subpart for Recommended Condition 3 (on p. 27 of Exhibit 45). Toll would like an additional option under subsection 3.b that would allow it to directionally drill a separate water line beneath Wetland B/Stream B. The City sees this option as an alternative to be worked out during construction plan review. Toll agrees that it must demonstrate no impact to Wetland B or Stream B if the option is employed. (Exhibit 2029; and testimony)
30. Any Conclusion of Law deemed to be a Finding of Fact is hereby adopted as such.

HEARING EXAMINER DECISION AFTER REMAND

RE: PSUB2016-00026 (*Carrier*)

PAUE2018-00068 (Water and sewer PAUE)

PAUE2018-00068 (Road PAUE)

August 27, 2018

Page 12 of 26

LEGAL FRAMEWORK ¹⁷

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

Authority

SEPA Appeal

The Examiner is charged with adjudicating administrative SEPA appeals “pursuant to the provisions of SMC 20.10.070”. [SMC 20.15.130(1)]

Preliminary Subdivision

A preliminary subdivision is a Type 3 land use application. [SMC 20.05.020, Exhibit A] A Type 3 land use application requires an open record hearing before the Examiner. The Examiner makes a final decision on the application 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]

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)]

Public Agency and Utility Exception

A PAUE is normally processed administratively by the Department. [SMC 21A.50.070(1)(c)] When consolidated with a preliminary subdivision application, it is processed as a Type 3 application. [SMC 20.05.020(2)]

Review Criteria

SEPA Appeal

SEPA requires that a determination be made as to whether a project would result in “a probable significant, adverse environmental impact” and requires that a “detailed statement” be prepared in conjunction with “major actions significantly affecting the quality of the environment”. [RCW 43.21C.031 and RCW 43.21C.030(c), respectively] The process of determining whether a project would result in such an impact is

¹⁷ Any statement in this section deemed to be either a Finding of Fact or a Conclusion of Law is hereby adopted as such.

HEARING EXAMINER DECISION AFTER REMAND

RE: PSUB2016-00026 (*Carrier*)

PAUE2018-00068 (Water and sewer PAUE)

PAUE2018-00068 (Road PAUE)

August 27, 2018

Page 13 of 26

referred to as the “threshold determination” process. The person making the determination is called the “responsible official”.

The State rules define “probable” as something which is “likely or reasonably likely to occur” as opposed to events “that merely have a possibility of occurring, but are remote or speculative.” [WAC 197-11-782] The term “significant” “as used in SEPA means a reasonable likelihood of more than a moderate adverse impact on environmental quality.” [WAC 197-11-794, both definitions adopted by reference at SMC 20.15.010(1)]

Preliminary Subdivision

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.

Additional review criteria for preliminary subdivisions are set forth at SMC 20.10.220:

When the examiner makes a decision regarding an application for a proposed preliminary plat, the decision shall include additional findings as to whether:

(1) Appropriate provisions are made for the public health, safety, and general welfare and for such open spaces, drainage ways, streets or roads, alleys, other public ways, transit stops, potable water supplies, sanitary wastes, parks and recreation, playgrounds, schools and school grounds and all other relevant facts, including sidewalks and other planning features that assure safe walking conditions for students who only walk to and from school; and

(2) The public use and interest will be served by the platting of such subdivision and dedication.

Public Agency and Utility Exception

PAUE applications may be granted

when the following criteria are met:

(i) There is no other reasonable alternative to the activity or proposed development with less impact on the critical area; and

HEARING EXAMINER DECISION AFTER REMAND

RE: PSUB2016-00026 (*Carrier*)

PAUE2018-00068 (Water and sewer PAUE)

PAUE2018-00068 (Road PAUE)

August 27, 2018

Page 14 of 26

(ii) The activity or development proposal is designed to avoid, minimize, and mitigate the impact on environmentally critical areas consistent with the avoidance and mitigation sequencing requirements in this chapter; and, if applicable:

(iii) The proposed development or activity is of a linear nature and is on an existing corridor or connects to public lands, trails, utility corridors, rights-of-way or other public infrastructure, or is required for functional reasons such as gravity flow.

[SMC 21A.50.070(1)(b)]

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 preliminary subdivision application is vested to the development regulations as they existed on February 2, 2016; neither the PAUE applications nor the SEPA appeals are subject to or benefitted by vested rights.

Standard of Review

SEPA Appeal

The clearly erroneous standard is the appropriate test to apply in an appeal of a SEPA threshold determination: the action of the responsible official is not disturbed unless, after reviewing all the evidence in the record, the appellate decision maker is left with the definite conviction that a mistake has been made.

[*Leavitt v. Jefferson Cy.*, 74 Wn. App. 668, 680 (1994)]

The appellant has the burden of proof. State law requires that "[i]n any action involving an attack on a determination by a governmental agency relative to the requirement or the absence of the requirement, or the adequacy of a 'detailed statement', the decision of the governmental agency shall be accorded substantial weight." [RCW 43.21C.090] That requirement is echoed in both state rule [WAC 197-11-680(3)(a)(viii)] and municipal code [SMC 20.15.130(1)(b)].

Preliminary Subdivision and Public Agency and Utility Exception

The standard of review is preponderance of the evidence. The applicant has the burden of proof. [City of Sammamish Hearing Examiner Rule of Procedure 316(a)]

HEARING EXAMINER DECISION AFTER REMAND

RE: PSUB2016-00026 (*Carrier*)

PAUE2018-00068 (Water and sewer PAUE)

PAUE2018-00068 (Road PAUE)

August 27, 2018

Page 15 of 26

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

1. The Conclusions in this decision are grouped by topic only for the reader's convenience. Such groupings do not indicate any limitation of applicability to the decision as a whole.
2. Except as it may differ from the Conclusions of Law contained herein, the Examiner concludes that the Department's analysis of application compliance with applicable review criteria is accurate and supported by the evidence. Therefore, except as it may differ from the Conclusions of Law contained herein, the analysis and conclusions in Exhibit 45 are incorporated herein by reference as if set forth in full.
3. Any Finding of Fact deemed to be a Conclusion of Law is hereby adopted as such.

SEPA Appeal

4. As noted above, the City's SEPA threshold determination must be accorded substantial weight. A jurisdiction whose adopted development regulations will "provide adequate ... mitigation for the specific adverse environmental impacts of the project ... shall not impose additional mitigation under [SEPA]." [WAC 197-11-660(1)(g)]
5. Although the SEPA appeals list a number of issues, the Appellants focused almost exclusively on the assertion that the Department still does not have sufficient information to render a determination on the category of Wetland B. The Examiner respectfully disagrees: The record contains substantial evidence to support a conclusion that Wetland B is a Category III wetland with a habitat score of 6. As noted in the Findings of Fact, above, the argument that Wetland B should be segmented into two parts for rating purposes is simply not persuasive, given the preponderance of the evidence and testimony.
6. The Examiner concludes that the Department's SEPA DNS was not clearly erroneous. The Appellants have not met their burden; their appeals must be denied.

Public Agency and Utility Exceptions: SPWater Exception

HEARING EXAMINER DECISION AFTER REMAND

RE: PSUB2016-00026 (*Carrier*)

PAUE2018-00068 (Water and sewer PAUE)

PAUE2018-00068 (Road PAUE)

August 27, 2018

Page 16 of 26

7. The SPWater Exception is unnecessary and will be dismissed.¹⁸ The overwhelming evidence in the hearing record is that water and sewer lines can be bored and jacked or directionally drilled through the glacial till which underlies Wetland B and Stream B without impact to either Wetland B or Stream B. The Appellants argue that an accident could occur during the boring or drilling process which might harm the wetland and/or stream. But the overwhelming evidence is that the likelihood of occurrence of any such accident is extremely remote and speculative. The Appellants' position is analogous to arguing that no one should drive an automobile because the drive shaft might disconnect and cause an accident.
8. The Appellants want the Examiner, if he approves *Carrier* without the SPWater Exception, to impose conditions establishing a reporting and corrections protocol in case some remote or speculative accident were to occur. The Appellants support this request by providing examples which they assert demonstrate that Toll is not environmentally conscious.

The Examiner declines to accept the invitation to create and impose such conditions. Land use entitlements, such as a preliminary subdivision approval, "run with the land." In other words, preliminary subdivision approval is for a specific project on a specific property, it is not for a specific applicant. The successful applicant for preliminary subdivision approval may elect, for reasons of its own choosing, to sell its interest in the project to another developer – who may, in turn, sell that interest yet again to another developer, and so on. Thus, this Examiner believes that conditions on a development should relate to the land and the proposal, not to the applicant. It is up to the jurisdiction(s) with regulatory control over a property and the development approved for that property to enforce its(their) regulations in an effective manner.

9. With dismissal of the SPWater Exception, all issues regarding possible alternatives asserted to have lesser environmental impact or asserted to better serve SPWater's future needs become moot.

Further, selection of utility routes is up to SPWater, not the Examiner. When a utility route comes before the Examiner in the context of a request for a City permit over which the Examiner has jurisdiction, the Examiner must determine if the proposed route complies with applicable City regulations and requirements. The Examiner does not become embroiled in route selection; the Examiner has no authority to tell SPWater (or any other special purpose district, for that matter) that it should have chosen a different route or site. If a proposed route or site does not comply with City regulations, then the Examiner would have to deny a requested permit (or, depending upon the situation, impose conditions to bring the proposal into conformance with City regulations). But the Examiner does not sit in the stead of a special purpose district's board.

¹⁸

Denial (as recommended by the Department in Exhibit 45) would imply a substantive shortcoming in the PAUE proposal or an inability to meet one or more of the approval criteria. The SPWater Exception has not been evaluated because it is unnecessary. Thus, dismissal is more appropriate than denial.

HEARING EXAMINER DECISION AFTER REMAND

RE: PSUB2016-00026 (*Carrier*)

PAUE2018-00068 (Water and sewer PAUE)

PAUE2018-00068 (Road PAUE)

August 27, 2018

Page 17 of 26

Public Agency and Utility Exceptions: Public Works Exception

10. The Public Works Exception meets the established criteria for approval.

- A. Criterion 21A.50.070(1)(b)(i). Frontage improvements are required along *Carrier's* frontage on SE 8th Street. Because Stream B flows in what amounts to a roadside ditch with absolutely no separation between the edge of the ditch and the current pavement, there is no room for the required improvements unless that segment of the stream is relocated to the north. Relocation of that segment of Stream B will enhance the riparian habitat: The stream will no longer be immediately adjacent to a street whose polluted runoff flows directly into it; that segment of Stream B will have a vegetated buffer along both sides and will be upslope from the street. This criterion is met.
- B. Criterion 21A.50.070(1)(b)(ii). Since the frontage improvements are required, relocation of the affected segment of Stream B will enhance the riparian habitat: The stream will no longer be immediately adjacent to a street whose polluted runoff flows directly into it; that segment of Stream B will have a vegetated buffer along both sides and will be upslope from the street. The end result is not just mitigation, it is improvement of the current condition. This criterion is met.
- C. Criterion 21A.50.070(1)(b)(iii). The frontage improvements are a linear feature located within a public right-of-way. This criterion is met.

Preliminary Subdivision

11. Section 20.10.200 SMC requires the Examiner to consider a number of items, including “the interim comprehensive plan”. The Examiner’s ability to use the comprehensive plan in project review is constrained by state law which states that the comprehensive plan is applicable only where specific development regulations have not been adopted: “The review of a proposed project’s consistency with applicable development regulations or, in the absence of applicable regulations the adopted comprehensive plan” [RCW 36.70B.030(1)] The SMC contains “applicable development regulations” against which *Carrier* has been reviewed.

The state Supreme Court addressed that provision in *Citizens v. Mount Vernon* [133 Wn.2d 861, 947 P.2d 1208 (1997), *reconsideration denied*] in which it ruled that “[RCW 36.70B.030(1)] suggests ... a comprehensive plan can be used to make a specific land use decision. Our cases hold otherwise.” [at 873]

Since a comprehensive plan is a guide and not a document designed for making specific land use decisions, conflicts surrounding the appropriate use are resolved in favor of the more specific regulations, usually zoning regulations. A specific zoning ordinance will prevail over an inconsistent comprehensive plan. If a comprehensive plan prohibits a particular use but the zoning code permits it, the use would be

HEARING EXAMINER DECISION AFTER REMAND

RE: PSUB2016-00026 (*Carrier*)

PAUE2018-00068 (Water and sewer PAUE)

PAUE2018-00068 (Road PAUE)

August 27, 2018

Page 18 of 26

permitted. These rules require that conflicts between a general comprehensive plan and a specific zoning code be resolved in the zoning code's favor.

[*Mount Vernon* at 873-74, citations omitted]

12. Land division in Washington State is a two-step process. With respect to subdivisions,¹⁹ the process requires a pre-decision open record hearing before approval of a "preliminary plat," which is then followed by administrative review of development plans and construction, leading to a closed record approval of a "final plat" by the City Council when the development has been fully constructed (or, under certain circumstances, bonded for completion of construction). A preliminary plat, by definition, is only an "approximate drawing of a proposed subdivision" which forms "the basis for for the approval or disapproval of the general layout of a subdivision." [SMC 19A.04.260] Detailed engineering plans, which would depict "building pad" elevations among a myriad of other details, are not a required component of a preliminary plat. Seeking detailed engineering specifications during the preliminary subdivision stage is simply looking for the right information in the wrong place at the wrong time.
13. The tree retention plan in Exhibit 7 (Sheet P05) is only a preliminary plan, as required by the SMC. Chapter 21A.37 SMC does not set a maximum tree retention standard, it sets a minimum tree retention standard for new development: "A minimum of 35 percent" shall be retained. [SMC 21A.37.250(1)(c)] The SMC also requires replacement of every significant tree lawfully removed. [SMC 21A.37.280] Thus, it makes economic sense to retain as many significant trees as possible, because otherwise the developer has to buy and plant replacement trees.
14. Based upon all the evidence in the record, the Examiner concludes that *Carrier* meets the considerations within SMC 20.10.200. All evidence demonstrates compliance with Comprehensive Plan policies, to the extent they can be considered, and zoning code, subdivision code, and Environmentally Critical Areas regulations. Buffer averaging is appropriate in this case.
15. Given all the evidence in the record, the Examiner concludes that *Carrier* complies with the review criteria of SMC 20.10.220(1). The proposed subdivision allows development at the density expected under the Comprehensive Plan, does not thwart future development of surrounding properties, and makes appropriate provision for all items listed in that code section.

With respect to drainage discharge, virtually all suburban/urban developments result in an increase in the volume of surface water runoff: It is usually impossible to retain all surface water runoff on the development site given the nature of this area's soils. What current drainage regulations require is infiltration where possible coupled with detention so that the rate of flow after a storm will not increase over current levels for certain specified storm events. The evidence indicates that the

¹⁹ As opposed to "short subdivisions" which are entirely administrative in nature.

HEARING EXAMINER DECISION AFTER REMAND

RE: PSUB2016-00026 (*Carrier*)

PAUE2018-00068 (Water and sewer PAUE)

PAUE2018-00068 (Road PAUE)

August 27, 2018

Page 19 of 26

required detention levels are proposed to be met. The preliminary *Carrier* drainage plan complies with applicable criteria.

16. Given all the evidence in the record, the Examiner concludes that *Carrier* will serve the public use and interest and will thus comply with the review criteria of SMC 20.10.220(2).
17. The recommended conditions of approval as set forth in Exhibit 45 are reasonable, supported by the evidence, and capable of accomplishment with the following changes:

- A. Recommended Condition 1. The last clause in this condition (“and ... Examiner.”) is unnecessary and will be eliminated. The remainder will be slightly restructured.
- B. Recommended Condition 3.b. Directional drilling of the water main is a possible alternative to placing both the water main and the sewer main in a large casing bored and jacked beneath Stream B and Wetland B. The Examiner agrees with Toll that if this condition is going to provide the degree of specificity that it does (and the Examiner agrees with the City that such specificity is desirable in this case), then this reasonable alternative should also be listed. A new subsection iii will be added using the text in Exhibit 2029.
- C. Two new conditions will be added after Recommended Condition 3. Toll offered to have earth stripping on the eastern portion of the site monitored for architectural items. (Exhibit 14:187) An offer by an applicant is considered part of the application; such an offer, if accepted, needs to be memorialized in the conditions of approval. Such an offer, being part of the application, carries forward with the approval, regardless of who the ultimate developer is. A requirement for architectural monitoring will be added.

The other added condition also flows from the Cultural Resources Assessment. (Exhibit 42). That document calls for an inadvertent discovery plan to be in place. Toll offered to implement such a plan. (Exhibit 14:200) An inadvertent discovery paragraph will be added.

- D. Recommended Conditions 5, 6, and 13. In Exhibit 42 City staff identified corrections that are needed to these three conditions, all dealing with Public Works issues. All of the recommended changes are justified by the facts in the record and will be made.
- E. Recommended Condition 8. The two sentences in this condition appear to contradict one another. The first mandates that 214th Avenue SE be regraded (“shall” is a mandatory verb form); the second says that a Public Works Standards variation may be requested. The conflict is easily remedied: Simply replace “. A” with “; or a”. That change will be made.
- F. Recommended Conditions 11, 12, 26, and 28 could create a legal problem in the future. They basically freeze stormwater control regulations for residential construction to the 2009 King

HEARING EXAMINER DECISION AFTER REMAND

RE: PSUB2016-00026 (*Carrier*)

PAUE2018-00068 (Water and sewer PAUE)

PAUE2018-00068 (Road PAUE)

August 27, 2018

Page 20 of 26

County Surface Water Design Manual (“KCSWDM”) in perpetuity. That position appears to conflict with our Supreme Court’s holding in *Snohomish Cty. et al. v. PCHB et al.*, 187 Wn.2d 346, 374, 386 P.3d 106 (2016). That case dealt with the question of whether vested rights statutes protected developments from compliance with stormwater regulations implemented under the requirements of the 2013 Phase I NPDES Permit issued by the State Department of Ecology. The Court held that state-mandated stormwater regulations are not protected by vested rights statutes:

Accordingly, we reverse the Court of Appeals and reinstate the Board's order finding that the storm water regulations permittees must implement as part of the larger NPDES permitting program are not “land use control ordinances” under the vesting statutes.

[At 362] The Phase I NPDES Permit requires compliance with its terms for “all applications submitted after July 1, 2015 and shall apply to application(s) submitted prior [to] July 1, 2015, which have not started construction by June 30, 2020.”

Since the *Carrier* application was filed in a complete fashion after July 1, 2015, it must comply with Phase I NPDES Permit requirements. But perhaps more importantly, those conditions purport to freeze drainage regulations for all future building permits. Not only is that contrary to SMC 20.05.070(3),²⁰ but it would also appear to be contrary to the Court’s holding in *Snohomish County, supra*. Simply put, drainage requirements for future building permits are not subject to vested rights and cannot be frozen through a condition on the face of a final plat. Recommended Conditions 11, 12, 26, and 28 will be revised.

- G. A new condition will be added after Recommended Condition 12. Toll offered to attempt to save two trees in the northwest corner of Proposed Lot 17. (Exhibit 86) An offer by an applicant is considered part of the application; such an offer, if accepted, needs to be memorialized in the conditions of approval. Such an offer, being part of the application, carries forward with the approval, regardless of who the ultimate developer is. A requirement to make every reasonable effort to save those two trees will be added.
- H. Recommended Condition 17. As presently written, this condition would require that all driveways in the subdivision be completed before the plat is recorded; in other words, before any of the houses have been built. The Examiner doubts that the Department intended that driveways would have to be constructed before the garages they are to serve are built. It is more likely that the Department wants all driveway curb cuts installed before final plat

²⁰ “Vesting of an application does not vest any subsequently required permits, nor does it affect the requirements for vesting of subsequent permits or approvals.”

HEARING EXAMINER DECISION AFTER REMAND

RE: PSUB2016-00026 (*Carrier*)

PAUE2018-00068 (Water and sewer PAUE)

PAUE2018-00068 (Road PAUE)

August 27, 2018

Page 21 of 26

approval so that subsequent cutting of the curb and sidewalk system will not be necessary. The condition will be revised to so provide.

- I. A few minor, non-substantive structure, grammar, and/or punctuation revisions to Recommended Conditions 21 and 24 - 28 will improve parallel construction, clarity, and flow within the conditions. Such changes will be made.

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** PAUE 2018--00068 (SPWater Exception) for the reasons set forth above;
- B. **DENIES** both the LeSueur and Williams SEPA appeals;
- C. **GRANTS** PAUE2018-00069 (Public Works Exception) **SUBJECT TO THE ATTACHED CONDITIONS**; and
- D. **GRANTS** PSUB2016-00026 (Preliminary subdivision) approval for *Carrier* **SUBJECT TO THE ATTACHED CONDITIONS**.

Decision issued August 27, 2018.


John E. Galt
Hearing Examiner

HEARING PARTICIPANTS²¹

Brent Carson, unsworn counsel
Michael Spence, unsworn counsel
Kim Adams Pratt, unsworn counsel
Doug McIntyre
Will Stockman

Robert Noe, unsworn counsel
Bryan Telegin, unsworn counsel
Jeffrey Peterson
Scott Weedman

²¹ The official Parties of Record register is maintained by the City's Hearing Clerk. This list includes participants at both the 2017 Hearing and the 2018 Hearing

HEARING EXAMINER DECISION AFTER REMAND

RE: PSUB2016-00026 (*Carrier*)

PAUE2018-00068 (Water and sewer PAUE)

PAUE2018-00068 (Road PAUE)

August 27, 2018

Page 22 of 26

Steve Tyzzer

Kris Lepine

Ryan Kahlo

David Pyle

Jeff Schramm

Nell Lund

Jay Regenstreif

Andrew Zagars

Larry LeSueur

Scott Brainard

Jason Williams

Brett Pudists

Scott Carlson

Kimberlie Steheli

George Emmett Pritchard

Susan Stockman

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 228th 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."

CONDITIONS OF APPROVAL

CARRIER

PSUB2016-00026

PAUE2018-00069

HEARING EXAMINER DECISION AFTER REMAND

RE: PSUB2016-00026 (*Carrier*)

PAUE2018-00068 (Water and sewer PAUE)

PAUE2018-00068 (Road PAUE)

August 27, 2018

Page 23 of 26

This Preliminary Subdivision and associated Public Agency and Utility Exception are subject to compliance with all applicable provisions, requirements, and standards of the Sammamish Municipal Code, standards adopted pursuant thereto, and the following special conditions:

1. Exhibit 49 is the approved preliminary plat (and supporting plans). Revisions to approved preliminary subdivisions are subject to the provisions of SMC 19A.12.040.
2. The Plator or subsequent owner(s) shall comply with the payment of street impact fees, impact fees for park and recreational facilities, and school impact fees in accordance to SMC Chapters 14A.15, 14A.20, and 21A.105, respectively.
3. The Plator shall have site stripping work monitored by Tierra Right of Way Services, Ltd., or other comparable firm qualified to perform cultural resources assessments, during work performed on the east portion of the property. (See Exhibits 14:187 and 25.)
4. If cultural resources are unearthed during the development process, immediately cease and desist ALL operations and contact the City of Sammamish, the Washington State Department of Archeology and Historic Preservation (DAHP) Historic Preservation Officer, regional Native American Tribes, and King County concerning the appropriate treatment of archaeological and historic resources. Do not resume work until appropriate approvals are received and the City of Sammamish has authorized development to resume. (See Exhibits 14:200 and 25:877 – 880.)
5. No open trench utility crossings across Stream B and Wetland B shall be allowed. The project utility design shall be modified as follows:
 - a. For the gravity sewer system, the Plator shall work with SPWater to design a gravity sewer line across Tract D that is constructed by auger boring. This provides the preferred system for long-term operation and maintenance by a construction method that avoids wetland and stream impacts. The bore casing should be at least 36-inch diameter to allow clearing from within the casing any obstructions encountered. The boring machine should be of sufficient size/power to be successful in the existing soil conditions.
 - b. For the water system, the Plator shall work with SPWater to either:
 - i. Provide dead-ends at Road A and Road B (no crossing of Stream B, Wetland B, or Tract D); or
 - ii. Provide a looped system across Tract D with the water main co-located within the casing used for the sewer line. Co-locating the utilities will require mitigation measures in accordance with Section C1-9.1.2 of the Washington State Department of Ecology Criteria for Sewage Works Design. An engineer should be consulted to determine the minimum casing size based on the mitigation

HEARING EXAMINER DECISION AFTER REMAND

RE: PSUB2016-00026 (*Carrier*)

PAUE2018-00068 (Water and sewer PAUE)

PAUE2018-00068 (Road PAUE)

August 27, 2018

Page 24 of 26

measures, soil conditions, grade constraints, carrier pipe material, outer diameter of carrier pipe casings, and line and grade tolerances of the auger bore; or

- iii. Provide a looped system across Tract D with the water main directionally drilled under Stream B and Wetland B and separated from the casing in which the sewer line is located.

Site Development Permit Special Conditions:

6. A final updated Critical Areas Mitigation Plan in substantial conformance with Exhibit 50 shall be prepared in support of construction permits. The final Critical Areas Mitigation Plan shall include a final accounting of all temporary and permanent impacts and shall provide complete mitigation plans including provision for contingency, maintenance, and monitoring associated with required mitigation and restoration measures.
7. Public Works variations have been approved. (Exhibit 40)
8. SE 8th Street is classified as a collector arterial with 60 feet of existing right-of-way. Half-street frontage improvements and a right-of-way dedication varying from 2.5 to 3.5 feet in width shall be provided along the development frontage with SE 8th Street consistent with Exhibit 49, Sheet 4 of 13.
9. 214th Avenue SE is classified as a local road with 60 feet of existing right-of-way. Half street frontage improvements shall be provided on 214th Ave SE consistent with the local road standard. No right-of-way dedication is required along 214th Avenue SE.
10. 214th Avenue SE shall be re-graded as required to accommodate entering sight distance as shown in the Entering Sight Distance (ESD) diagram exhibit; or a variation request may be submitted by the Plator to address compliance with entering sight distance requirements.
11. Illumination shall be provided on SE 8th Street consistent with the PWS standards for average foot candle and uniformity for a collector road. The pole shall be powder coated black steel with full cut off luminaire consistent with WSDOT standard J-28.10-01 Type 1 Davit Mast Arm with fixed base.
12. Illumination shall be provided on 214th Avenue SE and within the internal plat roads consistent with the City's standards for average foot candles and uniformity for a local road. Luminaires shall be full cut off. Pole type and style shall be approved by Public Works.
13. Individual lot flow control BMPs shall be required consistent with the applicable drainage standards.

HEARING EXAMINER DECISION AFTER REMAND

RE: PSUB2016-00026 (*Carrier*)

PAUE2018-00068 (Water and sewer PAUE)

PAUE2018-00068 (Road PAUE)

August 27, 2018

Page 25 of 26

14. Drainage plans, Technical Information Reports, and analysis shall comply with the applicable drainage manual, the City of Sammamish Surface Water Design Manual Addendum, the City of Sammamish Stormwater Management Comprehensive Plan, and the East Lake Sammamish Basin Plan.
15. The Platlor shall make every reasonable effort to preserve the two trees marked for retention on Exhibit 86 located in the northwest corner of Proposed Lot 17.

Prior to or Concurrent with Final Plat:

16. Right-of-way dedication on SE 8th Street shall be 2.5 to 3.5 feet in width along the plat frontage consistent with Exhibit 49, Sheet 4 of 13, and subject to the approved Public Works Standards variations.
17. The plat internal local roads shall be dedicated as right-of-way.
18. Off-site improvements, including all frontage improvements on SE 8th Street and 214th Avenue SE, shall be fully installed and approved.
19. Private roads shall be constructed under the site development permit.
20. Driveway curb cuts shall be completed prior to final plat. Any joint use driveways shall be bonded for or constructed under the Site Development permit.
21. A public stormwater easement shall be provided for access, inspection, maintenance, repair, and replacement of the detention and water quality facilities within Tract C and Tract G.
22. Off-site stormwater easements required by the stormwater design shall be recorded.

Conditions to appear on the face of the final plat (italicized words to appear verbatim):

23. Trees retained in accordance with SMC 21A.37 shall be identified on the face of the final plat for retention. Trees shall be tagged in the field and referenced on the face of the final plat with the applicable tag number.
24. *Trees identified on the face of this plat have been retained pursuant to the provisions of Chapter 21A.37 SMC. Retained trees are subject to the tree protection standards of Chapter 21A.37 SMC. Removal of these trees is prohibited unless the tree is removed to prevent imminent danger or hazard to persons or property, and may be subject to a clearing and grading permit approved by the City of Sammamish. Trees removed subject to this provision shall be replaced in compliance with Chapter 21A.37 SMC.*

HEARING EXAMINER DECISION AFTER REMAND

RE: PSUB2016-00026 (*Carrier*)

PAUE2018-00068 (Water and sewer PAUE)

PAUE2018-00068 (Road PAUE)

August 27, 2018

Page 26 of 26

25. Covenant and easement language pertaining to individual lot and tracts with flow control BMPs shall be shown on the face of the final plat. Public Works shall approve the specific language prior to final plat.
26. Unless located within a recreation tract and public easements provided, all Surface Water Management Facilities required for this subdivision shall be contained within a separate tract of land and shall be dedicated to the City of Sammamish for inspection, maintenance, operation, repair, and replacement. Language to this effect shall be shown on the face of the final plat.
27. *Maintenance of all landscape strips along the plat roads shall be the responsibility of the Homeowners Association or adjacent property owners. Under no circumstances shall the City bear any maintenance responsibilities for landscaping strips created by the plat.*
28. *Maintenance of landscaping atop the stormwater vaults shall be the responsibility of the Homeowners Association.*
29. *Individual lot flow control BMP's in accordance to the applicable drainage manual shall be provided with each single family residential building permit unless otherwise incorporated into the subdivision site development plans.*
30. *Maintenance of illumination along all local and private roads shall be the responsibility of the Homeowners Association or jointly shared by the owners of the development.*
31. *All building permits shall be subject to the applicable drainage manual to determine the best management practices for all surface water runoff. All connections of roof drains shall be constructed and approved prior to final building inspection approval.*

Prior to City Acceptance of Improvements:

32. Prior to acceptance into the Maintenance and Defect period, project close-out documents including the final acceptance construction punch list, as-builts, and final corrected Technical Information Report shall be submitted to Public Works for approval.