December 23, 2024

OFFICE OF THE HEARING EXAMINER
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DECISION ON MOTIONS FOR RECONSIDERATION AND CLARIFICATION

SUBJECT: Department of Local Services file no. **PLAT220004**

STEVENS 24

Location: 32911 and 32919 Redmond Fall City Rd SE, Fall City

Applicant: FC202 Investments, LLC
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Overview

1. On October 7, 2024, the Hearing Examiner issued her Report and Decision (Decision) granting in part and denying in part the SEPA appeal by Fall City Sustainable Growth (FCSG) of the Stevens 24 Determination of Non-significance (DNS). She remanded the Stevens 24 preliminary subdivision to the Department of Local Services–Permitting Division (Permitting or Permitting Division) for the preparation of a limited scope

environmental impact statement (EIS) based on three independent bases: (a) new information on more than a moderate impacts; (b) the need for information on significant adverse impacts essential to a reasoned decision among alternatives and (c) the sensitive location of the proposal.

2. The Applicant, FC 202 Investments, LLC (Applicant) and the Permitting Division timely filed motions for reconsideration.[1] Permitting also requested clarification of several Findings.

Examiner's Authority – New Information

3. The Applicant acknowledges that, pursuant to Hearing Examiner Rule XV.C and KCC 20.22.030.B, the Examiner may remand the matter for "additional information, analysis, review, or modification," but asserts that the Examiner may not dictate the SEPA process the responsible officials follows on remand. Applicant's Motion for Reconsideration (Applicant's Motion) at 2. Permitting similarly argues that the Examiner has infringed upon Permitting's authority under SEPA. Permitting's Motion for Reconsideration and Clarification (Permitting's Motion) at 3. As discussed in more detail below, the Examiner agrees that she may not dictate the SEPA process that the responsible official follows on remand*;* she has revised her Decision accordingly.

4. The Applicant relies on *In re Jurisdiction of King Cnty. Hearing Exam'r*, 135 Wn. App. 312, 144 P.3d 345 (2006). As the Applicant points out, the Court of Appeals ruled on several bases that the hearing examiner exceeded his jurisdiction. Motion at 2. The Examiner discusses and distinguishes the relevant bases below.

5. In *In re Jurisdiction of King Cnty. Hearing Exam'r*, the Hearing Examiner upheld the adequacy of a final environmental impact statement (FEIS) but required additional analysis of a potential seismic fault based on information that had come to light after the publication of the FEIS. The court held that the relevant code did not allow the examiner to deny an appeal yet include conditions. *In re King Cnty. Hearing Exam'r,* 135 Wn. App. at 319. The court based its decision on former KCC 20.24.080.B, which only authorized an examiner 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 the applicable state laws

[1] *See* October 16, 2024, email from Examiner Spohr to the parties establishing Thursday, October 31, 2024, as the deadline for filing a motion for reconsideration.

> and regulations, including Chapter 43.21C RCW, and… official laws, policies and objectives of King County.

That is no longer the relevant code; the Metropolitan King County Council has since amended the Examiner's authority. KCC 20.22.030.B currently provides:

> The Examiner's determination may *grant*, remand, or deny the application or appeal *and may include any conditions*, modifications, and restrictions necessary to carry out applicable laws, regulations and adopted policies. (Emphasis added).

In short, Examiner is authorized to grant an appeal, with conditions.

6. The court also found that WAC 197–11–600(3)(b), which provides that an agency *must* require a new threshold determination or supplemental EIS if there is new information indicating a proposal's probable significant adverse environmental impacts:

> … does not grant the *hearing examiner* the authority to order a supplemental EIS but directs the *agency* to determine whether a supplemental EIS is required. 135 Wn. App. at 320 (emphasis in original).

However, the court did not consider SEPA's definition of "agency." An agency means:

> any state or local governmental body, board, commission, department, or *officer authorized to* make law, *hear contested cases*, or otherwise take the actions stated in WAC 197 – 11 – 704, except the judiciary and state legislature.

WAC 197–11–714(1)(emphasis added). Thus, WAC 197–11–600(3)(b) refers to the agency. The emphasized language in the agency definition clearly includes the hearing examiner.

7. Two SEPA rules address new information; one refers to the "lead agency," the other refers to "agency":

   A. WAC 197–11–340(3)(a)(ii) provides that the *lead agency* shall withdraw a DNS if there is significant new information indicating, or on, a proposal's significant adverse environmental impacts. WAC 197-11-762 defines "lead agency" as:

   > the agency with the main responsibility for complying with SEPA's procedural requirements… "Lead agency" may be read as "responsible official" unless the context clearly requires otherwise.…

WAC 197–11–340(3)(a)(ii), together with the definition of "lead agency" could be read to mean that it is up to the Responsible Official to decide what to do with the additional analysis the Examiner is empowered to require. On the other hand, in the context of an examiner *granting* a SEPA appeal, the Examiner necessarily has found that the responsible official's issuance of a DNS was clearly erroneous, meaning "lead agency" may be read as synonymous with "agency"; and "agency" includes the Examiner.

B. The second rule dealing with new information is WAC 197–11–600(3)(b)(ii), provides that an *agency* must require the preparation of a new threshold determination or supplemental EIS if there is new information indicating a proposal's probable significant adverse environmental impacts.

Considering the context and the SEPA rules discussed above, the Examiner is the agency with the authority to direct Permitting to conduct the analyses required by her Decision (see finding 9) and, based on those analyses, to prepare a new threshold determination. She has revised the Decision accordingly. This revision should address Permitting's request for "a meaningful opportunity to weigh the additional information and make the determinations according to its mandate." Permitting's Motion at 5. The Examiner trusts that, this time around, Permitting *will* actually weigh the additional information rather than doubling down (perhaps tripling down) on its contention that "it has not been made aware of evidence" of a significant adverse environmental impact from the proposed LOSS. *See*, Decision, findings 62–63, 68–69.

8. The intent of the Examiner's Decision was to ensure that the she has adequate information regarding three specified topics: (1) the cumulative impacts of the Fall City Assemblage subdivisions on the unconfined aquifer, the Snoqualmie River nitrate TMDL, Wetland A/C, and the Barfuse salmon recovery site; (2) the potential hydraulic connection between the unconfined aquifer and the deeper aquifer; and (3) the cumulative impacts of the LOSSs on the Fall City Rural Town rural character (Remand Topics).

9. The Applicant and Permitting are correct that the required analyses need not necessarily take the form of an EIS, even a limited scope EIS. It may be possible for the Responsible Official to issue a mitigated DNS. It may even be possible to issue a DNS with an addendum, provided the process allows public comment and appeal. This is particularly the case where, after sitting through lengthy evidence, testimony, and questioning, Permitting doubled down on its contention that "it has not been made aware of evidence" of a significant adverse environmental impact from the proposed LOSS. *See*, Decision, findings 62–63, 68–69.

10. The Applicant argues that the Examiner should require the County to provide the information on the Remand Topics 1 and 2 to the Washington State Department of Health (DOH). Motion at 1, 14. The Examiner expected that to occur and has amended her Decision to make this expectation clear.

Examiner's Authority – RCW 43.21C.240

11. RCW 43.21C.240 provides in relevant part (emphasis added):

> (2) A county, city, or town shall make the determination provided for in subsection (1) [that the project's environmental impacts will be mitigated through its own development regulations or other local, state, or federal laws] of this section *if*: (a) In the course of project review, including any required environmental analysis, *the local government considers the specific probable adverse environmental impacts of the proposed action* and determines that these specific impacts are adequately addressed by the development regulations or other applicable requirements of the comprehensive plan, subarea plan element of the comprehensive plan, or other local, state, or federal rules or laws; and (b) The local government bases or conditions its approval on compliance with these requirements or mitigation measures….
> (5) In deciding whether a specific adverse environmental impact has been addressed by an existing rule or law of another agency with jurisdiction with environmental expertise with regard to a specific environmental impact, the county, city, or town shall consult orally or in writing with that agency and may expressly defer to that agency. In making this deferral, the county, city, or town shall base or condition its project approval on compliance with these other existing rules or laws.

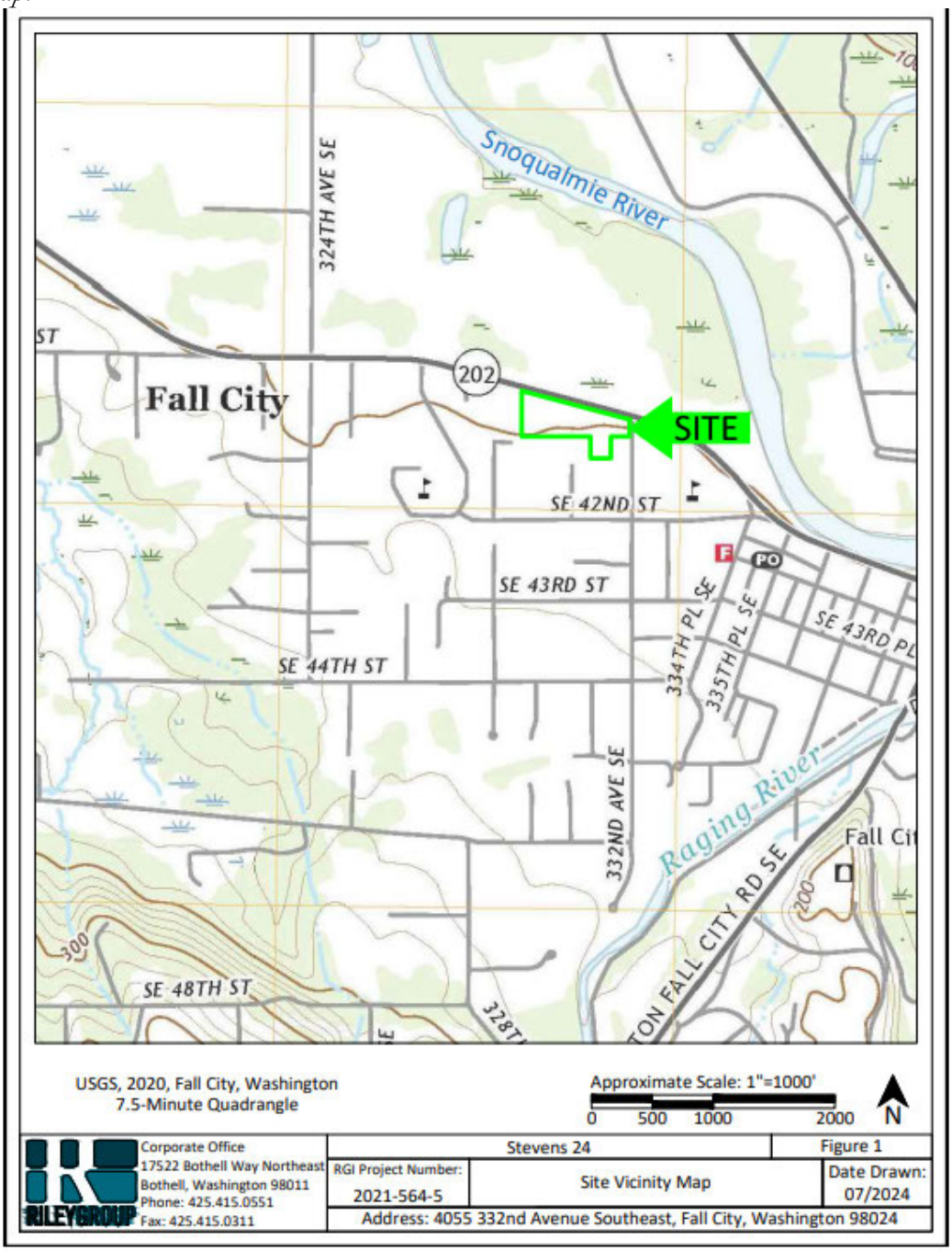
12. The record amply demonstrates that Permitting did *not* consider Remand Topics 1 and 2 in issuing its DNS and *did not* consult with DOH on Remand Topics 1 and 2. Nor is there any evidence that DOH considered the potential impacts on Snoqualmie River nitrate TMDL, Wetland A/C and the Barfuse salmon recovery site. In fact, the evidence is to the contrary: neither the Site Risk Survey (SRS) nor the Hydrogeology Report (HGR) identified these critical and sensitive sites. Decision, findings 38–40.

13. After the analyses of Remand Topics 1 and 2 are conducted, then reviewed by Permitting in consultation with DOH, Permitting may be positioned to apply RCW 43.21C.240. We are simply not there yet.

14. The Applicant also argues that the Examiner lacks the authority to undermine the uniform LOSS regulatory scheme established by Ch. 70A.115 RCW by imposing different environmental review or mitigation standards. The Examiner has zero intention of undermining the regulatory scheme, or of imposing mitigation standards on the proposed LOSS system. However, when a SEPA appeal filed, an examiner has an independent duty to determine whether the information on significant adverse impacts

essential to a reasoned choice has been obtained. WAC 197-11-080(1)(referring to agencies, not to the responsible official). She has determined that this information has *not* yet been obtained.

15. The Applicant disingenuously argues that the HGR includes "information on wetlands on the other side of SR202 and the Snoqualmie River," referring to Motion at 13, referring to exhibit D17 at 020. As shown below, the referenced exhibit is only a *vicinity map*.



The HGR includes the iMaps for floodplains and critical aquifer recharge areas, but it does *not* include wetlands Ex. D17 at 30, 32. HGR Section 6.0, entitled "Critical Areas

and Sensitive Lands/Resources" does *not* identify Wetlands A/C or the Barfuse salmon recovery site. As to the Snoqualmie River, it simply states that is it located one-half mile from the primary reserve drainfield. Ex. D17 at 17; testimony of David Jensen; Decision, finding 37.

16. Further, to approve the Stevens 24 preliminary subdivision, the Examiner must make written findings that appropriate provisions are made for the public health, safety, and general welfare and for potable water supplies and sanitary wastes. RCW 58.17.110(2); KCC 20.22.180. Analysis of the Remand Topics is needed for her to make these required determinations.

17. Finally, the Examiner notes that, due to the uncertainty regarding the cumulative impacts of the Taylor Development projects on Fall City drinking water, the Fall City Water District is recalculating its wellhead protection zones and updating its comprehensive plan. Phase 1 of this work was accomplished with the benefit of a 2023 DOH grant. Decision, findings 43–44.

Examiner's Authority – Cumulative Effect of LOSS systems.

18. As explained in Finding 1 of the Decision, Taylor Development has built one and is permitting six additional subdivisions in the Fall City Rural Town. Each *depends* on the use of a large on-site sewage system (LOSS). None of the subdivisions could proceed as proposed without a LOSS. It is this fact which lead the Examiner to require an analysis of the cumulative impacts of the proposed LOSSs.

19. Further as explained in Finding 28 of the Decision, the LOSSs allow Taylor Development to increase significantly the number of lots that can be created within each subdivision, to reduce significantly the lot sizes and increase significantly the impervious surfaces. It is these design impacts – which are enabled only by the use of LOSS – which are of concern to the community and the Examiner.

20. The Applicant cites one Supreme Court and two Court of Appeals decisions for the proposition that the Examiner may not require cumulative impacts analysis of the effect of the Fall City Assemblage LOSSs on groundwater, critical areas, and rural character. Each case is distinguishable.

21. As *Cheney v. Montlake Terrace*, 87 Wn. 2d 338, 334, 552 P. 2d 184 (1976) explained:

> Implicit in [SEPA] is the requirement that the decision makers consider more than what might be the narrow, limited environmental impact of the immediate, pending action. *The agency cannot close its eyes to the ultimate probable environmental consequences of its current action.*" (emphasis added).

22. In *Cheney*, the SEPA appellants argued that the completion of a highway requiring right–of–way from an undeveloped parcel would put the city in a position of being coerced to approve a development proposal that might be later proposed by the property owner. Similarly, in *Boehm v. City of Vancouver*, 111 Wn. App. 711, 47. P. 3d 137 (2002), the Court of Appeals found unspecified cumulative impacts of a Fred Meyer fueling station were

speculative. Unlike the facts in *Cheney* and *Boehm*, the impacts of the Fall City Assemblage are not remote or speculative. They are easily calculated in terms of numbers of lots, lot sizes, impervious surfaces, on street parking impacts, etc.

23. Similarly, in *SEAPC v. Cammack II Orchards*, 49 Wn. App. 609, 744 P. 2d 1102 (1987), Cammack filed applications for a rezone, conditional use permit for 234 units of manufactured housing, and subdivision of the perimeter area into 31 lots. Douglas County required an EIS, which was prepared. Following a Planning Commission hearing, Cammack withdrew its application for the manufactured housing development, leaving only the 31-lot subdivision for consideration. Following the Planning Commission's recommended approval, the Board of Commissioners approved the subdivision. SEAPC contended that the County erred in failing to consider future cumulative impacts beyond the 31–lot subdivision. The Court of Appeals disagreed, observing that that environmental considerations would best be served by waiting until a specific proposal was made. *SEAPC*, 49 Wn. App. At 615. In contrast, Taylor Development has made specific proposals, each of which depends on a LOSS; this is the essential feature which links them altogether.

Fall City Rural Character

24. The Applicant argues that the Examiner erred in requiring additional analysis of a development that is allowed "as a matter of right" in Fall City and that the use of LOSS has not created new or unforeseen impacts to rural character. Motion at 17, 19.

25. Permitting does not seek reconsideration of the Examiner's decision on rural character.

26. The record developed for this proposed subdivision (as well as the records of the other Taylor Development subdivisions[2]) in Fall City amply demonstrates that the use of LOSSs *has* created new and unforeseen impacts to rural character. Those impacts include a significant increase in the number of lots that can be created, a significant reduction in the achievable lot sizes, and significantly higher impervious surface percentages on each individual lot. Decision, findings 28, 88.

27. Other impacts flow from these design choices that are enabled by use of a LOSS, including overflow parking onto adjacent streets which are not prepared to handle parking.

28. As explained in Decision, finding 74, WAC 197 – 11 – 158, implementing RCW 43.21C.240, describes project specific impacts that may not have been adequately addressed in the comprehensive plan, subarea plan, and applicable development regulations. They include new information and impacts not reasonably foreseeable in the GMA planning process.

[2] *See*, Cedar 23 Decision, findings 14–15; Mt. Si Decision, Finding 13, Cha Cha Decision, Finding 15. FOSG appealed these preliminary plats to the King County Council; the Applicant did not and did not challenge any of the Examiner's findings.

29. It is evident that the impacts of use of LOSSs was not considered in the adoption of the Fall City Subarea Plan or GMA planning process.[3] Despite ample opportunity to do so in the several Fall City Assemblage subdivision hearings, the Applicant has provided no evidence the Fall City Subarea Plan or GMA anticipated or analyzed these impacts.

30. Arrington Court is the only residential LOSS in Fall City. The preliminary plat was approved in early 2023, 24 years after the adoption of the Fall City Subarea Plan. Decision, findings 20, 76.

31. At the time the County approved the Subarea Plan there were no LOSSs in Fall City. Decision, finding 75.

32. It is worth noting that DOH describes a LOSS as an alternative to a centralized municipal sewage treatment plant. This is particularly relevant considering the 2012 amendments to the Fall City Subarea Plan, amendments which strengthened the policy intent that any sewage system development be funded and serve exclusively commercial property owners. Decision, finding 16; Ex. A12 at 002.

Motion in Limine

33. FCSG filed its appeal statement on March 25, 2024. If the Applicant believed that the appeal statement was not sufficiently specific to apprise it of the factual basis upon which relief was sought, the appropriate course would have been to file a dispositive motion. Had it done so, the Examiner could have required FCSG to clarify its appeal. Examiner's Rule VII.B.1.e.

34. Instead, the Applicant filed its Motion in Limine on September 9, 2024, nearly three weeks *after* it had received the Appellant's exhibits and ten days before the September 18 hearing. The Applicant had ample time and sufficient specificity to prepare for the hearing. The Examiner declines to reconsider her decision on the Motion in Limine.

Permitting's Request for Clarification of Findings

35. Except as found below and in footnote 3, the Examiner has not modified the Decision's findings.

36. *Finding 19*. Finding 19 reflects Finding 53 of the Examiner's Cha Cha decision, which indicated that, in response to information provided to it by community members, DOH is requiring an HGR for Cha, Cedar 23 and Mt Si. The Examiner has revised Finding 19 to remove the reference to the SRS.

37. *Finding 42*. The hydrogeology reports and testimony described in findings 41 through 59 are intended to be a chronological summary of the information presented to the Examiner. Finding 42 is a direct quote from Exhibit FC2 at 251, a June 2024 technical

[3] The Examiner has stricken the final sentence of Finding 76, as it is neither necessary nor, as Applicant points out, entirely accurate.

memo from Matt MacDonald, in which Matt MacDonald "reviewed the assumptions in the previous wellhead delineations and modeling approach and determined that further investigation was warranted." Permitting asks that the citation be expanded to include the following sentence in Matt MacDonald's Technical Memorandum. The Examiner has revised Finding 42 accordingly.

38. *Finding 73*. The final sentence has been deleted.

DECISION

The Examiner has revised findings 19, 42, 73, and 76 of her October 7, 2024, Report and Decision as described above. The Hearing Examiner revised Decision to read:

> The Appeal is **GRANTED** in part and **DENIED** in part. The Stevens 24 preliminary plat is remanded to Permitting for ~~the preparation of a limited scope environmental impact statement analyzing~~ analysis of the following topics:
>
> A. Cumulative impacts of the seven proposed or existing LOSSs (Arrington Court, Mt. Si, Cha Cha, Cedar 23. Stevens 24, Fall City II, and Hazel) to the unconfined aquifer, and their potential impact to the Snoqualmie River nitrate TMDL, Wetland A/C and the Barfuse salmon recovery site.
> B. The hydraulic connection between the unconfined aquifer and the deeper, de facto sole source aquifer.
> C. The cumulative impacts of the seven proposed LOSSs on the Fall City Rural Town rural character.
>
> Based on the results of that analysis and consultation with DOH, the Permitting Division shall issue a new threshold determination.

DATED December 23, 2024.

Alison Moss, King County Hearing Examiner *pro tem*

December 23, 2024

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CERTIFICATE OF SERVICE

SUBJECT: Department of Local Services file no. **PLAT220004**

STEVENS 24

I, Jessica Oscoy, certify under penalty of perjury under the laws of the State of Washington that I transmitted the **DECISION ON MOTIONS FOR RECONSIDERATION AND CLARIFICATION** to those listed on the attached page as follows:

☒ EMAILED to all County staff listed as parties/interested persons and parties with e-mail addresses on record.

☒ placed with the United States Postal Service, through Quadient-Impress, with sufficient postage, as FIRST CLASS MAIL in an envelope addressed to the non-County employee parties/interested persons to addresses on record.

DATED December 23, 2024.

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