

**SAN JUAN COUNTY  
HEARING EXAMINER**

**FINDINGS, CONCLUSIONS AND DECISION**

**Applicants:** Windward North LLC  
10127 - 218 Court NE  
Redmond, WA 98253  
(formerly: Westview Development SJI, LLC)

**Agent:** Bruce Westmiller  
130 Gull Cove Lane  
Friday Harbor, WA 98250  
S.J.C. COMMUNITY

**File No:** HE44-08 (06LP002)  
(original decision HE18-07)  
SEP 30 2008  
DEVELOPMENT & PLANNING

**Request:** Preliminary Plat

**Location:** False Bay Road, no address for entry drive  
San Juan Island

**Property No:** 353433001

**Summary of Proposal:** After remand and further review of the proposed well and water system the applicant requested approval of a Class B water system serving 9 lots.

**Land Use Designation:** Rural Farm Forest 5

**Public Hearing:** After reviewing the report of the Community Development and Planning Department (CDPD) a public hearing was held on September 2, 2008.

**Applicable Policies and Regulations:** RCW 58.17 Subdivisions  
RCW 43.21C SEPA  
SJCC 18.06 Wells and water systems  
SJCC 18.16 Sewer systems  
SJCC 18.60 Development Standards  
SJCC 18.70 Land Divisions

**Decision:** The preliminary plat is approved with conditions.

## Findings of Fact

1. The original public hearings on this matter were held March 1 and March 7, 2007. An order was entered May 2, 2007. In that order findings of fact and conclusions of law were entered. The order determined that all aspects of the plat proposal were met with the exception of the proposed Class B water system requirements of the county and of state law.
2. On June 16, 2008 an initial staff report for the remand was submitted. As of that date the applicant had received approval from the Department of Health and Community Services for the water system.
3. Thereafter a public hearing date of September 2, 2008 was fixed and properly advertised. A supplemental staff report of August 8, 2008 was filed. The special hearing was held September 2, 2008.
4. In the time between the 2007 order and the 2008 hearing ownership was changed from Westview to Windward North LLC, 10127 - 218 Court NE, Redmond, WA 98253.
5. The findings of fact and conclusions of law from the order dated May 2, 2007 are adopted as part of the findings and conclusions of this order. For ease of reference they are set forth beginning with finding number 6 to and including finding number 43 and conclusions of law 1 through 8.
6. This is an introductory paragraph although it is as much a finding of fact as any other. The hearing examiner public hearing on these combined cases (06LP002 and 06APL 009) commenced March 1, 2007 and was continued and concluded on March 7, 2007. The applicants (hereinafter referred to as Westview) propose an 8-lot subdivision to be served by a class B water system to include 9 connections involving one off-site lot with a single family residence already built. The appellants for the challenge to the DNS and in opposition to the proposed subdivision include Friends of the San Juans (FOSJ), Margaret and Scotty Greene, Tom Schultz and Marcia Zakarison, Michael Prentiss, Kimble Sundberg and Deborah Clausen, William Neukom and David Ketter, Trustee of various Bave Family Trusts dba Mar Vista Resort (hereinafter referred to as FOSJ, neighbors or opponents).

Excellent presentations made during the hearing by representatives of both parties. Testimony was presented, reports were submitted and arguments were made. Both professional (experts) and non professional witnesses testified. Warren Road Associates, % William Neukom is also a neighbor of the project and submitted a letter generally in opposition (exhibit 2).

The evidence from Westview expert Kenrick and opponent expert Swope were well thought out, effectively presented and represented the opinion of each.

Unfortunately, the opinions were often incompatible. In these types of hearings, people who are impacted by a proposal desire certainty. Advocates of a proposal look to find probabilities.

The issues in this case involved 1)whether the DNS was properly issued, 2)whether a portion of the site constituted a critical aquifer recharge area (CARA), 3)whether the drainage plan/septic system approval complied with county standards, 4)whether the conservation design ordinance (CDO) approval was in compliance with county requirements, 5) whether the preliminary approval of the Class B water system complied with county and state requirements. This last issued comprised three major sub-elements involving A)whether an adequate source of water for the system was demonstrated, B)whether the evidence demonstrated a lack of impairment to neighboring and/or senior water right usage, and C)whether a sufficient analysis for the potential for saltwater/seawater intrusion (SWI) was sufficient to meet applicable standards. With regard to sub-issue (C) the terms saltwater and seawater were used interchangeably and apparently mean the same thing. The term "hearing examiner requirement" was occasionally used as short hand for the (B) impairment issue. While the impairment analysis requirement is set forth in (previous) hearing examiner decisions it is a State requirement evolving from both water law and the requirements of Chapter 58.17. At some point the Health Department should include analysis of this requirement to protect all water users rather than just those who challenge subdivision proposals.

7. The notice of public hearing was published June 6, 2006, mailed June 8, 2006 and posted June 7, 2006. The August 15, 2006 initial hearing date was properly postponed to September 6, 2006, September 20, 2006 and ultimately March 1, 2007.
8. A DNS was issued June 7, 2006. It was appealed July 21, 2006 by FOSJ/neighbors. All procedural requirement for the DNS appeal were followed. The appeal was consolidated with the subdivision proposal hearing.
9. The thrust of the opponents' DNS appeal is the alleged misinformation/lack of information on the environmental checklist and the contended need for a Determination of Significance and thus preparation of a full environmental impact statement (EIS).
10. SEPA is generally an information gathering tool. The DNS essentially is a decision that a full EIS need not be prepared. The traditional basis for that decision is that "there will be no probable significant adverse environmental impacts from a proposal." WAC 197-11-340.
11. San Juan County is required to plan under the Growth Management Act (GMA). One of the many purposes of the GMA is to gather environmental information at the Comprehensive Plan and Development Regulation stage so that general

environmental review for each project need not be repeatedly undertaken. WAC 197-11-660(g). *Braun HE 48-95*.

12. While the challengers may have a legitimate complaint that the DNS was issued prematurely, the “environmental” information relating to the proposed water system as a function of compliance with county DR’s and state requirements is sufficient. At this stage of the proceeding there is sufficient information to sustain the DNS.
13. Westview’s subdivision proposal is to divide approximately 40 acres into eight residential lots as well as one non-residential lot set aside to satisfy part of the Open Space Conservation Design Ordinance (CDO) requirements. An amended subdivision plat map was submitted at the hearing as Exhibit 5. That map becomes the official plat map for this proposal.
14. The site is located on False Bay Road. The southerly part of the property is lightly wooded and rocky. The northerly part of the site is cleared, lower in elevation with a graded open area and newly constructed pond. The surrounding neighborhood is mixed with agricultural, residential and commercial (Mar Vista). The shore of False Bay lies to the west, across the county road.
15. The “False Bay Biological Preserve” is property owned by the University of Washington which carries self-imposed private restrictions. It is an area of very environmentally sensitive and diverse biological resources.
16. Soil maps, developed in the 1960’s, show that a portion of the southerly part of the site contains Everett gravelly sandy loam, a high aquifer recharge soil.
17. Mr. Pietro testified that based on the soil log holes previously dug and his personal examination of February 27, 2006 and thereafter, a mix of sand and gravel occurred generally from 30 to 40 inches into a layer of clay then into bedrock. (Exhibit 13). He also testified that the type of soil and the septic design would adequately “move the water around the proposed septic systems”.
18. There are no CARA’s on the site.
19. The Public Works Department determined that the proposal met county concurrency standards. Proposed driveway widths met the standards of SJCC. Future driveway access permits must be approved by Public Works prior to installation.
20. Public Works also approved the Stormwater Site Plan and Construction Stormwater Pollution Prevention Plan as meeting county standards. FOSJ/neighbors challenged that approval based on concerns about the False Bay biological preserve, its connection with a county ditch and a general lack of protection, noting that the pond overflowed last winter.

21. Mr. Gosset, a registered engineer, testified that the site design plan allowed all upland development stormwater to flow through the pond thus becoming a permanent adequate treatment location. The amount of vegetation on the site as well as the gently sloping landscape would also provide adequate filtration.
22. The drainage plans comply with county standards and adequately protect the site and surrounding locations from environmental degradation.
23. The conservation design ordinance imposes requirements on the design and location of proposed plats as well as imposing standards to accomplish the CDO purposes. A draft conservation design using the False Bay Atlas was submitted as Exhibit 9. Each building lot is located in areas generally forested with no view impairment. No habitat issues were raised at staff level or at the hearing. Sufficient open space on each lot and on the site complies with the CDO ordinance. Since there is no CARA the opponents' claim of lack of protection for the "most sensitive" area is unfounded.
24. General design and development standards are met because the home sites are somewhat clustered, they generally conform to the natural features of the land and provide a usable area for construction of a dwelling unit and approved sewage system. The lots are not divided by roads and density and open space standards are met.
25. The site is located in the rural farm forest district which means that no more than 30% of the area or parcel can be covered by impervious surfaces, exclusive of roads and driveways.
26. Westview submitted an application for approval of a Class B water system for nine connections. Three wells (#1, #2, #3) were dug and initial pump test data was submitted to the Health Department in 2006. At Staff Report (SR) p. 88, the Health Department determined that two of the three wells did not meet county standards for "demonstrating sustained yields".
27. On June 12, 2006 CR Hydrogeologic Consulting (CR) submitted a letter (SR p. 91) regarding analysis of the previous water level testing. A Health Department letter dated July 28, 2006 (SR p. 106) noted that the report was also reviewed by Doug Kelly of Sound Hydrology, the county's contracted, licensed hydrologists. The letter indicated that long-term sustainability of wells #1 and #3 and SWI were not adequately addressed.
28. The letter further noted that the CR report concluded that sustainable production from the three wells was below the required 0.7 gpm/connection Class B water system requirement. The CR report indicated a total yield of 0.63 gpm/connection. The Health Department agreed that actual water use in the proposed plat might be less than the 0.7 gpm/connection county requirement, but

stated nonetheless the water availability standard “is required to provide a safety margin to insure the supply will meet the needs of the development year-round, particularly during the summer months when bedrock wells typically decline in production. This is particularly true in this area of False Bay where wells are known to decline and even run dry (e.g. Mar Vista Resort).” Further testing during summer months was required.

29. The July 28, 2006 letter also recommended a “complete hydrological assessment of the groundwater resources in the area.” The Health Department noted that the “Code” did not require this review but that recent Hearing Examiner decisions imposed an assessment of impact on neighboring wells.
30. The subsequent summer test were done under the supervision of CR and submitted in a report dated September 29, 2006 (SR p. 110).
31. The Health Department response of November 6, 2006 (SR p. 162) included the observation that well #2 had an average of 2.6 gpm in November, 2005 and that the test met county standards. For a variety of reasons, well #1 and well #3 did not meet county test protocol. Nonetheless the letter noted the Class B use restriction withdrawal of 0.47 gpm. County design standards required a source capacity of 6.3 gpm for a 9-party system. The letter concluded that the three wells had “adequate source capacity” for the proposed subdivision.
32. The November 6, 2006 letter also concluded that SWI potential analysis was incorrect and that the potential for impairment of existing users “was unresolved”. Again the Health Department noted that impairment was not a Health Code standard.
33. The attached report of Doug Kelly noted that there were numerous problems with the aquifer test data collection, analysis, and impact analysis in the CR report. The last sentence of Mr. Kelly’s evaluation was that “...the aquifer tests do not appear to meet the county pump standards for stabilization.”
34. No further tests for source adequacy were performed.
35. A report dated February 23, 2007 composed by GeoEngineers (Geo) was submitted to the Health Department and adopted as part of the record in this hearing. Some corrections to the data and appendices were made and the word Draft was eliminated in the report dated March 2, 2007. The Report is entitled “Analysis of Salt Water Intrusion Water Supply for Westview Estates”. At the March 7, 2007 hearing Mr. Kenrick noted that the March 2 report also contained some inaccurate data in the appendices. The thrust of the report was that SWI was an unlikelihood for the surrounding wells. The report relied upon the earlier pumping test on wells #1, #2, and #3.

36. On February 28, 2007 (Exhibit 3) the Health Department issued a letter that the new information along with the original application met requirements for a “conditional preliminary approval”. Certain conditions were attached to the approval.
37. Mr. Kelly’s February 26, 2007 attachment to Exhibit 3 noted that the Geo analysis for the aquifer test was reasonably accurate and usable for the purposes of analysis of SWI potential. The attachment concluded that a good case was made for “the sustainability of the proposed withdrawal.”
38. The conclusions of the Geo report and county review were challenged by a letter dated March 6, 2007 from Mr. Swope. His testimony likewise pointed out deficiencies in the approval decision.
39. The site is located in an area of declining water levels both seasonally and over the last 20 years. The neighbors’ wells are lower than they were and run dry more often than 20 years ago.
40. A Class B water system is restricted to use of less than 5,000 gallons per day for all connections. County requirements for a nine-connection system were not met by either the protocol used in well testing nor by the results obtained even with the subsequent Geo analysis. While the Health Department acknowledged that actual use would be less than county requirements, it did not cite any authority for disregarding the 6.3 gpm that was initially considered as a safety factor.
41. While the Geo report addresses SWI, the reliance on inadequate pump tests causes the conclusions to be questionable.
42. The requirement to show lack of impairment to neighboring wells (both from SWI and lack of sufficient water) burden was not met by Westview.
43. While it is accurate that the weight of the evidence demonstrates that test well protocols and standards were not met there was no conclusive evidence that the standards could not be met. The same is true of SWI and of the potential for impairment to neighboring wells. Under these facts the appropriate remedy is to remand the matter to CDPD and the Health Department for receipt of further information for compliance with county and state requirements.
44. In the June 12, 2008 letter from Department of Health and Community Services (Health Department) the three issues raised in the May 2, 2007 remand were addressed. The information was reviewed by members of the Department as well as by the contract Hydrologist for compliance with County and State requirements. The conditional approval from Health Department determined that the total source capacity for the nine connections, eight lot development was now 7.08 gpm, no seawater intrusion was demonstrated and that no impairment of nearby water sources was demonstrated. After review of the reports and review

of the testimony presented both in March 2007 and September 2008 the clear weight of the evidence sustains the determination reached by the County Health Department.

45. The new evidence concerning the water issue includes the report of GeoEngineers, Inc. dated January 31, 2008 and supplemented on April 25, 2008 along with a memorandum prepared by Keta Waters dated March 27, 2008; a report dated June 3, 2008 from Doug Kelly of Sound Hydrology and the June 27, 2008 memorandum from Keta Waters along with the testimony presented at the September 2, 2008 hearing.
46. As noted by Mr. Kelly and concurred with by Mr. Massmann and Mr. Kenrick, there are no absolute answers but at least as to the impairment of surrounding neighbors' water supply issues the computer modeling gives a predictability factor that is acceptable under state and county requirements.
47. While the information presented by the reports and at the hearing seem to differ, at least superficially, it was surprising how often the three experts agreed. The real disputes from those opposing the project related to the factors used in arriving at the various factual conclusions by GeoEngineers.
48. It is clear from the extensive evidence developed since the 2007 hearings that the saltwater intrusion issue is not significant.
49. The clear weight of the evidence is that sufficient water exists to comply with county requirements for the nine-connection Class B water system. This factual conclusion is most accurately described in Mr. Kelly's June 3, 2008 report.
50. The county, through Mr. Kelly, required GeoEngineers to re-evaluate the intrusion computer modeling. While Mr. Massmann would use different factors and thus reach different "worst case" predictions, he ultimately stated that the lowest risk would be to bring a portion of the nine connection properties on line and see what happens. While this may an excellent way of increasing the predictability factor, it is not one that is required by either county or state law and thus cannot be used as a basis for denying this subdivision request.
51. The historical evidence as testified to by the surrounding neighbors is that during summer months water levels and recharge rates drop significantly. While the water does not remain constantly available, it is more probably the result of the lack of connectivity of the fractured bedrock located in this area. In many instances the expert testimony was that a decreased water supply for the individual neighbors was more likely than not to be for reasons other than use of water by the nine connections of the Class B system approved for this proposal.
52. Ultimately as Mr. Kelly stated more study from this point on would not reduce the amount of uncertainty inherent in predicting water supply. He also noted that this

particular system was probably the most exhaustively studied of any in San Juan County.

53. After submission of the new data concerning the Class B water system and the conditional approval granted by the Health Department the proposed subdivision is consistent with all applicable provisions of state law and San Juan County requirements.
54. Any conclusion herein which may be deemed a finding is hereby adopted as such.

### **Conclusions of Law**

1. The Hearing Examiner has jurisdiction over the persons and subject matter of this proceeding.
2. Notice requirements, including those for the DNS appeal, were met.
3. A DNS is an information gathering tool. The decision is entitled to “substantial weight”. RCW 43.21C.075(3)(d). The burden is upon the applicant. *Homes HE 48-05. Truesdell HE 02-06.* FOSJ/neighbors did not sustain their burden of proving the DNS was issued in error.
4. The site does not meet CARA criteria.
5. The Stormwater Site Plan and Construction Stormwater Pollution Prevention Plan meets county requirements.
6. The sewage disposal system plan meets county requirements.
7. The proposed subdivision meets concurrency and road standards requirements.
8. The subdivision proposal meets the requirements of the CDO.
9. As conditioned by the June 12, 2008 Health Department approval, the proposed Class B water system meets state and county requirements.
10. Properly conditioned the subdivision meets the requirements of state law and SJCC.
11. Any finding herein which may be deemed a conclusion is hereby adopted as such.

## Conditions

1. This preliminary subdivision approval allows the division of 40 acres into 8 residential lots and one lot to meet part of the open space conservation design requirements, according to the approved attached preliminary subdivision map. No residential uses or construction shall be allowed on Lot 1. This preliminary subdivision approval shall expire if the subdivision is not recorded within 60 months of the approval date. The final subdivision application shall be submitted to the Community Development and Planning Department at least 90 days in advance of the expiration date.
2. Prior to recording, the surveyor shall provide written verification of the land area. If the area of land is less than 40 acres, inadequate land area exists for the subdivision and this preliminary subdivision approval shall be null and void.
3. Subdivision roads and any other private road connecting with the subdivision road shall be built as specified in SJCC 18.60.100, unless variances are obtained.
4. Maintenance of the roads, well or other water source, water distribution system, utilities and any commonly held areas shall be through provision of a maintenance agreement submitted to and approved by the Community Development and Planning Department, then recorded with the final subdivision approval. All subdivision property owners shall participate in the agreement.
5. Grass or other appropriate vegetation shall be established in the roadside ditches prior to application for final subdivision approval, to provide bio-filtration of stormwater runoff.
7. Drainage from roads shall be controlled using best management practices provided in SJCC 18.60.080 and 100 and in the Stormwater Management Manual for the Puget Sound Basin. Compliance with the requirements of the drainage plan is required.
8. Approved soil registration sheets for each parcel shall be filed with the Sanitarian prior to application for final subdivision approval. Easements for off-site sewage systems shall be provided prior to final subdivision approval and shall be shown on the final plat.
9. All lots shall be served by the community water system, which shall be installed, tested and approved by the appropriate authority prior to application for final subdivision approval. Service shall be extended to the boundary of each lot prior to final subdivision approval and necessary easements provided prior to final subdivision approval. Written guarantee of connection shall be provided prior to final subdivision approval. An easement for utilities shall be drawn on the final plat.

10. All conditions of the June 12, 2008 approval from Health and Community Services shall be met prior to application for final subdivision approval, including construction of the community sewage disposal system.
11. The subdivision map should bear a restriction requiring compliance with SJCC 18.30.140.
12. All survey standards and requirements shall be complied with pursuant to SJCC 18.70.070F2.
13. Building setbacks shall be as specified in SJCC 18.60 Table 6.2.

**The following conditions shall be shown as restrictions on the face of the plat, in addition to those restrictions and dedications required by SJCC 18.70.100:**

14. The approved water source for the lots within this subdivision shall be the community water system. If in the future another source of water is desired for any or all of the lots within the subdivision, the source shall be approved by Health and Community Services for quality and quantity.
15. Well sites shall be subject to a sanitary setback.
16. Best management practices for controlling erosion and sedimentation shall be used during construction of all roads and structures.
17. All utilities shall be placed underground.
18. All disturbed areas shall be restored to pre-project configurations, replanted with local vegetation, and the vegetation maintained until it is firmly established.
19. The open space conservation design shall be shown on the map and shall contain the restrictions of SJCC 18.70.060B10. Lot 1 is not a residential lot and shall not be used for residential purposes.
20. No more than thirty percent of the area of a parcel shall be covered by impervious surfaces, exclusive of roads and driveways.
21. This subdivision has been approved by the responsible county officials on the premise that each lot will be occupied by no more than one single family dwelling and lawfully related outbuildings. No lot shall be otherwise occupied unless the owner can first demonstrate to the county's satisfaction that the provisions for water supply, sewage disposal, circulation, lot size and related planning considerations are adequate to serve the proposed use. Compliance with this provision shall be effected by written application to the Subdivision

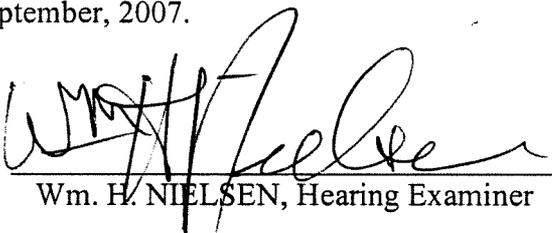
Administrator who shall be responsible for coordinating the review of such requests and for making the required determination.

22. Maintenance of the road, the well and the water distribution system serving the lots in this subdivision is shared equally by the lot owners.
23. There may be additional private conditions, covenants or restrictions in addition to those shown on the face of this plat. Such private conditions may not be shown on plats. Any private deed restrictions are supplemental to the requirements of this Code. The County shall not be party to any private restrictions.
24. If during excavation or development of the site an area of potential archaeological significance is uncovered, all activity in the immediate vicinity of the find must be halted immediately, and the Administrator must be notified at once.
25. According to RCW 58.17.170 "Any lots in a final plat filed for record shall be a valid land use notwithstanding any change in zoning laws for a period of five years from the date of filing. A subdivision shall be governed by the terms of approval of the final plat, and the statutes, ordinances, and regulations in effect at the time of approval under RCW 58.17.150(1) and (3) for a period of five years after final plat approval unless the legislative body finds that a change in conditions creates a serious threat to the public health or safety in the subdivision."

### Decision

The eight-lot subdivision proposal by Windward North LLC is approved subject to the conditions noted above.

DATED this 30<sup>th</sup> day of September, 2007.

  
Wm. H. NIELSEN, Hearing Examiner

### Appeal

Any appeal shall be to Superior Court pursuant to the Land Use Petition Act, Chapter 36.70 RCW, within 21 days of the issuance of the decision. See Home Rule Charter, Section 3.70.