BEFORE THE SAN JUAN COUNTY HEARING EXAMINER

FINDINGS, CONCLUSIONS AND DECISIONS

SUMMARY

Applicant:	Pear Point LLC 11 Comstock Street Seattle, WA 98109
Request:	Preliminary Plat Approval – Pear Point Estates
Agent:	Bob Querry The Permit Center P.O. Box 2573 Friday Harbor, WA 98250
Counsel:	Elaine Spencer Graham and Dunn PC 2801 Alaskan Way, Ste 300 Seattle, WA 98121-1128
Appellants:	Dr. Leighanne Harris P.O. Box 2536 Friday Harbor, WA 98250 Dr. Peter May 21817 SE 20th Street Sammamish, WA 98075 Ventana Water Association c/o Dr. Peter May, Secretary 21817 SE 20th Street Sammamish, WA 98075
Appeal:	Issuance of Determination of Non-Significance
Appellants' Counsel:	Peter Eglick, Jane Kiker Eglick Kiker Whited PLLC 2025 First Avenue, Ste 450 Seattle, WA 98121
Case File Nos:	HE 43-05 (05LP001, 05SEPA16)

Location:	Tax Parcel #251922003, consisting of 71.54 acres on the north side of Pear Point Road, within a portion of Sections 18 and 19, T35N, R2W, W.M., and a portion of Section 24, T35N, R3W, W.M.
Summary of Proposal:	To create a 14-lot residential subdivision on 71.54 acres, served by a community water system supplied by on-site wells. Sewage disposal would be via on-site septic systems. Drainage facilities would be installed. Proposed lots 1-10 range from 1.42 acres to 3.71 acres in size. Proposed lots11-14 range from 6.3 to 23 acres in size.
Land Use Designation:	Rural Farm Forest – 5
Public Hearing:	After reviewing the report of the Community Development and Planning, the Hearing Examiner convened a public hearing on November 4. 2005. In all four days of hearings were held: November 4, 2005, November 17, 2005, December 8, 2005, and January 17, 2006.
Exhibits:	Sixty-three exhibits were admitted and reviewed, as identified on the Exhibit List attached hereto as Attachment A.
Applicable Law/Policy:	Comprehensive Plan Open Space & Conservation Plan SJCC 18.30.140 – Critical Aquifer Recharge Areas SJCC 18.60 – Development Standards for Water supplies, Sewage disposal, Storm drainage. SJCC 18.70.060 – Subdivision Development Standards
Decision:	The DNS shall be withdrawn. The matter is remanded for development of further information

FINDINGS OF FACT

1. Pear Point LLC (applicant) seeks approval for a 14-lot subdivision to be called Pear Point Estates.

2. A Determination of Non-Significance (DNS) was issued for this project by the County on August 17, 2005. The DNS was appealed on September 7, 2005. Appellants Dr. Peter May and Dr. Leighanne Harris own properties immediately adjacent to and bordered on three sides by the property proposed for subdivision. Appellants May and Harris are officers in the Ventana Water System, named as the third appellant.

3. The site of the proposed new subdivision is Tax Parcel #251922003 on the Turn Point/Pear Point peninsula. The property is on north side of Pear Point Road, about one mile south of the Town of Friday Harbor and just east of the Friday Harbor Sand and Gravel quarry. The property comprises an irregularly shaped area of approximately 71.54 acres.

4. The western portion of the property includes a meadow and former orchard and slopes up toward the ridge that runs down the peninsula which lies between Griffin Bay and Friday Harbor. The eastern portion of the property is a heavily forested area that also contains a wetland and a portion of a pond. The most northerly lots are an extension of this forest at the crest of the ridge looking to the north.

5. The proposed subdivision development would include the construction of homes, roads and driveways. Sewage disposal would be by individual on-site septic systems. Stormwater facilities would be installed. Water would obtained from community wells.

6. The land use designation for the property is Rural Farm Forest-5, allowing a density of 14 homes on the total acreage. The subdivision plan is to distribute these homes unevenly over the 71+ acres, with the clustering of homes on relatively smaller lots and with a few large lots devoted mainly to open space.

7. The bulk of the residential development is to be concentrated in the western portion of the property on lots that look out on Griffin Bay to the south. As proposed, Lots 1 through 8 in this area vary between 1.12 and 2.02 acres in size. Proposed Lots 9 and 10 are to be 2.4 and 3.71 acres respectively. Collectively these lots take up about 18.3 acres of the 71+ acre total.

8. The plan is for Lots 1-8 and Lots 10-1l to be accessed by a plat road extending from Pear Point Road. A branch to the left will be named South Bay Place. A branch to the right will be called Bay View Lane.

9. Lot 9, and the larger lots 12, 13 and 14 are to be accessed from Covey Run Road, an existing road off of Pear Point Road. Lots 9 and 12 would have driveways

directly off of Covey Run road. A separate easement leading north from Covey Run Road would access the two northerly lots – Lots 13 and 14.

10. Covey Run Road currently serves the properties in the Ventana Short Plat. That short plat was recorded in 1995 and consists of residential Lots 1-3 and a residual property designated Lot 4. Lots 1-3 are along the ridge, east of some lots in Pear Point Estates and overlooking others. Appellants May and Harris maintain residences on two of these lots. Lot 4, the residual lot, is the subject of this proceeding.

11. The Ventana Short Plat is governed by CC&R's. One of these provides that the maximum number of home sites to be served by Covey Run Road is 10. At present six of these sites are taken, leaving only four more to complete the list of 10. Because of this limitation, just four of the Pear Point lots are proposed to be served by Covey Run Road.

12. The Pear Point Estates preliminary plat map designates a "build area" for each lot and, with the exception of roads and a "retention pond site" on Lot 10, allocates the balance of the lots to "conservation area" – an open space designation. Most, but not all, of the meadow, a large portion of the forested areas, and all of the wetland and pond are within the "conservation area" designation. Nearly 87% of Lots 1 through 10 will be in open space. Lots 11 through 14 will have at least 65% open space. Overall, about 70% of the site will be in open space.

13. On the western portion of the property where the clustering is proposed, there are few trees to screen development. The meadow area and the rolling slope behind it are essentially a pastoral landscape, one that was supporting an orchard over a century ago.

14. The CC&R's proposed for Pear Point seek to reduce the visual impact of the homes built in cluster area, as follows:

a) All significant tress are protected. Construction is to stay a safe distance from them. No tree is to be removed unless an arborist certifies that it is dead or dying.

b) Meadow protection is addressed by permitting only utilities and drive ways in the conservation areas of Lots 1-8 and Lot 10. If there is any disturbance to these areas, the surface is to be restored and replanted with native grasses typical of the remainder of the area. Existing fruit trees can only be removed if an arborist certifies that they are dead or dying. Planting of orchard trees of the same species is allowed.

c) An Architectural Control Committee is established and charged with overseeing all improvements according to a set of design guidelines that provide:

(1) Any structure or substantial landscaping visible from a

public road or water areas where boating occurs is to be designed to minimize visual impacts, using natural building materials.

2) Dark colors are to be used near significant trees and forested areas, Light colors are preferred "where the build area is within the meadow on lots 1 though 8 and 10, and is not in close proximity to significant trees."

3) "To the extent possible," rooflines are to be below the ridge line. When not possible, care is to be taken to avoid visual intrusion on the ridgeline, by use of significant trees, mirroring the roofline of the house to the ridgeline, or other approaches approved by the Committee.

15. A Stormwater Site Plan has been prepared by Hart Pacific Engineering. The topography is such that the subject property includes five separate drainage basins. Basin 1 is in the west and drains Lots 1-10, and some of Lot 11. Adjacent to the east, Basin 2 drains most of Lot 11 and most of Lot 12. Basin 3 drains most of Lot 13. Basin 4 drains Lot 14. Basin 5 drains the far northeast corner of Lot 13. The on-site portions of the wetland and pond are on Lot 13.

16. Surface runoff from the property sheets flows down to Pear Point Road on the south and Turn Point Road on the north or into the wetland and pond along the east boundary. From the roads, water flows through ditches and culverts eventually making its way to the salt water.

17. Flow control is planned for Basin 1. In Basins 2-5, stormwater would continue sheet flow off the site as under predevelopment conditions. In Basin 1 some new channeling would be required, but the historical drainage pattern to the Pear Point Road ditch would not be changed.

18. In Basin 1, a sand filter treatment facility and detention pond is proposed for road, driveway and lawn runoff. The water would be collected via lined ditch, conducted to the filter and lined pond located near the plat road entrance (Lot 10), and released after treatment to the roadside ditch. This system is designed as a closed system that will not discharge stormwater to the ground. For the most part, developed parts of Basin 1 are to be directed to the treatment facility. There are direct release areas in Basin 1, but they are areas that would undergo no development or too little development to trigger the treatment threshold. Non-polluting roof runoff in Basin 1 would be handled by downspout infiltration drywells. The net effect of all these features should normally limit stormwater discharge from Basin 1 to pre-development rates.

19. In basins 2, 3 and 4 the proposal is to handle stormwater through dispersion techniques. For roof downspouts there is a downstream vegetated flow path greater than 100 feet below each proposed building site. As to driveway runoff, sheetflow dispersion

can be used because at least 65% of the basin would be maintained as native growth areas and new impervious surfaces would account for less that 10% of their area. No development is planned for Basin 5 and so no drainage facilities are needed there.

20. The discharge of water to the wetland area is predicted to maintain the predevelopment conditions of hydrology, vegetation and substrate.

21. A Construction Stormwater Pollution Prevention Plan has been prepared recommending measures to prevent erosion and sedimentation while the project is being built. An operations and maintenance manual is to be prepared for the stormwater treatment facilities in Basin 1. The Stormwater Site Plan was approved by the Department of Public Works on August 22, 2005.

22. In general, the subject property is overlain with a thin layer of unconsolidated to poorly consolidated sediments (glacial drift). These are made up primarily of silt, clay, sand, gravel and glacial till. The sand and gravel are the major water-bearing materials. Beneath the unconsolidated sediments is bedrock which does not hold or transmit water except along fractures.

23. A Water System Concept Plan was produced by Hart Pacific Engineering, dated February 10, 2005. The proposal is for a Group B System using three existing wells drilled into the bedrock (two active and one back-up). The water would be conducted to a 23,500 gallon storage tank and then distributed by use of a booster station with a pressure tank and booster pump. The preliminary design is for an average day demand per connection of 220 gallons, with a maximum daily demand of 350 gallons. The amount of water needed to furnish such a maximum demand for 14 connections is 4900 gallons per day, just under the 5,000 gallons per day permit exemption for well systems. Conservation measures are expected to keep average daily consumption per connection at around 175 gallons per day.

24. One of the so-called active wells (Well #3) to be used to supply the system is on Lot 13 in the northernmost part of the development. The well proposed for standby (Well #2) is nearby. The wetland lies down slope, about 430 south of the nearest of these wells. The other active well (Well #1) is at a lower elevation within Lot 11. It is located about 600 feet from and 40 feet higher than the proposed stormwater detention facility. There is little risk of surface water contamination of any of these wells. A protective covenant for a 100-foot protection zone circle around each well will be established.

25. The Concept Plan noted that Well #1 is only about a ¼ mile from the bay shore and that chlorides measured 143 mg/l. This is below the EPA Maximum Contaminant Level for chlorides, but a requirement for monitoring chlorides in this well twice a year was recommended. Wells #2 and #3 are about 1500 and 1600 feet from the shore respectively. Because these wells are both drilled to depths substantially below sea level, salt water intrusion into them was acknowledged as a possibility.

26. Based on preliminary information, the Concept Plan concluded that Well #1 is capable of yielding approximately 2.7 gallons per minute and that Well #3 can yield about 8.3 gallons per minute. The rate needed to supply the development at the peak daily rate is 3.4 gallons per minute. The Plan proposed that this could be achieved by withdrawal from Well #1 at an average rate of approximately 2.7 gallons per minute and withdrawal fromWell #3 at an average rate of at 0.7 gallons per minute, thus furnishing the 3.4 gallons per minute needed to supply the maximum daily rate.

27. According to the Concept Plan, such a regime would not only keep total withdrawals below 5,000 gallons per day, but would also provide protection against salt water intrusion, by limiting pumping to levels that are above sea level. The bottom of Well #1 is approximately 35 feet above sea level. The report said that at 0.7 gallons per minute the theoretical pumping level of Well #3 would be about 12 feet above sea level.

28. Testing of Well #2 yielded a theoretical yield of just 0.57 gallons per minute when pumped at sea level and so it has been relegated to back-up status. A 2.5 acre area around Well #2 and Well#3 has been set aside as a reserve well site area.

29. Based on the Concept Plan, the Health Department, March 15, 2005, issued what it called a "conditional preliminary environmental health land division review approval." The condition required was a restriction of the Group B system to withdrawals of less than 5,000 gallons per day and a requirement for metering to insure this result.

30. Soils testing for the proposed individual on-site septic systems was performed by Richard Petro, a qualified and experienced system designer. He dug test holes on each proposed lot, some as deep as five feet. He noted that the development is near a gravel pit. The soils he found were sandy loams to loamy sands, overlying coarse sand and gravel. He concluded that the conditions were very good for septic systems. On the basis of his field work the Health Department approved the site for septic system development. Petro advised that the approval process involves further site visits to each lot and then a specific design for each particular lot that will be subject to further Health Department review and approval.

31. Petro stated that the septic system standards for preventing contamination are very conservative. He said that the waste water will travel vertically through the soil and that the sandy loam will slow its travel. For gravity systems three feet of separation from the water table is required. This means that treatment occurs before the wastewater enters the ground water. The key standards for solids, fecal coliform and biochemical oxygen demand are quickly achieved. All of the pits dug here were over three feet in depth, but the water table was not encountered. Most of the lots, therefore, should be able to use gravity systems. Nonetheless, Petro said that if pressure distribution or pre-treatment were indicated in any case, it would be provided. He expressed confidence that there would be no off-site impacts.

32. Because of the soil types involved (San Juan and Everett), Lots 1 through10 and part of Lot 11 lie within a High Class Critical Aquifer Recharge Area (CARA). The aquifer to be protected is apparently in the glacial drift soils near the surface. The Uniform Development Code contains protection standards for High and Medium Class CARAs which prohibit certain uses in such areas. Under SJCC 18.30.140, the prohibited used do not include residential development or septic systems. The prohibitions do include "stormwater facilities and discharge points." There is, however, a qualification on all of the prohibitions. They do not apply if "any significant adverse impacts can be mitigated by conditions of approval."

33. In CARAs, the County may, in its discretion, require hydrogeologic testing and site evaluation to insure that the proposed use will not degrade ground water and that hydrogeologic conditions do not facilitate the degradation. No such testing and site evaluation was required here.

34. There are two eagle nests on adjacent properties, one to the east and the other to the south. The Department of Fish and Wildlife determined that in light of the amount of open space being retained, the current eagle habitat would be maintained and individual eagle plans for each lot were unnecessary. They did this on condition that the identified "conservation areas" be maintained in a natural state.

35. The SEPA appeal raised four issues: (1) whether the applicants provided information sufficient to support a finding of no probable significant adverse impact on the water quality of the Ventana well or other surrounding existing wells; (2) whether the proposed subdivision would likely result in substantial interference with water supply in the Ventana water system; (3) whether the proposed plat layout – locating at least eight of the fourteen lots in the open meadow area – will result in significant impacts to both visual and natural resources; and (4) whether the plat design is inconsistent with adopted County plans, including but not limited to the County's Conservation Design Guidelines. The relief sought was either withdrawal of the DNS or issuance of as Determination of Significance (DS).

36. During the hearing the appellants injected an additional issue into the proceedings; that is, whether the data is sufficient to show that the water supply planned for the Pear Point development will be adequate in terms of quantity, and salt water intrusion will not occur.

37. The Ventana well is located just south of Pear Point Road directly south of the boundary between proposed Pear Point Estates Lots 5 and 10. It supplies water to the homes of appellants May and Harris through pipes that traverse the proposed new subdivision. The Ventana well is located within the unconsolidated sediments near ground surface. It is only 23 feet deep. Just below it is a 15 foot well (the Duffy well). About a 100 feet below the Duffy well is a spring. The spring appears to emerge at an elevation similar to the completion depth of the Ventana and Duffy wells. The Ventana well is a reliable source of good quality water that yields more than enough to supply the households it serves.

38. According to Al Mauldin, a driller who services the Ventana well it is "a sand and gravel well that relies upon rain so it is basically surface water that is supplying the Ventana well." In a letter to Pear Point representatives dated June 29, 2005, he said, "During really dry summers the well does 'go dry.' When the Ventana well goes dry, as soon as it rains, the well begins to recharge." He also noted that the Ventana water system has had leaks in the distribution system. Other than dry weather and leaks, he said he has observed no "influences" on the well.

39. His reference to "influences" was in the context of a discussion of whether operation of the Pear Point wells would affect the Ventana Well. Pear Point #1 has been in existence for several years. In 2003 Mauldin had performed a drawdown test on Pear Point #1 and monitored water in the Ventana well at the same time. There was no water level change in the Ventana well during the pumping of Pear Point #1. Later around the end of 2004, Mauldin drilled the two upper Pear Point wells, #2 and #3. These were sunk deep into the bedrock with #2 being 705 feet deep and #3 being 605 feet deep. When Mauldin performed pump tests of these two wells, there was again no change in the water level of the Ventana Well.

40. However, Mauldin did not fully document his measurements and comment letters from representatives of the appellants continued to question whether the Pear Point wells when used as a water supply would interfere with water levels in the Ventana well. Therefore, the applicants hired a hydrogeologist, Craig A. Russell, to do a more formal study on the question of possible well interference.

41. Russell set out to conduct a 72-hour test, simultaneously pumping Well #1 at 2.7 gallons per minute and Well #2 and 0.8 gallons per minute, to approximate 5,000 gallons per day. He chose Well #2 instead of #3 because it is closer to the Ventana well. Arrangements were made with the Ventana Water Association for monitoring of their well before, during and after the test. Monitoring wells were turned off at least 24-hours prior to the test start up to insure static water levels prior to pumping. The plan also called for field water quality sampling from the pumped wells to ensure that no sea-water intrusion occurred during the test.

42. Unfortunately, the test did not go as planned. After about 11.5 hours it began to look as though Well #1 was not capable of pumping at 2.7 gallons per minute for 72 hours without causing the water levels to fall below the pump intake. The flow in Well #1 was reduced to 2.0 gallons per minute and the flow in Well #2 was increased to 1.5 gallons per minute. However, 19.4 hours into the test, the pump for Well #1 failed and the test was prematurely terminated.

43. Well #2 continued to be pumped until it had run for 23.4 hours. The average pumping rate achieved for that well was only .74 gallons per minute. The less than expected average from Well #2 was caused by declining yields as water levels declined

and head pressures increased. Nonetheless, over the period of the test, water in the Ventana well and the nearby Duffy well did not materially fluctuate.

44. Even though the test did not last as long as planned, Russell felt that he had enough information to reach the conclusions that there is significant hydraulic discontinuity between the glacial drift aquifer and the bedrock wells and that pumping of the Pear Point wells at 5,000 gallons per day or less will not interfere with the use of the Ventana well or water system.

45. The appellants hired their own hydrogeologist, Dr. Peter Willing, who disagreed with Russell's conclusions. Willing argued that the test should have been run for 72 hours to produce reliable results. In his view, based on the current data, hydraulic continuity "cannot be ruled out." Willing emphasized that the Russell tests failed to comply with any of the standard guidelines for pump testing of a well, citing both Appendix D to currently effective SJCC 8.06.135 and a 1984 document called "Guidelines for the Preparation of Geohydrological Reports in San Juan County" which is referenced in the Comprehensive Plan at section at 4.2C(4). The latter arguably calls for 72 hours of testing for wells such as these (within a mile of salt water). The former requires at least 24 hours of pumping and a 72 hour test when chlorides exceed 160 ppm.

46. Willing found fault with the failure of the Russell test to discuss recharge characteristics and extent of the recharge area, aquifer boundaries and potential hydraulic connection to salt water. But the major problem Willing identified was that, during the entire test, water level drawdowns in the pumped wells did not stabilize. Stabilization at a particular pumping rate provides a sustained yield for the well. Mauldin's tests appeared to show sustained yields, but Russell's data threw all this into doubt because Mauldin's result were not replicated. Lacking stabilization, a sustained yield may be projected through a drawdown and recovery test. Russell performed no drawdown and recovery test for sustained yield.

47. The problem that all this points to is that without knowing the sustainable yield of the Pear Point wells, there is no assurance that they will be able actually to deliver the water needed for the project over the long haul.

48. The reason that sustained yields were not derived by Russell is that that is not what he was asked to do. His assignment was to investigate well interference. Even with a truncated well test, he felt that he could answer the interference question. He pointed to five additional factors in addition to the absence of measurable interference over several pumping tests. The first is simply different lithology. The Ventana well draws from the glacial drift while the Pear Point wells are drilled into the bedrock. The glacial drift can hold significant amounts of water and transmits it easily. The bedrock holds water only along fractures and the ease of water movement depends on the size, degree and interconnection of the fractures. The second factor and most compelling factor is the different static water levels in the wells. When the subject wells are at rest, the water levels are radically different between the deep bedrock wells and the shallow glacial drift wells, suggesting that they are drawing from distinct aquifers which are not

interconnected. The third factor is dissimilar water quality, a condition that would not exist if the water sources were connected. The fourth is vastly different values for transmissivity, showing dissimilar aquifer characteristics. The fifth is the distance between the wells. According to Russell, the distance between Well #1 and the Ventana well is approximately 1,000 feet. Well #2 is significantly farther from the Ventana well. Low production rates (3.5 gallons per minute maximum) and limited production quantities (5,000 gallons per day maximum) would make interference unlikely.

49. After considering all of the evidence, the Examiner is persuaded that Mr. Mauldin and Mr. Russell are right on the likelihood of well interference. Notwithstanding the brevity of the Russell pump test, there is nothing in the measurements taken or the known parameters affecting the Pear Point wells and the Ventana wells that provides any evidence of a hydraulic connection between them. Mr. Russell, a hydrogeologist of considerable experience, testified that "this is one of the most clear cut cases of hydraulic discontinuity that I've seen."

50. However, the problems that Willing identified are serious problems from the standpoint of assurance that the bedrock wells really will produce sufficient water for the subdivision over time or that they will be able to do so without inducing sea water intrusion. Well recovery data is limited to the Mauldin tests.

51. The proposed development site is on a peninsula in an area where annual precipitation is relatively low. The record contains no information on the fault or fracture zones that have been encountered, but preliminary data suggest that each of the three bedrock wells may be tapping a different source. These facts alone provide some reason to fear that the bedrock aquifers penetrated may not be extensive. Some of the homeowners on the peninsula sought and now receive water from the Town of Friday Harbor water system because of chronic water shortage problems they experienced relying on wells. Some effort should be made to estimate aquifer characteristics and recharge in order to provide greater assurance that over time the Pear Point wells will not be taking out more than is coming in.

52. The sea water intrusion concern should also be more thoroughly addressed. Russell was unable to get Well #1 to yield 2.7 gallons per minute and had to reduce the pumping rate. The theory of the water plan is that using 2.7 gallons per minute from Well #1 will permit pumping Well #3 at a rate that allows it to pump water from above sea level. If the rate of withdrawal from Well #3 must be increased in order to offset a lower pumping rate in Well #1, the likely result is that Well #3 will be pumping water from below sea level, creating the very sea water intrusion risk that its initial low pumping rate was designed to avoid.

53. Groundwater containing more than 160 mg/l is strongly suspected of being contaminated by sea water. Chlorides measured in Well #1 and Well #2 are approaching this level. In Well #3 the only known chloride measurement is 71 mg/l. Recommended practice is to install pumps above sea level when the chloride level reaches 100 mg/l.

Additional testing of the wells and analysis of the potential for seawater intrusion is warranted.

54. The concern over adverse impacts of the subdivsion on the water quality of the Ventana well stems from doubts about the use of numerous septic drain fields over the recharge area that feeds the Ventana well, and similar doubts about the output of the stormwater treatment system in that same area. Both Peter Willing and Laura Arnold, a land use expert retained by the appellants, addressed these worries.

55. Richard Petro's testimony on the likely efficacy of treatment in the soils that are present was convincing. While there is logic to the notion that cumulative adverse impacts of effluent from multiple septic systems might contaminate the aquifer, there is no evidence whatsoever that such a result is probable. Assuming the treatment standards are met as predicted, contamination will not reach the groundwater and the cumulative adverse effect will be zero. It does not matter that the direction of groundwater flow from some of the Pear Point lots is toward the Ventana well if that groundwater is not contaminated.

56. Where the stormwater system is concerned, the same sort of response is appropriate. In some undeveloped or lightly developed portions of the site above the CARA, stormwater will continue to infiltrate and run off naturally as it does now. No one suggests that under present conditions, runoff from the Pear Point property is contaminating down gradient wells. The treatment system should produce a discharge that is similarly non-polluting. That is the whole point of having a treatment system. The sand filter and detention pond features will be lined keeping any contaminated water out of the ground water until after treatment. The discharge to the roadside ditch, when it occurs will be of treated water. Thus, it should not matter that the ditch is not lined. If it functions as a sort of linear infiltration trench as suggested by Willing, that should be of no concern. The water involved should be essentially clean.

57. The argument against the septic tanks and stormwater treatment facilities is at bottom an argument that existing approved treatment techniques that are deemed adequate for regulatory purposes are, in reality, inadequate. This is really a matter of supposition on the part of appellant's experts. Without more, the Examiner declines to second-guess the adopted standards on this point.

58. Arnold points out that reliance is being placed on county-wide standards when the specific site is a high-category CARA. This, she asserts, makes the CARA designation meaningless. While this makes sense in the abstract, the CARA regulations are what they are. As noted, septic systems are not on the list of prohibited uses in CARA. And the stormwater system here involves no discharges prior to treatment, thus mitigating any significant adverse impacts. So, no violation of the CARA regulations is apparent.

59. Overall, the Examiner finds that there is sufficient information in the record from which to conclude that no probable adverse impact on water quality in the Ventana and surrounding wells is likely to occur.

60. The final appeal issue concerns the layout of the lots. As a SEPA issue this concerns the environmental impact of the clustering that is proposed. As a substantive issue for plat approval, the focus is whether the Conservation Design Requirements of the land division chapter are being met.

61. The San Juan County Open Space and Conservation Plan and its accompanying Open Space Atlas and Map Folio are 1991 documents that were designed to identify areas that have high value as open space and to suggest strategies for retention of those areas in their natural or rustic state. The main focus of the plan is on protection of open space from visual change that compromises its character. The type of visual accessibility emphasized is the availability of views for the public. SJCC 18.30.170 creates an Open Space Conservation Overlay District, but the Open Space and Conservation Plan is merely identified as one of a number of references that contain "voluntary protection guidelines" that may help property owners make land use decisions.

62. In the terminology of the Open Space Plan, the meadow, remnant orchard, and rolling slope that are present on the western portion of the subject property are a type of pastoral landscape. Such landscapes are among the most sensitive to visual intrusion by non-agricultural development. They tend to lack topographic features or vegetation that can conceal development. That is exactly the case here. Although significant trees are to be retained, the visual appearance of the western portion of the site is, by and large, not effectively screened by existing vegetation or by topographic relief.

63. The closest that the UDC presently comes to translating the ideas of the Open Space Plan into regulatory form is in the Conservation Design Requirements of the Land Division chapter. Among other things, these requirements call for identifying the "significance and sensitivity" of open space resources for the entire parcel using the landscape information in Parts II and IV (Open Space Atlas and Map Folio) of the Open Space and Conservation Plan and the criteria and rating scale of Part III. See SJCC 18.70.060(B)(10)(b).

64. Under the Open Space Plan "significance" is an expression of the relative importance of various landscapes to the community. The applicant has provided an analysis using tables from the Plan which concludes that as a whole the subject property is not particularly "significant." In the viewpoint of the neighbors, however, the pastoral landscape involved appears to hold a high degree of "significance." The meadow and orchard are prominently mentioned in comment letters about this development as things that are highly prized for their contribution to the rural atmosphere of the neighborhood. A common sentiment is that the clustering of houses in the un-forested open area will create a suburban-type enclave that is out of character with the setting.

65. In the Open Space Plan, visual "sensitivity" was evaluated by determining whether rural residential development can be seen in various landscape types. This was to be partly determined by visual accessibility for the public. As a general landscape type, the property at the western portion of the subject property is highly "sensitive" because the intervening elements (land forms or tress) are sparse.

66. Photos were presented showing the western portion of the property from the bay as boaters would see it and from Pear Point Road as motorists would see it. From a review of these offerings it is clear that the more elevated homes to be inserted into the landscape on the western portion of the property would be visible from the bay, and both the uphill homes and those lower down would be visible from the road. The presence of multiple structures in a pastoral landscape would significantly alter the character of the scenic views.

67. The substantive provisions of the Conservation Design Requirements are set forth at SJCC 18.70.060(B)(10)(c), as follows:

> The land division design shall adhere to the following principles to the extent practicable:
>
> i. Establish nonbuilding portions of new parcels to be contiguous with one another and to contain the most sensitive open space features of the site within them.
>
> ii. Establish the location of roads, individual driveways, houses and and outbuildings and utilities, to minimize intrusion on the most sensitive open space features of the site.
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> iii. Maintain existing orchards, meadows and pasture areas.
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> iv. Leave ridgelines and constrasting edges between landscape types unbroken by structures.
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> v. On rolling open or steep open slopes, locate building areas so that buildings will be screened by existing vegetation or terrain.
>
> vi. Ensure . . . the protection of features such as wetlands and wildlife habitat.

68. Reading subsection (b) of SJCC 18.70.060(B)(10) together with subsection (c), the Examiner is persuaded that the concepts of the Open Space Plan as to "sensitivity" are to be read into the principles of landscape design of that are stated above.

69. As a general proposition, "clustering" is encouraged in land division proposals. SJCC 18.70.060(2). However, the purpose of clustering is to allow some

important feature found on the property to remain free of development. In this case, the pastoral landscape constitutes visually sensitive open space which would be significantly altered by the proposed clustering. What is saved is the forested land on the east where development would not present the same threat to visual values. This is completely contrary to the purpose of clustering. It is akin to clustering the homesites in the wetland.

70. Peter Wangoe, an associate broker for Coldwell Banker, testified that he and his partner did the layout of the lots for the subdivision. The subdivision is intended to offer high end properties. Some of the lots in the cluster were located in order to take advantage of extraordinary views. The attempt to satisfy the Conservation Design Standards came after the layout was created.

71. The applicants have emphasized that only 13% of Lots 1 through 10 is given over to building areas. Arnold criticized this as a "mathematical exercise" that misses the spirit of what the design regulations aim to accomplish. In her letter of August 31, 2005, she stated, "The purpose of the conservation design standards is to conserve the open space values of the site overall, not lot-by-lot as those lots are laid out to attain other aims."

72. Both Wangoe and appellant Peter May presented analyses of the economic effect of moving some houses out of the cluster. Wangoe's analysis showed a substantially diminished value of the lots in the alternative layout. Not surprisingly, May's analysis of a different alternative should a much less dramatic impact on values. Neither Wangoe nor May were qualified as experts.

73. Economic impacts aside, there is no serious question that many alternative configurations could be developed that would preserve more of the visually sensitive open space on the west without violating Code requirements. Neither the need to protect the wetland, nor the need to protect eagles, dictates the clustering of houses on the western portion of the property. Further, it is not clear that additional accesses from Covey Run Road could not be negotiated.

74. Except for the wetland, the pastoral landscape on the western portion of the site contains the most sensitive open space feature of the site. Putting ten houses into that area does not "minimize the intrusion," no matter how small the percentage that is given over to building space.

75. There is nothing in the record that would substantiate a conclusion that an alternative design that reduced the number of lots in the open space on the west would deprive the property of all economically profitable use.

76. 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 the subject matter of this application and this appeal. SJCC 18.70.050(E)(2).

2. A DNS is a threshold determination that "there will be no probable significant adverse environmental impacts" from a proposal. WAC 197-11-340.

3. A DNS shall be made only when there is "information reasonably sufficient to evaluate the environmental impact of a proposal." WAC 197-11-335.

4. Under the facts, the Examiner concludes that reasonably sufficient information has not been developed on the long-term quantitative adequacy of the water supply proposed for the subdivision. He likewise concludes that reasonably sufficient information is lacking on the likelihood of sea water intrusion.

5. Although this water supply matter was raised as an issue during the hearing, it did not come up at the last minute. The hearing consumed four lengthy sessions over a three month period. The Examiner does not believe that the issue can fairly be regarded as a surprise or that the applicant had too little time to respond to it.

6. The Examiner concludes that the appellants failed to make their case in regard to the alleged adverse water quality impacts on the Ventana and other wells of the installation of on-site septic systems and proposed stormwater treatment facilities. There was sufficient information to evaluate these questions and the preponderance of evidence was that significant adverse effects are not probable.

7. The Examiner concludes that the likelihood of interference with the operation of the Ventana well by the pumping of the Pear Point wells was not shown. The information presented was sufficient to support the DNS in this regard.

8. In examining the UDC, the Examiner has found no link between the standards for protection of Critical Aquifer Recharge Areas and the Conservation Design Standards.

9. Nevertheless, the Examiner has concluded that the Conservation Design Standards are not met by the layout proposed. Specifically, it fails to comply with the requirements of SJCC 18.70.060(B)(10)(c)(ii). The location of houses does not minimize intrusion on the most sensitive open space features of the site.

10. Counsel for the applicant urges a narrow construction of these standards to avoid possible problems of unconstitutional vagueness. However, the evident existence of many other possible ways to lawfully build a subdivision without imposing the same

amount of intrusion on the pastoral landscape in the western portion of the property woul d seem to eliminate such an issue in this case. In context, "minimize intrusion" is not so vague as to prevent compliance or cause doubt as to its meaning.

11. Counsel for the applicant argues that the clustered layout proposed is consistent with the Conservation Design Standards because the "minimize intrusion" standard and others are to be followed only "to the extent practicable." This latter formulation she asserts allows the subdivider to weigh issues such as marketability and economic impact against the visual impact. There is nothing in the Code that suggests any such balancing test was intended.

13. "Practicable" as used here is a relatively simple term. It means actions that can be put into practice without violating the law. There are clearly "practicable" actions that can be taken that would reduce the intrusion of this development into the sensitive pastoral landscape.

14. The Examiner's opinion is that economic and market considerations are irrelevant unless the subdivision layout put forward has to be accepted in order to prevent the property from being deprived of all economically profitable use.

15. The failure of the proposed plat to meet the Conservation Design Standards is a failure to comply with the Code. At the same time, the clustering as proposed constitutes a significant adverse environmental impact to scenic resources. Rather than reject the subdivision for non-compliance with the Code, the Examiner believes the appropriate course is to send the matter back for redesigning of the layout in a way that will comply with standards. Such a redesign would permit the applicant to eliminate the significant adverse environmental impact.

16. Except as identified above, the Examiner concludes that the proposed preliminary plat meets the standards of the Unified Development Code and poses no likelihood of significant environmental impacts.

17. Any finding herein which may be deemed a conclusion is hereby adopted as such.

DECISION

The Determination of Non-Significance shall be withdrawn. The application is remanded to the County for the development of further information on the adequacy of the water supply, the danger of sea water intrusion and the minimizing of intrusion on the site's pastoral landscape. When the County is satisfied that it has sufficient information, it shall make a new threshold determination. Upon completion of environmental review, the application shall be brought back before the Hearing Examiner.

DONE this _____, day of April, 2006

Wick Dufford, Hearing Examiner

APPEAL

Any appeal of this decision 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.