

**BEFORE THE SKAGIT COUNTY HEARING EXAMINER**

<b>SKAGIT COUNTY CITIZENS</b>	)	
<b>ALLIANCE FOR RURAL</b>	)	
<b>PRESERVATION, and</b>	)	<b>PL06-0066</b>
	)	
<b>FRIENDS OF SKAGIT COUNTY,</b>	)	
	)	
Appellants,	)	<b>FINDINGS OF FACT,</b>
	)	<b>CONCLUSIONS OF LAW</b>
v.	)	<b>AND DECISION</b>
	)	
<b>SKAGIT COUNTY DEPARTMENT</b>	)	
<b>OF PLANNING AND DEVELOPMENT</b>	)	
<b>SERVICES, and</b>	)	
	)	
<b>SKAGIT COUNTY PUBLIC</b>	)	<b>(Appeal of PL05-0580)</b>
<b>UTILITY DISTRICT #1</b>	)	
	)	
Respondents.	)	
_____	)	

This matter came on regularly for hearing on April 12, 2006, before the Skagit County Hearing Examiner in the Commissioner’s Hearing Room, 1800 Continental Place, Mount Vernon, Washington.

The case involved the appeal of an Administrative Special Use Permit approved for the Public Utility District for the installation of new water line and related infrastructure north of the City of Sedro Woolley.

The appellants, Skagit County Citizens Alliance for Rural Preservation (SCARP) And the Friends of Skagit County (FOSC) were represented by David Bricklin, Attorney at Law. Respondent Department of Planning and Development Services (PDS) was represented by Brandon Black, Senior Planner. Respondent Public Utility District #1 (PUD) was represented by Warren Gilbert, Attorney at Law.

Testimony was taken. Exhibits were admitted. Argument was heard. On the record created, the Examiner enters the following:

## **FINDINGS OF FACT**

1. The PUD was issued an Administrative Special Use Permit (PL05-0580) for the installation of approximately five miles of “water conveyance infrastructure” on January 12, 2006. The subject appeal was timely filed on January 26, 2006.
2. The subject project calls for new pipeline and associated infrastructure north of the City of Sedro Woolley. The five miles covered would range over several roadways. The pipeline extensions would be within portions of Sec. 31, T36N, R5E, and Secs. 1, 2, 11, 12, and 13, T35N, R4E, and Secs. 6 and 7, T35N, R5E, W.M. The property involved is within unincorporated Skagit County. The zoning is Rural Reserve.
3. The general area is rural with single-family homes on acreage, forested land, and fields or pasture.
4. The project is called the Hansen Creek/Thomas Creek Pipeline Project. This is because the purpose is to reduce degradation of instream flows in the Samish and Lower Skagit Rivers, by limiting the impact of well development on the flows of tributary streams.
5. The project is being partially funded by a grant from the Washington Department of Ecology as part of the implementation of the 1996 Memorandum of Agreement Regarding Utilization of Skagit River Basin Water Resources for Instream and Out of Stream Purposes (MOA).
6. The project does not include one continuous pipe as part of a conveyance to serve a distant broader community. Rather, it consists of a number of pipeline fragments along Fruitdale, Moser, Grip and Bassett Roads serving miscellaneous local customers.
7. In its application, the PUD said the following:

The Public Utility District No. 1 (District) is improving its water system to meet existing and future distribution and regulatory requirements. These improvements will reduce further degradation of instream flows in the Samish and lower Skagit Rivers including the tributaries Thomas, Hansen and Swede creeks by providing potable water for existing development and future growth through the Regional Water Supply System.
8. The installation of a total of 26,500 linear feet of pipeline is proposed:

1800 lf of 12” – Bassett Road to Grip Road  
2600 lf of 12” – Grip Road from Bassett Road to Union Square  
5900 lf of 8” – Grip Road from Union Square to Brookings Road  
7400 lf of 8” – Mosier Road from Grip Road to Fruitdale Road  
8800 lf of 12” – Fruitdale Road from Kalloch road to Hansen Creek Road

In addition a pressure reducing station is proposed for the corner of Mosier Road and Fruitdale Road.

9. The majority of the pipeline segments will be constructed within existing Skagit County road right-of-way. Construction hours are to be during the daylight and during the work week.

10. The PUD assumed the role of lead agency under the State Environmental Policy Act (SEPA) for this proposal and issued a Determination of Non-Significance (DNS) on August 22, 2005, based on an Environmental Checklist.

11. On September 22, 2005, the PUD issued a revised DNS in replacement of the original one. The original DNS was not sent to all environmental review agencies. The revised DNS sought reviewing agency comments. No appeals of the DNS were received.

12. The Environmental Checklist cited a Wetland and Fish and Wildlife Reconnaissance and Impact Assessment as a source of environmental information. This document was prepared by Aqua-Terr Systems, Inc.(ATSI), and is dated July 6, 2005. The assessment reviewed the pipeline alignment as proposed and determined that the project will not impact wetlands and streams. The report stated:

The alignment is within Skagit County critical area buffers in several locations; however, the current buffer condition is paved road or gravel road shoulder. Therefore, the proposed project will not impact buffers beyond pre-existing conditions.

13. The Assessment involved reviewing the project drawings and aerial photographs and driving the proposed alignment. No field data were collected. The presence and location of wetlands were determined by office records and “windshield observation.” The report acknowledges that several wetlands and streams occur adjacent to or near to the proposed alignment, but there is no discussion of the effects of stream crossings by the project. Further there is no evaluation of the possibility that construction will cause additional wetland or buffer intrusion on steep terrain where the shoulders are narrow to non-existent.

14. The appellants presented extensive photographic evidence showing the lack of level ground at roadside along many stretches of right-of-way where the roads are very close to steep drop-offs into riparian or wetland buffer areas. They contended that during construction it will be virtually impossible to avoid some additional damage to critical areas or their buffers. Given the project’s proximity to such areas and the topography involved, the Examiner finds that it is more likely than not that the appellants are correct on this point.

15. The Critical Areas staff reviewed the proposal and recommended approval without conditions. The only staff comment about compliance with the Critical Areas Ordinance was unrelated to buffer intrusion. A staff memo was introduced which states:

SCC 14.24.330 requires protection measures to reduce adverse impacts or potential adverse impacts to underlying aquifers. Installation of a water pipeline by PUD is protecting beneficial groundwater uses and preventing degradation by protecting area groundwaters and does not required a hydrogeo report per SCC 14.24.330(1)

SCC 14.24.330(1) says that the level of study of potential impacts to aquifer recharge areas will be determined administratively. The level determined here was apparently no study.

16. The grant contract between the PUD and the Department of Ecology promises payment of \$1,185,000 for the construction of the Hansen Creek and Thomas Creek pipeline extension. Under its terms the grant is to assist with the implementation of the Skagit River MOA. The grant states: “It is not a requirement of this agreement that existing residences along the pipeline route hookup to the pipeline.”

17. In the record, there is substantial correspondence from the public, both for and against the pipeline extension project. A number of people said that their present wells are not supplying good water or sufficient water and that they would like to hook up to the new lines. The water levels in some wells have declined significantly in recent years. Another group claimed that the proposal is, in effect, a boondoggle, neither requested nor wanted by the area residents. They claimed that existing water supplies are good or better than what the PUD offers, and that the only purpose served by the project is to create pressure for more development.

18. The County processed the application as a “minor utility development” (14.04.020) requiring an Administrative Special Use Permit in the Rural Reserve zone. SCC 14.16.320(3)(b).

18. The standards for Special Use Permit approval are set forth at SCC 14.16.900(2)(b)(v), as follows:

- (a) The proposed use will be compatible with existing and planned land use and comply with the Comprehensive Plan.
- (b) The proposed use complies with the Skagit County Code.
- (c) The proposed use will not create undue noise, odor, heat, vibration, air and water pollution impacts on surrounding, existing, or potential dwelling units, based on the performance standards of SCC 14.16.840.

- (d) The proposed use will not generate intrusions on privacy of surrounding uses.
- (e) Potential effects regarding the general public health, safety, and general welfare.
- (f) For special uses in ... Natural Resource Lands ..., the impacts on long-term natural resource management and production will be minimized.
- (g) The proposed use is not in conflict with the health and safety of the community.
- (h) The proposed use will be supported by adequate public facilities and services and will not adversely affect public services to the surrounding areas, or conditions can be established to mitigate adverse impacts on such facilities.

19. In ruling on the Special Use Permit, the County staff determined that each of these criteria will be met.

20. In their appeal the appellants asserted that this is not so, and that the County committed errors in approving the application. Specifically they alleged:

- a) The application should have been processed as a “major utility development” requiring a pre-decision hearing by the Hearing Examiner
- b) The project is inconsistent with various policies and development regulations including Critical Area Ordinance requirements.
- c) The project will adversely impact normal residential uses within the zoning district.
- d) The project will generate impacts inconsistent with existing and planned land uses in the area.
- e) The decision ignores the project’s potential effect regarding the general public health, safety, and welfare.

21. In presenting their case, the appellants strongly argued that the record contains no proof that the proposed pipeline extension will in fact accomplish its stated objective – that is, to reduce further degradation of instream flows in the Samish and lower Skagit Rivers.

22. In addition they argued that the extension of water lines as proposed will create pressure for increased development and lead to the destruction of the rural setting and rural life style.

23. The appellants' ultimate position was that the pipeline extension is an unnecessary project driven by the availability of grant money. They asserted that most people will stick with their existing domestic wells and will decline to connect to the new pipeline, meaning that, if there really is some potential for improving instream flows by shifting to piped water, that potential will not be realized.

24. In response, the applicant argued that the need for the project is attributable to conclusions reached by the Department of Ecology which are not reviewable in this proceeding. They argued that the proposed pipeline will provide a form of rural service and will not constitute the extension of urban services to a rural area. They also contended that the concerns regarding pressure for growth are issues of zoning and not matters to which the PUD needs to respond in seeking a permit to extend its system.

25. The PUD showed that it serves many customers in rural areas. Indeed, under the County Coordinated Water System Plan (CWSP), the District's rural service area far exceeds its urban service area. The subject pipe extension is a part of the planned rural grid.

26. The Utilities Element of the Comprehensive Plan lists the County CWSP and the Skagit River MOA as among those more detailed plans it seeks to implement. Under the policies regarding water, the Comp Plan states:

This Comprehensive Plan recognizes that the need for the provision of piped water in rural areas may occur under limited circumstances such as: . . . where groundwater withdrawal will cause a conflict with instream resources as defined by the Skagit River MOA. . . The provision of piped water service in rural areas shall support the combined objectives of the Growth Management Act and the Skagit River MOA. (p 10-13)

There was no evidence that the project is inconsistent with the CWSP or that it violates the Skagit River MOA.

27. 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 proceeding. SCC 14.06.110(7).

2. The Hearing Examiner's authority is limited to determining whether project permits conform to the provisions of the County Code. The issues raised in this appeal are largely matters of policy which are beyond the Examiner's power to review.

3. There is nothing in the Code that requires an applicant to demonstrate the need for the project proposed. Whether this project really will help the instream flows of the Samish and Lower Skagit is not for the Examiner to decide. The motives that have led to this proposal and the validity of the factual basis for proposing it are not reviewable by the Examiner any more than are the motives and reasons that underlie a request by a businessman to build a warehouse.

4. Similarly, it is not the Examiner's job to decide whether the project is cost-effective. From the record it does appear that a number of people are in need of water and will hook up. It is also clear that others will not. Just how all this will shake out was not shown nor was it necessary that it be shown in order to evaluate the project against the Special Use Permit criteria.

5. A utility development in the Rural Reserve zone requires a Special Use Permit. If it is a "minor utility development" the permit is issued administratively. SCC 14.16.320(3)(b). If it is a "major utility development" the permit requires a decision by the Hearing Examiner after a hearing. SCC 14.16.320(4)(t)

5. For this proceeding, the significance of whether this utility development is considered "minor" or "major" is in the burden of proof. On appeal of an administrative permit decision, the burden is on the appellants. SCC 14.06.110(11):

The appellant shall bear the burden of proving that the decision of the Administrative Official was clearly erroneous. The Hearing Examiner shall not overturn or modify the Administrative Official's Decision unless he or she finds it was clearly erroneous.

If the Hearing Examiner decides on the permit in the first instance the burden is on the applicant. SCC 14.16.900(2)(b)(v).

6. In SCC 14.04.020, the Code defines both "minor utility development" and "major utility development." "Minor utility developments" are:

[D]esigned to serve a small local community, are not manned and would be considered normal utility services for the area.

A "major utility development" is "designed to serve a broader community or is manned." These definitions are not models of clarity.

7. Under all the circumstances, however, the Examiner concludes that the the Staff was not clearly wrong in treating the project as a "minor utility development,"

The project does not move water to any population center. It will serve a diffuse collection of rural residences. It will not be manned. It will be consistent with the CWSP and thus can be considered normal for the area. Accordingly, it fits the definition of “minor” and the administrative procedural route chosen should be sustained.

7. Accordingly, the burden of proof in this appeal was properly on the appellants.
8. The Friends of Skagit County objected to the process selected because there was no public hearing before the decision. They noted that water pipeline extensions are usually by the LUD process which includes a pre-decision hearing. They did not demonstrate, however, that the process used failed to comply with the law for permitting “minor utility development.” Their objection about the process is essentially the expression of a policy preference, not of a legal failure.
9. As to the Special Use Permit criteria, the project was not shown to be incompatible with the rural land use in the service area. Physically the pipeline will not introduce any structures that will be out of place in the rural neighborhood. The existence of the pipeline will in no way interfere with normal use of the residences in the area. Moreover, the project will not change the Rural Reserve zoning. If urbanization of the area is to occur, the zoning will need to be changed. That is a policy decision. The extension of piped water to rural customers does not necessitate any particular zoning decision.
10. Given the project’s consistency with the CWSP and the Skagit River MOA, there was no demonstration of conflict with the Comprehensive Plan. Indeed, the Plan contemplates extending water lines to rural areas where there is a conflict between groundwater withdrawals and instream flows as defined by the MOA.
11. There was no proof that the installing the pipeline will involve significant intrusions on privacy or that will create undue noise, odor, heat, vibration, air and water pollution impacts on surrounding dwelling units under SCC 14.16.840.
12. The appellants did not prove that the project will have adverse effects on general public health, safety and welfare or conflict with the health and safety of the community.
13. There was no showing that the project will have impacts on long-term natural resource management and production or that public services will be adversely affected.
14. In the main, the appellants failed to show that the project will entail specific violations of the County Code. The administrative determination to waive a hydrogeology report pursuant to the Critical Areas Ordinance was not shown to be clearly erroneous.

15. However, the Examiner has concluded that the evidence does raise a substantial issue over compliance with the Critical Areas Ordinance provisions concerning utility development in wetland buffers and in riparian buffers.

16. Utility construction is permitted within wetlands and streams and their buffers, provided that no alternative routes can reasonably be used and that the following standards are met: (1) The activity will have minimum adverse impact; (2) the activity will not significantly degrade surface or groundwater; (3) the intrusion into the critical area and its buffer is fully mitigated. See SCC 14.24.240(60 and 14.24.530(3).

16. The Wetland and Fish and Wildlife Impact Assessment conclusions were based on a cursory examination of the sites involved. The Assessment's conclusion that the project will not impact buffers beyond pre-existing conditions cannot be sustained on this record. There is a substantial likelihood of additional intrusion into such areas. Under the circumstances, the project has not been shown to comply with the above criteria for utility construction in critical areas.

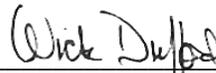
17. In this respect, the appellant's have carried their burden to show that compliance with the Skagit County Code has not been achieved.

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

### **DECISION**

The matter is remanded to Planning and Development Services for the development of information or conditions demonstrating that the project will comply with the Critical Areas Ordinance. When that information is prepared, another hearing before the Examiner shall be held, limited to the issue remanded.

Except for the above, the Administrative Special Use Permit is affirmed.



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Wick Dufford, Hearing Examiner

Date of Action: May 22, 2006

Date Transmitted to Parties: May 22, 2006