April 15, 2015

CITY OF BAINBRIDGE ISLAND, WASHINGTON
HEARING EXAMINER

REPORT AND DECISION

Project:	Wyatt Hill Subdivision
File number:	PLN50074SUB
Applicant:	DeNova Northwest, LLC
Location:	No physical address; on the south side of Wyatt Way between Nicholson Place and Grow Avenue, adjoining the unopened Shepard Way right-of-way.
Request:	Preliminary long lot subdivision approval to create 19 single-family lots, utilizing the cluster flex lot process in accordance with the City's flexible lot design subdivision provisions.
\SEPA Review:	A Mitigated Determination of Non-Significance was issued on February 13, 2015 with the 14-day appeal period ending on February 27, 2015. No appeals were filed.

FINDINGS OF FACT

A. Site Characteristics

1. Tax Assessor Information:
   Tax Lot Numbers: 272502-4-029-2003
   Owners of Record: Janice & Richard Nishimori & Jean Nishimori Devine
   Parcel Size: 4.51 acres or 195,983 square feet
   Current Land Use: Vacant, historic farm property.

2. Terrain: The site is located on a relatively flat property that slopes gently down from its northeast corner to the southwest.

3. Soils: The site is mapped with several different soils, including Kapowsin gravelly loam (Soil Survey of Kitsap County Area, Washington; U.S. Department of Agriculture, Soil Conservation

Service, 1977).

4. Existing Site Development: The property is currently undeveloped.

5. Proposed Access: The applicant is proposing public access from Wyatt Way.

6. Public Services and Utilities: The property is served by City of Bainbridge Island Water and Sewer.

7. Zoning/Comprehensive Plan Designation: The subject property is zoned as R-4.3, 10,000 square feet per unit. The Comprehensive Plan Designation is Single Family Residential, 4.3-6 units per acre.

8. Surrounding Zoning/Comprehensive Plan Designations:
North: R-3.5, SUR 2.9-3.5 units per acre
South: R-2.9, SUR 2.9-3.5 units per acre
East: R-4.3, SFR 4.3-6 units per acre
West: R-3.5, SUR 2.9-3.5 units per acre

9. Surrounding Uses:
North: Single-family residences
South: Shepard Way right-of-way, vacant and developed properties
East: Single-family residences
West: Single-family residences

B. Procedural History

10. A pre-application conference was conducted on August 26, 2014, and a public participation meeting held on September 20, 2014. The subdivision application was submitted on November 6, 2014, and deemed complete on December 4, 2014. The project was noticed for public comment on December 19, 2014, with the comment period ending on January 2, 2015. Various public comments were received. A request for further information was sent by the City to the applicant on December 29, 2014, with the requested information submitted on January 7, 2015.

11. A Mitigated Determination of Non-Significance (MDNS) was issued by the City pursuant to SEPA on February 13, 2015, with the 14-day appeal period ending on February 27, 2015. No appeals were received. The preliminary plat hearing held on March 26, 2015, was continued by the Hearing Examiner until April 1, 2015, to allow the Examiner to further review within the context of the overall record certain important documents that were not made available before the hearing and determine whether additional testimony may be required. While no new information was identified that required reopening the record to further discussion, an essential review document, the City's MDNS, was missing from the staff exhibit package and will be added to the record.

12. The circumstance that the Examiner did not reopen the hearing record before the April 1, 2015, deadline should not be understood as indicating that no unanticipated new issues emerged from the review, but only that the record (including online City regulatory and planning resources) appeared to be adequate to complete the process. Important changes to the posture of the application were made

relatively late in the review: a tract originally offered for open space use became redesignated by the applicant for stormwater use in January, 2015, as part of a major redesign of the site's stormwater treatment plan. Then in mid-March the staff upgraded its internal road engineering condition from the 30-foot suburban width proposed by the applicant to a 40-foot urban right of way width requirement. With respect to the late arising stormwater and road design issues, both the applicant and City now could well believe that important information is absent from the record that might alter a regulatory outcome. Any motions to reopen the hearing should identify specific new testimony and documents proposed to be offered, and describe how their consideration might change a regulatory consequence of importance.

13. Review comments were received from the City's Fire Marshal, Development Engineer and Department of Public Works Operations and Maintenance, as well as from the Kitsap County Health District. The Fire Marshal stated that demonstration of fire flow is required for the project, installation of a fire hydrant should be coordinated with the Fire Marshal, and that fire sprinklers may be required depending on the final construction plan. At the pubic hearing the Fire Marshal agreed to amend proposed fire flow condition language as requested by the applicant.

14. The City's Development Engineer is responsible for reviewing the subdivision for compliance with traffic, motorized and non-motorized improvements, water, sewer, stormwater management and geologically hazardous regulations. Regarding traffic, a Certificate of Concurrency was issued for this project pursuant to BIMC 15.32.040.B, and the Development Engineer required that the applicant's traffic report receive third party engineering review. A complete list of proposed engineering conditions for preliminary approval was set forth on March 18, 2015. The applicant has objected to certain of the road conditions proposed by the Development Engineer, as further discussed below.

15. The Kitsap County Health District provided a "no comment" letter on November 25, 2014, requesting that before final approval binding water and sewer availability letters be submitted. Condition No. 18 requires these before final plat approval. The City's Department of Public Works Operations and Maintenance issued a Non-Binding Commitment Limited Reservation for Sewer and Water on November 5, 2014.

16. As noted above, a public participation meeting was held on September 20, 2014 during the pre-application phase of the project, with comment letters also received during the public comment period. The loss of trees on this wooded lot is of concern to the surrounding neighbors, in particular with respect to two mature black locusts near the parcel's northeast corner. Neighboring residents downslope opined that the stormwater from the development could flood overburdened downstream conveyance channels and also potentially contaminate Eagle Harbor. One commenter expressed opposition to the idea of development traffic accessing the currently unopened Shepard Way right-of-way, displacing a heavily used bike and pedestrian trail.

C. Regulatory Compliance

17. The applicable standards for Hearing Examiner approval of a preliminary subdivision application are stated at BIMC 2.16.125.H:

H. Decision Criteria for Preliminary Long Subdivisions. The hearing examiner's decision shall

include findings of fact that the application meets all the requirements of the following subsections:

1. The preliminary long subdivision may be approved or approved with modification if:

a. The applicable subdivision development standards of BIMC Titles 17 and 18 are satisfied; and

b. The preliminary long subdivision makes appropriate provisions for the public health, safety and general and public use and interest, including those items listed in RCW 58.17.110; and

c. The preliminary long subdivision has been prepared consistent with the requirements of the flexible lot design process, unless a flexible lot standard has been modified as part of a housing design demonstration project pursuant to BIMC 2.16.020.Q; and

d. Any portion of a long subdivision that contains a critical area, as defined in Chapter 16.20 BIMC, conforms to all requirements of that chapter; and

e. Any portion of a long subdivision within shoreline jurisdiction, as defined in Chapter 16.12 BIMC, conforms to all requirements of that chapter; and

f. The city engineer's recommendation contains determinations that the following decision criteria are met and such determinations are supported by substantial evidence within the record:

i. The long subdivision conforms to regulations concerning drainage in Chapters 15.20 and 15.21 BIMC; and

ii. The long subdivision will not cause an undue burden on the drainage basin or water quality and will not unreasonably interfere with the use and enjoyment of properties downstream; and

iii. The streets and pedestrian ways as proposed align with and are otherwise coordinated with streets serving adjacent properties; and

iv. The streets and pedestrian ways as proposed are adequate to accommodate anticipated traffic; and

v. If the long subdivision will rely on public water or sewer services, there is capacity in the water or sewer system (as applicable) to serve the long subdivision, and the applicable service(s) can be made available at the site; and

vi. The long subdivision conforms to the "City of Bainbridge Island Engineering Design and Development Standards Manual," unless the city engineer has approved a variation to the road standards in that document based on his or her determination that the variation meets the purposes of BIMC Title 17; and

g. The subdivision conforms to the requirements of this chapter and the standards in the "City of Bainbridge Island Design and Construction Standards and Specifications," unless the city engineer has approved a variation to the road standards in that document based on his or her determination that the

variation meets the purposes of BIMC Title 17; and

h. The proposal complies with all applicable provisions of this code, unless the provisions have been modified as part of a housing design demonstration project pursuant to BIMC 2.16.020.Q; Chapters 36.70A and 58.17 RCW; and all other applicable provisions of state and federal laws and regulations; and

i. The proposal is in accord with the city's comprehensive plan.

2. A proposed subdivision shall not be approved unless written findings are made that the public use and interest will be served by the platting of such subdivision.

18. Most of the controversy between the staff and applicant generated by this plat proposal related to the engineering of infrastructure for this development, in particular the applicable road requirements. In addition, the original assumptions about stormwater management for the plat were recently deemed infeasible, creating new onsite facilities demands that eliminated open space and greatly reduced the area potentially available for future road development.

19. More generally, the disagreement between staff and applicant mandates, among other things, an inquiry into the extent to which the City's engineering conventions are explicitly regulatory in nature. A major regulatory gap was encountered a few months back in the review of the ultimately remanded Rolling Sunrise Subdivision application (SUB18840), where the Hearing Examiner discovered to his surprise that the City has no basic requirement that a subdivision be accessible via a minimally serviceable public road; this required a critical portion of the review to rely on the generic standards of the state platting statute. For Wyatt Hill the problem is somewhat different: the engineering staff has here filled a regulatory vacuum with internally generated design standards, and questions arise as to their exact regulatory status when an applicant balks at offering voluntary compliance.

20. Turning first to the stormwater issues, the applicant initially explored in discussions with the City the feasibility of employing an off-site stormwater direct discharge option that would bypass highly eroded Weaver Creek stream reaches downstream and release to the marine waters of Eagle Harbor via the City-owned John Nelson Park at Strawberry Cannery Cove. Since this diversion would have also incorporated basin flows upstream of Wyatt Hill that enter and pass through the site, the bypass would have operated to reduce Weaver Creek volumes below current rates. This option also would have resulted in the preservation of about an acre of trees located on the southern portion of the site adjacent to the Shepard Way trail.

21. However, further research on John Nelson Park disclosed both that the site is contaminated due to its past use as a gas station and future park usage is subject to restrictive covenants which may prohibit installation of stormwater improvements. Accordingly, the applicant has abandoned the bypass option. This will require the plat to store stormwater in on-site detention ponds located on the southern end of the site, resulting in loss of the trees in the tract abutting the unopened Shepard Way right of way.

22. Abandonment of the bypass discharge proposal also refocuses attention on the limitations characterizing the downstream flow system, not only within a Weaver Creek already seriously degraded by erosion from earlier development but also regarding capacity restrictions along the Shepard Way right of way system connecting the plat's southwest corner to the creek. The currently

applicable stormwater pond release rates are calculated to mimic predevelopment conditions and thus should not increase the rate of erosion in Weaver Creek. In other words, plat development flow releases should not accelerate the degradation of Weaver Creek, making its situation neither better nor worse than it otherwise would be if it received no development-related flows. The applicant's engineer has concluded that the capacity problems currently encountered within the Shepard Way route are due to undersized and poorly functioning pipes that impede flows, not to lack of ditch capacity. As mitigation, the applicant proposes to replace one culvert with a rock-lined ditch section, upsize a second pipe and lower a pipe inlet.

23. The requirement to construct stormwater ponds onsite at the south end of the parcel also impacts the staff's desire within its proposed condition no. 38 to have the final plat "provide language to allow for future vehicle and pedestrian connectivity through the conveyed stormwater tract", including a "stormwater plan to provide an appropriate area for future motorized and nonmotorized connectivity to Shepard Way." Since the staff is requesting a 40-foot right of way for the plat internal road, the width required for future connectivity south through the stormwater tract logically should be the same.

24. The applicant's revised drainage design depicts two drainage ponds occupying most of the tract south of the proposed lots, with the gap between the two ponds lying adjacent to the widest part of the cul-de-sac bulb. As shown on the plans, the space between the graded contours for the south end of the north pond and the north end of the south pond scales out at less than 20 feet of separation – in other words, less than half the width required for accommodating a 40-foot right of way. According to the applicant's engineer, making the pond deeper would either entail also making it wider or constructing retaining walls to accommodate steeper sides. The applicant's estimated additional cost for engineering and constructing deeper ponds with 40 feet of separation between them is $137,000. Because the parcel's soils are largely impermeable, increasing onsite infiltration of stormwater to reduce pond sizes does not appear to be an option.

25. There are two aspects of the disagreement between the staff and applicant over the plat's road requirements. The one alluded to just above concerns whether the stormwater plan should be modified at a substantial cost to provide a 40-foot gap between the two proposed detention ponds so that a future roadway connection south to currently unconstructed Shepard Way could someday be created by the City. The second issue is whether the plat's internal road right of way width should be increased from the 30 feet originally proposed by the applicant to the 40 feet now requested by staff, with full urban street improvements also mandated. This latter condition would also require at least a partial redesign of the layout of the proposed plat lots. It should be noted that, unlike the expansion of internal road right of way width, the future connectivity requirement would not mandate that the plat publicly dedicate more land – the potential southern route lies within a tract that will be dedicated to the City with or without the additional connectivity requirement.

26. The potential benefits of requiring current plat construction of a secondary street access through the plat south to the Shepard Way right of way and along Shepard Way east to Grow Avenue were analyzed in the two traffic study peer reviews commissioned for the project. The initial project traffic analysis performed by Heath & Associates dated November 13, 2014, did not model the effects of a second southern access, but the two peer reviews both dated November 24, 2014, by Gibson Traffic Consultants (GTC) and Transportation Solutions, Inc. (TSI) did perform this additional analysis.

27. Both peer reviews independently concluded that a secondary access to Shepard Way would produce a negligible traffic benefit. The worst-performing intersection impacted by plat traffic will be Madison Avenue at Wyatt Way. Both peer reviewers estimated that in the project's 2017 horizon year this intersection would operate after plat construction at LOS C with an overall calculated average vehicle delay of 15.4 seconds, with or without the secondary access to Shepard Way. In other words, the secondary access would not in any measurable way improve the function of the Madison/Wyatt intersection. All other study intersections will operate in 2017 at LOS A or B. The GTC report concluded that "there are only minor differences in the impacts on the study intersections if there is full access to Shepard Drive NW."

28. City staff did not challenged the accuracy of these conclusions nor their underlying data. Indeed, on the basis of the peer reviews, staff retreated from a position that a southern secondary access needs to be constructed now. But it continued to insist that space for a future connection should be accommodated within the plat design. As regulatory authority for its position, it relied on two somewhat improbable sources: a February 7, 2001, Public Works Department memorandum and an "Island-wide Transportation Study" Final Report noted on its title page as "accepted by City Council February 4, 2004".

29. The 2001 Public Works memorandum was directed to an unnamed "Plat Permit Reviewer." It stated that for many years the Department's engineering policy has been to regard development on parcels subject to a 2.9 units per acre or higher "effective land use density...as determined by the City Engineer" as requiring "urban public works infrastructure." The memo pointedly reminded the anonymous staff reviewer that the Department may withhold administrative approval from any plat application that fails to meet its standards. As far as the Examiner can determine from a quick search, the terms quoted above from the 2001 memo can claim no correspondence to a relevant currently adopted plan or regulation. In the current zoning code, the definitional divide between urban and suburban residential development appears to be crossed at 3.5 units per acre, not 2.9 (see BIMC 18.06.020.E and F). Thus, whatever value it may offer as internal staff guidance, nothing about the Public Works memo suggests that it is either entitled to regulatory effect itself or recites currently adopted regulatory standards.

30. The City Council discussion surrounding the 2004 "Island-wide Transportation Study" (IWTS) supplies a useful insight into the barriers that seem to chronically confront the City's land use regulatory process. Simply put, controversial issues are frequently studied, but study recommendations are often tabled without effective action to implement them. When notice was taken at the public hearing of the rather unusual "accepted by City Council" language, staff was requested to produce the relevant Council minutes for the February 4, 2014, meeting that dealt with the IWTS. It turns out this was a special workshop meeting where the City Council was presented with both the transportation study and a request from the Planning Commission that adoption of the study's major policy conclusions be deferred.

31. The rationale for the request was that the Planning Commission itself was actively working on a new Transportation Element for the Comprehensive Plan update and did not want to have its options foreclosed prematurely by the study's recommendations. The upshot is that the study was "accepted" as only comprising a technical document supplying a basis for additional discussion. It was moved for adoption as a "starting point for further studies to be done in the future to develop the long-range Transportation Plan, that accepting the study does not lock us into any policy positions or any specific

projects..." This motion was approved on a 4-3 vote, with the opponents apparently unwilling to ratify the study even on the watered-down basis embodied in the motion.

32. The first page of the introduction to the December, 2004, Comprehensive Plan Transportation Element acknowledged the role played the IWTS in formulating "a detailed analysis of a variety of transportation issues affecting the community." But the study was not embraced in its totality: "Elements of the IWTS have been extracted to serve as the Transportation Element update to the Comprehensive Plan." On the introduction's following page appears a bullet list of "some of the community's transportation issues" which identifies roadway connectivity as an item, discussing it terms that suggest the central concerns remained unresolved.

33. The IWTS recommendation that the new Transportation Element adopt the study's "general connectivity improvement map" was not followed, and no mention was made in the update of the study's list of 17 specific connectivity improvement projects. Staff's reliance on IWTS Figure 4-11 as authority for asserting the existence of a City policy to construct Shepard Way between Grow Avenue and Nicholson Place was misplaced. The City Council declined to adopt the IWTS generally as City policy, and the Transportation Element within the Comprehensive Plan update enacted later in 2004 did not alter such outcome with specific respect to road connectivity.

34. In the bigger picture, a degree of tension appears to have existed in 2004 between IWTS goal of increasing road connectivity and the pedestrian-friendly policies expressed in the Non-Motorized Transportation Plan (NMTP) adopted a year earlier. The NMTP advocates appear to have won this political scrum. Goal 9 of the Transportation Element update expressed more enthusiasm for trails connectivity than for road connectivity, suggesting that the trails lobby viewed road development as a conflicting interest and unopened rights of way primarily to be valued for their trails potential. The road and street guidelines stated under Goal 1, Community Character, exhibit a similar thrust: the emphasis is mainly on minimizing the impacts of an unwanted vehicle culture and enhancing non-motorized uses.

35. But a workable balance seems yet to be achieved, and the battle will likely continue. In the Examiner's view the City needs both a progressive trails policy and a realistic and efficient plan for managing undesired but inevitable quantities of vehicle traffic. Preferring trails while simply ignoring roads is not a recipe for long-term success. And while the impact-based traffic level of service methodology no doubt provides a critical tool, by itself it is incapable of resolving all the problems; mitigating for individual capacity bottlenecks is not the same thing as envisioning a comprehensive transportation network.

36. City staff's position that Wyatt Hill's internal road system should be built to an urban standard within a 40-foot right of way, not the modified 30-foot suburban standard proposed by the applicant, was mainly grounded on its reading of the year 2000 version of the Department of Public Works "Design and Construction Standards and Specifications." As alluded to above, a threshold issue is to determine whether the Public Works design standards are entitled to recognition as a regulatory document. The Examiner has encountered no evidence that it ever was formally adopted as a regulatory control, although references are made to it within both the City's subdivision and zoning ordinances. The "Design and Construction Standards and Specifications" document is not listed in BIMC Chapter 16.08 as a designated source of the City's substantive authority to mitigate

environmental impacts under SEPA.

37. A review of the document itself failed to disclose facts suggesting a plausible claim to regulatory legal status. Section 1, General Considerations, reads as follows:

> *1 - 01 INTRODUCTION*
>
> *The City has adopted the standards herein to encourage standardization of design elements associated with public facilities extensions, building sites, and grading operations. These standards are minimum requirements, and shall be used with good engineering practices. Prior to making any application, the applicants engineer is encouraged to meet with applicable city staff and gather any additional information that may be available for incorporation into their design.*
>
> *1 - 02 AUTHORITY*
>
> *RCW Chapter 35.43 charges the City with the authority to prepare standards for construction. Accordingly, this document is written with all approval authority assigned to the Director of Public Works or designated representative.*
>
> *1 - 03 APPLICABILITY*
>
> *These Standards have been adopted:*
>
> *To provide consistent road and infrastructure design elements and construction requirements for developers, private parties, and utility companies, who construct or modify road or right-of-way facilities, including on-site utilities storm drainage, all requiring city permits or approvals.*
>
> *To provide consistency, wherever possible, between development related construction detailed above and the Department's program for construction of new city roads, reconstruction of existing roads, and attendant infrastructure facilities.*
>
> *For city road construction projects involving Washington State Department of Transportation (WSDOT) or Federal Department of Transportation (USDOT) funding, and where the standards and procedures involved with the administration of those projects conflict with these standards, such standards and procedures as required by WSDOT or USDOT shall govern.*

38. Section 1-01 above states in a passive tense that the "*City has adopted the standards herein.*" In other words, the Section fails to identify precisely how the standards were adopted or by whom. For regulatory purposes, what is preferred is adoption by the City Council pursuant to ordinance. The implication derived from Section 1-01 is that the Department of Public Works itself adopted the standards without City Council review and approval.

39. Section 1-02, which is perhaps the most critical of the three for our purposes, is a curiosity. It cites as supporting authority RCW Chapter 35.43, which is the state statute governing the creation of a local improvement district (LID). It should be obvious that formation of an LID has no bearing on

either subdivision or permit review nor the standards applicable thereto. One also notes the awkward language referring to the document as being "*written with all approval authority assigned to the Director of Public Works,*" which stops just short of claiming that any such authority actually exists. Rather, it seems to merely assert that if any delegated authority happens to be available, it is gratefully being relied upon. And again, there is no explicit suggestion in Section 1-02 that the City Council has adopted the document. Finally, Section 1-03 is of interest primarily for its emphasis on establishing consistency rather than asserting regulatory authority.

40. In all fairness, one can sympathize with the difficult situation encountered by the Department of Public Works. It cannot even minimally perform its review functions without reference to some sort of design standards. So even if no such standards were ever to be legally adopted, internally it would need to make some operative assumptions about what such standards ought to entail just to make it through the work day. And its "Design and Construction Standards and Specifications" appear to provide substantively a reasonable and satisfactory framework for such internal use – and indeed for the use of property owners and developers in the day-to-day conduct of most of their business.

41. The problem is that unless the "Design and Construction Standards and Specifications" document has been formally adopted by the City Council in an action that specifically confers upon it a regulatory role, its contents cannot be directly imposed in this quasi-judicial proceeding on an unwilling subdivision applicant as mandatory requirements. Within the state platting statute, RCW 58.17.033(1) provides as follows:

> *(1) A proposed division of land, as defined in RCW 58.17.020, shall be considered under the subdivision or short subdivision ordinance, and zoning or other land use control ordinances, in effect on the land at the time a fully completed application for preliminary plat approval of the subdivision, or short plat approval of the short subdivision, has been submitted to the appropriate county, city, or town official.*

42. The essential point here is simply that state law requires that the rules applied to local review of a subdivision application be adopted by ordinance. Since there is no indication in either the City codes or the document itself that the Public Works "Design and Construction Standards and Specifications" have ever been formally adopted by ordinance as mandated by state law, RCW 58.17.033(1) operates to preclude the document from being regarded as a regulatory "*land use control*" within this proceeding. It may offer helpful guidance, but it is not regulatory, per se.

43. One hastens to add that the foregoing objection may be subject to qualification if the principles contained in the Department's "Design and Construction Standards and Specifications" are substantially mirrored in the City's other adopted codes and plans. In such instance, a case could be made that the Public Works design standards constitute a valid resource for interpreting these other adopted, and therefore indisputably regulatory, codes and plans. More specifically in terms of the Wyatt Hill application, if a clear regulatory distinction exists in the City's adopted codes or plans between "urban" and "suburban" development, and the infrastructure requirements for each are reasonably spelled out in terms of how they are to be applied to the various zoning designations, reliance on the "Design and Construction Standards and Specifications" to supply additional dimensional details may be warranted.

44. While an exhaustive review of the City's adopted codes and plans has not been undertaken,

based on current understanding the Examiner is not persuaded that the underlying regulatory framework exists in a form sufficient to deem the "Design and Construction Standards and Specifications" as supplemental to other codes and plans previously adopted by the City. An urban road development standard is neither articulated by the Comprehensive Plan nor the City's codes, nor by the two in combination, independent of the terms of the "Design and Construction Standards and Specifications". The City's staff report cites no additional or alternative authority for imposing the 40-foot urban requirement.

45. But because the issue emerged so late in the review process, the possibility surely exists that its full consideration by staff may not have been practical and feasible. Thus, if upon further deliberation the City believes that a framework of adopted codes and plans exists adequate for mandating a 40-foot urban road requirement at the Wyatt Hill location independent of reliance on the Public Works document, it might well consider requesting reconsideration of this portion of the decision, detailing in its motion the adopted codes and plans relied upon. In this respect, the City should take into account that the Wyatt Hill parcel lies within the secondary study area for the Winslow Master Plan (WMP) and well outside any of its overlay districts. Thus any discussion of the effect of WMP policies should analyze the rationale for applying such policies specifically to this parcel.

46. Finally, an observation is warranted as to the potential effect that the "Design and Construction Standards and Specifications" would have if the document indeed were to qualify for application as a stand-alone regulation. While the tables at the end of Section 7 suggest a distinction between "urban" and "suburban" residential streets, the document itself provides no guidance on how such categories should relate to the City's zoning district scheme. So if any such connection were to be successfully made, it would need to be derived from applicable provisions of the zoning code or Comprehensive Plan.

47. The only metric offered for distinguishing between the "urban" and "suburban" residential streets called out within Section 7 itself is based on the average daily trips (ADT) that each street design is capable of handling, with the urban street designated to accommodate up to 2000 ADT and the suburban street rated for up to1000 ADT. Since the projected ADT for Wyatt Hill will be less than 200, a suburban street obviously would provide more than adequate physical capacity. Plus the final table in Section 7 specifically calls out the suburban 30-foot right of way width as sufficient for a 200 ADT demand. Thus, unless there exists a Comprehensive Plan or code based requirement for requiring an urban residential street at this location notwithstanding ADT, the "Design and Construction Standards and Specifications" document by its own terms clearly specifies that the suburban standard is functionally adequate to accommodate the projected traffic demand.

48. In its current state the Wyatt Hill parcel, historically an agricultural property, is moderately wooded. The preliminary subdivision application filed November 6, 2014, for cluster development specified that 10.6% of the parcel (approximately 20,825 square feet) was to be retained as open space for "native forests and significant trees". We previously noted how a large stand of trees at its south end, initially slated for retention, now will need to be sacrificed to stormwater pond development. This wooded stand corresponds roughly to the the 10.6% open space initially proposed. No alternative open space area has been identified by the staff or applicant.

49. As described by a nearby neighbor, Christian Ford, the site also features two black locust trees on proposed lot 18 near the parcel's northeast corner that are of particular significance. A written

statement submitted by Mr. Ford to the staff review process described the larger of the two trees (shown in the application drawings at a 48 inch diameter) to be "confirmed as the oldest of its kind in all of Kitsap County" and probably deserving of recognition as a historical resource. Mr. Ford further elaborated on these matters in his public hearing testimony. Although such observations are not evidential in nature, the Examiner performed a site visit after the hearing and verified that the larger black locust is indeed an impressive specimen.

50. The City as yet has no straightforward process for dealing with trees of historic importance nor significant trees generally on residential development sites. Although the City has enacted a tree preservation ordinance, at this point it only applies to commercial properties. A biologically or historically significant tree could be deemed subject to preservation under SEPA authority, but the City did not pursue this avenue and its SEPA determination was not appealed. So this requires us to make a more explicit evaluation of open space requirements.

51. It is not the Examiner's view that the application's commitment to preserving 10.6% open space simply evaporated when the original open space tract was reallocated by the proponent to stormwater use. The subdivision cluster standards stated at BIMC 17.12.030 tend to be generic, but the definition provided at BIMC 17.28.020(5) supplies a suitable level of detail:

> *5. "Cluster development" means a group of adjoining homesite areas situated in a suitable area of a property, designed in such a manner that facilitates the efficient use of land by reducing disturbed areas, impervious surfaces, utility extensions and roadways, while providing for the protection of valued open space features.*

A specification for the "*protection of valued open space features*" implies that at least some open space area is being provided. Beyond perhaps the employment of joint use driveways, the applicant's cluster design offers little in the way of "*reducing disturbed areas, impervious surfaces, utility extensions and roadways.*" So the policy basis for waiving entirely an open space requirement appears to be weak.

52. Staff recommended condition no. 25 has been rewritten to require the redesign of lot 18 to provide an open space tract for the preservation of the two locust trees. Even though likely necessitating a dedication of far less than 10.6% of the site, the historic importance of the black locust trees justifies viewing this more modest requirement as providing full satisfaction of the applicant's open space commitment. The new design will need to be based on the recommendations of a certified arborist, subject to the proviso that if the arborist concludes that either or both of the trees are unhealthy and unlikely to survive, staff may authorize the tract requirement to be modified or eliminated based on this technical information. The Examiner acknowledges that open space issues were not addressed in detail at the hearing, so either the applicant or City could consider moving for a reopened hearing to introduce new evidence and analysis relating to this subject.

53. The staff report contains a detailed and generally satisfactory treatment of the BIMC Title 18 zoning design provisions as they apply to this application, including discussions of landscaping and roadside buffering requirements and flex lot dimensional standards. Base density is set at one unit per 10,000 square feet, minimum lot size is 5000 square feet, and maximum lot coverage by buildings is capped at 25% of the parcel area. The site not not contain regulated critical areas.

CONCLUSIONS

1. The Hearing Examiner has jurisdiction over this proceeding and is authorized under City ordinances to make a final decision on the Wyatt Hill preliminary subdivision application. Public hearing notice requirements have been met.

2. The traffic impacts identified for the Wyatt Hill proposal will not rise to a level that warrants imposition of a secondary street access requirement on the project, either as a condition for present construction or as mandating a costly major redesign of the project's proposed stormwater ponds. The staff recommendation for stormwater tract redesign to accommodate future road development thus has not been supported by a requisite showing of nexus and proportionality. The City's currently adopted policies and regulations for road connectivity and cul de sac length do not mandate provision of a future road connection at this location.

3. The Department of Public Works "Design and Construction Standards and Specifications" document is not an adopted land use control ordinance within the meaning of RCW 58.17.033 and as such does not impose review requirements that this subdivision application can be legally obligated to meet. The City's other plans and codes adopted by ordinance do not mandate at this location urban roadway development within a 40-foot right of way. The modified 30-foot suburban design proposed by the applicant will provide adequate capacity to serve the traffic generated by the plat. Concurrent rejection of the staff recommendation to provide a design for development of a future secondary access obviates any need to create additional capacity to accommodate potential future circulation demands.

4. The plat application proposed to provide 10.6% of the plat as open space area, which area was effectively removed from potential future open space use by the applicant's revised stormwater pond design. The applicant's open space obligation can be satisfactorily met by provision of a smaller open space tract in the plat's northeast corner for the preservation of two historically significant black locust trees.

5. If conditioned in the manner provided below, and as documented with the findings stated above, the plat application for Wyatt Hill meets the decisional criteria stated at BIMC 2.16.125.H for preliminary approval of a long subdivision. It complies with the applicable land use and subdivision development standards of BIMC Titles 17 and 18, and, as conditioned, makes appropriate provisions for the public health, safety and general welfare and for the public use and interest, including all items listed in RCW 58.17.110. The proposed development will be consistent with the City's comprehensive plan.

6. The City Engineer's recommendation for preliminary approval contains determinations that the City's decisional criteria for drainage, streets and pedestrian ways, road standards and utilities can be met, and, as conditioned below, such determinations are supported by substantial evidence within the record.

DECISION

The preliminary subdivision application for Wyatt Hill (file no. PLN50074SUB) is APPROVED, subject to the following conditions of final plat approval:

SEPA CONDITIONS:

1. A stormwater management plan for the proposed development shall be provided for City review and approval in accordance with BIMC 15.20. The plans must be approved, the improvements constructed (or a construction bond provided if applicable), and an acceptable final inspection obtained prior to final subdivision application.

2. The site is greater than one acre in size, therefore prior to construction activities, the applicant shall apply for a Construction Stormwater General Permit (NPDES) through the Washington State Department of Ecology.

3. A Temporary Erosion and Sediment Control Plan will be needed for construction of both plat infrastructure and the individual lot development. The final plat shall contain a note for future property owners of this requirement.

4. The limits of clearing and grading shall be clearly marked in the field and inspected by the City of Bainbridge Island prior to beginning any clearing or grading on site. To protect significant trees in the perimeter buffer, the applicant shall install chain link construction fencing at the edge of tree's dripline.

5. On site mobile fueling from temporary tanks is prohibited unless the applicant provides and is granted approval for a Permit and Best Management Plan that addresses proposed location, duration, containment, training, vandalism and cleanup. (Reference 1. Uniform Fire Code 7904.5.4.2.7 and 2. Department of Ecology, Stormwater Management Manual, August 2001, see Volume IV "Source Control BMPs for Mobile Fueling of Vehicles and Heavy Equipment".) (Chapter 173-304 WAC)

6. The contractor is required to stop work and immediately notify the Department of Planning and Community Development and the Washington State Office of Archaeology and Historic Preservation if any historical or archaeological artifacts are uncovered during excavation or construction.

7. To mitigate impacts on air quality during earth moving activities, contractors should conform to Puget Sound Air Pollution Control Agency Regulations which insure that reasonable precautions are taken to avoid dust emissions.

8. To mitigate potential impacts on air quality, cleared vegetation shall be removed from the site, processed by chipper or processed using other methods of disposal that does not require burning.

9. To mitigate potential off-site glare, any street lighting within the subdivision shall meet the outdoor

lighting standards of BIMC 18.15.040, including general standards (D) & figures of acceptable shielding and direction of outdoor lighting fixtures (F).

10. To mitigate impacts to area residences, construction activities shall meet the requirements of BIMC 16.16.025 including a) it shall be prohibited between the hours of 7:00 p.m. and 7:00 a.m. on weekdays that do not constitute legal holidays, b) it shall be prohibited before 9:00 a.m. and after 6:00 p.m. on Saturdays that do not constitute legal holidays and c) it shall be prohibited on Sundays and all legal holidays except that work on the inside of an enclosed structure may occur between the hours of 10:00 a.m. and 4:00 p.m. A noise variance shall be required for any deviation from these time limitations.

11. Any non-exempt tree harvesting shall require the appropriate Forest Practices Permit from the Department of Natural resources.

DEVELOPMENT CONDITIONS

12. The following table indicating the required setbacks and lot coverage shall be recorded on the face of the final plat.

	Minimum
Building to Building	10 feet
Building to exterior subdivision boundary	15 feet
Building to internal street	15 feet
Building to Trail or Open Space	Minimum 10 feet
Building to Wyatt Way	25 feet
Building to Shepard Way	15 feet
Maximum Lot Coverage per Lot	2,578 square feet

13. The final plat submittal shall include street names, the location of any traffic regulatory signs and approved mailbox locations from the United States Postal Service. The applicant is responsible for street names signs in accordance with the Manual on Uniform Traffic Control Devices and City requirements. A public trail sign shall be installed along Wyatt Way and Shepard Way.

14. A plat certificate shall be provided with the final plat application.

15. School impact fees may be required. If school impact fees are in effect at the time of submittal for the final plat, the applicant shall pay one half of the impact fees for the 19 single family units. The remaining half of the fees shall be paid at the time of building permit issuance for the single-family units.

    If the fees are in effect at the time of building permit submittal rather than subdivision submittal, then each applicant applying for a single family residential building permit shall pay the full impact fee prior to building permit issuance. This condition shall be provided on the face of the plat.

16. To meet the requests of the fire marshal, the building permits for the individual homes may require

fire sprinklers. This requirement shall be noted on the face of the final plat. The applicant shall also provide a fire hydrant and meet any fire flow requirements.

17. The applicant shall verify the adequacy of the proposed water main to meet fire flow requirements pursuant to the City of Bainbridge Island Municipal Code 13.10.065.

18. Prior to submittal of the final subdivision application, the applicant shall provide binding sewer and water availability letters.

19. Civil construction plans, sections, and profiles for all roads, roadway storm drainage facilities, and water facilities and appurtenances, prepared by the developer's engineer shall be submitted with the plat utility permit for review and final approval.

20. All landscaping shall be installed, or a performance assurance device shall be submitted and approved, prior to final inspection on the plat utility permit. The installation of landscaping shall be verified by the Landscape Professional or owner and a landscaping declaration shall be signed.

21. Landscape buffers shall be maintained with a maintenance assurance device for a period of three years. All plant material along these buffers shall be managed by pruning so that plant growth does not conflict with public utilities, restrict pedestrian or vehicular access, or create a traffic hazard. No vegetation within the buffers shall be disturbed without approval of the Department of Planning and Community Development through an approved clearing, grading or civil plan.

22. The final subdivision submittal shall comply with the flex lot dimensional standards of BIMC 18.12.020, including minimum lot area, maximum lot coverage, minimum lot dimensions, and minimum setbacks

23. The final subdivision submittal shall meet the cluster flex lot standards of BIMC 17.12.030 for homesite location and area.

24. A right-of-way (ROW) construction permit will be required prior to any construction activities within the right-of-way. The ROW permit will be subject to separate conditions and bonding requirements.

25. A revised preliminary plat drawing meeting the requirements of the Examiner's decision shall be submitted to and approved by the City before any site alterations are authorized. More particularly, the revised plat drawing shall incorporate the following features:

    a. Proposed lot no. 18 shall be reconfigured to create an open space tract for the preservation of the two black locust trees located therein. Recommendations for maximizing the trees' long-term survival potential shall be made by a certified arborist and incorporated into the tract design; provided that, if either tree is determined unlikely to survive, its location may be deleted from the tract, and if both trees are deemed beyond preservation, the entire tract may be eliminated. The tract design shall be reviewed and approved by the City, with the technical basis for any proposal to remove a tree from protection or delete the tract altogether confirmed through peer-review by a second independent arborist selected by the City.

    b. The open space tract design shall provide pathway connections to both Wyatt Way and the plat's internal roadway.

    c. The plat's internal roadway shall conform generally to the modified 30-foot right of way suburban design proposed in exhibit no. 28, with the 5-foot north-side sidewalk

designed to provide a surface and gradient satisfactory for use by the disabled.

d. The internal roadway sidewalk's terminus on the south side of the cul de sac bulb shall be redesigned to provide and safe and smooth wheelchair-accessible transition to a 5-foot walkway connecting south to the existing trail in the Shepard Way right of way. There is no requirement to redesign the proposed stormwater ponds to accommodate a future road connection to Shepard Way.

e. Prior to final plat approval, the tree retention open space tract may be conveyed to either the City or a qualified non-profit land trust, if either formally commits to owning and maintaining the tract. Otherwise, it shall be owned and maintained by a subdivision homeowners' association created by the applicant pursuant to a recorded document approved by the City prior to final plat recording.

26. Prior to final subdivision submittal the following conditions for the internal road shall be met:

    a. The internal roadway must be constructed or bonding submitted;

    b. Regulatory signing for the internal roadway is the responsibility of the developer and it must meet standards of the Manual on Uniform Traffic Control Devices (MUTCD) and City signing requirements; and

    c. Record internal roadway right-of-way dedication.

27. The developer's engineer shall certify that there is adequate entering sight distance at the site entrances and within the access driveways. Such certification shall note the minimum required sight distance, the actual sight distance provided, and a sight distance diagram showing the intersection geometry drawn to scale, topographic and landscaping features, and the sight triangle. The sight distance shall meet the requirements of the COBI Design and Construction Standards.

28. The applicant shall extend the remaining portion of the Wyatt Way sidewalk on the northeast corner of the site. The design for the sidewalk shall be included in the plat utility permit.

29. Transportation facilities shall be reviewed and approved by the fire official during the civil construction design.

30. The applicant shall provide a plan and profile for water, sewer, and storm sewer connections with the plat utility permit application.

31. Water lines, including meters to each property shall be installed or bonded for prior to submittal of the final subdivision application.

32. Sewer, including side sewers, shall be installed or bonded for prior to prior to submittal of the final subdivision application.

33. Stormwater connections to each property shall be installed or bonded for prior to submittal of the final subdivision application.

34. All lot corners shall be staked with three-quarter inch galvanized iron pipe and locator stakes. A survey of the property must be completed and submitted with the final plat application.

35. In lieu of completion of improvements with conditions of a preliminary short plat approval, the city engineer may accept an assurance device, in an amount and in a form determined by the City, but not to exceed 125 percent of the established cost of completing the infrastructure that secures and provides for the actual construction and installation of the improvements or the performance of the

conditions within one year, or such additional time as the city engineer determines is appropriate after final plat approval.

36. Engineer certified as-built civil construction plans will be provided by the applicant prior to final plat approval.
37. Prior to final plat submittal, the applicant shall submit an operation and maintenance plan for the on-going maintenance of the storm drainage system.
38. The stormwater tract shall be dedicated to the City for its operation and maintenance of the stormwater ponds.
39. Prior to final plat submittal, the utilities slated for dedication to the City shall occur through the city's utilities extension agreement process.
40. At the time of Building Permit application for the individual lots, demonstration of compliance with applicable stormwater management requirements shall be required in accordance with BIMC 15.20 and 15.21. This note shall be listed on the face of the final plat.
41. No building construction shall be started prior to civil construction is completed or bonding established.
42. The following conditions shall be noted on the face of the plat: 3, 10, 12, 15, 16 & 21.

ORDERED April 15, 2015.

Stafford L. Smith, Hearing Examiner
City of Bainbridge Island

The Hearing Examiner is authorized to make the City of Bainbridge Island's final decision on a preliminary subdivision application. A party with standing may seek judicial review of this decision by filing a timely suit in Kitsap County Superior Court under the Land Use Petition Act.

The exhibit list prepared by the Clerk of the Hearing Examiner's Office is attached.