

ISLAND COUNTY HEARING EXAMINER

RE: Appeals of SEPA MDNS)	File No. APP 235/07 and
for CGP #004/07)	APP 237/07
)	
Appellants: TR Camano INC.,)	FINDINGS OF FACT
C.A.R.E. & Jane Cassady)	CONCLUSIONS OF LAW
)	AND DECISION

SUMMARY OF APPLICATION APPEAL AND DECISION

APPLICATION: The Director of Island County Planning and Community Development, as the responsible official, issued a Mitigated SEPA Threshold Determination of Non-significance in conjunction with an application for a Clearing and Grading Permit, # 004/07.

The applicant for the Clearing and Grading Permit, TR Camano Inc., has appealed the threshold determination. Additionally C.A.R.E., Camano Action for a Rural Environment, and Jane Cassady have appealed the Mitigated Threshold Determination of Non-significance.

DECISION: The Mitigated Determination of Non-significance issued by Island County Planning and Community Development is upheld.

FINDINGS OF FACT

INTRODUCTION

The following Findings of Fact and Conclusions of Law are based upon consideration of the exhibits admitted herein and evidence presented at the public hearing on June 26, 2007.

I.

PRELIMINARY INFORMATION

Appellant: TR Camano Inc. App 235 07
Appellant: C.A.R.E. & Jane Cassady App 237 07

Property Location: Parcel #R33219-307-4860 located along North Camano Drive in the NE ¼ of Section 19, Township 32 North, Range 3 East.

Applicable Ordinances, Statutes and Regulations: Island County Comprehensive Plan, Zoning Ordinance Chapter 17.03 ICC, Site Plan Review Ordinance, Chapter 16.19 ICC, Chapter 16.14C County Environmental Policy, Titles 8, 11 and 12.

SEPA: A SEPA Final Mitigated Determination of Non-significance was issued by Island County on May 21, 2007.

Publication: June 19, 2007 Stanwood / Camano News

Mailing of Notice to Applicant: June 8, 2007

Sign Posted: February 23, 2007

Mailing of Staff Report: March 20, 2007

Date of Application: February 16, 2007

Hearing Date: June 26, 2007

Exhibit Log: TR Camano Inc. App 235/07

1. Staff Report
2. Clearing and Grading/Timber Harvest Permit Application dated 1/5/07
3. Environmental Checklist dated 1/5/07
4. Notice of incomplete application dated 1/19/07 from Monica Felici to David Platter
5. Ltr dated 1/25/07 from David Platter to Monica Felici
6. Phase 1 Sewer & Transport Line for Bayview Park dated 2/2/07
7. Legal description from Land Title Company dated 2/2/07
8. Fax dated 2/10/07 from Dan Parrent, Perco Engineering, to Bill Oakes, Island County Public Works
9. Ltr dated 2/13/07 from Bill Poss, Development Review Engineer, to David Platter
10. Email dated 2/13/07 from Bill Poss, to Randy Bracket, Island County Public Works
11. Email dated 2/14/07 from David Platter to Bill Oakes, Jeff Tate, Bill Poss
12. Notice of complete application dated 2/16/07
13. Request for Comment dated 2/16/07
14. Parcel information
15. Account Summary Snapshot
16. Account Land Snapshot
17. Account Apr Summary Snapshot
18. Quarter Section map
19. Email dated 2/19/07 from David Platter, to Bill Poss & Bill Oakes, Island County Public Works
20. Affidavit of Posting the Public Notice Sign dated 2/23/07

21. Affidavit of Publication dated 2/27/07
22. Notice of application with SEPA dated 2/27/07
23. Email correspondence dated 2/27/07 between David Platter & Bill Poss
24. Email correspondence dated 3/1/07 between Randy Brackett, Island County Public Works , and Keith Higman, Island County Health Department
25. Email correspondence dated 3/1/07 between Randy Brackett, Island County Public Works , and Keith Higman, Island County Health Department
26. Email dated 3/12/07 from Wes & Barbara Brock to Bill Poss
27. Email dated 3/13/07 from Joan Schrammeck, to Bill Poss
28. Email dated 3/13/07 from Daniel Millard, to Bill Poss
29. Memorandum dated 3/13/07 from CARE to Bill Poss
30. Ltr dated 3/13/07 from Karl Neue-Lawson, to Island County Planning & Community Development
31. Memorandum dated 3/20/07 from Jeff Tate, to Bill Poss
32. Memo dated 3/20/07 from Bill Poss, to David Platter
33. Email dated 3/22/07 from David Platter, to Bill Poss
34. Ltr dated 3/23/07 from David Platter, to Bill Poss and Jeff Tate
35. Site plan, Phase 1, Offsite-Erosion Control, for Bayview Park dated 3/28/07
36. Email correspondence dated 3/29/07 between David Platter and Jeff Tate & Bill Poss
37. Email dated 3/30/07 from David Platter to Bill Poss
38. Email correspondence dated 4/5/07 between Bill Poss and PERCO Engineering
39. Ltr dated 4/20/07 from Keith Higman, to Jeff Tate
40. Memorandum dated 4/25/07 from Jeff Tate to Bill Poss
41. Ltr dated 4/27/07 from Bill Poss, to Allison Warner (ltr's were sent to all POR's)
42. Ltr dated 4/28/07 from David Platter, to Jeff Tate
43. Email dated 5/3/07 from David Platter, to Jeff Tate
44. Memorandum dated 5/21/07 from Jeff Tate, to Bill Poss
45. Final SEPA Mitigated Threshold Determination of Non-Significance & Administrative Approval with Conditions/Forest Practices Clearing Permit/Clearing and Grading Permit dated 5/22/07
46. Applicant acknowledgment of decision dated 5/25/07
47. Appeal of Final SEPA Determination dated 5/29/07 from David Platter
48. Ltr dated 6/4/07 from Michael Bobbink, Hearing Examiner, to David Platter
50. Document submitted at the hearing from David Platter, 3 pages

Exhibit Log: C.A.R.E. & Jane Cassady App 237/07

1. Staff Report
2. Final Mitigated DNS – CPA 004/07 dated 5/21/07
3. Letter of Appeal dated 5/25/07
4. Letter to C.A.R.E. dated 6/4/07
5. Appeal of MDNS for CGP 004/07 dated 6/13/07
6. Comprehensive Statement dated 6/20/07
49. File from App 237/07

51. Soil log map
52. Statement from Karl Neue-Lawson
53. Written comments from C.A.R.E
54. Letter from Mark Bamber

HEARING TESTIMONY

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Mark Bamber
353 E. North Camano Dr.
Camano Island, WA 98282

II.

TR Camano Inc., represented by David Platter, applied to Island County for Clearing and Grading Permit, CGP 004/07 for the clearing and grading work to be done in reference to the installation of a large offsite sewage system (LOSS) on Assessors parcel # R33219-307-4860. This site is located along the south side of North Camano Drive at Terry Heights Road, Camano Island Washington.

The proposed LOSS is to serve a commercial center, Bayview Park, being developed approximately two miles from the drainfield site.

During the SEPA review of the Clearing and Grading Permit, Island County expanded the review to include environmental impacts from the proposed drainfield. The responsible official under SEPA did not note any significant adverse environmental impacts associated with the grading permit. The responsible official did note potential significant adverse environment impacts from the construction and operation of the LOSS. In regards to this the responsible official issued a Mitigated Determination of Non-significance.

III.

The applicant TR Camano appealed the Mitigated Determination of Non-Significance. TR Camano's grounds for appeal are that the impacts of the drainfield had already previously been evaluated, that the Washington State Department of Health had issued a permit for the drainfield subject to conditions, that no county review of the drainfield was required under county ordinances and that the SEPA evaluation should have been limited to the impacts of the clearing and grading and should not have addressed the large offsite septic system already approved for the site.

The citizens appeal filed by C.A.R.E. argued that the Threshold Determination of Mitigated Non-significance addressing impacts from the septic system was in error and that the responsible official should have required additional information prior to issuing the determination, and should have required more stringent mitigation conditions or should have required an Environmental Impact Statement. C.A.R.E.'s appeal addresses three major issues. The first of these is C.A.R.E.'s position that the responsible official requested certain additional information from TR Camano, prior to issuance of the threshold determination, that this information was necessary and was never obtained. The second issue raised by C.A.R.E. is that they believe the proposed drainfield will have significant adverse impacts on water quality. The third point is that the quantity of water discharged on the drainfield site, which will come from a different watershed, will have significant adverse offsite environmental impacts in the watershed in which it will be discharged.

IV.

In support of the threshold determination Island County Planning and Community Development submitted a staff report, exhibit number one in the Hearing Examiner File, which clearly lays out the history of the development proposal, the information, including studies done by qualified professionals, the reasons for the issuance of the Mitigated Determination of Non-significance, and a request that the Hearing Examiner uphold the Threshold Determination issued by Island County. The background information and other Findings of Fact set forth in staff report are supported by the record as a whole and are hereby adopted as Findings of Fact herein by this reference. A copy of the staff report is attached hereto. A person reading this decision should read the attached staff report at this time and then proceed with the remainder of the Hearing Examiner's decision.

V.

The Hearing Examiner believes that a partial summary and restatement of salient facts should be included at this point in order to clarify the Final Conclusions of Law reached by the Hearing Examiner. The Washington State Department of Health has jurisdiction over a large offsite septic system such as the one that is the subject of this appeal. On May 23, 2005 DOH, approved the offsite septic system subject to nine conditions. Prior to the approval by DOH, at the request of DOH the proposed system was reviewed by the Washington State Department of Ecology and by the Island County Public Health Department, including the Island County Hydrologist. Additionally DOH had reviewed reports prepared by a licensed professional Geo-hydrologist, dated September 17, 2004 and March 17, 2005. The Department of Health concluded, that subject to the conditions of approval the department was attaching to the permit, that the permit met the requirements for a LOSS, and, by implication, that the system would not have significant adverse environmental impacts.

NO SEPA review was done during the Department of Health processing of this permit application. However, the conditions of approval did indicate the approval was conditioned upon Island County Planning and Community Development approving the SEPA process.

As indicated above a SEPA review of the septic system was conducted as a part of Island County's SEPA review for the Clearing and Grading Permit.

In addition to the review done by State and County agencies with expertise, and the review by the Geo-hydrologist who prepared reports for DOH as part of the permit process that resulted in approval of the LOSS, the record also contains a report prepared by HWA GeoSciences Inc. The HWA report was submitted on behalf of C.A.R.E. and the HWA report was prepared by and stamped by a licensed geologist.

The Hearing Examiner has reviewed all of the reports and has paid careful attention to the reports submitted by HWA on behalf of the appellants C.A.R.E. The HWA report describes the purpose of the report as being to provide "... an opinion on potential impacts associated..." with the LOSS, and includes a brief letter report of findings, and recommendations for mitigation and monitoring. The first three pages of the report identify the written materials reviewed. On page four of the HWA report the author identifies issues. The issue section includes comments such as:

- "... proportions of the proposed drainfield area (e.g., east portion) **appear close to or may** exceed the recommended maximum slope of 30%..."
- "Assuming nitrogen removal rates of 72% **may be optimistic** ... "
- "The extent of the recessional outwash present at and near the proposed drainfield site **appears to be limited**".
- "... the outwash **appears** to thin and ultimately pinch out to the north... "
- "The outwash also **appears** to pinch out in the southern "upgraded" portion of the proposed drainfield."

These are just some of the examples of where the author of the HWA report suggests potential problems that may be associated with the LOSS in question.

The summary paragraph also talks about the site in the same way period. The author does indicate in the summary that "...effluent from the proposed drainfield will **likely** daylight at locations where the outwash thins or pinches out, and glacial hill is present near the surface." Emphasis added.

This ("likely") is the language of probability. However this summary does not indicated that any effluent daylighting downgradient will be of poor quality or inadequately treated, or of such a quantity as to result in probable significant adverse environmental impacts.

The Hearing Examiner also notes that the only recommendation was that if the drainfield was constructed as planned, it should be monitored. Monitoring is also required by the Department of Health Permit and by the mitigated conditions attached to the Determination of Non-significance issued by Island County.

The monitoring conditions proposed by the HWA report are more extensive than those required Island County or DOH. However the author of the HWA report does not state that these more stringent monitoring conditions are necessary to mitigate significant impacts. Many of the HWA suggestions, as well as others suggested by C.A.R.E., would further minimize the possibility of significant adverse environmental impact. Based on a careful review of the record the Hearing Examiner has not been able to identify any probable significant impacts that would not be adequately mitigated by the conditions placed on the project by DOH and by Island County.

The identification of additional conditions that further minimize any potential impacts is not the same as determining additional conditions are necessary to mitigate probable significant impacts.

VI.

Any Conclusion of Law which is deemed a Finding of Fact is hereby adopted as such. Based on the foregoing Findings of Fact, now are entered the following:

CONCLUSIONS OF LAW

I.

Island County appropriately evaluated under SEPA the probability of significant adverse environmental impacts resulting from the drainfield even though the permit requested was only for clearing and grading. No SEPA evaluation had been done by any agency on the proposed large offsite septic system. Additionally the Washington State Department of Health conditioned the permit on a SEPA review approved by Island County.

TR Camano may be right in suggesting that the SEPA review should have been done earlier in the process. However the failure to conduct the review in a more timely manner does not legally foreclose the county from undertaking a SEPA review of the septic system at the time the Clearing and Grading Permit was sought. This is especially true where the permit granted by the Department of Health was conditioned on Island County approval of the SEPA process.

II.

Island County Planning and Community Development appropriately required specific monitoring and payment for the monitoring as a condition of issuing a determination of environmental non-significance. Effluent monitoring was required under the terms of the permit issued by DOH. This requirement was further modified to require monitoring of the quantity of effluent discharged and establishment of who would be doing the monitoring and how it would be paid for. TR Camano has failed to establish that the conditions required by Island County on the DNS were inappropriate conditions based on the SEPA official's substantive authority, or that the specified monitoring was unnecessary to mitigate substantial impacts.

III.

The responsible official under SEPA is to issue a determination of non-significance if the official determines that "... there will be no probable significant adverse environmental impacts from a proposal ...". WAC 197-11-340.

In order to require an Environmental Impact Statement, or to require mitigation conditions under the substantive authority of SEPA, the responsible official must conclude that there are probable significant adverse environmental impacts.

Probable is defined in the SEPA rules, WAC 197-11-782 as follows:

“probable” means likely or reasonably likely to occur, as in “a reasonable probability of more than a moderate effect on the quality of the environment” (see WAC 197-11-794).

Probable is used to distinguish likely impacts from those that merely have a possibility of occurring, but are remote or speculative. This is not meant as a strict statistical probability test.

Significant is defined in the SEPA rules, WAC 197-11-794 as follows:

“significant” as used in SEPA means a reasonable likelihood of a more than moderate adverse impact on environmental quality.

Appeals on SEPA procedures are limited to a Final Threshold Determination or a final EIS. WAC 197-11-680 (3)(iii).

The Threshold Determination made by the responsible official under SEPA is entitled to substantial weight. WAC 197-11-680 (3)(viii).

Based on these requirements, under the SEPA rules an adverse environmental impact must be both “significant” and “probable” before it is subject to mitigation measures under SEPA’s substantive authority for the requirement of an Environmental Impact Statement.

In order for the Hearing Examiner to overturn a threshold determination issued by the responsible official, the Hearing Examiner must find that there is clear cogent and convincing evidence (this is giving significant weight to the determination of the responsible official) that an error has been made and that there are both adverse impacts which are likely and which would have more than a moderate impact on the environment which have not been adequately addressed by mitigation required by the responsible official.

In this case C.A.R.E. has shown that there are possible adverse impacts that may not have been mitigated completely. However C.A.R.E. has not provided clear, cogent and convincing evidence of the existence of adverse impacts which are both likely and significant.

IV.

The Hearing Examiner concludes, giving substantial weight to the determination of the responsible official, that the appellants have failed to establish that the large offsite drainfield in question is likely to result in more than a moderate adverse impact on environmental quality.

The Hearing Examiner should uphold the Mitigated Determination of Non-significance with the exception of one minor chance recommended by the responsible official on page 10 of the attached staff report.

V.

Any Finding of Fact deemed to be a Conclusion of Law is hereby adopted as such. Based on the foregoing Findings of Fact and Conclusions of Law, now is entered the following:

DECISION

The threshold determination of the responsible official in reference to the Clearing and Grading Permit 004/07 is upheld and the appeals are denied.

Paragraph g. of the mitigation conditions place on the permit by the responsible official is hereby modified to read as follows:

g. If the water quality monitoring program conclusively identifies that the LOSS is the cause of a water quality impairment or exceedance, the managing entity of the LOSS shall reimburse the county any expenses associated with the identification of the problem, in additions to any other penalties or fees that may be incurred.

Entered this 10th day of July, 2007, pursuant to authority granted under the laws of the State of Washington and Island County.

MICHAEL BOBBINK
Island County Hearing Examiner

APPEAL PROCESS:

APP (Administrative Decision)

Appeal Process: This land use decision is a final determination which may be appealed by filing a land use petition in Island County Superior Court within twenty-one (21) days of its issuance. Specific requirements for the petitions contents, time and service of process, and payment of the cost of the transcription of the record of the hearing may be found in Chapter 70C of Title 36 RCW