



Was the City of Sequim's decision to affirm the responsible official's Mitigated Determination of Nonsignificance (MDNS) for the Sequim Village Marketplace project clearly erroneous?

ANALYSIS:

The MDNS process has its roots in the case of *Hayden v. City of Port Townsend*, 93 Wn 2d 870 (1980), where the Washington Supreme Court upheld a Determination of Nonsignificance (DNS) issued after officials and project proponents worked together to remedy environmental deficiencies in the proposed plan. Four years after *Hayden* the MDNS process was incorporated into the SEPA rules with the promulgation of WAC 197-11-350. The MDNS was approved by the Legislature in order to encourage agencies and applicants to work together to reduce the impacts of a project below the threshold level of significance. The Washington Department of Ecology (DOE) has favorably characterized the MDNS process as "conducive to efficient, cooperative reduction or avoidance of adverse environmental impacts." *Anderson v. Pierce County*, 86 Wn.App. 290, 304 (1997). Use of mitigation to bring projects into compliance with SEPA (i.e. the MDNS process) has been viewed favorably by the Washington courts. *Moss v. City of Bellingham*, 109 Wn.App. 6, 21 (2001); *Anderson, supra* at 303.

“Therefore, to the extent that *Norway Hill* can be read to mandate an EIS for every large subdivision, regardless of

attempts to mitigate the impact prior to permitting, it is no longer good law.” *Moss, supra* at 21.

A decision to issue an MDNS is reviewed by the Court under the “clearly erroneous” standard. A MDNS finding is “clearly erroneous when, although there is evidence to support it, the reviewing court on the record is left with the definite and firm conviction that a mistake has been committed.” *Wenatchee Sportsmen v. Chelan County*, 141 Wn.2d 169, 176 (2000); *Anderson, supra* at 302. For the MDNS to survive judicial scrutiny, the record must demonstrate that “environmental factors were considered in a manner sufficient to amount to prima facie compliance with the procedural requirements of SEPA” and that the decision to issue an MDNS was “based on information sufficient to evaluate the proposal’s environmental impact.” *Wenatchee Sportsmen, supra*, at 176; *Anderson, supra* at 302. The mitigation measures imposed must be reasonable and capable of being accomplished. *Anderson, supra* at 302. An agency’s decision to issue an MDNS and not to require an EIS must be accorded substantial weight. *Anderson, supra* at 302; RCW 43.21C.090. Under the State of Washington’s Land Use Protection Act (LUPA) a Court reviews a decision to issue an MDNS under any one of the six standards set forth in RCW 36.70C.130(1). *Wenatchee Sportsmen, supra*, at 176.

Significant to the Court’s analysis are the policy changes reflected in the “Integration Act” of 1995. According to Professor Richard L. Settle in his work entitled “The Washington

State Environmental Policy Act: A Legal and Policy Analysis”, (1995), the Integration Act seeks to avoid duplicity in the environmental process by assigning SEPA a secondary role to:

“(1) more comprehensive environmental analysis in plans and their programmatic environmental impact statements and (2) systematic mitigation of adverse environmental impacts through local development regulations and other local, state and federal environmental laws.”

In essence, RCW 43.21C.240 as implemented by WAC 197-11-158, substantially streamlines the “threshold” determination process for cities and counties planning under the Growth Management Act (GMA) by authorizing the SEPA official to rely on existing plans, laws and regulations that meet the SEPA requirements. *Moss, supra*, at 16. WAC 197-11-158 reads in part as follows:

“(1) In reviewing the environmental impacts of a project and making a threshold determination, a GMA county/city may, at its option, determine that the requirements for environmental analysis, protection and mitigation measures in the GMA county/city’s development regulations and comprehensive plan adopted under Chapter 36.70A RCW, and in other applicable local, state, or federal laws or rules, provide adequate analysis of and mitigation for some or all of the specific adverse environmental impacts of the project.”

The provisions of WAC 197-11-158 create a process whereby SEPA officials are authorized to rely as much as possible on existing plans, rules and regulations, and to fill in the gaps where needed by imposing mitigation measures. *Moss, supra* at 22. The SEPA rules

provide that if in the course of formulating an MDNS the lead agency determines that a proposal continues to have a probable significant adverse impact, even with mitigation measures, an EIS shall be prepared. If an MDNS is issued and an appealing party proves that the project will still produce significant adverse environmental impacts, then the MDNS decision must be held to be “clearly erroneous.” *Anderson, supra* at 304. WAC 197-11-350 requires an EIS where a proposal continues to have a significant adverse environmental impact, even with mitigation measures. *Moss, supra*, at 25,29. However, SEPA does not demand a particular substantive result. It only ensures appropriate consideration of environmental issues.

“Contrary to popular belief, ‘SEPA does not demand a particular substantive result in government decision making’; rather, it ensures that environmental values are given appropriate consideration.” *Moss, supra*, at 14.

With respect to the present project the Court must determine whether there are any facts in the record indicating that the MDNS was “clearly erroneous.” Being the largest project of its kind ever proposed in Clallam County, the plans have received a great deal of review. The City gathered extensive comments from professional groups, agencies, and the public and held numerous public meetings. The City concluded that “the responsible official was not clearly erroneous in determining that the proposed project, as conditioned, would result in no more than a moderate effect on the quality of the environment” and that an EIS is

not required. (Par. 15). The MDNS was affirmed by the City Council with the addition of certain specific mitigating conditions. Sequim First has raised several issues on appeal which are addressed below

#### 1. RUNOFF/WATER QUALITY.

With a project of the present size, storm water runoff presents a significant issue. To quote Bob Martin, then Director of Community Development for Clallam County, in his testimony before the City Council on June 25, 2003:

“This is more storm water being collected and discharged at a given location than I think we have conceivably ever seen in this county in any project before. It’s very, very significant.  
(Page 61)

Respondent AVB Development Partners (AVB) has designed a system whereby storm water will be collected in four separate catch basins, each with its own sediment trap and each with its own independent biofiltration swale facility. The water will be conveyed to these swales through water tight piping to oil/water separators designed to remove hydrocarbon products. The proposed system was described by Mr. Martin as adequate and by Dave Lasorsa, Environmental Planner for Clallam County, as professionally done. (letter of July 10, 2003).

The reports submitted to the City Council, including the County's assessment, confirmed that the storm water system as designed by AVB will be adequate to handle the quantity of runoff anticipated for the project even under severe weather conditions.

“They are within a comfort range that would allow me to say that I think the system as designed is capable of handling the flow . . . I'm confident that hydraulically . . . the storm water system can accommodate that flow.” Bob Martin, June 25, 2003 at p 60.

Sequim First does not appear to debate this fact. Instead, its focus is on the potential pollutants contained in the runoff. Both the county and tribe also addressed the same concern.

The present project is located within a Critical Aquifer Recharge Area. The soil is particularly porous causing surface waters to infiltrate quickly into the underground aquifer. As a result, absorption of contaminants into the soil will be minimal, causing concern by appellants for pollution of the rather shallow underground aquifer which in turn could cause serious damage to underground wells lying north of the project and to nearby irrigation ditches and to the Dungeness River.<sup>1</sup>

“. . . The groundwater in this area is so vulnerable because of the permeability of the soils.” Bob Martin, June 25, 2003 at p 61-26.

AVB argues that it has complied with the 1992 DOE manual with regard to storm water runoff of this nature and there is nothing to suggest that its project will be anything but

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<sup>1</sup> The hydrogeologic studies contained in the record reasonably establish that surface and ground waters flow to the North Northeast away from the Dungeness River and at an elevation that should not affect the nearby irrigation ditches.

typical. The county's environmental planner observes however, "...this is not the typical site" because of its designation as a Critical Aquifer Recharge Area. Mr. Lasorsa does concede, however, that the system as designed "will result in some removal of the contaminants we are concerned about." (Lasorsa letter of July 10, 2003). The tribe's expert, Robert Montgomery, expressed concern as well that the pollutant removal efficiency of the proposed project is unknown and that further analysis is essential. On the other hand, AVB's project engineer, Jim Towslee, claims that the system as designed will alleviate potential harm to ground and surface water resources.

The City's findings as set forth in the August 11, 2003 Decision describe the City's analysis of the storm water issue. The analysis, which appears thorough, concludes that both the 1992 and 2001 DOE manuals recognize that effective treatment of storm water pollutants by biofiltration swales and compliance with the manual is a "reasonably effective means for the City to ensure compliance with the State's antidegradation policy." (Findings par. 36). At the same time, however, the City recognized the potential for impact on groundwater quality and thereby required the inclusion of a condition to the MDNS imposing a monitoring system to test the degree of contaminants reaching the ground water aquifer.

"Monitoring of discharges to groundwater from the infiltration facilities will provide further assurance that water quality will not be noticeably impacted by the proposed project." (Findings par 39).

This finding is consistent with the County's analysis:

“So what we are saying is that we would find this design acceptable if it were very, very closely monitored and very well conditioned to ensure that if it’s not working as hoped, that it will be corrected expeditiously.” Bob Martin, June 25, 2003 at p 62.

After reviewing the entire record the Court is not left with the “definite and firm conviction” that the City committed a mistake in approving the storm water system as conditioned. The City considered all of the relevant environmental factors and based its decision on information sufficient to evaluate the system’s environmental impact. However, the condition for monitoring the system does not appear adequate in its current form to accomplish the task for which it was designed. The apparent purpose behind the monitoring wells is to assure a prompt fix should harmful contaminants actually be found after the runoff has traveled through the project’s storm water system. The City’s Decision sets out the following criteria for the monitoring wells:

“c. The Applicant shall provide two shallow monitoring wells up-gradient and two shallow wells down-gradient to be located and at depths to be determined and approved by the Planning Director and the Director of Public Works of the City of Sequim and allow other storm water monitoring. The Public Works Director also shall approve the monitoring schedule. The Applicant shall submit the results of the monitoring promptly to the public works department and comply with applicable local, state and federal regulations.”

Noticeably absent from the above condition is any remedial language should contaminants be found. What happens in such an event? Who fixes the problem and under

what time frame? How will the remedy be designed? In addition, what level of contaminants will trigger the remedial action; i.e. what is “significant” in terms of the contaminant level? Upon what criteria is the “monitoring schedule” based? Upon what criteria has the City chosen “monitoring wells” as opposed to “sampling ports” which were proposed by the County as a more effective system?

The City believes a monitoring system is a necessary condition to the project. Having so found, it is incumbent upon the City to properly address the issues relative to a monitoring system. In his letter of July 10, 2003, Dave Lasorsa suggested that an experienced, independent laboratory be hired to devise a monitoring plan and conduct an analysis. Regardless, the City needs to address the issue and base the required monitoring system on solid, professional analysis. It further must address the “remedy” issue should “significant” contaminants be found.

In addition, it is not clear from the record whether AVB has committed to installing an API-type oil/water separator. Based upon the record, this method is clearly the best available. It should be made a condition of approval.

## 2. TRAFFIC:

The project at issue will, without question, have an impact on the surrounding road system. The degree of that impact was the subject of debate before the City Council. The

MDNS requires AVB to construct certain road improvements as recommended in the various reports. The record supports the need for these improvements.

At issue on appeal is the potential impact to the nearby county roads of Kendall, Hendrickson and Priest. The daily traffic on Priest Road is predicted to almost double as a result of this project alone (i.e. from 1840 cars per day to 3550 per day). According to Don McInnes, county engineer, the County has determined that Kendall, Priest and Hendrickson Roads are “nearing their practical capacity now” without considering the traffic anticipated from the current project. (McInnes letter of July 10, 2003).

“If the roads were to be rebuilt today, it appears a 34-foot wide standard would be called for. After the development is built, a 40-foot standard would be called for. The degree of impact to the roads raises the county into a higher standard. If we are unable to build to these standards due to inability to acquire needed right of way or due to lack of funding, a lesser width may be necessary. But the fact remains that the development increases the need for width in the roadbed to provide for pedestrians, bicycles, and motorists as discussed in previous correspondence. The level of service, mobility and safety that our taxpayers currently enjoy should not be allowed to degrade for the benefit of specific developers by taking away current capacity in the road (if there is any, realistically).” (McInnes letter of July 10, 2003).

The County also points to the accident rate on the three roads mentioned above.

According to Mr. McInnes the accident rate on these roads is well above the county average.

According to the County a doubling of the traffic over these roads will logically increase the

accident rate. “As density (traffic) increases even further the accident rate rises. We want to mitigate the effects of the proposed increase in traffic density.” (McInnes letter of July 10, 2003).

“They’ve tried to make that a capacity issue. There’s still a lot of capacity, and you can crowd more cars in that road so it is not an impact. We would say that that’s not true. We presented credible information from Don McInnes, our road engineer, that there is an accident record on these roads that is generally higher than the average through out the County. In other words, these roads experience higher accident rates at their present traffic levels than the average for the County. If you double that, that accident rate is going to go up, and it’s going to go up substantially, is what our belief is, and that the need for mitigating that impact with some road improvements that would provide some widening and so forth.

The question is not, you know, can we move these cars on the road? Yeh, we can. We can get them across. It’ll be a little more crowded. The question is, is the traffic going to increase? Essentially it’s going to double. We appear to be in agreement on that. So the question is, is that doubling going to - - what impact is that doubling going to be - - going to cause? Well, its certainly going to cause an increase to traffic - - or increased accident rates beyond what we have already found to be unacceptable in the area. And so the next question is, what in this proposal mitigates that? Well, presently nothing. We think there does need to be some road mitigation put into the impact on the county roads.” Bob Martin, June 25, 2003 at p 224-225.

Studies prepared on behalf of AVB insist that the level of service on the county system will not be seriously affected by the increase in traffic, i.e. that the roads have sufficient capacity to handle the increased loads. The City accepted these studies by finding that the

“the County roads in question would continue to have accepted levels of service and excess capacity in the future, with this project as well as other anticipated growth.” (par. 48). It is interesting to the Court that despite this finding, the Mayor asked AVB for a voluntary contribution of \$100,000 “to help defray the cost of road improvements.” (Decision, par 1d) Yet in its findings the City states that this contribution “was not required to satisfy any mitigation obligation.” (par. 49). At the July 28, 2003 hearing Mayor Schubert chastised the county for failing to improve its own road system in the area and yet, at the same time, voiced quandary over the road impact issue:

“I think we need an independent study done to try to define what the impacts would be.” (July 28, 2003 Hearing, page 43).

It is true that a developer cannot be required to bring an already substandard road to standard. The developer can be requested, however, to mitigate the impacts created by his development. *Cobb v. Snohomish County*, 64 Wn. 451 (1992).

By conditioning the MDNS approval on the \$100,000 contribution to “defray costs of road improvement” the City has implicitly recognized the traffic impact. Otherwise, it would be improper to have the developer mitigate for an impact that does not exist. Couching the condition in terms of a “voluntary contribution” does not negate the fact that this “voluntary contribution” was made a condition of the MDNS approval; a condition which the developer must satisfy in order to proceed.

Further, the Court is troubled by the haphazard way in which the condition was imposed. First, the mitigation amount was not based on any concrete criteria and appears totally speculative. On what basis was \$100,000 figure determined? On the record there does not appear to be one. Second, the method used by the City to request the mitigation reflects a clear indecision on the City's part over the issue of these offsite road impacts. To find, on the one hand, that there are no impacts to the county roads and then, on the other hand, to ask for a \$100,000 contribution to defray costs of future improvements appears a bit incongruous.

After reviewing the record the Court finds no mistake in the City's decision not to require an EIS with regard to traffic impacts. However, to the extent that the City found no impact to the county roadways of Priest, Hendrickson and Kendall, the Court finds error. The facts clearly show an impact as a result of the development; an impact that the developer needs to mitigate and an impact the City clearly anticipated in its Decision. Consequently, the mitigation must be based upon a reasonable analysis that supports its terms, possibly an agreed analysis performed by the major players, i.e. AVB, the City and the County. Furthermore, there needs to be a mechanism outlined for distribution of mitigation funds when improvements are in fact initiated by the County. It is the impact on the County, not the City, that is the issue here. As stated, an EIS is not necessary to accomplish the tasks required.

Sequim First also argues that an EIS is needed to assess the traffic impact through the downtown area east of the project. In this regard the appellant has not shown that the proposed project's impact on Washington Street will be significant such as to warrant a full EIS. There was simply not enough evidence in the record to warrant a finding that a project of this size on the west end of town would significantly affect the level of traffic on the east. This is especially true when the main points of access will be off of the 101 bypass at River Road and over the three county roads discussed above. While minds may differ on this point, the record shows a thorough review by the City of information sufficient to allow a full evaluation of the issue.

### 3. EMERGENCY SERVICES:

Sequim First further argues that an EIS is required to deal with significant impacts to emergency services, water supply and other municipal services. The Court finds no evidence in the record that the impact of the project in these areas is extraordinary or significant. It is true that the project will add additional areas of responsibility to police and other municipal services. However, the record does not support a finding that this additional strain cannot be adequately addressed in the normal course of city growth.

### 4. DOWNTOWN CORE:

It is understandable to the Court that concern would arise over the downtown core, which lies approximately one mile to the east of the proposed development. However, so long as the City Council considered the issue, the Court has no power to intervene unless the Court finds that the City's decision was clearly erroneous. Here, the record reflects a reasonable analysis by the City Council. It considered the pros and cons and concluded that the present project is not inconsistent with a vital downtown core and is not inconsistent with the City's comprehensive plan. The City's analysis is clearly shown on page 68 of the Findings:

“Opponents of the project claim the new retail center will be inconsistent with the comprehensive plan policies that support existing businesses and the City's downtown area. The proposed project may have a negative effect on some existing businesses. Others will benefit from the increase in customers attracted to the broader range of retail opportunities that will be available locally, keeping Sequim area residents from traveling to other locales to shop. Competition in the retail sector benefits the consumer and those businesses that are willing to service the consumers needs will thrive. The Comprehensive Plan is a dynamic document; it does not promote one sector of the economy to the exclusion of another. The City's desire to maintain a healthy downtown should not be construed as prohibition on development that competes with downtown. Rather, the Comprehensive Plan seeks to further the City's role as a regional commercial center. New businesses are welcome in Sequim.”

SEPA does not dictate a “no growth” result. In fact, it anticipates growth. What SEPA demands is a thorough and thoughtful review of the possible environmental harms from

that growth. Clearly, growth can cause pain and a restructuring of the community. So long as it is properly reviewed and considered, however, the future path of the community is left to its elected officials. It is not the Court's province to impose its own views on a community.

5. REZONE NOTICE:

Sequim First further argues that the City failed to give adequate notice of the hearing, i.e. the hearing notice should have labeled AVB's application as a "rezone" request. It is alleged that the notice failed to adequately inform those affected of the nature and purpose of the proceeding. The title of the notice for the June 25, 2003 hearing read as follows:

Notice of Consolidated  
Public Hearing  
City of Sequim: Binding Site Plan w/ C-IV  
Overlay (BSPO3/001)

The body of the notice also refers to the applicants request for "binding site plan approval with a C-IV overlay pursuant to City of Sequim Comprehensive Plan Land Use Policy (LUP 8.2.4).

It is the Court's finding that the notice in question adequately informed the public of the nature and character of the proceedings. Clear reference is made to the overlay process as outlined in the City Land Use Plan. Therefore, inclusion of the word "rezone" was not necessary for an adequate notice. In addition, the record does not reflect prejudice to anyone who participated in the hearing. All sides were well aware of the issues and were all well

prepared. In fact, an opportunity was given to the parties to further address any issues raised at the hearing through additional submittals.

CONCLUSION:

In conclusion, the Court finds that the MDNS process was appropriately followed by the City of Sequim in bringing the Marketplace project into compliance with SEPA. The mitigation measures imposed are reasonable and capable of being accomplished. However, as outlined herein, further clarification of a select few of these mitigation measures is necessary to ensure they accomplish the purpose for which they were imposed. According to RCW 36.70C.140 of the Land Use Petition Act the Court may remand a land use decision for “modification or further proceedings.” In accordance with the findings set forth herein, the Court will remand the land use decision under consideration for resolution of the following issues:

- (1) For a more complete analysis of the storm water monitoring system and a more detailed formulation of the terms of said mitigation measure.
- (2) For inclusion of a mitigating condition requiring the developer to use an API- type oil/water separator.
- (3) For a more complete analysis of the traffic impact to Priest, Kendall and Hendrickson Roads caused by the Marketplace Project so that the mitigation amount finds its basis in fact, not speculation. And for formulation of the terms by which the mitigation monies will be distributed to the County for resolution of those impacts.

The issues on remand may be resolved independent of Court review. However, the Court will retain jurisdiction should resolution require further judicial involvement, thus avoiding a lengthy appeal process which would cause undue delay and cost to all parties to the proceedings.

The Court will enter a final judgment upon presentation duly noted.

DATED this \_\_\_\_\_ day of \_\_\_\_\_, 2004.

GEORGE L. WOOD  
J U D G E