

**BEFORE THE LAND USE HEARING EXAMINER
FOR SKAMANIA COUNTY, WASHINGTON**

Regarding an application by Art Malfait for) **FINAL ORDER**
preliminary plat approval to divide 38.85-acres into)
five lots in the WE-RL5 zone at 302 Hillsberry Road) **SUB-17-02**
in unincorporated Skamania County, Washington) **(Hillsberry Road Subdivision)**

A. SUMMARY

1. Art Malfait, requests approval to divide a 38.85-acre parcel into five lots at 302 Hillsberry Road; also known as, Tax Parcel 02-05-35-0-0-1000-00 (the “site”). The site and abutting properties are zoned WE-RL5 (West End Rural Lands, 5-acre minimum lot size).

a. The site is currently developed with a single-family residence and accessory buildings. The applicant proposed to retain the existing structures on proposed Lot 1, which is 18.85-acres in size. A new single-family detached dwelling will be built on each of the remaining proposed five-acre lots. All proposed lots comply with the minimum dimensional standards for the WE-RL5 zone.

b. The existing and proposed homes will utilize individual on-site water wells for potable water and individual on-site septic systems for sewage disposal. The applicant will improve and extend the existing driveway on the site as a new private street to provide access to the proposed lots from Hillsberry Road. In addition, the applicant will construct vehicle two new vehicle turnouts on Hillsberry Road, located roughly 500 and 1,000 feet from the intersection of Mabee Mines Road. The applicant will collect stormwater runoff from the roadway improvements and treat and discharge it consistent with County regulations.

c. There are two streams on the site: Canyon Creek adjacent to the parcel’s southeastern boundary and a seasonal drainage ditch which runs along the existing driveway/proposed on-site private road.

2. The County issued a Mitigated Determination of Nonsignificance (“MDNS”) for the subdivision pursuant to the State Environmental Policy Act (“SEPA”) on December 13, 2017. The SEPA determination was not appealed and is now final.

3. Skamania County Hearing Examiner Joe Turner (the “examiner”) conducted a public hearing to receive testimony and evidence about the application. County staff recommended that the examiner approve the preliminary plat subject to conditions. See the Staff Report and Recommendation to the Hearing examiner dated February 14, 2018 (the “Staff Report”). The applicant accepted those findings and conditions, with certain exceptions. One person testified orally with objections to the proposed Hillsberry Road improvements. Contested issues in the case include:

- a. Whether the applicant should be required to widen Hillsberry Road to current County standards;
 - b. Whether the examiner can consider the applicant's equitable claims regarding improvements to the on-site road; and
 - c. Whether, and to what extent, the applicant can be required to widen the on-site private road.
4. Based on the findings provided or incorporated herein, the examiner approves the application subject to the conditions at the end of this final order.

B. HEARING AND RECORD

1. The examiner received testimony at a duly noticed public hearing about this application on February 26, 2018. That testimony and evidence, including an audio recording of the public hearing and the case file maintained by the Community Development Department, are included herein as Attachments. A list of the attachments is attached to and incorporated into this final order. The attachments are filed at the County. The following is a summary by the examiner of selected testimony and evidence offered at the hearing.

2. County planner Andrew Lembrick summarized the Staff Report.
 - a. He requested the examiner adopt the following amendments to the Staff Report:
 - i. The proposed Category 3 private road will provide access to Lots 2 through 5. Paragraph C on p. 9 should be amended to that effect.
 - ii. Condition 23 should be amended to provide, "Condition of the private roads may affect subsequent attempts to sell or divide your lot or lots.
 - iii. Condition 1 should be deleted, as it repeats condition 35.
3. County planner Alan Peters noted that condition of approval 7 should refer to "the below requirements for private wells..."
4. Attorney Albert Schlotfeldt and engineers Seth Halling and Dave Westen testified on behalf of the applicant.
 - a. Mr. Schlotfeldt summarized his written testimony, Exhibit H.
 - i. He requested the improvements for Hillsberry Road and the on-site private road be limited to those that were agreed upon at the pre-application conference as outlined in Attachment A of Exhibit H. The proposed development is only adding four additional homes on Hillsberry Road. At the pre-app conference, the County

agreed that the applicant would not be required to improve Hillsberry Road and the on-site private road would be limited to a 22-foot gravel surface within a 40-foot easement or a 12-foot gravel surface, if the applicant provides two pullouts and a turnaround at the end of the street. Now the County is requiring the applicant provide pullouts on Hillsberry Road and widen the on-site road to 22 feet. The applicant relied on the statements at the pre-application conference when he closed on the purchase of the property and the pre-app conference created a “special relationship” between the applicant and the County.

ii. As shown in Attachment C of Exhibit H, there is a stream adjacent to the on-site roadway, which will make it difficult to widen the road, as well as increasing the cost as outlined in Attachments E and F of Exhibit H.

iii. He requested the examiner modify condition 28 as outlined in Attachment F of Exhibit H.

b. Mr. Halling testified that widening the on-site private road will impact the adjacent stream as well as require significant grading and tree removal. Retaining the existing road and stream crossing would avoid impacts to the stream and buffer. The existing improvements are adequate to accommodate the additional traffic from this development. The applicant withdrew his objections to the on-site road improvements, provided the applicant can request a variance during final engineering review.

i. The applicant did not object to providing turnouts on Hillsberry Road. The applicant will construct the turnouts near the existing driveways, which will allow provide a wider area for residents to pull onto the road and see if any oncoming vehicles are approaching. The existing topography adjacent to the road makes it very difficult and expensive to widen the entire road to County standards.

c. Mr. Westen requested County staff describe exactly what road improvements the County will require.

5. County engineer Tim Homann agreed that County staff and the applicant discussed reduced improvements for the on-site private road. The improvements noted in the Staff Report are from the County’s private road standards manual, which recommends improvements for various road categories. Roads serving between four and ten parcels are Category 3 roads, which require a 22-foot driving surface within a 40-foot easement. The proposed on-site private road will only serve between four and ten lots until it reaches Lot 4 at the southeast corner of Lot 5. The County will consider a request for variance to the Category 3 road standards due to the location of the stream and the topography of the site. Such a variance request is subject to review by the County engineer, with opportunities to appeal to the examiner.

a. Hillsberry Road provides the only access to the site, as well as several other parcels. This road is currently a single-lane County road. He was unaware of the condition of this road at the pre-app conference and he did not recall that issue being discussed. The County could have required the applicant to widen this road to 22 feet to accommodate two-way traffic and emergency vehicles. However the cost of improving

the entire 1,500-foot section of public road leading to the site would likely be disproportionate to the impact of the proposed development. Therefore the County required the applicant provide two pullouts, which will allow opposing vehicles to pull over and pass each other. This improvement is adequate to accommodate the expected traffic volumes on this road.

6. Michael Parker argued that the applicant should be required to widen Hillsberry Road between the site and Mabee Mines Road. Hillsberry Road is currently a 1,500-foot long single-lane public road. If two vehicles approach from opposite directions one vehicle must back up a significant distance to allow the other vehicle to pass. This creates a hazard. The road, located between 1200 and 1500 feet in elevation, is frequently covered in snow in the winter, making it even more difficult to back up. This development will add additional traffic to the road, increasing the hazard. The proposed turnouts are not adequate to make this road safe. Proposed Lot 1 could be further divided into three lots as well as other existing parcels that are served by Hillsberry Road. Such land divisions would generate even more traffic on this road, contributing to the existing hazard.

7. The examiner closed the record at the end of the hearing and took the matter under advisement.

C. FINDINGS:

1. County staff recommended approval of the application, based on affirmative findings and subject to conditions of approval in the Staff Report, as modified at the hearing. The applicant accepted those findings and conditions, as amended, with certain exceptions.

2. The examiner concludes that the Staff Report identifies the applicable approval standards in the Skamania County Code (“SCC”) for the application and contains affirmative findings showing that the proposal does or can comply with those standards, provided that the applicant complies with the recommended conditions of approval, as amended. The examiner adopts the affirmative findings in the Staff Report as his own, except to the extent they are inconsistent with the following findings.

3. The examiner finds that the applicant cannot be required to improve Hillsberry Road to current County standards. Hillsberry Road is currently a single-lane roadway serving multiple homes. When vehicles traveling in opposing directions on this road meet, one vehicle must back up to allow the other to pass. This is an existing issue. The proposed development will generate additional traffic on this road, which will increase the potential for conflicting traffic. However applicants are not required to remedy all existing and perceived deficiencies in the area. The Code requires an applicant to mitigate impacts a development causes or to which it contributes significantly. It would be inequitable to require an applicant to bear the full burden of improvements where the proposed development is only responsible for a portion of the problem.

a. The applicant will improve the existing condition, providing vehicle turnouts at approximately 500 and 1000 feet from the intersection of Mabee Mines Road. Although this development will not eliminate vehicle conflicts, the turnouts will significantly reduce the distance vehicles must back up in order to allow an oncoming vehicle to pass, reducing the hazard created by this existing one-lane public road.

b. The applicant cannot be required to improve the full length of this road, because it would constitute an unconstitutional taking without compensation, based on the U.S. Supreme Court's decision in *Dolan v. City of Tigard*, 114 S. Ct. 2309, 129 L. Ed. 2d. 304 (1994). The *Dolan* case allows the County to impose an exaction as a condition of approval only if the cost of the exaction is roughly proportional to the impact of the development based on an individualized determination. The County has the burden of proof to show a condition complies with these requirements. An exaction imposed by a condition of approval may be an uncompensated taking of private property in violation of the 5th Amendment to the US Constitution in the absence of such a showing. The proposed development will only create four new homes on this road. Requiring the applicant to improve the entire 1500-foot length of this road would exceed the roughly proportional impacts of this development on this roadway.

c. The applicant is not required to mitigate for potential future development. The County can require additional proportional road improvements when and if additional development is proposed in the future with access to Hillsberry Road.

4. The examiner has no authority to address the applicant's equitable claims. The examiner has no equitable jurisdiction. The examiner's decision must be based on the plain meaning of the words in the Code and applicable state law. In addition, the applicant has not exhausted its remedies. The applicant can request a variance to the County's private road standards during the final engineering review. Given the topography on the site and the location of the stream near the road, the County is likely to allow some variation from the County's private road standards for this on-site roadway.

D. CONCLUSION

Based on the findings and discussion provided or incorporated herein, the examiner concludes that File No. SUB-17-02 (Hillsberry Road Subdivision) should be approved, because the application does or can comply with applicable standards of the SCC, provided it is subject to conditions that ensure timely compliance in fact with the Code.

E. DECISION

The Hearing Examiner APPROVES File No. SUB-17-02 (Hillsberry Road Subdivision) subject to the following conditions of approval:

Conditions of Approval

- 1. The unmapped Class V stream shall be depicted on the final plat. The existing culvert within the unmapped stream shall be allowed to increase 100% (10.5 feet) per SCC 21A.04.020.C.2 to allow for a 21-foot wide road approved per the county Engineer. The developed road shall be required to maintain the no touch buffer of 25 feet from the existing unmapped Class V stream ordinary high-water mark. The redesigned road shall be depicted on the subdivision plat as designed by a Washington State Licensed Engineer and approved by the county Engineer prior to final approval.**
- 2. Prior to any land clearing for roads, driveways, and residential building sites, the applicant shall contact Washington State Department of Natural Resources to determine if a Forest Practice Permit is required.**
- 3. The applicant shall have their Stormwater Engineer develop the Stormwater Management Plan to include the following: Any required Stormwater Management Report for the subdivision shall be reviewed and approved by the County Engineer. Any stormwater features necessary for the general property or access roads shall be part of the engineered plans for the subdivision and must be completed prior to submittal and approval of the final subdivision plat map. Any individual storm systems on the individual lots can be included with the individual lot building permit activities. Infrastructure as recommended or required in the approved Stormwater Management Plan shall be constructed prior to the recording of the final plat.**
- 4. The applicant shall complete the Land Division Septic prior to the recording of the final plat.**
- 5. The applicant shall complete the soil and site evaluations and show the locations of soil test pits on the final Hillsberry Road Subdivision final plat prior to recording.**
- 6. The applicant shall meet the below requirements for private wells in each lot prior to submitting the final plat for review and approval. Skamania County Subdivision Code stipulates that all proposed lots have an adequate water supply.**
 - a. The applicant shall be required to complete the Land Division Water Availability Review application prior to recording of the subdivision final mylar. The applicant has proposed four individual wells to serve Proposed Lots 2 - 5. Proposed Lot 1 has an existing home and connection to potable water.**
 - b. The wells are required to be drilled and tested prior to recording of the final mylar. Each lot shall be configured to allow a 100-foot radius sanitary control area (SCA), which shall be shown for each well on the plat map.**
 - c. Where the 100-foot radius extends onto an adjacent lot within the subdivision, a protective covenant shall be established ensuring protection of the SCA. The four wells need to be shown on the plat map once drilled.**

16. The applicant shall contact Skamania County Treasurer to ensure that all taxes and delinquent assessments for the subject parcel have been satisfied prior to the submittal of the final plat for recording.
17. The applicant shall ensure all requirements listed in the County Engineer's comments are completed prior to submitting the final plat for recording.
18. The final plat map shall include the locations of the soil test pits and any notes required by the Environmental Health Specialist on the private wells and onsite soil evaluations for the proposed onsite septic systems prior to submitting for final approval.
19. Future requirements by the Environmental Health Specialist upon the completion of the proposed new private exempt wells and the onsite septic system site and soil evaluations shall not be considered modified and are subject to new conditions of approval.
20. The applicants' surveyor shall include the requirements of Section 17.28.100 "A" through "M" on Map Standards on final subdivision drawing along with lot closure sheets prior to submitting the final plat map for review and approval.
21. The following note warning potential buyers of the private road(s) shall be shown on the final plat map prior to submittal for review and approval.

Warning

Purchasers of a lot or lots in this plat are advised to consult Skamania County Private Road Standards to ensure that private roads including driveways and shared driveways are constructed to the required standards of Skamania County. Lot owners within this plat are responsible for the maintenance of the private road(s) servicing this plat, including but not limited to grading, drainage, snow plowing, etc. Condition of the private roads may affect subsequent attempts to sell or divide your lot or lots. Skamania County does not maintain private roads.

22. The applicant shall follow Skamania County Public Utility District #1 guidelines for utility installation.
23. Any stormwater easements required or recommended by the **approved** Stormwater Management Plan shall be shown on the final plat prior to submitting for review and approval.
24. Proposed lots 2 through 5 shall be provided with potable water hook-ups. Lot 1 with the existing house will require a new water supply for use and a potable water hook-up will be required.
25. The applicant shall consult with the County Engineer and Fire Marshal to ensure:

- a. The construction of the private road(s) meets the requirements of the Private Road Standards, or as modified by an approved variance, and provides sufficient access for emergency vehicles; and
 - b. The mid-way point passing turnouts on Hillsberry Road at approximately the 500' and 1,000' points are adequate to allow opposing traffic, including emergency vehicles, to pass. These turnouts can be accommodated within the existing County Right-of-Way without further easement or right-of-way acquisition.
26. The following is required for approval by the County Engineer prior to submitting the final plat for review and approval
- a. The applicant shall provide a design plan and profile for the private road that is designed by a professional engineer licensed in the State of Washington that is consistent with the Private Road Manual and upgrades to the existing private portion of Hillsberry Road, or as modified by an approved variance.
 - b. The applicant shall provide a design plan and profile for the mid-way point passing turnouts on Hillsberry Road at approximately the 500' and 1,000' points that is designed by a professional engineer licensed in the State of Washington
 - c. The County Engineer shall approve the road plans prior to construction of the private road and turnouts.
 - d. The applicant shall schedule an inspection with the County Engineer to field verify the installation of the private road and turnouts.
27. The applicant shall have their Stormwater Engineer submit a Stormwater Management Plan to include the analysis of the impact for each individual lot and submit for approval prior to submitting the final plat for review and approval.
28. All infrastructure as recommended or required by the approved Stormwater Management Plan shall be constructed, including roadside ditches, prior to the submitting the final plat for review and approval.
29. The applicant shall submit the final plat along with the associated fee to the Community Development Department within 5 years from the date of approval of the preliminary plat, unless a written request for a one-year extension with the Hearing Examiner 30-days prior to the expiration date.
30. The applicant shall submit a final plat map for recording on a reproducible polyester film (Mylar) 18' x 24' or 22' x 32' with a 2-inch margin on the left edge and a ½ inch margin on all other edges.

THE SURVEYOR SHALL COMPLETE THE FOLLOWING CONDITIONS OF APPROVAL.

- 31. The Surveyor shall show bearings and distances of all section, quarter section, and sixteenth section lines relative the survey of this plat and tie from nearest permanent control monument to initial point of the plat.**
- 32. The following note shall be placed on the final plat prior to submitting for review and approval:**

Lots within the Hillsberry Road Subdivision are located within or near a Class II Landslide Hazard Area. A Geological Assessment Report may be required prior to the issuance of building permits.
- 33. The following note shall be placed on the final plat prior to submitting for review and approval**

Lots within the Hillsberry Subdivision lies within a Class II Erosion Hazard Area due to the type of soil and its susceptibility to wind and water erosion. It is the property owners' responsibility to use Best Management Practices to prevent wind and water erosion. It is recommended that native vegetation be planted in all disturbed undeveloped areas.
- 34. The Surveyor shall place the new private road name on the face of the plat prior to submitting for review and approval.**
- 35. The Surveyor shall show all wells and 100-foot well protection areas to assure protection of potable ground water for the new proposed lots.**
- 36. The Surveyor shall include easements for electric and other utilities of sufficient width to assure maintenance and future installations.**
- 37. The Surveyor shall submit an 18' x 24' paper copy or an electronic copy of the final plat map for review and approval, prior to printing on Mylar.**
- 38. The Surveyor shall ensure that all requirements related to the plat map found in the County's Engineer Comments are completed prior to submitting the final map for review and approval.**
- 39. The Surveyor shall remove the signature block for the Local Health Jurisdiction prior to submitting the final plat for review and approval.**
- 40. The Surveyor shall replace the Surveyor's Certificate found on the preliminary plat map with the following on the final plat map prior to submitting for review and approval.**
 - a. I, _____, registered as a professional land surveyor by the State of Washington, certify that this plat is based on an actual survey of the land described herein, conducted by me or under my supervision during the period of _____ 200_, through _____ 200_; that the distances, course, and angles are shown thereon correctly; and the monuments other than those monuments approved for setting at a later date have been set and lot corners staked on the ground as depicted on the plat.**

- 41. The Surveyor shall include the title “DECLARATION” above the owner’s declaration and signature block prior to submitting the final plat for review and approval.**
- 42. Upon approval of the final Stormwater Management Plan, the Surveyor shall include all easements required or recommended by the Approved Stormwater Management Plan on the final plat prior to submitting for review and approval.**
- 43. The Surveyor shall include the following note on the final plat prior to submitting for review and approval.**
 - a. Lots 2 through 5 shall be served by private wells and the well IDs should be identified along with the well locations on the subdivision plat.**
- 44. The Surveyor shall consult with the County Engineer for review and approval of the County Survey Standards set forth in Chapter 17.44 of the Subdivision Code.**

THIS SUBDIVISION IS ALSO SUBJECT TO THE FOLLOWING SEPA CONDITIONS:

The Applicant shall implement the following mitigation measures.

1. Dust suppression techniques are a requirement in order to prevent dust from entering nearby and adjacent residentially used properties at all times until the project is complete. If the dust-suppression technique is the use of water, requirements to ensure that the watering does not cause erosion and offsite discharge of sediment-laden water needs to be followed. Information about dust suppression techniques can be found in Department of Ecology Publication #96-433 “Techniques for Dust Prevention and Suppression”. Any discharge of sediment-laden runoff or other pollutants to waters of the state is in violation of Chapter 90.48, Water Pollution Control, and WAC 173-201A, Water Quality Standards for Surface Waters of the State of Washington, and is subject to enforcement action by the State of Washington.
2. All disturbed undeveloped areas shall be reseeded and landscaped with native vegetation to prevent and reduce wind and water erosion and the propagation of noxious weeds. Mulch shall consist of certified weed free straw or similar product.
3. The subject parcel is located within or near a Class I Erosion Hazard Area due to the soils susceptibility to wind and/or water erosion. Best Management Practices shall be used during all phases of development to prevent erosion.
4. Erosion control measures must be in place prior to any ground disturbance. These control measures must be effective to prevent storm-water runoff from carrying soil and other pollutants into surface water or storm drains that lead to waters of the state. Sand, silt, clay particles, and soil will damage aquatic habitat and are considered by pollutants by Washington State.
5. The applicant shall submit a Clear and Grade Permit, prior to Subdivision Preliminary Approval

6. A Class II Landslide Hazard Area is located within or near the subject parcel. A site specific Geological Assessment Report may be required prior to the issuance of Building Permits.
7. The proposed culvert replacement shall meet the 100-year flood event
8. If the proposed culvert replacement is more than double the size of the existing culvert, a Critical Area Variance Permit is required prior to preliminary plat approval.
9. Washington State Department of Fish and Wildlife may require a Hydrological Project Approval to replace or install culverts in the non-fish stream. The applicant shall meet any requirements by WDFW for stream crossings.
10. The applicant shall submit a Stormwater Management Plan for approval by the County Engineer prior to preliminary subdivision approval.
11. A Stormwater National Pollutant Discharge Elimination System (NPDES) permit is required by Washington State Department of Ecology for any construction activity which disturbs one acre or more and which may result in a discharge of stormwater to surface waters of the state, which includes storm drains, ditches, wetlands, creeks, rivers, lakes and marine waters. The permit requires construction site operators to install and maintain erosion and sediment control measures to prevent soil, nutrients, chemicals and other harmful pollutants from being washed by stormwater runoff into local water bodies. The permit application, called a Notice of Intent, can be obtained by calling Washington State Department of Ecology's Storm-water Request Line at 360-407-6858. The application form is also available online from Ecology's website at <http://www.ecy.wa.gov/programs/wq/stormwater/construction/#Application>
12. Site-specific information will have to be shown to demonstrate adequate on-site sewage systems prior to preliminary Subdivision approval plat and potable water prior to final Subdivision approval.
13. Any improvements to the existing driveway/private road and/or new driveways/private roads shall meet Skamania County private road standards.
14. Cultural Resources: The following procedures shall be effected when cultural resources are discovered during construction activities:
 - a. Halt Construction: All construction activities within 100 feet of the discovered cultural resource shall cease. The cultural resources shall remain as found; further disturbance is prohibited.
 - b. Notification: The project applicant shall notify the Planning Department within 24 hours of the discovery. If the cultural resources are prehistoric or otherwise associated with Native Americans, the project applicant shall also notify the Indian tribal governments within 24 hours.

DATED this 12th day of March 2018.



Joe Turner, AICP
Skamania County Hearing examiner

ATTACHMENTS

- A. Application Packet
 - a. Subdivision Application
 - b. Preliminary Map
 - c. Title Report
- B. SEPA “Mitigated” Determination of Non-Significance
 - a. Public comments
- C. Public Notices
 - a. Certificate of Mailing
 - b. Post Card Notice
 - c. Notice of Hearing
 - d. Notice of Hearing – Publication
- D. County Engineer Comments
- E. Environmental Health Specialist Comments
- F. Existing Recorded Easements
 - a. Auditor File Number 2011178081
 - b. Book 41 Page 382
- G. February 23, 2018 letter from AKS Engineering
- H. February 23, 2018 letter from Schlotfeldt Law Firm, PLLC