

SNOHOMISH COUNTY COUNCIL
Snohomish County, Washington

MOTION NO. 22-449

AFFIRMING THE HEARING EXAMINER'S DECISIONS IN THE
CLOSED RECORD APPEAL OF
CATHCART CROSSING, FILE NO. 21-107654 SPA/BSP

WHEREAS, Pacific Ridge – DRH, LLC (“Applicant”) applied to Snohomish County for approval of a Planned Community Business Preliminary Site Plan, a Binding Site Plan, and an Urban Residential Development Standards Administrative Site Plan for two commercial lots and one tract of 286 townhouses on property located in unincorporated Snohomish County at the southwest corner of State Route 9 and Cathcart Way; and

WHEREAS, the Snohomish County Hearing Examiner (“Hearing Examiner”) held an open record hearing on the application on June 14, 2022; and

WHEREAS, the Hearing Examiner issued a decision on July 7, 2022, approving the application subject to conditions, and denying a request to re-open the hearing; and

WHEREAS, Deborah Wetzel timely filed a petition for reconsideration, which was denied by the Hearing Examiner on August 8, 2022; and

WHEREAS, on August 8, 2022, the Hearing Examiner issued an amended decision; and

WHEREAS, Katrina Stewart filed an untimely petition for reconsideration on August 15, 2022, which was denied by the Hearing Examiner on August 18, 2022; and

WHEREAS, on August 22, 2022, Deborah Wetzel and Katrina Stewart (“Appellants”) filed a notice of appeal of the following Hearing Examiner decisions: (1) July 7, 2022, Decision of the Hearing Examiner; (2) August 8, 2022, Order Granting and Denying Petitions for Reconsideration; and (3) August 18, 2022, Order Denying Further Petitions for Reconsideration and Motion to File Late Reconsideration Petition; and

WHEREAS, by Motion 22-365 on August 31, 2022, Council dismissed Appellant issues 5.5 and 5.6 under SCC 30.72.075 for lack of jurisdiction; and

WHEREAS, the Applicant requested in written argument to the Council that Appellant issues 5.1 and 5.4 be summarily dismissed and that Council strike Hearing Examiner exhibits M.3, 1-8 as extra-record evidence; and

WHEREAS, on September 28, 2022, Council passed an oral motion reserving its decision on summary dismissal of issues 5.1 and 5.4, stating it would consider Hearing Examiner exhibits M.3, 1-8 only for the purpose of determining whether Deborah Wetzel’s

motion for reconsideration and request to re-open the hearing were properly decided, and stating it would not consider exhibits 1-8 and exhibit 10 to Linda Gray's written argument because they constituted extra-record evidence; and

WHEREAS, on October 5, 2022, Council heard oral argument from legal counsel for Appellants, legal counsel for the Applicant, and other parties of record; and

WHEREAS, on October 5, 2022, following oral argument and in response to argument alleging a purchase and sale agreement between the Applicant and Snohomish County was not available to the public prior to the June 14, 2022, open record hearing before the Hearing Examiner, Council requested under SCC 30.72.110 that Council staff seek an answer from the Snohomish County Public Records Officer whether the purchase and sale agreement was available to the public prior to June 14, 2022; and

WHEREAS, Council continued the hearing on the closed record appeal to October 12, 2022; and

WHEREAS, on October 10, 2022, legal counsel for Appellants requested the ability to cross-examine the Public Records Officer and to submit rebuttal evidence, and on October 11, 2022, Council directed the Clerk of the Council notify parties of record that such request was denied; and

WHEREAS, on October 12, 2022, at the continued hearing on the closed record appeal, Council staff informed Council that based on communications with the Snohomish County Public Records Officer, the purchase and sale agreement was requested three times (by two individuals) in 2021 and was provided by the County to the requestors; and

WHEREAS, after considering the appeal based upon the record, the new evidence requested by Council, and the argument of Appellants, the Applicant, and parties of record, the County Council approves a motion to affirm the Hearing Examiner's decisions consistent with the findings and conclusions described below.

NOW, THEREFORE, ON MOTION:

Section 1. The Snohomish County Council makes the following findings of fact and conclusions:

- A. The County Council adopts the above recitals as findings of fact.
- B. The County Council adopts all findings and conclusions of the Hearing Examiner in the matter of Cathcart Crossing, File No. 21-107654 SPA/BSP.
- C. On Issue 5.1, Applicant requested summary dismissal based on lack of standing and lack of jurisdiction. Council concludes summary dismissal is appropriate. Notwithstanding summary dismissal, Council concludes proper notice of the open record hearing was provided.

1. On the issue of jurisdiction, Council agrees it does not have jurisdiction to review the validity of SEPA determinations even where lack of notice is alleged. Under the Land Use Petition Act, chapter 30.70C RCW, claims alleging defective notice must be timely appealed; this rule applies to exhaustion of administrative remedies where defective notice is alleged. While there may be a limited exception allowing Council to independently determine whether to excuse a party's failure to timely exhaust administrative remedies under the doctrine of equitable tolling, Council finds there was no bad faith or deception on the part of PDS or the Hearing Examiner warranting equitable tolling. Council concludes it does not have jurisdiction over this issue.
 2. On the issue of standing, a person lacks standing to vindicate the constitutional rights of lack of notice/due process on behalf of a third party absent evidence that there exists some hinderance to the third party's ability to protect and assert their own interests. Neither Appellants Stewart nor Wetzel were signatories to the group letter and neither was prejudiced or denied notice as a result of the decision to exclude such individuals as parties of record under SCC 30.91P.110. Council finds there is no evidence that the signatories to the letter were subject to any hindrance in their ability to protect their own interests and join as parties to the appeal in this matter. Council concludes Appellants lack standing to assert lack of notice on behalf of those persons who signed the group letter.
 3. On the merits of Issue 5.1, Council concludes proper notice of the SEPA threshold determination was given under SCC 30.61.110, and proper notice of the open record hearing was given under SCC 30.72.030. These notices satisfied SEPA's noticing requirements under WAC 197-11-510 and for open record hearing noticing requirements under RCW 36.70B.110(4).
- D. On Issue 5.2, Council finds Appellants do not challenge the appearance of fairness of this particular Hearing Examiner, stating in oral argument they did not believe the Hearing Examiner "was specifically biased" in this matter. Appellants challenge the ability of any appointed Hearing Examiner to appear fair in this circumstance, stating "a county hearing examiner should not be acting on these matters." Appellants' requested relief is for the Council to appoint a pro tem or special hearing examiner for a new hearing. However, a pro tem or special hearing examiner is still a hearing examiner compensated by the County and subject to the same pressures alleged to apply to the Hearing Examiner at issue here. Appellants' complaints are about the Hearing Examiner system, not the Hearing Examiner.
- E. On issue 5.3, Council finds Snohomish County Hearing Examiner Rule of Procedure 4.2(d) authorizes PDS to revise its staff report at any time at or before the hearing. The nature of the corrections to the staff report did not alter the

substantive analysis of the project and merely corrected errors in how the data was summarized for purposes of the staff report.

- F. On issue 5.4, Council concludes summary judgment is not warranted. As evidenced in facts contained in the recitals above, Council finds the purchase and sale agreement between the County and the Applicant was available to the public as a public record and was provided to the two individuals who requested it in 2021. Council therefore concludes the agreement was available to the public as a public record prior to the open record hearing on June 14, 2022, and the Hearing Examiner properly denied requests to submit new evidence after the close of the hearing.

Section 2. The County Council hereby affirms the following decisions of the Hearing Examiner in the matter of Cathcart Crossing, File No. 21-107654 SPA/BSP challenged by Appellants: (1) July 7, 2022, Decision of the Hearing Examiner, as amended on August 8, 2022; (2) August 8, 2022, Order Granting and Denying Petitions for Reconsideration; and (3) August 18, 2022, Order Denying Further Petitions for Reconsideration and Motion to File Late Reconsideration Petition.

DATED this 18th day of October, 2022.

SNOHOMISH COUNTY COUNCIL
Snohomish County, Washington



Megan Dunn
Council Chair

ATTEST:



Debbie Eco, CMC
Clerk of the Council