

WHATCOM COUNTY HEARING EXAMINER

RE: Zoning Conditional Use Permit)	CUP06-0031
Application for)	
)	FINDINGS OF FACT,
<i>Lake Whatcom Water and Sewer District</i>)	CONCLUSIONS OF LAW,
<i>Lake Whatcom Residential Treatment Center</i>)	AND DECISION

SUMMARY OF APPLICATION AND DECISION

Application: The Applicant is requesting a Zoning Conditional Use Permit to construct a 105,700 gallon concrete reservoir, approximately 30-feet in diameter and 20-feet high, and 1700-feet of linear 8-inch water main, to supply drinking water and fire flow to the Lake Whatcom Residential Treatment Center. The reservoir and main will also be used to provide gravity fire flow protection to existing customers downhill of the reservoir site. Included in the proposal is a gravel access road to the reservoir site. Some upgrades to the existing pump station, consisting of new electrical panels, will be required. No additional pumps or increased pumping capacity is proposed for the existing pump station.

Decision: The requested Zoning Conditional Use Permit is approved, subject to conditions.

FINDINGS OF FACT

INTRODUCTION

The following Findings of Fact and Conclusions of Law are based upon consideration of the exhibits admitted and evidence presented at the public hearing.

I.

Applicant: Lake Whatcom Water and Sewer District

Applicant’s Representative: Melanie Mankamy, PE, Wilson Engineering

Property Address: 3400 Agate Heights Road
Bellingham, Washington

Legal Description: SW ¼ of Section 24, Township 38 North, Range 3 East; W.M.
Assessor’s Parcel Numbers: 380324 086194; 380324 101115;
380324 121197; 380324 168197; 380324 285190

Zone: Rural (R5A)

Subarea: Lake Whatcom

Comprehensive Plan: Rural

Shoreline Designation: N/A

Fire District: No. 4

School District: No. 501

Water District: Lake Whatcom Water & Sewer District

Sewage Disposal: Lake Whatcom Water & Sewer District

Neighboring Uses: North: Forested
South: Residential area
East: Forested
West: Light Residential area

Legal Notices: Posted – June 25, 2007 and March 4, 2008
Mailed – June 22, 2007 and February 28, 2008
Published – December 20, 2006, June 28, 2007, and March 6, 2008

Hearing Date: July 11, 2007 and March 19, 2008

Parties of Record:

Brian Hansen for Lake Whatcom Water and Sewer District
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Bellingham, WA 98225

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Wilson Engineering
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Bellingham, WA 98225

Gerrie W. Dudley
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609 North Shore Drive
Bellingham, WA 98226

Larry Helm
2660 E 41st Terrace
Bellingham, WA 98226

Larry and Virginia Watson
Y-Squalicum Water Association
2729 Jensen Road
Bellingham, WA 98226

Michael Allsop
2247 Northshore Drive
Bellingham, WA 98226

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2318 Northshore Road
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Mr. Kirk
Squalicum Water Association

Alan Marriner
Office of the City Attorney
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Clare Fogelsong
Public Works Department
City of Bellingham

Martin Blackman
Planning and Development Services

Sanja Barisic
Division of Engineering

Copy of Decision emailed to

Tom Callis
Whatcom Independent

Exhibits:

1 Land Use Application

- 2 Legal Notice, dated December 20, 2006
 - 3 SEPA, DNS, dated 11/30/06
 - 4 Staff Report, dated July 5, 2007
 - 5 Certificate of Mailing, dated June 22, 2007
 - 6 Certificate of Posting, dated June 25, 2007
 - 7 Legal Notice, dated June 28, 2007
 - 8 Vicinity Map
 - 9 Aerial Map
 - 10 Zoning Map
 - 11 Site Plans
 - 12 Grant Contract and Agreement
 - 13 Letter of Authorization
 - 14 Letters of Opposition
 - 15 Letters between Staff (dated January 9, 2007) re: wetlands and the Applicant (dated December 4, 2006 and March 9, 2007)
 - 16 Stormwater Plan
 - 17 Memorandum dated May 15, 2007 from Sanja Barisic
 - 18 Letter dated June 14, 2007, from Gregory Kirsch to Deborah Kingsley, Lake Whatcom County Water & Sewer District
 - 19 On Cooper Point & Lake Whatcom Water and Sewer District
 - 20 Memo dated July 11, 2007 from Larry Watson, Y-Squalicum Water Association
- Exhibits Received for Remand Hearing**
- 21 [Proposed] Order on Motion to Dismiss, filed February 7, 2008

- 22 Mailing Labels (1000-ft Buffer)
- 23 Certificate of Mailing, dated February 28, 2008
- 24 Legal Notice, dated March 6, 2008
- 25 Certificate of Posting, dated March 4, 2008
- 26 Letter dated March 17, 2008, from Wilson Engineering, with attachments
 - 26-1 Declaration of Melanie Mankamyer
 - 26-2 Lake Whatcom Water & Sewer District, and Lake Whatcom Residential Treatment Center Reply Brief
 - 26-3 Declaration of Jenny Billings Re: Trucking of Water
 - 26-4 Declaration of Melanie Mankamyer Re: Source of Water for Trucking to LWRTC in Fall
- 27 Letter dated March 17, 2008, from Daniel Warner
- 28 Letter dated March 14, 2008, from City of Bellingham, Office of the City Attorney, with attachments:
 - 28-1 Lake Whatcom Water and Sewer District Resolution No. 705
 - 28-2 Lake Whatcom Water and Sewer District Developer Extension Agreement
 - 28-3 Lake Whatcom Water and Sewer District Water Service Feasibility Study: Vineyard Development Group, LLC Property
 - 28-4 DNS, dated 11/30/06, Lead agency: Lk Whatcom Water & Sewer District
- 29 Letter dated March 18, 2008, from Brian Hansen
- 30 Brief, with supporting documents, submitted by Squaticum Valley Community Association
- 31 Council Appeal Documents
 - 31-1 Appeal Form, filed by Larry Watson
 - 31-2 Letter dated August 24, 2007, from Whatcom County Council to Larry Watson
 - 31-3 Appeal Brief of Appellants, David Bricklin, dated September 7, 2007
 - 31-4 Lake Whatcom Water & Sewer District's Brief, Brian Hansen, dated September 24, 2007
 - 31-5 Letter dated October 2, 2007, from Whatcom County Council to David Bricklin
 - 31-6 City of Bellingham's Motion to Intervene, dated October 1, 2007
 - 31-7 Response to Bellingham's Motion to Intervene, dated October 5, 2007
 - 31-8 Letter dated October 11, 2007, from Whatcom County Council to Larry Watson
 - 31-9 Letter dated October 24, 2007, from Whatcom County to Larry Watson

- 32 City of Bellingham’s Hearing Brief, dated March 19, 2008
- 33 Table showing Design Flows and Sizing of Storage Tanks: Agate Heights Water System Improvements
- 34 Written Testimony of Virginia Watson, dated March 19, 2008
- 35 Letter dated September 19, 2005, from County Fire District No. 4
- 36 Letter dated September 19, 2005, from Whatcom County Fire Marshal
- 37 Section 5: Minimum Design Standards, dated February 8, 2000
- 38 Map showing Lake Whatcom Water & Sewer District/Vineyard Development Feasibility Study
- 39 Letter dated March 21, 2008 from Brian Hansen
- 40 Letter dated March 21, 2008 from Alan Marriner
- 41 Letter dated March 24, 2008 from Alan Marriner
- 42 September 2001 *The Cooper Point Association v. Thurston County*, Cause No. 26425-1-II

II.

This is the second hearing on this proposal conducted by the Hearing Examiner. The Hearing Examiner has combined the records from the two hearings into a single record. The original Hearing Examiner Decision, dated July 17, 2007, was appealed to the Whatcom County Council. The Whatcom County Council upheld the Hearing Examiner Decision with one additional Condition of Approval, which reads as follows:

The improvements authorized by this permit shall not be used in the future to improperly extend urban services to the rural areas contrary to the provisions of the Growth Management Act.

As set forth in the Conclusions of Law, a County’s Plans and development regulations adopted pursuant to the GMA, are presumed consistent with the GMA and cannot be challenged in site specific land use decisions (such as this Zoning Conditional Use Permit application) on the basis of consistency with the GMA. If such site specific proposals are consistent with existing local plans and regulations, they must be approved without reference to the GMA.

The Decision of the Whatcom County Council was appealed to Superior Court. The Superior Court vacated the Hearing Examiner Decision on the grounds that the City of Bellingham was not given adequate notice of the public hearing date and the matter was remanded to the Hearing Examiner for additional proceedings which would allow the City of Bellingham to participate. The Superior Court did not reach the merits of any of the claims raised by the Parties herein.

Based on the Superior Court Decision, the Hearing Examiner re-scheduled a public hearing and gave notice to all Parties of Record. The Hearing Examiner has reviewed all materials submitted to the Whatcom County Council, those materials submitted to Superior Court which were put into the file by Interested Parties, the additional materials presented by the Parties, including the City of Bellingham, as well as additional Case Law, and has completed a further review of applicable Ordinances, the Comprehensive Plan, and the Whatcom County Coordinated Water System Plan Update, dated February 2000. The original record and this new information, plus the testimony received at the second Public Hearing, are the basis for this decision. None of this information changed any of the Findings of Fact initially set forth by the Hearing Examiner in the decision, dated July 17, 2007, in any significant material way.

In response to the ongoing concerns of county citizens and the concerns expressed by the City of Bellingham, the Hearing Examiner is entering a more detailed set of Findings of Fact and Conclusions of Law.

III.

The Lake Whatcom Water and Sewer District and the Lake Whatcom Residential Treatment Center have requested Conditional Use Approval for a Zoning Conditional Use Permit to allow construction of a 105,700 gallon concrete reservoir and approximately 1,700-linear feet of 8-inch water main on property located at 3400 Agate Heights Road, Bellingham, Washington.

The purpose of the new facilities is to combine the District's facility with a facility designed to supply water and fire flow to the Treatment Center. The Treatment Center currently has an out-dated and inadequate private water supply system. The updated system will provide a better quality of water and adequate fire flow to the Treatment Center.

The consolidation proposal has been reviewed by the Washington State Department of Health and the State Department of Ecology. The water rights for the consolidated system have been reviewed and approved by Ecology.

The proposal includes a gravel access road to the reservoir tank site and an upgrade of the existing pump station. The pump station upgrade consists of new electrical panels and other modifications which do not increase the pumping ability of the station. The purpose of the new facilities proposed by the Lake Whatcom Water and Sewer District is to replace the Treatment Center's existing private water system. The new facility has been designed to provide fire flow and water to the Treatment Center. It will also provide gravity fire flow to existing Water District customers located in the Opal Terrace Area, downhill from the proposed reservoir site. The District will run a water main from the end of their existing water main in an Opal Terrace cul-de-sac to the

reservoir. The main is proposed to be 8-inches in diameter in order to provide fire flow to fire hydrants below the reservoir site.

The Treatment Center has had a number of water tests which showed bacteria contaminated water, including E-Coli. The well water also contains metals which are above the recommended level set by the State Department of Health.

The Treatment Center provides residential group housing and treatment to a population of (approximately 27 residents) vulnerable adults. Most, if not all, of the residents at the Treatment Center suffer from mental illness.

The Lake Whatcom Water and Sewer District has been providing sewer service to the Treatment Center for approximately thirty years. The Treatment Center has received a State Grant to finance the proposed facility improvements.

Water for fire protection is currently supplied by a swimming pool, which is inadequate to provide fire protection that meets current safety standards. Failure to grant approval to the requested Zoning Conditional Use Permit would leave the residents and staff at the Treatment Center vulnerable to poorly treated water and inadequate fire protection.

The Whatcom County Fire District No. 4 Fire Chief and the Whatcom County Fire Marshal have both submitted letters or memoranda indicating their support for the proposed fire flow improvements (see Exhibits No. 35 and No. 36), indicating that the current fire flow available puts the building and residents at significant risk. They both indicate that the existing water capacity and the 60,000-gallon swimming pool reservoir are inadequate to provide appropriate, reliable fire flow for the Treatment Center.

The consolidation proposal has been reviewed by the Washington State Department of Health and the State Department of Ecology. The proposal has received Health Department Approval and Ecology has concluded that the consolidation proposal has more than adequate water rights. The Treatment Center's existing wells will no longer be used since a Lake Whatcom Water and Sewer District well will serve the Treatment Center.

IV.

A SEPA Determination of Non-significance was issued on this proposal on November 30, 2006. This Determination was not appealed. No State or County agencies with authority to review this proposal have stated any objection to the proposal. The City of Bellingham has objected to the proposal, as have residents served by the Y-Squalicum Water Association.

V.

There is heated opposition to this proposal from the Squalicum Valley Community Association, which asserts that this proposal by the District and the Treatment Center is an illegal extension of urban utility services into a Rural zone. This assertion is based on their interpretation of

the Growth Management Act. The City of Bellingham indicates that it supports the District's extension of water service to the Treatment Center, but opposes the issuance of a Zoning Conditional Use Permit for the project without appropriate conditions to protect Lake Whatcom. The same concerns were raised by the Whatcom County Chapter of Futurewise (see Exhibit No. 27), who indicated that they approve service to the Lake Whatcom Residential Treatment Center, but that they oppose any extension of the water improvement system to the uphill development of the Vineyard Development Group. All of the concerns raised by interested citizens and the City of Bellingham dealt specifically with the perceived connection between this proposal and an uphill development being considered by the Vineyard Development Group.

The basic thrust of the opposition is that the proposed Treatment Center water facility updates can be used to extend service further into the rural area uphill from the Treatment Center's property. Specifically, the opponents point out that the Vineyard Development Group, L.L.C. had the Lake Whatcom Water and Sewer District conduct a feasibility study in the Fall of 2005 to determine the feasibility of the Lake Whatcom Water and Sewer District providing water service to a possible uphill housing development of 64-lots on approximately 684-acres of Vineyard Development property located in the Rural Five Acre (R5A) Zoning District. The Water and Sewer District concluded that it would be feasible to supply water to a cluster development on the Vineyard property above the Treatment Center property at a cost of about \$115,000 per lot. The feasibility study noted that a proposed extension of water service from the existing Opal Terrace Development to the Treatment Center, including a reservoir, would be part of the infrastructure needed to serve the Vineyard Development Group development.

The opponents have argued that the District's proposal consists of a water main and reservoir larger than that necessary to provide appropriate fire flow and water to the Treatment Center and to downhill existing residential development. In fact, some of the opponents suggest that the Water and Sewer District is intentionally disguising their intent to serve the uphill Vineyard property and is over-sizing the facilities in order to meet the needs of further extensions of District service uphill of the Treatment Center property.

The feasibility study prepared by the Lake Whatcom Water and Sewer District has not to date resulted in any development proposals by the Vineyard Development Group. The Vineyard Development Group is not a party to this action.

VI.

The District's Engineer has indicated that the reservoir and 8-inch water main are necessary to provide adequate water and fire flow to the Treatment Center and adequate gravity fire flow to existing residential development below the Treatment Center. The District's Engineer has testified under oath that there is no excess capacity in this proposal designed to serve potential future uphill development. There has been no other expert testimony from any party which would support the opponents' contention that the proposed facilities are in excess of those needed to provide adequate services to the Treatment Center and downhill properties. The lack of expert testimony or evidence

from the opponents establishing a basis for their assertions that the proposed facilities are over-sized to meet the needs identified in the application is troublesome. Specifically, the City of Bellingham has a Public Works Department, the largest water utility in Whatcom County, a Planning Department, and a Fire Department, with all of the necessary expertise to evaluate the Lake Whatcom Water and Sewer District Engineer's conclusions, as well as the consistency of the proposed water extension with the requirements of the Whatcom County Coordinated Water System Plan Update, and could provide expert review of the appropriateness of the proposed fire flow, and of the District's ability to provide appropriate fire flow with smaller facilities. No such evidence was submitted.

The expanded record still supports the Factual Finding that the reservoir proposed, along with the 8-inch main, are necessary to meet the needs of the Treatment Center for water and adequate fire flow as well as the needs for the gravity fire flow which will be provided to the Opal Terrace area. A smaller reservoir and/or a smaller water main below 8-inches would not provide adequate, appropriate fire flow under today's standards.

VII.

Based on the record as a whole, the Hearing Examiner finds that the proposed consolidation of the Treatment Center's water system and the District's Agate Bay facilities will not have significant adverse impacts on Lake Whatcom, or, in fact, any other significant adverse impacts. The facilities proposed have been designed to protect the health and welfare of the residents and employees of the Treatment Center, and of those existing residential sites which will receive upgraded gravity fire flow instead of the existing pump pressured fire flow that requires electrical service in order to produce the needed fire flow.

The granting of this Zoning Conditional Use Permit will not increase the potential to add urban levels of development in this Rural zoned area within the Lake Whatcom watershed. The area in question is zoned R5A, one unit per five acres. (The Hearing Examiner notes that the proposed Vineyard Development is at a density of less than one unit per ten acres). This proposal will not change the limitation on development densities within this area, which are set by the zoning regulations, and which only allow Rural development.

VIII.

Additional concerns were raised regarding the impact on the aquifer and on the water rights of other users. However, the record indicates that the proposed water use, which has been approved, has been approved by the State Department of Ecology, and has adequate water rights. While fears have been expressed about negative impacts on water supply, no evidence of any kind has been produced to show that this proposal would in fact adversely affect any other water users in this watershed. In any case, allocation of water rights is not an issue properly reviewed and decided in a hearing on a Zoning Conditional Use Permit.

IX

The Land Use Services Division of Whatcom County Planning and Development Services has

reviewed the proposal for consistency with the Zoning Conditional Use Permit Criteria and has recommended approval of the requested permit. The Findings of Fact of the Division are set forth in a Staff Report, Exhibit #4 in the Hearing Examiner file, dated July 5, 2007, a copy of which is attached hereto. The Factual Findings made by Staff are supported by the record as a whole and are hereby adopted by the Hearing Examiner as Findings of Fact herein.

X.

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.

The issues raised by the concerned citizens, organizations, and the City of Bellingham regarding possible future service to a Vineyard Development Group are issues beyond the scope of this Zoning Conditional Use Permit Application.

It is a basic principle of law that legal controversies can only be resolved at the appropriate time in the appropriate forum. This is the concept of ripeness. In this case, the issues raised in regard to the Vineyard Development Group development are not properly before the Hearing Examiner and cannot and should not be resolved at this time. Any development proposal by the Vineyard Development Group will require County approval. The Vineyard Development Group is not a party to this action and issues regarding the legality of extending water service to the Vineyard development proposal, should a formal application ever be submitted, should not be considered or resolved as part of this limited application.

II.

The Squalicum Valley Association, Futurewise, and the City of Bellingham, all suggest that the proposed Water District facilities to serve the Treatment Center violate the Growth Management Act. The consistency of local regulations with the Growth Management Act is beyond the jurisdiction of the Hearing Examiner. In fact, even Superior Court cannot review specific land use decisions for consistency or compliance with the Growth Management Act. *Woods v Kittitas County*, 192 Wn.2d 597, 2007. Once adopted, comprehensive plans and development regulations are presumed valid. RCW 36.70A.320(1). In reviewing a proposed land use project, a local government must determine whether the proposed project is consistent with applicable development regulations, or in the absence of applicable regulations, the adopted comprehensive plan. RCW 36.70B.030(1). The Superior Court can review Hearing Examiner and County Council decisions regarding the consistency of a proposal with local plans and land use regulations but cannot review these decisions or the plans and regulations on which they are based for consistency with the GMA. In *Woods*, the Court held:

“We affirm the Court of Appeals and hold that the Superior Court lacks subject matter jurisdiction under LUPA to decide whether a site-specific land use decision complies with the GMA. The Superior

Court may decide only whether a site-specific land use decision complies with a comprehensive plan and/or development regulation.”

The Whatcom County Comprehensive Plan supports the delivery of adequate water service to rural areas. The Comprehensive Plan refers to the Whatcom County Consolidated Water Services Plan as a tool in carrying out the goal of providing adequate water service in rural areas.

Even though the Hearing Examiner has no jurisdiction to apply the Growth Management Act to a specific land use decision, the Hearing Examiner notes that the GMA specifically provides that the provision of domestic water, and fire protection services, are a rural government service when delivered at an intensity usually found in rural areas. The definition of “rural government services” in the Growth Management Act, at RCW 36.78.030(16), specifically includes water and fire protection services as a rural government service. Additionally, “rural government” is defined in the Growth Management Act at RCW 36.78.030(15). These two sections read as follows:

36.70A.030. Definitions

(15) “Rural development” refers to development outside the urban growth area and outside agricultural, forest, and mineral resource lands designated pursuant to RCW 36.70A.170. Rural development can consist of a variety of uses and residential densities, including clustered residential development, at levels that are consistent with the preservation of rural character and the requirements of the rural element. Rural development does not refer to agriculture or forestry activities that may be conducted in rural areas.

(16) “Rural governmental services” or “rural services” include those public services and public facilities historically and typically delivered at an intensity usually found in rural areas, and may include domestic water systems, fire and police protection services, transportation and public transit services, and other public utilities associated with rural development and normally not associated with urban areas. Rural services do not include storm or sanitary sewers, except as otherwise authorized by RCW 36.70A.110(4).

In general, reading these two sections together, it appears clear that the Growth Management Act allows water purveyors to deliver water services to rural development. In this case, the Treatment Center is located in a Rural zoned area, has received sewer services from the Lake Whatcom Water and Sewer District for thirty years, and under the Whatcom County Code is grandfathered in as a legal, nonconforming use if it is no longer a permitted or conditional use in this zone.

The Squalicum Water Association cites a Washington Case, *The Cooper Point Association v Thurston County*, in support of its assertion that this proposal amounts to an illegal extension of urban services into a rural area. (A copy of the case is included in the Hearing Examiner file as Exhibit No. 42). *Cooper Point* deals specifically with an extension of a sewer line in existing suburban type density development zone. As pointed out by the Court, RCW 36.70A.030(16)

specifically states that rural services cannot include sanitary sewers without a special showing of necessity under RCW 36.70A.110(4). Stated generally, the Growth Management Act allows extension of water services in the rural area at an intensity appropriate to provide water and fire flow to rural development, but would not generally allow sewer services to be extended in rural areas unless “necessary.” *Cooper Point* is not relevant to a domestic water service proposal.

Stated succinctly, the Lake Whatcom Water and Sewer District may provide rural water and fire flow services within its service area to rural areas for legal uses within rural areas under the current local plans and regulations.

The proposed consolidation of the Treatment Center’s water system with Lake Whatcom Water and Sewer District’s facilities in the area is sized appropriately to meet the needs of the Treatment Center. The Whatcom County Coordinated Water System Plan (WCCWSP) requires a water main serving a fire hydrant to be at least 8-inches in diameter for dead-end line. The main running downhill from the proposed reservoir will serve a fire hydrant and an 8-inch main is necessary both to meet the minimum requirements of the WCCWSP and to provide adequate fire flow for the Treatment Center. The Attorney for the City of Bellingham suggests that because the Treatment Center is existing development, it is not required to meet the current fire flow standards. It is true that the Treatment Center is exempt under the current fire codes as a pre-existing use. Even if the Treatment Center is not required to update to current fire flow standards, it is obviously in the best interest of the residents and the people who work there to have adequate fire flow. Even if the Treatment Center is exempt, the Water and Sewer District must meet the minimum standards of the WCCWSP (page 5-8) when it attaches water mains to fire hydrants, and is therefore required to use an 8-inch diameter main to provide fire flow to the gravity fed hydrants below the proposed reservoir. In general, under the WCCWSP the minimum water main diameter in the Rural zone is 6-inches. There is no maximum set in the Plan.

III.

The Hearing Examiner concludes that the provision of service to the Treatment Center is consistent with the applicable local plans and regulations. Issues about the legality of extending domestic water service beyond the Treatment Center’s property to uphill development sites are not properly before the Hearing Examiner.

The City of Bellingham recommends six conditions be attached to this permit to “... ensure that the extension of water to the Treatment Center complies with SEPA and the County’s Conditional Use Permit Criteria and is protective of Lake Whatcom.”

Considering the importance of the environmental preservation of Lake Whatcom, the Hearing Examiner would like to address briefly each of the requested conditions.

Proposed Condition No. 1 reads as follows:

1. The District is prohibited from using the water reservoir and the water lines installed on the Lake Whatcom Residential

Treatment Center's property to provide service outside of the District's current service area.

Under the Whatcom County Coordinated Water System Plan, the District cannot undergo a permanent waterline extension outside of the District's service area without undergoing the Boundary Review Board process set forth in Section 4.3 (pages 4-6 through 4-7 of WCCWSP). The issue of extension of service beyond the existing service area is not before the Hearing Examiner at this time. The District has not proposed any extension beyond their service area. Permission for any such extension is outside of the jurisdiction of the Hearing Examiner, and the proposed condition should not be attached to the approval.

Proposed Condition No. 2 reads as follows:

2. The water lines being installed on the Center's property must be reduced to the minimum size necessary to serve the Center.

As discussed above, based on the record made by the Parties, the water lines are the minimum size necessary to provide adequate fire flow to the Treatment Center and to other downhill properties.

Proposed Condition No. 3 reads as follows:

3. The water reservoir being installed on the Center's property must be reduced from 105,700 gallons to the minimum size necessary to serve the Center.

The District's Engineer has testified that the proposed water reservoir of 105,700 gallons is the minimum size necessary to serve the Center. No other Party has put in any other expert engineering testimony which would contradict that. The Hearing Examiner concludes the proposed 105,700 gallon reservoir is needed to provide adequate fire flow.

Proposed Condition No. 4 reads as follows:

4. The installation of a pump station on the Center's property to provide service outside of the District's current service area is prohibited.

There is no proposal to install a pump station on the Treatment Center's property to provide service outside the District's current service area. In fact, there is no proposal to install a new pump station on any property within the District's current service area. Such a proposal would require a Zoning Conditional Use Permit. As indicated above, the provision of service outside the existing service area of the Water District requires Boundary Review Board action.

Proposed Condition No. 5 reads as follows:

5. The upgrade to the Opal Terrace pump station to serve the Center is prohibited.

Prohibiting the requested upgrades to the Opal Terrace pump station, including new electrical panels, would defeat the purpose, because the upgraded system would not be able to function.

Proposed Condition No. 6 reads as follows:

6. The permit allows urban water facilities to be constructed in a rural area because the project is necessary to protect basic public health and safety and the environment, as the Treatment Center's water system is failing.

This language is not a Condition of Approval. Furthermore, the Hearing Examiner has concluded that the proposal is consistent with local regulations and plans and only allows appropriate rural domestic water service. The Hearing Examiner concludes that the permit is necessary to protect public health and safety in light of the Treatment Center's currently inadequate water system.

At the request of the Hearing Examiner, the City provided a somewhat more appropriate condition designed to ensure that any proposal to extend the water system beyond the Treatment Center's property lines be subject to further review and approval. Such a condition was proposed in a letter dated March 21, 2008, Exhibit No. 40 in the Hearing Examiner file. The Attorney for the City of Bellingham recommended the following condition:

The Lake Whatcom Water and Sewer District is prohibited from using the water reservoir and water lines installed on the Lake Whatcom Residential and Treatment Center's property to provide water service outside of the District's current water service boundaries without:
(1) obtaining all necessary County and State approvals for such an extension of water service and (2) providing written notice to the City of Bellingham's City Attorney prior to applying for such approvals.

The Hearing Examiner agrees that a condition which requires the Lake Whatcom Water and Sewer District to obtain all necessary approvals before attempting to use the water line installed on the Treatment Center's property to provide water service outside of the District is unobjectionable, even if not really related to this proposal. However, this is just a condition requiring the District to obey the law. The second requirement of providing written notice prior to applying for such approvals is probably also beyond the scope of conditions which should be attached to this Zoning Conditional Use Permit. However, the Hearing Examiner will include a new Condition of Approval basically incorporating the intent of the above condition, based on the understanding that the Water District will waive objection, if this Hearing Examiner decision is not appealed.

IV.

A SEPA Determination of Non-significance was issued and not appealed. This is a determination

that, subject to regulation by State and local agencies, the proposal will not have significant adverse environmental impact, which became a final decision when it was not appealed. The record before the Hearing Examiner supports this determination. There is no evidence in the record which would indicate probable significant adverse impacts from this proposal as conditioned.

V.

It is appropriate for the Water and Sewer District to provide water services in rural as well as urban areas. The District may provide water services throughout its boundaries. Approval of the project will only allow the District to do that which it is legally entitled (and, perhaps, required) to do.

The project will have a positive impact on the public health and safety by providing a higher quality of water and adequate fire flow for the Lake Whatcom Residential Treatment Center.

VI.

The proposal is consistent with the Whatcom County Comprehensive Plan and development regulations. There is nothing in the Comprehensive Plan or development regulations which would discourage a water district from supplying water to existing users within the district. The purpose of the project is to make available significant, additional amounts of potable water and to provide adequate fire flow to this rural use. Growth in this area is limited by the Whatcom County Zoning Ordinance to rural levels of development.

The construction and operation of the facilities should have no impacts on neighboring property owners. The only impacts expected will arise during the construction phase, which would include noise and dust during the construction activities, and which will be temporary.

VII.

The Hearing Examiner concludes that the proposal, subject to the Conditions of Approval recommended by Staff, as modified herein, is consistent with the Zoning Conditional Use Criteria and a Zoning Conditional Use Permit should be granted.

VIII.

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

A Zoning Conditional Use Permit is hereby granted to Lake Whatcom Water and Sewer District allowing construction of a 105,700-gallon concrete reservoir and approximately 1,700-feet of linear 8-inch water main, and a gravel access road to the reservoir site, on properties located in the area of 3400 Agate Heights Road, Whatcom County, Washington. The permit is granted, subject to the following conditions:

1. The use and location of the facilities on the Treatment Center's site as approved by this permit shall not be amended or changed in any way without further approval of the Hearing Examiner. The water facilities located on this site shall not be extended off-site without either an administrative revision; an amendment to this Zoning Conditional Use Permit Approval; or new Zoning Conditional Use Permit Approval.

The Lake Whatcom Water and Sewer District may not use the facilities permitted on the Treatment Center's site under this decision to provide water service outside the District's current water service boundaries without obtaining all necessary Whatcom County and State approvals and Boundary Review Board Approval. The Water District and the County shall give the City of Bellingham City Attorney notice of any requests to revise, amend, or change the uses and their locations as approved by this permit or to extend the facilities on the property off-site.

2. The Applicant shall comply with all requirements of the Fire Inspector, memorandum dated December 28, 2006, unless modified by the Fire Marshal or appealed to the appropriate agency.
3. The Applicant shall comply with all of the conditions of the Whatcom County Division of Engineering, memoranda dated January 2 and May 15, 2007, unless modified by the Division of Engineering or appealed to the appropriate agency.
4. The Applicant shall comply with the inadvertent discovery condition, as stated in the January 17, 2007, letter from the Lummi Nation Tribal Historic Preservation Office, which reads as follows:

“Should archaeological materials (e.g. shell midden, faunal remains, stone tools) or human remains be observed during project activities, all work in the immediate vicinity shall stop, and the area shall be secured. The State Office of Archaeology and Historic Preservation (360-586-3065) and the Lummi Nation Tribal historic Preservation Office (360-384-2298) shall be contacted immediately in order to help assess the situation and determine how to preserve the resource(s). Compliance with all applicable laws pertaining to archaeological resources is required.”

5. The Applicant shall complete construction or, if no construction is contemplated as a part of this permit, shall demonstrate compliance with all of the conditions of this permit within 24 (twenty-four) months of the date of the issuance of this decision. Failure to complete construction or demonstrate compliance shall result in the expiration of this permit. Substantial progress toward completion may satisfy the terms of this condition if approved by Whatcom County Planning & Development Services and the Hearing Examiner. The applicant or permit holder may apply for an extension for a term of up to one year upon a showing that substantial progress has been made toward completion or compliance. An extension shall be granted if the Hearing Examiner finds that the applicant or permit holder will suffer a substantial hardship if the extension is denied. The Hearing Examiner may grant an extension for any other good cause shown, in his discretion, but extraordinary circumstances must be shown to obtain an extension of more than one year. The Hearing Examiner shall obtain the comments of Whatcom County Planning & Development Services before granting any

extension.

NOTICE

This approval is subject to all of the above-stated conditions. Failure to comply with them may be cause for its revocation. Complaints regarding a violation of the conditions of this permit should be filed with Whatcom County Planning and Development Services. The Hearing Examiner may not take any action to revoke this approval without further public hearing.

Violations of this title shall constitute Class I civil infractions pursuant to RCW 7.80.120. The maximum penalty and the default amount for such violations shall be consistent with Chapter 7.80.RCW.

NOTICE OF APPEAL PROCEDURES FROM FINAL DECISIONS OF
THE WHATCOM COUNTY HEARING EXAMINER

This action of the Hearing Examiner is final. The following review procedure is available from this decision and may be taken by the applicant, any party of record, or any County department.

Appeal to County Council. Within ten business days of the date of the decision a written notice of appeal may be filed with, and all required filing fees paid to, the Whatcom County Council, Courthouse - 1st Floor, 311 Grand Avenue, Bellingham, WA 98225. The appeal notice must state either:

- 1) The specific error of law which is alleged, or
- 2) How the decision is clearly erroneous on the entire record.

More detailed information about appeal procedures is contained in the Official Zoning Ordinance at Section 20.92.600-.830. A copy of this document is available for review at the County Council Office. After an appeal has been filed and the Council office has received the hearing record and transcript of the public hearing, the parties will be notified of the time and date to file written arguments.

DATED this 8th day of April 2008.

Whatcom County Hearing Examiner