

WHATCOM COUNTY HEARING EXAMINER

RE: Administrative Appeal)	APL2009-0011
Application for)	
)	FINDINGS OF FACT,
<i>Mark and Tara Wright</i>)	CONCLUSIONS OF LAW,
<i>“Krebs Cluster Short Plat”</i>)	AND DECISION

SUMMARY OF APPEAL AND DECISION

Appeal: The Appellants, Mark and Tara Wright, have appealed certain conditions contained within a Notice of Preliminary Short Plat Approval document for SSS2006-00225, Krebs Cluster Short Plat, issued by Whatcom County Planning and Development Services, on March 26, 2009.

Decision: The Whatcom County Hearing Examiner remands this matter to Planning and Development Services for further processing of this Application in conformity with the Hearing Examiner’s Conclusions of Law.

FINDINGS OF FACT

I.

Background Information

Appellant: Mark and Tara Wright

Legal Property Owners: Mark and Tara Wright

WC File # Being Appealed: SSS2006-00225

Property Location/Address: 5757 Barr Road
Ferndale, WA 98248

Assessor’s Parcel Numbers (APN): 390123 203094

Zoning: Rural 5 Acres (R5A) subject to Agriculture Protection Overlay (APO)

Comprehensive Plan: Rural

Authorizing Ordinances:	WCC 20.92	Hearing Examiner
	WCC 21.02.030	Appeals

Applicable State Law

- RCW 58.17.033 Proposed division of land – Consideration of application for preliminary plat or short plat approval – Requirements defined by local ordinance
- RCW 58.17.060 Short plats and short subdivisions – Summary approval – Regulations – Requirements
- RCW 58.17.065 Short plats and short subdivisions – Filing

Applicable Whatcom County Codes

- WCC 2.02.125 Ordinances –Effective Date
- WCC 2.33 Permit Review Procedures
- WCC 16.16.265 Critical Area Protective Measures
- WCC 20.04.031 Vesting of Permits
- WCC 20.36 Rural
- WCC 20.38 Agriculture Protection Overlay
- WCC 21.04 Short Subdivision

Notice Requirements: Certificate of Posting, dated June 10, 2009
Legal Notice, dated June 11, 2009

Open Record Hearing: August 26, 2009

Exhibits:

- 1 Administrative Appeal Application, with attachments
 - 1-1 Exhibit “A” to Appeal, in re: SSS2006-00225
 - 1-2 PDS Notice of Preliminary Short Plat Approval, decision dated March 26, 2009
 - 1-3 Customer Receipt
 - 1-4 Cover letter for Appeal Application, dated April 14, 2009, from Peter Dworkin
- 2 Short Plat Application, “Krebs APO Cluster Short Plat, with (2-1) Application Sketch
- 3 Agreed Order re: Amendment of Preliminary Short Plat Approval Conditions, June 30, 2009
- 4 Staff Report, dated August 20, 2009
- 5 Notice of Unavailability of Counsel
- 6 Email correspondence among Staff
- 7 Certificate of Posting, dated June 10, 2009

- 8 Legal Notice, dated June 11, 2009
- 9 Declaration of Jaime White, dated July 26, 2009
- 10 Appellants' Hearing Memorandum, dated August 24, 2009
- 11 Whatcom County's Supplemental Briefing, filed by Royce Buckingham, dated September 25, 2009
- 12 Appellants' Supplemental Hearing Memorandum, filed by Peter Dworkin, dated September 25, 2009, with attachments
 - 12-1 Findings of Fact, Conclusions of Law and Order (Proposed)
 - 12-2 Declaration of Service
- 13 Legislative History, submitted by the County, as follows:
 - 13-1 AB No. 2006-441/Ord No. 2006-061/Attachment A: Code Scrub Amendments
 - 13-2 Council Planning & Development Committee Minutes, December 5, 2006
 - 13-3 Ord No. 2006-061/Attachment A: Code Scrub Amendments
 - 13-4 Planning Commission Meeting Minutes, dated September 21, 2006
 - 13-5 Affidavit of Publications, dated Dec 9 and Nov 25, 2006
 - 13-6 Memo dated Dec 8, 2006 from Laurie Caskey-Schreiber to Pete Kremen: Council Action at Dec 5, 2006 meeting
 - 13-7 Planning Commission Findings of Fact, Reasons for Action & Recommendations, signed and dated 10/31/06 by Hal Hart, with Attachment A: Proposed Code Scrub Amendments
 - 13-8 Planning Commission Meeting Minutes, dated September 21, 2006, Public Hearing File #ZON2005-00013, Stamped Draft
 - 13-9 PDS Staff Report, September 25, 2006, File #ZON2005-00013 w/ Code Scrub Amendments
 - 13-10 DNS, dated November 24, 2006, File SEP2006-00187
 - 13-11 PDS Staff Report, September 25, 2006, File #ZON2005-00013
 - 13-12 Annual Zoning Docket 2005, dated August 31, 2005 with PDS Minor Zoning Text Amendment (Staff-Proposed Code Language "Scrub" ZON2005-00013
- 14 Hearing Examiner memorandum, dated October 7, 2009
- 15 County's Memorandum re: Legislative History of WCC 20.04.031(5)(b)
- 16 Appellants' Second Supplemental Hearing Memorandum with attachment 16-A, Case No. 80684-5 Post v. City of Tacoma, Authored by Justice Richard B. Sanders
 - 16-1 Glaspay & Sons, Inc. v. Les Conrad, et al, 83 Wash.2d 707, 521 P.2d 1173
 - 16-2 Declaration of Service, dated October 19, 2009

- 17 Hearing Examiner memorandum, dated October 21, 2009
- 18 Email memo dated October 22, 2009, from Royce Buckingham re: Request for More Info
- 19 Email memo dated October 23, 2009, from Royce Buckingham re: Legislative History, with attachment (19-1) County Planning Commission Meeting Minutes, dated March 24, 2005
- 20 Email memorandum, dated November 9, 2009, from Royce Buckingham re: Wright Reconsideration Request, with attachments:
 - 20-1 Memorandum, dated November 9, 2009 from David Stalheim to Royce Buckingham
 - 20-2 Code Interpretation, dated January 27, 2003
 - 20-3 Annual Zoning Docket 2005, chart with hand-written notes
 - 20-4 PDS Staff-Proposed Code Language "Scrub"- Minor Zoning Text Amendment
- 21 Appellant's Response to County's Request for Reconsideration, dated November 12, 2009, with Declaration of Service attached, 21-1
- 22 Memorandum, dated November 13, 2009, from Michael Bobbink to Parties of Record re: Request for Reconsideration

Parties of Record

Mark and Tara Wright
5757 Barr Road
Ferndale, WA 98248

Peter Dworkin
Belcher Swanson Law Firm
900 Dupont Street
Bellingham, WA 98225

David Stalheim and Tyler Schroeder
Planning and Development Services

Royce Buckingham
Civil Deputy Prosecutor

II.

On December 28, 2006, Whatcom County received an Application for a 4-Lot Short Plat, the Krebs APO Cluster Short Plat (SSS2006-000225). The Department did not issue a formal Determination of Completeness within the 14 days allowed; therefore, pursuant to WCC 2.33.050(H), the project is deemed complete and vested from the date of submittal, December 28, 2006. On March 26, 2009, Planning and Development Services issued a Notice of Preliminary Short Plat Approval,

subject to conditions. On April 14, 2009, the Appellants appealed the Notice of Preliminary Short Plat Approval.

III.

In the Appeal filed, the Appellants set forth four grounds or issues which they wish to raise pursuant to the Appeal.

Prior to the public hearing on this matter, the Appellants and Planning submitted an Agreed Order to the Hearing Examiner resolving issues one and four.

At this point in the process, the Hearing Examiner is left to decide issues regarding the appropriate language of a Critical Areas Ordinance Note, which is required to be placed on the face of the plat by Ordinance; whether or not the Appellants should be allowed to place the critical areas buffer boundary line on the plat mylar to be recorded; the appropriate mechanism to satisfy the requirements of WCC 16.16.265(C)(2); and whether Planning erred in indicating the proposal may be subject to a SEPA review.

IV.

The Appellants are the owners of a 25-acre parcel zoned Rural Five Acres (R5A) and which is subject to the Agriculture Protection Overlay (APO). In accordance with the requirements of the APO, the Appellants have proposed a four lot cluster subdivision created pursuant to the Short Plat requirements of the Whatcom County Subdivision Ordinance.

The Parties agree that the short plat proposed vested on December 28, 2006, and that the short plat is required to be consistent with WCC 20.04.031(5)(b).

V.

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 Appellants object to the proposed language for the Critical Areas Ordinance Note required on the face of the plat by WCC 21.04.170. The proposed note reads as follows:

CRITICAL AREAS ORDINANCE (CAO) NOTE:

This short plat has been reviewed according to the Critical Areas Ordinance, Whatcom County Code Title 16, Chapter 16.16 adopted pursuant to Ordinance 2005-068. Regulated critical areas are located

within this short plat as shown on this original drawing. A Conservation Easement has been filed with the County Auditor, AF# _____ for the critical areas and associated buffers. **Future development on all lots will be subject to the Critical Areas Ordinance in effect at the time of application for that development.** [Emphasis added.]

Planning and Development Services' position is that the Critical Areas Ordinance Note set forth above is a correct interpretation of WCC 20.04.031(5)(b), and is not in conflict with State law as set forth in RCW 58.17.033. Planning requests the Hearing Examiner uphold the language used in the Critical Areas Ordinance Note. The Appellants' position is that the last sentence in the Note conflicts with both State law and with Whatcom County's Vesting Ordinance, specifically, WCC 20.04.031(5)(b). The Appellants' position is that the final sentence on the proposed Critical Areas Ordinance Note is contrary to law and must be removed. RCW 58.17.033(1) reads as follows:

- (1) A proposed division of land, as defined in RCW 58.17.020, shall be considered under the Subdivision or Short Subdivision Ordinance, and Zoning or other land use control ordinances, in effect on the land at the time a fully completed application for Preliminary Plat Approval of the subdivision or the Short Plat Approval of the short subdivision, has been submitted to the appropriate County, City, or Town Official.**

WCC 20.04.031(5)(b) was amended in 2006 and currently reads as follows:

- (b) Project permit applications for development of lots created by the Short Plat Process shall comply with all development regulations, including but not limited to Critical Areas Ordinance, impervious surface restrictions, environmental work closure periods, and all other applicable code standards.**

In the Critical Areas Ordinance Note, Planning has added to the language of WCC 20.04.031(5)(b), which requires that future development comply with the Critical Areas Ordinance, the words "... in effect at the time of application for that development." Planning's position is that the Whatcom County Council intended to apply the Critical Areas Ordinance in effect at the time of application for any actual physical development on lots previously created by Short Plat. The Appellants disagree, citing the language of RCW 58.17.033(1), which indicates that in addition to the Subdivision Ordinance in effect when a complete application has been filled, "... zoning or other land use control ordinances ..." vest at the time of a fully completed application. The Appellants argue that future development will be under the Critical Areas Ordinance in effect on December 28, 2006.

In support of their position, the Appellants cite Noble Manor v Pierce County, 133 Wash.2d 269, 943 P.2d 1378.

Noble Manor dealt with a Short Subdivision Application filed in Pierce County in 1990. The application indicated that the purpose of the subdivision was to create lots for three duplexes. The duplexes were an allowed use at the time of the Short Subdivision Application. Later, after zoning changes, Noble Manor applied for building permits for the duplexes. Pierce County denied the permits, based on the new zoning restrictions which no longer allowed duplex development on the lots created.

In Noble Manor, the Court concluded that, where the Applicant for a Short Plat identifies the proposed use, at the time of application, the Applicant has a right to develop that use under the land use control ordinances in effect at the time the Subdivision Application was complete.

In this case, the Appellants have proposed a Residential Short Plat, indicating on the Application that the purpose of the Short Plat is to create lots for residential development. In this zone, the only residential development currently allowed is for single-family residences. Based on Noble Manor and the language of RCW 58.17.033(1), the Appellants argue there is a vested right to develop the newly created lots under the Critical Areas Ordinance in effect at the time a complete Short Plat Application was submitted, December 28, 2006. This may be an overbroad reading of Noble Manor. A more restrictive reading would be that the right to develop single-family residences on the lots vested at the time of submission of a complete Short Plat Application by these Applicants. What the Court found vested in Noble Manor was the USE identified at the time of the Short Plat Application. However, our Supreme Court has also adopted a rule that can allow vesting based on Constitutional principles.

Planning suggests that the Whatcom County Council intended a different result when they adopted the current version of WCC 20.04.031(5)(b), i.e. that the Critical Areas Ordinance should be considered to be an ordinance which invokes a health and safety exception to vesting rules; and that all further development on lots created, including the Application for a Building Permit for single-family use, is required to meet the development regulations of the Critical Areas Ordinance in effect at the time the new permit is sought.

A review of the Legislative history in the adoption of the changes to WCC 20.04.031(5)(b) in 2006 is instructive. The Legislative intent for the changes in WCC 20.04.031(5)(b), adopted in 2006, is clearly identifiable by reviewing the Legislative history. The Whatcom County Planning and Development Services Staff Report, Exhibit 13-2 in the Hearing Examiner file, states that the changes made to WCC 20.04.031 in 2006 were part of a “regulatory Code Scrub” and that, “... the amendments are designed to eliminate minor problems such as unnecessary duplication, conflict, lack of clarity and simple errors.”

The Staff Report goes on to state, “the text changes will not result in more restrictive regulation, ...” ~ “There will be no substantive policy issue involved, ...” ~ and, “The text change will result in making language more consistent with the language of the most current State statute.” The Staff Report on the “Code Scrub” addresses the proposed changes in WCC 20.04.031 on pages 4 and 5 of the Staff Report. There, Staff lays out the then current language of WCC 20.04.031(5)(b)

and then lays out and underlines the new proposed language and states that the amendment proposes "... to clarify the legal distinction between: (a) the long plat ... and: (b) the short plat ...". State law had, and has, different vesting rules for long plats and for short plats, and the stated purpose of amending the language of this section was to distinguish between the rules that applied to long plats and those that applied to short plats. There is nothing in this discussion that indicates the Ordinance changes were intended to require development on lots created by Short Plat to comply with the Critical Areas Ordinance in effect at the time a further development permit was sought for the lots, as opposed to the one in effect when a complete Short Subdivision Application vested.

The language of WCC 20.04.031(5)(b) in effect under Ordinance No.96-011 was modified "... to clarify the legal distinction between ..." the long plat and the short plat. The original language from Ordinance No. 96-011 reads as follows:

“(b) Nothing herein shall be construed to restrict the County’s ability, to the extent otherwise permitted by law, to apply new regulations to a project permit or project permit application upon a finding that a change in conditions creates a serious threat to the public health and safety.” [Ord. 96-011]

The new language adopted in 2006 reads as follows:

“(b) Project applications for development of lots created by the short plat process shall comply with all development regulations, including but not limited to Critical Areas Ordinance, impervious surface restrictions, environmental work closure periods, and all other applicable code standards.

The original paragraph (b) refers, by implication, to RCW 58.17, when it used the language, “To the extent otherwise permitted by law ...” and stated that the County may apply new regulations to a project permit or project permit application on the lots created by the short plat process “... upon a finding that a change in conditions creates a serious threat to the public health and safety.”

If the current language of WCC 20.04.031(5)(b) is read and interpreted in the manner proposed by Planning, it would clearly make the change in language adopted pursuant to the Title 20 Regulatory Scrub, a substantive change. This would conflict with the Legislative history which indicates no substantive changes were being made.

The need to distinguish between short plats and long plats in applying vesting rules results from the differences between RCW 58.17.033 and RCW 58.17.170.

RCW 58.17.170 provides that a subdivision (long plat) is vested under the statutes, ordinances, and regulations in effect at the time of approval and for a period of five years after Final Plat Approval. A subdivision is defined in RCW 58.17.020 as a division or re-division of land into five or more lots, etc. Short subdivisions are not subject to RCW 58.17.170 and the five year vesting

limitation for long plats does not apply to short plats. The new language in WCC 20.04.031(5)(b), adopted by the Regulatory Code Scrub process in 2006, was apparently adopted to reflect this difference and not to substantively change vesting rules under either State or local law.

The Hearing Examiner concludes that the current language of WCC 20.04.031(5)(b) does not provide a basis for the language Planning is proposing to put into the Critical Areas Note, stating, **“Future development on all lots will be subject to the Critical Areas Ordinance in effect at the time of application for that development.”** This language should be removed from the Note, since it may conflict with RCW 58.17.033(1). It cannot be read into WCC 20.04.031(5)(b), since there is no showing that this was the intent of the Whatcom County Council in adopting the 2006 amendments.

Finally, it should be pointed out that the applicability of future Ordinances can only be determined based on the language of those Ordinances, the Legislative body’s intent, and the state of State statutory law and State and Federal Constitutional law at that time.

II.

The Department of Planning and Development Services has objected to the Appellants’ request that the current applicable wetland buffers be included on the Final Mylar. Planning is requiring wetland boundaries themselves to appear on the Final Mylar, but has objected to the inclusion of the buffers. Planning has taken the position that the current buffers should not be shown because more restrictive, larger buffers may be required in the future under a changed Critical Areas Ordinance.

One of the stated purposes of the Whatcom County Critical Areas Ordinance is to provide notice to affected Parties of the existence of critical areas on a parcel which may pose a hazard or otherwise limit development. WCC 16.16.100(B)(4) reads as follows:

16.16.100 Purpose and Intent.

- B. By regulating development and minimizing critical area alterations, this chapter seeks to:
 - 4. Alert appraisers, assessors, real estate agents, owners, potential buyers or lessees, and other members of the public to natural conditions that pose a hazard or otherwise limit development.

Failure to identify the buffers on the mylar lessens the notice value of the mylar and the Critical Areas Note, because it does not identify the buffer areas even though their existence imposes significant restraints on development. Considering the extensive coverage of this 25-acre parent parcel with wetlands and buffers, interested parties are entitled to, and need to, understand what portions of the property are buildable and what portions of the property are subject to a ban or strict restrictions on development activity. Failure to show the buffers may result in unintended encroachment into wetland buffers in situations where innocent purchasers fail to understand the

scope of the protected critical areas on a lot. This lessens the protective value of the buffers and denies purchasers needed information on the grounds of a totally speculative possibility of requirements for different, more extensive buffers in the future.

Planning's objection to showing the buffers on the recorded mylar because CAO buffers may change in the future would also apply to delineating the wetlands themselves on the mylar. The definitions of regulated wetlands may also change in the future through the adoption of modified Critical Areas Ordinances, but Planning is requiring the wetland boundaries be submitted for recordation on the Final Mylar.

The Whatcom County Council has concluded that the current buffers are required to protect wetlands. This determination, as required by the Growth Management Act, is based on the "best available science." The current buffers are those required to protect wetlands. The decision to approve the lots being created by the Appellants is based on the fact that there is sufficient useable area outside of setbacks, critical areas, and critical area buffers to allow the reasonable residential use of the lots. The portion of the property currently available for residential development should be clearly shown on the mylar in order to provide adequate information to potential buyers as to both their responsibilities and rights in reference to the regulated critical areas.

Planning argues that there is no ordinance language mandating the showing of critical area buffers on the mylar. That is true. It is also true that there is no ordinance language requiring the critical areas themselves be shown on the mylar yet Planning is requiring those boundaries to be shown.

The Hearing Examiner concludes that the regulatory buffers required pursuant to the Critical Areas Ordinance, as applicable to this Short Plat Application, should be shown on the Final Mylar. The Final Mylar should set forth both the boundaries of the regulated wetlands and their buffers along with explanatory language in the Critical Areas Note. This determination is consistent with the Purpose Section of the Critical Areas Ordinance, specifically WCC 16.16.100(B)(4), (7), (8), (9), and (10).

III.

The final area of disagreement between Planning and the Appellants relates to WCC 16.16.265(C), which reads as follows:

16.16.265 Critical Areas Protective Measures

(C) Tracts. Prior to final approval of any subdivisions, short subdivisions, or binding site plans, the part of the critical area and required buffer that is located on the site shall be protected using one of the following mechanisms:

- 1. Placed in a separate tract or tracts owned in common by all lots within a subdivision;**
- 2. Covered by a protective easement, or public or private land trust dedication; or**

3. Preserved through an appropriate permanent protection mechanism that provides the same level of permanent protection as designation of a separate tract or tracts as determined by the County Technical Administrator or Hearing Examiner.

The Appellants have supplied a copy of the Conservation Easement[attached as Exhibit C to Exhibit #9 in the Hearing Examiner file], which Planning has been requiring under paragraph (C)2, above. The Conservation Easement that Planning has been using requires the Applicant to give up significant real property rights "... in perpetuity." It contains a list of requirements, obligations of the property owner, and restrictions on use which are extensive and, would be under the Conservation Easement, permanent restrictions or obligations regardless of future changes in critical areas regulation. The Appellants have objected to a requirement that they grant a protective easement as well as objecting specifically to the easement language that the County has been requiring of property owners who are subdividing property pursuant to WCC 16.16.265(C).

At the request of the Hearing Examiner, the Parties attempted to come to an agreement on a mechanism which would comply with WCC 16.16.265(C). The Parties were unable to come to an agreement. Thereafter, the Civil Deputy Attorney representing the Planning Department proposed a less restrictive "Conservation Easement" [Attachment No. 2 to Exhibit No. 11]. Planning's Counsel further noted that the Hearing Examiner has the authority to further modify the easement and to determine whether the revised easement provides the appropriate level of protection of the wetland while minimizing the impact on property rights.

At the Hearing Examiner's request, a review of the Legislative history concerning the adoption of WCC 16.16.265(C) was undertaken. No useful Legislative history helping to interpret this section was found. The section must be implemented based on the specific language adopted by the Whatcom County Council.

The Appellants have chosen not to put the wetlands and their buffers in separate tracts to be held in common by the owners of the lots that have being created. The use of tracts to protect critical areas makes sense as a protective mechanism for large urban density residential subdivisions and in situations where the wetlands on site are not extensive. In this case, with extensive wetlands and buffers on the site, setting aside the wetlands and buffer areas as separate tracts would not be especially feasible.

The Appellants have not suggested a method to provide a "... permanent protection mechanism that provides the same level of permanent protection" as would the designation of a separate tract or tracts, pursuant to WCC 16.16.265(C)3. Since the Appellants have not suggested such a mechanism, and since neither Planning nor the Hearing Examiner have identified such a protective mechanism, the Hearing Examiner concurs in Planning's determination that the wetlands and buffers identified should be covered by a protective easement, pursuant to paragraph 2 of WCC 16.16.265(C).

The Appellants raise Constitutional issues resulting from requiring a protective easement. These Constitutional issues are beyond the authority of the Hearing Examiner to resolve. Planning and the Hearing Examiner are required to apply the ordinance as written, taking into account the rule of construction that ordinances should be interpreted, if possible, and where intent is an issue, so as to maintain their Constitutionality and their consistency with applicable State statutes.

Planning and the Hearing Examiner are required to impose a protective mechanism pursuant to WCC 16.16.250(C) in order to approve this Short Plat Application. However, that requirement should be tailored to be consistent with State statutes and with Constitutional limitations on land use regulation.

The amended Conservation Easement proposed by Whatcom County in their supplemental briefing, Exhibit #11, is a significant improvement on the Conservation Easement language that the County has been requiring. Specifically, it does not require that the protective easement be granted “in perpetuity” a requirement that raises Constitutional taking issues and may violate State statutes. Instead, it provides a mechanism which would allow for modification of the protective easement in the property owner’s favor should the character of the critical area or the law regarding regulation of the critical area change to the Appellants’ benefit.

The Hearing Examiner believes that the revised Conservation Easement language proposed by Whatcom County Planning in Exhibit #11 still places burdens upon the Appellants’ property rights which are unnecessary to provide the protective mechanism required by WCC 16.16.265(C) and which may violate State statute and/or State and Federal Constitutional private property protections. Modified Conservation Easement language found appropriate by the Hearing Examiner is attached hereto as Attachment No. 1.

The Planning Department suggests that WCC 16.16.265(C) was intended to be more restrictive than the specific restrictions of the Critical Areas Ordinance and intended to provide additional protection to critical areas. Since there is no useful Legislative history, the actual intent of the Council in adopting this portion of the Critical Areas Ordinance is unknown or unascertainable. However, it must be pointed out that the Critical Areas Ordinance is required by the Growth Management Act to protect critical areas using the best available science. To require protections beyond those identified under the best science available standard runs the risk of requiring extractions from a property owner beyond those necessary to address the actual impacts of the proposed development on critical areas (i.e., no nexus, or not roughly proportionate to the impacts). Planning has provided no information which would justify using the required “protective easement” to impose additional critical area restrictions on a property owner’s rights through the easement, nor has Planning indicated how such additional restrictions should be ascertained. Land use restrictions are required to have an actual nexus to the impacts caused by the development and to be roughly proportional to the impacts of the development. Since the specific regulations in the Critical Areas Ordinance incorporate the best available science in order to protect critical areas, expanding these regulations per WCC 16.16.265(C) could require exactions from property owners beyond those required to address the actual impacts of the development. The purpose of the protective easement required by WCC 16.16.265(C) may be intended only to give additional notice of the limitations on

development. In any case, neither Planning nor the Hearing Examiner has the authority to decide what additional restrictions should be included in the “protective easement.”

The Hearing Examiner has crafted a protective easement designed not to exact from a property owner concessions beyond those already required to protect the critical areas and/or buffers, and to give notice to others of the restrictions on the use of wetlands and buffers on site.

The attached protective easement, as modified by the Hearing Examiner, contains a number of changes from the modified protective easement prepared by Counsel for Whatcom County Planning and Development Services. Among the changes is the elimination of requirements based on existing law, such as the requirement that the property owner pay taxes; or the outright ban on hunting and trapping, which is regulated by the State.

Other changes were made in order to comply with WCC 16.16.100(F). WCC 16.16.100 is the Purpose and Intent Section of the current Critical Areas Ordinance. Paragraph F of this section reads as follows:

- F. Consistent with Whatcom County’s high standard of staff conduct, County staff observe all applicable Federal and Washington laws regarding entry onto privately owned property.

In light of this section, the Hearing Examiner has eliminated from the Conservation Easement proposed by the County the requirement that the Grantor of the easement [the property owner] to give to the Grantee [in this case the County] the right to enter on to the conservation easement area after giving notice to the property owner.

The Fourth Amendment of the United States Constitution bans unreasonable searches and seizures. In particular, the Fourth Amendment protects citizens’ homes and the curtilage around their homes. A basic rule of Fourth Amendment law is that, subject to specific limited exceptions, the government cannot undertake searches or seizures without a search warrant. In this regard, a whole body of law has developed around administrative searches and administrative search warrants. Requiring property owners to waive their basic Fourth Amendment right to be protected by judicial review of warrants before government employees enter onto their private property is not consistent with the language of WCC 16.16.100(F).

Also removed was a general condition which reads as follows:

- c. Grantor agrees to bear all costs of upkeep and maintenance of the conservation easement area and to indemnify Grantee there from.

The Hearing Examiner can see no basis in law for such a condition to be placed on a property owner as part of the requirement for a protective easement under the Critical Areas Ordinance, nor can the Hearing Examiner figure out what “costs of up-keep and maintenance” there might be in this case.

In the same vein, the Hearing Examiner has removed an Attorney's fee clause.

The Hearing Examiner has also removed paragraph 4.b, which gives to the County certain, specified enforcement rights. The enforcement rights of the County are set forth in the County Code and are not appropriately addressed, without a voluntary agreement, in a protective easement the County is requiring as a condition for the granting of a development permit.

The Hearing Examiner has attempted to draft a general protective easement which fulfills the requirements of WCC 16.16.265(C); which is consistent with the County Council's stated intent to protect property rights; and which will ensure that the grant of a protective easement does not exceed the purpose, boundaries, or duration of critical areas protection as required by law. Requirements beyond those set forth above can be appropriate for areas which are enhanced as mitigation for adverse impacts to other critical areas actually modified by a development. Property owners may give up additional property rights voluntarily when placing a conservation or protective easement over critical areas on their property, pursuant to WCC 16.16.265(C).

IV.

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

DECISION

The Whatcom County Hearing Examiner remands this matter to Planning and Development Services for further processing of this Application in conformity with the above Conclusions of Law.

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 calendar 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 3rd day of December 2009.

Michael Bobbink, Hearing Examiner

After recording return to:
Whatcom County Planning
and Development Services
5280 Northwest Drive
Bellingham, WA 98226

GRANTOR:
GRANTEE: WHATCOM COUNTY
GRANTEE (Trustee): N/A
LEGAL DESCRIPTION:
TAX PARCEL I.D. #:
REFERENCE #'s:

CONSERVATION EASEMENT

This grant of a conservation easement is made by and between _____, referred to hereafter as "Grantors," and Whatcom County, referred to hereafter as "Grantee." The Grantors own real property in Whatcom County, the legal description of which is attached hereto as Exhibit A (hereinafter the "Property"). The intent of Grantors and Grantee, through this conservation easement, is to preserve, protect, maintain and limit use of a portion of Grantors' undeveloped Property containing an identified critical area(s) and/or its associated buffer area(s), defined pursuant to WCC 16.16 – Whatcom County Critical Areas Ordinance, for the purpose of protecting the ecological functions and values provided by said critical area(s).

Grantors hereby convey to Grantee, its successors, heirs, and assigns, an easement for conservation purposes in reference to wetlands and/or Habitat Conservation Areas and/or associated buffers as defined pursuant to WCC 16.16. The conservation easement is depicted as "Conservation Easement" on Exhibit B attached hereto (hereinafter the "Conservation Easement").

It is the intent of this easement that the grant of protection not exceed the purpose, boundaries, or duration of critical area protection required by law under the Whatcom County Critical Areas Ordinance. Should the size, shape, or character of the identified critical area be altered by natural processes and/or operation of law in favor of the grantor, this easement shall be subject to amendment to conform to those changes, as determined by the administrator or a court of competent jurisdiction.

This conservation easement consists of mutual rights and obligations and is subject to the reservation of rights set forth below.

1. **Rights, Obligations and Reservations.** All rights, obligations and reservations shall operate as covenants running with the land.

2. **Permitted Uses and Rights Reserved by Grantors.** Grantor reserves the following rights:

- a. To use the property as allowed by applicable Whatcom County Ordinances after disclosing the proposed use to Whatcom County.
- b. To include the acreage of the conservation easement within any development permit application or any project proposal that may be located on the Property for the purposes of calculating residential density or designating required open space.
- c. To maintain fish and wildlife habitat.
- d. Only upon written consent of Grantee, or by an approved farm plan or an approved addendum by the Technical Administrator:
 - (1) and only upon written recommendation of a certified arborist or certified forester, to selectively remove hazard trees to reduce safety hazards; provided that, in the event of an emergency and prior written consent is not feasible, Grantor shall be subject to the provisions of WCC 16.16.235.A; or
 - (2) to enhance or restore degraded fish or wildlife habitat, wetlands, or wildland forest characteristics, on an ecologically managed basis; or
 - (3) to allow construction of unpaved foot trails.

3. **Restrictions on Use.** Except as provided above, and as may be necessary to carry out those rights reserved, and after review by Technical Administrator, the Grantors shall not conduct the following activities within the Conservation Easement area:

- a. Remove trees or native vegetation.
- b. Permit grazing of domestic animals.
- c. Excavate, dredge, fill, dike or otherwise alter the landscape or topography.
- d. Store derelict vehicles, hazardous substances, or waste of any kind.
- e. Explore for or extract minerals, hydrocarbons, soils, gravel or other materials.
- f. Construct, erect or place any buildings, structures, or improvements, either of a temporary or permanent nature.
- g. Grant or allow road or utility construction and easements.
- h. Apply chemicals (fertilizers, pesticides or herbicides).
- i. Alter the surface or subsurface hydrology entering or exiting the conservation easement area.

Otherwise use the conservation easement area in a manner that is inconsistent with the reservation of rights and the purposes of this Conservation Easement.

a.

4. Rights and Responsibilities of Grantee.

- a. Any forbearance by Grantee to exercise any rights under this agreement, in the event of a breach, shall not be deemed to be a waiver of Grantee's rights under this Conservation Easement.
- b. To access, with permission from Grantor, or with an administrative search warrant, to grantee, agents, successor and assigns for the limited purpose of monitoring this easement.

5. General Conditions.

- a. This conservation easement does not grant or permit public access to any portion of the conservation easement.
- b. Grantee may assign its interest in this conservation easement.
- c. This conservation easement shall run with the property and shall be binding on successors, assigns, heirs of Grantor and Grantee.
- d. In the event that any of the provisions contained in this conservation easement are declared invalid or unenforceable in the future, all remaining provisions shall remain in affect.

Dated this _____ day of _____, _____.

Grantor

Grantor

Grantor/Print Name

Grantor/Print Name

STATE OF WASHINGTON)
)ss.
COUNTY OF WHATCOM)

I certify that I know or have satisfactory evidence that _____
is/are the person(s) who appeared before me, and said person acknowledge that he signed
this instrument, on oath stated that he was authorized to execute the instrument and
acknowledged it to be the free and voluntary act of such party for the uses and purposes
mentioned in the instrument.

Dated: _____

NOTARY PUBLIC, in and for the State of Washington,
residing at: _____
Printed Name: _____
My Commission expires: _____

STATE OF WASHINGTON)
)ss.
COUNTY OF WHATCOM)

I certify that I know or have satisfactory evidence that _____
is/are the person(s) who appeared before me, and said person acknowledge that he signed
this instrument, on oath stated that he was authorized to execute the instrument and
acknowledged it to be the free and voluntary act of such party for the uses and purposes
mentioned in the instrument.

Dated: _____

NOTARY PUBLIC, in and for the State of Washington,
residing at: _____
Printed Name: _____
My Commission expires: _____

Reviewed and approved by:

Whatcom County Natural Resources Division

Date

CONSERVATION EASEMENT RECORDING INSTRUCTIONS DO NOT RECORD THIS PAGE

Margin requirements for recording a document at the Auditors Office

3 inch margin at the top for 1st page only

1 inch on all other margins

Do not write in these margins

1. **Grantor:**
This will need to be completed – this is the person who signs the document. If more than one person signs then include all names.
2. **Legal description:**
Full legal description (not the Assessors legal description) is required at the Auditor's to record your document. Your full legal can be found in your Deed or Deed of Trust. Attach a copy to your document.
3. **Abbreviated legal:**
Is required on the first page of the document. You can get this from your full legal description. (Example: NW 4 SE 4 R40 S05)
4. **Tax Parcel I/D. #:**
Is required, you can locate this number from your Deed or Deed of Trust.
5. **Exhibit B:**
This is the Conservation Easement map which indicates the location of the Conservation Easement on the parcel.
6. **Reference #'s:**
This refers to any previously recorded documents concerning a conservation easement.
7. Grantor(s) sign on Page 4 of 4 in front of a notary – signatures are required to be notarized. This can be done at the PDS Counter (\$8.00 fee)
8. Grantor(s) print your name under your signature.
9. Technical Advisor for permit signs the document at this time.
10. Take your document to the Treasurer's Office, 1st floor of the Courthouse for excise tax stamp.
11. Record completed document at the Auditor's office, 1st floor of the Courthouse.
12. Return to PDS with original recorded document. PDS staff will make a copy and return the original to you. Keep your original.



August 20, 2009

WHATCOM COUNTY PLANNING AND DEVELOPMENT SERVICES

STAFF REPORT

The application of:
Mark and Tara Wright
Appeal of the Notice of Preliminary Short Plat
Approval for SSS2006-000225, Krebs APO Cluster
Short Plat.

APL2009-00011
FINDINGS, CONCLUSIONS,
AND DETERMINATIONS

I. SUMMARY OF APPEAL AND RECOMMENDATIONS

Appeal: The appellant, Mark & Tara Wright, appeal the department's conditions of approval associated with the Notice of Preliminary Short Plat Approval document for SSS2006-00225, Krebs APO Cluster Short Plat, issued on March 26, 2009.¹

Recommendation:

The department maintains that the required Critical Areas Note, is the correct interpretation of WCC 20.04.031(5)(b), which indicates that development of lots created by the short plat process shall comply with all development regulations, including but not limited to the critical areas ordinance. In addition, the department maintains that the Conservation Easement, is consistent with WCC 16.16.265(c), which requires critical areas and required buffers to be placed in a separate tract or tracts owned in common, covered by a protective easement (emphasis added), or preserved through an appropriate permanent protective mechanism. The department recommends that the Hearing Examiner reject the appeal and conclude that the requirements of the Notice of Preliminary Short Plat Approval document for SSS2006-00225, Krebs APO Cluster Short Plat, issued on March 26, 2009, are correct interpretations of WCC 20.04.031(5)(b) and WCC 16.16.265(c).

Prior to the hearing the appellant and the County met to discuss a resolution to the issues brought forward in the appeal. The appellant and the County agreed to resolution of issues #1 and #4, as outlined in Exhibit "A" of the appeal application. Due to the resolution of these issues, the following staff report will not discuss those issues.

II. PRELIMINARY INFORMATION

A. BACKGROUND INFORMATION

Appellant: Mark and Tara Wright
5757 Barr Road
Ferndale, WA 98248

Peter Dworkin
Belcher Swanson Law Firm
900 Dupont Street
Bellingham, WA 98225

Legal Property Owners: Mark and Tara Wright
5757 Barr Road
Ferndale, WA 98248

WC File # Being Appealed: SSS2006-00225

Property Location/Address: 5757 Barr Road
Ferndale, WA 98248

Assessor's Parcel Numbers (APN): 390123 203094

Zoning: Rural 5 Acres (R5A) subject to Agriculture Protection
Overlay (APO)

Comprehensive Plan: Rural

B. PROCEDURAL INFORMATION

Authorizing Ordinances:	WCC 20.92	Hearing Examiner
	WCC 21.02.030	Appeals
Applicable State Law:	RCW 58.17.033	Proposed division of land -- Consideration of application for preliminary plat or short plat approval -- Requirements defined by local ordinance
	RCW 58.17.060	Short plats and short subdivisions -- Summary approval -- Regulations -- Requirements

RCW 58.17.065 Short plats and short subdivisions --
Filing

Applicable Whatcom County Codes:

WCC 2.02.125	Ordinances – Effective Date
WCC 2.33	Permit Review Procedures
WCC 16.16.265	Critical Area Protective Measures
WCC 20.04.031	Vesting of permits
WCC 20.36	Rural
WCC 20.38	Agriculture Protection Overlay
WCC 21.04	Short Subdivision

III. FINDINGS AND CONCLUSIONS

Summary:

On December 28, 2006, Whatcom County received an application for a 4 lot short plat, the Krebs APO Cluster Short Plat (SSS2006-000225). The department did not issue a formal determination of completeness within the 14 days allowed, therefore, pursuant to WCC 2.33.050(H); the project is deemed complete and vested from the date of submittal, December 28, 2006. On March 26, 2009 Planning and Development Services issued a Notice of Preliminary Short Plat Approval that was subject to conditions. On April 14, 2009, the appellants appealed the Notice of Preliminary Short Plat Approval.

Basis of Decision:

As indicated in the recommendation section of this staff report the appellant and the County have agreed to resolution of issues #1 (general language in opening paragraph) and #4 (Assigning of densities based on available building sites).

There are two issues still relevant to this appeal;

1. Is the Critical Areas Note required in violation of Whatcom County Code? The department believes that the following language;

CRITICAL AREAS ORDINANCE (CAO) NOTE:

This short plat has been reviewed according to the Critical Areas Ordinance, Whatcom County Code Title 16, Chapter 16.16 adopted pursuant to Ordinance 2005-068. Regulated critical areas are located within this short plat as shown on this original drawing. A Conservation Easement has been filed with the County Auditor, AF# _____ for the critical areas and associated buffers. Future development on all lots will be subject to the Critical Areas Ordinance in effect at the time of application for that development.

is the correct application of WCC 20.04.031(5)(b) and WCC 21.04.170(2). The department believes that this language clearly informs the property owner of the requirements stated in

WCC 20.04.031(5)(b), which states;

Project permit applications for development of lots created by the short plat process shall comply with all development regulations, including but not limited to the critical areas ordinance, impervious surface restrictions, environmental work closure periods, and all other applicable code standards. (Ordinance #2006-061)

2. Is requiring a Conservation Easement, to protect the critical area and required buffer on site, consistent with WCC 16.16.265(b) The department believes that requiring a Conservation Easement is clearly one of the three mechanisms WCC 16.16.265(c) requires to protect critical area and buffers prior to final approval of any subdivision or short subdivisions.

Question 1: Is the Critical Areas Note required in violation of Whatcom County Code?

The department maintains that the required Critical Areas Note, which includes the following language: “Future development on all lots will be subject to the Critical Areas Ordinance in effect at the time of application for that development”, is the correct application of WCC 20.04.031(5)(b) and WCC 21.04.170.

WCC 16.16.265 requires any owner of property containing a critical area or buffer for which a development permit is about to be issued to record a notice with the county auditor stating the general presence of the critical area or buffer on the property, and the fact that limitations on actions in or affecting the critical area or buffer exist. This notice requirement is fulfilled through the recording of a final short plat, as WCC 21.04.170 requires that all final short plats to include a Critical area note.

The critical area note required implements WCC 20.04.031(5)(b), enacted by Ordinance #2006-061. and states that project permit applications for development of lots created by the short plat process shall comply with all development regulations, including but not limited to the critical areas ordinance....

Whatcom County Ordinance #2006-061, was signed by Pete Kremen, Whatcom County Executive, on December 13, 2006. The effective date of Ordinance #2006-061 is December 23, 2006. The vested date of the Krebs APO Cluster Short Plat is December 28, 2006, therefore, this short plat is required to be consistent with WCC 20.04.031(5)(b).

The required Critical Areas Note implements the provisions of Title 21, Title 16, and Title 20.

Question 2: Is requiring a Conservation Easement, to protect the critical area and required buffer on site, consistent with WCC 16.16.265(c)?

WCC 16.16.265 (c) sets forth three options that prior to final approval of any subdivision, short subdivision, or binding site plan with critical areas and required buffers that are located on site must be protected must be followed. Those mechanisms are as follow;

1. Placed in a separate tract or tracts owned in common by all lots within a subdivision;

2. Covered by a protective easement, or public or private land trust dedication; or
3. Preserved through an appropriate permanent protective mechanism that provides the same level of permanent protection as designation of a separate tract or tracts as determined by the county technical administrator or hearing examiner.

According to the Wetland Delineation and Critical Areas Review document, prepared by NWC LLC, on January 2008, wetlands and/or buffers are present on all four of the proposed lot configurations. Under the findings section of the wetland delineation report, Category III and IV wetlands are found on site. The following memo from Lyn Morgan-Hill, Whatcom County Critical Areas Planner, dated March 20, 2009, indicates agreement with the wetland delineation;

An applicant for a 4 lot APO Cluster Short Plat has been routed to Critical Areas staff in conformance with WCC16.16, Critical Areas Ordinance. Submitted materials included a wetland delineation which indicated extensive critical areas on the site (Wetland Exhibit 1/08, NWC). In order to conform to WCC16.16.260 (A), all proposed development must occur outside critical areas and buffers.

The wetlands, habitat conservation areas and associated buffers must be placed in a Conservation Easement recorded prior to or at the time of mylar recording. If the applicants wish to maintain on-going agriculture on the site, an addendum may be attached to the Conservation Easement which allows this activity.

Along with agreeing to the information prepared by Katrina Jackson of NWC LLC, critical areas staff also indicated that a Conservation Easement must be recorded, pursuant to WCC 16.16.265(c), prior to or at the time of mylar recording.

The requirement to fulfill WCC 16.16.265(c) is also described under the Conclusions section of the wetland delineation report submitted by NWC LLC, prepared for the applicant. Whatcom County PDS maintains that the applicant has three different options to fulfill the requirements of WCC 16.16.265(c). Due to the lot configuration submitted by the applicant, WCC16.16.265(c)(1), is not appropriate for this proposal, because the critical areas and buffers are not located in a separate tract or tracts owned in common. The applicant did not request or submit any documents that would have met the requirements under WCC16.16.265(c)(3). Under that code section, the critical area and buffer is preserved through an appropriate permanent protective mechanism that provides the same level of permanent protection of a separate tract or tracts. Because neither WCC 16.16.265(c)(1) or (3) was requested or the plat designed to meet, Whatcom County PDS requested the protective easement (Conservation Easement) prior to the recording of the mylar to verify that the application is in accordance with WCC 16.16.265(c).

Basis for Appeal:

The appeal letter dated April 14, 2009 provides an overview of the applicant's position. The appellant believes that the Notice of Preliminary Approval of the short plat application is in violation of the State's Vested Rights Doctrine, RCW 58.17.033, and Whatcom County Code. The applicant believes that the conditions of approval must list the conditions of approval, which means, if a "critical areas note" is to be placed on the mylar as a condition of approval, then the text of that note must be provided. Further, the appellant believes that the critical areas note currently being required purports to instruct all future property owners on the plat that regardless of the date of vesting, all

future development on any lot within the short plat will be subject to the Critical Areas Ordinance in effect at the time of that development, not at the time of vesting. Finally, the appellant believes that requiring a conservation easement allows the County to increase its jurisdictional land grab for critical areas, but avoids the possibility that the County would lose those same buffers if de-regulation occurred.

1. *Conditions of approval must list the conditions of approval, or if a critical areas note is to be placed on the mylar as a condition of approval, then the text of that note must be provided.*

Staff response:

Staff agrees with the appellant that the critical area note should have been included with the Notice of Preliminary Approval. Since the appeal was submitted, the department and the appellant have met to discuss other issues, and the critical areas note has been provided. To clarify, the following note will be required;

CRITICAL AREAS ORDINANCE (CAO) NOTE:

This short plat has been reviewed according to the Critical Areas Ordinance, Whatcom County Code Title 16, Chapter 16.16 adopted pursuant to Ordinance 2005-068. Regulated critical areas are located within this short plat as shown on this original drawing. A Conservation Easement has been filed with the County Auditor, AF# _____ for the critical areas and associated buffers. Future development on all lots will be subject to the Critical Areas Ordinance in effect at the time of application for that development.

2. *That the critical areas note currently being required purports to instruct all future property owners on the plat that regardless of the date of vesting, all future development on any lot within the short plat will be subject to the Critical Areas Ordinance in effect at the time of that development, not at the time of vesting.*

Staff Response:

In the exhibit associated with the Appeal application the appellant indicates that “the short plat vested on the date a fully completed short plat application was filed with the County, in this case, December 28, 2006”. Whatcom County agrees with the date the application was vested. This appellant goes on to state that “the County must apply those zoning and other land use control ordinances in effect on the date of the application.”

Whatcom County Planning and Development Services does not dispute that the short plat application must be considered based on the zoning or other land use control ordinance in effect at the time of a fully completed application. As indicated in the basis of decision section of this staff report, the effective date of Ordinance #2006-061 is December 23, 2006. This ordinance adopted new language, WCC20.04.031(5)(b), which indicates that development of lots created by the short plat process shall comply with all development regulations, including but not limited to the critical areas ordinance.

WCC 21.04.170 indicates that a Critical Areas note shall be recorded, if applicable, on the final short plat map prior to final approval by the county. In this case, and other short plats that Whatcom

County are approving, the following language is included in the critical area note; *Future development on all lots will be subject to the Critical Areas Ordinance in effect at the time of application for that development.* The language that is included in the critical areas note is a clear representation and correct interpretation of WCC 20.04.031(5)(b).

The applicant is attempting to argue that the vested rights extend beyond the short plat final approval. This argument is not appropriate for two reasons:

- 1) The land use controls in effect at the time of this application clearly stated that development of the lots created by the short plat process shall comply with all development regulations, including but not limited to the critical areas ordinance. Thus, the note that is being required implements this legislative enactment.
- 2) Whatcom County PDS is not stopping this project. The timing of this issue might be more germane to a future development permit application, and not the land division application. Whatcom County PDS is simply implementing the code requirements that land divisions have notes on the plat notifying applicants about critical area limits on development.
- 3) The Whatcom County Critical Areas Ordinance (CAO) contains numerous health and safety regulations that are not subject to the vesting doctrine.

Whatcom County Code section 16.16.100 describes the purpose and intent of the act. Section 16.16.100 says, in part:

Critical areas regulated under this chapter include geologically hazardous areas, frequently flooded areas, critical aquifer recharge areas, wetlands, and fish and wildlife habitat conservation areas.

B. By regulating development and minimizing critical area alterations, this chapter seeks to:

1. Protect the public from harm due to landslides, earthquakes, erosion, volcanic events, flooding, and other natural hazards.
2. Minimize unnecessary maintenance of public facilities, and costs associated with property damage, emergency rescue relief operations, and environmental degradation.
3. Ensure there are no adverse impacts to the quality and quantity of water resources.
4. Alert appraisers, assessors, real estate agents, owners, potential buyers or lessees, and other members of the public to natural conditions that pose a hazard or otherwise limit development.
5. Protect wetlands, floodplains, critical aquifer recharge areas, and habitat conservation areas by applying the best available science to ensure no net loss of ecological functions and values.

6. Protect species listed as threatened or endangered and their habitats.
7. Protect unique, fragile and/or valuable elements of the environment, including ground and surface waters, wetlands, anadromous fish species, shellfish, and other fish and wildlife and their habitats.
8. Provide county officials with information to approve, condition, or deny project proposals.
9. Protect property rights, while allowing for economic development, including agriculture, and allowing for the development and maintenance of adequate and appropriate public services and essential public facilities.
10. Prevent adverse and cumulative environmental impacts to critical areas and mitigate unavoidable impacts.
11. Coordinate Whatcom County's critical areas protection activities and programs with those of other jurisdictions.
12. Coordinate environmental reviews and permitting of proposals with other departments and agencies to avoid duplication and delay.
13. Allow for reasonable use of property in accordance with the provisions of WCC [16.16.270](#).
14. Establish critical areas protection standards and procedures that are consistent with state and federal regulations pertaining to critical areas.

As outlined above, health and safety legislation ranging from outright hazards to water quality are addressed by the CAO. Enactment of the CAO's health and safety measures is a valid exercise of the government's police powers. Police power regulations, if reasonable, are legally permitted to affect property rights.

Inasmuch as the police power is an attribute of sovereignty, it is a universally sustained principle that persons within a state or the inhabitants of a municipal corporation hold their property and are entitled to enjoy and use it subject to a reasonable exercise of the police power; and since the police power is inherent in the effective conduct and maintenance of government, it is to be upheld even though it affects adversely the property rights of some individuals. [Bowes v. Aberdeen, 58 Wash. 535, 109 P. 369 \(1910\)](#); [Shepard v. Seattle, 59 Wash. 363, 109 P.2d 1067 \(1910\)](#); [Campbell v. State, 12 Wash.2d 459, 122 P.2d 458 \(1942\)](#).

Although judicial relief will be granted in the proper case, courts are reluctant to place limits on what may be done in the interest of the health of the community, so long as unreasonable methods are not employed or the natural and constitutional rights of citizens invaded. Accordingly, where not abused, municipal

discretion as to the necessity or propriety of ordinances and regulations to protect the public health will not be disturbed by the courts.

Ford v. Bellingham-Whatcom County Dist. Bd. of Health, 16 Wash.App. 709, **712-713**, 558 P.2d 821 (1977).

Health and safety regulations enacted pursuant to the government's police power are also recognized as an exception to established uses and/or vested rights by *Hass v. City of Kirkland*, 78 Wash. 2d 929, 481 P.2d 9 (1971) and *Rhod-A-Zalea & 35th, Inc. v. Snohomish County*, 136 Wash. 2d 1, 959 P.2d 1024 (1998).

Providing notice that new regulations may be applied to subdivisions at a future date is not only mandated by the Whatcom County code section, it is accurate and fair.

3. *Requiring a conservation easement allows the County to increase its jurisdictional land grab for critical areas, but avoids the possibility that the County would lose those same buffers if de-regulation occurred.*

Staff Response:

This issue is reviewed in detail earlier in the staff report. Requiring a Conservation Easement is a clear and correct option allowed by the interpretation of WCC 16.16.265(c). The applicant did not design the plat to allow for all of the critical areas and buffers on a tract or tracts in common ownership, which would have also met WCC 16.16.265(c)(1). The applicant did not propose an "appropriate permanent protective mechanism that provides the same level of permanent protection as designation of a separate tract or tracts," which would have met WCC 16.16.265(c)(3). Whatcom County would have been and is amendable to agreeing to this type of mechanism during the permit process. Since the options to meet WCC 16.16.265(c)(1) or (3) were not proposed, Whatcom County staff directed the applicant to prepared a protective easement (Conservation Easement) to make sure the project is consistent with WCC 16.16.265(c)(2).

Hearing Examiner Authority

The Hearing Examiner is authorized to hear appeals from any order, requirement, permit decision or determination made by an administrative official in the administration of the Land Division Code (Title 21) and the Critical Area Code (Title 16.16).

IV. RECOMMENDATION

Based on the above findings, Whatcom County PDS recommends that the Hearing Examiner reject the appeal and conclude that the requirements of the Notice of Preliminary Short Plat Approval document for SSS2006-00225, Krebs APO Cluster Short Plat, issued on March 26, 2009, are correct interpretations of WCC 20.04.031(5)(b) and WCC 16.16.265(c).

Report prepared by:

Tyler R. Schroeder
Whatcom County Planning and Development Services

Current Planning Supervisor