CITY OF SHORELINE
HEARING EXAMINER

FINDINGS, CONCLUSIONS AND DECISION – REMAND HEARING

APPELLANT:	Timothy and Patricia Crawford
APPLICANT:	Aegis Assisted Living
FILE NUMBER:	Building Permit #2000-0021, Application Number 107421
APPEALS:	Reissuance of a SEPA threshold determination at an assisted care living facility at 15100 1st Avenue NE, Shoreline and Director's Determination classifying a reach of Thornton Creek known as TC8 as an intentionally created stream as defined by SMC 20.80.470(E). An MDNS was reissued based on this additional information and analysis.
REVIEW PROCESS:	The Hearing Examiner holds an open record hearing on the appeal Of the Director's Decision and SEPA MDNS. Presentation of Testimony and argument is limited to the applicant, appellant and City staff as parties to the appeal. The Hearing Examiner makes a decision regarding the appeal. The court retains jurisdiction until the Hearing Examiner makes his decision.

I. Background and Procedural Findings

A. Project Information Summary

Project Numbers	Building Permit # 2000-0021
Address	15100 1st Avenue NE, Shoreline
Applicant	Aegis of Shoreline, LLC
Proposed Project Description	Proposal to build a 2-story dementia care facility (completed) with wetland and stream buffer enhancements on both the subject parcel at 15100 1st Avenue NE, a parcel immediately south of the subject parcel
Parcel Numbers	288170-0313 and 288170-00330
Date SEPA DNS' Issued	April 5, 2002 and June 16, 2005

B. Appeal Summary

Decision Appealed:	Issuance of SEPA Determination of Non-Significance and Director's Decision
Appellants	Patricia and Tim Crawford
Date Appealed	July 7, 2005
Appeal Hearing Date	October 19, 2005; Record Held Open Until November 17, 2005

C. Procedural History

This building permit was suspended following a Land Use Petition Act Appeal of the building permit and Addendum to the Mitigated Determination of Non-Significance (MDNS) issued April 5, 2002. This hearing stems from the April 15, 2004 Order by Judge John P. Erlick, King County Superior Court, specifically relating to the proper characterization of the waterway officially designated "TC8," which at various times has also been called "North channel," "interceptor ditch" and "North ditch." It was found that the amended building permit and the State Environmental Policy Act (SEPA) addendum show that the drainage ditch to the east of the subject property had been re-characterized from the initial MDNS and building plans that were made available for public comment. The Court's Order states:

> By operation of law, as a consequence of the failure to comply with the Shoreline Municipal Code and SEPA as set forth above, the amended building permit for the North site was not issued validly under SEPA and is suspended pending compliance with the Shoreline Municipal Code and SEPA. To comply with these requirements, the City shall first reopen the SEPA environmental review process for a new threshold determination on the proper characterization of the north channel. Court's Order, page 12, paragraph 2 (HE Exhibit 9, Exhibit 7).

In May 2004 Tetra Tech/KCM (on behalf of the City) published the Thornton Creek and West Lake Washington Basins Characterization Report (with appendices) (HE Exhibit 9, Ex. 2). Adolphson Associates prepared a memorandum entitled Thornton Creek Fish Passage Barrier Assessment in December, 2004 (HE Exhibit 9, Ex. 14). On April 1, 2005, Talasaea Consultants (on behalf of Aegis) published a Critical Areas Report (HE Exhibit 9, Ex. 5).

In response to the procedural concerns expressed by the Court, a neighborhood meeting was held on February 24, 2005, in accordance with the City of Shoreline Neighborhood Meeting guidelines. City requirements call for notice to be provided to residents within 500 feet of the subject property. The appellants questioned the adequacy of the process during the public hearing during the remand hearing before the Hearing Examiner, but it was not part of their appeal.

On April 8, 2005, Aegis filed its SEPA Modified Environmental Checklist to permit reopening of the SEPA environmental review process as ordered by the court. (HE Exhibit 9, Ex. 8). This was accompanied by a Critical Areas Report by Talasaea, consultants on behalf of Aegis. The City gave public notice of that application on May 2 with a comment deadline of May 16, 2005. (HE Exhibit 28, Exhibit L). The City received public comment letters in response to its notice (HE Exhibit 9, Ex. 10).

Following public comment the Director issued a classification of portions of the Interstate 5 ditch TC8 on June 10, 2005, Classifications of Portions Interstate 5 Ditch (TC8) Decision of the Director (HE Exhibit 9, Ex 1), hereafter "Director's Decision" and a MDNS was reissued for the building on June 30, 2005.

Appellants requested a remand hearing to consider the north-channel characterization as contemplated in the Interim Order through an appeal statement filed on July 7, 2005.

C. ANALYSIS OF APPEAL ISSUES

The Appellants have the burden of establishing that the decision of the City is not supported by a preponderance of the evidence. *Rules of Procedure Before the Hearing Examiner (RP), Rule 9.8.* City staff reviewed application materials for compliance with Shoreline Municipal Code (SMC) Chapter 20.80. Staff also verified that the materials complied with SEPA, adopted by the City under SMC 20.30.490 through 20.30.710.

SMC 20.30.210 specifies the grounds for an administrative appeal. This section states that the grounds for filing an appeal are limited to the following:

A. The Director exceeded his or her jurisdiction or authority;
B. The Director failed to follow applicable procedures in reaching the decision;
C. The Director committed an error of law; or
D. The findings, conclusions or decision prepared by the Director or review authority are not supported by substantial evidence.

The Appellants identify four appeal issues in their letter of July 7, 2005 challenging the Director's Decision on Aegis – Project #107421.

1. The Director exceeded his or her jurisdiction or authority pursuant to SMC 20.30.210 and failed to follow applicable procedures in reaching the decision pursuant to paragraph B of SMC 20.30.210, by relying on facts not entered into the record (specifically the suit filed by Aegis against the City for damages allegedly caused by the City in its review of this project).

At the time the Decision was entered there was a pending suit for damages brought against the City by Aegis requesting damages. The suit has subsequently been dismissed on summary judgment. No additional testimony was presented to the Hearing Examiner related to this issue and it is hereby dropped as an appeal issue.

2. The Director committed an error of law pursuant to paragraph C of SMC 20.30.210 by misinterpreting the documentation on the location of Thornton Creek as contained in the 1963 Surface Water Contract referred in Hearing Examiner Exhibit 9 (City) Exhibit 3.

The Appellants note that the State and Pryde mutually agree that there is a problem of surface waters including an "existing stream bed which first runs across the State Freeway property and onto the Pryde property at a point designated "A: on Exhibit "1" . . ." This reference is on page 2 of the document in the "WHEREAS" paragraph. They dispute the finding in the Director's Decision that Thornton Creek flows through the Crawford Property based on historic documents, notably the 1963 contract on drainage control executed with the construction of Interstate 5. However, a review of that same paragraph in the 1963 document referenced above states: "Said existing creek then proceeds across the Pryde property in the approximate location as shown on Exhibit '1' (original not attached) and intersects and crosses onto the Sunde property (now owned by Crawfords) at a point which is designated B' on Exhibit '1' and which lies westerly approximately 124 feet from the southeasterly corner of Pryde's property herein described." A map which shows these designations was recreated by the Crawfords to replace the one missing from the King County records (HE Exhibit 18). The Appellant also concludes that the language of

this agreement indicates that the State was diverting the existing stream into the "ditch" that the Director Decision found to be an "intentionally created stream."

The City and the Applicant introduce evidence demonstrating the historic natural flow of Thornton Creek through the Crawford property and continuing south under N. 155th to what is now Twin Ponds Park and thence to its present crossing of 1st Avenue NE onto the Aegis property into Peverly Pond. Their evidence showed that the stream did not and does not flow through the north-channel along Interstate 5 immediately to the east of the subject parcel. The Appellant introduced letters from individuals and agencies noting their interpretation that TC8 should be considered a stream based on their analysis and Shoreline's definitions. These are further identified in the Findings.

3. Having misinterpreted the agreement, the Director's Findings, Conclusion and Decision are not supported by substantial evidence and were appealed pursuant to paragraph D of SMC 20.30.210.

The Appellants do not expand on this item in their Letter of Appeal. Appellants assert that the 1963 drainage contract was misinterpreted and that is sufficient to rebut other evidence that the north channel is an intentionally created stream and not subject to regulation under the applicable zoning provisions.

The City argues that substantial evidence is sufficient to persuade a fair minded, rational person of the truth of the findings. State v. Hill, 123 Wn.2d 641, 647, 870 P.2d 313 (1994); In re Marriage of Monaghan, 78 Wn.App. 918, 923, 899 P.2d 841, 844 (1995). The City further argues that the Shoreline Municipal Code regulates surface waters "producing a defined channel or bed, not including irrigation ditches, canals, or storm or surface water runoff devices." SMC 20.20.046 further qualifies this definition to note exceptions if it is used by salmonids or to convey streams naturally occurring prior to construction of the watercourse. This is the primary rule and the City states that evidence will show that this ditch was designed and built with Interstate 5, its bed defined by concrete or asphalt, and that it is primarily a storm water runoff device.

The controversy lies in the exceptions which follow this principal rule detailed in the regulations under "intentionally created streams." SMC 20.80.270 (E: "Intentionally created streams are excluded from regulation under this subchapter, except manmade streams that provide critical habitat for species of fish and wildlife that are proposed or listed by the Federal government or State of Washington as endangered, threatened, critical, or priority species. Intentionally created streams that provide documented critical habitat for these species shall be classified and treated as natural streams. The Appellants argue that this is the case for the TC8.

The City further argues that the Director's Decision is amply supported by evidence that this drainage channel does not provide documented critical habitat, particularly in light of the fact that all documentation of fish sampling efforts have shown no fish in this reach and documented poor habitat quality. The City further argued at the public hearing that the decision need not reach the question of whether habitat is critical to one of the named species given the fact that no fish species have been documented. However, the Director's Findings and Conclusions do address the issue of critical habitat which is appropriate.

The Director relied on studies done both for the Aegis application (Critical Areas Report, April 2005 – HE Exhibit 9, Ex. 5), Adolphson Associates memorandum on – Thornton Creek Fish Passage Barrier Assessment, 12/7/04, (HE Exhibit 9, Ex. 14), Tetra Tech/KCM – Thornton Creek and West Lake Washington Basins Characterization Report (HE Exhibit 9, Ex 2) as well as letters and documents from individuals and representatives within private organizations, Washington State Department of Transportation (WSDOT) and the Washington Department of Fisheries and Wildlife (WDFW) commenting on both the barriers and the quality of TC8 as critical habitat.

4. Decision is incorrect factually with regard to the Director's analysis of the fish habitat capacity of the channel at issue.

The Appellant's statement is very succinct as to their contention. During the course of the Public Hearing they submitted substantial testimony and numerous documents regarding the quality of the fish habitat within TC8. This is perhaps the most difficult issue to review and to make an interpretation under the Director's responsibility to administer the City's Code. However, in reading the Director's Decision there are findings related to the quality of the fish habitat with references to information reviewed that both supports and questions its quality. Also, Conclusion 4 in the Director's Decision refers to his determination that TC8 does not provide critical habitat.

The Appellants Letter of Appeal (HE Exhibit 1) also lists a number of other issues:

- Contention that TC8 is essentially a second channel of Thornton Creek;
- Lack of supporting documentation in the Director's Decision;
- Ignoring the input of a resource agency such as WDFW and others; and
- Changing of the City's position on the characterization of TC8 since the initial review of the project which might require an entirely new permitting process.

The following findings have been structured to respond to these issues as well as the above four appeal items.

D. Public Hearing

On October 19, 2005, the Hearing Examiner held a public hearing on the appeal of the Director's Determination and SEPA MDNS for Project File No. 107421. The hearing was opened at 1:05 pm in the Mount Rainier Room of the Shoreline Conference Center and was closed at 8:40 pm. The record was held open to receive documents from the City, Appellants and Applicant. Information from the City from WSDOT (HE Exhibit 34) was not received until November 2, 2005 at which time the Appellants request that the record be kept open to allow time for them to respond. This was granted by the Hearing Examiner and the Appellants' response (HE Exhibit 35) was received on November 17, 2005, at which time the record was closed.

At the beginning of the public hearing the Hearing Examiner indicated that he had visited the site again and had reviewed the written briefs from the City, the Applicant and the Appellants. He stated that each witness would be asked to affirm that the information they would provide was true. The Hearing Examiner also visited the site after the hearing to review the maintenance work that had been done recently by WSDOT in TC8 on each side of N. 155th Street.