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BEFORE THE

SNOHOMISH COUNTY HEARING EXAMINER

SUPPLEMENTAL DECISION of the DEPUTY HEARING EXAMINER

In the Matter of the Application of **QUILCEDA LAND GROUP, INC.** for a rezone for **Arbutus Gardens** and Appeal of Determination of Non-significance by **CITIZENS FOR MEADOWDALE COUNTY PARK**	)	**FILE NO. 04-119124-LU**

DATE OF SUPPLEMENTAL DECISION: October 18, 2006

PLAT/PROJECT NAME: *Arbutus Gardens*

DECISION (SUMMARY): The appeal is **DENIED** and the proposed rezone from the current Residential-9,600 (R-9,600) to Low Density Multiple Residential (LDMR) is **CONDITIONALLY APPROVED**.

BASIC INFORMATION

GENERAL LOCATION: This project is located immediately northwest of the intersection of 60th Avenue West and 156th Street S.W. in Edmonds.

ACREAGE: 6.87 acres

ZONING: CURRENT: R-9,600
PROPOSED: LDMR

COMPREHENSIVE PLAN DESIGNATION:

General Policy Plan Designation:	Urban Medium Density Residential (6-12 du/acre)
Pre-GMA Subarea Plan:	Paine Field
Pre-GMA Subarea Plan Designation:	Urban (4-6 du/acre)

UTILITIES: Water/Sewer: Alderwood Water & Waste Water District

SCHOOL DISTRICT: Edmonds School District No. 15

FIRE DISTRICT: No. 1

SELECTED AGENCY RECOMMENDATIONS:

Department of:

Planning and Development Services:	Conditional Approval
Public Works:	Conditional Approval

PUBLIC HEARING

1. The consolidated (predecision and appeal) open record public hearing commenced at 9:01 a.m. on September 22, 2006. Witnesses were sworn, testimony was presented and exhibits were entered at the hearing. Pre-hearing, the Examiner had denied Quilceda's motion to dismiss the appeal, ruling that to allow the appeal would not be contrary to SCC 30.61.300(8), 30.71.110(3) or RCW 36.70B060(6) in view of the express language of Snohomish County Council Motion No 05-480 allowing "…filing an appeal of any future administrative decision…." in this matter.

2. The Examiner announced that he had read the PDS staff report, reviewed the file and viewed the area and, therefore, was generally apprised of the issues of the case.

3. The applicant, Quilceda Land Group, Inc., was represented by attorney Brad Cattle. Appellant Citizens for Meadowdale County Park was represented by attorney Henry Lippek. Snohomish County was represented by Erik Olson, Randy Sleight and Frank Scherf of the Department of Planning & Development Services.

4. The hearing concluded at 2:38 p.m., September 22, 2006.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND DECISION

FINDINGS OF FACT

Based on all of the evidence of record, the following findings of fact are entered.

1. The applicant, Quilceda Land Group, Inc. (hereinafter "Quilceda"), filed a complete master application on October 22, 2004 (Exhibit 1) for a rezone from the existing R-9,600 to the proposed Low Density Multiple Residential (LDMR). The purpose of the rezone is to allow 55 detached single-family dwellings: 24 more than the 31 homes which could be built under current zoning. The subject site of nearly seven acres is located immediately northwest of the intersection of 60th Avenue West and 156th Street S.W. in Edmonds abutting the 105-acre, 35-year-old Meadowdale County Park.

2. On June 8, 2005, Snohomish County's Department of Planning & Development Services (PDS) issued a SEPA threshold determination of non-significance as to the proposed rezone. On June 22, 2005, Citizens for Meadowdale County Park timely filed an administrative appeal from that threshold determination. A consolidated, open record public hearing pursuant to Snohomish County Code 30.61.300(4) was held before the Deputy Hearing Examiner (hereinafter the "Examiner") on August 17, 2005. The record remained open for pre-hearing briefs and, after review of those briefs, the Examiner issued a decision on September 12, 2005.

3. That decision held that the rezone application met all requirements for a rezone and was worthy of approval except for the need to examine in more detail the storm drainage impacts of the development proposal. The Examiner remanded the matter for withdrawal of the determination of non-significance and for issuance of a mitigated determination of non-significance. The Examiner specified that the mitigation measures were to be based on supplemental geotechnical, stormwater and groundwater analysis, to include at least the following:

> "Analysis of the potential effects that groundwater increases caused by increased infiltration rates within the western side of the development would have on shallow, loose weathered soils on the steeper slopes, especially under the influence of prolonged rainfall or rapid melt of various snow depths and, based on the results thereof, engineered designs as to:
>
> Changes required to the proposed drainage system, such as to increase infiltration across the site rather than concentrating all runoff into the conveyance system and detention vault, and
>
> Relocation or redesign of the dispersion trench." (Decision, p. 7)

4. In the remand, the Examiner did not require further analysis of the rezone itself. The rezone is consistent with the General Policy Plan's Future Land Use Map, which shows the subject site as designated Urban Medium Density Residential (6-12 dwellings per acre). The proposed LDMR zoning is synonymous with that Comprehensive Plan designation. Thus, no further review of the rezone itself is performed herein. The only issue herein is whether the SEPA official was clearly erroneous in concluding again on remand that the additional 24 homes will probably not cause significant, adverse and unmitigated environmental impact to the sensitive slopes, creek and Park.

5. As stated in the September 12, 2005 decision's findings of fact, the subject site is atop a bluff which slopes steeply (approximately 60% slope) as it drops off-site into a tributary (Type IV) of Lund's Gulch Creek (Type 1), which supports Chum and Coho salmon, Cutthroat trout and Steelhead. (Finding of Fact No. 3). That same finding adds:

> "It is undisputed that the ravine has a history of slope instability and flooding caused by storm water runoff from developments, with much damage to Lund's Gulch Creek and its tributaries and to the Park itself". (Id.)

6. Citizens appealed that September 12, 2005 decision to the County Council. Quilceda countered with a motion that that County Council dismissed that appeal. The County Council dismiss the appeal but only on grounds that the appeal was premature. The dismissal was explicitly "…without prejudice to any party of record filing an appeal of any future administrative decision on that application after the MDNS is issued." (County Council Motion No. 05-480, October 19, 2005) The instant appeal is from such "…future administrative decision…"; i.e., the appeal is from the decision of the SEPA responsible official

to accept as sufficient the further drainage impact mitigation taken by the applicant in response to the Examiner's remand. For the appellant to prevail, it must persuade the Examiner that the SEPA responsible official's acceptance of the further action as sufficient was a "clearly erroneous" choice. A SEPA threshold determination is clearly erroneous if, upon consideration of the entirety of the evidence of record, and according substantial weight to the determination of the SEPA responsible official, the Examiner is left with the definite and firm conviction that the determination of the SEPA official was a mistake.

7. In summary, the sole issue before the Examiner in this proceeding is well-stated at page one of Citizens' post-hearing brief in which Citizens asserts that Quilceda "…did not adequately mitigate the proposed project's drainage, groundwater, and flooding impacts on Meadowdale County Beach Park…." (Exhibit 227). The following findings focus on what mitigation is, in fact, proposed.

8. Following receipt of the Examiner's September 12, 2005 decision remanding the matter, Quilceda, in consultation with the staff of the Snohomish County Department of Planning and Development Services, categorized into 17 subparts the further actions required by the Examiner's remand. That process included consideration of the earlier SEPA review which the Examiner intended to have supplemented on remand. In essence, Quilceda undertook three primary actions comprising the "post remand process":

   A. Further evaluation of the site.

   B. Further evaluation of the project design.

   C. Re-evaluation of the calculations supporting A and B above.

9. As a result of the post remand process, Quilceda decided to increase the stormwater detention storage facility to 1.5 times the Soil Conservation Service calculated size per the applicable 1992 DOE Stormwater Design Manual standard design size. (See Exhibit 210) Further, in response to the Examiner's decision of September 12, 2005, by the end of that month the applicant's geotechnical consultants led by Higa-Burkholder Associates, LLC had dug supplemental test pits where the stormwater dispersion trench is proposed to be located. In that same area, in further response to the Examiner's remand, two deep borings were made in January and February 2006 in order to assess the thickness of the glacial till there in the area of the dispersion trench. Those actions were for the purpose of confirming the subsurface conditions in the area of the proposed stormwater dispersion trench and the steep, western slope. Results were published in Higa-Burkholder's report dated April 27, 2006. (Exhibit 211)

10. Earlier, at the end of November 2005, the principal wetland ecologist for Wetland Resources, Inc, William Railton, PWS, filed a report (Exhibit 212) recommending that two rows of willow and dogwood be planted on four-foot centers immediately down slope of the 120 foot-long dispersion trench to stabilize any potential sediment transport while increasing wildlife habitat. That study is part of the "peer review" confirmation and supplementation of earlier analysis done by other consultants before and after the Examiner's remand decision of September 12, 2005.

11. On April 4, 2006, Higa-Burkholder issued to Quilceda a Supplement to the Full Drainage Report and Erosion risk Assessment (Exhibit 213). Therein is presented a drainage basin analysis for sizing and designing the detention system. The applicant asserts that the detention vault is oversized sufficiently to help reduce existing stormwater flows and, thus, to help reduce potential erosion.

12. The detention design is challenged by Citizens. Citizens asserts that the sizing of the detention vault should be based on a 2.5 safety correction factor instead of the 1.5 factor proposed by Quilceda. The pivotal issue is whether the larger detention is required only if downstream flooding is of public roads or occupied dwellings, as argued by the County. Citizens assert that the County's position is an "undercutting of code requirements", by denying the 2.5 safety factor protection to the regionally important Meadowdale Beach Park. (Exhibit 227, p. 4)

13. The applicable provisions of the Snohomish County Code (SCC) are those of SCC Chapter 30.63A, "DRAINAGE", the "Purpose" section of which sets out eleven objectives of regulating and controlling drainage and stormwater to safeguard the public health, safety, and general welfare. It states: "This chapter applies to all development activity." (SCC 30.63A.010)

14. Thus, the chapter is intended to regulate the sources of stormwater without express limitation based on the type of land use impacted by that water. The logic of that intent lies in the fact that downstream uses may change over time. The off-site slopes, creeks and park which will receive Quilceda's storm drainage here include critical areas. It follows that the interpretation most consistent with SCC 30.63A.210(1)(c)(ii) and Table .210(1) is that, when the conversion of land use is from forest to single-family (as here), the correction factor of 2.5 applies to detention sizing when a history of downstream damage is undisputed in the record (as here) affecting a regionally significant public park for the protection of which Park the City of Lynnwood has invested $3 million. Thus, voluntary mitigation offer number six incorporated as a condition in the MDNS (Exhibit 209) must be amended to provide that the stormwater detention facility shall be increased to 2.5 times (not the proposed 1.5 times) the Soil Conservation Service calculated size per the required 1992 DOE Stormwater Management Manual standard design size.

15. Citizens' assertion that Quilceda performed inadequate study of flooding for a quarter-mile downstream is unpersuasive in view of the undisputed preponderance of evidence in this record that there is significant storm-related flood damage to the streams, the ravine and the Park itself following even two-year storms.

16. Citizens and the City of Lynnwood argue that the proposed subdivision should be limited to 28 dwelling units consistent with a low-impact model. That argument fails for two reasons: first, the site is not one of the five demonstration sites selected for low impact drainage projects in the Reduced Drainage Discharge Housing Demonstration Program and, second, the application must be approved or denied as presented, not as redesigned by the Hearing Examiner except for conditions imposed based on a rational nexus between the proposal and its specific impacts.

17. Citizens argue that the stormwater calculations should be based on zero runoff from the subject site in its predevelopment condition. However, Snohomish County Chief Engineer Randy Sleight testified that in 21 years spent reviewing proposals, he has not before encountered the design of stormwater detention facilities based on 100% infiltration and zero overland flow. In view of the steepness of the slopes forming the chasm of the ravine, the assertion that all rainwater is absorbed is incredible. SCC 30.63A.210 requires that the post-development rate of stormwater discharge not exceed the pre-development level and that requirement applies regardless of the amount of impervious surface proposed.

18. Witness Thomas Holz asserts for Citizens that the proposal will reverse the subject site's drainage pattern from one of zero overland flow to nearly all overland flow and concludes: "There is no amount of storage that can mitigate for this massive of a hydrologic change (Beyerlein, 1999)." (Exhibit 226) The evidence of record does not prove that point to such a level of certainty that the Examiner is left with the definite and firm conviction that a mistake has been made by the responsible SEPA official in this instance. That assertion seems to ignore the 120-foot wide dispersion trench and the upsized detention structure. Thus, as a result of the further analysis by the parties after the remand and the resulting amendment of the

proposal, the Examiner no longer finds as fact that it is insufficient to limit post-development runoff to pre-development levels.

19. The Examiner notes Quilceda's offer of a vegetation plan (Exhibit 212) to place 30 Scoulers willows and 30 red osier dogwoods immediately down-slope of the dispersion trench in order to improve the biological functions of the trench. Implementation of that planting plan is required as an additional condition upon approval herein.

20. All findings of fact in the Examiner's decision entered September 12, 2005 are hereby incorporated by this reference as if set forth in full herein. Where there is conflict between those earlier findings and the findings herein, the later findings control because they have taken into account new information resulting from the remand for further environmental review.

21. Any finding of fact above which should be deemed a conclusion of law is hereby adopted as such.

CONCLUSIONS OF LAW

Based on the findings of fact entered above, the following conclusions of law are entered.

1. As determined in the Examiner's decision entered more than one year ago on September 12, 2005, the proposed rezone from the existing R-9,600 to Low Density Multiple Residential (LDMR) is consistent with the General Policy Plan designation for the subject site. That is, it was determined in that September 12, 2005 decision that the application meets the requirement set forth at SCC 30.42A that a proposed rezone must be consistent with the Comprehensive Plan.

2. The purpose of the remand in response of the SEPA appeal in 2005 was to insure environmental full-disclosure required by the Washington State Environmental Policy Act (RCW 43.21C) as to the second applicable requirement of SCC 30.42A; i.e., that a proposed rezone must bear a substantial relationship to the public health, safety and welfare. The Examiner concludes as a matter of law that the proposal does bear that requisite relationship because of the actions taken by Quilceda in response to the Examiner's decision remanding the matter for that purpose. Those actions are described in the findings of fact above herein and include eight voluntary mitigation measures imposed as conditions upon the Mitigated Determination of Non-significance pursuant to SCC 30.61. In addition, the Examiner herein formalizes as a condition the landscaping plan supplementation described at Exhibit 212 and requires that the size of the stormwater detention facility be increased to 2.5 times the size calculated by the 1992 DOE Stormwater Management Manual. Subject to all of those conditions (set forth under Decision, below), the Examiner is able to conclude as a matter of law that the proposed rezone makes adequate provision for the public health, safety and general welfare.

3. Based on review of the entire record, and according substantial weight to the determination of the SEPA responsible official, the Examiner is not left with the definite and firm conviction that a mistake was committed in issuing the Mitigated Determination of Non-significance herein subject to the conditions as amended by the Examiner.

4. Any conclusion of law above which should be deemed a finding of fact is hereby adopted as such.

DECISION

Based on the findings of fact and conclusions of law entered above, the decision of the Hearing Examiner on the application is as follows:

The appeal is **DENIED** and the request for a rezone from Residential-9,600 to Low Density Multiple Residential is **CONDITIONALLY APPROVED** subject to the following conditions:

1. To help better screen the project from neighboring properties upgrade the code required 10-foot wide Type B frontage landscape buffer to a Type A landscape buffer along the projects 60th Avenue W. frontage and increase the 10-foot wide landscape buffer to 35-feet wide in the 35' X 154' section in the southwest corner along 60th Avenue W.

2. In addition to all code required landscaping and to help screen the project from neighboring properties, install a Type A landscape buffer, approximately 9-feet wide, along that portion of the southern property line starting from the SE corner behind Unit 1 and extending westward to the west end of the proposed retaining wall behind Unit 9.

3. In addition to all code required landscaping and to help protect the critical area between the buildings and the critical area buffer near the western boundary, install a Type A landscape buffer along the entire slope buffer area east of the top of the slope line as shown on the site and landscape plans.

4. To reduce erosion potential and minimize impacts to the Type 4 stream located off-site, the stormwater detention outlet structure will be located on the adjacent property to the north and, further, two rows of willow and dogwood shall be planted on four-foot centers immediately down-slope of the 120-foot long dispersion trench as further detailed in Exhibit 212.

5. Install two crosswalk crossings at the intersection of 60th Avenue W. and 156th Street SW, to allow for safer pedestrian crossing at the intersection, together with a paved pedestrian waiting area at the terminus of each crosswalk in the northeast corner of the intersection.

6. The stormwater detention storage facility shall be increased to 2.5 times the Soil Conservation Service calculated size per the required 1992 DOE Stormwater Management Manual standard design size.

7. The maximum allowable flow rates leaving the site shall be 0.04, 0.06, and 0.67 cubic feet per second for the 2, 10 and 100 year storm event as specified on Page 10 of the "Supplement to the Full Drainage Report and Erosion Risk Assessment for the Preliminary Plat of Arbutus Gardens" report by Higa Burkholder Associates, LLC of April 4, 2006. (Exhibit 213)

8. The applicant volunteers to comply with Volume II Construction Stormwater Pollution Prevention from the Department of Ecology 2005 Stormwater Management manual for Western Washington. This agreement includes only Volume II of the manual. An on-call certified erosion control specialist will be identified and will be on-site to determine initial construction erosion control measures. The certified erosion control specialist will also inspect after rain events and be on-call as needed to correct erosion control problems.

Decision issued this 18th day of October 2006.

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Ed Good, Deputy Hearing Examiner

EXPLANATION OF RECONSIDERATION PROCEDURES

The decision of the Hearing Examiner is final and conclusive with right of appeal to the County Council and Superior Court. However, reconsideration by the Examiner may be sought by one or more parties of record. The following paragraphs summarize the reconsideration and appeal processes. For more information about reconsideration and appeal procedures, please see Chapter 30.72 SCC and the respective Examiner and Council Rules of Procedure.

Reconsideration

Any party of record may request reconsideration by the Examiner. A petition for reconsideration must be filed in writing with the Office of the Hearing Examiner, 2nd Floor, County Administration-East Building, 3000 Rockefeller Avenue, Everett, Washington, (Mailing Address: M/S #405, 3000 Rockefeller Avenue, Everett WA 98201) on or before **OCTOBER 30, 2006**. There is no fee for filing a petition for reconsideration. **"The petitioner for reconsideration shall mail or otherwise provide a copy of the petition for reconsideration to all parties of record on the date of filing." (SCC 30.72.065)**

A petition for reconsideration does not have to be in a special form but must: contain the name, mailing address and daytime telephone number of the petitioner, together with the signature of the petitioner or of the petitioner's attorney, if any; identify the specific findings, conclusions, actions and/or conditions for which reconsideration is requested; state the relief requested; and, where applicable, identify the specific nature of any newly discovered evidence and/or changes proposed by the applicant.

The grounds for seeking reconsideration are limited to the following:

(a) The Hearing Examiner exceeded the Hearing Examiner's jurisdiction;
(b) The Hearing Examiner failed to follow the applicable procedure in reaching the Hearing Examiner's decision;
(c) The Hearing Examiner committed an error of law;
(d) The Hearing Examiner's findings, conclusions and/or conditions are not supported by the record;
(e) New evidence which could not reasonably have been produced and which is material to the decision is discovered; or
(f) The applicant proposed changes to the application in response to deficiencies identified in the decision.

Petitions for reconsideration will be processed and considered by the Hearing Examiner pursuant to the provisions of SCC 30.72.065. Please include the County file number in any correspondence regarding this case.

EXPLANATION OF APPEAL PROCEDURES FOR REZONE

An appeal to the County Council may be filed by any aggrieved party of record. Where the reconsideration process of SCC 30.72.065 has been invoked, no appeal may be filed until the reconsideration petition has been disposed of by the hearing examiner. An aggrieved party need not file a petition for reconsideration but may file an appeal directly to the County Council. If a petition for reconsideration is filed, issues subsequently raised by that party on appeal to the County Council shall be limited to those issues raised in the petition for reconsideration. Appeals shall be addressed to the Snohomish County Council but shall be filed in writing with the Department of Planning and Development Services, 2nd Floor, County Administration-East Building, 3000

Rockefeller Avenue, Everett, Washington (Mailing address: M/S #604, 3000 Rockefeller Avenue, Everett, WA 98201) on or before **NOVEMBER 1, 2006** and shall be accompanied by a filing fee in the amount of five hundred dollars ($500.00); PROVIDED, that the filing fee shall not be charged to a department of the County or to other than the first appellant; and PROVIDED FURTHER, that the filing fee shall be refunded in any case where an appeal is dismissed without hearing because of untimely filing, lack of standing, lack of jurisdiction or other procedural defect. [SCC 30.72.070]

An appeal must contain the following items in order to be complete: a detailed statement of the grounds for appeal; a detailed statement of the facts upon which the appeal is based, including citations to specific Hearing Examiner findings, conclusions, exhibits or oral testimony; written arguments in support of the appeal; the name, mailing address and daytime telephone number of each appellant, together with the signature of at least one of the appellants or of the attorney for the appellant(s), if any; the name, mailing address, daytime telephone number and signature of the appellant's agent or representative, if any; and the required filing fee.

The grounds for filing an appeal shall be limited to the following:

(a) The decision exceeded the Hearing Examiner's jurisdiction;
(b) The Hearing Examiner failed to follow the applicable procedure in reaching his decision;
(c) The Hearing Examiner committed an error of law; or
(d) The Hearing Examiner's findings, conclusions and/or conditions are not supported by substantial evidence in the record. [SCC 30.72.080]

Appeals will be processed and considered by the County Council pursuant to the provisions of Chapter 30.72 SCC. Please include the County file number in any correspondence regarding the case.

EXPLANATION OF APPEAL PROCEDURES FOR THE SEPA MDNS APPEAL

The decision of the Hearing Examiner is final and conclusive with right of judicial review in Superior Court within 21 days following the county's final decision on the underlying application or proposal. (As noted above, reconsideration by the Examiner may also be sought by any party of record.) For specific information about judicial review, please see SCC 30.61.330, RCW 43.21C.075 and WAC 197-11-680.

Staff Distribution:

Department of Planning and Development Services: Erik Olson/Randy Sleight
Department of Public Works: Andrew Smith

The following statement is provided pursuant to RCW 36.70B.130: "Affected property owners may request a change in valuation for property tax purposes notwithstanding any program of revaluation." A copy of this Decision is being provided to the Snohomish County Assessor as required by RCW 36.70B.130.