DECISION of the SNOHOMISH COUNTY HEARING EXAMINER

DATE OF DECISION: March 11, 2008

PLAT/PROJECT NAME: ***HIGHLANDS RANCH SOUTH***

APPLICANT/
LANDOWNER: Lifestyle Homes & Construction, Inc.
LLC

FILE NO.: 06 102828 SD

TYPE OF REQUEST: 10-lot Rural Cluster Subdivision (RCS) on 33.14 acres

DECISION (SUMMARY): **REMANDED** to the Department of Planning and Development Services for further information and possible re-hearing

BASIC INFORMATION

GENERAL LOCATION: The property is located on the northeast side of Jim Creek Road, ¼ mile south of its intersection with 133rd Avenue northeast of Arlington.

ACREAGE: 33.14 acres

NUMBER OF LOTS: 10

AVERAGE LOT SIZE: 47,102 square feet

MINIMUM LOT SIZE: 43,562 square feet

DENSITY: .3 du/ac (gross)

ZONING: Rural Conservation

COMPREHENSIVE PLAN DESIGNATION:

General Policy Plan Designation: Rural Residential-10 Resource Transition (1 du/10 ac)

UTILITIES:

Water:	Individual wells
Sewer:	Individual septic

SCHOOL DISTRICT: Arlington No. 16

FIRE DISTRICT: No. 21

INTRODUCTION

The applicant filed the Master Application on February 28, 2006 (Exhibit 1)

The Department of Planning and Development Services (PDS) gave proper public notice of the open record hearing as required by the county code. (Exhibits 19, 20 and 21)

A SEPA determination was made on October 3, 2007. (Exhibit 18) No appeal was filed.

The Examiner held an open record hearing on January 10, 2008, the 100th day of the 120-day decision making period. Witnesses were sworn, testimony was presented, and exhibits were entered at the hearing.

PUBLIC HEARING

The public hearing commenced on January 10, 2008 at 10:04 a.m.

1. 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 particular request involved.

2. The applicant, Lifestyle Homes and Construction, Inc. was represented by John Bissell of HBA Design Group. Snohomish County was represented by Robert Pemberton of the Department of Planning and Development Services.

3. The hearing concluded at 11:09 a.m.

4. By consent of the applicant dated February 29, 2008, Examiner Barbara Dykes listened to the record, reviewed the file and made a decision in this case.

NOTE: For a complete record, an electronic recording of this hearing is available in the Office of the Hearing Examiner.

FINDINGS, CONCLUSIONS AND DECISION

FINDINGS OF FACT

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

1. The master list of exhibits and witnesses which is a part of this file and which exhibits were considered by the Examiner, is hereby made a part of this file, as if set forth in full herein.

A. Forest Practices Issues

2. The applicant or its predecessor in interest (applicant) logged this property under a Class 3 Forest Practices Permit sometime in the last five (or six) years. Exhibit 10 at 1. Presumably, the applicant failed to disclose its intent to develop the property on the forest practices application, because a forest practices moratorium was imposed. Exhibit 10 at 1. The Examiner could not find any mention of the date of the permit for the logging, or of the date of the imposition of the moratorium pursuant to RCW 76.09.060(3)(b)(i).

3. Up until 2007, the statute required local government to develop a process for lifting the six-year moratorium which includes public notification, procedures for appeals, and public hearings, presumably for applications such as subdivisions. Former RCW 76.09.060(3)(b)(i)(C). In addition, the local government entity was allowed to develop an administrative process for lifting or waiving the six year moratorium for purposes of constructing a single family residence or outbuildings, or both, on a legal lot and building site. Former RCW 76.09.060(3)(b)(i)(D).

4. In this case, the applicant (or its predecessor) filed an application for a single family residence, (PFN: 05-118564 PA) and apparently achieved a lift of the moratorium for purposes of a single family residence through application of the PDS administrative policy 6300.

5. No hearing or process has been conducted for purposes of lifting the moratorium for a subdivision on this site.

B. Water Issues

1. The applicant proposes individual wells for this subdivision along with companion subdivision Highland Ranch North. The number of individual lots in this subdivision is ten, while the number of individual lots in the companion project is nine. Except for the names "Highland Ridge North" and "Highland Ridge South" and two different file numbers, these two subdivisions appear to be one development of nineteen lots. There is one road into both subdivisions. *See* Exhibit 8 at Site Basin Map. They were both filed on the same day by the same applicant, had their SEPA determination done on the same day, and had their public hearing on the same day. Even the forest practices moratorium was apparently applied to both sites.

2. Under the state water code, applicants must provide adequate water rights to serve both subdivisions. Testimony at the hearing by Mr. John Bissell indicates that the applicant relies on the theory that it

can claim what is known as an "exempt" well for each lot or parcel in the development. RCW 90.44.050, which governs groundwater withdrawals, requires a water rights permit to withdraw "public groundwaters of the state" from the Department of Ecology. There is an exception for single or group domestic uses in an amount not exceeding 5000 gallons per day, an exemption more commonly known as the "exempt well" provision or "six-pack well" provision. Under the exemption, an individual is allowed to drill a well or series of wells that produces up to a 5000 gallons per day, which can accommodate somewhere in the neighborhood of eleven lots (the Snohomish Health District requires new wells to pump 450 gallons per day if they are one acre in size and do not have to meet fire flow requirements). The question becomes for the Examiner whether Highland Ridge North and South should be considered one "development" or two under this exemption and *State of Washington Department of Ecology v. Campbell & Gwinn et al, 146 Wn.2d 1, 43 P.3d 4 (2002),* the leading case interpreting the issue of exempt wells.

CONCLUSIONS OF LAW

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

1. The forest practices moratorium is mandated by state law; Snohomish County has no choice but to impose a six-year moratorium when an applicant fails to disclose on a forest practices permit the intent to convert land from forestry to other uses:

> For six years after the date of the application the county, city, town, and regional governmental entities **shall deny** any or all applications for permits or approvals, including building permits and subdivision approvals relating to nonforestry uses of land subject to the application…
>
> Former RCW 76.09.060(3)(b)(i) *(emphasis added).* In 2007, the Legislature re-worked this part of the statute, but kept the same substantive requirement intact:
>
> If a county, city, town, or regional governmental entity receives a notice of conversion to nonforestry use by the department under RCW 76.09.060, then the county, city , town, or regional governmental entity **must deny** all applications for permits or approvals, including building permits and subdivision approvals, relating to nonforestry uses of the land that is the subject of the notification.
>
> RCW 76.09.460 (emphasis added).

2. The pre-2007 statute directed the local government entity, meaning the County Council…"to develop a process for lifting the six-year moratorium, which shall include public notification, and procedures for appeals and public hearings." RCW 76.09.060(3)(b)(i)(C). Although PDS has tried to write a hearing process into its administrative rule, this effort falls short of what is mandated by this statute. Only an ordinance amending the UDC will properly place this procedure in the county code with appeal rights, public notice, and appropriate public hearing procedure. Implicit in the structure of the statute is that there must be public notice, a public hearing, and appeal rights regarding lifting a moratorium and allowing subdivision development on a parcel on which a six-year moratorium has been imposed. Without this type of procedure,

the county must consider the six year moratorium still in place for purposes of any development except for single family residential, as specified in the statute (unless it has already expired).

3. RCW 76.09.060(3)(b)(i)(D) is quite explicit that the administrative process for lifting the moratorium is only for purposes of allowing single family development. RCW 76.09.060(3)(b)(i)(D). It cannot suffice to lift the moratorium for a subdivision.

4. In 2007, however, the Legislature changed the moratorium provisions of the statute. Whether or not these new provisions apply to the pre-2007 Class 3 permit in this case is a legal question. The Examiner directs PDS to consult with the Prosecuting Attorney about the appropriate procedure for potentially lifting the moratorium in this instance, should that be the route the applicant wishes to take. What is clear is that the appropriate steps have not yet been taken to lift the moratorium and the Examiner has no choice but to remand the decision to the department (or deny the application outright). If the applicant chooses to go forward to lift the moratorium, the Examiner needs information concerning the forest practices permit and moratorium in the record, and PDS needs to determine from the Prosecuting Attorney what procedural steps must be taken to lift the moratorium. That may include a public hearing before the Examiner, and it may also include adopting new legislation by the County Council to provide an adequate process that allows for public notice, participation, and appeals.

2. <u>Provision of Adequate Water.</u>

As pointed out in the findings of fact, the question is whether this applicant has adequately provided for water by proposing an exempt well for this subdivision, as well as an exempt well for the companion subdivision. While there is a 5000 gallon per day exemption under the RCW, there is no question that both of the proposed subdivisions together will exceed that exemption level, which can accommodate somewhere in the neighborhood of eleven lots (the Snohomish Health District requires new wells to pump 450 gallons per day if they are one acre in size and do not have to meet fire flow requirements). Once the exemption amount is exceeded, an applicant must provide other legal means of providing water, including obtaining adequate water rights permits to serve part or all of the subdivision (to allow permitted withdrawals of water) or extending water service from a certified private or public water purveyor to the development.

For some period of time, there was legal uncertainty about the status of multiple exempt wells in a development. An attorney general opinion in 1997 opined that a development using multiple wells that cumulatively pumped more than 5000 gallons per day were not exempt from the permit requirement of chapter 90.44 RCW. AGO 1997 No. 6. Then, in 2002, the Washington Supreme Court issued *State of Washington Department of Ecology v. Campbell & Gwinn et al, 146 Wn.2d 1, 43 P.3d 4 (2002),* which squarely addressed the issue of multiple exempt wells in a single subdivision. The Supreme Court held the following:

> Here, the plain meaning of the domestic uses exemption is apparent from the language in 90.44.050 and related statutes. RCW 90.44.050 plainly says that the exemption applies provided 5,000 gpd or less is used for domestic purposes. This is true, the statute provides, whether the use is to be a single use or group

> uses. That is, whether or not the use is a single use, by a single home, or a group use, by several homes or a multiunit residence, the exemption remains at one 5,000 gpd limit, according to the plain language of the statute. **The developer of a subdivision is, necessarily, planning for adequate water for group uses, rather than a single use, and accordingly is entitled to only one 5,000 gpd exemption for the project.**

Campbell at 8. The court explicitly defeated the argument that determination of applicability of the exemption could be delayed until building permit, thereby allowing the question of water availability to bypass preliminary plat approval. The court further stated:

> **Nevertheless, the Legislature's limits on the exemption, particularly the 5,000 gpd limit on the group uses exemption, establishes that the Legislature did not intend unlimited use of the exemption for domestic uses, and did not intend that water appropriation for such uses be wholly unregulated**. The balance which the Legislature struck in RCW 90.44.050 allows small exempt withdrawals for domestic uses, but does not contemplate use of the exemption as a device to circumvent statutory review of permit applications generally. The parties here dispute the potential impacts if RCW 90.44.050 is read to allow the exemption to apply to each individual well in a development such as Rambling Brooks Estates. The question is more basic, i.e., whether the Legislature even contemplated the possibility that developments of the size in this case, or even larger, would be entitled to exempt withdrawals of 5,000 gpd for each of their lots. **Given the limitation on single and group uses, and the overall goal of regulation to assure protection of existing rights and the public interest, it is clear that the Legislature did not intend that possibility when this statute was enacted.**

Campbell at 10 (emphasis added). Although there are two subdivisions at issue here, the logic is the same. The statute does not provide an exemption based on lots, or on subdivisions. The exemption is based on "groups of uses". As stated by the court above, the goal of the statute is to assure protection of existing water rights and public interest, and therefore the Examiner will not read into the statute words that are not there. This applicant plainly designed these subdivisions for the sole purpose of attempting to use multiple exempt wells, something the Legislature obviously did not intend. *Campbell & Gwinn* is unambiguous in its interpretation of RCW 90.44.050, and accordingly, the applicant's proposal to provide for water through the use of individual wells for these two subdivisions without a water rights permit or some other means of providing for adequate water supply is in violation of RCW 90.44.050. The subdivision cannot go forward without appropriate provision for potable water in a manner that meets the law.

6. If the subdivision eventually goes forward, the Examiner will have to add a pre-condition to the subdivision as follows:

> Applicant shall submit to PDS evidence of appropriate provision of potable water supply consistent with the decision for preliminary plat approval. Applicant has up to one year to submit such evidence, which shall also be copied to the Hearing Examiner. The Applicant may request an extension pursuant to Part 900 of the Hearing Examiner Rules.

7. Any conclusion in this decision which should be deemed a finding of fact is hereby adopted as such.

DECISION

The application is **REMANDED** to the Department of Planning and Development Services for further information and possible re-hearing consistent with this decision.

Decision issued this 11th day of March, 2008.

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Barbara Dykes, Hearing Examiner

EXPLANATION OF RECONSIDERATION AND APPEAL PROCEDURES

The decision of the Hearing Examiner is final and conclusive with right of appeal to the County Council. However, reconsideration by the Examiner may also 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 **MARCH 21, 2008**. 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.

Appeal

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 **MARCH 25, 2008** 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.

Staff Distribution:

Department of Planning and Development Services: Bob Pemberton

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.