

BEFORE THE
SNOHOMISH COUNTY HEARING EXAMINER
DECISION of the DEPUTY HEARING EXAMINER

In the Matter of the Application of)
) **FILE NO. 06 104246 LU**
ROBERT NEHRING)
)
Rezone from Residential-7,200 (R-7,200) to Low)
Density Multiple Residential (LDMR))

DATE OF DECISION: August 31, 2007

PLAT/PROJECT NAME: *Cascade Crest*

DECISION (SUMMARY): Rezone from R-7,200 to LDMR is **REMANDED**.

BASIC INFORMATION

GENERAL LOCATION: This project is located at 91st Avenue SE, Everett, Washington.

ACREAGE: 1.47 acres

ZONING: CURRENT: R-7,200
 PROPOSED: LDMR

COMPREHENSIVE PLAN DESIGNATION:

General Policy Plan Designation: Urban Medium Density Residential

UTILITIES:

Water: Snohomish County PUD No. 1
Sewer: Lake Stevens Sewer District

SCHOOL DISTRICT: Lake Stevens No. 4

FIRE DISTRICT: No. 8

INTRODUCTION

The applicant filed the Master Application on January 23, 2007. (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 10, 11 and 12)

A SEPA determination was made on June 7, 2007. (Exhibit 9) No appeal was filed.

The Examiner held an open record hearing on August 1, 2007, the 130th day of the 120-day decision making period.

PUBLIC HEARING

The public hearing commenced on August 1, 2007 at 11:02 a.m.

1. The Examiner stated that he had read the PDS staff report, reviewed the file and viewed the area.
2. The applicant, Robert Nehring was present. Snohomish County was represented by Scott Whitcutt of the Department of Planning and Development Services. No member of the general public attended the hearing. Two vicinity residents submitted pre-hearing documents raising concern or opposition: Britt Lind (Exhibit 16) and Harvey and Bonnie Gayle Tomlin (Exhibit 17).
3. The hearing concluded at 11:21 a.m.

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.
2. The applicant, Robert Nehring, filed an application requesting approval of a rezone of a 1.47-acre parcel from R-7,200 to LDMR. The subject site consists in a subdivision's four lots addressed with street numbers 3, 7, 9 and 13 of 91st Avenue SE. Those four lots are now zoned R-7,200 and, as such, each lot may be developed with only one single-family dwelling unit for a total of four dwellings. The purpose of the requested rezone to LDMR is to increase the four allowed dwellings to 16 dwellings: a gain of 12 dwellings. Each dwelling produces 9.57 average weekday trips. Thus, the rezone will result in an increase in local daily trips of 9.57 trips for each of the additional 12 single-family dwellings: 115 trips.

3. The proposed condominiums are adjacent to two separate residential developments already approved and underway. All three projects share the same vehicular access, utilities and detention. The other two projects are 25-unit Olympic Estates (06-104240) and 27-unit Pacific Place (06-104250). Thus, a total of 68 dwellings will share that common driveway, each dwelling generating 9.57 daily trips for a total daily volume of 651 trips.
4. Vicinity residents Harvey and Bonnie Gayle Tomlin reside in nearby Fairweather Point Condos on Market Street, which condos have only one point of access/egress to get out onto the street. They assert (Exhibit 17) that the additional vehicular trips from the above-mentioned common ingress/egress point will worsen their already difficult access to and from their home. Thus, their concern is site-specific. The record shows that State Route 9 on the east limits options for vehicular access. The record is devoid of any analysis related to the ability of the vicinity transportation infrastructure to absorb the proposal's 115 additional trips combined with the two other developments' traffic for a total of 651 daily trips.
5. Citizen Britt Lind expresses (Exhibit 16) a broader concern about traffic, asserting, in part:

"...You are trying to decide if there is enough capacity on our roads for more cars. IS THAT A JOKE? Things are so clogged now going over the trestle we need to subtract people from this area not add more..."
6. Scott Whitcut's testimony responds on behalf of the Department of Planning and Development Services that the neighbors' concerns apply to future development of the subject site, not to the proposed rezone of the subject site. The Department of Public Works provides no comment, choosing to delay its input until during the development project approval process. The Examiner finds as fact that the Tomlins' access concerns are site-specific and require analysis in this record without deferral until the development phase or construction phase. Britt Lind's comments add to the context in which to consider and respond to the Tomlins' concerns.
7. At the conclusion of all testimony, the Examiner announced that he would review the matter with caution, noting:

"I think the Council is meeting right now upstairs on an appeal of a rezone matter and I want to see what comes out of that from the Council before I rule on another rezone."

The result of that session of the County Council (06-135148) is its Motion No. 07-447 of August 8, 2007. That Motion is reviewed below under "Conclusions of Law".
8. MR zoning abuts to the north and east. R-7,200 abuts to the south and west. Multi-family use lies to the northeast and single-family lies in all other directions. The vicinity is experiencing multi-family rezoning to implement the Comprehensive Plan. (Exhibit 24)
9. No critical area (steep slope, wetland, or stream) is on or near the site. Public water and sewer service will be available for this development. (Exhibits 18, 20)
10. The property is designated Urban Medium Density Residential (UMDR 6-12 du/ac) on the General Policy Plan (GPP) Future Land Use Map (FLUM) and is located within an Urban Growth Area (UGA). According to the GPP, the Urban Medium Density Residential designation allows high density residential land uses such as townhouses and apartments generally near other high intensity land uses. Land in this category may be developed up to a maximum density of 12 dwelling units per acre. Implementing zones include the LDMR zone requested here.

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

CONCLUSIONS OF LAW

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

1. The Hearing Examiner's decision on a rezone application is a Type 2 decision based on (1) a report by the County staff and a file assembled by that staff and (2) evidence received through an open record public hearing. The burden of proof is on the applicant to demonstrate by a preponderance of the evidence that the proposed rezone meets the two applicable rezone decisional criteria set out at SCC 30.42A.100: (1) that the proposed rezone is consistent with the Comprehensive Plan and (2) that the proposed rezone bears a substantial relationship to the public health, safety and welfare. The Hearing Examiner's decision on those criteria is the final County action unless appealed to the County Council. (SCC 30.72.020 -.025)
2. The request is for a site-specific rezone and, therefore, must be consistent with the GMA Comprehensive Plan and Snohomish County Code regulatory provisions which implement that plan. The request for LDMMR zoning here is consistent with the type and character of land use permitted on the project site by the General Policy Plan (GPP) ULDR designation of the property. However, in addition to being consistent with the map designation, the proposal must also be consistent with relevant Plan policies such as (but not limited to) Land Use Policy 1.A.4 concerning infrastructure capacity, Land Use Policy 2.A.3 concerning critical areas, and Housing Policy 2.A.1 concerning preservation of the character of stable residential neighborhoods. (See County Council Motion No. 07-447.) In fact, the General Policy Plan provides at page LU-15 that the County will broaden the variety of housing types in traditional single-family and multi-family neighborhoods:

“...while respecting the vitality and character of established residential neighborhoods A mix of housing types with a range of densities will be encouraged throughout UGA's, as long as they are carefully sited, well designed, and sensitively integrated into existing communities.” (Emphasis supplied.)

3. As noted above, the instant proposal's consistency with the Comprehensive Plan is only one of the two applicable criteria set out at SCC 30.42A.100 which must be met before a rezone can be approved. A rezone must also comply with the second criterion: i.e., the rezone must bear a substantial relationship to the public health, safety and welfare. The bold-quoted language above is an expression of the second of the two rezone criteria. Stated in the converse, the quoted language provides that until it is determined that a proposed rezone's housing types are carefully sited, well designed, and sensitively integrated into an existing community, the proposed rezone cannot be found to bear a substantial relationship to the public health, safety and welfare. That burden of proof which must support that determination cannot be met without actual consideration of site-specific facts. A conclusory statement that a proposed rezone meets the criteria is no more acceptable than would be a conclusory statement that the proposed rezone fails to meet the criteria. The departmental staff and, in turn, the Hearing Examiner, must “show your work” and rationale in concluding whether or not a proposed rezone meets or does not meet the applicable criteria.

4. The requirement to actually consider the applicable criteria, particularly when relevant citizen concerns are expressed, is mandated by the County Council's Amended Ordinance No. 07-022 effective June 4, 2007, which at page 2 repeats the above-quoted Comprehensive Plan provision encouraging a mix of housing types with a range of densities only if "*carefully sited, well designed, and sensitively integrated into existing communities...*" The County Council reinforced that requirement to "show your work" in its Motion No. 07-447 of August 8, 2007 remanding a rezone application on appeal (Brookstone Investments, LLC, 06-135148) for failure to have adequately evaluated all project-level factors concerning the two criteria discussed above herein.
5. This matter should be remanded for further study and for a supplemental staff report consistent with the findings of fact and conclusions of law entered above and with Snohomish County Amended Ordinance No. 07-022 and County Council Motion No. 07-447.
6. Any conclusion in this decision 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 request for a rezone from Residential-7,200 to Low Density Multiple Residential is **REMANDED** for appropriate and adequate analysis of (1) the proposed rezone's compliance with applicable land use policies and other policies of the Comprehensive Plan, (2) compliance with the rezone criteria at SCC 30.42A.100(1) and (2), and (3) an analysis of the entire record, not merely of the Comprehensive Plan issues, as to how the proposal bears a substantial relationship to the public health, safety and welfare. (For guidance, see Council Motion 07-447).

Decision issued this 31st day of August, 2007.

Ed Good, Deputy 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 **SEPTEMBER 10, 2007**. 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 **SEPTEMBER 14, 2007** 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: Scott Whitcutt

<p>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.</p>
