

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

In the Matter of the Application of)
SCI REALTY INVESTMENTS) **FILE NO. 07 104061 LU**
Rezone from Residential-7,200 (R-7,200) to)
Low Density Multiple Residential (LDMR))

DATE OF DECISION: October 17, 2007

PLAT/PROJECT NAME: *Alderwood Acres LDMR*

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

BASIC INFORMATION

GENERAL LOCATION: This project is located at 13614 Ash Way, Everett, Washington in the community that includes Lake Stickney.

ACREAGE: 1.7 acres

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

COMPREHENSIVE PLAN DESIGNATION:

General Policy Plan Designation: Urban Medium Density Residential

UTILITIES:

Water/Sewer: Alderwood Water and Wastewater District

SCHOOL DISTRICT: Mukilteo No. 6

FIRE DISTRICT: No. 1

INTRODUCTION

The applicant filed the Master Application on May 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 16, 17 and 18)

A SEPA determination was made on July 18, 2007. (Exhibit 15) No appeal was filed.

The Examiner held an open record hearing on September 12, 2007, the 84th day of the 120-day decision making period.

PUBLIC HEARING

The public hearing commenced on September 12, 2007 at 1:32 p.m.

1. The Examiner stated that he had read the PDS staff report, reviewed the file and viewed the area.
2. The applicant, SCI Realty Investments, was represented by David Waite. Snohomish County was represented by Scott Whitcutt of the Department of Planning and Development Services.
3. No member of the general public attended the public hearing. Three vicinity residents submitted pre-hearing documents expressing concern or opposition: Gene Grieve (Exhibit 23), Nancy McLaren (Exhibit 22) and Roger Weber (Exhibit 21).

The hearing concluded at 2:16 p.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, SCI Realty Investments, filed an application requesting approval of a rezone of a 1.7-acre parcel from R-7,200 to LDMR. No critical area (steep slope, wetland, or stream) is on or near the site. The site drains to nearby Lake Stickney. There are two existing homes on-site, of which the one nearest the road will be removed and the one to the rear of the site will be retained. Seventeen new homes will be built for a total of 18 single-family dwellings. The 18 lots are one fewer than the 19 lots permitted if rezoned to LDMR. Applicant David Waite testifies that the proposed density is consistent with "...everything else up and down the street."

3. Some vicinity residents express concern that this application is one of several similar proposed developments in the area. Gene Grieve argues (Exhibit 23) that cumulative impacts to Ash Way from a number of LDMRs planned or built should be examined regarding recreation, fire access, streets and sidewalks. Nancy McLaren (Exhibit 22) has lived in the area for about 28 years (since 1979). She points out that the 18 dwellings proposed in this application on 1.7 acres are in addition to 45 homes nine blocks down the street and 42 homes two blocks up the street, which are but some of the eight or nine such projects on Ash Way between 164th Street SW and 134th Street SW.
4. The most contested site specific issue is storm drainage. The issue is raised by Roger Weber of 1226 South Lake Stickney Drive (Parcel No. 00493900008600), which abuts the southwestern corner of the subject site. At that corner all storm drainage from the subject site's proposed detention wet pond will leave a spreader trench to sheet flow onto Roger Weber's property. Mr. Weber writes (Exhibit 21) that he will not allow any conveyance through his property of storm water from a storm water pond system -- the drainage system proposed herein. Mr. Weber will oppose also a storm water infiltration system from the subject site upslope from his property because, he asserts, the glacial till soil cannot absorb the water, the shallow soil will become saturated, and seeps will form on the slope above his land, causing wet ground to develop.
5. Mr. Weber points out that his family has owned land around Lake Stickney for half a century and he now owns that land and has lived there for a decade. He asserts (Exhibit 21) that he has:

"...steadily observed the impact of densification on the quality of life in our neighborhood...and the effects of poorly designed and non-performing storm water systems permitted by Snohomish County on Lake Stickney and on properties next to the lake. Recently one of these systems allowed water to spout out of a roadside ditch and overflow onto the street."

"Should the County permit the LDMR development, the open storm water pond that will collect roof, road, and parking lot runoff will attract nuisance mosquitoes, rats, and other vermin, including raccoons, ravens, and possums that are attracted by excessively noisy bullfrogs and other animals living in or near the pond. An unlined pond would artificially seep water into underlying soil and create unstable ground which will jeopardize the health of the alder forest and other trees on my lot, and would create an unusable wet ground next to the natural drainage running through my property. The developer likely would request to convey the pond water through my or my neighbor's property and discharge the water into the ditch. As I mentioned above, I have seen how the excessive elevation drop between storm water ponds above Lake Stickney and the ditch along Lake Stickney Road creates turbulent flow that scours the ditch and discharges sediment contaminated by runoff from the road. The additional water will cause weeds to grow in the ditch along my property, which the developer or homeowners will not maintain. Storm water ponds in the Lake Stickney area create flashy, sediment-laden runoff in unlined ditches, which violate the County's storm water management policy. The County must address these violations before permitting another LDMR in the Lake Stickney watershed."

6. Mr. Weber's quoted language above describes the drainage system proposed herein, as depicted in the Full Drainage Report (Exhibit 9) which, at page four, reports that the site drains to the west as sheet flow to the neighboring property [the Weber property]. The downstream analysis (page 6) points out that the subject site drains to a pasture area on the adjacent property [the Weber property] and to a creek along the south property line [of the Weber property]. The creek drains to a catch basin on South Lake Stickney Drive and to a roadside ditch where another culvert discharges Ash Way's street drainage to the ditch. Thus, the ditch at that point is the confluence of the two drainages. That analysis by Flury-Wyrick and Associates, Inc., professional engineers, corroborates the drainage system description by Mr. Weber. Those engineers believe the system will properly and safely drain the subject 18-lot development. Mr. Weber doubts it.
7. The Hearing Examiner doubts it also, based on the preponderance of the evidence of record. That evidence shows (1) a history of drainage system failures involving the roadside ditches around Lake Stickney, (2) Ash Way's street runoff combined with the subject site's runoff in the final run to the Lake, and (3) the detention system is based on the Santa Barbara Urban Hydrograph method (Exhibit 9, page 18), plus a 30% safety factor, to size the detention facility to convey waters of a 2-year, 10-year and 100-year single storm event. That model meets County Code but does not account for runoff volumes caused by a series of back-to-back storms common to the Pacific Northwest. That continuous storm event model should be applied in this instance in view of the history of drainage failure in vicinity and the additional Ash Way runoff described at (1) and (2) above.
8. Applicant David Waite testifies that he was involved in a project directly north of the subject project and larger than the subject project. He states that that larger project's stormwater drains along Lake Stickney Drive to approximately where the storm drainage from the subject development meets the culvert under Lake Stickney Drive. (That is the location of the Weber property.) He states that flooding occurred early in 2007 from that larger project because a maintenance failure at the control structure had caused the water to back-up. He testifies that to release the backed-up water, the contractor pumped it out at a rate much faster than the engineered release rate. Mr. Waite states his belief that the flooding was of the roadside ditch but not the Weber property.
9. The Examiner finds as fact that the pattern or repeated flooding of roadside drainage courses around Lake Stickney is established by the evidence of record and that a series of back-to-back storms can have the same effect as the example of the contractor pumping out water too rapidly. The fact that public roadside drainage may be more impacted by such flooding than private property makes the flooding an issue about the public health, safety and welfare.
10. The Snohomish County Health District has no objection to this proposal because public water and sewer are available through the Alderwood Water and Wastewater District.
11. The subject site and most of the surrounding community are zoned R-7,200 and developed as such. To the north, east and south, however, mixed LDMR and MR zoning implements the Comprehensive Plan designation transitioning from single-family toward multi-unit development.
12. 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.

13. 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 proposal is reviewed under applicable codes in effect at the time a complete application was filed, which was prior to the effective date of Amended Ordinance No. 07-022 on June 4, 2007. Although only the rezone request is before the Examiner, project level issues and factors raised in the public hearing must be considered by the Examiner in order to determine whether the proposed rezone bears a substantial relationship to the public health, safety and welfare.
2. If such project-level factors were not considered for rezones in the past, County Council Motion 07-447 of August 8, 2007 requires consideration of such factors henceforth, particularly if the affected public raises challenges concerning those factors.
3. The Examiner having fully reviewed the PDS staff report hereby adopts said staff report except any portions of that report which are inconsistent with the findings of fact, conclusions of law or decision in this document
4. 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)
5. 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 LDNR 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.)

6. 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.
7. 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.
8. The instant application fails to meet the burden of proving by a preponderance of the evidence of record that the proposed rezone meets the decisional criterion of demonstrating a substantial relationship to the public health, safety and welfare. The record shows a history of flooding at the same roadside location that would be affected by storm drainage from the additional dwellings made possible by the proposed rezone. That history of flooding appears to apply at numerous locations around Lake Stickney, demonstrating that the drainage infrastructure in the broader vicinity and at the subject location is inadequate. It has to be presumed that the failing drainage systems around the lake were all found to meet Code. Therefore, it follows logically that to argue that the proposed drainage system "meets Code" does not suffice when site specific threats to the public health, safety and welfare are established by the record.
9. It is concluded as a matter of law that to add the storm drainage of 18 dwellings where now only two dwellings exist would not serve the public use and interest and that the proposed rezone should be denied.
10. 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 for this property is **DENIED**.

Decision issued this 17th day of October, 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 **OCTOBER 29, 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 **OCTOBER 31, 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>
