

BEFORE THE
SNOHOMISH COUNTY HEARING EXAMINER

IN RE THE APPEAL OF RURAL CLUSTER) **File No. 05-124120 SP**
SUBDIVISION APPROVAL)
) **Final Decision and Order**
Laura Hartman, et. al,)
)
Appellants)
vs.)
)
)
Snohomish County Planning & Development)
Services Department, and Anthony and Susan)
Morrissey,)
Respondents.)
)
2-lot Rural Cluster Subdivision (RCS) on 4.29 acres)

DATE OF DECISION: February 6, 2008

APPLICANT: Anthony and Susan Morrissey

PROJECT NAME: Morrissey Short Plat

DECISION SUMMARY: The appeal is **GRANTED**. The Morrissey Short Plat decision issued by PDS on October 23, 2007 is **MODIFIED** in part as specified herein.

LOCATION: 15820 230th Street SE, Snohomish, Washington

This matter having come before the Hearing Examiner on January 3, 2008 and the testimony of witnesses having been heard and all exhibits admitted into evidence having been considered, the Hearing Examiner makes the following findings of fact and conclusions of law and decision based on a preponderance of the evidence:

I. MOTIONS TO DISMISS

Snohomish County Planning and Development Services Department (“PDS” or “Department”) and the applicants, Anthony and Susan Morrissey (“Applicants”) (collectively, “Respondents”), have each filed motions to dismiss the appeal. (Exhibits 8 and 9) At the start of the hearing, the Hearing Examiner heard oral argument from all parties on the motions. Respondents argue that this appeal arises out of a deviation granted to the Applicants from the EDDS standards, which decision is not appealable to the Hearing Examiner. As such, they argue that the appeal is not properly before the Examiner. However it is clear from the record in this case that the Appellants’ appeal is not merely a challenge to an EDDS deviation, but to the subdivision approval administratively granted

by PDS acting under Chapter 58.17.110 and related provisions of the Snohomish County Code based on the failure to make adequate provision for streets and roads. Review of such decisions is within the authority of the Hearing Examiner pursuant to SCC 30.71.110. Accordingly, Respondents motions are denied.

II. FINDINGS OF FACT

1. This case involves the appeal of an administrative approval by Planning and Development Services Department administrative granting approval of a rural cluster subdivision (2-lot short plat), which was issued on October 23, 2007. (Exhibit 41) The appeal was timely filed on November 6, 2007. (Exhibit 1)
2. The decision appealed here is a Type 1 decision under the Section 30.71.020(11) of the Snohomish County Code. Appeals of Type 1 decisions are heard before the Hearing Examiner pursuant to SCC 30.71.110. On appeal, the Hearing Examiner may “affirm, may reverse in whole or in part, or may modify the permit or decision being appealed, or may remand the application to the applicable department for further processing.” (SCC 30.71.110)
3. The central issue on appeal is whether the Planning and Development Services Department (hereinafter “PDS” or “Department”) erred in approving the Morrissey rural cluster subdivision by failing to require adequate provisions for access to the plat and maintenance of the access road, after the Public Works Department granted an EDDS deviation for the project.
4. An open record hearing on the appeal was held on January 3, 2008, and proper notice of the same was provided by the Office of the Hearing Examiner. (Exhibits 2, 3, 4, 5 and 6) At the hearing, Stacy Abbott appeared on behalf of PDS, and Owen Carter, County Engineer, testified for the Public Works Department. Linda Atkins of Davis Wright Tremaine LLP appeared and represented the applicants, Anthony and Susan Morrissey, who were also present. Laura Hartman and Alan Geiger appeared on behalf of the Appellants. Steve Walker and Susie Phan Anderson also appeared and testified as interested parties. At the close of the lengthy hearing, the record was held open until January 11, 2008 for parties to file closing statements.
5. As noted above, although there are many regulations and factual issues that need to be addressed in approving any subdivision, and additional requirements unique to rural cluster subdivisions that must also be met, this appeal considers a central issue relating to whether, after approving certain EDDS deviations, the subdivision provides adequate access to the plat through a private, gravel road, and whether adequate provisions for road maintenance have been met.
6. Road Access to the Morrissey Short Plat. The Department of Public Works (DPW) reviewed the Master Permit Application request with regard to traffic mitigation and road design standards. That review considered the requirements of Title 13 SCC and Chapter 30.66B SCC as to road system capacity, concurrency, inadequate road conditions, frontage improvements, access and circulation, and dedication/deeding of right-of-way, state highway impacts, impacts on other streets and roads, and Transportation Demand Management. All developments are required to (1) provide for access and transportation circulation in accordance with the comprehensive plan and SCC 30.66B.420, (2) design and construct such access in accordance with the EDDS, and (3) improve existing roads that provide access to the development in order to comply with adopted design standards, in accordance with SCC 30.66B.430.

7. Here, the applicant is required to provide a public, paved asphalt access road on 230th Street S.E., which is the main access road serving the plat and surrounding properties. In its current state, 230th Street SE is a private, dirt and gravel road which is only sporadically maintained by local neighbors. (Exhibit 7)
8. Public Works Planner Mark Brown determined that the road currently exceeds the amount of usage for a private road. (An excerpt of the County's standards for private roads are shown in Exhibit 44). It states that private roads with an ADT of 91-1000 are considered "private subcollector roads (rural)". In its current state, the County considers 230th Street SE to be a private, sub-collector road. Public Works determined that the road provides access for more than 90 ADT and, per EDDS Plate 3-060, as well as SCC 30.41B.200, the standard requires the road to be upgraded to a paved, asphalt road from the proposed entrance of the rural cluster subdivision to 155th Avenue SE (approximately 1,000 lineal feet). (Exhibit 20) The standards found in EDDS relating to road type must be followed, unless a deviation is granted.
9. Deviations from road standards are governed by Chapter 1-05 EDDS. It provides that the deviation request must be in writing, use the specified form, and provide supporting information demonstrating compliance with four criteria. The criteria do not include nexus and proportionality, however, Public Works has asserted that it is required by law to take such considerations into account whenever it is raised. (Exhibit 7B).
10. The applicant stated in its EDDS deviation request that it "would be a hardship for a 2 lot short plat and is not proportional to the proposed impact. The proposed paving would require a 26 to 30 foot section approximately 1,000 feet in length. There would not only be the cost of improving the existing gravel road, but also the added drainage requirements for 30,000 s.f. of "new" impervious surface as well as the preparation of topographic mapping and design engineering. The additional lot will not have an impact to the existing road system that warrants this level of mitigation." (Exhibit 20) Instead, the applicant proposed to widen the road to 20 foot to provide 2 travel lanes from the short plat entrance to 155th Avenue SE, while maintaining the gravel surface and providing no additional drainage facilities, pedestrian features or other safety improvements. (Exhibit 20)
11. Here a deviation was granted by the County Engineer on December 4, 2006. (Exhibit 1) Chapter 1-05 EDDS provides that the Engineer is the final authority on all deviation requests. Although the deviation decision is not on appeal here, the rationale for allowing a deviation from adopted road standards are important facts which the Hearing Examiner should consider in determining whether adequate provision for the public health, safety and welfare has been made under all the facts and circumstances of the case.
12. In granting the EDDS deviation, the County Engineer's handwritten note states: "a 28' paved road from 155th to the development would be an unreasonable financial burden on a 2 lot short plat to construct." (Exhibit 20). No other findings or justification was presented by the County Engineer in granting the deviation, and no additional comments were provided by the Department as to how the proposed mitigation would achieve the same outcome as that required by the road standards. Upon questioning at the public hearing, the County Engineer testified that he has no set of criteria that he uses to judge when "proportionality" concerns rise to the level that a deviation from standards should be granted, only his professional judgment. Despite his handwritten note to the contrary, the County Engineer testified that the financial ability of the Applicants was not a factor in that decision. Although the Engineer may be correct in his determination (the Hearing Examiner does not offer comment on that decision), it is unfortunately not helpful on the issue presented here on appeal.
13. The Engineer's testimony and the written EDDS decision in this case leave the Hearing Examiner without an adequate basis on which to enter a finding that the public health, safety and welfare are met by the

proposed change to the required road construction standard. In considering the rural cluster subdivision application, the County is required to make an affirmative finding under RCW 58.17.110 and SCC 30.41C.100, and SCC 30.41B.100 that the proposal as designed makes adequate provision for among other things, streets, alleys and other public ways, pedestrian facilities, and shall assure safe walking conditions for school children. The Hearing Examiner has the authority to review such a determination pursuant to SCC 30.71.100.

14. In this appeal, the Appellants have the burden of proof to show that, by a preponderance of the evidence, the Department erred in issuing its decision granting the rural cluster subdivision for the Morrissey Short Plat. Here, Appellants argue that 230th Street SE, a private, sub-collector road is substandard, currently exceeds the allowed daily traffic volume by over 200% and that to protect the public health, safety and welfare, no further development should be allowed to impact the road until it is brought up to the County's road standards. (Exhibits 1, 7, 42, 43, 44)
15. The Hearing Examiner finds that Appellants have met their burden of proof, and have shown that several errors were made which require reversal and/or modification of the PDS decision.
16. First, where the parcels in a short subdivision are smaller than 5 acres in size (such as in this case), the provisions of SCC 30.41B.200(8) (which allow the County Engineer to modify some or all of the road improvement requirements) do not apply. Accordingly, it was error for the County Engineer to authorize changes to the road design standards set forth in the County Code, whether it was done through a deviation process or otherwise. The resulting change violates the clear language of the County Code, and prevents approval of the rural cluster subdivision unless the road standard requirements are met.
17. Second, the Department erred when it authorized the development using a private access road. The adopted County Code standards found in SCC 30.41B.200(9) and (10) prohibit the use of a private roads outside the UGA to serve a short subdivision in cases where road usage exceeds 9 lots or 90 ADT. As noted above, Public Works determined that 230th Street SE currently exceeds 90 ADT. Accordingly, in these circumstances, an open, constructed, and maintained public road must be provided that meets the County's public road standards.
18. Third, even if these errors were not present, the Examiner finds that the Appellants have met their burden of proof under RCW 58.17.110. The undisputed evidence in the record shows that current road usage is already well beyond the required County standards. The public health, safety and welfare is not served by continuing to allow the expanded use of an already substandard road. The Appellants are correct in asserting that the mitigation offered (expanding the road to 20 feet) does not solve the health and safety problems posed by this substandard gravel road. An expanded gravel/dirt road of 20 feet in width does not provide a safe surface, free of dangerous pot holes, does not provide mitigation for additional dust, does not provide adequate markings of the traveled lanes or drainage features, and does not provide safe pedestrian walkways in light of the large number of vehicles and pedestrians that travel on 230th Street SE each day.
19. Based on the totality of these facts, the Hearing Examiner finds that it was error for the Department to approve the Morrissey Short Plat as designed. The proposed development fails to provide adequate mitigation for the deficient road access condition and violates express requirements of SCC 30.41B.200. Accordingly, the decision shall be modified as further provided below.
20. Maintenance of the Private Road. Appellants allege that the Morrissey subdivision approval decision by PDS failed to include a requirement for maintenance of the private access road serving the plat. The record reveals that the properties along 230th Street SE are encumbered by a maintenance agreement which was executed in September, 1987. The Maintenance Agreement (which has been recorded with the

County Auditor) states that the agreement is binding on the heirs, successors, and assigns of the owners, that maintenance is to be done according to a majority vote of the property owners and the costs are to be shared equally for the work. (Exhibit 18)

21. At the public hearing on this appeal, PDS attempted to introduce a new requirement into its decision which was issued on October 23, 2007, which would state: “Each lot or successor in interest having access to the Morrissey short plat shall be responsible for maintenance of the private road [230th Street SE].” The Department cited SCC 30.41B.200(12) for its authority to impose such a condition. The Applicant did not raise any substantive objection to this requirement, although they felt that it is unnecessary in light of the Maintenance Agreement. Although PDS cannot normally add a condition to a previously issued decision without withdrawing and amending that decision, the issue of maintenance of the private road is an issue on appeal and is subject to review by the Hearing Examiner.
22. SCC 30.41B.200(12) applies to the rural cluster subdivision through SCC 30.41C.030.¹ Accordingly, had it been proper to authorize this development application with a private road, the PDS decision should have required a statement on the face of the plat requiring the subsequent properties owners within the plat to maintain the private road (230th Street SE) consistent with the Maintenance Agreement executed in September, 1987 and SCC 30.41B.200(12). However, none of these provisions are relevant, given the County Code requirement that the access road be converted to an open, public road, which will be maintained by the County upon establishment.
23. Easements for Ingress and Egress to the Plat. Finally, the Appellants claim that the plat lacks adequate access easements authorizing ingress and egress to the Plat. Here, the Appellants have not met their burden of proof. The weight of evidence in the record provided by the Applicants proves beyond a preponderance of the evidence that the Morrisseys purchased the subject property with appropriate access easements as shown on the face of the conveyance deed. (Exhibit 35)
24. 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 Department erred in its decision dated October 23, 2007, when it granted approval of a rural cluster subdivision for the Morrissey Short Plat where it failed to meet the requirements of SCC 30.41B.200, as well as SCC 30.41B.100, and RCW 58.17.110, without making adequate provision for roads and access. The proposed plat is accessed on a private road serving more than 90 ADT, and therefore exceeds the allowed use for a private road as set forth in SCC 30.41B.200(10). A public road shall be constructed meeting the County’s public road design standards for a rural subcollector, as set forth in EDDS. (SCC 30.41B.200(7), (9), (10) and SCC 30.41C.200(3)).
2. Even if SCC 30.41B.200 did not apply, the Hearing Examiner concludes that in order to protect the public health, safety and welfare and to make adequate provision for roads and access for a rural cluster subdivision pursuant to RCW 58.17.110, and SCC 30.42B.100, and SCC 30.42C.100, the Applicant’s

¹The standards found in SCC 30.41B.200 except to the extent they are covered by the provisions of SCC 30.41C.200-.240. Here, there is no private road maintenance agreement requirement set forth in SCC 30.41C.200 through .240, so the requirements of SCC 30.31.B.200(12) do apply.

development proposal shall provide an open, constructed and maintained public road, meeting the County's public road design standards for a rural subcollector, as set forth in EDDS.

3. The applicant has provided evidence that the subject property has adequate legal rights for ingress and egress.
4. As modified by this decision, the Applicant's request for a rural cluster subdivision is consistent with the (1) GMACP, GMA-based County codes, (2) the type and character of land use permitted on the site, (3) the permitted density, and (4) the applicable design and development standards.
5. As modified by this decision, the proposal makes adequate provision for the public health, safety and welfare.
6. Any conclusion in this decision which should be deemed a finding of fact is hereby adopted as such.

DECISION OF THE HEARING EXAMINER

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 GRANTED. The Department decision dated October 23, 2007 granting the Morrissey request for a 2-lot RURAL CLUSTER SUBDIVISION on 4.29 acres is hereby MODIFIED, in part, as follows:

The Department decision dated October 23, 2007 approving a 2-lot rural cluster subdivision on the Morrissey Short Plat application is hereby adopted by this reference as if set forth in full. The decision is MODIFIED IN PART, as specified below. All other findings, conclusions, decisions and Conditions in that decision shall remain in full force and effect except as modified herein:

FINDINGS AND CONCLUSIONS

The following Findings and Conclusions are modified to read:

. . . 8. Access is currently provided by a shared driveway easement off 230th Street SE (a private road). ~~Appropriate provisions are made in the short subdivision for streets or roads. The proposed road and access meet the requirements of Chapter 30.24 and 30.41B.200 SCC.~~ Consistent with the requirements of the County Code, the applicant shall provide an open, constructed public road on 230th Street SE according to the County's road standards for a rural subcollector road. SCC 30.41B.200.

. . . 13. The subject rural cluster subdivision (RCS) application has been reviewed for conformance with the RCS standards in Chapter 30.41C SCC. The applicant has provided the information required on an RCS development plan and preliminary short plat, the latest versions of which were received by PDS on October 9, 2007, and in an open space management plan that is to be implemented by a homeowner's association. The RCS application meets all of the criteria required for preliminary approval listed in SCC 30.41C.200, except as to roads. An open, paved, public road shall be constructed on 230th Street SE from the subject property to 155th Avenue SE sufficient for a rural subcollector road as a condition of approval of the RCS. All utilities shall be located underground. The proposal meets the requirements for restricted open space and bulk regulations, lot yield, and bonus residential development. . . .

. . . 15. An Engineering Design and Development Standard (EDDS) deviation was approved on December 4, 2006. The deviation was to allow 20 feet of gravel on 230th St SE in place of paving. This decision does not conform with the requirements of SCC 30.41B.200, 30.41C.100 and RCW 58.17.110. Accordingly, the standards for an open, paved public road sufficient for a rural sub-collector arterial road shall be required as a condition of development approval.

The Decision (and Conditions) of the Department are modified to read:

DECISION

As modified below, the Department of Planning and Development Services has determined this project to be consistent with applicable county development regulations and applicable comprehensive plan elements adopted under Chapter 36.70A RCW, and hereby APPROVES the preliminary Short Plat of Anthony and Susan Morrissey. This Short Plat Preliminary Approval will expire on ~~October 23, 2012,~~ February 6, 2013.

. . .

CONDITIONS

5. Prior to recording of the final short plat:

a) 230th Street SE shall be improved, from the subject property to 155th Avenue SE, to the current EDDS standard for an private low volume access road consisting of 20 feet wide gravel, open, public, constructed, paved sub-collector road.

Ordered this 6th day of February, 2008.

Millie Judge, Pro Tem Hearing Examiner

EXPLANATION OF APPEAL PROCEDURES

Reconsideration. Reconsideration may be sought by any party of record by filing a written petition for reconsideration with the Hearing Examiner within 10 days of the date of this decision. Additional requirements for reconsideration are set forth in SCC 30.71.120.

Appeals. This decision of the Hearing Examiner is a final and conclusive land use decision of the County, with a right of judicial review in Superior Court pursuant to the Land Use Petition Act, Chapter 36.70C RCW. The date of the final decision for purposes of appeal shall be February 6, 2008.

Pursuant to Chapter 30.85 SCC and Chapter 36.70C RCW, any person having standing under RCW 36.70C.060 may file a Land Use Petition in Superior Court. Service on parties must be as required by RCW 36.70C.040.

Please note that the staff of the Office of the Hearing Examiner cannot provide you with legal advice about your appeal. For more information about appeals to Superior Court, please refer to Chapter 36.70C RCW, RCW 43.21C.075, WAC 197-11-680, Chapter 30.85 SCC, as amended, and applicable court rules. If you have questions, you are urged to consult with your legal counsel.

The cost of transcribing the record of proceedings, of copying photographs, video tapes, and oversized documents, and of staff time spent in copying and assembling the record and preparing the return for filing with the court shall be borne by the petitioner. [RCW 36.70C.110] Please include the county file number in any correspondence regarding this case.

Staff Distribution:

Department of Planning and Development Services: Stacy Abbott

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.
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