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

In the Matter of the Application of)
)
GUY MAHAN) **FILE NO. 05 128353 LU**
)
Rezone from Residential-8,400 (R-8,400) to)
Low Density Multiple Residential (LDMR))

DATE OF DECISION: January 4, 2008

PLAT/PROJECT NAME: *Mahan 40th Avenue W LDMR*

DECISION (SUMMARY): Rezone from R-8,400 to LDMR is **APPROVED**.

BASIC INFORMATION

GENERAL LOCATION: This project is located at 15214 40th Avenue West, Lynnwood, Washington.

ACREAGE: .85 acres

ZONING: CURRENT: R-8,400
PROPOSED: LDMR

COMPREHENSIVE PLAN DESIGNATION:

General Policy Plan Designation: Urban Medium Density Residential (6-12 du/ac)

UTILITIES:

Water/Sewer: Alderwood Water and Wastewater District

SCHOOL DISTRICT: Edmonds No. 15

FIRE DISTRICT: No. 7

INTRODUCTION

The applicant filed the Master Application on May 3, 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 14, 15 and 16)

A SEPA determination was made on September 20, 2007. (Exhibit 13) No appeal was filed.

The Examiner held an open record hearing on November 13, 2007, the 124th day of the 120-day decision making period. 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.

PUBLIC HEARING

The public hearing commenced on November 13, 2007 at 2:05 p.m.

1. The Examiner stated that he had read the PDS staff report, reviewed the file and viewed the area.
2. The applicant, the marital community of Guy A. Mahan and Susan M. Mahan, was represented by Guy Mahan and by Camie Anderson, Senior Associate, Shockey/Brent, Inc. Snohomish County was represented by Scott Whitcutt and Paul Dragoo of the Department of Planning and Development Services. No member of the general public participated in this matter by written submittal or by oral testimony. No contested issues of fact or law are raised in the record.
3. The hearing concluded at 2:35 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 applicants, Guy and Susan Mahan, filed an application requesting approval of a rezone of a .85-acre parcel from R-8,400 to Low Density Multiple Residential (LDMR) at a site addressed 15214 - 40th Avenue W in Lynnwood. The application filed in March 2006 was amended on September 14, 2007 to be a concurrent application for an administrative (Type 1) Single Family Detached Unit (SFDU) site plan pursuant to SCC 30.41F. That amended proposal is for eight dwellings: three duplexes and two single-family detached dwellings, one of which replaces an existing single-family dwelling.

2. The subject site lies within approximately one city block of Highway 99, which is bordered on both sides in the vicinity by commercial and multi-family uses. The site has easy access to Highway 99 from either 40th Avenue W or 148th Street SW. No adverse traffic impacts of the proposed rezone are noted in the record.
3. The vicinity and the corridor of 40th Avenue W extending north of the subject site has been in transition to higher residential density and commercial uses. Across the street from the subject site is a childcare center and a used car lot, each of which uses has direct access to and from Highway 99. Property abutting on the south is already zoned LDMR and is developed as multi-family condominiums. Property abutting on the north is zoned R-7,200 but north thereof is LDMR as requested herein. To the east across 49th Avenue W toward Highway 99 the zoning is Planned Commercial Business and is commercially developed. Multi-family housing is the predominant land use along 49th Avenue West. The facts entered above in this Finding No. 3 are reflected in the County's adopted Comprehensive Plan, which designates the subject site Urban High Density Residential (UHDR). The proposed LDMR is an implementing zone for that Comprehensive Plan designation.
4. The only Critical Area on the site is a Type IV stream which crosses the southwest corner of the site. An interior drive isle crossing that stream was mentioned in the staff report (Exhibit 32, p. 9) but has been deleted from the site plan (Exhibit 5a) and that area is now shown thereon as a Native Growth Protection Area to include critical area buffers and setbacks and an outfall mitigation to protect the off-site wetlands to the southwest. Drainage analysis upstream, downstream and on-site is described in the preliminary drainage report (Exhibit 11). The administrative site plan review has already considered a Critical Areas Study and a Conceptual Mitigation Plan and concluded that a final wetland mitigation plan will be able to comply with the Critical Areas Regulations (SCC 30.62).
5. The Snohomish County Health District has no objection to this proposal provided that public water and sewer are furnished. (Exhibit 27) The Alderwood Water & Wastewater District issued a determination of availability of both water and sewer on June 22, 2006 and July 21, 2006 with a notation: "Gravity sewer required, pumping is not allowed." That latter document notes that it would expire in one year, which expiration date would have been July 21, 2007. No document of record shows a renewal or extension. At this rezone stage, the Examiner is willing to assume such renewal has occurred or will occur prior to issuance of any administrative SFDU site plan approval.
6. The subject 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, which is the zoning requested here.
7. The role of the Hearing Examiner in this matter is to determine whether a preponderance of the evidence of record demonstrates that the proposed rezone meets the applicable decision criteria of SCC 30.42A.100. The Examiner acknowledges that the staff report (Exhibit 32) addresses those criteria but, except for traffic-related issues, including concurrency, the staff report tends to defer analysis of site-specific effects on grounds that the current site plan (Exhibit 5A) might not be the final multi-family proposal for the property. The staff report reads (p. 10):

“NOTE: Future development activity on a subject site will be subject to applicable regulatory provisions and interlocal agreement(s) and mitigation fees in effect at time of receipt of a complete application for a different LDMR proposed development activity should the current contemplated SFDU site development proposal not be pursued.”
(Emphasis supplied)

8. Such analysis leaves the surrounding community uncertain as to what the proposed rezone will result in for that community. The Examiner expressed that concern in Brookstone Investment LLC (File No. 06-135148, Finding No. 18, p. 6) in a decision issued October 31, 2007, noting that, although the proposed rezone to LDMR in order to construct seven detached single-family dwellings was less impactful than would be the stacked, multi-family apartments or attached townhouses also permitted in the LDMR zone, the prospect of redevelopment to such stacked density does not ensure the vitality and character of the existing residential community around the subject site. That reasoning was sustained on appeal to the County Council. In summary, based on the staff report alone, this record would not support approval of the requested rezone to LDMR.
9. However, this record supports the approval of the requested rezone because of the applicant’s site-specific analysis in Exhibit 33. There, the applicant cites eleven specific Comprehensive Plan policies and objectives and, with each, provides a brief statement of how the proposed rezone specifically furthers each cited policy in consistency with the Comprehensive Plan. Not every one of those 11 statements is a model of relevance but, combined, the narrative shows (1) a community in transition, (2) with existing single-family homes older and run-down, (3) with LDMR allowing sensible and sensitive transition to the abutting commercial zones, (4) in the Southwest UGA where such density is anticipated, (5) in proximity to Highway 99, (6) with existing LDMR zoning already abutting. (The Examiner will not reprint that narrative here.) That site-specific detail is minimally sufficient in this instance to support finding as fact that the application is consistent with the Comprehensive Plan as required by the rezone decision criteria of SCC 30.42A.100.
10. As to the second criterion of SCC 30.42A.100 (that the proposal must bear a substantial relationship to the public health, safety and welfare) the staff and the applicant assert that because the proposal is consistent with the Comprehensive Plan, all issues of public health, safety and welfare are encompassed therein and no further analysis is required. The Examiner disagrees. Here, the applicant at least does point out that its narrative about the Comprehensive Plan relates to the goals of the Growth Management Act and overlap with issues of public health, safety and welfare. The Examiner concurs in part but notes that if any objection to the proposed rezone had been raised and supported by substantial evidence, failure to have responded might have been fatal. Based on this record, however, the Examiner finds no adverse relationship to the public health, safety and welfare.
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 R-7,200 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. The Examiner has fully reviewed the record and has found therein substantial evidence to support the approval of the requested rezone to LDMR at Findings of Fact Nos. 2, 3 and 6 through 10 demonstrating that the request 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) any applicable design and development standards and meets the decision criteria of SCC 30.42A.100.

6. Any conclusion in this report and 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-8,400 to Low Density Multiple Residential is hereby **APPROVED**.

Decision issued this 4th day of January, 2008.

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 **JANUARY 14, 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 **JANUARY 18, 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: Scott Whitcutt

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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