

BEFORE THE
SNOHOMISH COUNTY HEARING EXAMINER

DECISION of the DEPUTY HEARING EXAMINER

In the Matter of the Application of)
)
TAMARACK TRAILS, LLC) **FILE NO. 06 127842 LU**
)
Rezone from Residential-8,400 (R-8,400) to)
Low Density Multiple Residential (LDMR))

DATE OF DECISION: August 20, 2007

DECISION (SUMMARY): ¹The application for a rezone from R-8,400 to **LDMR is REMANDED** for analysis of the storm drainage plan taking into account the history of flooding in the vicinity.

BASIC INFORMATION

GENERAL LOCATION: This project is located at 22315 82nd Place West, Edmonds, Washington.

ACREAGE: .87 acre

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

COMPREHENSIVE PLAN DESIGNATION:

General Policy Plan Designation: Urban Medium Density Residential

UTILITIES:

Water/Sewer: Olympic View Water District

SCHOOL DISTRICT: Edmonds No. 15

FIRE DISTRICT: No. 1

¹ Decision summary corrected to be consistent with the Examiner's decision stated on Pages 6 and 7. (8/28/07)
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INTRODUCTION

The applicant filed the Master Application on September 25, 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 16, 17 and 18)

A SEPA determination was made on June 4, 2007. (Exhibit 15) No appeal was filed.

The Examiner held an open record hearing on July 31, 2007, the 158th day of the 120-day decision making period.

PUBLIC HEARING

The public hearing commenced on July 31, 2007 at 1:05 p.m.

1. The Examiner stated that he had read the PDS staff report, reviewed the file and viewed the area.
2. The applicant, Tamarack Trails, LLC, (hereinafter “Tamarack”) was represented by Andrew Lofstedt of ASPI. Mr. Lofstedt also represents Mediterranean Investments, LLC, (06-132593, hereinafter “Mediterranean”) which abuts on the north. Snohomish County was represented by Scott Whitcutt of the Department of Planning and Development Services in both matters. The two applications are for the same rezone from the existing R-8,400 to Low Density Multiple Residential (LDMR). Both parcels are smaller than one acre in size. For those reasons, the two matters were consolidated for hearing although separate decisions are issued. The two hearings were scheduled in sequence on the same date. Mediterranean differs from Tamarack in submitting a concurrent site plan for six lots for administrative approval if the requested rezone is approved. Tamarack submits no concurrent site plan. The two sites’ storm drainage is to the same basin and detention for both is entirely on the Mediterranean site. (Exhibits applicable to both are identified by the name of the development proposal file into which the Exhibit was submitted.)
3. Evidence supplied by vicinity residents expressing concern and opposition to either of the applications is considered applicable to the other application as well, unless clearly stated otherwise. The Examiner so announced at the hearing. Vicinity resident Neil Davis submitted the only pre-hearing public document (Exhibit 20) referencing Mediterranean. Documents submitted pre-hearing and at hearing referencing the Tamarack application but relevant also to Mediterranean were submitted under signatures of vicinity residents Gerry Boate, Eric Larson, Michael Scribner and Bill & Gwen Strickland. Those who testified at the hearing were Gerry Boat, Dwayne Langsberg, Eric Larson, Victor Schultz, Michael Scribner and Bill and Gwen Strickland.
4. The hearing concluded at 2:17 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, Tamarack Trails, LLC, filed an application requesting approval of a rezone of a .87-acre parcel from R-8.400 to LDMR. No critical area (steep slope, wetland, or stream) is on or near the site. The project would replace two existing homes with nine new homes for a net increase of seven homes. The abutting Mediterranean Investments project will replace two existing single-family residences with six new single-family homes: a net increase of four homes. Thus, the two abutting projects consolidated for hearing in this matter will add 11 single-family dwellings to the neighborhood.
3. Owners of property in the immediate vicinity oppose the proposed rezone, asserting that the resultant greater development density per acre will worsen flooding experienced in the neighborhood for the past several years. Exhibit 25 (Mediterranean) is those neighbors' letter expressing concern that the proposed drainage facilities here are based on standards from approximately 15 years ago (the 1992 Washington State Department of Ecology Stormwater Management Manual for the Puget Sound Basin) rather than the 2005 standards of the same name.
4. The subject rezones are of parcels located approximately 500 feet east of Chase Lake. The subject parcels and immediate vicinity are on dead-end 82nd Place W., which ends at Hall Creek or at a tributary to Hall Creek. Hall Creek carries water from Chase Lake to Lake Ballinger.
5. Less than one month prior to the instant hearing, the Enterprise Newspaper of Edmonds (Exhibit 27, Mediterranean) reported on July 6, 2007 that Lake Ballinger has cleaner water today than it had 35 years ago when Washington State had declared it to be the dirtiest lake in the Puget Sound region. Exhibit 27 points out that, since 2006, quarterly meetings to discuss Lake Ballinger's environmental and drainage issues have been held between the five cities of Edmonds, Lake Forest Park, Lynnwood, Mountlake Terrace and Shoreline. Those cities have spent \$25,000 on a hydrology study to be completed in August 2007. The state Department of Ecology completed a year-long study in October 2006 from which complete results are to be published in the Fall of 2007. Thus, the results of both studies are imminent. A spokesperson for the Lake Ballinger Community Association, David Page of Edmonds, is quoted at Exhibit 27 saying that Lake Ballinger is now dying and he is concerned that thousands of storm drains in the area dump unfiltered fluids into the lake. (It is noted that the shared detention system for the two rezones' development has filters downstream of the detention vault.)
6. In summary, six governments comprised of the State of Washington and the cities of Edmonds, Lake Forest Park, Lynnwood, Mountlake Terrace and Shoreline are shown by the evidence in this record to have been concerned about flooding in this vicinity for many years and have spent funds for studies of related issues to be released within a few weeks. The two rezones are requested immediately of a seventh government: Snohomish County.
7. The Environmental Checklist submitted for the each rezone (Exhibit 2 in each file) responds to section A-8 by reporting that the only environmental document prepared for the rezone is the Checklist itself. The response adds: "*Additional studies, if required, will be performed at time of permit submittal.*" Thus, it is found as fact that the impacts of each rezone have not been considered.

8. Exhibit 27 reports that although pollution is very much a concern, the biggest problem recently has been flooding. Exhibit 27 reports that the president of the Lake Ballinger Community Association, Jerry Thorsen, had more than 18 inches of water on his lakeside lawn and that his neighbors four homes distant had water pressing against their sliding glass door.
9. The above-noted evidence from Exhibit 27 parallels the assertions of the vicinity residents who have submitted evidence into this record. Eric Larson has lived in the vicinity for 25 years. He testifies that flooding began in the early 1980's when the Unitarian Church added to its parking lot. At Exhibit 25 (Mediterranean), those residents point out that the area is a former peat bog with a high water table and that the last parcel at the bottom of their hill has a water marker to monitor water height. ***"It was put there by Snohomish County."*** (Emphasis supplied.)
10. Exhibit 25 (Mediterranean) asserts that the current drainage pipe that was engineered and approved by the County has never been adequate and never maintained by the County to help prevent flooding of the lower properties. The pipe is pictured at Exhibit 28 (Mediterranean). Exhibit 25 (Tamarack) is a letter by Karen and Eric Larson which describes that outlet pipe as a 17-inch pipe unable to carry water incoming east of the Chase Lake bridge through five pipes totaling 44 inches with an additional weir of 36 inches. As a result, the Larsons report: *"Our house had sustained foundation damage due to all the flooding in our area..."* The Larsons' Exhibit 25 includes six colored photographs of flooding and damage to their home.
11. Witness Michael Scribner testifies that his home is flooded every year. He points out that the drainage weir flows backwards. Bill Strickland by letter (Exhibit 26, Mediterranean) explains that dilemma by pointing out that the lower parcels in the community become a secondary water retention pond for Chase lake. He writes that water overflow from Chase Lake is supposed to flow downhill to the drainage pipe but the grade of the ditch is higher than the outlet pipe. He notes that it is that pipe which the applicant proposes to replace as part of the drainage system for these two properties. Mr. Strickland summarizes by noting the pipe/ditch elevation difference *"...will create flooding of the properties before it makes it to the Creek that is supposed to be the drainage for Chase Lake."*
12. Mr. Strickland further writes at Exhibit 26 that the creek and ditch have been serviced by the County only twice in the past 25 years. He writes that residents on the lower properties have tried to keep things cleared to prevent flooding to their properties. He points out that the sludge needs cleaned out and dredged and maintained to improve the flow. His concluding sentence merits emphasis:

"We feel that the flooding issue should be resolved prior to allowing higher density in this location."
13. Witness Gerry Boate testifies that the City of Edmonds has requested as moratorium on building in the vicinity for safety reasons.
14. The applicant responds with testimony that the storm water detention vault has been sized at 2.7 times the size normally required for a 100-year storm at this site. Further, the applicant testifies that that increased detention was done in response to the concerns of the local citizens. The nine-unit Tamarack Trails final drainage report submitted by Joseph M. Smeby, P.E in September 2006 (Exhibit 12) states at page five that all runoff from the Tamarack Trails site is to be detained and treated on the adjacent Mediterranean Investments project on the north. (However, there is no equivalent final drainage report in this record for the Mediterranean Investments project.) Page seven states that runoff from the frontage improvements of both projects will be collected and conveyed to the existing drainage channel to the north. That channel is the one described by the vicinity residents as a contributing factor in the flooding problem. The

drainage report does not mention flooding in the vicinity. The report states (page 12) that a spokesperson for the church on which a concrete pipe is located reported “...that they do have ponding problems at that inlet....”

15. The preponderance of the evidence of record supports a finding of fact that the stormwater situation in the vicinity is described more accurately as “flooding” rather than as a “ponding problem.”
16. The subject site and the surrounding community are zoned R-8,400 but the general area is transitioning from single-family residential zoning to the low-density multi-family use encouraged by the General Policy Plan’s Urban Medium Density Residential designation.
17. There is no mitigation required for parks, schools or roads. The Snohomish County Department of Public Works has chosen not to comment on the rezone but will participate in the administrative site plan review or other approval process. Vicinity residents describe the current difficulty of driving from 82nd Place West onto 224 Street SW, or vice-versa, especially during peak hours. They express frustration with the perceived incompatibility of the more dense development that would be permitted by the proposed rezone. They lament the loss of significant trees. Despite their opposition, however, those traffic, density and grading/clearing aspects of the proposal need only meet applicable codes because no special circumstance such as flooding is shown as to traffic, density or vegetative buffering.
18. The Snohomish County Health District has no objection to this proposal provided that public water and sewer are furnished.
19. Public water, sewer service and electrical power will be available for this development from Olympic View Water and Sewer District.
20. 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.
21. 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 Examiner having fully reviewed the PDS staff report hereby adopts said staff report as properly setting forth the issues, the land use requests, consistency with the existing regulations, policies, principles, conditions and their effect upon the request. That staff report is hereby adopted by this reference in order to avoid needless repetition.
2. The request is for a rezone and, therefore, must meet the two applicable decisional criteria set out at SCC 30.42A.100. The first criterion is that the proposal must be consistent with the GMA Comprehensive Plan. The type and character of land use permitted on the project site is consistent with the General Policy Plan (GPP) ULDR designation of the property, and meets the implementing regulatory codes as to density, design and development standards in all respects except as to drainage.

3. A rezone must also comply with the second applicable criterion of SCC 30.42A.100; i.e., the proposal must bear a substantial relationship to the public health, safety and welfare. A preponderance of the evidence or record demonstrates that the applicant has failed to meet the burden of proving a positive relationship to the public health, safety and welfare. Specifically, the drainage report (Exhibit12) does not even acknowledge long-term and continuing flooding in the vicinity. Nor does any other document of record submitted as part of the rezone application process. However, that history of flooding is the context in which the reasonably probable, significant, adverse impacts of these two rezones must be considered.
4. For example, the 1992 DOE manual computes drainage detention capacity based on single event storms. The Pacific Northwest often experiences a series of storms some hours apart but too close together for a stormwater vault to drain before the next storm, and the next, and the next. Here, in the context of this vicinity's flooding history, it is not enough to have simply increased the size of the vault required by the 1992 manual by a factor of 2.7. (The street frontage sheet flow is a further concern here.) The issue is not whether the increased vault size meets Code. Rather, the issue is whether professional study demonstrates that the vault and related drainage system is, in fact, adequate. To risk adding further to the flooding negates any substantial, positive relationship to the public health, safety and welfare.
5. The General Policy Plan (effective February 1, 2006) component of the Growth Management Act Comprehensive 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 UGAs, as long as they are carefully sited, well designed, and sensitively integrated into existing communities.” (Emphasis supplied.)
6. The proposed rezones that would allow the addition of 11 new households in a community with a well-documented history of flooding must be based on demonstrated consideration of that flooding and responsive engineering in order for it to be concluded as a matter of law that the rezones are carefully sited, well designed and sensitively integrated into the existing community. The applicant has not met the burden of proof required to support that conclusion of law.
7. This matter must be remanded for further study and a supplemental staff report consistent with the findings of fact and conclusions of law entered above and will be set for further hearing accordingly.
8. 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 Planned Residential Development-8,400 to Low Density Multiple Residential for this property is hereby **REMANDED** for engineering analysis of the flooding history and related issues in the associated riparian corridor to insure the design of a stormwater drainage system to prevent further adverse impacts to the built or natural environment.

Decision issued this 20th day of August, 2007.

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 **August 30, 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 4, 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>
