

**FINAL DECISION of the  
SNOHOMISH COUNTY HEARING EXAMINER**

DECISION DATE: November 21, 2012

PROJECT NAME: **Hooper Tow Yard**

APPLICANT/  
LANDOWNER: Andrew and Shelley Hooper  
19030 Lenton Place SE, Suite 615  
Monroe, WA 98272

FILE NO.: 08-111037-000-00-LU

TYPE OF REQUEST: **CONDITIONAL USE PERMIT (CUP)**  
For tow yard in R-5 and CRC zones

DECISION (SUMMARY): **Denied without prejudice for failing to comply with vested minimum lot size requirements**

GENERAL LOCATION: 8115 180<sup>th</sup> St SE, Snohomish  
Section 11, Township 27 N, Range 5 East, W.M., Snohomish County

ZONING: R-5 and CRC

COMPREHENSIVE PLAN: Rural Residential (1 DU/5 Acres Basic)

PDS RECOMMENDATION: No recommendation.

**Introduction**

The Applicant has applied for a conditional use permit to operate a tow yard upon property that is zoned R-5. The application is denied without prejudice because the lot subject to the application does not meet the minimum lot size for the R-5 zone. Under the substandard lot regulations to which the application vested, new commercial uses are prohibited on substandard lots. The application is “denied without prejudice” so that the applicant may reapply under current regulations. Current regulations have more flexible substandard lot regulations than those to which the subject application vested. Reapplication will also enable the Applicant to correct material inaccuracies in its application materials that prevented staff from providing a complete assessment of the proposal’s impacts. The Findings of Fact supporting this decision start on page 8 and the Conclusions of Law commence on page 13. A summary of the hearing testimony is located at pages 3-8.

## Summary of Testimony

*Note: This hearing summary is provided as a courtesy to those who would benefit from a general overview of the public testimony of the hearing referenced above. The summary is not required or necessary to the decision issued by the Hearing Examiner. No assurances are made as to completeness or accuracy. Nothing in this summary should be construed as a finding or legal conclusion made by the Examiner or an indication of what the Examiner found significant to his decision.*

### Applicant Testimony

Gene Miller, GFM Associates, stated he is a land use planner and consultant for the Applicant. He reviewed the staff report and agrees with its content except for the section regarding vesting. The Applicant first applied in 2008 and the application was deemed complete on December 12, 2008. A series of procedural requirements followed between the Applicant and County staff. Eventually, lot size for the project became an issue when previous decisions (one in court, one by Hearing Examiner) for different projects suggested that the proposed lot size was too small to support the conditional use permit requirements. These decisions did not reflect Snohomish Code requirements for substandard lots. Instead, they were based on the Hearing Examiner's ruling that there was insufficient area in the property to support the nature of the permit requested. Based on these decisions, County staff decided the lot size had insufficient area for the Applicant's proposal as well. Staff issued a letter to the Applicant on January 24, 2011 in which they stated the proposal lot failed to meet minimum lot size requirements of the code. The Applicant responded, saying there are no minimum lot size requirements in the code and the previous decisions had no bearing on the current application. Staff did not recant their decision, thus the Applicant filed a law suit. The County and the Applicant entered into a settlement agreement where the County agreed to delay any enforcement action if the Applicant agreed to drop the lawsuit, pending a code agreement being approved by the County Council. The Council approved the code amendment; therefore the Applicant requested processing of the application. The Applicant specifically asked for the proposal to be considered under the new County code provision.

In regard to vesting, Mr. Miller testified that the County Council decision cited by staff in the staff report is germane only to that previous decision. Additionally, he does not believe the original determination that the lot was substandard in size should have been included in the report because it became irrelevant after the settlement was made. Moreover, he noted that the issue of vesting is judicial and County staff doesn't play a role in determining vesting periods. In Snohomish County Code, development ordinances change routinely. The Applicant requested for the new proposal to be considered under the new code amendment and has the right to be held only to the codes in effect at the time of the processing of the application. Yes, the Applicant has the right to be protected from code changes, but, also, the Applicant does not have to be bound to the previous code. He submitted a summary of his testimony along with Snohomish County Code provisions relevant to the proposal (exhibit k-2).

According to Mr. Miller, County staff has provided a thorough analysis of the application. He added that he believes staff is recommending approval of the CUP subject to conditions, and the Applicant concurs with these conditions.

Upon questioning by the hearing examiner, Mr. Miller noted that there is no specific provision for a minimum lot size dealing with a conditional use permit in bulk regulations. The proposal property is zoned R-5, and County regulations require a minimum lot size of 200,000sq ft; however, development is permitted on substandard lot sizes in accordance with SCC 30.23.235, the newly adopted County provision. The County issued a determination of completeness for the application on December 12, 2008. At that time, the only County code provision in regard to substandard lot sizes dealt with residential use. There is still no bulk requirement for any conditional use permit. The Applicant is not asking to pick and choose amongst the different development ordinances. The proposal should be held solely to current ordinances.

### Staff Testimony

Roxanne Pilkenton, Senior Planner with Planning and Development Services, stated that Planning and Development Services (PDS) has concluded that the CUP application is vested to the codes at the time of the complete application, December 12, 2008. Thus, PDS cannot recommend CUP approval on a lot of the proposed size in the R-5 zone. PDS is not recommending approval or denial of the application due to conflicting interpretations of the settlement agreement in regard to the application of the new substandard lot provisions to this proposal. PDS requests that, if the hearing examiner approves the application, all conditions listed at the end of the staff report be included in the decision. She submitted a supplemental staff report dated November 7, 2012. The supplemental report remedied some errors including an incorrect acreage report, a forgotten parenthesis, and a miscalculated fee.

According to Ms. Pilkenton, Mr. Miller was made aware of the vesting issue more than two days before the hearing date. She noted that he was informed of staff's decision not to issue approval or denial via email in August.

*Mr. Miller interjected that he was aware of staff's vesting decision; however, he did not expect it to be presented in the fashion it was in the staff report.*

Ms. Pilkenton testified that the language used in the recitals section of the settlement agreement was "whereas" not "will do." Section 3b of the settlement agreement describes what the County will do, not the recitals section. Section G of the settlement agreement states that the Applicant agrees not to perform any new, unpermitted activity on the subject property without obtaining the required approvals; however, it appears a large amount of impervious surface has been added to the site. This activity on the site is evidenced by a Google-Earth aerial photograph taken on July 5, 2012 (exhibit G12) compared to an aerial photograph taken in 2011(exhibit G11). Additionally, an on-site photograph from October 29, 2012 (exhibit G5) provides further evidence. The photographs suggest an approach was added to the area below the house where the tow facility stores vehicles. The site plans supplied in exhibit B1 are what Snohomish County based its MDNS on during the approval process. The plans (exhibit B1) show an existing gravel area to the south that would be turned to grass. Therefore, based on these plans, staff believed the tow facility would not be using the south area to store vehicles. Staff made no mitigations for this southern area being used. The aerial photo exhibits demonstrate that impervious surface was added to the south and around the house which was unpermitted activity. According to today's code, this work would have required a land-disturbing activity permit. Snohomish County questions if the

Applicant followed their portion of the settlement agreement. The application does not meet today's code because it did not get a land-disturbing activity permit.

Upon questioning by the hearing examiner, Ms. Pilkenton stated that staff's analysis of the application was completely based on the code in place for December, 2008.

Randy Sleight, Snohomish County Chief Engineering Officer, noted that his report states that the proposed site plan is far better than current conditions. However, he recanted this assertion because of the changes shown in the aerial photo from July 5, 2012 (exhibit G12). He no longer believes the proposed plan is a better option. Additionally, the unpermitted changes could be in violation of County stormwater code provisions which requires a full drainage plan for impervious surface over 5,000ft. PDS disagrees with Gene Miller's assertion, in an October 30, 2012 email (exhibit G13), that PDS agreed with the Applicant that some of the impervious area to the south of the residence existed prior to 1984. It appears that over time clearing and grading has occurred on site without any permits or drainage plans.

Upon questioning by Gene Miller, Mr. Sleight testified that paving work was done in the south to create an access area to the site. Additionally, the photo (G12) suggests sidewalks were added around the building. Mr. Sleight did not write the original drainage report.

Upon questioning by the hearing examiner, Ms. Pilkenton noted that staff does not expect the hearing examiner to address the other conditions of approval if the application is denied based on the vested lot-size standards. On the site, the residential properties are to the east, and the commercial properties are to the west. The north has both commercial and residential areas. The Limited Area of More Intensive Rural Development (LAMIRD) is the area zoned CRC. The landscape buffer for LAMIRDs is not applicable for this application. In regard to fencing, staff's main concern is that the fencing plan has the ability to be permitted. Staff did not mitigate the effect of barbed wire fencing in the MDNS. If barbed wire was necessary to meet state standards, PDS would recommend a new conditional use permit. Snohomish County does not register tow truck operators or facilities. Staff believes state definitions of "temporary," in regard to vehicle storage, and "towing facility" versus "repo area" should be followed because Snohomish Code does not give clear definitions.

In response to questions from the Examiner, Ann Goetz, Snohomish Traffic Engineer, agreed that the Applicant's traffic study found that no traffic mitigation fee would be necessary, but the County believes the Applicant needs to work with the city of Bothell on this issue.

#### Public Testimony

William Jaques, 20119 78<sup>th</sup> Ave SE, President of Maltby Neighborhood Alliance, testified that the Neighborhood Alliance represents around 160 families. The Alliance is recognized by PDS and does have standing in the area. The goal of the group is to prevent urban sprawl and protect the R-5 area. The County told the Applicant, Mr. Hooper, that he was on a substandard lot in Maltby. Subsequently, Mr. Hooper moved to Wenatchee. According to Mr. Jaques, the new owners of the Clearview lot are extremely noisy and worse than the previous Hooper operation. If the application is legal, it should be vested to the 2008 standards. If it isn't legal, a new application needs to be submitted. The Alliance won their case in Maltby in June, 2010 and hopes a similar ruling will be made in this one. The CUP proposal violates at least two provisions of the Snohomish County

Zoning Code, does not satisfy the requirements of SCC 30.42c.100acd, violates the Snohomish Comprehensive Plan, and does not satisfy the intent of the Growth Management Act. The Hearing Examiner's previous decision on the Maltby-Hooper request sets a precedent for the current application. Additionally, the Snohomish County PDS and the Sheriff's Office do not have the personnel to enforce County code requirements and noise ordinances. Surrounding neighbors are already suffering due to increased noise levels coming from the subject property. The Alliance asks that, at a minimum, no abandoned or repossessed vehicles be stored on the property. The Applicant has been unclear about the number of vehicles that would be kept on the property. If the Applicant truly planned on just towing from location to location, he could apply for a Home Occupation Permit and not go through this process.

Troy McGuire, 14305 89<sup>th</sup> Ave SE, stated he owned a business in the Clearview area for nine years. He does not agree with the Maltby Neighborhood Alliance because there are many businesses surrounding the Applicant's property. The subject lot is surrounded by business and is almost worthless as a residential lot. The new towing business is an asset to the community. He recommends approval. He is not related to the Applicant.

Upon questioning by Ms. Pilkenton, Mr. McGuire stated that he does not think it is a good residential location. He is not an expert on the towing industry. The current businesses in the area are not well kept, and a new business might make standards higher.

#### Staff Rebuttal

Roxanne Pilkenton noted that exhibit G5 are photographs from an on-site visit on October 29, 2012. Photos 3, 12, and 13 show various outdoor child toys. These photos demonstrate that the site is a functioning single-family residence. The site will remain a single-family residence with the addition of the tow-yard.

Upon questioning by the hearing examiner, staff noted that the most recent grading ordinance was from 2010. The prior version was issued in 1998. The CUP application would be vested to the 1998 ordinance. There are no grading or drainage permits on file for the subject property.

#### Applicant Rebuttal

Gene Miller stated that the submitted site plans are for the purpose of showing compliance with the County code. These plans do not necessarily reflect what exists today. The landscaping plan is a proposal. The conditions that staff recommended in the staff report stipulate that a detailed drainage plan must be submitted along with a landscaping plan. The Applicant agrees with these conditions. The Applicant had no intention of being misleading with the site proposal. The site plan, exhibit B1, illustrates the proposed project but is not final. Despite Mr. Sleight's testimony, according to Mr. Miller, there has been no additional paving since 1998 when the Snohomish grading codes were established. The Applicant did add sidewalks. Impervious area has been added, but it is under the eaves of the house. The parking area was paved prior to 1998. PDS indicated that if the Applicant could prove that the impervious surfaces had been there since 1984, the surfaces would not be considered in the impervious area total. The Applicant provided aerial photos demonstrating that this impervious area has been there since 1984. The previous Snohomish drainage engineer agreed with this assessment. After 1984, an area behind the house (northwest) that was previously graveled was changed back to a grass area by the new owners. In

regard to Mr. Jaques concerns, Mr. Miller noted that this application is not subject to CRC regulations because the site is not located within the boundaries of the CRC, except for a small portion of the property. The application meets the Comprehensive Plan Guidelines and Zoning Code. Currently, there is no storage of vehicles on the site. There is a tow facility directly south of the subject property. Additionally, there is a large wrecking yard across Highway-9 from the property. Thus, a tow facility is appropriate for the area.

Upon questioning by the hearing examiner, Mr. Miller stated that staff previously determined that the added asphalt was not additional impervious area that required new drainage review for County code compliance. All impervious services will be covered under the new drainage plan that is required by the conditions of approval.

#### Staff Testimony

Randy Sleight, Snohomish Drainage Engineer, noted that exhibit G12 (aerial photograph) shows that the sidewalks are not covered by the eaves of the roof. Additionally, there has been new paved parking and the previous parking has been repaved. 2,000sq ft. of new impervious surface requires a targeted plan which the Applicant submitted. Over 5,000sq ft. of new or replaced impervious surface requires water quality treatment and a full drainage plan, but the Applicant has not submitted any new plans. Staff believes the black-paved area in G12 is more than 5,000ft (not counting the sidewalks). The drainage code is in SCC 30.63A

#### Applicant Rebuttal

Gene Miller testified that the parking area was paved previously, prior to the review of the project. It possibly was repaved, but he is not sure. Mr. Miller first visited the property in 2008, and the parking area was already paved at that time. The note on the site plan (exhibit B1) about the grassing plan was inappropriately placed. The area that was changed from gravel to grass was to the northwest, not the south, of the property. Mr. Miller sent an email to Roxanne Pilkenton to inform her of this mistake.

#### Staff Rebuttal

Roxanne Pilkenton noted that she is unaware how much grading it took to establish the new grass in the northwest area. She does not know if grass seed was thrown on the gravel, or if fill was brought in to grow the grass. Since the 2008 application, stormwater and substandard lot size regulations have been the only two major changes in development regulation. The 10/11/08 site plan (B2) does not make clear what areas will be used for the storage of vehicles. Currently, there are service trucks stored on the property. The MDNS did not reflect the impacts of using the south of the property for parking because the submitted site plan did not reveal this use. The MDNS site plan showed an area to the north of the house as the parking area. There is less paved area on the MDNS site plan than showed on the google aerial map from 2012 (G12). Exhibits B1 does not say the southern area will be landscaped, but B2 does. B1 was used for the MDNS plan. The square footage (over .5 acre) was detailed on the southwest corner of the B1 document.

#### Public Testimony

Mr. Jaques stated that noise could be a problem 24 hours a day depending on the nature of the business. The County doesn't have the resources to regulate the noise levels. Additionally, the business has been operating illegally for the past 4 years and should not be allowed to continue. The other tow businesses in the R-5 zone were grandfathered in to the zoning area.

#### Applicant Rebuttal

Gene Miller testified that the application always reflected the southern area being used for vehicle storage. The drainage determination review dealt with the square footage of new impervious area. The storage area has always been gravel so it is not a change that would require reevaluation of the determination of non-significance. The plans did not need to reflect whether that gravel area was always meant for parking or not. Tow facilities are allowed in R-5 zones with a conditional use permit. The County agreed to proceed with the application once the code was amended. The Applicant has acted in accordance with the settlement agreement and asked for the project to be evaluated under the current regulations. Temporary storage for vehicles is necessary for a tow-facility.

Based on a preponderance of the evidence of record, the following Findings of Fact, Conclusions of Law and Decision are entered:

### **I. FINDINGS OF FACT**

1. **The Record.** The official record for this proceeding consists of the Exhibits entered into evidence as well as the testimony of witnesses received at the open record hearing. The entire record was admitted into evidence and considered by the Examiner in reaching the decision herein.

**NOTE:** For a complete record, an electronic recording of the hearing in this case is available in the Office of the Hearing Examiner.

2. **Parties of Record.** The Parties of Record are set forth in the Parties of Record Register and include interested parties who testified at the Open Record Hearing.
3. **Public Hearing.** The Hearing Examiner held an Open Record Hearing on November 7, 2012. Witnesses were sworn, testimony was presented, and exhibits were entered into the record at the hearing. Notice of the application and public hearing were made according to the provisions of SCC 30.70.050(5). All witnesses who participated in the hearing are identified in the summary of testimony, above.
4. **Application Request.** Andrew and Shelly Hooper are requesting a conditional use permit to convert a portion of a parcel with an existing single family residence and attached garage into an automobile tow facility. The portion of the single family residence that would not be used for the automobile tow facility office would be occupied by a tenant who would also operate one tow truck that would be headquartered on site.

The tow facility would be the headquarters and office facility for Spiveco, Inc. and Recovery Services of Washington, Inc which are both currently licensed as tow companies by the State of Washington. These companies provide vehicular tow services to the general public as a "destination-to-destination" facility with occasional temporary vehicle storage

on the subject site location for immediate pickup. The proposed automobile tow facility would be operating 24 hours a day, seven days a week on a radio dispatch basis. The proposed automobile tow facility would be providing both emergency and non-emergency towing services to abandoned, repossessed and in need of repair vehicles to the subject site.

The proposed automobile tow facility would not be in the business of towing wrecked vehicles per the Conditional Use narrative in Exhibit A3. The Applicant, in the narrative, has stated that the vehicles would be held temporarily at the subject site, but does not offer a time limit. The Applicant does not provide explanation as to how many vehicles could or would be stored on the subject site at any given time. While not in service, other tow vehicles, owned by Spiveco, Inc. or Recovery Services of Washington, Inc., would be with their assigned drivers at various locations other than the subject site.

### **Project Chronology**

On 05 June 2007, the subject property was included in a docketing application (07-106626 DA, Docket XII) to amend the GPP Future Land Use map to Clearview Rural Commercial (CRC) land use and rezone to CRC. PDS provided the County Council an initial review and evaluation of the docketing proposal on 26 June 2007. The County Council denied the docketing request, because the subject property was not able to meet all of the criteria of SCC 30.74.030, 30.74.040 and 30.74.060. A letter to Mr. Miller (Exhibit A6) from Will Hall, PDS Principal Planner, and an email to Mr. Hooper (Exhibit A7), from Darryl Eastin, PDS Principal Planner, has been made a part of the record. Both of these exhibits informed Mr. Miller and Mr. Hooper as to why the placement of the east boundary of the CRC designation approved by the Growth Management Hearings Board (2002) for the area, including the northwestern portion of Mr. Hooper's property, was based on the location of businesses and commercial uses in existence prior to 1990. The current CRC boundary east of State Route 9 and north of 180<sup>th</sup> Street SE, corresponds to the location of the east boundary line of the Neighborhood/Community Business designation (for the same area) in the Cathcart – Maltby – Clearview pre-GMA subarea plan. Because the east boundary of the Neighborhood/Community Business area did not correspond to parcel lines, the current CRC boundary, in order to be consistent with the subarea plan, does not follow parcel lines, and therefore cuts through several properties including Mr. Hooper's. Because Mr. Hooper's property, based on aerial photographs was not developed with a commercial use prior to 1990, it was not included in the CRC designated area submitted to the Growth Management Hearings Board. It should be noted that the CRC zone does not allow an Automobile Tow Facility.

On 22 May 2008 a complaint was filed with Planning and Development Services (PDS) requesting that PDS investigate the subject property for an alleged illegal towing/repossession business, the storing of vehicles, and the operation of an automobile sales business on the subject property. PDS Code Enforcement visited the site on 27 May 2008 and took photographs (Exhibit A5).

The conditional use permit application was submitted to PDS on 12 December 2008, and was determined on 08 January 2009 to be complete as of the date of submittal. This determination is uncontested. In response to review comments by the County on



18 May 2009, 17 March 2010, and 24 January 2011, the Applicant submitted revised application materials on 03 December 2009, 27 October 2012 and 02 July 2012 respectively. As of the date of hearing, 409 days of the 120 day review period will have elapsed. As per SCC 30.70.110(5), the Applicant was notified that the decision of the Hearing Examiner will be rendered beyond the usual 120 day review period.

During the course of the review for this project, Mr. Hooper submitted an application for a conditional use permit for another automobile tow facility located at 20709 86<sup>th</sup> Avenue SE in Snohomish, which is 3.86 miles away from the subject site. The conditional use permit was reviewed under PDS Project File Number (PFN) 09-100760 LU, and went to public hearing on 03 June 2010. The project was denied by the Snohomish County Hearing Examiner, and the denial affirmed on appeal to the Snohomish County Council. The Hooper's appealed the denial of the conditional use permit and filed an action for damages to Skagit County Superior Court (Cause No. 10-2-02521-1). The Hooper's voluntarily dismissed a federal claim, and the District Court subsequently remanded the matter once again to Skagit County under the same Skagit County Superior Court Cause No. 10-2-02521-1. A Settlement Agreement was signed by Snohomish County and Andy and Shelly Hooper on 08 November 2011 (Exhibit A2), which settled the conditional use permit application appeal, issues and damages claim.

5. Site Description. The project site is 1.19 acres in area and is currently developed with a single family residence, attached garage and large paved and graveled areas. The property is accessed through a private road easement off of 180th Street SE which was established with the recording of Short Plat 527(9-78) (Exhibit G3). There are mapped critical areas (wetlands) immediately south of the subject property across 180th within 300 feet of the subject property. The site majority is zoned as R-5, while a very small portion of the property, located in the north-western portion of the property is zoned as Clearview Rural Commercial. In addition, prior to this application the subject property was fully developed and no areas with significant native vegetation remain.

6. Adjacent uses.

<b>Location</b>	<b>Existing Use</b>	<b>Zoning</b>
South of subject parcel	Existing Tow Facility (Sky Valley Towing)	R-5
North of subject parcel	Commercial Development	R-5/CRC
East of subject parcel	Single Family Residential	R-5
West of subject parcel	Commercial	R-5

7. State Environmental Policy Act Compliance. PDS issued a Mitigated Determination of Nonsignificance (MDNS) for the subject application on September 2012 (Exhibit E2). The MDNS was not appealed.

8. Issues of Concern.

A. Staff. PDS raised two primary issues of concern. The first was that the lot accommodating the subject proposal does not meet the minimum area requirement of SCC 30.23.030(1) that applied at the time the project application vested on December 8, 2008, which requires a minimum lot size of 200,000 square feet. The 1.19 acres of the subject lot is significantly below this minimum requirement.

The second area of concern was inaccurate information provided by the Applicant. This affected two significant areas of staff review. Most significant was drainage review. In reviewing the drainage, staff believed that a significant amount of impervious surface has been added to the project site over the last several years and none of this impervious surface has been permitted. Although not specifically referenced by staff, it appears that the primary code provision at issue is SCC 30.63A.200(4), which provides that the addition and/or replacement of 2,000 square feet or more of impervious surface would trigger requirements for detention and water quality treatment as well as source control and stormwater control plans. This 2,000 square foot threshold only went into effect in 1998. Consequently, any impervious surface added prior to 1998 would not trigger the afore-mentioned stormwater controls requirements.

In response to staff's concerns on the timing of the impervious surface improvements, the Applicant's stormwater engineer, Ted Trepanier, submitted what he purported to be a 1995 aerial photograph to establish that most impervious surface on the project site had been installed prior to 1998 and that the net amount of new impervious surface added to the site since 1995 in conjunction with the current proposal would total less than 2,000 square feet. See Ex. C3. However, as pointed out in the staff report, the aerial photograph submitted by Mr. Trepanier was not taken in 1995. As shown in a 1998 aerial photograph submitted by staff, Ex. G11, the property to the east was not yet cleared or developed in 1998. The supposed 1995 aerial photograph submitted by Mr. Trepanier depicts the property to the east as cleared and developed. As outlined in Ex. A4, staff reviewed several aerial photographs taken since 1998 to conclude that over half the pervious surface found at the project site in 1998 had been removed and converted to impervious surface. Staff further determined that the amount of impervious surface depicted in the 1998 photograph is approximately 11,200 square feet. These computations were uncontested by the Applicant. The Applicant's stormwater engineer estimates that the site currently has 15,000 square feet of impervious surface. More likely than not, the Applicant has under-reported unauthorized impervious surface created at the project site and the Applicant will be required to provide for stormwater plans and improvements as asserted by staff.

A second inaccuracy in the submissions seriously impaired SEPA review. The site plans, Ex. B1, depicted the area south of the existing home as covered with grass. The entire area was covered with symbols depicting grass and was overlain with a note providing "Existing gravel area (to be turned to grass)". Based on these representations, staff conducted their SEPA review with the understanding that only the paved area on the northeast corner of the property would be used to store vehicles, which would correspond to only a handful of vehicles. Staff did not consider the impacts of such a small parking area to be significant, and issued its MDNS accordingly. Subsequent to the issuance of the MDNS, the Applicant "clarified" that the area south of the residence historically used for the storage of vehicles would continue to be used for that purpose and that the graveled area would not be replaced

by grass as indicated in Ex. B1. This statement is not just a clarification. The note stating the area would be replaced by grass was written at the location where automobiles are currently parked. The note was clearly a significant misrepresentation<sup>1</sup> on the scope of the proposal. As shown in the 2009 aerial photograph, retention of the graveled area to the south can accommodate more than 25 vehicles, which is several times more than the number of vehicles that could be parked in the proposed asphalt area to the east of the residence. The site plans submitted by the Applicant grossly underrepresent the scope of the use proposed for the project site.

B. Citizens. Citizen concerns expressed during the hearing are summarized in the Summary of Testimony, above.

PDS received an email from Elina Lyubezhanin on 13 January 2009 (Exhibit I3). At the time the email was sent, Ms. Lyubezhanin rented the property to the east, adjacent to the subject property. Ms. Lyubezhanin's primary concerns are related to noise, traffic, and the safety of the neighborhood children.

Ms. Nadezhda (Hope) Gorbunov sent a letter dated 26 January 2009, along with a 29 second video clip which demonstrates the level of activity on the Hooper property at that time (Exhibit I1). Ms. Gorbunov resides in a property that abuts Ms. Lyubezhanin's property. Ms. Gorbunov's concerns are related to noise, truck and trailer traffic and impacts to property value.

PDS received an email from William Jaques, President of the Maltby Neighborhood Alliance on 02 August 2010 (Exhibit I2). Mr. Jaques's concerns are related to substandard lot issues, the ability to mitigate the effects of noise, ground and air pollution, water quality, traffic, bright commercial lights and an increase in crime. Mr. Jacques also submitted a letter dated November 6, 2012, asserting that the application had vested to lot standards in place when the Applicant vested its application in December, 2008. Mr. Jacques further argued that two operations are not allowed in the CRC zone, that a two facility doesn't include repossession activities, and that the application should be denied for the same reason that the Applicant's proposed tow facility was denied for a similar operation in Maltby.

In the first review letter, dated 21 May 2009, PDS requested that the Applicant provide responses to Exhibits I3 and I1. Mr. Miller, in a letter dated 01 July 2009 (Exhibit G4), offered no response as to how the proposed activities would impact the adjacent neighbors.

The placement of bright commercial lights, are not a part of the proposed automobile tow facility and during a staff site visit performed on 29 October 2012 lights were not observed by staff on the subject property. Lighting has been discussed further in the Zoning and Development Standards section of the staff report.

It was observed during the staff site visit that landscaping and fencing have been added to the subject property. It was noted that a solid board fence, approximately six feet tall, and

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<sup>1</sup> Use of the term "misrepresentation" in this decision should not be read as imputing intentional misrepresentation. The errors in the application materials may well have been attributable to innocent mistake.

evergreens spaced equally in front of the fence, have been added to the property located at 8121 180<sup>th</sup> Street SE (Exhibit G5) between the driveway serving that address and the house. While it has been confirmed with the Applicant's contact person, Mr. Miller, that the fencing was not added by the Applicant, it along with the tree line and other measures that have been agreed upon by the Applicant may help to mitigate future noise and visual impacts to the surrounding property owners.

## **II. Conclusions of Law**

As determined in the Conclusions of Law below, the subject application fails to meet the requirements of the CUP regulations found in SCC 30.42C.100 because the proposal fails to meet minimum lot area requirements as discussed below. This decision will only address the minimum lot issue. The other review criteria will not be addressed at this time because a reapplication by the Applicant may result in significantly more useful information than is currently in the record. As noted in Finding of Fact No. 8(A) above, the application for this proposal contains inaccuracies that materially misrepresent the scope of the proposal. Staff noted that their SEPA review was significantly affected by these misrepresentations and staff ultimately did not make any recommendation to approve or deny the proposal. The County's drainage engineer further testified that his engineering conclusions would have been significantly different had he been presented with accurate drainage information. With a reapplication the Applicant will most likely correct the errors of its application and this information may in turn lead to a more in-depth staff assessment of impacts and recommended mitigation. Assessing compliance with all applicable criteria at this stage of review may lead to confusing prejudgment of issues that are not fully ripe for review.

1. Conditional Use Permit Criteria. SCC 30.42C.100 provides that the Hearing Examiner may approve, or approve with conditions, a CUP only when all the following criteria are met:
  - The proposal is consistent with the comprehensive plan;
  - The proposal complies with applicable requirements of [Title 30 SCC];
  - The proposal will not be materially detrimental to uses or property in the immediate vicinity; and
  - The proposal is compatible with and incorporates specific features, conditions, or revisions that ensure it responds appropriately to the existing or intended character, appearance, quality of development, and physical characteristics of the site and surrounding property.
  
2. Compliance with Title 30 SCC The proposal fails to comply with Title 30 SCC because it fails to comply with the minimum lot size requirement of SCC 30.22.110. SCC 30.22.110 requires a minimum lot size of 200,000 square feet for lots located in the R5 zone. The subject lot is only 1.19 acres in size and is located in the R5 zone. It is uncontested that the lot size of the subject lot fails to meet the 200,000 square foot area requirement.

As determined in the findings of fact, the conditional use permit application was submitted to PDS on December 12, 2008, and was determined on January 8, 2009 to be complete as of the date of submittal. As a complete application when it was filed, the application was vested to the

development regulations in effect on December 12, 2008. *See Graham Neighborhood Ass'n v. F.G. Associates*, 162 Wash. App. 98 (2011).

At the time of vesting, Snohomish County Ordinance No. 08-090 governed the development of substandard lots. Specifically, SCC 30.23.240, which was amended by Ordinance No. 08-090, exclusively allowed for the “residential development” of substandard lots. SCC 30.23.240 did not allow for any commercial development of substandard lots. The tow facility proposed by the Applicant does not constitute residential development and thus was not authorized by SCC 30.23.240 as it applied on December 12, 2008.

The Applicant argues that Ordinance No. 08-090 does not apply to its project because the County Council amended SCC 30.23.240 subsequent to the vesting of the Applicant’s application on December 12, 2008. It is concluded that the Applicant is vested to the regulations in effect on the date of vesting only and that subsequently enacted amendments do not apply without a reapplication. The issue is most closely addressed in *East County Reclamation Co. v. Bjornsen*, 125 Wn. App. 432 (2005). In the *Bjornsen* case a permit applicant also attempted to apply development standard amendments adopted subsequent to the date of vesting. The court prohibited this practice, holding that

*“the vested rights doctrine does not allow a developer to file an application for an impermissible use and then to selectively waive its vested rights from parts of newly enacted regulations allowing the use without having to comply with other parts of those same regulations.”*

125 Wn. App. at 436.

The court further concluded that:

*“If an Applicant wishes to take advantage of a change in the law allowing a previously prohibited land use, it may do so by withdrawing its original application and submitting another. But it may not select which laws will govern his application. While we agree that East could have resubmitted its application after the 1994 SWMP amendments, it did not. Thus, the hearing examiner was required to evaluate\*440 the adequacy of East's proposal under the 1991 regulations in effect when East filed its application.”*

*Id.* At 439.

The Applicant correctly notes that a major distinguishing factor from the *Bjornsen* case is that the Applicant is not “selectively” vesting regulations. The Applicant claims that it complied with all regulations that were in effect when the County Council amended SCC 30.23.240 by Ordinance No. 11-058 on February 16, 2012. The Applicant did not “selectively” try to vest to any development regulations, but rather moved its vesting point to the effective date of Ordinance No. 11-058.

The issue of moving a vesting date as opposed to selectively vesting was not directly addressed in the *Bjornsen* decision. However, many of the underlying principles of the *Bjornsen* decision still


apply. As noted in *Bjornsen*, the vested rights doctrine does not just exist to protect the developer, but also prevents a reviewing court from having to search through the moves and countermoves of the parties, and “the stalling or acceleration of administrative action in the issuance of permits” in each case. 125 Wn. App. At 438. Part of that administrative game playing can be used to assist favored development projects as much as it can be used to thwart them. Further, and perhaps more important, there is the issue of notice. The notice of application required by the Regulatory Reform Act, Chapter 36.70B, along with its requirement for a determination of completeness provide clear guidance to the public on what regulations apply to a development proposal. If developers are allowed to change the requirements that apply to their project by arbitrarily moving the vesting date to any time that suits them, the public is at a disadvantage as to knowing what regulations apply. Indeed, the confusion expressed by project opponents on the applicability of minimum lot standards for the hearing of this case is very much on point. A final factor supporting reapplication is permit fees. Permit fees are ideally based upon a single review of a permit application. If an Applicant is not required to reapply to vest to a different date, permitting staff could find itself having to completely reevaluate a project when the first review was already completed. For all of these reasons, the *Bjornsen* ruling on setting a vesting date still applies in this case – if the Applicant wants to vest to a different date, it needs to submit a complete application for that date.

Another point argued by the Applicant is that the settlement agreement referenced in Finding of Fact No. 4, Ex. A2, authorizes the application of Ordinance No. 11-058. The Applicant argues that a whereas clause to the agreement provides that the County Council was considering adoption of Ordinance No. 11-058 and that this should be read as authorizing the application of Ordinance No. 11-058 to the subject application. This argument is not compelling. Whereas clauses do not create any obligations on behalf of the County. Further, nothing in the whereas clause suggests that the County was authorizing the Applicant to circumvent any procedural requirements that apply to vesting, in this case the requirement to re-apply. Finally, the County Council does not have the authority to waive judicial vesting requirements and the local ordinances that implement them through a settlement agreement.

### III. DECISION

The requested approval for a conditional use permit is denied without prejudice.

Decision issued this 21st day of November, 2012.

  
Phil Olbrechts, Hearing Examiner Pro Tem

**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 **within 10 days** from the date of this decision. A petition for reconsideration must be filed in writing with the Office of the Hearing Examiner, 2<sup>nd</sup> Floor, Robert J. Drewel Building, 3000 Rockefeller Avenue, Everett, Washington, (Mailing Address: M/S No. 405, 3000 Rockefeller Avenue, Everett WA 98201). 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 **within 14 days from the date of this decision**. 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 at the Public Assistance Counter of Planning and Development Services, 2<sup>nd</sup> Floor, County Administration-East Building, 3000 Rockefeller Avenue, Everett, Washington (Mailing address: 3000 Rockefeller Avenue M/S 604, Everett, WA 98201), and shall be accompanied by a filing fee in the amount of five hundred dollars (\$500.00) for each appeal filed; PROVIDED, that the fee shall not be charged to a department of the County.

The filing fee shall be refunded in any case where an appeal is summarily dismissed in whole without hearing under SCC 30.72.075.

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.

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The Land Use Permit Binder, which must be executed and recorded as required by SCC 30.42C.200, will be provided by PDS. The Binder should **not** be recorded until all reconsideration and/or appeal proceedings have been concluded and the permit has become effective.

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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.