



**DECISION of the SNOHOMISH
COUNTY HEARING EXAMINER**

Gordon Sivley
Hearing Examiner

M/S 405
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Everett, WA 98201

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DATE OF DECISION: October 31, 2013

PLAT/PROJECT NAME: **Shelton Rezone**

APPLICANT: The Reserve at North Creek, LLC
11624 5th Street, Suite 200
Bellevue, WA 98005

FILE NO.: 13-103410 LU

TYPE OF REQUEST: **REZONE** from R-9600 to R-7200

DECISION (SUMMARY): **DENIED**

BASIC INFORMATION

GENERAL LOCATION: 19709 35th Avenue SE, Bothell

TAX PARCEL NO. 270521-002-060-00

ACREAGE: 1.08 acres

ZONING: CURRENT: Residential-9600
PROPOSED: Residential-7200

COMPREHENSIVE PLAN DESIGNATION: Urban Low Density Residential (ULDR)

PDS STAFF RECOMMENDATION: Approve

A. BACKGROUND INFORMATION

1. The Record. The official record for this proceeding consists of the Exhibits entered into evidence (Exhibits A.1 through G.4), 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 and the Hearing Log are available at the Hearing Examiner's Office.

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. A public hearing was held on October 15, 2013. Witnesses were sworn, testimony was presented, and exhibits were entered into the record at the hearing. Notices of the application and public hearing were issued according to the provisions of SCC 30.70.050. (Exhibits E.1, E.2 and E.3) Notice was concurrently given concerning the adoption of the SEPA Threshold Determination as required by the County Code.

B. FINDINGS OF FACT

The following Findings of Fact are supported by a preponderance of the evidence presented in the record pertaining to this matter.

1. Applicant's Request. The Applicant is requesting a rezone from R-9600 to R-7200 for a 1.08 acre site. The Applicant has concurrently submitted an application for a short subdivision to be processed as a Type 1 administrative decision following the decision on this rezone proposal. The rezone is necessary in order for the Applicant to achieve the proposed density.
2. Site description. The site is an 'exception' piece, left over from The Reserve at North Creek, AFN 201304035001. The site is approximately 1.08 acres and is vacant. There are no critical areas that exist on site or in the general vicinity. The site has already been cleared of numerous pre-existing significant trees and other vegetation and is relatively flat with slopes of 15 percent or less.
3. Adjacent uses. The parcels on north, east and south were recently rezoned to R-7,200 and are currently being developed with a subdivision containing approximately 216 new lots. The parcels to the west also contain single-family residential development and are zoned R-9,600.
4. Project Chronology. The rezone application was originally submitted to the Department of Planning and Development Services (PDS) on March 29, 2013, and was determined to be complete as of the date of submittal for regulatory purposes. A resubmittal of the application was received on August 7, 2013. As of the hearing date, 86 days of the 120-day review period had elapsed.
5. State Environmental Policy Act Compliance. PDS issued a Determination of Nonsignificance (DNS) for the rezone application on September 9, 2013. (Exhibit D.2) The DNS was not appealed. Accordingly, the Examiner finds that compliance with the substantive and procedural requirements of SEPA have been met.
6. Rezone Criteria. The Applicant seeks a rezone of the site from R-9600 to R-7200 pursuant to Chapter 30.42A SCC. In order to grant a rezone, the Hearing Examiner must find that (1) the proposal is consistent with the comprehensive plan; (2) that the proposal bears a substantial relationship to the public health, safety and welfare; (3) the proposal will not increase the density on any site where any significant trees were removed after January 7, 2009 and within six years prior to the date of application; and (4) where applicable, that minimum zoning criteria found in Chapters 30.31A through 30.31F SCC are met.

- a. In the instant case, the critical determination is whether the rezone proposal complies with the requirements of SCC 30.42A.100(3):

(3) The proposal would not increase the allowed density of residential development on any site where any significant trees other than hazardous trees were removed after January 7, 2009, and within six years prior to the date of the submission of the application, pursuant to SCC 30.25.016(3);

It is well established in the record of this proposal that significant trees **were** removed from the site after January 7, 2009 and within six years of the date of the rezone application. Thus, in order for the rezone to be approved, it must satisfy an exception to the prohibition of approval found in SCC 30.25.016(3)(c):

(c) If any significant trees other than hazardous trees were removed after January 7, 2009, and within six years prior to the date of the submission of the application, then the application shall not be approved; provided that the application may be approved if:

(i) The removal of trees was authorized by a forest practices permit issued by the State Department of Natural Resources;

(ii) The public is notified of the prior removal of trees consistent with the posting, publication, and mailing requirements of SCC 30.70.045, and this notice may be combined with the notice for the underlying application;

(iii) A tree survey of all significant trees is completed and significant trees are replaced as required in Table 30.25.016(3);

(iv) All significant trees within any perimeter landscaping required under SCC 30.25.020 and all significant trees within critical area protection areas and required buffers are retained;

(v) All significant trees on site are retained on 5% of the site in addition to those retained as required in SCC 30.25.016(3)(c)(iv); and

(vi) The owner of the property at the time of tree removal is not a person, corporation, or other entity engaged in residential land development or construction within unincorporated urban growth areas.

(Emphasis added)

- b. If non-hazardous significant trees are removed, SCC 30.25.016(3)(c) requires denial of the rezone application unless **all** of the listed criteria ((i) through (vi)) are met. Here, at least three of the criteria, (i), (ii) and (v) are not met. Exhibit A.2 establishes that no forest practices permit was obtained. No public notice of the prior removal of the trees was given (the notices for the rezone application, Exhibits E.1 through E.3, make no mention of the prior tree removal). Moreover, **all** significant trees were removed from the entirety of the site.
- c. Because the five criteria of SCC 30.25.016(3)(c) are not met, the removal of all significant trees from the site would bar approval of the rezone unless it were proven that **all of the trees were hazardous**. SCC 30.25.016 provides, in pertinent part, as follows:

30.25.016 General tree retention and replacement requirements.

(1) No person, corporation, or other entity engaged in residential land development or construction within unincorporated urban growth areas shall remove a significant tree without first obtaining county approval, except as provided in SCC 30.25.016(2). County approval shall be integrated into the permit review process for any activity requiring a county permit on a site where any significant trees are present.

(2) The following are exempt from the general tree and replacement requirements of SCC 30.25.016:

(a) **Removal of any hazardous, dead or diseased trees, and as necessary to remedy an immediate threat to person or property as determined by a letter from a qualified arborist;**

(Emphasis added)

- d. The term "hazardous tree" as used in Title 30 SCC is defined as follows:

30.91H.040 Hazardous tree.

"Hazardous tree" means a tree which poses an imminent danger of falling on structures, or which constitutes an airport hazard.

Thus, for the tree removal that occurred on the subject site to qualify the proposal for exemption from the development approval prohibition of SCC 30.25.016(3)(c), the Applicant must prove, by the written determination of a qualified arborist, **that all of the trees removed** posed an imminent danger of falling on structures or their removal was necessary to remedy an immediate threat to persons or property.

- e. The Applicant did submit a written statement from an arborist, Exhibit A.4. However, this statement falls significantly short of providing the required proof. The arborist, Paul H. Thompson, states on the first page of his statement that, "I was not able to specifically see the trees on this lot before they were cut down..." Thus, he could not have performed an individual assessment of each tree removed to determine if it posed an imminent danger or threat to persons or property. This situation is in stark contrast to the full evaluation performed for the adjoining property in which trees were individually assessed and recommendations for preservation, monitoring or removal were made for each individual tree. See Exhibit A.5. Mr. Thompson further indicates, at page 2 of Exhibit A.4, that, "This report is **speculative** because the trees at this address have been removed and graded." In fact, Mr. Thompson candidly states that,

In hindsight, an assessment of the trees would have been necessary and more conclusive to determine the risk of any tree failure, and the measures required to mitigate this risk, including pruning, root protection or tree removal.

Mr. Thompson's statement indicates that he could not make a conclusive determination of the risk of failure of any of the trees and that measures other than removal, such as pruning or root protection, may have been sufficient to remedy the risk.

Mr. Thompson's concluding opinion, at page 3 of Exhibit A.4, is that "all or most of the trees would have had a moderate to high probability of failure." Exhibit A.5 provides the definitions of the terms "moderate" and "high" probability of failure. A tree with a moderate risk of failure has, "well established defects, **not typical to lead to failure for several years**. Retain and monitor." (Exhibit A.5, Tree Inventory Definitions and Notes, page 2, emphasis added). Thus, the Applicant's own submissions indicate that it is possible that at least some of the trees removed were at only moderate risk of failure and, therefore, would likely not have failed for several years. The Applicant's arborist's recommendation for such trees would have been to "retain and monitor" them.

7. The Examiner finds that the requirements of Chapter 30.42A.100 are not satisfied by the present application and, therefore, the rezone must be denied.
8. Any Finding of Fact in this Decision, which should be deemed a Conclusion of Law, is hereby adopted as such.

C. CONCLUSIONS OF LAW

1. The Examiner has original jurisdiction over the rezone application pursuant to SCC 30.42A.020 and 30.72.020(2).
2. Rezones are not presumed valid. The proponent of a rezone has the burden of proof of showing (a) that conditions have changed since the original zoning, or that the proposed rezone implements policies of the comprehensive plan; and (b) that the rezone bears a substantial relationship to the health, safety, morals or welfare. See, *Woods v. Kittitas County*, 130 Wn. App. 573, 584, 123 P.3d 883 (2005); *Citizens of Mount Vernon v. Mount Vernon*, 133 Wn.2d 861, 875, 947 P.2d 1208 (1997). The county's regulations found in SCC 30.42A.100 are consistent with the criteria expressed in case law.
3. In order for the rezone to be approved, the following condition of SCC 30.42A.100(3) must be satisfied:

The proposal would not increase the allowed density of residential development on any site where any significant trees other than hazardous trees were removed after January 7, 2009, and within six years prior to the date of the submission of the application, pursuant to SCC 30.25.016(3).

This provision was added to the County Code by Ordinance 08-101 and was the result of a change in County policy to significantly limit the removal of trees in the course of subdivision development as compared to what had been permitted in the past. The numerous legislative findings made by the County Council in the adoption of Ordinance 08-101 attest to the importance the County Council placed on the need to adopt tree retention requirements to change how urban area development in the County will occur in the future. The amendment to SCC 30.42A.100 essentially imposed a six-year moratorium on development at increased density if significant trees were removed contrary to the new county policy. This mirrors the six-year development moratorium imposed by RCW 76.09.460 when forest land is improperly converted to non-forestry use.

Based upon the Findings of Fact set forth above, the Examiner concludes that the Applicant failed to prove that all of the trees removed posed an imminent danger of falling on structures or their removal was necessary to remedy an immediate threat to persons or property. The Examiner therefore concludes that the proposal fails to satisfy the requirements of SCC 30.42A.100(3) to permit approval of higher density zoning.

4. Because the proposal fails to meet the requirements of SCC 30.42A.100, the Examiner concludes that the rezone must be denied.
5. Any Conclusion of Law in this Decision which should be deemed a Finding of Fact, is hereby adopted as such.

D. DECISION

The requested **REZONE** from Residential-9600 to Residential-7200 for the subject property is **DENIED**.

Decision issued this 31st day of October, 2013.



Gordon Sivley, 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 **within 10 calendar days** from the date of this decision. A petition for reconsideration must be filed in writing with the Office of the Hearing Examiner, 2nd Floor, Robert J. Drewel Building, 3000 Rockefeller Avenue, Everett, Washington, (Mailing Address: M/S No. 405, 3000 Rockefeller Avenue, Everett WA 98201) **on or before November 12, 2013**. 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]. The petitioner should file with the Office of the Hearing Examiner an affidavit of mailing or other proof of service at the time the petition for reconsideration is filed.

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 is discovered which could not reasonably have been produced at the open record hearing and which is material to the decision; 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 with the Department of Planning and Development Services, 2nd Floor, County Administration-East Building, 3000 Rockefeller Avenue, Everett, Washington (Mailing address: M/S No. 604, 3000 Rockefeller Avenue, Everett, WA 98201) **on or before November 14, 2013**, 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.

Staff Distribution:

Department of Planning and Development Services: Stacy Abbott

PARTY OF RECORDS REGISTER
13-103410-LU Shelton Short Plat
Hearing: Oct 15, 2013
Time: 10:00 AM
13-103410-LU

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