

BEFORE THE
SNOHOMISH COUNTY HEARING EXAMINER

DECISION of the DEPUTY HEARING EXAMINER

In the Matter of the Application of)	
)	FILE NO. 04 118491
ROBERT J. HEAVEY)	
<i>(Heavey Estates)</i>)	
)	
for a 12-lot Rural Cluster Subdivision (RCS))	
on 27.5 acres)	

DECISION SUMMARY

The application for a 12-lot Rural Cluster subdivision is **CONDITIONALLY APPROVED**, and the matter is **REMANDED** for preparation of recommended conditions to be imposed upon the approval consistent with this decision.

BASIC INFORMATION

GENERAL LOCATION: The property is located at 14715 McElroy Road, on the east side of McElroy Road.

ACREAGE: 27.49 acres

NUMBER OF LOTS: 12

AVERAGE LOT SIZE: 47,787 square feet

MINIMUM LOT SIZE: 43,561 square feet

DENSITY: .44 du/ac (gross)
.73 du/ac (net)

ZONING: Rural-5 (R-5)

COMPREHENSIVE PLAN DESIGNATION:

General Policy Plan Designation: Rural Residential (1 du/5 ac, Basic)

Subarea Plan: Arlington

Subarea Plan Designation: Rural (.2 to .4 du/ac)

UTILITIES:

Water: Individual well
Sewer: Individual wastewater septic

SCHOOL DISTRICT: Arlington No. 16

FIRE DISTRICT: No. 12

SELECTED AGENCY RECOMMENDATIONS:

Department of:

Planning and Development Services (PDS): Denial without prejudice

Public Works (DPW): Denial without prejudice

INTRODUCTION

The applicant filed the Master Application on May 4, 2005. (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 17, 18 and 19)

A SEPA determination was made on July 8, 2005. (Exhibit 16) No appeal was filed.

The Examiner held an open record hearing on September 20, 2005, the 30th day of the 120-day decision making period. It was agreed at this hearing by all parties to continue this matter to October 20, 2005 at 10:00 a.m. At both hearings, witnesses were sworn, testimony was presented, and exhibits were entered.

PUBLIC HEARING

The first public hearing commenced on September 20, 2005 at 9:00 a.m. and concluded at 10:23 a.m. The second hearing commenced one month later on October 20, 2005 at 10:00 a.m. and concluded at 12:34 p.m. Thus, the hearings spanned approximately four hours.

1. At both hearings, the Examiner announced that he had read the PDS staff report, reviewed the file and viewed the area and therefore was generally apprised of the particular request involved.
2. The applicant was represented by Kelly Wrigg of Cascade Surveying and Engineering and by the applicant himself, Robert Heavey and by Noel Higa, formerly of Higa-Burkholder Associates, LLC. Barclays North, Inc., was represented by Brenda Fodge, Malcolm McNaughton and David Nemens. Snohomish County was represented by David Radabaugh of the Department of Planning & Development Services and by Ann Goetz and Tina Rogers of the Department of Public Works.
3. The second hearing was limited to one issue: the type and location of the roadway to be required of this plat.
4. Vicinity landowner Wendy Cochinella by letter dated May 16, 2005 (Exhibit 22) asserts that land development in the vicinity threatens her well water, burdens schools and hospitals and causes traffic jams and noise. By letter of July 20, 2005 and by testimony, Malcolm McNaughton of Barclays North, Inc., asserts that this applicant should be required to provide a stub public road to this plat's east property line as a connection between Burns Road and McElroy Road. (Issues about driver's sight distance were resolved by the parties.)

NOTE: The above information summarizes the information submitted to the Examiner at the hearing. For a complete record, electronic recordings of the hearing are 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 proposes a rural cluster subdivision of 12 lots on 27.5 acres zoned R-5. (All surrounding properties are zoned R-5 also.) Water supply will be from private wells. Wastewater septic systems are proposed. Access is via a private driveway extending from McElroy Road in an easement. Open space tracts of nearly 13 acres will comprise nearly one half of the entire parcel.
3. Barclays North (hereinafter “Barclays”) owns outright 400 acres known as the “Saint Andrews” property immediately east of the proposed Heavy plat. (Exhibit 48) Future residents on those 400 (and other) acres will have a primary vehicular trip distribution to and from the west. (Exhibit 48) A potential route for that east-west connection between Burns Road and McElroy Road is through the proposed Heavy plat.
4. One single family dwelling already exists on the proposed plat site. Thus, only 11 new dwellings will be added which, at 9.57 average daily trips, will generate a total of 105 new daily trips. The proportionate share mitigation fee for those trips is nearly \$24,000, which applicant Heavy does not contest. Of those 105 daily trips, eight will be a.m. peak-hour trips (2 inbound, 6 outbound) and 11 will be p.m. peak-hour trips (7 inbound, 4 outbound). (Exhibit 7, Gibson Traffic Impact Analysis, February 1, 2005). Gibson also reports (p. 4):

“The development does not generate more than 50 PM peak-hour trips. The development is therefore consistent with the County comprehensive plan and should be considered part of the anticipated traffic volumes during the County’s arterial level of service analysis for con-currency”.

5. In view of the facts entered above, this examination turns to the evidence of record seeking to answer the question:

Given the proportionate mitigation fee of \$24,000, and given Heavy’s agreement to pay that \$24,000, on what rationale does Heavy owe as further payment a public street (instead of a private street) through Heavy’s Rural Cluster Subdivision?

6. In a rural cluster subdivision, if the subdivision generates fewer than 1,000 daily trips, it may lawfully be served by a private road built to private road engineering standards. Heavy's plat generates only one-tenth of that. (SCC 30.41C.200 and SCC 30.41A.210 and Exhibit 48) The specific regulatory language of those cited Code sections takes precedence over the general recommendations of the General Policy Plan that encourage preservation of the integrity of the arterial road system. Further, the County Engineer is given discretion to approve private roads serving a rural cluster subdivision (SCC 30.41A.210). That discretion is not bound rigidly by the Engineering Design & Development Standards. The Engineer's discretion is clarified in the September 13, 2005 staff recommendation to the Hearing Examiner in this matter at page 5 as follows:

“DPW allowed the developer to provide a private road rather than a public road to the development based on the topography of the property east of the subject property and Burn Road. Two streams (Star Creek and Little Pilchuck Creek) run north/south through that area, as well as the El Paso Natural Gas Pipeline. Two e-mails have been received from Barclays North that requests a public road be required for this subdivision in order to provide properties to the east with a connection to a public road. This issue has been reviewed by the County Engineer, who determined that DPW would not require the road between McElroy Road and the subject development to be public at this time because that section of property is not owned by the applicant. DPW will require that the developer provide an easement across the north 30 feet of the property for a future road connection, and a statement shall be recorded on the face of the plat that the owners or future owners would not protest the conversion of the easement to a public road in the future. The same statement would be required for the private road in the 60-foot easement between the northwest corner of the development property and McElroy Road.”

7. The record contains compelling support for that above-quoted determination to allow a private road. That support is in the testimony of Noel Higa, a land development professional for decades in Western Washington (Exhibit 49). Mr. Higa states that for nearly twenty years he has been a consultant to two sequential sets of owners of the land including that owned by Barclays to the east of the subject Heavy plat. He reports that in the mid-1980's through the late 1990's, he represented the owner of 1,400 acres in the area. That owner wanted Mr. Higa to identify what was required in order to maximize the development potential of those 1,400 acres. Mr. Higa determined that the principal need was for master planning of an east-west connector. In anticipation, Mr. Higa submitted preliminary plat application on approximately 1,000 acres. However, the master plan was not undertaken.
8. Mr. Higa testifies that from the mid-1990's until 2003, he represented a new owner of the same land, and with the same identified need: an east-west connector between Burn Road and McElroy Road. For the past two years he has so advised other potential purchasers. In summary, he testifies that he agrees with Barclays in this matter to the extent that Barclays argues an east-west connector is needed. Mr. Higa disagrees that Mr. Heavy should pay for it.
9. Specifically, Mr. Higa testifies that the St. Andrews site has the potential for 600 lots, which will generate approximately 6,000 average daily trips. Further, he believes that existing residences in the area would choose that east-west arterial to access Highway 9 and that it might become the primary access for the area. He testifies that Barclays will be providing a full standard arterial east-west connector on a 70-foot right-of-way with minimum 35 miles per hour design speed.

10. To route that arterial through a 12-lot rural cluster subdivision is contrary to the purposes for which the Snohomish County Code provides the rural cluster concept at SCC 30.41C.010. The 12 statements of purpose listed there essentially provide that the rural cluster subdivision is to provide a more environmentally conscious alternative to traditional plats with an emphasis on protecting rural character, natural buffering and drainage functions and preservation of future tracts when placed in Urban Growth Areas. (The Heavy plat is not in an Urban Growth Area.). The subject property contains two Category 3 wetlands and three Category 4 wetlands. Those will be protected by a minimum 50-foot-wide Native Growth Protection Area buffer in accordance with Chapter 30.62 SCC (Chapter 32.10 SCC) Critical Area Regulations
11. The project would comply with park mitigation requirements under Chapter 30.66A SCC (Title 26A SCC) by the payment of \$1,056.00 for each new single-family home.
12. School mitigation requirements under Chapter 30.66C SCC (Title 26C SCC) have been reviewed and set forth in the conditions.
13. Proposed grading and drainage would be reviewed during full detailed drainage plan review pursuant to Chapter 30.63A SCC (Title 24 SCC).
14. The Snohomish County Health District has no objection to this proposal provided that public water and sewer are furnished. Public water and sewer service and electrical power will be available for this development.
15. The subject property is designated Rural Residential -5 on the GPP Future Land Use map, and is not located within an Urban Growth Area (UGA). It is not located within a mapped Growth Phasing Overlay. According to the GPP, the Rural Residential-5 designation applies to lands which were previously designated Rural by various subarea plans and have been subsequently zoned R-5. The implementing zone in this designation will continue to be the R-5 zone.
16. The proposed use (single-family detached development) is essentially compatible with existing single-family detached developments on larger lots. A comparison with the present lower density character of much of the area is inappropriate since the present density of development in much of the surrounding area is inconsistent with both the adopted comprehensive plans and the present zoning.
17. The request complies with the Snohomish County Subdivision Code, at SCC 30.41A and the Rural Cluster Code at SCC 30.41C, as well as the State Subdivision Code, RCW 58.17. The proposed plat complies with the established criteria therein and makes the appropriate provisions for public, health, safety and general welfare, for open spaces, drainage ways, streets or roads, alleys, other public ways, transit stops, potable water supplies, sanitary wastes, parks and recreation, playgrounds, schools and school grounds, and other planning features including safe walking conditions for students.
18. The request is consistent with Section 30.70.100 SCC which requires, pursuant to RCW 36.70B.040, that all project permit applications be consistent with the GMACP, and GMA-based county codes.
19. 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. It is therefore hereby adopted by the Examiner as a conclusion as if set forth in full herein, in order to avoid needless repetition except as to the requirement for a public road connection to the plat's east boundary. Of course, any inconsistency between the staff recommendations and this decision is resolved in favor of this decision's language.
2. There is no rational nexus between the less than one dozen peak hour trips generated by this proposed Rural Cluster Subdivision and the cost to the applicant of an arterial or collector road through the plat. This 12-lot plat does not create the need for that arterial east-west connection in any roughly proportional degree to the need generated by the 600 and more lots to be developed to the east. Having so concluded, the Examiner needs not enter any specific conclusion of law as to whether or not a Constitutional "taking" would be found by a court of law on these facts.
3. The request is consistent with the (1) GMACP, GMA-based County codes, (2) the type and character of land use permitted on the site, (3) the permitted density, and (4) the applicable design and development standards.
4. The application should be approved subject to conditions recommended by PDS on remand consistent with this decision, particularly conditions applicable to Rural Cluster landscaping, detention pond landscaping, and drivers' sight distance
5. 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 12-lot rural cluster subdivision is hereby **CONDITIONALLY APPROVED**, and the matter is **REMANDED** for preparation of recommended conditions to be imposed upon the approval consistent with this decision.

Decision issued this 4th day of November, 2005.

Ed Good, Deputy Hearing Examiner

EXPLANATION OF RECONSIDERATION AND APPEAL PROCEDURES

The decision of the Hearing Examiner is final and conclusive with right of appeal to the County Council. However, reconsideration by the Examiner may also be sought by one or more parties of record. The following paragraphs summarize the reconsideration and appeal processes. For more information about reconsideration and appeal procedures, please see Chapter 30.72 SCC and the respective Examiner and Council Rules of Procedure.

Reconsideration

Any party of record may request reconsideration by the Examiner. A petition for reconsideration must be filed in writing with the Office of the Hearing Examiner, 2nd Floor, County Administration-East Building, 3000 Rockefeller Avenue, Everett, Washington, (Mailing Address: M/S #405, 3000 Rockefeller Avenue, Everett WA 98201) on or before **NOVEMBER 14, 2005**. 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 **NOVEMBER 18, 2005** 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: David Radabaugh
Department of Public Works: Ann Goetz

The following statement is provided pursuant to RCW 36.70B.130: "Affected property owners may request a change in valuation for property tax purposes notwithstanding any program of revaluation." A copy of this Decision is being provided to the Snohomish County Assessor as required by RCW 36.70B.130.
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