BEFORE THE

SNOHOMISH COUNTY HEARING EXAMINER

DECISION of the DEPUTY HEARING EXAMINER

In the Matter of the Application of **QUILCEDA LAND GROUP, INC.** for a rezone for **Arbutus Gardens** and Appeal of Determination of Non-significance by **CITIZENS FOR MEADOWDALE COUNTY PARK**	)	**FILE NO. 04-119124-LU**

DATE OF DECISION: September 12, 2005

PLAT/PROJECT NAME: Arbutus Gardens

DECISION (SUMMARY): The appeal is **GRANTED** and the rezone is **CONDITIONALLY APPROVED** subject to a remand for withdrawal of the Determination of Nonsignificance (DNS) and issuance of a Mitigated Determination of Nonsignificance (MDNS) as to slope stability.

BASIC INFORMATION

GENERAL LOCATION: This project is located immediately northwest of the intersection of 60th Avenue West and 156th Street S.W. in Edmonds.

ACREAGE: 6.87 acres

ZONING: CURRENT: R-9,600
PROPOSED: LDMR

COMPREHENSIVE PLAN DESIGNATION:
General Policy Plan Designation: Urban Medium Density Residential (6-12 du/acre)

Pre-GMA Subarea Plan: Paine Field
Pre-GMA Subarea Plan Designation: Urban (4-6 du/acre)

UTILITIES:
Water/Sewer: Alderwood Water & Waste Water District

SCHOOL DISTRICT: Edmonds School District No. 15

FIRE DISTRICT: No. 1

SELECTED AGENCY RECOMMENDATIONS:

Department of:
Planning and Development Services: Conditional Approval
Public Works: Conditional Approval

INTRODUCTION

The applicant, Quilceda Land Group, Inc. (hereinafter "Quilceda"), filed the Master Application on October 20, 2004. (Exhibit 1) Snohomish County issued a DNS on June 8, 2005 from which Citizens for Meadowdale County Park (hereinafter "Citizens") timely filed an appeal on June 27, 2005.

The Department of Planning and Development Services (PDS) gave proper public notice of the open record hearing as required by the county code. (Exhibits 9, 10 and 11)

A pre-hearing conference was held on July 11, 2005, at which time a conference before a settlement Hearing Examiner was offered but the principal parties chose to continue to a hearing on the merits. The Examiner denied a motion by the County to dismiss the appeal. A schedule for submission of pre-hearing briefs, witness lists and exhibits was agreed upon. Those documents were timely filed. Post-hearing briefs were timely filed by Citizens and by Quilceda.

The Examiner held a consolidated, open record hearing on August 17, 2005: the 164th day of the 120-day decision making period. Witnesses were sworn, testimony was presented and exhibits were entered at the hearing.

PUBLIC HEARING

The public hearing commenced on at 9:04 a.m. August 17, 2005.

1. The Examiner announced that he has 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, Quilceda was represented by attorney Christopher Knapp. Appellant Citizens was represented by attorneys Henry Lippek and Ashley Pedersen. Snohomish County was represented by Erik Olson and Randy Sleight. The County's pre-hearing motion to dismiss the appeal had been denied at the pre-hearing conference, as noted above. At the hearing, Citizens' motion to stay the proceeding to allow a site visit by Citizens' experts was denied, as was Citizens' motion to strike the entire staff report from the record.

3. Approximately 100 households submitted letters of opposition into the pre-hearing record. From among those, nine witnesses testified at the hearing.

4. The hearing concluded at 5:11 p.m. on August 17, 2005.

NOTE: The above information is a summary. An electronic recording of this hearing is available in the Office of the Hearing Examiner.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND DECISION

FINDINGS OF FACT

As to the rezone and the SEPA appeal

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. Unless expressly found otherwise herein, the PDS staff report has correctly analyzed the nature of the application, the issues of concern, the application's consistency with adopted codes and policies and land use regulations, and the State Environmental Policy Act (SEPA). That staff report is hereby adopted by the Examiner as if set forth in full herein, with exceptions as noted in the text hereof.

3. The applicant, Quilceda filed an application for a rezone of 6.87 acres from the existing R-9,600 to Low Density Multiple Residential (LDMR) in order to construct 55 detached condominium dwellings known as "Arbutus Gardens". The subject site is located immediately west of the unopened right-of-way of 60th Avenue West, and has a panhandle extending southward to 156th Street SW. On the west and southwest the subject site abuts the Meadowdale County Beach Park. The 105-acre Park has been publicly owned since 1971. The subject site is atop a bluff which slopes from east to west becoming steepest (approximately 60% slope) as it drops off-site directly from the subject site into a tributary (Type IV) of Lund's Gulch Creek (Type I). In Meadowdale Beach Park, Lund's Gulch Creek supports chum and coho salmon, cutthroat trout and steelhead. It is undisputed that the ravine has a history of slope instability and flooding caused by storm water runoff from developments, with much damage to Lund's Gulch Creek and its tributaries and to the Park itself.

4. Applicant Quilceda filed the subject rezone application nearly one year ago on October 20, 2004. More than seven months later, on June 8, 2005, Snohomish County issued a DNS for the rezone. Approximately two weeks later, appellant Citizens timely appealed on June 27, 2005. The rezone application and the appeal are consolidated for review pursuant to Snohomish County Code (SCC) 30.61.300(4).

5. Quilceda proposes 55 dwellings built as detached single-family condominiums. The County's Staff Report notes that the proposed LDMR zoning would permit up to 75 dwelling units on the subject site, either single-family or multi-family. The County's Mr. Olson calculates that the applicant could construct up to 37 homes on the subject site as now zoned at R-9,600 if built as a Planned Residential Development. However, he points out that with reduction of road area, fewer than 37 dwellings could be built as now zoned. Under a regular subdivision, Mr. Olson states that 31 homes could be built as now zoned. He testified that the Growth Management Act requires no fewer than four dwellings per acre on the subject 6.87 acres; i.e., 27 homes. Quilceda's Mr. Bissell calculates that only 26 homes could be built

as now zoned in view of a loss of 15% of buildable area for roads and using lot averaging provisions of the current County code.

6. From that evidence, the Examiner finds as fact that up to 31 homes would be allowed by the County without the proposed rezone. Thus, the proposed rezone would add 24 homes. Therefore, the issue on the SEPA appeal is whether the County's responsible SEPA official was clearly erroneous in concluding that the probable, significant adverse environmental impacts of a rezone allowing 24 additional homes does not require preparation of an Environmental Impact Statement in view of the record as a whole. Focus now turns to that record. A principal issue is whether stormwater runoff from these 24 more houses and related streets will significantly increase the risk of slope failure or flooding affecting Meadowdale Park. Contrary to the Citizens assertion, no review of a speculative, potential project of 75 dwellings is required until such an application is filed.

7. On the final two pages of its post-hearing brief, appellant Citizens' closing words on this matter are that if the subject property were developed as now zoned, more trees could be saved and protective measures could reduce the adverse impacts on Meadowdale Beach Park and the housing would be congruent with the neighborhood. The record does not sustain those claims. The bulk of the site would be clearcut in either the present or proposed zoning. The Native Growth Protective Area would remain in either case. The townhome-sized proposed dwellings are single-family development and this record shows no incongruity between them and existing vicinity homes except as to size. All of their parking will be on-site. Vegetative buffers and setbacks will block views of the new homes from off-site, especially on the south at the Park entrance. If the new residents walk in the Park, such is the public purpose for which the Park was purchased. Thus, as to those issues, appellant Citizens does not meet the burden of proof to support denial of the rezone. However, it is found as fact that, as to the relationship between the proposed project and the slope stability, the appellants substantially prevail, as explained in the following findings.

8. About six years ago on June 18, 1999, a memorandum (Exhibit 147-3) from Snohomish County's Parks and Recreation Department to Snohomish County's Planning & Development Services Department reported that several plats had developed during the prior few years in the Lund's Gulch Creek watershed and, at the same time, the county-owned Meadowdale Beach Park had had increasingly heavy damage from high creek flows and failure of water-saturated slopes all along the gulch corridor, with repairs costing thousands of taxpayer dollars.

9. The above-referenced memorandum describes the effort to avert further stormwater damage by purchasing strategic parcels on three sides of the Park through the joint efforts and financing by the Brackett's Landing Foundation, the City of Lynnwood and Snohomish County's Parks Department. Funding assistance was from the Snohomish County Conservation Futures Program and a grant from the Washington State Interagency Committee for Outdoor Recreation.

10. A related memorandum from the City of Lynnwood's Parks, Recreation and Cultural Arts Department dated August 2, 2005 (Exhibit 130) points out that the City of Lynnwood has invested more than $2.5 million, with Snohomish County Conservation futures and IAC Land and Water Conservation funds, to preserve 77 acres of open space in Lund's Gulch north and south of Meadowdale Beach Park. The memorandum points out that the Park is of regional significance and is the largest natural resource in Southwest Snohomish County. (The Park is within the City of Lynnwood's Urban Growth Area but no interlocal agreement exists by which Lynnwood regulations can be applied to the instant application.)

11. The Examiner finds appellant Citizens concerns encapsulated in a document dated July 5, 2005 by Duane Usitalo, a science teacher for 29 years at Meadowdale Middle School and operator of an associated salmon hatchery. One paragraph merits quotation in full:

"Without the school wetland of 22+ acres the storm water runoff would race down the gulch with greater speed and power, tearing up the stream banks, washing away the spawning gravel, causing more landslides into the stream. Add in the housing developments along the edges of the gulch with impervious driveways and rooftops, accompanied by major tree removal and clearing that triggers unstable slopes, Lund's Gulch Creek does not have much wiggle room in surviving as a viable salmon stream. The large snowfall and flood of New Years 1997 initiated 37 slides in the gulch. Any contemplated development should be carefully studied to justify its undertaking. Growth's cumulative impact on the creek gets greater and greater."

12. Appellant Citizens' witness John H. Lombard recommends (Exhibit 147-4), in addition to a density reduction, two items for further consideration:

A. Relocation of the dispersion trench at least 50 feet away from the Type IV stream.

B. Changes to the proposed drainage system to increase infiltration across the site rather than concentrating all runoff into the conveyance system and detention vault.

Mr. Lombard's reasoning behind those recommendations merits attention. For example, his reasoning is persuasive on the insufficiency of merely assuring that post-development runoff not exceed pre-development runoff. He notes that clearing 5.4 now-vegetated acres and replacing the vegetation with 50% impervious surfaces and lawns will produce a greater volume of storm runoff which, even if metered, will have a longer duration than pre-development runoff.

13 Another persuasive perspective is that of Citizens' witness Martin W. Page of Shannon & Wilson, Geotechnical and Environmental Consultants. (Exhibit 147-5). Mr. Page challenges the geotechnical engineering reports filed by the applicant's Geotech Consultants, Inc. He points out that there has been no subsurface explorations or stability analyses in the area (off-site) where the dispersion trench is to be located and he asserts that such explorations and analyses are necessary in order to provide information on the thickness, composition and strength of the soils into which the proposed dispersal trench will discharge the proposed development's stormwater. He notes the seasonal stream where naturally-occurring groundwater is concentrated and urges study of the subsurface soils and groundwater. Specifically, he asserts that Quilceda's slope stability model applies to deep-seated landsliding through very dense glacial till. He concludes:

"…it does not represent the stability of near-surface, loose, weathered soils and also does not include the presence of any groundwater."

14. Citizens argue that the rezone is contrary to impending Comprehensive Plan provisions and fails to demonstrate changed circumstances since the current zoning was assigned. The Hearing Examiner disagrees. First, the Examiner has no authority to consider Comprehensive Plan provisions or regulatory language not yet adopted. Second, the subject rezone is consistent with the General Policy Plan's Future Land Use Map which shows the subject site as designated Urban Medium Density Residential (6-12 dwellings per acre) which is synonymous with the proposed LDMR zoning. A rezone implementing the Comprehensive Plan has, in the alternative, either (1) a changed circumstance in the Comprehensive Plan itself or, (2) is exempt from the changed circumstance test set out in *Parkridge v. Seattle. (See Byarnson v. Kitsap County. Citations omitted..)*

15. The Hearing Examiner has the authority to condition or deny a rezone if there is substantial evidence in the record to do so in the interest of the public health, safety or welfare. The findings of fact entered

above herein support additional conditions upon the rezone as described more fully under "Conclusions of Law' below.

16. The Snohomish County Health District has no objection to this proposed rezone because public water, sewer and electrical power will be provided.

17. Chapter 30.42A covers rezoning requests and applies to site specific rezone proposals that conform to the Comprehensive Plan. The decision criteria under SCC 30.42A.100 provides as follows:

> The hearing examiner may approve a rezone only when all the following criteria are met:
>
> (1) The proposal is consistent with the comprehensive plan;
> (2) the proposal bears a substantial relationship to the public health, safety, and welfare; and
> (3) where applicable, minimum zoning criteria found in chapters 30.31A through 30.31F SCC are met.

It is the finding of the Examiner that the request meets these requirements generally and should be approved.

18. Any mitigation requirements required for parks, schools or roads are in the adopted Staff Report as are Department of Public Works' comments.

19. Any finding of fact in this decision which should be deemed a conclusion of law is hereby adopted as such.

CONCLUSIONS OF LAW

Based on the findings of fact entered above, the following conclusions of law are entered.

Conclusions of Law As to the SEPA appeal

1. An appeal from a DNS is reviewed by Snohomish County's Hearing Examiner under the "clearly erroneous" standard. That is, the Hearing Examiner may overturn the decision of the responsible official only if, after review of the entire record, the Examiner is left with the definite and firm conviction that a mistake has been made. The burden of so proving is upon the appellant. Further, the Examiner must accord substantial weight to the SEPA responsible official's decision in deference to that official's expertise. (SCC 30.61.310)

2. The core of the appeal is that stormwater runoff from 24 additional homes requires preparation of an Environmental Impact Statement or a mitigated DNS. Key to that is whether impervious site coverage will be significantly greater if rezoned as proposed. In view of the size of the watershed at 1,536 acres and the subject site comprising less than one-half of one percent (.04%) of that watershed, the 24 additional homes will cover an area less than one-half of that: about one quarter of one percent of the watershed.

3. In the leading case, *Narrowsview Preservation Ass'n v .City of Tacoma (*citation omitted*),* the Court upheld the City's finding that a proposed rezone would not significantly affect the environment because it would not impact the area to any greater degree than the existing zoning. Viewed in the context of the watershed in the instant matter, the water volume in the Park added by 24 additional homes is "de minimis": "The law does not concern itself about trifles." However, in the context of the steep and

water-saturated slopes, the issues of slope stability and provisions for storm runoff from the 55 homes and related impervious surfaces (in view of loss of vegetation) are of paramount importance.

4. Based on the findings of fact entered above, the Hearing Examiner is left with the definite and firm conviction that a mistake was committed. Despite deference to the SEPA official's expertise, the Examiner finds that the DNS must be withdrawn and reissued as an MDNS in order to require further analysis of slope stability and related runoff and groundwater concerns, as clarified herein. To that extent, the appeal should be granted.

Conclusions of Law as to the Rezone

1. The request is for a rezone and, therefore, must be consistent with GMACP and GMA-based County codes. In this regard, the request is consistent with those plans and codes. The type and character of land use permitted on the project site is consistent with the General Policy Plan (GPP) LDMR designation of the property and meets the required regulatory codes as to density, design and development standards.

2. The request should be approved as submitted. However, approval is conditioned upon withdrawal of the DNS previously issued herein and issuance of a MDNS which shall include conditions to be met as found necessary by a supplemental geotechnical, stormwater and groundwater analysis, including at least the following:

> Analysis of the potential effects that groundwater increases caused by increased infiltration rates within the western side of the development would have on shallow, loose weathered soils on the steeper slopes, especially under the influence of prolonged rainfall or rapid melt of various snow depths and, based on the results thereof, engineered designs as to:
>
> Changes required to the proposed drainage system, such as to increase infiltration across the site rather than concentrating all runoff into the conveyance system and detention vault, and
>
> Relocation or redesign of the dispersion trench.

3. 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 R-9,600 to LDMR is **CONDITIONALLY APPROVED** subject to completion of the remanded SEPA process.

The appeal from the DNS is **GRANTED** and the matter is **REMANDED** to the SEPA responsible official for withdrawal of the DNS and issuance of an MDNS in order to require steep slope related analysis as specified in Conclusion No. 2 above. A revised PDS staff report shall be submitted with the DNS incorporating all conditions contained within the original staff report (Exhibit 136).

Decision issued this 6th day of September, 2005.

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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 **September 16, 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 **September 20, 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: Erik Olson/Randy Sleight
Department of Public Works: Andrew Smith

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.