

BEFORE THE
SNOHOMISH COUNTY HEARING EXAMINER

DECISION of the DEPUTY HEARING EXAMINER

In the Matter of the Application of)

ALEXANDER CHERBA and)
YELANA CHERBA)

FILE NO. 05 121026

The request is for a Rezone from Residential-8,400)
(R-8,400) to Low Density Multiple Residential (LDMR))

DATE OF DECISION: September 15, 2005

DECISION (SUMMARY): The request for a rezone from Residential-8,400 to Low Density Multiple Residential for this property is hereby **DENIED WITHOUT PREJUDICE**.

BASIC INFORMATION

GENERAL LOCATION: This project is located at 12828 Maplewood Avenue, Edmonds.

ACREAGE: 1.89 acres

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

COMPREHENSIVE PLAN DESIGNATION:

General Policy Plan Designation: Urban Medium Density Residential (ULDR 6-12 du/ac)
Subarea Plan: Paine Field
Subarea Plan Designation: Urban (4-6 du/ac)

UTILITIES:

Water/Sewer: Alderwood Water and Wastewater District

SCHOOL DISTRICT: Mukilteo No. 6

FIRE DISTRICT: No. 1

SELECTED AGENCY RECOMMENDATIONS:

Department of:

Planning and Development Services: Approval

Public Works: No recommendations at this time

INTRODUCTION

The applicant filed the Master Application on June 21, 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 10, 11 and 12)

A SEPA determination was made on July 25, 2005. (Exhibit 9) No appeal was filed.

The Examiner held an open record hearing on August 31, 2005, the 43rd 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 August 31, 2005 at 1:00 p.m.

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 applicants, Alexander Cherba and Yelenana Cherba were represented by John Bissell of Higa-Burkholder & Associates. Snohomish County was represented by Scott Whitcutt of the Department of Planning and Development Services. No member of the Snohomish County Department of Public Works appeared at the hearing.
3. Members of the public who appeared and testified in opposition or with concerns included Ronald G. Brown, Glenn Godden, and Barbara McMahon, who argue that the subject site is too unstable to be zoned to a higher density without a site plan following geotechnical analysis. Other issues include compatibility of LDMR zoning and development thereunder with existing single-family (R-8,400) residential development surrounding the subject site. Letters opposing the rezone were submitted by them and by Michael S. Katz. Agency comments are described below herein.
4. The hearing concluded at 3:22 p.m.

NOTE: The above information summarizes the information submitted to the Examiner at the hearing. However, for a full and 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 PDS staff report has 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 adopted by the Examiner except where inconsistent with findings and conclusions herein.
3. The applicants, Alexander Cherba and Yelena Cherba, filed an application for a rezone of 1.89 acres from R-8,400 to LDMR in order to potentially construct 18 to 23 homes (without a plat) instead of the maximum of nine platted homes permitted by the current zoning. The subject site is addressed 12828 Maplewood Avenue, Edmonds, west of the Maplewood Drive/Picnic Point Road intersection.
4. It is uncontested in the record that, in order to merit approval, a rezone application must meet the applicable decision criteria set out at Snohomish County Code (SCC) 30.42A.100 and that, in this instance, only the first two of the three criteria apply. That section provides that the Hearing Examiner may approve a rezone only if:
 - A. The proposal is consistent with the Comprehensive Plan, and
 - B. The proposal bears a substantial relationship to the public health, safety, and welfare.
5. It is uncontested in the record that the subject site meets the first test: the proposed LDMR is one of the implementing zones to carry out the Urban Medium Density Residential designation on the GPP Future Land Use Map pursuant to the GMA Comprehensive Plan which became effective nearly nine years ago on December 12, 1996. However, it is hotly contested in the record whether the proposed rezone meets the second test: i.e., is the rezone in the interest of the public health, safety and welfare?
6. It is uncontested in the record that the subject site has critically steep slopes of up to 68 percent to 70 percent, some of which are significantly wet. The applicants assert that the sensitive slopes can be better protected by the more flexible construction options available under the proposed LDMR zone. The opposed citizens assert that any increased number of dwellings threatens the steep slopes and, therefore, any rezone to higher density should at least be accompanied by a site plan to allow detailed review and challenge.
7. The County Department of Planning & Development Services and the applicants argue that a rezone has no impact until a development proposal is submitted. On that rational, the Environmental Checklist in this record becomes worthless bordering on deceptive. For example, the Checklist asks if there are surface indications or history of unstable soils in the immediate vicinity and the applicants' response is "No." The applicants respond to other questions on the Checklist by noting that, because this is a rezone only, no grading is proposed, no clearing or construction will be performed, no impervious surface will be constructed. (No supplemental checklist for non-project actions is submitted.) The applicants then take the next step of asserting that, because no appeal was filed from the Determination of Nonsignificance, no environmental issues can be argued in the hearing on this matter: an argument contrary to 30 years of SEPA law in the State of Washington. (Citations omitted.)

8. Noteworthy is this wording from the Determination of Nonsignificance for this matter issued on July 25, 2005:

“The issuance of this Determination of Nonsignificance should not be interpreted as acceptance or approval of this proposal as presented. Snohomish County reserves the right to deny or approve said proposal subject to conditions if it is determined to be in the best interest of the county and /or necessary for the general health, safety and welfare of the public to do so.”

It is important to relate that quoted text to the equivalent language of the rezone criteria at SCC 30.42A.100 to understand the function of the Hearing Examiner process in the review of even a non-project rezone.

9. With the findings of fact above as the context, this review focuses on the instant application. The Public Works Director for the City of Mukilteo comments (Exhibit 19) that this proposal has:

“...known geotechnical/unstable soils in vicinity Maplewood Road displays shifting soil conditions ck with Jeff Jones in Sno. Co. PW.”

Mukilteo’s Planning Director (also at Exhibit 19) urges denial of the rezone because mapping shows the steep slopes to be a landslide hazard area and liquefaction zone. That Director notes that surface water flows from the upper portion of the site down over steep slopes and to Picnic Point Creek.

10. The Alderwood Water District (Exhibit 22) refuses to issue a “will serve” statement of potable water availability until the applicants submit a site plan.

11. Snohomish County’s Director of Road Maintenance (Exhibit 28) points out that the southern one third of the parcel is wet and steep and is considered by the County’s geotechnical section to be a “geologic hazard critical area.” He asserts that any work in the vicinity of the toe of the embankment could cause Maplewood Avenue to slide. He points out that during the past decade Snohomish County has spent:

“...a considerable sum of the taxpayers [sic] money providing slope stability measures and sub-grade repairs on Maplewood Avenue, the main arterial that provides access to Picnic Point Blvd. for several hundred residents of the Wind-n-Tide neighborhood.”

12. Citizen Barbara McMahon, an abutting landowner, (Exhibit 15) confirms that Maplewood Drive is unstable and has a device installed in the road to measure slippage. She points out that the Wind and Tide community is entirely on septic systems. Her concerns are echoed in testimony of record by attorney Ronald Brown and Glenn Godden.

13. 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 preponderance of the evidence of record requires a conclusion as a matter of law that the application meets only the first of the two applicable decision criteria of SCC 30.42A.100, which is that the proposed rezone is consistent with the Comprehensive Plan's designation of the area. However, compliance with the Comprehensive Plan alone does not merit approval of a rezone, even where, as here, the current zoning is not a zone that implements the Comprehensive Plan.
2. The second criterion is that, after the quasi-judicial examination of a closed-record file's specific evidence about a subject site, the rezone is found to serve the public health, safety and welfare. This rezone would be entirely speculative, lacking any description of how many units are to be built, how storm water is to be handled, how much vegetation will be lost, and how stable (or unstable) is the site. Any rezone here needs the explanatory support that only a site plan can supply.
3. There is no presumption in favor of a rezone. The burden of proof is on the applicant and, here, that burden is not met. Because this rezone would be consistent with the Comprehensive Plan, the applicants need not show a change in circumstances since the current zoning was applied to the land. Beyond that, all other requirements necessary to a rezone application must be met.
4. These slopes are unstable and support a road which provides primary access to an entire community. To increase the risk of further instability without a detailed site plan and related studies is not in the public interest and, thus, the Hearing Examiner is prohibited by SCC 30.42A.100 from approving the rezone.
5. With a site plan for review, the proposal may merit approval. This denial is not on the merits and, thus, the rezone is denied without prejudice to refiling consistent with this decision.
6. Any conclusion of law herein 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 Residential-8,400 to Low Density Multiple Residential for this property is hereby **DENIED WITHOUT PREJUDICE**.

Decision issued this 15th day of September 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 **SEPTEMBER 26, 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 29, 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: Scott Whitcutt
Department of Public Works: Deb Werdal/Steve Pratt

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