

DECISION of the HEARING EXAMINER PURSUANT TO MOTION NO. 06-115 of the SNOHOMISH COUNTY COUNCIL REOPENING the RECORD and HOLDING an OPEN RECORD HEARING

DATE OF REMANDED DECISION: July 6, 2006

PLAT/PROJECT NAME: *SILER PLACE*

APPLICANT/
LANDOWNER: Delta Pacific Construction Corporation

FILE NO.: 96 106255

TYPE OF REQUEST: A 13-lot Rural Cluster Subdivision (RCS) on a 22 acre site within a Rural Conservation zone

DECISION (SUMMARY): APPROVE subject to preconditions and conditions

WHEREAS, this matter was remanded back to the Hearing Examiner, (not “the Deputy Hearing Examiner”) “...to hold an open record hearing regarding the appropriateness of evidence related to the potential ground water contamination associated with the proposed Siler Place RCS.” (Exhibit 91); and

WHEREAS, the Examiner set a status conference and issued an Order Memorializing a Status Conference for a hearing to be held on that issue on June 5, 2006 at 9:00 a.m. (Exhibit 95A); and

WHEREAS, Exhibits 93 to 116 were submitted and entered into the record; and

WHEREAS, the hearing commenced at 9:03 a.m.

The parties testifying at the hearing were: Laura Hartman, Wayne Fortner, Lynn Doremus, Karen Lewis, Andy Kindig, Alan Aramaki, Jeff Weber, attorney for the applicant, and Ed Caine of PDS. In summary the parties testified generally as follows:

1. Ms. Laura Hartman appeared and submitted Exhibit 102, for illustrative purposes of what she intended to prove. She stated that this is a generalized King County map which does not show the property in question. She stated that the Snohomish Health District has approved the request with 3.55 nutrient of nitrate in the ground water, while Department of Ecology says 2 milligrams per liter is a problem. She indicated on cross-examination that she has no technical experience in these areas and no one knows exactly what goes on here. She stated that these are all her opinions based on assumptions. She stated that this is a flood hazard area.

2. Mr. Wayne Fortner appeared and stated that this area is listed as a single source aquifer.

3. Ms. Lynn Doremus appeared and stated that the protection of a till layer is gone in this area for the aquifer and that there are three separations here with the wetland and it makes the travel time on infiltrations faster, and that nitrogen's are also a problem here. In cross-examination she stated that as to Exhibit 62, regarding Quinn's Crossing, there is required a higher level of design.

4. Ms. Karen Lewis appeared and stated that she is a homeowner in the area and has experienced septic failures.

5. Dr. Andy Kindig appeared and stated he has a masters and doctorate degree in this area and has practiced for many years. He submitted a report (Exhibit 96) which stated that his thinking on the old report has changed. He stated that 67 percent of the site is dedicated to open space and requires the whole project be considered and requires that the project be considered as a whole. He stated that the plat complies with the nitrate concentrations. He indicated that they are well within the antidegradation guidelines and that the Plat complies with all water quality requirements by a wide margin. He indicated that the cumulative impacts of the two plats would be negligible and there are no big impacts from the 13 lots on such a large amount of acreage. He indicated that the better and more expensive systems could be used, but there are no problems showing up here requiring that. He stated that Siler Place is not occupying all the capacity of the aquifer. He indicated that he had used the Henshie and Fennimore models, which are stricter.

6. Mr. Alan Aramaki appeared and stated that there are 3.9 acres of wetlands. Some wetlands will be filled and some created and there will be approximately 15 acres of open space.

7. Mr. Ed Caine of PDS stated that this is not considered to be a flood hazard area by the PDS staff.

8. Ms. Hartman concluded, citing SCC 30.65.100 and 130, that this is a flood hazard area.

9. The record was left open until June 15, 2006 for the submittal of post-hearing briefs.

The hearing concluded at 2:05 p.m.

NOTE: The above information reflects the information submitted to the Examiner summarizing the statements that were made at the hearing. However, for a full and complete record, verbatim audio tapes of the hearing are available in the Office of the Hearing Examiner.

FINDINGS, CONCLUSIONS AND DECISION

FINDINGS:

1. The Examiner allowed full and complete testimony by those parties who wished to testify at the open record hearing.

2. While questions were raised as to whether or not other issues should or should not be considered by the Examiner, and while the Examiner allowed all testimony, the only issue considered by the Examiner for decision was the one directed to the Examiner by the Council to hold an open record hearing regarding the appropriateness of evidence related to potential ground water contamination as associated with the proposed Siler Place RCS. In this regard the Examiner, in addition to the pertinent testimony, then gave particular emphasis to the following:
 - A. Review comments and letter from the Cross Valley Water District. (Exhibit 48)
 - B. Review Letter and memorandums from Brent Raasina, Bruce Straughn and Kevin Plemel of the Snohomish Health District. (Exhibit 49)
 - C. Review request for Clarification and Motion(s) for Reconsideration (Exhibit 62)
 - D. Supplemental Staff Report, dated 4/5/06. (Exhibit 94)
 - E. Appellants' Response to PDS Staff Report by Laura Hartman. (Exhibit 97A)
 - F. Quinn's Crossing and Siler Place aerial photograph with attached email from Laura Hartman. (Exhibit 97B)
 - G. Prehearing Brief of Applicant Delta Pacific Corporation, dated 5/30/06. (Exhibit 100)
 - H. Appellant's Prehearing Brief, dated 5/30/06. (Exhibit 101)
 - I. Posterboard--Ground Water--the Hidden Resource, for illustrative purposes only. (Exhibit 102)
 - J. Declaration of Lynn Doremus, dated 1/11/06. (Exhibit 104)
 - K. Petitioners' Objections to False Representations (Exhibit 105)
 - L. Email to the Hearing Examiner from Laura Hartman, dated 5/30/06 with attached Water Chemistry Comments. (Exhibit 108)
 - M. Email from Laura Hartman, dated 6/6/06. (Exhibit 109)
 - N. Letter to the Examiner from Jeff Weber, dated 6/6/06. (Exhibit 110)
 - O. Letter to the Examiner from Laura Hartman, dated 6/8/06. (Exhibit 111)
 - P. Post-Hearing Brief of Applicant Delta Pacific Construction Corp., dated 6/16/06. (Exhibit 112)
 - Q. Appellants' Closing Remarks, dated 6/15/06. (Exhibit 114)
 - R. Letter to the Examiner from Jeff Weber, dated 6/19/06. (Exhibit 115)
 - S. Letter to the Examiner from Laura Hartman, dated 6/20/06. (Exhibit 116)
3. It should be noted that while the Examiner reviewed the record generally from start to finish, specific attention was paid to the items listed above in accordance with the direction of the Council.
4. The previous decision of the Examiner (Exhibit 61) and the findings and conclusions therein is affirmed by the Examiner, except where there may be a conflict with these findings, which will control.
5. Other issues were raised as to whether or not flood plain permits were needed, and whether or not environmental issues could be raised. The Examiner, reviewed those requests to ensure that all issues pertaining to the direction of the Council were considered; and they were then excluded from this decision as not being in accordance with the direction of the Council, or as not having been timely raised, or not having sufficient probative value.
6. The testimony of Ms. Doremus, who is well qualified, did not go far enough or have sufficient foundation to overturn the decision of the Examiner. In fact, it contains some hesitations where she had not done personal reviews and models. Ms. Doremus never actually reached any final conclusions, but merely postulated theories about the hydrogeologic flow path.

“The most striking aspect of Ms. Doremus’ May 30 submission and her testimony at the hearing is that she never actually reached any conclusions regarding the nitrate concentration that would result from the plat or alleged that the nitrate concentration resulting from the plat would violate WAC ch. 173-200.” (Page 13, Lines 7-10 of Exhibit 112). Finally, “[w]hen the Examiner asked Ms. Doremus whether the 13 lots in the plat would cause a problem, she replied that there is a good chance of infiltration -- but she never established that the effluent that would infiltrate would be in a harmful concentration ...” (Page 20, Lines 5-8 of Exhibit 112).

7. Dr. Kindig’s report concluded that “We found no probable adverse impact from treated septic effluent is reasonably expected to occur in surface or ground waters as a result of the proposed Siler Place plat.” When asked by the Examiner “whether there was any problem with the number of lots and size of the property from the perspective of ground water contamination, Dr. Kindig stated that he could not find any problem, and that in fact the rural cluster nature of this subdivision (which maintains most of the site as open space) played a very positive role.” (Page 11, Lines 5-12, Exhibit 112)
8. It should be noted that the Cross Valley Water District, the one most affected because of the many houses that it furnishes water to, had no objection to the development of the 13 lots. (Exhibit 48)
9. It should also be noted that the Snohomish Health District, the key government player here, also approved the 13 lots and septic drainfields. (Exhibit 49)
10. One factor that is very significant is the fact that there will be 13 lots and 14.84 acres of open space. It would appear then that there is sufficient room for any septic overflow problems, if ever needed in the future. This problem could be met early in the future, if it ever arises, by a monitoring well.
11. While the Examiner recognizes the valid and sincere concerns of Laura Hartman and others who reside there, and in the excellent testimony presented by Ms. Doremus, the Examiner is unable to deny the request on the testimony they submitted alone, when contrasted with the abundance of testimony submitted by governmental agencies, the applicant, and the applicant’s experts.
12. Further, questions were raised regarding the tables submitted. However, I found insufficient relevance in them to justify denial of this request.
13. Any Finding of Fact in this Report and Decision, which should be deemed a Conclusion, is hereby adopted as such.

CONCLUSIONS:

1. From the abundance of substantial evidence and testimony presented by the applicant and the government personnel, such as in the Snohomish Health District, the preponderance of the evidence supports the granting of the 13 lots in this particular location at this time.
2. In the companion appeal, the Examiner did not consider testimony regarding *Quinn’s Crossing*, as these were two different applications that must stand on their own. Here, the 13 lots of Siler Place on 22 acres, the Examiner believes stands on its own. The only similarity of the two is the use of monitoring wells.

3. The ground water contamination is not such as to justify the denial of RCS. The RCS, if constructed as proposed, may proceed at this time, as long as a monitoring well, a common solution to situations of this type, is utilized.
4. The cumulative affect of other developments in and upon this area may be such as to deny applications in the future without a hydrologic report or similar such review. However, at this point and time the Examiner can not recommend denial.
5. The Examiner has carefully reviewed and considered all of the statements made with regard to the potential of the ground water contamination by those who are opposed to the request. However, the testimony in opposition thereto, is based on assumptions, unsubstantiated conclusions and fears. This is contrasted with the statements of the applicant, his experts and those using the aquifer from the area, such as the Cross Valley Water District, and finally the Snohomish Health District, which has the final say in the approval of septic systems that may affect the ground water both now and in the future.

When all of this is taken together, the Examiner concludes that the preponderance of the evidence supports the approval of the 13 lots and their minimal affect, if any, on potential ground water contamination for the reasons heretofore set forth in the Findings and Conclusions.

6. The request should be approved subject to compliance by the applicant with the following preconditions and conditions:

PRECONDITIONS

- A. Obtain an updated letter of water availability from the Cross Valley Water District.
- B. The plat shall be revised to show a 40 radius driving surface turnaround at the private road end in Tract 95.
- C. Updated comments from the Monroe School District shall be obtained.

CONDITIONS

- A. The preliminary plat received by PDS on March 23, 2005 (Exhibit 25), as revised by precondition B, above, shall be the approved plat configuration. Changes to the approved plat are governed by SCC 30.41A.330, with the Old Siler Logging Road being maintained as open space as shown thereon, in accordance with Conclusion No. 5.
- B. Prior to initiation of any further site work; and/or prior to issuance of any development/construction permits by the county:
 - i. All site development work shall comply with the requirements of the plans and permits approved pursuant to Condition A, above.
 - ii. A detailed drainage plan shall have been submitted and approved pursuant to Chapter 24.16 SCC.

- iii. At the sole discretion of the PDS's, limited site work may be allowed prior to approval of the full construction plans, if and only if a grading permit (if required) and Temporary Erosion and Sedimentation Control Plan (TESCP) have first been approved by the county for the limited site work. Any approved grading permit and TESCP for the limited site work must be consistent with any and all clearing limitations and/or other plans and conditions imposed and/or required herein.
- iv. The platlor shall mark with temporary markers in the field the boundary of all Native Growth Protection Areas (NGPA) required by Chapter 30.62 SCC, or the limits of the proposed site disturbance outside of the NGPA, using methods and materials acceptable to the county.
- v. A final mitigation plan shall be submitted for review and approval during the construction review phase of this project. The final mitigation plan shall be based upon the conceptual mitigation plan prepared by Pentec Environmental, dated September 9, 1998 and the "Conceptual Mitigation Plan Addendum" dated February 17, 2000 by Adolfsen Associates, Inc.

C. All site development work must comply with the requirements of:

- i. The approved detailed drainage plan pursuant to Chapter 24.12 SCC.
- ii. Any mandatory and special drainage requirements per Chapter 24.20 SCC.

D. The following additional restrictions and/or items shall be indicated on the face of the final plat:

- i. The lots within this subdivision will be subject to school impact mitigation fees for the Monroe School District No. 103 to be determined by the certified amount within the Base Fee Schedule in effect at the time of building permit application, and to be collected prior to building permit issuance, in accordance with the provisions of SCC 26C.20.020. Credit will be given for one existing lot to Lot 1 within the plat.
- ii. All Critical Areas shall be designated Native Growth Protection Areas (NGPA) (unless other agreements have been made) with the following language on the face of the plat:

"All NATIVE GROWTH PROTECTION AREAS shall be left permanently undisturbed in a substantially natural state. No clearing, grading, filling, building construction or placement, or road construction of any kind shall occur, except removal of hazardous trees. The activities as set forth in SCC 32.10.110(29)(a), (c), and (d) are allowed when approved by the County."
- iii. All structures shall be provided with fire suppression sprinklers to the satisfaction of the Fire Marshall's Office.
- iv. The lots in this subdivision do not qualify as duplex lots.

E. Prior to recording of the final plat:

- i. The developer shall pay the County \$771.00 per dwelling unit as mitigation for parks or recreation impacts in accordance with Title 26A SCC; provided, however, the developer may elect to postpone payment of the mitigation requirement until issuance of building permits for the lots. The election to postpone payment shall be noted by a covenant placed on the face of the recorded plat and included in the deed for each affected lot within the subdivision.

- ii. The applicant shall pay an impact fee to Snohomish County for traffic impacts to Transportation Service Area E in the amount of \$20,360.60 [SCC 26B.55.020]. Additional credit shall be given for Lot 2 if the applicant can demonstrate legal lot status for two underlying lots on the subject property approved by PDS.
- iii. The cul-de-sac, at the current terminus of 113th Dr SE, shall be reconstructed as a through road to the satisfaction of the Department of Public Works (EDDS).
- iv. The private road shall be provided with a 30 foot wide road easement (EDDS).
- v. Pedestrian facilities shall be constructed along the south side of 113th Drive SE, to 204th Street SE, or other location identified by the school district, or other alternative provisions for safe pedestrian walkway and/or school bus stop shall be provided, to the specifications of the DPW. [RCW 58.17.110]
- vi. Native Growth Protection Area boundaries (NGPA) shall have been permanently marked on the site prior to final inspection by the county, with both NGPA signs and adjacent markers which can be magnetically located (e.g.: rebar, pipe, 20 penny nails, etc.). The plat may use other permanent methods and materials provided they are first approved by the county. Where an NGPA boundary crosses another boundary (e.g.: lot, tract, plat, road, etc.), a rebar marker with surveyors' cap and license number must be placed at the line crossing.

NGPA signs shall have been placed no greater than 100 feet apart around the perimeter of the NGPA. Minimum placement shall include one Type 1 sign per wetland, and at least one Type 1 sign shall be placed in any lot that borders the NGPA, unless otherwise approved by the county biologist. The design and proposed locations for the NGPA signs shall be submitted to the Land Use Division for review and approval prior to installation.

- vii. The final wetland mitigation plan shall be completely implemented.
- viii. Covenants, deeds and homeowners association bylaws and other documents as appropriate, to be recorded prior to, or simultaneously with, final plat recording shall have been approved as to substance and completeness by the Department of Planning and Development Services, and shall at a minimum:
 - a. Establish all restricted open space as shown on the approved preliminary plat in separate tracts.
 - b. Establish a Homeowner's Association, guaranteeing maintenance of restricted open space in as much as such maintenance is required by the Open Space Management Plan, Exhibit 20.

EXAMINER'S CONDITION

- F. The applicant shall provide site and access in a suitable location as directed by the Snohomish Health District as adequate for installation and operation of a ground water monitoring well within this aquifer. Terms for ultimate location and installation of the monitoring well shall be approved by the Snohomish Health District and shall be paid for by the applicant.

Nothing in this permit/approval excuses the applicant, owner, lessee, agent, successor or assigns from compliance with any other federal, state or local statutes, ordinances or regulations applicable to this project.

Preliminary plats which are approved by the county are valid for five (5) years from the date of approval and must be recorded within that time period unless an extension has been properly requested and granted pursuant to SCC 30.41A.300.

7. Any Conclusion in this Report and Decision, which should be deemed a Finding of Fact, is hereby adopted as such.

DECISION:

The request for a 13-lot Rural Cluster Subdivision is hereby APPROVED, SUBJECT TO COMPLIANCE by the applicant, with the PRECONDITIONS and CONDITIONS set forth above.

Remanded Decision issued July 6, 2006.

Robert J. Backstein, Hearing Examiner

EXPLANATION OF RECONSIDERATION AND APPEAL PROCEDURES

This remanded 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 Examiner’s action on reconsideration would be subject to appeal to the Council.) 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, 2802 Wetmore Avenue, 2nd Floor, Everett, Washington, (Mailing Address: M/S #405, 3000 Rockefeller Avenue, Everett WA 98201) on or before **JULY 17, 2006**. 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 Examiner exceeded his jurisdiction;
- (b) the Examiner failed to follow the applicable procedure in reaching his decision;
- (c) the Examiner committed an error of law or misinterpreted the applicable comprehensive plan, provisions of Snohomish County Code, or other county or state law or regulation;
- (d) the Examiner's findings, conclusions and/or conditions are not supported by the record;
- (e) newly discovered evidence alleged to be material to the Examiner's decision which could not reasonably have been produced at the Examiner's hearing; and/or
- (f) changes to the application proposed by the applicant 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. Appeals shall be addressed to the Snohomish County Council but shall be filed in writing with the Department of Planning and Development Services, 5th Floor, County Administration Building, 3000 Rockefeller Avenue, Everett, Washington (Mailing address: M/S #604, 3000 Rockefeller Avenue, Everett, WA 98201) on or before **JULY 20, 2006** 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 and PROVIDED FURTHER that the filing fee shall be refunded in any case where an appeal is 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 are limited to the following:

- (a) the Examiner exceeded his jurisdiction;
- (b) the Examiner failed to follow the applicable procedure in reaching his decision;
- (c) the Examiner committed an error of law or misinterpreted the applicable comprehensive plan, provisions of Snohomish County Code, or other county or state law or regulation; and/or
- (d) the Examiner's findings, conclusions and/or conditions are not supported by the record.

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 this case.

Staff Distribution:

Department of Planning and Development Services: Ed Caine
Department of Public Works: Mark Brown

<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>

This decision is binding but will not become effective until the above precondition(s) have been fulfilled and acknowledged by the Department of Planning and Development Services (PDS) on the original of the instant decision. Document(s) required for fulfillment of the precondition(s) must be filed in a complete, executed fashion with PDS not later than JULY 6, 2007.

1. "Fulfillment" as used herein means recordation with the County Auditor, approval/acceptance by the County Council and/or Hearing Examiner, and/or such other final action as is appropriate to the particular precondition(s).
2. One and only one six month period will be allowed for resubmittal of any required document(s) which is (are) returned to the applicant for correction.
3. This conditional approval will automatically be null and void if all required precondition(s) have not been fulfilled as set forth above; PROVIDED, that:
 - A. The Examiner may grant a one-time extension of the submittal deadline for not more than twelve (12) months for just cause shown if and only if a written request for such extension is received by the Examiner prior to the expiration of the original time period; and
 - B. The submittal deadline will be extended automatically an amount equal to the number of days involved in any appeal proceedings.

ACKNOWLEDGMENT OF FULFILLMENT OF PRECONDITIONS

The above imposed precondition(s) having been fulfilled by the applicant and/or the successors in interest, the Department of Planning and Development Services hereby states that the instant decision is effective as of _____, _____.

Certified by:

(Name)

(Title)
