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BEFORE THE
SNOHOMISH COUNTY HEARING EXAMINER
DECISION of the DEPUTY HEARING EXAMINER

In the Matter of the Application of)
)
FOXGLOVE HILLS, LLC) **FILE NO. 05 127884 SD**
)
Preliminary plat for a 26-lot subdivision utilizing lot)
size averaging and a rezone from R-9,600 to R-7,200)

DATE OF DECISION: March 29, 2007

PLAT/PROJECT NAME: *Foxglove Hills*

DECISION (SUMMARY): The proposed rezone and the 26-lot subdivision are **CONDITIONALLY APPROVED.**

BASIC INFORMATION

GENERAL LOCATION: This project is located at 18815, 18917 and 18925 Waxen Road, Bothell, Washington.

ACREAGE: 6 acres

NUMBER OF LOTS: 26

AVERAGE LOT SIZE: 5,273.5 square feet

MINIMUM LOT SIZE: 3.373 square feet

DENSITY: 4.28 du/ac (gross)
5.31 du/ac (net)

ZONING: CURRENT: R-9,600
PROPOSED: R-7,200

UTILITIES:

Water/Sewer: Alderwood Water and Wastewater District

SCHOOL DISTRICT: Everett No. 2

FIRE DISTRICT: No. 7

INTRODUCTION

The applicant filed the Master Application on May 5, 2006. (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 December 18, 2006. (Exhibit 16) No appeal was filed.

The Examiner held an open record hearing on March 21, 2007, the 107th 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 March 21, 2007 at 9:00 a.m.

1. The Examiner stated that he had read the PDS staff report, reviewed the file and viewed the area.
2. Snohomish County was represented by Bob Pemberton of the Department of Planning & Development Services. The applicant, Foxglove Hills, LLC, was represented by James Egge. Pre-hearing letters of concern or opposition were submitted by Ken & Susan Brown (Exhibit 21), Marian & William Paananen (Exhibits 20, 23) and Barbara & Sam Penry (Exhibit 24). Public testimony was given by William Paananen and Star Dykstra. The principal public concerns were slope stability on the subject site and vehicular trips added to already heavily traveled local streets.

The hearing concluded at 10:12 a.m.

NOTE: For a complete record, an electronic recording of this hearing is 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, Foxglove Hills, LLC, filed an application for a 26-lot subdivision on six acres with a concurrent rezone from R-9,600 to R-7,200. Both of those zonings comprise the surroundings, where any development is single-family residential.
3. Public concern (see “Public Hearing” above) is focused primarily on the stability of steep slopes on the subject site, on protection of existing vicinity wells and septic systems and on traffic generated by the 26 lots on vicinity roads. As to slope stability, the Penrys point out (Exhibit 24) that the west slope of the north lot drops to Waxen Road with “great potential” for slides and erosion and has had “...two major slides over the years.” That concern is echoed by the Paananens, (owners of property surrounded on three sides by the subject subdivision) who assert that any person walking along the west side of the proposed plat can see two distinct depressions where slides have occurred during the past 15 years. The Paananens express concern that the applicant’s response on the Environmental Checklist to the question of whether there is any history of unstable soils is: “Not to our knowledge.”
4. The applicant’s response to the concerns reported in Finding No. 3 above is to refer to the geotechnical engineering evaluation performed for the project by Nelson Geotechnical Associates, Inc. (Exhibit 9) and to offer a voluntary condition upon approval (Exhibit 35) which requires implementation of the conclusions and recommendations of that evaluation during project construction. The Examiner has reviewed the Nelson evaluation and finds it appears professionally competent and thorough. The geotechnical findings captioned “Erosion Hazard” and “Landslide Hazard/Slope Stability” at page 5 of the evaluation explains that the risks are minimal if vegetation is not disturbed and if site grading, drainage, setback distances and foundation placement conform to the recommendations in the report. Those recommendations are substantially similar to the equivalent sections of the Dodds Engineers, Inc. report done in 1999 for a similar project known as Country Woods 2-5 at the site and submitted into this record by Ken and Susan Brown (Exhibit 21).
5. As to traffic, the above-listed witnesses express particular concern about the impact of this project on the intersection of 192nd Street SE and State Route 527 to the east of this project. That concern is well-articulated by witness Star Dykstra, who lives to the south and west of the project and experiences local traffic daily. She urges installation of a signal light at that intersection. Testimony of record shows a fatality accident at that intersection recently. Witness Sam Penry points out that another subdivision, Foxglove Meadows, in the vicinity is adding 80 new homes to the 24 new homes proposed here for a total of more than 100 additional homes to cause increased backups on 192nd Street SE and increased risk-taking by frustrated drivers. The proposed new homes will generate 230 average weekday trips, of which 18 will be in the morning peak-hour and 24 will be in the p.m. peak-hour. The school district reports that students of all grade levels will be served by school busses at the development’s entrance.
6. The project would comply with park mitigation requirements under Chapter 30.66A SCC by the payment of \$1,244.49 for each new single-family home.
7. The DPW reviewed the request with regard to traffic mitigation and road design standards. This review covered Title 13 SCC and Chapter 30.66B SCC as to road system capacity, concurrency, inadequate road conditions, frontage improvements, access and circulation, and dedication/deeding of right-of-way, state highway impacts, impacts on other streets and roads, and Transportation Demand Management. As a result of this review, the DPW has determined that the development is concurrent and has no objection to the requests subject to various conditions.
8. The Hearing Examiner can condition or deny a rezone if there is substantial evidence in the record of the need to do so in the interest of the public health, safety and welfare. However, none of the assertions listed above achieves that evidentiary level in this record at this stage.

9. The steep slopes in the northwestern section of the site are described earlier herein. No development will occur on those slopes. A Type 5 stream crosses the site and a Category 3 wetland lies in the southeastern corner of the site. PDS recommends that the Critical Areas Study and Mitigation Plan in the record comply with critical area regulations. The Examiner concurs.
10. The PDS Engineering Division has reviewed the concept of the proposed grading and drainage and recommends approval of the project subject to conditions, which would be imposed during full detailed drainage plan review pursuant to Chapter 30.63A SCC.
11. 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.
12. The property is designated Urban Low Density Residential (ULDR 4-6 du/ac) on the General Policy Plan (GPP) Future Land Use Map (FLUM) and is located within an Urban Growth Area (UGA). Land in this category may be developed at a density of 4-6 du/ac and one of the implementing zones is the R-7,200 zone which is the case here.
13. The proposed use (single-family detached development) is essentially compatible with existing single-family detached developments on larger lots. Because the property is within a UGA, policies where adopted promote urban densities of development, 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.
14. The request complies with the Snohomish County Subdivision Code, Chapter 30.41A SCC 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.
15. 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.

16. The proposal has been evaluated by PDS for compliance with the lot size averaging provisions of SCC 30.41A.240 and SCC 30.23.210. This proposal is consistent with these provisions.

17. The request is consistent with Section 30.70.100 SCC (Section 32.50.100 SCC), which requires, pursuant to RCW 36.70B.040, that all project permit applications be consistent with the GMACP, and GMA-based county codes.
18. 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 relationship to 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.
2. The Department of Public Works recommends that the request be approved as to traffic use subject to conditions specified below herein.
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 request is for a rezone and therefore must comply with Chapter 30.42A. This is a site specific rezone that conforms to the Comprehensive Plan. Because no evidence was submitted of non-compliance with the requirements of Chapter 30.42A, the project is presumed to meet those requirements.
5. The request complies with the Snohomish County Subdivision Code, Chapter 30.41A SCC (Title 19 SCC) as well as the State Subdivision Code, RCW 58.17. The proposed subdivision 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.
6. The applicant's response to neighborhood concerns about slope stability by offering to condition project approval on compliance with the above-referenced geotechnical engineering evaluation is an appropriate response supported by the record. (Exhibit 35) The Examiner amends the offer slightly to incorporate language added by the County Council to a similar condition in the past: (Timberwood Ridge, 05-123279).
7. 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 requests for a preliminary plat for a 26-lot subdivision utilizing lot size averaging provisions and for a rezone from Residential-9,600 to Residential-7,200 are hereby **CONDITIONALLY APPROVED**, subject to the following conditions:

CONDITIONS

- A. The preliminary plat received by PDS on December 4, 2006 (Exhibit 15C) shall be the approved plat configuration. The analysis and recommendations in the Geotechnical Engineering Evaluation of November 20, 2006 (Exhibit 9) is a primary inducement for this project's approval. Compliance with Exhibit 9 shall be a required condition of the grading permits issued by the Department of Planning and Development Services for this project. Any substantial deviation from the recommendations of Exhibit 9 at any phase in the construction or maintenance of the proposed development shall only be made following submittal, and approval by PDS, of a revised and updated Exhibit 9. Changes to the approved plat are governed by SCC 30.41A.330.

- 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. 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.

 - iii. A final mitigation plan based on the *Critical Areas Study and Buffer Mitigation Plan* prepared by Wetland Resources, Inc., dated December 1, 2006 (Exhibit 8) shall be submitted for review and approval during the construction review phase of this project.

- C. 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 Everett School District No. 2 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 30.66C.010. Credit shall be given for 3 existing parcels. Lots 1, 2, and 14 shall receive credit."

 - ii. Chapter 30.66B SCC requires the new lot mitigation payments in the amounts shown below for each single-family residential building permit:
 - \$2,452.98 per lot for mitigation of impacts on county roads paid to the county,
 - \$ 72.72 per lot for Transportation Demand Management paid to the county,
 - \$ 239.04 per lot for mitigation of impacts on the City of Mill Creek streets paid to the city. Proof of payment shall be provided.
 - \$ 75.33 per lot for mitigation of impacts on state highways paid to the County (WSDOT ID # DOT-38)

The developer of this subdivision has elected to defer these payment obligations to a time preceding building permit issuance. Notice of these mitigation payment obligations shall be contained in any deeds involving this subdivision or the lots therein. Once building permit has been issued all mitigation payments shall be deemed paid.

- iii. Right-of-Way dedication along Waxen Road shall be made to the satisfaction of the DPW.
- iv. 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 30.91N.010 are allowed when approved by the County."

- v. The developer shall pay the County \$1,244.49 per new dwelling unit as mitigation for parks and recreation impacts in accordance with Chapter 30.66A SCC; provided, however, the developer may elect to postpone payment of the mitigation requirement until issuance of a building permit for that lot. 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.

D. Prior to recording of the final plat:

- i. Urban frontage improvements shall be constructed along the parcel's frontage on Waxen Road to the satisfaction of the DPW.
- ii. 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 platator 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.

- iii. The final wetland mitigation plan shall be completely implemented.

E. All development activity shall conform to the requirements of Chapter 30.63A SCC.

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.

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.

Decision issued this 29th day of March, 2007.

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 **APRIL 9, 2007**. 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 **APRIL 12, 2007** 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: Bob Pemberton

<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>
