

BEFORE THE
SNOHOMISH COUNTY HEARING EXAMINER

DECISION of the DEPUTY HEARING EXAMINER

In the Matter of the Application of)
) **FILE NO. 06 100190 LU**
MICHAEL KILLMER)
)
Rezone from Residential-8,400 (R-8,400) to)
Residential-7,200 (R-7,200))

DATE OF DECISION: October 16, 2007

PLAT/PROJECT NAME: *Killmer Rezone*

DECISION (SUMMARY): Rezone from R-8,400 to R-7,200 is **APPROVED**.

BASIC INFORMATION

GENERAL LOCATION: This project is located at 14310 52nd Avenue W., Lynnwood.

ACREAGE: 0.45 acres

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

COMPREHENSIVE PLAN DESIGNATION:

General Policy Plan Designation: Urban Low Density Residential

UTILITIES:

Water/Sewer: Alderwood Water and Wastewater District

SCHOOL DISTRICT: Mukilteo No. 6

FIRE DISTRICT: No. 1

INTRODUCTION

The applicant filed the Master Application on July 12, 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 15, 16 and 17)

A SEPA determination was made on July 2, 2007. (Exhibit 11) No appeal was filed.

The Examiner held an open record hearing on September 12, 2007, the 118th day of the 120-day decision making period.

PUBLIC HEARING

The public hearing commenced on August 21, 2007, and resulted in an Order by the Hearing Examiner entered September 5, 2007 remanding to address public concerns in a supplemental staff report providing further analysis consistent with County Council Motion 07-447 of August 8, 2007. That Order set a hearing on the remanded matter for September 12, 2007. The supplemental staff report by Senior Planner David Radabaugh is an exemplary response to the greater scrutiny required by Council Motion 07-447 while tailoring that review to a two-lot development proposal. The hearing on remand began at 1:05 p.m.

1. At both hearings, the Examiner stated that he had read the PDS staff report, reviewed the file and viewed the area.
2. At both hearings, the applicant, Michael Killmer, was represented by Andrew Lofstedt of Alpha Subdivision Pros. Snohomish County was represented by David Radabaugh of the Department of Planning and Development Services. No member of the general public appeared at either hearing.
3. Pre-hearing documents expressing concern or opposition were submitted into the record (1) by an abutting neighbor on the south, Wilma Preston (Exhibit 21), (2) by Ms. Preston jointly with Victoria Irving (Exhibit 22) of the same address as Wilma Preston but in Unit "B" naming 13 additional vicinity residents, including Michael Irving of the same address as Victoria Irving, and (3) by another abutting neighbor, David K. Pendergrass (Exhibit 24). A letter (Exhibit 23) is also of record from attorney Frank W. Holman, representing Wilma Preston. All of the above-mentioned documents were submitted during the month of August 2006: a year ago.
4. The re-opened hearing on the remand concluded at 1:26 p.m.

NOTE: For a complete record, electronic recordings of both hearings are available in the Office of the Hearing Examiner.

FINDINGS, CONCLUSIONS AND DECISION

FINDINGS OF FACT

Based on all the evidence of record, the following findings of fact are entered.

1. The master list of exhibits and witnesses which is a part of this file and which exhibits were considered by the Examiner is hereby made a part of this file as if set forth in full herein.
2. The applicant, Michael Killmer, filed an application requesting approval of a rezone of a .45-acre parcel from R-8,400 to R-7,200 for the purpose of creating one duplex lot to be created through an administrative short subdivision process. An existing single-family dwelling on-site will be retained. Thus, three homes will exist where one now does.
3. A Category 3 wetland encompasses the northwestern portion of the site, on which portion also exist several big leaf maple trees and Douglas fir trees. The Critical Areas Study and Wetlands Mitigation Plan show wetland and buffer enhancement sufficient to comply with Critical Areas Regulations (SCC 30.62).
4. The subject site and the surrounding community are zoned R-8,400 except to the south, where the zoning is the R-7,200 proposed herein. Single-family homes predominate in the vicinity. Some owners of those vicinity homes oppose the requested rezone and short plat. (See "Public Hearing" above.) The following findings address those opposition issues.
 - 4-A. Wilma Preston personally and by her attorney (Exhibits 21, 22 and 23) assert that the proposal will intrude by seven to 13 feet upon land owned by Mr. Preston on the south boundary of the subject site. The applicant's attorney's analysis (Exhibit 38) argues the converse, asserting based on cited cases that a fence at the center of the issue is a livestock fence only and has been used only as such and that, absent a showing of some additional claim of right, such a fence does not satisfy the "hostile" element of an adverse possession claim. The Examiner is a creature of statute and is not given authority in Snohomish County to decide issues of ownership of realty. The Examiner accepts as fact that the applicant owns all property within the proposal boundaries and, if a court of competent jurisdiction determines otherwise, the applicant will have proceeded at the applicant's peril.
 - 4-B. Ms. Preston asserts that construction of the proposed duplex made possible if the rezone is approved will impair the lateral support of the northeast corner of the parcel owned by her and the Irvings. The preliminary short plat (Exhibit 14) shows that corner to be the location of the existing single-family dwelling which is to remain with minor, if any, exterior change. A rockery is shown there at approximately the property line with Ms. Preston and the rockery appears to be approximately 3.5 feet high from toe to top. The Examiner saw the rockery during the pre-hearing site visit. The evidence of record and the site view do not support the assertion of impairment of lateral support.
 - 4-C. Ms. Preston asserts that the proposal is located in and over long-established wetlands and will permanently damage the wetlands notwithstanding proposed drainages. She argues that the duplex together with additional driveways and other pavement will significantly increase the impermeable surfaces on the property adding further problems with water runoff and impacts. The Examiner's study of the Targeted Drainage Plan (Exhibit 13) and the Critical Area Study and Wetland Mitigation Plan (Exhibit 12) shows that the wetland impacts will be mitigated through use of Innovative Development Design (SCC 30.62.370) by exceeding Snohomish County mitigation standards and by increasing the diversity of the native plant community on site. That report states that because the site is highly

degraded, the proposed wetland and buffer enhancements and the additional buffer will improve overall functions and values of the site. (Exhibit 12, p. 2)

- 4-D. Abutting owner David Pendergrass argues that the combination of (1) a building setback of only five feet, (2) a rise in the proposed short plat's elevation of an estimated six to eight feet at the south property, and (3) the two-story height allowed for the duplex will tend to cause the duplex to be perceived as a "skyscraper" from a neighboring home. (The Examiner notes that the building height is the same in the current zoning and the proposed zoning.)
- 4-E. Mr. Pendergrass also expresses concern that the rezone allowing the proposed duplex will result in the duplex (1) detracting from the rural setting, (2) causing road and train noise to increase, (3) affecting his territorial view, (4) impact his shed's location, and (5) threaten three trees of an estimated 30-foot height.
- 4-F. Mr. Pendergrass summarizes his concerns by writing: "...[I] feel strongly someone is attempting to move into my backyard and destroy a previous natural layout for the benefit of a few bucks."
5. The Examiner understands the sense of loss expressed by abutting owners Preston and Pendergrass and is mindful of the 18 residents named as sharing their opposition to this rezone. However, much of their concern is expressed as a mere assertion with no factual support. One is left asking: "Train? What train? "Shed? Does it exist? Three trees on the subject site or the Pendergrass site or other site? Had any one of the concerned neighbors attended either of the two hearings on this matter to respond to questions about their written assertions, they might have increased the persuasive weight of their evidence.
6. There is no mitigation required for parks, schools or roads and the DPW has no comments or objections but will provide its input during the short plat approval process.
7. The Snohomish County Health District has no objection to this proposal because public water, sewer service and electrical power will be available for this development.
8. The request is consistent with Section 30.70.100 SCC which requires, pursuant to RCW 36.70B.040, that all project permit applications be consistent with the GMACP and GMA-based county codes. 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). According to the GPP, the ULDR designation covers various subarea plan designations which would allow mostly detached housing developments on larger lot sizes. 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.
9. As noted under "Public Hearing" above, on remand Senior Planner David Radabaugh produced an analytical and thorough supplementary staff report (Exhibit 37). His analysis begins by noting that the General Policy Plan's (GPP) Land Use Policy 1.A.4 requires Urban Growth Areas (UGAs) to have existing or planned infrastructure capacity to adequately support urban growth for 20 years. He then notes that GPP Land Use Policy 2.A.3 requires that in a UGA a variety of densities be provided, and that the density ranges consider the presence of critical areas. He then presents the text of GPP Housing policies 1.B.4, 1C.3, 1.D.3, 2.A.1, 2.A.4, 2.B.1, 2.B.4 and 3.A.3. (It would be needlessly duplicative to reprint each of those policies here.) The supplemental staff report then states that the proposed two lots – one with an existing home and the other to contain a duplex – are consistent with those policies. The Examiner concurs.

10. The supplemental staff report then presents the text of applicable transportation-related policies: 1.C.7-10, 1.D.1 and .2, 5.A.4 and 6.A.1-4. The report concludes that (1) the existing roads can accommodate the one additional lot proposed, (2) that the subject site does not have strong potential for creating additional connectivity so none is proposed, (3) the project has been deemed concurrent as to traffic, and therefore the proposal is consistent with the GPP transportation policies. The Examiner concurs
11. The supplemental staff report then presents the text of applicable GPP policies on capital facilities, utilities and the natural environment: 7.B.1, 10.A.2, 2.A.1, 3.A.1, 3.B.1, 3.F.1, 3.E.3 and 3.E.5. In response to those policies, the report then notes (1) that park and school mitigation fee requirements are recommended conditions of short plat approval, (2) that water and sewer service are available for the short plat, and (3) that a wetland buffer and mitigation proposal has been reviewed and approved. The Examiner finds as fact (see Finding No. 4-C above) that the drainage and buffer actions in mitigation will improve wetland values and functions in this instance.
12. The supplemental staff report on remand also addresses the issue of whether the proposed plat bears a substantial relationship to the public health, safety and welfare by combining under that topic review of cited code sections concerning parks mitigation, traffic and road standards, concurrency, inadequate road conditions, access and circulation, right-of-way dedication, state highway impacts, other jurisdictions' streets and roads, transportation demand management, pedestrian facilities, school mitigation, drainage and grading, critical areas regulations, utilities and zoning.
13. From among that list of topics, vehicular access merits mention in that the proposed duplex dwelling's access is to be by an exclusive, 15-foot-wide, shared driveway easement with a 6.5-foot separation between the two lots' access points as allowed by an EDDS deviation approved June 18, 2007. (That amends the supplemental staff report's p. 9.)
14. Another topic from the list at Finding No. 13 above warranting discussion here is the requirement of Mukilteo School District (Exhibit 25) for safe walkways for students to the bus stop serving all levels of students at the intersection of 52nd Avenue W and 144th Street SW. The supplemental staff report points out that such frontage and off-site improvements will be a recommended condition upon approval but fails to include that condition. The Examiner intentionally adds it herein at the rezone stage.
15. Any finding of fact in this decision which should be deemed a conclusion is hereby adopted as such.

CONCLUSIONS OF LAW

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

1. The Examiner having fully reviewed the PDS staff report hereby adopts said staff report as properly setting forth the issues, the land use requests, consistency with the existing regulations, policies, principles, conditions and their effect upon the request. It is therefore hereby adopted by the Examiner as a conclusion as if set forth in full herein, in order to avoid needless repetition.
2. The request is for a rezone and, therefore, must be consistent with the GMACP and GMA based county codes. 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) UMDR designation of the property and meets the required regulatory codes as to density.

3. 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.

4. The Hearing Examiner’s decision on a rezone application is a Type 2 decision based on (1) a report by the County staff and a file assembled by that staff and (2) evidence received through an open record public hearing. The burden of proof is on the applicant to demonstrate by a preponderance of the evidence that the proposed rezone meets the two applicable rezone decisional criteria set out at SCC 30.42A.100: (1) that the proposed rezone is consistent with the Comprehensive Plan and (2) that the proposed rezone bears a substantial relationship to the public health, safety and welfare. The Hearing Examiner’s decision on those criteria is the final County action unless appealed to the County Council. (SCC 30.72.020 -.025)

5. The request is for a site-specific rezone and, therefore, must be consistent with the GMA Comprehensive Plan and Snohomish County Code regulatory provisions which implement that plan. The request for LDMR zoning here is consistent with the type and character of land use permitted on the project site by the General Policy Plan (GPP) ULDR designation of the property. However, in addition to being consistent with the map designation, the proposal must also be consistent with relevant Plan policies such as (but not limited to) Land Use Policy 1.A.4 concerning infrastructure capacity, Land Use Policy 2.A.3 concerning critical areas, and Housing Policy 2.A.1 concerning preservation of the character of stable residential neighborhoods. (See County Council Motion No. 07-447.) In fact, the General Policy Plan provides at page LU-15 that the County will broaden the variety of housing types in traditional single-family and multi-family neighborhoods:

“...while respecting the vitality and character of established residential neighborhoods A mix of housing types with a range of densities will be encouraged throughout UGA’s, as long as they are carefully sited, well designed, and sensitively integrated into existing communities.” (Emphasis supplied.)

6. As noted above, the instant proposal’s consistency with the Comprehensive Plan is only one of the two applicable criteria set out at SCC 30.42A.100 which must be met before a rezone can be approved. A rezone must also comply with the second criterion: i.e., the rezone must bear a substantial relationship to the public health, safety and welfare. The bold-quoted language above is an expression of the second of the two rezone criteria. Stated in the converse, the quoted language provides that until it is determined that a proposed rezone’s housing types are carefully sited, well designed, and sensitively integrated into an existing community, the proposed rezone cannot be found to bear a substantial relationship to the public health, safety and welfare. That burden of proof which must support that determination cannot be met without actual consideration of site-specific facts. A conclusory statement that a proposed rezone meets the criteria is no more acceptable than would be a conclusory statement that the proposed rezone fails to meet the criteria. The departmental staff and, in turn, the Hearing Examiner, must “show your work” and rationale in concluding whether or not a proposed rezone meets or does not meet the applicable criteria.

7. The requirement to actually consider the applicable criteria, particularly when relevant citizen concerns are expressed, is mandated by the County Council's Amended Ordinance No. 07-022 effective June 4, 2007, which at page 2 repeats the above-quoted Comprehensive Plan provision encouraging a mix of housing types with a range of densities only if "*carefully sited, well designed, and sensitively integrated into existing communities...*" The County Council reinforced that requirement to "show your work" in its Motion No. 07-447 of August 8, 2007 remanding a rezone application on appeal (Brookstone Investments, LLC, 06-135148) for failure to have adequately evaluated all project-level factors concerning the two criteria discussed above herein.
8. The Examiner concurs with the supplement staff report's recommendation of approval and concludes that the instant application is consistent with the Comprehensive Plan and bears a substantial relationship to the public health, safety and welfare.
9. 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 Residential-8,400 to Residential-7,200 for this property is hereby **CONDITIONALLY APPROVED** subject to the following stipulation:

Prior to issuance of any certificate of occupancy for any dwelling unit, walkway improvements shall have been installed per Snohomish County EDDS along the most direct legal route along the west side of 52nd Avenue W between the subject plat and 144th Street SW in order to provide for safe walking by students enroute to and from the school bus stop at that intersection.

Decision issued this 16th day of October, 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 **OCTOBER 26, 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 **OCTOBER 30, 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: David Radabaugh

<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>
