

**DECISION of the SNOHOMISH  
COUNTY HEARING EXAMINER  
DENYING PETITIONS FOR RECONSIDERATION**

DATE OF DECISION: October 2, 2008

PLAT/PROJECT NAME: **HIGHLAND RANCH SOUTH**

APPLICANT/  
LANDOWNER: Lifestyle Homes & Construction, Inc.

FILE NO.: 06 102828-000-00-SD

**INTRODUCTION**

The Washington State Department of Ecology and Kevin T. Duncan filed timely petitions for reconsideration dated and received by the Hearing Examiner's office on September 3 and 4, 2008. PDS submitted comments on the petitions. Because of an error in listing parties of record, the Hearing Examiner's office re-ran the appeal period and called for further comments on the petitions for reconsideration. The new reconsideration period expired on September 29<sup>th</sup>, 2008. No additional comments were received.

**ANALYSIS**

The issues raised by both petitioners are identical. The Hearing Examiner will address each issue.

1. Highland Ranch South and Highland Ranch North (a second development by this developer previously approved by the Examiner, File No. 06-102833-000-00-SD) should have been considered as one "development" under RCW 90.44.050 of 19 lots to be entitled to only one 5000 gallons per day (gpd) group domestic use exempt well.

Finding of Fact 13(A) from the decision states:

A. Water.

Individual wells are being proposed on each of the 10 lots in the proposed subdivision. This issue was the subject of a previous order dated March 11, 2008 (Exhibit 39) and a re-opened open record hearing held July 23, 2008 by the undersigned Examiner. Two issues were discussed at the open record hearing - the legal issue of whether *State of Washington Department of Ecology v. Campbell & Gwinn et al*, 146 Wn.2d 1, 43 P.3d 4 (2002), would allow the use of one exempt well for Highlands Ranch North and one exempt well for Highlands

Ranch South, or whether under that decision they should be considered a single “development”. The second issue that was raised was a submission into the record of Chapter 173-505 WAC, entitled “*Stillaguamish River Basin Water Resources Inventory Area (WRIA) 5*”. This chapter is better known as the Instream Flow Rule for the Stillaguamish River established by the Department of Ecology (DOE).

(1) *Campbell & Gwinn*

As to the first issue, Ed Caine of PDS relayed to the Examiner that after consultation with the Prosecuting Attorney’s office, it is the position of PDS that Highlands North and South should be treated as independent “developments” under *Campbell & Gwinn* and receive an exempt well; in other words, even though Highlands Ranch North and South are closely connected in that they share the same developer, the same access road, went to hearing on the same day, they are separate developments within the meaning of the decision. The Examiner will acquiesce to that decision, since it was made in consultation with the Prosecuting Attorney’s office. Highlands South is entitled to an exempt well by virtue of the fact that it is a separate subdivision.

The DOE argues that the Hearing Examiner must independently assess the merits of factual and legal arguments. In supplying Exhibit 47 to the record, DOE argues it provided a legal and factual argument that the Examiner failed to address in her decision. The DOE requests that the Examiner address the following two points made in Exhibit 47:

- A. DOE argues that it is most consistent with the 5000 gpd group domestic limit use recognized by the Court in *Campbell & Gwinn* to consider adjacent, contemporaneous subdivisions under common ownership to be one subdivision, or else the developer could circumvent the group domestic limit by dividing a development into smaller subdivisions or short plats.

Response: The Examiner recognizes that a developer can circumvent the requirements by dividing the subdivision in two. But whatever sort of regulatory limits are put on something like this, it is simple enough for a developer to design the development to work around the parameters to allow the development to be considered separate. The DOE argues common ownership as a criteria; all the developer would have to do is have each development owned by a separate holding company to avoid that criteria.

The *Campbell & Gwinn* case spoke to a subdivision as a group common domestic use; and that is a bright line that can be used by the Examiner in the absence of legislation that provides guidance from a legislative body that has deliberated the best policy position for implementing this law. Perhaps DOE should ask the state Legislature to draft a law, or perhaps the DOE should adopt further administrative rules to craft the limitations of exempt wells. Or perhaps the local legislative authority can craft rules under its authority to make appropriate provision for water in subdivisions. It is not up to the Examiner to invent criteria. The Prosecuting Attorney advised PDS of an interpretation of a Washington Supreme Court case, and the Examiner believes that in this situation, it is the most prudent legal course of action to take. The Examiner fully recognizes that there may be consequences from this interpretation that do not satisfy everyone, but the answer is not to ask the Examiner to invent criteria that are not there.

- B. DOE argues that RCW 58.17.110 requires the County to find that the applicant has secured “appropriate provisions for . . . potable water supply.” DOE argues that when a water supply is clearly illegal under *Campbell & Gwinn*, it cannot be considered appropriate, proper, or suitable.

Again, the reasoning behind this argument goes back to the underlying premise that *Campbell & Gwinn* would require only one exempt well for both Highland Ranch North and South in this case. The Examiner rejects that premise, for the reasons stated above.

2. The DOE next argues that one group use of 5000 gpd is insufficient to serve the 19 homes of the Highlands Ranch (both North and South) development. DOE argues that the Hearing Examiner’s determination that each lot would “withdraw” only 175 gpd for purposes of compliance with 5000 gpd group domestic use limit of RCW 90.44.050 is mistaken. DOE quotes the Examiner from finding 13(a)(2):

At a rate of 175 gallons per day (gpd), assuming a development is on on-site septic, a 5000 gpd exempt well can accommodate 28 homes. Therefore, it is clear that the ten homes in the Highlands Ranch South development may be granted an exempt well pursuant to the rule.

DOE states:

RCW 90.44.050 provides a limit on the amount of water that may be “withdrawn” from one or more wells. The amount of water withdrawn is separate and distinct from the net effect on an aquifer if some of the water withdrawn returns to that aquifer by septic return flow. For example, if a well withdraws 5000 gpd and 4000 gpd of that water returns to the source through septic recharge, the withdrawal for purposes of RCW 90.44.050 would still be 5000 gpd although the net reduction of water in the aquifer would be 1000 gpd.

The 175 gpd reference from the Stillaguamish Instream Flow Rule (WAC 173-505-090(6)(a)) is the amount of assumed return flow from an exempt domestic withdrawal of 350 gpd when a home is connected to an on-site septic system. The fact that 175 gpd may return to the source does not in any way change the fact that 350 gpd is withdrawn.

In its July 24, 2008, letter, Ecology stated that the county has the authority to determine how much water it will require for an individual well serving an individual residential connection. Ecology continues to agree with Snohomish Planning and Development Services that the county has the authority and responsibility to make this determination. We apologize if the letter created any confusion by referring to a use rate of 450 gpd per residence. We intended this rate to be one example of what could be considered a reasonable amount of water for a residence. If instead 350 gpd had been used in that calculation, there still would not have been enough water under the ground water exemption to serve the combined 19 homes proposed for the Highlands Ranch North and South subdivisions.

The Hearing Examiner should correct her decision to indicate a reasonable amount of withdrawal per lot. Reasonable estimates can be found in WAC 173-505 (350 gpd) or from the Snohomish Health District Sanitary Code Chapter 9 (enclosed) which indicates that an individual water supply may be considered adequate if it can supply a minimum of 400 gpd, for a residential dwelling.

DOE Petition for Reconsideration, pp. 3-4.

The Examiner rejects the foundational legal premise of DOE's argument, that Highland Ranch South and North should be considered as one development. Beyond that however, is the question of the measure of gallons per day of water for each home. Up until now, there was little information in the record pertaining to the proper way to measure the amount of water per home, and conversely determining the number of homes per subdivision.

The Examiner found the number 175 gpd in the Stillaguamish Instream Flow Rule, WAC 173-505-090(6)(a), which states:

A record of all ground water withdrawals from the reservation shall be maintained by the department. The department will account for water use under the reservation based on the best available information reflecting actual water uses contained in well logs, water availability certificates issued by the counties, water rights issued by the department, public water system approvals or other documents. **When other sources of information are not readily available, the department may account for water use at a rate of three hundred fifty gallons per day (gpd) per residence or business. This figure may be adjusted down to one hundred seventy-five gpd if the residence or business is served by an on-site septic system.**

(Emphasis added)

Without further information, the Examiner saw no reason not to use 175 gpd as a number. The information provided by DOE is very illuminating and makes sense, given the context of the text. The explanation is entitled to great weight, because DOE is the administrative agency charged with administration and enforcement of this rule. *Hama Hama Co. v. Shoreline Hearings Board, et. al*, 85 Wn.2d 441, 448, 536 P.2d 157 (1975). The Examiner understands that 175 gpd is not included in the rule to be used as an appropriate measure of the amount of water that should be required for an individual well in a home.

DOE has attached the "Supplemental Drinking Water Policies and Procedures for Individual Water Systems" as well as the Department of Health and DOE Guidelines, all of which require 400 gpd per residential connection. See Attachments to DOE Petition for Reconsideration. The Examiner may take official notice of these items, as they are official documents of public agencies. While it does not change the outcome of this case, the Examiner does agree with DOE that the appropriate measure of the amount of water for an individual well should be 400 gpd, as required by the Snohomish Health District and the Department of Health and DOE. Under this measurement, Highlands Ranch South, with 10 lots will utilize 4000 gpd, which is under the 5000 gpd limitation for one exempt well.

The Examiner denies DOE's and Kevin Duncan's petitions for reconsideration, but will correct the decision to adopt the 400 gpd standard as adopted by the Snohomish Health District, Department of Health, and DOE.

## DECISION

For the foregoing reasons, DOE's and Kevin T. Duncan's petitions for reconsideration **ARE DENIED**. The Decision will be corrected to adopt the 400 gpd standard, but that will have no effect on the outcome of the decision.

Decision issued this 2nd day of October, 2008.

\_\_\_\_\_  
Barbara Dykes, Hearing Examiner

<b>EXPLANATION OF APPEAL PROCEDURES</b>
---

An appeal to the County Council of the Decision after reconsideration may be filed by any aggrieved Party of Record. "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." [SCC 30.72.070(2)] 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 East-Administration Building, 3000 Rockefeller Avenue, Everett, Washington (Mailing address: M/S #604, 3000 Rockefeller Avenue, Everett, WA 98201) on or before **OCTOBER 16, 2008** 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 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.

---

---

Distribution:

Parties of Record

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.