

**DECISION of the SNOHOMISH
COUNTY HEARING EXAMINER
DENYING IN PART AND GRANTING IN PART
PETITION FOR RECONSIDERATION**

DATE OF DECISION: August 15, 2008

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

APPLICANT/
LANDOWNER: Lifestyle Homes & Construction, Inc.

FILE NO.: 06 102833-000-00-SD

INTRODUCTION

The applicant filed a motion for reconsideration dated and received by the Hearing Examiner's office on July 10, 2008. The Examiner granted the motion for reconsideration and called for comments. No additional comments were received.

ANALYSIS

The applicant's petition alleges that the Examiner made an error of law by making certain findings of facts referenced in Finding of Fact 13(A)(2) of the decision and also including the same error in Condition C(xi).

Finding of Fact 13(A) (2) states:

(2) Instream Flow Rule for WRIA 5

The second issue, the Instream Flow Rule, must also be addressed. This set of rules now provides a new set of requirements that must be met for any development wishing to use exempt wells within Water Resource Inventory Area (WRIA) 5, as the Examiner understands it (see WAC 173-505-010(2)). Exhibit 54, a letter from the Department of Ecology pertaining to the Instream Flow Rule states that it is applicable to the portion of the Stillaguamish Basin wherein Snohomish County and/or City of Arlington approve permits for buildings that rely upon a permit exempt round water well for potable water supply. There is no question that it applies to Highland Ranch North and South.

Craig Ladiser, Director of Planning and Development Services, in a letter dated November 17, 2005, assured the Department of Ecology the following: "

In partnership with Snohomish Health District, Snohomish County confirms that any legally required determinations of adequate potable water for subdivision approvals and for building permits for new dwellings will be consistent with the applicable provisions of Chapter 173-505 WAC."

Exhibit 53. Unfortunately, June 4, 2008 is the first time the Examiner has been presented with this letter or with this WAC chapter. While it does liberalize the requirement for water quite a bit, it comes with some significant restrictions on water usage.

WAC 173-505-020 sets forth the purpose of the chapter which is set instream flows for the Stillaguamish basin to protect wildlife, fish, recreation, water quality, potable water supply, stock watering, and other needs. It also sets forth the DOE's policies to guide protection, utilization, and management of the river, including closures and sets forth a program of future water allocation.

Important to the Highlands Ranch North development is the fact that under WAC 173-05-090 has allocated a total amount of water not to exceed 5 cubic feet per second (cfs) to provide adequate and safe supplies of water for year-round domestic uses. It is further defined for the North and South Fork of the Stillaguamish at 2 cfs and 1.5 cfs respectively, as indicated on Table 8 at WAC 173-05-090(1). Use is only available under the following conditions specified at WAC 173-505-090(2):

(a) The reserved water shall be for ground water uses exempt from a water right permit application. This reservation is for either single or small group domestic uses, as defined in WAC 173-505-030(5).

(b) This reservation of ground water shall not exceed 3.23 million gallons of water per day (5 cfs).

(c) Domestic water use shall meet the water use efficiency standards of the uniform plumbing code as well as any applicable local or state requirements for conservation standards.

(d) This reservation shall be applicable only when the appropriate city(ies) or counties submit a written acknowledgment to the department that confirms that any legally required determinations of adequate potable water for building permits and subdivision approvals will be consistent with applicable provisions of this chapter.

Once this chapter is adopted and written acknowledgment is received, the department will promptly notify those city(ies) or counties, the tribes, water well contractors and the public that the reserve is in effect in those jurisdictions where acknowledgments exist.

(e) It shall be the responsibility of an applicant for a building permit or subdivision approval proposing a water use under the reservation to comply with the conditions in (a), (c), (e), (f), (g) and (h) of this subsection and all other conditions of this chapter.

(f) A new ground water withdrawal under this reservation is not allowed in areas where a municipal water supply has been established and a connection can be provided by the municipal supplier. If an applicant for a building permit or subdivision approval cannot obtain water through a municipal supplier, the applicant must obtain a letter from a municipal supplier prior to drilling a well which states that service was denied. Such a denial shall be consistent with the criteria listed in RCW 43.20.260.

(g) Outdoor water use is limited to the watering of an outdoor area not to exceed a total of 1/12th of an acre for all outdoor uses under each individual domestic water use. Under all circumstances, total outdoor watering for multiple residences under the permit exemption (RCW 90.44.050) shall not exceed one-half acre.

(h) The department reserves the right to require metering and reporting of water use for single domestic users, if more accurate water use data is needed for management of the reservation and water resources in the area of the reservation. All other ground water users under the permit-exemption shall be required to install and maintain measuring devices, in accordance with specifications provided by the department, and report the data to the department.

WAC 173-505-090. This section also emphasizes that the rule provides a single, one-time amount of water. Once the reserved water is fully allocated, it is no longer available. Finally, WAC 173-505-090(6)(a) addresses amount of water usage per residence. It 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. At a rate of 175 gallons per day (gpd), assuming a development is on onsite septic, a 5000 gallon per day exempt well can accommodate 28 homes. Therefore, it is clear that the nine homes in the Highland Ranch North development may be granted an exempt well pursuant to the rule. However, the approval must be conditioned in accordance with WAC 173-505-090(2)(a). Specifically,

- (a) The use is for an exempt single domestic use;
- (b) The use will use 1575 gpd, according to WAC 173-505-090((6)(a));

$$175 \text{ gpd} \times 9 = 1575 \text{ gpd}$$

- (c) Domestic water use shall meet the water use efficiency standards of the uniform plumbing code as well as any local or state requirements for conservation standards, therefore the project will be so conditioned;
- (d) A written acknowledgement of this rule from Snohomish County exists and is on file in this case (Exhibit 53). The DOE has also notified the county that the reserve is in effect pursuant to WAC 173-505-090(2)(d).

(e) Subsection (e) states that conditions (a), (c), (e), (f), (g), and (h) are the responsibility of the applicant.

(f) Groundwater withdrawals are not allowed in areas where a municipal water supply has been established. There is no evidence of a municipal water supplier in the area.

(g) Outdoor water use is limited; total outdoor watering for multiple residences under the permit exemption (RCW 90.44.050) shall not exceed one-half acre. The plat will be conditioned to not allow outdoor watering to exceed one-half acre for the entire plat. The Examiner will also condition the plat to disallow lawns and to require native vegetation on the lots, since lawns require a great deal of watering, especially when they are first established. Watering shall be controlled by the homeowners' association.

(h) Group ground water users under the permit-exemption shall be required to install and maintain water meters or measuring devices, in accordance with the specifications provided by the Department of Ecology, and report the data to the department. The plat will be so conditioned to require that meters be installed and that the homeowners association be responsible for reporting the data to DOE as required by this condition.

Condition C(xi) states:

- xi. Outdoor water use is limited; total outdoor watering for all nine residences under the water permit exemption (RCW 90.44.050) shall not exceed one-half acre as required by state law (WAC 173-505-090(g)). Only native vegetation and low maintenance landscaping requiring little or no water are permitted on lots; no grass lawns are permitted. Watering limits shall be enforced by the homeowners association.

The applicant has raised several issues. One is that, essentially, the WAC is self-enforcing and that these findings and Condition xi should be taken out of the decision for that reason. Therefore, the applicant argues, the plat could be conditioned to merely state that, "[a]ll lots within this subdivision shall be required to comply with the provisions of WAC 173-505."

The Examiner nonetheless believes that specific conditioning is necessary. Snohomish County did acknowledge that "any legally required determination of adequate potable water for building permits and subdivision approvals will be consistent with applicable provisions of this chapter". By letter dated November 17, 2005 Craig Ladiser, Director of Planning and Development Services, assured the Department of Ecology of the following:

In partnership with Snohomish Health District, Snohomish County confirms that any legally required determinations of adequate potable water for subdivision approvals and for building permits for new dwellings will be consistent with the applicable provisions of Chapter 173-505 WAC."

Letter on file with Snohomish County Department of Planning and Development Services (also attached to Applicant Submittal in Fulfillment of Precondition Related to Adequacy of Potable Water Supply, Exhibit 42). The WAC explicitly targets cities and counties as the enforcement arm in these provisions. Reading the next provision, WAC 173-505-090(2)(e), it explicitly puts the burden of compliance on the applicant for a building permit or a subdivision approval:

(e) It shall be the responsibility of an applicant for a building permit or subdivision approval proposing a water use under the reservation to comply with the conditions in (a), (c), (e), (f), (g) and (h) of this subsection and all other conditions of this chapter.

Since a subdivision approval provides the allowance for the exempt well pursuant to the WAC authority, the approval must also provide the conditions of usage that are required along with the allowance. It appears to the Examiner that Director Ladiser, in making the pledge of consistency of approvals to DOE above, agreed that both his agency and the Examiner and Council would ensure that approvals of subdivisions would provide for consistency with the provisions in the WAC. It seems doubtful to the Examiner that the WACs would be complied with if they were not specifically conditioned in the plat.

The Examiner does agree that a little fine tuning is necessary to both the finding and the condition that the petitioner has raised above, however. In the Finding of Fact, the Examiner made some minor errors which she will fix, and in the condition, the Examiner believes she overstepped her authority in prohibiting grass lawns. She will omit that requirement from the condition. Further, the Examiner agrees with the petitioner that the calculation of the amount of gallons per day that the subdivision could theoretically use should not be construed as an upper limit, and will include an extra finding to that effect.

ORDER

For the foregoing reasons, applicant's motion for reconsideration **IS DENIED** as to the request to delete Finding of Fact 13(A)(2), Finding of Fact 13(A)(2)(g) and Condition No. C(xi) and replace it as requested by petitioner. The Examiner **ORDERS** that:

Finding of Fact 13(A)(2) shall be modified as follows:

(2) Instream Flow Rule for WRIA 5

The second issue, the Instream Flow Rule, must also be addressed. This set of rules now provides a new set of requirements that must be met for any development wishing to use exempt wells within Water Resource Inventory Area (WRIA) 5, ~~as the Examiner understands it~~ (see WAC 173-505-010(2)). Exhibit 54, a letter from the Department of Ecology pertaining to the Instream Flow Rule states that it is applicable to the portion of the Stillaguamish Basin wherein Snohomish County and/or City of Arlington approve permits for buildings that rely upon a permit exempt round water well for potable water supply. There is no question that it applies to Highland Ranch North and South.

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watering, and other needs. It also sets forth the DOE's policies to guide protection, utilization, and management of the river, including closures and sets forth a program of future water allocation.

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Once this chapter is adopted and written acknowledgment is received, the department will promptly notify those city(ies) or counties, the tribes, water well contractors and the public that the reserve is in effect in those jurisdictions where acknowledgments exist.

(e) It shall be the responsibility of an applicant for a building permit or subdivision approval proposing a water use under the reservation to comply with the conditions in (a), (c), (e), (f), (g) and (h) of this subsection and all other conditions of this chapter.

(f) A new ground water withdrawal under this reservation is not allowed in areas where a municipal water supply has been established and a connection can be provided by the municipal supplier. If an applicant for a building permit or subdivision approval cannot obtain water through a municipal supplier, the applicant must obtain a letter from a municipal supplier prior to drilling a well which states that service was denied. Such a denial shall be consistent with the criteria listed in RCW 43.20.260.

(g) Outdoor water use is limited to the watering of an outdoor area not to exceed a total of 1/12th of an acre for all outdoor uses under each individual domestic water use. Under all circumstances, total outdoor watering for multiple residences under the permit exemption (RCW 90.44.050) shall not exceed one-half acre.

(h) The department reserves the right to require metering and reporting of water use for single domestic users, if more accurate water use data is needed for management of the reservation and water resources in the area of the reservation. All other ground water users under the permit-exemption shall be required to install and maintain measuring devices, in accordance with specifications provided by the department, and report the data to the department.

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Emphasis added. At a rate of 175 gallons per day (gpd), assuming a development is on onsite septic, a 5000 gallon per day exempt well can accommodate 28 homes. Therefore, it is clear that the nine homes in the Highland Ranch North development may be granted an exempt well pursuant to the rule. However, the approval must be conditioned in accordance with WAC 173-505-090(2)(a). Specifically,

- (a) The use is for an exempt single or small group domestic use;
- (b) The use will theoretically use 1575 gpd, according to WAC 173-505-090((6)(a);

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- (c) Domestic water use shall meet the water use efficiency standards of the uniform plumbing code as well as any local or state requirements for conservation standards, therefore the project will be so conditioned;
- (d) A written acknowledgement of this rule from Snohomish County exists and is on file in this case (Exhibit 53). The DOE has also notified the county that the reserve is in effect pursuant to WAC 173-505-090(2)(d).
- (e) Subsection (e) states that conditions (a), (c), (e), (f), (g), and (h) are the responsibility of the applicant.
- (f) Groundwater withdrawals are not allowed in areas where a municipal water supply has been established. There is no evidence of a municipal water supplier in the area.

(g) Outdoor water use is limited; total outdoor watering for multiple residences under the permit exemption (RCW 90.44.050) shall not exceed one-half acre. The plat will be conditioned to not allow outdoor watering to exceed one-half acre for the entire plat. ~~The Examiner will also condition the plat to disallow lawns and to require native vegetation on the lots, since lawns require a great deal of watering, especially when they are first established.~~ Watering shall be controlled by the homeowners' association.

(h) Group ground water users under the permit-exemption shall be required to install and maintain water meters or measuring devices, in accordance with the specifications provided by the Department of Ecology, and report the data to the department. The plat will be so conditioned to require that meters be installed and that the homeowners association be responsible for reporting the data to DOE as required by this condition.

(3) The Examiner finds that the amount of water calculated in Finding of Fact 13(A)(2)(b) for purposes of determining whether the subdivision meets the requirement of the rule, does not provide an upper limit of water usage for the plat or make any judgment to that effect. Neither the County nor the state has a regulation providing how much water an individual well may use per day, and the calculation was made simply for making the determination of adequate potable water supply only and compliance with the Instream Flow Rule.

Condition C shall be modified as follows:

Condition C.

- xi. Outdoor water use of the domestic water is limited; total outdoor watering for all 21 residences under the water permit exemption (RCW 90.44.050) shall not exceed one-half acre as required by state law (WAC 173-505-090(g)). ~~Only native vegetation and low maintenance landscaping requiring little or no water are permitted on lots; no grass lawns are permitted.~~ Watering limits shall be enforced by the homeowners association.

The Petition for Reconsideration is DENIED in part and GRANTED in part.

Order issued this 15th day of August, 2008.

Barbara Dykes, Hearing Examiner

EXPLANATION OF APPEAL PROCEDURES

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 **AUGUST 29, 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.