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

In the Matter of the Application of	)	
	)	<b>FILE NO. 06 124975 SD</b>
<b>ANDY RYSSEL</b>	)	
	)	
8-lot Rural Cluster Subdivision (RCS) on 19 acres	)	
with an associated setback variance	)	

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DATE OF DECISION: January 25, 2008

PROJECT NAME: *Maltby Meadows*

DECISION (SUMMARY): The requested setback variance is **DENIED**. The proposed subdivision is **DENIED WITHOUT PREJUDICE**.

**BASIC INFORMATION**

GENERAL LOCATION: The property is located on the north side of Maltby Road, near the intersection of Maltby Road and 73<sup>rd</sup> Drive SE, Snohomish, Washington.

ACREAGE: 19 acres

NUMBER OF LOTS: 8

AVERAGE LOT SIZE: 52,713 square feet

MINIMUM LOT SIZE: 16,779 square feet

DENSITY: .41 du/ac (gross)

ZONING: R-5

COMPREHENSIVE PLAN DESIGNATION:

General Policy Plan Designation: Rural Residential (1 du / 5 ac, Basic)

UTILITIES:

Water: Cross Valley Water District  
Sewer: Individual septic

SCHOOL DISTRICT: Monroe No. 103

FIRE DISTRICT: No. 7

**INTRODUCTION**

The applicant filed the Master Application on June 15, 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 22, 23 and 24)

A SEPA determination was made on August 27, 2007. (Exhibit 19) No appeal was filed.

The Examiner held an open record hearing on November 14, 2007, the 69<sup>th</sup> day of the 120-day decision making period. Witnesses were sworn, testimony was presented, and exhibits were entered at the hearing. 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.

**PUBLIC HEARING**

The public hearing commenced on November 14, 2007 at 1:08 p.m.

1. The Examiner announced that he had read the PDS staff report, reviewed the file and viewed the area and therefore was generally apprised of the particular request involved.
2. The applicant, Andy Ryssel, acting for Maltby Meadows, LLC, was represented by himself and by David Carson John Bissell and Chuck Lindsey. Snohomish County was represented by David Radabaugh of the Department of Planning & Development Services.
3. Pre-hearing letters raising concern or opposition were filed by vicinity residents Gerald and Judith Andrist (Exhibit 27), Barbara Ball and Michael Potter (Exhibit 28) and Al and Jean Grieve (Exhibit 29). Testimony was taken at the hearing from Nancy Davis in support of the application and from Melanie Baird, who expressed concern or opposition. The staff report (Exhibit 39, p. 3) acknowledges and addresses each of the issues raised by the public.

The hearing concluded at 3:38 p.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 applicant, Andy Ryssel, through Maltby Meadows, LLC, filed an application (Exhibit 1) for an eight-lot rural cluster subdivision on 19 acres zoned R-5 located approximately one-half mile east of Highway 9 on the north side of Maltby Road. Without the rural cluster subdivision bonus, only four lots could be placed on-site. Proposed Lot 3 is to contain a mini-equestrian center to accommodate up to 24 horses. The setback variance requested for that facility is a contested issue herein. The variance must be decided by the Examiner before consideration of the plat because the preliminary plat plans would have to be modified significantly if the variance were denied. The Department of Planning & Development Services recommends that the variance be denied. (Exhibit 38)
2. The applicant had purchased the subject site on June 20, 2006 (Exhibit 13) and more than seven years later filed the instant application on June 15, 2006. (Exhibits 1, 38). About four months thereafter on October 24, 2006, the applicant filed an affidavit of innocent purchaser (Exhibit 13) attesting that he had not known at the time of purchase that the subject site had been divided from other property in violation of State and County subdivision laws. The County acknowledged that affidavit on January 11, 2007.
3. The application was resubmitted on November 14, 2006 and resubmitted again -- but with a setback variance request -- on March 22, 2007. On June 7, 2007, the applicant also requested a written but informal code interpretation on the setback required for the mini-equestrian facility. The code interpretation (Exhibit 37) was issued a month later on July 9, 2007 by the County's Chief Planning Officer, Linda Kuller. Ms. Kuller concluded that the equestrian facility must be set back 50 feet from any property line of the proposed Lot 3 on which the equestrian facility was to be located. The applicant had sought approval of one-tenth of that -- a five-foot setback -- from Lot 3's southern boundary. The language interpreted by Ms. Kuller is the following from Snohomish County Code 30.23.110(8):

*"Equestrian Center and Mini-Equestrian Center: Open or covered arenas must be at least 50 feet from any external property line."*

4. On July 11, 2007, two days after Ms. Kuller's code interpretation was published, the applicant submitted revised plans (Exhibits 21 A – E) Another set of revised plans (Exhibits 25 A – E) was submitted on September 24, 2007. Both submittals at Sheet B contain "Mini-equestrian Center Notes" reading:

*"...All structures shall be set back as required in SCC 30.23.110(8)."*

In contradiction of that note, at hearing the applicant submitted a subdivision schematic (Exhibit 45) showing the contested setback and labeling it: *"5-foot building setback at adjacent lot lines within the plat (TYP)"*

5. At hearing, the applicant argued extensively that, in the absence of any County Code definition of the term "external property line", the term should be interpreted to mean the "parent" plat boundary line. Ms. Kuller's interpretation disposes of that argument at her Finding No. 11 in which she notes that the standard application of setback provisions:

“...require[s] measurement of setbacks from the property lines of **the lot where the use is proposed.**” (Emphasis supplied.)

6. Ms. Kuller’s Finding No. 11 also notes that there is no indication that the language at issue was intended to apply to a mini-equestrian center only if located in a subdivision. The Examiner concurs. Because the language applies to a mini-equestrian center whether or not located in a subdivision, a setback measurement based on a subdivision’s parent parcel’s boundaries could not have been intended.
7. The final sentence of Ms. Kuller’s code interpretation reads, in part:

*“The building setback requirements...help to protect neighboring properties from potential adverse impacts that could be associated with a mini-equestrian center and associated arenas.”*

The neighbors who raised concerns in pre-hearing submittals all reside on 72<sup>nd</sup> Avenue SE, which abuts the western boundary of the subject site. (See Finding No. 11 below.)

8. The applicant argues (Exhibit 18) that the application meets the four requisites for approval of a variance set out at SCC 30.43B.100. All four requirements must be met in order for the Examiner to approve a variance, as follows.
9. A. There are special circumstances applicable to the subject property or to the intended use, such as size, shape, topography, location or surroundings, that do not apply generally to other properties or classes of use in the same vicinity and zone;

The applicant asserts that an electrical powerline easement and related danger tree easement consume 32% of the 19.1-acre site, or 6.1 acres, and thus constrain realization of the potential residential density of eight lots, coupled with further constraints imposed by steep slopes, a Type 4 stream and Category 3 wetland and limited areas suitable for septic drainfields and reserve areas.

Analysis: The Department of Planning & Development Services’ staff report (Exhibit 38, p. 9) points out (1) that the stream, ravine and wetlands apply to some adjacent or nearby properties, (2) that many other lots in the vicinity are encumbered by the powerline easement and (3) alderwood soils are commonplace in the vicinity. The Examiner concurs and adds that the applicant is using the powerline easement as most of the five-acre minimum lot size required for the proposed mini-equestrian center but, instead of placing the equestrian facility near the center of the five acres, must locate it within 50 feet of the properties of the neighbors to the west along 72<sup>nd</sup> Avenue SE.

10. B. A variance is necessary for the preservation and enjoyment of a substantial property right or use possessed by other properties in the same vicinity and zone but which because of special circumstances is denied to the property in question.

Analysis: No other property in the vicinity or in the entire County has an absolute property right to achieve a doubled lot yield of eight lots instead of the four permitted by the underlying zoning while also devoting five acres or more to a mini-equestrian center. The applicant has chosen to do so, thus creating a self-imposed hardship. That does not warrant a variance from the setback imposed legislatively in order to supplement the normal setbacks required by the underlying zone for the mini-equestrian center use. (See SCC 30.23.110: *Special setbacks for certain uses.*) They applicant may choose fewer lots or smaller lots or loss of the equestrian facility but, whatever that choice, the applicant retains a reasonable, viable right to develop the subject site even if the requested variance is denied. The Examiner concurs with the following language from the staff report (Exhibit 38. p. 9):

*“Requiring a development to meet applicable setbacks and meet site design standards such that the subdivision lot yield may not be maximized does not deny a property right.”*

11. C. The granting of the variance will not be materially detrimental to the public welfare or injurious to the properties or improvements in the vicinity and zone in which the subject property is located.AA

The applicant asserts that by inserting the septic drainfield and reserve for proposed Lot 8 between the equestrian facility and other proposed lots, the distance between the equestrian facility and any dwelling will be at least 135 feet instead of the 50 feet required.

Analysis: The argument is without merit. The 50-foot setback required by SCC 30.23B.110(8) is from the property line, not from any dwelling, presumably because the County Council intended the residents adjacent to be able to enjoy their lawns as well as their dwellings. The Andrists (Exhibit 27) ask about odor and noise control: *“Especially when we are downwind for both.”* The Andrists’ neighbors (Ball & Potter, Exhibit 28) raise concern about disposition of animal waste. Al and Jean Grieve (Exhibit 29) assert that adjacent properties should not be asked to absorb the negative impacts associated with manure disposal and state: *“A minimal setback should not be allowed.”*

Moreover, the proposed septic drainfield and reserve area for proposed Lot 8 is located approximately 500 feet from proposed Lot 8 (center to center) and 48 feet higher (358’ cf. 310’) than proposed Lot 8 and will have to be pumped that distance and that height is order to “drain”. (Exhibits 43 and 45). The evidence of record does not establish whether that proposal for septic design is acceptable.

12. D. The granting of the variance will not adversely affect the comprehensive plan.

The proposed use is allowed in the Rural Residential designation of the General Policy Plan. The proposal implements the Comprehensive Plan.

13. Any finding of fact above which should be deemed a conclusion of law is adopted as such.

## CONCLUSIONS OF LAW

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

1. The Hearing Examiner has jurisdiction to decide upon a variance which, as in this instance, is submitted with another application requiring a predecision hearing by the Hearing Examiner. (SCC 30.43B.020(2))
2. The code interpretation discussed in the Findings of Fact above is not before this Examiner on appeal. The interpretation of language in the Snohomish County Code by the Chief Planning Officer is owed substantial weight by the Hearing Examiner in deference to the administrative expertise and experience of that officer. Thus, the Examiner is not to substitute her/his judgment for that of the Chief Planning Officer unless a preponderance of the evidence provides good cause to do so. In this instance, the reasoning and analytical method demonstrated by the code interpretation document (Exhibit 37) result in a preponderance of the evidence supporting the interpretation. Thus, the Examiner accords persuasive weight to the code interpretation to the extent that the code interpretation bears on the issue of whether a related variance is warranted.
3. Further, if enacted language is clear in its face, the language should neither be construed nor interpreted. In this instance, had there been no code interpretation, the Examiner would have concluded independently that the language of SCC 30.23.110(8) unarguably requires setbacks to be measured from Lot 3 lot lines. The result is that a proposed five-foot setback instead of the required 50-foot setback requires approval of a variance. The Examiner so ruled orally at hearing.
4. Analysis now turns to the requested variance. The variance requested fails to meet three of the four decision criteria set out at SCC 30.43B.100 as described at Findings of Fact eight through 12 above. Consequently, the subdivision may be modified and the Examiner does not wish to cause undue delay in that modification. However, the Examiner will not attempt to modify the subdivision proposal in this document. Therefore, the Examiner denies the subdivision without prejudice pursuant to SCC 30.72.060(3) so that refilling can be immediate.
5. Any conclusion of law above which should be deemed a finding of fact is 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 setback variance and an eight-lot rural cluster subdivision is hereby **DENIED WITHOUT PREJUDICE**.

Decision issued this 25<sup>th</sup> day of January, 2008.

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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, 2<sup>nd</sup> Floor, County Administration-East Building, 3000 Rockefeller Avenue, Everett, Washington, (Mailing Address: M/S #405, 3000 Rockefeller Avenue, Everett WA 98201) on or before **FEBRUARY 4, 2008**. 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, 2<sup>nd</sup> Floor, County Administration-East Building, 3000 Rockefeller Avenue, Everett, Washington (Mailing address: M/S #604, 3000 Rockefeller Avenue, Everett, WA 98201) on or before **FEBRUARY 8, 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 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.

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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>
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