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

In the Matter of the Application of )  
 )  
**Dale Hylton** ) **FILE NO. 06-133486 SD**  
 )  
7-lot Rural Cluster Subdivision (RCS) on 15.5 acres )

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DATE OF DECISION: December 26, 2007

PROJECT NAME: *Lake Riley Estates*

DECISION (SUMMARY): The application is **DENIED WITHOUT PREJUDICE.**

**BASIC INFORMATION**

GENERAL LOCATION: The property is located at approximately 28001 Lake Riley Road, Arlington, near the intersection with West Lake Riley Road, in Section 20, Township 32 North, Range 7 East, W.M., Snohomish County, Washington.

ACREAGE: 15.6 acres

NUMBER OF LOTS: 7

AVERAGE LOT SIZE: 47,660 square feet

MINIMUM LOT SIZE: 43,762 square feet

DENSITY: 0.45 du/ac (gross)

ZONING: R-5

COMPREHENSIVE PLAN DESIGNATION:

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

UTILITIES:

Water: Individual wells  
Sewer: Individual septic

SCHOOL DISTRICT: Arlington No. 16

FIRE DISTRICT: No. 21

## INTRODUCTION

The applicant filed the Master Application on December 22, 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 18, 19 and 20)

A SEPA determination was made on June 18, 2007. (Exhibit 17) No appeal was filed.

The Examiner held an open record hearing on November 13, 2007, the 124<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 13, 2007 at 11:03 a.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, Dale Hylton, appeared and testified and was also represented by Jesse Jarrell of Western Engineers, Inc. and Scott Brainard of Wetland Resources. Snohomish County was represented by Paul MacCready of the Department of Planning and Development Services (PDS) coordinating a PDS team consisting in Louis Coletta, Patrick McGraner and Tom Sage.
3. One member of the general public, Esther Van Der Berg, appeared and testified (Partial text, Exhibit 38) expressing opposition. She also submitted a pre-hearing document into the record (Exhibit 24), co-signed by Allen and Laura Bailey, Dave Danielson, Charles and Cheryl Greenwood and Shira McDonald. Laura Bailey, Shira McDonald and Timothy McDonald submitted pre-hearing documents in opposition. (Exhibits 25a, 36 and 37, respectively.) Those citizens' arguments are examined below.

The hearing concluded at 12:24 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, Dale Hylton, filed an application for the first rural cluster subdivision to be proposed in the Lake Riley Road vicinity: a seven-lot proposal where only three lots are otherwise allowed by the R-5 zoning. The subject 15.6-acre site is located on the east side of Lake Riley Road approximately 700 feet southeast of Lake Riley. All surrounding property is also zoned R-5 and is developed with some homes on large acreages but is primarily undeveloped forest and pasture. Much of the subject site and broader vicinity is wetlands according to the testimony of Tom Sage of PDS.
2. The applicants consulting engineer, Jesse Jarrell, testifies that there are approximately 500 acres to be developed in the vicinity. He notes that, if developed as now zoned, 100 new homes could be built. If developed at the density proposed herein, which is .43 dwellings per acre, the Examiner notes that the number of homes on the 500 acres would more than double to at least 215 homes. No public storm or sanitary sewer or potable water source serves the area. The County's Louis Coletta testifies that, eventually, water and sewer will come in. The Examiner observes that, until then, any rural cluster subdivisions in the vicinity will have been approved with private, individual wells and septic systems and may remain as problematic anomalies interspersed among later-approved subdivisions served by public water and sewer.
3. All seven proposed lots exceed one acre in size with the largest being 50,077 square feet. Wetlands lie in the center of the subject site, resulting in two clusters of lots: Lots 1, 2 and 3 grouped on the northern portion of the site and Lots 4 through 7 grouped on the southern portion. The two separate clusters are each served by a separate, unconnected interior plat driveway. Because of that wetland, the proposed rural cluster subdivision cannot be placed internal to the site, which makes perimeter visual buffering vital in this instance.
4. Because a Forest Transition Area abuts on the east, a 100-foot Commercial Forest Resource Protection Buffer is required within the proposed plat, encompassing portions of a well protection setback, a portion of a 50-foot Type 3 wetland buffer and some Native Growth Protection Area of Tracts 995 and 996. Along Lake Riley Road, a 50-foot site obscuring buffer is included within the recreational open space of Tracts 997 and 999.
5. Opponent Esther Van Der Berg owns more than 100 acres in the vicinity and has lived in her current home for the 32 years since 1975. She points out that the area was once zoned for one home on 10 acres but, she argues, "...greed changed that too." (Exhibit 38) She notes that this applicant owns another 48 acres on Lake Riley Road and she charges that if the instant application is approved it will open the remainder of the area to similar development. Timothy McDonald owns 164 acres abutting the eastern edge of the subject site and asks, rhetorically, if he can get the same density as is requested here. (Exhibit 23)
6. The above-referenced Timothy McDonald (Exhibits 23 and 37) points out that his property adjoins the subject site's east boundary for approximately 1,320 feet. He received \$10,000 in federal and Washington State funding in year 2000 to enhance the stream on his property for salmon habitat. He implemented that enhancement with involvement of John Keller of the Washington State Department of Natural Resources and David Brock of the Washington State Department of Fish and Wildlife. He notes that he has hosted visitors from around the Northwest based on the project's success in salmon restoration. Mr. McDonald

asserts that the subject site drains to his property and that more analysis of the subject site's runoff is needed.

7. The Environmental Checklist submitted with the application asks if there is any surface water body on or in the immediate vicinity of the subject site and, if so, will any work occur within 200 feet of it. (Exhibit 2, Section 1.B.3.a.(1) and (2)) The reply does not mention Mr. McDonald's abutting salmon project. The applicant's consultant, Scott Brainard, testifies that the Type 3 salmon-bearing stream is estimated from aerial photographs to be 250 feet east of the subject property. Mr. Brainard asserts that the Snohomish County Code requires identification of only streams and wetlands within 100 feet of the subject property. The County biologist, Patrick McGraner, testifies that the County regulations under which this proposal is vested indeed require showing critical areas only within 100 feet of the property. He states with admirable clarity: "...frankly I didn't review streams that were in excess of 100 feet off of the property." Mr. Brainard points out that, although not required in his opinion, the salmon-bearing stream is identified at the first page of the Critical Area Study (Exhibit 14) as:

"A fish bearing tributary to Lake Riley is located approximately 250 feet off-site to the east."

8. Actual measurement rather than estimation might find that stream within the 200-foot range of concern of the Environmental Checklist. The Targeted Storm Drainage Study (Exhibit 12) reports at the first page of Section 4 that drainage Basin 1 makes up 92% of the subject site. That Study adds that the majority of that Basin's flow is to the central area of the subject site from where "...it flows east and into the neighboring property." That property is the site of Mr. McDonald's salmon restoration project. As noted, the drainage route east to that salmon project is through on-site and off-site wetlands themselves.
9. Specifically, Section 6 of the Targeted Storm Drainage Study (Exhibit 12) points out that the proposed storm drainage system disperses and infiltrates the runoff "...into the surrounding environment." That surrounding environment is largely wetlands, as defined in the applicant's Open Space Management Plan, as follows:

*"Wetland areas are located throughout the site...These three wetlands are all part of the same wetland which extends into the neighboring property to the east of the site."*

10. Detention is not provided. Instead, roof and footing drains are to splash blocks. All asphalt areas on site will drain to one or the other of two open ditches on the south side of each access drive, then into one of two bio-swales for treatment on the western sides of Lots 3 and 7, then into the wetland buffers. The length of travel as sheet flow for both the roof/footing drains and the asphalt areas is at least 100 feet from any wetland boundary. However, the site drains primarily to wetlands and wetland buffers feeding a salmon recovery project. If 500 acres is permitted the same type of drainage, the result could be critically impactful. No study of that cumulative result is of record.
11. Further, the proposed storm drainage system is dependent upon homeowner maintenance according to the now 15-year-old Stormwater Management Manual for the Puget Sound Basin (February 1992). (See Exhibit 12, Section 7, p. III-3-47). The Manual notes at page III-3-49:

*"It is important to consider the fact that since these facilities are installed on individual structures, provision needs to be made for the maintenance of these structures, **especially when the systems are installed on single family dwellings.** (Emphasis supplied.)"*

12. The findings above give cause to question the efficacy of the wetland and stream protection that will be available for the approximately 500 acres in the vicinity if approval of this proposed subdivision sets the precedent for development. A drainage system tolerable for three or seven lots may not be so for 215 or more lots, particularly when the area is comprised largely of wetlands, some of which drain to a salmon-bearing stream and salmon restoration project.
13. The applicant's representative, Jesse Jarrell, points out that 500 acres could be developed as now zoned in the vicinity with 100 new lots and, if so developed, the 35% site coverage permitted by the R-5 zoning would allow that development to be more impactful than this rural cluster subdivision. The Critical Area Study (Exhibit 14) describes wetland buffer impacts to be that only 890 square feet of the buffer of Wetland A will be destroyed by building the access roads to proposed Lots 1 and 2. In mitigation, the applicant proposed to designate additional buffer at a ratio of 37:1; i.e., 33,405 square feet of additional forested area as buffer. The record does not describe the relationship of that buffer to required setbacks, unbuildable areas, or forestry protection areas.
14. The applicant proposes a separate private well on each of the seven proposed lots in order to provide potable water. The Snohomish Health District (Exhibit 32) accepts the concept of those seven wells. The Examiner takes notice that the Snohomish Health District requires (pursuant to WAC 173-160-321) that each well's test yield must be at least 400 gallons per day. Therefore, for the proposed seven lots, the total yield of the seven individual wells is required to be 2,800 gallons per day. That total is less than the 5,000 gallons of water per day allowed to be withdrawn under the domestic use exemption set out at RCW 90.44.050. However, if fire flow requirements cause the gallons per lot to be approximately 800 gallons per day, the proposed seven lots would require 5,600 gallons per day, which exceeds the 5,000 gallons per day exemption of RCW 90.44.050. This record does not explain any fire flow needs, nor are there any comments in the record from Fire District No. 21 or the County Fire Marshall. If fire flow requirements bring gallons needed per home per day to 800 gallons, the seven proposed homes would require 5,600 gallons per day, which exceeds the residential exemption. This record does not address that issue or its impact on the community along Lake Riley Road. The Examiner is concerned about how much density 500 acres might achieve as rural clusters if each separate cluster is within the 5,000 gallon daily exemption.
15. A contested issue at hearing was whether the subject site has access to Lake Riley Road. The issue is resolved by the fact that although the access is apparently not recorded, it has been established by prescriptive rights to an easement. (Exhibit 26 and testimony, Jesse Jarrell and Exhibit 15) The DPW reviewed the request with regard to traffic mitigation and road design standards. That 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 that review, the DPW has determined that the development is concurrent and has no objection to the request subject to various conditions.
16. No park mitigation payment is required in White Horse Park District No. 304 wherein the subject property is located.
17. School mitigation requirements under Chapter 30.66C SCC have been reviewed and set forth in the conditions. The Arlington School District reports (Exhibit 28) that school children of all grade levels will be picked up at each of the two access points on Lake Riley Road. Thus, no related off-site improvements are required of the applicant.

18. The subject property is designated Rural Residential-5 on the GPP Future Land Use map, and is not located within an Urban Growth Area (UGA). It is not located within a mapped Growth Phasing Overlay. According to the GPP, the Rural Residential-5 designation applies to lands which were previously designated Rural by various subarea plans and have been subsequently zoned R-5. The implementing zone in this designation will continue to be the R-5 zone.
19. Concerning 30.41A SCC requirements, the subject lots will not be subject to flood, inundation or swamp conditions. The lots as proposed are outside of all regulated flood hazard areas. As conditioned, the plat will meet all SCC 30.41A.210 design standards for roads.
20. The subject rural cluster subdivision (RCS) application has been reviewed for conformance with the RCS standards in Chapter 30.41C SCC. The applicant has provided an RCS development plan and preliminary plat, the latest versions of which were received by PDS on August 8, 2007 (Exhibit 16), and an open space management plan (Exhibit 13) that is to be implemented by a homeowners' association.
21. Any finding of fact in this decision which should be deemed a conclusion of law is hereby adopted as such.

### **CONCLUSIONS OF LAW**

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

1. A rural cluster subdivision is subject to the same approval process and requirements of SCC 30.41A as any standard subdivision. The requirements for approval are the same except as specifically provided at SCC 30.41C.200 through .240. (SCC 30.41C.030)
2. It follows that a rural cluster subdivision is subject to the decision criteria of SCC 30.41A.100(1), which provide that the hearing examiner “**shall**” (emphasis supplied) inquire into the public use and interest proposed to be served by the establishment of the subdivision.
3. SCC 30.41A.100(1) further provides that the public use and interest includes the public health, safety and general welfare and, inter alia,, specifically:
  - (1) drainage ways,
  - (2) potable water supplies,
  - (3) sanitary wastes,
  - (4) fire protection.
4. SCC 30.41A.100(2) provides that if the Examiner enters findings that adequate provision is made by the proposed subdivision for the decision criteria listed immediately above, a second and separate written finding by the Examiner must be that the proposed subdivision conforms to all applicable development regulations and construction codes. Note the use of the word “**or**” (emphasis supplied) in the language of SCC 30.41A.100(2):

*“If the hearing examiner finds that the proposed subdivision does not make such appropriate provisions **OR** that development regulations[sic] requirements are not met, **OR** the public use and interest will not be served, then the hearing examiner may deny the proposed preliminary subdivision.”*

5. That quoted language renders nonsense the oft-repeated maxim that if a proposed subdivision “meets code”, it has to be approved. The drafters of the SCC recognized that project-specific facts could result in a project that “meets code” nevertheless failing to provide, for examples, (1) drainage ways, (2) potable water supplies, (3) sanitary waste facilities and (4) fire protection. Otherwise stated, to “meet code”, a subdivision must meet all parts of SCC 30.41A.100(1) and (2), not merely the portion that requires compliance with development regulations.
6. It is uncontested in this record that the instant application is the first rural cluster subdivision proposed along Lake Riley Road. It is uncontested that the broader, general area is largely wetland, as is the subject site. It is uncontested that approximately 500 acres comprise the broader, general area near Lake Riley. It is uncontested that approval of the instant proposal would likely set the pattern for the development of much or all of the remaining acres at more than double the density of the underlying R-5 zoning. (Findings Nos. 1, 2, 5) The same 75-foot and 100-foot wetland buffers that apply to the proposed seven-lot subdivision would apply if the property were developed with three lots as now zoned. The wetlands and streams involved would be protected by the Critical Area Regulations (SCC Title 30.62) whether or not developed as a rural cluster subdivision. Consequently, there is no merit in a generalized claim that the rural cluster option will produce a more environmentally sensitive result. A thorough, site-specific analysis of that claim is required and is not provided in this record.

#### **Drainage Ways**

7. Dispersal and infiltration of storm drainage is not acceptable when the receptacle is wetland or wetland buffers which, in turn, drain to a salmon-bearing stream acknowledged by a government-funded salmon restoration facility. No analysis of the impact of the proposed drainage system upon the hydro-period of that stream or other impacts on that stream’s functional value is of record. The 100-foot limit for such consideration is a rebuttable presumption overcome by site-specific evidence in this instance showing a proposed drainage system using the wetlands and stream as drainage components instead of being protected by the subdivision’s drainage system. It is concluded as a matter of law that the application fails to make appropriate provision for drainage ways. The purpose of the SEPA checklist and threshold analysis is to help the decision-maker – the Examiner, in this instance. Absent such analysis, the Examiner may and must make that inquiry during the hearing on the matter. Further hearing is required on the issue of effects of the proposed subdivision on the wetlands and stream on-site and to the east.

#### **Potable Water Supply**

8. Assuming fire flow will be required as the vicinity develops to the pattern set by approval of the instant application, each home will require 800 gallons per day. There will be approximately 215 homes at build-out as rural cluster subdivisions. Thus, the total potable water needed will be 172,000 gallons per day. No evidence of record demonstrates that a water right for any amount is even possible in the subject watershed or aquifer. Nor is there any evidence of record that the watershed or aquifer can supply the water needed by only the subject plat, with or without fire flow. It is concluded as a matter of law that the application fails to demonstrate that appropriate provision has been made for potable water supply.

**Sanitary Waste**

9. The applicant has the right to install up to three individual residential septic systems on the subject now without a rural cluster subdivision. To more than double that to seven septic systems is unsupported by the evidence of record, given the predominantly wetland character of the subject site and the broader community along Lake Riley Road, the absence of any storm drainage system other than infiltration into wetlands themselves, and the salmon-bearing stream and project to which that drainage will flow. It is concluded as a matter of law that appropriate provision has not been made for sanitary waste.

**Fire Protection**

10. The record is silent as to whether or not the water required for fire flow now or in the immediate future will be available in sufficient quantity from the seven proposed wells or the total of 215 wells reasonably to be expected following approval of this first rural cluster subdivision in the Lake Riley Road community. That issue has to be addressed in a subsequent application. Until then, the evidence of record does not demonstrate appropriate provision for fire protection.
11. Any conclusion of law 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 seven-lot rural cluster subdivision is hereby **DENIED WITHOUT PREJUDICE** pursuant to SCC 30.41A.040(2) so that the application may be reactivated under the original project number and without additional fees if a revised application consistent with this decision is submitted within six months of the date of this decision.

Decision issued this 26<sup>th</sup> day of December 2007.

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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 **JANUARY 7, 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 **JANUARY 9, 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.

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Staff Distribution:

Department of Planning and Development Services: Paul MacCready

<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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