

BEFORE THE
SNOHOMISH COUNTY HEARING EXAMINER

DECISION of the DEPUTY HEARING EXAMINER

In the Matter of the Application of)
) **FILE NO. 06 135153 LU**
A.D. SHAPIRO ARCHITECTS)
)
Rezone from Residential-8,400 (R-8,400) to)
Low Density Multiple Residential (LDMR))

DATE OF DECISION: October 9, 2007

PLAT/PROJECT NAME: *88th Avenue West LDMR*

DECISION (SUMMARY): Rezone from R-8,400 to LDMR is **DENIED**.

BASIC INFORMATION

GENERAL LOCATION: This project is located on the west side of 88th Avenue W, south of 233rd Place SW, Edmonds, Washington.

ACREAGE: .57 acre

ZONING: CURRENT: R-8,400
 PROPOSED: LDMR

COMPREHENSIVE PLAN DESIGNATION:

General Policy Plan Designation: Urban Medium Density Residential

UTILITIES:

Water/Sewer: Olympic View Water and Sewer District

SCHOOL DISTRICT: Edmonds No. 15

FIRE DISTRICT: No. 1

INTRODUCTION

The applicant filed the Master Application on March 21, 2007. (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 9, 10 and 11)

A SEPA determination was made on July 17, 2007. (Exhibit 8) No appeal was filed.

The Examiner held an open record hearing on September 11, 2007, the 81st day of the 120-day decision making period.

PUBLIC HEARING

The public hearing commenced on September 11, 2007 at 3:01 p.m.

1. The Examiner stated that he had read the PDS staff report, reviewed the file and viewed the area.
2. The applicant, A.D. Shapiro Architects, was represented by Leslie Brown. John Anderson testified in support of the application. Snohomish County was represented by Roxanne Pilkenton of the Department of Planning and Development Services.
3. Pre-hearing documents expressing concern or opposition were submitted by David Thorpe (Exhibit 14) and Bruce P. Witenberg (Exhibit 15). In addition, Brian Rice testified and submitted a letter (Exhibit 20).
4. The hearing concluded at 3:45 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 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, A.D. Shapiro Architects, filed an application requesting approval of a rezone of a half-acre (.57-acre) parcel from R-8,400 to Low Density Multiple Residential (LDMR) in order to construct six detached single-family dwellings pursuant to an administratively approved site plan. Only two or possibly three homes could be constructed as currently zoned. The subject site is a vacant (but for one shed to be removed), wooded lot located west of 88th Avenue W between Maple Lane and Madrona Lane. The site is within the City of Edmonds Urban Growth Area. No critical area (steep slope, wetland, or stream) is on or near the site. All trees will be removed. Public sewer and water will be supplied by Olympic View Water and Sewer District. The Snohomish County Health District has no objection to this proposal if public water and sewer are furnished.

3. The subject site and abutting parcels on three sides are zoned predominantly single-family residential (R-8,400). On the west the zoning is MR. The vicinity is known as the Esperance neighborhood, which is in Snohomish County but surrounded by the City of Edmonds. The neighborhood is developed generally in lot sizes and dwelling densities consistent with the existing zoning of R-8400. The County island is bounded by Highway 99 on the east, 92nd Avenue W on the west, 220th Street SW on the north, and 234th Street SW on the south. Within those boundaries, rezones to LDMR have been occurring. One year ago, one of those LDMR developments added 21 homes abutting the north property line of the home of Brian Rice at the intersection of 88th Avenue W and Holly Lane: 1½ blocks north of the subject site.
4. The Environmental Checklist (Exhibit 2) reports that none of the six proposed dwellings will ~~not~~ exceed the zone's height limit (35 feet) and that the principal building materials are undetermined. In response to the checklist question as to what measures will be taken to ensure that the proposal is compatible with existing and projected land uses, the Checklist reads:

“Sensitive architectural design including a project design that is compatible with the residential scale of the surrounding area.”

However, no detail about the architectural design is supplied in this record. Further, because the proposed dwellings are considered single-family dwellings, no vegetative buffering is required at the perimeters of the site. Testimony of the staff is that some Type B landscaping will be required along the street frontage. During the hearing, the Examiner asked for an explanation of how, if all trees are removed, will six units be built on this half-acre and be “*sensitively integrated into the existing community.*” No explanation was offered.

5. The six proposed dwellings with a shared driveway will generate 57 average weekday trips of which four to five trips will be during the a.m. peak hour and six trips will be during the p.m. peak hour. The proposed internal driveway ends in a stub more than 150 feet in length. Consequently, a site plan notation (Exhibit 3) shows that fire sprinklering is required for dwellings Nos. 3 and 4. Access is from 88th Avenue W from which the site drops to the west by approximately 20 feet. Thus, the view from 88th Avenue W is down into the proposed development. That Avenue is in the City of Edmonds and, therefore, that City will evaluate the access proposal as to, for example, driver sight distance challenges caused by the quick drop into the site. Further, any parking on the internal driveway will be an impediment to fire or other emergency response even though the Fire Marshall has approved this application.
6. There are no sidewalks in the vicinity and any frontage improvements to be required of this proposed development will be determined by the City of Edmonds. No conditions requiring frontage improvements are recommended to the Hearing Examiner in the staff report. That is, the evidence of record does not establish how children who might dwell in the proposed development will walk safely to either a school or a school bus stop. Nor is there an explanation as to whether provision for such walkways will be made during the administrative site plan process. Although the application is not a plat, a child walking is a child walking. Adequate provisions for that child to walk to and from school is inherently part of providing a substantial relationship to the public health, safety and welfare as required by the decision criteria for a rezone at SCC 30.42A.100(2) whether or not the proposed development is characterized as a formal subdivision. Staff's testimony asserts that an LDMR site plan cannot be required to provide a bus waiting area. John Anderson testifies that the steep drop into the subject site prevents sidewalk construction on the west side of 88th Avenue W. Brian Rice responds: “*You are going down into a hole.*”

¹ Scrivener's error corrected – deleting the word “not”. (10/11/07)

7. David Thorp of Shell Valley Road in Edmonds writes (Exhibit 14) to assert that the proposed six dwellings on a half-acre would be out of character with the area. He asserts a drainage problem, as does Bruce P. Witenberg (Exhibit 15), who lives at the intersection of 88th Avenue W and Madrona Lane. Mr. Witenberg also asserts that children walk to school busses on 88th Avenue W and ride their bicycles there with no sidewalks and that many residents walk or jog there. He points out that the County's Fire Chiefs and Commissioners and Fire Prevention Officers have sought LDMR standards for public safety. Brian Rice has lived at the intersection of 88th Avenue W and Holly Lane for six years since 2001 and testifies and writes (Exhibit 20) describing the growth of residential density in the vicinity. He asserts that the LDMR density is up to 10 times the original density but that road infrastructure has not been upgraded commensurately. He expresses concern about the loss of trees and the resultant danger of blowdowns of the remaining trees, such as one near his house. He terms Lynnwood, Federal Way and Lake Stevens "*suburban disasters*".
8. The applicant argues that (1) the proposed density is vested under the SCC in effect when the application was filed prior to adoption of Amended Ordinance No. 07-022 effective June 4, 2007, (2) the proposal meets the Comprehensive Plan, the GMA and the SCC goals, policies and regulations, (3) because there is no tree preservation ordinance even a proposal for two or three lots could take out all the trees, (4) there are four or five LDMR projects in the vicinity already, which proves the vicinity is in transition, (5) the site is in an Urban Growth Area which calls for such density and, (6) in fact, up to 12 dwellings are permitted here to implement the Comprehensive Plan instead of six as proposed.
9. The property is designated Urban Medium Density Residential (UMDR 6-12 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 Urban Medium Density Residential designation allows high density residential land uses such as townhouses and apartments generally near other high intensity land uses. As noted, land in this category may be developed up to a maximum density of 12 dwelling units per acre. Implementing zones include the LDMR zone.
10. 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 proposal is reviewed under applicable codes in effect at the time a complete application was filed, which was prior to the effective date of Amended Ordinance No. 07-022 on June 4, 2007. Although only the rezone request is before the Examiner, project level issues and factors raised in the public hearing must be considered by the Examiner in order to determine whether the proposed rezone bears a substantial relationship to the public health, safety and welfare.
2. If such project-level factors were not considered for rezones in the past, County Council Motion 07-447 of August 8, 2007 requires consideration of such factors henceforth, particularly if the affected public raises challenges concerning those factors.
3. The Examiner having fully reviewed the PDS staff report hereby adopts said staff report except any portions of that report which are inconsistent with the findings of fact, conclusions of law or decision in this document

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 subject site sits at a lower elevation than most of the surrounding neighborhood. Consequently, when all the existing trees are removed and comparatively minimal Type B landscaping is installed, the six dwellings will be prominently visible from the higher surroundings, including 88th Avenue W. For the applicant, John Anderson testified that one reason why it is difficult to save existing trees is that, with utilities and infrastructure one must put “...so much into such a small package.” The Examiner concludes that it is that compression of features that makes this proposal inherently incompatible with the surrounding community into which the LDMR zoning would be inserted.
9. A preponderance of the evidence of record demonstrates that this proposed rezone has not been shown to result in a development “...carefully sited, well designed, and sensitively integrated into...” the surrounding, existing community. (See LU – 15) The proposal does not support Housing Goal HO 2: “Ensure the vitality and character of existing residential neighborhoods.” Nor does the proposed development implement Policy 2.A.1, which urges preservation of the character of stable residential neighborhoods through selective and innovative land use measures. The applicant has not met the burden of pointing to any selective or innovative land use measure herein.
10. In summary, the proposed rezone to LDMR should be denied for failure to meet the rezone decisional criterion of SCC 30.42A.100(2); i.e., the applicant has not met the burden of proving that the application bears a substantial relationship to the public health, safety and welfare.
11. 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 Low Density Multiple Residential for the subject property is **DENIED**.

Decision issued this 9th 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 19, 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 23, 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: Roxanne Pilkenton

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.
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