# DECISION of the SNOHOMISH COUNTY HEARING EXAMINER DENYING PETITION FOR RECONSIDERATION

DATE OF DECISION: June 10, 2009

PLAT/PROJECT NAME: ***Arbor Mist***

APPLICANT/
LANDOWNER: Craig and Sue Pierce

FILE NO.: 07-102236-000-00-SD

## INTRODUCTION

The Department of Planning and Development Services (PDS) filed a petition for reconsideration dated and received by the Hearing Examiner's office on May 26, 2009. (Exhibit 153) PDS seeks reconsideration of the portion of the Examiner's decision which vacates the requested variances and asks PDS to refund the application fees for them. The grounds upon which PDS requests reconsideration is that the Examiner committed an error of law. Specifically, PDS challenges Findings 3A and 3C.

The Examiner's conclusions of law on the variance were the following:

**3. Conclusions Regarding the Variance Application.**

A. The fact that this variance was required at all is very troubling to the Examiner. The Examiner is not sure where the error occurred, but Ms. Kuller's memo applies to a private road and a public road. In that situation, it may be appropriate to have two front yard setbacks. It is important to note that her memo did not apply directly to this case.

B. An auto court, by definition, may be any type of access way. It could be a street, it could be a hammerhead, or a private road. Its distinguishing feature is that area is designated for pedestrians and bicyclists:

> **30.91A.305 "Auto court" or "shared court"** means an access way designed to accommodate vehicles, pedestrians, and bicycles within the same circulation space. A sidewalk area may include a sidewalk separate from paved vehicle areas or be surfaced with paving blocks, bricks or other ornamental pavers to clearly indicate that the **entire street** is intended for pedestrians as well as vehicles. An auto or shared court may also include traffic calming measures to ensure safe co-existence of pedestrians, vehicles, and bicycles.

C. There is also a provision that provides a setback exception for corner lot provisions, applicable to the R-7200 zone by virtue of the Bulk Matrix at SCC 30.23.030(2) ftn.34. SCC 30.23.120(7) states:

> (7) Corner or through lots on limited access right-of-way: Where one of the roads creating a corner or through lot is a limited access right-of-way, side or rear yard setbacks shall apply along the limited access right-of-way.

This provision indicates that Lots 1 and 7 need only meet side yard setbacks, which are 5 feet. Under the PRD code, the side yard setback may be reduced to 1.5 feet on the side containing the auto court, and under the logic of Ms. Kuller's opinion, the rest of the setback could be included on the other side. Even so, both homes meet the requirement without need to resort to a variance.

D. Large front yard setbacks are intended to provide enough area to allow road improvements and additional dedication of right-of-way should the need arise in the future. In this case, the code is quite clear in its intent that limited access ways should not be treated in a way that treats them as corner lots. It makes no sense to require enormous setbacks on a limited access right-of-way where no additional improvements will ever be made to the street to widen it for intensified future use. The Examiner finds that to interpret the code in this manner is at odds with the purpose of the requirement.

E. The Examiner concludes that the applicants were erroneously required to submit a variance application and their fees should be refunded.

Ms. Kuller's memo, Exhibit A3, in the record, is the heart of the issue in dispute regarding the PDS claim with respect to clause 3A. In this memorandum, Ms. Kuller goes through the various provisions of the bulk standards in the zoning code and the PRD provisions. One conclusion that seems to be in controversy here are that

- In a development accessed by an auto court, if you have a 1.5 setback from an auto court, then the rear setback must be 18.5 feet

The other is that the auto court in this case is considered a front setback at all. PDS argues that Conclusion 3C is incorrect because the exception by its terms only applies to "right-of-ways" which are defined as "all property in which the county has any form of ownership or title and which is held for public road purposes, regardless of whether or not any public road exists thereof or whether or not is used, improved or maintained for public travel." Looking at other places the term "right of way" is used in the code; for instance, in SCC 30.66B.710 "Mitigation requirements for state highways", several of the code sections speak of the need for private applicants to deed property for right of way to the state. Presumably, the use of the term "right of way" in that context does not meet the SCC 30.91R.200 definition. Similarly, in 30.66B.720, an applicant may need to deed additional property to another city or county for additional "right of way". While these examples are obviously all other public entities, they still are examples of how the code strays from its own definition in several areas.

In looking back into the matter further, the present SCC 30.23.120(7) (quoted in Conclusion of Law 3C above) was derived from the old Title 18 SCC the zoning code (pre UDC). In the zoning code, it stated at SCC 18.42.140(7):

> For the purposes of "corner lot" determination, a "limited access" right-of-way is not a street or a road. Side and/or rear yard setbacks shall apply along such lot lines.

In addition, at SCC 18.90.535, the definition of corner lot was as follows:

> "Corner lot" means a lot situated at the intersection of two or more streets or roads or private roads or bounded on two or more adjacent sides by street or road or private road or private road lot lines. **A "limited access" right-of-way is not a street or road.** The angle of such lot lines shall not exceed 135 degrees.

Emphasis added. *See* Ordinance 098-94, attached as Exhibit A. When the UDC was adopted, the phase emphasized above was taken out of the definition of corner lot, and SCC 18.42.140(7) was re-worded into the present SCC 30.23.120(7). As long as one continues to believe that a limited access right-of-way is not a street or a road, SCC 30.23.120(7) maintains complete substantive continuity with the old Title 18 SCC, which was after all, the legislative charge to the drafters of the UDC. *See* Amended Ordinance 02-064 (only minor substantive changes allowed). *See* Amended Ordinance 02-064, attached as Exhibit B.

The definition from SCC 30.91R.200 was originally derived from the Binding Site Plan Ordinance (former SCC 19A.20.230), and adopted in 1995. It was selected as one of multiple definitions of "right-of-way" that could have been selected; there was another one in Title 19 (Subdivisions), for example. It is easy to see how mistakes in meaning can derive when there are multiple definitions for one phrase, and only one is selected. It is clear that the definition is not adequate to fit the code in multiple instances; therefore, it is ambiguous. The Examiner will implement the original meaning and intent of SCC 30.23.120(7) as intended under the old zoning code.

Given the origin of the phrase, "limited access" right of way, and the ambiguity of the present definition of a "right of way" when one looks at the term throughout the code and sees that the definition is clearly used in a broader sense than the strict definition in SCC 30.91R.200, the Examiner will not make these applicants pay the price for the County's mistakes in writing its own code. The Examiner will not change the outcome of the decision, but will modify the conclusions of law to provide more adequate justification for the decision.

## DECISION

The final decision issued May 15, 2009 shall be modified in accordance with this decision.

The applicant's Petitions for Reconsideration is **DENIED** as to the remainder of the petition.

Decision issued this 10th day of June, 2009.

Barbara Dykes

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 **JUNE 24, 2009** 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.

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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.