



See Revisions per attached Council Motion 10-572

Hearing Examiner's Office

Email: Hearing.Examiner@co.snohomish.wa.us

**DECISION of the SNOHOMISH
COUNTY HEARING EXAMINER PRO TEM**

Millie Judge
Hearing Examiner

M/S 405
3000 Rockefeller Ave.
Everett, WA 98201

(425) 388-3538
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DATE OF DECISION: September 20, 2010

PLAT/PROJECT NAME: **HOOPER TOW YARD**

APPLICANT/ LANDOWNER: Andrew & Shelly Hooper

FILE NO.: 09-100760-000-00 LU

TYPE OF REQUEST: **CONDITIONAL USE PERMIT** for an automobile tow facility, **APPEAL OF
SEPA THRESHOLD DETERMINATION**

DECISION (SUMMARY): **DENY CUP; GRANT SEPA APPEAL OF THRESHOLD DETERMINATION**

BASIC INFORMATION

LOCATION: 20709 86th Avenue SE, Snohomish in Section 24, Township 27 North, Range
5 East, W.M., Snohomish County, Washington

ACREAGE: 0.84 acres

CURRENT ZONING: R-5

COMPREHENSIVE PLAN DESIGNATION: Rural Residential (1 du/5 acres-basic)

UTILITIES:

Water/Sewer: Cross Valley Water District

SCHOOL DISTRICT: Monroe #103

FIRE DISTRICT: #7

SELECTED AGENCY RECOMMENDATIONS:

Department of Planning and Development Services: Deny

INTRODUCTION

The applicant is requesting a Conditional Use Permit (CUP) to permit and operate an automobile tow facility in the R-5 zone. The project involves construction of a new building, approximately 800 square feet in size, and installation of required parking and landscaping. The proposal is described in detail in Exhibit A2.

The applicant submitted the CUP application to the Department of Planning and Development Services (PDS) in February 9, 2009. (Exhibit I). PDS determined on March 9, 2009 that the application was complete on the day of submittal for regulatory purposes. (Exhibit I). After processing the application, the matter was taken to hearing on June 3, 2010, day 309 of the 120-day regulatory permit processing review period. Witnesses were sworn, testimony was presented, and exhibits were entered at the hearing. PDS gave proper public notice of the open record hearing as required by the county code. (Exhibits F1, F2, and F3).

A SEPA determination was made on April 13, 2010. (Exhibit E2) An appeal was filed by Maltby Neighborhood Alliance on May 6, 2010.

NOTE: To obtain a complete record of the proceedings, an electronic recording of this hearing is available through the Office of the Hearing Examiner.

FINDINGS, CONCLUSIONS AND DECISION

I. FINDINGS OF FACT

Based on all of 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. State Environmental Policy Act Compliance. A Determination of Nonsignificance (DNS) was issued April 13, 2010. (Exhibit E2) The DNS was appealed by Maltby Neighborhood Alliance on May 6, 2010.
3. Conditional Use Permit (CUP) Request: The applicant is requesting a CUP to allow an automobile tow facility. The tow facility is the headquarters/office for Recovery Services of Washington, Inc. Recovery Services provides vehicular tow services to the general public, as well as emergency response service to the Washington State Patrol. (Exhibit A1). The tow facility brings in towed cars into its lot, which is secured by fencing and lighting.
4. Site description: The 0.84 acre site is currently developed with an existing driveway off 86th Avenue SE. The site is developed with an existing brick well house, and is largely cleared. Most of the property is gravel surfaced. Grasses, herbs and shrubs are found in small patches within the gravel surface around the well house, and along the property boundaries. The property slopes west to east from 86th Avenue SE at an approximate five percent straight grade. Soils are mapped as Alderwood gravelly sandy loam. Existing drainage patterns are sheet flow to the east, through a neighboring parcel, and continuing east for a quarter mile before discharging into a wetland near the intersection of Maltby Road and SR 522. There are no critical areas on the property. Several wetlands and a seasonal stream are found on adjacent properties within 300 feet of the site. A portion of the wetland buffer overlaps the northeast corner of the site.

5. Adjacent uses: Neighboring zoning is R-5. Adjacent uses include single-family residence to the north and Maltby Community Club; to the east is a mobile home park and single-family residential; to the south is single-family residential; and to the west is a manufactured home and single-family residential. (Exhibit L1). North and west of the site the property is designated Rural Residential (basic); to the east the property is designated Urban Industrial (UI); and to the south, the property is designated Urban Commercial and UI. (Exhibit L1) Although designated UI, the usage is single-family residential. (Exhibit J).
6. Public Comment in the Record. The record reflects comments and concerns from a large number of citizens. (See Exhibits H1-66) The PDS staff report did a thorough job of cataloging the various concerns listed by mostly neighborhood residents, which consist mainly of neighborhood compatibility and environmental concerns. (Exhibit I at 3-4) These concerns will be addressed by the Examiner as part of the analysis of the CUP criteria.
7. SEPA Appeal. The Maltby Neighborhood Alliance filed a timely SEPA appeal on May 6, 2010. The appeal alleges the following errors and omissions: (1) Property mischaracterized on the application; (2) False statement on property zoning to the south; (3) Adjacent land uses not correctly identified in County evaluation; (4) Properties to the west not identified; (5) Noise pollution impacts; (6) History of Non-Compliance at Applicant's other business site; (7) Light pollution impacts; (8) Material misrepresentation of business; (9) Parking impacts in the neighborhood; (10) Criminal element; (11) Groundwater protection and environmental health impacts; (12) Environmental hazard issues; (13) Traffic impacts; (14) Omission of a small stream; (15) Inconsistency with RCW 36.70A.020 - reducing rural sprawl; (15) Placement of a permanent portable toilet "sani-can" unsightly in a single-family neighborhood; (16) Security fencing inappropriate in a single-family residential neighborhood.

The Neighborhood Alliance was represented at the hearing by Richard Aramburu, Attorney At Law, who additionally argued that the proposal does not meet minimum lot size requirements applicable to the R-5 zone. His argument was based on SCC 30.23.240, and the unpublished opinion entitled *Watson v. Snohomish County*, No. 653531-0-1 (April 12, 2010). Under that case, the court overturned the former Snohomish County Planning Director's code interpretation that duplexes were permitted on substandard lots in the R-5 zone. The court's decision was based on its interpretation of SCC 30.23.240, a provision that deals with use of lots for residential development when such lots have substandard area for their present zone.

8. Applicant's Submittals. The Applicant submitted the various studies required by the county development regulations for mitigation of impacts of the project under normal review standards. For the sake of brevity, the Examiner adopts the PDS staff report findings from page 4-11 on those various issues.

Conditional Use Permit Criteria

9. While there is a great deal of information to work with in this case, the issues can be best addressed through the CUP criteria. In considering the application, the Examiner must apply SCC 30.42C.100, which outlines the decision criteria for a CUP as follows:
 1. **The hearing examiner may approve, approve with conditions, or deny a conditional use permit only when all the following criteria are met:**

- (a) The proposal is consistent with the comprehensive plan;
- (b) The proposal complies with applicable requirements of this title;
- (c) The proposal will not be materially detrimental to uses or property in the immediate vicinity; and
- (d) The proposal is compatible with and incorporates specific features, conditions, or revisions that ensure it responds appropriately to the existing or intended character, appearance, quality of development, and physical characteristics of the site and surrounding property.

2. As a condition of approval, the hearing examiner may:

- (a) Increase requirements in the standards, criteria, or policies established by this title;
- (b) Stipulate the exact location as a means of minimizing hazards to life, limb, property damage, erosion, landslides, or traffic;
- (c) Require structural features or equipment essential to serve the same purpose set forth in 30.42C.100 (2)(b);
- (d) Impose conditions similar to those set forth in items 30.42C.100 (2)(b) and 30.42C.100 (2)(c) as may be deemed necessary to establish parity with uses permitted in the same zone in their freedom from nuisance generating features in matters of noise, odors, air pollution, wastes, vibration, traffic, physical hazards, and similar matters. The hearing examiner may not in connection with action on a conditional use permit, reduce the requirements specified by this title as pertaining to any use nor otherwise reduce the requirements of this title in matters for which a variance is the remedy provided;
- (e) Assure that the degree of compatibility with the purpose of this title shall be maintained with respect to the particular use on the particular site and in consideration of other existing and potential uses, within the general area in which the use is proposed to be located;
- (f) Recognize and compensate for variations and degree of technological processes and equipment as related to the factors of noise, smoke, dust, fumes, vibration, odors, and hazard or public need;
- (g) Require the posting of construction and maintenance bonds or other security sufficient to secure to the county the

estimated cost of construction and/or installation and maintenance of required improvements; and

- (h) Impose any requirement that will protect the public health, safety, and welfare.**

(Emphasis added)

After reviewing the record, the Examiner is convinced this proposal does not meet at least SCC 30.42C.100(1)(a), (c), and (d) of the criteria above, and therefore the CUP must be denied. Below are the findings that support that finding:

1. **Regarding criteria (1)(a):**

The Examiner finds the following goal and objective from the General Policy Plan apply to this application for the CUP for a tow yard facility in this rural residential area:

GOAL LU 6: Protect and enhance the character, quality, and identity of rural areas.

Objective LU 6.A: Reduce the rate of growth that results in sprawl in rural and resource areas.

The application is for an intensive use that can only be characterized as urban growth in the rural area. The Growth Management Act defines urban growth as

"Urban growth" refers to growth that makes intensive use of land for the location of buildings, structures, and impermeable surfaces to such a degree as to be incompatible with the primary use of land for the production of food, other agricultural products, or fiber, or the extraction of mineral resources, rural uses, rural development, and natural resource lands designated pursuant to RCW 36.70A.170. A pattern of more intensive rural development, as provided in RCW 36.70A.070(5)(d), is not urban growth. When allowed to spread over wide areas, urban growth typically requires urban governmental services. "Characterized by urban growth" refers to land having urban growth located on it, or to land located in relationship to an area with urban growth on it as to be appropriate for urban growth.

Protecting the "rural character" of the County is the required focus of the rural element of the comprehensive plan under of the GMA and the focus of Goal LU 6. (RCW 36.70A.070(5)(c)) Rural character is defined as follows:

- (15) "Rural character" refers to the patterns of land use and development established by a county in the rural element of its comprehensive plan:
- (a) In which open space, the natural landscape, and vegetation predominate over the built environment;
 - (b) That foster traditional rural lifestyles, rural-based economies, and opportunities to both live and work in rural areas;

- (c) That provide visual landscapes that are traditionally found in rural areas and communities;
- (d) That are compatible with the use of the land by wildlife and for fish and wildlife habitat;
- (e) That reduce the inappropriate conversion of undeveloped land into sprawling, low-density development;
- (f) That generally do not require the extension of urban governmental services; and
- (g) That are consistent with the protection of natural surface water flows and groundwater and surface water recharge and discharge areas.

RCW 36.70A.030(15)

In examining this proposal's congruence with the intention of the GPP to promote rural character in the rural areas, this proposal fails on a number of key aspects.

A. Parcel Size Inconsistent to Allow Finding of Rural Character.

The parcel size, 0.84 acres, is so small that in this instance, an automobile tow facility could not be characterized as anything but an urban use in which the built environment predominates over the natural environment. But the GMA's definition of rural character indicates that exactly the opposite should be the case: patterns of land use and development in the rural area should allow open space, natural landscape, and vegetation to predominate over the built environment. *Id.* That is not to say that an automobile tow facility in the right landscape, on the right size parcel might not be appropriate as a conditional use elsewhere in the R-5 zone. However, here on this small parcel, it becomes inappropriate urban-style development where the built environment predominates over the natural environment. Because the parcel size is so small, such a use fails to provide for rural character, and fails to further Goal LU 6 of the GPP.

B. Proposed Use Incompatible with Visual Landscape in the Immediate Rural Community.

The proposed use, if allowed, would also be incompatible with the already established visual landscape traditionally found in this rural community. (RCW 36.70A.030(15)(c)) As demonstrated by the Maltby Neighborhood Alliance, this area is a stable single-family residential community. A tow yard with security fencing and lighting, and possibly having cars towed in at any time of day or night, is incompatible with a single-family residential neighborhood.

The applicant has repeatedly tried to get this parcel into the Maltby UGA without success. One of the main reasons is that it cannot be adequately served by public services. The mere fact that the applicant has repeatedly tried to get into the UGA to do its development demonstrates the true nature of the development. Moreover, the use of a portable toilet for permanent sanitary waste needs is completely inadequate and an eyesore for the single-family residential community to endure.

C. Proposed Use is Inconsistent with the Protection of Natural Surface Water Flows and Groundwater and Surface Water Recharge and Discharge Areas.

The Maltby Neighborhood Alliance also points out that the applicant has not addressed issues relating to possible environmental hazards relating to oil leaks, gas and diesel

leaks, transmission fluid, and other possible leakage from cars stored on the property. The applicant has simply stated that such leakages are “unlikely” without planning for such an event.

This property sits atop the Cross Valley Sole Source Aquifer. Such environmental pollution could be devastating to this valuable resource. Moreover, there is no indication from the applicant that is any additional devices aside from the basic drainage system required of any development to catch possible environmentally hazardous material from vehicles stored at the tow yard. This is completely inconsistent with “the protection of natural surface water flows and groundwater and surface water recharge and discharge areas.” RCW 36.70A.030(15)(g).

2. **Regarding Criteria (1)(b) of the Conditional Use Permit Criteria.**

(b) The proposal complies with the applicable requirements of this title:

The Examiner makes no finding on whether the requirements of Title 30 SCC have been met, as it is not necessary to reach a decision in this case. The Examiner appreciates the thoughtful arguments on *Watson v. Snohomish County*, No. 653531-0-1 (April 12, 2010), but declines to rule on its applicability to this case. First of all, it is an unpublished opinion, which the Rules of Appellate Procedure indicate should not be used as precedent in other cases. Secondly, this case may be decided on other grounds; therefore ruling on the applicability of that decision to this set of facts is not necessary to reach an outcome in this case.

3. **Regarding Criteria (1)(c) of the Conditional Use Permit Criteria.**

(c) The proposal will not be materially detrimental to uses or property in the immediate vicinity.

The Examiner finds that the proposal will be materially detrimental to uses or property in the immediate vicinity for the same reasons as listed above in the discussion of Criteria (1)(a).

4. **Regarding Criteria (1)(d) of the Conditional Use Permit Criteria.**

(d) The proposal is compatible with and incorporates specific features, conditions, or revisions that ensure it responds appropriately to the existing or intended character, appearance, quality of development, and physical characteristics of the site and surrounding property.

This proposal is not compatible and does not respond appropriate to the existing or intended character, appearance, quality of development, and physical characteristics of the site and surrounding property. As outlined in (1)(a), the proposal is incompatible with the rural character of the single-family neighborhood. Because of the small parcel, the tow facility would be an intensive urban use wholly out of character in its surroundings. It would cause undesirable impacts to the surrounding neighborhood in the way of light, glare, noise, and environmental pollution, as argued by the Maltby Neighborhood Alliance. (See Exhibit J at 3-8). The rural visual landscape would be blighted by its presence.

CONCLUSIONS OF LAW

A. Conditional Use Permit

1. The Examiner has original jurisdiction over CUP applications pursuant to Chapter 30.72 SCC and Chapter 2.02 SCC.
2. In considering the CUP, application of many of the decision criteria require the exercise of discretion.
3. The proposal is inconsistent with the GMACP; GMA-based county codes, the type and character of land use permitted on the project site, and the applicable design and development standards.
4. The Examiner finds that the proposal is not consistent with the public health, safety and general welfare.
5. The CUP, if granted, would be materially detrimental to uses or properties in the immediate vicinity.
6. The CUP, if granted, would be incompatible with surrounding uses would not respond appropriately to the character, appearance, quality of development, and physical characteristics of the site and surrounding properties.
7. Any Conclusion in this decision, which should be deemed a Finding of F, is hereby adopted as such, and vice versa.

B. Appeal filed under the State Environmental Policy Act (SEPA) of Determination of Nonsignificance (DNS)

Standard of Review by the Examiner of SEPA Appeal.

1. The Examiner has appellate jurisdiction over the appeal of the DNS as a Type 1 application pursuant to SCC 30.61.300 and SCC 2.02.100. The appeal was combined with a Type 2 hearing on the CUP.
2. The Examiner reviews issues of law regarding SEPA under Chapter 30.61 SCC, Chapter WAC 197-11 and Chapter 43.21C RCW.
3. The State Environmental Policy Act of 1971 was enacted to "promote the policy of fully informed decision making by government bodies when undertaking 'major actions significantly affecting the quality of the environment.'" RCW 43.21C.090. Prior to undertaking or licensing a land use activity, Snohomish County (or any other permitting authority) must issue what is known as a threshold determination, which is a determination of whether the project is likely to have a "significant adverse impact to the environment."
4. In this case, PDS issued a DNS. A DNS is issued when the responsible official has determined that the proposal is unlikely to have significant adverse environmental impacts, or that mitigation has been identified that will reduce impacts to a nonsignificant level. (*See Department of*

Ecology, SEPA Handbook at 29) Under the SEPA Rules, “significant” is defined as “a reasonable likelihood of more than a moderate adverse impact on environmental quality.” (WAC 197-11-794) As pointed out in the SEPA Handbook, what is significant is “often nonquantifiable. It involves the physical setting, and both the magnitude and duration of impact.”

5. WAC 197-11-158 defines the decision making process the responsible official must undergo in making a threshold determination in a GMA jurisdiction. It states:

(1) In reviewing the environmental impacts of a project and making a threshold determination, a GMA county/city may, at its option, determine that the requirements for environmental analysis, protection, and mitigation measures in the GMA county/city’s development regulations and comprehensive plan adopted under chapter 36.70A RCW, and in other applicable local, state, or federal laws or rules, provide adequate analysis of and mitigation for some or all of the specific adverse environmental impacts of the project.

(2) In making the determination under subsection (1) of this section, the GMA county/city shall:

(a) Review the environmental checklist and other information about the project;

(b) Identify the specific probable adverse environmental impacts of the project and determine whether the impacts have been:

(i) Identified in the comprehensive plan, subarea plan, or applicable development regulations through the planning and environmental review process under chapter 36.70A RCW or this chapter, or in other local, state, or federal rules or laws;

and

(ii) Adequately addressed in the comprehensive plan, subarea plan, applicable development regulations, or other local, state, or federal rules or laws by:

(A) Avoiding or otherwise mitigating the impacts; or

(B) The legislative body of the GMA county/city designating as acceptable the impacts associated with certain levels of service, land use designations, development standards, or other land use planning required or allowed by chapter 36.70A RCW;

(c) Base or condition approval of the project on compliance with the requirements or mitigation measures in the comprehensive plan, subarea plan, applicable development regulations, or other local, state, or federal rules or laws; and

...

(3) Project specific impacts that have not been adequately addressed as described in subsection (2) of this section might be probable significant adverse environmental impacts requiring additional environmental review. Examples of project specific impacts that may not have been adequately addressed include, but are not limited to, impacts resulting from changed conditions, impacts

indicated by new information, impacts not reasonably foreseeable in the GMA planning process, or impacts specifically reserved in a plan EIS for project review.

- (4) In deciding whether a project specific adverse environmental impact has been adequately addressed by an existing rule or law of another agency with jurisdiction, the GMA county/city shall consult orally or in writing with that agency and may expressly defer to that agency. In making this deferral, the GMA county/city shall base or condition its project approval on compliance with these other existing rules or laws.
 - (5) If a GMA county/city's comprehensive plan, subarea plan, or development regulations adequately address some or all of a project's probable specific adverse environmental impacts, as determined under subsections (1) and (2) of this section, the GMA county/city shall not require additional mitigation under this chapter for those impacts.
 - (6) In making the determination in subsection (1) of this section, nothing in this section requires review of the adequacy of the environmental analysis associated with the comprehensive plans and development regulations that are being relied upon to make that determination.
6. Reviewing the responsible official's decision in an appellate role, the Examiner must accord substantial weight to the agency's threshold determination. (SCC30.61.310(3)) The appellant has the burden of proof. The Examiner must uphold the responsible official's DNS unless he or she determines that the decision was clearly erroneous, and may only overturn the DNS if, after reviewing the entire record, the Examiner is left with the definite and firm conviction that a mistake has been made. (SCC 30.61.310(1)) (See *Leavitt v. Jefferson County*, 74 Wn. App. 668, 875 P.2d 681 (1994))
 7. The SEPA threshold determination process has been streamlined under the GMA. Through RCW 43.21C.240 and implemented through WAC 197-11-158, the SEPA Rules allow GMA jurisdictions to issue a DNS or MDNS even for projects that might otherwise seem to be large projects that would generate significant impacts, if those projects can be adequately mitigated for under the jurisdiction's GMA development regulations and other SEPA policies. (See WAC197-11-158; *Moss v. Bellingham*, 109 Wn.App. 6, 18-26, 31 P.3d 703(2001)(court affirmed MDNS for an 80-lot subdivision)) Therefore, the mere fact that a DNS was issued in this case is not determinative. If there are significant adverse impacts that are not or cannot be mitigated, an Environmental Impact Statement (EIS) is required. (WAC 197-11-330(4)) A project cannot be approved with a DNS or an MDNS if it has significant adverse environmental impacts that are not mitigated; that can only be done after an EIS is completed. (See WAC 197-11-340) It is a procedural requirement of SEPA; significant impacts must be addressed through an EIS, they cannot simply be addressed through a study that "takes the place of an EIS."
 8. In this case, the SEPA arguments mirror the GMA and CUP arguments. They all boil down to the issue of an inappropriate urban use in a rural setting. Because of the small parcel size, the tow facility will cause the site to be dominated by the built environment, which will include many cars, a building, security fencing and a great deal of security lighting. There are significant adverse noise impacts, environmental health and hazardous spill impacts that have not been mitigated by the applicant. As demonstrated in the portion of the decision dealing with rural character, the proposal will have significant adverse environmental impacts on rural character.

On this basis, the Examiner finds that there are unmitigated impacts that must be addressed through an environmental impact statement and therefore remands the proposal to the Responsible Official.

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 **CONDITIONAL USE PERMIT** is hereby **DENIED**. The **APPEAL OF THE DNS IS GRANTED**; should the application be re-filed, the DNS is overturned and an Environmental Impact Study is ordered on this proposal.

Decision issued this 20th day of September, 2010.



Barbara. Dykes, 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 **SEPTEMBER 30, 2010**. 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 4, 2010** 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.

PARTIES OF RECORD REGISTER
4/15/10
09-100760-LU HOPPER TOW YARD
HG: 6/3/10
09-100760-LU

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CROSS VALLEY WATER DISTRICT
GARY HAJEK
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WILLIAM & SHARI JAQUES
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TAMARA KING
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BOB & KAREN LEMONS
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SNOHOMISH COUNTY COUNCIL
SNOHOMISH COUNTY, WASHINGTON

OFFICIAL NOTICE OF COUNCIL DECISION

In re the case of an Appeal from the Hearing Examiner decision in the case of Andrew and Shelly Hooper, File No. 09-100760, requesting approval of a conditional use permit for an automobile tow facility at 20709 86th Avenue SE, Snohomish.

NOTICE IS HEREBY GIVEN that on November 24, 2010 a decision in this matter was entered by the Snohomish County Council: Upon a unanimous vote of the four members present, the County Council approved a motion to affirm the Examiner's decision, with revisions, denying the requested conditional use permit, in accordance with Council Motion No. 10-572, attached hereto.

FURTHER NOTICE IS GIVEN that unless otherwise provided by law any person having standing who wishes to appeal this decision must do so by filing a land use petition in Superior Court in accordance with the provisions of Chapter 36.70C RCW and Chapter 30.72.130 SCC on or before Monday, December 20, 2010.

FURTHER NOTICE IS GIVEN that any person having standing who wishes to appeal an accompanying environmental determination must do so together with appeal of the decision in accordance with the provisions of Chapter 43.21C RCW and Section 30.72.130 SCC on or before the deadline for appeal set out above.

FURTHER NOTICE IS GIVEN that affected property owners may request the Snohomish County Assessor to make a change in valuation for property tax purposes notwithstanding any program of revaluation.

DATED this 24th day of November, 2010.

Asst. Clerk of the Council

Mailed: Wednesday, November 24, 2010

SNOHOMISH COUNTY COUNCIL
SNOHOMISH COUNTY, WASHINGTON

MOTION NO. 10-572

COUNCIL DECISION AFFIRMING THE REPORT AND DECISION
OF THE HEARING EXAMINER WITH REVISIONS

HOOPER TOW YARD
HEARING EXAMINER FILE NO. 09-100760

WHEREAS, Andrew and Shelly Hooper (Applicant) applied to Snohomish County for approval of a Conditional Use Permit (CUP) for an automobile tow facility at 20709 86th Avenue SE, Snohomish, Washington; and

WHEREAS, the Snohomish County Hearing Examiner (Examiner) held a public hearing on June 3, 2010, and issued a Decision (Ex. O.1) on September 20, 2010, denying the CUP; and

WHEREAS, the Applicant filed an appeal (Ex. P.1) on October 4, 2010, requesting that the Council reverse the Examiner's Decision and approve the CUP; and

WHEREAS, on October 13, 2010, the Council passed Motion No. 10-510, which summarily dismissed that portion of the Applicant's appeal dealing with the Examiner's Decision granting a appeal of the Determination of Nonsignificance (DNS) pursuant to the State Environmental Policy Act (SEPA) because SEPA issues are beyond the Council's jurisdiction in a closed record appeal; and

WHEREAS, the Council held a closed record appeal hearing on November 15, 2010, to hear oral argument and to consider the appeal; and

WHEREAS, the Council heard the arguments of the applicant and parties of record and has considered the appeal based upon the record and those arguments;

NOW, THEREFORE, ON MOTION:

Section 1. The Snohomish County Council incorporates the foregoing recitals as findings and makes the following additional findings of fact and conclusions, pursuant to SCC 30.72.120(1):

- A. The Council adopts the following Findings of Fact from the Examiner's Decision: Nos. 1 through 4, 6, and 8.

B. The Council revises and adopts the Examiner's Finding of Fact No. 5 to read as follows, with revisions indicated:

5. Adjacent uses: Neighboring zoning is R-5 to the north, west, and south, and Industrial Park to the East (Exhibit D2). Adjacent uses include ((single-family residence to the north and Maltby Community Club; to the east is a mobile home park and single-family residential; to the south is single-family residential; and to the west is a manufactured home and single-family residential. (Exhibity L1))) single-family residences to the north, west and south, and vacant land to the east (Exhibit I). Other nearby uses include a mobile home park and the Maltby Community Club (Exhibit L1). ((North and west of the site the property is designated Rural Residential (basic); to the east the property is designated Urban Industrial (UI); and to the south, the property is designated Urban Commercial and UI. (Exhibit L1) Although designated UI, the usage is single family residential. (Exhibit J).)) The comprehensive plan map land use designation to the north, west, and south is Rural Residential. The comprehensive plan map land use designation to the east is Urban Industrial.

C. The Council adopts the Examiner's Finding of Fact No. 9 with revisions to the subfindings under the heading "**1. Regarding criteria (1)(a):**" as indicated:

The Examiner finds the following goal and objective from the General Policy Plan apply to this application for the CUP for a tow yard facility in this rural residential area:

GOAL LU 6: Protect and enhance the character, quality, and identity of rural areas.

Objective LU 6.A: Reduce the rate of growth that results in sprawl in rural and resource areas.

The application is for an intensive use that can only be characterized as urban growth in the rural area. The comprehensive plan General Policy Plan (Glossary, Appendix E) defines urban growth as: ((The Growth Management Act defines urban growth as

"Urban growth" refers to growth that makes intensive use of land for the location of buildings, structures, and impermeable surfaces to such a degree as to be incompatible with the primary use of land for the production of food, other agricultural products, or fiber, or the extraction of mineral resources, rural uses, rural development, and natural resource lands designated pursuant to RCW 36.70A.170. A pattern of more intensive rural development, as provided in RCW 36.70A.070(5)(d), is not urban growth. When allowed to spread over wide areas, urban growth typically requires urban governmental services. "Characterized by urban growth" refers to land

~~having urban growth located on it, or to land located in relationship to an area with urban growth on it as to be appropriate for urban growth.))~~

Growth that makes intensive use of land for the location of buildings, structures, and impermeable surfaces to such a degree as to be incompatible with the primary use of such land for the production of food, other agricultural products or fiber, or the extraction of mineral resources. When allowed to spread over wide areas, urban growth typically requires urban governmental services. "Characterized by urban growth" refers to land having urban growth located on it, or to land located in relationship to an area with urban growth on it as to be appropriate for urban growth. (RCW 36.70A.030)

Protecting the "rural character" of the County is the required focus of the rural element of the comprehensive plan under of the GMA and the focus of Goal LU 6. (RCW 36.70A.070(5)(c)) The comprehensive plan includes policies for rural land use, and describes those policies as follows (Land Use Element, Rural Lands chapter, Introduction): ((Rural character is defined as follows:

- ~~(15) "Rural character" refers to the patterns of land use and development established by a county in the rural element of its comprehensive plan:~~
 - ~~(a) In which open space, the natural landscape, and vegetation predominate over the built environment;~~
 - ~~(b) That foster traditional rural lifestyles, rural-based economies, and opportunities to both live and work in rural areas;~~
 - ~~(c) That provide visual landscapes that are traditionally found in rural areas and communities;~~
 - ~~(d) That are compatible with the use of the land by wildlife and for fish and wildlife habitat;~~
 - ~~(e) That reduce the inappropriate conversion of undeveloped land into sprawling, low-density development;~~
 - ~~(f) That generally do not require the extension of urban governmental services; and~~
 - ~~(g) That are consistent with the protection of natural surface water flows and groundwater and surface water recharge and discharge areas.~~

RCW 36.70A.030(15))

"The rural land use policies provide for this limited growth (no more than 10% of the county's forecasted population growth after 2008) in rural areas, strive to be sensitive to existing land uses and development

patterns, preserve rural character and lifestyle, and protect the environment and natural resource lands.

“Rural land use policies describe and accommodate a wide array of land uses and a variety of residential densities that are compatible with the character of rural areas; support rural and natural resource-based industries; provide economic opportunities for rural residents; promote low intensity recreational uses consistent with rural surroundings; and preserve the rural lifestyle and traditional rural activities which contribute to the county’s overall quality of life.” (GPP pages LU 34 – 35)

In examining this proposal’s congruence with the intention of the GPP to promote rural character in the rural areas, this proposal fails on a number of key aspects.

A. Parcel Size Inconsistent to Allow Finding of Rural Character.

The parcel size, 0.84 acres, is so small that in this instance, an automobile tow facility could not be characterized as anything but an urban use in which the built environment predominates over the natural environment. But the ~~((GMA’s definition of))~~ comprehensive plan discussion of rural character indicates that rural land uses and densities should be sensitive to existing land uses and development patterns, preserve rural character and lifestyle, and protect the environment and natural resource lands. ~~((exactly the opposite should be the case: patterns of land use and development in the rural area should allow open space, natural landscape, and vegetation to predominate over the built environment. /d.))~~ That is not to say that an automobile tow facility in the right landscape, on the right size parcel might not be appropriate as a conditional use elsewhere in the R-5 zone. However, here on this small parcel, it becomes inappropriate urban-style development where the built environment predominates over the natural environment. Because the parcel size is so small, such a use fails to provide for rural character, and fails to further Goal LU 6 of the GPP.

B. Proposed Use Incompatible with Visual Landscape in the Immediate Rural Community.

The proposed use, if allowed, would also be incompatible with the already established visual landscape traditionally found in this rural community. ~~((RCW 36.70A.030(15)(e)))~~ As demonstrated by the Maltby Neighborhood Alliance, this area is a stable single-family residential community. A tow yard with security fencing and lighting, and possibly having cars towed in at any time of day or night, is incompatible with a single-family residential neighborhood.

The applicant has repeatedly tried to get this parcel into the Maltby UGA without success. One of the main reasons is that it cannot be adequately served by public services. The mere fact that the applicant has repeatedly tried to get into the UGA to do its development demonstrates the true nature of the development.

Moreover, the use of a portable toilet for permanent sanitary waste needs is completely inadequate and an eyesore for the single-family residential community to endure.

C. Proposed Use is Inconsistent with the Protection of Natural Surface Water Flows and Groundwater and Surface Water Recharge and Discharge Areas.

The Maltby Neighborhood Alliance also points out that the applicant has not addressed issues relating to possible environmental hazards relating to oil leaks, gas and diesel leaks, transmission fluid, and other possible leakage from cars stored on the property. The applicant has simply stated that such leakages are "unlikely" without planning for such an event.

This property sits atop the Cross Valley Sole Source Aquifer. Such environmental pollution could be devastating to this valuable resource. Moreover, there is no indication from the applicant that is any additional devices aside from the basic drainage system required of any development to catch possible environmentally hazardous material from vehicles stored at the tow yard. This is completely inconsistent with "the protection of natural surface water flows and groundwater and surface water recharge and discharge areas." RCW 36.70A.030(15)(g).

D. The Council adopts the following additional Findings of Fact:

1. The Appellant filed a reply brief on October 29, 2010, one day after the deadline for filing such briefs. The reply brief was provided to the Respondent by the deadline of October 28, 2010. The Council has the discretion to consider accepting a late brief. The Council considered arguments from both sides on whether to accept the late brief. The Council determined that no party would be prejudiced by acceptance of the late brief. The Council determined that extenuating circumstances were present that merit consideration of the late brief. The Council decided to accept the late brief, provided time for all members to review it, and considered it alongside all other argument and evidence in making Council's decision.
2. Substantial evidence in the record, including maps and photographs of surrounding uses and descriptions of the proposal, demonstrates that the intensity of the proposed use on such a small lot would be incompatible with the surrounding rural residential area and would be materially detrimental to the residential properties in the immediate vicinity. The mitigation measures listed in the record would provide some mitigation for the impacts on surrounding properties, but the intensity of the use would result in some impacts that cannot be mitigated on such a small lot. Photographs clearly show that the surrounding area is residential and the surrounding homes are of good quality and are well-maintained. The

appearance of a facility with a high fence surrounding a parking lot would be out of character with the surrounding community. The permanent use of portable sanitary facilities would be in conflict with the surrounding single family uses.

3. The subject property does not meet the minimum lot requirements of the Bulk Matrix and the proposed use does not come within an exception to that requirement under the Code.
- E. The Council adopts the following Conclusions of Law from the Examiner's Decision: Nos. A.1 through A.7.
 - F. The Council takes no action with regard to Finding of Fact 7, Conclusions of Law B.1 through B.8, and that portion of the Examiner's Decision granting the SEPA appeal and overturning the DNS because they apply to SEPA, which is beyond the the Council's jurisdiction to consider in a closed record appeal, and in conformance with Council Motion No. 10-510.
 - G. The Council adopts all of the Examiner's Findings of Fact, Conclusions of Law and Decision that are not otherwise inconsistent with this decision of the Council.

Section 2. The Snohomish County Council enters its decision in the case of Hooper Tow Yard, File No. 09-100760, as follows:

- A. The Snohomish County Council hereby affirms the September 20, 2010, Decision of the Examiner in accordance with the above findings and conclusions.
- B. The Snohomish County Council lets stand those portions of the Findings of Fact, Conclusions of Law, and Decision of the Hearing Examiner with respect to the SEPA appeal in accordance with the above findings and conclusions.

Dated this day of 24th day of November, 2010.

SNOHOMISH COUNTY COUNCIL
Snohomish County, Washington

Dave Gossett
Chair

ATTEST:

Sheila McCallister
Asst. Clerk of the Council