



200404290036

Skagit County Auditor

4/29/2004 Page

1 of

8 9:47AM

AFTER RECORDING RETURN TO:
SKAGIT COUNTY HEARING EXAMINER
302 SOUTH FIRST STREET
MOUNT VERNON, WA 98273

DOCUMENT TITLE: ORDER ON VARIANCE PERMIT VA 03 0858

HEARING OFFICER: SKAGIT COUNTY HEARING EXAMINER

APPLICANT: JACK BURNHAM

ASSESSOR PARCEL NO: P#:64947

LEGAL DESCRIPTION: The proposed project is located at 24709 Minkler Road, Sedro-Woolley, WA; A portion of Lot 5 of Deiter's Acreage; within the NW 1/4 of the SE 1/4 of Section 19, Township 35 North, Range 05 East, W.M. Skagit County, Washington.

BEFORE THE SKAGIT COUNTY HEARING EXAMINER

FINDINGS, CONCLUSIONS AND DECISION

Applicant: Jack Burnham
20978 Hermway Heights
Mount Vernon, WA 98274

Agents: Marianne Manville-Ailles
Skagit Surveyors
806 Metcalf Street
Sedro Wooley, WA 98284

David L. Day
Attorney at Law
P. O. Box 526
Burlington, WA 98233

File No: PL 03-0858

Request: Variance

Location: Approximately 1.6 acres at 24709 Minkler Road, a portion of Lot 5 of Deiter's Acreage, within the Urban Growth Area of the City of Sedro Woolley. This property is within a portion of the NW1/4SE1/4 Sec. 19, T35N, R5E, W.M.

Land Use Designation: SF-2, Single Family Residence 3-5 units per acre.

Summary of Proposal: To be excused from the City of Sedro Woolley requirements for half street improvements in connection with the development of a 4-lot short plat.

Public Hearings: After reviewing the report of the Planning and Permit Center, the Hearing Examiner conducted a public hearing on February 11, 2004. At the request of the City of Sedro Woolley, additional time to submit documents and argument was allowed. Pursuant to a teleconference on February 17, 2004, a briefing schedule was entered and a second hearing session was set for March 8, 2004. This additional session was later continued and was ultimately held on March 15, 2004.

Decision: The application is approved, subject to conditions.



FINDINGS OF FACT

1. Jack Burnham (applicant) seeks a variance from Sedro Woolley's half street improvement requirements in connection with developing a four-lot short plat in the Sedro Woolley Urban Growth Area (UGA). In lieu of making the improvements, he is proposing to sign a waiver of protest for future LIDS or ULIDS for upgrading streets.

2. The property is a 1.6-acre area bordered by Minkler Road on the south and Fruitdale Road on the east. The property measures approximately 340 feet along the north boundary, 91 feet along the east boundary, 410 feet along the south boundary and 340 feet along the west boundary. In the middle of the southern half of the property are an existing house and several small sheds. These are served by a single driveway off of Minkler Road.

3. The property is located at 24709 Minkler Road and comprises a portion of Lot 5 of Deiter's Acreage. The property is within a portion of the NW1/4SE1/4 Sec. 19, T35N, R5E, W.M. It is at the far eastern edge of the Sedro Woolley Urban Growth Area (UGA), about a half mile from the City's present limits.

4. The topography of the parcel is basically flat. Single family residences are located to the north, east and west. To the southeast is a mobile home park. Minkler and Fruitdale Roads are currently paved county roads with no urban improvements (*i.e.*, no sidewalks, curbs or storm drains).

5. Sedro Woolley's zoning of the property is SF-2, Single Family Residence 3-5 units per acre. The minimum lot size is 8,400 square feet. The applicant is proposing to divide the parcel into four lots. Lots 1, 2 and 3 are planned at 8,400 square feet each. The existing residence will be on Lot 2. Lot 4 will occupy the rest of the property (1.08 acres). A shadow plat is drawn on Lot 4, showing three more lots. Two of these are 8,400 square feet in area and the third contains 9,557 square feet. Approximately 20,790 square feet will be dedicated to an interior road to serve these future lots. Access for all lots will be from Minkler Road.

6. The applicant earlier was granted a variance (P1 01-0903) that allows the use of an on-site septic system for the proposed land division. The drainfields for proposed Lots 1, 2 and 3 are located on proposed Lot 4. The property is served by a public water supply (PUD #1).

7. Development of land that is located within an urban growth area is governed by the County-adopted provisions of the applicable City code. Skagit County Code (SCC) 14.02.040, Appendix A, lists the provisions of the Sedro Woolley Municipal Code (SWMC) that the County has adopted. Included is Title 16 -- Subdivisions.

8. Mr. Burnham filed an application to divide the subject property into four lots on November 13, 2002. The parties are in apparent agreement that the applicant is vested to the County-adopted provisions of City's code in effect on that date. Thus, SWMC 16.16.120 applies. That provision reads as follows:



Where an abutting street right-of-way is substandard in width or improvements therein, including paving, storm drains, curbs, gutters, sidewalks, additional right-of-way shall be deeded and/or improvements constructed so as to bring the abutting half of said right-of-way up to standard. At the discretion of the city, construction of such improvements may be deferred until such time as a building permit is applied for or a covenant may be placed on the plat requiring the developer or future property owners to participate in construction costs through a local improvement district, or other city or state sponsored road project.

9. The application at issue is for a variance from the requirement imposed by the first sentence of the above code subsection. At an earlier time the City routinely exercised its discretion under the second sentence, deferring half-street improvements indefinitely while requiring an agreement not to oppose a future LID or ULID for upgrading streets. This was done administratively and no variance application was required.

10. The applicant's pre-application meeting on the proposed short plat was held in May of 2001. He was then advised of the City's practice of granting administrative waivers of half-street requirements subject to a no protest agreement. On the basis of this discussion, he and his agents expected such a waiver in this case. City personnel do not recall saying that such a waiver would be forthcoming.

11. At some point, the City's practice of granting administrative waivers from the requirement for half-street improvements was abandoned. In the instant case, after a series of communications subsequent to the pre-application meeting, the City advised the applicant that he should either install the improvements or pay into a reserve fund to cover installing them at a future date. The amount to be paid would be equal to the costs of installing the completed half-street improvements.

12. The applicant decided that this was contrary to what he was told at the pre-application meeting and that he would not acquiesce in anything other than the signing of a no protest agreement. Eventually, the County notified the applicant that if the City refused to grant him relief on the half-street improvement issue he would need to pursue a variance before the County Hearing Examiner.

13. Once the variance was sought, the City staff did not flatly oppose it. Instead, they recommended approval with conditions. The primary condition involved a reduced package of street improvements identified by the City Engineer. The City also asked for a waiver of protest for both annexation and ULID creation.

14. At first, the County staff concurred in the City's recommendation, but on the day before the Hearing Examiner hearing, the County changed its position and recommended



approval of the variance subject only to the execution of a "no opposition agreement to a LID/ULID" prior to final approval of the proposed short plat.

15. The City's position was set forth in a letter from Richard Blair, City Engineer, to Marge Swint, County Planner, dated January 30, 2004. The letter stated that "the City is requesting that the applicant be required to construct sidewalks and limited asphalt and base in the unpaved area between the sidewalks and the county road but not make other improvements." The improvements requested would apply only to the Minkler Road frontage.

16. Although generally referred to in the record as a variance, the action sought is more properly called a "waiver" of requirements. The criteria to be applied are those of SWMC 16.24.030. That subsection reads, as follows:

The Planning commission shall not approve or disapprove of a waiver of the subdivision or short plat regulations unless it shall find that, because of the size of the tract to be divided, unusual geological conditions, unusual topographic conditions, the condition or nature of adjoining areas, or the existence of unusual physical conditions, strict compliance with the provisions of this title would cause unusual and unnecessary hardship on the subdivider, or would result in an undesirable plat.

Conditions on "waivers" should, insofar as practical, achieve the objectives of the requirement waived.

17. The three 8,400 square foot lots to be created by the proposed subdivision are all entirely along the Minkler Road frontage. The applicant points out that there are at present no urban roadway improvements along the entire length of Minkler Road. There are, in fact, no such improvements within a radius of at least a quarter mile in any direction from the subject property.

18. Because of a dip in the topography adjacent to Minkler Road along the property's frontage, considerable fill material would need to be imported either to make full half-street improvements or to install the level of improvements proposed by the City.

19. In February of 2002, the consultants for the applicant prepared a detailed estimate of the cost of full half-street improvements on Minkler Road and came up with a cost of \$45,790. A later estimate which eliminated the costs of curb and gutter, catch basin and storm sewer came to \$41,480.

20. The applicant testified that the cost of installing even the partial improvements requested by Sedro Woolley would make the subdivision economically infeasible.

21. The City's Engineer stated that he thought the applicant's figures for the partial improvements were too high. He said he would estimate the cost at about \$22,000. But he did not provide a detailed breakdown



22. The record contains an additional debate among engineers as to the usefulness of the improvements. In City's view, the fragment of sidewalk and paving would offset an impact of the short plat and could be integrated into a future road project. In the view of the applicant's consultants, the sidewalk and paving would serve no public purpose presently. Moreover, they assert, the incremental approach to construction might cause interim maintenance problems and would add features that would likely have to be replaced when a whole-road improvement is finally constructed.

23. The City's justifications for requiring street improvements were, at bottom, based on considerations of policy. Their factual reasons were conclusory and unsupported by any data. No traffic studies regarding the potential impacts of the short plat on road conditions were conducted. No studies of the effect of the development on pedestrian activity along the roadway were produced. No long-range plans for roads in the area were offered. No showing that the subdivision is likely to cause a violation of any adopted concurrency standard was made. No nexus was demonstrated between the sidewalk fragment and the needs of children in getting safely to area school.

24. In terms of the "waiver" standards, the uniformly unimproved condition of Minkler Road as it traverses the properties that abut it and the distance between the subject property and any properties with urban level road improvements qualify as "unusual physical conditions." Further, the Examiner finds that the cost estimates made by the applicant's consultants are credible. To be obliged to make even the outlay for the reduced package of improvements would constitute a hardship for the applicant for which no necessity has been demonstrated.

25. The hearing was continued and a second hearing session was held to allow the City to respond to the County's late change of position. The City representatives were concerned that the alteration of the County's recommendation was the result of specific directions to the Planning and Permit Department from the County Commission. Testimony was taken on this issue. The City's fears proved to be unfounded.

26. There was no written public comment or oral testimony in opposition to this application.

27. Any conclusion herein which may be deemed a finding is hereby adopted as such.

CONCLUSIONS OF LAW

1. The Hearing Examiner has jurisdiction over the persons and the subject matter of this proceeding.

2. The discretion of the City to defer half street improvements is not relevant here, because the City has declined to exercise that discretion under the terms of SWMC 16.16.120. Instead, the applicant has been obliged to apply for a waiver of the half-street requirement.

3. The Examiner concludes that the status of existing development in the area is among the circumstances that may be the basis for allowing a waiver of short plat regulations. Under the facts, the requisite unusual physical conditions and unnecessary hardship are present to support the granting of a waiver of half street improvement requirements pursuant to SWMC 16.24.030.

4. The City has attempted to compromise and require less than full half-street improvements. However, this effort founders on the City's failure to provide an adequate factual basis for the improvements sought. There is not substantial evidence to support the City's recommendation to require the applicant to make improvements to Minkler Road as a condition of development. See Benchmark Land Company v. City of Battleground, 146 Wn.2d 685 (2002).

5. Moreover, as Benchmark illustrates, it does not answer to say that street improvements are required by ordinance. The ordinance must be applied in conformity with State law. RCW 82.02.020 disallows such requirements in connection with the subdivision of land except to mitigate a direct impact that has been identified as a consequence of the subdivision. The City did not show the connection between the improvements recommended and substantiated project impacts.

6. The granting of a waiver for street improvements cannot be seen as a failure to provide "appropriate provisions" for infrastructure under the State subdivision law. See RCW 58.17.100. Indeed, the waiver, is a method for determining what is "appropriate" in the given situation.

7. The question of proper location of the west property line is, perhaps, a question that should be answered prior to the granting of a short plat. It is, however, not properly before the Examiner in these proceedings.

8. The waiver granted herein is intended to extend only to the short subdivision process and does not excuse the properties involved from bearing their fair share of infrastructure costs when urban level road improvements are eventually made in the area. The waiver, therefore, should be allowed in exchange for a promise not to oppose the eventual annexation of the tract or the extension of services by local improvements districts.

9. Any finding herein which may be deemed a conclusion is hereby adopted as such.



DECISION

The requested variance (waiver) from half-street improvements is granted, subject to the following conditions:

- (1) The variance number and date of approval shall be placed on the final plat map.
- (2) Prior to recording of the short plat, the applicant shall sign and record waivers of protest for a ULID or LID relating to streets abutting the property.
- (3) Prior to the recording of the short plat, the applicant shall sign, and give consent to a waiver of protest to annexation of the development, provided that the requirements of Chapter 35A.14 RCW are complied with in any annexation proceedings.



Wick Dufford, Hearing Examiner

Date of Action: April 13, 2004

Copy Transmitted to Applicant: April 13, 2004

RECONSIDERATION/APPEAL

As provided in SCC 14.06.180, a request for reconsideration may be filed with the Planning and Permit Center within 10 days after the date of this decision. As provided in SCC 14.06.120(9), the decision may be appealed to the Board of County Commissioners by filing a written Notice of Appeal with the Planning and Permit Center within 14 days after the date of the decision, or decision on reconsideration, if applicable.

