BEFORE THE SKAGIT COUNTY HEARING EXAMINER

WILLIAM A. STILES, JR.	)	
	)	**PL07-0912**
Appellant,	)	
	)	**FINDINGS OF FACT,**
v.	)	**CONCLUSIONS OF LAW**
	)	**AND DECISION**
SKAGIT COUNTY,	)	
	)	
Respondent.	)	
	)	

This case is an appeal of the denial of a lot certification for development permit consideration for Tract C of the Avery Lane plat/planned unit development. The hearing was held upon due notice on January 23, 2008. Patrick M Hayden, Attorney at Law, represented the Appellant. The County was represented by Grace Roeder, Senior Planner.

FINDINGS OF FACT

1. Willam Stiles, Jr. (Appellant) is the owner of Tract C of the Avery Lane plat/ PUD, located within a portion of the NW1/4NW1/4 Sec. 14, T35N, R4E, W.M. The Parcel number is P114992. The property is approximately at the southeast intersection of Union Road and the Burlington Northern Railroad tracks.

2. Tract C is a parcel of land labeled "Reserve" on the plat map that was approved and recorded in 1999 (AF 9905110004). It is 10.84 acres in size. The Appellant seeks to obtain a building permit or to sell the lot as being eligible for a building permit.

3. The Comprehensive Plan and zoning designation for the property is Rural Reserve (RRv) which establishes a minimum lot size of 10 acres and allows two residential developments per 10 acres with a CaRD land division. The parent plat/PUD development parcel is 70 acres in size and, as recorded, contains 14 residential lots. This meets the limit for CaRD density (two residences per 10 acres), leaving no further residential development opportunity at present. The residential lots are clustered as required for a CaRD.

4. The original plat/PUD set aside several open space tracts, including Tract C, as "reserve" tracts with the idea that they could be developed when and if future regulations allowed such development. Plat note #10 states: "Reserve Tracts C, D, and F are set

aside for future development as permitted by Local, County, and State laws, Ordinances and Regulations."

5. The subject lot certification decision (PL07-0877) confirms that the parcel is a lot of record as defined in SCC 14.04.020 and therefore is eligible for conveyance. However, it states that the property does not meet an exemption listed in SCC 14.16.850(4)(c) and therefore is not eligible to be considered for development permits. The decision was entered on November 19, 2007. The Appellant seeks reversal of the determination that the lot is not eligible to be considered for development permits.

6. Lot certification is required as a part of a complete application for a development permit. SCC 14.06.040(5). Under SCC 14.06.045(1)(a), to be eligible for conveyance, a lot must have been legally created (a "lot of record"). Under SCC 14.06.045(1)(b), to be eligible to be considered for development, a lot must either meet minimum lot size requirements for the zone or, if it is a "substandard lot of record," must meet at least one of the exemptions identified in SCC 14.16.850(4)(c).

7. SCC 14.16.850(4)(a) states that only lots of record meeting minimum lot size requirements for the zone will be eligible for development permits. Substandard lots shall be considered for development permits only if they meet one or more of the exemptions of (4)(c). SCC 14.16.850(4)(c) in pertinent part reads:

> The County shall only consider issuing development permits on those substandard lots of record meeting any of the exemptions in this Subsection.
>
> (i) The lot of record was properly platted and approved by Skagit on or after March 1, 1965; provided that any lot that was created with a restriction on the face of the plat that the lot was created "not for development purposes" shall not be considered for development pursuant to this Subsection.

6. When the original plat/PUD application was filed, the applicant asked for a variance from the then PUD requirement that 20% of the net development area, exclusive of land unsuitable for development, shall be established and preserved as open space. (See former SCC 14.04.140(6).) This variance request was denied.

7. The mitigated DNS for the plat/PUD contained a condition that was incorporated into the project's approval. The condition states:

> If the variance is granted to allow the open space portion of the project to be developed at some future date, the project shall be conditioned as follows:
>
> "The open space area shall be not available for development until

such time as the land is reclassified as part of comprehensive plan amendment or is included within an urban growth area. Interim uses of the property shall be open space and/or natural resource production."

8. The Staff has taken the position that the portion of the above condition in quotation marks is a restriction on the face of the plat showing that Tract C was created "not for development purposes" and that therefore it does not quality for an exemption under SCC 14.16.850(4)(c)(i).

9. On this point, the Appellant makes two arguments:

(a) Tract C is a 10-acre lot and thus meets the current minimum lot size for the RRv zone. Under the clear terms of the applicable regulations, to be considered for development a lot must either meet minimum lot size requirements or, if substandard, must qualify for an exemption. Because Tract C is not substandard, it need not qualify for an exemption. Meeting the minimum lot size is all that is required for certification.

(b) The MDNS condition does not apply in any event because by its terms it was to be applicable only if the variance was granted and that didn't happen.

10. The Appellant also makes an argument that the effect of the Supreme Court's reversal of a Growth Management Hearings Board (GMHB) decision in *Skagit Surveyors v Friends of Skagit County*, 135 Wn.2d 542 (1998), is that the subject plat/PUD is vested to development at a higher density than current zoning allows. The idea is that Tract C is entitled to be developed now taking advantage of this additional density.

11. In February of 1996, the GMHB invalidated pre-Growth Management Act development ordinances in the County. The subject plat/PUD application was submitted in May of 1996. The Supreme Court in 1998 ruled that the GMHB did not have authority to invalidate County ordinances enacted prior to the adoption of the GMA.

12. The Hearing Examiner approved the subject plat/PUD in May of 1998, in the configuration and density that were proposed. There was no appeal. The Supreme Court decision came out in June of 1998. In November of 1998, the County Planning Director advised the Appellant that as a result of the *Skagit Surveyors* decision, the project could be revised in accordance with the densities allowed prior to the invalidation (pre-GMA density). However, the Appellant never took advantage of this information. The final plat/PUD was recorded in May of 1999 as approved by the Hearing Examiner. The Appellant has never applied for a plat alteration. The present zoning and density requirements for the property were confirmed with the adoption of the new Comprehensive Plan and Uniform Development Code on July 24, 2000.

13. The Staff argues that the plat/PUD process has long since been completed, that the Appellant failed to revise the plat before it became final, and that vesting does

not operate to keep alive development opportunities that were taken prior to completion of the approval process.

14. Giving "reserve" status to Tract C was obviously an attempt by the developer to identify the parcel as a possible area for future development. The County's effort throughout the plat/PUD approval process was to warn that such development may not occur until changes in the law permit it. Plat note #10 is essentially a statement to this effect. It does not operate to authorize further development at the present time because, under the applicable zoning now in effect, no additional residential development is available for the subject property.

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

CONCLUSIONS OF LAW

1. The Hearing Examiner has jurisdiction over the persons and the subject matter of this appeal. SCC 14.06.045(8),

2. Both SCC 14.06.045 and 14.16.850 unambiguously create an either/or situation for certification that determines whether or not a lot of record will be considered for development permits. The lot must either meet the minimum lot size requirements of the zoning district in which it is located or, if the lot of record does not meet the zone's minimum lot size, it must meet one or more exemptions identified in SCC 14.16.850(4)(c).

3. In the instant case, the lot in question (Tract C) meets the applicable minimum lot size. Therefore, it is entitled to lot certification under SCC 14.05.045(b) allowing it to be considered for development permits.

4. The County argues that, read in context, the language of SCC 14.16.850(4)(c)(i) requires rejection of a certification request where there is a restriction on the face of the plat that the lot was created "not for development purposes." Under the plain language of the Code this ground for rejection applies only for "substandard lots of record."

5. Moreover, it is questionable that such a restriction exists in this case "on the face of the plat." Use of the word "reserved" surely doesn't amount to such a restriction. Plat note #10 is about future development. The MDNS condition on the plat's approval is by its terms inapplicable. Even if it were applicable, it does not state that no development can occur in the open space, but only that it will take a law change to accomplish it.

6. In holding that the Appellant is entitled to a lot certification for consideration for development permits, the Hearing Examiner is not deciding that any such permits should be approved. The law is clear that any such permit can be approved only upon the merits of the development permit application.

7. Any such application would have to be considered in the context of the existing plat/PUD approval as measured against current zoning and density requirements. SCC 14.18.200(8) expressly states that applications for subdivision alterations shall comply with regulations in effect at the time the alteration application is submitted.

8. The Appellant misconceives the reach of the vesting doctrine as codified for subdivisions by RCW 58.17.033. The doctrine allows land division proposals to be considered under the land use ordinances in effect at the time a fully completed application for preliminary plat is submitted. This means that changes in the law that occur while the approval process is still ongoing cannot operate to frustrate fully planned projects. However, it does not freeze the law applicable to that project forever. The benefit of prior ordinances lasts only until the approval process is complete. If the developer wishes to change the project after a permit or final plat approval is received, he must ask for the change and be subject to the law as it is when he makes the request.

9. The Appellant's problem with further development of Avery Lane PUD now is that he failed to take advantage of the chance to alter his application to take advantage of increased density when the opportunity was presented. Once the final plat was filed and recorded that door closed.

10. All this is just to say that obtaining a lot of record certification under both the conveyance and development subsections of the regulation may prove to be a Pyrrhic victory.

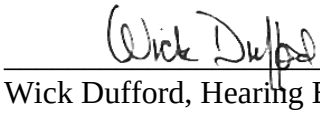
11. However, it should be pointed out that the lot of record regulations as they currently exist do not have the coverage that the Staff has assumed they have. If it is the County's intent to deny certification for consideration of development permits to all lots, of whatever size, that are created with a restriction forbidding development, a legislative fix is needed.

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

DECISION

The denial of certification for consideration for development permits for Tract C of Avery Lane is reversed. The County shall issue the certification pursuant to SCC 14.06.045(1)(b).

DONE this 21, day of February, 2008



Wick Dufford, Hearing Examiner

RECONSIDERATION/APPEAL

As provided in SCC 14.06.180, a request for reconsideration may be filed with Planning and Development Services within 10 days after the date of this decision. As provided in SCC 14.06.110(13), the decision may be appealed to the Board of County Commissioners by filing a written Notice of Appeal with the clerk of the Board within 14 days after the date of the decision, or decision on reconsideration, if applicable.