February 3, 2006

OFFICE OF THE HEARING EXAMINER
KING COUNTY, WASHINGTON
400 Yesler Way, Room 404
Seattle, Washington 98104
Telephone (206) 296-4660
Facsimile (206) 296-1654

REPORT AND DECISION

SUBJECT: Department of Development and Environmental Services File No. **L05AP015**

SOLOMON FAMILY, LLC
Pre-application Determination Appeal

Location: Between 240th Place Southeast and 244th Avenue Southeast, north of Southeast 218th Street

Applicant: Solomon Family, LLC
represented by **J. Richard Aramburu,** Attorney
505 Madison Street, Suite 209
Seattle, Washington 98104
Telephone: (206) 625-9515
Facsimile: (206) 682-1376

King County: Department of Development and Environmental Services,
represented by **Lanny Henoch**
900 Oakesdale Avenue Southwest
Renton, Washington 98055
Telephone: (206) 296-6632
Facsimile: (206) 296-7051

and

Cass Newell, Attorney
King County Prosecuting Attorney's Office
516 3rd Avenue, Room 400
Seattle, Washington 98104
Telephone: (206) 296-9015
Facsimile: (206) 296-0191

SUMMARY OF DECISION/RECOMMENDATION:

Department's Preliminary Recommendation:	Deny appeal
Department's Final Recommendation:	Deny appeal
Examiner's Decision:	Deny appeal

EXAMINER PROCEEDINGS:

Hearing Opened: January 12, 2006
Hearing Closed: January 12, 2006

Participants at the public hearing and the exhibits offered and entered are listed in the attached minutes. A verbatim recording of the hearing is available in the office of the King County Hearing Examiner.

FINDINGS, CONCLUSIONS & DECISION: Having reviewed the record in this matter, the Examiner now makes and enters the following:

FINDINGS OF FACT:

1. The King County Code requires that a prospective applicant for a short plat first file a request with the Department of Development and Environmental Services for a pre-application conference. Pursuant to this pre-application procedure DDES may issue a preliminary determination that a proposed development is not permissible under applicable county policies or regulations. In such case KCC 20.20.030.B provides that "the applicant shall have the option to appeal the preliminary determination to the hearing examiner in the manner provided for a Type 2 permit, as an alternative to proceeding with a complete application."

2. The Solomon Family LLC owns a nine hole golf course located near Maple Valley, northwest of the intersection of Southeast 216th Street and 244th Avenue Southeast and south of SR 18. On March 30, 2005 Jerry Solomon requested a pre-application conference with DDES to discuss a proposed nine lot short plat and a conference was held on April 20, 2005. On October 3, 2005, at the request of the Solomons' attorney, DDES planner Lanny Henoch wrote a pre-application review letter stating that "DDES anticipates it would issue a denial of the … short subdivision application" and reciting three basic reasons why such outcome was believed to be mandated. These reasons involved reference to the permitted use tables contained in KCC Chapter 21A 08, the clustering provisions of KCC Chapter 21A 14 and grading restrictions contained in KCC Chapter 16.82.

3. The Solomons' attorney Richard Aramburu filed a timely appeal of the October 3, 2005, DDES review letter pursuant to KCC 20.20.030.B. A pre-hearing conference was held on November 21, 2005, by the King County Hearing Examiner's Office, and a pre-hearing order dated November 30, 2005, identified appeal issues and set the January 12, 2006, hearing date. The parties have agreed that potential historic preservation concerns arising with respect to buildings on the site are not ripe for consideration in this proceeding, and DDES has reluctantly concluded that the mowing of golf course grass does not constitute clearing under the county grading ordinance. In addition on January 6, 2006 the Hearing Examiner clarified the pre-hearing order by directing the parties to also ponder the significance of the zoning code definition for "open space".

4. The basic facts underlying this appeal are not in dispute. The original 80 acre parcel that includes the Solomon property was cleared and cultivated as a farm and nursery dating back before 1936 as shown in aerial photos. The historic Olson mansion and barn were built about

1908. In 1992 a 62.5 acre portion of the original parcel obtained conditional use permit approval for development of a nine hole golf course on previously farmed portions of the property and for use of the historic Olson mansion buildings as bed and breakfast and golf course support facilities. Mr. Solomon bought the property in early 2003 and added a swimming pool and miniature golf. In early 2005 a portion of the site comprising more than 17 acres located at its north end adjacent to SR 18 and containing wetland and stream features was sold to the Washington Department of Transportation. WSDOT is currently widening SR 18 and has cleared about five acres of wetland area for use as a log dump.

5. Even with the facilities improvements recently constructed by Mr. Solomon, the complex has not been a financial success. This has led Mr. Solomon to conclude that a more profitable use of the property might be to convert it into a nine-lot cluster short plat with the residential lots to be developed in the general area of the existing buildings, driving range and parking lot. The nine hole course and the swimming pool would remain and be held in common by the lot owners for their personal recreational use.

CONCLUSIONS:

1. While DDES appears to have reached a correct conclusion overall regarding the ability of the short plat proposal to comply with county codes, we do not find most of the reasons cited by staff for this outcome to be persuasive. A general criticism of the staff analysis is that it plucks from various county codes provisions which appear descriptive of the property but does so without consideration for whether the specific code references cited are actually applicable to the short plat concept articulated by Mr. Solomon. If a code section by its terms simply does not apply to the Solomon proposal, then it has no direct regulatory effect even though it may describe a factual situation that is in some way analogous. As will be elaborated below, at most such provisions can only be employed to provide additional clarity to those regulatory terms that are in fact directly applicable to the Solomon proposal.

2. One of the pillars of the DDES analysis is a note appended to the "Recreational/cultural land uses" table contained at KCC 21.08.040.A. This table shows golf facility development to be conditionally permitted in the RA zone subject to footnote 7 within subsection B. Subsection B is titled "Development conditions" and note 7 supplies requirements for golf facility applications. The last two sentences of this note read as follows:

> "Furthermore, the residential density that is otherwise permitted by the zone shall not be used on other portions of the site through clustering or on other sites through the transfer of density provision. This residential density clustering or transfer limitation shall be reflected in a deed restriction that is recorded at the time applicable permits for the development of the golf course are issued."

While this language certainly upholds the proposition that golf courses cannot be used to support residential clustering applications, this note by its terms only applies to a golf facility application. Thus it cannot be cited as a primary basis for denial of the Solomon short plat proposal because the golf course already exists and no new permit application for it is contemplated or required.

3. DDES has also cited as authority for its position KCC 16.82.150, which contains clearing and grading code restrictions for the RA zone and provides standards that "apply to clearing on individual lots" (KCC 16.82.150.A). KCC 16.82.150.F contains language about maintaining uncleared space as resource areas and limits permitted activities thereon to passive recreational uses. These references are of no special importance to our review because the section as a whole does not apply to the Solomon proposal. Mr. Solomon is proposing a short plat, not clearing on individual lots.

4. Somewhat closer to the target is KCC 16.82.152, titled "Clearing standards for subdivisions and short subdivisions in the rural residential zone". Subsection A.1 provides that "clearing allowed in … short subdivisions in the RA zone … shall not exceed 35%" of the plat area and subsection A.2 requires the "area remaining uncleared" to be delineated as a "permanent resource management area." Further, subsection G restricts the uses permitted within the resource land tract to be those allowed by KCC 16.82.150.F, in other words, passive recreation uses and facilities.

5. The October 3, 2005 DDES review letter describes failure to comply with KCC 16.82.150 and 152 as providing "a third basis for our anticipated denial of the proposed short subdivision". The problem with that stance is that KCC Chapter 16.82 by its terms only applies to new clearing and grading activity, and the Solomon short plat proposal does not appear to require major new clearing to occur. As the record demonstrates, most of the significant site clearing took place over 70 years ago. While some regrading may need to occur for development of the short plat, the provisions cited by DDES only regulate clearing. Moreover, a quick peek at the KCC 19.08.060 procedures for subdivision and short plat approvals discloses 17 regulatory documents described as providing the substantive basis for short plat approval. Nowhere is compliance with the clearing and grading code identified as a preliminary approval requirement. What this omission implies is that a short plat only needs to comply with the grading code after it receives preliminary approval, and then only to the extent of the clearing and grading actually proposed. While the language in KCC 16.82.152 referring to the need to place remaining uncleared areas in resource tracts is troublesome in that it is conceivable that an uncleared area may not contain natural resource amenities worthy of protection, this is not an anomaly that needs to be addressed in this proceeding.

6. The one section relied upon by DDES that is in fact critical to this review is KCC 21A.14.040, which deals with lot clustering and therefore directly regulates the actual proposal being pursued by the Solomon Family Trust. KCC 21A.14.040.B applies to the RA zone and in subsection 6 requires that "open space tracts created by clustering in the RA zone shall be designated as permanent open space". It further states that "acceptable uses within open space tracts are passive recreation, with no development of active recreational facilities, natural surface pedestrian and equestrian foot trails and passive recreational facilities". Subsection 8 elaborates on the acceptable uses provision by stating that "passive recreational facilities include trail access points, small scale parking areas and restroom facilities". The intent here appears to be to clarify that for major passive recreational amenities the provision of basic support infrastructure will not constitute a disqualifying feature.

7. For a lot clustering proposal in the RA zone two fundamental requirements must be met. First, the non-clustered area must qualify as "permanent open space" and second, such permanent open

space can only be devoted to a limited range of passive recreational uses. While a conclusive description of passive recreational uses and facilities may not be essential here because the decision can be more firmly grounded on other requirements, the regulatory concept should look to characterizing the nature of the property development rather than attempting to quantify the level of use. The golf course should be regarded as either intrinsically an active or passive recreational facility without creating a need to monitor how many people actually use it.

8. The key element of the definition of "open space" provided at KCC 21A.06.819 is that it comprises "areas left predominantly in a natural state". The principal barrier to approving lot clustering on the Solomon property is that the golf course, green and lovely though it may be, is not an area left predominantly in its natural state and does not qualify as open space under the zoning code definition. While the term "predominantly" is not provided with further specification in the code, in its ordinary dictionary meaning it implies something more than 50%. For the Solomon golf course to qualify as open space for lot clustering purposes at least half of its area would need to be returned to a natural state either through some sort of natural vegetation planting regime or by simply allowing it to lie fallow. Since achieving this status appears to be at odds with the Solomon short plat application as it is presently conceived, the conclusion must be that the proposal described by Mr. Solomon does not supply the required open space and therefore does not qualify for lot clustering.

9. With respect to the second prong of the analysis required by KCC 21A.14.040.B.6, that open space tract uses be limited to passive recreation with no development of active recreational facilities, there is considerable room for argument as to what is permitted and what is not. The various descriptive references within KCC 21A.14.040.B itself seem to imply as a common element facilities and activities that emphasize the use of property in its undeveloped condition, with various forms of trail development being the primary specific examples provided of permitted passive recreation. The descriptions of passive recreation provided within KCC 16.82.150.F of the clearing and grading ordinance are somewhat more expansive, including horse as well as pedestrian trails, "nature viewing areas, fishing and camping areas". These grading code references are consistent with the viewpoint derived from KCC 21A.14.040.B that facilitating use of property in a primarily undeveloped condition is the regulatory focus, but we are reluctant to rely on them as authority for interpreting the zoning code because they appear in a different ordinance.

10. This debate could, of course, be brought to a summary conclusion if the zoning code definitions provided within KCC Chapter 21A.06 were more adequate. The definition of "active recreation space" provided at KCC 21A.06.026 mainly tells us that active recreation space is different from passive recreation space, which itself remains undefined. The definition of a "golf course facility" at KCC 21A.06.555 could have easily informed us whether a golf course is an active or passive recreational facility but it does not, merely defining it as "a recreational facility" without the critical qualifying descriptor.

11. On this issue of determining the scope of allowable passive recreation on an open space tract the most compelling conclusions are perhaps those that can be derived by inference. As noted above, the definition provided at KCC 21A.06.819 identifies the essential characteristic of "open space" as "areas left predominantly in a natural state". This criterion suggests that the uses and facilities appropriate to a designated open space tract are necessarily those consistent with its

preservation in a natural state. Here also footnote 7 attached to KCC 21A.08.040.B, discussed above, provides helpful guidance. Although the footnote regulates the development of new golf courses and thus by its terms does not apply to the Solomon proposal, its assertion that residential density requirements for clustering proposals cannot be met by employing a golf course facility as open space carries with it the inevitable implication that Title 21A does not regard a golf course as a passive recreational facility. Accordingly, this note, plus the open space definition itself, compel an interpretation of the passive recreation requirement within KCC 21A.14.040.B that limits it to uses and facilities that are consistent with the primary open space purpose of preserving the tract in its natural state. Although golf courses may be vegetated, they are not natural environments, and golf does not qualify as passive recreation within the meaning of KCC Title 21A.

DECISION:

The appeal of the Solomon Family LLC is DENIED. The Appellant's pre-application development concept for approval of short plat lot clustering based on reliance on an existing golf course as an open space tract conflicts the requirements of KCC 21A.14.040.B. A golf course is not an area left predominantly in a natural state as required by the open space definition, and golf itself, as characterized by the facilities essential for its conduct, is not passive recreation within the meaning of the zoning code.

ORDERED this 3rd day of February, 2006.

_____

Stafford L. Smith
King County Hearing Examiner

TRANSMITTED this 3rd day of February, 2006, to the following parties and interested persons of record:

Richard Aramburu
Attorney at Law
505 Madison St. #209
Seattle WA 98104

Ron Nieman
23858 SE 216th St.
Maple Valley WA 98038

Jerry Solomon
21401 - 244th Ave. SE
Maple Valley WA 98038

Kim Claussen
DDES/LUSD
MS OAK-DE-0100

Lisa Dinsmore
DDES/LUSD
MS OAK-DE-0100

Lanny Henoch
DDES/LUSD
MS OAK-DE-0100

Julie Koler
BRED/Historic Preservation
MS BOA-EX2000

Cass Newell
KC Prosecuting Attys' Office
MS KCC-PA-0400

Carol Rogers
DDES/LUSD
MS OAK-DE-0100

Ian Taylor
Prosecuting Atty's Office
MS KCC-PA-0400

NOTICE OF RIGHT TO APPEAL

Pursuant to Chapter 20.24, King County Code, the King County Council has directed that the Examiner make the final decision on behalf of the County regarding code enforcement appeals. The Examiner's decision shall be final and conclusive unless proceedings for review of the decision are properly commenced in Superior Court within twenty-one (21) days of issuance of the Examiner's decision. (The Land Use Petition Act defines the date on which a land use decision is issued by the Hearing Examiner as three days after a written decision is mailed.)

MINUTES OF THE JANUARY 12, 2006, PUBLIC HEARING ON DEPARTMENT OF DEVELOPMENT AND ENVIRONMENTAL SERVICES FILE NO. L05AP015.

Stafford L. Smith was the Hearing Examiner in this matter. Participating in the hearing were Lanny Henoch and Cass Newell, representing the Department; J. Richard Aramburu, representing the Appellant, and Jerry Solomon, the Appellant.

The following Exhibits were offered and entered into the record:

Exhibit No. 1	DDES File L05AP015
Exhibit No. 2	October 3, 2005 letter to J. Richard Aramburu from Lanny Henoch
Exhibit No. 3	October 17, 2005 letter from J. Richard Aramburu, Re: Notice of Appeal
Exhibit No. 4	State of Appeal prepared by J. Richard Aramburu; received by DDES on October 25, 2005
Exhibit No. 5	December 7, 2005 letter from Cass Newell, King County Prosecuting Attorney's Office to J. Richard Aramburu
Exhibit No. 6	Notice of Recommendation and Hearing; mailed December 15, 2005
Exhibit No. 7	Land Use Pre-application Meeting Request Form; received by DDES on March 30, 2005
Exhibit No. 8	DDES staff report prepared for the January 12, 2006 hearing
Exhibit No. 9	Undated correspondence received by DDES from Ron Nieman
Exhibit No. 10	Site Plan prepared by Baima & Holmberg, Inc.; received by DDES on March 30, 2005
Exhibit No. 11	Site Plan prepared by Baima & Holmberg, Inc.; received by DDES on December 13, 2005
Exhibit No. 12	Conditional Use Permit Decision dated August 13, 1992
Exhibit No. 13a	Aerial photo from Walker & Associates dated 1936
13b	Aerial photo from Walker & Associates dated July 28, 1960
13c	Aerial photo from Walker & Associates dated August 12, 1990
13d	Aerial photo from Walker & Associates dated April 25, 2004
Exhibit No. 14	Photograph taken December 2005 of the area taken by the state looking from the south to the north
Exhibit No. 15	Photograph taken December 2005 of area south of the mansion looking west
Exhibit No. 16	Photograph taken December 2005 looking west showing one of the ponds
Exhibit No. 17	Photograph taken December 2005 showing the pond by the 8th green

SLS :gao/ms
L05AP015 RPT