March 6, 2006

OFFICE OF THE HEARING EXAMINER
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ORDER ON RECONSIDERATION

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
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1. On February 14, 2006, the Solomon Family, LLC, through its attorney filed a motion for reconsideration of the Hearing Examiner's report and decision in this proceeding dated February 3, 2006. A notice of reconsideration was issued on February 15, 2006, providing a March 3, 2006, comment deadline. The King County Department of Development and Environmental

Services has filed a brief in opposition to the Appellant's motion and two area residents, Milton Hayes and Ronald Neiman, have also submitted letters expressing their opposition.

2. The DDES brief asserts that the Appellant's motion is categorically defective because it does not present any newly discovered facts or evidence, cites no legal mistakes and attempts to introduce as new authority materials that were available to the Appellant at the time of the hearing. There is substantial merit to DDES's position, particularly with respect to the Appellant's discussion of "passive recreation", which does little more than rehash earlier arguments. The Appellant also now offers a detailed exposition of the zoning code definition for "open space", even though the Examiner's January 6, 2006, notice requested this material to be submitted at or prior to the hearing. Nonetheless, the Appellant's motion highlights some ambiguities within the February 3, 2006, decision, and further clarification of conclusion no. 8 therein may be warranted.

3. The Appellant's discussion within its reconsideration motion of the definition of "open space" contained at KCC 21A.06.819 attempts to construe the key term "natural state" to have it mean "current condition". As pointed out by the DDES brief, this interpretation distorts the normal meaning of the word "natural". It also ignores the employment of a critical adjective. The reference within the definition is to "a natural state", which implies a condition natural in character rather than current in time. For this term to support a meaning of "current condition" as argued by the Appellant, it would need to read "its natural state".

4. The Appellant's motion also argues that the list of examples stated at KCC 21A.06.819 includes items that do not necessarily require a "natural state" form of open space. For example, it is possible that a golf course could serve as an "urban separator" or a "greenbelt". The problem with this argument is that examples only serve to modify an interpretation of the underlying definition if one or more of the examples necessarily contradict the definition. Natural areas, however, are capable of serving as urban separators and greenbelts just as a golf course can. The fact that facilities other than "areas left predominantly in a natural state" can conceivably serve as urban separators or greenbelts does not necessitate a reinterpretation of the definition. The defining characteristic is not required to include all possible forms of the examples listed.

5. Within the zoning code clustering provisions themselves, the Appellant points out that KCC 21A.14.040A imposes a stricter requirement with respect to limiting the alteration or disturbance of open space tracts in the R zone than does subsection B for the RA zone. While this is true, it does not logically follow that this distinction has the effect of repealing the open space definition for the RA zone. Rather, the evident intent is to acknowledge that under KCC 21A.14.040B.7 the open space clustering requirement can be met alternatively by creating a forestry or agriculture resource land tract. While forestry and agriculture activities involve alterations that constitute exceptions to the natural state requirement for open space tracts, the scope of such exceptions is strictly limited by the ordinance provisions.

   In the RA zone therefore, the choice is between creating an open space tract that meets the zoning code definition or else qualifies for the exception created for resource land tracts. Since a golf course is not a resource land tract use, the exception does not apply to it and the standard definition requirement must be met. Nonetheless, the discussion within conclusion no. 8 of the February 3, 2006, decision should be revised to include recognition of the resource land tract option and the possibility that Mr. Solomon at some future time could decide to employ it.

6. The reconsideration motion also contains a variety of less substantial arguments that refer for the most part to regulatory and planning documents other than the King County zoning ordinance. For example, the Appellant's brief relies on a discussion within the Examiner's February 3, 2006, decision about the preexisting condition of lands that arose in the context of an improper citation by DDES of the County clearing and grading code as a short plat review standard. The same arguments for rejecting DDES's reliance on the grading code also apply to the Appellant's reconsideration motion. In a like manner, the Appellant has quoted references to open space provisions within the current use taxation statute and the County's parks plan. Again, these discussions are specific to the topics under reference and provide no guidance in the zoning code context. Finally, the Appellant's brief cites some speculative discussion within the Examiner's decision concerning whether Mr. Solomon might convert his golf course back to open space qualifying uses, which discussion was offered simply as a framework for further conceptualization and not as a definitive exposition of regulatory requirements. Conclusion no. 8 has also been clarified to make this more plain.

ORDER:

A. On reconsideration, conclusion no. 8 within the Examiner's February 3, 2006, report and decision is revised to read as follows:

> 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 percent. Assuming for the sake of discussion that its current development status is not irreversible, 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 condition approximating a natural state, perhaps through some sort of natural vegetation planting regime or by simply allowing it to lie fallow. Since achieving such status appears to be at odds with the Solomon short plat application as it is presently conceived, the conclusion at this time must be that the proposal described by Mr. Solomon does not supply the required open space and therefore does not qualify for lot clustering.
>
> It is also to be noted that KCC 21A.14.040B.7 creates a specific exception to the "natural state" open space requirement for forestry or agriculture resource land tracts. Although creation of a resource land tract is not part of the Solomon short plat concept and therefore not germane to our discussion, the resource land tract option remains available to the Appellant.

B. The period for appealing the decision as described at the top of page 7 of the February 3, 2006, report shall commence on the date this reconsideration order is issued.

ORDERED this 6th day of March, 2006.

Stafford L. Smith
King County Hearing Examiner

TRANSMITTED this 6th day of March, 2006, to the following parties and interested persons of record:

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