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Kathy Hill, Skagit County Auditor

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

DOCUMENT TITLE: CRITICAL AREAS VARIANCE APPLICATION CV 99 0373

HEARING OFFICER: SKAGIT COUNTY HEARING EXAMINER

APPLICANT: DONALD and KRISTI HOLT

ASSESSOR PARCEL NO: P66835

ABBREVIATED LEGAL DESCRIPTION: located at Lot 57, Block 1 of Lake Cavanaugh
Subdivision #3, within the NE ¼ of Section 28, Township 33 North, Range 6 East, W.M.,
Skagit County, Washington

SKAGIT COUNTY HEARING EXAMINER
STATE OF WASHINGTON

In the Matter of:)	
Application of Don and Kristi Holt)	No: CV 99-0373
For a Critical Area Variance to Allow)	
Placement of a Single Family Residence,)	Findings of Fact,
Garage, Septic System and Driveway)	Conclusions of Law
Within the Riparian Buffer of Lake)	And Order
Cavanaugh an Associated Wetland.)	
)	

THIS MATTER, an application for a Critical Area Variance, came on regularly before the Skagit County Hearing Examiner in a public hearing on October 20, 1999. The Skagit County Planning and Permit Center presented its Staff Report. Rodney Vandersypen, Consultant, appeared for the applicants. Members of the public were given an opportunity to be heard.

Testimony was taken, exhibits were admitted and argument was made. On the basis thereof, the following is entered:

FINDINGS OF FACT

1. Don And Kristi Holt seek a variance in order to build a home and accessories on Lot 57, Block 1 of Lake Cavanaugh Subdivision #3. The lot is approximately .68 acre (29,625 square feet) in size. The property is within a portion of the NE1/4 of Sec. 28, T33N, R6E, W.M.
2. The project would at its closest point be approximately 64 feet from the Ordinary High Water Mark (OHWM) of Lake Cavanaugh. The lake is a Type I water area. (WAC 222-16-030). As such it constitutes a fish and wildlife conservation area under the Critical Areas Ordinance (SCC 14.06.040(29)(f)). If the riparian buffers apply to lakes as well as to streams, the relevant buffer width from the lakeshore is 200 feet.
3. Seventy percent (70%) of the property is also within a historic Category III wetland. The buffer associated with such a wetland is 50 feet.
4. The lot is approximately 100 feet wide and 375 feet deep. It is bordered on the northeast by Lake Cavanaugh and on the southwest by South Shore Drive. The historic wetland on site has been previously altered by fills and drainage attempts. A remnant of Western Hemlock forest is located in the middle portion of the lot. The back of the property supports Red Alder replanted over the proposed drainfield area. The lakefront portion of the lot has been cleared and filled over time. The proposed homesite would be toward the back of this largely open area with the rear of the house near the remnant of forest.



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5. The subject property is zoned Rural Village. The shoreline designation is Rural Residential. The subdivision was created long before the adoption of the Critical Areas Ordinance (CAO). The purpose was to create waterfront building sites for single family homes. The lots on either side of the applicants' lot are already developed with single family residences that intrude into the 200 foot setback. Indeed, the newest of them, built within the last several years, is closer to the Lake than the applicants propose to be.

6. The applicants purchased the property in 1998. None of the alterations of the site were their doing. Historically the site was higher than its neighbors on either side. Alterations of the neighboring lots have changed the drainage pattern. The remnants of an old rip rap bulkhead stretch across all three properties. Filling was done behind the entire bulkhead. Although there are some trees and shrubs, most of the area immediately behind the bulkhead on the applicants' lot is now a planted lawn. There is a rock lined curtain drain along the driveway toward the rear of the property. This drain discharges to a tightline which transmits water to the lake.

7. A Wetlands Assessment and Buffer Enhancement Plan prepared in 1997 by Graham-Bunting Associates for previous owners was submitted with this application. A detailed delineation of the wetland area was not done because "the site is predominated by wetlands and disturbed areas overlying wetlands." The Assessment concluded that, because of the extent of the wetlands, the 50 foot wetland buffer would be impossible to meet. Moreover, the proposed development would have a direct impact on approximately 2,500 square feet of disturbed wetland.

8. Notwithstanding prior disturbances, the Assessment determined that the property continues to provide wetland functions linked primarily with the forested plant community in the immediate shoreline area. The record does not disclose any site development in the interim between preparation of the Assessment and the present, but the photographic evidence presented shows a severely limited area of intact wetland fringe on the shoreline. Therefore, the Examiner finds that the remaining wetland functions are principally restricted to this very small remnant riparian vegetation.

9. The Assessment also concluded that wetland mitigation is not feasible. "On and off-site compensatory options are precluded by insufficient lot area and availability of alternative sites." A number of mitigation conditions were proposed. These are, as follows:

1. The existing native vegetation extending from the OHWM (located at the existing rock bulkhead) landward 50 feet should be retained in its natural condition as a buffer. Vegetation removal throughout the remainder of the subject property should be minimized. All areas disturbed during construction should be replanted upon completion of the project.
2. No additional shoreline hardening or bulkhead construction should be approved for the subject property without the landowner providing substantial

evidence verifying active erosion occurring at or landward of the OWHM.

3. A residential setback should be established in accordance with the dimensional requirements of the Skagit County Shorelines Master Program and should not be less than 64 feet landward of the OWHM. . . .

4. Temporary erosion-sediment control measures should be taken at ground breaking and maintained throughout the construction of the residence to avoid sediment discharge into Lake Cavanaugh. These measures should be pre-approved by the County to assure adequacy.

5. Construction phase and post construction monitoring should be provided to assure successful implementation of the mitigation conditions.

10. A number of letters from neighboring property owners were received, all in support of the subject application. At the hearing no members of the public testified. There is no record of any public opposition to this proposal.

11. SCC 14.06.100 sets forth the following criteria for approval of a CAO variance:

- a. That special conditions and circumstances exist which are peculiar to the land, structure or building involved and which are not applicable to other lands, structures, or buildings in the same district, and;
- b. The literal interpretation of the provisions of this chapter would deprive the applicant of rights commonly enjoyed by other properties in the same district under the terms of this chapter, and,
- c. That the special conditions and circumstances do not result from the actions of the applicant, and;
- d. The granting of the variance requested will not confer on the applicant any special privilege that is denied by this chapter to other lands, structures or buildings under similar circumstances.

12. The Staff's analysis applying these criteria to the instant application is set forth in the Staff Report under Finding 12 therein. The Examiner concurs with this analysis and hereby adopts it.

13. 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 parties and the subject matter of this proceeding.

2. As a threshold matter, the County Staff asks for consideration of whether the provisions for a Reasonable Use Exception should be employed here, rather than analyzing the application using the variance criteria.

3. Under the Critical Areas Ordinance (CAO), variances refer to relief from the "dimensional requirements" of the regulation. SCC 14.06.100. Reasonable Use Exceptions are for situations where "reasonable and economically viable use of the property cannot be obtained by consideration of a variance." SCC 14.06.110. The Staff points out that the request at hand asks for relief from the requirement for compensatory mitigation when wetlands or their buffers are impacted. Since this is not in itself a dimensional requirement, the suggestion is that the variance is the wrong mechanism for addressing the problem procedurally.

4. On reflection, the Examiner concludes that the variance process is appropriate. Normal setbacks simply prohibit development within a particular space. The variance is a means for relaxing the prohibition in circumstances of extraordinary hardship. The principal dimensional strictures of the CAO are those establishing buffers. Buffers differ from standard setbacks in that the prohibition on development does not apply if appropriate action is taken to compensate for the damage done by invading the restricted area. To grant relief from the compensatory mitigation requirement, however, does not require different analytical criteria from granting relief from an outright prohibition. The focus is still on the inability to comply imposed by special circumstances. Further, the relief granted is at bottom from a dimensional requirement.

5. A Reasonable Use Exception, on the other hand, is not concerned so much with the arrangement of structures in space as about the type of uses allowed in a particular area. Most land use regulatory regimes, including that of Skagit County, do not allow so-called "use variances." Where a particular use is prohibited outright in a zoning district, a variance cannot be granted to permit it. See SCC 14.04.233(3)(c), WAC 173-27-170(5). In extreme cases, land use regulations can result in restriction of the use of property beyond the limits allowed by the Constitution. The Reasonable Use Exception is really designed for the rare case when a variance will not solve a problem of Constitutional "taking." In such cases the ban against "use variances" may have to be relaxed in order to prevent the "denial of all reasonable and economically viable use of a property"

6. Therefore, the Examiner is of the opinion that the Reasonable Use Exception is designed to meet a different kind of problem than that presented in the instant case. This is not the sort of "last resort" situation for which the Reasonable Use Exception is intended.

7. Under the facts, the Examiner concludes that the variance criteria are met in this case.



The prior creation of this lot, its previous modification, and the lack of available sites for compensatory mitigation are special circumstances over which the applicants had no control. To deny the application would deprive the applicants of rights enjoyed by their immediate neighbors.

8. The Examiner notes that it is not altogether clear that a variance is even necessary in this case. SCC 14.06.230(1) states:

A regulated wetland or its required buffer can only be altered if the wetlands site assessment shows that the proposed alteration does not degrade the quantitative and qualitative functioning of the wetland, or any degradation can be adequately mitigated to protect the wetland function.

Here the Assessment appeared to limit the remaining wetland function to a small area near the lakefront which will not be affected by the subject project.

9. As to the 200 foot fish and wildlife habitat buffer, the language of SCC 14.06.530 is arguably limited to impacts on in-stream and near-stream habitat. Furthermore, the protective measures are to be based on a site-specific administrative "determination of potential impacts." Here the record does not document possible adverse impacts of the project on fish and wildlife resources.

10. Nevertheless, in keeping with the object of the CAO to reduce impacts to the minimum possible, it is appropriate that conditions be imposed, as follows:

1. The applicant shall obtain all necessary land use approvals (i.e., building permit, shoreline management master program approval) prior to construction.
2. The building setback line shall be flagged on-site during construction to prevent encroachment into wetland buffers.
3. Drainage outfall to the lake shall include a grassy swale to lessen erosion around the outfall of the curtain drain as requested by Skagit County Public Works Department.
4. Septic system proposed area needs to meet SCC 12.05. Remove fill in drainfield area as requested by Skagit County Health Department.
5. Any hazard trees proposed for removal shall be replaced at least one month prior to the end of the growing season with two year old trees of the same species.
6. The permittee shall comply with the conditions recommended in the



Wetland Assessment, as set forth above in Finding 9.

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

DECISION

The variance is APPROVED, subject to the conditions set forth in Conclusion 10 above.

Wick Dufford

Wick Dufford, Hearing Examiner

Date of Action: November 16, 1999

Copies transmitted to Applicant: November 16, 1999

RECONSIDERATION/APPEAL

This decision shall become final unless a request for reconsideration or appeal is filed. A request for reconsideration shall be filed with the Hearing Examiner within ten (10) days from the date of this decision. An appeal shall be filed with the Board of County Commissioners within fourteen (14) days from the date of this decision, or if reconsideration has been requested, within fourteen (14) day from the decision after reconsideration.



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