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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: ORDER ON VARIANCE VA 03-0070

HEARING OFFICER: SKAGIT COUNTY HEARING EXAMINER

APPLICANT: KIRBY HOSKINSON

ASSESSOR PARCEL NO: P36637, P36441

LEGAL DESCRIPTION: The proposed project is located at 8615 Garden of Eden Road, Sedro-Woolley, WA; a portion of the SW 1/4 of the NW 1/4 of Section 13, Township 35 North, Range 04 East, W.M. and a portion of the NE 1/4 of the SW 1/4 of Section 14, Township 35 North, Range 04 East, W.M., Skagit County, Washington.

BEFORE THE SKAGIT COUNTY HEARING EXAMINER

FINDINGS, CONCLUSIONS AND DECISION

Applicant: Kirby Hoskinson
8615 Garden of Eden Road
Sedro Woolley, WA 98284

Agent: Dave McLaughlin
Skagit Surveyors
806 Metcalf Street
Sedro Woolley, WA 98284

File No: PL03-0070

Request: Variance

Location: 8615 Garden of Eden Road, within a portion of SW1/4
NW1/4, Sec 13, T35N, R4E and with a portion of NE1/4
SW1/4, Sec 14, T35N, R4E, W.M. The site is within the
Urban Growth Area (UGA) for the City of Sedro Woolley.

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

Summary of Proposal: To be allowed to defer hook-up to the sanitary sewer in the
development of a four-lot short plat. The short plat will be
served by on-site septic systems.

Public Hearing: After reviewing the Report of the Planning and Permit
Center, the Hearing Examiner conducted a public hearing
on September 17, 2003.

Decision: The application is approved, subject to conditions.



FINDINGS OF FACT

1. Kirby Hoskinson (applicant) seeks a variance from the requirement for connection to the sanitary sewer in developing a four-lot short plat within the Urban Growth Area (UGA) of the City of Sedro Woolley.
2. The property is located at 8615 Garden of Eden Road, northwest of the City, within a portion of the SW1/4NW1/4, Sec. 13, T35N, R4E, and within a portion of the NE1/4SW1/4, Sec.14, T35N, R4E, W.M.
3. Development of land in Skagit County that is located within an urban growth area is governed by the County-adopted provisions of the applicable City code. SCC 14.02.040, Appendix A lists Title 16 (Subdivisions) of the Sedro Woolley Municipal Code (SWMC) as among those provisions adopted by the County.
4. Under SWMC 16.16.070(C) all plats must be served by sanitary sewer unless a variance is approved. The subject application seeks to be relieved of this requirement and to develop the short plat with on-site septic systems. The use of septic systems requires approval from the County Health Department.
5. The subject property is approximately 7.9 acres in size and irregular in shape. There is a single-family residence with an accessory building located in the northern portion of the property, east of a Type 4 stream that flows in a ravine that cuts through the parcel from north to south. The driveway to the house bridges the ravine. In the southeastern corner is a man-made pond.
6. The City'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 his property into four lots, as follows: Lot 1 will be approximately 8,441 square feet, Lot 2 will be approximately 8,404 square feet, Lot 3 will be approximately 8,410 square feet and Lot 4 will be approximately 322,720 square feet (7.41 acres). The existing residence is on the area included within Lot 4.
7. Proposed Lots 1 and 4 will have access via a 50-foot wide easement that contains the present driveway which connects to Garden of Eden Road near the southwest corner of the property. Lots 2 and 3 will have a combined access on the west off of Garden of Eden Road.
8. Lots 1, 2 and 3 are all located on the west side of the ravine. This is now a pasture area with a slight north-south slope. The drain fields for these lots are proposed to be located across the stream and east of the existing residence. The plat map shows a



15-foot easement for installation , maintenance and operation of sewer lines and drainage conveyance systems along the driveway that serves the residence.

9. The drain field area is remote from the westerly lots because it is only on the east side of the ravine that soils appropriate for septic system development can be found. The soils in the proposed drain field area have been tested and found to be satisfactory by the County Health Department.

10. The subject property is located at the north end of the UGA, separated from the existing sewer lines by several intervening large lot acreages. The nearest sewer is roughly 4,600 feet from the property. Extension of the sewer to the property would require a lift station.

11. According to City officials, a sewer pump station will be installed at West Jones Road and F & S Grade Road by mid-2004. This will be located southwest of the subject property by approximately 2,300 feet (.4 mile).

12. A letter of completeness for the subject application was issued on March 3, 2003. At that time, the Sedro Woolley Comprehensive Plan allowed for short plats more than 200 feet from the existing sanitary sewer to be served by individual on-site septic systems provided that the applicant signs a waiver of no protest for a future LID. Additionally, SWMC 16.16.240 then allowed short subdivisions to be served by on-site sewage disposal if a future development plan (shadow plat) was submitted and approved.

13. The applicant has indicated a willingness to sign the requisite waivers of protest. He has not, however, provided a shadow plat showing that the remaining property can be subdivided to create sufficient lots to comply with the minimum overall density of four units per acre. His agent stated that a shadow plat filed now would create a picture that is at odds with how the property will really be developed in the future, given the topography and the resulting eventual need to develop separate access to the eastern portion of the property.

14. Nonetheless, the agent testified if the subject short plat is approved, further division of the remainder of the property consistent with the minimum density ultimately required will not be precluded as a theoretical possibility.

15. On July 10, 2002, prior to the present application, Sedro Woolley adopted an interim ordinance (renewed December 11, 2002), requiring that all short plats and other land divisions be served by sanitary sewer and full public works infrastructure--effectively imposing a moratorium on the ability to subdivide without such urban facilities.

16. On May 12, 2003, after a public hearing, the Skagit County Board of Commissioners refused to adopt this ordinance for County lands within the Sedro Woolley UGA. This decision has been appealed to the Western Washington Growth



Management Hearings Board, as part of an ongoing compliance case, but the matter has not been decided. In August 2003, certain interim development regulations were adopted while settlement was pursued by the parties. The case has not been resolved.

17. The "moratorium" ordinance was made permanent by Sedro Woolley on June 25, 2003, and at the same time the requirement for shadow platting was eliminated. Amendments to the City's Comprehensive Plan supporting the ordinance changes were adopted concurrently.

18. There is, in short, a dispute between two governmental entities over what the appropriate regulations in the Sedro Woolley UGA ought to be. Notwithstanding the dispute, all parties are agreed that the scheme in effect prior to the city's "moratorium" legislation should govern in this case. The UGA is still under the County's jurisdiction and the City ordinances that apply there are only those that the County has seen fit to adopt.

19. The merits of this application are, thus, governed by the applicable County-adopted variance criteria from the Sedro Woolley Code. The request for a variance from the provisions of the Subdivision title is governed by the standards of Chapter 16.24 SWMC.

20. Chapter 16.24 SWMC uses the term "waiver" as a synonym for the term "variance." The standards of approval are found in SWMC 16.24.030 which allows a "waiver" upon findings 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.

21. The Examiner has, in the past, considered a number of variance requests for short plats seeking to avoid immediate sewer connection in the Sedro Woolley UGA. Prior to its recent legislation, the City, by and large, recommended approval of such variances. The Examiner has concurred. Now, in this case, doubtless influenced by the "moratorium," the City has recommended denial. The County Staff has, as before, deferred to the City's recommendation.

22. The applicant asserts that the distance to the nearest sewer is too great for the developer to bear the economic burden of sewer connection. If sewer extension must be financed, the short plat will simply not pencil out. This will still be true if the new pump



station is installed within a year or so. As noted, at the time of the application, the Sedro Woolley Comprehensive Plan contemplated that a distance to the sewer of over 200 feet would trigger approval of on-site septic systems for short plats.

23. Thus, the applicant argues, that the distance to the sewer is a special circumstance, supporting the use of septic systems for this particular four-lot short plat. In terms of the subdivision variance criteria, this circumstance can be characterized as an "unusual physical condition."

24. The applicant contends that the interim use of septic systems will not interfere with the ultimate goal of sewer connection because waivers of protest to a sewer ULID for such an eventual project will be required. Meanwhile, the objectives of the sewer connection regulation will be achieved by the use of septic systems approved by the Health Department.

25. The City opposes the variance. They are doubtful about the effectiveness of waivers of protest and believe that the cumulative effect of allowing sewer connection variances is detrimental to the ultimate ability to serve the UGA with sewers.

26. The City also advises that it is attempting to restrict stream crossings by utilities to those that will serve a large area in order to limit the environmental risk of leaks and breaks. The sewer line proposed here for a single small project is contrary to that policy.

27. The issue of the stream crossing by the sewer lines was addressed in environmental analysis. A geotechnical report concluded that the existing driveway can be widened and water and sewer force mains can be installed with conventional earthwork and road construction practices. Preliminary engineering of the sewer crossing resulted in a proposal for five two-inch sewer lines inside an eight-inch conduit to be placed in a trench located a minimum of six inches above the existing culvert in the existing driveway fill. No work would be done in the channel. The State Department of Fish and Wildlife advised that no Hydraulic Project Approval would be required.

28. A Mitigated Determination of Non-Significance (MDNS) under the State Environmental Policy Act (SEPA) for the variance request and the short plat was issued on July 1, 2003. The City made no comments. The MDNS was not appealed. Two of the MDNS conditions are as follows:

Stream crossing is allowed with double sleeving in adequate sewer pipe and no joints within 10 feet of the high water mark.

As an alternative, the joints may be certified by an Engineer that they have been pressure tested or leak tested in place.



29. These conditions are the result of recommendations from the County Health Department and will, if implemented, insure that the stream crossings meet the standards of the State Department of Ecology's "Criteria for Sewage Works Design." The applicants do not oppose these conditions.

30. The City has no explicit regulation restricting the number of stream crossings by utility lines. They seek to limit stream crossings on the basis of Comprehensive Plan policies that are broadly protective of critical areas. However, here, because the subject sewer lines will be within the existing right-of way they will not impact any critical area. Placement of utilities within existing rights-of-way is favored in the Sedro Woolley Code. See SWMC 17.65.060(13(b)).

31. Finally the City urges denial of the variance application because there is no shadow plat and therefore, they say, the possibilities for future division of the property cannot be analyzed.

32. The applicant's agent testified that he could supply a shadow plat showing development to the ultimately required density if required to do so.

33. Several letters were received from neighbors who opposed the variance. They expressed concern about poor soils, and the prior failure of septic systems in the neighborhood. They are afraid that the proposed on-site systems will cause pollution in the stream and nearby wells.

34. The reason for locating the drain fields east of the stream is to address these very concerns. The applicants had to search to find adequate soils, but did so to the satisfaction of the professionals who review such things. Both the sewage disposal facilities and the engineering of the stream crossing for the sewer lines can and will meet applicable standards designed to protect the environment.

35. Details of construction in relation to County ordinances will be handled in the short plat process. However, the materials presented to date are adequate for a ruling on the concept presented by the variance request.

36. 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. SCC 14.10.020.

2. The recent "moratorium" legislation and the apparent differences of the City and County concerning it are not relevant to the Hearing Examiner's decision on this application. The County Hearing Examiner's job is to apply the ordinances adopted by the County. Since the County has not seen fit to adopt this legislation, the Examiner must apply the regulatory scheme that existed without it.

3. In this case the applicant says that the four-lot short plat proposed is not economically feasible if he must comply with the sewer connection requirement. There is no evidence to the contrary.

4. The main argument against the sewer connection variance is that the cumulative effect of many such approvals will cumulatively render the eventual construction of sewers unlikely. The Examiner in the past has concluded that the waiver of protest mechanism counteracts this possibility.

5. This record contains no evidence that waivers of protest do not work, nor does the record otherwise offer a basis for concluding that the cumulative effect of sewer connection waivers will impede the eventual construction of sewers.

6. The Sedro Woolley subdivision variance criteria allow for the granting of variances when strict compliance with the provisions of the land division title "would cause unusual and unnecessary hardship on the subdivider, or would result in an undesirable plat." Among other things, the hardship may be the result of "the existence of unusual physical conditions." SWMC 16.24.030.

7. The Examiner concludes that the status of existing development in the area, including the distance to the sewer, is among the circumstances that meet the "unusual physical conditions" criterion. He concludes that such circumstances in this case are the cause of "unusual and unnecessary hardship on the subdivider." Therefore he holds that the proposal meets the requirements for a variance.

8. Moreover, the Examiner is unconvinced that the granting of such a variance will result in the violation of any other requirements of the Sedro Woolley Municipal Code. The septic system proposed can be constructed without significant environmental risk. The City's policy against multiple stream crossings is apparently the result of a perception of environmental risk, but it is legally based on general Comprehensive Plan policies rather than a concrete regulation. The policies on which it is based do not appear to be imminently threatened by approving this particular utility crossing within an existing right-of-way where the stream is already crossed by a road.

9. SWMC 16.16.240 allows for the approval of short plats without sewer service if a future development plan shows the possibility of attaining the minimum overall density of four units per acre. The idea is not to show how the property actually will be developed, but rather to show that the short plat will not preclude the possibility of development that meets density requirements. On the basis of the testimony, the



Examiner concludes that a plan showing this possibility can be drawn up. Therefore, rather than remanding the application for the preparation of such a plan, the Examiner has decided to require it as a condition of approval. If the plan provided does not make the requisite showing, then the condition will not be satisfied and the project will not be able to proceed.

10. SWMC (a)(1) states:

Subdivisions of four lots or under which rely on on-site sewage disposal shall cluster the lots on a portion of the site and create a reserve tract which will not be available for further subdivision or other development until municipal sewer service and water are available.

11. Here Lots 1 and 3 are roughly the minimum lot size for the district and are clustered on the western portion of the site. The large residual lot (Lot 4 -- 7.41 acres) can be viewed as the "reserve tract," upon which it is appropriate to preclude further subdivision until sewer service is available. Such a restriction should be made a condition of approval.

12. As in past cases, the sewer variance should be temporary in nature. Compliance with the requirement to connect to the municipal sewer should be deferred only until the special circumstances arising from the distance to the sewer cease to exist. This deferral should be allowed in exchanges for a promise not to oppose the eventual extension of services by ULID.

13. The following conditions of approval should be imposed on the variance.

- a. The variance number and date of approval shall be placed on the final plat map.
- b. Prior to recording of the short plat, the applicant shall sign and record a waiver of protest for a sewer ULID relating to facilities serving the property.
- c. 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 the requirements of Chapter 35A.14 RCW are complied with in any annexation proceedings.
- d. The applicant shall submit, and the County and City shall approve, a shadow plat showing how a future development might achieve the density of four units per acre on the property.



d. Beyond the four-lot short plat approved in connection with these variance proceedings, Lot 4 shall not be further subdivided until served by sanitary sewer so long as it remains within the Urban Growth area.

e. Development pursuant to this approval shall comply with the conditions of the MDNS issued on July 1, 2003.

f. All conditions of approval for Short Plat PL02-0389 shall be met.

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

DECISION

The requested variance is approved, subject to the conditions set forth in Conclusion 13 above. This variance is temporary in nature. This decision contemplates the eventual compliances of the owner(s) of the subject property with the urban infrastructure requirements of the Sedro Woolley Municipal Code.



Wick Dufford, Hearing Examiner

Date of Action: October 9, 2003

Copy Transmitted to Applicant: October 9, 2003

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.



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