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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 APPEALS AP 03 0768 and AP 03 0100

HEARING OFFICER: SKAGIT COUNTY HEARING EXAMINER

APPELLANT: NORTH BEACH COMMUNITY

ASSESSOR PARCEL NOS: P104416 & P46851

LEGAL DESCRIPTION: The subject property is located at 5126 Guemes Island Road, Anacortes, WA; a portion of Section 36, Township 36 North, Range 1 East W.M., Skagit County, Washington.

BEFORE THE SKAGIT COUNTY HEARING EXAMINER

North Beach Community,	)	
	)	**Appeal Nos: PL03-0768 (SEPA)**
Appellants,	)	**PL04-0100 (Special Use)**
	)	
v.	)	**FINDINGS OF FACT,**
	)	**CONCLUSIONS OF LAW**
Skagit County, Alverson Tract	)	**AND DECISION**
Owners Association,	)	
	)	
Respondents.	)	
	)	

This matter involves the appeal of an Administrative Special Use Permit and the Determination of Non-Significance (DNS) issued in connection with that permit. (See PL02-0149). The permit is for the construction and operation of a minor water utility to serve properties within the Alverson Tract on the north shore of Guemes Island. The Applicant is the Alverson Tract Owners Association.

The appeals came on regularly for hearing on April 14, 2004. Steve Orsini acted as spokesperson for the North Beach Community. Brandon Black, Planner, and Paul Reilly, Deputy Prosecutor, represented the County. Howard Pellett acted as spokesperson for the Alverson Tract Owners.

At the close of the hearing, the Examiner allowed two weeks for the County and the Applicant to make additional submissions and two weeks for response by the Appellants. Additional submissions were made by all parties. The record closed on May 12, 2004.

Testimony was taken, exhibits were admitted and argument was made. From the record, the following is entered:

FINDINGS OF FACT

1. On February 3, 2004, Skagit County administratively approved a Special Use Permit for the construction and operation of a "minor water utility development system" by the Alverson Tract Owners Association on Guemes Island.

2. A Mitigated Determination of Non-Significance (MDNS) under the State Environmental Policy Act (SEPA) was issued for the project on August 21, 2003.

3. Timely appeals of both the DNS and the Special Use Permit were filed by the North Beach Community. The Community through its members, had participated in the commenting process on the application. The Community appears to consist of persons owning property along the shore near the Alverson subdivision who possess near-shore wells that have experienced increases in chloride counts.

4. The application sought permission to construct a new 23,000-gallon water storage reservoir, a new pump house and booster system, and approximately 1,110 linear feet of transmission main line and approximately 1,110 linear feet of 8-inch fire main. The proposal is to create the infrastructure necessary to deliver potable water from a well to the residents of a small subdivision on the northeast shore of the island.

5. The project is a "minor utility development" as that term is defined in the Unified Development Code, at SCC 14.04.020. The proposed reservoir and the upper portion of the water line are located within a Rural Reserve (RRv) zoning district. The remainder of the water line is within a Rural Intermediate (RI) zoning district.

6. The Alverson subdivision consists of 18 lots. Initially it was the site of recreational cabins experiencing water use on weekends only. However, the subdivision has evolved into an area with a mixture of recreational and permanent residences. There is a trend toward increasing permanent residential use.

7. The subdivision is currently served by a community well near the shore which feeds a system that provides water to 14 hook ups. On April 1, 2003, the proposed new system was approved by the State Department of Health as a Class A System with authority to serve all 18 lots in the subdivision.

8. The water source for the new system will be a new well located in the SE1/4NW1/4, Sec. 36, T36N R1E, W.M., roughly 615 feet inland from the location of the old well that has served as the source of Alverson water in the past. An appropriation of ground water from the new well was approved by the State Department of Ecology on February 27, 2002. Ecology authorized withdrawing up to 15 gallons per minute, limited by a maximum annual quantity of six acre feet, for multiple domestic supply.

9. In its Report of Examination on the Alverson Tract Owners Association (ATOA) application, Ecology concluded, in essence, that the new well will be able to withdraw water without causing increases in seawater intrusion. However, the following are among the conditions of the approval:

> The old ATOA well shall be monitored for seawater intrusion during the permit phase of the project. As long as withdrawal amounts are increasing, the old well, which is down-gradient, shall be used to monitor for seawater intrusion. After the project is completely developed and a certificate is issued, the old ATOA well must be abandoned in accordance with chapter 173-16- WAC, Minimum standards for construction and maintenance of wells.

> If pumping of the well authorized by this permit or certificate causes chloride concentrations to increase in either ATOA well, immediate action shall be required to prevent concentrations from increasing (such as reducing the instantaneous withdrawal rate (gpm) of the well). If corrective measures fail to prevent chloride concentrations from increasing in the future, permittee or certificate holder shall relinquish the option to perfect additional allocated quantities regardless of the stage of development.

The approval then goes on to specify the manner, frequency and reporting of the monitoring effort.

10. The water right permit from Ecology was applied for on April 16, 1990, and notice of the application was initially published in the Skagit Valley Herald on May 30 and June 6, 1990. The location given in this original notice is the same as that of the approved well. No protests from members of the public were made in response to the published notice. Accordingly, the current Appellants were not personally notified of Ecology's decision to approve the groundwater permit. No appeal of Ecology's decision was made.

11. The instant SEPA appeal is based on the assertion that the issue of seawater intrusion should have been addressed in the Environmental Checklist for the Special Use Permit. The appeal contends, in effect, that the new and larger water system will likely increase seawater intrusion with significant adverse environmental impacts.

12. The Special Use Permit appeal states that approval of that permit will cause an increase in the volume of groundwater pumped which will move the saltwater interface landward and further degrade existing wells. This appeal asks for restriction of the project to the existing 14 hook ups and a denial of use of water from the well for a fire suppression system.

13. On the merits, the Appellants arguments are, thus, directed to the effects on the groundwater resource of withdrawing additional water, in particular as related to older wells located closer to the shore. No issues were raised concerning the direct effects of the storage reservoir or the system of pipes leading from the reservoir to the homes.

14. WAC 197-11-800(4) contains a categorical exemption from the threshold determination and impact statement requirements of SEPA for "water rights," in pertinent part as follows:

> The following appropriations of water shall be exempt, the exemption covering not only the permit to appropriate water, but also any hydraulics permit, shoreline permit or building permit required for a normal diversion or intake structure, well and pumphouse reasonably necessary to accomplish the exempted appropriation, and including any activities relating to construction of a distribution system solely for any exempted appropriation.

. . . (b) Appropriation of . . . 2,250 gallons per minute or less of ground water for any purpose.

15. WAC 197-11-800(23) contains a categorical exemption from the threshold determination and impact statement requirements of SEPA for "utilities," in pertinent part as follows:

> The utility-related actions listed below shall be exempt. . . . The exemption includes installation and construction, . . . maintenance, operation or alteration. ....
>
> . . . (b) All storm water, water and sewer facilities, lines, equipment, hookups or appurtenances including, utilizing or related to lines eight inches or less in diameter.

16. WAC 197-11-305 describes several specific situations in which proposals listed as categorical exemptions are not exempt. These include:

> (a) The proposal is not exempt under 197-11-908, critical areas.
>
> (b) The proposal is a segment of a proposal that includes:
> (i) A series of actions, physically or functionally related to each other, some of which are categorically exempt and some or which are not; or
> (ii) A series of exempt actions that are physically or functionally related to each other, and that together may have a probably significant adverse environmental impact in the judgment of an agency with jurisdiction. . . .

17. WAC 197-11-908 allows counties to select certain categorical exemptions that do not apply in one or more critical areas, but excludes "water rights" from those subsections that may be chosen. In any event, Skagit County has not opted to exercise the power of selection. See Chapter 14.12 SCC.

18. In the instant case, the Examiner finds that the ground water appropriation from the new Alverson well is within the SEPA exemption for "water rights." He finds further that the Special Use Permit here involves "activities related to construction of a distribution system solely for an exempted appropriation."

19. During the water rights permit process, the Applicant constructed the new well and conducted an eight-hour pump test. The pumping rate remained between 14-15 gallons per minute for the test. While the test was conducted conditions were monitored at the Applicant's old well (615 feet away) and the Flint well (446 feet away).

20. Total drawdown in the pumping well was .25 feet in 42 minutes, then stable for the duration of the test. After the test, the well recovered to static water level in 10 minutes. A drawdown of approximately 0.03 feet was observed in the Flint well and no drawdown was

recorded in the old ATOA well. Chloride levels in the new well at the time of the test were 32 mg/l. Under the State's groundwater standards (WAC 173-200-040, Table I), the maximum allowable chloride concentration is 250 mg/l.

21. The Appellants and the Applicants both presented expert witnesses at the hearing. Appellants' witness expressed the opinion that the pump test was too short to show definitively that withdrawals from the new Alverson well will not cause a worsening of chloride concentrations in some of the existing near shore wells. He made the point that showing a lack of adverse effects in the subject well is not proof that remote effects cannot occur. In his view, the increase in water quantity withdrawn by the Alverson system is over time likely to alter the seawater/freshwater interface. He does not believe that the monitoring called for by Ecology will be adequate to protect the resource.

22. The Applicant's expert noted that withdrawals from the new wells will, in fact, be much less than 15 gallons per minute on a continuous basis. He concluded that the drawdown from the new Alverson well will be localized and temporary, eliminated by recovery during periods of rest, and without any measurable effect on the regional ground water surface. Thus at its inland location, he is convinced that the new well is unlikely to have any negative impact on chlorides in near-shore wells. In fact, he thinks that the coastal wells and the new Alverson well tap into different aquifers. He noted that the specific capacity of the new well is much greater than that in the old Alverson well and in other coastal wells -- an indication that they are drawing from different geologic strata.

23. Based on the entire record, the Examiner is unable to find that the preponderance of evidence shows that the new inland well, even with increased withdrawals, will cause a worsening of seawater intrusion in the Appellants' wells. The likelihood of significant adverse environmental impacts from the appropriation was not proven.

24. Further, there is no evidence of adverse environmental impacts solely from the construction of the pump house, booster system, storage tank, and water lines.

25. The U.S. Environmental Protection Agency designated the Guemes Island Aquifer System as a sole source aquifer under the Federal Safe Drinking Water Act on December 1, 1997. This makes the area involved here a Category I aquifer recharge area.

26. After initial review of this "minor utility development," the County required the preparation and submission of a wetland site assessment. Thereafter, in its decision on the Special Use Permit, the County effectively concluded that the application complied with the Critical Areas Ordinance.

27. No Site Assessment Report was prepared to evaluate potential effects of the utility project on the aquifer recharge area and to identify potential mitigation measures.

28. 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 appeal. The SEPA appeal and the Special Use Permit Appeal were consolidated for hearing pursuant to SCC 14.06.070.

2. The appeals here attempt to get at a decision made by the State Department of Ecology regarding the withdrawal of ground water. The State, acting through the Department of Ecology, has exclusive jurisdiction over such withdrawals. RCW 90.03.010, 90.44.020, 90.44.050.

3. The County has no authority to second-guess the State on the acquisition of water rights. Review of Ecology's decision on such matters is exclusively given to the State Pollution Control Hearings Board. See Chapter 43.21B RCW.

4. The Appellants have complained that the process of notification and appeal of the State's water rights decision was flawed because no one was alerted to Ecology's decision on the new Alverson well until it was too late to appeal it. The merits of the State's system of notice are not for the Skagit County Hearing Examiner to determine. Complaints about such things need to be brought before a forum that can review State agency decisions.

5. In short, the County permit process cannot be used to make an end run around the State's exclusive power over water rights. The basic decision to allow the withdrawal of 15 gallons per minute of water, limited to six acre feet per year, from a particular point of withdrawal for the Alverson subdivision is simply not reviewable in these proceedings.

6. Moreover, applying SEPA does not change the result. The water right itself is exempt from SEPA review. And the minor utility development which is the subject of the Special Use Permit is included within the categorical exemption for water rights because it concerns "activities relating to construction of a distribution system solely for any exempted appropriation." WAC 197-11-800(4).

7. In addition, the minor utility development is within another categorical exemption under the utilities category that applies to water facilities, lines, equipment, hookups or appurtenances related to lines eight inches or less in diameter. WAC 197-11-800(23)(b).

8. The water appropriation and the minor utility are both covered by the same exemption. Thus, they do not encompass a series of exempt actions. As to the utilities exemption, it refers to the same basic action that is covered by the water rights exemption. The situation does not involve the kind of additive exempt activity that falls within the coverage of WAC 197-11-305(b). Also, the project's exempt status is not removed by virtue of its location in a critical area. See WAC 197-11-305(a) and 197-11-908.

9. In sum, the exemption of the project at issue from the procedural requirements of SEPA is clear. As a matter of procedure, it is accordingly irrelevant that the County actually did prepare an MDNS. There was no failure to comply with SEPA.

10. However, the MDNS does represent the County's view, at a threshold level, that the project is not, in fact, likely to have significant adverse environmental impacts. Notwithstanding the SEPA exemptions, this threshold choice was not shown to be wrong on the merits. As a matter of substance, the MDNS is unquestionably correct as to the likely effects of the minor utility development viewed in isolation from the water appropriation.

11. The Appellants did not make a case specifically addressing the Special Use Permit criteria of SCC 14.16.900(2)(b)(v). But, one of the standards for permit approval is that the proposed use will comply with the Skagit County Code. The Appellants did argue that the County's approval of the permit failed to comply with the Critical Areas Ordinance. The Examiner concludes that on this point, the Appellants are correct.

12. The County's conditions of approval for the Special Use Permit incorporate the conditions of the MDNS. One of these is that "the applicant shall comply with all relevant provisions of 14.24 (Skagit County Critical Areas Ordinance). The Critical Areas Ordinance, under SCC 14.24.330 and 340, requires a Site Assessment Report for development projects potentially affecting Category I aquifer recharge areas. The Hearing Examiner holds that the provisions regarding aquifer recharge areas are relevant here and that a Site Assessment Report is needed before the criteria for approval of a Special Use Permit are satisfied.

13. Therefore, the Examiner is adding a condition to the County's permit approval that requires the preparation of Site Assessment Report and the incorporation of its recommendations into the minor utility project. In general such reports are intended to deal with how a project on the land surface may be prevented from degrading the underlying aquifer. The Examiner renders no opinion on how the issue of seawater intrusion may need to be dealt with in regard to a report for the minor utility development in question.

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

DECISION

The SEPA appeal and the appeal of the Special Use Permit are denied and the decisions of the County are affirmed with the addition of the following condition of approval for the Special Use Permit:

> The Applicant shall cause to be prepared a Site Assessment Report identifying any needed mitigation measures that should be taken to prevent degradation of water quality and quantity in the relevant aquifer recharge area as a result of the minor utility development authorized by the Special Use Permit. Any recommended mitigation measures shall be taken in the construction and operation of the project.

Wick Dufford, Hearing Examiner

Date of Action: June 17, 2004

Date Transmitted to Parties: June 17, 2004

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 14.06.110(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.