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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 CRITICAL AREAS VARIANCE and REASONABLE USE
EXCEPTION CV 03 0663

HEARING OFFICER: SKAGIT COUNTY HEARING EXAMINER

APPELLANT: LUCILLE DODD

ASSESSOR PARCEL NO: P35022

ABBREVIATED LEGAL DESCRIPTION: The subject property is located on Bayview Edison
Road, within Section 30, Township 35 N, Range 3 E, WM, Skagit County, Washington.

BEFORE THE SKAGIT COUNTY HEARING EXAMINER

Applicant: Lucille Dodd
4606 SW Frontenac Street
Seattle, WA 98136

Agent: Bruce Lisser
Lisser & Associates, PLLC
320 Milwaukee Street
P. O. Box 1109
Mount Vernon WA 98273-5461

File No: PL03-0663

Request: Critical Areas Variance or Reasonable Use Exception

Location: Bayview Edison Road, Parcel 35022, within Sec. 30, T35N,
R3E, W.M.

Land Use Designation: Rural Reserve

Summary of Proposal: To place a single family residence within the 150 foot buffer of a
Category I wetland.

Public Hearing: After reviewing the report of the Planning and Permit Center, the
Hearing Examiner conducted a public hearing on March 10, 2004.

Decision: The variance application is denied. The Reasonable Use
Exception request is remanded to the Planning and Permit
Center for further consideration.



FINDINGS OF FACT

1. Lucille Dodd seeks a variance from the terms of the Critical Areas Ordinance in order to place a single-family home within the buffer of a Category I wetland. If the variance is not granted, a Reasonable Use Exception is sought.

2. The property is Parcel 35022 on Bayview-Edison Road, north of Bayview State Park, within Sec. 30, T35N, R3E, W.M. A lot certification for P35022 was approved on May 12, 2000. The zoning is Rural Reserve. The west side of the property abuts Padilla Bay. The east side borders Bayview-Edison Road. Except for a bulkhead, there are no structures on the property.

3. The lot is approximately 0.3 acres in size and four-sided. It is 70 feet wide, approximately 216 feet along the north boundary, and approximately 187 feet along the south boundary. On both the east and west ends the property is relatively level. There is however a significant slope (30% on average) near the center. The toe of the slope is about 112 feet from the east boundary. A Category Wetland I exists between the toe of the slope and the bay. The slope and wetland are well vegetated by a variety of conifers and underbrush.

4. On this property, the applicant proposes to build an approximately 3,500 square-foot (three level) house with a footprint of approximately 1,400 square feet. The house would be inserted into a space created by excavation of the on-site slope. Its western edge would be at the boundary of the wetland. The house would be entirely within the 150-foot wetland buffer.

5. Parking would occur near Bayview Road on the relatively flat area at the top of the hill. A trail would be constructed down the slope to the house. The area at the top of the hill is also proposed as the site of a septic system drainfield. The applicant has applied for a permit seeking to place the drainfield there, but to date no permit has been issued.

6. The proposed residence would be about 80 feet back from the Ordinary High Water Mark (OHWM), exceeding the minimum 50-foot setback of the County's Shoreline Master Program.

7. The subject property was originally a part of a larger parcel owned by the applicant's parents. The property was inherited by two sisters who divided their parents' parcel. The applicant's portion was the southerly lot. When the applicant's sister died, the northerly portion went to the sister's children.

8. The northerly lot is developed with a single-family residence, garage and lawn. The house there is perhaps 20 feet back from the OHWM defined by a concrete bulkhead that runs along the shore in front of the residence. The bulkhead extends southerly into the applicant's property, covering about 1/2 of its shorefront.



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9. Behind the portion of the bulkhead on the applicant's property is an area of lawn atop backfill that was apparently deposited and graded with the installation of the bulkhead in 1986. Behind the lawn is the wetland. The easterly portion of the wetland and the area around the toe of the slope were disturbed by clearing, grading and filling activity in the late 1990's. Access to this filled area was via a driveway extended through the lot to the north.

10. The clearing, grading and filling were carried on without permits and the County initiated an enforcement action. This led to a wetland delineation by Graham-Bunting Associates (GBA) in 1999. The delineation was accompanied by a mitigation proposal to offset project-generated impacts. The GBA report concluded that impacts to the property of the fill activity were "minimal in terms of area and function." Nonetheless, the six mitigation measures were recommended: (1) fill removal, (2) Sitka spruce planting, (3) allowing undisturbed re-colonization of shrub scrub and emergent species, (4) designation of a Protected Critical Area (PCA), (5) limitation of use property use to low intensity recreational activities, (6) allowing temporary placement of a travel trailer, tent or campsite on the upland adjacent to the toe of the slope.

11. In 2002, the applicant retained Aqua-Terr Systems, Inc. (ATSI) to review the site in relation to the proposed construction of a home. ATSI reviewed the GBA report and conducted a site investigation. They essentially agreed with the wetland delineation of GBA and reported that the suggested mitigation of fill removal and plantings had been completed.

12. ATSI concluded that the only feasible place to put a home on the property is at the place where the applicant proposes to build. In a letter dated October 22, 2003, ATSI stated:

The proposed home will be situated at the base of the slope on the eastern edge of an on-site wetland. The proposed structure will be inset into the hillside and extend waterward about 10 feet onto an existing upland flat area at the terminus of a narrow gravel road. This is the only feasible location for a structure due to the existence of the marine shoreline, the wetland that extends nearly to the shoreline (i.e., avoidance of wetland fill), the steep slope, the retention of trees on the slope (avoidance of cutting most trees), and the use of the area at the top of the slope adjacent to the road where septic system (only permissible area) and parking area are proposed.

13. ATSI proposed no mitigation for impacts to the wetland buffer. This was explained by noting the lack of physical space on the property to perform compensatory mitigation. The site is small and mostly comprised of a native plant community. It does not have any suitable undisturbed area to be enhanced. The area adjacent to Bayview-Edison Road can't be used because of the proposed parking and septic area. The slope is a native forest. The rest of the lot is wetland and shoreline setback. Enhancement of the small lawn would preclude access to the shore and block shoreline views of the neighbors to the north. Thus, ATSI concluded that compensatory on-site mitigation is not practical. The insertion of the home was characterized as a "minimal disturbance." No off-site mitigation has been proposed.

14. ATSI described the on-site wetland as a seasonally saturated freshwater wetland that has no hydric connection with the saltwater shoreline. The wetland is hydrologically charged by groundwater discharge at the toe of the slope. However, the site also collects overland water flow from the county road culvert on Bayview-Edison Road, which directs stormwater onto the property.

15. The county culvert conveys water from the east side of the road to the west side and then it is discharged onto the slope and across the Dodd property into the wetland from which it ultimately reaches the bay. J.B. Scott and Associates, who provided geotechnical information, urged that this flow be placed in a pipe and made to bypass the slope before discharging.

16. Without the water contributed by the culvert, the county road would intercept all of the upslope storm water, making the amount of water affecting the slope minor. Bypassing the storm flow from the culvert would have the same effect. Under these circumstances, the geotechnical evaluation saw no problem with placing the drainfield at the top of the slope. The slope appears to be stable, since the attitude of trees over 100 years of age does not indicate a past history of slope failure. Scott commented that if the culvert flow were made to bypass the wetland, "it is quite possible that the wetland condition might then revert to upland conditions."

17. There is nothing in the record showing that the geotechnical consultant has been given a chance to review the proposed building plans for the site. The County would require additional geologic hazard information at the time of building permit application.

18. Since the project involves redirecting an existing drainage channel, the Department of Public Works has asked for an engineered drainage plan and a stormwater plan prior to issuance of any building permit.

19. The Livingstons, now owners of the parcel immediately north of the applicant's parcel (the other portion of the original family property), strongly oppose the applicant's home building plans. They were unhappy over the clearing, grading and filling that took place earlier. They say that the fill has never been fully mitigated. They fear that the septic system on the hill will foul their downslope water well.

20. As noted, a driveway from the north was used by the applicant for site access for the clearing, filling and grading operations. This access entered the applicant's property at the toe of the slope. The Livingstons have since removed the portion of the fill placed on their side of the boundary and attempted to let the area recover as wetland. They dispute that there is an "existing gravel drive."

21. In 1999, the Livingstons commissioned a separate wetland analysis, which was prepared by Rozewood Environmental Services. The Rozewood report differs with the GBA report. Rozewood found the wetland on site to be larger than did GBA, and also noted that the wetland extends onto properties both to the north and south of the applicant's lot. Further, under Rozewood's wetland description, the applicant's proposed structure actually encroaches on the



wetland itself, rather than just occupying the wetland buffer. The County chose to rely on the GBA-ATSI wetland work, rather than the Rozewood report. The U.S. Army Corps of Engineers has accepted the GBA delineation.

22. Roger Pederson, the owner to the south of the applicant, wrote a letter detailing a variety of legal problems that he stated need to be resolved in relation to the applicant's parcel and access to it before any permits are granted.

23. SCC 14.24.230(1) contains the relevant substantive standard for the alteration of wetland buffers:

A regulated wetland 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. Any alteration approved . . . shall include mitigation necessary to mitigate the impacts of the proposed alteration on the wetland. . .

24. The Critical Areas Ordinance contains detailed requirements for Critical Areas Variances. Under SCC 14.24.140(3), the following applies:

Variances to the dimensional setbacks of this Chapter may be issued by the Hearing Examiner following the preparation of a site assessment by a qualified professional where the conclusion of the site assessment supports a modification of the dimensional requirements. Such a conclusion must also include all necessary mitigation. The Hearing Examiner must make a finding that the issuance of a zoning variance by itself will not provide sufficient relief to avoid the need for a variance to the dimensional setback and other requirements for critical areas regulated by this Chapter, and that a prepared site assessment and mitigation plan demonstrates that the project allows for development of the subject parcel with the least impact on critical areas while providing reasonable use of the property, and full mitigation of project impacts. (emphasis added.)

25. Similarly, SCC 14.24.140(6) requires that in granting a variance, the Hearing Examiner shall prescribe conditions as necessary "to insure that impacts to critical areas and their buffers are fully mitigated."

26. SCC 14.24.140(4) states that in order to grant a Critical Areas Variance, the Examiner must find that "the variance is the minimum variance that will make possible the reasonable use of land . . . and allow the minimum impact to critical areas necessary to allow such reasonable use."

27. Even if the Rozewood report is ignored, it is clear that there will be impacts to the functions and values of the wetland if the proposed house is built. The house will physically



displace a portion of the buffer immediately adjacent to the Category I wetland. The home site is not a candidate for buffer averaging or buffer reduction. The use of the access road during construction and the staging of equipment will necessarily have some effect. None of the experts dispute that there will be some impacts. The applicant's experts merely say that the impacts will be minimal. The impacts have not been quantified because there is no space available on the property to perform mitigation.

28. If the application of the Critical Areas Ordinance will result in denial of "reasonable and economically viable use of a property" and if such use cannot be obtained through a critical areas variance, then a Reasonable Use Exception (RUE) can be considered. RUEs can only apply to legal lots of record established prior to the effective date of this chapter and are intended as a "last resort" when mitigation and variance approaches fail.

29. The RUE standards are set forth in SCC 14.24.150(1). The principal criteria are:

- (a) The application of this Chapter would deny all reasonable and economically viable use of the property so that there is no reasonable and economically viable use with a lesser impact on the critical area than that proposed; and
- (b) The proposed development does not pose a threat to the public health and safety.

The modification to a critical area must be the minimum necessary to allow reasonable and economically viable use and the applicant must have been denied a variance.

30. The applicants have provided no specific design for the house, but have shown its proposed footprint and placement. That a large retaining wall would need to be built around the excavation for the house is acknowledged. No alternative size, configuration or placement has been proposed.

31. SCC 14.16.320 lists the uses that are permitted outright or that may be permitted as special uses in the Rural Reserve zoning district. In addition to single family dwelling units, the allowable uses include such things as primitive campgrounds, temporary manufactured homes, developed campgrounds, and personal wireless service towers.

32. The subject parcel became a legal lot prior to the adoption of the Critical Areas Ordinance. The Livingstons argue that the applicants have been using the parcel as a limited, low intensity recreational property for over 30 years and that this is now the "reasonable use" of the property. They urge that the home be scaled back to the size of other small summer cabins in the vicinity and that it be built at the top of the property. An alternative suggestion is the placement of a recreational vehicle pad on the upper portion of the lot. It should be noted that any activities at the top of the slope would remain within the 150-foot wetland buffer.

33. The Livingstons assert, without proof, that the applicant's parcel is taxed at a value of only \$14,000. If true, this is hardly consistent with use as waterfront residential property.



34. The Staff recommends that the variance be denied. At least implicitly, their recommendation for the Reasonable Use Exception is approval.

35. 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.

2. The certification of the lot does not authorize its development.

3. Because of the absence of hydric connection, the freshwater wetland is not an "associated shoreland" under the Shoreline Management Act (SMA). Therefore, the appropriate shore setback is from the OHWM not the wetland boundary, and no shoreline variance is required. See RCW 90.58.030(2).

4. Within wetland buffers, the Critical Areas Ordinance allows only "low impact uses and activities which are consistent with the purpose and function of the habitat buffer and do not detract from its integrity." Such activity shall not result in a decrease in wetland functional values or prevent the buffer's recovery to at least pre-altered condition or function. SCC 14.24.240(7).

5. The proposed use is not a "low impact" use. It will actually displace a portion of the buffer. Thus, obviously, it cannot go forward without either a variance or a Reasonable Use Exception.

6. After looking at the entire text of the Critical Areas Ordinance, the Examiner concludes, as a matter of law, that no variance can be granted for the alteration of a wetland buffer in circumstances where no mitigation will occur. See SCC 14.24.230(1), SCC 14.24.140(3), (6).

7. In this case only a single-family residence of a substantial size in a particular spot has been proposed. Under the circumstances, the Examiner is unable to find that the variance sought is the "minimum variance that will make possible the reasonable use of land." SCC 14.24.140(4).

8. Accordingly, the criteria for a Critical Areas Variance have not been met.

9. The Reasonable Use Exception (RUE), however, is another matter. The Examiner has determined that he requires more information on this subject before a ruling can be made.



10. What is "reasonable use" in the context of a property that is entirely covered by wetland or buffer area? Is there any developmental use that is "reasonable" under the circumstances? Notwithstanding the restrictions of the Critical Areas Ordinance, is "reasonable use" defined by the list of uses expressly made allowable in the zoning district? Does the waterfront location and neighborhood residential context make a difference?

11. Further it is not enough to know what uses are "reasonable." The deprivation must also be of uses that are "economically viable." The Examiner has no guidance on what "economically viable" may mean in the context of this case. How is the assessed value of the property relevant? Are the possessor's of this property entitled to a use that will increase its value? Are investment-backed expectations a factor? Does "economically viable" have a special meaning in the case of inherited property?


12. Some evidence as to the value of the property and the effect that denial of the application would have on that value is needed. In addition, the Examiner would benefit greatly from any information available on legislative intent or contemporaneous interpretation of the "reasonable and economically viable use" formulation. Argument from the parties on how to interpret the expression would also be useful. Therefore, the matter should be remanded to the Planning and Permit Center for additional information.

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

DECISION

The request for a Critical Areas Variance is denied. The request for a Reasonable Use Exception is remanded to the Planning and Permit Center for further information as to probable effects of denial on property value and the meaning of the expression "reasonable and economically viable use." On the latter point, the Staff should invite all the participants in the hearing to submit briefs.

Once the information requested on remand is assembled, the Staff should provide an amendment to its Staff Report and set the matter again for hearing.



Wick Dufford, Hearing Examiner

Date of Action: April 30, 2004

Copy Transmitted to Parties: April 30, 2004



RECONSIDERATION/APPEAL-- VARIANCE DECISION

Since the denial of the variance is a final decision of the Examiner it is subject to the provisions for reconsideration and 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.

The RUE decision has not yet been made. Therefore, reconsideration and appeal are premature as to the RUE request. When the RUE decision is finalized, normal reconsideration and appeal rules will apply.

