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

DOCUMENT TITLE: ORDER ON APPEAL AP 04 0541

HEARING OFFICER: SKAGIT COUNTY HEARING EXAMINER

APPELLANT: DON and TERI SABEN

ASSESSOR PARCEL NO: P18427

LEGAL DESCRIPTION: The subject property is located at 30628 Lake Cavanaugh Road, Mount Vernon, WA, within Section 18, Township 33 north, Range 6 east, W.M., Skagit County, Washington.

BEFORE THE SKAGIT COUNTY HEARING EXAMINER

In the Matter of the Appeal of the Denial Of an Administrative Decision on Building Permit Application BP03-1161	)	
DON AND TERI SABEN,	)	**PL04-0541**
Appellants,	)	**FINDINGS OF FACT, CONCLUSIONS OF LAW AND DECISION**
v.	)	
SKAGIT COUNTY,	)	
Respondents.	)	

This is an appeal of an administrative decision resulting in the denial of a building permit for a residence. The matter came on regularly for hearing before the Hearing Examiner on October 1, 2004.

Jeff Eustis, Attorney at Law, represented the Appellants Saben. Don Anderson, Chief Civil Deputy, represented the Respondent County. Exhibits were admitted, testimony was taken and argument was made.

On the basis of the record, the following is entered:

FINDINGS OF FACT

1. On July 16, 2004, the Administrative Official for the Planning and Permit Center issued a Notice of Decision to Don and Teri Saben. The decision applied SCC 14.16.410(3)(c)(ii) to the Sabens' application for a building permit for a residence at 30628 Lake Cavanaugh Road, leading to a denial thereof. The instant appeal followed

2. The file number for the application is BP03-1161. The subject property is located within an Industrial Forest – Natural Resource Lands (IF-NRL) zoning district. The assigned parcel number is P18427. The parcel is not located within the boundaries of a fire district.

3. The prior owners had entered into an agreement with the Big Lake Fire District to provide fire protection services to the subject property. The agreement stated in part:

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> The District will provide full fire protection and emergency response Services to the Property, on the same terms and conditions as if the Property were located within the District boundaries.

The agreement also stated:

> This Agreement shall be binding on the parties hereto and their respective heirs, successors and assigns, and shall be construed as a covenant running with the land.

Mr. Saben testified that there is a similar agreement with the Lake Cavanaugh Fire Department relating to the property.

4. In a letter accompanying the Notice of Decision for the Sabens' application, the Administrator said:

> In making this decision, the prime motivation was the fact that your property is located within an Industrial Forest – Natural Resource Land zoning classification and lies outside the boundaries of any fire district. Under SCC 14.16.410(3)(c)(ii), residential development is not permitted on such lands, notwithstanding other measures taken to provide fire protection.

5. SCC 14.16.410(3)(c) in its entirety reads:

> (3) Permitted Uses . . .
> (c) Single-family residential dwellings, together with the usual accessory buildings and uses only when all of the following criteria are met:
> (i) The residence is located within 200 feet of an existing County road or State highway;
> (ii) The residence is located within the boundaries of a fire district.
> (iii) The residence is an accessory use to timber resource management activities;
> (iv) Ingress and egress for fire vehicles meets the standards of the Uniform Fire Code Section 902, as amended:
> (v) There is a 200-foot slash abatement maintained around the exterior portion of the dwelling;
> (vi) There is a safety zone cleared of flammable vegetation 300 feet from any portion of the exterior of any structure on level grounds and 100 feet downhill on sloped ground;
> (vii) The dwelling or any accessory structure is constructed of a noncombustible roofing material; and
> (viii) There is availability of 300 gallons of water on-site, 400 feet of 1-inch fire hose with nozzle, and an internal combustion powered pump.

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6. The Staff Report for this appeal includes the following chronology of events leading up to the Notice of Decision:

(1) On September 17, 2003, the applicant applied for a building permit (BP03-1161) on Parcel 18427.

(2) On February 2, 2004, permit BP003-1161 for a new residence was denied by way of a Notice and Order to Abate. This action also revoked associated permits (BP03-1162 for a detached garage, BP03-1163 for a detached shop/garage, SW03-0445 for an onsite sewage system).

(3) On February 17, 2004, the applicant filed an appeal of the Notice and Order to Abate. This appeal was later withdrawn.

(4) On March 9, 2004, the revoked permits (BP03-1162, BP03-1163, and SW03-0445) were reinstated, and the decision to deny building permit for a new residence was reversed, allowing plan review to continue.

7. The Sabens (Appellants) assert that the building permit should have been granted. They rely on SCC 14.16.850 – the section of the zoning code entitled "General Provisions." Subsection (6) therein read as follows:

(6) Non-issuance of Building Permits Outside of a Fire District

(a) Within any zoning district, building permits shall not be issued for residential and/or commercial structures that are not determined to be within an official designated boundary of a Skagit County Fire District.

(b) Exceptions: ...
(iii) Outside a fire district, a single-family dwelling or accessory building may be applied for if it meets all of the following or comparable alternative fire protection requirements as determined by the Fire Marshal:
[a] The lot was a legal lot of record prior to the adoption of interim controls on June 11, 1990.
[b] Approved noncombustible roofing materials must be used.
[c] Slash abatement within 200 feet of any portion of the exterior of the structure.
[d] A safety zone cleared of flammable vegetation 30 feet from any portion of the exterior of the structure on level ground and 100 feet downhill on sloped ground.
[e] Building sprinklers installed per National Fire Protection Association 13D (NFPA 13D).
[f] Exception: Buildings of 800 square feet or less which are:
[1] Unheated separate accessory structures to a full-time dwelling unit

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20 feet from all other buildings; or
[2] A building used as a vacation cabin and not as a full-time residence.
[g] There is availability of 300 gallons of water on-site, 400 feet of 1-inch fire hose with foam applicator, and an internal combustion engine powered pump. (emphasis added.)

8. The Appellants argue that if the Fire Marshal determines that all the requirements of (b)(iii) above are met on property in any zoning district, including the IF-NRL district, a building permit for a single-family residence should be obtainable. They maintain that County records show Fire Marshal approval for this property as of October 17, 2003.

9. On August 23, 2003, the Appellants had entered into an agreement to purchase the property, subject to their ability to obtain a building permit within three months. By roughly the end of three month period, they had obtained a permit for a garage, for a detached shop and for a septic system. They then believed that their residential building permit would be issued as soon as they were able to satisfy all of the criteria of SCC 14.16.850(6)(b)(iii). On the strength of the permits already approved, the Appellants went ahead and closed on the property, receiving a warranty deed dated December 12, 2003.

10. The Appellants were taken by surprise by the Notice and Order to Abate issued on February 2, 2004. That decision both revoked the prior-issued "accessory" permits and denied the residential building permit. The basis for that decision (as for the decision now under appeal) was SCC 14.16. 410(3)(c)(ii).

11. After Appellants filed an appeal of the February 2, 2004 Notice, the County reversed itself. On March 9, 2004, the revoked permits were reinstated and the residential building permit was revived for completion of processing. The March 9 decision stated that upon further review, the project had been found to be in compliance with applicable County codes "including requirements for development within the Industrial Forest-NRL zone." The appeal was thereafter withdrawn.

12. On June 15, 2004, a legal analysis from outside counsel for the County was circulated internally. The analysis dealt with the relationship between the two code sections at issue – SCC 14.16.410(3)(c)(ii) and SCC 14.16.850(6)(b)(iii). It was counsel's view that the two sections can be reconciled. The analysis was that, although an application for a home at any site outside a fire district can be made under the general provisions of "850," the specific prohibition of "410" should control applications within IF-NRL districts and require their denial.

13. Sub silentio the interpretation provided by outside counsel was adopted by the County as its interpretation. Therefore, some time in late June, the Appellants' building permit was put on hold. The Sabens learned of the hold by chance through a

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phone call. No written notice of the County's interpretation was given to Appellants prior its being applied to them through the July 16 Notice of Decision.

14. The stated basis given in the July decision was essentially the same as that used in the Notice and Order to Abate in February – namely that SCC 14.16.410(3)(c)(ii) prohibits residential building permits at sites outside a fire district. However, the July decision did not revoke the permits for the garage, shop and septic system. Those uses were thought to be allowable in the IF-NRL zone as accessory to timber resource management.

15. As for the denied building permit application, the rationale for relying on SCC 14.16.410(3)(c)(ii) to the exclusion of SCC 14.16.850(6)(b)(iii) was not given to Appellants until the just before the hearing on this appeal. They were then provided with a Memorandum from the Deputy Prosecuting Attorney to the Planning Director, setting forth the substance of the opinion that had been provided by outside counsel in June. The memo, though transcribed in late September, was backdated to June 15, 2004, apparently to reflect the time at which the analysis therein was first communicated to the Planning and Permit Center.

16. After the initial filing of their building permit application in September of 2003, the Appellants were led by Planning and Permit Center personnel to believe that they would qualify for the residential building permit they had applied for once they had satisfied all of the code criteria for single family residences outside of fire districts.

17. In the reversal of March 9, Appellants were advised in writing that just two items needed to be completed before a building permit would issue. The items listed were: (1) a showing that the house is an accessory use to timber management activities, and (2) proof of a satisfactory water system. In mid-March, the Sabens advised the Planning and Permit Center of their intention to grow Christmas trees on the property. Subsequently, a water well was constructed.

18. There is no argument that the Appellants do not satisfy all relevant code criteria for a residential building permit, except for being outside a fire district in an IF-NRL zone.

19. The appeal alleges that the County is estopped from denying the residential building permit because of express representations by the Planning and Permit Center and the Skagit County Fire Marshal that a single family home is permissible at the site. An alternative ground for estoppel is the prior reversal of the decision to deny the permit.

20. There is ample evidence that the Appellants expended sums of money in reliance on what they thought the County would do. It is also uncontested that they sold their home in Mount Vernon and moved to an RV on the subject property because they expected to receive a building permit for a new house there.

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21. However, the evidence does not establish that the July 16 decision represents a departure from a prior pattern of County decision making. There was no showing that others similarly situated have been treated differently by the County in the past. As far as this record shows, the applicability of the development code to a question of residential building permit issuance in the IF-NRL zone is a matter of first impression.

22. There is no evidence that the decision on the Sabens' building permit had any connection with challenges made to the siting of a shooting range in the vicinity.

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

CONCLUSIONS OF LAW

1. The Administrative Official has the authority to issue "official" code interpretations through a formal process. See SCC 14.06.040(3). Notice of the interpretation decision and an opportunity to appeal are provided. This process gives an applicant the opportunity to find out how the code will be interpreted before the interpretation is applied to him in a permit decision. The process, however, is triggered by a request for such an interpretation. No such request was received here. The interpretation made in this case was, therefore, not subject to the formal process the code provides.

2. Decisions on building permits are not ordinarily appealable to the Hearing Examiner. This appeal is apparently based on the idea that the Notice of Decision of July 16, 2004, was an "administrative decision" as that term is used in SCC 14.06.040(4). The decision involved is the manner in which the zoning codes were applied. No argument was made that we are not dealing with an appealable "administrative decision."

3. The Examiner therefore accepts this characterization and takes jurisdiction under the review provisions for Level I decisions. See SCC 14.06.050(1)(a)(xii), 14.06.110(7).

4. There is no requirement that notice of a code interpretation underlying a permit decision be given to the applicant in advance of the permit decision.

5. The interpretation adopted by the Planning and Permit Center is simply that the code sets up a system whereby, in general, houses can be built outside of fire districts only with certain safeguards, but specifically in the IF-NRL district houses cannot be built outside of fire districts at all. To read SCC 14.16.850(6)(b(iii) and SCC 14.16.410(3)(c)(ii) to establish such a system is not a strained reading of the language.

6. This interpretation of the code takes a standard approach to statutory construction, applying the commonly-applied principle that the specific controls the general. The obvious general intent of restricting residential construction outside of the

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boundaries of a fire district in any zoning district is to limit the risk of fire to property and people in remote areas. Consistent with this overall restrictive notion, it is not illogical to conclude that in at least one specific district the risk to property and people, combined with the need to conserve the long-term viability of the forest resource, justifies prohibiting residential development outside of a fire district altogether.

7. The purpose of the Industrial Forest-Natural Resource Lands (IF-NRL) district is:

> to ensure that forest lands of long-term commercial significance are conserved and managed to provide sustainable forest yields, job stability, ecological values and the continuation of a viable commercial forest industry in Skagit County Conservation of forest resources must be assured through measures designed to prevent incompatible development on or adjacent to resource lands. . . . SCC 14.16.410(1).

A total ban on the development of residences outside of fire districts is entirely consistent with this conservation purpose.

8. In order to obtain a reversal, the Appellants have the burden of proving that the decision of the Administrative Official was clearly erroneous. SCC 14.06.110(11). The code provisions in question are capable to being read in different ways. Under the circumstances, the County's choice of readings was a rational one. The Examiner concludes only that this choice was not clearly wrong.

9. The decision in question does not involve a change in the language of the code adopted after the application was filed. Neither does it represent a change in an established interpretation of the code on which the public has come to rely. It is not the revocation of a permit already approved. It is the initial final decision on a permit application in a case of first impression. Thus, whatever reliance interests may have arisen here are matters of equity (fairness), not of law.

10. The Hearing Examiner's authority is limited to interpretation and application of the existing code. He does not have the power to grant equitable relief or to award damages.

11. This appeal exhausts the administrative remedies of the Appellants. The Hearing Examiner has allowed them to create a record from which they can argue estoppel or other equitable remedies on appeal. He has not made extensive findings on these matters, because such findings are not necessary to his decision, but notes that the record may support additional findings on these issues.

12. The parties were permitted to submit post-hearing briefs on a motion by the County to exclude certain exhibits offered by the Appellants. These are Appellants

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Exhibits 11, 16, 17, 18, 19, 20, 21, and 26. These exhibits are claimed to be inadmissible under Evidence Rule 408 which governs offers of compromise.

13. Such exhibits might be inadmissible in an action for damages, but neither liability nor the validity of a monetary claim is at issue here. All of the challenged exhibits were offered for a different purpose.

14. This is an administrative proceeding where the rules of evidence are less stringent than in Superior Court and where, in general, evidence is admitted if it is the kind of evidence upon which reasonably prudent persons are accustomed to rely in the conduct of their affairs. Relevance and reliability are the key limiting concepts.

15. As the Appellants brief points out, Exhibits 11,16, 17, 18, 19. 20 and 21 all have relevance to showing that SCC 14.16.410(3)(c) and SCC 14.16.850(6)(b) are capable of two interpretations. They are thus relevant to the Appellants' argument that their interpretation should be given credence.

16. Exhibit 26 was prepared for the instant hearing and thus could not be covered by ER 408, even if that rule were applied. It is an itemization of expenditures and of potential relevance to the reliance interests the Appellants may seek to establish in equity.

17. No reason was given to question the reliability of the challenged exhibits. Accordingly, all of the challenged exhibits are included in the record and the motion to exclude them is denied.

18. The Examiner is aware that the agreements reached with fire districts to protect the subject property create a situation which is functionally the same as being within a fire district. However, the code provisions in question do not mention this sort of arrangement as an alternative means for gaining building permit approval. The Examiner does not think he can rewrite the code to incorporate this approach, but it may indeed commend itself to legislative consideration.

19. The Examiner believes that he is compelled to sustain the County's legal interpretation of the code in this case. In so doing, he in no way wishes to endorse the County's course of conduct as it involves the Appellants.

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

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DECISION

The administrative decision is affirmed. The appeal is denied.

Wick Dufford, Hearing Examiner

Date of Action: November 29, 2004

Date Transmitted to Parties: November 29, 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.

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