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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 OR
REASONABLE USE EXCEPTION CV 03 0663

HEARING OFFICER: SKAGIT COUNTY HEARING EXAMINER

APPLICANT: LUCILLE DODD

ASSESSOR PARCEL NO: P35022

LEGAL DESCRIPTION: The proposed project is located within Section 30, Township 35
North, Range 3 East, WM, Skagit County, Washington.

BEFORE THE SKAGIT COUNTY HEARING EXAMINER

SUPPLEMENTARY FINDINGS, CONCLUSIONS AND DECISION

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

Agent: Craig E. Cammock
Attorney at Law
P.O. Box 336
Mount Vernon, WA 98273

File No. PL03-0663

Request: Critical Areas Variance or Reasonable Use Exception

Location: West of Bayview-Edison Road, a short distance south of junction with Bay View Cemetery Road. The west side of the parcel borders Padilla Bay, within Sec. 30, T35N, R3E, W.M. Parcel #35022.

Land Use Designation: Rural Reserve

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

Procedure: The Hearing Examiner initially conducted a hearing on the application on March 10, 2004. He denied the variance but remanded the Reasonable Use Exception (RUE) request to the Planning and Permit Center for further consideration. On August 2, 2004, the County Commissioners remanded the matter to the Examiner for consideration of the RUE in association with the variance request.

The matter was brought back before the Examiner on October 20, 2004, with the Staff providing an Addendum to its original Report that addressed questions relative to the RUE asked by the Examiner in his initial decision. The applicant was represented by counsel who briefed and argued the RUE request. The applicant's northerly neighbor, David Livingston, introduced a geotechnical



report at the hearing that the applicant had never seen before. The Examiner allowed the applicant additional time to respond to the report. The response was provided on December 9, 2004. The record then closed.

Decision:

The Reasonable Use Exception is provisionally approved, subject to conditions.

FINDINGS OF FACT

1. The Hearing Examiner decision of March 10, 2004, contains 35 findings which are ratified except as modified by the findings below. Certain of the initial findings are repeated or summarized herein in order to allow this supplement to be understood without extensive cross referencing.

2. The subject lot is about 70 feet from north to south. The north boundary extends about 216 feet and the south boundary extends about 187 feet. The west side abuts Padilla Bay. The eastside borders Bayview-Edison Road.

3. On both the east and west sides the property is relatively level. There is however a significant slope downward in the center from east to west. The toe of the slope is about 112 feet from the east boundary.

4. A Category I wetland exists between the toe of the slope and the bay. The slope and wetland are well vegetated by conifers and underbrush. Except for a bulkhead at the Ordinary High Water Mark (OHWM) along roughly the northerly half of the lot's waterfront, there are no structures on the property.

5. The applicant proposes to build an approximately 3,500 square-foot (three level) house with a foot print of approximately 1,400 square feet. The house would be about 80 feet landward of the OHWM with its western edge at the boundary of the wetland. The house would be entirely within the wetland buffer and a portion of its footprint would lie within an excavation cut into the slope.

6. The house would be served by an on-site sewage disposal system with both the septic tank and the drainfield located on the flat at the top of the slope near the road. This upper area would also be used for parking for the home.

7. The wetland was initially delineated by a consultant in relation to an earlier enforcement action. Later, the applicant retained a second wetlands consultant to review the site in relation to the construction of a home. This latter consultant concluded that the only feasible place to put a home on the property is at the location where the applicant proposes to build. Part of the basis for the conclusion is the apparent necessity to locate the septic tank and drain field on the top of the slope.

8. There is no space on the property to perform compensatory mitigation for the loss of buffer area occasioned by the placement of the home. However, the idea is to limit the area affected by facing the excavated area with a retaining wall and by maintaining most of the trees and undergrowth that exist in the buffer.

9. The impacts of the project will have minimal impact on the area and function of the wetland.

10. The wetland is charged by groundwater discharge at the toe of the slope. However, to an unknown degree overland flows from the county's drainage system on Bayview Edison Road contribute to the wetland conditions. The applicant's geotechnical expert has stated that if the flow contributed by the county's system were made to bypass the wetland, "it is quite possible that the wetland condition might then revert to upland conditions." He recommended that this flow be piped past the applicant's property before being discharged. There was testimony that no wetland existed on the subject property prior to the county's road project in 1958.

11. The parents of the present owner acquired the property in 1950 prior to the advent of county planning and zoning. The applicant received the property by inheritance prior to the adoption of the Critical Areas Ordinance. The use of the lot in question has been essentially for low-intensity recreation.

12. There are seven other homes in the neighborhood to the north that are accessed by Seabird Lane off of Bayview Edison Road. They are, in general, cabins and all were built prior to current planning and zoning restrictions.

13. The subject lot has been assessed as recreational property and valued at \$14,000 since at least 1990. The applicant had a professional appraisal prepared for the lot which placed its value at \$200,000. This latter value reflects its use as residential waterfront property and does not factor in any consideration of the effect of critical areas restrictions.

14. The Livingstons, owners of the parcel immediately north of the applicant's parcel, provided a geotechnical opinion concluding that the slope on the applicant's property is unstable and represents a landslide hazard, and that building on it would create a health and safety risk. The applicant's geotechnical consultant vigorously disputes this. Review by the county's geologist questions the basis for the conclusions of the Livingston's expert, but notes that the opposing opinions of both geotechnical consultants in this case are based on qualitative analysis. The county's analyst suggests that quantitative analysis be conducted to resolve the issue. Such analysis should include subsurface exploration, soil strength testing, and slope stability modeling.



15. There is no persuasive evidence based on qualified expert opinion that the septic system planned by the applicant would likely cause any ill effects to the wetland or to neighboring wells.

16. There is no evidence whatsoever that building the house in another part of the buffer would have a lesser effect on the wetland.

17. An easement crosses the applicant's property leading from the property to the north to lots that lie further to the south. This easement provides a means of access to the proposed building site.

18. Single family dwelling units are permitted outright in the applicable zone (Rural Reserve). Various less intensive uses are allowed outright or by special use permit. These include campgrounds, display gardens, outdoor recreational facilities.

19. There is no evidence that the footprint proposed would be larger than normal for a permanent contemporary waterfront home. Because of the site location and topography, the proposed structure would not interfere with any residential views. The Examiner finds that the proposal is for a reasonable use of the property. There is no basis for finding that a smaller house would impose a measurably lesser impact on the function and value of the wetland.

20. 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. Under the Critical Areas Ordinance, at SCC 14.24.230(1):

A regulated buffer can only be altered if the wetlands site assessment shows that the proposed alteration does not degrade the quantitative and qualitative function 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.

3. In this case, there is no assessment showing that, if the proposed house is built, the qualitative and quantitative function of the wetland will not be degraded at all or that



any degradation can be adequately mitigated. Accordingly, application of the Critical Areas Ordinance here would prevent the construction of the residence.

4. The principal criteria for granting a Reasonable Use Exception (RUE) are set forth in SCC 14.24.150(1), as follows:

- (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 less 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.

5. The earlier decision in this matter concluded that the Critical Areas Variance criteria are not met by the applicant's proposal.

6. The terms "reasonable and economically viable use" are not defined in the County Code.

7. The zoning ordinance specifies those uses that are, after the planning process has been completed, deemed appropriate for each particular district. It follows, therefore, that the allowable uses for a district constitute a list of "reasonable" uses for RUE purposes.

8. Since low intensity recreational uses are allowable uses in the subject Rural Reserve zone and are also allowed under the Critical Areas Ordinance, the Examiner concludes that for the ordinance to prevent the construction of a single-family home on the subject property would not deny all reasonable use.

9. However, "reasonable use" is coupled in the ordinance with "economically viable use." The Examiner does not believe that the list of allowable uses in a zone describes uses that are in every case "economically viable." As the applicant's counsel points out, if "camping" is economically viable, there is probably no property that would qualify for a RUE.

10. As a matter of plain meaning, "economically viable" must involve some notion of the effect of the regulation on market value. Consistent with decisions in cases on Constitutional takings, the effort should be to determine when the regulatory restriction goes "too far" in terms of value reduction. This necessarily involves a weighing of the public value advanced by the restriction against the value taken away from the property by applying the restriction.



11. After such balancing in the instant case, the Examiner concludes that the regulation goes "too far."

12. On the one hand we have a "minimal" intrusion into a buffer area – an intrusion for which no measurable effect on the wetland has even been described.

13. On the other hand the regulation has an enormous effect on what would otherwise be the property's value. The only evidence is that the property is valued at \$14,000 as recreational property and at \$200,000 as residential property. In other words, if a house cannot be built, the property is worth 93% less than if a house is allowed.

14. Such a regulatory impact on value might be justified if some overriding consideration of public health and safety were served by applying the regulation. Here a substantiated landslide hazard could present such a consideration. But the record on this issue is not conclusive. The weight of evidence favors the stability of the slope. But since the results of being wrong on such a prediction can lead to loss of life as well as property, the Examiner has determined that the additional investigations suggested by the Staff's geologist should be undertaken and that significant risk should be ruled out.

15. The Examiner acknowledges that he has been influenced in his consideration of this case by the distinct possibility that the wetland conditions have been caused by or at least considerably abetted by the county's actions in managing upland storm drainage. If the restrictions here are the result of storm water introduced to the property by the county's drainage project, it would be manifestly unjust to enforce them. Such enforcement would be tantamount to a physical taking of the property.

16. In sum, the RUE should be provisionally approved, subject to a condition that expert opinion be provided demonstrating that there is no substantial risk to health and safety from landslide activity at the subject site.

DECISION

The Reasonable Use Exception is approved, provided that the applicant submits to the Planning and Permit Center a quantitative analysis showing that the of risk of landslide activity at the subject site is not substantial. The analysis shall be along the lines suggested in the Memorandum of John Cooper, P.G., dated October 29, 2004. No construction at the site shall be undertaken unless or until such an analysis is presented.

If the required geotechnical analysis shows no substantial landslide risk from the project, the project may be undertaken, subject to the following conditions:

1. The applicant shall make final drawings that conform substantially with the concept presented in this application.



2. The applicant shall obtain a county building permit.
3. Any remaining fill on the property shall be removed.
4. The applicant shall present a detailed staging plan showing how access to the site will be obtained for purposes of construction of the house with minimal disturbance of the area outside of the building footprint.
5. The applicant shall preserve the existing trees and other vegetation on the site to the maximum extent possible. Where suitable, additional plantings of species appropriate to the wetland buffer shall be made.
6. All of the property not used for the home, parking, or the on-site septic system shall be included within a Protected Critical Area, recorded as required by law.
7. If any conditions are violated, the permit may be revoked.



Wick Dufford, Hearing Examiner

Date of Action: January 26, 2004

Date of Transmittal to Applicant: January 26, 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 14.06.120(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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