

NOTICE OF DECISION

BEFORE THE SKAGIT COUNTY HEARING EXAMINER

Appellant: Evergreen Islands
c/o Tom Glade
P. O. Box 223
Anacortes, WA 98221

Applicant: Frank Harkness
P. O. Box 171
Acme, WA 98220

Appeals: SEPA Threshold Determination (MDNS) regarding Forest Practice Conversion Application (PL 13-0102) and Grading Permit (BP13-0136).

File No: PL 13-0281

Location: South-facing flank of Mount Erie on Fidalgo Island, located north of 5285 Campbell Lake Road Drive, within a portion of NW1/4 Sec. 12, T34N, R1E, W.M. Parcel # P19301.

Land Use Designation: Rural Reserve

Summary of Proposal: Forest practice conversion; grading permit to construct access road for subsequent residential development.

Public Hearing: October 9, 2013

Decision/Date: The appeal is denied. The MDNS and Grading Permit are affirmed, subject to conditions. April 21, 2014.

Reconsideration/Appeal: A Request for Reconsideration may be filed with PDS within 10 days of this decision. The decision may be appealed to the Board of County Commissioners within 14 days of the date of decision or decision on reconsideration, if applicable.

Online Text: The entire decision can be viewed at:
[www.skagitcounty.net/hearing examiner](http://www.skagitcounty.net/hearing_examiner)

PROCEDURAL BACKGROUND

This appeal came on for hearing before the Hearing Examiner in the ordinary course on October 9, 2013. At the hearing Appellant Evergreen Islands was represented Gerald Steel, Attorney at Law. Jill Dvorkin, Assistant Prosecuting Attorney, represented the Skagit County.

The Appellant presented as lay witnesses seven citizens and the President of Appellant Evergreen Islands. Appellant also presented Dr. Ross Barnes as an expert.

John Cooper summarized the Staff Report for the County and Kevin Noyes, Deputy Fire Marshal, testified as to Fire Marshal review. Frank Harkness, Applicant, testified as a lay witness. The County called Robert Bailey, biologist, and Dan McShane, geologist, as experts.

Appellant's Exhibits A-1 through A-14 were admitted. Of these A-11 through A-14 related to Dr. Barnes testimony. Dr. Barnes report (A-12) included numerous attachments identified as Barnes Exhibits (A series, pp. A1-A47; B series, pp. B1-B15ff; and C series, pp. C1-C8)

County Exhibits C-1 through C-16 were admitted. These exhibits included 247 comment messages from members of the public.

On November 1, 2013, the Hearing Examiner entered an order entitled, "Remand for Consideration of Mediation." This order requested that discussion be pursued "between the landowner and his neighbors and other interested parties about how to develop the property in a way that will suit the interests of all." The Examiner stated that if mediation were agreed upon, he would await the outcome of that process prior to taking further action.

Pursuant to this request, Evergreen Island and Frank and Christine Harkness participated in a mediation session on November 21, 2013, and reached an agreement to work in good faith toward the purchase and sale of a conservation easement. If unable to reach agreement, the parties agreed to return for another mediation session. The second session took place on March 24, 2014 and no agreement resulted. The mediation was thereupon closed.

Given the failure of mediation, the Examiner has again taken up the case and the following decision represents his findings and conclusions based on the record of the October 2013 hearing.

The Examiner made a site visit to the area surrounding the subject property, an area he has visited many times before.

FINDINGS OF FACT

1. On March 18, 2013, Frank and Christine Harkness filed a Forest Practice Conversion application (PL13-0102) and a Grading Permit application (BP13-0136) seeking to prepare a 40-acre parcel on the southern flank of Mount Erie for residential development.

2. The parcel is located north of and adjacent to 5285 Campbell Lake Road Drive within a portion of the NW1/4 Sec. 12, T34N, R1E, W.M. The Parcel Number is P19301.

3. The zoning of the property is Rural Reserve (RRv). Within this zone detached single-family dwelling units are permitted uses with a minimum lot size of 10 acres. SCC 14.16.320(2)(f); SCC 14,16,320(5)(e). The property lies within a county Fire District.

4. The site is currently undeveloped. The lower portion of the steep rock face of Mount Erie occupies the northeastern portion of the property. The rest of the parcel is covered with timber.

5. The short-term goal of the applicants is to build a single-family residence on the property. Eventually, they may seek to subdivide the parcel into four residential lots.

6. The parcel is situated within a beautiful rural area between Deception Pass Park to the south and Mount Erie Park to the north, with Pass Lake and Campbell Lake in between. The presence of the parks is an indication of the scenic value of the setting.

7. The property in question occupies a central part of the vista looking northwest from the south and east sides of Campbell Lake towards Mount Erie. It spans the intersection of the rocky upper reaches of Mount Erie and the forest immediately below. The trees provide a natural visual buffer between the rock faces above and the rural development at the valley's edge. The picture of the mountain emerging from the forest is one of rare and essentially unspoiled natural beauty.

8. The valley floor around Campbell Lake has been developed with a number of homes, scattered among green fields. The applicants' property is on the hillside to the north and his proposed home appears to be at a substantially higher elevation than the other homes in the vicinity. In essence, the applicants propose to extend the rural residential scene farther up the hill. No man-made structures are now to be seen at the interface between the rocky hillside of Mount Erie and the forest.

9. To the immediate north of the subject lot are Anacortes Community Forest Lands (ACFL) which surround Mount Erie Park. These are within the jurisdiction of the City of Anacortes. The rock face of Mount Erie, primarily within the City, is regionally popular as a rock climbing site. There is a system of access trails to the foot of the face which has long been used by climbers. Some portion of these trails are on the applicants' property.

10. To the immediate south there is an intervening property between the subject parcel and Campbell Lake Road. Access to the site is to be obtained via a 60' foot access and utility

easement across this intervening ownership, extending up from Campbell Lake Road and entering the subject parcel near the southwest corner.

11. An Environmental Checklist was submitted with the application here. Later, on May 10, 2013, a professionally-prepared storm drainage plan was completed. Then, on May 24, 2013, a document containing a geohazard assessment, wetland delineation and fish and wildlife assessment was submitted. These documents show an evolution in the applicants' planning.

12. Initially the project was described simply as a clear-cut of the property in preparation for the residential development. The State Environmental Policy Act (SEPA) was implicated because the intention was to convert the parcel from forest to residential land. However, the Environmental Checklist names the project "Harkness Timber Harvest," and describes the proposal simply as follows: "to harvest approximately 900 MBF of timber from the parcel. This will require some gravel road construction to access the parcel."

13. The Notice of Development, published on March 28, 2013, provided a little more information:

Frank and Christine Harkness filed an application for a Forest Practice Conversion to harvest approximately 900,000 board feet of timber on a 40 acre parcel. The applicant proposes to clear the subject site for future subdivision and development as a single family residence. In addition to harvesting the timber and stump removal, the applicant proposes to excavate approximately 2,006 cubic yards of soil and fill approximately 1510 cubic yards of soil for construction of access roads for residential development of the site.

14. At the hearing the applicants clarified that their immediate intent is to build one single family residence (with garage and shop) for themselves. The professional reports submitted were prepared in relation to a single house and related outbuildings. The idea of future subdivision of the property into four parcels is, at present, just that -- an idea.

15. The instant decision therefore treats the application as limited to the one residence and outbuildings shown on the plans submitted. Any proposal for further development of the property will have to await a different application and a different review process. Such an application will trigger a further environmental review directed at the impacts of what is then concretely proposed.

16. The County approval required for the project is a Grading Permit, a type of building permit. Normally this kind of approval is non-discretionary if its technical requirements are met. However, because of the conversion from forestry use, the Grading Permit was, in this case, rendered discretionary by the applicability of SEPA. Such discretionary review included a need to comply with the Critical Areas Ordinance.

17. The Storm Drainage Plan by Engineered Solutions NW, LLC, described the project as "construction of a new driveway and residence" on Parcel 19301. The approximate location of a house, garage and shop were shown in the northeasterly portion of the site on a USGA

contour map as well as superimposed on a 2011 aerial photo. The drainage report said the house and garage are proposed "basically at foot of rock cliff." The access driveway was shown snaking sinuously upwards from the southwest entry of the lot to the home-site.

18. The drainage plan analyzed runoff from the property in a clear-cut condition and proposed a large detention pond on the lower part of the parcel near the southwest corner. The drainage plan set forth owner-provided information on the dimensions of the proposed structures as follows: "house - 46' x 72' = 3,312 square feet; garage - 30' x 35' = 1,050 square feet; shop - 45' x 65' = 2,925 square feet.

19. Later, Stratum Group and Edison Engineering produced a document entitled: "Geologically Hazardous Assessments; Wetland Delineation and Fish and Wildlife Assessment Harkness Property" (hereafter called the Critical Area Report). This document contained a Critical Area Site Plan which depicts the driveway leading up to a proposed house which is located within the northeast quadrant of the property. The garage is shown just west of the house and the shop (described as 70' x 70') is shown down-gradient and slightly to the east of the house

20. The Critical Area Report called for a buffer in the northwest portion of the property to protect what was represented as the nearest peregrine falcon nest. The buffer is a circle with an 850 foot radius. The site plan shows the on-site portion of such a buffer in the northwest portion of the parcel. It extends 550 feet south along the western boundary and 860 feet east along the north boundary. The report recommended that no logging take place inside this buffer. (The nest was estimated to be about 300 feet north and 10 feet east of the northern property boundary).

21. In addition, the Critical Area Report identified Category III wetlands in the southeast corner of the property that extend onto neighboring properties to the east and south. When a mandated 110 foot buffer is drawn around the wetlands, a sizable chunk of the southeast portion of the lot is removed from logging and other development.

22. After reviewing the various reports, the County issued Mitigated Determination of Non-Significance (MDNS). The MDNS, dated June 7, 2013 was in effect a determination that no environmental impact statement must be written. The description of the project in the MDNS is substantially the same as given in the March Notice of Development but it also notes the submission of the drainage plan and the Critical Area Report. The conditions of the MDNS include the following:

The applicant shall comply with the provisions of Skagit County Code 14.24, Critical Areas Ordinance. As indicated in the Geologically Hazardous Assessment, Wetland Delineation and Fish and Wildlife Site Assessment by Edison Engineering, dated May 24, 2013, no harvest, grading or development activities shall occur within 110-feet of the wetlands identified in the southeast corner of parcel P19301. No harvest, grading or development activity shall occur within 860 feet of the Peregrine Falcon nested located near the northwest corner of parcel 19301 (see critical areas site plan). No timber harvest shall occur on

the entire parcel from March 1st to July 1st of any year for the duration of the forest practice permit.

23. The proposal that emerged from the various review documents and, as conditioned by the MDNS, excludes significant portions of the northwest and southeast portions of the property from clear-cutting. From the outset, the proposal has also excluded any development on the rock bluff on the northeast portion of the property. Indeed, the entire northern boundary area appears to be untouched by the ultimate proposal. In response to a County inquiry, the City of Anacortes by letter noted:

The buffer provided in the northwest corner of the property and clearing limits set up by the Harkness family in the northeast corner provide a substantial buffer for the Anacortes Community Forest Lands which border this property to the north.

The Staff Report states that the net result is a 200+ foot buffer from the boundary of the ACFL

24. Based on the various reports provided, it appears that the house is proposed for a locale in the upper portion of the presently wooded area, below the interface of forest and vertical rock cliff. None of the proposed buildings are within any of the described buffers.

25. The portion of the Critical Area Report devoted to geohazard stated that the steep rock slope is about 165 feet in back of the proposed house. The investigating geologist after visiting the property concluded that the home-site is not within a landslide hazard area and that the proposed home is not likely to be damaged by falling rocks. No rock falls were identified within the vicinity of the proposed building area.

26. The plan view for the road, attached to the Grading Permit, shows the house at an elevation of almost 400 feet. This is nearly 300 feet higher than Campbell Lake Road. The evident purpose, then, is for the residence to take advantage of the broad territorial view to the south toward Campbell Lake and its surrounding fields and scattered dwellings. The current state of approval for development would allow trees to be cut down around the proposed home-site.

27. When the MDNS was issued, the public impression created was that the entire site would be clear cut. This created a wave of public reaction. A total of 268 public comments were received. An overwhelming majority opposed the project.

28. The numerous statements in opposition decried the anticipated effect of the clear cut on views toward Mount Erie from the valley and highways below, as well as on views from above down the mountain towards the lake. Some argued that the natural beauty of the site indirectly results in significant economic benefits through attracting visitors. Concerns were also expressed about impacts on rock climbing, on wildlife, in particular peregrine falcons, and on drainage toward Lake Campbell.

29. Evergreen Islands timely filed an appeal of the MDNS on July 12, 2013. The County issued a Grading Permit for the project (BP13-0136) on September 9, 2013. Subsequently on September 13, 2013, Evergreen Islands submitted an Amended Notice of Appeal which included an appeal of the Grading Permit.

30. The appeal alleged that the MDNS and Grading Permit are based on inadequate environmental review. The main issues asserted were (1) inadequate analysis of aesthetic impacts, (2) inadequate analysis of fire danger, and (3) inadequate critical area protection.

31. The Staff Report states that aesthetics were considered as a part of the SEPA review process and that the responsible official concluded that there would not be a significant adverse impact to aesthetics of the site and surrounding area from the project. The Staff Report indicated that the applicants have retreated from the idea of clear cutting. It stated that "the applicant intends to clear for residential development and selective cut or thin the trees and vegetation on the remainder of the parcel." Applicant Frank Harkness testified at the hearing to similar effect.

32. The appellants introduced a series of photographs of Mount Erie and the forest below in an attempt to suggest how logging on the property would affect views. The appellant downplayed the impacts suggested, but the preponderance of evidence is that views of the property would be negatively impacted by the development planned.

33. As to fire risk, the Grading Permit requires meet County road construction standards, including driveway access standards and turn-out and turn-around requirements for fire and emergency vehicles. The applicant intends to comply with the Firewise program to reduce the presence of fire hazards to developments on the property. A representative of the County Fire Marshal's office testified that the applicants' project meets relevant Fire Code and County standards. He said that use of Firewise would reduce risks of fire to climbers as well as structures.

35. The appellants did not make a persuasive case on fire danger impacts.

36. The Staff position was essentially that the professional work done with regard to critical areas was adequate to prevent significant adverse impacts as to geohazards, wetlands and wildlife. No issue was raised as to wetland protection.

37. At the hearing, the geologist who investigated the site for the applicants testified that in his professional opinion there is no rock fall hazard to either the proposed structures or the driveway. He also stated that there is no landslide hazard on the property even after timber harvest.

38. On geohazards, the appeal focuses on mapping shortcomings, and assertions that the home-site is within a landslide hazard area. The Examiner is persuaded by the on-site investigation of applicant's geologist and finds that the issue of landslide hazard was adequately analyzed. No need for better mapping in this regard was shown. Under the circumstances, there is no requirement for a geohazard area mitigation plan.

39. The applicants' biologist testified that he had called an expert at the State Department of Fish and Wildlife with regard to the location of peregrine falcon nests and the appropriate buffer to provide for such nests. The circle of protection recommended was 850 feet. This was represented on the Critical Areas Site Plan, using the off-site nest location given. As noted, the MDNS forbids harvest, grading or development activity in this protected area.

40. Appellants contend that the location of the falcon nest used by applicant's biologist was incorrect and that a buffer of 1310 feet should have been adopted for protection of the peregrine falcons in the vicinity. The 1310 foot figure is based on a buffer suggested in a State Department of Fish and Wildlife publication. This suggestion is a recommendation only and does not have regulatory authority.

41. The Examiner takes notice that falcons sometimes move around and that nesting sites may change from time to time. There is no strict requirement for any particular buffer.

42. The portion of the 850 circle shown on the Critical Areas Site Plan recognizes the presence of falcons in the area and makes an appropriate effort to protect them. The County made no finding that the project would likely have an adverse impact on any fish and wildlife conservation area and thus no requirement for a habitat management plan was triggered.

43. Both the applicants and the City of Anacortes report that they have reached an agreement on allowing access for climbers wishing to climb the rock face of Mount Erie. There is no final signed agreement in the record, but there is no reason to believe that such an accord will not be finalized. The record does not support a finding that the proposal will significantly interfere with the customary use of the property by climbers.

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

DISCUSSION

If there is a significant adverse environmental impact here it is the impact on aesthetics.

Other potentially negative environmental impacts appear to have been adequately provided against. An area for protection of the peregrine falcons will be set aside. The wetlands will be protected. Landslides are unlikely. The rock cliff will not itself be disturbed and the structures built on site will not be in significant danger from falling rocks. Appropriate fire protection measures will be taken. Trail access for climbers will be preserved. Run-off will be properly controlled and treated.

So, the case basically comes down to whether the aesthetic impacts should be the reason for rejecting the project or for requiring an Environmental Impact Statement.

The evidence on aesthetics provided by the large and passionate public outcry is already substantial. Much of this is predicated on the now-abandoned idea of clear-cutting the property. But, it is undoubtedly true that even with the modified logging regime, the single-family

residential development proposed would perceptibly change the look of the property and alter the pristine forest-below-rock picture that now exists.

The basic countervailing truth is that the parcel is private property and the relevant land use regulations allow building a home on this property. The parcel is zoned Rural Reserve, a zoning category in which single family homes are permitted outright.

Case law in general does not support turning a project down solely for aesthetic reasons. And an issue of fairness underlies this situation. A governmental body or a conservation organization could have purchased this property. They did not. The applicant/owners are asked to bear the full burden of protecting the natural setting.

The SEPA process is about full environmental disclosure. SEPA does not demand any particular substantive outcome. The environmental disclosure in the record supports a decision to condition the permit in an effort to minimize the aesthetic objections. But, as to approval or denial, it is within the discretion of the County to weigh the property rights of the applicants more heavily than the aesthetic objections raised.

Furthermore, the Examiner is convinced that an impact statement supplying a more refined aesthetics analysis would not add much to an understanding of the environmental effects of the proposal. Requiring such a statement would only be a way to increase costs and delay the project further.

The remaining problem, then, is to determine what conditions are appropriate to mitigate the environmental impacts of the proposal to build a residence on this piece of ground. The appellants seek to have the house moved from its proposed site to someplace lower on the property where it would perhaps be more effectively screened by trees and topography and thus less intrusive from afar.

The Examiner takes notice that a major value of this parcel for residential development is as a view lot, offering a spectacular territorial vista from the proposed home-site over the valley, lakes and fields below. The appellants seek to dilute this value in the interests of minimizing the impact on views onto the property by the public.

The immediate aesthetic change will be from a heavily forested site to a thinned forest on part of the property with a single family home and outbuildings. However, the structures on the site can, to some degree, be screened from view.

After much reflection, the Examiner has decided that the applicants should be allowed to build where they propose to build with as much screening of their structures as practicable, so as to preserve their own views out and to minimize impacts on public views in.

The Examiner notes that screening requirements are not uncommon. The construction of cell towers, which often occurs in relatively natural settings, must meet requirements for screening and for blending into the setting so far as possible. Likewise, screening from public views must be made in rural subdivisions under the CaRD provisions.

CONCLUSIONS OF LAW

1. The Hearing Examiner has jurisdiction over the subject matter of this appeal. The Grading Permit and the SEPA threshold determination are Level I administrative approvals, subject to appeal to the Hearing Examiner. SCC 14.06,110(7).

2. Because SEPA makes the permit decision discretionary, the subject Grading Permit is a form of "development permit." SCC 14.04.020. Accordingly, the requirements of the Critical Areas Ordinance must be met for approval of this application. SCC 14.24.060.

3. The timber harvest sought here is authorized by State law. The limitations on that harvest accepted by the applicants flow here from County requirements.

4. As conditioned below, the subject project can comply with the Critical Areas Ordinance. A habitat management plan would be required only if the County had found that the project would likely have an adverse impact on a fish and wildlife habitat conservation area. No such finding was made here. See SCC 14.24.520(2)

5. Similarly, a geohazard area mitigation plan is required only on properties containing geologically hazardous conditions. SCC 14.24.420(3). Such conditions were not identified here. A 50-foot buffer from a geohazard is required only when a mitigation plan is required.

6. Under the SEPA rules, the County could designate certain categorical exemptions that do not apply within critical areas. WAC 197-11-908. Skagit County has not chosen to make any such designations. Nonetheless this project is not categorically exempt from the threshold determination requirements. Under WAC 197-11-305(b) the threshold determination requirements apply generally to projects which include a series of exempt and non-exempt actions which are related to one another and together may have a probable significant environmental effects. That is the apparently what led to the threshold determination here.

7. The project which is the subject of the MDNS is the project as modified by the Storm Drainage Plan and the Critical Areas Plan. The MDNS specifically requires compliance with the Critical Areas Plan, effectively prohibiting timber harvest, grading or development within 860 feet of the falcon's nests and within 110 feet of identified wetlands. The MDNS also requires compliance with drainage and erosion control measures recommended by the Storm Drainage Plan.

8. The rules for appeals of SEPA threshold determinations require that such determinations by the County's Responsible Official shall carry substantial weight in any appeal proceeding. SCC 14.12.210 (4).

9. The Examiner concludes that under all the circumstances, the information provided in the record is "reasonably sufficient" to evaluate the environmental impact of the proposal. See WAC 197-11-335. Public comment provided a large amount of information and sentiment on

the matter of aesthetics. Viewed as supplementing the SEPA record, this information was, in the Examiner's view, adequate input on the aesthetics question. He does not think that it would help for more of the same to be provided within the format of an Environmental Impact Statement.

10. With this in mind and looking at the entire record, the Examiner concludes that the environmental full disclosure purposes of SEPA have been fulfilled in this case and that no useful purpose would be served by reversing the MDNS on technical grounds. The project as it has been modified by the review process will significantly reduce the environmental impacts, including the aesthetic impacts, if conditioned as set forth below.

11. Recognizing that aesthetics alone probably would not carry the day, the appellants presented a spirited case urging additional shortcomings. The Examiner compliments them on this effort, but is, in the end, convinced that no substantial problem of fire safety or critical areas compliance was proven.

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

CONDITIONS

1. The project shall be constructed as shown on the final Site Plan required by Condition (9), below.

2. All conditions set forth in the MDNS, issued June 7, 2013, shall be complied with.

3. The general construction recommendations set forth in the Geologically Hazardous Assessment, Wetland Delineation and Fish and Wildlife Assessment, dated May 24, 2013, shall be followed.

5. The applicants shall file a Protected Critical Areas easement per SCC 14.24.090, covering the critical areas identified on the Critical Areas Site plan.

6. The property shall be selectively logged, not clear cut.

7. The applicants shall comply with "Firewise" as appropriate for this property.

8. The applicants shall enter into a signed final agreement with Anacortes Parks and Recreation relating to the trails on their property that the public will be allowed to use. The applicants will permit the City to place signs along these trails advising that the routes are on private property and that users should remain on the trails.

9. The applicants shall present a final Site Plan showing clearing limits on the property, as well as the critical areas with buffers. The plan shall also show: (1) the location, elevation and dimensions of the buildings proposed; (2) the driveway including provisions made to accommodate fire and emergency vehicles; and (3) the approximate location and size of the detention pond as revised.

10. The applicants shall provide an addendum to the Storm Drainage Plan that evaluates the drainage resulting from development according to the final Site Plan and sizes the detention pond to reflect the reduction in logging on the site.

11. To the extent possible, screening trees shall be retained in the vicinity of the buildings and along the driveway. The applicants shall develop a Screening Plan which while preserving views from the house will to the extent possible obscure the structures built on the property from outside views. The County shall review and approve this plan.

12. The buildings on the site shall be finished in natural colors which blend into the background.

13. Failure to abide by these conditions may result in permit revocation.

DECISION

The appeal is denied. The MDNS and Grading Permit are affirmed, subject to the conditions set forth above.

DONE, this 21st day of April, 2014.



Wick Dufford, Hearing Examiner

Transmitted to the Parties, April 21, 2014.

See Page 1, Notice of Decision, for Appeal Information.