

BEFORE THE SKAGIT COUNTY HEARING EXAMINER

FINDINGS, CONCLUSIONS AND DECISION

Applicants: John and Malia Santucci
18327 71st Ave. West
Lynnwood, WA 98037

Representative: Warren Otteson
34207 Shore Drive
Mount Vernon, WA 98274

File No: PL06-0644

Request: Shoreline Variance

Location: North shore of Lake Cavanaugh, 34214
North Shore Drive; Lot 51, Block 2, Lake
Cavanaugh Subdivision #1, within NW1/4
Sec. 26, T33N, R6E, W.M.

Land Use Designation: Zoning: Rural Village Residential
Shorelines: Rural Residential

Summary of Proposal: To add a second story to an existing cabin,
increasing the size by approximately 542
square feet. The cabin is located waterward
of the Ordinary High Water Mark and within
the shoreline setback.

Public Hearing: After reviewing the report of Planning and
Development Services, the Hearing Examiner
conducted a public hearing on February 28, 2007.
After the hearing, the Examiner visited the site.

Decision: The application is denied.

FINDINGS OF FACT

1. John and Malia Santucci (applicants) seek to build a second story on their existing waterfront cabin on Lake Cavanaugh.

2. The site is Lot 51, Block 2, Lake Cavanaugh Subdivision #1. The address is 34214 North Shore Drive. The property is located within the NW1/4, Sec. 26, T33N, R6E, W.M. The Shoreline designation is Rural Residential.

3. Typical of the early platting on Lake Cavanaugh, Lot 51 is only 60 feet wide. It is, however, 378 feet deep. Northshore Drive (an easement) cuts across the lot. From maps submitted, it appears that the road is about 50 feet from the lakeshore.

4. The Skagit County Shoreline Master Program (SMP) became effective in 1976. It established a 50-foot shore setback for single-family homes in the Rural Residential environment. (SMP 7.13(2)(C)(Table RD)). Thus, any dwelling constructed on the waterward side of the road on Lot 51 would be within the shore setback.

5. The setback is measured from the Ordinary High Water Mark (OHWM). The Master Program defines OHWM as the vegetation line or, where the vegetation line can't be found adjoining fresh water, as the line of mean high water.

6. The original waterfront cabin on Lot 51 was placed on a piling-supported deck that extended over the water. Eventually a concrete foundation replaced the deck and piling. The County contends that construction of the concrete foundation involved the creation of some upland, because the area behind it was backfilled in order to support the dwelling.

7. The existing cabin rests on the concrete foundation. The County construes the front side of this foundation as lying waterward of the OHWM.

8. Assessor's office records show a small cabin (240 square feet) on a piling-supported deck in the subject location as of 1974. At that time there was another "older cabin" located across the road on the north part of the property.

9. Mary Anne Nelson Bartell, one of the prior owners, remembers that in 1968 the old "boathouse" was remodeled with two rooms and a large wooden deck and piling. Thereafter the wooden deck was replaced with a concrete bulkhead over a period of several years, ending in 1982. She says that from "1971 to 1982 the lower cabin was re-roofed and the roof formed a covered area at the lake-end that was closed to make the living room bigger." A bedroom was added in 1990.

10. The overall picture, then, is of a boathouse conversion begun in the late 1960's that has gradually evolved into the modest summer home of today. There is no record of any building permit or of any shoreline variance issued in connection with constructing the cabin.

11. The precise location of the OHWM on the subject property is not clearly identified. However, on consideration of the entire record, including the photographic evidence, the Examiner is persuaded that the County is correct and that a portion of the existing cabin does lie waterward of the OHWM.

12. The existing cabin is approximately 540 square feet in area. The proposed second story would double the square footage. The overall height of the structure would increase to 30 feet, which is within the SMP's height limit. The second story would not change the shoreline footprint of the structure.

13. The applicants purchased the property in 2003. They had no involvement in any of the improvements already on the lot. After they acquired the property, they installed a County-approved two-bedroom septic system, with the effluent being pumped to a drainfield on the upper part of their lot across the road. There is now no trace of the "older cabin" that used to lie on that part of the lot.

14. Ownership of the lot includes the shorelands between high and low water. The lot slopes up from the lake. The existing cabin is 12 feet below the grade of Northshore Drive. The northern part of the property is sloped, but no more steeply than neighboring properties where homes have been built.

15. With only about 50 feet of lot depth between the lake and the road, there is little room to expand the existing cabin on the inland side. Therefore, the plan is to go up. The reason for wanting to add the upper story is to accommodate applicants' family of two adults and three children. The small one-story cabin is too small to comfortably fit all the people and the appliances and facilities that are standard in modern homes.

16. Because the second story would not change the footprint, it would itself have little environmental impact. The principal effects the cabin has on shoreline values have already been felt. The only environmental concern with the present project is over the added height. Would it change the visual vista in an adverse way? Based on testimony at the hearing, the second floor would cause no view impairment for those wanting to look out at the lake. It would, however, be visible in lateral views from other properties and from the lake itself.

17. The pattern of development along this portion of Northshore Drive reflects the extremely constrained nature of the buildable area south of the road. The average of setbacks from the OHWM for residences within 300 feet on either side of the subject cabin is 68.25 feet, greater than the required SMP setback. This results from averaging in homes located on the opposite side of the road from the lake. In the near vicinity, most

lots do not involve homes next to the water. The shore side development is predominantly limited to docks and boathouses. There are, however, two other nearby dwellings that extend into the water. They are both small, older, single story cabins.

18. Variances from the Skagit County Shoreline Management Master Program for construction landward of the OHWM must meet the following criteria (SMP 10.03(1)):

- a. The strict application of the bulk, dimensional or performance standards set forth in this Master Program precludes or significantly interferes with a reasonable use of the property not otherwise prohibited by this Master Program. (emphasis added.)
- b. The hardship described above is specifically related to the property and is the result of unique conditions such as irregular lot shape, size or natural features and the application of this Master Program and, not, for example, from deed restrictions or the applicant's own actions.
- c. That the design of the project will be compatible with other permitted activities in the area and will not cause adverse effects to the adjacent properties or the shoreline environment designation.
- d. The variance granted does not constitute a grant of special privilege not enjoyed by the other properties in the same area and will be the minimum necessary to afford relief.
- e. The public interest will suffer no substantial detrimental effect.

19. Shoreline Variances for construction waterward of the OHWM are subject to stricter criteria (SMP 10.03(2)): Under subparagraph (a) the language reads:

- a. The strict application of the bulk, dimensional or performance standards set forth in the Master Program precludes a reasonable use of the property not otherwise prohibited by this Master Program.

A new subparagraph (e) is inserted, as follows:

- e. That the public rights of navigation and use of the shorelines will not be adversely affected by the granting of the variance.

20. In the granting of all variance permits, consideration must be given to the cumulative impact of additional requests for like actions in the area. (SMP 10.03(3)).

21. The Staff in its report recommends denial of the variance requested for the second story. This recommendation is based primarily on three points: (1) the fact that

the nearest other homes built waterward of the OHWM are only one story high (incompatibility), (2) the visual effect of allowing other such single-story cabins to add a second floor (adverse cumulative impact), (3) backfilling behind the foundation (creation of upland).

22. Because denial of the application was recommended on other grounds, no Fish and Wildlife Habitat Assessment was conducted for this application.

23. The applicants' representative argued against the viability of residential development on the lot area on the north side of the road. Factors mentioned were the effects of an excavation on Lot 50 next door, the steepness of the terrain, the presence of the drainfield, and the existence of a seasonal stream that crosses several lots. The argument was not convincing. Though only 60 feet wide, this area is several hundred feet deep. A cabin once existed there. The appellants' did not show that there is inadequate space on the north side for an improvement of the size they propose.

24. The applicants have been part of the Lake Cavanaugh community since 1963 and are well-known and apparently well-liked. At the hearing there was no public testimony opposing the proposal. One neighbor appeared in support. The applicants presented 14 letters of support from others.

25. 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 application is exempt from the procedural requirements of the State Environmental Policy Act (SEPA).

3. The key problem here is with overwater, or more precisely "into-the-water" residential development. One of the major motivating factors in the original passage of the Shoreline Management Act (SMA) was to prevent more of this sort of thing from occurring.

4. In pre-SMA days there was no reason for a sense of constraint about building waterward of the OHWM. Rather, in places such as the subject lot, the feeling was probably one of entitlement to do so, in light of private ownership of the shorelands between high and low water.

5. The idea of pushing development that doesn't require a shoreline location away from the water's edge has not been easy to implement in places where significant

overwater or inwater development was already in place before the shoreline rules went into effect. See Department of Ecology v. Ballard Elks, 84 Wn.2d 55a, 527 P.2d 1121 (1974). The subject shoreline, however, does not present a situation where an established pattern of building over or into the water is dominant. So the impetus to bend the regulations provided by an overwhelming status quo of this type is not present.

6. The variance criteria of the local SMP mirror the State variance regulations. See WAC 173-27-170. The standards for overwater or inwater variances are more stringent than those for building on the upland - a reflection of a strong policy.

7. Because the instant proposal is waterward as well as landward of the OWHM, the criteria for waterward development (SMP 10.03(2)) must be met. This means that application of the setback rule must not merely “significantly interfere” with a reasonable use of the property, the rule must “preclude” a reasonable use of the property.

8. Clearly residential use of this property is a reasonable use. But denial of the variance will not preclude it. Residential use is already going on without the variance. Even if the proposed second-story addition is characterized as the reasonable use in question, denial of the variance will not preclude it. There is space elsewhere on the property for such expanded use.

9. So on the basis of the applicable SMP criteria, the variance cannot be approved insofar as the development is waterward of the OWHM. If the development were placed landward of the OWHM, then the “significant interference” standard would apply. Since there is no such proposal before him, the Examiner does not reach the question of whether that standard could be met.

10. Because the variance cannot be approved, the Examiner needn’t analyze the status of the structure as a non-conforming structure. But, since variances have been granted on Lake Cavanaugh for the expansion of such structures, some discussion may be useful.

11. As a result of the early development pattern, noncompliance with the 50-foot shore setback is more the rule than the exception on Lake Cavanaugh. The Examiner has reviewed 16 decisions over the last 8 years concerning building on the shorelines of the lake. Most involved incursions into the setback to remodel a non-conforming existing cabin. In one case (Hansen, 05-0113, 05-0114) the setback from the OWHM approved was only one foot (with removal of an overwater deck), but in the other cases, the variances were for larger setbacks. Significantly, no other case has involved development over or into the water.

12. In the subject case, the part of the existing cabin built before 1976 can be regarded as a legal non-conforming structure. Those parts built later without benefit of permit represent the expansion of a non-conforming structure. To the extent that an expansion is involved, the SMP, in general, would disallow it. SMP 12.02.

13. However, an exception to this prohibition is provided in SMP 12.04, if the Hearing Examiner determines

that the enlargement, extension or increase of the non-conforming use of shorelines can be accomplished without appreciable threat to the health, safety and general welfare of the public or the shoreline environment and purpose of this Program and Act, and that to deny the enlargement, extension or increase in the non-conformity would constitute a hardship greater than the public benefit derived from denial of the non-conformity.

11. Here it appears that environmental impacts of adding a second-story are negligible. Any violation of the prohibition against filling to create upland (SMP 7.13(2)(B)(6)) occurred years ago. So the project at hand does not appear to pose an appreciable threat to health, safety, general welfare or to the shoreline environment.

12. Nonetheless, in the Examiner's view, there is an appreciable threat to the purpose of the Master Program and the Act. Overwater or inwater development is of particular concern because it interferes with the public right of navigation which is the underlying basis for the SMA. Such development infringes on the Public Trust. The Act was aimed at preventing such development except when some compensating navigational or public access purpose would be served.

13. The policy against development that interferes with the public's use of public waters is embodied in regulations that limit overwater or inwater development to activities that are water-dependant or water-related. Residential development is not within those categories. The State regulations (with which local programs should comply) allow the expansion of non-conforming residences only if located landward of the OHWM. WAC 173-27-080(3). The expansion proposed here would not be permissible under the State's version of non-conforming structure rules.

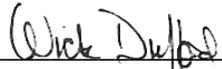
14. In sum, the SMA regulatory program involves making a kind of bright line at the OHWM. On the seaward side, development is limited to things that require such a location because of their intrinsic nature. Thus, to refuse these applicants is not to treat them arbitrarily, but rather to enforce a distinction which is at the heart of the shoreline legislation. In the larger view, this is more than a matter of philosophy. It makes sense because of the fear expressed by the Staff over cumulative impacts.

15. Maintaining the bright line, where possible, benefits the public by maintaining the integrity of the Act. Under the circumstances, the Examiner does not think that denial constitutes a hardship greater than the public benefit derived from denial.

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

DECISION

The requested Shoreline Variance is denied.



Wick Dufford, Hearing Examiner

Date of Action: March 26, 2007

Date Transmitted to Applicants: March 26, 2007

RECONSIDERATION/APPEAL

As provided in the Skagit County Shoreline Master Program, Section 13.01, a request for reconsideration may be filed with Planning and Development Services within five (5) days after the date of this decision. The decision may be appealed to the Board of County Commissioners by filing a written Notice of Appeal with Planning and Development Services within five (5) days after the date of decision or decision on reconsideration, if applicable.

DEPARTMENT OF ECOLOGY REVIEW

If approval of a Shoreline Variance or Shoreline Conditional Use becomes final at the County level, the Department of Ecology must approve or disapprove it, pursuant to RCW 90.58.140.