

BEFORE THE SKAGIT COUNTY HEARING EXAMINER

FINDINGS, CONCLUSIONS AND DECISION

Applicant: Norman and Eleanor Ovenell
46279 Concrete Sauk Valley Road
Concrete, WA 98237

Agent: Marianne Manville-Ailes, Louis Requa
Skagit Surveyors & Engineers
806 Metcalf Street
Sedro Woolley, WA 98284

File No: PL09-0103

Request: Building setback variance

Location: 46276 Concrete-Sauk Valley Road, within a portion of
SE1/4 Sec. 14, T35N, R8E, W.M.

Parcel Nos: P43893, P43894, P43907, P43908

Land Use Designation: Rural Resource, Natural Resource Lands

Summary of Proposal: To reduce the building setback requirement from adjacent
natural resource lands from 200 feet to 50 feet on lots of a
four-lot CaRD subdivision.

Public Hearing: After reviewing the Report of Planning and Development
Services, the Hearing Examiner conducted a public hearing
on June 10, 2009. Prior to completing his decision, the
Examiner visited the site.

Decision: The application is approved, subject to conditions.

FINDINGS OF FACT

1. Norman and Eleanor Ovenell seek a variance from the building setback requirement from adjacent natural resource lands.
2. The subject property (hereinafter, the “base parcel”) is located at 46276 Concrete-Sauk Valley Road, within a portion of SE1/4 Sec. 14, T35N, R8E, W.M. The zoning of the property is Rural Resource – Natural Resource Lands (RRc-NRL). Adjacent property is in the same zoning.
3. The base parcel comprises about 40 acres situated on the south side of Concrete-Sauk Valley Road. The parcel is irregular in shape, the current configuration being the outcome of a boundary line adjustment, involving several verified lots encompassing a much larger surrounding area. The total area is held by the applicants, their daughters or a combination of both.
4. The base parcel is a combination of pasture land and forested area. The pasture is in the northern part of the property close to the county road. The forested area is at the back of the parcel, south of the internal road. The topography is relatively flat near the county road and then slopes up to the south. The parcel is operated as part of a ranch and as part of an ongoing forestry operation. There are three separate wetland areas in the southwest corner of the property and one large wetland located in the middle of the southern half.
5. Currently there are three residences on the base parcel. Two of these are located in the western portion, and one in the eastern portion. One of the western residences is an approved Bed and Breakfast. Various outbuildings are located around the existing residences.
6. The parcel is served by on-site septic systems and a Group B water system.
7. An internal road (Cattle Drive) starts in the northeast corner of the base parcel proceeds south and then curves and interseects the western property line. This road also serves property farther to the west. There is a separate driveway in the northwest corner of the parcel that accesses the Bed and Breakfast.
8. In 1997, prior to the boundary line adjustment, the Hearing Examiner granted the applicants a Special Use Permit (PL96-0368) for the development of a resort on their holdings. The approval included three existing residences and the contemplated development of four new homesites, bringing the eventual total to seven residences. The idea was to allow family members to continue to live and work on the family operation.
9. At some point it became clear to the family that having all of the different family members living in separate homes on the same piece of property was problematic

when it came to financing those homes. For financing a new home or renovating an old one, in general, the person seeking the loan must own the property where the home is placed. This has led to a plan for creating separate home-site lots through a combination of boundary line adjustment and a four-lot short CaRD.

10. One of the four new home-sites already has been developed on separate adjacent property to the east of the base parcel. The family wishes to provide for the other three. The plan is for one of these is to be built on another separate lot that occupies an enclave in the northern boundary of the base parcel. The other two are to be placed on Lots 2 and 4 of the proposed CaRD within the base parcel.

11. Under the plan, the existing B&B and a nearby existing home would occupy Lot 1. The third existing home would be to the east on new Lot 3. The overall effect would be to cluster all seven homes in a rough arc. The end result would be six separate home-site lots. Only Lot 1 would end up with two homes on it.

12. The problem with this scheme is that it does not allow most of the homes to conform to the setback requirements of the code. Therefore, the applicants have sought a building setback variance for Lots 1, 3 and 4 of the short CaRD.

13. The standard setback for structures on RRc-NRL property is 50 feet. SCC 14.16.430(5). However, the CaRD approval provisions call for a 200-foot setback from “adjacent” NRL designated parcels. SCC 14.18.310(8). Since the lands surrounding the subject property are also designated NRL, the applicable setback is 200 feet for the CaRD lots bordering these lands (Lots 1, 3 and 4). With respect to proposed Lot 2, the 50-foot setback applies because the lot is entirely inside the base parcel and does not border on “adjacent” NRL designated parcels.

14. The applicant apparently believes that the residences, existing and contemplated, within the CaRD they propose can all meet a 50-foot setback. But, the 200-foot limit poses difficulties on proposed Lots 1, 3 and 4. Therefore, the Ovenells have asked for a variance, allowing them to observe a setback of 50 feet on these lots.

15. The Staff analysis finds that the existing manufactured home on proposed Lot 1 and the shop and a small portion of the home on proposed lot 3 do not meet even the underlying (50-foot) zoning setback. Nevertheless, the Staff concedes that the existing structures on Lots 1 and 3 should be allowed to remain where they are.

16. But, new construction is needed in order to locate a house on Lot 4 and that lot has no available building area outside of the 200-foot limit. Given this circumstance, the Staff examined all areas of the base parcel to determine if there is land available outside of the 200-foot limit and outside of sensitive areas where a house could be built. They found three such areas (consistent with the small lot sizes allowed in CaRDs) and therefore recommended reconfiguring the CaRD and denying the variance as to Lot 4.

17. In addition, as to buildings on Lots 1 and 3, the Staff recommended a condition requiring any replacement structures to comply with the “underlying” zoning setback. By this the Staff meant that the variance would limit new construction on these lots to areas behind a 50-foot setback.

18. In addition to asserting that a variance is not really needed, the Staff’s position is that the setback difficulties, particularly as they relate to Lot 4, are the result of the odd configuration of the base parcel that the applicants chose in the boundary line adjustment and that, therefore, the need for the variance is self-imposed rather than inherent in the nature of the site.

19. The applicants take the position that the location of Lot 4 is the most sensible spot for the final residential lot because it fits most readily within the pattern of resource management that they are using and plan to continue to use for the property. Their argument is, essentially, that sensible resource management should trump the setback requirement

20. The applicants provided a setback exhibit, prepared by professional surveyors, that shows the 200-foot setback area on the base parcel. Two of the areas identified by the County as outside the setback and buildable are wholly or partially within the setback as shown on the applicants’ exhibit. The County presented no evidence contradicting the applicants’ depiction of the setback.

21. The two areas are just south of Lot 3 and in the easterly portion of Lot 2. Testimony for the applicants was that these areas have been managed for forestry for decades and are currently devoted to active cultivation of forest growth intended for commercial purposes. The applicants contended that devoting these areas to home-sites would interfere with and, to a degree, frustrate the ongoing forest management program.

22. The third potential building site identified by the County is between the existing Bed and Breakfast and the Concrete-Sauk Valley Road. This area is in a field that is directly in the line of sight for what the B&B’s promotional literature calls “the Inn’s million dollar view of Mt. Baker.” It is highly unlikely that the applicants would ever choose to locate a residence there, even if it was allowed. To do so would be destructive of one of the principal assets of the B&B location. At present this area is part of the working ranch that the guests of the B& B are able to experience along with the view. Cattle are moved through the area and it is used for grazing.

23. Proposed Lot 4 is described by the applicants as an area of “infrequently used pasture.” They apparently do not think that its use for residential purposes would be a significant lost to their agricultural operations.

24. The applicants point to SCC 14.18.310(9) (b), a part of the CaRD approval standards, which states:

On CaRDs within or adjacent to an NRL designation, lots shall be placed to minimize potential impacts to natural resource and land production on both the subject property and any adjacent resource lands. Lots shall be located to not complicate resource access, normal field operations or harvesting, and to minimize the impact of resource land operations on the residential lot (such as airborne dust, noise, and smell).

They argue that the way they have laid out the short CaRD is the optimum arrangement for meeting their resource management needs in both forestry and agriculture. They maintain that the County's suggested building sites would disrupt reasonable operational judgments in the interests of meeting an arbitrary setback number.

25. Based on the whole record, the Examiner agrees and finds that the proposed CaRD lots are placed so as "minimize potential impacts to natural resource and land production."

26. The criteria for approval of a variance are set forth at SCC 14.10.030(2). A variance must conform to the following standards:

- (a) Special conditions and circumstances exist which are peculiar to the land, structure or building involved and which are not applicable to other lands, structures, or buildings in the same district.
- (b) Literal interpretation of the provisions of this chapter would deprive the applicant of rights commonly enjoyed by other properties in the same district under the terms of the terms SCC Titles 14 and 15.
- (c) The special conditions and circumstances do not result from actions of the applicant.
- (d) The granting of the variance will not confer on the applicant any special privilege that is denied by this chapter to other lands, structures, or buildings in the same district.
- (e) [special criteria for specific variance types which do not apply here]
- (f) If applicable, an explanation as to why, if a variance is denied, the applicant would be denied all reasonable use of his or her property.

27. [**Special conditions**] One of the special conditions pertaining to the base parcel is the location of existing development on the site, including a resort which benefits from a magnificent unobstructed view of Mount Baker. The proposed development is being pursued within the context of a special use approval for seven houses issued without specification for their location. The site is encumbered with

several wetland and stream areas which constrain development outside the 200 foot setback. The most critical circumstance, though, is the mixture of two active resource uses on the site – agriculture and forestry – both of which are protected and encouraged by the NRL zoning of the site.

28. **[Depriving applicants of rights enjoyed by others]** Forcing the relocation of Lot 4 to an area where forest cultivation is the dominant use rather than agriculture would dictate a management choice on resource use in the interests of a dimensional standard designed to protect resource use.

29. **[Problem not the result of applicants' actions]** The current configuration of the base parcel gives rise to the problem with the CaRD setback. While it is true that the applicant is ultimately responsible for this configuration, the boundary line adjustment which created the base parcel was pursued after consultation with the County. The applicants maintain that the County did not mention the setback requirement when the BLA was discussed, even though the lot locations were disclosed at the time. It appears that the applicants were innocent of any conscious intent to create a situation requiring this variance request.

30. **[Special privilege]** The variance as to existing structures would be consistent with the treatment expected at other properties in the district. If a new residence were allowed on Lot 4, the pattern of resource use of the site would be chosen by the applicants, rather than by a dimensional regulation.

31. **[Denial of all reasonable use]** The variance request is not based on the assertion that all reasonable use of the property would be denied if it is not granted. This criterion is not applicable.

32. The public hearing involved a thoughtful presentation by both the applicants' representatives and the County on this request. There was public testimony from one person. A neighbor of the Ovenells testified that they have always been good stewards of their property and, he opined, that they know better than anyone else how to manage it.

33. 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. SCC 14.06.050(1)(b)(i).

2. The application is exempt from the procedural requirements of the State Environmental Policy Act (SEPA). WAC 197-11-800(6)(b).

3. The regulatory context of this request is not altogether internally consistent. For parcels of land adjacent to but outside of NRL lands, the setback is 200 feet from the NRL lands, but this limit can be waived by agreement. SCC 14.16.810(7). However, in the creation of CaRDs no such flexibility is allowed, even when the property is inside NRL lands. The relevant provision states simply: “A 200-foot setback shall be observed from adjacent NRL parcels.” SCC 14.18.310((8)(b).

4. In the CaRD situation, the only way to alter the 200-foot setback from NRL property for any parcel is to obtain a variance. The variance provisions, however, are established to apply only to special circumstances where to deny the request would constitute a hardship that is not self-imposed.

5. The instant case does not conform neatly to the variance criteria. The need to create separate lots is an economic imperative, not a circumstance that is inherent in the subject property. Moreover, the setback problem appears to have been the result of a miscalculation as to how the overall boundary line adjustment/short CaRD plan would work.

6. However, the request needs to be viewed in the context of the purposes setbacks serve. One aim of setbacks is aesthetics. Clearly, in this case any aesthetic purpose would be defeated by selecting a building lot in the middle of the B & B’s view of Mount Baker. But, more to the point, the particular setbacks relating to NRL zones were chosen to protect the resource use of the NRL lands. In concept, then, a request to alter such a setback in the interests of resource use should be within the rationale for a variance.

7. The Examiner believes that the strict variance criteria in this instance should be read in light of the additional design requirement for CaRDs that says “within or adjacent to an NRL designation, lots shall be placed to minimize potential impacts to natural resource land production.” SCC 14.18.310(9)(b).

8. The critical special circumstance here involves resource use. The question is how to resolve a conflict involving the sacrifice of one resource use over another. Specifically, the basic problem is whether to relocate Lot 4 and put two lots in the vicinity of proposed Lot 2. Assuming this is possible to do while still meeting applicable setback requirements, the effect would be to convert some property now used for forestry to residential use. The alternative is to keep Lot 4 as proposed and to eliminate some present pasture.

9. The County has focused on whether the applicants can achieve their homesite requirements without invading the 200-foot setback. It has not really made a judgment on which residential configuration is best from the standpoint of resource use. Under the circumstances, the Examiner concludes that what the applicants think is the best resource management choice should govern.

10. In light of the underlying regulatory aims for NRL lands, the Examiner concludes that the proposed variance is consistent with the variance criteria of SCC 14.10.030. The granting of the variance will be in harmony with the general purpose and intent of the Unified Development Code and other provisions of the Skagit County Code and will not be injurious to the neighborhood, or otherwise detrimental to public welfare.

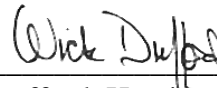
11. Any finding herein which may be deemed a conclusion is hereby adopted as such.

DECISION

The requested variance is granted subject to the following conditions:

1. The applicants shall obtain approval of and shall record the proposed four lot CaRD land division.
2. Existing structures may remain where they are presently located.
3. The applicants shall comply with the underlying zoning setback (50 feet) in the placement of any replacement structures.

DONE this 30th day of June, 2009.



Wick Dufford, Hearing Examiner

Copy transmitted to Applicants: June 30, 2009

RECONSIDERATION/APPEAL

As provided in SCC 14.06.180, a request for reconsideration may be filed with Planning and Development Services 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 Planning and Development Services within 14 days after the date of the decision, or decision on reconsideration, if applicable.