

BEFORE THE SKAGIT COUNTY HEARING EXAMINER

**FINDINGS, CONCLUSIONS AND DECISION
ON REMAND**

Applicant: Hillside Enterprises LLC
c/o Galen and Debora Johnson
23158 Bonnie View Road
Mount Vernon, WA 98273

Counsel: Craig Magnusson
Attorney at Law
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Bellevue, WA 98004-4273

Agent: Ravnik & Associates
c/o John Ravnik
Burlington, WA 98233

File No: PL07-0407

Request: Special Use Permit

Location: 23002 and 23158 Bonnie View Road, within a portion
of Sections 29 and 32, T33N, R4E, W.M.

Parcel Nos: P17482, P17603

Land Use Designations: Rural Business (RB) and Rural Reserve (RRv)

Summary of Proposal: To redevelop and expand the existing Hillside Motel
with a new three-story building (plus basement)
containing 78 units. The proposed footprint is
17,381 square feet. Associated parking will include
114 stalls.

Public Hearing: The matter was heard on remand from the Board of
County Commissioners on December 10, 2008.

Decision: The application is approved, subject to conditions.

PROCEDURAL HISTORY

This application for a Special Use Permit was initially heard by the Examiner on March 12, 2008. On April 7, 2008, the Examiner issued a decision denying the application.

The denial was predicated on a legal conclusion that the expansion proposed exceeds square footage limitations for enlargement of motel use within the Rural Business (RB) zone. The term "footprint" was construed as a measure from which the allowable square footage of motel space is to be calculated

Because of this conclusion, the Examiner did not determine whether the development meets the additional Code criteria for expansion within a Rural Business zone.

The denial was appealed to the Board of County Commissioners and a closed record appeal was heard. On June 16, 2008, the Commissioners signed Resolution # R20080281, remanding the matter to the Hearing Examiner for further review.

The Resolution determined that the Examiner's legal conclusion regarding the limits of expansion was erroneous. The Commissioner' decided that, in effect, there is no numerical limit to the potential square footage of expanded use, so long as the footprint of the new building(s) is not more than 50% larger than the footprint of the present building(s)..

The matter was remanded to the Examiner to consider the application under the additional criteria for expansion set forth in SCC 14.16.150(4)(d)(i-vi).

The remand hearing was held on December 10, 2008. The applicant was represented by Craig Magnusson, Attorney at Law, and John Ravnik, Professional Engineer. The County was represented by Brandon Black Senior Planner, and Michele Szafran, Associate Planner.

Mr. Black and Ms. Szafran submitted a revised Staff Report and provided argument in support of a recommendation to deny the application. Ron Palmer, Environmental Health Specialist, spoke regarding unresolved sewer and water concerns.

For the applicant there was testimony from Messrs. Magnusson and Ravnik, who also provided argument in support of approval of the application. In addition, testimony was taken from professional consultants on septic design, nitrate loading, the drinking water system, and architecture and aesthetics. Galen Johnson, the owner-operator of the motel presented information on the economic impacts of the proposed motel expansion.

Only one member of the public spoke at the hearing, June Kite, who testified in opposition. Ms. Kite also testified at the original hearing. Four additional written public comments were included in the record, two in favor and two opposed.

THE RECORD

Resolution #20080281 rewrote the initial decision, revising or eliminating some of the Findings of Fact and Conclusions of Law. The decision, as amended by the Commissioners, is attached hereto at Attachment A.

The Exhibits previously admitted continue as a part of the record. Additional exhibits were offered during the hearing on remand. The applicant objected to new

exhibits 1N and 12N as outside the scope of review. The Examiner has determined to admit these exhibits, along with the others offered by the County on remand.

The County's additional exhibits, designated 1N through 13N are listed in the Staff Report. Additional public correspondence was admitted as Exhibit 14N. The applicant's additional exhibits, designated RA-1 through RA-15, were all admitted. A list of these exhibits is appended hereto as Attachment B.

FINDINGS OF FACT

The Findings and Conclusions of the decision of April 7, 2008, as amended by Resolution #R20080281, are adopted as Findings and Conclusions for this decision. In addition, the following supplemental Findings and Conclusions are entered.

Special Conditions for Expansion

1. The record amply demonstrates that the use was established prior to July 1, 1990.
2. The proposed expansion of footprint is not more than 50% larger than the square footage of the existing footprint of the motel. Under the Resolution, the proposal meets the 50% maximum of SCC 14.16.150(2)(c) and (4)(d).
3. The total square footage of expansion planned is substantially greater than 1,500 square feet.
4. SCC 14.16.150(4)(d) reads as follows:
 - (d) With an approved Hearing Examiner Special Use Permit, a use designated Rural Business which was established prior to July 1, 1990, may be expanded beyond the 1,500 square foot limit established in (2)(c) of this Section; provided that the 50% maximums of that Subsection are met and the following criteria are met:
 - (i) The expansion will occur on the same lot upon which the existing use is located;
 - (ii) The expansion is visually compatible with the surrounding neighborhood and rural area;
 - (iii) Detrimental impacts to adjacent properties or to existing easement rights on the property will not be increased or intensified;
 - (iv) The expansion does not result in a formerly small operation dominating the area;
 - (v) The expansion will not constitute new urban growth in the rural area, except that uses may utilize urban services that are

historically already available at the site; and
(vi) Public services and facilities are limited to those necessary to serve the isolated non-residential use and are provided in a manner that does not permit low density sprawl.

The applicant shall have the burden of proof in demonstrating that the use was established prior to July 1, 1990.

5. The plans presented at the remand hearing are nearly identical to the plans submitted for the original hearing. An extra water tank has been added.

6. The new expanded motel building will be situated entirely within the RB-zoned lot on which the existing motel is located.

7. The adjacent property, zoned RRv, will contain a number of ancillary facilities, including septic drain fields, pump house, water tanks, drive lanes, and some parking.

8. The proposed motel will be located adjacent to the west side of the I-5 freeway but tucked into the hillside with the bulk of the building hidden from view behind an intervening bank. The freeway here runs through a cut and is significantly lower than the motel site. Freeway drivers headed north down into the valley will be able to see only the top portion of the structure, a prospect comparable to viewing a two-story house. Plantings along the bank top will further screen the building. Views of motorists coming up the hill heading south will effectively be obscured by trees and undergrowth. Thus, from the major public vantages, the new building will not represent a major intrusion into the viewscape. In addition, the parking will not be visible from the highway.

9. Other than the freeway, the vicinity is largely in trees and open space. The motel will constitute a significant new visual presence for just a few neighboring residences along the frontage road on the opposite side of the freeway. Only drivers who drop into the immediate site via the motel access road will experience the building as a three-story structure.

10. Moreover, the building itself will be attractive. It has been designed in vernacular architecture to blend into the setting. The alignment and exterior modulation will tend to make the building look like a series of structures. Shed roofs, river rock facing and exposed beams will contribute to the residential appearance. Lighting around the building and the parking areas will be shielded.

11. The expansion will be visually compatible with the surrounding neighborhood and rural area.

12. Adequate preliminary planning has been carried out regarding the probable impacts on the sewage disposal facilities. The soils and topography appear suitable. The

system proposed will provide tertiary treatment. Nitrate loading at the down gradient boundary is persuasively predicted to meet the relevant standard.

13. An onsite stormwater detention and water quality treatment facility is proposed at the north end of the motel re-development area. Stormwater from new impervious areas will be routed to a detention pond that will release developed runoff waters to the west at a peak rate no greater than the current condition. The design for releases will simulate the sheetflows off the site that currently occur. No adverse downstream impacts are likely.

14. Traffic generated will increase but no declines in levels of service at intersections are anticipated. No significant traffic problems are likely as a result of the expansion. No residences that might be adversely affected by noise were identified

15. Although access will be improved and widened, there is no evidence of any easements rights that will be adversely affected. All utilities needed to serve the site already exist and will merely be upgraded.

16. Detrimental impacts to adjacent properties or to existing easement rights on the property will not be increased or intensified.

17. The expanded motel will be much larger than the present one. It will have some new features, such as a conference room and an indoor swimming pool. However, none of this will significantly change the visual impact. In its context, the new facility will not dominate the area.

18. The proposed expansion site is described by the applicant as an infrastructure island. Power and road facilities are in place, though some upgrading will be provided at no public expense. Existing public water and sewer systems will not be impacted. If all necessary approvals for water and sewer are obtained, the facility will effectively provide its own services for these needs. The services required are all services that have been historically available at the site. The proposal, though larger, will not affect the concurrency of any urban infrastructure system. It will not constitute new urban growth in the rural area.

19. Furthermore, the public services and facilities proposed for the expansion will be limited to those necessary to serve the isolated nonresidential use. There is no indication that additional infrastructure is being prepared in anticipation of further expansion of this use or the proliferation of other business uses in the area. Thus, the services and facilities associated with this proposal will be provided in a manner that does not permit low density sprawl.

General Special Use Permit Criteria

20. The general criteria for a Special Use Permit are set forth at SCC 14.16.900 (1)(b)(v), as follows:

- (a) The proposed use will be compatible with existing and planned land use and comply with the Comprehensive Plan.
- (b) The proposed use complies with the Skagit County Code.
- (c) The proposed use will not create undue noise, odor, heat, vibration, air and water pollution impacts on surrounding, existing, or potential dwelling units, based on the performance standards of SCC 14.16.840.
- (d) The proposed use will not generate intrusions on privacy of surrounding uses.
- (e) Potential effects regarding the general public health, safety, and general welfare.
- (f) For special uses in ... Natural Resource Lands ..., the impacts on long-term natural resource management and production will be minimized.
- (g) The proposed use is not in conflict with the health and safety of the community.
- (h) The proposed use will be supported by adequate public facilities and services and will not adversely affect public services to the surrounding areas, or conditions can be established to mitigate adverse impacts on such facilities.

21. The continuation of the existing use is permitted outright in the RB zone. Within the adjacent RRv property to the south, the proposed ancillary utility improvements – driveways and parking, water tanks and septic facilities – are not inconsistent with the purposes of the zone. All of the zoning involved is designed to be consistent with the Comprehensive Plan.

22. The proposal meets the permit requirements established under SCC 14.16.150. Parking spaces provided, landscaping, and signs will comply with regulatory requirements. If relevant approvals for water and sewer systems are obtained, the proposal will comply with the County Code.

23. Project design adequately provides for avoiding undue noise, glare or other pollution impacts. The performance standards of SCC 14.16.840 will be met.

24. Intrusions of privacy from the expanded motel are unlikely in this isolated locale.

25. Potential health, safety and welfare effects should not be adverse, assuming that water and sewer system approvals, insuring adequate safeguards, are obtained. The project will serve the general welfare through the generation of new economic activity and new employment.

26. The proposal does not involve uses in Natural Resource Lands.

27. Adequate public services are available to support the proposal and public services to the surrounding areas will not be adversely affected.

Sewer and Water

28. Through a Memorandum dated December 2, 2008, and testimony at the remand hearing, the Sewage and Water Section of the Planning and Development Services Department provided input on the sewer and water issues.

29. The final design of the sewer and water systems has not been completed, pending the issuance of a Special Use Permit giving land use approval to the project.

30. The soils for the proposed septic system have been conditionally approved. The nitrate loading information presented for the first time at the hearing is probably sufficient to satisfy concerns on that subject. Details of the sewage system design as to location, size and treatment method await further evaluation. It is doubtful that an approvable septic system located entirely within the RB property could be designed. However, assuming the system is located as presently proposed, using RRv property as well as the RB lot, it will not be likely to impair groundwater and can probably be approved.

31. The existing water supply from the applicant's private well is an approved Group B Public Water System. Approval from the State Department of Health is needed to expand the water system to a Group A TNC (transient noncommunity) water system. Prerequisites to such approval are a "water right" from the Department of Ecology and site/source approval by the Department of Health.

32. From the data supplied on behalf of the applicant it appears likely that the well supplies an adequate source of water to supply the expanded motel without adversely affecting other users or depleting the aquifer. However, the County's Hydrogeologist recommends additional pump testing to substantiate this.

33. The well in use is the successor to a spring source, with use dating to 1907. This source was converted to a well with pumps in the late 1920's. In 1969, the Skagit County Superior Court required the State Highway Department to pipe water from the source to the motel because of interference caused by the construction of I-5. The

WSDOT has drilled two new wells at a changed point of withdrawal located on the subject RB property that now serve the motel. A water right claim for the source was filed in 1972, based on a theory of riparian right.

34. The history presented is not adequate for determining the current scope of any vested water right. However, from the information given, it appears likely that the proposed level of usage will exceed the level of historically perfected usage. The applicant does not intend to (and probably cannot) rely on the groundwater well exemption of RCW 90.44.050. Therefore, it is probable that a water right permit needs to be obtained from the Department of Ecology.

New Mitigated Determination of Non-Significance

35. The County withdrew its previous Mitigated Determination of Nonsignificance (MDNS) and reissued a new MDNS document on September 23, 2008.

36. The new MDNS imposed some mitigation measures for the environmental impacts related to site disturbance and construction as follows:

- (1) Temporary erosion/sedimentation control measures, as approved by the Skagit County Department of Public Works, shall be in place prior to the placement of any fill material. The applicant shall maintain all temporary erosion/sedimentation control measures in accordance with the Skagit County Drainage Ordinance. Said measures shall remain in place until completion of the project.
- (2) The proposal shall comply with all Northwest Clean Air Agency requirements.
- (3) The proposal shall comply with the provisions of Chapter 14.32 of the Skagit County Code, the Skagit County Drainage Ordinance, as it relates to increased runoff resulting from additional impervious surfaces.
- (4) The proposal shall comply with all requirements of the Skagit County Fire Marshal and all required Fire Code Standards.
- (5) An engineered soils compaction report shall be required for all structures placed on fill material.
- (6) The proposal shall comply with all relevant provision of 14.24 (Skagit County Critical Areas Ordinance).

37. The MDNS also contains a discussion of impacts related to size and scale of the proposed development on the natural and built environments and a set of conditions dealing with size and scale. These conditions are considered below in the Conclusions of Law.

38. On October 10, 2008, Craig Magnusson, counsel for the applicant, provided comments objecting to the withdrawal and reissuance of the MDNS and asserting that the document is an attempt to impose a new interpretation of the zoning code through the threshold determination process.

39. 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 subject matter and the persons of this proceeding. SCC 14.06.050(1)(b)(ii). The proposal is a Level II application.

2. SCC 14.12.210 makes SEPA threshold determinations appealable to the Hearing Examiner as Level I decisions. See also SCC 14.06.050(ix). The appeal of such a decision must be filed within 14 days of the date the decision becomes final. SCC 14.06.110(7). The hearing on such appeals is combined with the hearing on the underlying permit application. SCC 14.06.070(2)(d).

3. The Examiner adopts the letter of counsel of October 10, 2008, objecting to the MDNS, as a timely appeal of the MDNS.

4. The purpose of a SEPA threshold determination is to decide whether project environmental impacts are significantly adverse and an impact statement should be written. Mitigated Determinations of Nonsignificance are intended for imposing conditions on proposals that will reduce project impacts below the level of significance, removing the necessity for an impact statement. See WAC 197-11-350.

5. In issuing an MDNS, it must be assumed that all applicable rules and regulations will be complied with and that the conditions imposed are necessary to reduce impacts remaining after regulatory compliance. The first of the MDNS conditions related to size and scale reads:

“1. The entire proposal, including motel, any outbuildings, roads, settling ponds, parking, septic and water, shall be on the same lot and may not expand onto any adjacent lot, none of which are zoned for rural business.”

The Examiner concludes that this condition is aimed at achieving regulatory compliance according to the County’s interpretation of its regulations and not at reducing environmental impacts independent of those regulations.

6. In general, MDNS conditions should relate to the project as proposed. They should not be used to substantially redesign the project. Moreover, they cannot incorrectly interpret what the law requires. The Examiner concludes that condition #1 related to size and scale (MDNS, page 4) goes too far into project redesign and is improper. The Examiner is also of the view that the condition incorrectly interprets the Code. The condition is therefore stricken.

7. The other MDNS conditions related to size and scale are also directed to Code compliance. But they do not purport to interpret the Code, nor to redesign the project. Those conditions are likewise stricken from the MDNS as surplusage, but, in amended form they are reflected in the conditions of approval for the project, as set forth below.

8. The Staff's core conviction is that the proposed motel is simply too big in terms of size and scale to meet the intent of the RB zone. They interpret the zone's "reasonable expansion" purpose and the subsections under SCC 14.16.150(4)(d) (i-vi) in light of this conviction. The conviction is based on the Staff's analysis of the entire scheme contained in the Comprehensive Plan and the implementing regulations, as well as of their understanding the history leading to the adoption of the RB zone.

9. The applicant urges that because the "expansion" provisions of the regulations are "clear and unambiguous" no recourse should be had to extrinsic materials to determine intent. The Examiner points out that Resolution #R20080281 addresses only how the 50% limit is to be calculated. Whether the terms of SCC 14.16.150(4)(d)(i-vi) are "clear and unambiguous" was not considered. Further the permissibility of ancillary development on the adjacent parcel was not previously adjudicated.

10. While textual analysis is the primary key to interpretation, determining the meaning of legislation can always benefit from an examination of the "legislative surround" – extrinsic materials that may shed light on what was meant in enacting a particular law. The "clear and unambiguous" canon of construction is not a rule of positive law. The Examiner therefore denies applicant's motion to strike all references in the Staff Report to extrinsic materials.

11. The County's main contention is that the proposal does not comply with the requirement of SCC 14.16.150(4)(d)(i) that "the expansion will occur on the same lot upon which the existing use is located." In order for this project to be approved, they maintain that the ancillary project features, such as parking and drain fields, placed in the adjacent RRv zoned parcel, must all be squeezed onto the RB parcel where the motel is. This is an indirect way of reinforcing their position that the expanded motel project is simply too big for the RB zone.

12. The applicant's position is that the expansion limitation refers only to the motel building and the lot that it occupies. They argue that the ancillary project features on an adjacent lot are permissible because they are not contrary to the RRv zoning where they will be located.

13. After reviewing Resolution #R20080281 and particularly Conclusion 8 as revised by the Resolution, the Examiner concludes that the term "expansion," as there construed, relates solely to an increase in size of the "existing building footprint," and not to the total of increased development associated with the motel use.

14. Thus, any ancillary project development that does not relate to increasing the original structural footprint of the motel is not within the definition of "expansion."

And since such development is not “expansion” it does not matter under SCC 14.16.150(4)(d)(i) that it may spill over onto another lot adjacent in another zoning designation.

15. Beyond the “same lot,” restriction, the Staff objects to the size and scale of the project per se. They note that there is nothing of commensurate size and scale in the vicinity and point out that the expanded motel would be by far the largest commercial business within the RB zone or any zone in the surrounding area.

16. However, in light of Resolution #R20080281, the Examiner is convinced that the central concern of SCC 14.16.150(4)(d) is with visual impacts and impacts to adjacent properties and not with size and scale per se.

17. What constitutes “reasonable expansion” within the purpose of the RB zone is determined by compliance with the criteria of SCC 14.16.150(d)(i-vi). Based on the findings herein, the visual impacts and impacts to adjacent properties from the project will be consistent with the standards set forth in those subsections.

18. In sum, the Examiner concludes that the project, as conditioned herein, will meet the requirements of SCC 14.16.150(4)(d)(i-vi) as well as the general Special Use Criteria of SCC 14.16.900(1)(b)(v).

19. The Examiner draws attention to SCC 12.48.100(2) which reads, in pertinent part:

“When a water right permit is required, a water right permit must be issued by Ecology before SCPHD [Skagit County Public Health Department] can proceed with a water system evaluation.

It is essential for public health reasons that the water source be secure before the project goes forward. A condition of approval has been included requiring, before the issuance of a building permit, that the applicant obtain either a water right permit for the source or other acknowledgment from the Department of Ecology that the proposed withdrawal from the source may lawfully proceed.

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

CONDITIONS

1. The applicant shall obtain all necessary Federal, State and local permits and approvals. Note particularly, the need for grading and building permits. Construction plans shall be prepared by a licensed civil engineer.

2. The reference to specific regulations in these conditions shall not be construed to limit or modify the applicant's responsibility to comply with all relevant provisions of the Skagit County Code.

3. The applicant shall comply with those MDNS conditions set forth in Finding 36 above.

4. The applicant shall comply with all applicable requirements of Chapter 14.16 SCC prior to building permit issuance. These include, but are not limited to, SCC 14.16.800 "Parking," SCC 14.16.820 "Signs," SCC 14.16.830 "Landscaping," and SCC 14.16.840 "Performance Standards."

5. The applicant shall demonstrate full compliance with Chapter 12.48 SCC prior to building permit issuance. The applicant shall obtain either a water right permit for the source or other acknowledgment from the Department of Ecology that the proposed withdrawal from the source may lawfully proceed. The applicant shall obtain approval of the water system by the State Department of Health District Engineer or a Public Drinking Water sign-off from the Skagit County Health Department

6. The applicant shall demonstrate full compliance with Chapter 12.05 SCC and Chapters 246-272(A) and (B) WAC, as applicable, prior to building permit issuance. The sewage system calculations shall take into consideration any additional uses that may be contemplated, such as food service and workout area showers. The applicant shall obtain a sign-off from the appropriate County health official of the nitrate loading analysis performed. Based on the calculated nitrate loading, a mitigation plan may be required.

7. Trees and native vegetation sufficient to immediately screen view and light impacts of the proposal from the highway and neighboring properties shall be retained and planted on the property, pursuant to an approved plan submitted to Planning and Development Services. The plan shall be submitted prior to building permit issuance.

8. Additional pump testing shall be performed in accordance with directions from the County Hydrogeologist.

9. A Drainage Report, prepared by a licensed engineer, addressing water quality and quantity for stormwater and groundwater, shall be submitted. Detention facilities shall be provided as required by Chapter 14.32 SCC and the State Department of Ecology Stormwater Management Manual for Western Washington. Design plans shall insure that stormwater releases meet the intent for low impact uses within the critical areas buffer. Approval of the drainage system shall be obtained prior to building permit issuance.

10. Final details of the alternative turn-around design at the northerly end of Bonnie View Road shall be submitted and reviewed prior to grading permit issuance.

11. Prior to any work in a public right-of-way, a permit shall be obtained from the Department of Public Works.

12. The applicant shall submit a Protect Critical Area Easement (PCA) agreement for review and approval with the building permit application. The PCA site plan shall indicate the location of PCA signs (typically every 200 feet or line of sight, whichever is closer). The approved PCA shall be recorded as required by law.

13. The permit shall be void if the project is not commenced within two years of permit approval as required by SCC 14.16.900(1)(d).

14. Failure to comply with any permit condition may result in permit revocation.

DECISION

The requested Special Use Permit (PL07-0407) is approved, subject to the conditions set forth above.

DONE this 2nd day of January, 2009



Wick Dufford, Hearing Examiner

Date Transmitted to Applicant: January 2, 2009