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74435-6

NO. 74435-6-1

COURT OF APPEALS, DIVISION ONE
OF THE STATE OF WASHINGTON

TOM BUTLER and LINDA LEWIS,
Husband and wife

Petitioners,

v.

SKAGIT COUNTY, a Washington County,
and HAZEL FORD

Respondents,

PETITIONERS' OPENING BRIEF

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I. INTRODUCTION

Through a Land Use Petition initially filed in superior court, Tom Butler and Linda Lewis (“Butlers”) challenge approvals granted by Skagit County allowing development on two substandard lots on Guemes Island. In particular, the Butlers challenge variances to minimum building setback limitations for failure to meet minimum variance criteria and for lack of support by required findings of fact. Further, the reasonable use exception was unlawfully granted because the proposed uses cannot satisfy all other zoning code provisions, which is a requirement for approval of a reasonable use exception. Each of the challenged approvals violates express provisions of county law and should be reversed and vacated.

II. ASSIGNMENTS OF ERROR

Petitioners assign error to the following approvals and orders:

1. The approvals by the Skagit County Department of Planning and Development Services and the appeal decisions by the Skagit County Hearing Examiner and the Board of County Commissioners granting setback variances and a reasonable use exception issued under file numbers PL 13-054, PL13-0146, PL 13-

0354, PL 14-0026, PL 14-0117, PL 15-055 and County Commissioner Resolutions R20140288 and R20150144.

2. The Order of the Snohomish County Superior Court affirming Skagit County's approval of setback variances and a reasonable use exception for development of two lots on Guemes Island.

III. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Were the building setback variances lawfully approved where the variance requests failed to meet minimum requirements and were granted without the necessary findings of fact and conclusions of law?

2. Where a reasonable use exception for a lot failing to meet minimum area requirements may only be granted for uses that can otherwise satisfy all other zoning requirements, was the reasonable use exception properly granted for Lots 12 and 13 where the proposed uses do not meet minimum setback requirements?¹

¹ Because this court reviews the underlying administrative decision and not the ruling of the superior court, no issue is presented relating to the lawfulness of the superior court's order. *Spokane County Fire Prot. Dist. v. Spokane Boundary Review Bd.*, 27 Wn. App. 491, 493, 618 P.2d 1326 (1980).

IV. STATEMENT OF THE CASE

A. Background

This Land Use Petition challenges variances reducing building setback distances and a reasonable use exception² allowing development on two substandard lots (Lots 12 and 13) within the Plat of Holiday Hideaway No. 1 on Guemes Island.³ Copies of the plat cover sheet and the page containing Lots 12 and 13 are set forth in the superior court record at CP 94.

The physical character of the two lots along their access road is shown in photographs at CP 110 and 111, which are attached at Appendix 1 to this brief.⁴ Aerial photographs of the southwesterly portion of Guemes Island and Lots 12 & 13 are set forth at CP 101 and 102 and are also included within Appendix 1. However, the photographs do not reveal the dense platting of the area. Platted in 1962, the lots are smaller than allowed under the

² The Land Use Petition also challenged the consolidation of Lots 12 and 13 and it alleged that the reduced building setbacks violated the Holiday Hideaway plat restrictions. The Butlers do not pursue those claims within this appeal.

³ A copy of the plat map of Holiday Hideaway is set forth within the Administrative Record (AR) at page AR 00135, Lots 12 and 13 are shown in the portion of the plat at AR 00138, The Administrative Record appears at Sub-file 14 in the superior court docket sheet and has been designated for forwarding to the Court of Appeals. References to documents within the Administrative Record are to the designated page numbers.

⁴ The photographs are contained in the decision record at AR 00297-304.

current Rural Intermediate zone. Lot 12 is 13,600 square feet in area; Lot 13 is 14,000 sq. ft.; together, the lots total 27,600 sq. ft.⁵ Under the current Rural Intermediate zoning, the minimum lot size is 2.5 acres⁶ (108,900 sq. ft.), which would be 5 acres (217,800 sq. ft.) for both parcels, or about eight times the size of the current lots.

The photographs also do not fully portray the physical character of the land. Lot 12 mostly consists of a rock knob above a cliff and debris field. The top of the rock knob rises about twelve feet above the surface of the adjacent road, Decatur Place.⁷ On its westerly side, the lot falls away abruptly, initially at a gradient of nearly 100%.⁸ To allow for construction of a residence, the owner proposes to lower the top of the knob by approximately eight feet, which would include excavation within the dedicated roadway of Decatur Place.⁹ Lot 13 is a bit larger; a somewhat level area fronts on Decatur Place and then the lot slopes easterly, downward to Woody Lane.¹⁰ The two lots straddle Decatur Place, with Lot 12

⁵ AR 00264 (Site Plan of Lots 12 and 13).

⁶ AR 00010 (Hearing Examiner Decision of July 10, 2014, Finding 9).

⁷ AR 00263-264 (Topographic map of Lot 12).

⁸ AR 00281 (Slope Profile), also set forth at CP 107.

⁹ AR 00280 (Critical Area Site Plan) and -281 (Slope Profile) show the removal of approximately eight vertical feet off the top of the knob, including removal of earth within right of way of Decatur Place.

¹⁰ AR 00263 shows a 12 foot drop in elevation from west to east over a distance of 112 feet for Lot 13, in contrast to 70' drop in elevation for Lot 12.

lying on the west side and Lot 13 on the east. Copies of the referenced topographic map, site plans and slope profile are set forth at CP 104-107.

The Butlers live with their son and daughter on the east side of Decatur Place, adjacent to and south of Lot 13. Another house is located at the end of Decatur Place. Although platted as a 40 foot road, Decatur Place is currently developed as an unpaved, single lane road, as shown in the first set of photos at Appendix 1.¹¹

B. Permit Applications

Hazel Ford ("Ford") purchased Lots 12 and 13 on January 17, 2013.¹² Shortly after her purchase, she arranged for a survey of Lots 12 and 13,¹³ applied for a Site Evaluation (soils) for future single family residence on Lot 13, applied for a Critical Area Review, and applied for an administrative variance to reduce front yard setbacks for a residence on Lot 12 and garage on Lot 13.¹⁴

Over the next several months, the Skagit County Department of Planning and Development Services (PDS)

¹¹ AR 00267 (Survey) shows the traveled surface of Decatur Place occupying the easterly 20 feet of the right of way. Lots 14 and 15 on the survey are owned and occupied by the Butlers. See also, AR 00298 & 299 (Photographs of Decatur Place).

¹² See Hearing Transcript (Tr.) at page 118, line 3, which has been filed by the county with the decision record in this matter and has been forwarded to this court as an exhibit at CP 14.

¹³ AR 00263.

approved Ford's development applications: on April 11, 2013, it approved a soils test for a new septic system for Lot 13; on April 19, 2013, it issued a Lot Certification for Development;¹⁵ and on August 20, 2013 it approved Ford's variance request, reducing building setbacks for a single family residence on Lot 12 from 25 to 5 feet from Decatur Place and from 35 to 16 feet from Holiday Boulevard and reducing setbacks for a garage on Lot 13 from 35 to 10 feet from Decatur Place.¹⁶

C. Hearing Examiner Remands Variance Approval

The Butlers appealed PDS's approval of the setback variance to the county Hearing Examiner.¹⁷ Among other grounds, the Butlers claimed that the variance had been unlawfully issued for substandard lots without prior approval of a reasonable use exception. The Examiner agreed, holding that Skagit County Code (SCC) 14.16.850(4)(f)(i) requires approval of a reasonable use exception prior to the consideration of an application for a reduction

¹⁴ AR 00310 et seq. (application for setback variances).

¹⁵ AR 00259.

¹⁶ AR 00333 (Administrative Variance Decision, 8/21/2013).

¹⁷ AR 00253, Notice of Appeal (9/3/13). In this appeal and all subsequent appeals the Butlers, who are not attorneys, represented themselves, a task made more difficult by Tom Butler's suffering heart problems and undergoing heart surgery during the administrative proceedings. AR 00054.

in setbacks.¹⁸ The Examiner also found that PDS's prior Lot Certification for Lots 12 and 13 had been improperly granted because the certification had been predicated upon there having been an existing septic system on Lot 13 as of January 1, 2004, when in fact no septic system existed at the time (or even now).¹⁹ The Examiner remanded the variance application to PDS.²⁰

D. PDS Approves a Reasonable Use Exception.

On February 3, 2014, Ford applied for a Lot Certification application to treat Lots 12 and 13 as a single unit and for a Reasonable Use Exception to allow development on those two parcels.²¹ On February 7, 2014, PDS granted a Lot Certification, but for conveyance only, indicating that the lots were "not eligible to be considered for development permits."²²

On March 18, 2014, PDS approved a Reasonable Use Exception that treated Lots 12 and 13 as consolidated and allowed development of a single family residence on Lot 12 and a garage on Lot 13.²³ The Butlers appealed the lot certification and approval

¹⁸ AR 0004 (Notice of Decision, 12/19/13); AR 0007-8 (Examiner conclusions regarding requirement for prior approval of reasonable use exception).

¹⁹ AR 0006 (Examiner Findings 8 and 9).

²⁰ AR 0008.

²¹ AR 00164 (Notice of Decision referencing applications).

²² AR 00131.

²³ AR 0133 (PDS memo approving reasonable use exception).

of the reasonable use exception to the Examiner.²⁴ The Butlers challenged the reasonable use exception on grounds that the proposed residence and garage could not satisfy other requirements of the zoning code (a requirement for reasonable use exceptions) and for variances on grounds that Ford could not satisfy the requirement that rejection of the variance request would deny her all reasonable use of her property.²⁵

E. Hearing Examiner Affirms Setback Variances and Reasonable Use Exception.

At a hearing on June 11, 2014, the Examiner considered the appeals of the reasonable use exception. He also considered the Butlers' appeal of setback variances on its merits, since he had previously remanded the setback variances to PDS for consideration of a reasonable use exception and therefore had not ruled on the merits of PDS's approval of the variances.

By a decision dated July 10, 2014, the Examiner denied the Butlers' appeal of the reasonable use exception, ruling that the need for a setback variance did not preclude approval of a reasonable use exception. The Examiner also rejected the Butlers' appeal of the setback variance, in part on grounds that the variance

²⁴ AR 00126 (Notice of Appeal).

²⁵ AR 00226 *et seq.* (Butlers' statement in support of appeal).

criteria at SCC 14.10 were inapplicable.²⁶ The Butlers appealed the Examiner's decision to the Board of County Commissioners.²⁷

F. County Commissioners Grant Butlers' Appeal.

On September 16, 2014, the Board of County Commissioners ("County Commissioners") granted the Butlers' appeal and remanded the matter back to the Hearing Examiner for consideration of the application's conformance with the variance criteria under SCC Chapter 14.10.²⁸

G. Hearing Examiner Again Affirms Reasonable Use Exception and Setback Variances.

The Examiner construed the two issues remanded by the County Commissioners as raising five separate issues,²⁹ to which PDS³⁰ and Ford³¹ responded in November 2014. On account of the need to undergo heart surgery,³² Tom Butler requested and received a continuance of the Examiner's proceeding.³³ Appellants

²⁶ AR 00025-31 (Hearing Examiner Decision of 7/10/14).

²⁷ AR 00021 (Notice of Appeal).

²⁸ AR 00018 (Resolution R20140288). The remand also directed the Examiner to determine compliance with the Holiday Hideaway plat restrictions, an issue that is not pursued in this appeal.

²⁹ AR 00034 (Hearing Examiner Amended Pre-Hearing Order, 10/13/14).

³⁰ AR 00037.

³¹ AR 00043.

³² AR 00054.

³³ AR 00050 (Order of Continuance) and 0055 (Appellants' request for continuance).

submitted their response in January 2015.³⁴ The parties also submitted replies.³⁵ Due to his health, Mr. Butler was not able to attend the appeal hearing.³⁶

The first issue the County Commissioners remanded for the Examiner's consideration concerned compliance of the setback variances with the criteria under SCC 14.10.030, including the requirement for "an explanation from the applicant as to why, if a variance is denied, the applicant would be denied all reasonable use of his or her property." SCC 14.10.030(2)(f).³⁷ Ford's architect and listing agent offered statements as to why the placement of a residence on Lot 12 could capture better views than its placement on Lot 13, but none of the applicant's representatives offered any evidence that the placement of a residence on Lot 13, instead of Lot 12, would deny her all reasonable use of her land.³⁸ Despite that lack of proof – and in the face of photographic evidence showing views of Guemes Channel from both Lots 12 and 13 under

³⁴ AR 00056 – 80.

³⁵ AR 00081 (Applicant's Response); 0085 (Butler response); 0089 (PDS response).

³⁶ AR 00085.

³⁷ AR 00018 (Resolution R20140288, Recital 6).

³⁸ Tr. 112 (Testimony of architect), Tr. 117 et seq. (Testimony of listing agent). The narrative statement in support of the setback reductions states that reductions are sought "in order to provide a solid and secure foundation platform..." AR 00313, but offered no evidence that without the variances Lots 12 and/or 13 lacked a secure foundation platform.

current setbacks³⁹ -- the Examiner accepted assertions by the applicant's representatives that the topography directed development of the two parcels in the manner requested.⁴⁰ Even though the Examiner did not make -- and on the factual record could not make -- the requisite finding that denial of the variance would deny Ford all reasonable use of her property, he affirmed PDS's approval of the variance anyway.⁴¹

On February 4, 2015, the Examiner denied the appeals, leaving both the reasonable use exception and the setback variances in place.⁴²

H. The County Commissioners Affirm Setback Variances and Reasonable Use Exception.

The Butlers appealed the Examiner's decision to the County Commissioners.⁴³ As more fully articulated within their appeal statement, the Butlers challenged the reasonable use exception for failure to meet applicable zoning requirements and the building setback variance for failure to satisfy minimum variance criteria.⁴⁴

³⁹ See photos set forth at Appendix 2: the first page of which shows a view from Lot 12 to the west under current setbacks and is in the record at CP 99 and AR 00302. The second page shows a westerly view from Lot 13 and is in the record at CP 113 and AR 00437.

⁴⁰ AR 00093 (Hearing Examiner Decision, 2/4/15).

⁴¹ *Id.*

⁴² AR 0093 (Hearing Examiner Decision, 2/4/15).

⁴³ AR 0100 (Notice of Appeal, 2/18/15).

⁴⁴ AR 00104 - 0124.

The County Commissioners heard the Butlers' appeal on April 7, 2015. A week later, the County Commissioners approved Resolution R20150144, denying the Butlers' appeal and affirming the Hearing Examiner's decision.⁴⁵ The Butlers appealed this decision under the Land Use Petition Act.⁴⁶

I. Superior Court Affirms County Decisions.

The Butlers' Land Use Petition was argued and denied on November 23, 2015. CP 4. The Butlers appeal from that decision. CP 1.

V. STANDARD OF REVIEW

Under LUPA the court may grant relief if:

- (a) The body or officer that made the land use decision engaged in unlawful procedure or failed to follow a prescribed process, unless the error was harmless;
- (b) The land use decision is an erroneous interpretation of the law, after allowing for such deference as is due the construction of a law by a local jurisdiction with expertise;
- (c) The land use decision is not supported by evidence that is substantial when viewed in light of the whole record before the court;
- (d) The land use decision is a clearly erroneous application of the law to the facts;

* * *

RCW 36.70C.130 (1)(a), (b), (c) and (d).

⁴⁵ AR 00098 (Resolution R20150144).

Among the standards provided by LUPA, the issues presented in this appeal are reviewable *de novo* as questions of the construction of law. RCW 36.70C.130 (1)(b)&(d). Construction of an ordinance, like a statute, presents a question of law and is reviewed *de novo*. *Faben Point Neighbors v. City of Mercer Island*, 102 Wn.App. 775, 778, 11 P.3d 322, *review denied*, 142 Wn.2d 1027, 21 P.3d 1149 (2000), citing to *McTavish v. City of Bellevue*, 89 Wn. App. 561, 564, 949 P.2d 837 (1998). Likewise, whether land use decisions satisfy requirements of law presents a question of law and also is reviewable *de novo*. *Sunderland Family Treatment Services v. City of Pasco*, 107 Wn. App. 109, 117, 26 P.3d 955 (2001) (“Issues of law are reviewed *de novo*.”) and *United Development Corp. v. City of Mill Creek*, 106 Wn. App. 681, 687-688, 26 P.3d 943 (2001) (“Factual findings are considered under the substantial evidence standard and conclusions of law are reviewed *de novo*.”). Under LUPA, issues of the construction and application of zoning ordinances are reviewable under the clearly erroneous standard. RCW 36.70C.130 (1)(b)&(d).

The two issues presented for review are properly reviewed for error of law under the clearly erroneous standard. The setback

⁴⁶ CP 143, et seq. (Land Use Petition).

variances are challenged on grounds that they fail to meet approval criteria and they were approved without the requisite findings of fact and conclusions of law. The approval of the reasonable use exception is challenged for failure to meet approval criteria. Both approvals are challenged under the clearly erroneous standard at RCW 36.70C.130 (1)(d). An agency action is clearly erroneous if “the reviewing court on the record is left with a definite and firm conviction that a mistake has been committed.” *Anderson v. Pierce County*, 86 Wn. App. 290, 301, 936 P.2d 432 (1997).

VI. ARGUMENT

A. The Building Setback Variances Should Be Reversed Because Ford Failed to Satisfy Requirements for Approval.

PDS and the Examiner initially approved Ford’s building setback variance application under the wrong standards. On appeal, the County Commissioners corrected this error and remanded the application to the Examiner for review under variance criteria within SCC 14.10.⁴⁷ SCC Chapter 14.10 is set forth in full at Appendix 3 to this brief.

Variances provide a form of relief to property owners “where, due to special conditions, literal enforcement of the provisions of

⁴⁷ AR 00020 (Resolution 20140288, remanding application).

th[e] Code would result in unnecessary hardship.”⁴⁸ In granting a variance,

The Approving Authority shall make findings whether:

(a) The reasons set forth in the application justify the granting of the variance, including findings relating to compliance with any relevant variance criteria found in other sections of Skagit County Code.

(b) The variance is the minimum variance that will make possible the reasonable use of land, building or structure.

(c) The granting of the variance will be in harmony with the general purpose and intent of this Title and other applicable provisions of the Skagit County Code, and will not be injurious to the neighborhood, or otherwise detrimental to public welfare.

SCC 14.10.040(1)(Emphasis supplied). The reasons justifying the variance (part 1(a) in the passage above) must include the following:

(d) The granting of the variance requested will not confer on the applicant any special privilege that is denied by SCC Titles 14 and 15 to other lands, structures, or buildings in the same district.

(e) An explanation of how the requested variance meets any other specific criteria required for the type of variance requested, where applicable, including, but not limited, to the following:

(i) Explanation of compliance with the criteria for a Critical Areas Ordinance variance under SCC 14.24.140.

⁴⁸ SCC 14.10.010.

(ii) Explanation of compliance with the criteria for a shoreline variance under the Skagit County Shoreline Management Master Program.

(iii) Explanation of compliance with the criteria for a public works alternative under the Skagit County Public Works Standards adopted pursuant to Chapter 14.36 SCC.

(iv) Explanation of compliance with the criteria for variance from the agricultural siting criteria found in SCC 14.16.400(6).

(v) Explanation of compliance with the criteria for a Flood Hazard Ordinance variance found in SCC 14.34.130.

(f) If applicable, an explanation from the applicant as to why, if a variance is denied, the applicant would be denied all reasonable use of his or her property.

SCC 14.10.030(2)(d)-(f)(Emphasis supplied).⁴⁹

Of these standards, the Butlers challenge the setback variances because the applicant has failed to show that the variances are “the minimum ... that will make possible the reasonable use of [her] land;” that denial of the variances would “den[y] all reasonable use of ... her property;” and that the

⁴⁹ Under SCC 14.10.030(2)(a)-(c), a variance applicant must also show why: the variance is warranted by special circumstances peculiar to the property; a literal interpretation of the county code would deprive the owner of rights enjoyed by other properties in the zoning district; and the special circumstances are not the result of the applicant’s actions. These are among the “other applicable provisions of the Skagit County Code” referenced in SCC 14.10.040(1)(c), with which approval of a variance must conform.

variances would not “confer on [her] special privilege[s] denied ... to other lands in the same district.”⁵⁰

The setback variances were granted to allow the construction of a residence on Lot 12 on two grounds: the property consists of a rock knob that rises approximately 12 feet above Decatur Place and then steeply falls away to the West (even though Ford intends to remove eight feet off the top of the rock knob); and to allow Ford to gain a better view of Guemes Channel to the west.⁵¹ Even if those reasons would suffice for showing special circumstances peculiar to the site, they do not demonstrate satisfaction of the criteria: that the requested variances are the minimum “that will make possible the reasonable use of land;” that the denial of the variance would deny applicant “all reasonable use of his or her property;” or that the variance would not “confer on the applicant special privilege[s] denied ... to others...” The applicant herself submitted no statements in support of any of these requirements.

⁵⁰ SCC 14.10.040(1)(b), .030(2)(f) and .030(2)(d), respectively. Resolution 20140144’s recitals specifically reference requirements that an applicant show that denial of a variance would deny all reasonable use of property and that a variance not confer on the applicant privileges denied to others in the same zoning district. AR 00019.

⁵¹ AR 00431 (Letter from Ford’s architect) and 00441 (Letter from Ford’s listing agent).

First, Ford failed to make the showing required by .030(1)(f) that rejection of the variances would deny her all reasonable use of her property. Both prior to and at the remand hearing, the applicant's architect and real estate agent offered statements and testimony in support of her variance requests. Her architect estimated that about half the lots within Holiday Hideaway had views and about half did not, and that to allow Ford to better capture a view, she would need setback variances for Lot 12.⁵² Ford's real estate agent opined that the setback variances would allow her to gain a better view of Guemes Channel to enhance the market value of the property.⁵³ But neither of her witnesses offered evidence to fulfill the criterion that "if a variance is denied, the applicant would be denied all reasonable use of ... her property." Nor could they, since Ford has consolidated Lots 12 and 13 and Lot 13 is developable and has a view to the west. Ford proposes to place a garage on the property. Photographs taken from the building site show that at ground level Lot 13 would enjoy views of Anacortes and Lopez and Decatur islands and other portions of Guemes Island to the west.⁵⁴ Ford has proposed to build a two

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⁵² AR 00434 and Tr. 115:3-7.

⁵³ AR 00441.

⁵⁴ AR 00437, a copy of which is set forth at Appendix 2.

story house.⁵⁵ Even if capturing a better view were grounds for a variance (which it is not), Ford has failed to show why a two story house on Lot 13 would not allow her to gain her desired westerly view or to make reasonable use of her property.

Second, the applicant also has not satisfied the criterion at .040(1)(b) that the requested variances are the *minimum* “that will make possible the reasonable use of land, building or structure.” Ford seeks three setback variances: two setback variances to construct a residence on Lot 12 and one to construct a garage on Lot 13. But she does not need any of these variances to make reasonable use of her land. As shown by the photos at Appendix 2, Ford could build on Lot 12 and gain views to the west without setback variances. If that’s not to her liking, she could build a residence and garage on Lot 13, which has 14,000 sq. ft. of area, a permit for an on-site septic system, and access from Decatur Place on the West, Holiday Boulevard on the north, and Woody Lane to the east. Apart from her desire to use Lot 13 for a garage and to place that garage within 10 feet of Decatur Place, Ford has presented no evidence that placement of a house on Lot 13, or that compliance with a minimum setback of 35 feet from Decatur Place

⁵⁵ AR 00335 (Administrative Variance Decision, Finding 6a).

would not “make possible the reasonable use of land...” Ford has failed to show, and the Examiner failed to find, the satisfaction of SCC 14.10.040(1)(b).

Third, the setback variances should be reversed because they grant special privileges to Ford that are denied to others in the same subdivision. Ford’s architect, who resides on Guemes Island, offered statements that approximately half of the lots in Holiday Hideaway have views, and half do not.⁵⁶ As shown by the photographs set forth at Exhibits 3 and 7, Ford has views of Guemes Channel from both Lots 12 and 13. By combining her lots, Ford has ample space for a residence and a garage on Lot 13. The setback variances issued for Lot 12 grant her special privileges not enjoyed by others because they ostensibly allow her to better capture a view, when only about half of the Holiday Hideaway properties have views. In requesting variances she seeks to transform Lot 12 into something that it is not -- a level home site -- when Lot 13 already provides a suitable home site.

Fourth, approvals of the setback variances are not adequately supported by findings of fact. As noted above,

⁵⁶ AR00432.

SCC 14.10.040(1) requires that the “Approving Authority shall make findings whether:”

- (a) The reasons set forth in the application justify the granting of the variance, including findings relating to compliance with any relevant variance criteria found in other sections of Skagit County Code.

On remand by the County Commissioners, the Hearing Examiner acted as the “approving authority”, yet his approval of the setback variances failed to make the findings required by .040(1)(b) and .030(1)(f) that the requested variances were the minimum necessary to make use of the land and were necessary to avoid denial of all reasonable use. The Examiner rationalized approval of the variances on the asserted grounds that “the topography of Lot 12 and Lot 13 directs any reasonable development of those properties as requested by Ford.”⁵⁷ However, that is not the finding required for variance approval and it does not provide the findings required by subsections .040(1)(b) and .030(1)(f).

The Examiner’s conclusion begs the question as to why the placement of a residence at the edge of a near 100% slope⁵⁸ is

⁵⁷ AR 00095 (Hearing Examiner Decision of February 4, 2015, Finding 18).

⁵⁸ AR 00280 & -281 (location of Lot 12 home site at top of 94% slope). CP 106 & 107.

“reasonable” when: the slope is a designated landslide area;⁵⁹ when county code requires at least a 30 foot buffer from the top of the slope⁶⁰ and none is provided;⁶¹ when the buffer may only be reduced to a minimum of 10 feet if no reasonable alternatives exist;⁶² and a reasonable alternative clearly does exist – the placement of the house and the garage on Lot 13. The Examiner has approved a variance for the siting of a house that would conflict with the county’s critical areas ordinance.

The Examiner’s decision did include a finding of lack of special privilege, on the asserted grounds that “a large percentage of the homes in Holiday Hideaway Plat take advantage of the ‘view’ height difference[,]”⁶³ but that finding, as well as the architect’s statement it relies upon, fails to address whether the other claimed Holiday Hideaway lots are so constrained as to force homes to be sited at the top of a landslide hazard area with no buffers.

⁵⁹ SCC 14.24.410(2)(c)(Slopes of 40% or steeper with a vertical relief of 10 feet or more are classified as landslide hazard areas).

⁶⁰ SCC 14.24.430(1)(g)(“A minimum buffer width of 30 feet shall be established from the top, toe and all edges of all landslide and erosion hazard areas.”).

⁶¹ AR 00281.

⁶² SCC 14.24.430(2)(a)(Buffers of landslide areas may only be reduced to a minimum of 10 feet if no reasonable alternatives to buffer reduction exist). The provisions of SCC 14.24.400 et seq. are set forth within Appendix 3.

⁶³ AR 00095 (Finding 19).

The failure of any of the county's approving authorities to enter findings on the variance criteria cited above renders those decisions contrary to law and invalid. The county should be aware of such an outcome because its approval of a variance in *St. Clair v. Skagit County*, 43 Wn.App. 122, 128-29, 715 P.2d 165 (1986) was invalidated for lack of required findings. In *St. Clair*, a lot owner had applied for a variance to allow a second dwelling unit on the second of two contiguous parcels which together just met the required minimum width of 100 feet. The county Board of Adjustment approved the variance on grounds the owner had (erroneously) been issued a building permit for the second residence, possibly to cover for the county's mistake. But the Board failed to render findings on the applicable variance criteria, as required by state statute and county code. The trial court found the Board's approval of the variance to be contrary to law, and the Court of Appeals agreed:

Granting a variance without entering the required findings of fact is also contrary to law.

St. Clair v. Skagit County, 43 Wn.App. at 129. In so holding, the court cited to *Andrew v. King Cy.*, 21 Wn.App. 566, 576, 586 P.2d 509 (1978), in which the court remanded a decision also for failure to make required findings:

Where, as here, the administrative fact-finding tribunal is required to enter written findings of fact, the purpose of such findings is not only to inform the parties of the basis of the decision, but is also to assist the courts in reviewing the administrative action.

Citing to a decision by the D.C. Circuit, the *Andrew* court observed that remand served not just to correct a procedural error, but to allow the administrative agency to re-evaluate its decision:

The proper disposition in this case must be remand. Such remand is not solely for the purpose of redrafting findings and conclusions to facilitate our review and reinforce the Board's decision. The Board may deem it desirable, in applying the (appropriate) criteria . . . , to conduct further hearings or to even reach a different result.

Andrew at 576, citing to *Salsbery v. District of Columbia Bd. of Zoning Adjustment*, 318 F.2d 894, 896 (D.C.Cir., 1974).

While time has passed since these decisions, the requirement for findings of fact on applicable criteria remains a bedrock principle of administrative decision making. *Citizens for Responsible and Organized Planning v. Chelan County*, 105 Wn.App. 753, 755, 21 P.3d 304 (2001) (“Meaningful appellate review requires entry of adequate and detailed findings of fact and conclusions of law.”), citing to *Org. to Pres. Agric. Lands v. Adams County*, 128 Wn.2d 869, 882, 913 P.2d 793 (1996).

In sum, the approval of Ford's variance requests should be reversed for lack of support by the showings required of the applicant and the findings required by the approving authority.

B. The Reasonable Use Exception Was Not Properly Granted Where the Proposed Uses on Lots 12 and 13 Do Not Meet Minimum Setback Requirements.

The Reasonable Use Exception to allow the proposed construction on Lots 12 and 13 was not lawfully granted because the proposed development does not "otherwise satisfy all other requirements of the Skagit County Code." SCC 14.16.850(4)(f)(i)(B).

Pursuant to SCC 14.16.850(4)(a)(iii), if the consolidation of lots does not result in lots that meet minimum lot size requirements, the resulting parcel still may be considered eligible for development permits through a reasonable use exception under SCC 14.16.850(4)(f).⁶⁴ However, SCC 14.16.850(4)(f)(i) allows the approval of a reasonable use exception for such non-conforming consolidated lots only as long as "all other requirements of the Skagit County Code" can be satisfied:

⁶⁴ As noted above at page 4, the consolidation of Lots 12 and 13 resulted in a combined lot of 27,500 square feet, about 1/4 of the 2.5 acre minimum lot size.

(4) Development of Lots of Record.

(a) ...Lots of record that do not meet the minimum lot size requirements of the zoning district in which they are located (hereafter "substandard lots of record") shall only be considered for development permits if they are not restricted from development by prior County decision or action and meet 1 or more of the exceptions described in Subsection (4)(c) of this Section.

* * *

(c) The County shall only consider issuing development permits on those substandard lots of record meeting any of the exemptions in this Subsection. [Exemptions deleted, as none apply.]

f) Reasonable Use.

(i) Variances from the requirements of this Section shall not be considered. However, if a substandard lot of record in the Rural Reserve, Rural Intermediate, Rural Village Residential, Urban Reserve Residential, Bayview Ridge Residential or Bayview Ridge Urban Reserve zones does not meet any of the exceptions in Subsection (4)(c) of this Section, the lot owner may request that the County further evaluate the lot for a reasonable use exception pursuant to this Subsection. Issuance of a reasonable use exception shall allow the lot owner to apply for residential development permits on the lot. Reasonable use exceptions shall only be issued if the lot owner can demonstrate the following:

(A) The lot has not been owned with any other contiguous lots with the same zoning designation at any time from July 1, 1990, to the present. The owner may elect to aggregate all contiguous, substandard lots held in common ownership, thereby creating a single parcel, to then qualify under this Subsection; and

(B) The proposed use can otherwise satisfy all other requirements of the Skagit County Code; and

(C) The proposed use does not require extension of, or installation of, urban levels of service outside of an urban growth area.

* * *

(Emphasis supplied; inapplicable provisions omitted). Appendix 3 contains a copy of SCC 14.16.850 in its entirety. Ford applied for and obtained a reasonable use exception under section SCC 14.16.850(4)(f), and so would be subject to the limitations under subsection .850(4)(f)(i).

Even though Lots 12 and 13 had been consolidated (thereby meeting part A, above), the reasonable use exception was unlawfully granted because the proposed uses on Lots 12 and 13 could not meet the part B requirement since they do not “otherwise satisfy all other requirements of the Skagit County Code.” As addressed in the prior argument, Ford’s proposals for a residence on Lot 12 and the garage on Lot 13 do not satisfy all other county code requirements because they are dependent upon variances from minimum building setback requirements: for Lot 12, the reduction from 35 feet to 16 feet along Holiday Blvd and from 25 to 5 feet along Decatur Place; for Lot 13, a reduction from 35 to 10

feet from Decatur Place.⁶⁵ Ford's proposed uses cannot satisfy the requirement of .850(4)(f)(i)(B) because the proposed house on Lot 12 and the garage on Lot 13 cannot "otherwise satisfy all other requirements of the Skagit County Code."

PDS and the Hearing Examiner rationalized approval of the reasonable use exception on grounds that satisfaction of zoning requirements (the Part B test) could be met through the variance procedure.⁶⁶ However, SCC 14.16.850(4)(f)(i) clearly states that "[v]ariations from the requirements of this Section shall not be considered." Variations from the reasonable use exception provision apparently are not to be considered to prevent owners from doubling up on exceptions. In other words, since a reasonable use exception already sets standards for the development of substandard lots, those standards may not be further reduced through the variance procedure. In any event, as demonstrated in the prior argument, the setback variations were not lawfully granted.

The reasonable use exception was approved in violation of the express provisions of county code and should be reversed and vacated.

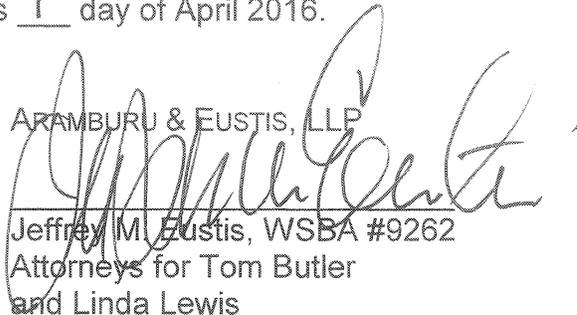
⁶⁵ AR 00333-34 (Administrative Variance description of proposal).

VII. CONCLUSION

For the above reasons, the Butlers' appeal of the variance approvals and the reasonable use exception should be granted and those approvals should be reversed and vacated.

Respectfully submitted this 7th day of April 2016.

ARAMBURU & EUSTIS, LLP



Jeffrey M. Eustis, WSBA #9262
Attorneys for Tom Butler
and Linda Lewis

⁶⁶ AR 00030 (Hearing Examiner Decision, Conclusions 9 &10).

DECLARATION OF SERVICE

I am over eighteen years of age and competent to be a witness herein. On the date below, I served copies of the above document as follows:

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I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct to the best of my knowledge and belief.

DATED: April 7, 2016

Carol Cohoe
Carol Cohoe

FILED
COURT OF APPEALS DIV 1
STATE OF WASHINGTON
2016 APR -8 AM 10:55

Appendix 1

Looking north on Decatur Place to Holiday Blvd. Picture 2 of 3.



Looking south along Decatur Place to cul-de-sac. Picture 3 of 3.





Imagery ©2015 Google, Map data ©2015 Google 500 ft

Decatur Place

Google Maps Google Maps



Imagery ©2015 Google, Map data ©2015 Google 50 ft

Lot 12

Lot 13

Appendix 2

Views from the top of P65742. Top photo taken from the furthest north east corner possible for a home with current setbacks.





Anacortes

Lopez & Decatur Islands
ON a clear day

Guemes Island

Appendix 3

Chapter 14.10 VARIANCES

Sections:

- 14.10.010 Purpose.
- 14.10.020 Types of variances.
- 14.10.030 Application procedures.
- 14.10.040 Findings of variance.
- 14.10.050 General conditions.

14.10.010 Purpose.

Variences from the terms of this Title may be authorized in specific cases that will not be contrary to the public interest, and where, due to special conditions, literal enforcement of the provisions of this Code would result in unnecessary hardship. Generally, variances shall only be considered for dimensional standards, unless otherwise specified in this Title. Under no circumstances shall a variance be granted that allows a use not permissible under the terms of this Chapter in the district involved, or any use expressly or by implication prohibited by the terms of this Chapter in the district. (Ord. O20090010 Attch. 1 (part): Ord. 17938 Attch. F (part), 2000)

14.10.020 Types of variances.

Variences shall generally be 1 of 3 types:

(1) Administrative Variences. The following variances shall be processed as a Level I administrative decision pursuant to the provisions of Chapter 14.06 SCC by the respective department indicated:

- (a) Alternatives to the Public Works Standards of Chapter 14.36 SCC shall be decided administratively by the Public Works Department, pursuant to Section 2.10 of the Skagit County Road Standards Manual.
- (b) Variences to the agricultural siting criteria of SCC 14.16.400 and 14.16.860 shall be decided administratively by Planning and Development Services.
- (c) Variences allowed in SCC 14.16.800(1)(d) related to parking requirements, SCC 14.16.810(4) related to setback reductions and SCC 14.16.830(5)(i) related to landscaping requirements shall be decided administratively by Planning and Development Services.

(d) Variances to SCC 14.16.340(5), minimum density for short plats, may be allowed in cases where previously developed property or property with critical areas constraints precludes development at the required densities. Such variances shall be decided administratively by Planning and Development Services.

(e) Technical deviations from the provisions of Chapter 14.32 SCC shall be decided administratively by Planning and Development Services as outlined in SCC 14.32.030(5).

Appeals of administrative variances shall be to the Hearing Examiner as provided in Chapter 14.06 SCC, except for alternatives to public works standards of Chapter 14.36 SCC.

(f) Variances to standard critical area buffer widths (25% to 50%) pursuant to SCC 14.24.140(1)(a) shall be decided administratively by Planning and Development Services.

(2) Board of County Commissioner Variances. Variances to any other requirements of the Ag-NRL zone found in SCC 14.16.400 or to agricultural resource land preservation, SCC 14.16.860, shall be processed as a Level III-HE recommendation by the Hearing Examiner with a final decision by the Board of County Commissioners, as described in Chapter 14.06 SCC.

(3) Hearing Examiner Variances. All other requests for variances to any of the allowed provisions of this Title shall be processed as a Level II Hearing Examiner Decision pursuant to the requirements of Chapter 14.06 SCC (Permit Procedures). Appeal of the Hearing Examiner Decision may be made to the Board of County Commissioners as described in Chapter 14.06 SCC; provided, that shoreline variances shall follow the procedures of the Skagit County Shoreline Management Master Program, as may be amended. (Ord. O20090010 Attch. 1 (part); Ord. O20080009 (part); Ord. O20070009 (part); Ord. 18375 § 6, 2001; Ord. 17938 Attch. F (part), 2000)

14.10.030 Application procedures.

(1) A variance from the requirements of this Title shall be submitted on forms provided by Planning and Development Services, or, in the case of a request for an alternative from the Public Works Standards, on forms provided by the Public Works Department.

(2) A narrative statement shall be included with the application forms demonstrating that the requested variance conforms 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. Topics to be addressed include topographic or critical area constraints that make use of the particular site infeasible without the proposed variance.
- (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 SCC Titles 14 and 15.
- (c) The special conditions and circumstances do not result from the actions of the applicant.
- (d) The granting of the variance requested will not confer on the applicant any special privilege that is denied by SCC Titles 14 and 15 to other lands, structures, or buildings in the same district.
- (e) An explanation of how the requested variance meets any other specific criteria required for the type of variance requested, where applicable, including, but not limited, to the following:
 - (i) Explanation of compliance with the criteria for a Critical Areas Ordinance variance under SCC 14.24.140.
 - (ii) Explanation of compliance with the criteria for a shoreline variance under the Skagit County Shoreline Management Master Program.
 - (iii) Explanation of compliance with the criteria for a public works alternative under the Skagit County Public Works Standards adopted pursuant to Chapter 14.36 SCC.
 - (iv) Explanation of compliance with the criteria for variance from the agricultural siting criteria found in SCC 14.16.400(6).
 - (v) Explanation of compliance with the criteria for a Flood Hazard Ordinance variance found in SCC 14.34.130.
- (f) If applicable, an explanation from the applicant as to why, if a variance is denied, the applicant would be denied all reasonable use of his or her property. (Ord. O20070009 (part); Ord. 17938 Attch. F (part), 2000)

14.10.040 Findings of variance.

(1) The Approving Authority shall make findings whether:

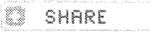
- (a) The reasons set forth in the application justify the granting of the variance, including findings relating to compliance with any relevant variance criteria found in other sections of Skagit County Code.
- (b) The variance is the minimum variance that will make possible the reasonable use of land, building or structure.
- (c) The granting of the variance will be in harmony with the general purpose and intent of this Title and other applicable provisions of the Skagit County Code, and will not be injurious to the neighborhood, or otherwise detrimental to public welfare. (Ord. 17938 Attch. F (part), 2000)

14.10.050 General conditions.

(1) In granting any variance, the Approving Authority may prescribe such conditions and safeguards as are necessary to secure adequate protection for the locality in which the use is to be permitted.

(2) All variance decisions of the County shall be recorded with the Auditor. If they contain conditions to be imposed on the property even after it has been sold, the recorded notice shall include the following information:

- (a) Owner's name.
- (b) Parcel number.
- (c) Property address.
- (d) Complete legal description.
- (e) Conditions to be imposed on the property. (Ord. 17938 Attch. F (part), 2000)

SCC 14.16.850 General provisions. 

- (1) Any provision of this Title may be suspended in an emergency situation by the Administrative Official, subject to approval by the Board of County Commissioners.
- (2) There shall be no more than 1 primary dwelling unit and 1 accessory dwelling unit per lot of record, unless otherwise permitted in the zoning district.
 - (a) Recreational vehicles, including park model trailers, will not be considered as dwelling units, shall only be occupied on a temporary basis and shall be limited to 1 occupied vehicle per lot of record.
 - (3) Prohibition on Extension of Sewer Service into Rural and Resource Areas.
 - (a) Extension of sewer service is prohibited into rural and resource designated areas, except in these limited circumstances shown to be necessary to protect basic public health and safety and the environment and when such services are financially supportable at rural densities and do not permit urban densities.
 - (b) For the Similk Beach LAMIRD (SCC 14.16.920), only those properties within the LAMIRD may be served by the sewage system designed for that area, even if allowed by Chapter 12.05 SCC (On-Site Sewage Code). Connections to provide sewage service to properties outside of the LAMIRD are prohibited.
 - (4) Development of Lots of Record.
 - (a) Notwithstanding other restrictions of the Skagit County Code, only lots of record meeting the minimum lot size requirements of the zoning district in which they are located that are not restricted from development by prior County decision or action (e.g., plat notes, open space designation, or other means) will be eligible for development permits. Lots of record that do not meet the minimum lot size requirements of the zoning district in which they are located (hereafter "substandard lots of record") shall only be considered for development permits if they are not restricted from development by prior County decision or action and meet 1 or more of the exceptions described in Subsection (4)(c) of this Section.
 - (i) An owner of contiguous, substandard lots may choose to aggregate (combine) the lots in order to meet these requirements; provided, that aggregation of lots shall meet the requirements of and be recorded as a boundary line adjustment, pursuant to SCC 14.18.700.
 - (ii) If the owner chooses to aggregate contiguous, substandard lots to meet these requirements, the County shall waive the application fee for the boundary line adjustment.
 - (iii) If an owner of contiguous, substandard lots chooses to aggregate the lots pursuant to this Subsection in order to meet these requirements and the resulting aggregated lot still does not meet the zoning minimum lot size, the lot must meet an exemption in Subsection (4)(c) of this Section, or apply

for and receive a reasonable use exception pursuant to Subsection (4)(f) of this Section to be considered for development permits.

(b) Lots created through testamentary provisions or the laws of descent shall be governed by the following provisions:

(i) Lots that meet the current lot size requirements of the zoning district in which they are located shall be treated the same as a legally subdivided lot;

(ii) Lots that do not meet the current lot size requirements of the zoning district in which they are located, but which did meet the requirements in effect at the time they were created will be treated the same as substandard lots of record under Subsection (4)(c) of this Section;

(iii) Lots that do not meet the current minimum lot size dimensional standards of the zoning district in which they are located, and did not meet the standards in effect at the time they were created shall be treated as lots of record for purposes of conveyance, but will not be considered for building or development permits.

(c) The County shall only consider issuing development permits on those substandard lots of record meeting any of the exemptions in this Subsection.

(i) The lot of record was properly platted and approved by Skagit County on or after March 1, 1965; provided, that any lot that was created with a restriction barring future development (e.g., plat notes, open space designation, or other means) shall not be considered for development pursuant to this Subsection.

(ii) The lot of record is recognized as a participating parcel paying assessments to the Edison Subarea (Sub-District) of the Skagit County Clean Water District pursuant to Ordinance No. 16177 or any subsequent ordinances.

(iii) The lot of record is recognized as part of an adopted "Limited Area of More Intense Rural Development (LAMIRD)" pursuant to SCC 14.16.920.

(iv) The lot of record has been approved on a previously issued lot of record certification consistent with SCC 14.06.045(5).

(v) The lot of record is located in an urban growth area, is a minimum of 1 acre in size, and can satisfy the requirements of the Skagit County Code for water (either on-site or connection to a public water system) and for wastewater (either on-site or connection to a public sewer system), together with any other code provision applicable to the type of development proposed, as specified in SCC 14.06.045(6).

(vi) The lot of record is at least 1 acre in size and further meets 1 or more of the following:

(A) Has existing water meter and/or sewer service connection existing on the lot prior to January 1, 2004; or

(B) Has water and/or sewer connections allowed under a specific binding written contract in effect on January 1, 2004, that is an extension agreement or connection agreement; or

(C) The owner or predecessor owner has paid or is currently still paying water and/or sewer assessments pursuant to a legally established utility local improvement district (ULID) or a local improvement district (LID) that was established prior to January 1, 2004.

(vii) The lot of record meets 1 or more of the following:

(A) Has an existing dwelling unit that, at a minimum, meets the definition of an “efficiency dwelling unit” or a commercial/industrial/institutional building located solely on the lot of record and the dwelling unit or commercial/industrial/institutional building was either constructed prior to July 1, 1990, according to the Assessor’s records, or, if constructed after that date, obtained a building permit for its construction and approval to occupy from the County; or

(B) Has an approved permit for an on-site sewage system pursuant to Chapter 12.05 SCC that is submitted and approved prior to January 1, 2004, and either that permit is still valid, or the system has been installed; or

(C) Has an individual water system evaluation pursuant to Chapter 12.48 SCC (including installation of the well) submitted and approved prior to June 1, 1997, for a water system intended to serve the substandard lot; or

(D) Has been issued a development permit which vests future structure(s) pursuant to SCC 14.02.050 (Vesting).

(viii) The lot of record was legally created prior to March 1, 1965, or if created after March 1, 1965, was exempt from subdivision requirements at the time it was created, and meets 1 of the following requirements:

(A) The lot of record is 1 acre or larger and is located in the Rural Village Residential or Rural Intermediate zoning district. Lots located within the Fidalgo Island subarea plan boundaries identified in Ordinance No. 18375, Appendix 1, Section 1, No. 12, or located on Guemes Island shall not be eligible for this Subsection; or

(B) The lot of record is 5 acres or larger and is located in a Rural Reserve or Bayview Ridge Urban Reserve zoning district; or

(C) The lot of record is 10 acres or larger and is located in a Rural Resource-Natural Resource Lands or Secondary Forest-Natural Resource Lands zoning district; or

(D) The lot of record meets the requirements of SCC 14.16.410(3)(c) for residential development in the Industrial Forest-Natural Resource Lands designation; or

(E) The lot of record is 0.25 acres or larger and is located in the Bayview Ridge Residential zoning district.

(d) In the following zones, if the proposed use for the substandard lot of record is 1 of the following nonresidential uses and otherwise meets all requirements for the use in the zone, it may be allowed regardless of the determination pursuant to SCC 14.06.045(1)(b):

(i) Rural Village Residential.

(A) Administrative special uses: minor utility developments; parks, specialized recreation facilities; trails and primary and secondary trailheads.

(B) Hearing Examiner special uses: cemetery; community club/grange hall; expansion of existing major public uses up to 3,000 square feet; historic sites open to the public; minor public uses; parks, community; personal wireless services towers, subject to SCC 14.16.720.

(ii) Rural Intermediate.

(A) Permitted uses: agriculture, agricultural accessory uses.

(B) Administrative special uses: minor utility developments; parks, specialized recreational facilities; trails and primary and secondary trailheads.

(C) Hearing Examiner special uses: cemetery; community club/grange hall; expansion of existing major public uses up to 3,000 square feet; historic sites open to the public; impoundments greater than 1-acre feet in size; minor public uses; outdoor recreational facilities; parks, community; personal wireless service towers, subject to SCC 14.16.720.

(iii) Rural Reserve.

(A) Permitted uses: agriculture, agricultural accessory uses, agricultural processing facilities, cultivation, harvest and production of forest products or any forest crop, in accordance with the Forest Practice Act of 1974, and any regulations adopted pursuant thereto.

(B) Administrative special uses: minor utility developments; parks, specialized recreational facility; trails and primary and secondary trailheads.

(C) Hearing Examiner special uses: animal preserve; cemetery; community club/grange hall; expansion of existing major public uses up to 3,000 square feet; historic sites open to the public; impoundments greater than 1-acre feet in volume; manure lagoon; minor public uses; natural resources training/research facility; outdoor outfitters enterprises; outdoor recreational facilities; parks, community; personal wireless services towers, subject to SCC 14.16.720.

(iv) Urban Reserve Residential.

(A) Administrative special uses: expansion of existing major public uses, minor public use, minor utility development, seasonal roadside stands under 300 square feet, temporary event, trails and primary and secondary trailheads.

(B) Hearing Examiner special uses: cemetery; community club/grange hall; display gardens; historic sites open to the public; parks, community; personal wireless services towers subject to SCC 14.16.720.

(v) Urban Reserve Commercial-Industrial.

(A) Permitted uses: community club/grange hall, historic sites open to the public, minor public uses.

(B) Administrative special uses: expansion of existing major public uses up to 3,000 square feet; minor utility developments; parks, specialized recreational facility; personal wireless services towers subject to SCC 14.16.720; temporary events; trails and primary and secondary trailheads.

(C) Hearing Examiner special uses: none.

(vi) Urban Reserve Public Open Space.

(A) Permitted uses: agriculture; agricultural accessory use; caretaker dwelling unit for on-site resident park manager accessory to the primary public use; cultivation; harvest and production of forest products or any forest crop, in accordance with the Forest Practice Act of 1974, and any regulations adopted pursuant thereto; historic sites open to the public; interpretive center; minor public uses; minor utility development; open space; parks, community; park, recreation open space; parks, regional; park, specialized recreation area; trails and primary and secondary trailheads.

(B) Administrative special uses: natural resources training/research facility, outdoor recreation facilities, personal wireless services towers, subject to SCC 14.16.720, Water diversion structure.

(C) Hearing Examiner special uses: impoundment.

(vii) Bayview Ridge Residential.

(A) Permitted uses: agricultural uses; historic sites open to the public.

(B) Administrative special uses: minor utility developments; parks, specialized recreational facilities; trails and primary and secondary trailheads.

(C) Hearing Examiner special uses: parks, community.

(viii) Bayview Ridge Urban Reserve.

(A) Permitted uses: agriculture.

(B) Administrative special uses: minor utility developments; parks, specialized recreational facilities; trails and primary and secondary trailheads.

(C) Hearing Examiner special uses: expansion of existing major public uses up to 3,000 square feet; impoundments greater than 1-acre feet in volume; parks, community.

(e) In the natural resource land zones, if the proposed use for the substandard lot of record is any of the uses permitted in the respective natural resource land zone other than the following residential uses, it may be allowed regardless of the determination pursuant to SCC 14.06.045(1)(b):

* * *

f) Reasonable Use.

(i) Variances from the requirements of this Section shall not be considered. However, if a substandard lot of record in the Rural Reserve, Rural Intermediate, Rural Village Residential, Urban Reserve Residential, Bayview Ridge Residential or Bayview Ridge Urban Reserve zones does not meet any of the exceptions in Subsection (4)(c) of this Section, the lot owner may request that the County further evaluate the lot for a reasonable use exception pursuant to this Subsection. Issuance of a reasonable use exception shall allow the lot owner to apply for residential development permits on the lot. Reasonable use exceptions shall only be issued if the lot owner can demonstrate the following:

(A) The lot has not been owned with any other contiguous lots with the same zoning designation at any time from July 1, 1990, to the present. The owner may elect to aggregate all contiguous, substandard lots held in common ownership, thereby creating a single parcel, to then qualify under this Subsection; and

(B) The proposed use can otherwise satisfy all other requirements of the Skagit County Code; and

(C) The proposed use does not require extension of, or installation of, urban levels of service outside of an urban growth area.

Lots included in a plat shall not be required to be combined with unplatted land or lots in separate plats for the purposes of qualifying under this Subsection. Lots where ownership of 1 or more contiguous lots has been transferred since July 1, 1990, shall not be considered as held in common ownership if the segregation(s) occurred in compliance with all zoning and aggregation provisions in effect at the time of transfer.

(ii) The County evaluation of a reasonable use exception to the requirements of this Section shall be processed as a Level I administrative decision, pursuant to SCC 14.06.110, including all of the public notice and comment requirements.

(iii) In the Natural Resource Lands zoning districts (Ag-NRL, RRc-NRL, SF-NRL and IF-NRL), natural resource production is deemed a reasonable use of the property and, therefore, substandard lots of record in these zones shall not be eligible for a reasonable use exception pursuant to this Subsection.

SCC 14.24.400 Geologically hazardous areas designations. SHARE

Geologically hazardous areas shall be designated consistent with the definitions provided in WAC 365-190-080(4). These include areas susceptible to the effects of erosion, sliding, earthquake, or other geologic events. They pose a threat to the health and safety of citizens when incompatible residential, commercial, industrial, or infrastructure development is sited in areas of a hazard. Geologic hazards pose a risk to life, property, and resources when steep slopes are destabilized by inappropriate activities and development or when structures or facilities are sited in areas susceptible to natural or human-caused geologic events. Some geologic hazards can be reduced or mitigated by engineering, design, or modified construction practices so that risks to health and safety are acceptable. When technology cannot reduce risks to acceptable levels, building and other construction in, above and below geologically hazardous areas should be avoided. (Ord. O20080014 (part))

14.24.410 Geologically hazardous areas known or suspected risk. SHARE

Geologically hazardous areas shall be classified as “known or suspected risk” or “unknown risk.” Areas of known or suspected risk are indicated in Subsections (1) through (5) of this Section.

(1) The following are considered known or suspected erosion hazards:

(a) Areas with gradients greater than or equal to 30%.

(b) Areas located within the following map units: No. 1 Andic Cryochrepts, Nos. 3 and 4 Andic Xerochrepts, No. 13 Birdsvew, Nos. 47 and 48 Dystric Xerochrepts, Nos. 50 and 51 Dystic Xerorthents, Nos. 63 and 65 Guemes, No. 69 Hoogdal, No. 90 Lithic Haploxerolls, No. 91 Marblemount, No. 99 Mundt and Nos. 150 and 151 Typic Croyorthods or mapped severe erosion hazard, as identified in the U.S. Department of Agriculture Natural Resources Conservation Service Soil Survey of Skagit County Area, WA (1989).

(c) Coastal beaches or bluffs.

(d) Areas designated in the Department of Ecology, Coastal Zone Atlas, Washington, Volume Two Skagit County (1978) as U (Unstable), UB (Unstable Bluff), URS (Unstable Recent Slide), or UOS (Unstable Old Slide).

(e) Areas susceptible to rapid stream incision and stream bank erosion.

(2) Landslide hazards are areas potentially subject to landslides based on a combination of geologic, topographic and hydrologic factors. The following are known or suspected landslide hazards:

(a) Areas designated in the Department of Ecology, Coastal Zone Atlas, Washington, Volume Two, Skagit County (1978) as U (Unstable), UB (Unstable Bluff), URS (Unstable Recent Slide), or UOS (Unstable Old Slide).

(b) Slopes having gradients of 15% or greater:

- (i) That intersect geologic contacts with permeable sediments overlying low-permeability sediment or bedrock and springs or groundwater seepage are present; or
- (ii) That are parallel or subparallel to planes of weakness (such as bedding planes, joint systems, and fault planes) in subsurface materials.
- (c) Slopes of 40% or steeper and with a vertical relief of 10 feet or more.
- (d) Areas of previous failure such as earth slumps, earthflows, mudflows, lahars, debris flows, rock slides, landslides or other failures as observed in the field or as indicated on maps or in technical reports published by the U.S. Geological Survey, the Geology and Earth Resources Division of the Washington Department of Natural Resources, or other documents authorized by government agencies.
- (e) Potentially unstable areas resulting from rapid stream incision, stream bank erosion, and undercutting by wave action.
- (f) Coastal bluffs.
- (g) Slopes with a gradient greater than 80% and subject to rock fall.
- (h) Areas that are at risk from snow avalanches.
- (i) Areas designated on the Skagit County Alluvial Fan Study Orthophoto Maps as alluvial fans or as identified by the Administrative Official during site inspection.
- (j) Areas located in a narrow canyon potentially subject to inundation by debris flows or catastrophic flooding.
- (k) Those areas delineated by the U.S. Department of Agriculture's Natural Resources Conservation Service Soil Survey of Skagit County as "severe" (Table 9) limitation for building development.
- (3) Seismic hazard areas are subject to severe risk of damage as a result of earthquake-induced ground shaking, slope failure, settlement, soil liquefaction or surface faulting. The following are known or suspected seismic hazards:
 - (a) Areas located within a high liquefaction susceptibility as indicated on the Liquefaction Susceptibility Map of Skagit County issued by Washington Department of Natural Resources dated September 3, 2004, or as amended thereafter. A site assessment is not required for high liquefaction hazard areas for single-family residence proposals unless other criteria provided in this Section apply.
 - (b) Areas located within 1/4 mile of an active fault as indicated on investigative maps or described in studies by the United States Geologic Survey, Geology and Earth Resources Division of the Washington Department of Natural Resources, or other documents authorized by government agencies, or as identified during site inspection.
 - (c) Those known or suspected erosion and landslide hazards referenced in Subsections (1) and (2) of this Section.

(d) Tsunami and seiche hazard areas include coastal areas and lake shoreline areas susceptible to flooding, inundation, debris impact, and/or mass wasting as the result of coastal or inland wave action generated by seismic events or other geologic events. Suspect tsunami hazard areas are indicated on the Tsunami Hazard Map of the Anacortes-Whidbey Island Area, Washington: Modeled Tsunami Inundation from a Cascadia Subduction Zone Earthquake. A site assessment is not required for tsunami and seiche hazard areas but they are addressed through the frequently flooded section of this Chapter.

(4) Volcanic hazard areas are subject to pyroclastic flows, lava flows, debris avalanche, and inundation by debris flows, mudflows, lahars or related flooding resulting from volcanic activity. Suspect volcanic hazards include those areas indicated in the United States Geologic Survey Open-File Report 95-499 as the volcanic hazard zone for Glacier Peak, Washington; or in the United States Geologic Survey Open-File Report 95-498 as the volcanic hazard area of Mount Baker, Washington. A site assessment is not required for volcanic hazard areas unless other criteria provided in this section apply.

(5) Mine hazard areas as designated on the Department of Natural Resources Map: Coal Measures of Skagit County (1924) or within 200 feet of any other current or historic mine operations determined to be a suspect or known geologically hazardous area by the Administrative Official. (Ord. O20080014 (part))

14.24.420 Geologically hazardous areas site assessment requirements

(1) If the Administrative Official determines that the proposed development activity is located within 200 feet of an area of known or suspected risk as indicated in SCC 14.24.410, or within a distance from the base of a landslide hazard area equal to the vertical relief, and that the geologic condition may pose a risk to life and property, or other critical areas on and off the project area, a geologic hazard site assessment as indicated in this Section shall be required. This site assessment shall be prepared by a qualified professional.

(2) The geologically hazardous area site assessment shall classify the type of geologic hazard(s) in accordance with SCC 14.24.400 and 14.24.410. In addition to the requirements of SCC 14.24.080, the site assessment shall include the following:

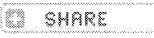
(a) A site plan depicting the height of slope, slope gradient and cross section indicating the stratigraphy of the site. The site plan shall indicate the location of all existing and proposed structures and any significant geologic features such as outcrops, springs, seeps, ponds, streams or other water bodies; and

(b) An assessment of the geologic characteristics and engineering properties of the soils, sediments, and/or rock of the subject property and potentially affected adjacent properties. Soils shall be described in accordance with the Unified Soil Classification System; and

(c) A description of load intensity, surface and groundwater conditions, public and private sewage disposal systems, fills and excavations and all structural development; and

(d) A description of the extent and type of vegetative cover including tree attitude; and

- (e) For potential coastal bluff geologic hazards: estimate of the bluff retreat rate, which recognizes and reflects potential catastrophic events such as seismic activity or a 100-year storm event; and
 - (f) For potential landslide hazards: estimate slope stability and the effect construction and placement of structures will have on the slope over the estimated life of the structure. Quantitative analysis of slope stability or slope stability modeling may be required by the Administrative Official; and
 - (g) Additional site assessment elements may be required by the Administrative Official.
- (3) Properties containing geologically hazardous conditions identified by the Administrative Official and the qualified professional shall require a geologically hazardous area mitigation plan. (Ord. O20080014 (part))

14.24.430 Geologically hazardous area mitigation standards. 

The mitigation plan shall be prepared by a qualified professional and include a discussion on how the project has been designed to avoid and minimize the impacts discussed under SCC 14.24.420. The plan shall also make a recommendation for the minimum setback from the geologic hazard. Mitigation plans shall include the location and methods of drainage, locations and methods of erosion control, a vegetation management and/or restoration plan and/or other means for maintaining long-term stability of geologic hazards. The plan shall also address the potential impact of mitigation on the hazard area, the subject property and affected adjacent properties. The mitigation plan must be approved by the Administrative Official and be implemented as a condition of project approval.

One or more of the following mitigation standards, as required by the Administrative Official, shall be included as components of a mitigation plan pursuant to the requirements of SCC 14.24.420. Mitigation standards, other than those listed below, may be required by the Administrative Official depending on the geologic hazard and the site conditions.

(1) Mitigation Standards.

- (a) A temporary erosion and sedimentation control plan prepared in accordance with the requirements of Chapter 14.32 SCC (Drainage Ordinance), as amended.
- (b) A drainage plan for the collection, transport, treatment, discharge and/or recycling of water in accordance with the requirements of Chapter 14.32 SCC, as amended. Surface drainage shall not be directed across the face of a landslide hazard (including marine bluffs or ravines). If drainage must be discharged from the hazard area into adjacent waters, it shall be collected above the hazard and directed to the water by tight line drain and provided with an energy dissipating device at the point of discharge.
- (c) All proposals involving excavation and/or placement of fill shall be subject to structural review under the appropriate provisions of the International Building Code (IBC) as amended by Skagit County.

(d) Critical facilities as defined under Chapter 14.04 SCC shall not be sited within designated geologically hazardous areas with the exception of volcanic hazard areas. No critical facilities shall be located within 1/4 mile of an active fault.

(e) All infiltration systems, such as stormwater detention and retention facilities and curtain drains utilizing buried pipe or French drains, are prohibited in geologically hazardous areas and their buffers unless the mitigation plan indicates such facilities or systems will not affect slope stability.

(f) Existing vegetation shall be maintained in landslide and erosion hazard areas and associated buffers. Any replanting that occurs shall consist of native trees, shrubs, and ground cover that is compatible with the existing surrounding native vegetation, meets the objectives of erosion prevention and site stabilization, and does not require permanent irrigation for long-term survival. Normal nondestructive pruning and trimming of vegetation for maintenance purposes; or thinning of limbs of individual trees to provide a view corridor, shall not be subject to these requirements.

(g) A minimum buffer width of 30 feet shall be established from the top, toe and all edges of all landslide and erosion hazard areas. For landslide and erosion hazard areas with a vertical relief greater than 50 feet, the minimum buffer shall be 50 feet. The buffer may be increased by the Administrative Official for development adjacent to a marine bluff or ravine which is designated as Unstable in the Coastal Zone Atlas, Washington, Volume Two, Skagit County (1978) or where the Administrative Official determines a larger buffer is necessary to prevent risk of damage to existing and proposed development.

(h) Structural development proposals within seismic hazard areas shall meet all applicable provisions of the IBC as amended by Skagit County. The Administrative Official shall evaluate documentation submitted pursuant to SCC 14.24.420(2) and condition permit approvals to minimize the risk on both the subject property and affected adjacent properties. All conditions shall be based on known, available, and reasonable methods of prevention, control and treatment. Evaluation of geotechnical reports may also constitute grounds for denial of the proposal.

(i) No residential structures shall be located in geologic hazard areas or their buffers if that hazard cannot be fully mitigated.

(2) Landslide or Erosion Hazard Buffer Reduction. Buffers of landslide or erosion hazard areas may be reduced to a minimum of 10 feet for development meeting all of the following criteria:

(a) No reasonable alternative to buffer reduction exists; and

(b) A site assessment is submitted and certifies that:

(i) There is a minimal hazard in the vicinity of the proposed development as proven by evidence of no landslide activity in the past; and

(ii) A quantitative slope stability analysis indicates no significant risk to the development proposal and adjacent properties; or the geologically hazardous area can be modified; or the development proposal

can be designed so that the hazard is eliminated. The quantitative analysis shall include the minimum setback allowed for development as indicated by a slope stability model with respect to a minimum factor of safety of 1.5 for static conditions, 1.25 for seismic conditions, or 10 feet, whichever results in the greater setback. The elements of the quantitative site assessment shall be determined by the Administrative Official and may include 1 or more of the following:

- (A) Subsurface exploration, to include at least 1 boring with sample collection for laboratory analysis.
- (B) Laboratory analysis shall assess the soil characteristics and include sieve analysis, moisture, angle of internal friction, and cohesion.
- (C) Utilizing the information from the subsurface exploration and laboratory analysis, the quantitative site assessment shall include slope stability modeling with factor of safety analysis. The analysis shall indicate the factor of safety within 50 feet of the top and toe of geologic hazards; and
 - (iii) The development will not significantly increase surface water discharge or sedimentation to adjacent properties beyond pre-development conditions; and
 - (iv) The development will not decrease slope stability on adjacent properties; and
 - (v) Such alterations will not adversely impact other critical areas.
- (3) Failed Mitigation Plans. Mitigation plans which do not fulfill the performance requirement based on the site assessment/geotechnical report findings or otherwise fail to meet the intent of this Chapter shall be revised and the subject development brought into compliance with the revised mitigation plan.
- (4) Mitigation Plan Verification. Upon completion of the project, a qualified professional shall verify that the mitigation plan has been properly implemented. The verification shall be required prior to final approval of the project by the Administrative Official. (Ord. O20080014 (part))