

74435-6

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No. 74435-6-I

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION I

TOM BUTLER and LINDA LEWIS,

Appellant,

v.

SKAGIT COUNTY and HAZEL FORD,

Respondents.

SKAGIT COUNTY and HAZEL FORD'S
JOINT RESPONSE

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I. INTRODUCTION

Recognizing that many lots, like Hazel Ford's, which were platted before the county adopted its zoning regulations, could not be developed for residential use as intended after the county adopted a zoning ordinance that effectively downzoned the property, the county adopted a reasonable use exception (RUE) ordinance and provided for a less stringent review for variances from setback provisions when topography and lot size were the constraining factors. The amendments allowed property owners to use their residential property to build a home.

The record and a reasonable interpretation of applicable county ordinances supports the county's determination that Hazel Ford meets the requirements for an RUE and for a variance from the setback requirements for what is a typically situated lot in the Rural Intermediate zoning district. Hazel Ford may build a modest view home, garage, and septic system on her two lots on Guemes Island.

II. ISSUE PRESENTED FOR REVIEW

1. Do the record and a reasonable interpretation of county ordinances support Skagit County's approval of a variance and reasonable use exception allowing Hazel Ford to build a modest view home on her Guemes Island property?

III. STATEMENT OF THE CASE.

Hazel Ford purchased two lots in Holiday Hideaway with the intent to build a “small view home” on one and a garage and septic drain field for the residence on the other. Record at 466, 441-42. Each lot, P65742 and P65743, lots 12 and 13, respectively, is a corner parcel. Lot 12 is .26 acres (11,325 sq. ft.). Lot 13 is .4 acres (17424 sq. ft.). Record at 310.

At the time Hazel Ford applied for permits to develop her lots, the minimum lot size for a lot in the Rural Intermediate (RI) zoning district was 2.5 acres. SCC 14.16.300(5)(e).¹ Under the county’s current zoning ordinance, “only lots of record meeting the minimum lot size requirements of the zoning district in which they are located . . . will be eligible for development permits.” SCC 14.16.850(4). Because Hazel Ford’s lots were smaller than the minimum required for the RI zoning district, they were “substandard lots”² and Hazel Ford was required, among other things, to

¹ Holiday Hideaway, on Guemes Island in Skagit County, was platted in 1962, Record at 4, before the county adopted its first zoning ordinance. This allowed the developer to create smaller, buildable lots than would have been allowed under the county’s later-adopted zoning ordinances.

² SCC 14.16.850(4) (“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’) . . .”). *Also see* SCC 14.04.020 (“Lot, substandard: a lot which does not meet the minimum size or width requirements or is unable to meet the minimum setback requirements of the zone.”)

apply for a reasonable use exception.³

Skagit County Department of Planning and Development Services (Planning) approved Hazel Ford's proposed development, but Butler appealed, and the Skagit County Hearing Examiner remanded the matter back to Planning for compliance with "requirements concerning a reasonable use exemption for Lot Certification." Record at 8.

On remand, Planning granted a lot certification and a reasonable use exemption (RUE) to Hazel Ford. Record at 10. Butler again appealed. After hearing Butler's second appeal, the Hearing Examiner determined that Hazel Ford met the criteria for a RUE set out in SCC 14.16.850(4)(f)(i). Record at 14. Butler appealed for review by the Board of County Commissioners (Board). Record at 21. The Board remanded the matter back the Hearing Examiner for consideration of the variance criteria in chapter 14.10 SCC and plat restrictions. Record at 20.

On remand, the Hearing Examiner made findings and conclusions, including:

³ See SCC 14.16.850(4)(a)(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 exemption pursuant to Subsection (4)(f) of this Section to be considered for development permits").

18. The weight of the evidence in this case from all three hearings, viewed under the clearly erroneous burden assigned to Butler (SCC 14.06.160(3)) is that the topography of Lot 12 and Lot 13 directs any reasonable development of those properties to be as requested by Ford. HE decision 7/10/14 agrees with the administrative official that public health, safety and welfare will be maintained even with the granting of the setbacks (HE decision 7/10/14).

19. The weight of the testimony in the current hearing is that a large percentage of the homes in the Holiday Hideaway Plat take advantage of the “view” height difference. That trait is common throughout the Plat. It would not confer a special privilege upon Ford to grant the requested setbacks and development plans.

20. PDS finds compatibility between SCC 14.18.700 (Aggregation) and SCC 14.16.850 (Lot Certification). Under these facts PDS has found that lot aggregation through the BLA [boundary line adjustment] process is appropriate under the requirements of SCC.

21. The claim that the aggregation of Lots 12 and 13 violates critical area requirements of the SCC is without factual basis.

22. Plat restriction 1 requires that each lot contain 7,200 square feet (both Lot 12 and Lot 13 comply) and that the lot contain greater than 60 feet in width at the building setback lines (Lot 12 and Lot 13 comply).

23. Plat restriction 2 provides that there are no setbacks from a private roadway easement, which is what Decatur Place is. The uncontroverted evidence is that there are no violations of any plat restrictions.

24. Any claim of violation of a “developer agreement” entered subsequently to the recording of the plat is not sustained by the evidence and is

not relevant to the issues in this case. HE rule 1.11(b).

25. A prior factual determination concerning reasonable use of the Ford property was not changed by the BoCC remand and is not properly an issue in this case.

26. There is no credible evidence in the record that any restrictions against a single family residence exist in the Plat of Holiday Hideaway. Butler's claim of "camping" usage of Lots 12 and 13 is without basis.

27. Butler has failed to show that PDS has an inviolate policy for BLA when an existing easement is part of the property.

28. Butler has failed to produce proof under the clearly erroneous test (or any test) that Ford has received special privileges.

Record at 95-96. On further appeal, the Board held that the Hearing Examiner's decision was not clearly erroneous and denied Butler's appeal.

Record at 98-99.

Butler sought review under the Land Use Petition Act (LUPA).

The Snohomish County Superior Court denied Butler's petition. CP 4.

IV. ANALYSIS

This appeal turns on the application of county ordinances for reasonable use exceptions (RUE) and variances from setback requirements, both of which have provisions that serve to promote residential development on substandard lots.

The county's reasonable use exception allows owners of substandard lots, such as Hazel Ford's, that were created before the county "down-zoned"⁴ the property to develop the property for residential use:

. . . if a substandard lot of record in the . . . Rural Intermediate . . . 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. . . .**

SCC 14.16.850(4)(f)(i) (emphasis added).

The county also allows the Administrative Official (the Planning Department's director or authorized staff) to administratively reduce setbacks "**where topography or critical areas or the lot's size and configuration** impact the reasonable development of the property" upon a finding that the reduction in setbacks will maintain "public health, safety, and welfare." SCC 14.16.810(4) (emphasis added).

The county explicitly provides for a liberal interpretation of variance requirements to allow residential development on like-zoned lots, such as lots in the RI zoning district. *See* SCC 14.10.030(2)(b) ("Literal interpretation of the provisions of this Chapter would deprive the applicant

⁴ *See King County v. Wash. State Boundary Review Bd.*, 122 Wn.2d 648, 686, 860 P.2d 1024 (1993) (defining "'down zone' -- an action which reduced the number of available uses for the area.")

of rights commonly enjoyed by other properties **in the same district** under the terms of SCC Titles 14 and 15.”) (Emphasis added.)

Butler’s reasons for ignoring the county’s direction for a liberal application of variance requirements are hyper-technical, general, and not well-founded. The court should find that the county correctly applied the applicable ordinances and that substantial evidence in the record supports the county’s approval of Hazel Ford’s application to build a small view home on her property.

A. Standard of Review.

Butler has the burden of proving error. RCW 36.70A.130(1).

Evidence and any reasonable inferences are reviewed in the light most favorable to the county and Hazel Ford because they prevailed in the highest forum exercising fact finding authority – before the Skagit County Hearing Examiner. See *Schofield v. Spokane County*, 96 Wn. App. 581, 586, 980 P.2d 277 (1999).

Whether the county’s interpretation of its own regulations and policies is erroneous is a question of law that is subject to de novo review. See RCW 36.70A.130(1)(b); *Pinecrest Homeowners Ass’n v. Glen A. Cloninger & Assoc’s.*, 151 Wn.2d 279, 290, 87 P.3d 1176 (2004). The county’s application of the facts to the law should be upheld unless the decision is clearly erroneous. See RCW 36.70C.130(1)(d).

The application of law to the facts is “‘clearly erroneous’ when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed.” *Whatcom County Fire Dist. No. 21 v. Whatcom County*, 171 Wn.2d 421, 427, 256 P.3d 295 (2011). To find a decision clearly erroneous, the reviewing court must be left with the definite and firm conviction a mistake has been committed. *Schofield*, 96 Wn. App. at 586. Under this standard, the court’s review is deferential to factual determinations by the fact-finding authority – here, the Skagit County Hearing Examiner. *See Schofield*, 96 Wn. App. at 586.

B. Butler seeks relief under four LUPA standards, but he abandons each by omitting necessary argument.

Butler claims relief under four of LUPA’s six standards for relief.

See Opening Brief at 12.

1. Butler fails to demonstrate that any alleged error of procedure or prescribed process was harmful.

Relief may be granted if the county “engaged in unlawful procedure or failed to follow a prescribed process, unless the error was harmless[.]” Butler cannot obtain relief under this standard, because he fails to establish that the allegedly unlawful procedure or failure was not harmless. *See* RCW 36.70C.130(1)(a).

Under the “last antecedent” rule,⁵ the legislature’s use of a comma before the qualifying phrase “unless the error was harmless” applies the “not harmless” requirement to both “unlawful procedure” and “failing to follow a prescribed process.” See *In re Sehome Park Care Ctr., Inc.*, 127 Wn.2d 774, 781-82, 903 P.2d 443, 447 (1995) (“the presence of a comma before the qualifying phrase is evidence the qualifier is intended to apply to all antecedents instead of only the immediately preceding one”).

“[A] harmless procedural error may not serve as a basis for the reversal of a land use decision.” *Ellensburg Cement Prods., Inc. v. Kittitas County*, 171 Wn. App. 691, 709, 287 P.3d 718 (2012).

Further, RCW 36.70C.130(1)(a) contemplates procedural and process errors that are “prejudicial to the substantial rights of the party assigning [error.]” See *Young v. Pierce County*, 120 Wn. App. 175, 188, 84 P.3d 927 (2004). The “substantial right” addressed in *Young* was an alleged violation of due process – a lack of notice about the land use violation. The *Young* court cited two cases that support restricting a “substantial right” to a constitutional-level violation: (1) *City of Bellevue*

⁵ See *In re Personal Restraint of Smith*, 139 Wn.2d 199, 204, 986 P.2d 131 (1999) (“The ‘last antecedent’ rule of statutory construction ‘provides that, *unless a contrary intention appears in the statute*, qualifying words and phrases refer to the last antecedent.’ A corollary to the rule is that ‘the presence of a comma before the qualifying phrase is evidence the qualifier is intended to apply to all antecedents instead of only the immediately preceding one.’”) (Citations omitted.) (Italics in original.)

v. *Lorang*, 140 Wn.2d 19, 32, 992 P.2d 496 (2000) in which the substantial right was conviction under an unconstitutional ordinance, and (2) *State v. Smith*, 131 Wn.2d 258, 264, 930 P.2d 917 (1997) in which the substantial right was the right to a fair trial given an instructional error that relieved the city of its burden of proof on an essential element of the charged crime.

Butler fails to allege, let alone demonstrate, that any process or procedural error caused him harm or substantially affected his rights.

Butler does argue, in passing, that Hazel Ford “herself submitted no statements in support of any of these requirements [to satisfy the criteria for a setback variance].” *See* Opening Brief at 17-20. This argument fails to recognize that Hazel Ford does not make findings of fact for the county. While he focuses on her apparent failure to provide a certain statement to the county in her application,⁶ he ignores the fact this statement is required to simply support a finding the county is required to make:

- (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

⁶ SCC 14.10.030 provides that “[a] narrative statement shall be included with the application forms demonstrating that the required variance conforms to the following standards: . . .”

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.

As Butler recognizes, the Hearing Examiner held three public hearings on Hazel Ford's application. *See* Opening Brief at 6-7, 8-11. This gave the Hearing Examiner the opportunity to consider – in addition to Hazel Ford's application – Hazel Ford and the Planning Department's presentation of additional facts that supplemented her application. Butler fails to demonstrate that these facts, which were established at a public hearing, could not be considered by the Hearing Examiner to provide the evidence Hazel Ford could have placed in a written statement.

That the Hearing Examiner made the necessary findings from sources other than a written statement from Hazel Ford is akin to the harmless error found in *Ellensburg Cement Prods., Inc. v. Kittitas County*, 171 Wn. App. 691, 709, 287 P.3d 718 (2012) (holding “the failure to formally incorporate a prior environmental document is harmless error.”)

Butler fails to demonstrate any harm or prejudice from the Hearing Examiner's making the needed findings after three public hearings.

2. Butler fails to demonstrate that the county has misinterpreted its ordinance.

The county's ordinances are clear and unambiguous. As addressed below, Butler fails to show how the county misinterpreted or failed to follow them.

3. Butler fails to demonstrate that the decision is not supported by substantial evidence.

Findings of fact supported by substantial evidence are verities on appeal. "Substantial evidence is evidence in sufficient quantum to persuade a fair-minded person of the truth of the declared premise."

Cowiche Canyon Conservancy v. Bosley, 118 Wn.2d 801, 819, 828 P.2d 549 (1992).

The failure to properly assign error to findings made by a hearing examiner normally renders such unchallenged findings verities on appeal. *See City of Medina v. T-Mobile, Inc.*, 23 Wn. App. 19, 29, 95 P.3d 377 (2004). However, in its discretion, "where proper assignment of error is lacking but the nature of the challenge is clear and the challenged finding is set forth in the party's brief," the court may review the findings. *Fuller v. Dep't of Employment Sec.*, 52 Wn. App. 603, 605, 762 P.2d 367 (1988). But, when an appellant fails to provide argument that findings of fact are not supported by substantial evidence in the record, the court should treat

the findings as verities on appeal. *See In re Disciplinary Proceeding Against Jackson*, 180 Wn.2d 201, 206, 322 P.3d 795 (2014).

Findings of fact were made by the Skagit County Hearing Examiner following each of several hearings. Butler fails to clearly assign error to any of the Hearing Examiner's findings of fact. Nor does he quote them in his brief.

Butler mentions only one Hearing Examiner finding: finding 19 at page 22 of his Opening Brief. While he argues that this finding is inadequate, he fails to demonstrate that it or any other finding is not supported by substantial evidence in the record.⁷

The court should find that the Hearing Examiner's findings of fact are verities on appeal.

4. Butler fails to demonstrate that the county's decision is a clearly erroneous application of the law to the facts.

As addressed below, the county properly applied its variance and RUE ordinances to the facts adduced by the Hearing Examiner following three public hearings.

⁷ Butler appears to challenge finding 19 on the sole ground that the Hearing Examiner did not address "whether the other claimed Holiday Hideaway lots are so constrained as to force homed to be sited at the top of a landslide hazard with no buffers." *See* Butler's Opening Brief at 22. Thus, Butler attempts to shift the burden of proof from his shoulders to the county. To prevail on this issue, Butler needs to demonstrate the allegedly missing facts and establish that the Hearing Examiner's finding were clearly erroneous. He did not do so.

C. Substantial evidence in the record supports the variance from the county's setback requirements.

Holiday Hideaway was platted before county development regulations existed resulting in small lots with significant topographic features that make "many of the lots [] unsuited for buildings." Record at 172-174. Butler describes Hazel Ford's lot 12 as being constrained by geographic features.⁸ Record at 303 (describing the residential lot as only allowing for a 5' x 5' flat area that meets all setback requirements.)

This historical and geographical background presents a challenge for Hazel Ford to locate her home:

The topography of this particular site is somewhat steep exiting from Decatur. Due to the topography, and the road appearing to be located in the approximate easterly half of the right of way. Based on the site plan and narrative statement submitted, there does not appear to be an alternative location that would allow construction of the proposed residence. The topography of the 'garage' parcel appears to be almost the opposite of the 'residence' parcel. Topographically, the 'garage' parcel is somewhat below Decatur. Placing the proposed garage within Decatur Place right of way, would provide a better construction site.

Record at 43.

⁸ Butler's opinion, while useful to depict the difficulties Hazel Ford faces in locating a home, does not accurately describe the buildable area on lot 12.

To build her small view home in a suitable, buildable area, Hazel Ford needed a reduction in the setback from two streets adjacent to her corner lot, Holiday Hideaway Blvd. and Decatur Place

The setback requirements for corner lots vary depending on whether the setback is for a primary or secondary frontage:

Setback, front: a setback extending across the full width of the lot, at the required depth, which shall be measured at right angles from the front lot line to a line parallel thereto on the lot. **Lots having more than 1 front lot line, as on corner and through lots, shall meet the required front setback for the front lot line that contains the dedicated access; all other front lot lines shall have a setback of 20 feet.**

SCC 14.04.020 (emphasis added).

Because the proposed home and garage would each front onto Decatur Place, it presents the primary frontage. In the RI zoning district, the standard setback for a primary frontage is 25 feet. SCC 14.16.300(5)(a)(i) (“Front: 35 feet, 25 feet on minor access and dead-end streets.”) Holiday Hideaway Blvd. presents the secondary frontage and the standard setback requirement would be 20 feet. *See* SCC 14.04.020.

Hazel Ford’s plans for a two-story single family residence with a modest 748 square foot footprint on lot 12 call for a setback of five feet from Decatur and of approximately 16 feet from Holiday Hideaway Blvd. Her plans for a 24 x 24 square foot garage on lot 13 call for a setback of

10 feet from Decatur Place. Record at 334-35, 466 (depicting residence footprint as 22' x 34', not including second story deck).

Thus, to build her “small view home” on the available space, see Record at 281, Hazel Ford needed a variance from the setback requirements from the dimensional standards set out in SCC 14.16.300(5)(a).

1. The Skagit County Code allows for a variance from setback requirements when topography and lot size restrain the construction of a reasonable residence.

Planning is authorized to administratively reduce the “the required front, side or rear setbacks **where topography or critical areas or the lot’s size and configuration impact the reasonable development of the property.**” SCC 14.16.810(4) (emphasis added). *Also see* SCC 14.10.020(1)(c) (designating variances related to setback requirements under SCC 14.16.810(4) as administrative variances.)

To reduce a front setback, “the Administrative Official must determine that the public health, safety, and welfare will be maintained.” SCC 14.16.810(4).

The county found that the SCC 14.16.810(4) requirements for a variance from the front setbacks were met:

1. All of the lots within the Plat of Holiday Hideaway are considered substandard to current requirements. Due to the plat having been established prior to zoning requirements,

it is necessary to take that into consideration in addition to topography, etc.

2. Staff finds that the proposed reduction in setbacks will not create a level of demand that would negatively impact the public health, safety, traffic, or general welfare.

The subject property is located within the Rural Intermediate zoning designation. The request is in compliance with the allowances of the Rural Intermediate zoning designation.

Record at 338.

In addition, approval of a variance requires the county to 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).

The applicant is asked to supply a narrative statement demonstrating that the requested variance conforms to several standards. SCC 14.10.030. However, nothing in the Skagit County Code restricts the county from using evidence outside the applicant's narrative to support the

required findings for a variance. The county may rely on reports, applications, plans, drawings, photographs, testimony, etc. to provide evidence for its findings. In this case, because Planning failed to make the required findings for a variance, the Board remanded the matter back to the Hearing Examiner to make those findings. Record at 20.

2. Hazel Ford meets the criteria for a variance from the standard setback requirements.

Before granting a variance, the county is required to find:

- (a) The reasons set forth in the application [described under SCC 14.10.030] 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.

Butler limits his argument to four issues.

- a. **Butler’s argument that Hazel “Ford failed to make the showing required by .030(1)(f) that rejection of the variance will deny her all reasonable use of her property, Butler’s Opening Brief at 18-19, is not supported by the record.**

As addressed above, Butler fails to demonstrate that Hazel Ford’s failure to address this factor in her application is not harmless error.

Further, the Hearing Examiner made the necessary findings:

18. The weight of the evidence in this case from all three hearings, viewed under the clearly erroneous burden assigned to Butler (SCC 14.06.160(3)) is that the topography of Lot 12 and Lot 13 directs any reasonable development of those properties to be as requested by Ford. HE decision 7/10/14 agrees with the administrative official that public health, safety and welfare will be maintained even with the granting of the setbacks (HE decision 7/10/14).

The weight of the testimony in the current hearing is that a large percentage of the homes in the Holiday Hideaway Plat take advantage of the “view” height difference. That trait is common throughout the Plat. It would not confer a special privilege upon Ford to grant the requested setbacks and development plans.

Record at 95.

- b. **Butler’s argument that Hazel Ford “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,’ Butler’s Opening Brief at 19-20, is not supported by the record.**

As set out below, the Hearing Examiner made the necessary findings. Also, Butler fails to demonstrate that Hazel Ford’s failure to

address this standard in her application⁹ resulted in an error that was not harmless or that prejudiced him.

- c. **Butler’s argument that “the setback variances should be reversed because they grant special privileges to [Hazel] Ford that are denied to others in the same subdivision, Butler’s Opening Brief at 19-20, is not supported by the record.**

In arguing that Hazel Ford received a special privilege, Butler intentionally misstates the standard for granting a variance. The county requires evidence “that 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.**” SCC 14.10.030(2)(a) (emphasis added). Similarly, the words “in the same district” are used throughout the standards set out in SCC 14.10.030(2). Nowhere does the county code require consideration of special privileges that are “denied to others in the same subdivision” as Butler argues. *See* butler Opening Brief at 20.

A “subdivision” is distinct from a “district.”

⁹ As Butler points out in his statement of procedural facts, Planning initially applied the wrong standard to Hazel Ford’s application. This led to three hearings before the Hearing Examiner and two closed record appeals before the Board of County Commissioners. That Hazel Ford elected to produce the necessary evidence at the hearings rather than amend her application was, under the circumstances, an appropriate course of action that did not harm Butler.

The county defines a subdivision as the division of land into “lots, tracts, parcels, sites or divisions, for the purpose of sale, lease or development[.]” *See* SCC 14.04.020. A “district” refers to the county’s several zoning districts. *See* SCC 14.16.030 (“Skagit County is hereby divided into land use districts to carry out the policies and objectives of the Comprehensive Plan.”) The Rural Intermediate (RI) zoning district, is one such district. *See* SCC 14.16.030 (Table of Land Use Districts).¹⁰

By missing this distinction and by failing to even consider other subdivisions in the RI zoning district, whether elsewhere in Skagit County or even on Guemes Island, Butler fails to show that the county’s decision was clearly erroneous.

d. Butler’s argument that “approvals of setback variances are not adequately supported by findings of fact” is not supported by the record.

Butler fails to support this argument with anything more than the cursory statement that “[t]he Examiner rationalized approval of the variance on the asserted grounds that ‘the topography of Lot 12 and Lot 13

¹⁰ In reply, Butler may argue that RCW 36.70.810(1) invites comparison to “other properties in the vicinity and zone in which subject property is situated.” However, he does not – and cannot – demonstrate that RCW 36.70.810(1) and not the county code is the applicable standard. *See* RCW 36.70A.320(1) (“Except as provided in subsection (5) of this section, comprehensive plans and development regulations, and amendments thereto, adopted under this chapter are presumed valid upon adoption.”) To demonstrate invalidity of a county development regulation, Butler needed to file a timely challenge to the county ordinance. He did not.

directs any reasonable development of those properties as requested by Ford.” By not bothering to support this argument with citation to authority, the record, or reasoned analysis, Butler shows that his real dispute is “this is not the finding required for variance approval[.]” Butler Opening Brief at 21. Thus, Butler’s core reason is that the county did not make the necessary findings of fact. *See* Butler Opening Brief at 23.

As addressed below, the county made the required findings to grant a variance and each is supported by substantial evidence in the record.

3. Substantial evidence in the record supports the findings required under SCC 14.10.030 for a variance.

- 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. SCC 14.10.030(2)(a).**

The required findings are found in Hearing Examiner’s finding 18.¹¹ Butler does not disagree that the reasonable use of the property is

¹¹ Record at 96.

18. “The weight of the evidence in this case from all three hearings, viewed under the clearly erroneous burden assigned to Butler (SCC 14.06.160(3)) is that the topography of Lot 12 and Lot 13 directs any reasonable development of those properties to be as requested by Ford. HE decision 7/10/14 agrees with the administrative official that public health, safety and welfare will be

constrained by the property's topography, which topographical constraint provides a valid reason for granting a variance. *See* RCW 36.70.810(2).

Holiday Hideaway, as was typical for plats approved before the county adopted its zoning ordinance, was platted for maximum residential development on very small lots. *See* Record at 338 (The Plat of Holiday Hideaway was "established prior to zoning requirements"). *Also see* Transcript at 109. It is also located on an island, Guemes Island, which is highly desirable for residential use:

Guemes Island is a quiet place. It has no industry or commerce, no hustle of traffic, no crime -- and no police. The air above it is pure and sweet, and the waters around it sparkling and clean. It lies at the eastern end of the San Juan archipelago -- one of a group of inordinately beautiful islands. Its southern shore running nearly parallel to the mainland about 1 mile south at Anacortes, forms the north shore of Guemes Channel, a deep water body capable of carrying the largest ships afloat. Framed by inviting beaches, highlighted with open fields and wooded uplands, this beautiful island affords the residents there a peaceful pastoral haven for their homes and several beach and park areas for public recreation. When the Skagit County Commissioners, after years of intensive zoning study and planning, reserved Guemes Island for residential and recreational purposes only, they were simply recognizing

maintained even with the granting of the setbacks (HE decision 7/10/14)."

what was universally accepted as the highest and best purposes for the use of the land.

Smith v. Skagit County, 75 Wn.2d 715, 716-17, 453 P.2d 832 (1969).

The Rural Intermediate zoning district, which was adopted after 1964, the year Holiday Hideaway was platted, now requires lots in plats to have a minimum lot size of 2.5 acres. SCC 14.16.300(5)(c). This is usually sufficient for a substantially sized residence without a setback variance even if the lot has critical areas and other topographical features that may restrict development.

The uniqueness of Hazel Ford's two lots within the RI zoning district is not disputed. For example, Butler argues that Hazel Ford is restricted to a five by five foot area suitable for building on the residential lot. Butler further characterizes the uniqueness of Hazel Ford's lots as:

[a] cliff and debris field below a rock knob on its easterly side; the top of the rock knob rises about 12 feet above the surface on the adjacent road, Decatur Place. On its westerly side, the lot falls abruptly, initially at a gradient of nearly 100%. 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.

Petitioners' Memorandum at 3.

From this argument, Butler argues that Hazel Ford should only be allowed to locate her residence on lot 13. However, Thomas Lindsay, an

architect, “estimates that only 30% of lot 13 [where the garage is proposed] is useable for construction purposes and that portion is the western portion of the lot.” Record at 44.

Hazel Ford’s lots are unique and present challenges to development not found elsewhere in the RI zoning district. Record at 44 (“[T]here is a reason there has been no construction on either of these lots since they were platted in 1962. The lots are challenging and only a variance from current setback standards will allow for the residential development the current owner seeks.”)

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. SCC 14.10.030(2)(b).

The required findings are found in Hearing Examiner’s finding 19.¹² Butler does not deny that the county may liberally interpret the variance criteria and, as noted above, he erroneously limits his comparison to properties in the same subdivision rather than those in the RI zoning

¹² Record at 96.

19. “The weight of the testimony in the current hearing is that a large percentage of the homes in the Holiday Hideaway Plat take advantage of the “view” height difference. That trait is common throughout the Plat. It would not confer a special privilege upon Ford to grant the requested setbacks and development plans.”

district. Thus, Butler fails to offer any evidence of an improper special privilege.

SCC 14.10.030(2)(b) allows the county to make a liberal interpretation of the requirements for a variance when one is needed to allow a property owner to build a home. In this case, Hazel Ford seeks to build a modest home on lots that were platted – and remain zoned – for residential use. The county code very clearly supports such residential development in the RI zoning district even on substandard lots. See SCC 14.16.850(f) (authorizing residential development on substandard lots in the RI zoning district with minimal conditions.)

The predominate use in the RI zoning district is residential. See SCC 14.16.300(1) (“The purpose of the Rural Intermediate district is to provide and protect land for residential living in a rural atmosphere, taking priority over, but not precluding, limited nonresidential uses appropriate to the density and character of this designation.”) The only use in Holiday Hideaway is residential. Certainly, the lots that have been developed in the Holiday Hideaway plat have been developed for residential use. As set out in *Smith v. Skagit County*, there is no industry or commerce on Guemes Island and the record does not show any significant agriculture or commercial use in the area.

Like the other developed lots in Holiday Hideaway, which have been developed because of their view, Hazel Ford's lots are "clearly situated to take advantage of a natural view that other property owners either now enjoy or will enjoy when the lot is developed." Record at 432-33.

The Department is authorized to administratively grant a variance from a front setback "where topography . . . or the lot's size and configuration impact the reasonable development of the property." SCC 14.16.810(4). Here, absent a setback on lot 12, Hazel Ford would be restricted to a very small home that could not be located to take best advantage of the lot's natural benefits. That would not allow reasonable development of a reasonably-sized home in a reasonable location.

c. The special conditions and circumstances do not result from the actions of the applicant. SCC 14.10.030(2)(c).

Although the county did not make a specific finding that Hazel Ford did not create the "special conditions and circumstances" that support her request for a setback, this finding is implicit in Hearing Examiner finding 18. There is no evidence that Hazel Ford created the topographical conditions or her lots. Butler does not allege and nothing in the record establishes that Hazel Ford did anything other than purchase two lots that were created in 1964 or that she expected to be able to use the

undeveloped lots for her home, garage, and drain field in a manner that made the best use of the topographical features that affect her two small lots.

If any error may be found in the lack of a specific finding on this requirement, it is harmless.

- 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. SCC 14.10.030(2)(d).**

Although the county did not make an explicit finding that Hazel Ford would not receive “any special privilege,” this finding is implicit in Hearing Examiner findings 19 and 28.¹³

Nothing in the record establishes that Hazel Ford will receive a special privilege. Variances from setbacks are granted when the requirements for a variance are met. Further, the record establishes that denial of the variance would “deprive Ms. Ford of her ability to develop the proposed residential property on lot 12 (P65742) of the reasonable use and development rights enjoyed by her neighbors in the same district.” Record at 432. As is the case for other property owners, Hazel Ford’s two

¹³ Record at 96.

28. Butler has failed to produce proof under the clearly erroneous test (or any test) that Ford has received special privileges.

“lots, when combined, formed a perfect site for a small view home on one lot, and a garage and septic system on the other lot.” Record at 441.

Another owner of two lots in Holiday Hideaway offered that “[w]hen you consider two small lots such as ours, one lot is needed for septic and the other lot is needed to capture the view for the primary residence.” Record at 455.

In similar circumstances, where lake front lots on Lake Cavanaugh are too small for septic drain fields, lots “are routinely aggregated across South Shore Drive and North Shore Drive, in order to provide an area for on-site sewage disposal and well placement on the upper side of the road, and allow residential construction on the lakeside or the downhill side of the road.” Transcript at 106.

Butler’s argument that Hazel Ford should locate her residence on lot 13 rather than lot 12 – which he appears to conceive as a special privilege¹⁴ – is based on the fallacy that lot 13 offers a view. Without citation to the record, Butler argues that “Lot 13 is developable and has a view to the west.” Opening Brief at 18. Butler also argues, “Ford has views of Guemes Channel from both Lots 12 and 13,” Opening Brief at 20, without citation to the record.

¹⁴ Correctly, Butler does not argue that qualifying for a variance is in itself a special privilege.

However, the record is clear that only lot 12 offers a view. *See* Record at 11 (Hearing Examiner Finding 12, “The topography of Lot 13 is almost the opposite of Lot 12.”) The Hearing Examiner also determined that granting a variance to Hazel Ford “would not confer a special privilege” because “a large percentage of the homes in Holiday Hideaway Plat take advantage of the ‘view’ height difference.” Record at 95 (Finding 19.) These findings are supported by Architect Thomas Lindsey’s testimony about the specific elevations of the two lots and conclusion that a 12 foot “height difference which would block any view” from a house built on Lot 13. Record at 431. *Also see* Record at 440 (photo taken by Architect Lindsey and admitted as Exhibit 43, showing a view from Lot 13 to Lot 12 on the other side of Decatur Place.) There is no view from the east lot because of topography and the eastern slope away from the private driveway.

Butler’s argument that the variance grants Hazel Ford some sort of special privilege is inconsistent with the evidence in the record, and if any error may be found in the lack of a specific finding on this requirement, it is harmless.

e. An explanation of how the requested variance meets any other specific criteria required for the type of variance requested. SCC 14.10.030(2)(e).

Butler's argument that Hazel Ford needed a setback from the steep slopes on her property fails to recognize that a variance is only required for geologically hazardous steep slopes.

Because of concern that the steep slopes on Hazel Ford's property may have created the need for a buffer between any development and the slopes, the county required Hazel Ford to obtain a geologically hazardous area site assessment. *See* SCC 14.24.020 (setting out requirements for site assessment.) Edison Engineering, after conducting the required geotechnical investigation, concluded "that the site is not a geologically hazardous area where the house and garage are to be constructed," and that the "slopes do not present severe erosion hazards as long as the amount of water is small, as in house drainage and the septic system, even though the site has slopes in excess of 40 percent, because the building lot is small and has always been impervious." Record at 277.

Given these findings, the slopes on Hazel Ford's lots are not geologically hazardous areas that require a setback. *See* SCC 14.24.400 (defining geologically hazardous areas to "include areas susceptible to the effects of erosion, sliding, earthquake, or other geological events.")

Butler did not contradict Edison Engineering's findings and conclusions that the slopes were not "geologically hazardous." Because the record establishes that the slopes on Hazel Ford's properties were not geologically hazardous, they did not qualify as critical areas, and the county was not required to impose any additional setback requirements or make findings to show compliance with critical areas regulations.¹⁵ Thus, the only variance Hazel Ford needed was from the setback requirements for lots in the RI zoning district. She did not need an additional setback from the steep slopes. Thus, no specific finding was required on this requirement.

The county is also required to consider restrictions imposed by notes on the Plat of Holiday Hideaway. Such plat notes set an outside limit on any variance from the setbacks that could be allowed under the county code. *See Jones v. Town of Hunts Point*, 166 Wn. App. 452, 459, 272 P.3d 853 (2011) ("As the hearing examiner correctly determined, the town was required by local ordinance and statute to interpret and apply the plat restriction to [the developer].")

¹⁵ Rather than work to deny a variance, the steep slope geography, which limited the space available to build a residence and detached garage and locate a septic drain field, supports the administrative reduction from the standard the setbacks from Decatur and Holiday Hideaway Blvd. *See* SCC 14.16.810(4) ("The Administrative Official may reduce the required front, side or rear setbacks where topography or critical areas or the lot's size and configuration impact the reasonable development of the property.")

Note 2 on the Plat of Holiday Hideaway allows a minimum setback from Holiday Hideaway of 10 feet and does not require a setback from Decatur Place, a private road:

No structure of building shall be constructed on any lot, tract or parcel of this plat other than 20 feet to the front property line, and 5 ft. side yard, and in the case of corner lots, no structure or building shall be constructed closer than 10 feet to the side property line abutting the road right of way EXCEPT there will be no setbacks from private roadway easements.

Record at 318, 40. Hearing Examiner finding 23¹⁶ makes the required finding for this “other specific criteria. It is supported by substantial evidence in the record.

The county approved a reduction in the primary front setback – from Decatur Place, a private drive – from 20 feet to five feet. The setback from Holiday Hideaway, the secondary front setback, was reduced from 20 feet to 16 feet at the northwest corner of lot 12, which allowed for an angular placement of the residence. Neither setback reduction runs afoul of the plat restriction on setbacks.

¹⁶ Record at 96.

23. “Plat restriction 2 provides that there are no setbacks from a private roadway easement, which is what Decatur Place is. The uncontroverted evidence is that there are no violations of any plat restrictions.”

The restrictions set out in the plat notes on the Holiday Hideaway plat, being based on an awareness that subdividing a small area into approximately 400 separate lots with difficult terrain features, appear to be more suitable for the topography and lots in the Holiday Hideaway plat than the setbacks set for the 2.5 acre lots now required in the RI zoning district. Allowing a setback reduction that falls short of the minimum setbacks set by the plat is an allowable liberal interpretation that serves the goal of authorizing residential development on such substandard lots.

- 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)(f).**

The requirement for a finding that an applicant would be denied all reasonable use of her property applies only “if applicable.” SCC 14.10.030(2)(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.”). It is not applicable here.

Because the reasonable use exception – which necessarily incorporates the variance requirements – exists to allow owners of substandard lots in the RI zoning district to build residences, interpreting the variance requirements to allow a reasonable use for residential development only if the land cannot be used for any other allowable use would defeat the intent of the reasonable use exception.

SCC 14.10.030(2)(f) must be read together with SCC 14.16.810(4) to give effect to county's scheme for reasonable use exceptions. *See Whatcom County v. City of Bellingham*, 128 Wn.2d 537, 546, 909 P.2d 1303 (1996) ("Statutes must be interpreted and construed so that all the language used is given effect, with no portion rendered meaningless or superfluous") *citing Stone v. Chelan County Sheriff's Dep't*, 110 Wn.2d 806, 810, 756 P.2d 736 (1988); *Tommy P. v. Bd. of County Comm'rs*, 97 Wn.2d 385, 391, 645 P.2d 697 (1982). Further, if there are both general and specific provisions that apply to the same subject matter and the provisions conflict, the more specific provision would apply. *See In re Estate of Kerr*, 134 Wn.2d 328, 343, 949 P.2d 810 (1998).

Butler's interpretation that a variance from setback requirements on a substandard lot needed to build a residence must be denied unless it blocks "all reasonable use of his or her property" conflicts with Planning's clear administrative authority to "reduce the required front, side or rear setbacks where topography or critical areas or the lot's size and configuration **impact the reasonable development** of the property" after determining that the public health, safety, and welfare will be maintained. SCC 14.16.810(4) (emphasis added).

A reasonable interpretation of SCC 14.16.810(4) and SCC 14.10.030(2)(f) would restrict the "where applicable" condition under

SCC 14.10.030(2)(f) to setbacks other than front, side or rear setbacks that may be administratively reduced under SCC 14.16.810(4) to allow for residential use on a substandard lot. For example, the county's critical areas ordinance provides that a setback from a critical area may only be reduced upon compliance with chapter 14.10 SCC. SCC 14.24.140(1). No similar provision exists for a setback from a dimensional standard which may be granted when considerations of topography and lot size – the controlling restrictions on Hazel Ford's use of her residential property – “impact the reasonable development of the property.” *See* SCC 14.16.810(4).

Further, the more specific criteria regulating setbacks under the “reasonable use exception” should control over the more general requirement that an applicant is required to address in an application for a variance. Excepting variances from the dimensional standards for setbacks on a substandard lot in the RI zoning district that is constrained by its topography is a reasonable interpretation of the county code. When the use of a substandard lot for a residence is constrained by topography, critical areas, and lot size, which support granting an RUE, the general variance criteria at SCC 14.10.030(2)(f) should give way to the specific criteria under the RUE ordinance.

The Hearing Examiner addresses the reasonable use of the property in findings 25 and 26.¹⁷ These findings are supported by the facts that Hazel Ford seeks to build a modestly sized home, not a mansion, with a footprint of less than 800 square feet. Her use of her property for her home is severely limited by lot size and topography. Recognizing the topographical and lot size constraints she would face, Hazel Ford had to buy two lots from separate prior owners to fit in her proposed home and garage. It belies common sense to hold that because she purchased both Lots 12 and 13 and proposes to combine them she should now have to leave Lot 12 completely unused as Butler suggests. That would be a wholly unreasonable use of the property. Thus, the county found that “the Applicant will in fact lose reasonable use of her property because there is no other place to put a house, as well as her on-site septic system.”

Transcript at 107.

¹⁷ Record at 96.

25. A prior factual determination concerning reasonable use of the Ford property was not changed by the BoCC remand and is not properly an issue in this case.

26. There is no credible evidence in the record that any restrictions against a single family residence exist in the Plat of Holiday Hideaway. Butler’s claim of “camping” usage of Lots 12 and 13 is without basis.

Properly, Butler declines to argue that the Hearing Examiner's findings are not supported by substantial evidence in the record. And nothing in the record support's Butler's argument that the home and garage could be moved to other locations. Butler offers no site plans, surveys, etc.

Substantial evidence in the record supports finding that a variance from the front and side setback requirements are necessary to allow Hazel Ford a reasonable use of her property.

4. The variance is the minimum variance that will make possible the reasonable use of land, building or structure. SCC 14.10.040(1)(b).

The county found that “[b]ased on the site plan and narrative statement submitted, there does not appear to be an alternative location that would allow construction of the proposed residence.” Record at 336. This finding follows from the topographical constraints on development, including the need for two lots to locate a residence, garage, and septic field. That Hazel Ford elected to build a small view home with a footprint of less than 800 square feet demonstrates that she is not seeking more intrusion into the setbacks – which are eminently suitable for 2.5 acres lots but not for a .4 or .26 acre lot with steep slopes – than is necessary.

“Even though Decatur is a narrow and/or undeveloped driveway for very few of us nearby lot owners, only a portion of the actual right of

way is used by the property owners. Her building being close to the property line will not affect access to our property for anyone.” Record at 454-455.

5. 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.

The purposes of the county’s zoning code, Title 14 SCC, broadly provide for economic and social advantages; livability and quality of housing; desirable, appropriately located living areas in a variety of dwelling types; affordable housing; predictability regarding future development; and judicious, efficient, timely and reasonable administration. SCC 14.02.010. To this end, the county permits residential uses in the RI zoning district. SCC 14.16.300(2)(d). It also recognizes that developers platting areas under state law before the county enacted its first zoning code have left numerous persons holding substandard lots and therefore provided a means for those persons to develop those lots. One means involves obtaining a reasonable use exception to place a residence on lots that became “substandard” as the county adopted zoning regulations. SCC 14.16.850(4).

Hazel Ford purchased two lots, one on either side of a private road, with the understanding that they were contiguous and could be aggregated

and used for residential and residential accessory uses. Such actions are in harmony with the purposes of the county's code and the intent of the reasonable use criteria for development of substandard lots.

Denying her the reasonable use exception and a variance from the standard setback requirements – which reductions fully meet the explicit plat requirements for setbacks – is not detrimental to the public welfare or injurious to the neighborhood. Record at 338 (“Staff finds that the proposed reduction in setbacks will not create a level of demand that would negatively impact the public health, safety, traffic, or general welfare.”)

The reductions in setback requirements will not restrict use of Holiday Hideaway Blvd or Decatur Place, a short and undeveloped private road. Record at 147. The development of a small view home and detached garage “will not impact any views nor will any of the new construction be visible.” “Once construction is completed, there should be no substantial negative impact on the adjacent properties.” Record at 335. As explained by architect Thomas Lindsey, “[w]hen you drive around Holiday Hideaway you will notice that a large percentage of the homes have been sited to capitalize on the view to the water, mountains or territory. The view is a common trait shared by many neighbors. To deprive Hazel Ford

of the same opportunity would be to deny her the same privilege that others in her neighborhood benefit from.”

Butler’s argument that the property is suitable for camping fails to recognize the greater good that comes from allowing residential property to be used for a residence. Nor is it supported by any evidence in the record.¹⁸ The only detriment that Butler would appear to suffer is that he’ll have another neighbor in a residential neighborhood and his view may be diminished.¹⁹ This does not establish a detriment to the public welfare or injury to the neighborhood that the county or the court need consider.

“[L]ots in Holiday Hideaway are not for camping[.]” Transcript at 119.

D. Hazel Ford meets the criteria for a reasonable use exception, which allows her to build her home on lot 12.

Because Hazel Ford’s two substandard lots, even when aggregated (combined) into one lot, do not meet the minimum lot size for the RI

¹⁸ Record at 96.

26. There is no credible evidence in the record that any restrictions against a single family residence exist in the Plat of Holiday Hideaway. Butler’s claim of “camping” usage of Lots 12 and 13 is without basis.

¹⁹ As Lindsey testified, “Mr. Butler lives on Decatur, probably some 200, 300’ from the site that we are making an application for. I met him on the site the first – maybe the first or second time I was there. He had a picnic table on the rock that we intend to develop. And it is my opinion that he has been using the site, or had been using the site as, you know, a nice – it has a very nice view from there and – and he has – his attitude is he really doesn’t want neighbors. Transcript at 113.

zoning district and she did not qualify outright for an exception allowing residential development²⁰ she needed to meet the alternative requirements for a reasonable use exception:

...

(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.

...

SCC 14.16.850(4)(f)(i).

Butler's argument that the RUE is grounded on an erroneous interpretation of the law is not supported by the record or a reasonable interpretation of the county's RUE ordinance.

1. The county's RUE ordinance does not preclude variances allowed by other sections of the county code.

Butler argues that Hazel Ford does not "satisfy all other requirements of the Skagit County Code." Specifically Butler argues that Hazel Ford cannot meet the requirements for a variance from setback

²⁰ See SCC 14.16.850(4)(a)(iii) (quoted below).

provisions to build a residence on a substandard lot. This argument, alleging a standard for relief under RCW 36.70C.130(1)(b) that the county misinterpreted its RUE ordinance, is not supported by the record, statute, or precedent.

In making this argument, Butler ignores the plain and unambiguous language in SCC 14.16.850(4)(f)(i), which provides in part: “Variances from the requirements of **this Section** shall not be considered.” (Emphasis added.) The words “this Section” limit the no-variances restriction to just the requirements of section .850 of chapter 14.16 SCC. It does not restrict applicants for an RUE from obtaining a variance from some other requirement.

The court should decline to consider Butler’s argument that SCC 14.16.850(4)(f)(i) bars independently allowable variances of other sections of the county code because it conflicts with .850(4)(f)’s plain and unambiguous language.

When interpreting a statute, the court’s fundamental objective is to determine and give effect to the intent of the legislature.” *State v. Sweany*, 174 Wn.2d 909, 914, 281 P.3d 305 (2012) (citing *State v. Budik*, 173 Wn.2d 727, 733, 272 P.3d 816 (2012)). The court first looks to the statute's plain language. “If the plain language is unambiguous, subject

only to one reasonable interpretation, [the court's] inquiry ends.” *State v. Velasquez*, 176 Wn.2d 333, 336, 292 P.3d 92 (2013).

SCC 14.16.850(f)(i), by its plain and unambiguous terms, simply bars variances from RUE requirements. It does not bar use of applicable variances from any other section of the Skagit County Code when a person applies for an RUE. Thus, because variances from setback requirements are regulated under SCC 14.16.810(4) and chapter 14.10 SCC and not under section .850 of chapter 14.16. SCC, the county could grant Hazel Ford a variance from setback requirements and an RUE.²¹

2. Hazel Ford’s RUE is supported by substantial evidence in the record.

The Skagit County Code explicitly designates residences as a reasonable use in the RI zoning district. SCC 14.16.850(4)(f)(i) (“Issuance of a reasonable use exception shall allow the lot owner to apply for residential development permits on the lot.”); SCC 14.16.300(2)(d) (designating “detached single-family dwelling units” as a permitted use in the RI zoning district).²² *Also see* Record at 224 (“The Reasonable Use

²¹ Butler does not argue or demonstrate that the county issued Hazel Ford a variance from any requirement in SCC 14.16.850.

²² Holiday Hideaway was platted for small residential lots similar to Hazel Ford’s. *Buechel v. Dep’t of Ecology*, 125 Wn.2d 196, 209-10, 884 P.2d 910 (1994) (“Although not necessarily determinative, courts may look to the zoning regulations in effect at the time of purchase as a factor to determine what is a reasonable use of the land.”)

Exception guarantees that a subject parcel is then eligible for residential development applications.”)

Given the expressed preference for residential uses as a reasonable use, the requirements to obtain a reasonable use exception for a residential use are not stringent.

...

(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.

...

SCC 14.16.850(4)(f)(i).

Hazel Ford, who bought the two lots from two separate owners (Record at 441), meets the first requirement for a reasonable use, SCC

14.16.850(4)(f)(i)(A), by aggregating the two contiguous substandard lots that she bought to build a residence into a single parcel.²³

She meets the third requirement for a reasonable use, SCC 14.16.850(4)(f)(iii), because there is no need to extend any urban services to her property.

As discussed above, she satisfies all other requirements of the Skagit County Code, the second criteria for a reasonable use, SCC 14.16.850(4)(f)(ii), when she qualified for a variance from the setback requirements for lots located in the RI zoning district.

V. REQUEST FOR COSTS AND ATTORNEY FEES

Should the court affirm the superior court and deny Butler's appeal, respondents request an award of their reasonable attorney fees and costs as the prevailing party on appeal. *See* RCW 4.84.370(1); RCW 4.84.370(1)(a). Skagit County and Hazel Ford, the respondents in this appeal, were the prevailing parties before the superior court. Should the court affirm the superior court, Skagit County and Hazel Ford are entitled to their reasonable attorney fees and costs upon application. *See* RAP 14.4.

²³ The Hearing Examiner imposed a condition that Hazel Ford complete the paperwork for joining the two lots into one common ownership. Record at 14-15. Butler does not challenge this condition.

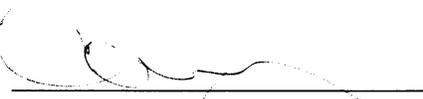
VI. CONCLUSION

For the reasons set forth above, Skagit County and Hazel Ford ask that the court issue its order denying Butler's appeal.

RESPECTFULLY SUBMITTED this 26th day of April, 2016.

RICHARD A. WEYRICH
Skagit County Prosecuting Attorney

By:



A. O. DENNY, WSBA #14021
JILL DVORKIN, WSBA #34484
Deputy Prosecuting Attorney



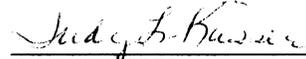
C. THOMAS MOSER, WSBA #7287
Attorney for Hazel Ford

DECLARATION OF DELIVERY

I, Judy L. Kiesser, declare as follows:

I sent for delivery by; [xx]United States Postal Service; []ABC Legal Messenger Service, a true and correct copy of the document to which this declaration is attached, to JEFFREY M. EUSTIS, ARAMBURU & EUSTIS LLP, 720 THIRD AVENUE, STE 2000, SEATTLE, WA 98104.

I certify under penalty of perjury under the laws of the state of Washington that the foregoing is true and correct. Executed at Mount Vernon, Washington, this 27th day of April, 2016.



JUDY L. KIESSER