

ISLAND COUNTY HEARING EXAMINER

RE: Appeal) File No. APP 337/08 FERGUSON
Appellants: Ralph Ferguson &) APP 338/08 DANIELSON
Ginette Danielson) FINDINGS OF FACT
) CONCLUSIONS OF LAW
) AND DECISION ON REMAND

SUMMARY OF APPEAL AND DECISION ON REMAND

FINDINGS OF FACT

I.

The above captioned matter was remanded to the Hearing Examiner by Skagit County Superior Court. On September 8, 2009, the Skagit County Superior Court entered an Order Granting Petitioners' Motion to Supplement the Record in Ferguson v. Island County, et al., Skagit County Cause No. 09-2-01033-4. Included in the Court's Order was a remand to the Hearing Examiner to evaluate the original ruling in light of the additional information.

II.

On April 24, 2002, the Island County Hearing Examiner issued Findings of Fact, Conclusions of Law, and Decision, denying Appeals, APP 337/08 and APP 338/08. The Hearing Examiner's Decision upheld the Island County Planning Departments' approval of a Site Plan Review, SPR 444/07. The Site Plan Approval of the Planning Department allowed a four building personal storage facility on an approximately six-acre parcel subject to conditions.

The Decision of the Island County Hearing Examiner was thereafter appealed to Superior Court giving rise to the Court's granting of a Motion to Supplement the Record and the Remand to the Hearing Examiner to re-examine the Examiner's Decision in light of the additional materials allowed into the record.

As of this date, the Hearing Examiner file and record contains 217 exhibits. The following exhibits were admitted into the record after the Hearing Examiner's original Decision:

134. The April 21, 2009, memorandum from Michael Bobbink addressed to Ralph Ferguson, and cc'd to ICP & CD and Pam Bartlett.
135. The Applicant Acknowledgement signed on 11/20/08 and file stamped received on November 24, 2008, as well as the site plan acceptance letter, dated November 19, 2008.
136. The Hearing Examiner's Findings of Fact and Conclusions of Law and Decision that was issued on April 24, 2009.
137. Island County Assessor's Map, dated 11/18/77 - portion dated 3/1/73
138. Island County Assessor's Map with lots numbered by Ralph Ferguson
139. Real Estate Contract, dated 3/31/65, between Moe (Seller) and Garrison and Glancy (Purchasers)
140. Real Estate Contract, dated 5/7/68, between Garrison and Glancy (Seller) and Thompson (Buyer) and Parcel Summary Report
141. Parcel Summary Report – no deed available
142. Real Estate Contract, dated 4/12/72, between Garrison and Glancy (Seller) and Munson (Buyer) and Parcel Summary Report
143. Real Estate Contract, dated 2/2/71, between Garrison and Glancy (Seller) and Keenan (Buyer) and Parcel Summary Report
144. Real Estate Contract, dated 2/15/68, between Garrison and Glancy (Seller) and Wirth (Buyer) and Parcel Summary Report
145. Real Estate Contract, dated 4/21/70, between Garrison and Glancy (Seller) and Watkins Fifteen Investors (Buyer) and Parcel Summary Report
146. Real Estate Contract, dated 2/19/69, between Garrison and Glancy (Seller) and Bever (Buyer) and Parcel Summary Report
147. Real Estate Contract, dated 11/14/66, between Garrison and Glancy (Seller) and Wells (Buyer) and Parcel Summary Report
148. Real Estate Contract, dated 6/19/67, between Garrison and Glancy (Seller) and Ledford (Buyer) and Parcel Summary Report
149. Quit Claim Deed, dated 6/13/72, between Garrison (Seller) and Havens (Buyer) and Parcel Summary Report
150. Real Estate Contract, dated 3/8/71, between Garrison and Glancy (Seller) and Nelson (Buyer) and Parcel Summary Report
151. Quit Claim Deed, dated 6/13/72, between Garrison (Seller) and Glancy (Buyer) and Parcel Summary Report
152. Real Estate Contract, dated 5/10/71, between Garrison and Glancy (Seller) and Nelson (Buyer) and Parcel Summary Report
153. Real Estate Contract, dated 6/4/68, between Garrison and Glancy (Seller) and Hungerford (Buyer) and Parcel Summary Report
154. Real Estate Contract, dated 5/1/70, between Garrison and Glancy (Seller) and Galbraith (Buyer) and Parcel Summary Report
155. Real Estate Contract, dated 4/16/68, between Garrison and Glancy (Seller) and Pearson (Buyer) and Parcel Summary Report

156. Real Estate Contract, dated 5/31/68, between Garrison and Glancy (Seller) and Hadley (Buyer) and Parcel Summary Report
157. Real Estate Contract, dated 6/5/68, between Garrison and Glancy (Seller) and Spaulding (Buyer) and Parcel Summary Report
158. Real Estate Contract, dated 4/16/68, between Garrison and Glancy (Seller) and Whitney (Buyer) and Parcel Summary Report
159. Statutory Warranty Deed, dated 1/25/68, between Garrison and Glancy (Seller) and Roland (Buyer) and Parcel Summary Report
160. Real Estate Contract, dated 3/29/67, between Garrison and Glancy (Seller) and Masee and Wight (Buyer) and Parcel Summary Report
161. Real Estate Contract, dated 7/31/67, between Garrison and Glancy (Seller) and Burrows (Buyer) and Parcel Summary Report
162. Parcel Summary Report referencing Quit Claim Deed, between Garrison and Glancy (Seller) and Moa (Buyer) and Parcel Summary Report
163. Parcel Summary Report – no deed available
164. Real Estate Contract, dated 7/6/66, between Garrison and Glancy (Seller) and Standaert (Buyer) and Parcel Summary Report
165. Statutory Warranty Deed [Corrected], dated 2/26/68, between Garrison and Glancy (Seller) and Roland (Buyer) and Parcel Summary Report
166. Statutory Warranty Deed, dated 1/23/68, between Garrison and Glancy (Seller) and Troiani (Buyer) and Parcel Summary Report
167. Real Estate Contract, dated 4/15/68, between Garrison and Glancy (Seller) and Spaulding (Buyer) and Parcel Summary Report
168. Real Estate Contract, dated 4/10/68, between Garrison and Glancy (Seller) and Hadley (Buyer) and Parcel Summary Report
169. Real Estate Contract, dated 4/19/68, between Garrison and Glancy (Seller) and Pearson (Buyer) and Parcel Summary Report
170. Real Estate Contract, dated 4/23/68, between Garrison and Glancy (Seller) and Hadley (Buyer) and Parcel Summary Report
171. Real Estate Contract, dated 8/1/78, between Garrison Partnership and Glancy (Seller) and Blandford (Buyer) and Parcel Summary Report
172. Statutory Warranty Deed, dated 6/14/77, between Garrison Partnership and Glancy (Seller) and Eyl (Buyer) and Parcel Summary Report
173. Real Estate Contract, dated 4/25/71, between Garrison and Glancy (Seller) and Vibricht (Buyer) and Parcel Summary Report
174. Real Estate Contract, dated 1/10/79, between Nelson (Seller) and Archer (Buyer) and Parcel Summary Report
175. Statutory Warranty Deed, dated 1/21/75, between Nelson (Seller) and Husby (Buyer) and Parcel Summary Report
176. Real Estate Contract, dated 1/10/79, between Nelson (Seller) and Archer (Buyer) and Parcel Summary Report
177. Statutory Warranty Deed, dated 6/28/71, between Nelson (Seller) and Vaughan (Buyer) and Parcel Summary Report
178. Certificate of Ground Water Right
179. Application for a Permit to Appropriate Public Ground Water

180. Report of Examination on Ground Water
181. Permit to Appropriate Public Waters
182. Notice of Completion of Construction
183. Water Well Report
184. Certificate of Instruction and Installation of Public Water System Projects and Water System Plan & Details
185. Letter from Glenn Grace, Island County Health Dept, dated 5/4/70, to Wilson Bow, Washington State DOH
186. Letter from Wilson Bow, Washington State DOH, dated 7/5/73, to Garrison
187. Construction Specifications for G&G Water Association
188. Letter from Don Holmes, Island County Health Dept, dated 8/8/83, to Vaughn Water System
189. Water Well Report
190. Map of Juniper Beach Water District Service Area
191. Spreadsheet showing RF Lot # (Ferguson's assigned number), the current Island County Assessor's Tax Parcel number, the old historical tax lot number, and sale history from G&G to a subsequent owner
192. Spreadsheet showing RF Lot # (Ferguson's assigned number), the current Island County Assessor's Tax Parcel number, the old historical tax lot number, and details of short plats in the G&G development area
193. Short Plat # 70-009, subdivided by Lloyd Glancy, approved 9/21/1970
194. Short Plat # 70-0072, subdivided by Lloyd Glancy, approved 10/2/1970
195. Short Plat # 71-013, subdivided by Daniel Garrison, approved 3/2/1971
196. Short Plat # 71-042, subdivided by Walter Nelson, approved 5/11/1971
197. Short Plat # 72-088, subdivided by Dan Garrison, approved 10/24/1972
198. Map of G&G development area with handwritten abbreviated current tax parcel numbers
199. Memorandum from Daniel B. Mitchell, Deputy Prosecuting Attorney to Michael Bobbink, Island County Hearing Examiner, dated 9/11/09
200. Email from Karen Reich to Paula Bradshaw, dated 9/23/09 with attached index of exhibits added to the Hearing Examiner Record 137 – 198.
201. Memorandum from Paula Bradshaw to Pam Bartlett, Bobak Talebi, Dan Mitchell, dated 9/24/09
202. Memorandum from Bobak Talebi to Michael Bobbink, dated 9/25/09
203. Letter from Simi Jain to Michael Bobbink, dated 9/30/09
204. Memorandum from Paula Bradshaw to Robert Carmichael & Dan Mitchell, dated 10/7/09
205. Courtesy notice of hearing published on-line and emailed 11/12/09 to the addresses of interested parties, hard copies mailed to Ralph Ferguson and Ginette Danielson 11/13/09, copy sent to Pam Bartlett & Katherine Baker with a copy of the staff response, exhibit # 206.
206. Staff response to additional review material.
207. Staff response letter from Andreeana Richardson to Robert Carmichael, dated 11/16/09
208. Affidavit of Mailing staff response letter, dated 11/16/09
209. Letter from Paula Bradshaw to Robert A. Carmichael, dated 11/16/09

210. Appellants' Remand Brief, received 11/16/09
211. Declaration of Ralph Ferguson in Support of Appellants' Remand Brief, received 11/16/09
212. Declaration of Karen Reich with Transcripts of Hearings Attached, received 11/16/09
213. Declaration of Karen Reich in Support of Appellants' Remand Brief, received 11/16/09
214. Declaration of Sabrina England in Support of Appellants' Remand Brief, received 11/16/09
215. Declaration of Service, received 11/16/09
216. Appellants' Reply Brief, received 12/1/09
217. Declaration of Service, received 12/1/09

III.

On December 3, 2009, the Hearing Examiner conducted an additional hearing in order to give the Parties an opportunity to present evidence and argument based on the additional materials entered into the record pursuant to the Skagit County Superior Court Order.

IV.

The information submitted by the Appellants establishes that "Garrison and Glancy" purchased a large parcel of land in 1965 which included the two parcels that are the subject of the Site Plan Review Approval, and the subject of the above captioned Appeals.

The Appellants refer to this area as the Garrison/Glancy segregated subdivision. Between 1968 and 1977, approximately thirty-seven parcels were created out of the parcel purchased by Garrison/Glancy in 1965.

A dozen or so of these lots were created by Short Plats in 1970 and 1971. Additionally, there was a Nelson Short Plat adjacent to the Garrison/Glancy properties which created four lots in 1971. The record does not establish how the remaining parcels from the 1965 parcel purchased by Garrison and Glancy were created.

In 1998, when the Board of Island County Commissioners adopted ICC Chapter 17.03, the current Island County Zoning Ordinance, the parcel purchased by Garrison and Glancy in 1965

consisted of about 37 parcels ranging in size from 0.72 acres to 5.98 acres with an average size of approximately 2.2 acres.

The information admitted into the record, pursuant to Superior Court's Order Supplementing the Record, also appears to establish that more than ten of these parcels are serviced by public water system hookups. The submitted documents also show that Garrison/Glancy received Department of Ecology approval for a twenty-five lot public water system in 1973.

The Appellants see the parcels created by Garrison/Glancy [See page 29 of the transcript], along with the old Plats of Juniper Beach, Domerude's Beach Plat, and Jacobson's Park, as all being part of a larger Juniper Beach rural residential area, and the area being zoned Rural Residential based on their interpretation of the Zoning Ordinance. It is not clear from the record how the boundaries of this larger area were chosen by the appellants but they may be based on the once proposed RAID discussed below.

As testified to by Mr. Ferguson- prior to the adoption of the current Island County Zoning Ordinance in 1998, Island County Planning established, pursuant to the Growth Management Act, Rural Areas of More Intensive Development, hereinafter referred to as RAID'S. During this time period leading up to the adoption of ICC 17.03 in 1998 the Board of Island County Commissioners considered including the greater Juniper Beach area in the Rural Residential Zone as a RAID. The Board of Island County Commissioners rejected a RAID in this area based on concerns that the adoption of Rural Residential zoning in this area would result in a significant population and density increase in an area that was not suitable for such an increase. As indicated by Mr. Ferguson, the Island County Health Department had concerns both about the ability of the soils for onsite septic systems and the quality and quantity of available water within the aquifer that would serve increased development in this area. Based on these concerns, the Board declined to create a RAID in this area and zoned the area Rural instead of Rural Residential.

Even though the Board of Island County Commissioners declined to include this area in the Rural Residential zone as a RAID, the Appellants still argue, based on their reading of the certain sections of ICC 17.03, that the area is zoned Rural Residential and not Rural.

As pointed out by the Planning Department, the Board of Island County Commissioners adopted the current Comprehensive Plan and the Zoning Atlas Maps on September 29, 1998, and these documents show the area in question to be zoned Rural. No Appeals of this zoning determination were filed with the Western Washington Growth Management Hearings Board. Planning continues to maintain that the parcels are zoned Rural and that the proposed storage facility is conditionally allowed in the Rural zone because it meets the requirements for Site Plan Approval.

V.

Any Conclusion of Law which is deemed a Finding of Fact is hereby adopted as such. Based on the foregoing Findings of Fact, now are entered the following:

CONCLUSIONS OF LAW

I.

Pursuant to the Superior Court Order on Remand the Hearing Examiner has carefully reviewed the documents submitted into the record pursuant to the Superior Court Order; has reviewed the transcript of the original hearing; has reviewed the relevant sections of the Island County Zoning Ordinance; and still concludes that the area containing the lots which were the subject of this development application are zoned Rural.

II.

The Appellants argue that, in spite of the Zoning Atlas and Comprehensive Plan designation of the subject properties as Rural, they are actually zoned Rural Residential. The Appellants reach this

conclusion based on ICC 17.03.050 (Zoning Classifications and Overlays) (C)(5), which reads as follows:

- 5. Designation criteria have been established for certain zone classifications. These written criteria control when there is a conflict between the criteria and the zone depicted in the zoning atlas.**

The Appellants combine the above paragraph with ICC 17.03.050(E) (Transition From 1985 Zoning Classifications) 1.b, which reads as follows:

- 1. Rural Residential.** All properties classified Rural Residential will be classified Rural with the following exceptions:
 - b) Properties meeting the new designation criteria for Rural Residential will be classified in the Rural Residential Zone.

The Appellants read these two sections as requiring application of the Rural Residential Designation Criteria to this area and possibly other areas within Island County, even though the areas are not shown as being zoned Rural Residential in the Zoning Atlas, in order to determine if in fact these areas meet the Rural Residential Criteria and therefore are zoned Rural Residential regardless of the Zoning Atlas or Comprehensive Plan classifications.

In this case, the Appellants argue the area contained within the Garrison/Glancy “segregated subdivision” meets the Designation Criteria for Rural Residential and is therefore zoned Rural Residential. This interpretation would result in the potential for a higher density development than that allowed in the Rural zone, including possible multi-family dwellings.

The purpose of the Rural Residential zone is set forth in ICC 17.03.070, as follows:

The purpose of the Rural Residential Zone is to define the Logical Outer Boundary of a pattern of development and density that is more intensive than the density permitted in the Rural zone.

The “Logical Outer Boundary” language of this Section is a reflection of RCW 36.70A.070(5)(d), which, as a 1997 Amendment to the Growth Management Act, allowed Limited Areas of More Intensive Rural Development (LAMIRDs) within areas covered by the Rural Element of Comprehensive Plans adopted pursuant to the Growth Management Act. RCW 36.70A.070(5)(d) reads in relevant part as follows:

- (5) Rural element.
 - d) Limited areas of more intensive rural development. ... the rural element may allow for limited areas of more intensive rural development as follows:
 - (iv) Lands included in such existing areas or uses shall not extend beyond the logical outer boundary of the existing area or use, ...

When these two sections are read together (e.g. the “logical outer boundary language”), it becomes clear that the Rural Residential zone in the Island County Zoning Ordinance is specifically designed to apply to those areas that the Board of Island County Commissioners deemed as appropriate areas to be designated as a RAID. The Board of Island specifically declined to identify the Juniper Beach area as a RAID, based on the Board’s conclusion that this area could not handle the additional development that would be allowed under a Rural Residential zone designation, because of the inability of the soils to provide for adequate sewage disposal and the probable lack of adequate potable water.

Based on the Board of Island County Commissioners’ decision not to identify the Juniper Beach area as a RAID, it is clear that the interpretation put forth by the Appellants would not carry out the intent of the Board. It would in fact overturn it.

III.

A careful reading of the Designation Criteria for the Rural Residential zone establishes that the Board intended to exercise discretion in determining which areas should be designated as Rural Residential. The language of ICC 17.03.070(E) is permissive. It allowed the Board to determine whether or not an area with a more intense pattern of development should be designated as Rural Residential. ICC 17.03.070(E), reads as follows:

E. Designation Criteria and Areas. Areas with a predominant pattern of development and density existing on July 1, 1990, that is greater than the Base Density permitted in the R zone may be designated RR when the criteria set forth below are met. The areas designated Rural Residential listed in ICC 17.03.075 and depicted in the Zoning Atlas. Specific conditions can be found in Appendix A.

Since the language of ICC 17.03.050(E)(1)(b) is permissive a decision not to zone an area Rural Residential, even though it meets the other Designation Criteria for the Rural Residential zone, is consistent with the Designation Criteria and therefore with ICC 17.03.050(C)(5)

The main purpose of statutory construction is to determine the intent of the legislative body. When the Board of Island County Commissioners specifically rejected the Juniper Beach area as a residential area of more intense development and designated it as Rural, the intent was clearly stated. To follow the argument of the Appellant and now designate this area as Rural Residential would overturn the decision of the Board of Island County Commissioners to not designate this area as a RAID, and would leave the zoning status of all properties shown as Rural on the zoning maps unclear.

The intent of the Board that the Juniper Beach area should be zoned Rural is further supported by the fact that the areas designated as Rural Residential are specifically listed in ICC 17.03.075 and are depicted in the Zoning Atlas pursuant to ICC 17.03.070. The Juniper Beach area is not an area listed as Rural Residential in ICC 17.03.075 and is not an area depicted as Rural Residential in the Zoning Atlas. These facts are consistent with the specific decision of the Board of Island County Commissioners to deny the Juniper Beach area a Rural Residential designation based on concerns about ability of this area to support additional density because of inadequate water and inadequate soils for onsite septic systems needed to support that increased density.

The Board of Island County Commissioners specifically intended that the area encompassed by the Garrison/Glancy land divisions be zoned Rural.

IV.

After further review and reflection, the Hearing Examiner reaffirms his Conclusion of Law that the properties in question are zoned Rural and, therefore, personal storage facilities are allowed as a Conditional Use pursuant to Site Plan Approval under ICC 17.03.060(B)(1)(m).

V.

Any Finding of Fact deemed to be a Conclusion of Law is hereby adopted as such. Based on the foregoing Findings of Fact and Conclusions of Law, now is entered the following:

DECISION

On Remand, the Hearing Examiner reaffirms his Conclusion of Law that the properties in question are zoned Rural and that personal storage facilities are conditionally allowed pursuant to Site Plan Approval.

Entered this 16th day of December, 2009, pursuant to authority granted under the laws of the State of Washington and Island County.

MICHAEL BOBBINK
Island County Hearing Examiner