

ISLAND COUNTY HEARING EXAMINER

RE: Appeal) File No. APP 033/10
Appellant: Edward Wallgren) FINDINGS OF FACT
) CONCLUSIONS OF LAW
) AND DECISION

SUMMARY OF APPEAL AND DECISION

APPEAL: The Appellant, Edward Wallgren, has appealed an Administrative Decision issued by Island County Public Works, denying an Application for a Clearing and Grading Permit, associated with the expansion of a single-family residence on a waterfront parcel, located at 1034 North Cliff View Drive, Oak Harbor, Washington. The existing residence is set back, at its closest point, approximately 15-feet from the top of a feeder bluff. The Clearing and Grading Permit was denied because Public Works determined that the proposed addition was not adequately set back or protected from the geological hazard associated with the bluff.

DECISION: The Appellant is entitled to a Clearing and Grading Permit for the expansion of the existing non-conforming residence only if the proposed additions meet the setback requirements from the unstable slope applicable to new construction as determined pursuant to ICC 11.02.170.

This matter is remanded to Island County Public Works to establish the setback from the top of the unstable bluff applicable to new residential construction.

FINDINGS OF FACT

INTRODUCTION

The following Findings of Fact and Conclusions of Law are based upon consideration of the exhibits admitted herein and evidence presented at the public hearing on June 25, 2010.

I.

PRELIMINARY INFORMATION

Appellant: Edward Wallgren

Property Location: 1034 North Cliff View Drive, Oak Harbor, WA 98277

Publication: June 12, 2010

Mailing of Notice to Appellant: June 7, 2010

Mailing of Staff Report: June 14, 2010

Date of Appeal: February 16, 2010

Date of Comprehensive Statement: April 28, 2010

Hearing Date: June 25, 2010

Exhibit Log:

1. Appeal Response
2. Decision of denial for Edward Wallgren Clearing and Grading Permit CGP 011-10 from Bill Poss to Jon Chew; dated 2/5/10
3. Peer Review from J. Robert Gordon of GeoEngineers to Bill Poss; date received 3/30/10
4. Letter from William E. Oakes & Robert H. Pederson to John Chew, RE: Island County response to 3rd party geotechnical peer review; dated 4/14/10
5. Master Land Development Permit Application; date received 1/20/10
6. Water Well Report; date received 1/20/10
7. Deed for Easement & Replacing Old Easement requested from Barbara Coffin from the Island County Auditor; date received 1/20/10
8. Bald Eagle Nest Site Management Plan; date received 1/20/10
9. Critical Areas Evaluation from David Jellum of GeoTest Services, Inc to E.J. Wallgren; date received 1/20/10
10. Oversize Site Plan & Vicinity Map—SEE STAFF FOLDER FOR MAP; date received 1/20/10
11. Memo from Larry Kwarsick to Bill Poss, RE: Wallgren Peer Review--Structural Engineering Report from J.H. Husband Engineering; date received 1/20/10
12. Request for Comment, Account Summary Snapshot, Zoning, Parcel Information, ¼ section map & ArcExplorer 2.0 for CGP 011/10; date received 1/20/10
13. Critical Areas request for interpretation or site visit; date distributed to staff 1/21/10
14. Historical Review Committee Land Development Review; date received 2/4/10
15. Memo from Kyla Walters to Bill Poss, RE: Clearing & Grading Permit 011/10-Request for Information; dated 2/5/10
16. Letter from Andreana Richardson for Bill Poss to Jon Chew, RE: Notice of Complete Application; dated 1/22/10
17. Letter of acknowledgement from Paula Bradshaw to Ed Wallgren, RE:APP 033/10, appeal of CGP 011/10; dated 2/19/10
18. Email from Paula Bradshaw to Larry Kwarsick, RE: App 033-10 Wallgren with attachment of Wallgren HE Acknowledgement; date sent 4/28/10
19. Letter of acknowledgement from Michael Bobbink to Ed Wallgren, RE: APP 033/10, appeal of CGP 011/10 Wallgren; dated 4/29/10
20. Letter from E.J. Wallgren to Bill Oakes, RE: Notification of intent to appeal CGP 011/10; date received 2/16/10
21. Draft letter from Jon Chew & Larry Kwarsick to Michael Bobbink, Bill Oakes & Bob Pederson, RE: Appeal of Administrative Decision-CGP 011-10; date received 4/27/10

22. Email with attachment from Larry Kwarsick to Paula Bradshaw, RE: Appeal-Wallgren; date sent 4/21/10
23. Letter from Jon Chew & Larry Kwarsick to Michael Bobbink, Bill Oakes & Bob Pederson, RE: Appeal of Administrative Decision-CGP 011-10; date received 4/22/10
24. Letter from Larry Kwarsick to Michael Bobbink, Bill Oakes, Bob Pederson, RE: Detailed Statement of Appeal of Administrative Decision; date received 4/28/10
25. Email from sps@whidbey.net to Bill Oakes, Bill Poss & Bob Pederson, RE: Wallgren Appeal, date sent 2/23/10
26. Emails between J. Gordon and Bill Poss, RE: Wallgren's Peer Review; dated sent 3/5/10
27. Emails between Bill Poss, Larry Kwarsick, Jon Chew, Bud Wallgren, Paula Bradshaw & Bill Oakes, RE: Wallgren Peer review-CGP 011-10 and APP 033-10; date sent 4/15/10
28. Email from Paula Bradshaw to Larry Kwarsick, RE: APP 033-10 Wallgren location; date sent 6/8/10
29. Email from sps@whidbey.net to Paula Bradshaw, RE: APP 033-10 Wallgren location; date sent 6/8/10
30. Letter of Notification of Scheduled Date of Hearing; dated 6/7/10
31. Affidavit of Mailing the Notification of Scheduling the Hearing Date; dated 6/7/10
32. Letter for Mailing the Staff Report from Paula Bradshaw to Larry Kwarsick; dated 6/14/10
33. Affidavit of Mailing the Staff Report; dated 6/14/10
34. Affidavit of Publication, dated 6/18/10
35. Additional comments in response to staff report, dated 6/14/10, submitted at the 6/25/10 hearing.

HEARING TESTIMONY

Larry Kwarsick
Sound Planning Services
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Langley, WA 98260

Edward Wallgren
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Jon Chew
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Dan Sorenson
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Robert Pederson
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Bill Poss
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II.

The Appellant is the owner of a single-family home located on the top of a 160-foot high waterfront feeder bluff, located at 1034 North Cliff View Drive, Oak Harbor, Washington. This home is approximately 50-years old and, at the nearest point, the foundation of the residence is 15-feet from the top of the slope.

There is a flat, stone-tiled area between the house and the bluff, which extends all the way to the top of the bluff. There is a stone foundation or retaining wall right at the top of the bluff. Geotechnical reports indicate that there is some undermining cracks of this stonewall due to slope erosion.

The approximate top 15-feet of the bluff are nearly vertical. The bluff is a feeder bluff and is subject to erosion, both on the face of the bluff and at the toe of the bluff. The average rate of erosion appears to be approximately three-inches per year. However, the geologic reports point out that the rate of erosion is variable and hard to predict. At times the site is subject to potential episodic failures of the slope, which could, even if it is not likely, result in isolated areas of the slope, several feet thick, failing during a single event.

The bluff in front of the Appellant's residence has been subject to past erosion and will be subject to future erosion. The location and rate of erosion are unpredictable, but an average of three-inches per year is a reasonable expectation.

The Appellant acknowledges erosion on the bluff face, but indicates that there has been no erosion in the area closest to the foundation of the house for the past 49-years.

III.

The bluff in front of the Appellant's house has been identified as an unstable bluff in the Coastal Zone Atlas, maintained by the Washington State Department of Ecology. Geotechnical review of individual areas of this bluff is required to determine stability and appropriate setbacks for new development on any specific site.

IV.

The Appellant wishes to expand the existing residence by approximately 450-square feet. None of the proposed additions will be closer to the slope than the current house. The Appellant sought a Clearing and Grading Permit as the first step in obtaining permit approval for modifications and additions to the existing residence. This permit was sought first in an attempt to determine if a permit for the expansion would be granted or denied based on the location of the house and proposed construction so near to the top of the bluff.

V.

After application for the Clearing and Grading Permit, the Appellant was notified that the Public Works Director did not believe a Clearing and Grading Permit for the proposed expansion could be granted because of the hazards associated with the erosion of the unstable bluff.

The Appellant then submitted a Geotechnical Report, prepared by David Jellum of GeoTest Services, Inc., and requested reconsideration based on the report. In response to the report, the Public Works Director requested peer review of the report under the authority granted in the Clearing and Grading Permit Ordinance. A second report, prepared by a Geotechnical Engineer, paid for by both the County and the Appellant [prepared by J. Robert Gordon of GeoEngineers], was submitted. After review of the second report, Island County Public Works denied the requested permit and this appeal followed.

VI.

A Geotechnical Report regarding this site was prepared on December 6, 1991. It was sought for the purpose of obtaining financing, secured by the home. This report indicated that the site and residence were suitable for a 30-year loan. In other words, the Engineer who prepared that report concluded that the house would not likely be subject to damages, as a result of the geo-hazard, through 2021.

The second Geological Report was prepared by GeoTest. This report indicated that the proposed additions to the house would not increase the risk to the structure from the geo-hazard relating to the bluff and would not exacerbate instability on the bluff. It did recommend that, at such point as any part of the top of the bluff was within 10-feet of the residential structure, the home should be moved. Based on the estimated three-inches per year of erosion, the move date would be approximately 20-years out.

The third Geotechnical Report, submitted by GeoEngineers at the request of Island County Public Works, was obtained as a peer review of the GeoTest Report. This third report also indicated that the proposed additions would not cause or result in a greater risk or greater instability related to the geo-hazards. It did indicate that, subject to proposed mitigation, the geo-hazards to the existing home might actually be reduced as a result of mitigation required as a Condition of Approval for the proposed home addition.

The GeoEngineers Report also indicated the possibility of episodic failures on the bluff which could remove from two to five feet of the bluff face at a time. These kind of larger failures are associated with shoreline bluffs, such as this one, with soils consisting mainly of Glacial Till.

The peer review report by GeoEngineers also indicated that a 15-foot setback would not be acceptable for new construction but that the proposed addition to an existing residence could probably be allowed based on their reading of the Island County Clearing and Grading Ordinance.

VII.

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.

Island County has adopted a set of Ordinances, including the Clearing and Grading Requirements, set forth in ICC 11.02; the New Island County Critical Areas Ordinance, ICC 17.02A; and the Shoreline Use Regulations, ICC 17.05, which address issues associated with development on or near geologic hazard areas.

The Critical Areas Ordinance states that geologically hazardous areas are to be regulated by Chapters 11.02 ICC and 11.03 ICC [see ICC 17.02A.020.C]. Chapter 11.02 ICC is the Clearing and Grading Ordinance. Chapter 11.03 ICC is the Stormwater Drainage Ordinance. The work proposed by these Applicants is within a Geological Hazardous Area, pursuant to the Critical Areas Ordinance, as defined in ICC 17.02A.030.

However, because of HB1653 under current State law Island County cannot apply their Critical Areas Ordinance to the repair, modification, or expansion of an existing single-family residence within the shoreline jurisdiction. Instead the proposed expansion is only subject to regulation under Island County's Shoreline Regulations.

II.

Island County is required to address this proposed expansion of an existing shoreline residence under the Island County Shoreline Master Program and the adopted Shoreline Use Regulations.

Island County's current standard shoreline setback for the subject property requires a setback of 75-feet landward of the OHWM. However, greater setbacks may be required for construction on a shoreline property in order to comply with the setbacks required for Geologically Hazardous Areas in ICC 11.02. 11.02 ICC requires a 100-foot setback from

geologically hazardous areas unless a lesser one is shown to be appropriate in a geotechnical report prepared by a Geotechnical Engineer.

ICC 17.05.200.B.10, Shoreline Use Regulations, requires setbacks from geological hazardous areas, as determined through the application of 11.02 ICC. The shoreline setback for new construction on the subject property would be determined by applying ICC 11.02. The existing home location does not meet the current required setback from the geological hazard area. The existing residential structure is therefore a legally established nonconforming structure.

III.

Island County's Shoreline Use Requirements address additions to legally established, nonconforming residences in ICC 17.05.200.B.17, which reads as follows:

“Additions to legally established residences shall not be located seaward from the applicable setback and shall conform to applicable shoreline regulations as well as other applicable county and state regulations. For purposes of this section, “residence” shall mean the primary residential structure on the property and attached or detached guest cottages.”

In order to apply this section of ICC 17.05, it is necessary to determine what the Board of Commissioners of Island County intended when they used the language **“.... shall not be located seaward from the applicable setback”** The applicable shoreline setback in this case is determined by application of 11.02 ICC. The Hearing Examiner concludes that additions to existing non-conforming residences within the shoreline jurisdiction are required to meet current setbacks for new construction. This interpretation is consistent with Chapter ICC 17.03.230, Existing Uses. The expansion of existing nonconforming structures is also governed by Chapter ICC 17.03.230.H, which reads, in relevant portion, as follows:

“A legally established Existing Use or Structure may be expanded, enlarged, or extended (including extension of hours of operation) provided the expansion conforms to land Use standards set forth in ICC 17.03.180 for parking and Setbacks; the height restrictions of the applicable Zone; ...” [Emphasis added].

Proposed additions to legal nonconforming structures are required to meet the current zoning setback requirements of ICC 17.03.180. Requiring additions to meet the current shoreline and/or hazardous area setback requirements is consistent with requiring them to meet current zoning setback requirements. The Hearing Examiner concludes that nonconforming existing structures may be expanded so long as the expansion, itself, meets current setback requirements, including those for shoreline hazardous areas, as determined by the application of ICC 11.02.

IV.

The Appellant argues that the Clearing and Grading Ordinance, Chapter ICC 11.02, does not contain adequate standards on which to base the denial of this development application and that the application of Chapter 11.02 ICC is more ministerial than substantive. The Hearing Examiner disagrees.

Island County has clearly decided to determine setbacks from geo-hazardous areas through the Clearing and Grading Permit process set forth in ICC 11.02. This Chapter of the Island County Code gives the Public Works Director the authority to determine appropriate setbacks from a geologically hazardous area. A careful reading of Chapter 11.02 ICC, in its entirety, leads to the inescapable conclusion that it was intended to apply to much more than just the impacts from the actual clearing and grading proposed. In fact, the Chapter specifically applies to all “land disturbing activities.” Land disturbing activity is defined, in relevant part, as follows:

11.02.030

FF. **Land disturbing activity** means any activity that results in a change in the existing soil cover (both vegetative and non-vegetative) and/or the existing soil topography. **Land disturbing activities include**, but are not limited to, demolition, **construction**, clearing, grading, filling, and excavation. [Emphasis added.]

The definition includes construction activities, such as this proposed expansion of an existing residential structure, as a Land Disturbing Activity.

ICC 11.02.110, specifically, states that the purpose of a Grading Permit Application is to determine compliance with the requirements of ICC 11.02 and Titles 16 and 17 ICC, as applicable. As indicated above, the Shoreline Use Regulations found in Chapter 17.05 of ICC expressly require the application of the standards in ICC 11.02.090 to determine setbacks for residential construction from a shoreline geologically hazardous area.

Chapter 11.02 ICC, requires the Public Works Director to determine the proper setbacks applicable to proposed construction on or near an unstable bluff, and allows site specific setbacks to be approved or required based on geotechnical engineering reports.

ICC 11.02.140C, allows the Director to require Mitigation Plans and conditioned Clearing and Grading Permits, and sets out the requirement for Mitigation Proposals.

A Clearing and Grading Permit can be granted to allow expansion of legally established existing structures which are nonconforming in regard to setbacks from a geologic hazard only when the proposed additions to the structure meet the current applicable setbacks for new construction.

V.

The Public Works Director has expressed concerns regarding a number of voluntary concessions offered by the Appellant, including an agreement to move the residential structure at the point in time where it is located within 10-feet of the top of the bank.

If there is a Mitigation Plan adopted and agreed to by Island County Public Works and the property owner, and the requirement to comply with the Plan is not appealed by the property owner, the Hearing Examiner sees no obvious legal reason why the conditions of the permit requiring compliance with the Mitigation Plan and any Covenants filed with the Auditor, pursuant to ICC Chapter 11.02, would not be fully enforceable.

VI.

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

This matter is remanded to Public Works to determine the appropriate setback from the unstable bluff for new construction. The Appellant is entitled to expand the existing residence only if the additions meet the setback requirements for new construction or a Shoreline Variance is obtained.

Entered this 12th day of August 2010, pursuant to the authority granted under the laws of the State of Washington and Island County.

MICHAEL BOBBINK
Island County Hearing Examiner

APPEAL PROCESS:

APP (Administrative Decision)

Appeal Process: This land use decision is a final determination which may be appealed by filing a land use petition in Island County Superior Court within twenty-one (21) days of its issuance. Specific requirements for the petitions contents, time and service of process, and payment of the cost of the transcription of the record of the hearing may be found in Chapter 70C of Title 36 RCW.