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, Skagit County Auditor

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AFTER RECORDING RETURN TO:
SKAGIT COUNTY HEARING EXAMINER
302 SOUTH FIRST STREET
MOUNT VERNON, WA 98273

DOCUMENT TITLE: APPEAL AP 00 0295 OF PL 00 0220

HEARING OFFICER: SKAGIT COUNTY HEARING EXAMINER

APPLICANT: BRET and KIM GILBERTSON

ASSESSOR PARCEL NO: P47779

ABBREVIATED LEGAL DESCRIPTION: located within the SE ¼ of the NE ¼ of Section 12, Township 36 North, Range 3 East, W.M., Skagit County, Washington.

SKAGIT COUNTY HEARING EXAMINER
STATE OF WASHINGTON

In the Matter of the Appeal of GERALD D. GILBERTSON)	
)	PL #00-0220
)	AP#00-295
From an Administrative Decision)	
Denying a Request for Waiver of)	FINDINGS OF FACT,
The Six Year Development Moratorium)	CONCLUSIONS OF LAW,
Imposed Pursuant to the Forest)	AND DECISION
Practices Act)	
)	

THIS MATTER concerns development on land where timber has been harvested without a Forest Practice Permit. The appeal came on for hearing on July 12, 2000, upon due notice. The Planning and Permit Center was represented by Dan Cox. John Troutner represented the applicants. Gerald Gilbertson testified in support of the appeal. Members of the public were given an opportunity to be heard.

The Examiner left the record open for additional information regarding the posting of the property by the State Department of Natural Resources. Post-hearing submissions were made by the applicants, the appellant, and the County. These were admitted into evidence. (Exhibits 6, 7 and 8). The record closed on July 20, 2000.

From the testimony taken, exhibits admitted, and argument made, the following is entered:

FINDINGS OF FACT

1. On April 21, 2000, Bret and Kim Gilbertson (applicants) sought a waiver from a six-year development moratorium imposed on their property. On May 23, 2000, the Planning Director denied their request. The decision was appealed by Bret Gilbertson's father, Gerald Gilbertson, on June 2, 2000.

2. The subject parcel is located at 1244 Samish Way (Alger), within a portion of the SE1/4NE1/4, Sec. 12, T36N, R3E, W.M. It is approximately 1.9 acres in size.

3. The applicants purchased the property in August of 1999 with the intention of building a residence there. The property was forested.

4. The parcel slopes generally from the southwest to northeast and is bisected by an unnamed creek with a well-defined channel. The creek is dry during part of the year. Some time in the fall of 1999, after their purchase, the applicants caused the property to be partially logged. The areas adjacent to the stream were cleared of nearly all vegetation with the exception of a few immature evergreen trees.



5. According to a professional Wetland Reconnaissance and Stream Buffer Assessment submitted by BEK Engineering and Environmental, Inc., on January 19, 2000, the stream is a Type IV stream, meaning that it has a 50 foot buffer protected under the County's Critical Areas Ordinance (CAO).

6. The BEK report recommended a scheme of plantings in the cleared buffer, but concluded that neither that scheme nor any other will meet the CAO's requirement for recovery of the buffer within six years. The applicants state that they have carried out the recommended plantings.

7. The record contains no evidence that the buffer can be restored within a six-year period to a level of critical area function comparable to what it was prior to the logging activity.

8. It is apparent from the evidence that the removal of timber within the riparian buffer zone did not meet the following performance standards:

- a) maintain 50% of total large woody debris (LWD) recruitment expected to enter the stream from a mature stand; and
- b) Maintain 85% of the trees which are greater than 24" DBH within 50 feet of stream; and
- c) Maintain an average of 75% canopy cover.

9. The State Department of Natural Resources (DNR) posted a Stop Work Notice on the property on November 18, 1999, upon discovering that the sides of the stream on the property had been cleared of vegetation. In a post-hearing letter, DNR stated that because of the presence of the stream, a Class 4 General Forest Practice Application should have been filed before any harvest occurred.

10. After looking at the site, the DNR inspector concluded that a conversion of the property was occurring and referred the matter to Skagit County for review under the County's CAO.

11. For the record here, the County submitted 15 photos from DNR's inspector, showing the extent of the clearing done and, including a picture of the Stop Work Notice as posted.

12. The appellant argues that neither he nor the applicants were ever informed about the requirements for protecting the stream buffer, and that their dealings with the DNR and the County misled them into thinking they could go ahead with the clearing that was performed without a Forest Practice Application.

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

CONCLUSIONS OF LAW

1. The Hearing Examiner has jurisdiction over the parties and the subject matter of this appeal.

2. Under the CAO, when harvesting takes place without a Forest Practice Application, the County must impose a six-year moratorium on all future activities that require a permit or land use approval from the County. The moratorium begins on the date the harvesting activity was discovered by the DNR or the County. SCC 14.06.094(5). The moratorium in this case commenced on November 18, 1999.

3. The Examiner lacks authority to review the determination of DNR that a Forest Practices Application was required in this case.

4. The Class IV stream and its buffers are within a type of critical area defined as a "fish and wildlife habitat conservation area" SCC 14.06.040(29)(f). As noted, the relevant buffer width is 50 feet. SCC 14.06.530(2).

5. The CAO specifies the procedures and standards to be met for waiver of the six-year moratorium once it has been imposed. Where construction of a single family residence and outbuildings are concerned, the waiver decision is made by the Planning Director. SCC 14.06.094(6)(a). The standards the Director must apply are set forth in SCC 14.06.094(6)(c), as follows:

(i) A critical areas site assessment must be prepared where warranted by the CAO following initial review and site visit of the use proposed for the subject to the moratorium. The site assessment shall determine the level of impacts to County regulated critical areas and associated buffers that have occurred due to logging and any associated conversion activity. The site assessment shall also include an estimated time needed for recovery of the critical area to a state comparable to what it was before the forest practice took place.

(ii) If, based on the prepared site assessment and comments received, the Planning Director . . . determines that recovery of the critical area(s) and associated buffers can be achieved within 6 years, then a mitigation plan shall be prepared and implemented consistent with the CAO and then the waiver shall be lifted. If, however, critical areas and their buffers cannot be restored within a 6 year period to a level of critical area function comparable to what it was prior to the logging activity, the request for a waiver of the moratorium shall be denied, and the County shall not accept applications for development permits for a duration of 6 years. . . .(emphasis added)



6. The appellant herein has not carried the burden of showing that the buffers in question can be restored within the prescribed time. Therefore, the decision of the Planning Director denying the waiver must be upheld.

7. It should be noted that compensatory mitigation is not available for fish and wildlife habitat conservation areas, including riparian areas. SCC 14.06.094(6)(c)(ii). Limited invasion of buffers is allowed only when rigorous riparian-zone performance standards are met. SCC 14.06.530(2)(f). The clearing done in this case violated all of the relevant performance standards. See Finding 8 above.

8. Appellants arguments about what the applicants were or were not told when they obtained septic system approval or in subsequent discussions with Planning and Permit Center personnel cannot change what the law requires. The Examiner is without power to apply equitable principles to change the result here.

9. The ordinance provides that where a request for waiver has been denied, "restoration to the extent feasible shall occur within the critical area and their standard buffers." SCC 14.06.094(7). The plantings done to date are toward the fulfillment of this requirement and do not provide a basis for granting the waiver.

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

DECISION

The decision of the Planning Director to deny the waiver application is **AFFIRMED**. The appeal is denied. The moratorium shall remain in effect until November 18, 2005.

Wick Dufford

Wick Dufford, Hearing Examiner

Date of Action: September 20, 2000.

Copies Transmitted to Appellant and Applicants: September 20, 2000

RECONSIDERATION/APPEAL

A request for reconsideration may be filed as provided in SCC 14.06.180. The decision may be appealed to the Board of County Commissioners by filing a written



Notice of Appeal with the Clerk of the Board within 14 days after the date of the Examiner's decision, or decision on reconsideration if applicable.



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