



SAN JUAN COUNTY
DEPARTMENT OF COMMUNITY DEVELOPMENT

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**BEFORE THE HEARING EXAMINER
FOR SAN JUAN COUNTY**

**FINDINGS, CONCLUSIONS AND DECISION
DENYING APPLICATION FOR CONDITIONAL USE PERMIT
TO DEVELOP 9 RESIDENTIAL CONDOMINIUMS**

S.J.C. DEPARTMENT OF

AUG 11 2020

COMMUNITY DEVELOPMENT

FILE NUMBER: LANDUSE-19-0228

OWNER/APPLICANT: WARSEN FAMILY LIMITED PARTNERSHIP
JOHN WARSON, GENERAL PARTNER
607 FISHERMAN BAY ROAD
LOPEZ, WA 98261

APPLICATION: CONDITIONAL USE PERMIT –
TO DEVELOP NINE (9) RESIDENTIAL CONDOMINIUMS ON A PORTION OF
PROPERTY KNOWN AS THE EXISTING LOPEZ FARM COTTAGES & TENT
CAMPING RESORT.

SITE ADDRESS: 607 FISHERMAN BAY ROAD, LOPEZ ISLAND

TAX PARCEL NUMBERS: 251131004000 AND 251131005000

SUMMARY OF DECISION: *DENIED – PROPOSAL TO DEVELOP 9 RESIDENTIAL CONDOMINIUMS ON SITE
CANNOT BE APPROVED BECAUSE IT WOULD BE CONTRARY TO APPLICABLE
CODES AND COMPREHENSIVE PLAN PROVISIONS, PRIMARILY RESIDENTIAL
DENSITY LIMITATIONS.*

DATE OF DECISION: AUGUST 7, 2020

I. INTRODUCTION

The Warsen Family Limited Partnership, represented by John Warsen, General Partner, owns the existing Lopez Farm Cottages & Tent Camping, located at 607 Fisherman Bay Road, in the north central part of Lopez Island. The resort is on two adjoining tax parcels, with the “site plan” provided in the application materials (*Ex. 5*) showing the resort as having about 27 acres. The entire site is in the County’s Agricultural Resource land use designation. (*Staff Report, page 1*).

In this matter, the applicant seeks approval of a Conditional Use Permit to authorize development of 9 (nine) residential condominiums on a portion of their property. (*Staff Report; Ex. 3, application materials; Ex. 4, site plan for “Proposed Pocket Neighborhood”*). The applicant’s SEPA Checklist describes the proposal as follows: “We plan to build 9 residential condominiums.” (*Ex. 8, Checklist, on page 2, item 11 re: description of proposal*). During the public hearing, Mr. Warsen explained that he would like to sell the condominium units and wants to restrict any rentals of such units to at least 1-year lease terms. (*Testimony of Mr. Warsen*). The applicant’s letter to neighbors and adjacent property owners explained that “each condo will be a single story standalone unit” and that the “units will be purchased by individual homeowners.” (*Ex. 14*).

II. CONTENTS OF RECORD

Copies of all materials in the record and a digital audio recording of the open-record hearing conducted for this application are maintained by the County and may be requested or reviewed by contacting the Community Development Department during regular business hours. Given the Covid-19 health proclamations issued by the Governor and local authorities, the hearing occurred on June 24, 2020, using teleconference equipment operated by county staff. Staff confirmed that no members of the general public other than hearing participants mentioned herein contacted staff to express an interest in providing testimony or participating in the public hearing. Julie Thompson, the designated County Planner assigned to review the pending application, appeared and provided testimony under oath during the hearing. The applicant representative, John Warsen, participated in the hearing, providing sworn testimony explaining the intent and purpose of the application, answering questions from the Examiner, leaving no doubt that he seeks the requested Conditional Use Permit to authorize development and sale of 9 residential condominium cottages on the Lopez Farm Cottages & Tent Camping site, and that he wants to limit rentals of such condominium units to at least one year leases.

The Staff Report, prepared by Ms. Thompson, with 10 pages, dated June 10, 2020, and the 15 Exhibits attached to and described on pages 9 and 10 of such report, are included as part of the Record for this matter. The Examiner takes judicial notice of the County’s Comprehensive Plan Land Use map for Lopez Island, showing residential density limits that apply to the applicant’s property, and has included such map as Exhibit 16, to be maintained as part of this record.

EXHIBITS:

1. Request for review;
2. Determination of Non-significance;
3. Application materials dated November 21, 2019;
4. Proposed site plan;
5. Existing site plan;
6. Review of Table 8.2 for determining type of permit required;
7. Conditional Use Permit Narrative date stamped December 5, 2019;
8. Environmental checklist;
9. Memo from DOE regarding NPDES requirements dated March 31, 2020;
10. Legal description;
11. Historical documents about Lopez Farm Cottages & Tent Camping;
12. Vegetation inventory prepared by Carson Sprenger;
13. Legal ad dated March 18, 2020;
14. Notification validation dated March 20, 2020; and
15. Permit receipt dated November 21, 2019.
16. Comprehensive Plan Land Use and Shoreline Master Program Map for District 2, includes Lopez Island, showing assigned residential density for applicant's parcels as 1-unit per 10-acres, dated 5/11, revised 10/17. (*Added by the Hearing Examiner after the hearing*).

III. APPLICABLE LAW

Jurisdiction.

Under SJCC 18.80.090(C), if a development application is processed as a Conditional Use Permit application, “the Hearing Examiner is the decisionmaker.” SJCC 18.80.100(C), captioned “Decisionmaking Authority”, provides that “[t]he hearing examiner has the authority to approve or deny conditional use permit ... applications, and to impose conditions of approval on such permits.”

Criteria for CUP approval.

The Criteria for approval of a Conditional Use Permit are found at SJCC 18.80.100(D) and include ten items that must be considered by the Examiner.

Burden and Nature of Proof.

Under SJCC 18.80.040(B), “[t]he burden of proof is on the project permit applicant. The project permit application must be supported by evidence that it is consistent with the applicable state law,

County development regulations, the Comprehensive Plan, and the applicant meets his burden of proving that any significant adverse environmental impacts have been adequately analyzed and addressed.”

IV. ISSUE PRESENTED

Whether a preponderance of evidence demonstrates that the applicant has satisfied its burden of proof to meet the criteria for Conditional Use Permit approval?

Short Answer: No, so the pending application must be denied.

V. FINDINGS OF FACT

1. Upon consideration of all the evidence, exhibits, testimony, codes, policies, regulations, and other information contained in the file, the undersigned Examiner issues the following findings, conclusions and Decision denying the requested Conditional Use Permit for reasons set forth below.

2. Any statements in previous or following sections of this document that are deemed findings are hereby adopted as such.

3. The Warsen Family Limited Partnership owns the existing Lopez Farm Cottages & Tent Camping resort, located at 607 Fisherman Bay Road, in the north central part of Lopez Island. The resort is on two adjoining tax parcels, with the “site plan” provided in the application materials showing the resort as having about 27 acres, comprised of a fenced sheep pasture, guest cottages, tent sites, camp buildings, and other service buildings. (*Ex. 5*). The entire site is in the County’s Agricultural Resource land use designation. (*Staff Report, page 1*).

4. In this matter, the Warsen Family Limited Partnership, represented by its General Partner, John Warsen, seeks approval of a Conditional Use Permit to authorize development of 9 residential condominiums on a portion of their property. (*Staff Report; Ex. 3, application materials; Ex. 4, site plan for “Proposed Pocket Neighborhood”*). The applicant’s SEPA Checklist describes the proposal as follows: “We plan to build 9 residential condominiums.” (*Ex. 8, Checklist, on page 2, item 11 re: description of proposal*). During the public hearing, Mr. Warsen explained that he would like to sell the condominium units and wants to restrict any rentals of such units to at least 1-year lease terms. (*Testimony of Mr. Warsen*). The record also includes a letter from Mr. Warsen, included as part of *Exhibit 14*, dated March 20, 2020, to adjoining property owners, which reads as follows:

LFC&TC accommodations and residential housing use was grandfathered in prior to the adoption of the County Comprehensive Plan. Because of the serious need for housing on Lopez Island the Warsen Family Limited Partnership is planning to aid this need by building nine new residential one bedroom condominium units in a small ‘Pocket Neighborhood.’ Each condo will be a single story standalone unit. These units will be purchased by individual homeowners. [...]”

5. The applicant submitted this Conditional Use Permit application to the San Juan County Community Development & Planning Department on or about November 21, 2019. (*Staff Report at page 8; and Exhibit 3, application cover page*). The application was deemed complete for purposes of vesting and review on or about December 5, 2019. (*Staff Report, page 8*). Staff reviewed the application materials and the SEPA Checklist (*Ex. 8*) submitted by the applicant and issued a SEPA Determination of Non-Significance (DNS) for the proposal on March 18, 2020. Notices regarding the pending application were published, mailed and posted in accord with applicable County codes on March 18 and 20, 2020. (*Staff Report, page 8; Exhibits 13 and 14*). Before the date of the hearing, no one from the general public submitted any written comments regarding this application.

6. The Hearing Examiner is delegated specific authority to review this Conditional Use Permit application for compliance with detailed approval criteria adopted by the County Council in the San Juan County Code. (*See SJCC 18.80.100(D), CUP criteria for approval; SJCC 18.80.090(C), designating the Hearing Examiner as the decision maker for CUP applications*).

7. The first of 10 items listed in the approval criteria for this CUP application mandates that “The proposed use will not be contrary to the intent or purposes and regulations of this code or the Comprehensive Plan.” (*SJCC 18.80.100(D)(1)*).

8. The County Code specifies density requirements for various land use designations assigned to properties throughout the county. For the two parcels involved in this application, there is no dispute that they are both assigned the “Agricultural Resource” land use designation. The maximum allowable residential density for all parcels is shown on the official maps of the San Juan County Comprehensive Plan. (*SJCC 18.30.020(D)(1)*).

9. There is no dispute that the County’s Comprehensive Plan Land Use Map for Lopez Island designates the applicant’s parcels a density of 1-unit per 10-acres. (*See Ex. 16, Comprehensive Plan Land Use and Shoreline Master Program map for District 2, which includes Lopez Island, last revised in May of 2017*).

10. The San Juan County Assessor’s records show that the applicant’s two parcels are sized as follows:

Parcel No. 251131004000 is 18.6459 acres; and
Parcel No. 251131005000 is 10.5251 acres.

11. While the Assessor’s records provide more generous land area figures (29.1701 acres) than those used by the applicant on its site plan (27 acres +/-) included in the record as *Exhibit 5*, the residential density for the applicant’s property remains the same: 1-unit per 10-acres.

12. Using either set of figures, it is clear that applicant’s request for a Conditional Use Permit authorizing development of 9 residential condominiums – depicted on the applicant’s “Proposed Pocket Neighborhood” site plan included in the record as *Exhibit 4* as 9 stand-alone detached

condominium cottages, each with one-story and one-bedroom, and sized at 9000 +/- sq.ft. – exceeds the maximum allowable density allowed on the site.

13. 9-units would require a land area of at least 90-acres. With 29.1701 acres, the maximum density could be up to two residential units. The County’s code does not permit ‘rounding up’ fractions. *(See SJCC 18.30.020(D)(1), which reads in relevant part: “In determining the maximum number of allowable parcels or dwelling units, only whole numbers may be used. Fractional density units are not parcels and may not be combined across density designation or parcel boundaries to create a whole density unit.”)*

14. The application seeks approval of the requested CUP, generally relying on language found in the table at SJCC 18.30.040, which allows existing resorts and camps to increase the scope or scale of their facilities and services in an agricultural resource land use designation, subject to approval of a conditional use permit in this instance. The table cannot be read in a vacuum. And, the applicant provided no evidence or citation to applicable legal authority that its property is somehow “grandfathered” thereby making any new development proposals for its property exempt from complying with current development regulations, particularly those related to density limits, the creation of condominiums, and the division of land for purposes of creating legal lots or units that will be offered for sale to individual property owners.

15. A conditional use permit cannot be used to re-write county codes, including density standards. In fact, as noted above, the very first item listed in the criteria for approval of any conditional use permit expressly mandates that “The proposed use will not be contrary to the intent and purposes and regulations of this code or the Comprehensive Plan.” *(SJCC 18.80.100(D)(1))*.

16. For this applicant, the existing summer cottage and tent camping operation on its property may be able to increase the scope and scale of its facilities and services, so long as such proposals comply with other County codes and Comprehensive Plan provisions. This application seeks to add long-term residential housing to the site, in the form of 9 stand-alone residential cottages that the applicant expressly intends to sell as separate condominium units, with limits on rentals to leases of at least one year. *(Testimony of Mr. Warsen; Ex. 4, Proposed Pocket Neighborhood site plan depicting 9 residential condominium cottages; Ex 14, Mr. Warsen’s letter quoted above)*. The application does not comply with county codes and Comprehensive Plan provisions, including without limitation the maximum residential density permitted on the property. Accordingly, this application cannot be approved.

17. Materials included in the record for this application show that the existing resort has “Summer Cottages” and/or transient cabin accommodations on the site. *(See Ex. 11, Historical documents about Lopez Farm Cottages & Tent Camping, item “E”, an 8-page letter dated July 1, 2009 from Mr. Warsen, describing prior permit history for the site, and request for proposed “Summer Cottages”)*. Based on the record and evidence presented during the course of this hearing process, the applicant’s property has never been developed with condominium units offered for sale to individual owners, or for rent under long-term leases of at least one year. Instead, Mr. Warsen’s letter included as part of *Exhibit 11* indicates that the Summer Cottages requested and approved at some point in or after 2009:

were to be occupied by an average of two guests per night; would not accept children (noting that such restriction should generate ‘far less solid waste’; would not include stoves so guests would not cook meals, as a means to reduce solid waste; and that the Summer Cottages could be offered to the public for 180 days a year, i.e. they are not and were not offered for sale or rent as long-term residential units. (*Ex. 11, item E, particularly details provided on pages 3 and 4*). The existing guest accommodations on the applicant’s property, whether they are called cottages, cabins, tent sites, or some other term, do not appear to fit within the definition of “Dwelling Unit,” which means “a single unit providing complete independent living facilities for one or more persons, including permanent provisions for living, sleeping, eating, cooking and sanitation”. (*See definition of term in SJCC 18.2.040*). The “historical documents” about the Lopez Farm Cottages & Tent Camping operations, included in the record as *Exhibit 11*, indicate that the existing cottages do not include stoves, so they are not “dwelling units”. In contrast, the proposed new condominium cottages would provide permanent provisions for living, sleeping, eating, cooking and sanitation, thus falling in the definition of “dwelling unit”. Accordingly, the new cottages can only be developed if they fit within applicable density requirements for the property. The Examiner finds and concludes that the pending application seeks to add a type of residential housing to the site – 9 new condominium dwelling units to be sold to individual owners – that has never before been part of the Lopez Farm Cottages’ operation. The applicant’s proposed site plan is labeled: “Proposed Pocket Neighborhood”. (*Ex. 4*).

18. “Resort” is defined in the San Juan County code as follows: “a land area devoted to providing commercial recreational facilities and related lodgings, sales, and personal services primarily serving vacationers, which may or may not include residential uses.” (*SJCC 18.20.180, emphasis added*). While adding some forms of on-site residential housing to an existing resort or camp operation may be subject to approval under a conditional or even a provisional use permit, depending on impacts as determined by the Director (*See SJCC 18.40.410(A)*), like the sort of summer-cottages, camp sites, or transient cabin accommodations as described by Mr. Warsen in his history of the Lopez Cottages’ operations and facilities (*Ex. 11, item E*), there is no support in the code or evidence in the record for this matter that supports the applicant’s proposal to divide and develop condominium dwelling units for sale to individual owners, via this request for a stand-alone conditional use permit. The Examiner finds that 9 individually owned condominiums, with rental terms limited to leases of at least a full year, would not primarily serve vacationers, contrary to the definition for a “resort.” Instead, the applicant’s development proposal fits the County code’s definition for “Residential development” which means “development of land with dwelling units for nontransient occupancy”. (*SJCC 18.20.180, emphasis added*).

19. The applicant seeks approval of a conditional use permit that would essentially serve as a preliminary subdivision or binding site plan approval for a “pocket neighborhood” with 9 stand-alone residential condominium cottages to be built and sold on the property. (*See Ex. 4*). A conditional use permit cannot be used to circumvent state and county land division or condominium requirements, including without limitation those found in the Condominium Act, Chapter 64.34 RCW; the Washington state Subdivision statute, Chapter 58.17 RCW; RCW 58.17.033, traditional subdivision process; RCW 58.17.035, binding site plan which may be used to divide land in connection with creation of condominiums; and Chapter 18.70 SJCC re: Land Divisions, which includes SJCC 18.70.050, preliminary subdivision requirements for proposals with more than 4-lots, and SJCC

18.70.090, binding site plan process, which can be used in connection with creation of residential condominiums. The applicant has provided no evidence or information demonstrating that the current proposal is in compliance with any applicable state or county land division code.

20. Under Chapter 58.17 RCW, two methods exist for property owners to divide their property into individual lots, parcels, tracts or units. One is the traditional subdivision process provided in RCW 58.17.033 and SJCC 18.70.050. The other method is the binding site plan process provided in RCW 58.17.035 and SJCC 18.70.090.

21. The requested Conditional Use Permit application materials do not meet all of the requirements for a binding site plan or a subdivision, so it does not and cannot accomplish the division of land into legal lots that may be sold on the open market as envisioned by the applicant. For instance, the requested Conditional Use Permit lacks the Concurrency testing and certifications required by SJCC 18.70.120 and SJCC 18.60.200; it does not demonstrate compliance with SJCC 18.30.020(D)(8), which mandates that in all resource land use designations, like the Agricultural Resource designation assigned to the applicant's property, land division proposals shall be subject to the conservation design provisions found in SJCC 18.70.060(B)(10); and the application materials do not meet the submittal requirements for either a preliminary plat or a binding site plan.

22. While Washington's recently adopted Uniform Common Interest Ownership Act (codified as Chapter 64.90 RCW) provides that Chapter 58.17 RCW does not always apply to the creation of a new condominium project, it also explains that the statute "must not be construed to permit the creation of a condominium or cooperative or miscellaneous community on a lot, tract, or parcel of land that could not be sold or transferred without violating chapter 58.17 RCW"; and that "this chapter does not invalidate or modify any provision of any building, zoning, subdivision, or other statute, ordinance, rule, or regulation governing the use of real estate". (*See RCW 64.90.025*).

23. With respect to this application and this applicant, the Examiner finds and concludes that any attempt to sell individual condominiums cannot be authorized under the requested conditional use permit or any previously-issued conditional use permit for the applicant's property. The existing resort is under common ownership, and primarily serves vacationers. Any action to sell portions of the property that would exceed applicable residential density limits assigned to the site would violate state and county law. The pending application does not comply with applicable regulations, including without limitation the residential density limits imposed on the applicant's parcels. Thus, any attempt to divide, develop, sell or transfer a lot, tract, parcel, or portions thereof, as one or more of a 9 residential condominium unit project on the applicant's property, would likely be in violation of County density limits for the site, and in violation of RCW 58.17.300 and SJCC 18.70.010(H)(re: Illegal Division and Development of Land).

24. While the applicant's expressed reason for seeking approval to develop new residential units on its property may be commendable – to help address the serious need for housing on Lopez Island – the Hearing Examiner is not delegated authority to ignore applicable residential density limits for the site.

25. As Ms. Thompson explained during the public hearing, the County code includes a process that could result in authorization to develop the applicant's property using a density other than that provided on the current Comprehensive Plan Land Use Map for the site. Specifically, SJCC 18.30.060 includes a number of special provisions that may be applied to properties that obtain approval as a Master Planned Resort, noting that residential densities and uses for a Master Planned Resort shall be as determined at the time of Master Plan approval. *See SJCC 18.30.060(B)(1)*. "Master planned resort" means a self-contained and fully integrated planned unit development in a setting of significant natural amenities, with primary focus on destination resort facilities consisting of short-term visitor accommodations associated with a range of on-site indoor or outdoor recreational facilities. *SJCC 18.20.130*.

26. Ms. Thompson testified that she provided Mr. Warsen with information regarding the Master Planned Resort process. For whatever reason, he has declined to pursue such process, and instead believes that a stand-alone conditional use permit can be used to develop his property with the 9 proposed residential condominiums on the site. Unfortunately, he is mistaken, and the pending application for a conditional use permit does not satisfy applicable approval criteria.

27. As explained above, the applicant's requested conditional use – 9 new stand-alone residential condominium units that will be built for purchase by individual homeowners – must not be contrary to the intent or purposes and regulations of County codes or the Comprehensive Plan. (*SJCC 18.80.100(D)(1)*). From the outset, the applicant's proposed conditional use had to comply with the county's comprehensive plan, irrespective of whatever conditions might be imposed by the hearing examiner. In this instance, the proposed development is not compatible with the County's code or the Comprehensive Plan. It would exceed applicable residential density limits for the site. Thus, the application must be denied.

VI. CONCLUSIONS OF LAW

1. Based on the Findings as summarized above, the undersigned examiner concludes that the proposed Conditional Use Permit to develop nine (9) residential condominiums on the applicant's property would be contrary to the intent and purposes and regulations of County codes and the Comprehensive Plan, including without limitation applicable density limitations for the site. Accordingly, this application cannot be approved.

2. Any Finding or other statements in previous or following sections of this document that are deemed Conclusions are hereby adopted as such.

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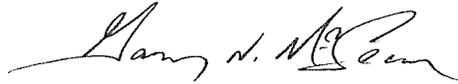
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VII. DECISION

Based upon the preceding Findings of Fact and Conclusions of Law, evidence presented through the course of the open record hearing, and all materials contained in the record, the undersigned Examiner respectfully DENIES the requested Conditional Use Permit to develop nine (9) residential condominiums on the Warsen Family Limited Partnership property.

ISSUED this 7th day of August, 2020



Gary N. McLean
Hearing Examiner

EFFECTIVE DATE, APPEALS, VALUATION NOTICES

Hearing Examiner decisions become effective when mailed or such later date in accordance with the laws and ordinance requirements governing the matter under consideration. SJCC 2.22.170. Before becoming effective, shoreline permits may be subject to review and approval by the Washington Department of Ecology, pursuant to RCW 90.58.140, WAC 173-27-130 and/or SJCC 18.80.110.

Decisions of the Hearing Examiner are final and not subject to administrative appeal to the San Juan County Council, unless the County council has adopted, by ordinance, written procedures for the discretionary review of such decisions. See Section 4.50 of the San Juan County Home Rule Charter and SJCC 2.22.100.

Depending on the subject matter, this decision may be appealable to the San Juan County Superior Court or to the Washington State Shorelines Hearings Board. State law provides short deadlines and strict procedures for appeals and failure to timely comply with filing and service requirements may result in dismissal of any appeal. See RCW 36.70C and RCW 90.58. Persons seeking to file an appeal are encouraged to promptly review appeal deadlines and procedural requirements and confer with advisors of their choosing, possibly including a private attorney.

Affected property owners may request a change in valuation for property tax purposes, notwithstanding any program of revaluation.