

**SAN JUAN COUNTY
HEARING EXAMINER**

FINDINGS, CONCLUSIONS AND DECISION

Applicants: Black Family Enterprises
174 Blake Way
Friday Harbor, WA 98250

Agent: Francine Shaw
Law Office of Stephanie O'Day
PO Box 2112
Friday Harbor, WA

File No: HE40-08 (07CU012)

Request: A request for a conditional use permit (CUP) for purposes of expanding an existing non-conforming use; appeal of a Mitigated Determination of Non-significance (MDNS) S.J.C. COMMUNITY,

Parcel No: 351124003 SEP 09 2008

Location: 70 Bonnie Drive DEVELOPMENT & PLANNING
San Juan Island

Summary of Proposal: Black Family Enterprises is requesting a conditional use permit to expand the allowable number of on-site employees from four to twelve. A Determination of Non-significance (DNS) was withdrawn and a MDNS was issued. Black Family Enterprises appeals the issuance of the MDNS.

Land Use Designation: Rural farm forest (RFF)

Public Hearing: After reviewing the report of the Community Development and Planning Department a public hearing was held on August 5, 2008.

Applicable Policies and Regulations: RCW 43.21(C) State Environmental Policy Act (SEPA)
WAC 197-11 SEPA Regulations
SJCC 18.80.050 SEPA Implementation Rules
SJCC 18.40.310 Non-conforming Uses
SJCC 18.80.100(D) CUP Criteria

Decision: Deny the SEPA appeal; deny the CUP.

Findings of Fact

1. On September 29, 1995 the San Juan County Board of Adjustment issued a CUP to Mr. and Mrs. Scuman for expansion of a home occupation to a commercial operation. The permit covered a five-acre parcel surrounded on the north, east and south by a 35-acre property owned by Mr. Scuman's mother. The original land use designation of the five-acre parcel was suburban. The CUP was subject to seven different conditions, none of which included vehicle trips per day.
2. During the adoption of the Growth Management Act mandated Comprehensive Plan (CP) and Unified Development Code (UDC) in 1998, the designation for the Scuman property was changed from suburban to rural farm forest. Upon the adoption of the new CP and UDC the "commercial" use CUP became non-conforming.
3. Subsequent to the new CP, the surrounding properties were subdivided and became residential five-acre tracts. Additionally, as Mr. Scuman reached retirement age, the level of activity for the business lessened.
4. Mr. Black purchased the Scuman five-acre tract in 2006 with the intention of operating the Black Family Enterprises excavation business under the terms of the CUP. After the applicant's purchase of the property the level of business activity increased significantly.
5. Not surprisingly the owners of the surrounding residential five-acre parcels objected to the increase of business activity of this non-conforming use. According to the neighbors, traffic increases in the range of 400% ensued and outdoor storage of material increased by approximately 250%. The quiet solitude of the surrounding RFF area was destroyed by the noise and dust of significant trips from large trucks and other excavating equipment, increased outdoor storage of material that was unscreened and significant increases in the number of employees and on-site work, according to the neighbors.
6. A code enforcement contact with the applicant was made in March of 2007. The County alleged that the current level of operation exceeded the 1995 CUP. The usual flurry of denials, county staff activity and increased neighbor complaints ensued.
7. An application was submitted by Black Family Enterprises for a new CUP to expand the non-conforming use. A number of requests were submitted with the original application. At the time of the hearing the applicant specified that the new CUP was for expansion of the number of employees on-site from three plus the owner to a total of 12. Additionally, the applicant also asked for approval of the revised "internal circulation pattern".

8. A DNS for the new CUP application was issued April 2, 2008. Comments from neighbors regarding the DNS were received. In responses to those comments, the responsible official withdrew the DNS and issued a MDNS on April 30, 2008.
9. The MDNS determined that a significant environmental impact would occur from the increased commercial traffic resulting from the proposed increase to 12 full time employees. In order to mitigate that significant environmental impact a limit of 20 trip ends (one way trips), was made a condition.
10. The MDNS was appealed on May 19, 2008. The applicant contended that the MDNS was incorrectly issued because he had a grandfathered right to 20 round trips per day from the 1995 CUP.
11. While the next two findings may more correctly be conclusions of law, it is important to understand what is authorized to be decided in this case and what is not being decided. This is not a proper forum to determine if Mr. Black has a grandfathered right to 20 round trips per day under the 1995 CUP. This is not the proper forum to determine whether the staff interpretation of the 1995 CUP is correct or incorrect. This is not the proper forum to determine if Mr. Black has or has not violated any of the conditions of the 1995 CUP or for that matter what the conditions of the 1995 CUP are or are not.
12. The only SEPA issue in this case is whether the MDNS limiting commercial traffic to 20 trip ends per day was correctly issued as that determination relates to the request for a new CUP to expand the non-conforming use. While I understand the desire of the County, the applicant and the neighbors to resolve some of the issues relating to the 1995 CUP that simply is not authorized by the UDC to be decided in this proceeding. If the County believes a violation exists sufficient to take further action, the evidence and the legal test accompanying an enforcement action are completely different from those to determine whether SEPA compliance has occurred or in determining whether the criteria for issuance of a new CUP are met.
13. The requirements of expanding a non-conforming use are found in SJCC 18.40.310. In determining whether a non-conforming use shall be expanded the decision must take into consideration the total impact of the use currently as well as the added impact of the proposed change, and the consistency of the change with the RFF designation.
14. The total impact of the current level of the 1995 CUP is significant. The added impact of the proposed change would be major. Tripling the number of employees would make the non-conforming use even more inconsistent with the RFF designation.
15. Whether the current use of the Black property is considered an industrial or commercial use, it does not conform to the UDC standards. It is not the type of

low level activity that is consistent with the RFF designation. A significant increase in on-site employees would make the use even more non-conforming.

16. The criteria for a new CUP is found at SJCC 18.80.100(D). The current use and an intensification is not strictly contrary to the code because it is allowed under SJCC 18.40.310 under certain conditions.
17. The intensification, however, would not be appropriate to or consistent with the design, character and appearance of the RFF designation.
18. It is clear from the evidence that the applicant has already increased the number of employees from four to 12. That increase has correspondingly increased the level and impact of traffic, noise, dust and safety issues.
19. The 1995 CUP levels of traffic present a hazard to the now existing significantly changed neighborhood. The proposed increase in the number of employees will significantly increase the commercial vehicular traffic and will be a hazard to the existing neighborhood.
20. The issue of the amount and type of outdoor storage is not properly a part of this hearing.
21. Notice of hearing was published April 9, 2008, April 30, 2008 and June 18, 2008. Mailing and site posting occurred on April 8 and June 18, 2008.
22. 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 persons and subject matter of this proceeding.
2. Proper notice was given in compliance with local and state requirements.
3. SEPA compliance is governed by RCW 43.21(C), WAC 197-11 and SJCC 18.80.050. Under SJCC 18.80.050(G) the responsible official makes the threshold decision. Under subsection (4) the responsible official may issue a MDNS where a significant adverse impact can be mitigated. The standard of review of that decision is found in SJCC 18.80.140(J)(1)(g) which provides that the determination of the responsible official "shall carry substantial weight" in an appeal.
4. It is the burden of the appealing party to prove that the MDNS was issued incorrectly. In this case the appellant contended the MDNS was issued incorrectly because there was a grandfathered right to 20 round trips per day.

Whether such grandfathered right exists is not a proper basis for challenging the MDNS. The MDNS determination was based upon existing conditions relating to the CUP request for an expanded non-conforming use. The responsible official determined that such increase in employees would add a significant environmental impact to the surrounding area. The impact determination was not challenged.

5. The non-conforming use section is found in SJCC 18.40.310. Under subsection (A):

When a non-conforming use or structure is proposed for alteration, modification, intensification, or expansion under this section, the total impact of the non-conforming use will be considered as well as the added impact of the incremental changes being proposed and the consistency of the changes with the applicable land use designation.

Under section (F) the expansion of non-conforming use is allowable only if:

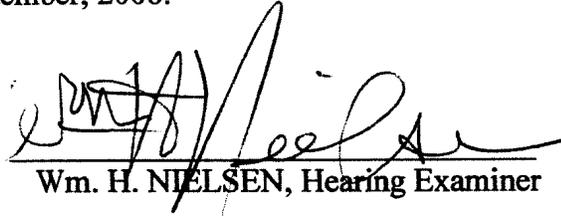
- 1. A non-conformance with the standards of this code shall not be created or increased;*
 - 2. The proposal shall comply with the standards of this code to maximum extent feasible; and*
 - 3. The proposal shall not have an adverse impact on an environmentally sensitive area.*
6. In this case there is no consistency of the proposed expansion with the RFF designation. Because of the change to the area from 1995, the total impact of this non-conforming use is now significant. The additional impact of increasing the employees from four to 12 along with the associated traffic increases would add immeasurable impacts to this neighborhood. The proposed increase in non-conformance does not comply with the standards of the UDC.
7. The criteria for issuance of a CUP is found in SJCC 18.80.100(D). The burden is on the applicant to show all of the 10 criteria are met. Under the facts of this case the applicant has failed to prove that criteria 1, 2, 3, 5, 7, 8, or 10 have been met.
8. Any finding herein which may be deemed a conclusion is hereby adopted as such.

Decision

The frustration that staff, Mr. Black and his representative and the neighbors have over the current situation is evident. It is not legally appropriate to issue any decision regarding the 1995 CUP in this process. The issue to be decided is a request for a CUP to expand a non-conforming use. The revised request for "internal circulation pattern" approval was so confusing as to not be understandable.

Simply stated, the appellant failed in his burden of showing that the County's MDNS determination was incorrect. The applicant failed to show compliance with the requirements for issuance of a CUP for expansion of a non-conforming use.

DONE this 9th day of September, 2008.



Wm. H. NIELSEN, Hearing Examiner

Appeal

Any appeal of this decision shall be to Superior Court pursuant to the Land Use Petition Act, Chapter 36.70 RCW. See Home Rule Charter, Section 3.70.
