

**SAN JUAN COUNTY
HEARING EXAMINER**

FINDINGS, CONCLUSIONS AND DECISION

Applicant: Scott Boden
1013 Golf Course Road
Friday Harbor, WA 98250

File No.: PLPALT-11-0001

Request: Plat Alteration

Parcel No: 451451001-451451010

Location: San Juan Island

Summary of Proposal: Removal of conservation areas from approved plat

Land Use Designation: Rural Residential and Rural Farm Forest

Hearing Date: April 7, 2011

Application Policies and Regulations: SJCC 18.70.080

Decision: Approved subject to conditions.

S.J.C. COMMUNITY

APR 27 2011

DEVELOPMENT & PLANNING

1 **BEFORE THE HEARING EXAMINER FOR THE COUNTY**
2 **OF SAN JUAN**

3 Phil Olbrechts, Hearing Examiner

4 RE: Scott Boden	FINDINGS OF FACT, CONCLUSIONS OF LAW AND FINAL DECISION.
5 Plat Alteration 6 (PLPALT-11-0001)	

S.J.C. COMMUNITY

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DEVELOPMENT & PLANNING

7 **INTRODUCTION**

8 The Applicants have applied for approval of a plat alteration to remove 60%
9 conservation area designations and associated restrictions from an approved plat.
10 The application is approved with the condition that the public works department
11 verify that changes in open space and building envelope will not prevent compliance
12 with stormwater regulations.

11 **TESTIMONY**

12 Exhibits 1-8 identified in the staff exhibit list were admitted into the record. Exhibit 9,
13 a compilation of email comments, was also admitted into the record.

14 Julie Thompson, San Juan County planner, summarized the staff report. She noted
15 that as a result of a court ruling invalidating County requirements for conservation
16 areas, the conservation areas on the subject plat have been removed and replaced with
17 a reduced 30% open space area. The building envelopes are being expanded from
18 30% to 60% of lot coverage. There is still a storm water requirement requiring 65%
19 retention of natural vegetation and another requirement that still sets the limit on
20 impervious surface to 10%. The alterations to the plat only provide for more options
21 on the locations of buildings on each lot and do not change the amount lot coverage
22 allowed. In response to neighbor concerns, the Applicant has proposed to change the
23 wording of Plat Restriction No. 12 to expressly provide that 65% of native vegetation
24 shall be retained on each lot.

21 Francine Shaw, Applicant's representative, submitted a public comment synopsis,
22 which was admitted into the record of Exhibit 10. Ms. Shaw noted that the soils of the
23 project area are characterized by low infiltration and high runoff. Ms. Shaw said she
24 and the Applicant met with the project opponents to discuss the flooding of the area,
25 which includes flooding four times in the last ten years. Ms. Shaw noted that it is
incorrect to conclude that storm water regulations restrict building envelopes. The
regulations only restrict the amount of impervious surface to 10%. Increasing the
building envelope only increase flexibility on building location. The storm water
flows south and increasing the building envelope won't change that since storm water
regulations don't allow any alteration in flow direction. The Applicants have

1 proposed to place the 10% impervious surface requirements and the 65% vegetative
2 retention requirements on the face of the plat. There are concerns about clear cutting,
3 but plat restrictions 6 and 10 already place restrictions on clear cutting. She noted that
4 increasing the building envelope will not increase environmental impacts, it just shifts
around where the buildings can be located. Ms. Shaw also submitted a County policy
on conservation areas, which was admitted as Exhibit 12. Exhibit 13 was admitted as
comments from Rachel Dietzman, San Juan County Public Works.

5 Charles Peckinpaugh, President of the Carefree Owner's Association, testified on
6 behalf of neighboring property owners. The Owner's Association has twenty lots and
7 ten of those adjoin the subject subdivision. Their principal concern is stormwater
8 management. The original stormwater plan has 80% open space, now called non-
9 buildable. That's not on the plat but based upon his calculations from the stormwater
10 plan. Under the revised plan the building area is larger and the open space is reduced
from 80% to 65%. The stormwater plan noted that the 80% was added margin for
assuring added protection from stormwater overflow. Mr. Peckinpaugh acknowledged
that impervious surface will stay the same but water retaining vegetation will decrease.

11 Mike Edwards, lives next to the subdivision. He noted that he is at the center of a
12 drainage bowl that is designated as of intermediate geological stability. He noted that
13 has been a landslide in the last few months near his property. He also noted that
14 additional water will come from wells and sewer systems. He said that infrastructure
drainage has been overrun four times in the last few years and wanted to know who
would be responsible for fixing the problem.

15 In rebuttal, Ms. Shaw noted that the site is composed of hydric soils, which are
16 wetland soils. The drainage plans note that the property has low infiltration capability.
17 The vegetation doesn't pull up a lot of water. There was 80% open space dedicated in
the original plat, but this was never a requirement of the drainage plan. The 80% is
not referenced in the drainage plan.

18 EXHIBITS

19 All documents identified in "Exhibits for West Side Highlands Plat Alteration",
20 attached to the 1/24/11 staff report, were admitted into the record at the hearing. In
21 addition, the following documents were admitted during the hearing:

22 Exhibit 9: Email comments.
23 Exhibit 10: Applicant response to public comments.
24 Exhibit 11: County conservation design area policy.
25 Exhibit 12: 1/25/11 Email from Rachel Dietzman, Public Works
Exhibit 13: 10/05 storm water plan.

FINDINGS OF FACT

Procedural:

Plat Alteration

p. 2

Findings, Conclusions and Decision

1. Applicant. The Applicants is Scott Boden.

2. Hearing. The Hearing Examiner conducted a hearing on the subject application on April 7, 2011. The hearing was left open for submission of the storm water plan for the subdivision, which was received by the Examiner on April 9, 2011.

Substantive:

3. Site and Proposal Description. The Applicant seeks to revise a subdivision that acquired preliminary approval in 2005 and final approval in 2008. The subdivision, called West Side Highlands, is composed of 10 lots on 52.1 acres. The Examiner decision approving the subdivision is Exhibit 4. The Applicant has requested the changes in response to Skagit County Superior Court Judge Susan Cook's decision that SJCC 18.70.060(B)(10)(a) violates RCW 82.02.020 as an unauthorized tax on development. SJCC 18.70.060(B)(10)(a) requires that 60% of subdivision lots be set aside as open space. As a result of the decision, the Applicant requests the following alterations to the Hearing Examiner decision (Ex. 4) are as follows (track changes used to highlight additions and deletions):

FOF No. 8: The non-build area protects wetlands, provides well protection areas and provides screening from adjacent public roads. The seasonal stream near the western boundary is located in the non-build area.

COA No. 14: Areas designated as both non-build and native growth protection areas must be preserved in their natural state...

COA No. 19: Areas designated as non-build areas shall be maintained as open space areas from which all construction related to residential use (houses, residential outbuildings, parking and residential landscaping) shall be excluded. Agricultural activities and structures other than for human habitation, wells and related structures, utility lines, residential driveways, septic systems, biofiltration and ponds approved as pumper supply points and other allowed activities may be placed within the designated non-build areas.

COA No. 20: The "non-build areas" shall be maintained in a natural state. No native trees or shrubs may be cut or killed, although invasive weeds may be removed.

The Applicant also proposes similar changes to the Plat Map, identified in Exhibit 6.

4. Characteristics of the Area. Ten lots of a twenty lot subdivision, apparently called "Carefree", abut the subject subdivision.

6. Adverse Impacts of Proposed Use. The residents of Carefree are very concerned that the elimination of the conservation areas from the plat will increase the opportunity for removal of vegetation, which they believe is necessary to absorb storm water that would otherwise flood their properties. The neighbors have good

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1 reason to be concerned because they have experienced flooding four times in the last
2 ten years.

3 It is undisputed that the proposed alterations will reduce open space from 80% of lot
4 area to 65%. The neighbors believe that the extensive open space in the original plat
5 was relied upon by the hearing examiner and the stormwater engineer as a margin of
6 error to prevent flooding of their properties. If this contention is correct, additional
7 stormwater analysis would certainly be justified. The hearing examiner decision does
8 not contain any language that suggests any reliance upon the "extra" open space of
9 the invalidated conservation area requirement to control stormwater impacts.
10 However, the stormwater design plan does state at p. 3 that *"the proposed location of
11 building envelopes and/or vegetative buffers, driveways, and open space on the plat is
12 intended to accomplish most of the stormwater controls and avoid need for specific
13 flow control of treatment facilities.."* This language does suggest that the location of
14 building envelopes and vegetative retention on the plat affected the stormwater
15 conclusions of the stormwater engineer.

16 It is entirely possible and even very likely that the 10% impervious surface limitation
17 and the 65% vegetation retention requirements of the County's stormwater
18 regulations still provide adequate stormwater controls. As noted by Ms. Shaw,
19 stormwater regulations do not permit any alterations in off-site stormwater flows or
20 increases in their volumes, so it is hard to conceive of how the alterations would make
21 a difference on stormwater impacts. Unfortunately, it is unclear whether this standard
22 would be revisited upon final engineering or whether it has already been incorporated
23 into the stormwater plan with its apparent reliance upon the proposed location of
24 building envelopes and vegetative retention areas. Given the quoted language in the
25 preceding paragraph, some review is necessary from someone with expertise in
stormwater engineering to make sure this is not an issue.

It is unclear from the record whether the public works department has considered the
impacts of the reduction in open space. Ex. 12, which contains some comment from
Rachel Dietzman of the public works department to Ms. Shaw, simply reiterates the
65% vegetative retention and 10% impervious surface requirements without
mentioning that Ms. Dietzman was aware of or had considered the fact that the plan
bases part of its analysis on the location and amount of open space and that these
factors have changed. Ms. Dietzman may well have been aware of this issue, but her
email doesn't provide that assurance. The conditions of approval will require further
clarification from the public works department on this issue. It may well take the
public works department two minutes to provide the requested clarification and that's
perfectly fine. Of course, if the public works department finds that the change merits
further investigation and mitigation, that should be done.

CONCLUSIONS OF LAW

Procedural:

Plat Alteration

p. 4

Findings, Conclusions and Decision

1 1. Authority of Hearing Examiner. Permits for the alteration of subdivision
2 applications are reviewed and processed by County staff, and the Hearing Examiner,
3 after conducting an open-record public hearing, renders a decision on the permit.
SJCC18.70.080(A)(3).

4 **Substantive:**

5 2. Comprehensive Plan and Zoning Designations. The subject property is
6 designated as Rural Residential and Rural Farm Forest.

7 3. Permit Review Criteria. The San Juan County Code ("SJCC") governs the
8 policies and criteria for subdivision alteration. SJCC 18.70.080(A)(4) establishes the
9 criteria for approval. Applicable criteria are quoted below and applied to the
application with corresponding conclusions of law.

10 **SJCC 18.70.080(A)(1):** *Alterations of subdivisions shall be processed in accordance*
11 *with RCW 58.17.060 and 58.17.215 through 58.17.218. Alteration applications shall*
12 *contain the signatures of the majority of those persons having an ownership interest*
in lots, tracts, parcels, sites or divisions in the subject subdivision or portion to be
altered.

13 *If the subdivision is subject to restrictive covenants which were filed at the time of the*
14 *approval of the subdivision, and the application for alteration would result in the*
15 *violation of a covenant, the application shall contain an agreement signed by all*
16 *parties subject to the covenants providing that the parties agree to terminate or alter*
the relevant covenants to accomplish the purpose of the alteration of the subdivision
or portion thereof (RCW 58.17.215).

17 4. As demonstrated in Ex. 8, the owners of all the lots of the subject plat alteration
18 have authorized the proposed alteration by signed statements. The staff report states
19 that no covenants would be violated by the proposal and there is nothing in the record
20 to suggest otherwise. There is nothing in the record to suggest that any covenants
would be affected by the proposed alteration.

21 **SJCC 18.70.080(A)(2):** *Notice and Public Hearing. Notice of alterations shall be*
22 *consistent with the notice provisions (SJCC 18.80.030) of this code. Mailing*
23 *notifications shall also include owners of each lot or parcel of property within the*
subdivision to be altered. A public hearing (SJCC 18.80.040) shall be required for
long subdivision alteration proposals.

24 5. The staff report states that these notice requirements were followed.

25 **SJCC 18.70.080(A)(4)(a):** *The application meets the requirements of this chapter,*
and complies with the applicable policies and requirements of RCW 58.17.330, the

6. The County Council has authorized the hearing examiner to make a final decision on the application as authorized by RCW 58.17.330. As noted in the Applicant's application letter, Ex. 2, compliance with the regulations identified above has already been established through approval of the original subdivision in 2005 and no applicable regulations have changed except for invalidation of the conservancy requirement. The alterations proposed by the Applicant do not result in any violations of the regulations cited above.

SJCC 18.70.080(A)(4)(b): *The application satisfactorily addresses the comments of the reviewing authorities and is in the public interest (RCW 58.17.100, 58.17.110, and 58.17.215)*

7. There are no comments from reviewing authorities in the record. The project is in the public interest since it removes the implementation of invalidated development requirements. The conditions of approval will also serve the public interest by ensuring that stormwater regulations are followed.

SJCC 18.70.080(A)(4)(c): *Any outstanding assessments (if any land within the alteration is part of an assessment district) are equitably divided and levied against the remaining lots, parcels, or tracts, or are levied equitably on the lots resulting from the alteration; and*

8. The alteration will not alter the number, size or location of the lots so no impacts on assessments is anticipated.

SJCC 18.70.080(A)(4)(d): *Any land within the alteration that contains a dedication to the general use of persons residing within the subdivision is divided equitably*

9. No new dedications are proposed.

DECISION

The application (the changes to the Examiner decision identified herein and Ex. 6) is consistent with all applicable regulations as outlined above and subject to the following conditions:

1. Public works staff with expertise in stormwater management shall provide written assurance that the reduction in open space and changes in building envelopes and vegetative retention proposed by the Applicant shall not prevent compliance with applicable stormwater regulations. A short email is fine. If the public works department determines that further evaluation is necessary, the Applicant will provide further engineering analysis as required by County staff.

1 2. Stormwater regulations requiring 65% vegetative retention and a
2 maximum of 10% impervious surface shall be identified on the plat map.

3 Dated this 25th day of April 2011.

4 
5 Phil Olbrechts
6 County of San Juan Hearing Examiner

7 **Effective Date, Appeal Right, and Valuation Notices**

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

13 This land use decision is final and in accordance with Section 3.70 of the San Juan
14 County Charter. Such decisions are not subject to administrative appeal to the San
15 Juan County Council. See also, SJCC 2.22.100.

16 Depending on the subject matter, this decision may be appealable to the San Juan
17 County Superior Court or to the Washington State Shorelines Hearings Board. State
18 law provides short deadlines and strict procedures for appeals, and failure to timely
19 comply with filing and service requirement may result in dismissal of the appeal. See
20 RCW 36.70C and RCW 90.58. Persons seeking to file an appeal are encouraged to
21 promptly review appeal deadlines and procedural requirements and consult with a
22 private attorney.

23 Affected property owners may request a change in valuation for property tax purposes
24 notwithstanding any program of revaluation.
25