

CITY OF SHORELINE HEARING EXAMINER
FINDINGS, CONCLUSIONS AND DECISION

PROJECT INFORMATION SUMMARY

Applicant: Shaun Leiser

Location: 2330 N. 156th Place

Project Number: 2000-1492

Decisions: Supplemental Variance (buffer and setback widths) and Revised SEPA Addendum

Petitioners: Twin Ponds Fish Friends/Patty and Timothy Crawford

Introduction

This matter arises out of a remand from the Court of Appeals and Superior Court to the Hearing Examiner, following those courts' rulings concerning the decision by the City's Hearing Examiner in 2001 regarding Project 2000-1492. On July 9, 2008, the City's Planning and Development Services Department issued a "Supplemental Variance Decision" and a SEPA MDNS Addendum. Petitioners Twin Ponds Fish Friends/Patty and Timothy Crawford filed an appeal of the supplemental variance. The Department issued a Revised SEPA MDNS Addendum on September 10, 2008.

The matter was heard by the Hearing Examiner on October 1, 2008. Represented at the hearing were: the Crawfords, by Michele McFadden, attorney at law; the City of Shoreline, by Ian Sievers, City Attorney; and the applicant, Shaun Leiser, by Melody McCutcheon, attorney at law. Following the hearing, the record was held open through October 8, 2008, to receive additional information from the parties.

For purposes of this decision, all section numbers refer to the Shoreline Municipal Code (SMC or Code) unless otherwise indicated. The following shall constitute the findings of fact, conclusions, and decision of the Hearing Examiner in this matter.

Findings of Fact

1. The subject property, addressed as 2330 N. 156th Place, is zoned R-6 Single Family (6 units per acre), and is approximately 6,924 square feet in size. The lot is surrounded by other single family properties to the north, south and east, and is bordered by the right-of-way of Interstate 5 to the east, where a ditch runs parallel to the freeway.
2. The north branch of Thornton Creek enters a pipe from the Interstate 5 drainage swale north of the subject property, and all portions of the stream located on the property are enclosed within this pipe. The stream is conveyed through the pipe along the eastern and southern property lines, then exits the pipe and becomes an open water stream on the adjacent property to the west.
3. The full procedural history of this project is contained in the record. The applicant (originally, Gaston Enterprises LLC) applied in 2000 for a variance from the buffer and setback requirements of SMC 18.24.360 and 18.24.200, which required a 100-foot buffer from a Class 2 stream used by salmonids, a 50-foot buffer from a Class 2 stream not used by salmonids, and a 15-foot building setback from the buffer's edge.
4. The entire property is within the 100-foot buffer area, and the applicant sought the variance in order to complete the construction of a single family home. The structure would be located approximately 52 feet from the off-site open portion of the watercourse and approximately 13 to 17 feet from the piped stream that was located on the property.
5. In accordance with the Code in effect at that time, the Planning and Development Services Department considered the variance requests pursuant to SMC 20.30.310 (zoning variances) and SMC 20.80.190 (buffer width modification). On December 7, 2000, the Department issued a decision conditionally granting the variance from the buffer and setback requirements. The Director, as SEPA responsible official, also issued a Mitigated Determination of Nonsignificance (MDNS) for the proposed stream buffer variance with conditions set forth in the MDNS.
6. The petitioners, Twin Ponds Fish Friends/Timothy and Patricia Crawford (the Crawfords) appealed the SEPA MDNS and the variance decision to the City's Hearing Examiner, Robert Burke. The Examiner issued a decision on March 16, 2001, concluding that the variance criteria had been met and denying the appeals.
7. The Crawfords appealed the Examiner's decision to Superior Court. Judge Armstrong reversed the City's decision in a January 10, 2003 Final Judgment, ruling that not all of the variance criteria of SMC 20.30.310 had been met. The trial court found the need for the variance was due to a self-created hardship (the applicant's boundary line adjustment) and that there was insufficient evidence to show that the variance was the minimum necessary to grant relief. Judge Armstrong also ruled that the MDNS was erroneous because the analysis failed to consider the piped watercourse as a Class 2

stream, did not account for the presence of juvenile coho, and did not consider the possibility that the piped watercourse would need to be removed under the authority of the Washington Department of Fish and Wildlife.

8. The City and the applicant appealed the court's decision, which the Court of Appeals reversed in part and affirmed in part. In its decision, the Court of Appeals found no self-created hardship as to the variance, but remanded for further proceedings as to whether the relief granted was the "minimum necessary." The Court observed that "if Shoreline interpreted its ordinance such that it is an unreasonable hardship for Gaston to be denied a home of similar size as others in the same vicinity and zone, then it must make a record of what the sizes of those homes are, how his proposed home compares and how its placement satisfies the minimum necessary relief." Exhibit NNN5, page 14.

9. The Court also ruled that there was no authority cited to show that the piped watercourse was illegal or that the City could order its removal, and thus the trial court erred by finding the MDNS in error for failure to consider impacts to a future hypothetical restoration project. The Court affirmed the lower court's ruling that the culverted stream was a Class 2 stream, but noted that the error may have been harmless, since the buffer requirements were "intended to protect the open stream." The Court remanded for further consideration of whether the purposes to be served by the buffer requirements had been satisfied, or whether additional mitigation was required. The Court noted that on the record before it, it could not "be sure that all adverse impacts on an environmentally sensitive stream or the fish contained in it have been identified and mitigated." Exhibit NNN5, page 18. The Court therefore remanded to the lower court for further consideration of these issues.

10. By Order dated October 7, 2005, the Superior Court remanded the case "to the Shoreline Hearing Examiner to determine whether the relief sought satisfies the minimum necessary requirement of the variance ordinance, and whether or not the purposes to be served by the reduced buffers have been satisfied or whether additional mitigation is required." Exhibit OOO1.

11. In 2006, the City's Hearing Examiner and the parties met to discuss the remand. The applicant (now Shaun Leiser) indicated that he would submit revised information concerning the proposal for the Department's review and possible action. The Examiner's July 29, 2006 Order noted that, following the Department's review and any associated appeal period, a hearing could be held unless the parties agreed to submit evidence and arguments in writing.

12. In October, 2006, the applicant submitted supplemental information in response to the remand. Exhibit NNN1-12. The submittals include maps and charts which show the building footprints, lot sizes, and lot coverages for all other R-6 properties in the vicinity (the contiguous area of R-6 zoning between North 155th Street and the Metro Bus Barn) that are within the 100-foot stream buffer area.

13. The median footprint for houses within this area is 1,995 square feet. The footprint of the proposed structure would be 1,405 square feet.

14. The applicant revised the proposal after October 2006 by changing the stormwater control system. Rather than relying on a bioswale and catch basin system, the applicant now proposes a “Low Impact Development” (LID) infiltration system. The system relies on permeable surfaces, roof drains, piping, infiltration trench and catch basins on site, sending all water into the ground so as to emulate natural drainage conditions. The system has been designed to comply with the “small site drainage requirements” of the King County Surface Water Design Manual (KCSWDM), although normally a single family residential site of this size would not be required to meet those requirements. No runoff would be directed to the piped portion of the stream.

15. Prior to designing the system, the applicant retained a geotechnical engineering firm, Liu and Associates to evaluate the feasibility of using an infiltration system. The consultant excavated test pits to depths of approximately 6 feet, in order to examine the soil and geologic conditions. The Liu report notes that the test pits were excavated in the middle of a very wet winter, and “the groundwater levels encountered by the test pits should represent closely those of the high winter groundwater levels under the subject lot.” Exhibit OOO3, Liu report at page 5. The report’s recommendations concerning the infiltration trenches, including the placement of perforated piping within the trenches, were incorporated into the applicant’s LID system.

16. Regular inspection and maintenance of the system, e.g., annual vacuuming of the permeable pavement and cleaning out catch basins as needed, should be performed in order to ensure that the system’s optimal functioning. The City will require a covenant with the owner (binding on successive owners) that authorizes the City to inspect the stormwater facilities and to require any needed maintenance or repair. Exhibit A to the covenant includes instructions for maintaining the system, including inspections and cleaning of the permeable surfaces. Exhibit GGGG.

17. The nearby ditch along I-5 is controlled by the Washington State Department of Transportation (WSDOT). In the event that there were any overflows from the site to this drainage ditch, the sheet flows would not be considered point source discharges. According to Mr. Davido and Ms. Mosqueda, WSDOT would not require approval for any overflows from the site that might reach the ditch.

18. The applicant’s consulting biologist, William Shiels, analyzed the stream habitat on the property in light of the Court of Appeals and superior court rulings that the piped portion of the stream was a Class 2 stream. Mr. Shiels concluded that the purposes of a stream buffer, i.e., controlling temperature and sedimentation, introduction of nutrients, and management of runoff, did not apply to a stream in a pipe. Thus, reducing the buffer distances as proposed would not have adverse impacts on the stream in the pipe, the open water stream off-site, or the fisheries resources that might utilize the stream. He also concluded that the stormwater detention system proposed at that time would have no

adverse impacts on water quality, flow or fish habitat. Mr. Shiels also reviewed the infiltration system proposed by the applicant, and concluded that this system would also have no adverse impacts on water quality or fish habitat in the creek.

19. In 2003, the City amended its critical areas regulations. A critical areas reasonable use permit (CARUP) process was created which superseded the variance process that was used in 2000 for this variance. The City's Planning Commission considered what would be the "minimum necessary" alteration to a critical area to allow a reasonable use of the property. City staff had proposed specifying in the Code a maximum residential footprint of 800 square feet, but the Commission did not agree with this proposal, apparently because of concerns that this footprint size would prevent reasonable use of property.

20. On July 9, 2008, the Department issued its Supplemental Variance decision for this project. The memorandum decision identified the issues to be addressed in the remand as: (1) What standard should be used in determining whether the variance is the minimum necessary to grant relief to the applicant; (2) Does the requested variance meet that standard; and (3) In light of the determination that the culverted portion of Thornton Creek on the subject property is a class 2 stream and based on further analysis of impacts to fish, is a modification to the MDNS required?

21. The Department noted that the Court of Appeals had used an example of how the City could interpret "unreasonable hardship" under its Code as the denial of a home of similar size as others in the same vicinity and zone, provided there was a record of the sizes of those homes, how the proposed home compared, and how the proposed home's placement satisfied the "minimum necessary relief" criterion. The Department noted that it had used the same methodology in at least two other decisions, the Casper project 201165, and White Water LLC 201516, both of which involved critical areas and the sizing and placement of single family residences. The Department concluded that, based on the Court's direction and these previous cases, the "minimum necessary" standard "shall be a house footprint that is equal or smaller than the median footprint of houses in the vicinity that is also positioned as far as practical from the most sensitive critical areas given other building setbacks." Exhibit OOO5.

22. The Department compared the proposed footprint of 1,405 square feet and deck with the median footprint of single family houses in the same contiguous zone (R-6) between 155th Street and the Metro Bus Barn which are also constructed within the 100-foot setback of Thornton Creek, the median being 1,995 square feet. The Department also considered the fact that the applicant had proposed to place the house on a location approximately 15 feet from the piped stream in the side yard and approximately 50 feet from the identified open channel/outfall. The Department concluded that position of the footprint was as far as was practical from the most sensitive portion of the stream, i.e., the open channel area, given the other setback requirements at the site.

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23. On July 9, 2008, the Director, as SEPA responsible official issued a SEPA MDNS Addendum. The Addendum concluded that the proposed buffer distances would not have any additional impacts to the stream system and that no alteration of the issued MDNS was therefore required. On September 10, 2008, the Director issued a Revised SEPA MDNS Addendum. The Revised Addendum noted that the proposal had been revised to include downspout infiltration systems, an infiltration trench, new catch basin, and permeable concrete. The Revised Addendum noted that these site improvements would replace the mitigation measures identified in the November 22, 2000 MDNS (i.e., bioswale and catch basin improvements) and would result in no increase in stormwater runoff from the proposal, compared with existing conditions. The Addendum concluded that there would actually be a net environmental benefit as a result of the revised stormwater improvements, that there would not be probable significant adverse environmental impacts, and that “the existing threshold determination should therefore stand.”

24. On July 17, 2008, the City published a “Notice of Supplemental Variance Decision and Issuance of an Addendum to SEPA MDNS.” The Crawfords submitted letters of appeal of the variance decision on July 24 and July 31, 2008, within the “appeal” periods identified by the City.

Conclusions

1. This matter is before the Hearing Examiner on remand from the King County Superior Court and pursuant to SMC 20.30. The issues before the Examiner are limited to those which were remanded to the City and which are the subject of the Supplemental Variance decision and the SEPA Addendums. The petitioners bear the burden of showing that the City’s decision is not supported by the preponderance of the evidence; RP 9.8.

2. Several of the issues identified in the July appeal letters were dismissed prior to hearing by an Order dated September 23, 2008. The remaining issues identified by the appeal letters include: the Director exceeded his jurisdiction by adopting a standard for comparing the footprints of homes; the decision fails to provide adequate mitigation; the decision fails to conduct adequate analysis concerning what constitutes an “unreasonable hardship;” and that the impacts from stormwater runoff have not been addressed.

3. A preliminary issue is whether the Director exceeded his authority to adopt the standard for “minimum necessary” relief for grant of a variance. The Court of Appeals stated that “Shoreline must interpret the requirements of its ordinance and apply them accordingly.” The Director has authority to interpret the City’s Code and to “determine the level of detail and appropriate methodologies for required analysis” pursuant to SMC 20.100.050. Thus, the Director was acting within his authority to interpret the criteria of SMC 20.30.310.B.11 as part of the decision in response to the remand.

4. The Department correctly identified the three issues that must be addressed in the remand. The first issue is what standard is to be applied to determine the “minimum necessary to grant relief.” The City has determined that the “minimum necessary” standard is a house footprint that is equal or smaller than the median footprint of the houses in the vicinity that is also positioned as far as practical from the most sensitive critical areas, given the other setbacks that will be required. This standard is based on the example cited by the Court of Appeals, and is also consistent with the City’s administration of critical areas reasonable use permits pursuant to the standards in SMC 20.30.336.B.3. This standard satisfies the Court’s remand directions and is a reasonable method of measuring the “minimum necessary” to provide relief.

5. The Crawfords have urged that the standard should compare the project with the portions of neighboring houses that are within the 100-foot buffer area. The Department argues that using portions of houses for comparison is meaningless and results in a denial of reasonable use for this property, which is located entirely within the 100-foot buffer area. Regardless of whether this is so, it is clear that the Director has authority to interpret the Code language as he has done here, and the interpretation is reasonable. Neither the Code nor the Court of Appeals decision directs that the standard is to be limited to comparing portions of structures that are within the buffer area. No error has been shown as to the Department’s determination of the standard.

6. The next issue is whether the proposed variance will meet the identified standard. The proposed footprint size would be 1,405 square feet. The median footprint in the defined vicinity is 1,995 square feet. Thus, the proposed footprint is substantially smaller than the median footprint of the houses in the vicinity. As to its positioning, the house is surrounded on three sides by critical areas, and is located 15 feet from the piped stream in the side yard, and 50 feet from the open channel/outfall, while meeting the minimum 5-foot side yard setback. This location provides a greater setback for the more sensitive open channel area as opposed to the piped stream. The requested variance meets the standard, and would provide the minimum necessary relief from the buffer requirements.

7. The Crawfords assert that inadequate mitigation has been provided to address the impacts from the proposal. The evidence, including the testimony and reports by the applicant’s expert, Mr. Shiels, shows that the purposes of the Code’s buffer requirements are satisfied by the proposal, and that there would be no impacts to the stream or fish as a result of the project. The City’s Addendums correctly conclude that no changes to the MDNS are required.

8. The Crawfords raised questions about the proposed stormwater system, and are skeptical that it will successfully contain stormwater on the property. The Crawfords are very concerned about flooding of their property, which they describe as quite substantial. But some of their objections to the LID system, e.g., that it did not incorporate piping in the trenches, or that the roof runoff would not go into the trenches, were inaccurate. Other critiques or concerns regarding the effectiveness of the system, or allegations that it would allow harmful overflows onto their property, were speculative

and not supported by the evidence. Even if impacts on other properties were required to be considered in the remand (as opposed to impacts to the Class 2 stream or the fish), the evidence does not show that the MDNS needed to be modified on account of the proposal's impacts to the Crawford's property.

9. The Crawfords have requested that, should the application be approved, certain conditions be added. As noted below, some of these conditions will be added, but given the narrow scope of the Examiner's authority in this matter, and the actual impacts shown, many of these conditions cannot be imposed.

10. Proposed condition 3 would require installation of a berm to prevent flows to the Crawford property and the outfall. The evidence did not show that there would be overflows from the LID system once it is in place, but placement of a berm before the site is developed is a reasonable preventive measure that the respondents have not objected to. A condition requiring a 1-2 foot high berm, as determined by the City, will be added. Proposed condition 6, requiring stormwater improvements to be completed prior to occupancy or issuance of occupancy permits, should be imposed in order to avoid storm water impacts to the off-site stream. A note should be added to Exhibit A of the covenant to advise the owners of the need for annual vacuuming of the pervious surfaces, as the record shows this is an effective maintenance activity.

11. The remainder of the conditions proposed are not supported by the record or else are already adequately addressed by the proposal or the conditions of approval. Notice regarding the stream and the infiltration system is provided by the title and the covenant, except for the notice on annual vacuuming noted above. The requested Type II landscaping for the berm is not justified by the impacts shown in this record. There was no evidence that WSDOT would require approval if sheet flows reached the ditch, so there is no authority to impose this requirement. The replacement of failed pavement or infiltration materials is addressed by the maintenance requirements in the covenant. An additional "back-up" plan was not shown to be needed in this case; the proposed infiltration system was shown to be effective to address stormwater impacts from the proposal. Conditions 8-11 place duties on the City regarding enforcement and notification that are not supported by this record and would be outside of the Examiner's authority to impose.

12. The Director's supplemental variance decision together with the SEPA Addendums correctly address all of the remanded issues, and are supported by the evidence in this record. The supplemental variance decision on appeal is hereby affirmed as modified with the addition of the conditions described above.

Decision

The Supplemental Variance is Affirmed as Modified, with the following added conditions:

- A. The surface of the driveway is to be sloped away from the western property boundary. A berm one to two feet in height (to be determined by the City) shall be installed on the west property line south of the driveway, with a transition from the pavement to the unpaved area sloped to direct any runoff from the driveway to the inside of the berm. The berm is also to be extended along the south property line. The berm shall be designed to prevent flows to the Crawford property and the outfall of Thornton Creek as it exits the pipe west of the southwest corner of the applicant's property. The berm materials shall be installed in a manner that prevents erosion of the berm itself. The berm shall be installed prior to any other site improvements.
- B. Stormwater improvements shall be completed prior to occupancy of the home or issuance of the occupancy permit.
- C. "Exhibit A" to the Maintenance Covenant shall be amended to include a requirement that the pervious pavement be vacuumed annually.

Entered this 13th day of October, 2008.

Anne Watanabe
Shoreline Hearing Examiner

Exhibits and Parties of Record are found in the Clerk's File for this matter.