

WHATCOM COUNTY HEARING EXAMINER

RE: Administrative Appeal) APL2009-0008
Application for)
Michael and Leslie Lebeau) FINDINGS OF FACT,
) CONCLUSIONS OF LAW,
) AND DECISION

SUMMARY OF APPEAL AND DECISION

Appeal: The Applicants are appealing the denial of the Ravenwood Short Plat Application, SSS2001-0021, an Administrative Determination made by Whatcom County Planning and Development Services. The denied proposal would short plat an existing 14-acre site in the R2A zoning district into three-single-family lots and one unbuildable open space tract. The site is located off Lake Whatcom Boulevard south of Sudden Valley on steep, vegetated property with five streams and a shoreline associated wetland along Lake Whatcom.

Decision: The Denial of the proposed subdivision by Whatcom County Planning and Development Services is upheld.

FINDINGS OF FACT

I.

Background Information

Appellant: Michael and Leslie Lebeau

Project Name: Ravenwood Short Subdivision

Location: Lake Whatcom Boulevard

Project File Number: SSS2001-00021

Assessor's Parcel Number: 370416 017213 and 370416 038168

Shoreline Designation: Conservancy

Project Description: Three lot short subdivision on a 14.2 acre site in the R2A zoning district

Application Date: December 6, 2001

Technical Committee Decision Date: March 16, 2009

Notices:

Posting Notice of Open Record Hearing: September 2, 2009

Legal Notice of Open Record Hearing: September 3, 2009

Open Record Hearing: September 16 and 23, 2009

October 19, 2011

Exhibits:

- 1 Administrative Appeal Application
 - 1-1 Letter dated March 30, 2009, Appeal Statement from Langabeer & Tull

- 2 Letter dated June 24, 2009 from Alison Moss, Response to County's Notice of Denial, with attachments
 - 2-1 On-Site Sewage System Application
 - 2-2 Appeals Board Record
 - 2-3 Whatcom County Health & Human Services Subdivision Application
 - 2-4 Handwritten Notes, dated July 31/01, OSS Appeal's Board Meeting
 - 2-5 Appeals Board Record, dated October 17, 2002
 - 2-6 Letter dated January 5, 2006 from Health Department to John Cox
 - 2-7 Notice of Requirements to Continue Short Plat Review, dated January 4, 2002
 - 2-8 Letter dated December 1, 2005, from PDS to Jones Engineers
 - 2-9 Letter dated July 22, 2008 from PDS to Langabeer & Tull
 - 2-10 Memorandum, dated June 5, 2008 from Chad Yunge to Wayne Fitch
 - 2-11 Memorandum, dated June 5, 2008 from Lyn Morgan Hill to Technical Administrator
 - 2-12 Memorandum, dated December 18, 2001, Technical Committee Meeting Agenda and Minutes
 - 2-13 Letter dated November 28, 2005 from Jones Engineers to Jay Irwin
 - 2-14 Handwritten note from Warner Webb, dated November 18, 2005

- 3 Letter dated July 9, 2009, from PDS to Alison Moss, denying revised short subdivision

- 4 Mitigation Plan, dated June 2009

- 5 Memorandum, dated September 2, 2009 from PDS to Michael Bobbink, with attachments
 - 5-1 Notice of Preliminary Short Subdivision Denial
 - 5-2 Proposed Site Plan, dated November 14, 2008
 - 5-3 Letter dated June 24, 2009, from Alison Moss to David Stalheim [duplicate Exhibit 2]
 - 5-4 Proposed Site Plan, dated June 24, 2009
 - 5-5 Memorandum, dated September 1, 2009 from Kyle Dodd to Amy Keenan
 - 5-6 Memorandum dated August 4, 2009 from Lyn Morgan Hill to Technical Administrator
 - 5-7 Memorandum, dated August 11, 2009 from Chad Yunge to Amy Keenan
 - 5-8 Memorandum dated September 1, 2009 from Amy Keenan to Michael Bobbink
 - 5-9 Letter dated August 27, 2009 from Lee Carter to Amy Keenan
 - 5-10 Memorandum dated August 28, 2009 from Bill Hewett to Amy Keenan

- 6 Comment letter from ReSources, dated January 29, 2009 to Michael Bobbink

- 7 Certificate of Posting, dated September 2, 2009
- 8 Legal Notice, dated September 3, 2009
- 9 Appellant's Notebook of Exhibits No. 1-27

The following Exhibits submitted at September 23, 2009 Hearing

- 10 Whatcom County Sewage Control Appeals Board Hearing, July 31, 2001 [one tape-missing]
- 11 Comment Letter dated September 23, 2009, from Marian Beddill to Hearing Examiner
- 12 Entire Ravenwood Short Subdivision File
 - 12-1 Memorandum, dated September 2, 2009, from Amy Keenan to Michael Bobbink
 - 12-2 Notice of Preliminary Short Subdivision Denial
 - 12-3 Letter dated June 24, 2009, from Alison Moss to David Stalheim, re: Response to County's Notice of Denial
 - 12-4 Memorandum, dated September 1, 2009, from Kyle Dodd to Amy Keenan
 - 12-5 Memo dated August 4, 2009 from Lyn Morgan-Hill to Technical Administrator
 - 12-6 Memorandum, dated August 11, 2009 from Chad Yunge to Amy Keenan re: Whatcom County SMP Review
 - 12-7 Memorandum, dated September 1, 2009 from Amy Keenan to Michael Bobbink re: Current Planning Comments on June 29, 2009 Submittal
 - 12-8 Letter, dated August 27, 2009 from Lee Carter, Engineering Services to Amy
 - 12-9 Memorandum, dated August 28, 2009 from Bill Hewett to Amy Keenan
 - 12-10 Lebeau Appeal to Hearing Examiner, Application dated March 30, 2009, with attached Letter, dated March 30, 2009 from Langabeer and Tull
 - 12-11 Letter dated June 24, 2009, from Alison Moss to David Stalheim re: Response to County's Notice of Denial [duplicate letter 12-3, but with attachments]
 - 12-11.1 On-Site Sewage System Application
 - 12-11.2 Appeals Board Record
 - 12-11.3 Whatcom County Health & Human Services Subdivision Application
 - 12-11.4 Handwritten Notes, dated July 31/01, OSS Appeal's Board Meeting
 - 12-11.5 Appeals Board Record, dated October 17, 2002
 - 12-11.6 Letter dated January 5, 2006 from Health Department to John Cox
 - 12-11.7 Notice of Requirements to Continue Short Plat Review, dated January 4, 2002
 - 12-11.8 Letter dated December 1, 2005, from PDS to Jones Engineers
 - 12-11.9 Letter dated July 22, 2008 from PDS to Langabeer & Tull
 - 12-11.10 Memo, dated June 5, 2008 from Chad Yunge to Wayne Fitch
 - 12-11.11 Memorandum, dated June 5, 2008 from Lyn Morgan Hill to Technical Administrator
 - 12-11.12 Memorandum, dated December 18, 2001, Technical Committee Meeting Agenda and Minutes
 - 12-11.13 Letter dated November 28, 2005 from Jones Engineers to Jay Irwin
 - 12-11.14 Handwritten note from Warner Webb, dated November 18, 2005
 - 12-12 Mitigation Plan, June 2009, Prepared by Northwest Wetlands Consulting, LLC
 - 12-13 Notice of Preliminary Short Subdivision Denial, Decision dated March 16, 2009

- 12-14 Short Subdivision Application, dated December 6, 2001
- 12-15 Short Plat Application, dated December 6, 2001
- 12-16 Letter dated January 15, 2009, from Langabeer & Tull to Wayne Fitch re: Revised Notice of Additional Requirements
- 12-17 Letter dated June 19, 2007 from Langabeer & Tull to Chad Yunge re: SHV2007-00007
- 12-18 Letter dated March 27, 2008 from Langabeer & Tull to Wayne Fitch re: Revised Plat Application
- 12-19 Letters dated November 20, 2007 and October 31, 2006 [backside] from Jones Engineers to Robert Martin
- 12-20 Letter dated October 4, 2006 from Jones Engineers to Whatcom County Public Works, Engineering Div re: Driveway Sight Distance Certification with map on backside
- 12-21 Letter dated September 21, 2006 from Freeland & Assoc to Mike Lebeau, with handwritten note, dated May 20, 2005 from Ginger Essex to Jay Irwin [backside]
- 12-22 Transmittal Memorandum from Jones Engineers, dated November 30, 2005 to Whatcom County PDS, [backside: Letter dated November 28, 2005-Jones Eng]
- 12-23 Quit Claim Deed, dated September 24, 2001 with map attached
- 12-24 Comment Letter dated January 29, 2009, from ReSources to Michael Bobbink
- 12-25 Case Activities for : SSS2001-00021 Notes
- 12-26 Memo dated March 2, 2009 from Lyn Morgan-Hill to Technical Administrator
- 12-27 Memo, dated March 2, 2009 from Chad Yunge to Amy Keenan
- 12-28 Memo, dated February 17, 2009 from Charles Sullivan
- 12-29 Email memo, dated February 6, 2009, from Lee Carter to Amy Keenan
- 12-30 Memo, dated February 5, 2009 from Lyn Morgan-Hill to Technical Administrator
- 12-31 Memo, dated May 7, 2009 from Lyn Morgan-Hill to Technical Administrator
- 12-32 Memo, dated February 4, 2009 from Michael Kershner to Amy Keenan
- 12-33 Email memo dated February 6, 2009 from Lee Carter to Amy Keenan
- 12-34 Memo, dated January 26, 2009 from Chad Yunge to Amy Keenan re: NOR
- 12-35 Email memo, dated Feb 17, 2009 from Lyn Morgan-Hill to Amy Keenan
- 12-36 Memo, dated February 4, 2009 from Michael Kershner to Amy Keenan re: Watersheds Conditions of Approval and Plat Notes
- 12-37 Email memo, dated Feb 2, 2009, from Bill Hewett to Amy Keenan
- 12-38 Memo, dated Jan 6, 2009, from Keenan to Tech Committee re: NOR
- 12-39 Letter dated July 22, 2008 from Wayne Fitch to Langabeer & Tull re: revised Notice of Additional Requirements
- 12-40 Handwritten meeting notes [not dated]
- 12-41 Memo dated June 5, 2008, from Lyn Morgan-Hill to Technical Administrator
- 12-42 Memo, dated June 5, 2008 from Yunge to Fitch re: Tech Review Committee Meeting Review
- 12-43 Customer Receipt, dated March 27, 2008
- 12-44 Email memo dated Dec 11, 2006, from Kyle Dodd to Elaine Wick
- 12-45 Handwritten meeting notes, dated Dec 13, 2006
- 12-46 Memo, dated December 4, 2006, from Elaine Wick to Tech Committee
- 12-47 Email memo dated November 26, 2007 from Robert Martin to Lee Carter and Wayne Fitch
- 12-48 Email memo dated Nov 1, 2006 from Fitch to Wick
- 12-49 Email memo correspondence betw Robert Martin and John Cox dated June 22 and June 14, 2006
- 12-50 Email correspondence betw Fitch, Wick, Martin and Cox dated June 19 and June 14, 2006
- 12-51 Email correspondence betw Martin, Fitch and Cox, dated June 16 and 14, 2006
- 12-52 Email [not dated] from Wayne Fitch to Robert Martin

- 12-53 Letter dated Dec 1, 2005 from Jay Irwin to Jones Engineers
 - 12-54 Fax Transmittal from Whatcom County Health to John Cox, dated Nov 7, 2005
 - 12-55 Letter dated July 10, 2006 from Ed Halasz, Health Dept to John Cox
 - 12-56 Letter dated June 2, 2005 from Jay Irwin to Ginger Essex
 - 12-57 Notice of Expired Permit, dated May 16, 2005
 - 12-58 Letter dated Jan 5, 2006, from Whatcom County Health to John Cox
 - 12-59 Letter dated December 6, 2004 from Washington State Dept of Health to Fred and Joann Ossewarde re: Raven Wood Water System, Group B PWS
 - 12-60 Sorption Arsenic Treatment Plant Annual Report, Draft State Health
 - 12-61 Sight Distance Map, dated Dec 30, 2005, Jones Engineers
 - 12-62 Letter dated May 24, 2004 from County Health to Tony Freeland re: Revised plans for Ravenwood Group B Public Water System
 - 12-63 Notice of Requirements to Continue Short Plat Review, dated Dec 6, 2001
 - 12-64 Memo, dated Dec 20, 2001 from County Health to Jay Irwin
 - 12-65 Letter dated Dec 19, 2001 from Jay Irwin to Chief Tom Fields, Fire Dist #2
 - 12-66 Notice of Technical Committee Meeting, dated Dec 18, 2001 from Jay Irwin
 - 12-67 TRC Meeting Minutes, dated Jan 4, 2002 [handwritten]
 - 12-68 Technical Committee Meeting Agenda, dated Jan 4, 2001 [handwritten comments]
 - 12-69 Customer Receipt, dated Dec 6, 2001
 - 12-70 Site Zoning Map
 - 12-71 Site Vicinity Map
 - 12-72 Site Zoning Map [dotted]
 - 12-73 Site Vicinity Map, "Exhibit B" [Deed stamped – request of Larry Steele & Assoc]
 - 12-74 Whatcom County GIS generated, DOE Shoreline Area Designations, dated Jan 8, 1998
- 13 Large Map Existing Conditions, showing stream buffers highlighted in blue [Jones Eng]
 - 14 Map showing boundaries betw two existing exempt lots [yellow highlighting on portion – Jones Engineers]
 - 15 Large Map Proposed Preliminary Mitigation and Site Plan [Jones Engineers]
 - 16 Large Maps: Existing Conditions and Proposed Site Plan, dated Oct 23, 2008 [Jones Eng]
 - 17 Errors of Fact and Law, Decision and Attachments to September 2, 2009 Memorandum to Hearing Examiner, submitted by Alison Moss
 - 18 Critical Areas Memo, dated October 5, 2009, from Lyn Morgan-Hill to Michael Bobbink
 - 19 Appellant's Brief re: Substandard Shoreline Lots, dated October 7, 2009, from Alison Moss, with attachments
 - 19-1 Title 21, Land Division Regulations, dated November 28, 2000, pages 20-21
 - 19-2 Declaration of Service, dated October 8, 2009
 - 20 Letter dated January 15, 2010, from Alison Moss, with attachments
 - 20-1 Email, dated December 16, 2009, from Christi Aiello
 - 20-2 Memorandum, dated January 15, 2010, from Alison Moss re: Response to October 5, 2009 Critical Areas Memorandum

- 21 County's Response to Appellant's Call for Decision, dated January 25, 2010
- Exhibits submitted after September 23, 2009 and prior to and in preparation for October 19, 2011 hearing.*
- 22 Memorandum, dated March 9, 2010 from Michael Bobbink to Parties of Record
- 23 Memorandum, dated August 3, 2011 from Wayne Fitch to Michael Bobbink re: APL2011-0009, Request for Whatcom County Planning and Development Service's interpretation of the Critical Areas Ordinance regarding Buffer Reduction and Reasonable Use
- 24 Letter dated August 16, 2011 from Alison Moss to Michael Bobbink re: Request to Schedule Hearing
- 25 County's Response to Appellant's memo re: Substandard Shoreline Lots, prepared by Royce Buckingham, dated September 27, 2011, with attached *Court of Appeals of Washington, Division 2, Kitsap Alliance of Property Owners, v. Central Puget Sound Growth Management Hearings Board, Futurewise, Hood Canal Environmental Council, Kitsap Citizens for Responsible Planning, et al*
- 26 Appellants' Response Brief, prepared by Alison Moss, October 11, 2011 with attachments:
- 26-1 Ravenwood Short Plat Critical Areas – Mitigation Sequencing
 - 26-2 Email from Edward Halasz to Alison Moss dated March 14, 2011 re: Ravenwood Septic System Applications
 - 26-3 Critical Areas Review Memo, March 31, 2011 to Kyle Dodd re: Septic Review
 - 26-4 Health Dept Letter dated May 3, 2011 from Edward Halasz to Adam Prince re: On-site Sewage System Applications
 - 26-5 Email correspondence betw Alison Moss and Lyn Morgan-Hill, May 12/13, 2011
 - 26-6 Site Map, On-Site Wastewater Treatment System prepared by Alissi Consulting, Feb 28, 2006, with revisions September 28, 2010
 - 26-7 DOE Status of Local Shoreline Master Programs: Comprehensive Updates, pages 1,7,14
 - 26-8 Email correspondence: Royce Buckingham and Alison Moss, Sam Ryan, and Staff, Aug 23 and Sept 7, 2011
 - 26-9 Email correspondence: from Edward Halasz and Alison Moss Sept 15, 2011
 - 26-10 Nonconforming Uses and Parcels, Chapter 20.83/Ord 87-11, with Exhibit 1, Ord 2001-020, Exhibit 1
 - 26-11 Email correspondence: from Chad Yunge to Alison Moss, May 21, 2009
- 27 Ordinance No. 97-056, Chapter 16.16, "Critical Areas," with attached Exhibit A, Title 16, Chapter 16.16, dated Nov 3, 1997 and Appendix A: Conservation Program on Agriculture Lands and Critical Areas Ordinance, Nov 1997, 16.16.50 Standard Buffer Adjustment [yellow and purple highlighting]
- 28 Memo, dated Feb 1, 2010 from Michael Bobbink to Parties of Record re: Requests for Decision
- 29 Royce Buckingham's Presentation Hearing Outline, October 19, 2011
- 30 Addendum to Mitigation Plan Ravenwood Cluster Short Plat, prepared by Northwest Wetlands Consulting, LLC, dated October 13, 2011
- 31 Septic Field Exhibit, Jones Engineers – Alternate Proposal for Lot 3 Sand Filter
- 32 Site Plan, Photo Overlay, tree canopy proposed lot 3, prepared by Jones Engineers

Parties of Record:

Michael and Leslie Lebeau
5540 North Highway 1
Little River, CA 98456-9501

Alison Moss
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Seattle, WA 98116

Tyler Schroeder, Amy Keenan, Chad Yunge, Wayne Fitch, and Lyn Morgan-Hill
Whatcom County Planning and Development Services

Lee Carter, Whatcom County Public Works Engineering

Kyle Dodd, Whatcom County Environmental Health Department

Royce Buckingham, Whatcom County Civil Deputy Prosecutor

II.

This matter comes before the Hearing Examiner as an appeal of an Administrative Determination made by Whatcom County Planning and Development Services, denying a proposed three-lot short plat to be known as "Ravenwood." The area currently consists of two parcels totaling approximately 14.2-acres. The application was deemed complete in December 2001 and is vested under the applicable land use ordinances in effect at that time.

Most of the parcel lies between Lake Whatcom Boulevard and the shore of Lake Whatcom. A small triangle of the property is located landward of Lake Whatcom Boulevard.

The original application was for a four lot short plat. The Applicant now seeks to create three parcels out of the existing two parcels.

III.

This site is subject to significant development constraints encompassing virtually the whole of the two existing parcels. There are five regulated streams on the parcel. Three of these streams eventually end up exiting into Lake Whatcom and the other two into a large lakefront associated wetland [Wetland A] on the southeast portion of the site. Additionally, there is a small regulated wetland west of Wetland A, between Wetland A and Lake Whatcom Boulevard. Significant portions of the site contain steep slopes. It is not clear from the record as to whether or not these slopes are regulated as a hazardous or critical area. The northern end of the parcel is currently in an existing Conservation Easement.

Each of the streams on site is subject to a 100-foot critical areas buffer on each side. The wetlands are also subject to a 100-foot critical areas buffer.

Each of the wetlands is subject to a 100-foot wetland buffer and the entire portion of the property abutting Lake Whatcom is subject to a 75-foot shoreline setback and a 100-foot critical areas buffer.

Neither of the two existing parcels contains a site adequate for a single-family home site and appurtenant development outside of critical areas, critical areas buffers, and shoreline setbacks.

The proposed short plat would create three lots and a large open space tract. Approval of the short plat would necessarily create additional impacts on the critical area buffers as compared to the development impacts associated with the existing two-lot development.

IV.

In addition to each building site and appurtenant development requiring encroachment into critical areas buffers, development on proposed Lot 3 would require a Shoreline Variance. There is a small reasonable sized building site on Lot 3 which could meet the applicable shoreline setbacks from both Wetland A and Lake Whatcom. However, the driveway accessing this site would have to cross through the shoreline setback. There is no residential building site on proposed Lot 3 which would be outside of the critical areas buffer of either the streams or the shoreline of Lake Whatcom.

Additionally, the proposed driveway to access the home site proposed on Lot 3 would encroach on the 75-foot shoreline setback applicable to the portion of Wetland A within shoreline jurisdiction.

V.

One of the grounds for denial of the short plat application dealt with sewage disposal. The Applicant had obtained some kind of variance for a proposed onsite septic system [OSS] at the time of the short plat application. The proposed onsite septic system did not meet the then current OSS regulations for the Lake Whatcom watershed. The Applicants appealed to the OSS Appeal Board, who reviewed the application and issued a variance to the OSS standards that would allow approval of the short subdivision application.

The Applicant and Health Department Staff did not, and do not agree on what was permitted under the variance. The language of the approval of the variance was unclear at best. The record of the hearing before the OSS Appeals Board was an unclear tape recording which could not be transcribed.

During the pendency of this hearing, the Applicant worked with the Health Department and a system was designed which satisfied the Health Department. The location of the drainfield and associated piping and sand filters would almost entirely be located within critical area buffers. A

small portion of piping from proposed Lot 3 to the drainfield site would also be within the applicable shoreline setback from Wetland A and would require either a Shoreline Variance or Exemption.

With the exception of the pipe transferring sewage from the proposed building site on Lot 3 to the drainfield [It would cross under one of the streams onsite.], it appears that all of the necessary and reasonable, new development required by the OSS for the proposed 3-lot short plat would not encroach into any of the critical areas themselves. The encroachment would be limited to critical area buffers and, in the case of a small portion of the driveway servicing proposed Lot 3, within the shoreline setback.

VI.

In the decision denying the short plat application, the Technical Review Committee concluded that the proposal did not adequately avoid or mitigate impacts within critical areas or critical areas buffers. The Applicants disagree and assert they have proposed adequate mitigation through the use of buffer averaging and conservation easements.

The Hearing Examiner has concluded that the Critical Areas Technical Administrator has failed to establish that adequate mitigation was not proposed or, in the alternative, that adequate mitigation for critical areas and buffer impacts cannot be achieved through a revised Mitigation Plan and/or through utilization of an interdisciplinary team and consensus building as provided for by WCC 16.16.230 (1997 Critical Areas Ordinance).

VII.

Any Conclusion of Law which is deemed a Finding of Fact is hereby adopted as such. Based on the foregoing Findings of Fact, now are entered the following

CONCLUSIONS OF LAW

I.

The existing two parcel site does not contain a reasonable building site for a single-family residence outside of the critical area buffers, which apply, pursuant to the 1997 Critical Areas Ordinance.

The 1997 Critical Areas Ordinance applies both within the area of Shoreline Management Act jurisdiction as well as the areas outside of such jurisdiction.

The 1997 Critical Areas Ordinance [CAO] calls for a 100-foot buffer from each of the five streams on site, a 100-foot critical areas buffer from the Ordinary High Water Mark [OHWM] of Lake Whatcom, and a 100-foot critical areas buffer around both of the regulated wetlands.

The appropriate critical areas buffer from the shores of Lake Whatcom was a matter of some

confusion. The Hearing Examiner has concluded that the critical areas buffer from the lake shore is 100-feet. Section 16.16.710.G includes lakes as a Fish and Wildlife Habitat Conservation Area, and in 16.16.720.G, states as follows:

16.16.720 Regulatory Requirements

G. Lakes and Marine Water Bodies: The nearshore and deepwater habitats of lakes and marine water bodies providing fish and wildlife habitat shall be protected according to the provisions of Article VI in addition to the above sections (A) and (B). [Emphasis added].

This language requires the near shore habitat of lakes to be protected according to Article VI of the 1997 CAO. Article VI regulates wetlands and requires in 16.16.640.C a standard 100-foot buffer to protect wetlands. This 100-foot buffer applies to the shoreline of Lake Whatcom pursuant to the language of 16.16.720.G, which is set forth above and which incorporates by reference the protective provisions of Article VI and applies them to lakes and marine water bodies.

II.

Both the Shoreline Management Act and the Whatcom County Zoning Ordinance are applicable to this proposed short plat. The shoreline setback applicable for this property within the Conservancy Shoreline Designation is 75-feet from the OHWM. Pursuant to WCC 23.90.61 of the 1998 Edition of the Whatcom County Shoreline Management Program, "development" is subject to shore setbacks. "Development" is defined in the program in Chapter 23.110.D.2 and specifically includes the construction of structures. "Structures" is defined in the 1998 Shoreline Program in WCC 23.110.S.20. These definitions read, as follows:

WCC 23.110.D.2

Development means a use consisting of the construction or exterior alteration of structures, dredging, drilling, dumping, filling; removal of any sand, gravel or minerals; bulkheading; driving of piling; placing of obstructions; or any project of a permanent or temporary nature which interferes with the normal public use of the surface of the waters overlying lands subject to the Act at any state of water level. This term includes both exempt and substantial developments. [Emphasis added].

WCC 23.110.S.20

Structure means a permanent or temporary building or edifice of any kind, or any piece of work artificially built up or composed of parts joined together in some definite matter whether installed on, above, or below the surface of the ground or water, except for vessels (after Uniform Building Code). [Emphasis added].

The Hearing Examiner concludes that construction of a road or drive-way is required to meet the shoreline setback unless a Shoreline Variance is obtained. A Shoreline Variance cannot be obtained for a hardship created by the property owner. The subdivision of a shoreline parcel resulting in the creation of a lot which cannot be used for a permitted use without a variance is a self-created hardship and therefore could not obtain a Shoreline Variance. The proposed residential development on Lot 3 would not meet the shoreline setback requirements, would not be eligible for a variance, and therefore could not be used for the proposed residential purpose. The subdivision process cannot be used to create lots which cannot be developed in accordance with applicable local ordinances, including the applicable Critical Areas Ordinance, and the applicable Shoreline Management Program.

The 1998 Whatcom County Shoreline Management Program states in regard to subdivision in 23.90.53(a), as follows:

- 23.90.53 Subdivision**
(a) Substandard shoreline lots unsuitable for development of a primary permitted use under the Official Zoning Ordinance (Title 20) and this Program shall not be subdivided.

The Hearing Examiner concludes that the existing two parcels are substandard shoreline lots because they cannot be developed for a primary permitted use without encroaching on shoreline setbacks or critical areas, or critical area buffers. While variances are available for development of existing substandard or nonconforming shoreline lots, it is inappropriate to create such a lot through a new subdivision.

III.

The 1998 Whatcom County Shoreline Management Program addresses the relationship of the program to other local regulations in WCC 23.50.40. WCC 23.50.44, specifically, addresses subdivision and reads in relevant part as follows:

- 23.50.40 Relationship to Other Local Regulations**
.44 In the case of subdivision of land, including short subdivisions, within the jurisdiction of this Program which requires county approval, the Hearing Examiner, Administrator or County Council, as appropriate, shall attach conditions to such approval as are required to make the design of such subdivision(s) consistent with this Program.

This section ("shall") requires the Hearing Examiner to condition any subdivision within the jurisdiction of the Shoreline Management Program to make design of such subdivisions consistent with the Whatcom County Shoreline Management Program. In this proposed subdivision, there are no conditions which can be applied to the proposed Lot 3 to make its development consistent with the requirements of the 1998 Shoreline Management Program.

IV.

No residential development can take place on the subject property without encroaching on critical areas buffers. The existing lots are entitled to a reasonable use and may be developed for single-family purposes only through the application of mitigation in accordance with the mitigation sequencing set out in WCC 16.16.245 in the 1997 CAO.

Mitigation sequencing also applies to a proposed subdivision. The sequencing requires avoidance, first, and minimization, second. The creation of a new lot will create additional encroachment on critical areas and critical areas buffers. The additional impact on critical areas and their buffers resulting from the creation of an additional lot, which cannot be developed without impacts on critical areas and/or buffers, can be easily avoided by not creating the additional lot. The overall impact of development on critical areas on these parcels can be minimized by not creating an additional lot. Subdivision of this particular highly sensitive property is not consistent with the mitigation sequencing requirements of WCC 16.16.245(A) and (B).

The 1998 Whatcom County SMP specifically makes County Zoning, Subdivision Regulations, and Critical Areas Ordinance applicable to any shoreline development.

V.

As pointed out by Planning and Development Services, the Land Division's regulations applicable to this project require in both WCC 21.04.030(1)(f)(ii) and WCC 21.04.050(1) that subdivisions must be in conformity with and comply with the standards of local, State, and Federal laws and regulations. Creating a new lot whose development will necessarily be inconsistent with the shoreline setbacks and with the protection of critical areas and their buffers does not conform or comply with either the applicable Shoreline Management Program or the applicable Critical Areas Ordinance.

VI.

The Hearing Examiner previously addressed virtually the same issue in a Decision, APL2010-0006, dated May 24, 2010. This Decision was in response to an Appeal of a denial of a Boundary Line Adjustment, pursuant to the Subdivision Ordinance, which proposed to adjust the boundary lines of 24 contiguous parcels, ending up with 23-parcels. In paragraph V. on page 10 of the Decision, the Hearing Examiner addressed the issue of the meaning of "building site," as used in the Subdivision Ordinance, Chapter WCC 21.03. The Hearing Examiner concluded that the proposed boundary line adjustment, including 24-lots, could proceed as a boundary line adjustment and that the requirement that each lot resulting from the boundary line adjustment "..... contain sufficient area and dimensions to meet minimum requirements for width and area of a building site pursuant to this Title" did not require that the lots resulting from the boundary line adjustment meet current standards for lot size applicable to their location. However, the Hearing Examiner did conclude that the minimum requirements for width and area of a building site required an adequate area on each lot suitable for building structures which were located outside the applicable zoning setbacks, shoreline

setback, and outside of critical areas and/or their buffers. This was set forth in Conclusion of Law, V, of the Decision in APL2010-0006, which reads as follows:

Conclusion of Law, V.

The Planning Director concluded that the meaning of the term “building site” would necessarily exclude areas which could not be built on due to setbacks and the existence of critical areas and their buffers.

Existing legal nonconforming lots may be allowed to encroach upon zoning setbacks and/or critical areas and their buffers, including shoreline setbacks, based on either the variance criteria or the reasonable use criteria.

However, the Hearing Examiner concurs with Planning’s position that the requirement for an adequate “building site” on parcels realigned by Boundary Line Adjustments means a buildable area for structures outside of the applicable zoning setbacks, shoreline setbacks, and outside of critical areas and/or their buffers. If the Applicant wishes to take advantage of existing variance and reasonable use exceptions to allow building within zoning setbacks, shoreline setbacks, and/or critical areas and their buffers, the Applicant must leave those lots in their current configuration.

In order to determine the applicable setbacks, the Applicant will be required to show an adequate right-of-way for roads servicing the lots which is consistent with the current development standards for roads and then set back the “building site” so that it is consistent with the road or front yard setbacks applicable. The Applicant must demonstrate the ability to construct a road consistent with the Whatcom County Development Standards. Additionally, the requirements for new access roads must comply with WCC 21.03.060(f) and proper utility easements must be provided to comply with WCC 21.03.060(e).

The term “building site” was undefined in the Land Division regulations, just as the word, “substandard,” is undefined in the Shoreline Management Program. In both cases, one must look to the dictionary definition in order to determine how to interpret the use of that term within the context it is found.

The Hearing Examiner sees no difference in concluding that new parcels created by subdivision must have an adequate building area outside all applicable setbacks and outside critical areas and their buffers. The Hearing Examiner concludes that new subdivision of existing parcels is required by law to contain a sufficient area for construction of a primary permitted use outside of all the applicable setbacks, and outside of critical areas and their buffers.

VII.

For the reasons set forth above, the Hearing Examiner should deny the appeal and the proposed subdivision. This leaves the owner with the opportunity for reasonable residential development of a residence on each of the subject parcels. It leaves open at least the potential for one of the residential units to be located in the building site proposed on what would have become Lot 3, with adequate and appropriate mitigation and/or a Variance.

VIII.

Any Finding of Fact deemed to be a Conclusion of Law is hereby adopted as such. Based on the foregoing Findings of Fact and Conclusions of Law, now is entered the following

DECISION

The Whatcom County Hearing Examiner upholds the denial of subdivision approval to the proposed Ravenwood Subdivision.

**NOTICE OF APPEAL PROCEDURES FROM FINAL DECISIONS OF
THE WHATCOM COUNTY HEARING EXAMINER**

This action of the Hearing Examiner is final. The following review procedure is available from this decision and may be taken by the applicant, any party of record, or any County department.

Appeal to County Council. Within ten business days of the date of the decision a written notice of appeal may be filed with, and all required filing fees paid to, the Whatcom County Council, Courthouse - 1st Floor, 311 Grand Avenue, Bellingham, WA 98225. The appeal notice must state either:

- 1) The specific error of law which is alleged, or
- 2) How the decision is clearly erroneous on the entire record.

More detailed information about appeal procedures is contained in the Official Zoning Ordinance at Section 20.92.600-.830. A copy of this document is available for review at the County Council Office.

After an appeal has been filed and the Council office has received the hearing record and transcript of the public hearing, the parties will be notified of the time and date to file written arguments.

DATED this 15th day of November 2011.



Michael Bobbink, Hearing Examiner