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AFTER RECORDING RETURN TO:
SKAGIT COUNTY HEARING EXAMINER
302 SOUTH FIRST STREET
MOUNT VERNON, WA 98273

DOCUMENT TITLE: ORDER ON ADMINISTRATIVE APPEAL
AP 02 0777

HEARING OFFICER: SKAGIT COUNTY HEARING EXAMINER

APPELLANTS: FAMILY TRUST OF PATRICK AND KATHLEEN CORBIERE and
JOHN R. COX & ASSOCIATES, LLC

ASSESSOR PARCEL NO: P#68387

ABBREVIATED LEGAL DESCRIPTION: The proposed project is Lot 13 of Rancho San Juan Del Mar, Subdivision 7 located at 13654 Orca Lane, Anacortes, WA.; a portion of Section 10, Township 34 North, Range 1, E.W.M., Skagit County, Washington.

BEFORE THE SKAGIT COUNTY HEARING EXAMINER

In the Matter of the Appeal of	)	
	)	PL02-0777
FAMILY TRUST OF PATRICK AND	)	
KATHLEEN CORBIERE,	)	
and	)	FINDINGS OF FACT,
JOHN R. COX & ASSOCIATES, LLC	)	CONCLUSIONS OF LAW
	)	AND DECISION
From the Revocation of Building Permit	)	
# BP02-0587, Issued for the Construction	)	
of a Single Family Home on Lot 13 of	)	
San Juan Del Mar Subdivision No. 7	)	
at 13654 Orca Lane.	)	

This matter, the appeal of the revocation of a building permit, came on regularly for hearing before the Hearing Examiner on February 19, 2003. C. Thomas Moser, Attorney at Law, represented the appellants. Linda Kuller, Senior Planner, appeared for the Planning and Permit Center. A group called Fidalgo Aggregation in Review (FAIR) made a presentation through its attorney, Gerald Steel. Steel stated that FAIR's members include neighbors of the Corbieres' property.

Testimony was heard, exhibits were admitted and argument was made. After the close of the Hearing the Examiner reopened the record to allow responses to briefing presented at the hearing and replies to those responses. The Examiner has admitted the post-hearing submissions of the parties, including those of the County. He denies the motion of the appellants to strike certain submissions of FAIR or to reopen the record. The post-hearing-submissions of the parties have been given exhibit numbers.

Based on the record, the Examiner enters the following:

FINDINGS OF FACT

1. Patrick and Kathleen Corbiere are the owners, as trustees, of the real property located at 13654 Orca Lane, where initial site preparation has been completed for the construction of a single family residence. The property is Tax Parcel P68387, Lot 13 of Rancho San Juan Del Mar, Subdivision No. 7, located in the unincorporated area of Skagit County.
2. The construction process was commenced pursuant to Lot Certification PL02-0553 and Building Permit BP02-0587. John R. Cox and Associates, LLC, is a contractor



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who managed the purchase of the property for the Corbieres, who applied for and obtained the certification and permit, and who has a contract to build the Corbiere home.

3. The Lot Certification for Lot 13 was issued by the County on October 3, 2002. The Corbieres filed a Declaration of Innocent Purchase regarding the property on October 11, 2002. The Building Permit was issued on December 12, 2002.

4. On December 17, 2002, the Permit Center revoked the building permit. This appeal followed.

5. The County's first Subdivision Ordinance was passed on March 1, 1965.

6. Rancho San Juan Del Mar, Subdivision No. 7 (and Lot 13 within it) was created in 1956, years before subdivision regulations were adopted. At the time the lot was initially delineated there were no minimum lot size requirements. Under the then effective law, the lot did not violate any development requirements.

7. Lot 13 borders the boundary of the subdivision. Lot 7 of Rancho San Juan Del Mar Subdivision 8 lies next to it. Lot 6 of Subdivision 8 borders Lot 7. The lots in Subdivision 8 were created by platting in 1960, again before the subdivision ordinance came into being.

8. The present zoning for the area that includes these three contiguous lots is Rural Intermediate. The minimum lot size for the zone is 2.5 acres. Lots 13, 7 and 6 are each under one acre. (Lot 13 has 18,450 square feet. Lot 7 has 17,517 square feet and Lot 6 has 17,517 square feet.)

9. Prior to the adoption of the present Comprehensive Plan in July of 2000, the former SCC 14.04.190(5) required aggregation of contiguous lots of substandard size, as follows:

When any person owns or acquires contiguous pieces of property involving descriptions setting forth lots which would be substandard under the provisions of this chapter, the Planning and Permit Center and the Assessor shall combine such property in the following manner:

- (a) If either or both of the two (2) lots are substandard, they shall be aggregated to form one (1) lot;
- (b) If any of three or more lots are substandard, they shall be aggregated in such a way that no substandard lots remain;
- (c) All contiguous substandard lots shall be aggregated into a single lot even if the resultant lot is substandard. . .

Certain exceptions were provided, but the subject lots (Lots 13, 7 and 6) were not within an exception.



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10. The County's interpretation of SCC 14.04.190(5) was that owners of contiguous property who did not aggregate or submit to aggregation were not entitled to development permits for any of the substandard lots.

11. When the 2000 Comprehensive Plan was adopted, the aggregation requirements of SCC 14.04.190(5) were replaced with performance-based criteria that focus on health and safety considerations. See 14.16.850(4). Litigation was commenced over whether this new approach complied with the Growth Management Act (GMA). The Western Washington Growth Management Hearings Board determined that the new regulations failed to comply with the GMA. That decision was appealed and at present is subject to settlement discussions in Superior Court.

12. In order to meet the objections of the Growth Management Hearings Board while the appeal is pending, the County reinstated the aggregation requirements of SCC 14.04.190(5). This was accomplished by the adoption of Interim Ordinance 20020037 on January 28, 2002. The provisions of this interim measure have since been extended several times and remain in effect.

13. Contiguous lots 13, 7 and 6 were in held in common ownership from 1981 through March 7, 2002. Lot 13 was never aggregated with the other lots.

14. Lot 13 became the subject of a purchase and sale agreement on November 27, 2001, and was purchased by the Corbieres on March 7, 2002. Lots 7 and 6 were sold to other parties. The purchase and sale agreement was made during the so-called "window" period when aggregation was not required. However, by the time the purchase was concluded, the reinstated aggregation provisions of former SCC 14.04.190(5) had become effective.

15. Before a building permit was issued, the Permit Center required the Corbieres to acquire a "lot of record" certification. The certification, when issued in early October, stated that the subject lot (Tax Parcel P68387) is a substandard lot of record. Concurrently the Planning and Permit Center advised the Corbieres that the lot is subject to Interim Ordinance 20020037 "which requires aggregation of substandard lots of record in common adjacent ownership." The letter stated that the lot was not eligible for a building permit based on nonconformance with the Interim Ordinance.

16. However, in addition the Permit Center directed the Corbieres' attention to SCC 14.18.000(9), the "innocent purchaser" regulation. The subsection reads, in pertinent part:

(b) An innocent purchaser of a lot created in violation of this Chapter who files a notarized affidavit of innocent purchase with the Planning and Permit Center . . . shall be treated as follows for purpose of determining zoning compliance and for establishing eligibility for



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building permits . . .

(ii) Innocent purchaser lots which do not meet current zoning requirements but which did meet development requirements in effect at the time they were created, will be treated the same as legally created lots subject to SCC 14.16; and

(iii) Innocent purchaser lots which do not meet current zoning requirements and which did not meet the development requirements in effect at the time of their creation will be treated the same as legally created lots for purpose of conveyance, but will not be eligible for building permits.

(iv) Any innocent purchaser may, alternatively, rescind the sale or transfer of the subject property and recover the costs of investigation, suit, and reasonable attorneys fees occasioned thereby as provided in RCW 58.17.210.

(These subsections are referred to hereinafter as Subsections (b)(ii), (b)(iii), and (b)(iv).)

17. Upon receipt of these communications, the Corbieres filed their Declaration of Innocent Purchase, and the Permit Center advised that pursuant to Subsection (b)(ii) development review could proceed.

18. In response to this determination, counsel for FAIR wrote the Permit Center and argued that Corbieres were not entitled to the benefits of Subsection (b)(ii) because the lot in question was not "created" until it was sold to the Corbieres,

19. On November 22, 2002, the Permit Center by letter answered FAIR, indicating an intention to continue processing the building permit. This letter stated that Lot 13 was created during the platting of Subdivision 7 of Rancho San Juan Del Mar in compliance with County regulations. Further, the letter stated that "Mr. Corbiere appears to have purchased the lot for value without notice of the aggregation requirements for merging the three subject lots into one new lot."

20. Thereafter came the issuance of the building permit and its subsequent revocation. The revocation letter stated that the permit was issued in error and that:

The proper code interpretation considers creation of the lot as the time of sale to Mr. Corbiere due to the lot aggregation regulations in effect at the time under [the Interim Ordinance].

21. In the development code, the definition of "lot of record" includes "any tract of land . . . platted and recorded with the auditor prior to March 1, 1965." The subject Lot 13 is a "lot of record." SCC 14.04.020.



22. "Lot certification" is not a defined term under the code, but it apparently refers to a process in use for a number of years for determining whether a lot was created in accordance with regulations. If applicable, the aggregation requirement has been implemented in conjunction with the certification process. Certification was and is required prior to the completion of a development permit application. See SCC 14.06.090(1)(b).

23. Before July of 2000 in the years when SCC 14.04.190(5) was effective, the County's approach was, if possible, for the staff to aggregate contiguous properties administratively when development was sought. After aggregation, the certification was for a "lot of record, legal."

24. However, where contiguous substandard lots had once been in common ownership but had then passed into separate hands, there was an acknowledged failure to implement the aggregation law uniformly. This problem is what led the County in 2000 to abandon the strict aggregation approach. Before the Growth Management Hearings Board the County explained that "due process" problems and the impact of a State statute providing an "innocent purchaser" exception (RCW 57.18.210) were interfering with enforcement of the law requiring aggregation.

25. Interim Ordinance 20020037 essentially revived the difficult situation facing the County prior to 2000. The old aggregation regulation was restored, but the "innocent purchaser" provisions of SCC 14.18.000(9) were not affected.

26. There is no formal administrative interpretation by the County that analyzes the meaning of the phrase "at the time they were created" in Subsection (b)(ii) of the "innocent purchaser" regulation. The plain and commonsense reading would be that the time of "creation" is the time a lot originally came into existence as a distinct parcel. Where there is no aggregation requirement, there appears to be no question that the original date of creation of a substandard lot is the date to be applied for purposes of Subsection (b)(ii)

27. The record does not support a finding that there is any sort of long-established administrative interpretation that Subsection (b)(ii) somehow refers to a different time of "creation" when the lot has been subject to the aggregation regulation.

28. Nothing in the regulatory language suggests that a separately sold lot that should have been aggregated is "created" at the time of sale for purposes of defining innocent purchasers.

29. The "innocence" involved here is the state of knowledge of the purchasers, not of the sellers. Moreover, the time when "innocence" is relevant is on the date of purchase, not later when development permits are sought. The Examiner is persuaded



that on the date of purchase the Corbieres were, in fact, innocent of the knowledge that the aggregation law was in force and that Lot 13 did not qualify for a building permit.

30. Further, there was no lack of due diligence on the part of the John R. Cox organization in researching the situation prior to sale. The over-the-counter information received preceding the purchase and sale agreement in November 2001 correctly described the situation during the "window" period before Interim Ordinance 20020037 restored the old regime. Among the things then learned was that the County had never formerly required aggregation of contiguous lots in separate subdivisions. This policy apparently changed quietly after the Interim Ordinance was adopted.

31. Interim Ordinance 20020037 was adopted in January of 2002 without notice or hearing. It re-instituted the former lot aggregation provisions of SCC 14.04.190(5) by reference and did not spell out the regulatory terms.

32. A Notice of Adoption for the Interim Ordinance was published in February 2002. The Notice of Adoption said only that to allow the pursuit of settlement of litigation, the Court had ordered "certain interim ordinance provisions to address Rural Marine Industrial (RMI)-designated properties, portions of the Big Lake Rural Village, Open Space Reserve CaRD (OS-RSV), lot aggregation, and County action on comprehensive plan amendments." The topic of lot aggregation was, thus, buried in a laundry list. There was no elaboration.

33. 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 the subject matter of this proceeding. SCC 14.06.110(11).

2. The key to this case is the determination of the time of "creation" of Lot 13 for purposes of the innocent purchaser provisions of the County code. As noted, SCC 14.18.000(9) (b)(ii) applies to lots that met development requirements in effect "at the time they were created."

3. The appellants would interpret the time of "creation" to be the time the lot was described and identified in the platting of Rancho San Juan Subdivision No. 7 in 1956. At that time there were no identified development requirements that the lot did not meet.

4. The County and FAIR would say that the lot was created on March 7, 2002, when it was sold to the Corbieres. The March 7 date would serve the purposes of the County and FAIR in attempting to prevent the development of substandard lots. Because that time of "creation" is after the effective date of the Interim Ordinance which revived



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SCC 14.04.190(5), the Corbieres would not qualify under the language of Subsection (b)(ii). They would fall under Subsection (b)(iii). The effect would be that their lot would not be eligible for building permits.

5. However, the interpretation of the County and FAIR is far from intuitively obvious. To get there, one must imagine that some sort of constructive aggregation occurred after the lot came into common ownership with neighboring lots, and then conclude that the lot was effectively segregated from this aggregated whole when it was sold separately. Such segregation would be the act of lot "creation."

6. While ingenious, this way of looking at things overlooks that the lot was never in fact aggregated to its neighbors. Former SCC 14.04.190(5) did not aggregate contiguous properties in common ownership by operation of law. It required that Planning and Permit Center and the Assessor do something to combine them. The idea of "constructive aggregation" appears nowhere.

7. It may very well be that the interpretation sought by the County and FAIR is in keeping with the spirit of the settlement negotiations in the pending litigation over the retention or abandonment of aggregation requirements. But what may be going on in such discussions cannot operate to dictate what the adopted regulatory provisions mean.

8. Indeed, being intimately familiar with the pending litigation may be the only route by which a person could come up with the interpretation the County and FAIR have put forward. There is simply no way that a foreigner to the Skagit County GMA wars could, upon reading the plain language of Subsection (b)(ii), derive the meaning for which the County and FAIR argue.

9. Lot 13 was created in 1956 and has remained a separate parcel ever since. The existing lot certification process makes sense only if this is the case. The certification recognizes lots of record but does not necessarily certify that present requirements are met. If such requirements are not met, the process can and does refer the applicant to the innocent purchaser provisions.

10. The Corbieres did not, in fact, know that the aggregation rule was in effect when they purchased. Upon review of the text and the method of adoption of the Interim Ordinance, the Examiner concludes also that this is not a situation where the Corbieres should have known about the re-instituted aggregation requirement and the ramifications thereof before they purchased.

11. Under the facts the Examiner concludes that Lot 13 is an innocent purchaser lot qualifying under SCC 14.18.000(9)(b)(ii) to be treated the same as legally created lots subject to the zoning code. This means that the revocation of the building permit by the County was improper.



12. In reaching this conclusion, the Examiner intends no comment on what the law ought to be. The attempt is only to construe what it now is. If there is a problem with that, the solution is to adopt new regulatory language that speaks with clarity about what the County truly intends with respect to old lots that have been made nonstandard by modern zoning requirements.

DECISION

The appeal is granted. The revocation of Building Permit #BP02-0587 is reversed. The permit shall be re-instated as initially issued.

Wick Dufford

Wick Dufford, Hearing Examiner

Date: March 21, 2003

Copies sent to Parties: March 21, 2003

RECONSIDERATION/APPEAL

As provided in SCC 14.06.180, a request for reconsideration may be filed with the Planning and Permit Center within 10 dates after the date of this decision. As provided in SCC 14.06.110(13), the decision may be appealed to the Board of County Commissioners by filing a written Notice of Appeal with the Clerk of the Board within 14 days after the date of the decision, or decision on reconsideration, if applicable.



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