

**BEFORE THE HEARING EXAMINER
FOR ISLAND COUNTY**

In the Matter of the Application of)	No. ZAA 130/21
)	
Suzannah Dalzell)	Dalzell Rezone
)	
)	FINDINGS, CONCLUSIONS,
<u>For Approval of a Site-Specific Rezone</u>)	AND RECOMMENDATION

SUMMARY OF RECOMMENDATION

The Hearing Examiner recommends that the Island County Board of Commissioners **APPROVE**, with conditions, the request to rezone a 23-acre parcel, located at 6098 Maxwellton Road, from the dual Rural and Commercial Agriculture zoning designations to the single Rural Agriculture zoning designation.

SUMMARY OF RECORD

Hearing Date:

The Hearing Examiner held an open record hearing on the request on March 7, 2022, using remote access technology.

Testimony:

The following individuals presented testimony under oath at the open record hearing:

John Lanier, County Senior Planner
Virginia Shaddy, County Clerk
Suzannah Dalzell, Applicant

Exhibits:

The following exhibits were admitted into the record:

1. Staff Report, dated January 19, 2022
2. Application Materials:
 - a. Zoning Amendment Application, received March 26, 2021
 - b. Community Meeting Minutes, dated March 9, 2021; Aerial Map; Notice of Community Meeting, dated February 16, 2021; Mailing List; Three (3) Photographs of Mailing Envelopes; Two (2) Photographs of Posted Notice
 - c. Rezone Narrative, received March 26, 2021
 - d. SEPA Environmental Checklist (unsigned), received March 26, 2021
 - e. Critical Area Study and Biological Site Assessment, Wetland Resources, Inc., dated September 9, 2021
3. Site Data

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4. Notice of Complete Application, dated May 3, 2021; Affidavit of Mailing, dated May 3, 2021; Legal Notice Ad Confirmation with Classified Proof, for publication in the *Whidbey News Times* on May 12, 2021; Affidavit of Posting, dated May 11, 2021
5. Notice of Public Hearing, published February 23, 2022.
6. SEPA Determination of Nonsignificance, dated January 19, 2022; SEPA Environmental Checklist (Signed), dated January 4, 2021

The Hearing Examiner enters the following findings and conclusions based upon the testimony and exhibits admitted at the open record hearing:

FINDINGS

Application and Notice

1. Suzannah Dalzell (Applicant), requests a site-specific rezone of a 23-acre parcel from the dual “Rural” (R) and “Commercial Agriculture” (CA) zoning designations to the single “Rural Agriculture” (RA) zoning designation. There are no specific development proposals associated with the proposed rezone, and the Applicant indicates that she is requesting the rezone to eliminate the current dual zoning designation for the single tax parcel and to redesignate the property with a zoning classification appropriate for the site and compatible with surrounding rural residential uses. The property is located at 6098 Maxwellton Road.¹ *Exhibit 1, Staff Report, pages 1 through 3; Exhibit 2; Exhibit 3.*
2. On March 9, 2021, the Applicant held a preapplication community meeting on the proposed rezone as required under Island County Code (ICC) 16.19.050. The Applicant provided notice of the community meeting by mailing notice to property owners within 300 feet of the property and by posting notice on-site. Members of the public attending the meeting did not raise any objections or concerns about the proposed rezone. *Exhibit 2.b.*
3. Island County (County) determined that the application was complete on May 3, 2021. The next day, the Applicant posted notice of the application on-site. On May 12, 2021, the County published notice of the application the *Whidbey News Times*, with a comment deadline of May 26, 2021. On February 23, 2022, the County provided notice of the open record hearing associated with the application by publishing notice in the *Whidbey News Times*. The County did not receive any comments on the proposed rezone in response to its notice materials. *Exhibit 1, Staff Report, pages 1 through 3; Exhibit 4; Exhibit 5.*

State Environmental Policy Act

4. The County acted as lead agency and analyzed the environmental impacts of the proposal, as required by the State Environmental Policy Act (SEPA), Chapter 43.21C

¹ The subject parcel is identified by Island County Assessor’s Parcel No. R32922-482-0160. *Exhibit 1, Staff Report, page 1.*

Revised Code of Washington (RCW). The County consolidated notice of the SEPA review and application comment periods under the optional process provided for by Washington Administrative Code (WAC) 197-11-355, with a comment deadline of May 26, 2021. The notice materials stated that the County expected to issue a Determination of Nonsignificance (DNS) for the proposal. After reviewing the Applicant's environmental checklist and other information on file, the County determined that the proposed rezone would not have a probable significant adverse impact on the environment. Accordingly, the County issued a DNS on January 19, 2021, which was not appealed. *Exhibit 1, Staff Report, pages 1 through 4; Exhibit 2.d; Exhibit 6; Testimony of John Lanier.*

Comprehensive Plan and Zoning

5. The County Comprehensive Plan designates the property as "Rural Lands." The purpose of the County's rural land use designations is "to permit land uses that are compatible with the rural character and to preserve open space, agricultural opportunities, recreational opportunities, and the protection of natural resources." *Comprehensive Plan, page 33.* The Rural Lands designation applies to areas that "are not within an Urban Growth Area (UGA) or Rural Area of more Intensive Development (RAID)." *Comprehensive Plan, page 43.* The Comprehensive Plan's Rural Lands designation is implemented by the Rural (R), Commercial Agriculture (CA), and Rural Agriculture (RA) zoning designations. *Comprehensive Plan, page 43.* Accordingly, the proposed rezone of the parcels from R and CA to RA would not require a Comprehensive Plan amendment. *Exhibit 1, Staff Report, pages 1 through 3; Exhibit 2; Testimony of John Lanier.*

6. The western 7.5-acres of the property is currently within the R zoning district and the eastern 15.5 acres of the property is currently within the CA zoning district. Limitations on density and uses within the R zone "are designed to provide for a variety of rural lifestyles and to ensure compatible uses." *ICC 17.03.060.* The purpose of the CA zoning district is as follows:

The primary purpose of the Commercial Agriculture (CA) Zone is to protect and encourage the long term commercially productive use of Island County's agricultural resource lands of long term commercial significance that have been designated pursuant to RCW 36.70A.170. It is established to identify geographic areas where a combination of soil, and topography allow commercial farming practices to be conducted in an efficient and effective manner; to help maximize the productivity of the lands so classified; to protect farming operations from interference by non-farmers; and to maintain agricultural land areas for agriculture use free from conflicting non-farm uses. Otherwise, the purposes of the zoning classification are the same as the RA Zone.

ICC 17.03.100. Exhibit 1, Staff Report, pages 1 through 3; Exhibit 2.

7. As noted above, the Applicant requests a rezone of the property from R and CA to RA. The purpose of the RA zone is as follows:

The primary purpose of the Rural Agriculture (RA) Zone is to protect and encourage the long term productive use of Island County's agricultural land resources of local importance. It is established to identify geographic areas where commercial farming practices can be conducted in an efficient and effective manner; and to help maximize the productivity of the lands so classified. Secondly, lands classified RA provide scenic open space, wildlife habitat and watershed management to the extent such use is consistent with the primary purposes of the zone.

ICC 17.03.090. Exhibit 1, Staff Report, pages 1 through 3; Exhibit 2.

Existing Site and Surrounding Property

8. The northeast corner of the 23-acre property is developed with a single-family residence and associated outbuildings, with the remainder of the property consisting of maintained pasture, unmaintained fields, and patches of forest. The topography of the northeast corner of the property is relatively flat and slopes moderately to the west and south. Wetland Resources, Inc., prepared a Critical Area Study (CAS) of the property, dated September 9, 2021. The CAS identified a Type F fish-bearing stream (Stream A), with a standard 100-foot protective buffer, and a Category B wetland (Wetland A), with a standard 110-foot protective buffer, on the subject property. Stream A flows from the northeast across the site and into Miller Lake, a fish-bearing waterbody located offsite to the southwest. The outlet of Miller Lake (Maxwelton Creek) flows directly into Puget Sound (Useless Bay). Wetland A covers the western portion of the property and extends offsite to the north, south, and west. The on-site wetland, stream, and their associated buffers cover a majority of the property. *Exhibit 1, Staff Report, pages 1 through 3; Exhibit 2.*
9. Properties surrounding the subject property are characterized by rural and residential uses. The subject parcel abuts 10 parcels within the R zone and one parcel within the CA zone. The 5.1-acre property within the CA zone is located to the north of the subject property, is owned by a separate property owner, and is within the Agricultural Current Use Tax Program. *Exhibit 1, Staff Report, pages 2 and 3; Exhibit 2.*

Proposed Rezone

10. ICC 17.03.220 provides a process to apply for individual parcel zoning reclassifications when such zoning amendments are compliant with the Comprehensive Plan or Subarea Plan. ICC 17.03.220.D provides the specific standards applicable to site-specific rezone requests. *Exhibit 1, Staff Report, pages 2 and 3; Exhibit 2.*

Rural to Rural Agriculture

11. Under ICC 17.03.220.D.2, a reclassification from R to RA shall be granted if requested by the owner and the parcel is 10 acres or larger in size "upon a finding that the uses

allowed in the proposed classification will be compatible with surrounding permitted uses.” The Applicant provided a Rezone Narrative addressing these requirements, which asserts:

- The subject parcel is 23 acres.
- The reclassification of the property to RA would be compatible with surrounding permitted uses in the R zone. Many of the same uses are permitted in both zones, such as accessory living quarters, guest cottages, manufactured homes, single-family dwellings, and home occupations. The RA zone, however, has a lower density for single-family residences and does not allow for some of the higher intensity uses allowed in the R zone, such as mobile home parks, campgrounds, country inns, mini-storage, small-scale recreation and tourist uses, and fire stations.
- Reclassification of the property from R to RA would be compatible with existing surrounding uses, which primarily include single-family homes on large rural lots and on smaller lots to the north. The RA reclassification would also be compatible with the current agricultural use of the property to the northwest, which is zoned CA, and with the designated forest tax classification of property to the west, which is zoned rural.

Exhibit 2.c.

12. County staff reviewed the proposal and determined that it would meet the requirements for a site-specific rezone of property from R to RA, noting that the rezone would not enable the property owner to conduct uses that are not already permitted or that are incompatible with surrounding uses. *Exhibit 1, Staff Report, page 3.*

Commercial Agriculture to Rural Agriculture

13. Under ICC 17.03.220.D.5:
Reclassification from CA to RA for lands not included in a farm management plan . . . shall be granted if requested by the owner upon finding that the owner cannot make reasonable agricultural use of the property if classified CA . . ., considering the factor contained in WAC 365-190-050 and where the inability to make commercial farm use of the property is not due to action or inaction of the owner. Factual information provided by the owner shall be given substantial weight.

The Applicant’s Rezone Narrative addresses these requirements, asserting:

- Approximately two-thirds of the property is zoned CA and is not included in a farm management plan.
- A significant portion of the property is encumbered by critical areas that include a designated wetland and associated buffer and a regulated stream and associated buffer. Over time, the wetlands have expanded east onto the property, reducing the amount of acreage available for farming. The property is also heavily impacted by upland drainage because it is a low point in this portion of the valley.

- The property is physically divided between the homesite and the previously farmed open field to the south by a perennial fish-bearing stream contained in a steep ravine. There are only about 5.2 acres of farmable area in the southern portion of the property. This area is not commercially viable for agriculture because of the lack of irrigation, lack of infrastructure, and site characteristics such as sloping. In addition, farm equipment cannot access the southern field from within the property and, instead, must exit the driveway and travel down Maxwellton Road. This southern area has historically been used for hay, but the amount of hay that could be produced off this small acreage is not of a commercial quantity making it viable for a farming enterprise.
- There is a small area in the northeastern portion of the property with farmable soils. This area, however, is where the existing house, outbuildings, garden, driveway, parking area, and residential lawn are located. Therefore, this area is not adequate for commercial farming uses.
- The previous property owner owned the property from 1990 to 2019, and during much of that time the property was in the open agricultural tax classification. Prior to the transfer of ownership to the Applicant in 2019, the Assessor's office determined that there was no evidence of any agricultural income from the property for many of the previous years. The property was therefore removed from the agricultural current use program, and the previous property owner's estate paid the required compensation.
- The Washington State definition of farm and agricultural land, which is used when applying the CA zone and Open Agricultural tax classification to properties, does not allow more than 20 percent of a property to be used for non-agricultural purposes. Of the 15.5 acres of the property zoned CA, about 47 percent is covered by wetlands, well over the 20 percent limit.
- In the past, farming on wetlands and across streams was more widely practiced in Island County. Current County regulations and the inability to farm in wet areas acting as a drainage basin for upland areas, however, make this practice economically and physically impossible.

Exhibit 2.C

14. County staff reviewed the proposal and determined that it would meet the requirements for a site-specific rezone of property from CA to RA, noting agreement with the Applicant's narrative. *Exhibit 1, Staff Report, page 3.*

Testimony

15. County Senior Planner John Lanier testified generally about the proposal and how it would be consistent with the Comprehensive Plan and would meet the specific requirements for a rezone. He described the subject property and surrounding properties, consistent with the findings above. Mr. Lanier noted that the R, CA, and RA zones are all included within the Comprehensive Plan's Rural Lands land use designation and, therefore, the proposed rezone would not require an amendment to the Comprehensive

Plan. He explained that the County discourages dual-zoning for single parcels and stated that the requested rezone makes sense in light of compatible surrounding land uses and the inability to utilize the property for commercial farming purposes. *Testimony of Mr. Lanier.*

16. County Clerk Virginia Shaddy testified about how notice of the open record hearing was provided in accordance with County code requirements. *Testimony of Ms. Shaddy.*
17. Applicant Suzannah Dalzell testified that this has been a long process and that she is grateful that it has reached this point. *Testimony of Ms. Dalzell.*

Staff Recommendation

18. Mr. Lanier testified that County staff recommends the Hearing Examiner forward a recommendation to the Board of County Commissioners to approve the rezone request, with conditions. Ms. Dalzell testified that she understands and would comply with County staff's recommended conditions. *Exhibit 1, Staff Report, page 5; Testimony of Mr. Lanier; Testimony of Ms. Dalzell.*

CONCLUSIONS

Jurisdiction

The Hearing Examiner has authority to hear and issue a recommendation to the Board of Commissioners on an application for a Type III Site-Specific Rezone. *ICC 16.13.110.C; ICC 16.19.040, Table A and Table B; ICC 16.19.180.*

Criteria for Review

ICC 17.03.220.C.1 provides:

Zoning classifications that are compliant with the Comprehensive Plan and occur within the land use designation "Rural Lands", as established in the Comprehensive Plan Future Land Use map, shall be processed as a Type III application and processed pursuant to section 16.19.170:

- a. Rural (R).
- b. Rural Forest (RF).
- c. Rural Agriculture (RA).
- d. Commercial Agriculture (CA).
- e. Parks (P).

ICC 17.03.220.D provides standards for site-specific rezones of properties designated Rural Lands under the Comprehensive Plan, which as relevant to the current rezone request provides:

2. Reclassification from R to RA or RF shall be granted if requested by the owner and the parcel is twenty (20) acres (ten (10) acres for RA) or larger in size upon finding that the uses allowed in the proposed classification will be compatible with surrounding permitted uses.

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...

5. Reclassification from CA to RA for lands not included in a farm management plan and RA to R shall be granted if requested by the owner upon finding that the owner cannot make reasonable agricultural use of the property if classified CA or RA, considering the factor contained in WAC 365-190-050 and where the inability to make commercial farm use of the property is not due to action or inaction of the owner. Factual information provided by the owner shall be given substantial weight.

The criteria for review adopted by the County Commissioners implements the requirement of Chapter 36.70B RCW to enact the Growth Management Act. In particular, RCW 36.70B.040 mandates that local jurisdictions review proposed developments to ensure consistency with County development regulations, considering the type of land use, the level of development, infrastructure, and the characteristics of development. *RCW 36.70B.040.*

Conclusion Based on Findings

1. **The proposed site-specific rezone of the property from the Rural and Commercial Agriculture zoning designations to the Rural Agriculture zoning designation would be consistent with the Comprehensive Plan.** The subject parcel is designated “Rural Lands” under the Comprehensive Plan. The Comprehensive Plan’s Rural Lands land use designation is implemented by the Rural (R), Commercial Agriculture (CA), and Rural Agriculture (RA) zoning designations. Accordingly, the proposed rezone of the property from the R and CA zoning designations to the RA zoning designations would be consistent with the Comprehensive Plan and would not require a Comprehensive Plan amendment. *Findings 1, 5, 15, and 18.*
2. **With conditions, the proposed site-specific rezone would meet the specific standards for rezoning the 7.5-acre portion of the property currently zoned R to the RA zoning designation.** The Applicant held a preapplication meeting on the proposal, as required by the County code, at which members of the public attended but did not raise any objections or concerns about the proposed rezone. The County provided reasonable notice and opportunity to comment on the proposed rezone. The County did not receive any comments on the proposal in response to its notice materials. The County reviewed the environmental impacts of the proposed rezone and issued a Determination of Nonsignificance, which was not appealed. The Applicant requests the rezone to provide a single zoning designation of RA for the currently dual-zoned property. The subject parcel measures 23 acres, exceeding the 10-acre minimum parcel size required for a rezone from R to RA. The Applicant’s Rezone Narrative asserts, and County staff agrees, that the proposed rezone to RA would be compatible with surrounding permitted uses. The Hearing Examiner concurs with the Applicant and County staff. The proposed RA zoning classification for the property would be compatible with uses permitted in the R and CA zoned properties in the surrounding area, which currently include single-family residential uses on R zoned properties and agricultural uses on the CA zoned property to

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the northwest. Conditions, as detailed below, are necessary to ensure that the proposal meets the specific requirements for a rezone and complies with all other applicable code requirements. *Findings 1 – 18.*

3. **With conditions, the proposed site-specific rezone would meet the specific standards for rezoning the 15.5-acre portion of the property currently zoned CA to RA.** A rezone of the portion of the property currently zoned CA to the RA zoning designation is appropriate due to site constraints rendering commercial agricultural use of the property infeasible. The property is not included in a farm management plan and has not been utilized for commercial farming for several years. Wetland Resources, Inc., prepared a Critical Area Study for the property, which determined that a majority of the site is covered by a Type F fish-bearing stream, a Category B wetland, and their associated protective buffers. The presence of critical areas on the property, together with other site conditions, such as a relatively small acreage, lack of irrigation and other commercial farming infrastructure, and existing single-family development, render the property infeasible for commercial farming uses. These conditions are not the result of any action or inaction on the part of the Applicant. Conditions, as detailed below, are necessary to ensure that the proposal meets the specific requirements for a rezone and complies with all other applicable code requirements. *Findings 1 – 18.*

RECOMMENDATION

Based upon the preceding findings and conclusions, the Hearing Examiner recommends that the Island County Board of Commissioners **APPROVE** the request to rezone a 23-acre parcel, located at 6098 Maxwellton Road, from the dual Rural and Commercial Agriculture zoning designations to the single Rural Agriculture zoning designation, subject to the following conditions:

1. The rezone decision is not final until the expiration of the appeal period noted below. If this decision is appealed, this decision is not final until the conclusion of all appeal proceedings.
2. The conditions of approval identified in this decision are subject to change if any information provided by the Applicant or their authorized representative is found to be inaccurate.
3. This approval is limited to the rezoning of parcel R32922-482-0160 from Rural (R) and Commercial Agriculture (CA) to Rural Agriculture (RA). No other proposals are permitted by this decision.

4. Any future development or use of this property will adhere to the standards outlined in ICC 17.03.090.

Upon consideration of the Hearing Examiner's recommendation, the Board of Commissioners shall make the final quasi-judicial land use decision. Such decisions are to be made by the adoption of an ordinance or resolution that either approves or denies the site-specific rezone request. Such final land use decision may be appealed in accordance with the procedures set forth in section 16.19.200.B. *ICC 16.19.190.C*. A person with standing seeking further review of a final County land use decision, within twenty-one (21) days of the issuance of the decision, must both file a petition for review in the Island County Superior Court and serve the petition on all necessary parties in conformity with the requirements of the State Land Use Petition Act, Chapter 36.70C RCW. *ICC 16.19.200.B*.

RECOMMENDED this 21st day of March 2022.



ANDREW M. REEVES
Hearing Examiner
Sound Law Center