

**BEFORE THE HEARING EXAMINER
FOR ISLAND COUNTY**

In the Matter of the Application of)	No. 335/20 PLA-PRD
)	
Thomas Perham, on behalf of the Finisterre Heights HOA)	Finisterre Heights Subdivision Alteration
)	
)	
<u>For Approval of a Subdivision Alteration</u>)	FINDINGS, CONCLUSIONS, AND DECISION

SUMMARY OF DECISION

The request for a subdivision alteration related to the Finisterre Heights Subdivision, an existing planned residential development in the northern portion of North Camano Island, to allow for vegetation management in dedicated open space tracts for forest health, fire hazard abatement, view maintenance, and the removal of noxious weeds, is **APPROVED**. Conditions are necessary to mitigate specific impacts of the alteration.

SUMMARY OF RECORD

Hearing Date:

The Hearing Examiner held an open record hearing on the request on June 21, 2021, using remote access technology. The record was left open to allow additional information requested by the Hearing Examiner to be submitted. The record closed on July 7, 2021.

Testimony:

The following individuals testified under oath at the open record hearing:

Kathryn Bird, County Associate Planner
Meredith Penny, County Planning Manager
William Hallberg, County Public Works Development Coordinator
Thomas Perham, Applicant Representative
Paula Dascher
Jeff Gilmore
Susan Anderson
Warren James
Chandler “Harry” Williamson

Exhibits:

The following exhibits were admitted into the record:

1. Staff Report, dated May 21, 2021
2. Request for Comments, dated March 9, 2021

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3. Site Data Reports, generated May 21, 2021
4. Master Land Development Permit Application, received December 16, 2020
5. Long Plat Alteration Application, received December 16, 2020, with attachments:
 - a. Preliminary Critical Areas Determination: Summary of Findings, received August 17, 2018
 - b. Land Use Intensity Worksheet, received September 21, 2018
 - c. Wetland Buffer Worksheet, received September 21, 2018
 - d. Narrative Concerning HOA Signatures; HOA Signature List
6. Draft Open Space Management Plan, received December 16, 2020
7. Project Narrative, received December 16, 2020
8. Email from Thomas Perham to Shawn Morris and Kathryn Bird, dated March 25, 2021, with email string
9. Notice of Complete Application, dated December 30, 2020
10. Notice of Application, *Stanwood/Camano News*, published January 19, 2021
11. Affidavit of Publication, dated January 19, 2021
12. Affidavit of Posting, dated January 11, 2021
13. County Environmental Planning Comments:
 - a. Memorandum from Shawn Morris, dated April 23, 2021
 - b. Revised Memorandum from Shawn Morris, received June 22, 2021
14. Memorandum from William Hallberg, dated May 5, 2021
15. Island County Inadvertent Discovery Plan
16. Property Owner Mailing Labels
17. Materials Associated with 1993 PRD Approval:
 - a. Department of Ecology Report of Examination, dated November 5, 1992
 - b. Island County Planning Commission Recommendation, Finisterre Heights PRD, dated September 17, 1992
 - c. Island County Board of Commissioners Approval, dated October 12, 1992
18. Plat Sheets: Finisterre Heights Planned Residential Development, No. 004/92, recorded January 7, 1993
19. Notice of Hearing Materials:
 - a. Notice Letter to Thomas Perham, dated April 23, 2021
 - b. Notice Letter to Thomas Perham, dated April 26, 2021
 - c. Notice Letter to Finisterre Heights HOA, dated May 3, 2021
 - d. Notice Letter to Thomas Perham, dated June 3, 2021
 - e. Notice of Hearing Letter, dated June 3, 2021
 - f. Legal Notice, *Stanwood/Camano News*, published June 8, 2021; Legal Notice, *Whidbey News Times*, published June 9, 2021

Based upon the testimony and documents submitted at the open record hearing, the Hearing Examiner enters the following findings and conclusions:

Findings, Conclusions, and Decision
Island County Hearing Examiner
Finisterre Heights Subdivision Alteration
No. 335/20 PLA-PRD

FINDINGS

Background

1. The Finisterre Heights Planned Residential Development (PRD), located south of Utsalady Point on the south side of North Camano Drive on North Camano Island, was originally approved by the Island County Board of County Commissioners (Board) on October 12, 1992, following an earlier recommendation by the County's Planning Commission. The Board's approval allowed for development of 84 lots within five adjacent parcels, totaling approximately 95.9 acres.¹ It also required that the PRD comply with several approval conditions (originally recommended by the Planning Commission), including the requirement that a "conservation easement shall be placed on the open space to maintain it in perpetuity." *Exhibit 17.C.*

2. The plat was recorded on January 7, 1993 (as "Finisterre Heights PRD, No. 004/92"), and language in the recorded "Dedication" states:

Tracts A and B are to be left in their undisturbed natural state, except those portions designated as recreational areas, utility facilities, and utility easements; also Tracts A and B are reserved and permanently committed as OPEN SPACE and shall be conveyed to the owners of the lots in this P.R.D. as described within the Restrictive and Protective Covenants referenced herein.

Exhibit 18.

3. The first plat restriction also notes that a portion of the property is encumbered by steep slopes, wetlands, and high water table areas and that no grading should be permitted within 100 feet of these areas without required permits or waivers. *Exhibit 18.*

4. The Finisterre Heights neighborhood was developed, as planned, with 84 residential lots, and, ultimately, two separate open space tracts were dedicated as open space areas to be "left in their undisturbed natural state" (*see Exhibit 18*) as required by the recorded plat: Tract A, an approximately 24.2-acre portion of the PRD identified as parcel number S6627-00-0000A-0; and Tract B, an approximately 24.8-acre portion of the property, identified as parcel number S6627-00-0000B-0. *Exhibit 3.*

Application and Notice

5. Thomas Perham, on behalf of the Finisterre Heights Homeowners Association (HOA, Applicant), requests approval of a subdivision alteration to allow for vegetation management in the dedicated open space tracts (Tracts A and B) for forest health, fire

¹ The Assessor's parcel numbers included: R23224-298-1980; R23224-330-0680; R23224-365-1960; R23224-414-1550; and R23224-447-0660. *Exhibit 17.c.*

hazard abatement, view maintenance, and the removal of noxious weeds. *Exhibit 1, Staff Report, page 1; Exhibit 5; Exhibit 6.*

6. Island County (County) determined that the application was complete on December 30, 2020. On January 11, 2021, the Applicant posted notice of the application on the property. On January 19, 2021, the County mailed notice of the application to property owners within 300 feet of the PRD and to all other property owners within the PRD, and published notice in the *Stanwood/Camano News*. Notice materials provided for a comment period until February 2, 2021. On June 3, 2021, the County mailed notice of the open record hearing associated with the proposal to all property owners within 300 feet of the PRD and to all other property owners within the PRD. On or around June 9, 2021, the County also published notice of the hearing in the *Stanwood Camano News* and the *Whidbey News Times*. Notice materials related to the open record hearing explained that written comments should be submitted in advance of the scheduled hearing on June 21, 2021. No public comments were received on the proposal. *Exhibit 9; Exhibit 10; Exhibit 11; Exhibit 12; Exhibit 16; Exhibit 19.*

State Environmental Policy Act

7. Kathryn Bird, County Associate Planner, testified that County staff determined that the proposal would be exempt from review under the State Environmental Policy Act (SEPA), Chapter 43.21C Revised Code of Washington (RCW), in accord with Washington Administration Code (WAC) 197-11-800(1), because the property already underwent environmental review in 1993 and the subdivision alteration would not involve the creation of additional lots or construction of any new structures. *Testimony of Ms. Bird.*

Comprehensive Plan and Zoning

8. The property is designated “Rural Residential” by the County Comprehensive Plan and is within an area designated for “Rural Areas of More Intensive Development” (RAIDs) under the Growth Management Act, RCW 36.70A.070(5)(d), the “Utsalady RAID.” *Island County Comprehensive Plan, pages 33 through 35.* The purpose of the Rural Residential designation is to permit land uses that are compatible with the rural character and to preserve open space, agricultural opportunities, recreational opportunities, and protection of natural resources. In addition, RAIDs support a variety of rural densities, uses, essential public facilities, and rural governmental services needed to serve permitted densities and uses. *Island County Comprehensive Plan, pages 33 and 34.* County staff determined that the proposed subdivision alteration would be consistent with the Comprehensive Plan. *Exhibit 1, Staff Report, page 4.*
9. The property is zoned Rural Residential (RR). The purpose of the RR zone is to define the logical outer boundary of a pattern of development and density that is more intensive than the density permitted in the Rural zone. *Island County Code (ICC) 17.03.070.* The

proposal would not involve any change to the lot sizes of the 84 existing parcels that were previously recorded. *Exhibit 1, Staff Report, page 3.*

Existing Site

10. As noted above, the existing Finisterre Heights neighborhood totals approximately 95.9 acres, and Tracts A and B preserve approximately 49 acres of the site as undisturbed open space. These parcels are, by now, heavily forested. In addition, County staff determined that there is a “Category D” wetland located within Tract B. When the plat was first recorded in 1993, a 100-foot buffer was required. In reviewing the current proposal, however, the County determined that the subdivision alteration would require compliance with the current critical areas ordinance (Chapter 17.02B ICC). Accordingly, a 125-foot buffer is now required for the Category D wetland within Tract B, and no vegetation clearing or management would occur within the 125-foot buffer, apart from maintenance of legally nonconforming yard and garden structures. *Exhibit 13.b.*

Subdivision Alteration

11. All subdivisions of land must comply with Chapter 58.17 RCW, the State Subdivision Act. Specific to alterations of existing plats, RCW 58.17.215 requires: the signatures of the majority of those persons having an ownership interest of lots, tracts, parcels, sites, or divisions in the subject subdivision or portion to be altered; any necessary agreements signed by all relevant parties subject to restrictive covenants terminating or altering such covenants to accomplish the purpose of the alteration; appropriate notice of a public hearing related to the alteration; and a determination by the appropriate decisionmaker that the public use and interest would be served by such alteration. ICC 16.06.170 incorporates these requirements and, further, requires that approval conditions of the original land division “that are applicable to the alteration which have been relied upon” and are “still applicable” be incorporated in the alteration. *ICC 16.06.170.A.2*
12. As previously noted, the Applicant seeks a single alteration to the original plat recorded in 1993. Specifically, the Applicant would change the conclusion of the “Dedication” (quoted in Finding 2) to read:

Tracts A and B are to be designated as Native Growth Protection Areas and left in their undisturbed natural state, except those portions designated as recreational areas, utility facilities and utility easements. There shall be no removal or cutting of vegetation in the Native Growth Protection Areas except when trees and other vegetation need to be managed for fire hazard abatement, to enhance forest health, maintain views and/or avoid invasion of noxious weeds and then only in accordance with the applicable provisions of the Island County Code. *Those portions of the Native Growth Protection Areas designated as wetlands and wetlands buffers by Island County must remain in an undisturbed natural state. No vegetation*

clearing or management may occur within the 125 foot buffer of the wetland apart from maintenance of legally existing yard and garden structures. Also, tracts A and B are reserved and permanently committed as OPEN SPACE and shall be conveyed to the owners of the lots in the PRD as described within the Restrictive and Protective Covenants referenced herein.

Exhibit 1, Staff Report, pages 2 and 3.

13. The Applicant submitted the required signatures from a majority of homeowners belonging to the HOA, and Applicant Representative Thomas Perham testified that the HOA has already approved amendment of the covenants, conditions, and restrictions (CC&Rs) to reflect the proposed change to vegetation management in Tracts A and B. *Exhibit 4; Exhibit 5; Exhibit 6; Exhibit 7; Exhibit 8; Testimony of Mr. Perham.*
14. County staff reviewed the proposal and determined that it would comply with the requirements for alteration of an existing subdivision, with appropriate conditions. Specifically:
 - Environmental Planner Shawn Morris detailed the need to protect the Category D wetland within Tract B and its associated buffer; and
 - Public Works Development Coordinator William Hallberg noted that amending the language of the dedication for the existing plat would not grant approval for the Applicant to perform any work on a steep or unstable slope or within 100 feet of the top or toe of such slopes without prior review and/or approval by the County and that Restriction 1 on the face of the plat concerning grading within steep slope hazard areas would remain unchanged.

Exhibit 13; Exhibit 14.

Testimony

15. Associate Planner Kathryn Bird testified generally about the proposal and how it would comply with the County Comprehensive Plan, zoning ordinances, critical areas ordinances, and requirements for a subdivision alteration. She explained that, although the County originally considered requiring the Applicant to submit a new wetland assessment, it determined that an assessment occurred in 2018 (Exhibit 5.a) and that such assessment is still valid. Ms. Bird stressed that the plat alteration would not create any new lots, alter existing lots, or result in further development of the site but, instead, would allow the Applicant to perform vegetation maintenance within Tracts A and B, previously dedicated simply as “open space” but now dedicated as Native Growth Protection Areas (NGPAs), while still protecting wetlands and steep slopes. *Testimony of Ms. Bird.*
16. Planning Manager Meredith Penny explained that Island County is somewhat unique in that it has adopted its own wetland rating system (as opposed to the system created by the

Department of Ecology) and that, under the County's system the wetland within Tract B requires a 125-foot buffer. She noted that, in altering the plat, the Applicant lost any vested status to the previous requirement of a 100-foot buffer protecting the wetland, and, in addition, she clarified that critical areas assessments are considered valid under the municipal code for five years. Ms. Penny noted, however, that if further plat amendments or other development projects were to occur in the future, additional critical areas documentation would likely be required. *Testimony of Ms. Penny.*

17. Public Works Development Coordinator William Hallberg reiterated the comments he previously submitted during review of the proposal and stressed that the Applicant should consult with County staff prior to performing any vegetation maintenance within the 100-foot buffer of steep slope areas. Mr. Hallberg noted that, although permits may not be required for all vegetation maintenance envisioned by the HOA, consulting with County staff prior to such work beginning would ensure that the HOA complies with all requirements of the municipal code. *Testimony of Mr. Hallberg.*
18. Applicant Representative Thomas Perham testified that, when the Finisterre Heights neighborhood was first developed, vegetation within Tracts A and B generally included trees with heights of 4 to 5 feet, but that was over 20 years ago. Now, the trees have grown significantly, and the HOA is concerned with view maintenance, forest health, fire safety, and the potential spread of noxious weeds such that the ability to manage these tracts responsibly would be beneficial. He noted that, in 2005, several HOA members took a class on forest health and vegetation management from the Department of Natural Resources (DNR) and created an "open space management plan" for Tracts A and B. The plan was not implemented at that time, but it will now serve as the foundation for future vegetation management following alteration of the plat and CC&Rs allowing such management, with appropriate updates consistent with the County's requirements concerning wetland and steep slope buffers. Mr. Perham stressed that the HOA does not intend to significantly alter the existing open space tracts but, instead, to manage them in a sensible and ecologically sensitive way that benefits the community. *Testimony of Mr. Perham.*
19. Area resident Jeff Gilmore testified that he lives in one of the adjacent neighborhoods, believes the Applicant's plan is well thought out, and supports the proposal. *Testimony of Mr. Gilmore.*
20. Several area residents, including Paula Dascher, Susan Anderson, Warren James, and Chandler "Harry" Williamson, requested additional information on the envisioned scope of the vegetation maintenance and the process by which such maintenance would occur. In response, Mr. Perham explained that the Applicant does not intend to perform any vegetation maintenance that would have significant impacts on adjacent properties or neighborhoods and that, were any maintenance proposed near property lines, the HOA

would consult with neighboring HOAs or property owners in advance of any such work occurring. Mr. Perham also noted that the HOA would be setting up a committee to handle all requests for vegetative maintenance within the NGPAs and to address any issues that may arise. *Testimony of Ms. Dascher, Ms. Anderson, Mr. James, Mr. Williamson, and Mr. Perham.*

21. In response to public testimony, Ms. Bird noted that the County has certain threshold requirements related to clearing and grading and that it would benefit the HOA to consult the County prior to implementing any significant vegetation maintenance within Tracts A and B, even if such maintenance is “allowed” consistent with the alteration to the plat and the CC&Rs. Ms. Bird also explained that, ultimately, the County Board of Commissioners would need to sign off on approval of the final plat associated with the subdivision alteration prior to it being recorded. *Testimony of Ms. Bird.*

Staff Recommendation

22. County staff determined that the proposal would meet the requirements for approval of a subdivision alteration under the County code and Chapter 58.17 RCW. Ms. Bird stated that the County recommends approval of the proposal, with conditions. Mr. Perham testified that the Applicant agrees with the proposed conditions. *Exhibit 1, Staff Report, pages 3 through 6; Testimony of Ms. Bird; Testimony of Mr. Perham.*

CONCLUSIONS

Jurisdiction

The Hearing Examiner is granted authority by the County Commissioners to receive and examine available information, conduct public hearings and prepare a record thereof, and enter decisions on Type III decisions, including applications for plat alterations. *ICC 16.13.110.B; ICC 16.19.170 and .180; ICC 16.06.170.*

Criteria for Review

The County code provides that all subdivisions of land must comply with Chapter 58.17 RCW, the State Subdivision Act. Specific to alterations of existing plats, RCW 58.17.215 provides:

When any person is interested in the alteration of any subdivision or the altering of any portion thereof. . . that person shall submit an application to request the alteration to the legislative authority of the city, town, or county where the subdivision is located. The application shall contain the signatures of the majority of those persons having an ownership interest of lots, tracts, parcels, sites, or divisions in the subject subdivision or portion to be altered. If the subdivision is subject to restrictive covenants which were filed at the time of the approval of the subdivision, and the application for alteration would result in the violation of a covenant, the application shall contain an agreement signed by all parties subject to the covenants providing that the parties agree to terminate or alter the relevant

covenants to accomplish the purpose of the alteration of the subdivision or portion thereof.

Upon receipt of an application for alteration, the legislative body shall provide notice of the application to all owners of property within the subdivision, and as provided for in RCW 58.17.080 and 58.17.090. The notice shall either establish a date for a public hearing or provide that a hearing may be requested by a person receiving notice within fourteen days of receipt of the notice.

The legislative body shall determine the public use and interest in the proposed alteration and may deny or approve the application for alteration. . .

After approval of the alteration, the legislative body shall order the applicant to produce a revised drawing of the approved alteration of the final plat or short plat, which after signature of the legislative authority, shall be filed with the county auditor to become the lawful plat of the property.

ICC 16.06.170 incorporates these requirements and, further, requires that approval conditions of the original land division “that are applicable to the alteration which have been relied upon” and are “still applicable” be incorporated in the alteration. *ICC 16.06.170.A.2*

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.*

Conclusions Based on Findings

- 1. With conditions, the proposal would satisfy the requirements of RCW 58.17.215 for approval of a subdivision alteration.** The criteria and standards for preliminary plat approval in Island County are essentially identical to those in Chapter 58.17 of the Revised Code of Washington (RCW). Prior to approval of the preliminary plat (No. PRD 004/92) for the Finisterre Heights Planned Residential Development and its subsequent recording in 1993, both the Planning Commission and Board of County Commissioners had determined that appropriate provisions would be made for the public health, safety, and general welfare, and for open spaces, drainage ways, streets or roads, alleys, other public ways, transit stops, potable water supplies, sanitary wastes, parks and recreation, playgrounds, schools and school grounds, including sidewalks and other planning features that ensure safe walking conditions for students who walk to and from school. The Applicant does not seek to substantially alter the existing plat but, instead, seeks to alter language in the dedication on the face of the plat to allow for appropriate and responsible vegetation management within the two open space tracts on the property,

which encompass approximately 49 acres of the 95.9-acre site. As recorded, Tracts A and B must “be left in their undisturbed natural state” (Exhibit 18), except for maintenance generally related to utilities. The plat alteration would preserve these tracts as Native Growth Protection Areas but would also allow for vegetation management related to forest health, fire hazard abatement, view maintenance, and the removal of noxious weeds. In addition, the Applicant has obtained the signatures of the majority of those persons having an ownership interest of lots, tracts, parcels, sites, or divisions in the subject subdivision or portion to be altered, and the CC&Rs would be amended to reflect the changed language on the face of the plat.

The County provided reasonable notice of the application and open record hearing associated with the proposal and no public comments were received in advance of the hearing. At the hearing, several area residents inquired about the scope of the vegetation maintenance envisioned by the HOA as well as process details. The Applicant Representative explained that the HOA would be creating a committee to handle all requests for vegetation maintenance, that the Applicant does not intend to perform any vegetation maintenance that would have significant impacts on adjacent properties or neighborhoods, and that, were any maintenance proposed near property lines, the HOA would consult with neighboring HOAs or property owners in advance of any such work occurring. He also acknowledged that the Applicant would consult with County staff prior to performing any significant maintenance to ensure that such work complies with municipal requirements, especially in relation to critical areas such as steep slopes.

County staff reviewed the proposal and determined that the subdivision alteration would serve the public use and interest, and the Hearing Examiner concurs with this assessment. Conditions of approval, as detailed below, are necessary to ensure compliance with state requirements for alteration of an existing plat. *Findings 1 – 22.*

With conditions, the proposal would satisfy the requirements of ICC 16.06.170 for approval of a subdivision alteration. In addition to incorporating the requirements for approval of a plat alteration under the State Subdivision Act, ICC 16.06.170 requires that approval conditions of the original land division “that are applicable to the alteration which have been relied upon” and are “still applicable” be incorporated in the alteration. Here, a portion of the “Dedication” on the face of the plat would be altered to allow for responsible vegetation maintenance within Tracts A and B of the PRD, but none of the restrictions—including Restriction 1 on the face of the plat concerning grading within steep slope hazard areas—would be altered. The Applicant consulted with DNR about responsible forest/vegetation maintenance prior to creating an “open space management plan” for Tracts A and B and, ultimately, all critical areas would be protected in perpetuity within these Tracts, now designated as Native Growth Protection Areas, with appropriate buffers. Conditions are necessary to ensure compliance with municipal requirements for alteration of an existing plat. *Findings 1 – 22.*

DECISION

Based on the preceding findings and conclusions, the request for a subdivision alteration related to the Finisterre Heights PRD to allow for vegetation management in dedicated open space tracts for forest health, fire hazard abatement, view maintenance, and the removal of noxious weeds, is **APPROVED**, subject to the following conditions:²

1. The recorded plat for the proposal must conform to the approved subdivision alteration as specifically detailed in this decision.
2. The Applicant shall adhere to all requirements of the revised memorandum submitted by the Island County Public Works Development Coordinator. Specifically:

Approval of this application does not grant approval to perform any work on a steep or unstable slope or within 100 feet of the top or toe of such slopes without prior review and approval from Public Works. Review may involve submittal of a Clearing and Grading permit and geotechnical report, and any other permits or documentation deemed necessary for review in compliance with Island County Code (ICC) including but not limited to Chapter 11.02.

Restriction Number 1 on the face of the plat shall remain unchanged.

3. Approval of this subdivision alteration shall expire within five years of the date of this decision. Accordingly, all requirements for final plat approval must be fulfilled and the final plat alteration must be approved by the County Board of Commissioners and recorded, apart from any required periods staying such time period associated with an appeal of this decision, by July 7, 2026.
4. This decision shall not be construed to authorize work, development, construction, or other site modifications in excess of the work, development, construction, and modifications specifically authorized by this decision.
5. Erosion and Sedimentation Control Best Management Practices shall be employed for any proposed development. The Applicant should consult County staff prior to performing any significant vegetation management within Tracts A and B, consistent with this decision.
6. This permit is conditioned upon strict observance of all applicable federal laws, including

² Conditions are necessary to mitigate specific impacts of proposed development and to comply with county code.

the Bald and Golden Eagle Protection Act. The HOA is responsible for determining if regulated Bald Eagle habitat is present within the development vicinity, and adhering to the U.S. Fish and Wildlife Service National Bald Eagle Management Guidelines (2007) and/or any applicable U.S. Fish and Wildlife Service permit.

7. No ground disturbance shall occur within 250 feet south of W North Camano Drive without prior consultation with Island County Planning and the WA Department of Archaeology & Cultural Resources (DAHP).
8. The final plat must comply with the requirements of ICC 16.06.120.
9. The Applicant shall ensure that its CC&Rs are updated prior to recording the final plat to reflect the subdivision alteration approved by this decision.

DECIDED this 8th day of July 2021.



ANDREW M. REEVES
Hearing Examiner
Sound Law Center