

**BEFORE THE HEARING EXAMINER
FOR ISLAND COUNTY**

In the Matter of the Appeal of)	No. S-VAR 290/20
)	No. APP 416/21
Jim Martyn, on behalf of)	
Salish Sea, LLC)	
)	
)	FINDINGS, CONCLUSIONS,
<u>Of a Shoreline Variance</u>)	AND DECISION

SUMMARY OF DECISION

This appeal concerns whether the Island County Planning Director erred in her interpretation and application of the “common line” setback exception to the shoreline buffer and building setback regulations under the County Shoreline Master Program. The Director interpreted the exception in a manner requiring the property owner, Salish Sea, LLC (Appellant), to obtain approval of a shoreline variance for the proposed location of a single-family residence that would be constructed on the property, which the County ultimately denied. Because the Appellant has not met its burden to show that the Director clearly erred by interpreting the setback exception of Island County Code (ICC) 17.05A.090.F.1 to require the common line to be drawn between the nearest water-side corners of adjacent residential structures, the appeal is **DENIED**.

SUMMARY OF PROCEEDINGS

Hearing Date:

The Hearing Examiner convened an open record appeal hearing on January 31, 2022, using remote access technology. The record was left open until February 2, 2022, to allow the Appellant to submit a supplemental brief.

Testimony:

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

County Witness:

Mary Engle, County Planning Director

Jim Martyn represented the Appellant at the hearing.

Exhibits:

The following exhibits were admitted into the record:

Appellant Exhibits:

- A-1. Email from Meredith Penny to Denise Rothman, dated July 12, 2019, with email string
- A-2. [Excluded]

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- A-3. Email from Meredith Penny to Shawn Morris, dated February 5, 2021, with email string
- A-4. Memorandum from Tansy Schroeder, dated May 5, 2020
- A-5. Email from Kathryn Bird to Adam Fulton, dated August 6, 2021, with email string
- A-6. ICGeoMap – Aerial and common line measurement, dated June 30, 2021
- A-7. Email from Meredith Penny to Kathryn Bird, dated August 6, 2021, with email string
- A-8. Various Project Site Plans with markups:
 - 1. Shoreline Project Site Plan (No. 028/16), undated
 - 2. Shoreline Project Site Plan (No. 263/17), approved October 11, 2017; Aerial Photograph, undated
 - 3. Shoreline Project Site Plan (No. 470/18), approved February 5, 2019
 - 4. Shoreline Project Site Plan (No. 507/18), approved June 18, 2019
 - 5. Shoreline Project Site Plan (No. 223/19), approved May 18, 2020
 - 6. Shoreline Project Site Plan (No. 366/19), approved December 3, 2019; Excerpt from Staff Report & Decision (No. SHE 366/19), dated December 3, 2019
 - 7. Shoreline Project Site Plan (No. 395/19), approved May 18, 2020; Excerpt from Staff Report & Decision (No. SHE 395/19), dated May 18, 2020
 - 8. Excerpts from Staff Report & Decision (No. 457/19), revised March 4, 2020
 - 9. Shoreline Project Site Plan (No. 256/20), approved June 28, 2021; Excerpts from Staff Report & Decision (No. SHE 256/20), dated June 28, 2021
 - 10. Draft Site Plans (No. 263/20), dated July 8, 2020; Site Plan Drawing, received October 7, 2020; Aerial Site Map, undated
 - 11. Shoreline Project Site Plan (No. 256/20), dated May 18, 2021; Enlarged Shoreline Project Site Plan (No. 256/20), dated May 18, 2021; Shoreline Project Site Plan (No. 256/20), approved June 18, 2021; Email from Dan Miranda to Katherine Bird, dated June 4, 2021, with email string; Excerpt from Staff Report & Decision (No. SHE 363/20), dated June 18, 2021
 - 12. Shoreline Project Site Plan (No. 187/21), approved August 23, 2021; Site Photograph with markup, undated
 - 13. Excerpts from Critical Areas Study (No. 307/21), dated June 21, 2021
 - 14. Shoreline Project Site Plans (No. 141/21), dated July 12 and August 30, 2021
 - 15. Shoreline Project Site Plan (No. 104/16), approved September 16, 2016
 - 16. Shoreline Project Site Plan (No. 402/17), approved December 19, 2017; Excerpt from Staff Report & Decision (No. SHE 402/17), dated December 19, 2017; Email from Michelle Pezley to David Pater and Jocelyn Young, dated September 27, 2017, with email string
- A-9. Current Use Planner Interview Test, Responses, and Evaluation Emails, various dates
- A-10. Email from Garrett Kuhlman to Jonathan Lange, dated April 13, 2021, with email string
- A-11. Appellant's First Interrogatories and Requests for Production, dated November 5, 2021, with annotated responses from County Planning Director Mary Engle
- A-12. Letter from Jim Martyn to Mary Engle, dated December 8, 2021
- A-13. Letter from Jim Martyn to Mary Engle, dated December 13, 2021

- A-14. Proposed Site Plan (No. 290/20), with disputed commonline markups, dated January 16, 2021
- A-15. Assistance Request from Kathryn Bird to County Prosecuting Attorney, dated July 12, 2021
- A-16. Email from Dave Jorgensen to Meredith Penny and Kathryn Bird, dated August 13, 2021, with email string
- A-17. Draft Staff Report & Decision (No. S-VAR 290/20), dated September 2021
- A-18. Email from Grant Johnson to Sydney Fishman, dated July 10, 2020, with email string
- A-19. [No exhibit submitted]
- A-20. Excerpt from Draft Shoreline Master Program Update, undated
- A-21. Shoreline Design and Permit Application Guide for Consultants and Contractors, undated

County Exhibits:

- C-1. Witness List
- C-2. Staff Report & Decision (No. S-VAR 290/20), dated October 7, 2021
- C-3. Objection Regarding Privileged Communications, undated
- C-4. Letter from Kristin Daves to Jim Martyn, dated January 4, 2022; Email from Jim Martyn to Kristin Daves, dated January 4, 2022, with email string

Motions, Orders, and Briefs

- Appeal, dated October 21, 2021
- Hearing Examiner’s Pre-Hearing Order, dated December 16, 2021
- Appellant’s Hearing Brief, dated January 25, 2022
- Declaration of Jim Martyn in Support of Appellant’s Hearing Brief, dated January 23, 2022
- County Hearing Brief, dated January 27, 2022
- Appellant’s Supplemental Brief, dated February 2, 2022

FINDINGS

Background and Application

1. Salish Sea, LLC, sought administrative approval from Island County (County) for a shoreline variance to allow construction of a 1,790 square foot single-family residence and associated 658 square foot detached garage on a 0.46-acre unaddressed vacant lot located along Fort Ebey Road and adjacent to the Strait of Juan de Fuca shoreline. The proposed residential development would occur within 200 feet of the Strait of Juan de Fuca ordinary high water mark (OHWM) and is therefore subject to shoreline regulations under the State Shoreline Management Act, Chapter 90.58 Revised Code of Washington (RCW), and the Island County Shoreline Master Program (County SMP), Chapter 17.05A Island County Code (ICC). *RCW 90.58.030(2)(f); ICC 17.05A.050; ICC 17.05A.070*. County staff determined that a shoreline variance would be required for the proposal because it would exceed the 10 percent maximum impervious surface area allowed on the lot under applicable shoreline regulations and, as pertinent to this appeal, because the proposed single-

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family residence would encroach 12 feet into the “common line” building setback applicable to the project. *ICC 17.05A.090.F.1. Exhibit C-2.*

2. The County SMP designates the subject property as within the Rural Conservancy Shoreline Environment, which generally requires a minimum 75-foot marine buffer from the Strait of Juan de Fuca OHWM and a minimum 50-foot steep slope buffer from the top of an exceptional feeder bluff on the site, as well as an additional 25-foot setback from the most landward buffer edge. *ICC 17.05A.090.D – Table 3.* The County SMP provides, however, that single-family residential development may be allowed within a setback or marine buffer (but not within a steep slope buffer) when, as here, “there are legally established residences adjacent to and within 100 feet of the project site that are waterward or partially waterward of the required shoreline buffer or building setback.” *ICC 17.05A.090.F.1.* Further,

In such cases, a single-family residential structure may be constructed within a marine or lake buffer, or within a setback provided the proposed structure is set back from the OHWM to a common line drawn between the water-side corners of the facades of each adjacent residential structure that are nearest to the proposed structure.

ICC 17.05A.090.F.1.

3. Adjacent properties to the north and south of the subject property are developed with legally established residences located partially waterward of currently required building setbacks and, therefore, the proposed residential development qualifies for the common line setback exception under *ICC 17.05A.090.F.1.* The existing single-family residence to the north of the subject property is generally square in shape and is oriented parallel to the shared property line. In contrast, the existing single-family residence to the south has a multifaceted shape and orientation that includes several water-side corners along the structure’s façade. County staff, under the direction of County Planning Director Mary Engle, determined that the applicable common line would be established by drawing a line from the nearest water-side corner of the residence to the north to the water-side corner of the residence to the south located closest to the subject property, but less waterward of other corners located on the water-facing façade of the neighboring residence. Because Salish Sea, LLC, had planned to site the proposed single-family residence along a proposed common line drawn to a more waterward corner of the residence to the south, County staff determined that the proposed location of the residence would require a shoreline variance. *Exhibit A-1; Exhibit C-2.*
4. On October 7, 2021, the County denied the Salish Sea, LLC, application for a shoreline variance upon the County’s determination that a single-family residence could be developed within the buildable area of the property behind the common line setback, as determined by the County (and described above). *Exhibit C-2.*

Appeal

5. On October 21, 2021, Jim Martyn, on behalf of Salish Sea, LLC (hereafter Appellant), timely appealed the County's decision denying the shoreline variance request. The appeal contends that the County applied the common line setback exception in a manner contrary to the plain language of ICC 17.05A.090.F.1 and inconsistent with the County's application of the exception to other similarly situated development projects. *Appeal*.

6. The Hearing Examiner issued a pre-hearing order on December 16, 2021, which provided instructions for the submission of documentary evidence, set a briefing schedule, and scheduled the appeal hearing for January 31, 2022. *Hearing Examiner's Pre-Hearing Order, dated December 16, 2021*.

7. On January 25, 2022, the Appellant filed a hearing brief, which asserts:
 - The County incorrectly interpreted the common line setback exception of ICC 17.05A.090.F.1 to require the common line to be drawn between the nearest waterward corners of the neighboring residences rather than between the most waterward corners of the residences that are nearest to the proposed structure. Although these differing code interpretations have no practical difference when applied to neighboring homes that are rectangular in shape and aligned in generally parallel rows, the differing code interpretations result in a substantial difference when, as here, they are applied to neighboring homes with an irregular façade or nonstandard orientation to the waterfront.
 - Similarly situated shoreline project proposals approved by the County demonstrate that the County knowingly acted to deprive the Appellant of equal protection of the law by singling out this project for harsher common line treatment.
 - The disputed code text presents a compound prepositional phrase containing a series of three subjects ("water-side corners," "façades," and "each adjacent residential structure") followed by the subsequent modifier, "that are nearest." Under the last antecedent rule of statutory construction, the qualifying phrase "that are nearest" modifies only "each residential structure." Therefore, the plain meaning of the common line setback exception requires a common line drawn between the most waterward corner of the exterior wall surface (façade) of each of the two nearest adjacent residences.
 - The purpose of the common line setback exception is to allow for a reduced setback that reasonably approximates the existing setback line enjoyed by adjacent neighbors. The exception explicitly contemplates a line between two corners that lie waterward of the normal setback line, and the purpose of the exception cannot be fulfilled unless those defining points are both situated more waterward than the standard setback line. The County thwarted this purpose by choosing a corner of the adjacent southerly residence located landward of the standard setback line, resulting in setback line at an acute angle that is unlike any pattern of development along the waterfront.

- The Planning Director’s interpretation of the common line exception is not entitled to deference because the language of the exception is unambiguous and because the Director has not shown that this interpretation has been adopted as a matter of agency policy to other shoreline project proposals.

Appellant’s Hearing Brief, dated January 25, 2022.

8. The Appellant submitted several documents in support of the claims raised in its hearing brief, which largely consist of site plans for previous shoreline projects approved by the County. The Appellant annotated these site plans with setback lines purporting to show that the County has consistently applied the common line setback exception in the manner urged by the Appellant. The Appellant also submitted other documentation in support of its claims, including various email correspondence from County staff regarding the common line setback exception, responses to the Appellant’s interrogatories in which County Planning Director Mary Engle denied applying the common line setback exception inconsistent with her interpretation, and an excerpt from a draft County SMP update proposing changes to the language of ICC 17.05A.090.F.1. *Exhibit A-1; Exhibits A-3 through A-18; Exhibit A-20; Exhibit A-21.*
9. The County filed an objection to the Appellant’s submission of an email correspondence between a County Commissioner and the County’s attorney, designated as Exhibit A-2, asserting that it contains privileged attorney-client communications. The Hearing Examiner excluded the email correspondence at the appeal hearing, without objection by the Appellant. The County did not file a formal hearing brief in this matter. *Exhibit C-3; Exhibit C-4; Oral Ruling of Hearing Examiner.*

Appeal Hearing

Appellant’s Arguments

10. Jim Martyn, on behalf of the Appellant, Salish Sea, LLC, did not call any witnesses at the hearing and asserted that the Appellant would rely on the documents and briefing submitted in advance of the hearing, as well as additional briefing that would be submitted following the hearing, to prove that the County incorrectly interpreted the common line setback exception of ICC 17.05A.090.F.1 to require a shoreline variance for the proposed location of a single-family residence on the subject property. He stated that, to be presumed valid, the Planning Director’s interpretation of the common line setback exception must be supported by a pattern of enforcement. He argued that the Appellant has provided numerous examples of the County applying the common line setback exception in a manner contrary to the interpretation applied in this matter and, therefore, the Director’s interpretation here is invalid and should not be afforded any deference. *Arguments of Mr. Martyn.*

County's Argument and Witness

11. County Planning Director Mary Engle represented the County at the hearing and testified on the County's behalf. She testified that, since taking on the position of County planning director, the County Community Development Department has provided staff training to alleviate any confusion about the requirements of the common line setback exception. Director Engle stated that, in her interpretation, the language of the common line setback exception requires a multistep process to determine the appropriate setback line, explaining that the process entails identifying all corners on the water-side facades of the neighboring residential structures, establishing which corner of each adjacent residence would be located nearest to the proposed residence, and then drawing a line between those corners to determine the location of the common line setback. She stated that her duties as planning director do not include directing her experienced planning staff in processing a development application but, rather, to assist members of her staff when they have questions or concerns about a particular aspect of a development proposal or about a code or policy interpretation. Director Engle noted that she reviewed the staff report prepared for the Appellant's proposal and determined that County staff correctly analyzed and applied the common line setback exception in accord with her interpretation of the provision. *Argument and Testimony of Director Engle.*

Cross-Examination of County Witness

12. In response to questions posed by Mr. Martyn on cross-examination, Director Engle testified that ICC 17.05A.090.F.1 explicitly refers to "water-side corners" and explained that because adjacent residential structures each contain multiple water-side corners and because a common line needs to be drawn between two points, the modifying language "that are nearest to the proposed structure" dictates which of the multiple water-side corners of each adjacent residential structure must be used to establish a common line. She stated that, in this case, the existing residence to the south has 10 water-side corners and that ICC 17.05A.090.F.1 requires that the water-side corner nearest to the proposed structure be used to establish the appropriate common line setback exception. *Testimony of Director Engle.*

Closing Brief

13. Following the appeal hearing, the Appellant filed a supplemental brief, which asserts:
- Despite County staff's apparent lack of training in the rules of statutory construction, County staff has consistently applied the most liberal setback reductions to other projects seeking to build homes on infill waterfront lots. County staff has applied this more liberal setback reduction to other projects through a common-sense approach to the common line setback exception that draws a line between the corner nearest the water on each of the two flanking homes.
 - This common-sense approach was applied by County staff over the past five years through their review and analysis of ten similarly situated site plans that preceded the determination here, and it continues on to this day as evidenced by six similar

plans that have been analyzed since denying Appellant the same intuitive result. This is an impressively consistent record of common line interpretation without the aid of technical legal guidance, punctuated only by this single appealed anomaly.

- Nothing in the Director’s briefing, oral argument, or testimony provides any explanation why the same intuitive approach was excluded for this project alone, nor does it provide any persuasive argument why the Appellant’s property should not enjoy the same intuitive application of the common line setback exception.

Appellant’s Supplemental Brief, dated February 2, 2022.

CONCLUSIONS

Jurisdiction

The Hearing Examiner has authority to hear and decide appeals from Type II administrative land use decisions, including decisions denying an application for a shoreline variance. *ICC 16.13.110.A.; ICC 16.19.040; ICC 16.19.180; ICC 16.19.190.B.1; ICC 17.05A.130.C.5.*

Review Criteria

The responsibility of the Hearing Examiner is to review the County decision and to determine, based on facts and law, if an error was made. The Appellant has the burden of proof to show that the County erred when denying the Appellant’s request. The Hearing Examiner must accord substantial deference to the County’s interpretation of its own ordinances. *Cockle v. Department of Labor and Industries*, 142 Wn.2d 801, 829, 16 P.3d 583 (2001); *Doe v. Boeing Co.*, 121 Wn.2d 8, 15, 846 P.2d 531 (1993); *Superior Asphalt & Concrete v. Dep’t of Labor & Indus.*, 84 Wn. App. 401, 405, 929 P.2d 1120 (1996); *McTavish v. City of Bellevue*, 89 Wn. App 561, 564, 949 P.2d 837 (1998).

The Hearing Examiner’s duty is to review the entire record before him to determine whether the Appellant has met this burden. To properly review the County’s determination, the Hearing Examiner must decide what facts are important to make a decision, determine those facts with reference to specific exhibits or testimony, draw conclusions from those facts, and make a decision based on those conclusions. *See Weyerhaeuser v. Pierce County*, 124 Wn.2d 26, 873 P.2d 498 (1994).

The Hearing Examiner reviews the County’s decision to determine if it is clearly erroneous, after allowing for such deference as is due to the construction of a law by the agency with expertise. Under the “clearly erroneous” standard of review, the Hearing Examiner examines the entire record in light of the policy set forth in the ordinance and reverses the decision only if the Hearing Examiner has a definite and firm conviction that the County made a mistake. *Seven Hills, LLC v. Chelan Cnty.*, 495 P.3d 778, 784 (2021); *see Buttnick v. Seattle*, 105 Wn.2d 857, 860, 719 P.2d 93 (1986). When applying the clearly erroneous standard, the Hearing Examiner must not substitute his own judgment for the judgment of the County. *See Buechel v. Department of Ecology*, 125 Wn.2d 196, 202, 884 P.2d 910 (1994). In other words, the County’s

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decision must be upheld if substantial evidence supports it and the Hearing Examiner is not left with a definite and firm conviction that a mistake has occurred.

Conclusions Based on Findings

The Appellant has not met its burden to show that the Director’s interpretation of the common line setback exception of ICC 17.05A.090.F.1 was clearly erroneous and, therefore, cannot demonstrate that the County erred by determining that a shoreline variance was required for the proposed location of a single-family residence extending into the applicable setback area. The parties do not dispute that the Appellant’s property qualifies for the common line setback exception under ICC 17.05A.090.F, but they do dispute where the common line should be located based on language of the provision stating that the common line is “drawn between the water-side corners of the facades of each adjacent residential structure that are nearest to the proposed structure.” *ICC 17.05A.090.F.1*.

The Appellant asserts that this language requires the common line to be drawn between the *most* waterward corners of the nearest adjacent residences. The Appellant therefore asserts that the Director erred by interpreting ICC 17.05A.090.F.1 in a contrary manner. The Appellant’s interpretation is misplaced, however, because the provision does not contain any language explicitly providing or suggesting that the “most” waterward corners of adjacent residences are to be used when establishing a common line. Accepting the Appellant’s interpretation would therefore require the Hearing Examiner to read language into the provision that the Board of Island County Commissioners chose not to include, contrary to well established principles of statutory interpretation. *See, e.g., State v. Reis*, 183 Wn.2d 197, 217, 351 P.3d 127 (2015) (stating that a court does not have the authority to read language into a statute even if it believes that the statute contains errors or inadvertent omissions).

In contrast to the Appellant’s interpretation of the common line setback exception, the Director interprets ICC 17.05A.090.F.1 to require the common line to be drawn between the nearest water-side corners of adjacent residential structures. This interpretation is reasonable and comports with the plain language of the provision. As explained by Director Engle at the appeal hearing, residential structures necessarily contain multiple water-side corners and, therefore, the provision’s modifying language “that are nearest to the proposed structure” dictates which of the multiple water-side corners of each adjacent residential structure must be used to establish a common line. This is true for both simple square-shaped residences with typical orientations along the shoreline and for residences having a more complex multifaceted shape and atypical orientation to the shoreline. The Appellant argues that the provision’s phrase “that are nearest to the proposed structure” modifies “each residential structure” rather than “corners” or “facades” under the last antecedent rule of statutory construction. This argument lacks merit under basic rules of grammar, which dictate that the phrase is used to modify a plural term rather than a singular term.

The Appellant also argues that the Director’s interpretation is unreasonable and should not be afforded any deference because the County has previously interpreted the rule in the manner urged

by the Appellant as demonstrated by several previous shoreline project approvals. In support of this argument, the Appellant relies on *Sleasman v. City Lacey*, 159 Wn.2d 639, 151 P.3d 990 (2007), in which the Washington State Supreme Court held that, to be entitled to deference, an agency’s interpretation of an ambiguous ordinance must be supported by a pattern of past enforcement. It is unclear, from the Appellant’s submitted materials, whether the previous shoreline project approvals involved any dispute regarding the common line setback exception requiring an interpretation by the Director. More importantly, however, the Appellant’s reliance on *Sleasman* is unavailing because the Hearing Examiner does not conclude that the language of ICC 17.05A.090.F.1 is ambiguous. See *Milestone Homes v. City of Bonney Lake*, 145 Wn. App. 118, 186 P.3d 357 (2008) (stating “[W]e are not bound by *Sleasman*’s discussion of ambiguous ordinances because we find that the zoning ordinances [are clear and unambiguous.]”). *Findings 1 – 13*.

DECISION

Because the Appellant has not met its burden to show that the Director clearly erred by interpreting the setback exception of Island County Code 17.05A.090.F.1 to require the common line to be drawn between the nearest water-side corners of adjacent residential structures, the appeal is **DENIED**.

DECIDED this 28th day of February 2022.



ANDREW M. REEVES
Hearing Examiner
Sound Law Center