

BEFORE THE EDMONDS CITY COUNCIL

Re: Tom and Lin Hillman

APPEAL FROM FINAL DECISION UPON
RECONSIDERATION, ENTERED BY
EDMONDS HEARING EXAMINER PHIL A.
OLBRECHTS APRIL 24th, 2013

PLN20120033

Stephen C. Schroeder and Cheryl L. Beighle,
1142 Vista Pl., Edmonds, WA 98020, Telephone
(425) 712-8694; and Todd
and Candy Brown, 1135 Sierra Pl., Edmonds, WA
98020, Telephone # (425) 672-4418; Parties of Record,
Appellants.

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DEVELOPMENT SERVICES
COUNTER

I.
STATEMENT OF STANDING TO APPEAL

Appellants are adjacent property owners and Parties of Record in this matter who testified at the open record public hearing before the Hearing Examiner. Pursuant to ECDC 20.07.003, they are accorded the right to appeal from this decision.

ii.

ISSUES ON APPEAL

1. The Final Decision Upon Reconsideration found that “there is insufficient evidence in the record to determine if the proposal has been designed to minimize wetland encroachments as required by the variance criteria” [Final decision Upon Reconsideration, p. 1]. The same Hearing Examiner also ruled that “the applicant failed to justify the proposed filling of wetlands under the City’s reasonable use criteria” [Order on Reconsideration, p. 3.]. Inconsistently with these rulings, the Hearing Examiner then invited the Applicants’ hired consultant, (Wetlands Resources, Inc.) to submit, by means of untested expert opinion testimony, a finding of whether “removing the proposed wetlands encroachment would appreciably improve upon impacts to wetland functions,” [Final Decision Upon Reconsideration, p. 20]. This aspect of the decision is improper, and deprives the appellants of due process rights to contest the application. This decision should be reversed, and a finding entered that the applicants have not sustained their burden of proof that the filling of 11% of the wetland was “the minimum necessary to allow the owner the rights enjoyed by other properties in the vicinity with the same zoning,” as required by ECDC 20.85.010.F. Consequently, the application for a variance should be denied.

2. The strict application of the wetlands and sensitive area regulations in this matter would not amount to a “taking,” the legal concept that is incorporated within the definition contained in ECDC 23.40.320. **“Definitions pertaining to critical area:** “Reasonable economic use(s) means the minimum use to which a property owner is entitled under applicable state and federal constitutional provisions in order to avoid a taking and/or violation of substantive due process.” That standard is not applicable to regulation on the use of land so long as the regulation in question is aimed at achieving a legitimate public purpose. If this Council were to find that the wetlands regulations, strictly applied, would amount to a taking or inverse condemnation, however, that impact was visited upon the prior owners, Darryl and Shari Lewis, in 2003 when the wetland and buffers were delineated. The applicants, Tom and Lin Hillman, reaped the benefits of that past reduction in value, having purchased the land at a price substantially below fair market value for a comparably-sized buildable lot. That reduced price obviously reflected the fact that the nature of the property and the existence of the wetlands regulations rendered the construction of a home on the lot problematical. Their argument that the advent of these highly-predictable results amounts to an unreasonable taking should be rejected, and their application for variances denied in total.

III.

STATEMENT OF FACTS

On August 7, 2003, the area in question was the subject of a Critical Area Study conducted for the City of Edmonds by Wetland Resources, Inc. As a result of that Study, the wetland and stream boundaries, and their buffers, were delineated. Those boundaries were substantially unchanged ten years later when Wetland Resources, Inc., performed a Critical Area

Study and Wetland Mitigation Plan for the Hillmans [Attachment 8, Planning Division Report & Recommendation].

County tax records reflect that Darryl and Shari Lewis purchased the property on May 28, 2003, for \$190,000. On January 15, 2004, they filed with the City a consolidated application for a critical areas reasonable use variance and north property line setback variance. As part of their proposal to build a large house on the eastern (slope) section of the property, they requested a variance to allow them to put a portion of the footprint of the house in the wetland and stream buffer areas, proposed to run a driveway through a portion of the wetland substantially along the Sierra Pl. right of way, and requested a boundary setback variance to allow them to put the north-most portion of the house (a large, enclosed deck) ten feet from the property line instead of the twenty-five feet required by the Code.

Those variance requests were approved and, on April 19, 2005, the City Council heard an appeal of the Hearing Examiner’s decision. The issue was raised whether the setback variance, necessitated solely by the large deck, was “necessary to a reasonable use of the property” [Edmonds City Council Approved Minutes, April 19, 2005].

Councilmember Dawson asked whether the Council was limited to the issues raised on appeal. City Attorney, Scott Snyder, advised the Council that they were limited to facts in the record and the issue raised on appeal (whether the footprint of the house would intrude into the adjacent property). Based upon that legal advice, the Council voted 6-1 to deny the appeal and uphold the decision of the Hearing Examiner [Id. P. 16].

Subsequently, City Attorney Snyder concluded that his advice had improperly restricted the scope of the Council’s review and that they were free to review all of the variance criteria and determine whether they had been met [Edmonds City Council Approved Minutes June 7,

2005]. Based upon that clarification, the Council reopened the matter. When it became clear upon the record that the large enclosed deck on the north end of the structure had not been justified by the evidence (Councilmember Dawson pointed out that, on the record, the Hearing Examiner had indicated that the deck was not necessary to allow a reasonable use of the property), the Council voted 5-2 to remand the matter to the Hearing Examiner to review the criteria regarding the rear setback variance [Id. P 13].

Upon remand, on July 13, 2005, the Hearing Examiner issued Findings, Conclusions and Decision of the Hearing Examiner in which he denied the application to reduce the rear boundary setback from 25 to ten feet. The Lewis house was never built.

Public land records reveal that the Hillman Family Trust purchased the property in April of 2011. On November 27, 2013, Wetland Resources, Inc., filed a Critical Area Study and Wetland Mitigation Plan commissioned by the Applicants. The Hillmans filed the instant Variance Request on July 9, 2012. In that Request, they asked that the fifty-foot buffer for the category 3 wetland be reduced to zero and that they be allowed to build on 11% of the wetland, itself. They also asked that the requirement for a fifty-foot buffer for the type Np stream be reduced to twenty-five feet. They further requested that the fifteen-foot building setback from critical area buffers be reduced to five feet at the wetland edge, and three feet from the stream buffer. They, finally, requested reductions of the property line setback from twenty-five feet to twelve feet at the front of the property, and reduction of the ten-foot side yard setback to three feet.

On March 28, 2013, the Hearing Examiner approved the street, side yard and critical area reasonable use variance requests, subject to Conditions. Condition 1 read, in pertinent part:

“As discussed in FOF No. 6, staff shall consult with a qualified wetland biologist, who can be Andrea Bachman, to determine whether encroaching into the Category III wetland of the

subject property causes significantly more damage to wetland functions than building within its buffer. If that is the case, staff shall displace as much of the wetland encroachment into the second story of the proposed home and further northward into the buffer as much as reasonably possible to reduce the encroachment into the wetland.”

The Finding of Fact No. 6, referred to, read:

“The most challenging issue for this proposal is whether the request constitutes the minimum necessary to grant relief from the City’s critical area regulations. It appears that encroachments into the wetland could be entirely avoided by moving living space to the second floor of the home and reducing the yard area . . . “

The City and the Applicant requested reconsideration of the final decision, the City seeking further clarification of the footprint determination that they were asked to make. In an Order on Reconsideration, the Hearing Examiner explained that:

“Condition No. 1 was imposed because the applicant failed to justify the proposed filling of wetlands under the City’s reasonable use criteria. Under the city’s critical area regulations, an encroachment into a wetland should arguably only be authorized as a measure of last resort where no other options for reasonable use of land are available. In this case it appears that most, if not all, of the portion of the home encroaching into the home (sic – presumably wetland) could be moved to the second floor of the home in lieu of the proposed vaulted ceilings.”

The Final Decision Upon Reconsideration was issued on April 24, 2013. The Hearing Examiner modified Condition No. 1 to provide guidance to City staff. It now read:

“As discussed in FOF No. 6, staff shall consult with a qualified wetland biologist, who can be Andrea Bachman, to determine whether removing the proposed wetland encroachment would appreciably improve upon impacts to wetland functions. If there is any appreciable environmental benefit to avoiding the proposed wetland encroachment, the building footprint for the home, inclusive of the garage, will be limited to the squared building space (including the west bay window) depicted in Ex. 4, Sheet 2, excluding the garage area and the room appended to the north of the garage to the extent it encroaches into the wetland. The southeast wetland encroachment of this living space is authorized. The driveway shall be located outside the wetland.”

Finding of Fact No. 6 was also amplified, thus:

“6. Minimum Variance. The most challenging issue for this proposal is whether the request constitutes the minimum necessary to grant relief from the City’s critical area regulations. It appears that encroachments into the wetland could be almost entirely avoided by limiting the building footprint to 1,600 square feet, inclusive of garage space. The need to encroach into 1,790 square feet of Class III wetland is based upon the applicants’ desire to have

vaulted ceilings and a driveway that could be larger than necessary to serve the property. . . . These are not sufficient reasons to justify an encroachment into wetlands.”

Despite these unambiguous findings, the Hearing Examiner seemingly remanded the issue, inviting the Applicants’ paid expert to offer an unchallenged opinion on the footprint issue.

As of the date of the filing of this appeal, no further information has been provided by the City or by Wetland Resources, Inc., and the Appellants are treating the Decision Upon Reconsideration as a final, appealable, order.

IV.

ARGUMENT

Typically, the argument that a zoning or development restriction deprives an owner of all reasonable use of her property, arises in the context of long-term ownership of that property. To take the most obvious example, if an owner’s property is subjected to a retroactive restriction that decreases its value, that owner might be entitled to fair compensation as a matter of Constitutional law. Therefore, an alternative approach might be to exempt that property from the newly imposed restriction (a practice commonly referred to as being “grandfathered.”) A somewhat lesser, but still compelling case for a variance or non-conforming use permit, is presented when a buyer purchases a property intending to use it for a purpose that is consistent with zoning and development laws as they existed at the time of his purchase. In other words, the buyer relied upon being allowed to build on the newly acquired land according to plans. A subsequent change in the ordinances restricting the uses would be inconsistent with the legally sanctioned assumptions that the buyer was entitled to make. To put it another way, by spending money in reliance on existing law, the buyer’s rights to develop his newly acquired property may have vested.

The two situations set forth above are not exhaustive, but illustrate that the advent of zoning variances and non-conforming use permits was a response to the reality that, at times, land use restrictions had unintended consequences to individual property owners that were fundamentally unfair. In addition, however, because all land use restrictions have economic impact on property owners within the jurisdiction (both positive and negative), the criteria for the granting of relief from the application of the law via a variance evolved to require that the restriction have an impact upon one seeking a variance that is *unique* from the impact on all property owners as a class. This requirement is set forth in ECDC 20.85.010: *No variance may be approved unless all of the findings in this section can be made:*

A(1) – Special Circumstances: That, because of special circumstances relating in the property, the strict enforcement of the zoning ordinance would deprive the owner of use rights and privileges permitted to other properties in the vicinity with the same zoning.

The Hillmans contend, and the hearing examiner seemingly found, that the only reasonable use of the property in question was the construction of a single family dwelling. To bolster this argument, they point to adjacent properties that contain houses of a comparable or larger size, and urge that: “If no variance was granted, the applicant would be denied the use of property enjoyed by the neighbors in the same zoning district.” A source of this confusion may be found in Chapter 23 of the ECDC, specifically 23.40.320:

Reasonable economic use(s) is defined as: “The minimum use to which a property owner is entitled under applicable state and federal constitutional provisions in order to avoid a taking and/or violation of substantive due process. ‘Reasonable economic use’ shall be liberally construed to protect the constitutional property rights of the applicant. For example, the minimum reasonable use of a residential lot which meets or exceeds minimum bulk requirements is use for one single-family residential structure.”

The term “minimum bulk requirements” is not defined, but is presumed to refer to the size of the proposed structure.

The language “minimum reasonable use” lacks clarity, even with the extended definition. On its face it would grant the owner of every plot of land in the City that exceeded minimum size requirements, the right to build a house on that land. A literal application would seem to erase critical area protections from all privately owned property in the city, even land containing swamps, critical habitat, or even fish-bearing streams. Thus, a well-intentioned attempt to add clarity to the concededly difficult constitutional standards went too far and, if applied in the manner advocated by the applicants, would make the uniform application of the Edmonds City sensitive area regulations generally impossible.

The proper cohort of property owners against which to measure the development rights of the applicants is not, as assumed, other property owners in the vicinity and zone, but those properties in the greater City of Edmonds that contain wetlands that are subject to restrictions. It is self-evident that recognizing a right to build that is available to unrestricted properties would render ineffective the wetlands regulations. Indeed, it would put all zoning restrictions in jeopardy. Wetlands restrictions and general zoning codes in fact discriminate among properties based upon ascertainable attributes. So long as those discriminations are reasonably designed to promote a legitimate public purpose, they do not arise to a “taking.”

A look at the provisions of the Edmonds Community Development Code (ECDC) reveals that the City of Edmonds and this City Council have been leaders in protecting wetlands and other critical habitat areas. The Code requires, for example, that a Category 3 wetland such as the one at risk here, have a buffer of fifty feet [ECDC 23.50.040.F1.c.]. Recognizing some margin for compromise and accommodation, this legislative body provided that the Director of Development Services could approve a reduction of that fifty-foot buffer to “no less than 50 percent of the standard width” [ECDC 23.50.040.F.3], but even then only if certain provisions

were met. The Hillmans in this Application would have the City eliminate the wetland buffer altogether. Indeed, they propose to actually intrude their house into the wetland itself. In their own words: “The applicant requests reduction of this buffer to zero on a major portion of the western boundary of the wetland, and proposes partial encroachment into 11% of the wetland itself, with compensatory mitigation measures.” [Variance Request received by the City on February 15, 2013].

The language concerning the “reduction of the buffer” is, at first glance, misleading. What, in fact, the applicants are seeking is permission to construct a house entirely inside the buffers. In addition, the proposed structure would intrude into some 11% of the wetland, itself. In other words, no portion of the proposed structure would exist outside of areas protected by Edmonds Ordinances. It is not a variance that they seek. It is a total abrogation of the laws that were enacted by this body to protect wetlands in the jurisdiction.

The Applicants have placed much emphasis upon the proposition that the wetlands regulations that apply to their newly-acquired property would, if strictly enforced, deprive them of all reasonable economic use of the site. That test, however, is but one of three inquiries that must be made when determining whether a jurisdiction’s regulation of the use of land amounts to a “taking” in the Constitutional sense. The basic premise is that “mere regulation on the use of land has never constituted a ‘taking’ or a violation of due process. . . ,” Presbytery of Seattle v. King County, 114 Wn,2d 320 (1990), so long as the regulation in question is aimed at achieving a legitimate public purpose and it is not unduly oppressive on the landowner. As to the latter issue, the deciding body should consider the economic impact of the regulation on the property and the extent of its interference with investment-backed expectations.

It is clear beyond cavil that the denial of development plans for environmental reasons does not constitute a taking of private property for public use without compensation, State of Washington v. Lake Lawrence Public Lands Protection Association, 92 Wash. 2d, 656, 663 (1979).

This is a critical factor in this case, as the Hearing Examiner noted. [Final Decision Upon Reconsideration, Conclusions of Law 12]. Public land records reflect that the property was purchased by the Hillman Family Trust on April 1, 2011. By that time, there had been at least one attempt to develop the property, by the Lewis family. The Lewis family had purchased the property on May 28, 2003, for \$190,000. They filed for a variance to allow the construction of a large house on the eastern portion of the site. After that variance request was largely granted by the Hearing Examiner, the matter was appealed to the City Council. That body astutely discerned that the Hearing Examiner's decision had not been supported by evidence that a large enclosed deck that was proposed for the north side of the house was "essential" in order for the Lewis's to enjoy a reasonable use of their property. Upon remand, the Hearing Examiner denied the variance request that included the large, enclosed deck.

The public record does not disclose the reasons, but the Lewis family effort to build on the property was abandoned, and the property went into foreclosure. The record of that matter does reveal that the adjacent property owner established by means of a survey that the proposed structure would actually intrude onto his property.

County tax records reflect that the Hillmans purchased the property in question on April 1, 2011, for \$75,000. Those same County tax records reflect that the same property had been

purchased by the Lewis family in 2003 for \$190,000.00.¹ The property at 1142 Vista Pl was purchased on August 9, 2000, for \$525,000, while the property at 1122 Vista Pl (a much smaller parcel) was purchased on September 29, 2006, for \$660,000. Both of those purchase prices reflected the value of the building lots alone, as the existing old structures on the sites were razed prior to the construction of the new. Neither property is as large as the parcel in question. Thus, while the surrounding properties (the development of which did not entail filling in a wetland) sold for up to nearly ten times what the Hillmans paid, the one that they purchased had continuously fallen in value, due solely to the nature of the plot and the restrictions that were required by Edmonds City laws. Indeed, by the time they purchased it, it was valued at a fraction of its peak value and had had a rather fractious history of hearings, appeals, remands, modifications and, ultimately, abandonment. Thus, when the Hillmans paid their bargain-basement price for the land, they did so with full knowledge that its development would be problematical. For them now to contend that they are entitled to build a house that is comparable in size to those of their neighbors, is, under the circumstances, unreasonable. In the words of the Washington State Supreme Court, if their “investment-backed expectations” were to reap a wind-fall profit, those expectations were not reasonable.

There is a further aspect to this large disparity in pricing. Their contention is that the wetlands regulations would deprive them of “reasonable economic use” of the property. If, in fact, such an impact occurred it was already in place when the Hillmans purchased the property. If the regulation unreasonably restricted the use of the property, any loss flowing therefrom had been visited upon the owners of the property at the time that it was designated a sensitive area in 2003. What the Hillmans are seeking by means of this variance request amounts to a gratuitous

¹ The County land records also contain a copy of a Deed of Trust running from the Lewis’s to Cascade Bank for \$380,000.00. This document, dated October 6, 2006, is curiously reflected in the County Land records as a transaction with a sales price of \$0 for excise tax purposes.

enrichment – not a reasonable economic use of the land. Indeed, should this variance go forward, the value of their land will increase immediately by a factor of more than eight.

There is insufficient evidence in the record to establish that the Hillmans' proposal has been designed to minimize encroachment of the wetlands. [Final Decision Upon Reconsideration, p. 1] Consequently, upon the state of the record, the permit cannot be approved. [Order on Reconsideration, p. 2]. Because no new evidence is permitted under prevailing law, the Applicants have simply failed to carry their burden of proof that the filling of 11% of the wetland presents the only reasonable option for a reasonable use of the property. [Id., at p.3]. Inconsistently with this proper ruling, the Hearing Examiner invited the Applicants' partisan experts (Wetland Resources, Inc.) to unilaterally submit expert opinion evidence as to "whether removing the proposed wetland encroachment would appreciably improve upon impacts to wetland functions." [Final Decision Upon Reconsideration, p. 20, Condition 1.] This not only puts the opposing parties of record at a decided disadvantage, it is improper as a matter of law. Upon the record as it exists, the only lawful outcome is to deny the application for a variance because the applicants have not established that the proposed footprint is essential in order to not deny the applicants all reasonable economic uses and privileges permitted to other properties in the vicinity and zone.

In the context of properties in the area in general, the granting of a variance in this case that allows a dwelling to be built entirely inside the wetland and its buffers would be a dangerous precedent. As David Thorpe testified at the hearing on this matter, the entire elimination of the stream and wetlands buffers would establish a precedent for the development of similarly-situated properties. It is anticipated that both property owners and developers, looking to the decision in this matter, will also file for variances allowing them to build within wetlands and

buffers. Should any of those variance requests be denied, the City is likely to become engaged in litigation brought by persons seeking equal treatment. Given the broad scope of the concessions made in the Hearing Examiner's Decision, the City of Edmonds would be hard-pressed to protect and preserve other wetlands and sensitive areas within its jurisdiction.

In a matter such as this, the City Council has a dual function. On one level, it sits in a quasi-judicial capacity to review the Decision and findings of the Hearing Examiner as to this specific property. At the same time, this is essentially a legislative body that makes decisions based upon what is best for the community as a whole. In the latter capacity, you are not bound by the "no new evidence" convention. You are free to elicit and consider information that goes beyond the scope of this particular matter – information that is relevant to the impact of the ruling on the City's ability to protect sensitive areas in general. In this regard, we urge the City Council to ask the Planning Division staff to research and identify similarly-situated, privately held properties that contain wetlands, streams or other sensitive areas that are protected by Chapter 23 of the Edmonds Code – and, hence, would be put in jeopardy by the precedent that would be set in this case if affirmed. Staff should be instructed to pay particular attention to sites that are comprised of more than fifty percent of sensitive, protected areas and buffers.

V.

RELIEF SOUGHT

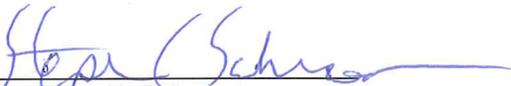
1. The sensitive area variances sought in this matter are inconsistent with the ECDC provisions that protect wetlands, streams, other sensitive areas and their buffers from development, and should be denied. In so doing, this body should clarify that the "reasonable use" standard was enacted to comply with constitutional law

requirements, and not to expand them. Consequently, reasonable land regulations that protect important public interests do not amount to a taking of private property.

2. Alternatively, this body should find that the evidence submitted in this matter by the applicants was not sufficient to establish that the encroachment of their proposed house into the wetland itself was the minimum necessary to allow them a reasonable use of their property.

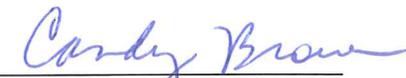
We have read this appeal and believe the contents to be true.

Dated this 7th day of May, 2013,


Stephen C. Schroeder


Cheryl L. Beighle


Todd Brown


Candy Brown