

**DECISION OF THE HEARING EXAMINER
CITY OF BAINBRIDGE ISLAND**

In the Matter of the Appeal of

Douglas and Karina Nelson

No. BLD 13574 CLR

From an Administrative Decision
Of the Director, Dept. of Planning and
Community Development

Introduction

Douglas and Karina Nelson appeal the administrative decision issued by the Director, Department of Planning and Community Development, regarding a clearing permit for property at 5159 Crystal Springs Drive NE.

A public hearing on the appeal was held May 5, 2011. Dennis D. Reynolds represented appellants and Jennifer Sutton, Planner, represented the Director, Department of Planning and Community Development. The record was closed June 8, 2011, with the filing of the final post-hearing memorandum.

All section numbers in the decision refer to the Bainbridge Island Municipal Code, unless otherwise indicated.

After due consideration of all the evidence in the record consisting of the testimony at the hearing and the documentary evidence admitted at the hearing, the following shall constitute the findings, conclusions, and decision of the Hearing Examiner in this matter.

Findings

1. In September 2005, building permit No. BLD13574SFR was issued for the construction of a single-family residence at 5159 Crystal Springs Drive N.E. The land was cleared and the house was built on the flat bench on the waterside of the lot that slopes up to the east. Landscaping was not approved initially because of unapproved paths and a patio. A shoreline exemption was obtained and, after removal of a path and planting of species on a planting list approved by the City, the landscaping received final approval on July 12, 2007. There was no grass lawn on the west side of the house at that time.

2. The subject site is a waterfront lot approximately .35 acres in size. The lot is zoned R-2 with a shoreline environment designation of Rural. Section 16.12.090, establishes the requirement for a vegetation buffer, the native vegetation zone (NVZ), of 50 feet immediately landward of the OHWM in the Rural shoreline environment if existing vegetation is altered or removed. The

buffer installed varied from the 50 ft. requirement through utilization of the buffer averaging option of Section 16.12.090C(9) with the required substitute buffer space located in the side yards.

3. The purpose of the NVZ is “to protect and enhance the Island’s natural character, water quality, native plant communities, and wildlife habitat along the shoreline.” Section 16.12.090A.

4. Section 16.12.090C.3 provides:

New plantings in this zone shall be native plant species, or other approved species, similar in diversity, type, density, wildlife habitat value, water quality characteristics and slope stabilizing qualities to the original vegetation.

5. In November 2010, Appellant Doug Nelson applied under protest for a clearing and grading permit to address a serious drainage problem resulting from a landscape mound or mounds between the house and the water that trapped runoff coming down the sloping driveway that the catch basin and two sump pumps could not handle causing standing water, mold, and a serious infestation of flies. He proposed to regrade an area of approximately 2500 square feet by removing approximately 25 cubic yards of dirt. As some of the native plants approved for planting in 2007 did not thrive on the site because the species were more appropriate for shady areas than this sunny location, he proposed to replant the surviving vegetation and supplement those plants with about 80 native shrubs for a total of 13 varieties and 132 plants from the list approved in 2007. He also proposed to incorporate Dwarf Perennial Ryegrass mixed with Tall Fescue into the plantings. His planting list was approved. Exhibit 46, Attachment A.

6. A clearing and grading permit technically was not required but the City offered that approach instead of requiring a shoreline exemption permit because clearing permits are free and the delay is minimal, usually one to two weeks. Testimony of Sutton. Jennifer Sutton, Planner, as designee of the Director of the Department of Planning and Community Development (“Director”), approved the clearing permit for the clearing, grading, and replanting of the NVZ, subject to three conditions (Exhibit 5). Those conditions are the subject of the appeal filed by Appellants. The conditions are:

1. The applicant shall allow City staff on site to inspect the existing conditions prior to commencing work. The applicant shall notify City staff once grading and replanting work is completed and City staff will conduct a site visit to confirm that the area has been replanted in accordance with this approval.

2. The clearing permit application indicates that the existing plants, approved in 2007, will be replanted after the grading is completed. The type and quantify of plants on that planting list is still approved, with the addition of the grasses suggested by Landscape Architect Tom Rengstorf. Consistent with the original requirements, the plants shall be distributed throughout the native vegetation zone to achieve species diversity required by BIMC Section 16.12.090.C.3. In accordance with this section, the replanted area may not resemble a lawn or other monoculture.

3. The brick border shown on the site plan is not approved, as new impervious surfaces are not permitted in the required shoreline side yard or the Native Vegetation Zone. A fence no higher than 4 feet or untreated logs may be used in these locations to help maintain site grading or identify property boundaries.

The permit was issued seven calendar days after application.

7. Condition No. 1 was necessary, according to Ms. Sutton, because she had not been able to visit the site prior to issuance of the permit and the most recent photos of the landscaping she had were from 2007, nor was she able to do the normal three-year inspection of the previous landscaping, because of a pending lawsuit.

8. Because of the request to use grasses commonly used for lawns and playfields and the City interpreted the NVZ regulations to disallow new grass lawns, the approval was conditioned with No. 2 to assure that lawns would not be planted in the NVZ. Testimony of Sutton.

9. At some point between the initial clearing and landscaping that was inspected in July 2006, and the final inspection approving the landscaping in 2007, some grass lawn was planted. Testimony of Nelson; Exhibit 22. The lawn was required to be removed.

10. When the regrading and replanting was completed, there were seven beds planted with the listed species along the edges around the site and large grassy areas surrounded by those beds. Though Ms. Sutton had envisioned that the grasses or ground cover would be interspersed with shrubs, solid areas of mown grass occupied approximately forty percent of the area of the NVZ and sixty percent was in beds of the shrubs, not a native vegetation planting scheme in Ms. Sutton's view.

11. The Code provides exemptions for clearing of less than 2500 square feet in a twelve month period and for removal of trees and ground cover in emergency situations involving immediate danger to life or property. Section 15.18.040. Most of the NVZ was cleared and replanted, amounting to around 2,800 square feet based on a 75 ft. width by the 37.5 setback, not including the additional area needed for the buffer averaging. Testimony of Sutton. Mr. Nelson estimated the area to be less than 2,500 square feet but did not provide dimensions or other details. The hearing examiner finds Ms. Sutton's estimate to be more reliable. The drainage problem, though serious, was not of the immediacy that it would have satisfied the standard for exemption.

12. The grasses Thomas Rengstorf, Appellant's landscape architect, recommended for the site were a mixture of perennial ryegrass and "Tall turf type Fescue." Ex. 30. The grasses actually planted were Creeping Red Fescue, Chewing Fescue and several varieties of perennial ryegrasses. Exhibit 31. Mr. Rengstorf testified that he wasn't aware of any official definition regarding native grasses but that in his view the tall fescue would be considered a native grass and that the ryegrass is an adapted species having been around the northwest for hundreds of years. Both have ecological functions and values in that they are drought tolerant, collect pollutants and excessive water and hold back invasive species such as horsetail. Testimony of Rengstorf. He relied on both the "Washington Native Plant Society" publication that includes information about *Restuca rubra*, red fescue, suggesting that that species is native to Washington, Exhibit 30, and the Basic Restoration & Enhancement Guidelines, Exhibit 48, once but no longer distributed by the City that refers to use of grass seed mixtures in the planting plan from Appendix C, which includes red fescue and annual ryegrass, though not perennial. Those guidelines have been superseded by more current information. Testimony of Morse. Mr. Nelson explained at that time that the grasses would not be broadly used but would be a ground cover that would preserve views. Photos of the grasses (Exhibit 46, Att. N) provided Ms. Sutton by Mr. Nelson showed tall, unmaintained stands. The pictures were taken from the Internet and were intended merely to be illustrative of the species. Testimony of Nelson.

13. “Native vegetation” is not defined in the Shoreline Master Program (“SMP”). Steve Morse, Associate Planner with training and experience in natural resource planning and management, does not regard tall fescue and perennial ryegrass as native vegetation. He defines native vegetation as that indigenous to the Puget Sound region prior to European settlement. Further, he believes that, unlike mown grasses, a natural plant community has more than one layer.
14. The Lefeber Turf Farm indicated that the seed mixture used is considered native grass of the northwest. Exhibit 31.
15. The “original vegetation” on this site is regarded by Ms. Sutton as that originally approved in 2007 and present at the time of issuance of the clearing permit. Appellants agree that the original vegetation was the mix approved in 2007. Nelson’s Reply to City’s Hearing Brief, p.26. At that time there was no grassy area or lawn in the NVZ and the list presented by Nelson and approved did not include fescue and ryegrass. Exhibit 46, Att. K; Testimony of Sutton.
16. While a grass lawn may provide some ecological functions and values, including prevention of erosion, it does not provide wildlife habitat or overhanging vegetation to shade the water and allow detritus and insects to fall into the water. Testimony of Morse. Mr. Morse disputed the value of a lawn to remove pollutants from water pointing out that normally a residence is not a source of heavy metals and while grasses may provide that function in a bioswale, a lawn does not function as a bioswale.
17. “Monoculture” means the raising of only one crop without using the land for other purposes. Webster’s New World Dictionary, Second College Edition (1982). Wikipedia’s discussion of monoculture, utilized by both parties, states that lawns are examples of monoculture. Exhibit 12; City’s Post-Hearing Brief Appendix 1.
18. Staff interprets the Code provision regarding new plantings to intend that there be a wide distribution of plants across the site. Testimony of Morse. While recognizing that ground cover can be part of a native community, the intent of the Code is to plant in a mixed fashion, ground cover interspersed with trees and shrubs. Testimony of Sutton. The City has consistently interpreted the Code to prohibit lawns in the NVZ. Testimony of Sutton; Morse; McKnight.
19. A survey based on multiple listing service’s records of waterfront lot development since 1996, when the SMP was adopted, showed “dozens” of houses with lawns between the house and the water. Testimony of Nelson; Exhibit 24. Exhibit 25 shows several houses built within the last five years, one of which is the subject of a current enforcement action; another, the Broom Street house, has been determined to be a legal nonconforming use; and the South Beach House 1 has not yet been given a certificate of occupancy. Testimony of McKnight. Many of the properties on the long list may be legally nonconforming or may be in violation of the Code but the City had not been aware of violations. Testimony of McKnight. The grassy area associated with the parking area for the Point White pier owned by the Bainbridge Island Metro Park and Recreation District was determined by the City to be existing at the time of adoption of the SMP and therefore legally nonconforming. Testimony of McKnight.
20. Because the grade of the subject site is about two feet higher than the property to the south, a small brick wall or border was added along one side of the lot to channel runoff to the beach instead of flowing onto the neighbor’s property. The brick wall is approximately six inches wide and is six inches high near the beach rising slightly as it goes west to 18 inches at its highest. Mr.

Nelson removed a walkway that had been installed so that the amount of impervious surface was less than had been approved in the first permit. Mr. Nelson was told that he could have used untreated logs for that purpose, but he is concerned about termites and other insects. Testimony of Nelson.

21. Section 16.12.260B.8 requires that side yards in the shoreline jurisdiction remain free of above-ground structures and impervious surfaces. An exception is made for fences. The SMP defines “structure”, in relevant part, as “...any piece of work artificially built or composed of parts joined together in some definite manner....” Section 16.12.030(176). Under that definition, the brick border is a structure.

22. A previous owner built a bulkhead and used the lot for recreational purposes prior to the adoption of the SMP. Testimony of Nelson. The character of the vegetation in the past and at the time just prior to construction of the residence is in dispute. The project manager for Landmark LLC, which was the development company that applied for the building permit, first saw the site in 2005 and observed a “grassy, weedy” lot with vegetation about knee high. Testimony of Fletcher. He said it looked like it had been maintained in the past, and though he saw some Scotch Broom, nothing over three or four feet tall, there was nothing he couldn’t cut with his weed “whacker”. Mr. Nelson also saw the site in 2005 and observed grass knee high or lower with weeds and some Scotch Broom sprouts. Before the site was cleared for construction, the company kept the vegetation mown down using a weed eater. Ms. Sutton visited the site in late 2005 and saw a weedy, shrubby, overgrown lot with Scotch Broom and blackberries. Historical aerial photographs were provided (Exhibit 46, Att. E) and clearly show something other than mown lawn but are inconclusive. City staff utilized stereoscope equipment and saw that the texture on the subject site in 2004 was different from that of the lawn on the property to the north. Testimony of Sutton, Morse. Staff concluded that at the time taken, there was brush on the part of the lot subject to the NVZ and it was not a flat grass lawn and that was consistent with what they could see in photos from 2000 and 2004.

23. A maintained lawn encourages active recreation, which Department staff believes that a reading of the Code as a whole shows is not appropriate in the NVZ. Testimony of Sutton.

24. Normal pruning and limbing for maintenance and view is allowed in the NVZ. Section 16.12.090C.5. To “prune” means “1. to cut or lop superfluous or undesired twigs, branches, or roots from; trim. 2. to cut or lop off twigs, branches, or roots;” Random House Webster’s College Dictionary (1992). To “mow” means “1. to cut down (grass, grain, etc.) with a scythe or a machine. 2. to cut grass, grain, etc. from.” Id. The maintenance performed on the planted grasses on the site is mowing, not pruning.

25. Section 16.12.390 allows shoreline uses established prior to the effective date of the SMP that do not conform to current regulations to continue provided they are not altered or expanded in a way that increases their nonconformity or discontinued for twelve consecutive months.

Conclusions

1. The Hearing Examiner has jurisdiction to hear and decide this appeal pursuant to Section 2.16.095.

2. The errors in the Director's decision specified by Appellants in their appeal are: that the condition regarding lawns and monoculture imposes requirements that are not in the Code; that there is nothing in the Code that prohibits addition of new impervious surfaces; that the building permit did not specifically require planting and maintaining native vegetation; that the decision fails to recognize the nonconforming use of the property; and that the clearing activity was exempt from the requirement for a clearing permit. The appeal claimed that the decision is inconsistent with the Comprehensive Plan in that it fails to recognize individuals' rights to use and develop property consistent with City regulations; it imposes a tax, fee or charge in violation of RCW 82.02; the requirement to restore or enhance a critical area and the failure to recognize alteration for a single family home as a preferred use in the shoreline is in violation of RCW 90.58; it failed to properly apply 2010 Engrossed House Bill 163, and in addition the appeal raised constitutional claims regarding inconsistent enforcement, due process and property rights. The constitutional claims may not be resolved in this administrative appeal.

3. Though no conditions requiring compliance with the requirements for the NVZ were attached to the building permit for construction of the residence, express conditions are not required for Code requirements.

4. Contrary to Appellants' view, the SMP expressly requires that side yards within the shoreline jurisdiction remain free of structures and impervious surfaces.

5. Appellants contend that the clearing for regrading was exempt pursuant to Section 15.18.040 from the requirement for a clearing permit because it did not exceed 2500 square feet in area in a twelve month period and also because vegetation may be removed in an emergency situation involving immediate danger to life or property. The findings do not support that the area cleared was less than 2500 square feet, nor that the danger was such that the seven days delay for issuance of a permit would cause immediate danger to life or property.

6. Though the construction of single-family residences in the shoreline are preferred uses and are exempt from the requirement of a shoreline substantial development permit, such construction is still subject to the regulations of the SMP. Section 16.12.360B(5).

7. The burden of proving the existence of a nonconforming use is on the landowner. The record was minimally sufficient to show that the lot was used historically for recreation purposes, whether active or passive. The burden is then on the Director to show, as argued, that the prior use was abandoned in that it was discontinued for at least twelve months. As argued by Appellants, a showing of intent to discontinue or abandon and an act is required. That intent was shown by the action of applying for a building permit to construct and the construction of a single-family residence, thereby changing the use from recreation to residential. Though yards accessory to a residence are likely to be used for recreation, regulations applicable to the new development would now control, including those for the NVZ. The vegetation planted for the 2007 approval further demonstrated Appellants' intent to permanently comply with the now applicable regulations. The nonconforming use status was lost with the application for a building permit and construction of a residence changing the use from recreation to residential for a period longer than twelve months.

8. Appellants urge that the Director invaded the purview of the legislative body by the conditions prohibiting lawns and the brick border. Appellants argue that the Code provisions regarding the nature and design of plantings in the NVZ are not ambiguous so there is no room for interpretation and with no express prohibition on active recreation in the NVZ, no express

prohibition on mowed grassy areas planted with two types of grass seeds, and no standards regarding the distribution of plants, the Director's conditions are attempted legislation. However, where the Director is delegated authority to approve clearing permits if the application meets relevant City code requirements, Section 15.18.050, that delegation necessarily implies authority to do what is necessary to execute that express authority. See *Tuerk v. Department of Licensing*, 123 Wn.2d 120, 864 P.2d 1328 (1994). Implied in that authority is the power to condition permits to assure that the activity will meet City code requirements and necessary to assure that the intent of the SMP for native vegetation zones is carried out, to determine what are native species, and what degree of diversity, what density, and what values must be provided by the new plantings to be similar to the original vegetation. The Code provision carries implied authority for the official charged with enforcing it to assess whether the planting done satisfies the intent of the code provision so the Director has not exceeded her administrative authority.

9. Appellants urge that even if the Director has the authority and interpretation is warranted, the determination should not be given substantial weight because the Director's interpretation as to what is necessary or prohibited to meet the required standard, i.e., the diversity, distribution, values, and functions necessary, is wrong. Appellants argue the Director's interpretation as applied to the subject site is wrong as the variety of types was approved, the native plants are distributed over the entire NVZ, though in separate areas for the health of the ground cover and to allow for recreation, and that the grassy areas do provide for some, though not all, of the functions intended by a NVZ but few if any native plantings could provide for all the desired functions. Accepting that the "original vegetation" was that existing prior to the regrading and replanting in 2010, the hearing examiner does not believe that the interpretation is wrong. The regulation requires that the new plantings be similar to the original vegetation in diversity, type, density, wildlife habitat value, water quality characteristics and slope stabilizing qualities. The large, separated lawn areas are not similar to the original plantings in any of those qualities except perhaps for slope stabilization. And, even were the "original" vegetation the grasses and low Scotch Broom that existed prior to the clearing for construction, the maintained lawn in areas separated from the shrubs are not similar in diversity, density, and habitat value even to that original vegetation.

10. Appellants contend that, though the hearing examiner is to give substantial weight to the determination of the Director, no deference is warranted here because, not only was the interpretation wrong, but it was not shown to be a pre-existing policy of the City. The City cites to *Milestone Homes, Inc. v. City of Bonney Lake*, 145 Wn.App. 118, 186 P.3d 357 (2008) for the proposition that great weight should be given to the contemporaneous construction of an ordinance by the official charged with its enforcement in any doubtful case. Generally, as argued by Appellant, the City needs to show the interpretation is a preexisting policy or that there is a pattern of enforcement of the interpretation, though that showing is excused when the circumstances haven't previously arisen. Here, though the statements of staff that the City has consistently interpreted the provision to prohibit lawns alone might not have been a sufficient showing in light of the long list provided by Appellant of properties developed with lawns after the adoption of the SMP, there is evidence of previous enforcement of that interpretation, e.g., the action taken in 2007 against the neighboring property to enforce the prohibition resolved with documentation of the prior existence of the lawn. The lengthy list of properties with NVZ vegetation not conforming

to this requirement suggests that either this is a relatively recent interpretation or that its enforcement is not a high priority for enforcement activity.

11. The requirement that the hearing examiner give the determination "substantial weight," Section 2.16.130F(2), means that the decision must be reviewed under a "clearly erroneous" standard. *Norway Hill Pres. & Prot. Ass'n v. King County Council*, 87 Wn.2d 267, 275, 552 P.2d 674 (1976), *superseded by statute on other grounds as recognized in Moss v. City of Bellingham*, 109 Wn. App. 6, 21, 31 P.3d 703 (2001). A finding is clearly erroneous when, although there is evidence to support it, the reviewer is left with the definite and firm conviction that a mistake has been made. *Wenatchee Sportsmen Ass'n v. Chelan County*, 141 Wn.2d 169, 176, 4 P.3d 123 (2000). The hearing examiner concludes that the interpretation that the Code provision prohibits "monoculture" or maintained lawns in a native vegetation zone, where the intent is to "enhance the Island's natural character, water quality, native plant communities, and wildlife habitat along the shoreline," is plausible. Appellants have not proved that the determination was clearly erroneous.

12. As to prohibiting the brick border, though the hearing examiner cannot see any distinction between bricks and logs for a border as to perviousness, the hearing examiner's authority goes to the interpretation of the language, not its wisdom. The Director is correct that a brick border meets the SMP's definition of a structure, and that structures are prohibited in the side yard. Therefore, imposition of Condition No. 3 is not clearly erroneous.

13. Requiring compliance with Code provisions is consistent with the Comprehensive Plan.

14. Requiring compliance with the replanting requirements of the SMP when the NVZ has been altered does not directly or indirectly impose a tax, fee, or charge in violation of RCW 82.02.020.

Decision

The Director's Administrative Decision conditioning the clearing permit is affirmed.

Entered this 7th day of July 2011.

/s/ Margaret Klockars
Margaret Klockars
Hearing Examiner *pro tem*

Concerning Further Review

NOTE: It is the responsibility of a person seeking review of a Hearing Examiner decision to consult applicable Code sections and other appropriate sources, including State law, to determine his/her rights and responsibilities relative to appeal.

The decision of the hearing examiner shall be final in this matter unless, within 21 days after issuance of a decision, a person with standing appeals the decision in accordance with Chapter 36.70 RCW.