



CITY HALL

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July 22, 2009

Fireweed LLC
1320 Puyallup Street
Sumner, WA 98390

RE: PLN2009-00024

Dear Applicant:

Transmitted herewith is the Report and Decision of the City of Sumner Hearing Examiner relating to the above-entitled matter.

Very truly yours,

STEPHEN K. CAUSSEAU, JR.
Hearing Examiner

SKC/cka
Enclosure
cc: All Parties of Record

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JUN 04 2010.

CITY OF SUMNER

Rev 2 Addendum 3/5 PLN2004-00123

OFFICE OF THE HEARING EXAMINER

CITY OF SUMNER

REPORT AND DECISION

CASE NO.: PLN2009-00024;

APPLICANT: Fireweed LLC
1320 Puyallup Street
Sumner, WA 98390

SUMMARY OF REQUEST:

The applicant is requesting approval to allow relocation of a culvert to a more narrow section of Salmon Creek resulting in the reduction of a Type 3 stream buffer from 100 feet to 0 feet. The proposal includes mitigation of the existing stream buffer which will add additional buffer width and vegetation.

SUMMARY OF DECISION:

Request granted, subject to conditions.

PUBLIC HEARING:

After reviewing Community Development Department Staff Report and examining available information on file with the application, the Examiner conducted a public hearing on the request as follows:

The hearing was opened on July 13, 2009, at 3:33 p.m.

Parties wishing to testify were sworn in by the Examiner.

The following exhibits were submitted and made a part of the record as follows:

EXHIBIT "1" - Community Development Department Staff Report and Attachments

ERIC MENDENHALL appeared, presented the Community Development Department Staff Report, and testified that he had reviewed the zoning code and comprehensive plan. The project does not meet the first criteria for a reduction of a buffer as the parcel is more than 200 feet in depth. However, denial of a variance would eliminate any use of the parcel. The applicant provided a Habitat Management Plan addressing the buffer alteration and changes. The plan shows a net gain for habitat functions as the buffer now consists of

invasive vegetation. Staff recommends approval subject to four conditions. A previous crossing of the creek existed here, so the buffer reduction previously existed. They have relocated the crossing to a narrow area of the creek.

LISA KLEIN, AHBL, appeared on behalf of the request and testified that she has no comments on the staff report. They will replace an existing crossing that a flood previously washed out. They chose the location for its narrowness, its better location, and lack of impact on habitat. The parcel is landlocked and the City Code intends that it be developed. However, they cannot develop it without the crossing. The Examiner previously approved a similar crossing to the west for a 26 foot wide culvert. They need a quick decision due to the fish window. They have no problems with conditions of approval.

No one spoke further in this matter and so the Examiner took the request under advisement and the hearing was concluded at 3:45 p.m.

NOTE: A complete record of this hearing is available in the office of the City of Sumner Community Development Department.

FINDINGS, CONCLUSIONS AND DECISION:

FINDINGS:

1. The Hearing Examiner has admitted documentary evidence into the record, heard testimony, and taken this matter under advisement.
2. The project is exempt from SEPA review under WAC 197-11-800.
3. Appropriate notice was provided pursuant to the Sumner Municipal Code.
4. The applicant has a possessory ownership interest in a vacant, 4.83 acre parcel of property located south of Salmon Creek within the industrial area of the City of Sumner. The REI warehouse and an industrial plat known as the Maestro Fireweed plat abut the parcel on its west property line, and the Burlington Northern Santa Fe Railroad tracks abut the parcel on its south and east boundary. Salmon Creek passes through the center of the property flowing from east to west. Previous uses of the parcel include agriculture and a turf farm. The site presently consists of a plowed agricultural field with thickets of blackberry along the eastern perimeter and the railroad tracks. It currently offers little habitat to wildlife.
5. Previous access to the portion of the parcel south of Salmon Creek was via a culvert crossing of the creek from north to south. However, a recent flood destroyed the culvert and the parcel now has no access. The applicant desires to rebuild the culvert crossing of the creek in a more narrow section of the creek. However, such will result in the reduction of a Type 3 stream buffer from the required 100 feet to zero feet. The applicant has requested a variance to the Type 3 buffer width to

facilitate replacement of the creek crossing.

6. Chapter 16.40 of the Sumner Municipal Code (SMC) sets forth the "Resource, Wildlife, and Hazard Area Regulation Framework". Section 16.56.100 SMC requires a 100 foot wide buffer for a DNR Water Type 3. Salmon Creek meets the definition of a Type 3 water. Section 16.56.100(F) SMC authorizes modification of buffer widths for Type 3 streams subject to showing that the modification meets its requirements and also the requirements for a variance as set forth in SMC 16.40.120. Findings on each criteria set forth in SMC 16.56.100(F) are hereby made as follows:

- A. The applicant's parcel, located within the Light Industrial (M1) zone classification, has no access other than by crossing Salmon Creek from the parcel to the north, also owned by the applicant. Criteria F1 authorizes a buffer modification only for parcels less than 200 feet in depth as measured perpendicular from the ordinary high water mark. The applicant's parcel significantly exceeds the 200 foot limit. However, the applicant can make no use of the parcel without providing a crossing, and prohibition of such crossing could amount to a taking. Furthermore, SMC 16.40.120(A), which sets forth the variance criteria, provides:

These provisions should be applied in a manner, which while protecting the environment, will assure that a person will be able to use his/her property in a fair and equitable manner.

The applicant may not use its property in a "fair and equitable manner" unless it has access thereto.

- B. The applicant must reduce the buffer width a greater amount than the minimum 75 foot width authorized. Again, the applicant must provide a crossing of Salmon Creek that will reduce the buffer to zero. However, an historic crossing of Salmon Creek was recently destroyed by a flood. The applicant proposes to replace the culverts used for the crossing with box culverts that are more suitable for fish. The historic crossing had a zero buffer and the proposed crossing will have a zero buffer.
- C. Criteria three provides that the impervious surface of the reduced portion of the buffer shall not exceed 10% unless the applicant removes an equivalent amount of existing impervious surface within the Type 3 stream sub-basin and permanently sets aside and restores the habitat of the area subject to impervious surface removal. The applicant will remove the remnants of the previous crossing and will relocate the new crossing to the west. The applicant will also increase the buffer width in other areas along the creek to maintain the total gross buffer area. Conditions require

restoration of native vegetation along the creek, which will increase the habitat functions and quality.

- D. The applicant has consulted appropriate State and Federal agencies.
 - E. The reduction in buffer and proposed use will not harm fish, wildlife, or plant habitat. The applicant will construct the improvements only during the approved fish window and will restore plant habitat along the stream to a better condition.
 - F. The applicant has prepared a Habitat Management Plan and Landscape Plan which include enhancement measures to improve the functional attributes of the buffer. The landscape plan includes native species.
 - G. The Habitat Management Plan shows that the applicant will use best management practices in determining the proper design layout, construction, and use of the site. The buffer enhancement will increase and mitigate impacts to wildlife and habitat areas.
7. Prior to obtaining a variance the applicant must show that the request satisfies the criteria set forth in SMC 16.40.120(D) SMC. Said section provides that variances for development located landward of the ordinary high water mark may be authorized subject to an applicant demonstrating that the project meets the criteria set forth therein. Findings on each criteria are hereby made as follows:
- A. The strict requirements of the development standards set forth in Chapter 16.40 SMC preclude a reasonable use of the property not otherwise prohibited. Without the creek crossing 4.83 acres of M1 zoned property would remain unimproved and landlocked. A previous crossing of the creek provided access to the parcel.
 - B. The hardship described in Subsection A specifically relates to the property and is the result of a unique condition, in that access to the parcel is limited to a crossing of Salmon Creek.
 - C. Design of any future project will be compatible with other permitted light industrial activities in the area and will not cause adverse impacts to adjacent properties or the critical area. The crossing will allow continuation of existing farming uses and future light industrial uses in accordance with the applicable zone classification.
 - D. The variance does not constitute a grant of special privilege not enjoyed by other properties in the area and is the minimum necessary to afford relief. Other properties in the area either do not need to cross Salmon Creek for access or already have such a crossing. Many parcels gain

access by crossing Salmon Creek. The applicant has shown that strict application of the development standards set forth in SMC 16.56.100(F) will preclude all reasonable use of the property, and that the proposal is consistent with the criteria set forth above.

- E. Subsection E requires consideration of cumulative impacts for additional requests. Salmon Creek already has a significant number of access crossings and the replacement of a previous crossing should have no cumulative impacts on the creek.

CONCLUSIONS:

1. The Hearing Examiner has jurisdiction to consider and decide the issues presented by this request.
2. The applicant has shown that the request for a variance satisfies the criteria set forth in Sections 16.56.100(F) and 16.40.120 SMC and therefore should be granted subject to the following conditions:
 1. All conditions of SEPA shall be completed prior to final approval.
 2. The buffer shall be established by a permanent protective easement, public or private land trust dedication, or similar protective mechanism as approved by the director.
 3. An easement shall also be provided by the underlying property owner that grants the City access to the buffer for the placement of further conservation/restoration measures.
 4. The buffer shall be delineated with an open fence to allow habitat to migrate in and out of the area freely.

DECISION:

The request for reduction of a Type 3 stream buffer from 100 feet to zero feet to allow reconstruction and relocation of a culvert crossing Salmon Creek at a site located west of the BNSF railroad tracks within the City of Sumner is hereby granted subject to the conditions contained in the conclusions above.

ORDERED this 22nd day of July, 2009.



STEPHEN K. CAUSSEAU, JR.
Hearing Examiner

TRANSMITTED this 22nd day of July, 2009, to the following:

APPLICANT: Fireweed LLC
1320 Puyallup Street
Sumner, WA 98390

AGENT: Lisa Klein
AHBL
2215 N. 30th Street, Ste. 300
Tacoma, WA 98403

OTHERS:

Ed Sewall
27641 Covington Way SE #2
Covington, WA 98042

Kathy Fewins
1302 Puyallup Street
Sumner, WA 98390

City of Sumner
c/o Eric Mendenhall
1104 Maple Street
Sumner, WA 98390

RECONSIDERATION AND APPEAL NOTICE

Reconsideration and Appeal Rights are set forth in Chapter 18.56 of the Sumner Municipal Code.