

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

In the Matter of the Appeal of

Elyse Kane

Nos. RUE 10755 & RUEA 10755

From Reasonable Use Exception Amendment
Administrative Decisions

Introduction

Elyse Kane appeals the administrative decisions on two applications for requested amendments to the reasonable use exception granted in 2004 for property at 9865 Manitou Drive NE.

A Motion for Partial Dismissal of Administrative Appeals was filed by the City of Bainbridge Island. The public hearing on the appeals was held September 12, 17 and 19, 2008. Dennis D. Reynolds represented Ms. Kane and Dawn F. Reitan, Inslee Best, represented the Department of Planning and Community Development. The record remained open for response to the Motion for Partial Dismissal and for post hearing briefing until October 15, 2008, and was extended further because of the unavailability of _____ counsel to November 10, 2008. Appellant filed a Motion to Admit Exhibits in Response to City's Motion to Dismiss.

All section numbers in the decision refer to the Bainbridge Island Municipal Code, unless otherwise indicated. "City" refers to the city of Bainbridge Island. Though Peter and Elyse Kane applied for the reasonable use exception, all references will be to Ms. Kane only.

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. The subject of these appeals is a 13,200 square foot lot located at 9865 Manitou Beach Drive adjacent to two Category II wetlands and a Type 3 stream. The buffer for these critical areas extends over the entire lot. As the Critical Area Ordinance (CAO) did not allow buffers to be disturbed, the property owners applied in January 2004, for a Reasonable Use Exception ("RUE") to allow the construction of a single-family residence on the lot. Exhibit 114. Amendments to the CAO, Chapter 16.20, had not been adopted at the time of the application.
2. Ms. Kane owned four adjoining lots amounting to about two acres. She sold one lot that had a house on it. Then she sold the other two lots which included the waterfront property and

property to the east of her current holding to the City through the open space program. She did not reserve an easement for access. The City was exploring the possibility of the restoration of a salt marsh on its property but that proposal has not gone forward. All three lots were within the buffer area. The City granted Ms. Kane a drainage easement over 5,000 square feet of the parcel to her east because her septic approval for her remaining lot required an 18,000 sq. ft. lot and her remaining lot was 13,000 sq. ft.

3. Ms. Kane explained that she originally proposed a 1200 square foot house and asked that a 500 square foot, two-car garage be located in the back of the house with a driveway that extended from the street along the west side of the lot to the rear to avoid elements of her septic system on the east side. She understood the Wetland Advisory Committee that reviewed her application to say that for her application for a RUE to be approved she needed to reduce the amount of access, eliminate the garage and add a single car carport in the front, so to gain the approval of the committee she altered her plan.

4. On June 12, 2004, the City issued a Mitigated Determination of Nonsignificance (MDNS) for the proposal and an administrative decision conditionally approving the application. Exhibit 7. The MDNS had four conditions. Relevant to this decision are two: No. 3 required a split rail fence be installed approximately 20 ft. from the rear property line to provide a distinction between the “native vegetation buffer area” and any landscaped area; and No. 4 which described the area north of the fence as a “nondisturbance” area. Seven conditions were imposed pursuant to the RUE authority, including limitation on the footprint of the house to 1,085 square feet and 225 square feet for an open carport; a driveway in conformance with the site plan; and a mitigation plan for restoration of approximately 10,900 square feet of on and off-site area. Ms. Kane did not appeal this decision.

5. A building permit to build the house, Exhibit 116, was issued for a two-story house. The permit showed approval of 750 square feet first floor, 570 sq. ft. second floor, 750 sq. ft. basement, 280 sq. ft. carport and 269 sq. ft. “other.” Ms. Kane explained that this does not reflect the actual built configuration. During development of the property, Ms. Kane installed a patio, propane tank, a storage shed, a gravel parking area behind the house and parking for a recreational vehicle, all within the wetland buffer and partially within the area designated for enhancement, none of which was shown on the approved plan.

6. The City, notified by neighbors, threatened code enforcement action. To obtain a certificate of occupancy needed for her financing, she moved the shed and recreational vehicle from the lot. In a later discussion with Larry Frazier, then the director of the Department of Planning and Community Development, Ms. Kane, understood that she was given permission to return the shed and recreational vehicle, which she memorialized in a letter to Mr. Frazier, Exhibit 107, so she had the shed reinstalled and returned the recreational vehicle to the site.

7. In October 2006, at Mr. Frazier’s suggestion, she applied for an amendment (“first amendment”) to the RUE for a modified site plan that incorporated “changes to the existing driveway, reconfiguration of the enhanced or mitigation area, revision to filtered catchment basin and tightline drainage, and location of the pervious patio pavers, registered recreational trailer (“RV”), and portable storage shed within the designated impact area.” Exhibit 12. The request noted that other items of personal property, e.g., kiddie-pool, picnic table, etc., would also be located on the site. The proposed revision to the mitigation area involved changing it from a 20 ft.

deep rectangular area across the north side of the lot to a triangular area on the northwest portion of the site, which Ms. Kane said that Marja Preston, a planner with the City at that time, had approved on-site.

8. Ms. Kane indicated at the time of the application for the first amendment that she did not believe the expansion of the driveway turnaround space would be sufficient and that she would likely make additional proposals for amendment in the future. Exhibit 41.

9. Because building permits were not required for installation of the patio, placement of the storage shed or placement of the propane tank, Ms. Kane did not agree that she had constructed improvements exceeding those approved in the RUE.

10. On January 31, 2007, the City issued a MDNS for the proposed changes to the RUE and partially approved the application. Exhibit 13. The proposed expansion of the driveway, the reconfiguration of the on-site mitigation area, a change in the stormwater drainage system, and pervious patio were all approved. The patio was not considered a substantial change or significant development because it was not paved and has minimal impact. The original MDNS conditions were repeated except that Nos. 3 and 4 were revised to reflect the approved change in the area of the non-disturbance area. The non-SEPA conditions also changed in that the previous driveway condition (No. 7) was revised to allow expansion of five feet on the northwest and northeast sides of the turnaround, and conditions were added requiring moving the propane tank as close as possible to the residence, effectively adding the tank to the approved plans, removal of the parking area behind the house which had not been on the approved plans, prohibiting RV parking except in permitted driveway and turnaround area, prohibiting placement of other buildings or structures on the property except for the minor items described, e.g., kiddie pool, picnic table, etc., but only outside the mitigation/enhancement area, and a condition relating to maintenance of a native vegetation landscaped area outside the buffer mitigation/enhancement area. The RV was not allowed to park in the rear because parking is an activity not allowed in the buffer and because separate RV parking was not regarded as necessary to attain reasonable use of the property. Moving the propane tank closer to the house would move the activity associated with filling it out of the otherwise undisturbed area thereby minimizing impacts.

11. Josh Machen, Senior Planner for the City, remembered mailing the notice of the MDNS and administrative decision to Ms. Kane and to all who commented on January 31, 2007. This is called into question, at least in part, by his memo to Diane Berry, administrative secretary, asking her to mail the decision to a list and her affidavit of mailing that shows that she mailed notice of the decision and MDNS to a list of persons. Exhibit B to Declaration of Elyse Kane. That list did not include Ms. Kane, an ambiguous omission as it could mean that Mr. Machen mailed it to her himself but not to others or that she was inadvertently left off the mailing list. At that time, planners who mailed notices did not prepare affidavits of mailing. Ms. Kane did not receive the notice.

12. On or about March 2, David Huchthausen, a friend who was assisting Ms. Kane with the process, called the City to find out if Ms. Kane needed to restore the posted notice that had been blown down in a storm. He was told that the decision had been issued in January and the decision was e-mailed to him. He advised Ms. Kane who filed an appeal of the decision on March 15, 2007. The parties, Ms. Kane and the City, agreed to stay the appeal to allow application for a second

amendment while maintaining their respective legal positions and defenses. Exhibit 14.

13. Though Ms. Kane indicated that the City could contact Mr. Huchthausen for information about the details of her application in Exhibit 12, he was not designated at that time as her agent for the purpose of notice.

14. Ms. Kane testified credibly that she was in residence at the address during the month of February and actively watching for the decision, though hospitalized in earlier months. Mr. Machen was not notified by staff of any mail returned.

15. In February 2008, Ms. Kane applied for the second amendment to the RUE and requested that the City Council grant an easement across City property for access to the rear of the subject lot. Exhibit 15. This request proposes the relocation of the access and driveway from the front or south side of the house to the rear. The existing carport would be vacated and connected to the deck, a 22 by 25 ft. two-car garage would be built on the back side of the house accessed from a driveway easement for the parcel to the north side of the subject site and then west across land owned by the City for which an easement is sought. The new location for the access now would be technically possible because the Glendon Biofilter septic system was replaced with new technology so the area of the driveway no longer needed protection from activity that would compact the soil. The justification offered by the applicant for the second amendment was to improve public safety with minimal intrusion and no loss of wetland function, and that the proposed development would be outside the buffer, the buffer width having been “reduced” by the RUE. Exhibit 15.

16. The garage proposed in the second amendment application is generally in the same location as that in Ms. Kane’s initial proposal for the RUE, prior to altering it to gain the Committee’s approval, but slightly larger and attached, rather than detached. The driveway would not go around the house as in the original proposal. The change would remove 713 ft. of disturbance to the buffer but add 980 square feet of disturbance on the site and between 600 and 735 square feet on the City’s property. Exhibit 16 and Testimony of Kane.

17. On July 3, 2008, an administrative decision was issued denying the second amendment request. Exhibit 16. Ms. Kane appealed that decision.

18. The house as built by Ms. Kane covers 750 square feet, the deck 310 square feet, the porch 153.3 square feet and the carport 231.8 square feet, according to Ms. Kane’s measurements, for a total just over 1440 square feet. Though the approval was for a maximum of 1,085 square feet for the house footprint and a carport of 225 square feet, Mr. Machen said that house as built complies with the approval because of the width of the eaves. The configuration proposed in the second amendment would have total lot coverage of over 2,100 square feet with the new 550 square foot garage addition and extension of the second story deck and porch. Exhibits 16 and 72. The lot coverage with the additions requested would far exceed the 1200 square feet the current CAO allows for RUEs.

19. The 8 ft. by 14 ft. storage shed that is proposed for the rear of the property does not have a foundation and can be, and has been, moved.

20. Ms. Kane has been using the access proposed in the second amendment request. She testified that Michele Fischer, a City employee, said that she could continue using it, after

inspecting the property in response to complaints from neighbors, and Randy Witt, Director of Public Works also gave her permission to continue this use.

21. Mr. Witt responded to Ms. Kane's attorney's letter requesting the easement with a April 24, 2006, letter saying that the City is not interested in providing an easement at that time but could consider it after planning is complete for the City's property. Exhibit 37.

22. Ms. Kane believes that the City Administrator said that the City would grant the easement she requested if the RUE amendment was approved. Though Mark Dombroski, City Administrator, did not recall the content of the conversation, he acknowledged that if she obtains approval of the changed access he would have no reason to oppose granting an easement or type of license to allow use of the City property for access, absent environmental or legal reason.

23. JoAnn Bartlett, with education and certifications as a wetland biologist and eighteen years of experience, who was retained by Ms. Kane in 2002 to identify the boundary of the wetland and determine its category, was on the site four times. She concluded in her report, Exhibit 9, that the wetland to the west is a Category II estuarine wetland that required a 100 ft. buffer at that time, so the entirety of the subject lot is in the buffer. She determined that the wetland had "moderate" functional values, in part because of its isolation from regular tidal influence and surrounding development. Her report indicated that a reduced buffer would be required to accommodate a single family home and proposes a 25 ft. reduced buffer instead of the 100 ft., which extends across the property. Ms. Bartlett recommended to Ms. Kane that she apply for an RUE and advised that development under an RUE would have no significant impact on the wetland. She recommended a reduced 25 ft. buffer with a 10 ft. planting strip within that buffer for enhancement of the buffer on-site for mitigation. In 2007, she provided information to support the second amendment. She considered the proposed garage, shed, and access, etc. to be in the required buffer but not in the reduced 25 ft. buffer she recommended in 2002 and so distant (49 ft. for corner of the garage, 64 ft. for the shed) from the wetland not to affect water quality due to the grassy area between. She opined that the runoff from the proposed garage roof would result in cleaner runoff than the uncovered parking spot in front.

24. Ms. Bartlett dug holes on the site and found compact clay and silt, which she determined to be impervious historic fill. Stephen Morse, a planner with the City with a certificate in wetland science and degrees in forest and wild life resources, reviews wetland reports as part of his duties with the City. He previously had checked the soils on the City's property adjacent to the subject site for the proposed septic system and found the soil to be reasonably pervious. The Herrera Environmental Consultants report prepared for the City for the Manitou Beach Salt Marsh Restoration, Exhibit 51, said that Norma fine sandy loam is mapped in this vicinity and that "permeability is moderately rapid." The report also said that these soils are typically ponded during winter months. Ms. Bartlett's report for the initial application, Exhibit 9, stated that because the lot is filled wetland with compacted soils impermeable to surface water, construction of the house would not change existing conditions, regarding potential flooding of the road.

25. Section 16.20.040C of the current code provides an exemption for activity within a portion of a wetland buffer "located landward of an existing, substantially developed area, such as a paved area, or permanent structure, which eliminates or greatly reduces the impact of the proposed activities on the wetland..." Mr. Morse testified that there is no substantial development between the proposed garage and driveway at the rear of the house and the wetland, only a planted area so

the new exemption in the critical areas ordinance would not apply to this proposal. Mr. Machen also testified that there is no intervening substantially developed area. Ms. Bartlett regards the patio as a substantially developed area.

26. Ms. Kane determined that there are 840,708 square feet of impervious surfaces in the Manitou Creek Drainage Basin draining into the wetland based on excerpts of the Manitou Beach Salt Marsh Restoration Analysis by Herrera, Exhibit 66, and that her proposed addition of a 550 square foot garage would be but .00064 percent of that impervious surface. Exhibit 65. The additional coverage based on those figures would actually amount to .065 percent.

27. The impact of the proposed additional development on the basin as a whole is unlikely to be measurable, according to Mr. Morse, but it is the cumulative effect of small additions throughout the basin that are of concern.

28. The location of the activity relates directly to its impact on wetlands. While moving activity further away from wetlands is generally positive, introducing light, glare and noise to an area that has been unaffected instead of clustering the impacts in one place is undesirable. Testimony of Morse. The current access and parking situation has the vehicular activity on the side where there is already activity from the public roadway and adjacent driveway to the west. Moving it to the north of the house would spread the impacts to other areas of the wetland.

29. Generally, a covered garage is preferable to uncovered parking as a roof keeps rainwater from washing pollutants off the cars into the system and roof runoff is considered to be clean. Exhibit 70. Testimony Bartlett and Morse. That would not be the case if the garage drained into a catch basin and was used as a shop or to wash cars.

30. The configuration of the access originally approved would allow at least two vehicles to park in the access with one in the carport and one behind so that the car in the rear would have to back out to exit and, if the first car needed to leave, the second car would have to back onto the roadway to allow the first car out. When only one car is parked, with multiple motions it could leave going forward.

31. Two off-street parking spaces are required for a single-family residential unit by Section 18.81.030. Tandem spaces may be approved for a single-family residence. Section 18.81.020H. A building permit may not be issued until the plans demonstrate that required parking will be provided. Section 18.81.020B. A building permit was approved. Exhibit 116.

32. The architect's depiction of the property with driveway and turnaround area approved in the initial RUE was not to scale and gave a false impression of the size of the area, according to Ms. Kane. Because she kept the area cordoned off during construction, she did not discover that the parking/turnaround area was inadequate until after she occupied the house. She mentioned her belief that it would not be adequate in her October 12, 2006 request for an amendment to the RUE.

33. If she expanded her turnaround area as approved in the first amendment, the area would be five feet closer to the stream, or 15 ft. instead of twenty, and she would still have to back one car onto the street if she needed to get the more forward car out. The stream at this point is in a culvert so activity in this location would have less potential for impact than if the stream were in an open channel. Exhibit 55. She did not carry out the expansion but decided to seek access via the proposed easement.

34. Manitou Beach Road is a two-lane roadway with a 25 mph speed limit. No parking is allowed on the water side. Ms. Kane testified that sightseers use the road. A curve in the road to the east limits the sight distance from, and of, the access point, however the City's Public Works determined that there is sufficient sight distance in both directions for private access. Exhibit 16.

35. A motorist testified that in passing the subject lot she had to brake to avoid hitting a car backing from the driveway and then go around it. The motorist felt there is not enough time to stop between the first view after rounding the corner and the driveway. Testimony of Burke.

36. Christopher E. Brown, a traffic engineer, testified that he could not opine that the driveway was unsafe because that determination had to be based on an accident rate that is outside the statistical confidence level and no accidents have been reported to date. He had advised Ms. Kane that backing into the street is an "undesirable vehicular maneuver in consideration of traffic safety given limited entering sight distance (ESD) to the east." Exhibit 34. His own driveway forces him to back on Rainier Avenue without adequate sight distance but the frequency of events, two accidents in 35 years, is not enough to determine it is hazardous. He suggested that the City may be subject to liability because "traffic safety has been severely compromised..." and should be proactive in avoiding such liability. Exhibit 16, attachment. He testified that well-being would be enhanced by a configuration that did not require cars to back onto the roadway, but though not optimum, the access is adequate.

37. On Bainbridge Island it is more common to back out from parking onto roadways than to have space to turn around. Testimony of Machen. The Code, Section 18.81.020G, specifically allows single family buildings to have access that requires backing onto a public road, and limits parking spaces that block access to other parking spaces to approved tandem parking. Section 18.81.020H. Other houses along Manitou in the area have two-car garages and substantially larger driveways. Testimony of Kane.

38. Ms. Kane obtained Bainbridge Island Police speed information and calculated that on average for a four-day period 60 percent of the drivers were speeding an average of 56 percent over the limit. Exhibit 35. Her methodology places drivers driving at the speed limit in the "speeding" category so the percentage of drivers speeding is overstated.

39. Larger houses and two car garages have been authorized by RUE's. A 20,000 square foot property at Lot 13, plat of Murden Cove DR. NE. received a RUE in 2002 for a house and garage footprint of 1,720 square feet rather than the 2500 square feet requested. The staff report refers to the proposed house being "partially" within the wetland buffer but no further description is provided. Exhibit 76. Exhibit 77, an excerpt from a 2005 hearing examiner decision, includes a finding that "the inclusion of a garage is not more than what is reasonable", but without the remaining findings describing other conditions of those applications, they cannot be used for comparison. Excerpts of a 2005 decision on a shoreline variance allowed a 820 sq. ft. garage on one lot, a house on another and the drainfield on another and described the variance as the minimum necessary but without the findings made to explain why in that case that was the appropriate conclusion.

40. Ms. Kane contends that the current access to her property is so unsafe as to deny her reasonable use of the property.

41. She also takes the position that reasonable use requires that her property's fair market value be comparable to other homes in the vicinity and that the fair market value of her property is lower because her property lacks a two-car garage and safe access. She contends that her economic use is severely compromised.

42. Because Ms. Kane travels, she rents out her house periodically. Her advertisements say that the house sleeps 6-8 people. Exhibit 117. She asks her renters to be careful accessing the street and that if they have more than one car, the second should park in back of the house.

43. Ms. Kane prepared and submitted a mitigation plan for the required on-site mitigation in the triangular area. Marja Preston from the department staff sent her a worksheet for guidance for number and species required to bring the area back to pre-disturbance level. To comply with Condition 10, Ms. Kane planted larger trees than required at substantially greater cost believing they would have a better chance of survival. She has waited for greater clarity from the City to plant the shrubs and to avoid disturbing the new trees.

44. Ms. Kane has not provided any of the required off-site mitigation required by Condition 10. She is waiting for the City to decide what it wants to do with the adjacent property and give her instructions.

45. Ms. Kane has not installed the split rail fence required by RUE Condition 3 because she believed that the distinction between her yard and the protected area was clear enough and because she felt that it made no sense to fence it off if the City was going to open it to the public anyway. She believes that Ms. Preston altered the condition. That condition required that a split-rail fence be installed to "provide a clear distinction between native vegetation buffer area and any future yard landscaped area." The fence is needed to assure that the homeowner's yard does not tend to creep over into the protected buffer over time.

46. The subject property is also within the shorelines jurisdiction. Section 16.12.100.B.4 requires parking facilities to be located landward from the principal building, unless in or beneath the structure and screened. The existing carport is a part of the building and does partially screen one vehicle, according to Mr. Machen. However, the proposed garage would move parking farther from the shoreline.

47. Appellant offered the following to show that the size of the wetland buffer was reduced by the RUE approval to the 1,930 square foot triangular area, as contrasted to the buffer being disturbed but remaining on the entire site:

1) Former Section 16.20.090.I(1) provided that the exception is authorized only for "proposed alterations to required buffers..." and not authorized for changes in permitted uses.

2) Former Section 16.20090.G lists permitted activities and uses in a buffer zone and does not include residences.

3) Table 8, Section 16.20.160 of the current Code shows that residential uses are not permitted in a buffer.

4) Former Section 16.20.090.I(4) listed decision criteria for RUE's including (a) that the proposed activity will result in minimum "intrusion, alteration or impairment of the wetlands, stream or required buffer...."

5) Condition No. 4 required that the “area to the north of the fence shall be a non-disturbance area.” Exhibit 20.

6) To change to a use within a buffer that is not permitted in Table 8 requires a “special use review” and she was not required to seek that review.

7) The report of the Wetlands Advisory Committee said: “To provide buffer function where almost none exists, the wetland consultant report (Wiltermood, 3/21/02) recommended installation of a buffer along the west boundary line that abuts the wetland north/south channel.” Exhibit 25.

8) A Notice to Title is required to be recorded giving notice that there may be restrictions on use or alteration of the critical areas or their buffers but the attached site plan does not show buffers. Exhibit 28. No site plan was attached to that exhibit.

48. Mr. Machen interprets Section 16.20.080, the RUE exception, to permit construction within a buffer to allow reasonable use, not to reduce the size of the buffer. To make up for the disturbance within the buffer and the loss of function, enhancement is required. So, the buffer remains but a portion is disturbed and a portion is enhanced.

49. Mr. Machen testified that he has not seen another amendment to an RUE since the passage of the new exemption in the CAO, Section 16.20.040C.8 that allows activity within the buffer on the opposite side of substantial development from the wetland. He believes that the exemption applies only if the substantial development is not a part of development pursuant to an RUE.

50. The City had considered the possibility of providing public parking associated with the restoration of the wetland on the parcel to the east of the subject site acquired from Ms. Kane. Ms. Kane was told that the new exception of Section 16.20.040C.8 allowing development landward of a substantially developed area would apply to allow the parking area within the buffer in that case because there is substantial development—two access roads and Ms. Kane’s house—that interrupt the buffer.

Conclusions

1. The Hearing Examiner has jurisdiction to hear and decide the subject matter of these appeals pursuant to Sections 15.04.130 and 2.16.130.

2. Appellant’s Motion to Admit Exhibits in Response to City’s Motion to Dismiss should be granted as to those exhibits listed as Nos. 2-13 in that document because the record remained open specifically for introduction of such exhibits. The date of the exhibit listed as No. 1 and Appellant’s declaration indicate that it was not in the official file for public inspection until after the hearing and, as it bears directly on an issue at hearing, it is also admitted.

3. The City’s Motion for Partial Dismissal of Appeals (Motion) contended that the appeal of the decision on RUE amendment No. 1 should be dismissed as untimely. Section 2.16.130 provides that an appeal must be filed with the City Clerk “14 days after the date of the decision”. Though inartfully stated, the appeal provision must mean no later than 14 days after the decision. Section 2.16.085E(2) requires the decision maker to “distribute” notice to the applicant by mail, fax or personal service. Though the hearing examiner accepts as true the planner’s belief that he

personally mailed a copy of the decision to the applicant, the applicant did not receive the mailing so there was an error in the distribution. The evidence of prior and subsequent mailing lists that included the applicant raises question about why this particular mailing would have been treated differently and does provide support to the planner's testimony that he separately mailed the applicant's copy, however he also could have failed to carry through with his intent to do so. Given that the record does not prove conclusively that the notice to appellant was actually distributed to her, but does prove that she did not receive it, and because due process requires that notice be afforded the applicant/property owner, the motion to dismiss the first appeal as untimely should be denied.

4. The Motion also asks that parts of both appeals be dismissed based on application of the doctrine of *res judicata*. That doctrine "bars the resurrection of the same claim in a subsequent action." *Davidson v. Kitsap County*, 86 Wn.App. 673, 681, 937 P.2d 1309 (1997). To determine if it applies requires looking at whether the subject matter, cause of action, persons and parties, and quality of the persons for whom the claim is made are the same. *Hilltop Terrace v. Island County*, 126 Wn.2d 22, 32, 891 P.2d 29 (1995). In this case, the outcome turns on the analysis of subject matter as it is clear that the others coincide. The applications for amendments would not be barred only if they were based on a substantial change in the application itself or in surrounding circumstances or conditions relating to the application. The changes relied upon by appellant are her discovery that the access/parking situation requires one vehicle to back onto the public road when two cars are parked, the new access drive location, and the new septic system technology.

5. Even if the proposed amendments, or her appeals, would otherwise be barred by *res judicata*, appellant contends that the City should be equitably estopped from taking the position that the RUE cannot be amended in that she was instructed to apply for the amendments by City representatives. As the City points out, the hearing examiner has only the authority granted by the City Council and that authority does not include deciding this claim. See Section 2.38.025 and *Chaussee v. Snohomish County*, 38 Wn.App.630, 636-8, 689 P.2d 1084 (1984). However, it is clear that the Appellant received some relief in the form of revision to the conditions as a result of her applications and the City is not asking that that relief be rescinded.

6. Appellant notes that the same limitation on the hearing examiner's authority would apply as to application of the doctrine of *res judicata*. The policy of finality in land use decisions is so strong that after the appeal period for LUPA, Ch. 36.70C RCW, has passed, not even the City can change its decision. See *Chelan County v. Nykreim*, 146 Wn.2d 904, 52. P.3rd 1 (2002). The hearing examiner, as part of the City, cannot authorize changes in a prior decision unless the appellant proves a substantial change in the application or conditions relating to the application.

7. Because Appellant did not challenge the original RUE, the issue is whether the record shows such a change in conditions that the development allowed by that exception no longer allows any reasonable use of the property. The burden of proof in an RUE application is on the applicant to bring forth evidence in support of the application and to provide sufficient information. The standard for the burden of proof is "clear and convincing evidence." Section 16.20.080H.

8. The doctrine of finality prevents her from pursuing her contentions that without a two-car garage she does not have reasonable use of the property and that she is entitled to more because other properties in the area have greater use. Both could have been addressed in an appeal of that decision. As substantial change in conditions, Appellant must rely upon her misunderstanding about how much parking area the plans provided resulting in the issue of the safety of backing from her property, an unnoticed code violation as to parking spaces, and the change in the septic system.

9. An unknown, hazardous condition could rise to the level of a substantial change and a potential denial of any reasonable use, but the facts show that the access, though not ideal, is adequate. Her misunderstanding about the size of the area also is not a substantial change in conditions, and has been partially addressed by the first amendment. As to the alleged code violation for tandem parking, there has been no change since the initial RUE and it appears from the issuance of the building permit that the tandem parking arrangement has been approved, as permitted by the Code. The change in septic system technology that allows consideration of different access to a garage is a substantial change, but Appellant did not, and could not, show that because of the change she is denied reasonable use of her property. None of these amounts to a substantial change in conditions that would allow reopening the issue of whether there is reasonable use of the property. Without such change in conditions, she cannot qualify for the amendment to the previously issued RUE.

10. The Hearing Examiner is required to give substantial weight to the decision of the Director. Section 2.16.130F2. The "substantial weight" requirement 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). *Sportsmen Ass'n v. Chelan County*, 141 Wn.2d 169, 176, 4 P.3d 123 (2000).

11. Appellant's argument that her proposed alterations and additions are outside the required buffer because that buffer was "reduced" by the granted RUE and also must be rejected. The staff's interpretation of the code has been longstanding and is correct. Though RUEs were to allow "alterations to proposed buffers", according to the former code, the exception is to the prohibition on disturbance within Code prescribed buffers. The former code did provide for reductions to buffer width in Section 16.20.090H(3) but subject to the variance criteria and the limitations in that subsection. The buffer widths could also be modified by averaging. Section 16.20.090H(4). The current code continues the prohibition on disturbance. Section 16.20.160D(3). The RUE is an exception to that prohibition, not one of the mechanisms for actually reducing the width of the buffer provided by the former and current code.

12. Her argument that neither the former CAO or the current CAO lists residences as a use permitted in a required buffer and because the former CAO provides that RUEs are not authorized to change permitted uses, the granting of the RUE must have changed the buffer so that her residence is outside it, fails. The City's explanation that the permitted uses referred to are those of the underlying zone appears to be correct. The former CAO did not allow a use that is inconsistent with the uses and limitations on other properties in the zone, Section 16.20.090I(4)(h) and the

current CAO refers to uses being consistent with the underlying zone designation. Section 16.20.160E.

13. Language in Conditions 3 and 10 of the original RUE decision and the reference to the “non-disturbance buffer area” north of the fence in Condition 4 of the first amendment shows that the fence demarks the new boundary of the buffer. That language does not prove that the size of the buffer has been altered.

14. Because Section 16.20.160G provides for special use review for certain kind of development that may need to occur in a wetland or its buffer, and she was not required to obtain special use review, she contends that her development must not be in a buffer. The code is ambiguous. Section 16.20.160 subsection E, Special Use Review, provides that development not listed in Table 8 may be allowed if granted a special use review “in accordance with this chapter” but in subsection G it says “development identified as a special use review in Table 8” may be approved. Under the latter, her residence would not qualify for special use review, only access.

15. She argues that because her consultant’s recommendation for “reduction” to 25 ft. was accepted by the Wetland Advisory Committee report where it states that the Committee concurs with the recommendation of the wetland consultant for the “installation of a buffer along the west boundary line...” shows the reduction of the buffer. The imprecise language actually refers to planting areas to improve buffer function, not the required buffer itself and there is no other indication that the consultant’s recommendation was adopted as a reduction in the buffer.

16. Finally, Appellant’s suggestion that the notice that she was required to record with attached plan shows reduction of the buffer because the plan did not identify a buffer, cannot be considered because the plan was not attached to the exhibit (Exhibit 28) for review. Even if it fails to show the buffers, that fact would not be sufficient to prove that the buffer had been reduced, rather than an oversight, as she acknowledges that there would still be some buffer on her property.

17. None of the examples Appellant puts forward to support her argument that the buffer has been reduced overcomes the weight to be given the interpretation by the City staff, who are charged with implementing the provisions, or the plain language and structure of the code provisions. The effect of the RUE is to allow disturbance within the wetland buffer, so her proposed additions are still within the required buffer.

18. The parties agree that the amendment applications are subject to the “new” CAO. Appellant urges that the new exemption in Section 16.20.040C(8) would allow her additions and alterations. Though, as opined by Mr. Machen, allowing the alterations and even additions to development that was permitted under the RUE exception would seem to have the effect of “nullifying” the reasonable use exception purpose, to allow only that development needed to allow reasonable use, there is no principled way to read the new provision as inapplicable to development obtained pursuant to an RUE. Certainly other exemptions in the list in Section 16.20.040 would apply to such development, such as those for routine maintenance. We can only speculate about whether allowing serial additions to development permitted by an RUE was an intended result. That such development is exempt from the regulations on buffers is clear, however.

19. The issue, then, is whether the activities proposed by Appellant may be allowed because they are within a portion of the buffer “located landward of an existing, substantially developed area...which eliminates or greatly reduces the impact of the proposed activities on the...wetland.” Section 16.20.040C(8). Appellant points to her patio on the north side of her house as a substantially developed area, however its addition was approved in the first amendment decision precisely because it did not amount to any substantial development. The findings show that City’s position is correct, that there is no substantially developed area between the proposed new activity and development and the wetlands to the northeast and east.

20. Appellant emphasizes the potential reduction in impacts to the wetlands from her proposed amendments because the new access activity would be more distant from the wetland than where it is now. The City’s witnesses stressed that the move, instead of keeping impacts concentrated in one place where there is activity already on the public road and a driveway nearby, would introduce new activity in the form of light, glare, and noise to the wetlands to the northeast and east which do not now experience those impacts. Who is correct about the reduction of impacts is immaterial, however, because the issue of whether impacts are eliminated or greatly reduced does not arise unless the findings show the proposed alteration or activity would be on the landward side of a substantially developed area, and the evidence did not support such a finding.

21. The proposed additions to her residence would further exceed the 1,200 square foot limitation now in the code for lot coverage allowed pursuant to an RUE so could not be granted.

22. Nor would the alterations to the house meet the standard of Section 16.20.040D(2)(d) for existing development built prior to the effective date of Ordinance No. 2005-03 to be altered because any expansion of the footprint can be only on sides that do not touch the buffers and here the buffer surrounds the footprint. There also can be no change in the location of driveways and parking and no further encroachment into buffers of those improvements. Section 16.20.040D(3).

23. Appellant’s argument as to the selective interpretation or different treatment of the City’s property next to the subject site as to the applicability of the new exception fails because its application was based on the fact that the activity would be landward of substantially developed areas, as required by the exception.

Decision

Appellant’s Motion to Admit Exhibits in Response to City’s Motion to Dismiss is granted. The City’s Motion for Partial Dismissal is denied as to the timeliness of the appeal of the decision on the first amendment application and granted as to those requested amendments to the conditions imposed on the original RUE. The City’s Administrative Decision on the first amendment application is affirmed. The City’s Administrative Decision on the second amendment application is also affirmed.

Entered this 2nd day of December 2008.

RUE 10755 & RUEA 10755

Page 13 of 14

/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.