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SAN JUAN COUNTY
HEARING EXAMINER

FINDINGS, CONCLUSIONS, AND DECISION

Applicant(s):	Todd and Shelby Silva 103 Hilltop Lane Eastsound, WA 98245
File No.:	PCUP000-15-0029
Request:	Conditional Use Permit (CUP)
Parcel No.:	271456032
Location:	103 Hilltop Lane, Orcas Island
Summary of Proposal:	An application for a conditional use permit to allow vacation rental of a single-family home
Land Use Designation:	Eastsound Rural Residential
Public Hearing:	April 21, 2016
Application Policies and Regulations:	SJCC 18.40.270 Vacation Rentals SJCC 18.80.100(D) CUP Criteria
Decision:	Approved subject to conditions

S.J.C. DEPARTMENT OF
MAY 31 2016
COMMUNITY DEVELOPMENT

BEFORE THE HEARING EXAMINER
FOR SAN JUAN COUNTY

In the Matter of the Application of	)	NO. PCUP000-15-0029
Todd & Shelby Silva	)	
	)	
	)	
For approval of a conditional use permit	)	
to allow vacation rental of the three	)	
bedroom residence at 103 Hilltop Lane	)	
Orcas Island	)	

SUMMARY OF DECISION

The request for conditional use permit to authorize the use of the three bedroom residence at 103 Hilltop Lane, Orcas Island as a vacation rental is **APPROVED** subject to conditions.

SUMMARY OF RECORD

Request:
Todd and Shelby Silva (Applicants) requested a conditional use permit to authorize vacation rental use of the three bedroom residence located at 103 Hilltop Lane, Eastsound, Orcas Island.

Hearing Date:
The San Juan County Hearing Examiner held an open record public hearing on the request on April 21, 2016. At the conclusion of the proceedings, the Applicants agreed to a five business day extension of the decision issuance. However, after the hearing, circumstances unrelated to the proceedings and beyond the control of the undersigned caused an additional delay in issuance.

Testimony:
At the open record public hearing, the following individuals presented testimony under oath:

Lee McEnery, Planner 3, San Juan County Department of Community Development
Mimi Wagner, Attorney for Applicants
Jamie Grifo, Attorney for Applicants
Cory Harrington, Agent for Applicants
Todd Silva, Applicant
Ed Sutton
Michael Riordan

Exhibits:
The following exhibits were admitted in the record:

1. Department of Community Development Staff Report, dated March 29,2016
2. Application, received December 2, 2015, with attached site plan, aerial photo, elevations, and rules of conduct
3. Ed Sutton comment letters on behalf of View Haven Homeowners Association, dated January 10, 2016, with attached View Haven Estates CCRs
4. Jay Lucas email, dated March 17, 2016
5. Notice of Application, Mailings, and Posting; mailed December 18, 2015 and posted and published December 23, 2015
6. Notice of Application, Mailings, and Posting; posted February 23, 2016, published February 24, 2016, and mailed February 25, 2016
7. Michael Riordan comment letters, dated March 28, 2016 (with attached CCRs) and March 30, 2016 (with septic design and permitting information regarding subject property)
8. Mimi Wagner letter to Ed Sutton, dated March 15, 2016
9. James Griffo letter to Hearing Examiner (one page), dated April 7, 2016
10. James Griffo letter to Hearing Examiner (five pages with two attached court cases), dated April 7, 2016
11. Cory Harrington email to Julie Thompson, dated April 18, 2016
12. James Grifo letter to Hearing Examiner, dated April 20, 2016, with attached:
    a. Rick Petro, Orcas Sewage Design, letter to Examiner, dated April 18, 2016
    b. Email exchange between James Griffo and Fred Schaller, San Juan County Building Official, April 2016
13. Mimi Wagner letter to Hearing Examiner, dated April 21, 2016
14. Rick Petro email to James Grifo, dated April 20, 2016
15. Proposed Revised rules of conduct for 6 or 9 occupants and parking, two pages
16. Application cover sheet and letter from Cory Harrington, undated, two pages
17. Ed Sutton letter with recommended additional conditions if approved, dated April 21, 2016, with attached View Haven plat map

Upon consideration of the testimony and exhibits submitted at the open record public hearing, the Hearing Examiner enters the following findings and conclusions:

FINDINGS

1. The Applicants requested approval of a conditional use permit to authorize the use of the three bedroom residence located at 103 Hilltop Lane, Eastsound, Orcas Island as a vacation rental.[1] The parcel is developed with a single-family residence and an attached garage. *Exhibits 1 and 2; Silva Testimony.*

2. The subject property has an Eastsound Rural Residential land use designation. Located within the View Haven Estates plat, the parcel abuts residential development on all sides. The neighborhood is rural and residential in nature. There are no nearby airfields or airports. *Exhibit 1.*

3. The subject property has existing access from Hilltop Lane. The nearest arterial is Enchanted Forest Road, approximately one quarter of a mile from the property. No changes to the existing site access are proposed. *Exhibits 1 and 2.*

4. The existing residence is served by the Eastsound Water Users Association and an on-site septic system (OSS). *Exhibit 1.* The OSS (permit #9919) was designed and installed to serve a two bedroom residence. *Exhibits 7 and 12.* An unpermitted third bedroom was added to the residence sometime between initial construction and the Applicants' March 2013 purchase of the property, which was not known to the Applicants when they bought the house or applied for the instant permit. The septic system was never expanded to address the third bedroom and currently only has the legal capacity for a two bedroom residence. The County Building Official confirmed that the residence is a legal structures. *Silva Testimony; Exhibit 12.*

5. The proposal initially requested authorization to rent all three bedrooms, allowing up to three overnight guests per bedroom, or nine guests per rental. *Exhibit 2.* Upon learning of the septic system's restriction to two bedrooms, the Applicants' amended their request to ask for authorization of three bedroom rentals once the septic system is upgraded and allowing two bedroom rentals in the meantime. The Applicants have met with a septic system designer, who has done a preliminary design for expansion of the system and met with a County Board of Health representative on-site. The Applicants will determine when and if to do such an upgrade at a later date. *Silva Testimony; Exhibit 13.*

6. The subject property has off-street parking for four vehicles in the driveway. No outdoor advertising signs or food service are proposed. *Exhibits 1, 2, and 16; Silva Testimony.*

7. Planning Staff submitted that because the subject property is an existing developed site, the proposal is consistent with San Juan County Code (SJCC) Chapter 18.60. *McEnery Testimony; Exhibit 1.*

8. Planning Staff noted that noise and trespass impacts could be expected to mimic those associated with typical residential use of the site and that any increased potential for

[1] The subject property is known as Assessor Parcel number 271456032. *Exhibit 1.*

disturbance to surrounding properties from temporary occupants could be mitigated by the following measures: restricting the number of vacation rental occupants to three per bedroom; requiring rules of conduct to be posted that specifically prohibit trespass; identification of property lines; providing neighbors with a 24-hour contact phone number; and requiring the contact to keep a written log of complaints. Staff recommended conditions implementing the above measures. *Exhibit 1; McEnery Testimony.*

9. The County Code requires the Applicants to obtain a business license or work through a property management company. *Exhibit 1, SJCC 18.40.270.* The Applicants intend to manage the rental themselves and are aware of this requirement. *Silva Testimony; Exhibit 16.*

10. The application was submitted December 2, 2015 and determined to be complete on the same date. Notice of the application was first mailed to surrounding property owners on December 18, 2015, and published and posted on-site on December 23, 2015. The Applicants' agent later discovered that one neighbor that should have received notice did not receive it. A second notice of application was posted on-site on February 23, 2016, published on February 24, 2016, and mailed to surrounding property owners on February 25, 2016. The hearing date was changed from March to April at the time of this second notification. *Exhibits 1, 2, and 6; McEnery Testimony.*

11. The County received comments on the proposal prior to hearing. Ed Sutton, President of the View Haven Estates Homeowners Association (HOA), submitted comments contending that transient rentals are prohibited by the covenants, conditions, and restrictions (CC&Rs) of the plat. Mr. Sutton argued that the language of the current CC&Rs prohibits short term rentals or any commercial activity. He also indicated that he is in the process of attempting to amend the CC&Rs to more explicitly prohibit transient rentals. Jay Lucas, View Haven Estates resident, submitted concerns about speed limit compliance on the part of short term renters, particularly because of the dirt roads accessing the subject property, and requested that the Applicants be required to add instructions to drive slowly to the rules of conduct. *Exhibit 4.* Michael and Donna Riordan submitted comments opposing the proposal, reiterating both the CC&Rs alleged exclusion of short term rentals and concern about the use of the dirt roads in the plat by short term visitors, which they asserted would raise dust and potentially damage the roads, which are maintained by the HOA at substantial expense. The Riordans were also concerned that visitors unfamiliar with the plat would drive too quickly to safely navigate the roads, resulting in collisions. They recommended conditions that should be imposed to limit the impacts of short term rentals in the event the permit is approved. *Exhibit 7.*

12. Also prior to hearing, Mr. Riordan discovered the issue with the Silvas' septic system only having been designed and approved to serve two bedrooms. He notified the Applicants and/or their permit consultant of this fact. *Exhibit 11; Harrington Testimony.* In order to address the Applicants' revised "contingency" request for approval of a two bedroom rental now that is authorized to expand to a three bedroom rental upon

completed and approved upgrade of the septic system, the permit consultant submitted a revised proposed set of Rules of Conduct, one for two bedroom rentals and one for three bedrooms rentals. *Exhibit 15.*

13. At hearing, Mr. Sutton provided testimony that if the County was persuaded by the Applicants' legal counsel on the issue of the CC&Rs, he requested additional conditions be added to address anticipated impacts to the other five other properties on Hilltop Lane, three of which are directly below the subject property. Especially for those three parcels, it would not be acceptable to have loud outside activities after 8:00 pm, to have renters violate a burn ban, to allow unleashed dogs to roam, or for guests not to pick up after dogs, among other items. Mr. Sutton testified that the HOA vote to restrict rentals within the plat to periods of six months or more was tallied at 17 to 17. He testified that the HOA would be investing in additional signage for the internal roads, in speed bumps, and potentially in chip sealing the dirt roads, and he wondered if someone renting their lot to strangers might reasonably be considered to owe more for such costs. *Sutton Testimony.*

14. Mr. Riordan also testified in support of his earlier written comments. He challenged several assertions in the application materials, including the number of parking spaces actually available in the driveway and whether the Applicants can provide any assurance to the HOA that the residence would only be rented to "family renters". He renewed the argument that the CC&Rs prohibit short term rentals and argued that vacation rental is a commercial use; he asserted that approval of this application would create a precedent in the plat. He contended that there are two blind intersections that are dangerous even at the posted speed of 15 mph. He repeated his concern that gravel roads create a lot of dust, which increases exponentially at speeds of greater than 15 mph (based on physics). He contended that dust is especially harmful to children and the aged. He testified that the HOA applies dust management treatments to the roads twice a year and that the operators of vacation rentals should contribute to address wear from caused by renters. He requested that recreational vehicles (RVs), campers, and trucks be prohibited. He asserted that the Silva septic system must be close to failure because they've been using the home as a three bedroom residence since at least 1987. He contended that even if the septic is ungraded, vacation rental - if approved - should be limited to no more than six people because renters from the city will overload the system; they don't understand septic. *Riordan Testimony.*

15. In response to public comment, Planning Staff noted that the County Comprehensive Plan and the Eastsound Plan both explicitly identify short term rentals as residential uses. Regarding concerns that approval would create a precedent, Staff testified that each application is reviewed on its own merits. Staff was ambivalent about the requested additional conditions, noting that the County has many dirt roads, and was not certain whether vacation rental use of a specific road would require maintenance contribution beyond any made by the property owner. Upon review of the complete application materials, Planning Staff determined that the proposal can comply with all applicable criteria and recommended approval with conditions. *McEnery Testimony; Exhibit 1.*

16. In response to public comment on the issue of whether the CC&Rs prohibit short term rentals, counsel for the Applicants argued that the San Juan County Code neither obligates nor allows County decision makers to consider CC&Rs when deciding vacation rental applications. Nevertheless, they pointed to several Washington court cases which they assert demonstrate that short term rentals of private property for residential purposes are not considered commercial uses. *Exhibits 8, 9, and 10.*

17. Regarding concerns about impacts on the road, the Applicant testified that it is anticipated that the vacation rental would not be occupied full time, and that during periods when his family resides elsewhere on the island and the house is rented, there should be a reduction in traffic on Hilltop Lane, with fewer cars and less dust. Regarding concerns that renters would create noise, smoke, pet-related, and other adverse impacts to neighbors, the Applicant testified that during the days he would often be in his office on the property, and that his family would be staying only 10 minutes away in Deer Harbor during rentals. They would be able to quickly respond to all neighbor concerns. *Silva Testimony.*

18. With regard to the conditions requested by Mr. Riordan, Applicants' counsel argued they are outside the scope of the instant permit review and/or the authority of the County decisionmaker. Counsel asserted that conditions requested by Mr. Sutton are similar to the restrictions and instructions to guests included in the proposal and/or to existing County law that applies regardless of the application. The County's Building Official confirmed that the structure is legal and the record shows that the existing septic can accommodate two bedroom occupancy. The Applicants have proposed steps to inform guests of expectations. *Wagner Argument.*

CONCLUSIONS

Jurisdiction:

The Hearing Examiner is granted jurisdiction to hear and decide applications for conditional use permit pursuant to Chapter 36.70.970 of the Revised Code of Washington and Chapters 2.22 and 18.80 of the San Juan County Code.

Criteria for Review:

Conditional Use Permit

Pursuant to SJCC 18.80.100.D, a conditional use permit shall be granted by the County only if the following criteria are met:

1. The proposed use will not be contrary to the intent or purposes and regulations of this code or the Comprehensive Plan;

2. The proposal is appropriate in design, character, and appearance with the goals and policies for the land use designation in which the proposed use is located;

3. The proposed use will not cause significant adverse impacts on the human or natural environments that cannot be mitigated by conditions of approval;

4. The cumulative impact of additional requests for like actions (the total of the conditional uses over time or space) will not produce significant adverse effects to the environment that cannot be mitigated by conditions of approval;

5. The proposal will be served by adequate facilities including access, fire protection, water, stormwater control, and sewage disposal facilities;

6. The location, size, and height of buildings, structures, walls and fences, and screening vegetation associated with the proposed use shall not unreasonably interfere with allowable development or use of neighboring properties;

7. The pedestrian and vehicular traffic associated with the conditional use will not be hazardous to existing and anticipated traffic in the neighborhood;

8. The proposal complies with the performance standards set forth in Chapter 18.40 SJCC;

9. The proposal does not include any use or activity that would result in the siting of an incompatible use adjacent to an airport or airfield (RCW 36.70.547); and

10. The proposal conforms to the development standards in Chapter 18.60 SJCC.

Vacation Rental Standards
Pursuant to SJCC 18.40.270, the following standards apply to all vacation rentals of single-family residential units and accessory dwelling units or portions thereof:

A. No more than three guests per bedroom shall be accommodated at any one time.

B. The vacation rental of a principal residence or accessory dwelling unit shall be operated in a way that will prevent unreasonable disturbances to area residents.

C. At least one additional off-street parking space shall be provided for the vacation rental use in addition to the parking required for the residence or accessory dwelling unit.

D. If any food service is to be provided the requirements for a bed and breakfast residence must be met.

E. No outdoor advertising signs are allowed.

F. The owner or a long-term lessee may rent either the principal residence or the accessory dwelling unit on a short-term basis (vacation rental), but not both.

G. Where there are both a principal residence and an accessory dwelling unit, the owner or long-term lessee must reside on the premises, or one of the living units must remain unrented.

H. In all activity center land use districts, rural residential, and conservancy land use districts, the vacation rental of a residence or accessory dwelling unit may be allowed by provisional ("Prov") permit only if the owner or lessee demonstrates that the residence or accessory dwelling unit in question was used for vacation rental on or before June 1, 1997. When internal land use district boundaries are adopted for an activity center, this provision will apply to VR and HR districts but not to the activity center in general.

I. Vacation rental accommodations must meet all local and state regulations, including those pertaining to business licenses and taxes.

J. Owners of vacation rentals must file with the administrator a 24-hour contact phone number.

K. The owner or lessee of the vacation rental shall provide notice to the tenants regarding rules of conduct and their responsibility not to trespass on private property or to create disturbances. If there is an easement that provides access to the shoreline, this shall be indicated on a map or the easement shall be marked; if there is no access, this shall be indicated together with a warning not to trespass.

L. Detached accessory dwelling units established under SJCC 18.40.240 cannot be separately leased or rented for less than 30 days.

Conclusions Based on Findings:

1. As conditioned, the proposed vacation rental would be consistent with applicable provisions of the SJCC and the Comprehensive Plan. The use would occupy an existing residence without altering the appearance of the structure. Conditions would ensure that even when rented it continues to function like a residence; the residential character of the neighborhood would be unaffected. No adverse cumulative environmental impacts are suggested by the record in the event of additional vacation rental request approvals. The proposal meets or can be conditioned to meet the applicable standards of sections 18.40 and 18.60 of the SJCC, ensuring there are adequate public services and facilities to serve the proposal. Potential adverse impacts of the vacation rental on neighboring properties would be mitigated by conditions requiring rules of conduct prohibiting trespass, clear presentation of property boundaries to renters, and a 24-hour contact for neighbor complaints (among other requirements). Pedestrian and vehicular traffic would be consistent with that expected of a typical residence. There is no airfield adjacent to this property. *Findings 1, 2, 3, 4, 5, 7, 8, 10, 15, and 17.*

2. Regarding the use-specific requirements of SJCC 18.40.270, the site is currently served by the Eastsound Water Users Association and an on-site septic system. Conditions

would ensure that the number of guests is restricted to three per bedroom able to be served by the septic system, as inspected and approved by the County health officials. Potential noise, trespass, and parking impacts to surrounding parcels would be mitigated through conditions requiring posted rules of conduct, identification of property boundaries, provision of a 24-hour contact phone number, and the requirement for the contact to maintain a log of complaints. The rules of conduct would specifically be required to prohibit trespass. The site would provide four off-street parking spaces. No outdoor advertising, food service, or accessory dwelling unit are proposed. Conditions would ensure that the Applicants obtain a business license or work through a property management company. *Findings 1, 4, 5, 6, 8, 9, 12, 15, and 17.*

3. San Juan County contains many residential uses that are accessed by dirt roads. Additional conditions requiring speed limit observance, pet control, prohibiting nuisance noise by guests and the like are redundant in light of existing applicable County regulations, enforceable through various agencies. Persons with complaints about nuisance conditions on-site may register complaints with the appropriate agency and with the Applicants, who are required to maintain a log of complaints. *Findings 11, 13, 14, 15, 16, 17, and 18.*

4. Disputes arising between parties on the basis of restrictions imposed through CC&Rs are outside the scope of authority for any County agent, including the Hearing Examiner. *Chaussee v. Snohomish County Council, 38 Wn. App. 630, 636 (1984).* No conclusions regarding the effect of the CC&Rs are entered herein.

DECISION

Based on the preceding findings and conclusions, the request for conditional use permit to authorize the use of the three bedroom residence at 103 Hilltop Lane, Eastsound, Orcas Island as a vacation rental is **APPROVED** subject to the following conditions:

1. This vacation rental shall be operated as described in the application materials except as modified by these conditions. The residence may be rented as a single unit on a short term basis for periods of less than 30 days.

2. The property shall only be rented as a two bedroom residence, with a maximum of six overnight guests, until such time as the on-site septic system is upgraded, inspected, and approved by appropriate County officials as having the capacity to serve a three bedroom residence. After evidence of such approvals is provided to the Department of Community Development, the residence may be rented as a three bedroom rental accommodating a maximum of nine overnight guests.

3. Prior to operation, evidence shall be presented to the Department of Community Development that the driveway has been approved for emergency vehicle access.

4. The vacation rental shall be operated in a way that prevents unreasonable disturbances to area residents. To this end, the Applicants shall:

   A. Provide copies of this decision to property owners within 300 feet of the subject property, along with a 24-hour local contact phone number, so that complaints can be dealt with in a timely manner. A log of complaints shall be kept by the contact and provided to the Department of Community Development on request.

   B. Prominently mark the boundaries of the subject property so that it is clearly evident to guests where those boundaries are.

   C. Provide notice to the tenants regarding rules of conduct and their responsibility not to trespass on private property or create disturbances. If there is an easement that provides access to the shoreline, this shall be indicated on a map or the easement shall be marked; if there is no access, this shall be indicated together with the warning not to trespass.

   D. Provide copies to the Department of Community Development of the rules of conduct and the 24-hour local contact phone number.

5. No food service is to be provided. No outdoor advertising signs are allowed. At least as many off-street parking spaces as approved bedrooms must be maintained on-site for the life of the vacation rental use.

6. The rental must meet all local and state regulations, including those pertaining to business licenses and taxes.

7. No use of the property shall be made that produces unreasonable vibration, noise, dust, smoke, odor, or electrical interference to the detriment of adjoining properties.

8. Written rules of conduct shall be submitted to the Department of Community Development before rentals commence. These rules shall be distributed to all renters and also sent to all owners of property within 300 feet of the site boundaries.

9. Since the County is not a party to private covenants, it is not in a position to enforce private covenants between property owners that may prohibit use of a residence as a vacation rental. However, issuance of a permit for a vacation rental does not license the owner to violate private restrictions.

10. If the conditions of approval are not complied with, the resulting impacts may change a typical residential area to one with frequent incidents of trespass, noise, and traffic from strangers who have no investment in maintaining civil relations with neighbors. For this reason, it is emphasized that failure to comply with conditions of approval is grounds for revocation of this permit.

11. Upon determination by the Director of the Department of Community Development that any condition listed above has been violated, following issuance of a Notice of Violation, the Director may, in addition to his other code enforcement remedies, revoke the conditional use permit.

Decided May 27, 2016.

By:

Sharon A. Rice
San Juan County Hearing Examiner

Effective Date, Appeal Right, and Valuation Notices

Hearing examiner decisions become effective when mailed or such later date in accordance with the laws and ordinance requirements governing the matter under consideration. SJCC 2.22.170. Before becoming effective, shoreline permits may be subject to review and approval by the Washington Department of Ecology pursuant to RCW 90.58.140, WAC 173-27-130 and SJCC 18.80.110.

This land use decision is final and in accordance with Section 3.70 of the San Juan County Charter. Such decisions are not subject to administrative appeal to the San Juan County Council. See also, SJCC 2.22.100.

Depending on the subject matter, this decision may be appealable to the San Juan County Superior Court or to the Washington State Shorelines Hearings Board. State law provides short deadlines and strict procedures for appeals and failure to timely comply with filing and service requirements may result in dismissal of the appeal. See RCW 36.70C and RCW 90.58. Persons seeking to file an appeal are encouraged to promptly review appeal deadlines and procedural requirements and consult with a private attorney.

Affected property owners may request a change in valuation for property tax purposes notwithstanding any program of revaluation.