

WHATCOM COUNTY HEARING EXAMINER

RE: Administrative Appeal) APL2009-0023
Application for)
)
Wesley and Penny Mussio) FINDINGS OF FACT,
) CONCLUSIONS OF LAW,
) AND DECISION

SUMMARY OF APPEAL AND DECISION

Appeal: The Appellants, Wesley Mussio and Penny Stainton-Mussio, have appealed the action taken by Whatcom County Planning and Development Services to enforce a Decision of the Whatcom County Hearing Examiner, dated June 19, 2008. In enforcing said Decision, Whatcom County Planning and Development Services allowed the neighboring property owners, William and Joan Tezak, to remove seven feet from the water-ward end of the boathouse structure involved in the Hearing Examiner's Decision.

Decision: Whatcom County Planning and Development Services have appropriately enforced the Decision of the Hearing Examiner by reducing the size of the boathouse through the elimination of seven feet of the structure most water-ward from the Tezak's shoreline. The Appeal is DENIED.

FINDINGS OF FACT

I.

Background Information

Appellant: Wesley and Penny Mussio
Property Owner: William and Joan Tezak
Property Address: 1380 Roy Road
Bellingham, Washington 98229
Parcel Number: 370327-104303
Zoning Designation: Residential Rural (RR2)
Shoreline Designation: Shoreline Residential

Authorizing Ordinances:	WCC 23.60.15.G	Notice of Decision, Reconsideration and Appeal
	WCC 23.60.15.H	Appeal Procedures
	WCC 23.80.02.B	Violations and Penalties
Applicable County Codes:	WCC 23.50.01	Applications to Persons and Development
	WCC 23.60.02	Exemptions from Shoreline Substantial Development Permit Process
	WCC 23.80.02.E	Violations and Penalties

Exhibits:

- 1 Cover Memorandum dated October 16, 2009, from Bryan Sehmel with attachments
 - 1-1 Administrative Appeal, dated October 14, 2009
 - 1-2 Appeal Statement
 - 1-3 Customer Receipt
 - 1-4 Notice of Required Corrective Action, dated August 11, 2009 issued to William and Joan Tezak
 - 1-5 Site drawing

- 2 Email from Bryan Sehmel to Penny Mussio, dated August 11, 2009, with attachments
 - 2-1 Email correspondence betw Penny Mussio to Bryan Sehmel, Aug 11 & 12, 2009
 - 2-3 Email correspondence betw PMussio and Bryan Sehmel, August 19 & 20, 2009
 - 2-4 Email correspondence betw Sehmel & P Mussio, Sept 9 & 10, 2009
 - 2-5 Email correspondence betw Sehmel & P Mussio, Sept 23, 2009
 - 2-6 Email correspondence betw Sehmel and P & Wes Mussio, Sept 30, 2009
 - 2-7 Email correspondence betw Stalheim, Sehmel, & Mussio, Oct 2, 4, 5 & 6, 2009

- 3 Demolition Permit No. DET2009-00183, issued September 29, 2009, Applicant Bill Tezak

- 4 Certificate of Posting, dated November 18, 2009

- 5 Legal Notice, dated November 19, 2009

- 6 Staff Report, dated November 20, 2009

- 7 Black Binder submitted at hearing: Mr. Mussio's presentation

- 8 Photos and waterline easement documentation, submitted by Pam Nolan, neighboring property owner

Parties of Record

Wesley and Penny Mussio
 4611 Angus Drive
 Vancouver, B. C. V6J 4J4
 CANADA

William and Joan Tezak
10567 Samish Island Road
Bow, WA 98232-9398

Pam Nolan
1377 Roy Road
Bellingham, WA 98229

Bryan Sehmel, Code Enforcement Planner
Planning and Development Services

Royce Buckingham
Civil Deputy Prosecutor

II.

On June 19, 2008, the Whatcom County Hearing Examiner entered Findings of Fact, Conclusions of Law, and a Decision in an Administrative Appeal, APL2008-0004.

APL2008-0004 was an Appeal by Wesley Mussio of a Determination made by Whatcom County Planning and Development Services, granting legal nonconforming status to an existing boathouse located on the Mussio's neighboring property, owned by Bill and Joan Tezak.

The Hearing Examiner's Findings of Fact in APL2008-0004 included Findings that there was a boathouse in approximately the same location as the current boathouse and that its existence in that location preceded the adoption of the Shoreline Management Act and the Whatcom County Shoreline Program. Based on this Finding, the Hearing Examiner concluded that Bill and Joan Tezak had established a legal nonconforming use for a boathouse located in its approximate, current position, but found as a matter of Fact that "... The record establishes that the boathouse structure was expanded after 1985 and that it encroaches approximately 7-feet further into the lake than it did in 1986."

Having found as a matter of Fact, that the boathouse was expanded after the adoption of the Whatcom County Shoreline Master Program by lengthening it by approximately 7-feet, the Hearing Examiner concluded that since the expansion was done without shoreline permits, the Tezaks would be required to either obtain a permit for the expansion or reestablish the boathouse to its configuration at the time the boathouse became a nonconforming use.

III.

After entering the Hearing Examiner's Decision in APL2008-0004, on June 19, 2008, the owners of the boathouse requested the Hearing Examiner to Reconsider the Decision and to rule on a Motion to Dismiss for Lack of Standing that was filed during the proceedings, but not addressed by the Hearing Examiner in his Decision.

On July 1, 2008, the Hearing Examiner issued a Decision which read as follows:

The Request for Reconsideration of the Hearing Examiner's Factual Finding that the Tezak boathouse was expanded without required permits, after it became a nonconforming use, is denied. The Findings of Fact set forth in the Hearing Examiner's decision remain the Hearing Examiner's Findings. The Hearing Examiner committed an error of law when he failed to address the Standing issue properly raised by the Tezak's. The Hearing Examiner has concluded that the Appellant does not have sufficient interest in the nonconforming use decision to be granted Standing. The Decision of the Hearing Examiner should be modified to remove the requirement that the matter be remanded to Whatcom County Planning and Development Services for further action. The Hearing Examiner hereby dismisses the Mussio Appeal for lack of legal Standing.

Wesley Mussio appealed the Hearing Examiner's Decision dismissing APL2008-0004 on the legal grounds that Mr. Mussio did not have Standing. Mr. Mussio did not challenge any of the Findings of Fact or the Decision entered by the Hearing Examiner in the initial Decision, issued June 19, 2008.

IV.

On September 26, 2008, the Whatcom County Council upheld Mr. Mussio's Appeal of the Hearing Examiner's Decision granting the Motion to Dismiss the Appeal for Lack of Standing. The Whatcom County Council's Decision reinstated the Hearing Examiner's Decision of June 19, 2008, and remanded the matter to Whatcom County Planning and Development Services for corrective action consistent with the Hearing Examiner's Decision of June 19, 2008.

V.

On August 11, 2009, Whatcom County Planning and Development Services sent a Notice of Required Corrective Action to William and Joan Tezak. The Notice directed the Tezak's to pursue legal permitting for the expansion or extension of the boathouse 7-feet further into Samish Lake without a permit or to apply for a Demolition Permit to reduce the length of the boathouse. The Notice of Corrective Action was not appealed by any Party.

On September 8, 2009, the Tezak's submitted a Demolition Permit Application describing the work as removing 7-feet of an existing boathouse structure on Lake Samish. Diagrams submitted with the Demolition Permit Application indicated that the boathouse would be reduced in size by removing 7-feet of the structure most water-ward from the shoreline of Lake Samish.

On October 14, 2009, the Mussio's filed an Appeal to the Hearing Examiner indicating they were appealing a Decision made September 29, 2009, interpreting the Hearing Examiner's Decision

of June 19, 2008, in APL2008-0004. The Decision made September 29, 2009, was the approval of the Demolition Permit. The actual Decision allowing demolition of the expanded portion of the boathouse was contained in the Order to Correct, dated August 11, 2009.

The record shows that on August 20, 2009, Appellant Mussio sent a letter to Bryan Sehmel, Natural Resources Code Enforcement Officer for Whatcom County Planning and Development Services, indicating disagreement with the Staff determination that removing the water-ward 7-feet of the boathouse would comply with the Hearing Examiner's Decision. When and how Mr. Mussio received notice of the Planning Department Decision that removing 7-feet of the water-ward end of boathouse would comport with the Hearing Examiner's Decision of June 19, 2008, but does indicate that Mr. Mussio had actual notice on or prior to August 20, 2009. After the letter of August 20, 2009, the next communication between Mr. Mussio and the Planning Department was in the form of emails dated October 2, October 5, and October 6, 2009.

VI.

The Appellants' dissatisfaction with the corrective action taken by Whatcom County Planning and Development Services is stated as follows:

“More than half of the boathouse is located directly in front of 1382 Roy Road, our property. By allowing removal of 7-feet of the boathouse on the waterside of the boathouse, without requiring the boathouse to be moved, means the boathouse remains in front of 1382 Roy Road.”

The position taken by Planning is that removal of 7-feet of the boathouse from the end extending furthest into the lake is consistent with the Hearing Examiner's determination upholding the legal nonconforming status of the boathouse while not allowing an expansion of the non-conforming boathouse without the proper permits.

VII.

Any Conclusion of Law which is deemed a Finding of Fact is hereby adopted as such. Based on the foregoing Findings of Fact, now are entered the following

CONCLUSIONS OF LAW

I.

The Decision appealed by the Mussio's was part of the Notice of Corrective Action sent by Planning and Development Service to the Tezak's on or about August 11, 2009. This notice indicated that the Tezak's could come back into conformity with the Whatcom County Shoreline Master Program by reducing the length of the boathouse by 7-feet. The Appellants were aware of

this interpretation on or before August 20, 2009. The Appellants appealed this determination on October 14, 2009, approximately 54-days or more after the Appellants became aware of this interpretation of the Hearing Examiner's Decision by Planning.

The Hearing Examiner is given the authority to hear Appeals of Administrative Determinations by WCC 20.92.210(1). This section reads in relevant part as follows:

20.92.210 Final Decisions.

The hearing examiner shall conduct open record hearings and prepare a record thereof, and make a final decision upon the following matters:

(1) Appeals from any orders, requirements, permits, decisions or determinations made by an administrative official or committee in the administration of this title.....

The time period for Appeals of Administrative Determinations is set forth in WCC 20.92.211, which reads as follows:

20.92.211 Administrative Appeals – Appeal Period.

Appeals to the hearing examiner on the subjects listed in WCC [20.92.210](#)

(1) and (2) must be filed within 14 calendar days of the date of administrative determination.

The Hearing Examiner does not have jurisdiction to hear any Appeals of Administrative Determinations unless they are filed within fourteen calendar days of the date of the Administrative Determination.

The Hearing Examiner does not have jurisdiction to hear this Appeal. If there are Equitable or Constitutional grounds which might allow the Appeal to go forward, even though it was not filed within 14 days, that determination is solely within the jurisdiction of Superior Court in the State of Washington.

II.

On the merits of the Appeal, the Hearing Examiner concludes that Planning correctly interpreted the Decision of June 19, 2008, of the Hearing Examiner. This Decision upheld the legal, nonconforming status of a boathouse in the current location of the Tezak boathouse. The Hearing Examiner concluded that the boathouse had been expanded and extended 7-feet further into Lake Samish after it became a legal nonconforming use. The Hearing Examiner Decision in APL2008-0004, when read as a whole, indicates that the Tezak's would either have to obtain shoreline permits under the current Shoreline Management Program for the expansion of the boathouse at this location or would have to reduce the boathouse in size so that it would be consistent with the size at the time that the Shoreline Management Act and Whatcom County Shoreline Master Program were adopted.

Finding of Fact No.2 from the Hearing Examiner Decision, APL2008-0004, states as follows:

“Based on a careful review of the record, the Hearing Examiner Concludes that there was a boathouse structure, in approximately the same location as the current boathouse, and that this structure existed prior to the adoption of the Shoreline Management Act and Whatcom County’s Shoreline Program.”

Finding of Fact No. 4 from the Hearing Examiner Decision, APL2008-0004, states as follows:

“... The record establishes that the boathouse structure was expanded after 1985 and that it encroaches approximately 7-feet further into the lake than it did in 1986.”

Then later in the same Finding, it states, again, as follows:

“ The boathouse was expanded in length approximately 7-feet after 1986.”

The Hearing Examiner’s Decision on that matter reads as follows:

“The Hearing Examiner concludes that Bill and Joan Tezak are entitled to nonconforming rights to a boathouse structure on their property at 1380 Roy Road, Bellingham, Washington, but that the structure has been illegally expanded seven-feet further from the shoreline without permit approval and that the Tezak’s must either obtain a Conditional Use Permit for the expansion, or re-establish the boathouse at a location seven-feet closer to the shoreline than it is now located. This matter is remanded to Whatcom County Planning and Development Services for further corrective action consistent with this decision and with the requirements of WCC 23.50.90.”

III.

The Determination by Whatcom County Planning and Development Services set forth in the Notice of Corrective Action, dated August 11, 2009, fully carries out the intent of the Hearing Examiner in the Decision on APL2008-0004. Read as a whole, that Decision requires that the Tezak’s either obtain appropriate shoreline permits for the expansion of the boathouse by extending it 7-feet further into the lake or reduce the boathouse back to its configuration on the date it became a nonconforming use. Taking 7-feet off of the water-ward end of the boathouse, both, reduces the expanded boathouse to approximately its original size and makes the water-ward end of the boathouse 7-feet closer to the shore. This was all the Hearing Examiner required in the Appeal Decision.

The Mussio’s are requesting that the Hearing Examiner resolve a boundary line dispute and

have read into the Hearing Examiner's Decision in APL2008-0004 a determination by the Hearing Examiner requiring the boathouse to be moved from "within front of" the Mussio's property. The Hearing Examiner did not order the relocation of the boathouse to a location the Mussio's desired. The Hearing Examiner has the authority to require that legal nonconforming uses not be expanded after they became nonconforming unless appropriate permits are obtained. This is what the Hearing Examiner did in the Decision of June 19, 2008.

The Hearing Examiner does not have the authority to resolve boundary line disputes. Disputes over the boundary lines of real property lie within the jurisdiction of Superior Court. The ownership of the lake bed and the direction and location of property lines when taken at a lake shoreline, if adjacent upland owners do have ownership rights in the lake bed, present complicated factual and legal issues. The title to property can be obtained through adverse possession. The Mussio's have not established that the dock in question encroaches on property to which they have title. If the record was sufficient to establish such facts and support legal determinations, it is beyond the Hearing Examiner's jurisdiction or authority to rule on these issues.

IV.

Any Finding of Fact deemed to be a Conclusion of Law is hereby adopted as such. Based on the foregoing Findings of Fact and Conclusions of Law, now is entered the following

DECISION

Whatcom County Planning and Development Services have appropriately enforced the Decision of the Hearing Examiner in APL2008-0004 by reducing the size of the boathouse through the elimination of seven feet of the structure most water-ward from the Tezak's shoreline. The Appeal is DENIED.

NOTICE OF APPEAL PROCEDURES FROM FINAL DECISIONS OF THE WHATCOM COUNTY HEARING EXAMINER

This action of the Hearing Examiner is final. The following review procedure is available from this decision and may be taken by the applicant, any party of record, or any County department.

Appeal to County Council. Within ten calendar days of the date of the decision a written notice of appeal may be filed with, and all required filing fees paid to, the Whatcom County Council, Courthouse - 1st Floor, 311 Grand Avenue, Bellingham, WA 98225. The appeal notice must state either:

- 1) The specific error of law which is alleged, or
- 2) How the decision is clearly erroneous on the entire record.

More detailed information about appeal procedures is contained in the Official Zoning Ordinance at Section 20.92.600-.830. A copy of this document is available for review at the County Council Office.

After an appeal has been filed and the Council office has received the hearing record and transcript of the public hearing, the parties will be notified of the time and date to file written arguments.

DATED this 18th day of December 2009.

Michael Bobbink, Hearing Examiner