

WHATCOM COUNTY HEARING EXAMINER

RE: Administrative Appeal) APL2009-0019
Application for)
)
Michelle Schraeder / Edwin Stone) FINDINGS OF FACT,
Appellants) CONCLUSIONS OF LAW,
) AND DECISION

SUMMARY OF APPEAL AND DECISION

Appeal: Michelle Schraeder and Edwin Stone are appealing Staff's Determination approving Application for an Exempt Gift Land Division, EXE 2003-00280.

Decision: The Determination of Whatcom County Planning and Development Services approving EXE 2003-00280, on June 16, 2009 is UPHELD and the APPEAL is DENIED.

FINDINGS OF FACT

I.

Background Information

Appellant: Michelle Schraeder/Edwin Stone

Property Owner: Roy Palmer

Property Location/Address: 5500 block Everson-Goshen Road
Bellingham, Washington

Legal Description: Portion of the NE ¼ of section 26, T39N, R3E, W.M.

Assessor's Parcel Number (APN): 390326 428375

Zoning: Rural – One Dwelling per Five Acres
[R5A, subject to Agriculture Protection Overlay-WCC 20.38]

Minimum Lot Size: five (5) acres

Comprehensive Plan: Rural

Subarea: Lynden – Nooksack Valley

Authorizing Ordinances: WCC 20.92 Hearing Examiner
 WCC 20.84.240 Appeals

Applicable Whatcom County Codes:
WCC 21.03.020(6) Gift Exemption Requirements
WCC 20.38 Agriculture Protection Overlay Zone
WCC 20.36.315 Exempt Cluster Tract
WCC 16.16 Critical Areas Ordinance
Chapter 5 Whatcom County Development Standards

Notice Requirements: Legal Notice, published August 27, 2009
 Posting Notice, dated August 24, 2009

Open Record Hearings: September 9 and October 28, 2009

Exhibits

- 1 Administrative Appeal Application
 - 1-1 Statement of Appeal, Edwin Stone
 - 1-2 Memorandum, dated June 16, 2009 from Tyler Schroeder to Michael Bobbink
 - 1-3 County Council Decision, dated September 30, 2004, Appeal of Mark and Roy Palmer from the decision of Hearing Examiner, APL2004-0001
 - 1-4 Customer Receipt

- 2 Declaration of Easement, dated May 21, 2009

- 3 Conservation Easement, dated May 21, 2009

- 4 Memorandum dated June 16, 2009 from Schroeder to Bobbink with attachments
 - 4-1 Memo, dated June 10, 2009 from Lee Carter to Wayne Fitch
 - 4-2 Statutory Warranty Deed, dated November 3, 2003, with attached Exhibit A and Plat Map

- 5 Email correspondence [Robertson, Magner, Schroeder]

- 6 Certificate of Posting, dated August 24, 2009

- 7 Legal dated August 27, 2009

- 8 Brief, dated September 4, 2009, from Dannon Traxler, with attachments
 - 8-1 Administrative Appeal Application of Schraeder/Stone
 - 8-2 Critical Area Assessment: Wetland Delineation Mitigation Plan, July 2008
 - 8-3 WCC 21.02 Variances, Appeals and Amendments
 - 8-4 WCC 12.08 Construction Standards

- 8-5 Hearing Examiner's Decision, APL2004-0001, Stone/Schraeder Administrative Appeal
- 8-6 Email Memo, dated March 13, 2008 from Dainel Gibson to Lee Carter
- 8-7 PDS Case Activities for SSS2006-0011
- 8-8 Email Memo, dated August 12, 2009 from Lyn Morgan-Hill to Dannon Traxler
- 8-9 Memorandum, dated June 16, 2009 from Tyler Schroeder to Michael Bobbink
- 8-10 Letter dated March 16, 2009 from Department of the Army, Corps of Engineers to Mark and Patricia Palmer, Roy and Doris Palmer
- 8-11 Email Memo, dated August 14, 2009 from Doug Goldthorp to Dannon Traxler

- 9 Memorandum in Support of Appeal, dated September 9, 2009, from Douglas Robertson

- 10 Curriculum Vitae: Tony Freeland

- 11 Map showing Everson-Goshen Road Access Road & Easement Plan & Profile

- 12 Site Color Photos (9)

- 13 Dan McShane Vitae

- 14 Letter dated August 3, 2009 from Stratum Group re: Geology Conditions- Proposed Access Road

- 15 Information on the Extent of Fish and Wildlife Habitat Enhancement Projects, prepared by John Gillies, with attached aerial map Stream Enhancement Projects, Ten Mile Watershed

- 16 Map highlighting property ownerships

- 17 Mark Palmer Testimony

- 18 Motion to Enter Order of Denial of Application, filed by Douglas Robertson, dated September 16, 2009, with attachments
 - 18-1 Memorandum in Support of Entry of Order of Denial
 - 18-2 Affidavit of Mailing/Delivery

- 19 Memorandum in Response to Appellants' Motion to Enter Order of Denial of Application, filed by Dannon Traxler, dated September 25, 2009, with attachments
 - 19-1 AB No. 2000-160/Ordinance No. 2000-056
 - 19-2 Ordinance No. 2003-033
 - 19-3 AB No. 2003-175 A/ Ordinance No. 2003-058
 - 19-4 AB No. 2002-109/Ordinance No. 2002-017
 - 19-5 AB No. 2004-163/Ordinance No. 2004-031
 - 19-6 AB No. 2008-404A/Ordinance No. 2009-007
 - 19-7 AB No. 2001-153/Ordinance No. 2001-027

- 20 Hearing Examiner Memo, dated October 8, 2009, denying Order to Denial
- 21 Staff Report, dated October 9, 2009 with attachments
 - 21-1 Memo dated June 10, 2009 from Lee Carter to Wayne Fitch
 - 21-2 Conservation Easement, dated May 21, 2009
 - 21-3 Critical Areas Memo, dated October 9, 2009
 - 21-4 Aerial Photo, highlighting GeoHazards and Wetlands / Subject Properties
 - 21-5 Hand-written notes from Meeting to discuss gift exemption final approval, Memo dated June 9, 2005 from Jay Irwin
 - 21-6 Memo, dated October 7, 2009 from Douglas Goldthorp to Tyler Schroeder
 - 21-7 Memo, dated March 19, 2003, from Larry Stoner to Elaine Wick
 - 21-8 Staff Report, dated August 13, 2003
 - 21-9 Statutory Warranty Deed, Exempt Stamp dated April 7, 1999
 - 21-10 Statutory Warranty Deed – Conveys to Palmer, Exemption, dated July 25, 2000
 - 21-11 Statutory Warranty Deed –Lot Line Adjustment Murray, July 25, 2000
 - 21-12 Conveyance of Densities, Exempt Stamp dated March 24, 2004
 - 21-13 Statutory Warranty Deed, “Re-record to satisfy Hearing Examiner’s requirements,” dated November 3, 2003
- 22 Email correspondence [Robertson, Traxler, Schroeder, dated Oct 13 and 14, 2009]
- 23 Supplemental Staff Report Addendum, Engineering Services, dated October 16, 2009 from Robert Petersen
- 24 Notebook: Appellant’s Supplemental Memorandum in Support of Appeal, dated October 23, 2009 with attachments 00 thru 27a-e [index included with notebook]
- 25 Preliminary Stormwater Proposal to Whatcom County, Jones Engineers, dated October 22, 2009
- 26 Letter dated October 23, 2009 from Dannon Traxler
- 27 Letter dated October 26, 2009 from Dannon Traxler
- 28 Memorandum in Response to Supplemental Materials Submitted Applicant, dated October 27, 2009
- 29 Letter, dated October 27, 2009 from Dannon Traxler
- 30 Email memo, dated October 30, 2009 from Doug Robertson re: Vesting issue, with attached Case Law, Exhibit 30-1, East County Reclamation Co v. Nancy Bjornsen and F. Gene English, No. 30109-1-II, dated January 25, 2005

- 31 Email memo, dated October 30, 2009, from Dannon Traxler re: Vesting issue response to Doug Robertson's memo
- 32 Email memo, dated October 30, 2009, from Robertson re: vesting issue, opposing opening record, response to Traxler's memo
- 33 Memorandum Regarding Jurisdiction Over Density, dated November 6, 2006 from Doug Robertson, with Declaration of Service, dated November 6, 2009 attached [Ex 33-1]
- 34 Memorandum re: Allowable Density Position, dated October 9, 2009, from Tyler Schroeder, through Royce Buckingham
- 35 Letter, dated November 6, 2009, from Dannon Traxler re: Agreement to amend deed and reinstate densities

Parties of Record:

Michelle Schraeder/Edwin Stone
3413 Mt. Baker Highway
Bellingham, WA 98226

Douglas Robertson
Belcher Swanson
900 Dupont Street
Bellingham, WA 98225

Roy and Mark Palmer
5643 Everson-Goshen Road
Bellingham, WA 98226

Dannon Traxler
Langabeer & Tull
PO Box 1678
Bellingham, WA 98227

Sandy Petersen, Development Manager
Division of Engineering

Tyler Schroeder, Current Planning Supervisor
Planning and Development Services

Royce Buckingham, Civil Deputy Prosecutor

II.

Roy Palmer is the owner of an approximately 12-acre parcel, Assessor's Parcel No. 390326 428375. On May 15, 2003, Mr. Palmer applied for EXE 2003-00280, seeking to use the Gift Exemption Provisions of WCC 21.03.020(6), in effect on the date of application, to create two lots, each in excess of five acres. An access point and ingress and egress to one of the proposed parcels would cross an adjoining parcel. Mr. Palmer granted and recorded an easement, giving access to the newly created parcel from Everson-Goshen Road.

The matter was routed to the Whatcom County Division of Engineering for review of the proposed ingress and egress access. Engineering determined that an easement had been created and recorded under Auditor's file No. AF 2000-800504. Engineering indicated that the location of the proposed access easement to and from Everson Goshen Road met the requirements for sight-distance for entering onto Everson Goshen Road, and that the access point may need to have the bank sloped back and the grade cut down prior to approval of the access to Everson Goshen Road from the easement road when constructed.

Engineering concluded that the proposed Exemption appeared to meet the required components for a Gift Exemption and recommended approval of the Exemption.

Whatcom County Planning and Development Services approved the requested Exempt Land Division on January 29, 2004. Thereafter the above-named Appellants appealed Planning's approval of the Gift Exemption Land Division to the Whatcom County Hearing Examiner.

On May 17, 2004, the Hearing Examiner entered a Decision on the Administrative Appeal, APL2004-0001. This Decision read as follows:

Decision

An Applicant for a Land Division by Gift Exemption is required to establish that each lot to be created has an access to Whatcom County roads that can be developed with an ingress and egress road that can conform to applicable Whatcom County Ordinances, including the Critical Areas Ordinance, prior to approval of the proposed land division. This matter is hereby remanded to Whatcom County Planning and Development Services for a new review of the subdivision requested in accordance to this opinion.

All issues related to the applicability of the Whatcom County Road Construction Development Standards are to be decided by the Whatcom County Division of Engineering and any Appeal of the Decision of the Division of Engineering in this regard is to be appealed to the Technical Advisory Committee pursuant to the procedures set forth in WCC 12.08.035, paragraph (I). The Division of Engineering

is to reconsider their determination in accordance with this Decision. In particular, they are to determine whether or not the entire proposed access road can be constructed consistent to the County Road Standards.

The Applicant for the Gift Exemption appealed the Hearing Examiner Decision to the Whatcom County Council. On September 30, 2004, the Whatcom County Council upheld the Decision of the Hearing Examiner and remanded the matter for further action as required and consistent with the Hearing Examiner's May 17, 2004, Decision.

This Decision of the Whatcom County Council was not appealed and the matter was remanded back to Planning and Development Services, pursuant to the Hearing Examiner's Decision, set forth above.

III.

On or before June 16, 2009, Whatcom County Planning and Development Services concluded that the information required by the Remand Order had been provided, that the Applicants [Palmer] had provided sufficient information to establish that the proposed access easement corridor was sufficient to allow the construction of a legal access road from Everson-Goshen Road to the proposed Gift Exemption parcel. Based on this Determination, Planning and Development Services again approved the Gift Exemption on June 16, 2009. The Appellants herein again appealed the approval of the Gift Exemption and this matter came before the Hearing Examiner as APL2009-0019.

IV.

Between the Remand and the second approval of the Gift Exemption by Planning, the Applicant submitted a Wetland Delineation and Report delineating the wetlands on the property. This Report was accepted as complete and adequate by the Critical Areas Technical Administrator, who reviewed the proposal for construction of a road within the proposed easement; approved a mitigation plan for impacts to the functions of a wetland buffer crossed by the road; and accepted a Conservation Easement from the Applicants providing permanent protection to wetlands and buffers on site.

Responding to Critical Areas issues [potentially unstable slopes], the Whatcom County Geologist visited the site in 2005; approved the revised proposed road easement on June 22, 2005 [see Exhibit 21-5]; reviewed the Geo-hazard Report from the Stratum Group, dated August 3, 2009; and re-visited the property on October 7, 2009. After all of this review, the County Geologist has concluded that there are no geo-hazards that require further detailed assessment of the proposed road development; that the proposed road location presents no threat to public health or safety; and that there is no significant risk to proposed or surrounding developments.

Prior to the approval of the Gift Exemption, Planning received a memorandum from the Division of Engineering, dated June 10, 2009. Engineering indicated that the revised easement

location would need to be recorded and concluded that the road could meet the requirements for sight distance. Engineering did not indicate any barriers which would prohibit road development within this easement and pointed out that all work would have to be permitted.

After review, Planning re-approved EXE 2003-00280, on June 16, 2009.

This second approval of the Gift Exemption Land Division was again appealed by Michelle Schraeder and Edwin Stone. The Appeal was filed in a timely manner. The Appeal is properly before the Hearing Examiner. The Appellants raised the issue of the need for a stormwater plan for the proposed road and provided expert testimony from Tony Freeland, a licensed Civil Engineer, and Dan McShane, a licensed Geologist. Staff conceded that no Preliminary Stormwater Plan evaluation had been done. On the request of the Applicant, the Hearing Examiner continued the matter in order to develop evidence on the issues raised by stormwater runoff from the proposed road.

The Appellants also provided testimony from John Gillies, a Soil Conservation Specialist, who testified about significant wildlife enhancement projects in the area and concern that potential sediment-laden run-off be transported down stream and potentially into Ten Mile Creek.

V.

The second hearing was held on October 28, 2009. At this time, the property owner had the Wetland Specialist, Katrina Jackson, testify. Doug Goldthorp, the County Geologist, also testified. Additional testimony was taken from Dan McShane and both of the Appellants testified.

Based on the entire record, the Hearing Examiner has concluded that a road can be developed within the revised, proposed easement area, which will meet the requirements of the Critical Areas Ordinance in regard to both wetlands and geo-hazards.

Prior to any road construction, a Clearing and Grading Permit from Whatcom County will be required. The record establishes that the proposed easement corridor can meet the regulatory requirements for construction of a roadway to access the additional lot created by the Gift Exemption.

VI.

The Appellants again attempt to have the Hearing Examiner hear and rule on issues of whether or not the road can meet the Road and Stormwater Development Standards. The Hearing Examiner, consistent with the Conclusions of Law and Decision in the previous Appeal, APL2004-0001, ruled at the hearing that the Hearing Examiner does not have the authority to address the development regulation issues because the Whatcom County Code set up a specific appeal process for Appeals of Engineering Decisions on Road and Stormwater Standards. This process requires a review by the Technical Advisory Committee and appeal thereafter to the County Executive. The Hearing Examiner also ruled that the jurisdictional issues were already decided in the previous Decision, APL2004-0001, and the Appellants could not raise them again.

VII.

Whatcom County has determined that the Palmer property, which is the subject of the proposed Gift Exemption division, has a total of seven allowable building densities. The Appellants challenge this Determination. In order to understand this issue, a brief history is required.

In 1999, all of the parcels involved in this matter were part of an approximately 36-acre parcel owned by Maggie Murray (Murray).

In 1999, Murray conveyed to the Appellants herein (Schraeder and Stone) approximately 25.6-acres of the 36-plus acre parcel, leaving a remainder parcel in Murray's name of approximately ten acres. During the 1999 transfer from Murray to the Appellants, the Parties agreed that all seven densities allowed for the 36-acre parent parcel would go with the ten-acre cluster parcel and that the 25-plus acre parcel transferred to the Appellants would be entitled to no building density. A Certificate of Allowed Densities (CAD) was prepared and signed by both the Appellants and by Murray. For some reason the Certificate of Allowed Density was not recorded with the deed. Thereafter, a corrected deed was filed indicating that the Murray property had seven densities and the Appellants' property had none. It does not appear that the Appellants were aware of or party to the correction deed. However, it is clear that the Appellants were aware that the 25-plus acre parcel they were purchasing from Murray had no building density.

In March 2000, deeds were filed as part of a Boundary Line Adjustment between Murray and Roy and Doris Palmer (Palmer). Through the Boundary Line Adjustment, Murray transferred approximately five acres of property to Palmer. This property was attached to an adjoining property already owned by Palmer, creating the parcel which Palmer wishes to divide by the Gift Exemption which is the subject of this Appeal. In the deeds acknowledging the Boundary Line Adjustment, a Certificate of Allowed Density, giving three units of building density to Palmer and retaining one unit of density development in the Murray remainder parcel, was filed. Through these deeds, an existing seven building density allowance was reduced to four. It is unclear from the record as to why or how that happened. It does not appear that the Appellants herein were part of that transaction.

In 2003, Palmer applied for this Gift Exemption to divide the Palmer parcel and requested the three densities not transferred by the deeds memorializing the 2000 Boundary Line Adjustment be assigned to his property.

Initially, Staff denied the request of Mr. Palmer to be assigned the three densities at question. Mr. Palmer appealed (APL2003-0004). Staff indicated in their Staff Report on this Appeal that any assignment of densities would require agreement of all of the current property owners who have a right in the property which received the seven densities in 1999, and that those Parties were Clifford/Knutson and Palmer. The Appellants herein appeared at the Appeal hearing. They were Parties of Record.

That hearing was continued and during the continuance, Palmer and Clifford/Knutson reached an agreement regarding the densities. This agreement met the requirements of Planning that all of the current owners in the property which was originally entitled to the densities consent to any assignment of these densities. The three densities at issue were assigned to Clifford/Knutson who conveyed them by deed recorded on March 24, 2004 [Exhibit 21-12]. Since Mr. Palmer had reached an agreement with Mr. Knutson resolving the issues which led Planning to deny his request to assign the three densities at issue to his property, his Appeal became moot. The Hearing Examiner was not notified that the matter had been settled and no Order Dismissing the Appeal has been entered.

With the deed of three densities from Clifford/Knutson to Palmer on March 24, 2004, the Palmer property is entitled to six of the original seven densities retained by Murray when she transferred, without a building density, approximately 26-acres to the Appellants herein.

There is nothing in the documentary record which would indicate that the Appellants herein were entitled to or felt they were entitled to a density at the time that they purchased the property from Murray. They bought the 26-acre parcel from Murray knowing that they could not build on it.

As part of this 2009 Appeal, the Appellants are challenging the assignment of the three densities at issue to Palmer.

The Administrative Decision resolving the three densities was made by Whatcom County and memorialized by deed filed in February 5, 2004 and March 24, 2004. It is not clear from the record when the Appellants learned of the assignment of density set forth in the 2004 deeds. However, Appellant Schraeder indicated at the hearing that she had been aware of the County's Decision for a long period of time.

VIII.

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 by the Whatcom County Council in AB2004-230 upheld both the factual determinations and the legal Conclusions reached by the Hearing Examiner in the Hearing Examiner's file APL2004-0001. In the Hearing Examiner's Decision on Appeal, APL2004-0001, the Hearing Examiner concluded [Conclusion of Law No. II] that the appeal process for Appeals of Decisions made by the Technical Administrator when applying Road Construction Development Standards was the process set forth in WCC 12.08.035, paragraph 1. The Hearing Examiner now concludes that an Appeal of any Decisions made by the Technical Administrator when applying Stormwater Standards will have to follow the same appeal process. This section states that an Appeal

of the Technical Administrator's Decisions shall be made to the Technical Advisory Committee (TAC). The TAC has the authority to hear the Appeal, and is to recommend to the County Executive a Determination regarding the administration of the specific Development Standards at issue.

The Decision by the Whatcom County Council in AB2004-230 upheld the Hearing Examiner's legal Conclusion that Decisions made in applying the Road Construction Development Standards had to be appealed to the Technical Advisory Committee and that the Hearing Examiner had no jurisdiction to hear these Appeals.

This Decision of the Whatcom County Council was not appealed. The Parties in the original Administrative Appeal, APL2004-0001, are the same Parties as in this Appeal. The failure of either Party to appeal the Decision of the County Council upholding the Hearing Examiner makes the Hearing Examiner's Decision in APL2004-0001 applicable to this Appeal.

The Hearing Examiner has reconsidered this legal Conclusion in view of the arguments again raised on this issue by the Appellants and finds no convincing rationale which would allow or support reconsideration of the Hearing Examiner's previous ruling on this matter.

II.

The Gift Exemption to the subdivision requirements was found in WCC 21.030.020(6)(e). The Applicant's Application for Gift Exemption was filed in 2003 and is vested. There is no longer an exception to Subdivision Rules for a Gift Exemption.

The Hearing Examiner Decision in APL2004-0001, regarding this Gift Exemption Application required the Applicant requesting division through the Gift Exemption to establish that an ingress and egress road connecting the created parcel to the Whatcom County road system can be legally developed within the easement corridor recorded as part of the Gift Exemption process. This Decision did not require that the necessary permits be obtained prior to approval of the Gift Exemption. Additionally, the Ordinance language applying to Gift Exemptions specifically stated that no road construction is required prior to approval of the Gift Exemption.

Based on the record as a whole, the Hearing Examiner concludes that the Applicants can obtain the necessary permits to construct a road through the revised easement corridor now proposed. This was all that the Hearing Examiner Decision in APL2004-0001 required of the property owner. The Decision by Planning and Development Service to approve the Gift Exemption on June 16, 2009, should be upheld and the Appeal should be denied.

III.

The Administrative Determination allowing the assignment of the three densities, at issue, to Palmer with the agreement of Clifford/Knutson was made by Whatcom County Planning in 2004. That Decision resolved the issue of the requested reassignment of three densities.

The Hearing Examiner's jurisdiction to hear Appeals of Administrative Determinations is specifically limited, by WCC 20.92.211, to Appeals filed within fourteen days of the Administrative Determination or Decision. Since this Determination was made in 2004, the Hearing Examiner lacks jurisdiction to hear the Appeal.

The failure to file a timely Appeal can, in certain circumstances, be set aside by Superior Court through that Court's authority to apply the principles of equitable relief. However, the Hearing Examiner has no such authority and is bound by the fourteen day limitation on an Appeal as set forth in Whatcom County Ordinances. This Conclusion of law has been reached with the full understanding that the Appellants herein did not have notice of the Decision within ten days but did have notice for a period far in excess of ten days before they raised the issue in this Appeal.

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

The Decision of Whatcom County Planning and Development Services, approving Gift Exemption, EXE2003-00280, on June 16, 2009, is hereby UPHeld and 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 23rd day of November 2009.

Michael Bobbink, Hearing Examiner