

WHATCOM COUNTY HEARING EXAMINER

RE: Administrative Appeal) APL2008-0037
Application for)
Paul Van de Velde) FINDINGS OF FACT,
) CONCLUSIONS OF LAW,
) AND DECISION

SUMMARY OF APPEAL AND DECISION

Appeal: Paul Van de Velde, Appellant herein, has appealed an Administrative Determination made through the issuance of a Notice of Violation, dated October 23, 2008. The Notice alleged Mr. Van de Velde had violated Whatcom County Shoreline Management Program by undertaking development within the Shoreline Management Program jurisdiction without submitting the proposed development to review, without requesting a Statement of Exemption, and/or without applying for and obtaining permit approval. The development included the construction of an enclosed gazebo-type structure between the home and the shoreline, a patio between the home and the shoreline, and the construction of a retaining wall, behind which fill was placed, near the Ordinary High Water Mark, and the associated removal of two mature trees.

Decision: The Administrative Determination set forth in the Notice of Violation is upheld and the Appeal is denied.

FINDINGS OF FACT

I.

Background Information

Appellant/Property Owner: Mr. Paul Van de Velde

Property Address: 2460 Lake Whatcom Boulevard
Bellingham, Washington

Parcel Number: 370406-286528

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

- 9 Email, dated August 21, 2009, from Dannon Traxler to Michael Bobbink
- 10 Status Report Memorandum, dated September 1, 2009, from Chad Yunge
- 11 Memorandum dated May 11, 2009 from Yunge to Bobbink
- 12 Letter dated September 4, 2009 from Dannon Traxler to Bobbink with attachments
 - 12-1 Letter dated March 19, 2009 from Traxler to Yunge
 - 12-2 Email, dated March 19, 2009 from Traxler to Yunge
 - 12-3 Email, dated March 19, 2009 from Traxler to Yunge
 - 12-4 Email, dated March 20, 2009 from Traxler to Yunge
 - 12-5 Email, dated March 25, 2009 from Yunge to Traxler
 - 12-6 Letter, dated April 1, 2009 from Tull/Traxler to Brenda Wilson, with attachment (A) Letter dated March 17, 2009 from Tull/Traxler to Bobbink with attachments [marked File Copy]
 - 12-7 Letter dated April 22, 2009 from Wilson to Traxler, Determination of Completeness-Nonconforming Use
 - 12-8 Email dated May 1, 2009 from Traxler to Yunge
 - 12-9 Memorandum, dated May 11, 2009, from Yunge to Bobbink
 - 12-10 Email dated May 20, 2009 from Yunge to Traxler
 - 12-11 Letter dated May 26, 2009 from Traxler to Yunge
 - 12-12 Email, dated June 9, 2009 from Traxler to Yunge
 - 12-13 Email, dated June 15, 2009 from Traxler to Yunge
 - 12-14 Email, dated June 16, 2009 from Yunge to Traxler
 - 12-15 Letter, dated June 24, 2009 from Paul Van De Velde to Pete Kremen
 - 12-16 Request for Decision, dated August 19, 2009, from Royce Buckingham
 - 12-17 Email, dated August 21, 2009, from Traxler to Bobbink/Magner
 - 12-18 Declaration of Service, dated August 19, 2009 from Terri Zemel
 - 12-19 Status Report Memorandum, dated September 1, 2009 from Yunge
 - 12-20 Email, dated August 25, 2009 from Traxler to Magner
- 13 Email correspondence [dated September 15, 17, 21, 22, 28] betw Traxler, Buckingham, and Bobbink re: request for additional comment time

Parties of Record:

Paul Van de Velde
215 Bayside Place
Bellingham, WA 98225

Dannon Traxler
Langabeer & Tull, P.S.
709 Dupont Street/PO Box 1678
Bellingham, WA 98227

Bryan Sehmel
Planning and Development Services

Royce Buckingham
Civil Deputy Prosecutor

II.

On October 23, 2008, Whatcom County Planning and Development Services, hereinafter referred to as Planning, issued an Enforcement Order, ENF2008-00037, to Mr. Paul Van de Velde. The Enforcement Order alleged violations of Whatcom County Shoreline Management Program associated with the construction of a gazebo, patio, a retaining wall and associated fill, and the removal of two large trees within the shoreline jurisdiction of Mr. Van de Velde's home at 2460 Lake Whatcom Boulevard, Bellingham, Washington. The Notice of Violation directed Mr. Van de Velde to undertake corrective action, including the removing of the gazebo, patio, retaining and associated fill. The Appellant was directed by Planning to apply for a demolition permit on or before November 17, 2008, to allow the complete removal of the unpermitted work done within the shoreline jurisdiction.

The Appellant filed a timely Appeal to the Hearing Examiner of the Notice of Violation and also of the monetary penalties imposed by the Whatcom County Council.

III.

This Enforcement Order arose out of a citizen's complaint about unpermitted dock work done by the Appellant. The unpermitted dock work was the source of a June 2008 Enforcement Order.

The 2008 Enforcement Order in regard to the dock was not appealed.

During a site visit, Planning Staff was made aware of other possible violations. After a search of the County records and a review of aerial photographs, Planning issued the Enforcement Order which is the subject of this Appeal.

Planning concluded that since 2004, a new and expanded retaining wall and associated fill was installed near the Ordinary High Water Mark of Lake Whatcom. Staff also concluded that a gazebo and a patio structure were constructed on the site after May 2007. There is no record of Mr. Van de Velde bringing his proposed development within shoreline jurisdiction to the attention of Planning. There was no request for a Statement of Exemption. There was no application for a Shoreline Variance and there was no application for a Shoreline Substantial Development Permit. Based on these Findings, Planning issued the Enforcement Order.

The Appellant has not denied that the work took place within the shoreline jurisdiction as outlined in the Violation Notice. The Appellant has also not claimed that he requested permits, a Statement of Exemption, did not apply for Non-conforming Use Status, and did not contact Planning prior to the development work which lead to the Enforcement Order.

IV.

The Appellant suggests that the work undertaken was either exempt under the Shoreline Management Program or could have been permitted at the time the work was undertaken, pursuant to the 1998 Shoreline Management Program. The Appellant was granted a continuance in order to allow time for a retroactive application for an Exemption from Substantial Development Permit requirements or for an application for permits, including a Shoreline Variance. The Appellant continued to argue throughout the proceedings that the work done was allowed under the 1998 Shoreline Management Program and that the Appellant was entitled "... to undertake the proper process for retroactively permitting his shoreline development which includes his dock, gazebo/playhouse, pervious patio, and small retaining wall ..." [Exhibit 12-6 (A) page 13]. The Appellant was given a number of months to seek retroactive permitting and/or establish exempt status, but no such permit applications were filed and an Application for a Determination of Exemption was also not filed. In spite of arguing on a number of occasions that the Appellant should be allowed to applying retroactively for permits and/or approval as an exempt development, and in spite of the Hearing Examiner encouraging the Appellant to apply for such permits as he thought he was entitled to them, the Appellant failed to seek any kind of retroactive approval for the work done.

V.

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 Appellant is in violation of the Whatcom County Shoreline Management Program by conducting significant development activity, as described in the Findings of Fact, without receiving a Statement of Exemption, and/or without applying for any permits. Much of the work was done within the shoreline setback applicable to Lake Whatcom, a Shoreline of Statewide Significance. In order to be approved, this work would have required a Shoreline Variance. The Appellant did not apply for a Shoreline Variance even though given months of opportunity after the Enforcement Order was issued.

II.

Work within shoreline jurisdiction requires a Shoreline Substantial Development Permit unless it is exempt. In order to determine if the work is exempt, a property owner is required to give notice of the proposed development to Planning and request a Statement of Exemption. Proceeding with the development within shoreline jurisdiction without prior review and/or permit approval is a violation of the Whatcom County Shoreline Management Program. A property owner has the burden of proof in showing that work within shoreline is exempt from permit requirements. This Appellant

failed to contact Planning before doing significant work within the regulated shorelines of Lake Whatcom, has failed to show that the work was exempt from permit requirements, and has declined to apply for permits or undertake corrective action.

III.

The Appellant has asked the Hearing Examiner to consider issues regarding the status of his dock improvements as part of this Appeal. However, as set forth in the Findings, the alleged violations in regard to the dock were a part of a June 2008 Enforcement Order. This Order included appropriate instructions on how to appeal. No Appeal was forthcoming. An Appeal of this Order would not be timely at this time and the Hearing Examiner would not have jurisdiction to review it.

The October 23, 2008, Enforcement Order which was appealed makes no mention of the dock. That is the only Order that is properly before the Hearing Examiner. The request that the Hearing Examiner deal with issues regarding the dock should be denied.

IV.

The Hearing Examiner has carefully reviewed the Findings of Fact and the Conclusions of Law set forth in the Staff Report, dated February 2, 2009, Exhibit #2 in the Hearing Examiner file. The Findings of Fact in the Staff Report are adopted as Findings of Fact herein.

The Hearing Examiner also concurs with the legal conclusions drawn by Staff in the Staff Report and hereby adopts them as Conclusions of Law herein.

The Notice of Violation and required Corrective Action should be upheld and the Appeal should be denied.

V.

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 Hearing Examiner upholds all of the determinations made by Whatcom County Planning and Development Services' Staff in the Notice of Violation, dated October 23, 2008, in case number ENF2008-00079, including the required corrective actions are upheld and the Appeal is denied. The Appellant is ordered to apply for a Demolition Permit from Whatcom County in order to remove the illegal development and to restore the affected area, pursuant to WCC 23.80.02, within thirty days of the date of this decision and to remove the illegal development per the terms of the Demolition Permit.

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 6th day of October 2009.

Michael Bobbink, Hearing Examiner

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David Stalheim
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February 2, 2009

WHATCOM COUNTY PLANNING AND DEVELOPMENT SERVICES

STAFF REPORT

The application of
Mr. Paul Van de Velde
For an Appeal of a Code Violation

APL2008-00037
FINDINGS, CONCLUSIONS,
AND RECOMMENDATIONS

I. SUMMARY OF APPEAL AND REQUEST FOR DETERMINATION

Appeal

The Appellant contests the administrative determination made on a Notice of Violation dated October 23, 2008. The determination referenced development within Shoreline Management Program (SMP) jurisdiction without prior review and/or permit approval on record. Specifically, this included construction of an enclosed gazebo-type structure and patio, and construction of a retaining wall with associated removal of two mature trees.

Not Part of This Appeal

It is not appropriate to discuss the following issues as part of this appeal: 1) Issues surrounding the dock and 2) Notices of Penalty. Please see attached Appendix "C" for copies of the related documents.

Request for Determination

Staff respectfully requests that the Hearing Examiner uphold both the administrative determination and the required corrective actions from the Notice of Violation dated October 2008.

II. PRELIMINARY INFORMATION

Background Information

Appellant/Property Owner: Mr. Paul Van de Velde
Property Address: 2460 Lake Whatcom Blvd.
Parcel Number: 370406-286528
Zoning Designation: Residential Rural (RR2)
Shoreline Designation: Shoreline Residential

Procedural Information

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 23.80.02 Violations and Penalties

III. FACTS AND FINDINGS

Location

The subject parcel is located on the shoreline of Lake Whatcom and immediately north of Lake Whatcom Boulevard. It is east of Bellingham, Washington and northwest of the community of Sudden Valley. It is within the jurisdiction of the Whatcom County Shoreline Management Program (SMP) and is designated "Shoreline Residential" in the 2008 SMP. This was verified by consulting the Whatcom County Geographical Information Systems (GIS) maps (Attached App. "A-1"). The data in this mapping system is based on the Official Shoreline Map pursuant to WCC 23.30.02.

Appeal Application

Whatcom County Planning and Development Services (PDS) staff received the appeal application (Attached App. "B-1,2,3,4,5") and filing fee in a timely manner on November 18, 2008. The appeal was filed under case number APL2008-00037. The appeal addresses an administrative determination rendered by PDS staff on October 23, 2008 and outlined on the Notice of Violation dated the same.

Site Inspection & Aerial Photographs

This appeal is the result of formal enforcement action associated with case number ENF2008-00079. PDS staff conducted a site inspection on February 27, 2008 and took photos (Attached App. "A-2,3,4"). Further research – including electronic and physical permit records as well as aerial photography – confirmed violations of the SMP.

With regard to the aerial photographs, Staff noted a difference between aerial photos from March 2004 (Attached App. "A-5") and those from May 2007 (Attached App. "A-6"). In that time, at least two mature evergreens were removed, a new wall was constructed east of the remaining tree (to retain additional fill material), and the configuration of the westerly retaining wall was altered (moved forward with a shallower slope further toward the dock to the west). By February 2008 (Attached App. "A-7,8"), the enclosed gazebo-type structure was built. Finally, aerial photographs from May 2008 (Attached App. "A-9,10,11,12") showed further waterward expansion of the patio from the bottom of the staircase to a point at or near the Ordinary High Water Mark (OHWM).

Notice of Violation

Staff issued an administrative determination via certified mail in a Notice of Violation dated October 23, 2008 (Attached App. "B-6,7"). The Notice was delivered and signed for on October 29, 2009 by the Appellant (Attached App. "B-8").

Staff documented development without prior review and/or permit approval on record. In this instance, the development consisted of construction of an enclosed gazebo-type structure and patio (since May 2007). Staff also documented construction of a retaining wall in association with removal of two mature trees (since March 2004). These activities all occurred waterward of a pre-existing retaining wall located between the OHWM and the existing single-family residence. The new, smaller retaining wall extended near the OHWM.

Required Corrective Actions

The Notice of Violation also included corrective action. PDS staff was not provided with the opportunity to review a development proposal for the gazebo, patio, retaining wall (and associated fill) etc. However, the development could not have been approved in its current location and configuration within the "Shoreline Residential" designation.

As a result, the Appellant was required to apply by November 17, 2008 for a demolition permit from Whatcom County to completely remove the gazebo, patio, retaining wall (and associated fill) etc. and

with sensitivity to the Lake. He was required not to commence demolition until authorized to proceed via issuance of the permit. He was also advised that he may also be required to completely restore the area pursuant to WCC 23.80.02.

To date, the Appellant has not complied with any part of the required corrective actions to restore the site. He has failed to apply for a demolition permit, and has failed to remove the unpermitted structures.

IV. BASIS FOR APPEAL AND BASIS FOR STAFF'S DETERMINATION

The Appellant contests the administrative determination made on October 23, 2008 regarding development within SMP jurisdiction without prior review and/or permit approval on record.

The following is Staff's rebuttal to the issues raised (emboldened) in the letter addressed to the Hearing Examiner as part of the appeal application (Attached App. "B-3,4,5"):

- 1) **"The County also issued a determination that the development...which included the construction of a gazebo-type structure and patio, and construction of a retaining wall are in violation of WCC 23.50.01. We also disagree with this determination, because this type of residential, water-oriented recreational use is allowed by both the 1998 SMP...and the 2008 SMP.... Permits for this type of development within the shoreline setback can be obtained through the variance process. This type of development is exempt from a shoreline substantial development permit process."**

Violation

Staff documented development without prior review and/or permit approval on record. The development consisted of construction of an enclosed gazebo-type structure and patio (since May 2007) and construction of a retaining wall with associated fill and removal of two mature trees (since March 2004). This new retaining wall was constructed near the Ordinary High Water Mark (OHWM).

"Development"

Pursuant to WCC 23.50.01, the SMP shall apply to any use or development as defined in SMP Chapter 11. The development that occurred on the subject parcel met this definition and was subject to the SMP; it was regulated. As a result, review and/or permit approval were required prior to the construction.

Development Consistent with the SMP

Further, "All development and use of shorelines of the state shall be carried out in a manner that is consistent with [the SMP] and the policy of the [Shoreline Management] Act..., whether or not [emphasis added] a shoreline permit or statement of exemption is required for such development pursuant to Chapter 6 of [the SMP]" (WCC 23.50.01.B).

Similarly, "No substantial development as defined in Chapter 11 shall be undertaken within shorelines by any person on shorelines without first obtaining a substantial development permit from Whatcom County; provided that, such a permit shall not be required for the exempt activities listed in SMP 23.60.02.2" (WCC 23.50.01.C).

Exemptions from Shoreline Substantial Development Permit Process

The Appellant argues that this type of development is exempt from the shoreline substantial development permit process. The Appellant attempts to justify that assertion by stating that residential, water-oriented recreational uses are permitted within the Shoreline Residential designation of the SMP

(WCC 23.30.06.4 & 23.100.10.C.4). Regardless of the validity of that statement, review and/or permit approval was required prior to the development. This would have consisted of a Shoreline Substantial Development Permit or a Statement of Exemption.

However, please note that, “An exemption from the substantial development permit process is not an exemption from compliance with the [Shoreline Management] Act or [the SMP], or from any other regulatory requirements...A statement of exemption shall be obtained for exempt activities consistent with the provisions of SMP 23.60.02” (WCC 23.60.02.1.A).

Development is not Appurtenant

In this instance, the Appellant constructed an enclosed gazebo-type structure, a patio, and a retaining wall with associated fill and tree removal). Of all the exemptions listed under WCC 23.60.02.2, this development most closely fits under WCC 23.60.02.2.G. However, exemptions shall be construed narrowly (WCC 23.60.02.1.B), and the development does not meet the definition of a normal “appurtenance” listed under SMP Chapter 11.

As a result, the development would have required prior approval thru the shoreline substantial development permit process. Further, if the total cost or fair market value of the development, whichever is higher, exceeds \$5718.00 (WCC 23.60.02.2), then the activity is not exempt from the shoreline substantial development permit process. Finally, “The burden of proof that a development or use is exempt is on the applicant/proponent of the exempt development action” (WCC 23.60.02.1.C).

Variance Process

Finally, the Appellant argues that permits for this type of development can be obtained through the variance process. But, variances must meet the Variance Permit Criteria (WCC 23.60.03), and are typically reserved for unavoidable hardships or extraordinary or unique circumstances, such as irregular lot shapes or sizes. Staff does not recommend this option and would likely not be able to support it before the Hearing Examiner. However, the Appellant retains the right to enter into the variance process.

- 2) **“These determinations that our client’s development violates the County SMP and should therefore be removed, adversely affect our client’s property rights, because they ignore the fact that these uses are permitted and/or allowed by the Whatcom County Code and would be approved in a normal permitting and/or nonconforming use process.”**

Required Corrective Action

The statements above demonstrate that the Appellant’s development clearly violated the SMP and that the associated administrative determination was issued appropriately. However, the Notice of Violation dated October 2008 also included required corrective action. Although the Appellant did not submit a development proposal prior to construction, Staff contends that the development could not have been approved in its current location and configuration for the reasons listed below.

Non-conforming Development Status

First, this development clearly does not qualify as non-conforming. Construction of the gazebo-type structure and patio occurred after May 2007, while construction of the retaining wall (and associated fill and tree removal) occurred after March 2004.

Gazebo-type Structure

Second, the gazebo-type structure was not authorized and would have been required to conform with WCC 23.90.09.B.9. It states that, “Accessory uses that do not require a shoreline location shall be sited

away from the land/water interface and landward of the principal use....” Further, accessory structures are not allowed within the 100-foot setback from the OHWM (SMP Table 23.90.13.C). Finally, shoreline permits are required for accessory development that does not meet the intent and definition of an appurtenance (WCC 23.100.11.B.2).

Retaining Wall, Patio, Landfill and Excavation, and Clearing

Likewise, construction of the retaining wall and the patio – with the associated landfill, excavation, and clearing (removal of trees) – was not authorized. It is allowed only along with approved shoreline use and development including conformance with WCC 23.90.10 and 23.90.06.

- 3) **“To order the removal of the development would be unnecessary, wasteful, and costly, especially when Mr. Van de Velde is quite willing to undertake the proper procedure.... An order directing Mr. Van de Velde to undertake the proper process for this sort of shoreline development would be appropriate.”**

New Notice not Necessary

There is no need to issue a new Notice, such as a Notice of Required Corrective Action. The Notice of Violation from October 2008 already provided the Appellant with required corrective action. Plus, Staff has already demonstrated that they would be unable to recommend approval for a Shoreline Substantial Development Permit proposal for the existing development.

V. CONCLUSION

The “development” was regulated and occurred within SMP jurisdiction. As such, the Appellant was required to receive review and/or permit approval prior to constructing the gazebo, patio, and retaining wall (with the associated fill and tree removal). Had Staff been provided with the opportunity to review a development proposal for the structures as they now exist, the development likely would not have been recommended for approval. As a result, the Appellant must restore the site and remove all unpermitted structures.

Staff respectfully requests that the Hearing Examiner uphold both the administrative determination and the required corrective actions from the Notice of Violation dated October 2008.

Report Prepared by:

Bryan Sehmel, Planner – Code Enforcement

Whatcom County Planning and Development Services