

WHATCOM COUNTY HEARING EXAMINER

RE: Administrative Appeal)	APL2014-0007
Application for)	APL2014-0008
)	APL2014-0009
)	
Ken and Charmae Scheffer)	FINDINGS OF FACT,
)	CONCLUSIONS OF LAW,
)	AND DECISION

SUMMARY OF APPEAL AND DECISION

Appeal: This matter is an Appeal of two Notices of Violation issued by Whatcom County Department of Planning and Development Services. The County alleges in one notice that the Appellants, the Scheffer's, are in violation of the Zoning Code and the International Residential/Building Codes for operating a commercial dog kennel, "Rover Stay Over," in the AG zone without zoning approval; and for failure to obtain building permits for the change of occupancy of an existing building and for the illegal construction of a new building. The county also alleges the lease/rental/use of the subject site by Homeland Security for the storage of their government vehicles for canine dispatch is a prohibited use in the AG zoning district.

A second Notice of Violation was issued to the appellants for moving dirt in excess of 110 cubic yards without an issued Land Disturbance Permit for the grading activities as required pursuant to Title 15.

Decision: All the Appeals are denied and the Violations and Penalties are upheld.

FINDINGS OF FACT

I. Background Information

Appellant: Ken and Charmae Scheffer

Property Owners: Ken, Charmae, and Sydney Scheffer

Site Location/Address: 6451 Hannegan Road
Lynden, WA 98264-9619

Assessor's Parcel Number(s): 390317 496480 0000

Zoning: Agriculture (AG)

Total Acreage: 4.66 Acres

Hearing Date: January 14, 2015

Authorizing Codes, Policies, Plans, and Programs

The Official Whatcom County Zoning Ordinance, Title 20.

The International Residential Code (IRC) and the International Building Code (IBC) as codified pursuant to Title 15.

Exhibits

- 1 Administrative Appeal Application, 2014-0007, dated June 4, 2014 with attachments
 - 1-1 Appeal Statement and Customer Receipt, dated June , 2014
 - 1-2 Notice of Violation, dated May 21, 2014

- 2 Administrative Appeal Application, 2014-0008, dated June 4, 2014, with attachments
 - 2-1 Appeal Statement and Customer Receipt, dated June 19, 2014
 - 2-2 Appeal Summary Statement from Suzanne Bosman, with attached Stop Work Order, dated June 12, 2014

- 3 Administrative Appeal Application, 2014-0009, dated July 7, 2014, with attachments
 - 3-1 Appeal Statement and Customer Receipt, dated July 7, 2014
 - 3-2 Notice of Violation Land Disturbance Activities, June 17, 2014
 - 3-3 Site Inspection Photographs, June 12, 2014
 - 3-4 Appeal Rights and Enforcement Authority, WCC Title 15
 - 3-5 Notice of Penalty, Land Disturbance Activities, June 17, 2014
 - 3-6 Appeal Rights
 - 3-7 Letter dated June 22, 2010, from Charmae Scheffer re: quest to own and operate kennel, with attachments

- 3-7-1 Staff email from Erin Osborn re: Kennels as Home Occupation and/or Cottage Industry, Feb 13, 2012
 - 3-7-2 Staff comment email from Erin Osborn, Feb 13, 2012 to Nick Smith and Tyler Schroeder re: A question about permissible uses in RR1 area
 - 3-7-3 Staff email from Erin Osborn, Feb 13, 2012 re: Preliminary Draft “policy” – commercial kennels
 - 3-8 Unsigned letter, dated July 29, 2014 to Whatcom County Planning re: Rover Stay Over
 - 3-9 Cover letter from Brad Swanson, dated November 3, 2014, with attached copy of the Summons and Complaint, Zuidmeer and Zuidmeer v Scheffer, et al, Whatcom County Superior Court Cause No. 14-2-01257-6
- 4 Agreed Order Consolidating ENF 2014-0007, 0008, 0009 before the Hearing Examiner as the Single Cause ENF 2014-0007
- 5 Staff Report, dated January 7, 2015
- 5-1 Appendix A Charmae Scheffer’s short biography re: quest to own [Exhibit 3-7 above]
 - 5-2 Appendix B Code Violation Report, May 3, 2011
 - 5-3 Appendix C1 – C10 Rover Stay Over Advertising Web Site [1/3/2015 2:02:45 P.M.]
 - 5-4 Appendix D Case Summary Report for DET2001-0053, Final: April 24, 2001
 - 5-5 Appendix E 2012 International Building Code, Scope and Administration, Section 105 Permits
 - 5-6 Appendix F State of Washington Business Licensing Service: License Information for Rover Stay Over, Inc., current as of 12/15/2014
 - 5-7 Appendix G Code Violation Report: Complainant Information, dated May 12, 2014
 - 5-8 Appendix H Notice of Violation, May 21, 2014; Notice of Penalty-Zoning-Rover Stay Over; Notice of Penalty-IBC; Notice of Penalty-Zoning-Government Use Facility for Homeland Security; Notice of Penalty IRC/IBC-New Detached Structure; Appeal Rights –Titles 15 and 20
 - 5-9 Appendix I Notice of Violation, June 17, 2014; Appeal Rights-Title 15
 - 5-10 Appendix J Notice of Penalty, Land Disturbance Activities, June 17, 2014; Appeal Rights-Title 15
 - 5-11 Appendix K Uniform Building Code, Section 312-Requirements for Group U Occupancies
 - 5-12 Appendix L Uniform Building Code, Chapter 2, Definitions and Abbreviations, page 1-7 Agricultural Building [highlighted]; page 11 Agricultural Building [highlighted]
 - 5-13 Appendix M Site Photos [15] taken June 12, 2014
- 6 Legal Notice of Open Record Hearing, published January 1, 2015
- 7 Notice of Appearance: Appellants Attorney, Shawn Alexander, October 21, 2014
- 8 Emailed copy of Brief of Appellant, dated January 12, 2015, prepared by Shawn Alexander with attachments
- 8-1 Staff Report, June 4, 2013, Application of Steve Liikala, CUP2012-0013

- 8-2 Senate Bill Report, SB 5106, January 17, 2008
 - 8-3 Whatcom County Council, Natural Resources Committee, June 3, 2014, [see page 2, under Other Business re: Notice of Violation of a dog kennel in AG zone
 - 8-4 Aerial Site Photo
 - 8-5 Rover Stay Over Text Amendment, Whatcom County Comprehensive Plan's Applicable Goals and Policies, Chapter 2: Land Use; Chapter Seven: Economics
 - 8-6 Email string between Charmae Scheffer and Nick Smith, Sept 30 and Oct 2, 2014
- 9 Letter dated January 14, 2015, from Bradley Swanson, representing neighboring property owners, with attached Declarations:
- 9-1 Declaration of Peter Zuidmeer, dated January 13, 2015
 - 9-2 Declaration of Bernita Zuidmeer, dated January 13, 2014
 - 9-3 Declaration of Denise Zuidmeer, dated January 13, 2014
 - 9-4 Declaration of William Zuidmeer, dated January 13, 2014

Parties of Record

Ken and Charmae Scheffer
6451 Hannegan Road
Lynden, WA 98264-9619

Shawn Alexander
Attorney-at-Law
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Brad Swanson
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Royce Buckingham
Civil Deputy Prosecuting Attorney

Sam Ryan, Director
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Suzanne Bosman, Senior Planner
Planning and Development Services

II.

The Appellant's are the owners of a 4.66 acre parcel located on Hannegan Road between Bellingham and Lynden. The purchase took place in 2014. The Appellants had

leased the property for approximately three years prior to recording purchase.

The property contains the owners' residence and a large storage building or buildings currently used for a commercial dog kennel and grooming salon for both cats and dogs, doggy day care services, and short and long-term boarding of dogs. This facility was apparently opened in 2011, as evidenced by a citizen complaint about noise from the dog kennels, submitted on May 3, 2011. The Appellants have indicated a capacity to have 50 or more dogs in the original building and the new building could conceivably double that.

The Appellants entered into a contract with Homeland Security approximately nine months ago. Through this contract they provide boarding for K-9 dogs and a parking area enclosed by a chain-link fence for vehicles used by the dog handlers. Eight or more dogs and vehicles are boarded or stored onsite under this contract. The contract has been described as "long-term."

III.

One of the Appellant's, Charmae Scheffer, first contacted Whatcom County by letter, dated June 22, 2010, indicating a desire to operate a dog kennel from the subject site.

Later, Mrs. Scheffer met with a County Planner, and discussed her interest in purchasing the site to operate a commercial dog kennel. Mrs. Scheffer was clearly informed that Planning Staff did not believe a dog kennel could be operated at that site under the Whatcom County Code. Planning Staff communicated to her that the proposed use was a prohibited use in the Agriculture zone. Staff did indicate to Mrs. Schaffer that a commercial dog kennel of modest size might be allowed as a cottage industry if a Zoning Conditional Use Permit was obtained, but that the size of the proposed kennel desired by Mrs. Scheffer probably well exceeded the size of a commercial operation that could be approved as a cottage industry.

Apparently, soon after the conversations with the Planning Department, the Appellants opened on that site a commercial dog kennel and a dog and cat grooming salon, named as Rover Stay Over.

The initial complaint about use of the property as a dog kennel for commercial purposes was received by the Planning Department on May 3, 2011, less than one year after being told the proposed business was not allowed in the Agriculture zone [except possibly as a small scale kennel approved as a cottage industry by a Zoning Conditional Use Permit].

The Appellants maintain a website and Facebook page for this business. A Google Search for Rover Stay Over brings up the site. The Hearing Examiner has reviewed this website and takes judicial notice of the contents.

At no time have the Appellants obtained any kind of County Permit for the commercial activities, building activities, and land disturbance that took place on the site prior to the County undertaking enforcement action in June 2014.

In addition to the ongoing kennel, doggy daycare, and grooming business, it was alleged in the Violation Notices that the Appellants converted the use of the building onsite from an unheated, personal storage occupancy to a commercial operation which included use of the building by employees, the grooming business, doggy day care, and boarding kennels.

Additional complaints about the use of the site were received from two separate parties on May 12 and May 14, 2014 by Whatcom County Planning. The complaints included continued use of the site as a dog kennel, the erection of a large sign, the use of the site for parking by Homeland Security vehicles, and the construction of a new building without a building permit. Complaining neighbors have filled a lawsuit in Superior Court

requesting Declaratory Judgment that the use is illegal and an Injunction that would shut the business down.

A site visit by the Whatcom County Code Enforcement Officer and other County Staff verified that the site was being used as described and that a new building was being built. It was confirmed that no building permit had been obtained for the new construction. A stop work order was posted on the site on May 22, 2014.

Planning received a phone call from a complainant on June 12, 2014, stating that the Appellants were excavating large quantities of fill on the west side of their property. This complaint resulted in another site inspection. It was determined, and the Hearing Examiner finds, that in excess of 100 cubic yards of material were moved, and that no Land Disturbance Permit was obtained. A stop work order was posted on the site. It was also observed that additional work on the building had taken place since the first site inspections, even though the Appellants had already been informed that a stop work order would be issued and the Appellants had already had a pre-deprivation hearing with the County as a precursor to the issuance of the stop work order. On June 17, 2014, a Notice of Violation and a Notice of Penalty were issued to the property owner for the land disturbance/fill and grade activities.

IV.

The five violations alleged have been appealed by the Scheffer's to the Whatcom County Hearing Examiner. These Appeals were timely. Some of the Appeals were Building Code Violations. The parties have stipulated that the Hearing Examiner should handle the Appeals under the International Building Code as well Zoning Code Appeals. All of the Appeals have been consolidated and are dealt with herein. The five Appeals are as follows:

On June 4, 2014 the appellants filed an appeal (APL2014-00007) of the alleged Whatcom County Code, Title 20 zoning violations:

1. Operation of a commercial kennel – WCC 20.40.135, WCC 20.40.155

and WCC 20.40.200.

2. Operation of a vehicle storage yard used by Homeland Security – WCC 20.40.200 and WCC 20.40.201.

On June 19, 2014 the appellants filed an appeal (APL2014-00008) of the alleged Whatcom County Code, Title 15 building code violations;

3. Change of use/occupancy of a structure without a building permit– IBC 105.1
4. Construction of a new pole building without a building permit – IRC, R105.1 and/or IBC, 105.1.

On July 7, 2014, the appellants filed an appeal (APL2014-00009) of the alleged Whatcom County Code, Title 15 violation:

5. Fill & grade activities without a land disturbance permit–IBC, J103.1 as amended pursuant to WCC 15.04.020(B)(4)(1).

V.

At the time the Appellants obtained initial possession of the property, there was an outbuilding onsite which had obtained and been built with a building permit. This building obtained Final Occupancy Approval on April 24, 2001. The building permit contains two specific conditions pertinent to this Appeal. They read as follows:

1. “This structure is approved for use as an unheated and unoccupied garage or residential storage building ONLY. This structure is NOT approved for Commercial Use or for use as habitable space (UBC, Sec. 209). Heating, cooling or any change of use shall require further review by Whatcom County Planning and Development Services.”
2. “Commercial use of the structure shall require further review and approval by the Whatcom County Planning and Development Services.”

VI.

The new building, attached to the original building, is in excess of 3300 square feet and was constructed by the Appellants without a building permit.

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 Appellants argue that their business, Rover Stay Over, a dog and cat grooming and a dog boarding business, is a permitted use in the Agriculture zone, as "animal husbandry" per WCC 20.40.051, which reads as follows:

. 051 Dairying, raising of livestock, husbandry of small animals, raising of crops, horticulture, apiculture, and temporary portable equipment used for the processing of locally harvested crops.

Specifically, the Appellants state that their dog grooming, doggy daycare, and dog boarding business constitutes animal husbandry.

Animal husbandry is not a defined term in the Whatcom County Zoning Ordinance, WCC Chapter 20. Therefore the meaning of animal husbandry must be determined by the common definition and a review of the Zoning Ordinance as a whole to determine if the legislative body adopting the Ordinance intended animal husbandry to include the Applicants' business.

Most initial definitions of "animal husbandry" reviewed by the Hearing Examiner, related the term to Agriculture or farming. Examples follow:

Animal husbandry
The branch of agriculture concerned with the care and

breeding of domestic animals such as cattle, hogs, sheep, and horses. *American Heritage Dictionary of the English Language, Fifth Edition*. Copyright 2011 by Houghton Mifflin Harcourt Publishing Company. Published by Houghton Mifflin Harcourt Publishing Company. All rights reserved.

Animal husbandry

(Agriculture) the science of breeding, rearing, and caring for farm animals *Collins English Dictionary-Complete and Unabridged*, HarperCollins Publishers 1991, 1994, 1998, 2000, 2003

Animal husbandry

The scientific study or the practice of breeding and tending Domestic animals, esp. farm animals. *Random House Kernerman Webster's College Dictionary*, 2010 K Dictionaries Ltd. Copyright 2005, 1997, 1991 by Random House, Inc.

Thesarus

Animal husbandry – breeding and caring for farm animals
Farming, husbandry, agriculture – the practice of cultivating the land or raising stock

Husbandry is defined in Black's Legal Dictionary as follows:

husbandry

a. The cultivation of plants or the raising of livestock; farming; agriculture. b. The application of scientific principles to a branch of farming, especially animal breeding

Additionally Staff has listed a number of definitions for animal husbandry in the Staff Report. Virtually all of the definitions relate animal husbandry to agriculture. Planning Staff argues that the commercial dog grooming and boarding use is not included within the common meaning of animal husbandry and is a service business and not an agricultural use. The Hearing Examiner agrees that in the context of a permitted use in the Agriculture zone, animal husbandry refers to agricultural related animal husbandry.

A careful reading of WCC Title 20, the Whatcom County Zoning Ordinance, identifies a clear intent by the legislative body to treat kennels, such as the one operated by the Appellants, as a separate use from animal husbandry. This is clearly established by the following.

Kennel is a defined word in the Zoning Ordinance in WCC 20.97.191, which reads as follows:

20.97.191 Kennel.

“Kennel” means a commercial establishment in which five or more dogs, cats, or other household pets are housed, groomed, bred, boarded, trained or sold for a fee or compensation.

The Appellants' business is clearly a kennel under this definition and is a commercial establishment.

Additionally the word kennel is used as a separate use from animal husbandry in many sections of the Zoning Ordinance. The most vivid example of this is found in the Rural Zoning Sections of the Code, WCC 20.36.

Animal husbandry is specifically listed as a permitted use in the Rural zone in WCC 20.36.052. On the other hand, kennels are listed as a Conditional Use in the Rural zone pursuant to WCC 20.36.156. Additionally the word kennel is used in eleven different sections within the Zoning Ordinance, WCC Chapter 20. In some Zoning Districts or overlays, kennels are listed as a permitted use. In others, they are listed as an Administrative Approval, Conditional or Prohibited Use.

In the same manner, animal husbandry can be found in eleven separate sections of the Zoning Ordinance. Overall it is clear that the legislative body intended to treat the business of operating dog kennels and animal husbandry as different uses, and to specifically indicate when kennels were permitted either outright or subject to obtaining an Administrative Approval or Conditional Use Permit.

Since kennels are not listed as a Permitted Use, Administrative Approval Use, or a Conditional Use in the Agriculture zone, they are a prohibited use under WCC 20.40.201, which identifies all unlisted uses as prohibited.

The Appellants point out two conditional uses allowed in the Agriculture zone which might allow a dog kennel use. One is as a Cottage Industry allowed pursuant to WCC 20.40.155. The Appellants also suggest that their contract with Homeland Security to board their dogs and store their canine unit vehicles could be approved pursuant to WCC 20.40.151, as a public facility for emergency related health and safety purposes.

The issue of potentially approving some form of the Appellants' business at this site through Conditional Use Approval is not before the Hearing Examiner. The Applicants have not applied for a Conditional Use Permit for any portion of the business they are operating. Therefore they are in violation of the Zoning Ordinance, either because the use is prohibited outright or because they have not obtained the required Conditional Use Permit. The Hearing Examiner should uphold the violation notice alleging that the operation of the Rover Stay Over business is in violation of the Whatcom County Zoning Ordinance.

II.

Code Enforcement Staff have listed as a violation the Appellants' use of a pre-existing storage building, built with a building permit as a personal storage building, now being used to house and operate the Rover Stay Over dog boarding and dog and cat grooming business.

The Appellant's argue that the building was approved as in agriculture building and that they are using it for agricultural purposes.

That argument fails for two reasons. First the Hearing Examiner has already concluded that the kennel use is not an agricultural use and is prohibited unless the Applicants can obtain a Conditional Use Permit for a cottage industry, a business or

commercial use allowed under limited circumstances in the Agriculture zone, and/or as a governmental emergency services use. Neither of these uses are agriculture uses and neither of the uses could be allowed under the occupancy for which the building's use permit was granted.

As set forth in the Findings of Fact, the permit for the building, as an agricultural building had two conditions which severely limited the use of the building. The current use violates both of those conditions. Since the building was approved as an agricultural structure, subject to conditions which limited the approved use as only an unheated and unoccupied garage or residential storage building, and since the conditions clearly indicated it was not approved for a commercial use, the Appellants were required to obtain a new Certificate of Occupancy from the Building Official as required by Section 3408 of the 2012 International Building Code, adopted by Whatcom County under Title 15 of the Whatcom County Code. In relevant part, the Change of Occupancy Section reads as follows:

3408.1 Conformance. No change shall be made in the use or occupancy of any building that would place the building in a different division of the same group of occupancies or in a different group of occupancies, unless such building is made to comply with the requirements of this code for such division or group of occupancies. Subject to the approval of the *building official*, the use or occupancy of existing buildings shall be permitted to be changed and the building is allowed to be occupied for purposes in other groups without conforming to all the requirements of this code for those groups, provided the new or proposed use is less hazardous, based on life and fire risk, than the existing use.

3408.2 Certificate of occupancy. A certificate of occupancy shall be issued where it has been determined that the

requirements for the new occupancy classification have been met.

The building was originally approved as a "U Occupancy." The current kennel and grooming business use is listed under "Business Group B," a different classification, which requires approval from the Building Official before occupying the building for the use. IBC Section 304.1; IBC Section 105.1.

The Appellants are in violation of the Sections of the International Building Code requiring Building Official Approval by obtaining a Building Permit and Certificate of Occupancy, prior to using the building for a dog boarding kennel, doggie day care, and grooming business.

III.

The Appellants make a couple of arguments based on the definition of the term "animal enclosure" found in WCC 20.97 of the Whatcom County Zoning Ordinance and the use of the word "animal" as defined in WCC Chapter 6.04.020 [which includes dogs as an "animal"]. The arguments have no legal merit. The definition of animal under Chapter 6 of the Whatcom County Code applies only to the places in Title 6 where the word "animal" is used. Title 6 of the Whatcom County Code contains two chapters. Chapter 6.04 deals with "Animal Control." Chapter 6.08 deals with "Restriction of Livestock." Neither of these Chapters has anything to do with the alleged Zoning Violations or the alleged Violations of the Building Code. The definitions of animal enclosure and animal are applicable only within the chapters where the terms are defined and only when the terms are used. The arguments are specious.

IV.

The Applicants do not deny that they have constructed a new building in excess of 3,300 square feet and attached it to the existing building without a building permit. This is a

violation of Section 105.1 of both the International Building Code and International Residential Code, whichever applies. The violation alleged regarding this illegal building activity was committed and the Appeal is denied. Penalties associated with the violation were not appealed and are upheld.

V.

The Appellants no longer argue that the alleged violation of the requirements for a Land Disturbance Permit for Fill and Grade activities were committed.

They have obtained the necessary Land Disturbance Permit to correct the violation and are no longer in violation. The Notice of Violation is upheld. Penalties associated with the violation, if any, were not appealed. The penalties imposed were not appealed and are upheld.

VI.

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 Whatcom County Hearing Examiner finds that Rover Stay Over is operating in violation of the Whatcom County Zoning Ordinance as alleged by the County Enforcement Officer. The violations of the Zoning Ordinance alleged are found to have been committed.

The Hearing Examiner also finds that the violations of the Building Code alleged have been committed. Specifically a change of occupancy was undertaken without obtaining the required building permit; a new building was constructed without a building permit; and land disturbance activities which required a permit were conducted without one. All of the violations alleged are upheld.

All of the Appeals are denied and the Penalties imposed are upheld.

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 business 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 30th day of January 2015.



Michael Bobbink, Hearing Examiner