

BEFORE THE HEARING EXAMINER
FOR WHATCOM COUNTY

In re the appeal of conditions of a Shoreline Exemption SHX2018-0094:)	APPEAL No. APL2018-0004
)	
Norman Chang, Appellant)	DECISION No. SHX2018-0094
)	
vs.)	
)	ORDER GRANTING
)	APPELLANT'S MOTION FOR
WHATCOM COUNTY, Respondent)	SUMMARY JUDGMENT
)	

This matter comes before the Hearing Examiner on the Motion of the Appellant for Summary Judgment in the above captioned matter; all Parties having received notice; the Hearing Examiner having reviewed the pleadings and exhibits herein [see attached Exhibit List and Parties of Record]; having heard and considered oral arguments and otherwise being fully advised now enters the FOLLOWING FINDINGS, CONCLUSIONS AND DECISION:

FINDINGS OF FACT

**I.
Background Information**

Appellant: Dr. Norman Chang

Site Location/Address: 2382 Northshore Road
Bellingham, Washington 98229

Assessor's Parcel Number: 380325 405530 0000

Water Body: Lake Whatcom

Shoreline Designation: Shoreline Residential

Authorizing Codes, Policies, Plans, and Programs

Authorizing Ordinance: WCC 20.84.240: Whatcom County Hearing Examiner Appeal

Applicable Whatcom County Codes:

Mitigation is not required for the removal of Hazard Trees, pursuant to

WCC 23.110.080.H.2, WCC 23.90.060.B.9, and WCC 16.16.230F

WCC 20.51.430.5.a Certified Arborist Tree Assessment

Exhibits

- 1 Administrative Appeal with attachments
 - 1-1 Appellant's Motion for Summary Judgment, dated November 1, 2018, with attached Exhibit 1, Notice and Statement of Appeal, dated October 11, 2018
 - 1-2 Administrative Appeal Application, dated October 12, 2018, prepared by Norman Chang, with Exhibit A: Exemption from the Shoreline Management Program: Substantial Development Permit Requirement, SHX2018-0094, dated October 2, 2018 by Andrew Hicks, Shoreline Administrator, with attached Conditions
 - 1-3 Exhibit B: 9 pages: email exchanges with Applicant and Staff betw Oct. 2 & Oct 11 re: correction to determination to approve requested tree removals
 - 1-4 Exhibit C: Proposed Order Granting Appellants' Motion for Summary Judgment, APL 2018-0003
 - 1-5 Exhibit D: Email exchange betw Kyla Walters & Jeff Vander Yacht, Pacific Surveying & Engineering, Inc. Aug 30 & Oct 11, 2018
 - 1-6 Exhibit E: Tree Risk Assessment, prepared by Aubrey Stargell, August 5, 2018, with attached Site Plan, prepared by Marcus Johnson, AIA Architects

- 2 County's Shoreline Administrator's Appeal Documents
 - 2-1 Notice and Statement of Appeal: Appeal of conditions Associated with SHX2018-0094, from Dr. Chang to Hearing Examiner & PDS Natural Resources Supervisor Ryan Ericson, dated October 11, 2018
 - 2-2 Administrative Appeal, dated October 12, 2018, with Customer Receipt, dated Oct. 12, 2018
 - 2-3 Exhibit A: Exemption from Shoreline Management Program: SHX2018-0094, prepared by Andrew Hicks, dated Oct 2, 2018, with attached Conditions, including compliance with archaeological resources applicable laws
 - 2-4 Exhibit B: 9 pages email exchanges with Applicant & Staff betw Oct 2 & Oct 11 re: correction to determination to approve requested tree removals
 - 2-5 Exhibit C: Proposed Order Granting Appellants' Motion for Summary Judgment, APL2018-0003
 - 2-6 Exhibit D: Email exchange betw Kyla Walters & Jeff Vander Yacht, Pacific Surveying & Engineering, Inc. Aug 30 & Oct 11, 2018
 - 2-7 Exhibit E: Tree Risk Assessment, prepared by Aubrey Stargell, August 5, 2018, with attached Site Plan, Noting Hazard Trees, prepared by Marcus Johnson, AIA, Architects; and Email exchange betw Andrew Hicks, Norman Chang, and Andrew Wisner re: Conditions of Approval authorized for tree removal by the Shoreline Statement of Exemption, dated Oct 2 thru Oct 11, 2018, with colored 2016 Lake Whatcom Site Map; Department of Licensing Geologist Program, Certificate, Andrew Paul Wisner, Geologist/Engineering Geologist, issued May 4, 2010 to expire Aug 22,

- 2019; and the Original Shoreline Exemption Application, SHX2018-0094 for Norman Chang, October 2, 2018, with Conditions and Shoreline Statement of Exemption: Notice of Additional Requirements [NOAR], prepared by Kyla Walters, October 2, 2018, with Shoreline Management Program Conditions Associated with SHX2018-0094; aerial Site Plan, with County Code 20.51.430 Tree Removal not associated with development activity [Lake Whatcom Watershed Overlay District]; Shoreline Exemption Master Land Use Application and Shoreline Exemption Application Requirements & Supplemental Application; Statutory Warranty Deed, dated June 22, 2006; Fee Responsibility, August 15, 2018; Tree Risk Assessment for Norman Chang, prepared by Aubrey Stargell, August 5, 2018; Customer Receipt, SHX2018-0094, 8/15/2018
- 2-8 Enlarged Site Plan with Hazard Trees Noted, August 10, 2018, prepared by Marcus Johnson, AIA, Architects, signed Shoreline Approved by Andrew Hicks, dated Oct 2, 2018
- 3 Email dated November 1, 2018 from Carole Magner to Dr. Chang and Andrew Hicks re: APL2018-0014 Summary Judgment Request re: Dr. Chang's procedural question
- 3-1 Email from Norman Chang to the Hearing Examiner via Carole Magner, dated Nov 26, 2018 re: Chang Appeal and County's continued illegal mitigation requirement for removal of hazard trees and request for Hearing Examiner Summary Judgment Decision
- 3-2 With attached copy of Jeff Vander Yacht's Exemption from the Shoreline Management Program Substantial Development Permit Requirement, SHX2018-0081, regarding removal of three hazard trees
- 4 Whatcom County's Memo re: Geological Hazard Area [Slope Stability], prepared by Royce Buckingham, dated November 29, 2018, with attached Exhibit 4-1: Staff Memorandum, dated November 29, 2018, from Andy Wiser, L.E.G. re: Code Justification for Article 3 Regulations
- 5 Appellant's Rebuttal to Whatcom County's Memo, prepared by Norman Chang, dated December 3, 2018
- 6 Hearing Examiner Memorandum, dated December 5, 2018 to Parties of Record re: Request by Planning Staff for Oral Argument Hearing

Parties of Record

Norman Chang
 PO Box 4793
 Blaine, WA 98231

Andrew Hicks and Kyla Walters
 Shoreline Administrators

Ryan Ericson
 Natural Resources Supervisor

Royce Buckingham
 Whatcom County Civil Deputy Prosecutor

II.

The Appellant herein has requested Summary Judgment be granted in this dispute over the removal of five hazard trees identified in the Shoreline Exemption No. SHX2018-0094, which was approved with the following relevant mitigation conditions:

3. Replacement of trees shall be conducted at a ratio of 1:1 for similar species or 3:1 for native shrubs or bushes, as deemed necessary to preserve slope stability.
4. Photographic evidence shall be submitted to the shoreline administrator after the replacement trees have been planted.

The Appellant is the owner of a waterfront lot on the north side of Lake Whatcom. The Planning Department and the Appellant agree that five large trees on a sloped area landward of the Appellant's house meet the definition of 'hazard trees' and can be removed.

Planning believes that the slope the trees are located on may be geologically unstable due to its steepness and that over time the tree removal could destabilize the slope. For this reason Planning required the mitigation conditions. The Appellant argues that the removal of hazardous trees is exempt from Shoreline and Critical Areas Regulation and that the mitigation requirements are not legal.

There are no disputed relevant facts.

Conclusions of Law

I.

The area where the trees are located is within Shoreline jurisdiction. Lake Whatcom is a Shoreline of Statewide Significance. The Lake Whatcom watershed is subject to a strict degree of regulation due in part to its high value as a fresh water source for a large number of people and evidence of deteriorating water quality. Tree retention and mitigation for impacts associated with tree removal is regulated within the entire watershed of the lake as well as in Shoreline and Critical Areas throughout the county.

II.

WCC 23.90.060 contains the County's regulations related to vegetation conservation in areas under Shoreline jurisdiction. When the County Council adopted these Code Provisions in the County's Shoreline Master Program, it decided that the removal of Hazard Trees is to be specifically exempted from the no net loss standards in both the SMP and the CAO. The SMP, WCC 23.90.060.B.9, provides, "**Vegetation conservation standards do not apply to the removal of Hazard Trees pursuant to WCC 16.16.230.F.**" (Emphasis added).

The Master Program including this language was approved by the Department of Ecology.

Section WCC 23.10.060 of the Shoreline Master Program reads as follows:

23.10.060 References to plans, regulations or information sources.
A. The Whatcom County Critical Areas Ordinance, Chapter 16.16 WCC (Ordinance No. 2005-068, dated September 30, 2005, and as amended on February 27, 2007) **is hereby adopted in whole as a part of this program, except** that the permit, nonconforming use, appeal and enforcement provisions of the critical areas ordinance (**WCC 16.16.270 through 16.16.285**) **shall not apply within shoreline jurisdiction.** All references to the critical areas ordinance (CAO), Chapter 16.16 WCC, are for this specific version. (Emphasis added).

This section also incorporates WCC 16.16.230.F into the Shoreline Regulations. (Only sections 16.16.270 through 16.16.285 are not incorporated.

The County Critical Areas Ordinance, WCC 16.16.230F, provides as follows:

16.16.230 Exempt activities.

The following activities as specified are exempt from the provisions of this chapter:

F. The landowner may cut hazard trees within critical areas and buffers.
(All emphasis added).

Even if the slope behind the Appellant's is unstable and is regulated as a Critical Area, the removal of hazard trees is specifically exempted from regulation. The Planning Department

cannot require mitigation or otherwise regulate the removal of hazard trees under Title 23: The Shoreline Master Program, or under Title 16: Critical Areas. Planning suggests that language in the Shoreline Management Act, authorizing a liberal construction of the Act and regulations adopted under it, enables them to address what they see as activity contrary to the purposes of the Act. Presumably this would also apply to the Critical Areas Ordinance, adopted under the Growth Management Act, which also calls for liberal construction. However we only construe statutory language when there is some kind of ambiguity. If there is an ambiguity in a statute or ordinance that calls for liberal interpretation, it is to be interpreted in a manner to carry out the intent and policies of the Act.

Construe is defined by Google search as follows:

con·strue

/kən'stroo/Submit

Verb

past tense: construed; past participle: construed

interpret (a word or action) **in a particular way.**

"his words could hardly be construed as an apology"

synonyms: interpret, understand, read, see, take, take to mean, parse, render, analyze, explain, elucidate, gloss, decode

"his actions could be construed as an admission of guilt"

The term "legal construction" is defined by the free legal dictionary as follows:

"The process by which the meaning of an **ambiguous** provision of a statute, written document, or oral agreement is determined. A judge usually makes a construction of an unclear term in a document at issue in a case that involves a dispute as to its legal significance."

Construction legal definition of construction - Legal Dictionary - ..."

The problem with Planning's argument is that there is no ambiguity in the applicable Ordinance language that requires any construction. The Shoreline Master Program and the Critical Areas Ordinance consistently and explicitly exempt the removal of trees that meet the definition of hazard trees from regulation/mitigation. As written, current Whatcom County Ordinances make removal of hazard trees an outright permitted activity. Concern within the Planning Department that this allows activities that may have adverse impacts that could be harmful and/or appears contrary to more general policies, such as, the one requiring no net loss of ecological functions does not justify the Department ignoring clear and specific statutory language. Until the Whatcom County Council and the Department of Ecology grant final approval to changes to the Code, allowing mitigation for the removal of hazard trees, the Planning Department is required to follow the explicit language exempting their removal from Shoreline mitigation requirements.

The real harm here is the impact this kind of regulatory over-reaching has on the reputation of the regulatory body and government. Dealing with regulatory bodies is often seen by those regulated as an unpleasant and difficult process at best. When a regulator takes an action, which virtually any lay person can see is contrary to the clear language of a regulation, ordinance, or statute, it undermines the public perception of the professionalism and fairness of the agency, and, in the long term, undermines the willingness of the public to accept or adopt regulations deemed necessary for protection of the general health, safety and welfare of the public.

Decision

The Motion for Summary Judgment is granted. Under current County Ordinances, the removal of trees appropriately designated as hazard trees is an activity not subject to mitigation requirements.

Conditions 3 and 4 in Shoreline Exemption SHX 2018-0094 are to be removed from the Shoreline Permit. Mitigation for removal of hazard trees in the watershed, within Shoreline

Jurisdiction or in a Critical Area is not required under current County Code.

DATED this 23rd day of January 2019.



Michael Bobbink, Hearing Examiner

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

This action of the Hearing Examiner is final.

Any party of record may request a closed record review of the hearing by the county council. Such an appeal shall be filed with the county council on forms supplied by the county within 10 calendar days of the written decision. If appeal is made to the county council, notice of appeal shall be provided to all parties of record at least 15 days prior to consideration by the county council. The council shall meet to review the hearing examiner's decision within 21 days of transmittal thereof, at which time it may approve or disapprove the application, or remand the matter to the hearing examiner.