

BEFORE THE HEARING EXAMINER
FOR WHATCOM COUNTY

WHATCOM COUNTY HEARING EXAMINER

RE: Administrative Appeal) APL2019-0003
Application for)
David Morse III, Appellant) FINDINGS OF FACT,
) CONCLUSIONS OF LAW,
) AND DECISION

SUMMARY OF APPEAL AND DECISION

Appeal: The Appellant filed an Administrative Appeal of a Code Interpretation made by Whatcom County Planning and Development Services' Director of the timeframes associated with the issuance of development permit applications in the Lake Whatcom Watershed. Pursuant to WCC 22.20, the Appellant requested the director to provide an interpretation of WCC Section 20.51.410 to clarify whether or not County Staff have the authority to delay the issuance of permits, keeping in mind the statutory permit issuance timing requirements of RCW 36.70, WAC 365-196-845, WCC Title 22.

Decision: Development permits, including those authorizing work subject to seasonal closures, should be approved and issued within the time limits of WCC 22.05. This matter is remanded to the Planning Department for the implementation of policies consistent with this Decision.

FINDINGS OF FACT

**I.
Background Information**

Appellant: David Morse

Site Location/Address: Lake Whatcom Watershed
Bellingham, Washington 98229

Whatcom County Code:

WCC 20.51.410: Seasonal clearing activity limitations

WCC 22.20: Land Use and Development Code Interpretation Procedures

Hearing dates: June 12 and reopened July 24, 2019

Exhibits

- 1 Hearing Examiner Routing Memorandum, March 29, 2019 from PDS Director
- 2 Administrative Appeal, filed by Appellant, David C. Morse III, filed April 3, 2019 with attachment:
 - 2-1 Appellant's Statement, dated March 28, 2019, to PDS Director
- 3 Letter dated March 15, 2019, from PDS Director to Dave Morse re: Lake Whatcom Watershed Seasonal Clearing Activity Limitation Code Interpretation, with attached Relevant Code Sections
- 4 Email dated February 15, 2019 from the Appellant to PDS Director re: Request for Interpretation
- 5 Legal Memorandum of the Whatcom County Planning Department: Appeal of Whatcom County Code Interpretation, prepared by Royce Buckingham, Prosecuting Attorney, dated June 7, 2019
- 6 PDS Memorandum, prepared by Michael Kershner, PDS Stormwater Office to Mark Personius, PDS Director re: WCC 20.51 Appeal
- 7 Morse Notebook of materials re: the Appeal, submitted to the Hearing Examiner at the hearing
- 8 Mr. Morse Follow-up on Appeal of Code Interpretation, APL2019-0003, dated June 20, 2019, with three Attorney cases attached
- 9 Notice of Appearance of Timothy Schermetzler, dated June 24, 2019
- 10 Notice of Unavailability of Timothy Schermetzler, dated July 10, 2019

Parties of Record

Dave Morse III, P.E.
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Bellingham, WA 98226

Tim Schermetzler, Attorney
Chmelik Sitkin & Davis P.S.
1500 Railroad Avenue
Bellingham, WA 98225

Michael Kershner, Planner
Mark Personius, Director
Planning & Development Services

Royce Buckingham
Whatcom County Civil Deputy Prosecutor

The Appellant has appealed an interpretation of the Planning Director made under the process set forth in WCC 22.20. The history and status of the case was accurately set forth in the Brief filed by Whatcom County, as follows:

“Code History/Procedural Facts”

The seasonal clearing restrictions of WCC 20.51.410 were first adopted as a Temporary Ordinance in 2002 and adopted permanently under Ordinance 2003-049. They have been enforced for seventeen years in substantially the same form.

An additional regulation was subsequently added to WCC 20.51.410 as subsection (3), which prohibits issuing permits for the two week period prior to October 1st.

In 2019, David Morse requested a code interpretation of WCC 20.51.410.

On March 15, 2019, Whatcom County Planning (PDS) Director Mark Personius issued a code interpretation pursuant to WCC Chapter 22.20 regarding the interpretation of WCC 20.51.410.

On March 28, 2019, David Morse appealed the interpretation.”

II.

The Director’s Decision reads as follows:

“Interpretation:

Whatcom County has implemented the State requirements in RCW 36.70B Local Project Review through adoption of Whatcom County Code Title 22. As a general rule, pursuant to WCC 22.05.130, Whatcom County must issue a notice of final decision for all permit types within 120 days from the date of complete application (with exceptions noted in WCC 22.05.130(2)(a)). The final decision shall be provided in the form of a written determination or permit and it "*may be granted subject to conditions, modifications, or restrictions that are necessary to comply with all applicable codes.*" [WCC 22.05.110(1); RCW 36.70B.030(5)]

"In order to protect water quality, the Lake Whatcom Watershed Overlay District contains provisions that restrict the time period for which development greater than 500 square feet may commence. [WCC 20.51.410(2)] Therefore, as required by WCC 22.05.110(1), project permits in the Lake Whatcom Watershed Overlay District are subject to a Condition of Approval to meet the seasonal clearing activity limitation prohibiting clearing activity greater than 500 square feet from October 1 through May 31st. In addition, WCC 20.51.410(3) prohibits the issuance of development permits exceeding the maximum threshold during the seasonal clearing activity closure period within two weeks prior to the closure date of October 1st.

To comply with project review timeframe requirements (120 days) and all other applicable codes for project permits located within the Lake Whatcom Watershed Overlay, Whatcom County Planning and Development Services issues a written final determination on applications within the requisite 120 day timeframe, but provides that they are approved subject to the conditions required by WCC 20.51.410. In essence, the 120 day time period applies to the permit *decision*. RCW 36.70B does not require that the permit be *issued* within that timeframe. PDS complies with the 120 day statutory timeframe by noticing the applicant of the permit approval (decision) and the timeframe [WCC 20.51.410(2)] of when the permit can be issued."

Appellant Morse argues that the Planning Department cannot delay the issuance of a permit that includes seasonal clearing restrictions until the seasonal restriction ends. His

position is that the permit itself must be issued within the 120 day period mandated by WCC.20.05.130. The Appellant argues that delaying the issuance of the permit can cause problems in obtaining financing; keeps permittees from conducting other permit associated work not affected by the seasonal clearing restrictions; and can create difficulties in the hiring of contractors for the project. While one or more of these may be true, there is little to no evidence in the record confirming any of these have arisen, other than indications that some building permits contain permission for work not affected by the seasonal closure, which the Department is apparently willing to resolve to allow this work to proceed, if asked.

The Planning Department argues that holding the permits until the seasonal restrictions end helps insure compliance with the applicable requirements. Again, while this may be true, there is no evidence in the record confirming it and no known violations of the seasonal closure restrictions.

Conclusions of Law

I.

The Hearing Examiner hears and decides legal issues, raised under WCC 20.22 *de novo*. The Hearing Examiner is not a Court and is the final Administrative Decision maker at the County level for those matters properly before him.

II.

The Hearing Examiner presumes County Ordinances adopted, pursuant to State law, are consistent with State law and relies on the County Ordinances when making Decisions.

The legal interpretation requested by the Appellant goes to the interaction of two Chapters of the Whatcom County Code. The first of these requires the Planning Department to review matters in a timely matter and reads in relevant part as follows:

22.05.110 Final decisions.

(1) The director or designee's final decision on all Type I or II applications shall be in the form of a written determination or permit. The determination or permit may be granted subject to conditions, modifications, or restrictions that are necessary to comply with all applicable codes.

22.05.130 Permit review time frames.

(1) The county shall issue a notice of final decision for all permit types, including procedures for administrative appeal and notice that affected property owners may request a change in valuation for property tax purposes, to the applicant, the Whatcom County assessor, and any person who requested notice or submitted substantive comments on the application **within 120 calendar days of the date the department determined the application complete,.....**(Emphasis added)

The relevant sections of the second Chapter that is the subject of this Code Interpretation, reads as follows:

WCC 20.51.410(2) Seasonal clearing activity limitations.

Clearing Activity, as defined in WCC 20.97.054, that will result in exposed soils exceeding 500 square feet **shall not be permitted from October 1st through May 31st;**

WCC 20.51.410(3) Seasonal clearing activity limitations.

To ensure compliance with subsection (2) of this section, **Whatcom County planning and development services shall not issue development permits** requiring more than 500 square feet of land disturbance located within the Lake Whatcom watershed **within two weeks prior to the watershed seasonal closure on October 1st.**

Relevant definitions:

20.97.053 Clearing.

"Clearing" means destruction of vegetation by manual, mechanical, or chemical methods resulting in exposed soils. (Ord. 2003-049 § 1, 2003; Ord. 2003-032 Exh. A, 2003; Ord. 2002-075, 2002; Ord. 2002-034, 2002; Ord. 96-013 § 1, 1996).

20.97.054 Clearing activity.

“Clearing activity” means clearing taking place on a single parcel of record or as part of a single project. Fill and grade activities regulated by the county are considered a clearing activity. (Ord. 2005-079 § 1, 2005; Ord. 99-086, 1999; Ord. 96-013 § 1, 1996).

In interpreting these Sections, the Director reads WCC 20.51.410(2) to completely ban the issuance of permits, during the seasonal closure period, that allow clearing activity, after the seasonal closure period ends, that will expose soils of more than 500 square feet.

The Hearing Examiner respectfully disagrees.

WCC 20.51.410(2) is a seasonal ban on clearing activity and does not address the issuance of Permits. Permits can be approved and still ban the clearing during the closure period by conditioning the permit. While the words in the Section might be read as stating permits for clearing activity, which is subject to this limitation, shall not be issued during this period; this is an expansive stretch of the language actually used. What this Section is addressing and restricting is certain clearing activity, not Permit issuance. The ordinary meaning of “permitted” is “allowed.” Certain clearing is not allowed. Generally, conditions regarding clearing activities, including timing, are just a part of a building or other development Permit issued.

This interpretation is supported by the language used by the County Council in WCC 20.51.410(3), where the County Council specifically forbids the issuance of permits during the two week period prior to the start of the seasonal closure, using the language **“Whatcom County Planning and Development Services shall not issue development permits,”** during a two week designated period. It is a basic rule of statutory construction that the use of specific language in one part of a Chapter of the Code being interpreted, but not using that language in another Section, indicates the adopting body intended different results. Another way of stating this is that, if the legislative body wished certain development permits not be issued during the seasonal closure, it would have said so specifically, as it did when not allowing permits to be issued during the two week period

before the seasonal closure started. The use of different language in two paragraphs of the same Section of the Code indicates a different intent.

Additionally, the interpretation of WCC 20.51.410(2) offered by Planning, in reality, requires the adding into the Section additional language which forbids the issuance of Permits during the seasonal closure. Another basic rule of statutory construction favors interpretations that do not require reliance on language not in Ordinance or Statute, when construing its meaning or intent.

WCC 20.51.410(2) does not ban the issuance of development permits allowing more than 500 square feet of clearing activity until the seasonal closure period ends. It does ban the clearing activity itself during the closed period. This seasonal limitation is currently included as a Condition in all Final Determinations and Permits issued in areas subject to the seasonal closure limitations. This is specifically allowed by WCC 20.05.110(1). *“The determination or permit may be granted subject to conditions, modifications, or restrictions that are necessary to comply with all applicable codes.”*

The Planning Department can have permittees affected by the seasonal closure sign a separate document acknowledging the seasonal closure before issuing any permits, and, of course, all permits affected by the seasonal closure need to contain a specific condition forbidding the clearing activity during the closure. Putting this Condition in bold capitals is also appropriate. In addition, the Planning Department can do occasional drive-by inspections when in the area of properties issued a Permit under these circumstances. It is the Hearing Examiner’s, understanding, that there have been only a dozen or so Permits affected by seasonal closures each year.

III.

WCC22.05.110(1) requires a final decision either as a permit or determination using the following language:

22.05.110(1) Final decisions.

The director or designee's final decision on all Type I or II applications shall be in the form of a **written determination or permit**. The **determination or permit** may be granted subject to conditions, modifications, or restrictions that are necessary to comply with all applicable codes shall be in the form of a written determination or permit. (Emphasis added)

WCC 20.05.130(5) requires timeframes for Permit of Final Decision, as follows:

22.05.130 Permit review time frames.

(1) The county shall issue a notice of final decision for all permit types, including procedures for administrative appeal and notice that affected property owners may request a change in valuation for property tax purposes, to the applicant, the Whatcom County assessor, and any person who requested notice or submitted substantive comments on the application **within 120 calendar days** of the date the department determined the application complete.....(Emphasis added).

The Planning Department has a current policy of issuing final determinations instead of Building Permits when the proposed development activity involves the seasonal clearing restrictions—not issuing the actual Permit until the seasonal closure periods have ended. The Hearing Examiner believes that the best interpretation of this Section is that, where a Permit is sought, it is to be issued within the applicable timeframe. A Final Decision on a Permit is made by issuing the Permit. Where a Decision not involving a Permit is sought, such as, a Code Interpretation or a Shoreline Exemption, then a Final Determination is issued. Since the word “or” is used between permit and determination, twice in fact, it is a better reading of the legislative intent that using the words “determination or permit” was simply an acknowledgment that Final Decisions included matters other than permits. Either one was to be finalized within the applicable timeframes.

Issues such as seasonal clearing and grading closures can adequately be handled by Conditions of Approval requiring compliance. Requiring the permittee to specifically

acknowledge the requirement would be one appropriate way to increase compliance.

Decision

Development Permits, including those authorizing work subject to seasonal closures, should be approved and issued within the time limits of WCC 22.05. This matter is remanded to the Planning Department for the implementation of policies consistent with this Decision.

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

This action of the Hearing Examiner is final.

The applicant, any party of record, or any county department may appeal any final decision of the hearing examiner to Superior Court or other body as specified by WCC 22.05.020. The appellant shall file a written notice of appeal within 21 calendar days of the final decision of the hearing examiner, as provided in RCW 36.70C.040.

More detailed information about appeal procedures is contained in the Whatcom County Code Title 22 and Title 23.60 and which is available at <http://www.codepublishing.com/WA/WhatcomCounty>.

DATED this 30th day of July 2019



Michael Bobbink, Hearing Examiner