

WHATCOM COUNTY HEARING EXAMINER

RE: Administrative Appeal) APL2019-0014
Appeal of Notice of Additional Requirements) NOAR SHX2019-00108
Application for)
Washington Coho, LLC) FINDINGS OF FACT,
) CONCLUSIONS OF LAW,
) AND DECISION

SUMMARY OF APPEAL AND DECISION

Appeal: The Appellant, Washington Coho, LLC, has appealed a Decision made by appealing the Notice of Additional Requirements (NOAR) associated with case #SHX2019-00108 issued by Whatcom County Planning and Development Services on December 9, 2019.

Decision: The Hearing Examiner Upholds Planning and Development Services' Notice of Additional Requirements/Conditions of Approval, subject to modification and remands the matter back to the Department for action in accordance with this Decision.

FINDINGS OF FACT

**I.
Background Information**

Appellant: Washington Coho, LLC

Site Location/Address: 2174 Dellesta Drive
Bellingham, Washington 98226

Assessor's Parcel Number: 380326 519037

Zoning: Rural [R5A]

Shoreline Designation: Shoreline Residential

PROCEDURAL INFORMATION

Authorizing Ordinance: Title 23 Shoreline Management Program

Applicable Whatcom County Codes:

WCC 22.05	Project Permits Procedures
WCC 16.16	Critical Areas Ordinance
WCC 20.51	Lake Whatcom Watershed Overlay
Title 17	Flood Damage Prevention
Title 20	Zoning
Title 24	Health Code

Exhibits

- 1 Administrative Appeal, filed by Appellant, David C. Morse III, filed Dec 20, 2019 with attachment:
 - 1-1 Appellant's Statement, dated December 20, 2019, to PDS WC Hearing Examiner and PDS Shoreline Administrator, prepared by Tim Schermetzler, Attorney
 - 1-2 Customer Receipt, dated December 12, 2019
- 2 Staff Report, dated February 19, 2020
- 3 Index of Cited Cases in Appellant's Reply to County's Response to Motion for Summary Judgment [3 Cases attached
- 4 Summary Judgment Motion: Whatcom County's Memorandum re: (1) Nonconforming Development and (2) Shoreline Administrator Authority, prepared by Royce Buckingham, Prosecuting Attorney, dated February 12, 2020
- 5 Shoreline Statement of Exemption: Notice of Additional Requirements [NOAR], dated December 9, 2019, from Shoreline Administrator to Applicant's Representative
- 6 Appellant's Reply to County's Response to Motion for Summary Judgment, prepared by Timothy D. Schermetzler, with attached Certificate of Service, dated February 19, 2020
- 7 Statement of Additional Authority, prepared by Royce Buckingham, February 21, 2020
- 8 Three-ring binder: [10] Cited Cases in Appellant's Motion for Summary Judgment
- 9 Exhibit A: Shoreline Exemption Master Land Use Application, received Sept 27, 2019
 - 9-1 Shoreline Exemption Supplemental Application
 - 9-2 Fee Responsibility
 - 9-3 Agent Authorization
 - 9-4 Property Information Narrative for Single-Family Residence
 - 9-5 Whatcom County Land Use Checklist
 - 9-6 Customer Receipt
 - 9-7 Proposed Site Plan
 - 9-8 Statutory Warranty Deed, September 23, 2010
 - 9-9 Preliminary Stormwater Proposal, with Stormwater Site Plan attached

- 9-10 Preliminary Traffic & Concurrency Information
 - 9-11 Determination of Completeness, dated October 11, 2019
 - 9-12 Shoreline Statement of Exemption, NOAR, dated December 9, 2019 from Andrew Hicks to Jon Sitkin
 - 9-13 Memo dated December 10, 2019 from Environmental Health to Shoreline Staff re: Sewage Disposal and Drinking Water
- 10 WA State Department of Ecology, Letter dated March 10, 2020 re: Washington Coho, LLC v. Whatcom County, prepared by Joe Burcar, Section Manager: Shorelands and Environmental Assistance Program

Parties of Record

David Morse, Appellant
Washington Coho, LLC
2184 Dellesta Drive
Bellingham, WA 98226

Timothy Schermetzler, Attorney
1500 Railroad Avenue
Bellingham, WA 98225

Royce Buckingham, Attorney
Whatcom County Senior Deputy II

Andrew Hicks
Shoreline Administrator

Michael Kershner, Watershed Planner
Ryan Ericson, Natural Resources Supervisor
Whatcom County Planning & Development Services

II.

On September 27, 2019, Whatcom County Planning and Development Services (WCPDS) received a Shoreline Exemption Application from the Appellant proposing a new, single-family residence on a non-conforming lot at 2174 Dellesta Drive (APN 380326 519037).

On October 11, 2019, WCPDS issued a Determination of Completeness.

On December 9, 2019, Staff from WCPDS issued a Notice of Additional Requirements (NOAR) requiring a reduction in building area to 2,500 square feet or application for a shoreline variance; a site plan showing the proposed build-out of the subject parcel; flagging of the Ordinary High Water Mark (OHWM); a stormwater plan consistent with WCC 20.51.420; a tree canopy retention plan; an Erosion and Sedimentation Control (ESC) plan; a “Declaration of Covenant and Grant of Easement: On-site Stormwater Document”; a vegetation management plan or inner/outer planting plan; and an analysis of existing and proposed lot coverage that meets WCC 20.97.217.

On December 20, 2019, Washington Coho, LLC submitted an Appeal to the Hearing Examiner of Administrative Official’s Decision, along with the applicable appeal fees.

When the current shoreline and habitat conservation area setbacks are applied to the Applicant’s lot, there is approximately 1400 square feet available for a building site while complying with all current setbacks. The Applicant wishes to construct the home within the shoreline setback area by using a “common line setback” allowed without a variance under Appendix F of the Whatcom County Shoreline Master Program, but argues that he is not limited to the 2500 square foot building area allowed under Appendix F and WCC 23.50.070(N), and that he is not required to provide the information requested in the NOAR Decision he is appealing prior to the Approval of the requested Shoreline Exemption.

The Appellant did not meet with Staff to ask about the reasons the Administrator requested the information, but instead simply appealed. There were no follow-up inquiries in preparation for this motion and no requests to Staff regarding the timing or order in which the information was to be submitted.

II.

Any Findings of Fact deemed to be Conclusions of Law are hereby adopted as such. Based on the foregoing Findings of Fact now are entered the following Conclusions of Law.

CONCLUSIONS OF LAW

I.

WCC 23.50.070 defines non-conforming lots within shoreline jurisdiction as follows:

M. Nonconforming lots are those that have a building area of less than 2,500 square feet available for a single-family residence and normal appurtenances that is unrestricted by setbacks or buffers from shorelines.

The Appellant's lot has less than 2500 square feet of buildable space outside of currently required setbacks and is therefore a non-conforming lot for the purpose of applying the Shoreline Regulations to the Applicant's project.

WCC 23.50.070(N) allows setback reductions on non-conforming lots "without a shoreline variance" when the nine conditions in the section are all met, stating as follows:

N. Where permitted according to shoreline areas designations (WCC Table 23.100.010), new single-family development on any legal lot in shoreline jurisdiction that is nonconforming with respect to the required shoreline buffer standards may be allowed without a shoreline variance when all of the following criteria are met:

The Appellant argues that he is entitled to build within the buffer but that WCC 23.50.070(N) does not apply to him because his lot does not meet Condition 1, which reads as follows:

- 1. The depth of the lot (the distance from the Ordinary High Water Mark to the inside edge of the frontage setback) is equal to or less than the standard buffer as indicated in Chapter 16.16 WCC;***

Apparently, the Appellant believes that, since the depth of his lot is greater than the standard buffer, he does not meet the criteria. However, if paragraph 1, above, is read to only allow lots that are no deeper than the standard applicable buffer (in this case 100 feet from the shoreline) to be allowed without a variance, then the Appellant is required to apply for a Variance; something he has not done.

The Shoreline Administrator, reading the non-conforming section and Appendix F as a whole, has determined that residential development on any non-conforming lot as defined in WCC 23.50.070(M) (less than 2500 square feet of buildable area outside of applicable buffers) can proceed without a variance in order to effectuate the intent of WCC 23.50.070(N) and Appendix F.

It is the clear intent of these sections to simplify the regulatory process for lots with less than 2500 square feet of buildable area outside of the shoreline buffers and setbacks by allowing such development to proceed without a shoreline variance, the public hearing process, and the required Department of Ecology review and approval. This simplified process is to the benefit of owners of non-conforming shoreline lot owners, not to their detriment.

However, it must be noted that common line setback is not a right but instead a discretionary matter needing approval of the Shoreline Administrator. Appendix F of the Shoreline Management Program reads in relevant part as follows:

Appendix F Common-Line Setback Standards

1. Single-family residential development on nonconforming lots shall meet the setback standards established in WCC 23.90.130, *Shoreline Bulk Provisions*, except as provided in WCC 23.50.070(N)(1) through (9), Nonconforming Development, and subsection 2 below.

2. For the purpose of accommodating shoreline views to be adequate and similar to adjacent residences but not necessarily equivalent, setbacks and buffers for single-

family residences may be reduced consistent with the following:

a. Where there are existing legally established nonconforming residences that encroach on the established setback/buffer within fifty (50) feet of either side of the proposed building foot print, the Administrator may reduce the required setback/buffer for the proposed structure. In such cases, the proposed residential structure may be set back from the OHWM to a common line drawn between the nearest corners of each adjacent residence.

b. In those instances where only one existing nonconforming single-family residence is within fifty (50) feet of the proposed building footprint, the Administrator may reduce the setback/buffer of the proposed structure to a line drawn between the nearest corner of the existing adjacent residence and the nearest applicable setback for the adjacent vacant parcel.

c. In no case shall the reduced setbacks and buffers applied, be less than fifteen (15) feet landward of the OHWM. In all cases, vegetative buffers shall be optimized.

d. Any further setback/buffer reduction for nonconforming lots beyond that allowed in this section shall require approval of a shoreline variance permit.

Section 1 requires setbacks be met unless the proposed development meets the ALL requirements of WCC 23.50.070(N) and subsection 2 of Appendix F. Subsection 2 states that the Administrator may (Not shall) reduce setbacks to the common line setback. In order to get a common line setback for residential construction without a Shoreline Variance, an Applicant must show full compliance with all of the requirements of WCC 23.50.070(N) and Appendix F subsection 2, and must have an Exemption approved by the Administrator. To comply with these requirements, the Appellant must identify a buildable area that does not exceed 2500 square feet. If the Appellant really believes he is not entitled to use WCC 23.50.070(N), he needs to apply for a Variance. Such an application could include a

request for a larger “buildable area” such as that proposed by the Appellant in his Shoreline Exemption request.

II.

Shoreline residential construction is exempt from the requirement to obtain a Shoreline Substantial Development Permit. However, the developer must still comply with all standards and policies of the Shoreline Master Program. Basically, there can be no net loss of ecological functions and complete review of the project is necessary to insure adverse impacts are fully mitigated. Furthermore, the proposed home is in the Lake Whatcom Watershed and the Lake Whatcom Watershed Overlay applies. Part of the Overlay requirements limit tree canopy removal. The Shoreline Administrator must have accurate tree canopy information and a tree plan to appropriately condition the Exemption. Likewise, the Administrator needs an accurate and detailed site plan showing existing development and proposed redevelopment and new development to be able to approve a specific “buildable area” for the proposed development.

The Administrator has broad authority to gather the information needed to ensure that any project is consistent with all applicable regulations, including zoning regulations, before granting an Exemption, as shown by the following Code Sections and others identified in Section 4, Authority of Shoreline Administrator in the County’s submitted Memorandum:

23.50.020 Relationship to other local regulations.

B. In the case of development subject to regulations of this program but exempt from the shoreline substantial development permit requirement, any required statement of exemption shall be obtained prior to issuance of the building permit; provided, that for single-family residences, a building permit reviewed and signed off by the administrator may substitute for a written statement of exemption. A record of review documenting compliance with bulk and dimensional standards as well as policies and regulations of this program shall be included in the permit review. The building official shall attach and enforce conditions to the building permit as required by applicable regulations of this program pursuant to RCW 90.58.140(1).

23.60.023 Statements of exemption.

A. The administrator is hereby authorized to grant or deny requests for statements of exemption from the shoreline substantial development permit requirement for uses and developments within shorelines that are specifically listed in WCC 23.60.022. Such statements shall be applied for on forms provided by the administrator. The statement shall be in writing and shall indicate the specific exemption of this program that is being applied to the development, and shall provide a summary of the administrator's analysis of the consistency of the project with this program and the Act. As appropriate, such statements of exemption shall contain conditions and/or mitigating measures of approval to achieve consistency and compliance with the provisions of the program and Act. A denial of an exemption shall be in writing and shall identify the reason(s) for the denial. The administrator's actions on the issuance of a statement of exemption or a denial are subject to appeal pursuant to WCC 23.60.150.

All of the information requested in the NOAR must be submitted by the Appellant prior to granting a building permit. The Shoreline Administrator has no obligation to grant the Exemption until all the information requested has been submitted and reviewed. The Applicant can request that certain information be supplied after a 2500 square foot, buildable area has been identified as acceptable. Requests to submit required information in an identified order should be negotiated between an Applicant and Staff. However, it is in any Applicant's best interest to know early in the process the various information Staff will require before an Exemption and final building permit can be granted. Ultimately an Applicant will need to propose adequate mitigation for any adverse impacts to critical areas and buffers, so the no net loss of ecological functions requirements can be met and the Appellant can show compliance with all Shoreline Program and Zoning Code requirements. The Shoreline Administrator has the right to all of this information prior to issuing a decision on the Exemption request. The Appeal should be denied and the matter remanded back to the Department for further processing of the Application.

III.

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 Appeal is denied. The Applicant is entitled to up to 2500 square feet of buildable area for residential development of the subject Non-conforming shoreline parcel without a Variance when compliance with the Whatcom County Shoreline Program and Zoning Ordinance has been established. All of the information requested in the challenged Notice of Additional Requirements must be supplied to the Shoreline Administrator before a formal decision on the Exemption requested can be issued. Further NOAR'S may be necessary. This matter is Remanded back to the Department for further action 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 25th day of March 2020

Michael Bobbink, Hearing Examiner