

WHATCOM COUNTY HEARING EXAMINER

RE: Administrative Appeal ) APL2012-0022  
Application for )  
 )  
*Don Hickey and Marjory Newman* ) FINDINGS OF FACT,  
 ) CONCLUSIONS OF LAW,  
 ) AND DECISION

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**SUMMARY OF APPEAL AND DECISION**

Appeal: Marjory Newman, through her son-in-law, Don Hickey, the Appellants' Consultant, Bruce Ayers, and the Appellants' Attorney, David Cottingham, have appealed a Determination by Whatcom County Planning and Development Services that two adjacent parcels owned by Mrs. Newman are a single parcel for the purposes of use and sale, pursuant to the Lot Consolidation requirements of WCC 20.83.070.

Decision: The Determination of Whatcom County Planning and Development Services is upheld. The Lots are consolidated as a single parcel for use or sale, pursuant to WCC 20.83.070.

**FINDINGS OF FACT**

**I.**

**Background Information**

Appellant: Don Hickey and Marjory Newman  
Assessor's Parcel Number: 370308 514246  
Property Location/Address: 1883 Yew Street Road  
Bellingham, Washington  
Zoning: Rural (R10A)  
Minimum Lot Size: 10 acres

Comprehensive Plan: Urban Growth Area Reserve

Subarea: Chuckanut – Lake Samish

Authorizing Ordinances

WCC 20.92 Hearings Examiner

WCC 20.84.240 Appeal

Ordinance No. 2008-003 Amendment to the Title 20 Zoning Map

Ordinance No. 2000-0075 Non-conforming Lots and Lot Consolidation

Applicable Whatcom County Codes

WCC 20.83.070 Lot Consolidation

Noticing Requirements: Legal Notice of Public Hearing, February 14, 2013

Public Hearing: February 27, 2013

Exhibits

- 1 Appeal Application Cover Memo, dated December 17, 2012 with attachments
  - 1-1 Appeal Application
  - 1-2 Appeal Statement, December 14, 2012, from Ayers Consulting, LLC
  - 1-3 Customer Receipt, December 14, 2012
  - 1-4 Notice of Appearance, January 10, 2013, from David Cottingham
  
- 2 Cover Memo, dated February 12, 2013, from Stacie Pratschner, with attachments
  - 2-1 Microfiche record of Building Permit 7903-79
  - 2-2 Hearing Examiner Decision, APL2008-0019, dated July 14, 2010, Robert Matichuk, Appellant, with Staff Report, dated July 7, 2010
  - 2-3 PDS Letter, November 30, 2012 re: Lot of Record Determination to Mr. Ayers
  - 2-4 Vicinity Map
  - 2-5 Ordinance No. 2006-03-026
  - 2-6 Ordinance No. 2011-05-025
  - 2-7 Email from Martin Kjelstad, City of Bellingham re: water/sewer, Nov 20, 2012
  - 2-8 Email from Belinda Jaeger re: Water Resource Protection Overlay, Nov 20, 2012
  - 2-9 Covenant Binding Properties, July 10, 1979
  
- 3 Cover Memo, dated February 7, 2013, from Stacie Pratschner, with attachments
  - 3-1 Microfiche Record of Building Permit 7903-79
  - 3-2 Hearing Examiner Dec, APL2008-0019, July 14, 2010, Matichuk, with Staff Report, July 7, 2010
  
- 4 Lot of Record Application [EXE2012-0094, November 20, 2012] with attachments
  - 4-1 Fee Responsibility, Don Hickey and Marjory Newman
  - 4-2 Agent Authorization: Ayers Consulting
  - 4-3 Deed History
  - 4-4 Customer Receipt, October 17, 2012

- 4-5 Cover Letter, Oct 17, 2012, from Ayers Consulting
- 4-6 Deed History Map Configuration
- 4-7 Statutory Warranty Deed
- 4-8 Color-Coded Zoning Map: Newman on March 21, 2000 and May 2, 2006
- 4-9 Stewart Title
- 4-10 Lot of Record Determination, November 30, 2012, with attached Vicinity Map; Ordinance No. 2006-03-026; Ord No. 2011-05-025; Covenant Binding Properties, July 10, 1979
- 4-11 Emails betw Staff and Applicant
- 4-12 PDS Case Activities Tide Mark Record
  
- 5 Legal Notice of Public Hearing, February 14, 2013
  
- 6 Certificate of Delivery, dated February 26, 2013, with attached Appellants' Memorandum of Authorities, prepared by David Cottingham, dated February 26, 2013
  
- 7 Appendix to Appellants' Memorandum
  
- 8 Letter dated May 2, 2006 from Robert Martin re: Social Security Issue
  
- 9 Case Activities for EXE2004-0280, dated May 4, 2004 re: property binder rescinder
  
- 10 Whatcom County Staff Report, December 3, 1998 re: Lot Consolidation Amendment
  
- 11 Email memo from Michael Bobbink to Parties, March 11, 2013 re: Request for Clarification of Zoning Ordinance affecting Newman properties in 2000
  
- 12 Email response from Bruce Ayers to Bobbink, March 11, 2013 re: Response to 2000 Zoning
  
- 13 Email response from Tyler Schroeder to Bobbink, 03-13-2013 re: UR and RR March 2000 With attachments, [13-1] Chapter 20.20, Urban Residential (UR) District and [13-2] Chapter 20.32, Residential Rural (RR) District
  
- 14 Email Letter dated March 14, 2013 from Bruce Ayers to Hear Examiner re: Response to Schroeder: Factual Dispute
  
- 15 Email from Schroeder to Hearing Examiner, March 14, 2013 re: Factual Dispute
  
- 16 Email from Hearing Examiner to Parties, March 20, 2013 re: final review and decision

**Parties of Record**

Don Hickey  
 1339 Scenic Avenue  
 Bellingham, WA 98229

Marjory Newman  
 PO Box 30653  
 Bellingham, WA 98228

David Cottingham  
Bellingham National Bank Building  
103 East Holly Street, Suite 418  
Bellingham, WA 98225

Bruce Ayers  
1313 East Maple Street, Suite 201  
Bellingham, WA 98225

Stacie Pratschner, Tyler Schroeder, Nick Smith  
Planning and Development Services

Royce Buckingham  
Civil Deputy Prosecutor

## II.

Marjory Newman is the owner of two adjacent parcels located east of Yew Street Road, just east of the city limits of the City of Bellingham. The parcels are located in the Lake Padden Watershed. The parcels are portions of a single Assessor's Parcel, APN 370308 514246. The parcels have had separate tax identification numbers since their creation.

As part of the processing of a Lot of Record Determination, EXE2012-0094, Whatcom County Planning and Development Services determined that Mrs. Newman is the owner of two separate, legal Lots of Record, but that the two lots are subject to the Lot Consolidation provisions of WCC20.83.070, and are considered as one undivided parcel for purposes of use or sale. The Determination that the lots are consolidated under WCC 20.83.070 is the subject of this Appeal by Mrs. Newman.

## III.

The Appellant's property consists of approximately 5.8-acres. The 5.8-acres consist of a 5-acre parcel created by deed on March 31, 1953, and an approximately 0.8-acre parcel created by deed on January 7, 1949. Both lots were legally created prior to the

original establishment of the Whatcom County Subdivision Code. The two parcels first came into a common ownership in 1953. Also in 1953, the two parcels were transferred by a single Statutory Warranty Deed, containing a separate legal description for each of the two parcels. The parcels have been in common ownership since 1953. The parcels were purchased by Ronald C. Newman and Marjory L. Newman [Appellant, herein] in 1968. Mr. Newman died in 1997 and Marjory Newman has been the sole owner of the property since his passing.

#### IV.

The 0.8-acre parcel is the location of a single-family residence of unknown age. In 1979, Ronald Newman sought a building permit to construct a garage/shop structure on the 5-acre portion of the property, which at that time was undeveloped. The 5-acre portion of the property has never been developed with a residence. Since there was no Primary Use on the 5-acre parcel in 1979, under the Whatcom County Code at that time, the requested accessory building was not allowed. In order to overcome this obstacle, Ronald Newman signed a Covenant, binding the two parcels together, thereby allowing an Accessory Use on the property associated with the existing residence [a Primary Use] on a 5.8-acre parcel. The Covenant to Bind the two parcels into a single parcel in 1979 was not signed by Mrs. Marjory Newman.

Mrs. Newman argues that the Covenant to Bind is not enforceable against her because she did not sign it.

#### V.

The Appellants are seeking to obtain a building permit to construct a single-family residence on the 5-acre portion of the property. The Appellants' intent is to have two separate parcels developed with single-family residences, which can be sold or developed individually. Planning has pointed out that a second residence may be allowed as an accessory dwelling unit on the 5.8-acres, but that the 5.8-acres must be developed and sold as a single parcel.

## VI.

Whatcom County's Lot Consolidation provisions, currently found in WCC 20.83.070, were adopted in the year 2000. At that time, the 0.8-acre parcel was zoned UR3, and, with public sewer and water, could be developed at a density of three units per acre. Without public sewer and water, the minimum lot size was five acres. The 0.8-acre lot was, and still is, served by a private well and a private onsite sewage disposal system. The 0.8-acre parcel was a legal nonconforming [because less than five acres] parcel in 2000.

In 2000, the 5-acre parcel was zoned at RR2 [Rural Residential Two] and at that time, could be developed at a density of two units per acre if serviced by public sewer and water. Without public sewer and water, the minimum lot size was one acre. The five acre parcel was a legal conforming parcel [one acre or larger in size] when the Lot Consolidation Ordinance was adopted.

The 0.8-acre parcel with the existing residence had, and still has, a private well and an onsite septic sewage system. The 5-acre parcel, at this time, does not have a well or a sewage disposal system. On the date of the adoption of the current Lot Consolidation provisions of the Zoning Ordinance in 2000, both the properties could have been subdivided if they were connected to a public water or sewer system. At that time, it appears the City of Bellingham would have extended services to these properties if requested. As the Hearing Examiner understands the record, the City of Bellingham was allowing water and sewer hook-ups for the area containing the subject property until 2004. Water hook-ups have not been available to the property since 2004. The City of Bellingham no longer allows water and sewer hook-ups outside the city limits and only supplies public sewer and water to properties after they have been annexed into the City. Under the Growth Management Act, it is illegal, under most circumstances, to extend urban level services outside of a city's Urban Growth Area.

As part of the Growth Management Act zoning process, the Appellant's properties were down-zoned in 2008 or 2009 to Rural Ten Acres which allows density of one home per

ten acres. Even if treated as a single parcel, the 5.8-acre parcel is now a (legal) non-conforming lot.

#### **VII.**

All of the Appellant's 5.8-acre property, which is the subject of this Administrative Appeal, is located within the Lake Padden Watershed. The Lake Padden Watershed is in a Whatcom County Water Resource Protection Overlay District [WCC Chapter 20.71]. The Lake Padden Watershed was added to the Water Resource Protection Overlay District in 2009.

#### **VIII.**

In April 2006, Marjory Newman contacted the Whatcom County Planning Department concerning a "Social Security issue" involving these parcels. In response to this contact, Planning reviewed the status of this property and supplied Mrs. Newman with a written letter saying that the two parcels were consolidated under Whatcom County Lot Consolidation provisions and were one property for the purpose of use or sale. This was apparently the result that Mrs. Newman desired and it apparently benefited her at that time.

The 2006 written determination by Whatcom County did not contain a notice of Mrs. Newman's Right to Appeal the determination that the properties were consolidated. No Appeal of the 2006 letter was expected or filed.

#### **IX.**

Mrs. Newman, through her representative, has indicated a willingness to remove the garage/shop building from the 5-acre portion of the property in order to facilitate a rescission of the Covenant to Bind, signed by Mr. Newman in 1979.

#### **X.**

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 Parties agree, and the Hearing Examiner concurs, that the two parcels owned by Mrs. Newman are separate, legal non-conforming Lots of Record, as described in WCC 20.83.060, which reads as follows:

**20.83.060 Lots of record.**

Except as modified by WCC 20.83.070, legal parcels or lots of record that do not meet the minimum area or width requirements of the zone district may be developed with permitted, accessory and conditional uses provided:

- (1) That all other district standards are met; and
- (2) The lots or parcels were created pursuant to applicable state and local subdivision regulations in place at the time of lot segregation.

As indicated above, nonconforming Lots of Record may be developed, "except as modified by WCC 20.83.070 ..." WCC 20.83.070 contains the Lot Consolidation provisions at issue in this Appeal. If the Appellant's lots have been consolidated under the terms of WCC 20.80.070, the Appellant only has a single parcel for the purposes of use or sale. Planning's determination that the Appellant's lots have been consolidated was based on WCC 20.83.070, which reads as follows:

**20.83.070 Lot consolidation.**

Two or more lots of record shall be considered as one undivided parcel for the purpose of use or sale if all of the following circumstances apply, except as modified by WCC 20.83.071, 20.83.072, or 20.83.073:

- (1) The lots were in one ownership as of the date of the adoption of the ordinance codified in this section (March 21, 2000);
- (2) One or more of the lots in question does not meet the conventional minimum lot size of the applicable zone district;
- (3) The lots are not separated by an intervening parcel in



different ownership or by public right-of-way;

(4) No more than one lot is developed with a legally established permitted or conditional use;

(5) At least one of the lots is less than one acre or located within the Lake Whatcom watershed or other water resource protection overlay district, a designated critical area, or an area zoned agriculture, commercial forestry, or rural forestry.

Planning, in their Determination, dated November 30, 2012, [Exhibit No. 4-10 in the Hearing Examiner file], reviewed the Appellant's situation in regard to each of the five circumstances that must apply before two or more Lots of Record are considered to be an undivided parcel, that is, consolidated into a single parcel for the purpose of development or sale. Planning concluded that each of the circumstances set forth in WCC 20.83.070 applied to the Appellant's property and that her two Lots of Record had to be considered as one undivided parcel for the use or sale of the property. The Hearing Examiner concurs in the analysis made by the Planning Department. Each of the five circumstances is analyzed separately, below.

(1) As set forth in the Findings of Fact, above, the two adjacent lots, in question, were in one ownership on March 21, 2000.

(2) The two Lots of Record total approximately 5.8-acres. The lots are currently in a Rural Ten Acre zone and the minimum lot size for this zone is 10-acres. Therefore, neither lot meets the conventional minimum lot size of the currently applicable Zoning District. Even if applied, as suggested by the Appellant, the 0.8-acre lot did not meet the conventional lot size requirement of five acres for a parcel in the UR3 zone on March 21, 2000, the date of codification of the Lot Consolidation Ordinance.

To apply Criteria No. 2 of WCC 20.83.070, as requested by the Appellants, requires changing the word "does" in Criteria No. 2 to "did."

- (3) It is undisputed that the lots share a common boundary and are not separated by an intervening parcel in different ownership or by public right-of-way.
- (4) The 0.8-acre lot is the only lot currently developed with a legally established Permitted or Conditional Use. The residential use of this parcel is a Permitted Use. The only developed use on the 5-acre portion of the property is an Accessory Use, the garage/shop structure constructed in 1979, after Mr. Newman signed a Covenant to Bind the parcels in order to legalize the construction of the garage building on the 5-acre lot. The 5-acre lot is not developed with a Permitted or Conditional Use.
- (5) One of the lots is [and was on March 21, 2000] less than an acre in size and both lots are currently located in a Water Resource Protection Overlay District, protecting the Lake Padden Watershed.

Since the Appellant's lots met all of the circumstances in paragraphs one through five of WCC 20.83.070, Planning appropriately determined that the two lots must be treated as one undivided parcel for the purpose of use or sale.

## II.

The Appellants raise a number of issues regarding the application of the five factors set forth in WCC 20.83.070.

The Appellants suggest that the determination of the circumstances, set forth in paragraphs two through five of WCC 20.83.070, should be applied as of the date of the adoption of the Ordinance, March 21, 2000. The Appellants point out that with public sewer and water both of the lots in question would have met the conventional minimum lot size on March 21, 2000. In the same vein, the lots in question were not located in a Water Resource Protection Overlay District until the adoption of the Overlay for the Lake Padden Watershed in 2009.

The Appellant argues that, based on the legal history and appropriate legal construction of the Ordinance, the Whatcom County Council intended the March 21, 2000 date be used to determine if the circumstances in paragraphs two through five of WCC 20.83.070 applied, and that Planning erred in using current zoning and current circumstances when reviewing the Appellants property to determine if Lot Consolidation applies.

The Hearing Examiner knows of no rules of statutory construction that support the Appellants' interpretation. The Legislative History does indicate that the Whatcom County Council, when adopting the Ordinance in 2000, intentionally minimized the application of Lot Consolidation, recognizing the significant burden that Lot Consolidation imposes upon owners whose Lots of Record are consolidated. The Council first restricted the application of Lot Consolidation by only applying it to parcels "in one ownership" as of March 21, 2000. Adjacent parcels which came "into one ownership" after that date are not subject to Lot Consolidation under any circumstances. The reach of Lot Consolidation was further limited by the requirement that at least one of the lots was less than one acre in size. The Whatcom County Council also provided for Administrative Approval for relief from the provisions of the Lot Consolidation Section in WCC 20.83.072, and .073. These sections allow many lots which otherwise would be consolidated to continue to be used as separate parcels. However, the Council specifically indicated that Administrative relief from Lot Consolidation was not available for parcels "... located in the Lake Whatcom Watershed or other water resource protection overlay districts ...." While the Whatcom County Council clearly understood that the application of Lot Consolidation creates a significant hardship on the property owners affected by it, the Council concluded that the public interest in protecting Water Resource Protection Overlay Districts outweighed the individual hardship imposed on those properties by making them subject to Lot Consolidation. By using the language "... other water resource protection overlay districts ...," the Whatcom County Council applied Lot Consolidation to all Water Resource Protection Overlay Districts.

There is nothing in the Legislative History, or the language of paragraphs two through

five of WCC 20.83.070, which indicate a legislative intent to apply the criteria only as of the date of the adoption of an Ordinance. In fact, the language used in paragraphs two through five is present tense language. The Whatcom County Council indicated in paragraph one its intent to have that requirement determined as of March 21, 2000. Had it desired to do so for all five criteria, it could easily have stated that intent. Each of the five circumstances which, if all are met, result in Lot Consolidation, is to be determined separately based on the language identifying that circumstance.

After review of the Legislative History in the record and a careful reading of all of the sections of the County Code that apply to Lot Consolidation, the Hearing Examiner concludes that the determination as to whether or not parcels are subject to Lot Consolidation is to be made, based on the circumstances existing at the time an application for a Lot of Record Determination, or for a development permit, on properties is submitted. In fact, the lots are consolidated even if WCC 20.80.070 is applied as of March 21, 2000, because one of the lots is less than one acre in size.

The Appellant is left arguing that because the properties were not in a Water Resource Protection Overlay District when the Lot Consolidation Ordinance was adopted, they are entitled to Lot Consolidation Relief under WCC 20.80.070. There is nothing in the Legislative History to support that conclusion.

### III.

The Appellants argue that the Hardship Provision set forth in WCC 20.83.100 supports their contention that the Council intended that a determination of the applicability of Lot Consolidation be made based on circumstances as they existed at the date of adoption of the Lot Consolidation Ordinance. This Section reads, as follows:

**20.83.100 Hardship.**

To mitigate hardship to the applicant/ property owner, lots being created pursuant to a currently valid application for a short plat or long subdivision, at the date of adoption or

amendment of this ordinance, shall be recognized as conforming lots for the purpose of this ordinance; provided, that other applicable requirements of the zone district and subdivision ordinance are met.

The above section only applies to property which had a valid and complete application for subdivision pending at the date of the adoption of the Ordinance. The section only restates the vesting laws set forth in RCW 58.17, and in the Whatcom County Code.

#### IV.

Lot Consolidation does cause significant hardship to parties whose lots are subject to its requirements. The loss of one or more buildable or legal Lot of Record, which is the consequence of Lot Consolidation, has significant financial impact on the property owner. Additionally, Lot Consolidation can affect parcels that were in common ownership as of March 21, 2000, at a future time an area is subject to zoning changes. The implementation of the Growth Management Act has resulted in a number of downzones. The possibility exists that future down-zoning will result in additional lots subject to Lot Consolidation.

However the language of the criteria which lead to Lot Consolidation, as set forth in WCC 20.83.070, is not ambiguous. The Ordinance is therefore not subject to interpretation and the Ordinance must be applied as written unless, and until, modified by the Whatcom County Council.

#### V.

The Appellants raised a number of interesting arguments regarding the legality of the Lot Consolidation provisions. Appellants' Counsel suggests that provisions adopted by the Whatcom County Council are inconsistent with the State Subdivision Statute, RCW Chapter 58.17. For example, Counsel suggests that Lot Consolidation allows for the moving or vacation of property lines in a manner that is inconsistent with RCW Chapter 58.17, which contains a process for Boundary Line Adjustments.

Additionally, Appellants' Counsel expresses strong reservations about the

constitutionality of the Ordinance, raising "taking" issues, and substantive and procedural due process arguments.

The Hearing Examiner has limited jurisdiction. The jurisdiction is that granted to the Hearing Examiner by the Whatcom County Council. The Hearing Examiner does not have jurisdiction to question the legality of Ordinances adopted by the County Council. The Hearing Examiner does not have authority to rule on the constitutionality of Ordinances.

The Ordinance imposes a heavy burden on a limited number of property owners and affects property interests that have Constitutional protection under both the State and Federal Constitutions. Only the Courts have jurisdiction to determine the basis of protecting constitutionality of legislative actions which impact property rights on the public interest.

The authority of the Hearing Examiner, in this case, is limited to applying the Ordinance. If the Hearing Examiner concludes there is ambiguity in an Ordinance, the Examiner does have the ability to apply rules of statutory construction, and to review Legislative History, in an attempt to ascertain the intent behind the Ordinance. In this case, the Hearing Examiner finds no ambiguity in the Ordinance as applied to the Appellant's property. The Ordinance reflects the County Council's determination that Lot Consolidation, as provided for by the Ordinance, is appropriate and in the public interest when the properties are in a Water Resource Protection Overlay District. Since the Appellant's properties meet all of the circumstances applied in WCC 20.83.070, and since they are entirely located within a Water Resource Protection Overlay District, Planning appropriately concluded that they were subject to Lot Consolidation, pursuant to WCC 20.83.070, were to be considered as one undivided parcel for the purpose of use or sale, and were not eligible for Lot Consolidation relief [see WCC 20.83.072(2)].

## 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 Determination of Whatcom County Planning and Development Services that the two Lots of Record, which comprise APN 370308 514246, are to be considered as one undivided parcel for the purpose of use or sale, pursuant to WCC 20.83.070, is 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 16<sup>th</sup> day of April 2013.

  
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Michael Bobbink, Hearing Examiner