

WHATCOM COUNTY HEARING EXAMINER

RE: Zoning Conditional Use Permit) CUP2009-0006
Application for)
)
Dick Bosch) FINDINGS OF FACT,
) CONCLUSIONS OF LAW,
) AND DECISION

SUMMARY OF APPLICATION AND DECISION

Application: The Applicant is requesting a Zoning Conditional Use Permit to expand a nonconforming use by enlarging the Glen Echo Garden. The Applicant also seeks approval of a Cottage Industry commercial business, utilizing the gardens for weddings, anniversaries, church socials and other outdoor events. The proposal is for a maximum of five social events per month from May through September for a total of no more than 25 events per year, with no more than 100 people per event.

Decision: The requested Zoning Conditional Use Permit is approved with modifications, and subject to conditions.

FINDINGS OF FACT

INTRODUCTION

The following Findings of Fact and Conclusions of Law are based upon consideration of the exhibits admitted and evidence presented at the public hearing.

I.

Applicant: Dick Bosch

Site Location/Address: 4390 Y Road, Bellingham, WA 98226

Legal Description: Within the NE ¼ Section 7, Township 38, Range 4 East, W.M.
Whatcom County, Washington

Assessor's Parcel Number(s): 380407 518470

Zoning: Rural (R5A)

Comprehensive Plan: Rural

Subarea: Lake Whatcom Subarea

Total Acreage: 16.13 acres

Roads: "Y" Road (Public)

Water Supply: Private Well

Sewage Disposal: On-Site Sewage System (OSS)

Fire Protection: Whatcom County Fire District No. 4

Law Enforcement: Whatcom County Sheriff's Office

Public Schools: Mt. Baker School District No. 507

Topography: The parcel is essentially developed at two levels. The upper level contains the residence and two greenhouses. The gardens and social events will occur at the lower level. The lower level is accessed by a very steep ravine with slopes of approximately 50%-70%. Anderson Creek runs through the property.

Vegetation: Vegetation on the site consists of pasture grass, alders, large mature evergreens, and a mix of native and nonnative flowering plants. Riparian vegetation can be found long the creek.

Adjacent Land Uses: North: R5A, Heavily Treed
East: RF, Heavily Treed
South: R5A, Residential
West: R5A, Residential

Easements: None

Authorizing Codes, Policies, Plans, and Programs

Whatcom County Comprehensive Plan

Whatcom County Code Chapter 12.08, Development Standards

Whatcom County Code Chapter 15, Building Code

State Environmental Policy Act (SEPA). Washington Administrative Code Chapter 197-11,

Whatcom County Environmental Policy Administration Chapter 16.08

Whatcom County Code Chapter 16.16, Critical Areas

Whatcom County Code Title 20, Official Whatcom County Zoning Ordinance

Whatcom County Code Title 24, Health Regulations

Legal Notices: Posted – Notice of Public Hearing, April 25, 2012
Mailed – Notice of Application and SEPA, January 27, 2012

- Notice of Public Hearing, April 20, 2012
Published – Notice of Application and SEPA, January 27, 2012
- Notice of Public Hearing, April 26, 2012

Hearing Date: May 9, 2012

Parties of Record

Dick Bosch
Glen Echo Garden
4390 Y Road
Bellingham, WA 98226

Terry Unger
222 Grand Avenue, Suite C
Bellingham, WA 98225

Peter and Jan Willing
4402 Y Road
Bellingham, WA 98226

Lora Thayer
5005 Samish Way
Bellingham, WA 98229

Sanja Barisic
Division of Engineering

Suzanne Bosman and Lyn Morgan-Hill
Planning and Development Services

Exhibits:

- 1 Land Use Application with attachments
 - 1-1 Statutory Warranty Deed
 - 1-2 Supplemental Conditional Use Application
 - 1-3 Determination of Complete Application, April 9, 2009
 - 1-4 PDS form memo to Tech Committee, April 14, 2009
 - 1-5 Letter to Mr. and Mrs. Bosch requesting Additional Information, Dec 27, 2010
 - 1-6 Letter to Mr. Bosch, dated March 8, 2011 re: Notice of Additional Requirements
 - 1-7 PDS form Letter to Neighboring Property Owners, April 14, 2009
 - 1-8 Property Owner Mailing Labels
 - 1-9 Fee Responsibility Form
 - 1-10 Agent Authorization Form

- 1-11 Customer Receipt, March 18, 2011 and March 3, 2009
 - 1-12 Preliminary Traffic Information
 - 1-13 Preliminary Stormwater Proposal
 - 1-14 Revocable Encroachment Permit Application
 - 1-15 Assessor's Record
 - 1-16 Preliminary Stormwater Site Plan and Report, October 2008
 - 1-17 Hearing Examiner Checklist, April 10, 2012
- 2 Staff Report, dated March 27, 2012
- 3 Agency Comments, Memorandum dated September 14, 2011 from Suzanne Bosman to Technical Review Committee
- * Critical Areas Review, October 4 and September 14, 2011, May 4, 2010, April 28, 2009
 - * Warner Webb, Fire Marshal's Office, September 21, 2011
 - * Doug Goldthorp, September 16, 2011
 - * Charles Sullivan Environmental Health, September 28, 2011, and April 28, 2009
 - * DOE, Kasey Ignac, Water Master Letter dated September 15, 2011
 - * Plans Examiner, April 28, 2009 and June 9, 2010
 - * Division of Engineering, April 28, 2009
 - * Division of Engineering, Exemption from Concurrency Evaluation form
- 4 Revised Site Plan, stamped received by PDS March 18, 2011
- 5 Email memo from Hearing Examiner to Suzanne Bosman and Tyler Schroeder, dated December 15, 2011, re: Noticing Requirements
- 6 Memorandum, dated December 20, 2011, from Hearing Examiner to Suzanne Bosman and Tyler Schroeder re: Noticing Requirements
- 7 Public Comments received after re-noticing corrections
- Jan and Peter Willing, April 2, and February 13, 2012
 - Steve Otten, February 10, 2012
 - Janet Lehwald, February 8, 2012
 - Jill Holmes, January 30, 2012
 - John Herod, February 3, 2012
 - Gary and Sharon Karlberg, February 9, 2012
- 8 Public Comments received before re-noticing corrections
- Jan and Peter Willing, September 20, 2011
 - Patrick and Jan Harman, September 20, 2011
 - John Herod, April 29, 2009
 - Fred and Jill Holmes, April 14, 2009 form, comment not dated

- 9 PDS- Provided Site Photos
- 10 Vicinity Map
- 11 Plat Map
- 12 Aerial Photo
- 13 Revised SEPA DNS, issued February 24, 2012, with Distribution and Checklist attached
- 14 Legal Notice, SEPA and Application Notice, January 27, 2012 and September 14, 2011
- 15 Legal Notice of Application, April 14, 2009
- 16 Certificate of Mailing, Notice of Application and SEPA, January 27, 2012
- 17 Certificate of Mailing, Notice of Public Hearing, April 20, 2012
- 18 Certificate of Posting, Notice of Public Hearing, April 25, 2012
- 19 Legal Notice of Public Hearing, April 26, 2012
- 20 Glen Echo Garden Brochure
- 21 Memorandum dated May 9, 2012 from Suzanne Bosman revising Staff Report, Condition 8, regarding amplification
- 22 Email dated April 27, 2012 from John Herod
- 23 Mr. Bosch's testimony: written copy
- 24 Building Permit, No. 7540, dated October 8, 1974
- 25 Packet of Letters supporting Mr. Bosch's testimony
- 26 Receipt for RV sewage tank disposal
- 27 Revocable Encroachment Permit, June 22, 2010

II.

The Applicant is the owner of an approximately 13-acre parcel, zoned Rural, and located on Y Road, northeast of Bellingham.

The Applicant is seeking a Zoning Conditional Use Permit to expand an existing legal nonconforming use, including expansion of the botanical gardens onsite and the use of the site for group events, such as weddings, anniversaries, church socials, family reunions, and other outdoor events.

III.

Whatcom County Planning and Development Services has recommended the Hearing Examiner approve the requested Zoning Conditional Use Permit, subject to some modifications in what the Applicant requested, and subject to numerous Conditions set forth in the Staff Report to the Hearing Examiner, on pages 28 thru 32. The Staff Report, Exhibit 2 in the file, includes numerous factual findings, as well as legal conclusions, and a recommendation.

There are a few disputed facts in the Staff Report. These disputed facts center around the extent that former actions by the owner constitute Code violations, including illegal land disturbance, and the failure to obtain proper permits, including building permits.

Resolution of the issues regarding past Code violations is not centrally relevant to the present request for a Zoning Conditional Use Permit. It is clear that there have been past violations of the County Ordinances. It is also possible that some of the violations alleged in the Staff Report may be inaccurate.

But for the disagreements regarding past Code violations, the facts set forth in the Staff Report are supported by the record as a whole. These facts within the Staff Report are hereby adopted as Findings of Fact, herein, through this reference.

IV.

Both the written record and public comments at the public hearing indicate some property owners living in the neighborhood have concern about both past actions taken by the Applicant and about the potential impacts associated with the granting of this Permit.

It should also be noted that there are a number of written comments in the file, testifying to the beauty of the Applicant's property and the good character of the Applicant.

V.

The Hearing Examiner believes that Staff has done a thorough and careful job of analyzing the potential impacts, with devising appropriate conditions, and balancing the interests of the Applicant and neighboring property owners. The Hearing Examiner believes that Staff's recommendation and conditions could be properly approved without modification.

The Hearing Examiner has determined that there are a few modifications to the conditions recommended by Staff which would help balance the Applicant's rights to use his property and the

legitimate concerns about neighboring property owners and the maintenance of their quality of life. The modifications made by the Hearing Examiner are at least in part aimed at clarifying what is and is not allowed on the site in a manner which will make the Permit easier to enforce.

VI.

There were just a few issues of contention between the Applicant, concerned citizens, and Staff's recommendation. The Hearing Examiner finds that a Condition which allows only unamplified music and voices at tours and events onsite is appropriate. The Hearing Examiner has approved two somewhat similar applications in the past year and has required both conformance with the Washington Administrative Code Noise Standards in WAC 173-60, and contained a Condition restricting or not allowing amplified sound. In this case, the Hearing Examiner believes that compliance with the WAC Standards and a complete ban on amplified sound is appropriate for this location.

The Hearing Examiner recognizes that the different Wedding Event Conditional Use Permits handled by the Hearing Examiner impose somewhat different conditions. The differences in these conditions are designed to take into account the actual differences in the sites and areas where the permits for large events were located and in the history of the Applicants' actions.

VII.

The conditions recommended by Staff distinguish between daytime "tour or group tours" of the botanical gardens during the day and the single events, which would bring up to 100-people onto the site for a limited number of single events from Spring into early Fall, and which would be allowed to continue until 10 p.m.

The Applicant has stated a willingness to accept Staff's recommendation that the larger and longer events, such as weddings, be limited to 20-events, all of which must be held in the months of May through September. For the purposes of the Conditions to follow, these events shall be called "large events."

In contrast, Staff has recommended that the botanical garden tours, which have been ongoing for a number of years, be allowed to continue between the hours of 10 a.m. and 6 p.m., six days a week. As pointed out by the Applicant at the public hearing, there could be controversy over what does and does not constitute a "tour." The Hearing Examiner will be adjusting the Conditions and calling what the Staff Report describes as "garden tours," "small garden events."

The Applicant has for years grown plants onsite and sold them to the public. This is a legal use of the property and none of the Conditions imposed are designed to interfere with growing and selling of plants, and customers parking on the portion of the property near Y Road.

VIII.

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.

Subject to the Conditions of Approval, attached hereto, the Hearing Examiner concludes that the requested Conditional Use Permit to allow an expansion of the Glen Echo Garden and to allow use of the site as a Cottage Industry business, allowing garden tours and outdoor events will be consistent with the Zoning Conditional Use Criteria of WCC 20.84.220 (2 through 8) and that a Zoning Conditional Use Permit should be issued.

II.

The Hearing Examiner concurs in the Conclusions of Law reached by Staff in the Staff Report and that, subject to some modification of the Conditions proposed by Staff, adopts Staff's Conclusions and Recommendation. The Hearing Examiner should issue a Zoning Conditional Use Permit, subject to Conditions.

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

A Zoning Conditional Use Permit is hereby granted to Dick Bosch allowing for a three acre expansion of the botanical gardens at Glen Echo Garden and for the operation of a Cottage Industry consisting of an outdoor social events business, located on Assessor's Parcel No. 380407 518470, at 4390 Y Road, Bellingham, Washington, subject to the following conditions:

Planning Division

1. The approved use and its location on the site shall not be modified or changed without further approval of the Whatcom County Hearing Examiner.
2. Future Garden Expansion: The existing botanical gardens on the site will be permitted to expand up to three acres in the area of the existing parcel where the botanical gardens currently exist. Any future development of the property for botanical gardens or anything else related to the business shall require further review by Planning and Development Services, and, if necessary, further approval by the Whatcom County Hearing Examiner.

3. **Small Garden Events:** The botanical garden areas reached by the pathway from the parking lot to and across the Anderson Creek Bridge are available for tours and Small Garden Events, six days a week, Monday through Saturday, between the hours of 10:00 a.m. and 5:00 p.m. The small groups allowed during this time shall consist of no more than 20-persons. Small weddings, small group luncheons, and small family gatherings are the type of small group activities allowed in addition to tours. These groups shall be off the property by 5 p.m.

4. **The Large Wedding and Social Events:**
 - * Large Events shall be permitted between the months of May through September.
 - * A maximum of 20 Large Events shall be permitted per year.
 - * There shall be no more than two Large Events in any given week. Only one of these events can fall on a Friday thru Sunday weekend. Large Events are not allowed on back to back days. No more than five Large Events are allowed in any given month. No tours or small events shall be held on the same day as a Large Event.
 - * The guests at large events shall be offsite by 10 p.m.
 - * All music shall cease by 9:30 p.m. for Large Events. Except for small weddings, no music is allowed for small events.
 - * A maximum of 100 guests shall be permitted onsite for any one Large Event.
 - * Food handler permits shall be obtained for all food handlers/caterers. [This shall apply to Small Garden Events also.]
 - * All licenses and/or permits shall be obtained for any alcohol served at the Large Events. [Alcohol is not allowed at Small Garden Events.]
 - * All activities associated with the approved Large Group and Small Garden Events, Cottage Industry (including the reception area, seating, catering kitchen, bathrooms, etc.) shall be limited to no more than one acre on the parcel, with the exception of touring the botanical garden areas.

5. **Parking:** Pursuant to WCC 20.80.500, adequate parking shall be established. An approved parking plan shall be submitted prior to issuance of the required commercial building permit.

6. **Employees:** No more than four employees, other than family members who reside on the premises shall be engaged in the operation of the Cottage Industry. This does not include

various support staff that may be on-site associated with the weddings and or social events (such as musicians, photographers, caterers, etc.)

7. Use of Fertilizers & Pesticides: The Applicant shall comply with Washington State Department of Ecology (DOE) requirements for Source Control BMPs for Landscaping and Lawn/Vegetation Management. The Applicant shall contact DOE with any questions regarding the DOE handbook/standards requirements.
8. Noise: The Applicant is required to ensure that sounds related to the events comply with the Class A Residential Source to Residential Receiving Property Standards of WAC 173-60-040. No amplified sound, including but not limited to, amplified voice and music, shall be permitted at any time. With the exception of small weddings, music is not allowed at Small Garden Events.
9. Lighting: Pursuant to WCC 20.80.523, any lights used to illuminate a parking lot shall be so arranged as to direct the light away from the adjoining property and the public road.
10. Greenhouse Lighting: The Applicant shall immediately cease using the current lighting system for the plants in the greenhouse and instead, install "full cut-off" lights designed for greenhouse growing. Lighting for the greenhouses shall not illuminate or impact any neighboring properties.
11. Signage: The Applicant did not propose a sign for the facility. Whatcom County will allow one non-illuminated freestanding sign on the property, visible from the road and not exceeding six feet in height. One additional non-illuminated sign may be attached to a building for a maximum total signage of 16 square feet. No portion of any sign shall extend above the lowest portion of the roof pursuant to WCC 20.36.161(3). A building permit is required for a sign.
12. Compliance Issues:
 - * Permits shall be obtained for all structures on the property including but not limited to: the sign, bridge, office, catering kitchen and restrooms. All structures must receive final approval by Whatcom County prior to any events occurring at the site.
 - * ALL off-site advertising signs (including but not limited to those on Y Road, Mt. Baker Highway, and I-5) shall be removed immediately.
13. CUP Nontransferable: Pursuant to WCC 20.84.210, "Conditional Use Permits shall be nontransferable unless said transfer is further approved by the Hearing Examiner."
14. Right to Farm: Pursuant to WCC Title 14, the owners of the property upon which this Conditional Use Permit Approval is granted shall sign a statement of acknowledgment containing a disclosure that pertains to the use of natural resources in Whatcom County.

This disclosure shall be made on forms provided by Whatcom County, which shall then be recorded in the Whatcom County Auditor's Office.

15. Department of Ecology: The property owner shall contact the Washington State Department of Ecology (DOE) and reference File #201104506. The property owner shall identify what water right(s) the Applicant intends to withdraw water under. If the property owner intends to withdraw water under the State's Groundwater Permit Exemption (RCW 90.44.050), any groundwater development proposal that will withdraw water in excess of 5,000 gallons per day for single or group domestic supply, or for industrial purposes, or for the irrigation of more than ½ acre of lawn or non-commercial garden (within the total project area) will require a permit from DOE.
16. Future Concession Stand: Although not shown on the site plan, one concession stand shall be permitted without requiring a new CUP Application. The concession stand will require a building permit and shall meet all other County Code Requirements. Location of the stand shall be approved by Whatcom County Planning and Development Services.

Building Services Division

1. A separate building permit will be required for the private bridge.
2. A pre-application screening is required prior to building permit submittal.
3. A separate building permit is required for all other structures previously built without a permit.

Critical Areas

1. A *Notice of Title* is required which states the general presence of the critical areas and buffers located on the property. The *Notice of Title* form will be provided by Whatcom County. The Notice shall be recorded at the Whatcom County Auditor's Office prior to any events occurring at the site.
2. The property owner shall complete the *Natural Resource Notification of Activity* form prior to any development of the property (including roads and/or the expansion of the gardens). This is to ensure a Land Disturbance Permit is not required and to protect any potential impacts to the critical areas and/or their associated buffers.
3. The Applicant shall submit to Planning and Development Services a Plan to increase the effectiveness [if it can be reasonably accomplished] of the existing buffer between Anderson Creek and the fence protecting the botanical gardens area. Under no circumstances may the fence be moved closer to the creek. Any new fencing associated with the expansion of the botanical gardens shall be no closer than the currently required critical area buffer for the creek. Where appropriate, the existing fence should be moved further away from the creek, if it can be done without interfering with the existing botanical gardens and other existing uses on the site. Unless good cause is shown, the

existing fence should be located further from the creek and closer to the existing path through the botanical gardens. The purpose of the Plan required by Condition is to increase the protection of the creek, both from a water quality stand point and as wildlife habitat.

Shoreline

1. Additional shoreline review will be required for any future use of buildings within SMP jurisdiction or if any future development activities of any kind are proposed within such jurisdiction.

Fire Marshal

1. No single-family residences over 4,000 square feet in size, or detached storage buildings over 2,500 square feet in size will be allowed without adequate fire protection.
2. The proposal shall comply with all applicable Codes and Ordinances adopted by Whatcom County. Any overlooked hazardous condition and/or violation of applicable Code does not imply approval of such condition or violation.

Public Works – Engineering Division

1. All development shall comply with Whatcom County Development Standards.
2. The existing driveway access point shall be improved and paved. The Applicant shall obtain a Revocable Encroachment Permit from the Division of Engineering prior to the installation of the paved apron on “Y” Road.

Health Department

1. If employees or the public have access to water, then public water is required.
2. Any irrigation on the property must be in compliance with Washington State Water Law.
3. If plumbing is run to any building, an approved On-Site Sewage Permit is required. Any alternative sewage disposal method will be required to be reviewed by the Whatcom County Health Department to ensure adequate provisions for sewage disposal have been made.
4. All food handlers will be required to pass the food handlers test and obtain a food handler card from the Whatcom County Health Department as per Washington State Law.

The Applicant shall complete construction or, if no construction is contemplated as a part of this permit, shall demonstrate compliance with all of the conditions of this permit within 24 (twenty-four) months of the date of the issuance of this Decision. Failure to complete construction or demonstrate compliance shall result in the expiration of this Permit. Substantial progress toward completion may satisfy the terms of this condition if approved by Whatcom County Planning and Development Services and the Hearing Examiner. The Applicant or permit holder may apply for an extension for a term of up to one year upon a showing that substantial progress has been made toward completion or

compliance. An extension shall be granted if the Hearing Examiner finds that the Applicant or permit holder will suffer a substantial hardship if the extension is denied. The Hearing Examiner may grant an extension for any other good cause shown, in his discretion, but extraordinary circumstances must be shown to obtain an extension of more than one year. The Hearing Examiner shall obtain the comments of Whatcom County Planning and Development Services before granting any extension.

NOTICE

This Approval is subject to all of the above-stated conditions. Failure to comply with them may be cause for its revocation. Complaints regarding a violation of the conditions of this Permit should be filed with Whatcom County Planning and Development Services. The Hearing Examiner may not take any action to revoke this approval without further public hearing.

Violations of this Title shall constitute Class I civil infractions pursuant to RCW 7.80.120. The maximum penalty and the default amount for such violations shall be consistent with Chapter 7.80.RCW.

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 1st day of June 2012.



Michael Bobbink, Hearing Examiner