

WHATCOM COUNTY HEARING EXAMINER

RE: Administrative Appeal) HDAPL2011-01
Application for)
)
Joey and Sandra Moniz-Lecce) FINDINGS OF FACT,
) CONCLUSIONS OF LAW,
) AND DECISION

SUMMARY OF APPEAL AND DECISION

Appeal: The Appellants have appealed an Administrative Determination made by Whatcom County Health Department, denying the approval of a Private Rainwater Catchment System and related Drinking Water Variance for a building permit for a single-family residence to be constructed on property located at 256 Boundary Bay Road, Point Roberts, Washington.

Decision: The Administrative Determination made by the Whatcom County Health Department denying approval for a private rainwater catchment system and related drinking water variance is upheld. By law, the Appellants are required to obtain a water connection to Point Roberts Water District No. 4 as a condition of building permit approval.

FINDINGS OF FACT

I.

Background Information

Appellants: Joey and Sandra Moniz-Lecce

Property Owner: Joey and Sandra Moniz-Lecce

Property Address: 256 Boundary Bay Road
Point Roberts, Washington

Parcel Number: 405301 010492

Applicable County Codes: WCC 24.11 Drinking Water
WCC 24.07 Appeals
Whatcom County Coordinated Water System Plan

Notices: Posting Notice, January 12, 2012
Legal Notice, January 12, 2012

Hearing Date: January 25, 2012

Exhibits:

- 1 Memo dated December 8, 2011, from Kyle Dodd re: Appeal of Water Availability Denial, with Appeal attached
- 2 Administrative Appeal Application and Summary, filed by Joey and Sandy Moniz-Lecce with attachments:
 - 2-1 Whatcom County Private Rainwater Catchment Application, June 22, 2011
 - 2-2 Whatcom County Drinking Water Variance Request Application, July 27, 2011
 - 2-3 Pt. Roberts Water District 2010 Water Quality Report
 - 2-4 Example of Pt Roberts Water District Advisory Notification
 - 2-5 Article: All Point Bulletin re: Water District Moratorium, August 1, 2005
 - 2-6 Article: All Point Bulletin re: Pt Roberts Water District's position on rainwater harvesting, December 1, 2009
 - 2-7 Article: All Point Bulletin re: new calculation of water hookups available, August 1, 2008
 - 2-8 Article: All Point Bulletin re: uncertainty of water availability in Pt. Roberts, November 18, 2011
 - 2-9 Article: All Point Bulletin re: contractual limits of water availability certificate, May 27, 2011
 - 2-10 Letter from City of Bellingham, Dept of Public Works, October 11, 2010
 - 2-11 Article: All Point Bulletin re: water main construction required, April 30, 2010
 - 2-12 Article: All Point Bulletin re: Pt Roberts Water Quality, July 14, 2011
 - 2-13 Email from Laurette Rasmussen, Whatcom County Health Dept, August 8, 2011
 - 2-14 Email from Kyle Dodd, Whatcom County Health Department, August 12, 2011
 - 2-15 Article: All Point Bulletin re: Pt Roberts Water District's position on rainwater harvesting, August 26, 2011
 - 2-16 Article: All Point Bulletin re: future water service, June 24, 2011
 - 2-17 Email from Pt Roberts Water District, August 10, 2011
 - 2-18 Whatcom County Coordinated Water System Plan, Exh 2-1 defining "Public Water System"
 - 2-19 Whatcom County Coordinated Water System Plan Exhibit 6-1 flowchart for Utility Service Review Procedure
- 3 Email dated January 22, 2012 from Sandy to Kyle Dodd re: Appeal
- 4 Staff Report, dated January 23, 2012, from Kyle Dodd
- 5 Health Dept Water Availability Notification: Private – Rainwater Catchment Application
- 6 Electronic copy of Whatcom County Coordinated Water System Plan Update, February 2000
- 7 Certificate of Posting, dated January 12, 2012
- 8 Legal Notice, published January 12, 2012

Parties of Record

Joey and Sandy Moniz-Lecce
14942 -81B Avenue
Surrey, BC V35 7V6
CANADA

Kyle Dodd and Laurette Rasmussen
Whatcom County Environmental Health Department

Dan Bourks
Point Roberts Water District
79 Tye Drive, Suite A
Point Roberts, WA 98281

II.

The Appellants are owners of a residential building lot located at 256 Boundary Bay Road, Point Roberts, Washington. They have applied for building permit approval. Building permit approval requires identification of the source of potable water. The Applicants intend to build a single-family residence on this parcel.

The Whatcom County Health Department denied the application to supply potable water to the proposed residence through a private rainwater catchment system. Denial was based on the grounds that the Applicants' property is within the boundaries of the Point Roberts Water District No. 4, that the Water District can serve the property, and that the Water District is unwilling to sign a denial of service form or its equivalent.

The Applicants appealed the determination of the Whatcom County Health Department, denying the private rainwater catchment system and, in the alternative, requested a variance from the requirement that allows a private rainwater catchment system only where there is not a public water system available and willing to serve the property.

III.

The Applicants' property is located within the boundaries of Point Roberts Water District No. 4. The Water District is willing to serve the property and has available potable water to serve this property.

IV.

The rainwater catchment system proposed by the Applicants appears to be feasible and a system could meet the technical requirements for provision of potable water through a private rainwater catchment system which would serve only this single-family residence.

V.

The Point Roberts Water District is both willing and able to serve the proposed single-family residence on the Appellants' property and does object to the Appellants obtaining potable water from any other source.

VI.

On July 27, 2011, the Applicants filed a Drinking Water Variance Request with the Whatcom County Health Department on forms provided by the Department. The forms provided to the Appellants incorrectly indicated that an Appeal of Denial of the Variance would be decided by the Director of the Whatcom County Health Department. The forms submitted to the Applicants included a description of the grounds for a variance and listed a Set of Criteria which are similar or the same as an older Set of Criteria used for variances in the Whatcom County Zoning Ordinance, Title 20, Whatcom County Code.

In any case, the forms reflected something other than the current criteria and procedure for a variance from Health Department regulations. A Decision on a Variance is to be made by the Health Department Director and Appeal is to the Hearing Examiner.

Ultimately, the Variance request was denied, along with the Applicants' request to provide potable water by a rainwater catchment system. These denials were appealed to the Whatcom County Hearing Examiner.

The reasons for the Applicants' original request for a variance were set forth in a July 27, 2011, letter to Kyle Dodd, Whatcom County Health Department, Environmental Health Manager.

The letter states that the variance request is because the Point Roberts Water District would not provide the document indicating that the District was unable to provide water service to the Appellants' property.

The Appellants go on to indicate their desire to provide potable water through a rainwater catchment system, because:

“Our desire is to build a weekend home that fulfills the requirements of the Built Green standard set out by the Building Industry Association of Whatcom County. Water harvesting is an environmentally responsible, eco-friendly and sustainable initiative supported by that program and one that we believe strongly in and would like to implement in our own green living.”

The Applicants then addressed the Variance Criteria that were in the document provided to them by the Health Department. As indicated above, these Variance Criteria do not appear in the Health Code, WCC Title 24. The Applicants state that the lot was purchased in 2004, for \$14,000. That the water hook-up fee at that time was approximately \$1,500 and water rates were estimated to be approximately \$19.00 per month. Shortly thereafter, a water moratorium was placed on the property. The moratorium lasted approximately three years and when the moratorium was lifted, the hook-up fee had increased to approximately \$8,000 and water rates increased to approximately \$33.00 per month. They also point out that the Water District has indicated water fees will double in the next five years, which would make the monthly water fee \$63.00.

The Appellants, also, restate their desire to use rainwater catchment as an environmentally friendly way to promote and educate others about the sustainability and benefits of a water catchment system. These benefits are argued to include water conservation, sustainability, and stormwater management benefits.

The Variance Application goes on to argue that the Water District cannot provide a reliable water source with reasonable economy and efficiency, as required by RCW 19.27.097.

In support of their contention that the Water District cannot provide safe and reliable potable water with reasonable economy and efficiency, the Appellants point out that the current water source contract with the City of Vancouver will expire in 26 years and that the District is considering other sources of potable water based on the possibility that the contract will not be renewed or will not be renewed under financially feasible terms. The file indicates that the Water District has had contacts with the City of Blaine regarding the provision of water to Point Roberts via Blaine sources, and that obtaining water from Blaine, including required new Capital Construction, may be significantly less expensive than purchase of water from the City of Vancouver.

VII.

In support of their request for a variance, the Appellants point out that the Whatcom County Health Department approved a rainwater collection system for a single-family residence served by the City of Bellingham. The City wrote that it was willing and able to provide water, that it does not prohibit development based on alternative sources of domestic water, and that the City has no objection to the proposed alternative rainwater catchment system. Rather than signing the Denial of Service Form, the City asked the County to accept their written response as a signature, acknowledging that they were not denying service, but that they had no objection to provision of water service through this environmentally friendly alternative.

VIII.

The County simply bases its denial of approval of a rainwater catchment system for the Appellants' Point Roberts' property on the specific language of the Whatcom County Code, and the objection of Point Roberts Water District.

IX.

The file does reflect ongoing concerns by the Water District No. 4 in regard to its ability to provide water within the district on a long-term basis, at a reasonable rate. The record indicates that the Water District is planning for those possibilities and seeking alternatives that will ensure a long-term water source, while minimizing the rates for water service in so far as possible.

There is nothing in the record that would support a finding that the Water District is unable to provide adequate potable water at a reasonable price for the foreseeable future, nor any reason to conclude that the Water District will be unable to successfully plan for the long-term water needs of

the district.

X.

Point Roberts Water District No. 4 has refused to sign the Denial of Water Service Form and has indicated their opposition to County approval of private rainwater catchment systems to serve single-family residences within the district. The District indicates concerns about its ability to appropriately plan and pay for necessary capital improvements if property owners are allowed to opt-out of the Water District's services through approval of private forms of potable water supply.

XI.

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 Hearing Examiner has jurisdiction to hear this Appeal, pursuant to WCC 24.11.250. The Appeal Process adopted is set forth in Chapter 24.07 WCC and requires an appeal of the Director's Determination within ten working days of the Decision. There was some confusion in the decision-making process about the methods of appeal and the Applicant was notified when the Health Department discovered their forms were out-of-date. Ultimately, the Health Department denied the Applicants' request for approval of a private rainwater catchment system and a request for a variance from the requirement that they hook-up to the water system of Point Roberts Water District No. 4, on November 22, 2011. The Appellants' Appeal was properly submitted on December 7, 2011, which was within ten working days of the Health Department Decision denying the Appellants' request and variance.

A different timeframe for filing an Appeal is set forth in WCC 20.92.211. This section provides for a 14-calendar day appeal period from the date of the Administrative Determination. The Appellants have also met this time requirement. The Appeal is properly before the Hearing Examiner.

The required notices of the open record hearing were given.

II.

The jurisdiction of the Hearing Examiner is limited by State Statute and County Ordinances. The jurisdiction does include deciding Appeals of Administrative Decisions made by the County Health Department in carrying out their duties to administer Whatcom County Health Code, Title 24 WCC. Chapter 24.11 WCC contains the Health Code Provisions regarding Drinking Water.

WCC 24.11.060 requires evidence of water availability prior to the issuance of a building permit.

The General Requirements for the determination of water availability in the Whatcom County Health Code are set forth in WCC 24.11.050 and paragraph (C) requires the Health Department to evaluate the ability of a public water system prior to approving the use of a private water system. This section reads as follows:

24.11.050 General requirements.

C. The director shall evaluate the availability of a public water system prior to approving the use of a private water system. If it is determined that a public water system is available and willing to provide water, the applicant must connect to that public water system when:

1. The applicant proposes to use surface water, spring water, rainwater, or contaminated groundwater; or

2. The applicant proposes to build on a lot located in a short subdivision or long subdivision that Whatcom County approved based on the availability of public water; or

3. The existing public water system has transmission lines adjacent to the property line of the applicant; or

4. The existing public water system has defined a "service area boundary" in accordance with the Whatcom County Coordinated Water System Plan which includes the property of the applicant.

This Section sets forth the circumstances under which an Applicant, seeking approval of a drinking water source, and requires connection to the public water system if any of the paragraphs 1 through 4 under 24.11.050.C set forth above, apply. As stated, it is a requirement that the Applicant must connect to the public water system if any of the circumstances in paragraphs C,1 through 4, are met.

As pointed out by the Health Department, the Applicants propose to use rainwater as a source of potable water; there is a water system transmission line adjacent to the Appellants' property, and the location of the Appellants' property is within a "service area boundary" of a Public Water System per the Whatcom County Coordinated Water System Plan.

In other words, the Appellants are required to attach to the existing public water system under paragraphs C (1), (3), and (4).

There is no ambiguity in WCC 24.11.050.C. The Health Department appropriately determined, since the Water District indicated both the availability of water and a willingness to serve the Appellants' property, that hooking-up to the public water system is mandatory and that the proposed private rainwater catchment system cannot be approved.

III.

The Appellants point out that the Health Department allowed a single-family residence that could have been served by water provided by the City of Bellingham to instead use a rainwater catchment system.

That approval was only issued after the City of Bellingham indicated no objection to the use of the requested private rainwater catchment system, and, although acknowledging that they were not denying service, indicated their willingness to have their lack of objection considered as signing the Denial of Service Form used by the Whatcom County Health Department.

The Health Department's Decision to approve the City of Bellingham private rainwater catchment system arguably conflicts with the General Requirements of WCC 24.11.050.C. Public water was available and the City of Bellingham was willing to provide water in that case. However, that case did not come before the Hearing Examiner and, if the decision was erroneous, it does not provide a basis for the Hearing Examiner, or, for that matter, the Health Department to approve the proposed rainwater catchment system of the Appellants when there is a public water system available and willing to provide water and objecting to the proposed private system.

IV.

The Appellants cite RCW 19.27.097 as supporting their Appeal and their request for a variance. The Appellants note the statute grants authority to the County to regulate the water source required prior to the issuance of a building permit. RCW 19.27.097 (1) reads, as follows:

(1) Each applicant for a building permit of a building necessitating potable water shall provide evidence of an adequate water supply for the intended use of the building. Evidence may be in the form of a water right permit from the department of ecology, a letter from an approved water purveyor stating the ability to provide water, or another form sufficient to verify the existence of an adequate water supply. **In addition to other authorities, the county or city may impose conditions on building permits requiring connection to an existing public water system where the existing system is willing and able to provide safe and reliable potable water to the applicant with reasonable economy and efficiency. An application for a water right shall not be sufficient proof of an adequate water supply.** [Emphasis added].

The Appellants suggest that the Health Department's position is inconsistent with RCW 19.27.097, by suggesting that the Water District is not able to meet the requirement to provide safe and reliable potable water to the Applicant with reasonable economy and efficiency. The Appellants have submitted information which establishes a prior issue with the District's water quality, which was resolved, and which shows the District's long-term concern about the best way to ensure an

ongoing source of potable water as inexpensively as possible.

However, it cannot be said that the Appellants have shown that the existing system cannot provide safe and reliable potable water with reasonable economy and efficiency.

In any case, the Whatcom County Council adopted WCC 24.11, based on RCW 19.27.097(1), indicating the Council's determination that the adopted ordinance was consistent with State law.

The Hearing Examiner does not have the authority to rewrite sections of the Whatcom County Code, or to determine if the Code is consistent with applicable State law. When the Code sections are clear and unambiguous, as is the case with WCC 24.11.050.C, Administrative Officials with responsibility to apply the ordinance, and the Hearing Examiner are required to apply the ordinance as written.

V.

The Appellants objected to the position taken by the Point Roberts Water District No. 4. The Hearing Examiner has no jurisdiction over the actions of Water District No. 4, and, having concluded that the Health Department had appropriately denied the rainwater catchment system based on the clear language of WCC 24.11.050.C, should uphold that Decision.

VI.

The Appellants suggested that they are entitled to a variance. The applicable standards for a variance from a Health Department Decision are set forth in WCC 24.11.220, which reads as follows:

24.11.220 Variance clause.

The director, upon written petition of the owner of a water system may grant a variance to any section of this chapter when:

- A. No health hazard would exist as a result of this action;
- B. The results of the variance remain consistent with the intent of this chapter. [Ord.2002-024].

It appears that the Appellants' proposed rainwater catchment system is consistent with paragraph A, above, in that approval of this system, subject to conditions, would not lead to a health hazard.

However, the Hearing Examiner cannot conclude that the requested variance is consistent with paragraph B, above. Granting a variance to the specific requirement that a rainwater catchment system cannot be utilized where there is a public water system available and willing to provide water, would clearly be inconsistent with the intent of Chapter 24.11.

The Variance Criteria the Appellants have addressed in their submission, apparently listed on an Health Department form, do not apply from variances from Chapter 24.11 WCC. Even if these

criteria applied, the Appellant, contrary to their statements, would not meet those criteria. They have not shown a hardship based on the physical characteristics of their property and they have not established that the reason for a variance is not based on their design preferences and/or for financial reasons.

Only the Whatcom County Council has the authority to balance the public interest served by allowing rainwater catchment systems where there is a public water system willing and able to provide water. The legislative body could weigh the environmental benefit from allowing rainwater catchment systems within areas served by public water systems, against the potential for undermining the public water system's ability to serve their district, and/or the potential health hazards and benefits associated with the use of alternative systems when an approved public water system is available. The Whatcom County Council determined that alternative water systems, such as that proposed by the Appellants, should not be approved where there is a public system available. Only the Whatcom County Council, through legislative action, can modify that determination.

The Appellants have identified a number of public policy benefits that they believe would result from allowing rainwater catchment systems, even where there is a public water system willing and able to provide water service. The Hearing Examiner's Decision cannot be based upon a determination as to whether than some policy, other than that contained in WCC 24.11.050.C, would better serve the public. Only the legislative body has the authority to determine that changes in the water source requirements, embodied in WCC 24.11, are appropriate, or should be changed.

VII.

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 Whatcom County Hearing Examiner upholds the Whatcom County Health Department Determination that a building permit cannot be issued to the Appellants unless they obtain public water from Point Roberts Water District No. 4.

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 9th day of February 2012.



Michael Bobbink, Hearing Examiner