

WHATCOM COUNTY HEARING EXAMINER

RE: Administrative Appeal) APL2011-0002
Application for)
Bruce Robertson) FINDINGS OF FACT,
) CONCLUSIONS OF LAW,
) AND DECISION

SUMMARY OF APPEAL AND DECISION

Appeal: The Appellant, Bruce Robertson, has appealed a Determination by Whatcom County Planning and Development Services. Planning has decided that Mr. Robertson’s proposed building area on his waterfront lot cannot be approved without a Shoreline Variance.

Decision: The Whatcom County Hearing Examiner has concluded that Mr. Robertson’s proposed building site is Exempt from the requirement for a Shoreline Variance, pursuant to WCC 23.50.07.K and Appendix F of the Whatcom County Shoreline Management Program.

FINDINGS OF FACT

I. Background Information

Appellant/Property Owner: Mr. Bruce Robertson

Appellant Representative: Ms. Dannon Traxler, Attorney at Law, Langabeer & Tull, P.S.

Property Address: 4382 Saltspring Drive, Ferndale, Washington

Parcel Number: 380108 517411

Location: East shore of the Sandy Point Peninsula fronting on Lummi Bay/Strait of Georgia

Shoreline Designation: Shoreline Residential

Applicable County Codes:

- WCC 23.10 Purpose and Intent
WCC 23.20 Goals and Objectives
WCC 23.30 Shoreline Jurisdiction and Area Designations
WCC 23.50 Applicability and Non-conforming Uses
WCC 23.60 Shoreline Permits and Exemptions

WCC 23.70	Administration
WCC 23.80	Legal Provisions
WCC 23.90	General Policies and Regulations
WCC 23.100.11	Residential Policies and Regulations
WCC 23.110	Definitions
WCC Title 23	Appendix F

Notice Requirements: Legal Notice Published June 2, 2011
Property Posted – Notice of Open Record Hearing, June 2, 2011

Open Recorder Hearing Dates: June 15 and continued on July 13, 2011

Exhibits

- 1 Administrative Appeal Application, dated February 24, 2011
- 2 Letter dated February 24, 2011, from Dannon Traxler re: SHX2009-00131
- 3 Letter dated February 4, 2011, from Wayne Fitch re: Shoreline Statement of Exemption SHX2009-00131
- 4 Staff Report, dated June 8, 2011, with letter dated April 15, 2011 from Barry Wenger, DOE and site aerial photo attached
- 5 Memo, dated March 18, 2011, from Chad Yunge to Hearing Examiner re: Robertson Appeal
- 6 Letter dated August 17, 2010 from Dannon Traxler re: SHX2009-00131
- 7 Letter dated December 1, 2010 from Dannon Traxler re: SHX2009-00131
- 8 Letter dated November 24, 2010 from Bruce Robertson re: Shoreline Permit with site plan attached
- 9 Application for Shoreline Exemption, SHX2009-00131, dated August 17, 2009
- 10 Letter dated August 25, 2009 from Chad Yunge to Mr. Robertson
- 11 Site Plan with red highlighting
- 12 Letter dated September 15, 2009 from Bruce Robertson to Mr. Yunge with drawings attached
- 13 Letter dated October 1, 2009 from Chad Yunge to Mr. Robertson re: Shoreline Statement of Exemption, with August 25, 2009 letter and plans attached

- 14 Letter dated June 7, 2010 from Chad Yunge to Mr. Robertson
- 15 Letter dated November 12, 2010 from Chad Yunge to Ms. Traxler
- 16 Legal Notice dated June 2, 2011
- 17 Staff emails re: scheduling
- 18 Certificate of Posting, June 2, 2011
- 19 Appeal Brief on behalf of Bruce Robertson, submitted by Dannon Traxler, June 13, 2011, with attached Exhibits A thru P
- 20 Whatcom County's Motion to Dismiss, submitted by Royce Buckingham, June 14, 2011
- 21 Whatcom County's Withdrawal of Motion To Dismiss, submitted by Royce Buckingham, June 23, 2011

Parties of Record

Bruce Robertson
2982 Cove Place
Coquitlam, BC, V3C3X9
CANADA

Dannon Traxler
Langabeer & Tull, P.S.
PO Box 1678
Bellingham, WA 98227

Royce Buckingham
Civil Deputy Prosecutor

Chad Yunge
Shoreline Administrator

Barry Wenger
Senior Environmental Planner
Washington State DOE
Bellingham Field Office
1440 10th Street, Ste 102
Bellingham, WA 98225

II.

Bruce Robertson is the owner of a waterfront lot located at 4382 Saltspring Drive, Lot 76 of the Sandy Point Shores No. 1 Plat, which was created in 1966, prior to the adoption of the Shoreline Management Act. Mr. Robertson's lot is undeveloped and he proposes to construct a single-family residence on the lot within a 2,500-square foot building envelope.

Mr. Robertson's lot is 60-feet in width and 150-feet in length. The 150-foot length includes a portion of the property located waterward of the Ordinary High Water Mark of Lummi Bay. Portion of the lot landward of the Ordinary High Water Mark is significantly less than 150-feet.

The subject property is currently vacant and is vegetated with a mixture of low grasses, native trees and shrubs, and ground cover.

The subject property is located on an accretion shoreform (the Sandy Point peninsula) and is located entirely within the boundaries of the Lummi Nation Reservation. Lots and condominium units within the Plat of Sandy Point are owned in fee simple and are subject to regulation under the Whatcom County Shoreline Management Program.

The overall Plat of Sandy Point includes a dredged-out marina, with a channel access from Georgia Strait, and is located, except for the access channel, landward of the shoreline of Georgia Strait and Lummi Bay. The entirety of the waterfront within the Plat consists of well over one-hundred waterfront lots along Georgia Strait and Lummi Bay. Most of the waterfront lots are in a size similar to Mr. Robertson and most are developed with single-family residences. Only a few of these lots remain undeveloped. One portion of the waterfront development consists of condominium development.

III.

The current Whatcom County Shoreline Management Plan, approved by DOE August 8, 2008, requires a 150-foot buffer setback from the Ordinary High Water Mark. This setback is termed a habitat conservation area and is incorporated by reference from the Critical Areas Ordinance. Since Mr. Robertson's lot and all of the other Sandy Point waterfront lots abutting Georgia Strait and Lummi Bay do not contain a buildable area for single-family residential development beyond the now required 150-foot setback, and since the lots were created prior to the adoption of the current Shoreline Management Program requiring the 150-foot buffer, the lots meet the definition of a nonconforming lot as set forth in WCC 23.110.N.6. Residential development is a permitted use within the Shoreline Residential Designation, applicable to Mr. Robertson's lot and other waterfront lots abutting Georgia Strait and Lummi Bay, located within the Plat of Sandy Point. A non-conforming lot is defined as a lot with less than a total of 20,000-square feet, including the portion within shoreline jurisdiction, and lawfully established prior to the adoption of the original Whatcom County Shoreline Management Program, on August 27, 1976, and which cannot conform to the current setback or buffer standards of the Program [WCC 23.11.N.6].

Mr. Robertson's lot contains 9,000-square feet, some of which is waterward of the Ordinary High Water Mark.

IV.

Whatcom County Planning and Development Services has concluded that the building envelope, proposed by the Appellant for the residence on this undeveloped lot, cannot be approved without applying for and receiving a Shoreline Variance. The Appellant argues that a new residence, within his proposed building envelope, on this nonconforming lot can be approved administratively, as a Shoreline Exemption, under the current regulations contained within the Whatcom County Shoreline Management Program.

The Department of Ecology, which shares a responsibility for administering the Shoreline Management Act, concurs in the Decision by Whatcom County Planning and Development Services and believes the current program requires the Appellant to obtain a Shoreline Variance for the proposed building site.

V.

Whatcom County Planning and Development Services has concluded that the Appellant can construct a home on a building area containing 2,500-square feet outside of the side yard setback buffers and waterward of the 25-foot buffer from Saltspring Drive required by the covenants of the Plat of Sandy Point Shores, without a Shoreline Variance, but that a Shoreline Variance is required if the building envelope is moved any closer to the O.H.W.M.

Mr. Robertson has requested a 2,500 square foot building site which would be fully landward of the Common-Line Setback Standards, set forth in Appendix F of the Whatcom County Shoreline Management Program, but which would be closer to the Ordinary High Water Mark than a 2,500 square foot building area, set 25-feet from the right-of-way of Saltspring Drive.

VI.

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.

This Appeal raises a single issue. That issue is rather or not the Appellant's proposed building area on his legally established, undeveloped, nonconforming waterfront lot can be approved administratively, as argued by the Appellant, or if the proposed location requires a Shoreline Variance, as determined by Whatcom Planning and Development Services Staff, after consultation

with the Washington State Department of Ecology.

Both Planning and the Appellant agree that the Appellant is entitled to a 2,500-square foot building area for construction of a single-family residence and normal appurtenances. The Parties acknowledge that the Appellant cannot meet the current applicable 150-foot habitat conservation area setback from the Ordinary High Water Mark of Lummi Bay.

The shoreline regulation for new single-family development on legal nonconforming lots is controlled by WCC 23.50.07.K. This section of the Code is set forth below in its entirety. [The emphasis has been added to assist the reader in following the Hearing Examiner's reasoning.]

23.50.07.K Nonconforming development.

K. **New single-family development on nonconforming lots** consisting of property under contiguous ownership **less than 20,000 square feet in size** and not subject to landslide hazard areas, alluvial fan hazard areas, or riverine and coastal erosion hazard areas or associated buffers as provided in WCC [16.16.310](#) **may be allowed without a variance in accordance with the following criteria:**

1. Nonconforming lots with a building area of 2,500 square feet or more available for a single-family residence and normal appurtenances and unrestricted by setbacks or buffers from shorelines or critical areas shall comply with the provisions of this program. The "building area" means the entire area that will be disturbed to construct the home, normal appurtenances (except drainfields), and landscaping.
2. **Nonconforming lots that do not meet the requirement of subsection (K)(1) of this section shall provide the maximum setback and buffer dimension feasible** while providing for a building area of not more than 2,500 square feet **on the portion of the lot farthest from the required setback or buffer; provided, that consideration shall be given to view impacts and** all single-family residences approved under this section **shall not extend waterward of the common-line setback** as measured **in accordance with Appendix F of this title.**
3. The area between the structure and the shoreline and/or critical area shall comply with the vegetation conservation standards of WCC [23.90.060](#)(B)(3).
4. Development may not take place waterward of the ordinary high water mark.

5. Facilities such as a conventional drainfield system may be allowed within critical areas or their buffers, except wetlands and buffers, outside of the building area specified above, subject to specific criteria in Chapter [16.16](#) WCC.

The Parties all agree that the Appellant's proposed new residence is subject to the section of the Whatcom County Shoreline Management Program set forth above.

Section K allows new single-family development on nonconforming lots containing less than 20,000-square feet in size without a Shoreline Variance, subject to the criteria set forth in Paragraphs 1 and/or 2, above. Paragraph 1 does not apply to the Appellant's property because it does not have a building area of 2,500-square feet available outside of the 150-foot applicable habitat conservation area setback.

The Appellant's proposed development must take place consistent with Paragraph 2, above. The first clause of Paragraph 2 requires building within 2,500-square foot portion of the lot that provides "... the maximum setback and buffer dimension feasible ..." This general rule states that the allowed building area of 2,500-square feet is to be set back as far as possible from the Ordinary High Water Mark. In the Appellant's case, the Appellant and Staff both agree that the building area would have to be set back to within 25-feet of the Saltspring Drive right-of-way and within the applicable side yard setbacks, if Paragraph 2 ended after the first semicolon.

However, Paragraph 2 contains a second clause which reads as follows:

"...; provided that consideration shall be given to view impacts and all single-family residences approved under this section shall not extend waterward of the common-line setback as measured in accordance with Appendix F ..."

This clause, by using the words "...; provided that, ..." modifies the general rule in some way, otherwise it is superfluous. It is the interpretation of this clause, read in concert with Appendix F, which gives rise to the legal issue that must be determined to resolve this Appeal. Planning has concluded that Paragraph 2 and Appendix F require the 2,500-square foot building area, allowed under Paragraph 2, must be consistent with the first clause of Paragraph 2, and must be set on the portion of the lot furthest from the Ordinary High Water Mark, unless a Shoreline Variance is obtained. Since Paragraph K is telling us when a Shoreline Variance is not required, the second clause of Paragraph K.2 and Appendix F must have been designed to further identify when a Shoreline Variance is not required to give them meaning; otherwise, the ";provided that," section and Appendix F has no meaning and can be eliminated or, as Planning does, ignored.

The Appellants argue that the second portion of Paragraph 2 allows the 2,500-square foot building area to be located up to the Common-Line Setback area, as measured in accordance with Appendix F, without obtaining a Shoreline Variance.

Planning’s interpretation, as supported by the Department of Ecology, is that the intent of the proviso, (...; provided that, ...) which forms the second part of Paragraph 2, was only intended to ensure that the 2,500-square foot buildable area not extend waterward of the Common-Line Setback in order to protect adjacent developed parcels from adverse view impacts.

The Appellant argues that the language “...; provided that, consideration shall be given to view impacts,” along with the language referring to application of Appendix F, allows new residential construction on lots subject to Paragraph K of WCC 23.50.07, up to the Common-Line Setback, measured in accordance with Appendix F, *without a Shoreline Variance*.

Appendix F, in its entirety reads 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\(K\)\(2\)](#), 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.**

Ecology has indicated, and Planning apparently agrees, that the language set forth in Appendix F is ambiguous or vague and is subject to “two differing interpretations when read strictly and absent of context.” [Staff Report, page 8]

The Hearing Examiner finds no ambiguity in Appendix F, itself. It clearly allows development which cannot meet the 150-foot setback standard to be reduced by the Administrator to the Common-Line Setback, without a Shoreline Variance, in cases where the building site and nonconforming lot are consistent with Paragraphs (a) and (b) of Paragraph 2 of Appendix F.

Since Shoreline Variances require a public hearing and a Decision by the Hearing Examiner, which is then reviewable by the Department of Ecology, the language of Appendix F allowing the Administrator to reduce the required setback/buffer to the Common-Line Setback Standards clearly indicates that the setback standards can be reduced “for the purpose of accommodating shoreline views to be adequate and similar to adjacent residences” without a Shoreline Variance.

The Parties agree that there are residences within 50-feet of the building footprint proposed by the Appellant and that the applicable Common-Line Setback would be that “... line between the nearest corners of each adjacent residence.” The Appellant’s proposed building site is landward of the Common-Line Setback Standards of Appendix F. As set forth above, Paragraph 2.d. of Appendix F states that setback buffer reduction for nonconforming lots, beyond the reduction allowed by Appendix F, “... shall require approval of a Shoreline Variance Permit.” Therefore Paragraph 2.d. of Appendix F establishes that setbacks to the Common-Line Setback Standards, pursuant to Appendix F, can be approved administratively, without a Shoreline Variance, in order to accommodate adequate and similar shoreline views for new construction on legally established nonconforming lots.

Since Appendix F was purposely designed to allow Common-Line Setbacks, administratively, without a Shoreline Variance, in order to provide, to certain limited new residential construction, views “... which are adequate and similar to adjacent residences ...,” the “...; provided that, ...” provision of WCC 23.50.07.K.2, which refers to and incorporates Appendix F, must be read in a manner consistent with Appendix F, and, therefore, indicates the legislative body’s intent to allow new single-family development on nonconforming lots to be set up to the Common-Line Setback as established in Appendix F, without a Shoreline Variance. All of WCC 23.50.07.K is designed to establish where shoreline setbacks can be reduced without a Shoreline Variance. It has no other purpose.

The Hearing Examiner has italicized in WCC 23.50.07.K, set forth above, the language that shows the purpose of Paragraph K was to establish when new single-family residential development on legally established nonconforming lots could be allowed without a Shoreline Variance. Paragraph 2 of Paragraph K requires the setback to be the maximum feasible, subject to an exception (“... ; provided that, ...”) which allows the application of Appendix F to administratively reduce the setback to the Common-Line Setback, in order to give appropriate consideration to view impacts, for those undeveloped properties that meet the requirements of Appendix F.

The portion of Paragraph K.2 that refers to Appendix F would be rendered entirely meaningless, as would Appendix F, itself, if a Shoreline Variance is required, for the Appellant's request to have the proposed building envelope, which is landward of the Common-Line Setback.

Planning, in support of its position, points out WCC 23.90.05.B.1, which reads as follows:

23.90.05.B Regulations

1. Protection and/or enhancement of critical areas and their associated buffers shall be preferred over provisions for visual access, when the two are in conflict.

This language is very general. The language of 23.50.07.K and Appendix F is quite specific and only applies to limited properties under certain circumstances. Rules of statutory construction favor the more specific language over the more general language where the specific language applies. Additionally, the section set forth above states in general that protection and/or enhancement of critical areas and their buffers are preferred over visual access "... when the two are in conflict." There is no showing that the Common-Line Setback allowed by 23.50.07.K and Appendix F is in conflict with the protection of shoreline ecology and processes. Administrative Approval of the Common-Line Setback, established Appendix F as the setback line for the Appellant's building area, will be subject to the requirements of the Shoreline Program, including enhancement of the area between the Appellant's proposed building area and the Ordinary High Water Mark pursuant to SMP23.90.06.B.3.

II.

The issue raised by this Appeal is identification of the required procedure for establishing the location of the building area on nonconforming lots less than 20,000-square feet in size. WCC 23.50.07.K and associated Appendix F, allow in limited instances, Administrative Approval of a reduction in the setback requirements of a Common-Line Setback, established pursuant to Appendix F.

A Shoreline Exemption or any shoreline development is still subject to the requirements of the Whatcom County Shoreline Management Program and the Administrator is left with the authority to condition an Administrative Approval of a building area at the Common-Line Setback to comply with all applicable portions of the Shoreline Management Program, other than the setback requirements.

III.

The Hearing Examiner concludes that the Whatcom County Council intended to grant Whatcom County Planning and Development Services the authority to Administratively Approve setback reductions for nonconforming lots of less than 20,000-square feet, up to the Common-Line

Setback pursuant to WCC 23.50.07.K.2 and Appendix F. Reading WCC 23.50.07.K.2 and Appendix F together leads to the inescapable conclusion that the Whatcom County Council intended to allow owners of certain undeveloped nonconforming shoreline lots, which cannot meet the currently required 150-foot setback buffer, to have a building area located up to the Common-Line Setback established by applying Appendix F instead of requiring such approval to go through the expensive and time-consuming process of obtaining a Shoreline Variance.

Parenthetically, it should be noted that Whatcom County and the Department of Ecology have routinely approved Shoreline Variance Requests to allow construction of new, or expansion of existing, residences up to the Common-Line Setback described in Appendix F in situations mirroring the facts presented by this Application. Generally, those variances were granted, subject to conditions requiring mitigation by enhancement of the habitat conservation area, mostly, through requiring native shoreline vegetative plantings. Based on prior precedent set by Whatcom County and Department of Ecology regarding view enhancement through the use of the Common-Line Setback, there is little doubt that the building area sought by the Appellant would be approved, subject to conditions, if it went through the Shoreline Variance process. The Shoreline Administrator can apply these conditions to the requested Administrative Approval of the Appellant's proposed building area. The shoreline receives no less protection and the Applicant is relieved of the significant financial and procedural burdens. Additionally, governmental staff at both the local and State level are able to process applications like the Appellant's more efficiently, which reduces the burden on taxpayers and property owners, and allows the regulators to focus more time on proposals which are likely to have a significant impact.

The current Whatcom County Shoreline Management Program greatly expanded the required buffers for shoreline development. Shoreline jurisdiction only encompasses the area within 200-feet of the Ordinary High Water Mark. Current regulations identify the area within 150-feet of the OHWM as a habitat conservation area which generally must be left undeveloped. Since a significant portion of the shorelines of Whatcom County have already been subdivided and developed, the adoption of the 150-foot setback has created hundreds of nonconforming shoreline lots and shoreline structures. Under these circumstances, it is not unreasonable to conclude that the Whatcom County Council adopted WCC 23.50.07.K.2 and Appendix F, to provide a simplified and less expensive procedure to allow new residential development on a limited number of legally established nonconforming lots without obtaining a Shoreline Variance. The Hearing Examiner concludes that it was the intention of the Whatcom County Council to give the Whatcom County Planning and Development Services Department the authority to Administratively Approve building areas on nonconforming lots, for new single-family development, up to the Common-Line Setback described in Appendix F.

IV.

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 Hearing Examiner concludes that the building area proposed by the Appellant can be approved administratively, subject to appropriate conditions, by Whatcom County Planning and Development Services Department. A Shoreline Variance is not required. This matter is remanded to Whatcom County Planning and Development Services with instructions to approve administratively a building area landward of the Common-Line Setback, subject to appropriate conditions.

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 29th day of July 2011.

Michael Bobbink, Hearing Examiner