

WHATCOM COUNTY HEARING EXAMINER

RE: Administrative Appeal)	APL2010-0002
Application for)	
)	FINDINGS OF FACT,
<i>James and Jean Gibson</i>)	CONCLUSIONS OF LAW,
<i>Dave and Sharon Loepky</i>)	AND DECISION

SUMMARY OF APPEAL AND DECISION

Appeal: The Appellants appealed a Determination by Whatcom County Planning and Development Services. The Planning Department determined that two adjacent parcels of land on Lummi Island, owned by the Appellants, were subject to the Lot Consolidation Provisions of WCC 20.83.070 and that the parcels were, thereby, consolidated into a single parcel for the purpose of future development or use.

Decision: The Hearing Examiner has determined that Whatcom County Planning and Development Services lacked the authority to apply Lot Consolidation Relief on Lummi Island because it was bound by a prior Hearing Examiner’s Decision resolving the same issue when that Decision failed to be appealed.

FINDINGS OF FACT

I.

Background Information

Appellant: James and Jean Gibson
Dave and Sharon Loepky

Legal Property Owners: James and Jean Gibson
Dave and Sharon Loepky

WC File # Being Appealed: EXE2009-00158

Property Location/Address: 0 North Nugent Road
Lummi Island, WA

Assessor’s Parcel Numbers (APN): 380133 328008

Zoning: Residential Rural-Island

Comprehensive Plan: Rural

Authorizing Ordinances: WCC 20.84.240 Appeals
WCC 20.92 Hearing Examiner

Applicable Whatcom County Codes: WCC 20.34.254 Lots platted prior to 1978
WCC [20.83.070](#) Lot Consolidation

Exhibits:

- 1 Appeal Submittal
 - 1-1 Application for Lot of Record
 - 1-2 PDS Determination Letter, dated December 21, 2009
 - 1-3 WCC 20.8.070 Lot Consolidation / 20.34.254 Lots Platted Prior to 1978
 - 1-4 Table 2: Platted Land, Lummi Island Subarea Plan, April 1979
 - 1-5 Table 9, Platted Lots of Record Prior to 1978, Not Subject to Lot Consolidation
 - 1-6 Figure 4: Long and Short Plats
 - 1-7 Ordinance No. 86-55
 - 1-8 Memorandum, dated July 9, 2002 from Roland Middleton to Land Use Division Staff re: Lot Consolidation Requirements for Lummi Island
 - 1-9 Whatcom County Hearing Examiner, Re: Application for Relief, Gregory Iwasaki, Order Dismissing Application, LCR13-91
 - 1-10 Appeal to the Hearing Examiner, dated January 12, 2010
 - 1-11 Appeal Statement
- 2 Staff Report, dated April 2, 2010
- 3 Certificate of Posting, dated April 7, 2010
- 4 Legal Notice, dated April 8, 2010
- 5 Staff and Attorney emails
- 6 Memorandum in Support of Overturning Whatcom County Planning and Development's Determination, dated April 19, 2010, prepared by Dannon Traxler, with attachments
 - 6-1 (A) Lummi Island Plan, April 1979
 - 6-2 (B) Declaration of James Arthur, dated April 19, 2010
 - 6-3 (C) Appeal Statement , Larry Stoner, with attachments
 - 6-4 (D) Letter dated March 14, 1986, from Jim Arthur to Lummi Island Steering Committee
 - 6-5 (E) Deed Information
- 7 Supplemental Brief In Support of Overturning Whatcom County Planning and Development's Determination, dated May 14, 2010, by Dannon Traxler

- 8 A Prior Erroneous Equitable Decision by a Hearing Examiner is not Precedent, dated May 14, 2010, by Royce Buckingham
- 9 County's Brief re: Issue Preclusion/Collateral Estoppel, dated May 27, 2010
- 10 Brief in Support of the Application of the Doctrine of Collateral Estoppel, dated May 31, 2010

Parties of Record

James and Jean Gibson
c/o
Dannon C. Traxler
Langabeer & Tull, P.S.
P.O. Box 1678
Bellingham, WA 98227-1678

Larry Stoner
4751 Birch Bay-Lynden Road, No.259
Blaine, WA 98230

Tyler Schroeder and Julia Barnes
Planning and Development Services

Royce Buckingham
Civil Deputy Prosecutor

Copy of Decision Sent via email to
Tom Miller
tom@thomasmillerconstruction.com

II.

The Appellants are the owners of two legally established Lots of Record. The two lots are adjacent and are located within the current Assessor's Parcel No. 380133 328008.

One of the lots was originally created by Plat as Lot 11, Lummi Park Plat, dedicated in 1910. The adjacent parcel is an unplatted, 3.29-acre parcel, legally created by a metes and bounds deed.

In 1918, Lummi Park Plat was partially vacated and the lot lines of most of the lots were effectively erased by this action. Lot 11 was not one of the lots for which boundary lines were erased.

The two lots were in one ownership on March 21, 2000, the date of the adoption of the current Lot Consolidation Ordinance. The lots are adjacent; neither lot meets the current, conventional lot size of five acres; neither lot has a legally established permitted use; and one of the lots is less than one-acre in size.

Based on these facts, Planning issued a Determination on December 21, 2009, finding that the lots were subject to Lot Consolidation pursuant to WWC 20.83.070 and therefore were a single lot for the purpose of purchase, sale, or use. This is the Administrative Determination that the current owners, the Gibson's and Loepky's, have appealed.

Much of Lummi Island, including the Appellants' parcels, is zoned Rural Residential-Island, a Zoning District which applies only to Lummi Island, and is subject to WCC. 20.34.

WCC 20.34.254 exempts most lots platted prior to 1978 from the Lot Consolidation Provisions that are applicable in the rest of Whatcom County. This section, specifically reads as follows:

**20.34.254 Lots platted prior to 1978.
Platted Lots of Record created prior to 1978 and identified in
Table 2, page 7, of the Lummi Island Comprehensive Plan shall
be considered as separate lots for building purposes regardless
of ownership, unless bound to adjoining lots(s) by covenant, and
shall not be subject to the lot consolidation provisions of
WCC 20.83.070. (Ord. 86-55, 1986)**

In order to understand this exemption from Lot Consolidation requirements, a review of the history of the Lummi Island Comprehensive Plan is relevant. As noted above, one of the Appellants' parcels, originally Lot 11, Block 1 of the Lummi Park Plat, was platted prior to 1978 as required by WCC 20.34.254. However, this plat is not listed in Table 2, page 7 of the Lummi Island Comprehensive Plan referred to in WCC 20.34.254, and therefore is not exempt from Lot Consolidation under the specific language of WCC 20.34.254. The second parcel is not a platted Lot of Record and therefore is not exempt from Lot Consolidation under this section.

In 1979, the Lummi Island Comprehensive Plan was developed and adopted. The major factor considered in the Plan for determining density requirements for Lummi Island was the availability of sufficient potable water to support future development.

As part of the process for determining what development density the Island could support, it was assumed that existing platted lots would be developed. This assumption resulted in an attempt to ascertain and list the number of platted lots on the Island and this list resulted in Table 2, a listing of plats established prior to 1978 and the number of lots in each of these plats.

Taking into account existing platted lots which could be developed later; the number of developed parcels on the Island; the acreage available for future development on the Island; and the

presumed amount of water available; the Lummi Island Comprehensive Plan, and the Zoning Ordinance regulations, based on the Plan, allowed for a density of one unit per three acres for future land subdivision. The purpose for which Table 2 was created was to quantify the number of existing parcels available for development in order to ascertain the number of new parcels that could be created within the constraints of water availability.

Since the Lummi Island Comprehensive Plan took into account the future development of the lots in plats created prior to 1978, it was determined by the legislative authority that it was appropriate to exempt “platted Lots of Record” from Lot Consolidation. This was done using the language set forth above in WCC 20.34.25, exempting the platted Lots of Record created prior to 1978 and listed in Table 2, page 7 of the Lummi Island Plan, from the Lot Consolidation Provisions of WCC 20.83.070.

The plats listed in Table 2, page 7 of the Lummi Island Comprehensive Plan include most, but not all, of the plats created prior to 1978. It does not include pre-existing Lots of Record, legally created by methods other than platting. It is clear that the purpose for creating Table 2 was to obtain an estimate of lots available for development at the time the Plan was drafted in order to determine an appropriate density for future land subdivision on the Island. Table 2 was not developed for the specific purpose of determining what parcels on the Island should be exempt from Lot Consolidation even though it was ultimately used for this purpose.

The Ordinance exempting the Table 2 parcels from Lot Consolidation was passed by the Whatcom County Council in 1986, approximately seven years after the development of the Plan and the creation of Table 2. The result is that most small lots or parcels on Lummi Island, which would have been otherwise subject to the same Lot Consolidation Provisions applicable to the rest of Whatcom County, were exempted. Those few platted lots which were not identified in Table 2, page 7 of the Plan, and those small lots (less than one-acre) legally created by means other than platting, did not fall within the language of WCC 20.34.254, and were left subject to Lot Consolidation under WCC 20.83.070. Since the mostly vacated Plat of Lummi Park was not listed in Table 2, the Appellants lot, Lot 11 of Lummi Park Plat, is not exempt from Lot Consolidation under a literal reading of WCC 20.34.254. The plats listed in Table 2 encompass a total of 1,079-lots, 832 of these lots were listed as unimproved lots. These lots are exempt from Lot Consolidation based on the plain language of WCC 20.34.254.

The result is that most of the substandard lots on Lummi Island are exempt from the Lot Consolidation requirements that apply to the rest of Whatcom County, but there are a few substandard lots on the Island, some platted and some not created by plat, which are not listed in Table 2 of the Plan and therefore subject to Lot Consolidation under the plain language of WCC 20.34.254.

III.

When read as a whole, Ordinance No. 86-55, the Ordinance adopting WCC 20.34.254, exempting plats listed in Table 2 from Lot Consolidation, suggests that the County Council was not

aware they were exempting most, but not all, substandard parcels on Lummi Island from Lot Consolidation.

The recitals for this Ordinance contain language which clearly suggests that the County Council thought it was exempting the whole Rural Residential Island Zone from Lot Consolidation. The statements within the WHEREAS recitals for the Ordinance read as follows:

WHEREAS, The Bureau of Buildings and Code Administration has applied for a zoning amendment to the Official Whatcom County Zoning Ordinance, Title 20, **that would exempt the Rural Residential-Island zone district from the lot consolidation provisions of Section 20.83.070; and**

WHEREAS, the Rural Residential-Island zone is applied only to Lummi Island; and

WHEREAS, the Lummi Island Comprehensive Plan developed a zoning density based upon the number of dwelling units that groundwater resources could sustain; and

WHEREAS, all existing lots of record in 1978 listed on page 7 of the Lummi Island Comprehensive Plan were expected to be developed in making final density calculations; and

WHEREAS, exempting the RR-I zone from lot consolidation regulations of Section 20.83.070 is in accordance with the adopted comprehensive plan, and therefore such exemption will not change the impacts of development on the island provided for when adopting the comprehensive plan; and

WHEREAS, the RR-I zone is unique in that all platted lots of record were subtracted from the overall density allowed for by the controlling natural restraint of groundwater availability and therefore this uniqueness prevents this exemption from being used as a precedent for exempting other areas of the county from the lot consolidation provisions; and

WHEREAS, the Planning Agency has come forth with a proposed amendment to the Official Whatcom County Zoning Ordinance after having its proper public hearings as required by law, and the Whatcom County Council agrees that such amendment is appropriate. **(Emphasis added.)**

The above recitals to the Ordinance make it clear that the County Council felt it was exempting the Rural Residential-Island Zone District on Lummi Island from Lot Consolidation regulations because the zoning density adopted for this District was based on the number of dwelling units that groundwater resources could sustain and, therefore, Lot Consolidation was not necessary to carry out the Lummi Island Comprehensive Plan.

IV.

Even though it appears that the Whatcom County Council intended to exempt the RR-I District on Lummi Island from Lot Consolidation, the language they adopted to carry out this attempt only exempted those parcels contained in the list set forth in Table 2, page 7 of the Lummi Island Plan. As shown in the Findings above, this language does not cover all of the potential parcels subject to Lot Consolidation on Lummi Island and, in fact, does not cover these Appellants' parcels.

V.

The issue of the breath of the Lot Consolidation exemption applicable to the RR-I District on Lummi Island came before the Whatcom County Hearing Examiner in file No. LCR 13-91, resulting in a Final Decision, dated April 1, 1992, entered by Edward L. Goode, Whatcom County Hearing Examiner. Mr. Goode recognized that WCC 20.34.254 exempts most, but not all, parcels on Lummi Island from Lot Consolidation. Mr. Goode ruled that there was no rational basis for exempting from Lot Consolidation platted lots listed in Table 2, but not exempting other legally created lots. Mr. Goode concluded that a strict application of the Lot Consolidation language in WCC 20.34.254 created a "manifest injustice" and that the distinction between the classes of lots exempted and those not exempted had no basis in law or policy and must be abandoned. Mr. Goode's Decision was that all Lots of Record within the Rural Residential-Island zone on Lummi Island were exempt from Lot Consolidation.

Mr. Goode's Determination was not appealed by Whatcom County Planning and Development Services and, consistent with this Decision, Whatcom County Planning and Development Services did not apply Lot Consolidation to Lummi Island until, on or after, July 9, 2002. On that date, the Land Use Division Manager of Whatcom County Planning and Development Services issued a Memorandum stating that Mr. Goode's interpretation in 1992 had been reviewed with a member of the Prosecuting Attorney's Office. The Prosecuting Attorney indicated that Mr. Goode's Order appeared to be in error because he lacked the authority to make a ruling based on "manifest injustice."

After following Mr. Goode's ruling for ten years, the Planning Department decided, based on the Prosecuting Attorney's opinion in 2002, that the Lot Consolidation exemption, stated in the language of WCC 20.34.254, should be strictly applied and only those platted Lots of Record created prior to 1978 and identified in Table 2, page 7 of the Lummi Island Comprehensive Plan, were exempt from Lot Consolidation. That change in policy resulted in this 2010 Administrative Determination that the Appellants' lots were subject to Lot Consolidation because they were not listed in Table 2.

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.

Based on the plain language of WCC 20.34.254, the Appellants' lots are subject to Lot Consolidation since they were not identified in Table 2, page 7 of the Lummi Island Comprehensive Plan, and were therefore not entitled to the Lot Consolidation Exemption of WCC 20.34.254.

This Hearing Examiner concludes that WCC 20.34.254 is not ambiguous and therefore a Hearing Examiner must apply it as written.

This Examiner concurs in the Prosecuting Attorney's opinion in 2002, that the prior Hearing Examiner exceeded his authority when he failed to apply WCC 20.34.254 as written, and instead extended it to all properties in the Rural Residential-Island zone on Lummi Island.

Like Mr. Goode, this Hearing Examiner sees issues regarding equal protection and substantive due process arising from the strict application of WCC 20.34.254. However these concerns raise Constitutional issues, which are beyond the jurisdiction of the Hearing Examiner to resolve. When an Ordinance is clear on its face, a Hearing Examiner is compelled to apply it as written. The issues of Equity and Constitutional deficiencies in an Ordinance are within the jurisdiction of the Courts and outside of the jurisdiction of a Hearing Examiner.

II.

The Hearing Examiner's Determination in 1992 that Lot Consolidation did not apply to the Rural Residential-Island zone on Lummi Island was a Final Decision and this Hearing Examiner concludes, based on collateral or issue estoppel, that the Planning Department was required to administer WCC 20.34.254 pursuant to the 1992 Hearing Examiner Decision even if that Decision was based on an erroneous legal conclusion.

When Whatcom County Planning and Development Services, a Party in the matter, failed to appeal the 1992 Decision of Examiner Goode, Planning and Development Services was thereafter bound by the Decision.

III.

Collateral or issue estoppel is applicable to Hearing Examiner Decisions. In Shoemaker v.

City of Bremerton, 109 Wash.2d 504, 745 P. 2d 858, the Washington State Supreme Court ruled that where the elements for issue estoppel are met and where the Hearing Examiner's Decision was made in a proceeding which included the essential elements of adjudication, issue estoppel applied.

The legal issue decided by the Hearing Examiner in 1992 is identical to the legal issue raised by Planning's Administrative Determination in this case. The Planning Department chose not to appeal the 1992 Decision after a proceeding in which it was allowed to submit evidence, make legal arguments, seek Reconsideration of the Decision under the Hearing Examiner's Business Rules after it was made, and to appeal the Decision. The Planning Department is therefore bound by the legal conclusion reached in that Decision.

The legal Determination made by Hearing Examiner Goode in 1992 that Lot Consolidation does not apply to any properties in the Rural Residential-Island zone on Lummi Island controls the Determination in this case. In the 1992 Decision, the Hearing Examiner concluded that all parcels within the Rural Residential-Island zone on Lummi Island were exempt from Lot Consolidation.

The issue brought before the Hearing Examiner in 1992 involved the application of WCC 20.34.254, a section of the Whatcom County Zoning Ordinance. The Hearing Examiner had the authority to rule on the applicability of the Ordinance and concluded that all properties within the Rural Residential-Island District on Lummi Island were exempt from Lot Consolidation. The Hearing Examiner had jurisdiction to decide that issue. When this Final Determination of the Hearing Examiner was not appealed by Whatcom County Planning and Development Services, a Party in that proceeding, Planning was obligated thereafter to administer Lot Consolidation in the Rural Residential-Island zone in a manner consistent with the Decision of the Hearing Examiner. Planning cannot re-litigate the issue by deciding at a later date that the controlling Decision was incorrect.

To rule otherwise would allow Whatcom County Planning and Development Services, or any other Party, to ignore Final Decisions of the Hearing Examiner that they later decided were incorrect and would remove finality from Hearing Examiner Determinations.

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 Appeal of the Determination by Whatcom County Planning and Development Services that Lot Consolidation applied to the Appellants' adjacent parcels on Lummi Island is UPHELD. Whatcom County Planning and Development Services is required to allow the Appellants to use the two legal Lots of Record as separate parcels.

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 June 2010.

Michael Bobbink, Hearing Examiner