

WHATCOM COUNTY HEARING EXAMINER

RE: Administrative Appeal	)	APL2010-0006
Application for	)	
<i>Ron and Shelley Jepson</i>	)	FINDINGS OF FACT,
	)	CONCLUSIONS OF LAW,
	)	AND DECISION

**SUMMARY OF APPEAL AND DECISION**

Appeal: The Applicants for a Boundary Line Adjustment, EXE2009-00027, have appealed an Administrative Determination made by the Director of Whatcom County Planning and Development Services on January 8, 2010. The Boundary Line Adjustment sought to adjust the boundary lines of 24-parcels, ending up with 23-parcels. The denial was based on the conclusion of the Director that the proposed Boundary Line Adjustment does not meet the requirements for a Boundary Line Adjustment because it results in parcels that contain insufficient area and dimension to meet the minimum requirements for width and area for a building site.

Decision: The Decision of the Director of Whatcom County Planning and Development Services is UPHeld in part and OVERRULED in part. This matter is REMANDED to Whatcom County Planning and Development Services for further processing of the proposed Boundary Line Adjustment in a manner consistent with this Decision.

**FINDINGS OF FACT**

**I.**

**Background Information**

Appellant:	Ronald T. and Shelley Jepson
Applicant:	Ronald T. and Shelley Jepson
Legal Property Owners:	Ronald T. and Shelley Jepson
WC File Being Appealed:	No. EXE2009-00027
Property Location/Address:	Sandy Point Garden Tracts
Assessor’s Parcel Numbers (APN):	380108 – 502222, 449206, 448201, 448196, 456328, 455324, 448191, 447186, 480137, 476115, 439111, 457110, 454104, 457096, 448093, 500092, 509062, 454080, 447181, 456058, 380116 – 495250
Zoning:	Residential Rural 3 (RR3)

Comprehensive Plan: Suburban Enclave

Authorizing Ordinances: WCC 20.92 Hearing Examiner  
WCC 21.02.030 Appeals

Applicable State Law: RCW 58.17.040 Platting Exemptions  
RCW 58.17. 215 Alteration of Subdivision – Procedure

Applicable Whatcom County Codes:

WCC 21.01 Land Division, General Provisions  
WCC 21.03 Exempt Land Divisions and Boundary Line Adjustments  
WCC 21.06.030 Subdivision Vacation and Alteration  
WCC 2.33 Permit Review Procedures

Certificate of Posting of Notice, dated April 20, 2010

Legal Affidavit Notice of Open Record Hearing, dated April 22, 2010

Hearing Date: May 5, 2010

Exhibits

- 1 Administrative Appeal Application, with attached Receipt, Appeal Statement Letter dated January 22, 2010, from Dannon Traxler, and Letter dated December 7, 2009, from Dannon Traxler to Craig Ostrum, PDS Planner
- 2 Recorded Copies, Covenant to Bind Properties [Lot 26 Canal, Lot 29 Canal, Reconfiguration Quit Claim Deed, dated December 7, 2009]
- 3 Surveyor's Maps:
  - 3-1 Canal Record of Survey Phase II, 2070203995, 2/27/2007
  - 3-2 Canal Lot Line Adjustment II, dated March 18, 2009
  - 3-3 Canal Lot Line Adjustment II, dated March 18, 2009
  - 3-4 Canal Lot Line Adjustment II, dated February 11, 2009, with "Lot 1, L.L.A. AF 2090202300" highlighted
- 4 Aerial Map, entitled "SMP approximated by Shoreline's Staff – Not Provided by Applicant"
- 5 Jepson Boundary Line Adjustment Application, EXE2009-0027, Findings of Fact and Decision, dated January 8, 2010, prepared by David Stalheim, PDS Director, with Parcel List A, attached
- 6 Memorandum, dated March 11, 2010, from Michael Bobbink, with attached Jepson Letter, dated February 26, 2010
- 7 Letter dated January 13, 2009, from Dannon Traxler to Michael Bobbink re: APL2008-0002/EXE2008-0004

- 8 Letter dated January 21, 2009 from Wayne Fitch to Larry Stoner re: Jepson Boundary Line Adjustment
- 9 Memorandum, dated July 6, 2009, from Michael Bobbink to Parties of Record re: APL2009-0012
- 10 Letter dated December 7, 2009 from Dannon Traxler to Craig Ostrum re: EXE2009-0027, Preliminary Approval of Boundary Line Exemption
- 11 Letter dated December 11, 2009 from Dannon Traxler to David Stalheim re: EXE2009-0027/Preliminary Approval
- 12 Letter dated December 14, 2009, from David Stalheim to Dannon Traxler re: follow-up response
- 13 Letter dated January 8, 2010 from Dannon Traxler to David Stalheim re: APL2009-0012/EXE2009-0027
- 14 Application for Boundary Line Adjustment, 2009-0027
- 15 Certificate of Posting of Notice, dated April 20, 2010
- 16 Legal Notice of Open Record Hearing, dated April 22, 2010
- 17 Memorandum in Support of Overturning Whatcom County Planning and Development's Denial of a Boundary Line Adjustment Application, dated April 23, 2010, prepared by Dannon Traxler, with attachments:  
17-1 Exhibit A, Chronology of correspondence, decisions, submissions and staff reports  
17-2 Exhibit B, Statue and Code Provisions  
17-3 Cases
- 18 Whatcom County Response re: Denial of Boundary Line Adjustment, dated April 30, 2010, prepared by Royce Buckingham, with attachments:  
18-1 Memorandum, dated April 26, 2010, from David Stalheim to Royce Buckingham re: Response to Appellant Memorandum  
18-2 Letter dated January 8, 2010, from Dannon Traxler to David Stalheim re: APL2009-0012/EXE2009-0027; Letter dated January 21, 2009 from Wayne Fitch to Larry Stoner re: Jepson BLA case; Letter dated January 13, 2009 from Traxler to Bobbink re: APL2008-0002/EXE2008-0004  
18-3 Case: Ralph Mason v King County, 134 Wash.App.806, 142 P.3d 637  
18-4 Aerial Map  
18-5 GIS Map, Approximated Wetlands
- 19 Email Correspondence between Staff [Stalheim, Buckingham, Magner] and Ms. Traxler

- 20 Colored Site Map, showing SMP approximated by Shoreline's Staff
- 21 Colored Site Map, showing SMP GIS approximated wetlands
- 22 2-page document, showing current lot sizes and configurations – BLA #3
- 23 To scale map showing accurate lot lines
- 24 Email dated May 6, 2010 from Whatcom County requesting a Hearing Examiner Decision
- 25 Memorandum, dated May 7, 2010 from Dannon Traxler re: Jepson Appeal
- 26 Memorandum, dated May 12, 2010, from Dannon Traxler re: Jepson, with attachments
  - 26-1 Letter, dated May 12, 2010, from Ronald Jepson re: EXE009-00027 Appeal
  - 26-2 Memorandum, dated May 10, 2010, from Ed Miller re: Critical Areas Reconnaissance of Jepson Sandy Point properties
  - 26-3 Site map (small) showing wetland buffer and shoreline setback
  - 26-4 Site map (large version of Exhibit 26-3)
- 27 Whatcom County Response Re: Denial of Boundary Line Adjustment, dated May 14, 2010, by Royce Buckingham

**Parties of Record**

Ronald and Shelley Jepson  
222 Grand Avenue, Suite C  
Bellingham, WA 98225

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

Dannon C. Traxler  
Langabeer & Tull, P.S.  
P.O. Box 1678  
Bellingham, WA 98227-1678

David Stalheim and Tyler Schroeder  
Planning and Development Services

Royce Buckingham  
Civil Deputy Prosecutor

## **II.**

The Appellants are the owners of a number of contiguous parcels, located on Sandy Point, Whatcom County, Washington.

The contiguous parcels include sixteen-lots within Bolster's Sandy Point Tracts, No. 2, and Bolster's Garden Tracts [hereinafter, referred to Garden Tracts lots]. Additionally, the Appellants own six 5-acre tracts, Tracts B thru G, that were a part of eight 5-acre tracts (Tracts A thru I), created by exemption in June 1999 from Lot 3 of the Sandy Point Shores Short Plat. Lot 3 of the Sandy Point Shores Short Plat was created by the recording of the Sandy Point Shores Short Plat in May 1978. The final parcel included in this proposed Boundary Line Adjustment is Lot #1 of the Firehouse Lot Line Adjustment which was previously created from Tract A.

The Garden Tracts lots were created by the recording of the subdivision in January 1959.

## **III.**

The Garden Tracts lots are all subject to a covenant which does not allow residential construction on the lots for a period of 99-years from 1957. This covenant was signed prior to the recording of the Garden Tracts subdivision and filed after the recording.

The 5-acre tracts created by exemption from Lot 3 of the Sandy Point Shores Short Plat are not subject to this covenant. Lot #1, created from Tract A, is also not subject to this restriction.

The Lot Line Adjustments proposed by the Appellants would create 20-building lots on the seven 5-acre tracts (B thru F) created by exemption; would result in the combining of lots 54A thru 59A of the Garden Tracts into a single tract; Lots 37A thru 44A of the Garden Tracts into a single lot; and incorporate Lots 21A and 22A of the Garden Tracts into a large canal lot. The three proposed parcels which would contain lots that are now part of the Garden Tracts would remain subject to the covenant not allowing residential buildings unless the covenants were modified through a Plat Alteration or the 99-year time period has run. The number of parcels available for residential development among the seven 5-acre parcels, originally created by exemption out of Lot 3 of the Sandy Point Shores Short Plat, would increase from seven residential parcels, all abutting the canal, to 20 residential parcels, all of which would have canal frontage.

## **IV.**

Whatcom County Planning and Development Services had previously approved Boundary Line Adjustments for this Applicant on both the north and south end of the properties which are the subject of this application. These approvals allowed both the

combination of multiple lots within the Garden Tracts into single parcels combined with the creation of additional parcels outside of the Garden Tracts. These Boundary Line Adjustments affected five parcels in one case and six parcels in the other case. In neither of these cases did Planning and Development Services raise issues regarding the creation of new lots available for residential development outside of the Garden Tracts, while combining lots not currently available for residential development within the Garden Tracts. Nor did the County raise any issue in processing these earlier applications about the necessity for a Plat Alteration to accomplish the same thing the Appellants are attempting to accomplish with the current application, "Canal Lot Line Adjustment II." All three of these Boundary Line Adjustment proposals result in the creation of additional lots not encumbered by the restriction on residential development, combined with a reduction in the number of lots subject to the 99-year prohibition on residential building. The only difference with this application is that it involves 23-parcels instead of five or six.

## V.

The proposed Boundary Line Adjustment would significantly readjust the boundary lines between 23-existing parcels. However, the number of parcels would not increase. The number of parcels subject to the restriction on residential building under the covenant of the Garden Tracts Plat would be reduced from sixteen to three, which the Applicants label as Tracts A, B, and C, calling Tracts A and B, "Conservation Tracts," and Tract C, "The Canal Tract." Meanwhile the seven 5-acre tracts, located adjacent to the Garden Tracts and adjacent to the existing canal, would be increased from seven lots with canal frontage to 20-lots with canal frontage.

## VI.

This is the second time an Appeal regarding this proposed Boundary Line Adjustment has come before the Hearing Examiner. In a Decision, dated September 15, 2009, the Hearing Examiner upheld an Appeal by the Applicants for this Boundary Line Adjustment, and remanded this application to Whatcom County Planning and Development Services. In that Decision, the Hearing Examiner concluded as follows:

*Decision:* The Appellants' proposed Boundary Line Adjustment does not require a Plat Alteration since it does not propose to modify any covenant. The Appellants' Boundary Line Adjustment cannot be denied because it creates new buildable sites so long as no additional parcels are created. The proposed Boundary Line Adjustment does not require "singular" applications and can be processed as a proposed adjustment affecting twenty-three parcels. The Appeal is upheld and the Determination of Planning and Development Services, dated April 2, 2009, is overturned. This matter is remanded back to Planning and Development Services for processing as a Boundary Line Adjustment in a manner consistent with this Decision. The Boundary Line Adjustment is to be approved if it meets the specific requirements set forth in WCC 21.03.

This Decision of the Whatcom County Hearing Examiner was appealed to the Whatcom County Council, but prior to a resolution of the Appeal by the Council, Planning and Development Services withdrew the Appeal and processed the Application, pursuant to the requirements of the Hearing Examiner set forth in the Remand. After further review, the Director of Whatcom County Planning and Development Services issued a fourteen-page Decision denying the Boundary Line Adjustment. The Director took the position that the Boundary Line Adjustment, proposed, resulted in parcels that contained insufficient area and dimensions to meet the minimum requirements for width and area for a building site and, therefore, did not comply with the requirements for approval of a Boundary Line Adjustment, pursuant to WCC 21.03.060. The Director's list reads as follows:

1. The Boundary Line Adjustment would result in lots that do not contain building sites, a requirement of WCC 21.03.060 and RCW 58.17.040(6).
2. The Boundary Line Adjustment would result in increasing the nonconformity of seven lots that do not meet minimum lot size requirement of the Whatcom County Zoning Code, WCC 21.03.060 and RCW 58.17.040(6).
3. The Boundary Line Adjustment would result in lots not meeting the minimum requirements for width at the street line required by the Whatcom County Zoning Code.
4. The Boundary Line Adjustment application has not demonstrated that there are building sites within all parcels that are outside regulated wetlands, aquatic habitat conservation areas and/or their buffers.
5. The Boundary Line Adjustment application would result in lots that are wholly within the required buffers and setback areas under the Shoreline Management Program for residential and other building development, thus not meeting the requirement of WCC 21.03.060 and RCW 58.17.040(6).
6. The Whatcom County Building and Fire Codes require fire apparatus access roads be provided for every building. The Boundary Line Adjustment application would result in lots that would require roads meeting Whatcom County Development Standards, Chapter 5. The applicant has not demonstrated that access roads would be provided to the lots not accessed by public road.

Specifically, for the above stated reasons, the Director concluded that the proposed Boundary Line Adjustment did not meet the criteria found in WCC 21.03.060(2)(b), in that the Applicant had not shown that the lots resulting from the proposed adjustment resulted "...in lots which contain sufficient area and dimension to meet the minimum requirements for width and area for a building site pursuant to this Title."

## VII.

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 issues raised in this Appeal deal with the interpretation of WCC 21.03.060(2)(b). The Director concluded that the Applicant had not met the requirement that lots resulting from a Boundary Line Adjustment "... contain sufficient area and dimensions to meet minimum requirements for width and area of a building site pursuant to this Title." [WCC 21.03.060(2)(b)]

The Hearing Examiner has been asked to address and resolve issues relating to the meaning of WCC 21.03.060(2)(b), which reads as follows:

(2)(b) With the exception of those boundary line adjustments located within the agricultural zone, the boundary line adjustment shall result in lots which contain sufficient area and dimensions to meet minimum requirements for width and area for a building site pursuant to this title. [Emphasis added.]

The language used is mostly identical to the language used in the comparable sections of RCW 58.17, the State statute governing the subdivision of parcels of land.

### II.

Neither the Whatcom County Subdivision Ordinance nor RCW 58.17 defines the term "building site." Undefined terms in a statute are accorded their ordinary meaning. Stated simply, each lot must have an area set aside which is sufficient for construction of the buildings or structures associated with an allowed use. In this case, the proposed use for all of the lots is clearly residential and the Applicant must show that each lot has a sufficient buildable area to accommodate residential usage.

### III.

In determining the required width and area for a "building site," the Director first concludes that section WCC 21.03.060(2)(b) of the Subdivision Ordinance requires all the resulting lots to meet the minimum lot size set forth for the zoning designation in the Whatcom County Zoning Ordinance, Title 20. The Director went on to conclude that there was inadequate proof of water availability and that the minimum lot size for these properties at this time was five acres. The Director suggests that no lot containing less than five acres can be created through this Boundary Line Adjustment.

The terms "building site," as used in the Subdivision Ordinance, and "minimum lot size," as used in the Zoning Ordinance, are not comparable. There is nothing in the



applicable version of Chapter 21, Land Division Regulations Subdivision Ordinance, indicating that Boundary Line Adjustments were to be limited to properties which would result in parcels meeting the minimum lot size requirements for the applicable zoning designation. Historically, Whatcom County has allowed Boundary Line Adjustments which result in parcels that do not meet the current minimum lot size for creation of a new lot within the applicable zoning designation.

The Hearing Examiner concludes as a matter of law that the Applicants can adjust boundary lines within their adjacent parcels, pursuant to the version of WCC 21.03 that applies to this application even if none of the lots resulting meet the current minimum lot size for new subdivision in the applicable zoning designation.

The Planning Director cites a Court of Appeals case, Mason v. King County, et al, 134 Wash.App. 806, 142 P.3d 637, for the proposition that the County is required to apply the minimum lot standards of the Zoning Ordinance, WCC Chapter 20, to the Boundary Line Adjustment process, set forth in WCC Chapter 21, the Subdivision Ordinance.

The Hearing Examiner disagrees and concludes that Mason can be distinguished from the facts in this application. The Mason case stands for the proposition that a local government may define the term “building site” since it is undefined by RCW 58.17, and where a local government defines the term “building site” in their Ordinance dealing with Boundary Line Adjustments, that definition controls. The Mason case dealt with the application of the King County Code. The Court pointed out that pursuant to the Boundary Line Adjustment Ordinance in King County, “building site” was defined and that pursuant to that definition, the term “building site” required that the parcels created through the Boundary Line Adjustment process in King County comply with the minimum lot size requirements of the King County Zoning Ordinance.

Whatcom County has no similar definition. Since “building site” is undefined, it must be given its ordinary meaning. The ordinary meaning of the word “building site” can be found by referring to the dictionary and it does not include a site which meets the minimum lot size requirements of a local government Zoning Ordinance.

Since land use regulations are in derogation of the common law, a long line of cases requires that they be construed narrowly and in favor of the property owner. Since Whatcom County does not define the term “building site” in the Ordinance setting forth requirements for a Boundary Line Adjustment, a narrow interpretation would foreclose the County from expanding the ordinary meaning of “building site” to encompass the requirements of a separate chapter of the Whatcom County Code.

#### IV.

In addition to reaching the conclusion that all of the lots would have to meet the current minimum lot size for the zone, the Director determined that each of the lots would be required to meet the minimum width at the street line for lots in the Rural Residential

zone without public water as set forth in WCC 20.32.254.

The Hearing Examiner concludes that this is an overbroad and restrictive reading of the requirements for a Boundary Line Adjustment and that the requirements of WCC 20.32 are not applicable in determining the meaning of “building site,” as used in the Subdivision Ordinance, WCC 21.03.

## V.

The Planning Director concluded that the meaning of the term “building site” would necessarily exclude areas which could not be built on due to setbacks and the existence of critical areas and their buffers.

Existing legal nonconforming lots may be allowed to encroach upon zoning setbacks and/or critical areas and their buffers, including shoreline setbacks, based on either the variance criteria or the reasonable use criteria.

However, the Hearing Examiner concurs with Planning’s position that the requirement for an adequate “building site” on parcels realigned by Boundary Line Adjustments means a buildable area for structures outside of the applicable zoning setbacks, shoreline setbacks, and outside of critical areas and/or their buffers. If the Applicant wishes to take advantage of existing variance and reasonable use exceptions to allow building outside of zoning setbacks, shoreline setbacks, and/or critical areas and their buffers, the Applicant must leave those lots in their current configuration.

In order to determine the applicable setbacks, the Applicant will be required to show an adequate right-of-way for roads servicing the lots which is consistent with the current development standards for roads and then set back the “building site” so that it is consistent with the road or front yard setbacks applicable. The Applicant must demonstrate the ability to construct a road consistent with the Whatcom County Development Standards. Additionally, the requirements for new access roads must comply with WCC 21.03.060(f) and proper utility easements must be provided to comply with WCC 21.03.060(e).

## VI.

Any Finding of Fact deemed to be a Conclusion of Law is hereby adopted as such. Based on the foregoing Findings of Fact and Conclusions of Law, now is entered the following

### **DECISION**

The Whatcom County Hearing Examiner upholds the Decision of the Planning Director in part. Specifically, the Hearing Examiner concludes that the Applicant must show a reasonable sized area on each of the lots resulting from the Boundary Line Adjustment after required roadways have been identified and applicable zoning setbacks have been determined. The Hearing Examiner also concludes that the Planning Director correctly

concluded that the building sites must be outside of shoreline setbacks and critical areas and their buffers.

The Determination of the Planning Director that the Applicant needs to show that each of the lots meets the current minimum lot size for the creation of new lots in the applicable zoning designation is overturned.

The Hearing Examiner remands this matter to the Planning Department for further processing of the Boundary Line Adjustment proposed. The Applicant should have a 120-day stay on the issuance of the Decision in order to submit the necessary information to establish adequate, reasonable-size building sites on any of the lots affected by the proposed Boundary Line Adjustment.

The Hearing Examiner retains jurisdiction in this matter to resolve any new issues that arise during the processing of the Boundary Line Adjustment Application after remand.

The Hearing Examiner notes that the Planning Department has the authority to place conditions on a Boundary Line Adjustment in order to assure that the applicable development standards, setbacks, and critical area and shoreline regulations can be complied with.

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 calendar 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 24<sup>th</sup> day of May 2010.

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Michael Bobbink, Hearing Examiner