

WHATCOM COUNTY HEARING EXAMINER

RE: Administrative Appeal) APL2009-0002
Application for)
Reijo Salminen) FINDINGS OF FACT,
) CONCLUSIONS OF LAW,
) AND DECISION

SUMMARY OF APPEAL AND DECISION

Appeal: On February 6, 2009, the Appellant filed an Appeal of a Planning and Development Services Administrative Decision, Notice of Required Corrective Action, Case No. ENF2008-00248, dated January 21, 2009. The Appellant filed an Appeal within twenty days of the dated Receipt of Notice. The Appeal was timely.

Decision: The Appellant has failed to properly appeal any of the Notices of Penalties imposed by Whatcom County Department of Planning and Development Services. The Hearing Examiner does not have the authority to hear Appeals on the amount of the fines on Shoreline Management Master Program violations. The Hearing Examiner does not have the authority to hear any Appeals that are not filed in a timely manner and the Appellant’s request that the Hearing Examiner set aside or reduce the penalties is denied.

FINDINGS OF FACT

I.

Background Information

Appellant: Mr. Reijo Salminen

Property Address: 373 Cove Road
Bellingham, Washington

Parcel Number: 370236-302356

Zoning Designation: Residential Rural (RR2)

Shoreline Designation: Conservancy

Notice Requirements

Certificate of Posting, dated May 20, 2009

Legal Notice, dated May 21, 2009

Hearing Date: August 12, 2009

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|--------------------------|----------------|--|
| Authorizing Ordinances: | WCC 23.60.15.G | Notice of Decision, Reconsideration and Appeal |
| | WCC 23.60.15.H | Appeal Procedures |
| | WCC 23.80.02.B | Violations and Penalties |
| Applicable County Codes: | WCC 23.80.02.E | Violations and Penalties |

Exhibits

- 1 Administrative Appeal Application
 - 1-1 receipt
 - 1-2 Notice of Required Corrective Action
 - 1-3 Appeal Rights
 - 1-4 Appellant's Appeal Statement, dated February 6, 2009
 - 1-5 Copy of Retaining Wall Sketch, dated June 22, 2008
 - 1-6 Copy of Retaining Wall Sketch, dated Feb 1, 2009
- 2 Memorandum, dated February 10, 2009 from Bryan Sehmel to Magner re: enclosed Appeal Application
- 3 Certificate of Posting, dated May 20, 2009
- 4 Legal Notice, dated May 21, 2009
- 5 Site Plans and Photos
- 6 Email correspondence between Staff [Sehmel, Magner, Yunge] and Appellant's Representative [Simi Jain]
- 7 Staff Report, dated June 12, 2009
- 8 Supplemental Prehearing Brief, dated August 5, 2009, from Simi Jain
- 9 Declaration of Counsel, dated August 5, 2009, from Simi Jain
- 10 Email correspondence between Staff [Yunge, Sehmel, Magner] and Appellant's Representative [Simi Jain], dated July 21, July 14, July 10]
- 11 Declaration of Service, dated August 5, 2009
- 12 Photocopy of envelop, date received 10/31/08

- 13 Return receipts for each item from PDS mailed to Salminen
- 14 Email from Sam Ryan to Suzanne Bosman, dated September 8, 2008

Parties of Record

Reijo Salminen
373 Cove Road
Bellingham, WA 98229

Simi Jain
Zender Thurston, P.S.
1700 D Street
Bellingham, WA 98225

Bryan Schmel
Planning and Development Services

Copy of Decision sent to
R. H. Giesecke
353 Cove Road
Bellingham, WA 98229

Ethelyn Payne
345 Cove Road
Bellingham, WA 98229

II.

On February 6, 2009, the Appellant filed an Appeal of a Planning and Development Services Administrative Decision, Notice of Required Corrective Action, Case No. ENF2008-00248, dated January 21, 2009. The Appellant filed an Appeal within twenty days of the dated Receipt of Notice. The Appeal was timely.

III.

The purpose of the Notice of Required Corrective Action was to specifically notify the Appellant of the steps necessary to bring the Appellant into compliance with the previously entered enforcement orders. The corrective action required was set forth in three paragraphs on the first page of the notice.

During the pendency of this Appeal, the Appellant worked with Whatcom County Planning and Development Services and an agreement was reached on the activity necessary to bring the

Appellant's property into compliance.

Thereafter, the Appellant's Attorney informed the Hearing Examiner that all of the issues had been settled, except for issues regarding penalties imposed by Planning and Development Services in enforcement violations issued prior to the issuance of the Notice of Required Corrective Action. At the request of the Appellant's Attorney, an Open Record Hearing was held to discuss issues regarding the monetary penalties imposed.

IV.

The enforcement action regarding the Appeal started with the issuance of Code Enforcement Order under No. ENF2008-00248, on or about August 25, 2008. The Notice alleged violations of County Ordinances as follows:

Construction activities related to a retaining wall, fence, and railing were conducted within the jurisdiction of the Shoreline Management Program and within the marine shoreline buffer without approval or permits on record. Further, the activities associated with the retaining wall were conducted without building permits on record.

This Violation Notice included a Notice of Penalties for violations of both the Shoreline Management Program and the International Residential Code in the amount of \$1,000.00 each, for a total of \$2,000.00.

Appeal rights were attached to both the Notice of Violation and the Notice of Penalties, along with the Appellant's right to request remission or mitigation of the fine, administratively.

The Violation Notices, along with the Penalty Notices, were not appealed.

On October 29, 2008, Whatcom County Planning and Development Services imposed an additional \$2,000 in penalties because no corrective action had been taken on the initial violations. The Notice of Penalties on October 29, 2008, included written Appeal rights, and, again, the Appellant failed to appeal the penalties or request a Remission or Mitigation Hearing.

On December 8, 2008, because no corrective action had been undertaken, Whatcom County Planning and Development Services sent the Appellant notice of an additional \$2,000 in penalties resulting from the on-going violations. As of December 2008, the penalties totaled \$6,000. The December Notice of Penalties included written information on the Appellant's right to appeal. No Appeal was filed in a timely manner.

At the time the Notice of Corrective Action was issued, \$6,000 in penalties had been imposed by Whatcom County Planning and the Appellant had filed no Appeals of either the original Notice of Violation or the Notice of Penalties.

The Appellant filed the first Appeal on this matter after the receipt of the Notice of Corrective Action on February 6, 2009. The Appellant in a Statement of Appeal attempted to raise issues, regarding the imposition of the \$6,000 in penalties.

The issues from the original Notice of Violation, dated August 25, 2008, were finally resolved after the Appellant was given approval for a Shoreline Statement of Exemption which gave after-the-fact permit approval for a portion of the work, and contained conditions aimed at bringing the site into full compliance. The Shoreline Statement of Exemption Decision was also not appealed. As a result of the approval of a Shoreline Exemption with conditions, the enforcement issues were resolved.

However, as indicated above, the Appellant's Attorney has requested that the Hearing Examiner either set aside the penalties or reduce them pursuant to this Appeal.

V.

The Notice of Corrective Action did not impose any penalties and the prior Notices of Penalties were not appealed in a timely manner.

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.

No penalties were imposed in the Administrative Determination setting forth a Notice of Corrective Action, which was the Order appealed by the Appellant. Therefore, issues regarding penalties are not properly a part of this Appeal since they were not part of the Order appealed.

II.

On three different occasions, the Appellant was give Notice of the Penalties imposed and the list of appeal rights and other action which the Appellant could undertake in regard to the penalties. None of the Notices of Penalties imposed have been appealed. The appeal period for a timely Appeal of the Penalties has run in each case.

III.

The Hearing Examiner has jurisdiction to hear Appeals of administrative activities in many cases so long as a timely Appeal is filed. The Hearing Examiner does not have jurisdiction to hear

any Appeal which has not been filed in a timely manner. Issues regarding why a timely Appeal was not filed or the fairness of the penalties become equitable issues for which jurisdiction lies within Superior Court, when a timely Appeal has not been filed.

IV.

\$3,000 in penalties were imposed for the ongoing Shoreline Management Master Program violations. Appeal of fines imposed as a result of Shoreline Management Master Program violations are to be appealed to the Whatcom County Council or the Shoreline Hearings Board, and not the Hearing Examiner. [See WCC 23.80.03C]

V.

Neither party has argued as to whether or not the Hearing Examiner even has the authority to hear Appeals under the International Residential Code. Even if the Hearing Examiner has been granted authority to hear this kind of Appeal, the failure of the Appellant to appeal in a timely manner any of the three Notices where penalties were imposed under the International Residential Code would require dismissal of the Appeal by the Hearing Examiner.

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 Appellant has failed to properly appeal any of the Notice of Penalties imposed by Whatcom County Planning and Development Services. The Hearing Examiner does not have the authority to hear Appeals on the amount of the fines on Shoreline Management Master Program violations. The Hearing Examiner does not have the authority to hear any Appeals that are not filed in a timely manner and the Appellant's request that the Hearing Examiner set aside or reduce the penalties is denied.

**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 2nd day of September 2009.

Michael Bobbink, Hearing Examiner