

WHATCOM COUNTY HEARING EXAMINER

RE: Administrative Appeal) APL2009-0015
Application for)
Sal Vacca) FINDINGS OF FACT,
) CONCLUSIONS OF LAW,
) AND DECISION

SUMMARY OF APPEAL AND DECISION

Appeal: Sal Vacca, through his representative, Bruce Ayers, has appealed a Determination made by Whatcom County Planning and Development Services that the Agriculture Protection Overlay (APO) Standards apply to a proposed Short Plat, Assessor's Parcel No. 380304 205142, located at 1056 Van Wyck Road, Bellingham, Washington.

Decision: The Administrative Appeal, APL2009-0015, filed by Sal Vacca is upheld. The Appellant has a "parcel" as that term is defined in the Agriculture Protection Overlay consisting of 19.77 acres. The parcel is not a nominal twenty acre parcel and contains less than twenty acres. Therefore the Agriculture Protection Overlay does not apply to this Appellant's proposed Short Plat.

FINDINGS OF FACT

I.

Background Information

Appellant: Sal Vacca

Applicant/Property Owner: Sal Vacca

Whatcom County Case Under Appeal: SS2008-00029

Property Location/Address: 1056 Van Wyck Road
Bellingham, WA

Assessor's Parcel Number (APN): 380304205142

Zoning: Rural (R5A)

Comprehensive Plan: Rural

Authorizing Ordinances:

WCC 20.92 Hearing Examiner
WCC 21.02.030 Appeals

Applicable Whatcom County Codes:

WCC 21.01 Land Division, General Provisions
WCC 20.36 Rural Zoning Ordinance
WCC 20.38 Agriculture Protection Overlay
WCC 20.97 Definitions, Zoning Ordinance

Exhibits

- 1 Appeal Application
 - 1-1 Letter dated April 29, 2009, from Ayers Consulting to Hearing Examiner

- 2 Letter, dated April 16, 2009, from PDS Annie Matsumoto re: Response to March 3, 2009 letter

- 3 Letter dated June 11, 2009, from Sal Vacca, with Tax Stubs attached [1975, 2005, 2009] and Surveyor's Map showing farmland with wetlands in orange

- 4 Staff Report, dated June 26, 2009, with attachments
 - 4-1 Email dated June 26, 2009 from Whatcom Title re: Van Wyck
 - 4-2 Plat of Garden Addition, located directly south of the subject property
 - 4-3 Map of APO prime agriculture soils
 - 4-4 Vicinity Map – Vacca property highlighted in yellow,
 Amended Sterk Short Plat, Map recorded on April 12, 1990
 Amended Vekved Short Plat, Map recorded on July 28, 1994
 - 4-5 Letter dated May 15, 2009, from Ayers Consulting to Brenda Wilson

- 5 Appellant's Memorandum, June 20, 2009 from David Cottingham, with attachments
 - 5-1 Hearing Examiner's Decision, APL2002-0007, Rodrigo del Pozo and Janet Cunniffe, Appellants, dated June 24, 2002
 - 5-2 American Title Insurance Co.-Statutory Warranty Deed, dated September 9, 1974
 - 5-3 Zoning/97.3(2), pages 97-11 thru 97-17
 - 5-4 Letter dated May 15, 2009, from Ayers Consulting
 - 5-5 Letter dated April 29, 2009, from Ayers Consulting
 - 5-6 Letter dated April 16, 2009, from PDS, Matsumoto to Ayers Consulting
 - 5-7 Letter dated March 3, 2009, from Ayers Consulting to Matsumoto
 - 5-8 Record of Survey, map dated July 30, 1990
 - 5-9 Vicinity Map –Vacca property highlighted in yellow
 - 5-10 Large Vicinity Maps and Amended Short Plat Maps [Vekved, Sterk, Staveland, Hanson, Kunzmann]
 - 5-11 Vacca Short Plat Application Ketch for Sal Vacca, dated December 11, 2008

- 6 Certificate of Posting, June 15, 2009
- 7 Legal Notice, dated June 18, 2009
- 8 (a) small site plan (b) large size
- 9 Declaration of Lawrence Steele
- 10 Declaration of Ben Morris
- 11 Letter, dated June 29, 2009 from Jensen Salisbury, Whatcom Land Title to Bruce Ayers
- 12 Memorandum dated June 30, 2009 from Ty Whitcomb, County Public Works to Ayers
- 13 Current Definition, 20.97.240 Minimum Lot Size
- 14 (a) small size Vacca Record of Surety, 1990 (b) large size
- 15 Short Plat Application – Vacca
- 16 Agenda Bill, AB2000-356, with Ordinance No. 2001-016, WCC 20.38-Agriculture Protection Overlay Amendments, including legislative history as known to Planning Dept
- 17 Additional Staff Comments, Memorandum dated July 6, 2009, from Tyler Schroeder
- 18 Response to Schroeder Memorandum of July 6, 2009, from Ayers Consulting, dated July 7, 2009
- 19 Memorandum, dated July 8, 2009, from Bill Geyer, with Resume attached
- 20 Appellant’s Reply Memorandum, dated July 8, 2009, from David Cottingham

Parties of Record

Sal Vacca
1056 Van Wyck Road
Bellingham, WA 98226

Bruce Ayers
Ayers Consulting, LLC
2101 Cornwall Avenue
Bellingham, WA 98225

David Cottingham
103 Holly Street
Bellingham, WA 98225

Bill Geyer
1008 -16th Street
Bellingham, WA 98225

Robert Van Weerhuizen
7026 Noon Road
Everson, WA 98247

Annie Matsumoto, Brenda Wilson, Tyler Schroeder
Planning and Development Services

Royce Buckingham
Civil Deputy Prosecutor

II.

On December 22, 2008, the Appellant applied for a Short Subdivision of the subject parcel, seeking to divide the parcel into four lots.

Staff reviewed the application and determined that the subject parcel contained over 50% Agriculture Protection Overlay soils and the other applicable, additional criteria to subject the parcel to the requirements of the APO Development Standards.

The Appellant disagreed with Staff's Determination, arguing that the parcel does not contain twenty acres and therefore is not subject to the APO regulations.

III.

The legal description of the property contains an exception for County road and, excepting the County road, contains 19.77 acres.

Including the County road in the parcel size, the parcel would be twenty acres.

The legal description reads as follows:

The West 20 acres of the East 1/3 of the Southwest quarter of Section 4,
Township 38 North, Range 3 East of W.M., EXCEPT County Road No.
44, (Van Wyck Road) situate in Whatcom County, Washington

This legal description does not describe a "nominal parcel" because it is not a "fractional"

portion of a section of land. Both the Appellant and Planning agree that the parcel is not a nominal parcel of land as described in the Hearing Examiner Decision in APL02-0007, a copy of which is Exhibit No. 5-1 in the Hearing Examiner file for this Appeal.

Planning and Development Services Staff concluded that the parcel contains twenty acres for the purpose of the application of the APO Development Standards and that the clustering requirements of the APO applied. The Appellant argues that the parcel is less than twenty acres in size for the purpose of the application of the APO Standards and appealed Staff's Determination.

IV.

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 sole question raised by this Appeal is whether or not the Agriculture Protection Overlay Development Standards apply to the subject parcel. The parcel is located in the Rural zone, contains more than 50% agriculture soils, and would be subject to the APO Development Standards if it were a parcel consisting of twenty acres or more, or was a nominal twenty acre parcel. [WCC 20.38.050]

For the purposes of this Appeal, the definition applied to the "parcel" in the APO is "... a legal lot of record (WCC 20.83.060)" ...

A Lot of Record is defined in WCC 20.97.220 as follows:

"Lot of record" means a lot which is described by final plat, short plat, or metes and bounds, and is established pursuant to applicable local and state regulations at the date a legal instrument creating the lot is recorded at the Whatcom County auditor's office.

As described in the legal description, the parcel which is the subject of this Appeal contains 19.77 acres.

The term "minimum lot size" as used in the Whatcom County Zoning Ordinance has a different definition than legal Lot of Record. "Minimum lot size" is defined in WCC 20.97.240 as follows:

"Minimum lot size" means that portion of total parcel area which is determined to be usable for the purpose of creating a building lot, pursuant to all applicable Whatcom County regulations. Parcels of

five acres or greater may be regarded as nominal and may be measured to the center of proposed and bounding roads; however, parcels of less than five acres shall exclude those portions of lot area devoted for access, including all access easements, and easements not usable to the present or future surface owner of the parcel. For properties within the jurisdiction of the Shoreline Management Program (WCC Title 23), submerged lands and/or tidelands within the boundaries of any waterfront parcel that are located waterward of the ordinary high water mark shall not be used to compute minimum lot size.

Pursuant to the definition of legal Lot of Record, the Appellant's lot contains 19.77 acres.

Since the applicability criteria for the APO does not use the phrase "minimum lot size," but instead uses the term "parcel," which is defined as a Lot of Record, and since Lot of Record is described as a lot "described by final plat, short plat, or metes and bounds," the APO does not apply to the Appellant's lot since the lot is less than twenty acres in size.

II.

Staff argues that the conclusion reached in Conclusion of Law I, above, is illogical because, for the purpose of subdivision, per the definition of "minimum lot size," the property contains twenty acres and therefore can be subdivided into four lots. Staff argues for this reason that the interpretation of the applicability portion of the APO should be done in a manner that is consistent with the definition of "minimum lot size," and that this lot should be determined to contain twenty acres for the purpose of the application of the Agriculture Protection Overlay.

The term "minimum lot size" is not used in the Applicability Section of the APO. The term is a defined term in the Whatcom County Code, has a specific meaning where it is used, and the term is used in other sections of the Code, including situations involving the creation of lots from a parcel greater than five acres. In this case, the Appellant's parcel contains 19.77 acres and in order to meet the "minimum lot size" requirements for the Rural zone, one of the lots may be measured from the center of the bounding road, per the definition of "minimum lot size" in WCC 20.97.240.

III.

The language of the Applicability Section of the APO is clear and there is no need to refer to legislative history or other types of interpretative tools. Since there is no ambiguity, the Code in this area must be applied as written. The Hearing Examiner concludes that the APO does not apply to the Appellant's property since it consists of a parcel containing 19.77 acres of area.

In regard to the subdivision of properties within the Rural zone, the term "minimum lot size" is specifically used in reference to both lot size and maximum density in the Rural zone, per WCC 20.36.250 through 20.36.253.

Put quite simply, the term “minimum lot size” is a term of art within the Zoning Ordinance and it must be presumed that the legislative body’s failure to use the term within the Applicability Section of the APO was intentional. Had the legislative body desired to include one-half of the bounding roads in determining the parcel size to be subjected to the APO, it could have made it applicable to parcels with a “minimum lot size” of twenty acres or larger, instead of giving a specific definition to the term “parcel” in the APO Section and then applying the APO to “parcels” twenty acres or larger in size.

There is nothing inherently illogical in the legislative body determining that “minimum lot size” or “maximum density” should include the area from the center line of the bounding roads for the purposes of subdivision; thereby, giving the property owner a benefit, while deciding not to include the portion of bounding roads outside the legal description of the property when deciding which properties should be subjected to Agriculture Protection Overlay. In any case, the Applicability Section of the Agriculture Protection Overlay is not ambiguous and pursuant to the definition of “parcel” within the APO, the Appellant’s property contains only 19.77 acres and therefore the APO does not apply to it.

When it comes to “minimum lot size” for subdivision of parcels within the Rural zone, the definition of “minimum lot size” for the purpose of creating new building lots, when the parent lot is greater than five acres, includes one-half of the bounding roadway. Under this definition, the Appellant’s property contains twenty acres and may be short platted into four parcels.

Even if the Hearing Examiner were to find some ambiguity in the Applicability Section of the Agriculture Protection Overlay, WCC 20.38, the Appellant’s Attorney is correct in reminding us that Zoning Ordinances are in derogation of the common law and must be strictly construed. The Appellant’s Attorney was also correct in pointing out that the discretion permissible in zoning matters lies with the legislative body and not with the body administering the Zoning Ordinance. The administrative authorities are limited to application of the Ordinance as written and are not properly concerned with the wisdom of the Ordinance.

In this case, the Appellant has a “parcel” as that term is defined in the APO consisting of 19.77 acres. The parcel is not a nominal twenty acre parcel and contains less than twenty acres. Therefore the APO does not apply to this Appellant’s proposed Short Plat.

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 Administrative Appeal, APL2009-0015, filed by Sal Vacca is upheld. The Appellant has a “parcel” as that term is defined in the Agriculture Protection Overlay consisting of 19.77 acres. The parcel is not a nominal twenty acre parcel and contains less than twenty acres. Therefore the

Agriculture Protection Overlay does not apply to this Appellant's proposed Short Plat.

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 16th day of July 2009.

Michael Bobbink, Hearing Examiner