

**BEFORE THE SKAGIT COUNTY HEARING EXAMINER**

<b>GEORGE and RITA TEREK,</b>	)	
	)	
Appellants,	)	<b>PL06-0064</b>
	)	
v.	)	<b>ORDER DISMISSING APPEAL</b>
	)	
<b>SKAGIT COUNTY, and</b>	)	
<b>JAMES PAULSON,</b>	)	
	)	
Respondents.	)	
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On January 26, 2006, Notice of Appeal PL06-0064 was filed on behalf of Appellants, challenging revisions to Building Permit BP04-00857. The appeal related to a revised site plan.

After receiving and reviewing correspondence from both the Appellants' representative and County, the Examiner entered an Order of March 29, 2006, scheduling a hearing for Wednesday, May 3, 2006. The Order stated that the County's letters were construed as a Motion to Dismiss to which Appellants letters had responded, but asked for additional evidence and argument from the parties on the jurisdictional issue.

The Order scheduled presentations on the jurisdictional issue as the first order of business in the hearing. However, in the interim the County submitted a formal written Motion to Dismiss supported by a lengthy brief. The Appellants were thereupon provided ample time to respond in writing, which they did through a lengthy reply. Subsequently counsel for Respondent Paulson filed a brief in support of the Motion to Dismiss. These several submissions were accompanied by declarations and items of documentary evidence.

Having received and reviewed all this evidence and argument, the Examiner determines that he has ample information upon which to rule on the Motion without the oral presentations scheduled for the commencement of the hearing.

Accordingly, the following is entered:

## **FINDINGS**

1. The Paulson property is waterfront, bordered by saltwater on the south. A private access road (Salmon Beach Road) abuts on the north.
2. The present Appellants, the Tereks, live next door to Respondent Paulson.
3. A building permit for the Paulson home (BP04-00857) was issued on December 15, 2004.
4. No appeal of the issuance of this permit was filed within 14 days of the decision.
5. The building permit decision was made after approval on November 16, 2004, of an administrative determination granting a reduction in setbacks from the road in order to build the single family residence. This setback reduction, likewise, was not timely appealed.
6. In 2005, after the permit was issued, substantial progress was made on the construction of the house and approved by County inspectors. Excavation and foundation work were done. Framing was performed.
7. Beginning some 10 months after the building permit was issued, Rita Terek begin submitting requests for investigation to the County regarding the Paulson project. Requests were made on October 1, 2005, November 22, 2005, January 10, 2006, and January 13, 2006. The original request complained of the setback from the bluff, the height, and the road setback. The second request, among other things, alleged violations of the appropriate shoreline setback, lot coverage, and elevation limits in the development. The third request complained of the setback from the bluff and dimensions of a deck. The fourth request complained again of the bluff setback and the deck.
8. The County investigated these complaints and determined not to issue a Notice of Violation or a Notice and Order to Abate. However, in response to the Code enforcement investigation, Paulson submitted a revised site plan on January 12, 2006, and again on January 23, 2006. The latest of these revised plans was approved for compliance with zoning (land use) requirements.
9. The approved revised plan does not alter any setback nor does it change the house's elevation. Some additional area is shown on a southside deck. An existing boathouse and boathouse steps, not shown on the original plan, are depicted.
10. On January 26, 2006, the Appellants filed the instant appeal. It alleges that the revisions to the site plan do not comply with County codes, specifically Shoreline Master Program requirements for site coverage, height, and setback from the water. The

appeal also asserts that the zoning front setback is not consistent with the variance granted and violates the Critical Areas Ordinance in some unspecified way.<sup>1</sup>

11. The Appellants assert that the revised plan shows an increase in shoreline coverage, an increase in the area of a deck, the covering of the access road with Grasspave2 lawn, and additional outside parking space. In the Appellants' brief the increase in shoreline site coverage is calculated at about 212 square feet. The source of this increase is not specified.

12. The County contends that the revised plan was approved in settlement of the enforcement proceedings. They emphasize that no Code violations were found and contend that the changes in the plan primarily correct discrepancies in measurements.

13. The record here contains both the original approved site plan and the revised approved site plan. The Examiner finds that the changes reflected in the revised plan are minor corrections, such as are commonly made in the process of permit administration. The changes were not made to resolve violations found to exist in connection with the original plans. There is no evidence of any significant changes in the County's evaluation of compliance with underlying land use requirements.

14. If any problems exist as to height, shore setback, lot coverage, or critical areas, the applicable standards were not met by the original plans. The revised plan has created nothing new in terms of Code compliance.

15. The Appellants seeks to be allowed to present evidence that the shore setback is not accurately plotted, that the site coverage is not accurately calculated and, apparently, that the drawing does not conform to the approval for the front setback. In terms of Code compliance, these are all matters that could have been presented by appeal of the original permit.

## **CONCLUSIONS**

1. The subject building permit is a "development permit," by definition. SCC 14.0.020.

2. Applications for development permits may be appealed to the Hearing Examiner under Level I review procedures. Such an appeal shall be by the applicant or by parties who have commented on the proposal by filing a written notice of appeal within 14 days of the date of the decision. SCC 14.06.110(7).

3. The subject appeal was not filed within 14 days of the date of the initial building permit decision. In terms of that decision, the subject appeal is clearly too late.

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<sup>1</sup> Issues raised regarding the septic system have been directed to the Health Department and are not addressed here.

4. If it is objected that the time to appeal should not start to run until the Appellants learned of the decision, the subject appeal would still be too late. All of the activity on the site during the first three-quarters of 2005 should have put these next-door-neighbor Appellants on inquiry about the existence of a building permit well before the time they started filing requests for investigation. The requests themselves show that at least as of November 2005 the Appellants were well aware of the construction and had identified the alleged Code compliance problems they now assert. They did not appeal within 14 days of the time they knew or should have known of the initial permit decision.

5. The insurmountable problem for the present Appellants is that no other appealable action has been taken by the County on the subject building permit since the initial permit decision. The Appellants argue that acceptance of the revised plans in January of 2006 was an “administrative decision” triggering a new appeal opportunity, but this argument is misguided.

6. An “administrative decision” is subject to appeal as a Level I determination. See SCC 14.06.040(4). But, Level I review procedures are triggered by proposals made in applications for development permits. SCC 14.06.050(1)(a). The acceptance of the revised plan was not in response to a permit application. It was attendant to an enforcement proceeding, a fundamentally different process.

7. In enforcement proceedings, the County as the enforcement authority has the discretion to decide what actions constitute Code violations and what response needs to be taken to secure compliance. Compromise of complaints is within their discretionary power.

8. The applicable procedures for enforcement are set forth in Chapter 14.44 SCC. These procedures do not authorize appeals of settlements. SCC 14.44.120 allows appeals only of written notices of violation or orders to abate. In its discretion the County determined that no such notice or order need be issued here. Thus, again, acceptance of the revised plan was not an appealable action.

9. Moreover, no standing to appeal even of a notice or order is accorded to third parties in enforcement matters. Complainants are not in the same position as persons who have commented on a permit application proposal. Third party complainants are outsiders in the enforcement process. Otherwise, prosecutorial discretion would be effectively abolished.

10. Prosecutorial discretion is exercised on behalf of the public at large and no particular individual has the power to dictate how it is exercised. What the Appellants here seek is roughly analogous to allowing a criminal complainant to overturn a plea bargain.

11. In this case, the prosecutors, in effect, decided not to prosecute because they concluded there was no violation. The Appellants are simply not in a position to second-guess that decision.

12. The case might be different if, in terminating the enforcement proceeding, the County had approved a fundamentally different project than the one approved initially upon issuance of the building permit. There is such a thing as abuse of discretion. But, in the instant matter we are a long way from any such thing. What we have is a difference of opinion over whether certain provisions of the Code have been correctly applied through the building permit.

13. Under the Shoreline Master Program (SMP), the building official has an obligation to ensure that shorelines dimensional requirements are met before a building permit is issued. See SMP 8.05. If some sort of shoreline permit were required in this situation it should have been requested and obtained prior to issuance of the building permit in the first place. That no such shoreline permit was required, reflects the County's determination that the dimensional standards and exemptions of the SMP had been complied with.

14. The opportunity to resolve questions about such matters was presented in the original 14 day appeal period when the building permit was first issued. At the present juncture, the principle of finality dictates that that opportunity is foreclosed.

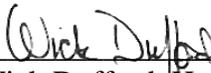
15. The essential fairness of applying this principle is demonstrated by this case. After closure of the appeal period, the Respondent Paulson expended large sums of money in reliance on the permit. That is the way the system is supposed to work. The Appellants' efforts to insert themselves into the process at this point is both untimely and inappropriate.

16. The Hearing Examiner has no authority to entertain appeals that are too late or to entertain appeals by persons who lack standing to appeal. Accordingly, the subject appeal must be dismissed for lack of jurisdiction.

### **ORDER**

The appeal is hereby dismissed. The hearing scheduled for May 3, 2006, is cancelled.

DONE this 28<sup>th</sup> day of April, 2006.

  
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Wick Dufford, Hearing Examiner