BEFORE THE SKAGIT COUNTY HEARING EXAMINER

KEVIN BINGHAM,	)	
	)	**PL06-0531**
Appellant,	)	
	)	**FINDINGS OF FACT,**
v.	)	**CONCLUSIONS OF LAW,**
	)	**AND DECISION**
SKAGIT COUNTY,	)	
	)	
Respondent.	)	
	)	

This matter came on regularly for hearing on August 23, 2006, before the Skagit County Hearing Examiner in the Commissioner's Hearing Room, 1800 Continental Place, Mount Vernon, Washington.

The case involved the appeal of an administrative decision by the Skagit County Shoreline Administrator concerning a fence on property located on Samish Island.

Kevin Bingham was represented by David Hough and himself. Daniel Downs, Shoreline Administrator, represented the Skagit County Department of Planning and Development Services.

Testimony was taken. Exhibits were admitted. Argument was made. On the record created, the Examiner enters the following:

EXHIBITS

1. Notice of violation sent to Mr. Bingham on September 12, 2005.

2. April 27, 2006, letter from David Hough, consultant representing the appellant, to Daniel Downs, Shoreline Administrator, Skagit County Department of Planning & Development Services (PDS).

3. May 22, 2006, letter from Mr. Downs to Mr. Hough responding to Mr. Hough's April 27, 2006 letter.

4. May 28, 2006, Notice and Order to Abate.

5. June 5, 2006, Appeal, PL06-0531 submitted.

6. September 27, 2000, Fish & Wildlife Site Assessment prepared by Graham Bunting & Associates.

7. The Washington State Shorelines Hearings Board Decision SHB-80-30, (Madden vs. Grenley, Pierce County and State of Washington, Department of Ecology).

8. Staff report and photos of fence and surrounding property

9. Photos 9-1 through 9-5 presented by Hough

10. Letter David Hough to Hearing Examiner 8/23/06

11. – 21. Photos submitted by Bingham

22. List of neighbors opposing fence presented by Jacqueline Donovan

TESTIMONY

The following persons were duly sworn on oath and gave testimony:

Daniel Downs, Skagit County Planning & Development Services
David C. Hough, representing appellant
Kevin Bingham, appellant
Jacqueline Jean Donovan, local resident
Edward M. Morrow, local resident

FINDINGS OF FACT

1. On September 1, 2005, a Request for Investigation was received by the Skagit County Department of Planning & Development Services (PDS). The complaint alleged that a fence had been constructed on Mr. Bingham's property and was located less than 35 feet landward of the Ordinary High Water Mark (OHWM) as required for accessory uses pursuant to SCC 14.26.7.13.(2)(C)(1)(d).

2. On September 2, 2005, County staff performed a site visit and determined that the following activities had occurred on the property:

   A). Side yard fences had been placed within 35 feet of the OHWM.

   B). Riprap had been placed below the OHWM without County authorization.

3. A Notice of Violation was sent to Mr. Bingham on September 12, 2005 (exhibit #1)

4. On April 27, 2006, David Hough, representing the appellant, sent a letter stating that the fence did not constitute an accessory use and that the County had erred in issuing the Notice of Violation (exhibit #2)

5. On May 22, 2006, Daniel Downs, Shoreline Administrator for Skagit County, responded to Mr. Hough's April 27th, 2006 letter (exhibit #3).

6. A Notice and Order to Abate was sent to Mr. Bingham on May 25, 2006 (exhibit #4).

7. On June 5, 2006, a Notice of Appeal, PL06-0531, was filed on behalf of Mr. Bingham (exhibit #5).

8. A Protected Critical Area easement was filed with Building Permit (BP02-1253) and recorded at the Skagit County Auditor's office on December 13, 2000. The PCA easement states in part: "PROTECTED CRITICAL AREAS (PCA) is to be left undisturbed in a natural state. No clearing, grading, filling, logging or removal of woody material, building, construction or road construction of any kind or planting of non-native vegetation is allowed within the PCA area except as specifically permitted by Skagit County on a case-by-case basis consistent with the Skagit County Code 14.06."

   PDS required a Fish & Wildlife Site Assessment be prepared for the septic permit SW00-0500 in 2000. A report dated September 27, 2000, was prepared by Graham Bunting & Associates (GBA) (exhibit #6). The report indicated that the development proposed would impact the Habitat Conservation Area (HCA) of Samish Bay. One of the components of the mitigation plan included the recommendation that the applicant be required to record a 35 foot buffer landward of the OHWM as a Protected Critical Area.

   Later, two fences were placed within 35 feet of the OHWM within the established PCA without County authorization. The non permitted fence has been located within the PCA without the benefit of the required additional environmental analysis for potential negative impacts to the previously established PCA as required by SCC 14.24.060.

   In addition the report prepared by GBA states "Although no bulkhead exists on the property, rock riprap has been placed in several locations along the toe of the slope to slow the effects of wave action erosion." Current photographs of the property (exhibit #6), clearly reveal that additional shoreline armoring has occurred on the property within the PCA since the report was written in 2000. No shoreline permit or exemption has been being issued for a bulkhead (including riprap) on the subject property.

9. Fences within the shoreline setback appear to exist in various shoreline areas in Skagit County and in some, but not all instances, no abatement action has been undertaken. The Hearing Examiner takes judicial notice that the county normally takes action upon receipt of a complaint.

DISCUSSION

The county contends that the fence in question constitutes an "Accessory Structure" under the SMP and therefore must comply with the shoreline setback. The county cites the Washington State Shorelines Hearings Board in decision SHB-80-30 (exhibit #7), (*Madden vs. Grenley* – page 4). There the Board found that a fence was a "structure" and that a variance was required for its construction waterward of the ordinary high water mark under the Piece County SMP.

The county further points out that the Skagit County SMP states:

> Accessory development or uses as defined in SCC 14.26.3.03 Accessory development or uses: "means any structure or use incidental, subordinate, and usually adjacent to a primary shoreline development or use."
>
> Also within the definitions section cited previously, the SCSMMP defines a structure "is anything constructed or erected with a fixed location on the earth and joined together in a different manner (pursuant to the Uniform Building Code)". A fence clearly meets the definition of a structure and therefore is an Accessory Use pursuant to the SCSMMP.

Further the County references SCC 14.26.7.13(2)(C)(1)(d) Table RD that requires that all Accessory Uses within the Rural Residential shoreline designation be set back a minimum of 35 feet landward of the OHWM. Lastly the County cites two DOE shoreline regulations that state: "… On a state-wide basis, normal appurtenances include a garage; deck; driveway; utilities; *fences*; …" (emphasis added) WAC 173-27-040(1)(g) and "… [w]hen a development or use is proposed that does not comply with the bulk, dimensional and performance standards of the master program, such development or use can only be authorized by approval of a variance." WAC 173-27-040(1)(b).

The owner argues that the county's contention is incorrect, principally because the county allows fences on the property lines between parcels within shoreline areas, fences which clearly encroach into the side yard setbacks. The owner's argument points out the inconsistency of allowing fences in side yard setbacks if they truly qualify as "Accessory Structures" while prohibiting them within shoreline setbacks. The owner also points out that the county's SMP does not define a fence as an "Accessory Structure."

The owner also argues that *Madden vs. Grenley* is inapplicable in that it is based on an interpretation of the Pierce County SMP. Since there is no evidence that the Pierce

County and Skagit SMPs are alike in this regard, the owner contends the case is not controlling. The Piece County SMP was requested by the Hearing Examiner, but the county's efforts to obtain it were unsuccessful. Given that the case involved a fence below the ordinary high water and the interpretation of another county SMP, the contents of which are not before the Hearing Examiner, it cannot be the basis for a decision in this case.

The owner also argues that its legitimate concerns, such as privacy and security, compel a conclusion that the county's attempt to regulate his fence is contrary to sound public policy. These concerns are not to be taken lightly. On the other hand, the county points out that fences running into the shoreline setback area have adverse aesthetic and potentially adverse environmental effects that are contrary to the broad policies furthered by the SMA and the county's SMP. These concerns likewise must not be taken lightly. Indeed, these "policy" concerns tend to balance each other, and each weighs more heavily depending on one's point of view.

Because the regulations are not decisive (the definition of "Accessory Structure" does not expressly include or exclude fences), the invocation of "policy" considerations as the basis for the determination of this question by the owner is attractive and meritorious.

Cases decided by judicial decision-makers recognize the policy-making role of administrative agencies in interpreting their own regulations and regulations within their jurisdiction. In one case, it was stated:

> [w]here a statute is within [an] agency's special expertise, the agency's interpretation is accorded great weight, provided that the statute is ambiguous." *Postema v. Pollution Control Hr'gs Bd.*, 142 Wash.2d 68, 77, 11 P.3d 726 (2000) *see also, Dep't of Ecology v. Theodoratus*, 135 Wash.2d 582, 589, 957 P.2d 1241 (1998)…deference to an agency's interpretation of its own regulations is also appropriate. *Postema*, 142 Wash.2d at 86, 11 P.3d 726.

Port of Seattle v. Pollution Control Hearings Bd., 151 Wash.2d 568, 90 P.3d 659 (2004.)

The Skagit county SMP sates, in part that:

1. The Skagit County Planning Director or his designee, hereinafter known as the Administrator, is hereby vested with:
   a. Overall administrative responsibility for this Master Program (SMP Chapter 8, Section 8.02 (1).)

Additionally, the SMP states that

> The duties and responsibilities of the Administrator shall include:
> . . .
> Making administrative decisions and interpretations of the principles and policies of this program and the Shoreline management Act.

. . .

> Seeking remedies for alleged violations of this program, the provisions of the Act, or of conditions of any approved shoreline substantial development, conditional use or variance permit issued by Skagit County. (SMP Chapter 8, Section 8.02 (2) (c) & (n).)

Because the county's planning department and its Shoreline Administrator are designated by the Board of County Commissioners to implement the county's master program, the Hearing Examiner must afford its/his interpretation of relevant statutes and regulations great weight per *Port of Seattle*. Likewise, under the same case, the Hearing #Examiner must give deference to the county as it interprets its own SMP. But the inquiry does not end there.

An administrative interpretation of a regulation will be upheld " if it reflects a plausible construction of the language of the statute and is not contrary to the legislative intent." *Anderson v. Weyerhaeuser Co*.**,** 116 Wash.App. 149, 64 P.3d 669 (Div. 2, 2003); *citing*: *Seatoma Convalescent Ctr. v. Dep't of Soc. and Health Serv.*, 82 Wash.App. 495, 518, 919 P.2d 602 (1996). In this case, the county has adopted an interpretation that it claims seeks to carry out the objectives of the SMA.

RCW 90.58.020 sets forth management criteria for shorelines of statewide significance, as is at issue here. It states, in part, that:

> The legislature declares that the interest of all of the people shall be paramount in the management of shorelines of statewide significance. The department, in adopting guidelines for shorelines of statewide significance, and local government, in developing master programs for shorelines of statewide significance, shall give preference to uses in the following order of preference which:
>
> (1) Recognize and protect the statewide interest over local interest;
>
> (2) Preserve the natural character of the shoreline;
>
> (3) Result in long term over short term benefit;
>
> (4) Protect the resources and ecology of the shoreline;
>
> (5) Increase public access to publicly owned areas of the shorelines;
>
> (6) Increase recreational opportunities for the public in the shoreline;
>
> (7) Provide for any other element as defined in RCW 90.58.100 deemed appropriate or necessary.

I cannot find that the county's interpretation is implausible or contrary to this legislative imperative.

There still remains, however, the owner's implied argument that the county is engaged in "selective enforcement" by not acting to remove side yard fences from boundary lines, all of which encroach into side yard setbacks. However, two observations address this argument.

First, as set forth above, the SMP gives the Planning Department and the Shoreline Administrator the power to enforce the SMP regulations. Part of that authority includes the power and discretion to ***not*** enforce the regulations. *See, e.g., State v. Judge, 100 Wash.2d 706, 675 P.2d 219 (1984).*

Second, boundary fences commonly found in all zoning areas (traditional land use zoning and the SMP), always violate side yard setbacks. To disallow all such fences in the SMP would place great burdens on county code enforcers and on land owners that would far outweigh the benefits. As the evidence in this case suggests, fences in shoreline setbacks reduce or eliminate views and curtail or entirely eliminate the movement of people, animals and other natural elements along the shoreline. It is within the county's discretionary purview to not take action on a boundary fence landward of the shoreline setback but to take action against those within the setback. The owner's legitimate concerns about privacy and security can be addressed by building a rear yard fence, landward of the shoreline setback and without ill effects to adjoining landowners and the shoreline environment.

All things considered, the county's interpretation and enforcement of the SMP, while problematic for the owner and which may be subject to legitimate debate, is well enough within its discretionary powers to not be upset by the Hearing Examiner.

DECISION

Based on the facts as presented at hearing and the forgoing discussion and authorities, the owner's appeal is DENIED.

SO ORDERED this 19th day of September, 2006.

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Bradford E. Furlong
Hearing Examiner *pro tem*

RECONSIDERATION/APPEAL

As provided in SCC 14.06.180, a request for reconsideration may be filed with Planning and Development Services within 10 days after the date of this decision. As provided in SCC 14.06.120(9), the decision may be appealed to the Board of County Commissioners by filing a written Notice of Appeal with Planning and Development Services within 14 days after the date of the decision, or decision on reconsideration, if applicable.