

**CHELAN COUNTY**

**DEPARTMENT OF HEARING EXAMINER**

316 WASHINGTON STREET, SUITE 301  
WENATCHEE, WASHINGTON 98801

**BEFORE THE CHELAN COUNTY HEARING EXAMINER**

<b>IN THE MATTER OF:</b>	)	<b>FINDINGS OF FACT,</b>
AA 2021-259/AA 2021-377	)	<b>CONCLUSIONS OF LAW AND</b>
Bryerton	)	<b>DECISION ON</b>
	)	<b>ADMINISTRATIVE APPEAL</b>

**I. FINDINGS OF FACT**

1. A consolidated application for an Administrative Appeal was submitted to appeal the denial of Building Permit (BP 210396), Shoreline Substantial Development Permit (SDP 21-189) and Habitat Management and Mitigation Plan (HMMP 21-190) to demolish the existing single-family residence (BP 950273) and construct a new single-family residence, and to construct 493 sq. ft. of shoreline access stairs with landing and mitigation plantings. The appeal was submitted on the basis that the agent believes both the Chelan County Code (CCC) and the Shoreline Master Program (SMP) do not prohibit the property owner from building a new single-family residence on the subject property.
2. The Appellants are Steven and Stacy Bryerton and their agent is Brandon S. Gribben, attorney, of Helsell Fetterman.
3. The subject property is located at 20477 Beaver Valley Rd, Leavenworth, WA 98826. The tax parcel number is 27-17-36-340-085 and the legal description is Lot 2 of SS # 198.
4. A building permit for a single-family residence (BP 950273) was issued on June 14, 1995 and building permit for a detached garage (BP 960807) was issued on November 12, 1996. There is no evidence that the single-family residence ever received its final inspection or was ever issued a certificate of occupancy. Therefore, the building permit has expired. BP 210396 was submitted on April 29, 2021 and a letter of denial was issued on May 25, 2021.
5. A shoreline substantial development permit (SDP 21-189) and habitat management and mitigation plan (HMMP 21-190) were submitted on May 4, 2021. The Applicant has the burden of proof to show that the application complies with all laws, rules, and regulations. Denial of the SDP/HMMP was issued on August 3, 2021 under CCC Section 16.14.020 Denial of Permit.
6. On June 10, 2021, the administrative appeal (2021-259) was filed with Chelan County Community Development with the associated application fees appealing the BP 210396 permit denial.

7. On August 17, 2021, the Administrative Appeal (AA 21-377) was filed with Chelan County Community Development with the associated application fees, appealing the SDP 21-189 denial.
8. The Notice of Public Hearing was issued on December 30, 2021.
9. Pursuant to CCC Section 3.04.030(1), the Chelan County Hearing Examiner is designated as the Chelan County building code board of appeals. Appeals shall comply with CCC Section 14.12.010 and review of the appeal application shall be in accordance with CCC Section 14.10.040. There shall be no administrative appeal of a decision of the board of appeals and such decision shall be final and conclusive unless appealed to the superior court in accordance with CCC Section 14.12.020.
10. Pursuant to CCSMP Section 7.1.3(B), the Hearing Examiner shall also decide on appeals of administrative decisions issued by the Administrator of this SMP.
11. On April 29, 2021, a building permit application (BP-210396) for a new single-family residence was submitted.
  - 11.1 The application proposed a NEW 6 BEDROOM 7 BATH SFR TO INCLUDE: 300 SQ FT BASEMENT; 4,997 SQ FT MAIN FLOOR; 2,219 SQ FT SECOND FLOOR; 661 SQ FT COVERED PORCHES/DECKS; AND 500 GALLON PROPANE TANK.
  - 11.2 The applicant proposes to demolish the existing single-family residence and construct a new single-family residence in its place.
  - 11.3 The Applicant has the burden of proof to show that the application complies with all laws, rules, and regulations.
12. On May 25, 2021, a building permit denial was issued by the Chelan County Building Official.
  - 12.1 During Building Department review, the original building for the single-family residence (BP 950273) was never finalized and has expired.
    - 12.1.1 Due to the fact that the structure did not receive the final inspection or certificate of occupancy, a final inspection is required.
    - 12.1.2 While a final inspection could be conducted, the County is unable to issue a certificate of occupancy. Therefore, the existing structure cannot be considered legally established and non-conforming.
13. On August 3, 2021, the SDP/HMMP Denial was issued because the property was found to be in violation.
  - 13.1 According to CCC Section 16.14.020 Denial of permit, the department may deny a permit application, when the property has been found in violation and remains in violation of any ordinance, regulation or resolution.
14. Pursuant to Chelan County Code Section 11.97.015(1), no structure shall be erected, moved, reconstructed, extended, enlarged, remodeled, repaired, or altered, except in conformity with all current Chelan County development regulations.
  - 14.1 Demolishing a single-family residence so that only the foundation remains

would constitute reconstruction.

15. At the time of application, the CCSMP Section 6.2.4B Pre-existing Residential Structures stated that legally established residential structures may be replaced, enlarged, or expanded in height or behind laterally, provided there is no increase of the nonconformity waterward.
  - 15.1 In September 2021, CCSMP Section 6.2.4B was amended to state, "Upon approval of a shoreline administrative application showing no net loss of shoreline ecological function, structures may be replaced enlarged or expanded in height or behind, laterally, provided there is no increase of the nonconformity waterward (in the direction of the water); and"
  - 15.2 Regardless, the existing structure cannot be considered legally established or non-conforming. Therefore, the SMP provision allowing pre-existing residential structures to be replaced does not apply.
16. Pursuant to CCSMP Section 1.5B, in the event the provisions of this SMP conflict with provisions of other County regulations, the more protective of shoreline ecological functions and processes shall prevail.
17. To permit and construct a new house on the property, the structure must comply with all current codes and regulations found in both the Chelan County Code and the Shoreline Master Program (SMP). This includes the required 100-ft. shoreline buffer.
18. Pursuant to the SMP, Section 3.8.2, buffers may be administratively modified, only once. All buffer modifications shall be written approval of the Shoreline Administrator
19. Chelan County Code Section 14.12.010: Administrative appeals.
  - 19.1 An administrative appeal to the hearing examiner shall be filed with the department within ten working days of the issuance of the decision appealed, together with the applicable appeal fee.
  - 19.2 The notice of appeal shall contain a concise statement identifying:
    - 19.2.1 The decision being appealed; (B) The name and address of the appellant and his/her interest(s) in the application or proposed development; (C) The specific reasons why the appellant believes the decision to be erroneous, including identification of each finding of fact, each conclusion, and each condition or action ordered which the appellant alleges is erroneous. The appellant shall have the burden of proving the decision is erroneous; (D) The specific relief sought by the appellant; (E) The appeal fee.
20. In 1995, at the time of the issuance of BP 950273, Chelan County did require a final inspection and issuance of a Certificate of Occupancy, in order to grant final approval of a building permit.
21. After due legal notice, an open record public hearing was held via Zoom video conference on January 10, 2022.
22. Admitted into the record were the following documents:
  - 22.1 For the Appellant:
    - 22.1.1 Appellant's opening brief dated December 21, 2021.
    - 22.1.2 Appellant's witness and exhibit list;

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- 22.1.3 Appellant's exhibits A1-A12;
- 22.1.4 Appellant's reply brief dated January 3, 2022.
- 22.2 For the County:
  - 22.2.1 The County's brief dated December 28, 2021;
  - 22.2.2 County exhibit and witness list;
  - 22.2.3 County exhibits C1-C12;
- 22.3 All documents within the following files:
  - 22.3.1 BP 210396, SDP 21-189, and HMMP 21-190.
- 23. There is no dispute that the residential structure on the property, as it exists, is a non-conforming structure.
- 24. The issue is whether or not the structure is a legal non-conforming structure and therefore, allowed to be demolished and rebuilt.
- 25. As stated above, the Applicant/Appellant has the burden of proof, not only as to the underlying permits to show that they comply with all the applicable laws, rules and regulations, but in the appeal to prove the County was error in issuing their administrative decisions. The Applicant/Appellant has submitted absolutely no evidence whatsoever that a final inspection was completed or a Certificate of Occupancy was issued, regarding BP 950273 that was issued on June 14, 1995.
- 26. The Hearing Examiner finds that the Hearing Examiner has not been granted authority to grant equitable relief, including relief sounding in waiver, laches or equitable estoppel.
- 27. Appearing on behalf of the Appellant was Brandon S. Gribben, attorney at law. Mr. Gribben did not provide testimony, but did provide argument.
- 28. Appearing and testifying on behalf of the Appellant were the following individuals:
  - 28.1 Steven Bryerton. Mr. Bryerton testified that he was the property and Appellant. He bought the property in July of 2020. He testified that a single family residence and attached garage were on the site when he purchased the property. He stated that he had received no notice of violation from the County and that all real estate taxes had been paid. He testified that when he purchased the property, he assumed that it was a legal structure.
  - 28.2 Todd Smith. Mr. Smith is an architect and testified as an expert witness. Mr. Smith testified as to the application process that he was involved with concerning the permit applications with Chelan County. He testified that no issue was raised regarding lack of final inspection or lack of a Certificate of Occupancy was raised until the receipt of letters denying the requested permits. He testified as to his experience with working in Chelan County and that he has not been involved in a project where the legality of a non-conforming structure was based upon the lack of a final inspection and issuance of a Certificate of Occupancy.
  - 28.3 On cross examination, Mr. Smith agreed that he did not check for a Certificate of Occupancy on the existing residence. His investigation was limited to confirming

ownership, but not to look for documents to prove the legality of a structure. Finally, he stated that Chelan County never asked for a final inspection, and never offered to issue a Certificate of Occupancy.

- 28.4 Ryan Walker. Mr. Walker testified as an expert witness. Mr. Walker is a senior biologist with Grette Associates. He testified that the shoreline permit for stairs was denied stating the basis that the existing home did not have a Certificate of Occupancy on file, and therefore, was not a legal non-conforming structure. He stated the County never asked for a Certificate of Occupancy, or final inspection. Mr. Walker testified that he believed that the project met the requirements of the Shoreline Master Program in 1994. Mr. Walker believed that the County not only can, but has changed interpretation of the Chelan County code.
- 28.5 Chris Young. Called by the Appellant was Chelan County building official, Chris Young. Mr. Young testified that he has had land use code administration experience for 37 years. As related to the Applicant's various applications, his responsibility was for a Certificate of Occupancy to determine whether the non-conforming structure was legal. He stated he researched whether the building was a legal non-conforming structure by looking at the SmartGov permit system, which is an online system. He stated that he looked in the actual hard copy file, but then also stated that he didn't recall whether he "pulled" the paper file. He testified that he discovered that multiple other inspections were performed on the property, but he just didn't find that the final inspection was ever performed or that a Certificate of Occupancy was issued. He stated that the County process that exists now, is that the County will not accept an application until the Applicant establishes either proper prior permitting or that the structures are legally non-conforming. He stated that the County cannot now perform a final inspection because of the passage of time from the date of the construction to present. He stated that they cannot issue a 1995 permit pursuant to the 2018 zoning code. He agreed that no code violation was ever issued to the property owners of the subject property.
- 28.6 On questioning by the County, Mr. Young stated that the purpose of the final inspection is for closure of all inspections in order for the County to make a decision as to whether to issue a Certificate of Occupancy. He stated that a final inspection is required to confirm the building permit complies with all codes, regulations and the actual permit application in order to issue a Certificate of Occupancy. He stated that building permits were first required in Chelan County in 1975 and that in 1995, final inspections and Certificates of Occupancy were required.
- 28.7 The Applicant/ Appellant also called as a witness, Catherine Lorbeer. Ms. Lorbeer is the Assistant Director of Community Development for Chelan County, a position she has held for the past 17 months. For six years prior to that, she was a lead planner in Gilbert, Arizona. Ms. Lorbeer did not do any investigation as to permits issued in the past for this property, or Certificates of Occupancy, she relied upon the investigation of Mr. Young. Ms. Lorbeer stated that Mr. Bryerton, their agent, Mr. Smith or Mr. Walker, or their attorney, never provided Chelan County with a final inspection or Certificate of Occupancy for the subject property. She also indicated that it was the Applicant's burden of proof to demonstrate in their application that their application complies with all the laws, rules, and regulations, which would include proving that all required permits of the property have been obtained and, in this particular case,

that the property was a legal non-conforming structure. She further testified that homes built before the adoption of the Chelan County Building Code, such as the example from 1928 provided by the Appellant, would not have had a final inspection or have been issued a Certificate of Occupancy because they were not required to until the adoption of the Chelan County Building Code.

- 28.8 In summation, the Appellant's argument was that the property was lawful when it was built in 1995, that the County failed to do a thorough search for a Certificate of Occupancy and final inspection, and that many inspections were completed throughout the building of the structure in 1995.
  - 28.9 The Applicant/Appellant argued for application of equitable relief of waiver, equitable estoppel, and laches. The Applicant's attorney did concede that the Applicant has not provided the County with a form demonstrating a final inspection was performed, or that a Certificate of Occupancy was issued.
  - 28.10 The Chelan County attorney argued that Appellant's failure to prove a final inspection was performed, and that a Certificate of Occupancy was issued, prevents, as a matter of law, the finding that the residential structure on the Applicant/Appellant's property is a legal non-conforming structure. The County argued that the Assessor records and taxes assessed and paid were irrelevant as to whether a Certificate of Occupancy was issued. The County argued that the Appellant was asking the Hearing Examiner to simply assume that a Certificate of Occupancy was issued.
  - 28.11 In rebuttal, the Appellant argued that the issuance of the 1997 permit for the detached garage on the site is proof that the home was lawful at the time. The Hearing Examiner specifically finds, and concludes, that this 1997 garage permit is not proof that the home is "legal" to determine whether the residence is a legal non-conforming structure.
- 29. The Hearing Examiner finds that no final inspection was performed regarding BP 950273.
  - 30. The Hearing Examiner finds that no Certificate of Occupancy was issued regarding BP 950273.
  - 31. Any Conclusion of Law that is more correctly a Finding of Fact is incorporated herein as such by this reference.

## **II. CONCLUSIONS OF LAW**

- 1. The Hearing Examiner has been granted authority to render this Decision.
- 2. The Applicant has the burden of proof to show that the application complies with all laws, rules, and regulations.
- 3. The residential structure is not a legal non-conforming structure.
- 4. The Hearing Examiner has not been granted authority to grant equitable relief, including relief sounding in waiver, laches or equitable estoppel.



5. Pursuant to Chelan County Code Section 11.97.015(1), no structure or part of a structure shall be erected, moved, reconstructed, extended, enlarged, remodeled, repaired, or altered, except in conformity with all currently Chelan County Development Regulations
6. At the time of application, the Chelan County Shoreline Master Program (CCSMP) Section 6.2.4.B Pre-existing Residential Structures stated that legally established residential structures may be replaced, enlarged, or expanded in height or behind laterally, provided there is no increase of the nonconformity waterward.
7. According to CCC Section 16.14.020 Denial of Permit, the department may deny a permit application, when the property has been found in violation and remains in violation of any ordinance, regulation or resolution.
8. In September 2021, CCSMP Section 6.2.4B was amended to state, "Upon approval of a shoreline administrative application showing no net loss of shoreline ecological function, structures may be replaced enlarged or expanded in height or behind, laterally, provided there is no increase of the nonconformity waterward (in the direction of the water)."
9. Regardless, the existing structure cannot be considered a legally established non-conforming structure. Therefore, the SMP provision allowing pre-existing residential structures to be replaced does not apply.
10. Pursuant to CCSMP Section 1.5B, in the event the provisions of this SMP conflict with provisions of other County regulations, the more protective of shoreline ecological functions and processes shall prevail.
11. To permit and construct a new house on the property, the structure must comply with all current codes and regulations found in both the Chelan County Code and the Shoreline Master Program (SMP). This includes the required 100-ft. shoreline buffer.
12. Pursuant to the SMP, Section 3.8.2, buffers may be administratively modified, only once. All buffer modifications shall be written approval of the Shoreline Administrator.
13. Any Finding of Fact that is more correctly a Conclusion of Law is incorporated herein as such by this reference.

### III. DECISION

WHEREFORE, based upon the above Findings of Fact and Conclusions of Law, the Hearing Examiner finds that the denial of BP 210396, SDP 21-189 and HMMP 21-190 are **AFFIRMED**.

Dated this 18<sup>th</sup> day of January, 2022.

CHELAN COUNTY HEARING EXAMINER

  
\_\_\_\_\_  
Andrew L. Kottkamp

**This decision is subject to appeal pursuant to the Chelan County Code. Appeals must be timely filed. Anyone considering an appeal of this decision should seek immediate legal advice.**