

WHATCOM COUNTY HEARING EXAMINER

| | | |
|---|---|---------------------|
| RE: Administrative Appeal |) | APL2017-0008 |
| Administrative Appeal |) | APL2017-0009 |
| Application for |) | |
| |) | FINDINGS OF FACT, |
| Michael Wylie and Panagiota Kotsalis |) | CONCLUSIONS OF LAW, |
| |) | AND DECISION |

SUMMARY OF APPEAL AND DECISION

Appeal: The Appellants, Michael Wylie and Panagiota Kotsalis, filed Administrative Appeals of Determinations made by Whatcom County Planning and Development Services, denying two 4-lot short plat projects [Wisteria Short Subdivision and Lantana Cluster Short Subdivision, pursuant to the Land Division Regulations of WCC 21.04.034(2)(a) and (b). The properties in question are addressed as 1539 Willeys Lake Road and 0 Willeys Lake Road, Blaine, Washington.

Decision: The Hearing Examiner Upholds Planning and Development Services and the Appeal is denied.

FINDINGS OF FACT

**I.
Background Information**

Appellants: Michael Wylie and Panagiota Kotsalis

Site Location/Addresses: 1539 Willeys Lake Road and 0 Willeys Lake Road
Blaine, Washington

Assessor's Parcel Numbers: 400233 199440; 400233 023437

Authorizing Codes, Policies, Plans, and Programs

Authorizing Ordinance: WCC 20.84.240: Whatcom County Hearing Examiner Appeal

Applicable Whatcom County Codes:
WCC 21.04.034(2)(a) & (b) Land Division Regulations

Exhibits

File No: APL2017-0008 /SSS2006-0052 Wisteria "Cluster" Short Subdivision

- 1 Administrative Appeal with attachments
 - 1-1 Customer Receipt, August 15, 2017
 - 1-2 Statement for appeal to the Hearing Examiner of Administrative Officer's Decision
- 2 Short Plat Application, Wisteria "Cluster" Short Plat, with attached Survey
- 3 Notice of Additional Requirements, dated February 24, 2006, with attached County Health Department: Environmental Health Requirements
- 4 Short Subdivision, Exempt Land Division, Long Subdivision and Binding Site Plan Extension Request, with Extension Request Declaration, dated 6/27/2010, and Customer Receipt, Nov 29, 2010 attached
- 5 Response letter from Planning Supervisor to Lesa Starkenburg-Kroontje dated December 3, 2010 re: Extension Request
- 6 Letter dated August 29, 2012 from Senior Planner to Lesa Starkenburg-Kroontje re: Notice of Additional Requirements
- 7 Wisteria Cluster Short Plat, Record of Survey, submitted 10/03/2012
- 8 Letter dated March 25, 2013 from Senior Planner to Lesa Starkenburg-Kroontje re: Notice of Additional Requirements
- 9 Emails with response, March 8, 2016 from Amy Keenan to Lesa Starkenburg-Kroontje re: status of short plats
- 10 Emails with response, May 17-19, 2016 from Amy Keenan to Lesa Starkenburg-Kroontje re: status of short plats
- 11 Final Short Subdivision Determination for Wisteria Cluster Short Subdivision
- 12 Certificate of Posting, Notice of Public Hearing, dated April 5, 2018
- 13 Affidavit of Publication, Notice of Public Hearing, dated April 5, 2018
- 14 Memorandum dated April 16, 2018 from Amy Keenan to Michael Bobbink
- 15 Appellant's Arguments, Brief prepared by Attorney Lesa Starkenburg-Kroontje, dated April 18, 2018

File No: APL2017-0009 /SSS2006-0089 Lantana "Cluster" Short Subdivision

- 1 Administrative Appeal with attachments
 - 1-1 Statement for Appeal to the Hearing Examiner of Administrative Officer's Decision
 - 1-2 Customer Receipt, August 15, 2017
- 2 Short Plat Application, Lantana "Cluster" Short Plat, with attached Survey
- 3 Notice of Additional Requirements, dated September 28, 2006, with attached County Health Department: Environmental Health Requirements

- 4 Short Subdivision, Exempt Land Division, Long Subdivision and Binding Site Plan Extension Request, with Extension Request Declaration, dated 6/24/2010, and Customer Receipt, December 1, 2010 attached
- 5 Response letter from Planning Supervisor to Lesa Starkenburg-Kroontje dated December 3, 2010 re: Extension Request
- 6 Letter dated November 15, 2012 from Senior Planner to Lesa Starkenburg-Kroontje re: Notice of Additional Requirements
- 7 Lantana Cluster Short Plat, Record of Survey, submitted 11/10/2015
- 8 Letter dated June 27, 2013 from Senior Planner to Lesa Starkenburg-Kroontje re: Notice of Additional Requirements
- 9 Emails with response, March 8, 2016 from Amy Keenan to Lesa Starkenburg-Kroontje re: status of short plats
- 10 Emails with response, May 17-19, 2016 from Amy Keenan to Lesa Starkenburg-Kroontje re: status of short plats
- 11 Final Short Subdivision Determination for Lantana Cluster Short Subdivision
- 12 Certificate of Posting, Notice of Public Hearing, dated April 5, 2018
- 13 Affidavit of Publication, Notice of Public Hearing, dated April 5, 2018
- 14 Memorandum dated April 16, 2018 from Amy Keenan to Michael Bobbink
- 15 Appellant's Arguments, Brief prepared by Attorney Lesa Starkenburg-Kroontje, dated April 18, 2018

Parties of Record

Michael Wylie
421 -11th Street
Blaine, WA 98230

Lesa Starkenburg
PO Box 231
Lynden, WA 98264

Royce Buckingham
Whatcom County Civil Deputy Prosecutor

Amy Keenan, Senior Planner
Planning & Development Services

II.

The Parties agree that the facts laid out in the supplemental memorandum filed by Amy

Keenan, Exhibit No. 14 in the Hearing Examiner file, are accurate. These facts are adopted as Findings of Fact herein. A copy of Exhibit 14 is attached hereto and incorporated herein by this reference.

These applications for short plat approval were submitted and deemed complete applications in 2006 and 2008. A Notice of Additional Requirements was issued for each with required response dates. The Notices specifically informed the Applicant that if the required submissions were not received in a timely manner, the applications would be denied. Timely extensions were granted a number of times and the last Notice of Additional Requirements for each short plat expired in 2013. There were email communications between the Applicants and Staff in November of 2015, March of 2016 and last in May of 2016. On August 1, 2017, Planning issued a denial of the short plats because the information submitted did not meet the requirements for Preliminary Short Plat Approval. The denial was more than 10 years after the filing of the applications, more than 3 years after the last deadlines for submitting additional requirements expired, and more than 14 months after the last communication from the Applicant. These Appeals followed.

III.

The Applicant is requesting the Hearing Examiner reinstate the short plats with a new expiration date, arguing that since Staff continued to work with the Applicant long after the formal deadline expired, the County should be subject to some kind of *estoppel* and not be allowed to deny 10 year old applications without giving the Applicant one last deadline.

IV.

Any Findings of Fact deemed to be Conclusions of Law are hereby adopted as such. Based on the foregoing Findings of Fact now are entered the following Conclusions of Law.

CONCLUSIONS OF LAW

I.

As pointed out by the Planning Department, the existing regulations require Planning to make a Decision on Preliminary Plat Approval within 120 days of the filing of a complete application. These deadlines are often extended to request additional information and/or extensions allowed by Ordinance. It is true that the main purpose of these deadlines is to require timely processing of applications by Planning, and that Planning often continues to process applications after the deadlines have passed, and, in fact, finds itself unable to meet the deadlines in many cases. However, if an Applicant has not provided the information necessary to process the application or meet the requirements for approval in a timely manner, it is appropriate for Planning to deny the application.

The Applicant suggests that the Hearing Examiner should use *Estoppel* principles to overcome the statutory authority given to Planning to issue a decision on a Permit within 120 days, plus extensions granted, for the filing of a complete Application for Preliminary Short Plat Approval. However, no specific *estoppel* theory was briefed and the Hearing Examiner, an Administrative Officer created by statute, does not have jurisdiction to apply Equity. That jurisdiction is in the Superior and Appeals Courts.

The Decision of the Planning Department to deny these 10 or more years old Short Plat Applications, more than three years after the last extension for submitting the requirements for Preliminary Short Plat Approval, and more than a year after the last communication with the Applicants, was clearly not arbitrary and capricious and was within the Department's statutory authority.

The denial of Preliminary Short Plat Approval should be upheld and the Appeal denied.

II.

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 Decision of Planning is upheld and the Appeal 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 business 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 7th day of May 2018.

Michael Bobbink

Michael Bobbink, Hearing Examiner

WHATCOM COUNTY
Planning & Development Services
5280 Northwest Drive
Bellingham, WA 98226-9097
360-778-5900, TTY 800-833-6384
360-778-5901 Fax



Mark Personius, AICP
Director

EXHIBIT

MEMORANDUM

#14

TO: Michael Bobbink, Whatcom County Hearing Examiner
FROM: Amy Keenan, AICP Senior Planner *AKK*
DATE: April 16, 2018
RE: Wisteria and Lantana Appeals (APL 2017-00008 and 00009)

Whatcom County Planning and Development Services (PDS) issued a denial of two short subdivisions (Wisteria, SSS2006-00052 and Lantana, SSS2006-00089). The two denials were appealed within fourteen days of the denial. Staff issued an individual staff report denying each short subdivision and this memo serves as supplemental information and response for both subdivision appeals. The application materials, notice of additional requirements and staff emails have been submitted to the Hearing Examiner as part of the record.

Wisteria Short Subdivision

The Wisteria short subdivision was submitted on February 24, 2006 and was issued a notice of additional requirements (NOAR) to provide additional information to the Technical Review Committee (TRC). The initial NOAR provided two years for response by the applicant. The applicant then requested a two-year hold (allowed by WCC 21.04.030(1)(e)) and a second two year hold (allowed by WCC 21.01.180). Both extensions were granted. The applicant submitted requested information and two additional NOAR's with timeframes were issued. The final NOAR was issued on March 25, 2013 and contained a 180 day response timeframe. No appeal of the March 25, 2013 NOAR was filed.

Staff followed up the March 25, 2013 NOAR with two additional emails in March and May of 2016 to determine status of the application. No additional information was received. Staff did not receive the requested information and the subdivision application was denied, pursuant to WCC 21.04.034(2)(a)&(b). Staff gave adequate additional time to provide the requested information to meet the applicable County Code provisions. Please note the applicant exhausted all hold and extension requests allowed by code. Pursuant to RCW 36.70B, WCC 2.33 and WCC 21.04, the County is obligated to review and issue a determination on a project permit application within 90 days (120 days if SEPA review is required).

The following details the specific timeframes and activities associated with this subdivision:

| Action | Date | Required Response Date |
|---|-------------|-------------------------------|
| Application Received | 2/24/2006 | N/A |
| Notice of Additional Requirements Issued | 7/27/2006 | 7/27/2008 |
| Applicant Requested two-year hold (WCC 21.04.030(1)(3)) | 7/14/2008 | 7/27/2010 |
| Applicant Requested two-year economic extension request (WCC 21.01.180) | 11/29/2010 | 7/27/2012 |
| Applicant Submitted Information | 7/24/2012 | N/A |
| Second Notice of Additional Requirements Issued | 8/29/2012 | 2/29/2013 |
| Applicant Submitted Information | 2/27/2013 | N/A |
| Third Notice of Additional Requirements Issued | 3/25/2013 | 9/25/2013 |
| Submittal by Applicant | 5/3/2013 | N/A |
| Email from applicant to schedule a meeting | 11/10/2015 | N/A |
| Email from staff to applicant requesting status | 3/8/2016 | N/A |
| Email from applicant verifying status | 3/8/2016 | N/A |
| Second Email from staff to applicant requesting status | 5/17/2016 | N/A |
| Second Email from applicant verifying status | 5/19/2016 | N/A |
| Staff Issued Denial of Subdivision | 8/1/2017 | N/A |

Lantana Short Subdivision

The Lantana short subdivision was submitted on February 27, 2006 and was issued a notice of additional requirements (NOAR) to provide additional information to the Technical Review Committee (TRC). The initial NOAR provided two years for response by the applicant. The applicant then requested a two-year hold (allowed by WCC 21.04.030(1)(e)) and a second two year hold (allowed by WCC 21.01.180). Both extensions were granted. The applicant submitted requested information and two additional NOAR's with timeframes were issued. The final NOAR was issued on June 27, 2013 and contained a 180 day response timeframe. No appeal of the June 27, 2013 NOAR was filed.

Staff followed up the June 27, 2013 NOAR with two additional emails in March and May of 2016. No additional information was received. Staff did not receive the requested information and the subdivision application was denied, pursuant to WCC 21.04.034(2)(a)&(b). Staff gave adequate additional time to provide the requested information to meet the applicable County Code provisions. Please note the applicant exhausted all hold and extension requests allowed by code. Pursuant to RCW 36.70B, WCC 2.33 and 21.04, the County is obligated to review and issue a determination on a project permit application within 90 days (120 days if SEPA review is required).

The following details the specific timeframes and activities associated with this subdivision:

| Action | Date | Required Response Date |
|---|-------------|-------------------------------|
| Application Received | 2/27/2006 | N/A |
| Notice of Additional Requirements Issued | 9/28/2006 | 9/28/2008 |
| Applicant Requested two-year hold (WCC 21.04.030(1)(3)) | 9/26/2006 | 9/28/2010 |
| Applicant Requested two-year economic extension request (WCC 21.01.180) | 12/1/2010 | 9/28/2012 |
| Applicant Submitted Information | 9/27/2012 | N/A |
| Second Notice of Additional Requirements Issued | 11/15/2012 | 5/15/2013 |
| Applicant Submitted Information | 5/14/2013 | N/A |
| Third Notice of Additional Requirements Issued | 6/27/2013 | 12/27/2013 |
| Email from applicant to schedule a meeting | 11/10/2015 | N/A |
| Email from staff to applicant requesting status | 3/8/2016 | N/A |
| Email from applicant verifying status | 3/8/2016 | N/A |
| Second Email from staff to applicant requesting status | 5/17/2016 | N/A |
| Second Email from applicant verifying status | 5/19/2016 | N/A |
| Staff Issued Denial of Subdivision | 8/1/2017 | N/A |

Summary

The applicant and staff worked for several years to resolve the issues with both Wisteria and Lantana subdivisions. Pursuant to RCW 36.70B and WCC 2.33, the

County is obligated to review and issue a determination on a project permit application within 90 days (120 days if SEPA review is required). As noted above, the County provided clear timeframes (two years and several 180 days) and additional time to submit the requested information. At no point did the applicant appeal the timeframes provided in the NOARs.

After months of no response by the applicant, staff denied the applications because without the requested information both applications failed to meet the approval requirements of WCC 21.04.034(2)(a)&(b). Staff requests that the Hearing Examiner uphold the denial of the subdivision applications and not allow the applicant the ability to resubmit information on a denied application. Please note the applicant may submit new permit applications as the underlying zoning has not changed.