

WHATCOM COUNTY HEARING EXAMINER

RE: Administrative Appeal) APL2013-0010
Application for)
Robert Wilson) FINDINGS OF FACT,
) CONCLUSIONS OF LAW,
) AND DECISION

SUMMARY OF APPEAL AND DECISION

Appeal: This Appeal raises issues regarding a hardship extension and the expiration of the Appellant's Short Plat.

Decision: The Appeal is denied. The Applicant's Short Plat Application expired on or about May 10, 2013, when the Applicant failed to submit a Final Application Packet within the deadlines set by WCC 21.04.035.

FINDINGS OF FACT

I.

Background Information

Appellant: Robert Wilson

Property Address: 5090 Samish Way
Bellingham, Washington 98229

Assessor's Parcel No. 370315 450062

Project Name: Emission Tech Cluster Short Plat, SSS2009-0020

Legal Notice: Notice of Open Record Hearing, January 9, 2014

Hearing Date: January 22, 2014, written record remained open until February 7, 2014

Exhibits:

- 1 Administrative Appeal Application with attachments:
 - 1-1 Letter dated August 30, 2013 from Dannon Traxler to Tyler Schroeder re: Emission Tech Cluster Short Plat SSS2009-0020
 - 1-2 Letter dated March 22, 2010 from Craig Ostrom to Robert Wilson re: Notice of Additional Requirements
 - 1-3 PDS Extension Request Declaration: Robert Wilson, December 02, 2010
 - 1-4 PDS Extension Request Approval, dated December 3, 2013
 - 1-5 Letter dated July 10, 2013, from Robert Wilson to Tyler Schroeder
 - 1-6 Customer Receipt
- 2 Letter dated October 3, 2013, from Robert Wilson to Sam Ryan
- 3 Notice of Preliminary Short Plat Approval for Emission Tech Cluster Short Plat, prepared by Craig Ostrom on behalf of Tech Committee
- 4 Cover Memo, dated November 8, 2013 from Craig Ostrom to Michael Bobbink re: Appeal Application
- 5 County's Memorandum Regarding Timeline, SSS 2009-0020, prepared by Royce Buckingham, dated November 12, 2013, with attachments:
 - 5-1 Project Timeline, prepared by Craig Ostrom, dated September 10, 2013
 - 5-2 Notice of Additional Requirements, March 22, 2010
 - 5-3 Agenda Bill No. 2010-180 and Ordinance 2010-026
 - 5-4 Email correspondence: Brandon Hausmann and Craig Ostrom , Nov 30, 2010
 - 5-5 PDS Extension Request Approval, Dec 3, 2010
 - 5-6 Customer Receipt, Extension Request Fee
 - 5-7 Short Subdivision, Exempt Land Division, Long Subdivision, and Binding Site Plan Extension Request Form, Robert Wilson, Dec 2, 2010
 - 5-8 Brandon Hausmann, Wilson Engineering, Letter dated Dec 6, 2010 to Craig Ostrom re: Notice of Additional Requirements
 - 5-9 Memo dated Jan 11, 2011 from Charles Sullivan, Environmental Health to Craig Ostrom re: Pre-App Comments
 - 5-10 Notice of Preliminary Short Plat Approval with attached Agency Comments
 - 5-11 Preliminary Concurrency Determination, issued May 3, 2011
 - 5-12 Memo dated March 9, 2010 from Michael Kershner, Watersheds Office to Craig Ostrom, re: Conditions of Approval and Plat Notes
 - 5-13 Email, dated Sept 10, 2012, from Rhett Winter to Craig Ostrom re: Application fees
 - 5-14 Email, dated April 1, 2013, from Bruce Raper, Wilson Engineering, to Craig Ostrom re: current total application fees
 - 5-15 Letter dated July 10, 2013 from Robert Wilson to Tyler Schroeder re: Emission Tech Short Plat Application expiration
 - 5-16 Letter dated August 30, 2013, from Dannon Traxler to Tyler Schroeder re: Emission Tech Cluster Short Plat
 - 5-17 Letter dated March 22, 2010, from Craig Ostrom to Robert Wilson re: NOAR
 - 5-18 Extension Request Declaration, dated Dec 2, 2010

- 5-19 Extension Request approval, December 3, 2010 letter from Craig Ostrom to Robert Wilson
- 5-20 Letter dated July 10, 2013 from Robert Wilson to Tyler Schroeder
- 5-21 Letter dated Sept 26, 2013 from Craig Ostrom to Dannon Traxler

- 6 Legal Notice dated January 9, 2014

- 7 Staff email correspondence [Nov 8, 14, Dec 3, 4, 2013] regarding scheduling hearing

- 8 Appellant's Statement to the Hearing Examiner, prepared by Dannon Traxler, January 22, 2014

- 9 Letter dated August 30, 2013 from Dannon Traxler to Tyler Schroeder, re: Emission Tech Cluster Short Plat, SSS2009-0020, expiration

- 10 Declaration of Rhett Winter, dated January 22, 2014

- 11 Declaration of Robert Wilson, dated January 22, 2014, with attachments:
 - 11-A Notice of Preliminary Short Plat Approval
 - 11-B Cluster Short Plat Drawings, 11/18/11
 - 11-C Short Subdivision, Exempt Land Division, Long Subdivision and Binding Site Plan Extension Request, dated December 2, 2010
 - 11-D Extension Request Approval, dated December 3, 2010
 - 11-E Agenda Bill No. 2010-180, with Ordinance No. 2010-026
 - 11-F Notice of Additional Requirements, March 22, 2010
 - 11-G Chapter 21.04 Short Subdivisions

- 12 North Samish Project Phase I Entire Site Plan, dated May 23, 2011

- 13 Email from Craig Ostrom, Jan 24, 2014 re: Title 21 Ordinance updates

- 14 Appellant Robert Wilson's Brief To The Hearing Examiner, prepared by Dannon Traxler, dated January 31, 2014

- 15 County's Memorandum Regarding Substantial Compliance, prepared by Royce Buckingham, dated February 13, 2014

- 16 Appellant's Reply To County's Response Brief, prepared by Dannon Traxler, dated February 18, 2014

Parties of Record:

Robert Wilson
 15609-D Peterson Road
 Burlington, WA 98233

Dannon Traxler
 Langabeer & Traxler, P.S.

2011 Young Street, Ste 200
PO Box 1678
Bellingham, WA 98227

Royce Buckingham
Whatcom County Civil Deputy Prosecutor

Craig Ostrom, Planner
Planning and Development Services

Tyler Schroeder, Division Manager
Planning and Development Services

II.

On October 10, 2013, an Appeal was filed on behalf of Robert Wilson, owner of the proposed Emission Tech Cluster Short Plat. The Appeal was purported to be an appeal of a “decision” issued by Whatcom County Planning and Development Services, in a letter dated September 26, 2013. The letter itself does not hold itself out as a formal decision, but does respond to a letter from the Appellant’s Attorney.

The Planning Department letter, written by Craig Ostrom, indicates that the economic hardship time extension previously granted to the Appellant was an extension of time to submit information necessary to gain Preliminary Plat Approval after a Notice of Additional Requirements [NOAR] was issued to the Applicant. The letter points out that during the hardship extension period, the Applicant fulfilled the requirements of the NOAR, and that Preliminary Approval was granted for the Short Plat on May 10, 2009. The issuance of the Preliminary Approval of the Short Plat was done within the extended timeframe of the NOAR time limits. The Preliminary Approval Decision itself informed the Appellant/Applicant that Preliminary Approval would expire, pursuant to County Ordinance, if the Applicant failed to submit the Final Review Packet within two years. WCC 21.04.035. The County’s letter went on to say that, in their opinion, the Short Plat Application expired on May 10, 2013.

The Applicant treated the September 26, 2013, letter as a formal Decision of the

County and filed this Appeal.

III.

Whatcom County has submitted a project timeline, identifying active dates on this Short Plat Application from the original application through the determination by Whatcom County Planning that the application had expired due to failure to submit the Final Application within two years of Preliminary Approval. The written action noting the expiring application was made on June 26, 2013. The timeline is set forth in Exhibit No. 5-1. The Appellants have not challenged the timeline and the dates and actions set forth in the timeline are supported by the record as a whole. Exhibit No. 5-1 is incorporated herein by this reference and adopted as a factual finding herein.

A short summary of the most relevant dates in the timeline follows:

- 12/16/2009: Whatcom County received the original application for a two-lot commercial short plat.
- 03/22/2010: Whatcom County issued a Notice of Additional Requirements [NOAR] and notifying the Applicant/Appellant that the additional material was required within a 180-day timeframe. That timeframe would have ended on September 22, 2010.
- On 09/22/2010, the NOAR timeline expired without a request for an extension, pursuant to WCC 21.04.034[2]. At that point, the Subdivision Administrator could have, and in the reasonably near future, should have, written a decision denying the short plat. No such decision was ever issued.
- 05/25/2010: The Whatcom County Council passed Ordinance No. 2010-026, granting an economic hardship extension for certain land use approvals. This included retroactive extensions per the Ordinance.
- 11/30/2010: The Subdivision Administrator received an email requesting an extension to finish the short plat from Wilson Engineering. The email indicated that the Applicant was still working on the short plat, but needed additional time to complete health requirements. Planning responded that the timeframe to submit the additional requirements expired on March 26, 2010 [more than 7 months before.] However Planning offered the Appellant the right to apply for an economic hardship extension, pursuant to Ordinance No. 2010-026.
- 12/02/2010: The Appellant submitted an application for an economic hardship

extension.

- 12/03/2010: Planning grants approval for a two-year, retroactive extension from September 22, 2010 to September 22, 2012 to comply with the NOAR requirements.
- 05/10/2011: The Appellant, having completed the NOAR requirements, was granted preliminary approval. The Applicant was informed in the preliminary approval that a final review packet was required within two years of approval and if this timeframe was not met, the short subdivision "shall be considered expired and a new application meeting the requirements of this title and other Whatcom County Codes will be required." The two year date fell on or about May 10, 2013, about 3 ½ years from the date the application was originally filed.
- 06/04/2012: The Subdivision Administrator met with the Appellant and reiterated the timeline deadline to submit the final packet.
- 12/10/2012: Planning received an email from Wilson Engineering seeking confirmation of final short plat application and other fees. This fee information was again requested on May 1, 2013. It is not clear if anyone responded to this third request for fee amounts.
- 05/10/2013: The date for submission of the final package occurred with no filings.
- 06/26/2013: Planning received a call from Wilson Engineering, asking about submitting the final short plat application. The caller was told that the final packet was due on May 10, 2013 and that failure to submit it led to the expiration of the short plat application. The caller was directed to contact Tyler Schroeder, the Current Planning Manager.

After the call, the Subdivision Administrator noted that the application had expired.

IV.

On August 30, 2013, the Appellant's Attorney sent a letter to Tyler Schroeder of Whatcom County Planning and Development Services regarding the subject Short Plat. This letter explains some of the circumstances that had taken place and argued that the Plat should not be considered expired. One of the arguments was that because of the two year economic hardship extension the County granted for the NOAR and the fact that the Applicant only used about six months of this extension, it would be fair to grant another year and a half as part of the original extension. The letter ended with a request that the

deadlines for filing the Final Application Packet be September 22, 2014, and that the date for filing the final mylar be September 22, 2015.

This letter led to the September 26, 2013, letter from Craig Ostrom to Dannon Traxler, stating that the two year hardship extension was for the submission of the NOAR requirements only; that those requirements were met when Preliminary Approval was granted on May 10, 2010; that the Appellants had notice on numerous occasions that the deadline date for submission of final materials was May 10, 2013. Whatcom County reiterated its opinion that the Short Plat expired when the final application materials were not submitted by May 10, 2013. The County also noted, as has the Appellant, that the expiration of the Short Plat does not affect completion of the buildings on the site; and that the effect on the Applicant is that he owns one parcel with all the proposed developments, instead of having two separate parcels with the two separate buildings, which would allow the sale of either one separately, if the Short Plat was finally approved.

V.

Zoning changes have taken place since Preliminary Approval was granted. If the Short Plat were resubmitted at this time, it would be denied because of those zoning changes.

VI.

There are a number of documents, letters, and declarations in the file. It is not clear from all of these documents exactly why the Plat Application was allowed to expire. The Appellant and the Appellant's Agent, Wilson Engineering, had been given numerous reminders of the expiration date; had indicated more than once over a period of many months that they were about to file the required paperwork; and had requested information on fees on at least three different times. It appears that the failure of the Applicant to submit a fee payment to Mr. Winter, Wilson Engineering Agent, may have been partially responsible. It also appears that Staffing changes at Wilson Engineering may have been partially responsible. The record as a whole does not provide a full picture of a how or why the expiration was allowed to happen. Both the Applicant/Appellant and his Agent, Wilson

Engineering, failed to take needed actions in a timely manner.

VII.

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 Appellant makes two basic arguments supporting the request that the Appellant be granted additional time to submit a Final Application Packet on Short Plat, SSS2009-00020. The first of these arguments is that, under the Appellant's interpretation of Ordinance No. 2010-0026, which allows extensions to certain applications and proceedings, based on an economic hardship, the hardship extension preciously granted to the Applicant, extending the period of time to meet the time deadlines to comply with the Notice of Additional Requirements on the Short Plat, can be used to justify setting aside the County's determination that the Short Plat expired, by operation of law, on or about May 10, 2013.

Whatcom County's memorandum, dated November 12, 2013, clearly explains the County's position that the County's hardship extension granted to the Applicant cannot be used in this situation to further extend the time to file a Final Application Packet on the subject Short Plat. The Hearing Examiner concurs in the discussion and conclusions reached in the memorandum. To summarize, the Applicant was granted an economic hardship extension, specifically to extend the period of time to comply with a Notice of Additional Requirements. During the extension period, the Applicant complied with the NOAR and was granted Preliminary Approval on May 10, 2011.

The time extension requested extended the period of time to comply with the Notice of Additional Requirements for two years. The Ordinance allows a one-time economic hardship extension, using the following language:

Section 1: Amend the Whatcom County Zoning Code, Chapter 20.84 as follows:

One-Time Economic Hardship Extension of Permit Expirations

1. A one-time two (2) year time extension of vested status for any terms, conditions or other dates, including permit expiration, shall be granted for the following land use permits: planned unit developments, conditional use permits, variances, or administrative use permits if all of the following criteria are met:
 - a. The applicant files a written extension request with applicable fee on forms provided by the County no later than March 1st 2012.
 - b. The extension request includes a sworn declaration that the work authorized by the land use approval will be delayed as a result of adverse market conditions or inability to secure financing; and
 - c. The extension request is for an issued land use approval to expire between January 1st, 2009 and March 1st, 2012.

Under Section (1.) of this Ordinance, only one economic hardship extension can be requested. It could be applied to any terms, conditions, or dates set to expire between January 1, 2009 and March 1, 2012. The NOAR was properly extended for two years. When preliminary approval was granted on May 10, 2011, two new extension dates became applicable to the Short Plat Application, pursuant to WCC 21.04.035, which reads as follows:

21.04.035 Final short subdivision review process.

(1) Submittal. The final short subdivision submittal packet shall include responses to all items called for in the notice of preliminary approval, and shall be in conformance with WCC 21.04.160.

(2) Time Allowed for Final Short Subdivision Approval.

(a) The applicant shall submit the final review packet pursuant to WCC 21.04.160(1) within two years of receiving the notice of preliminary approval. [Emphasis added]

(b) The applicant shall record the short subdivision original drawing pursuant to WCC 21.04.160(2) within three years of receiving the notice of preliminary approval.

(c) If the applicant fails to submit the final short subdivision within these time frames, the short subdivision shall be considered expired and a new application meeting the requirements of this title and other Whatcom County codes will be required. [Emphasis added]

These deadlines were included in the Preliminary Approval given to the Applicant. The Applicant or the Applicant's Agent was also notified on a number of different occasions that the deadline for submission of the Final Application Packet was May 10, 2013, and the deadline for the filing of the mylar was May 10, 2014.

Neither of these dates is for a land use approval, set to expire between January 1, 2009, and March 1, 2012, as required by Ordinance No. 2010-0026. Even if one was able to get around the language indicating only one two year extension of vested status was allowed, the Final Application Packet date could still not be extended under the Ordinance because it came after the March 1, 2012 deadline and therefore within the timeframes set by the Economic Hardship Extension Ordinance.

II.

The Appellant argues that the Hearing Examiner should find that the action of the Appellant and his Agent amount to "substantial compliance" with the Whatcom County Code, and that this "substantial compliance" allows the Hearing Examiner to set aside the timeline established for submission of a Final Application Packet in WCC 21.04.035, set forth above. WCC 21.04.035, above, is operative in this situation. This section clearly sets forth a deadline for submission of the final package within two years of Preliminary Approval. That date came and went on May 10, 2013. The section also states that if the deadline is not met "... the subdivision shall be considered expired and a new application meeting the requirements of this Title and other Whatcom County Codes will be required."

As pointed out by the Appellant, Substantial Compliance is an equitable doctrine. The Law of Equity arose in Great Britain starting in the late 1500s, and was well established

during in the 1700s. Historically, equity arose to deal with specifically hardships, including a lack of a viable form of relief in certain cases, under the common law. The United States Constitution grants equitable jurisdiction to the courts.

Substantial Compliance is an equitable doctrine applicable to contract law. No legal authority has been cited which would imply that the doctrine could be applied to statutory deadlines in land use ordinances.

Occasionally, land use ordinances contain language which allows the Administrative Decision-maker or the Hearing Examiner authority to modify strict requirements. Variances are one example of this authority. The Appellants cite other sections of the Whatcom County Zoning Ordinance, WCC Chapter 20, as giving the Hearing Examiner authority to set aside the deadlines under WCC 21.04.035. Both the Variance Procedures and the language cited by the Appellant are part of the Zoning Ordinance and do not apply to the deadline set in the Subdivision Ordinance. The Hearing Examiner can find no indication in the Subdivision Ordinance that he has been granted the authority to ignore the clear language of sections of the Ordinance, where the Ordinance itself does not allow or even imply such discretion.

The legislative history in the record establishes that the deadlines in the Short Subdivision Ordinance, found in WCC 21.04.035, were specifically aimed at curing a problem resulting from Subdivision Application still pending and in the Planning Department files which were 20 years or more old. The ultimate legislative determination was to adopt an Ordinance which had Short Plats expire at certain dates if certain actions had not been completed. The Hearing Examiner concludes that he does not have the authority to set aside the deadlines, based on an equitable doctrine designed to apply to contract law. The Hearing Examiner concludes that the Short Plat expired when the Final Application Packet was not filed by May 10, 2013.

Even if the Hearing Examiner felt that he had some authority or discretion to apply or

grant some kind of relief from these deadlines in extraordinary situations, it is unlikely he would apply a kind of Substantial Compliance doctrine in this case.

The Applicants had a period of three and one-half years to process their application from its filing date until the date the final packet required by Preliminary Subdivision Approval was due. Not only did the Applicant not submit anything by that date, the Applicant did not even contact Planning for an additional six weeks after that date to inquire about their Short Plat Application. That fact, combined with the fact that the Applicant was notified numerous times of the deadline, and the fact that the Applicant indicated numerous times over months they were about to file their Final Application Packet and requested on three occasions the fees that would be required at submission does not amount to any kind of Substantial Compliance with the deadline set in the Ordinance.

The Hearing Examiner can image cases, such as where the final packet was filed timely, but one of the required documents was missing, or where final packet was not filed timely because the Applicant arrived on the deadline date with the packet after the office had been closed or was one business day late.

The Hearing Examiner acknowledges that the expiration of the Short Plat creates a hardship on the Applicant as a result of zoning changes which no longer allow the requested Short Plat. However this hardship was the result of the Applicant and/or the Applicant's Agent's diligence.

The Hearing Examiner concludes that the Whatcom County Council adopted WCC 21.04.035 to specifically address situations such as the one raised in this case by requiring termination of a Short Plat if certain deadlines were not met by operation of law. For the Hearing Examiner to set this aside in these circumstances, would amount to the reinstatement of a system where it was no longer clear when Short Plat Applications expired. This would be directly contrary to the intent of the legislative body in adopting WCC 21.04.035 in its current form.

The Hearing Examiner should deny the Appeal.

III.

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 Appeal is denied. The Applicant's Short Plat Application expired on or about May 10, 2013, when the Applicant failed to submit a Final Application Packet within the deadlines set by WCC 21.04.035.

**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 21st day of March 2014.



Michael Bobbink, Hearing Examiner