

WHATCOM COUNTY HEARING EXAMINER

RE: Preliminary Long Subdivision) LSS2005-0003
Application by) "Phasing Revision"
)
Paul Garrett) Findings of Fact, Conclusions of Law,
"Birch Bay Meadows") and Decision

SUMMARY OF APPLICATION AND DECISION

Application: The Applicant has requested a Major Modification of a Long Subdivision, LSS2005-0003, Birch Bay Meadows Long Subdivision. A Revision Request is sought to allow phasing of the subdivision, and includes a request for a one year extension.

Decision: The Requested Revision, allowing phased development, is approved subject to conditions. The Applicant's request to apply a two-year extension for the already approved original [non-phased] Long Subdivision, granted pursuant to Whatcom County Ordinance 2010-026, is denied. The request for a one year extension to the time allowed to submit a Final Plat for the phased subdivision is denied

SUMMARY OF FINDINGS OF FACT AND CONCLUSIONS OF LAW

INTRODUCTION

The following Findings of Fact and Conclusions of Law are based upon consideration of the exhibits admitted and evidence presented at the public hearing.

I.

Applicant: Paul Garrett

Property Address: east side of Blaine Road, between Birch Bay-Lynden and Arnie Roads
Blaine, Washington

Legal Description: within the N ½ of the SW ¼ of Sec29, T40N, R1E, W.M.
Assessor's Parcel No. 139205

Zoning: Urban Residential (UR4)

Comp. Plan: Short Term Urban Growth Area

Subarea: Birch Bay- Blaine

Number of Lots: 97 single-family residential lots

Acreage: 64.79-Acres

Reserve: 40.42-Acres of Open Space Reserve Areas

Roads: Public

Water Supply: Birch Bay Water & Sewer District

Sewage Disposal: Birch Bay Water & Sewer District

Fire Protection: Whatcom County Fire District No. 13

Law Enforcement: Whatcom County Sheriff's Office

Public Schools: Blaine School District 503

Vegetation: A mixture of deciduous and evergreen trees as well as grass and wet soil plants.

Adjacent Land Use: Adjacent land zoned Urban Residential (UR4) and Urban Residential Medium Density (URM6 & URM24) developed with residential uses

Utility Easements: Any necessary utility easements will be established prior to recording final plat.

Variations: None requested.

SEPA Review: Determination of Non-significance, issued July 18, 2005

Authorizing Ordinances

Revised Code of Washington Chapter 58.17

Whatcom County Code Title 20, Official Whatcom County Zoning Ordinance

Whatcom County Code Title 21, Subdivision Regulations

State Environmental Policy Act (SEPA). Washington Administrative Code Chapter 197-11

Whatcom County Environmental Policy Administration Chapter 16.08
Whatcom County Code Chapter 12.08, Development Standards

Pursuant to the *Revised Code of Washington (RCW) 58.17.110*, in order to approve a preliminary long subdivision, Whatcom County must find that appropriate provisions are made for the public health, safety, and general welfare, open spaces, drainage ways, streets or roads, alleys, other public ways, transit stops, potable water supplies, sanitary wastes, parks and recreation, playgrounds, schools and school grounds, and shall consider all other relevant facts including sidewalks and other planning features that assure safe walking conditions for students who walk to and from school, and the public use and interest will be served by the platting of such subdivision.

Legal Notices: Posted – November 2, 2012
 Mailed – November 1, 2012
 Published – November 2, 2012

Hearing Date: January 9, 2013

Parties of Record

Paul Garrett
43529 Ridgepark Drive
Temcula, CA 92590

Dannon Traxler
Langabeer & Tull, P.S.
709 Dupont Street
PO Box 1678
Bellingham, WA 98227

Doug Campbell
Associated Project Consultants, Inc.
1401 Astor Street
Bellingham, WA 98225

Kathy Berg
chairkathy@birchbayinfo.org

Suzan Nasona / Wendy Steffensen
RE Sources
2309 Meridian Street
Bellingham, WA 98225

Amy Keenan
Planning and Development Services

Roger McCarthy
Division of Engineering

Royce Buckingham
Civil Deputy Prosecutor

Exhibits

- 1 Amended Land Use Application, dated June 27, 2011
- 2 Plat Phasing Plan, dated 10/07/10 Exhibit 2 replaced with Exhibit #20 at request of Staff at the Public Hearing
- 3 Staff Memorandum from Amy Keenan, December 20, 2012
- 4 Tech Committee Comments: Kyle Dodd, December 20, 2012
Roger McCarthy, Oct 1, 2012; Lyn Morgan-Hill, Oct 1, 2012
- 5 Agency Comments: DOE, Kurt Baumgarten and Mark Kaufman, August 19, 2011;
and DOE Patrick McGraner, Sept 13, 2012
- 6 Public Comments: ReSources, Sept 18, 2012, and Aug 29, 2011
K Creed, Aug 15, 2011; Jean Temple, Aug 17, 2011; Douglas and Betty Robertson,
Aug 15, 2011; "Chair Kathy" Sept 18, 2012
- 7 Re-issued SEPA MDNS, Set 4, 2012, with attached Phasing Conditions; Distribution List;
SEPA Notice; and SEPA Checklist
- 8 Critical Areas Review: Wetland Delineation for Birch Bay Meadows, Preliminary Draft,
Sept 2012, prepared by Northwest Wetlands Consulting
- 9 Legal Notice of Application for revision, Aug 10, 2011
- 10 Legal Notice of Public Hearing, Nov 2, 2012
- 11 Certificate of Posting, November 2, 2012
- 12 Memo, from Amy Keenan to Michael Bobbink, Feb 16, 2011
- 13 Memo, from Bobbink to Keenan, Mar 1, 2011
- 14 Memo, from Keenan to Bobbink, Mar 31, 2011
- 15 Memo, from Bobbink to Keenan, April 19, 2011
- 16 Staff Email communication re: scheduling
- 17 Certificate of Mailing Notice of Public Hearing, November 1, 2012

- 18 Email communication [Staff and Applicant] re: scheduling hearing
- 19 Dannon Traxler Memorandum to Hearing Examiner, dated January 8, 2013, with attachments
- 20 Plat Phasing Plan, dated 10/07/10
- 21 Hardship Ordinance in effect at time Applicant granted economic hardship
- 22 Chapter 21.05 Development Standards Language
- 23 Memorandum from Dannon Traxler, January 14, 2013 re: Modification Request
- 24 Email from Royce Buckingham to Hearing Examiner re: Response to Ms. Traxler's January 14, 2013 memorandum

II.

Birch Bay Meadows Long Subdivision, consisting of a 97-single-family residential lot subdivision, on a 64.79-acre parcel located in the Urban Residential (UR-4) zone, received Preliminary Subdivision Approval by the Hearing Examiner on September 15, 2005. Pursuant to the Subdivision Ordinance, WCC 21.05.039(1), Preliminary Subdivision Approval expires unless a Final Plat has been submitted within five years of the date of Preliminary Subdivision Approval.

WCC 21.05.039(3) allows for a Phased Subdivision. A Phased Subdivision expires ten years from the date of Preliminary Approval. The Applicant did not propose a Phased Subdivision and the Preliminary Approval granted in 2005 was set to expire in 2010.

III.

The Applicant is now seeking a Major Revision to Preliminary Subdivision Approval to allow phasing.

The Phasing Request has gone through the open hearing process required for Major Revisions. Four public comments on the proposal [none of which objected to phasing] were received by Planning and Development Services.

The Applicant and Whatcom County Planning and Development Services have agreed on a new set of conditions, to be applied to the phased subdivision. Whatcom County Planning and Development Services has recommended approval of the Major Modification, subject to these conditions. The revised conditions are set forth in a memorandum, dated December 20, 2012, Exhibit No. 3 in the Hearing Examiner file.

WCC 21.05.039 require phases, submitted after five years from the date of Preliminary Approval, to comply with the Whatcom County Development Standards in effect as of the date construction plans are submitted for each phase. Future development plans for each phase will be required to comply with the Whatcom County Development Standards in effect as of the date construction plans are submitted, as required in WCC 21.05.039(3).

The proposed Conditions of Approval require the Applicant to comply with the current Critical Areas Ordinance. The site contains significant regulated wetlands. A new wetland plan, which conforms to the requirements of the Critical Areas Ordinance in effect as of the date of approval of this modification is required. The current Critical Areas Ordinance has been adopted under the Growth Management Act process and is, therefore, deemed to contain requirements consistent with Best Available Science.

IV.

The Applicant requested, and was granted, a two-year extension to the original requirement that a Final Plat be submitted within five years. This Extension Request was sought pursuant to Whatcom County Ordinance 2010-026. The granting of the extension allowed the Applicant until September 15, 2012, to submit the originally approved subdivision for Final Plat Approval. During this extension, the Applicant requested this Major Modification to allow the development to be phased in order to take advantage of the ten-year period for submitting a phased subdivision for Final Approval.

The only issue of contention between Planning and the Applicant is the Applicant's

request that the two-year extension for the original subdivision be added to the ten-year period allowed for submission for Final Plat Approval for a Phased Subdivision. If granted, Final Subdivision Approval for the Phased Subdivision would expire on September 15, 2017, instead of September 15, 2015. Additionally, the Applicant has requested a one-year extension of the time required for a Final Approval, pursuant to WCC 21.05.039, which would allow submission of the Final Plat up to September 15, 2018.

The Planning Department concluded a one-year extension is not needed at this time if phasing is approved and argues that the two-year extension granted, pursuant to Whatcom County Ordinance 2010-026, does not extend the ten-year time period for the Final Plat Approval for the Phased Subdivision being approved at this time. The position of Planning is that the Phased Subdivision must receive Final Approval within ten-years of the original approval of the subdivision. If Planning's position is upheld, the Applicant will be required to submit the documents for Final Approval no later than September 15, 2015.

V.

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.

Long Subdivisions which have received Preliminary Approval may apply for a Major Modification, pursuant to WCC 21.05.110. The Applicant has sought a Major Modification, allowing phased development of Birch Bay Meadows. Consistent with the requirements for a Major Modification, the Hearing Examiner has given public notice and held an open record public hearing on the request. Concerns raised by the public and by other agencies have been addressed by conditions requiring the Applicant to submit a new Wetland Delineation consistent with the Critical Areas Requirements contained in the current Critical Areas Ordinance.

Subject to the Conditions of Approval recommended by Staff, the Hearing Examiner concludes that the modified subdivision, incorporating a phasing plan, is consistent with the requirements of the Whatcom County Subdivision Ordinance and of RCW Chapter 58.17. Specifically, the Hearing Examiner finds that the proposed modified subdivision is in the public interest and has made appropriate provisions, consistent with the requirements of RCW Chapter 58.17.

The proposed revision to allow phasing should be approved, subject to the Conditions of Approval recommended by Whatcom County Planning and Development Services in the memorandum, dated December 20, 2012, Exhibit No. 3 in the Hearing Examiner file, a copy of which is attached hereto and incorporated herein.

II.

Whatcom County Ordinance 2010-026 was approved by Whatcom County Council on May 25, 2010 and approved by the Whatcom County Executive on May 26, 2010.

The purpose of this Ordinance was to allow extended expiration dates for certain zoning permits and pending applications, including Preliminary Subdivision Approvals. The Ordinance was adopted in response to difficult economic conditions. Pursuant to this Ordinance, the Applicant applied for and was granted a two-year extension to the five-year period required for submission of the Birch Bay Meadows Subdivision for Final Approval.

After the approval of the two year extension to this Long Subdivision, the Growth Management Hearings Board invalidated Ordinance 2010-026, as being inconsistent with the requirements of the Growth Management Act. The invalidation was prospective and not retrospective and did not affect the Applicant's two-year extension.

The Applicant is now requesting the Hearing Examiner to add the two-year extension for the original Preliminary Approval to the ten-year period allowed for phased subdivisions. Whatcom County Planning and Development Services objects to this request, arguing it

does not apply under these circumstances, on the grounds the extension only applied to the original approval of the non-phased subdivision.

Even if the Applicant was vested under Ordinance 2010-026 prior to its invalidation, under the terms of Ordinance 2010-026, the Applicant is not eligible for a two-year extension to a newly approved phased subdivision. Under Section 1 of Ordinance 2010-026, an Extension Request can only be approved for an issued land use approval that expires between January 1, 2009 and March 1, 2012. In the same vein, the Applicant can only request an extension on a permit application if that application was pending on January 1, 2009.

The Applicant's Subdivision, now, approved as a Phased Subdivision by this Decision, is not set to expire between January 1, 2009 and March 1, 2012. The Application for Approval of the Phased Subdivision was not pending on January 1, 2009. For these reasons, the Applicant is not eligible for a two-year extension to the ten-year period for which to obtain Approval for a Phased Subdivision.

III.

The Applicant has requested a one-year extension for the submission of a Final Plat, pursuant to WCC 21.05.039, which allows a one-year extension of the five-year for submission of a Final Plat, when consistent with the criteria set for in WCC 21.05.039(2). However this Section does not grant the Hearing Examiner authority to extend the ten years allowed for submission of a Final Plat for a Phased Subdivision. WCC 21.05.039(3), specifically, states "... the phasing plan shall expire ten years from the date of preliminary approval."

IV.

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 Hearing Examiner hereby approves a Major Modification in the Preliminary Approval for a 97 single-family residential lot development, LSS05-0003, to be known as Birch Bay Meadows, subject to the Conditions set forth in the attached memorandum, dated December 20, 2012, Exhibit No. 3 in the Hearing Examiner file. Pursuant to WCC 21.05.039, the approved Phased Subdivision will expire, unless it is submitted in final form for Plat Approval, on or before September 15, 2015.

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 25th day of February 2013,



Michael Bobbink, Whatcom County Hearing Examiner

WHATCOM COUNTY
Planning & Development Services
5280 Northwest Drive,
Bellingham, WA 98226-9097
360-676-6907, TTY 800-833-6384
360-738-2525 Fax



J.E. "Sam" Ryan
Director

RECEIVED
JAN 03 2011

MEMORANDUM

WHATCOM COUNTY
HEARING EXAMINER

TO: Michael Bobbink, Whatcom County Hearing Examiner
FROM: Amy Keenan, AICP *AK*
DATE: December 20, 2012
RE: Major Modification Request and One Year Extension for LSS2005-00003 Birch Bay Meadows Long Subdivision - REVISION

EXHIBIT
#3

Please note this is a revised memo, intended to replace the October 3, 2012 memo with revised conditions for Current Planning Conditions #2 and #3 as shown in italics. The Health Department conditions have also be revised.

The applicant, Paul Garrett, has requested a major modification of a preliminary long subdivision pursuant to WCC 21.05.110 to include phasing of the completion of the proposed 97-lot single family residential subdivision. The applicant also submitted a request for a one year extension of time for submittal of final long subdivision pursuant to WCC 21.05.039(2).

A Revised Notice of Application was issued by Planning Staff on July 27, 2011 for the phasing request (Attachment A). A SEPA Mitigated Determination of Non-significance (MDNS) was issued on September 4, 2012 (Attachment B). The MDNS included the following conditions:

Prior to approval of Phase I of Birch Bay Meadows long subdivision, a wetland delineation shall be provided to Whatcom County Planning & Development which is performed according to best available science and current critical areas regulations. All impacts to critical areas shall be mitigated according to best available science.

If archaeological materials (bones, shell midden, cobble tools, etc.) are observed during any site work associated with this permit, work in the area of discovery shall cease and the Whatcom County SEPA Administrator (676-6907), Nooksack Tribe (592-5176 ext. 3290), LNTHPO (384-2298) and Washington State Office Archaeology and Historic Preservation (360-586-3065) shall be contacted immediately to determine the significance of the discovery. If human remains are observed, the Whatcom County Sheriff (911) shall be contacted immediately. Compliance with all other applicable laws pertaining to archaeological resources is required.

We received comments during revised notice application period (Attachment C) and during SEPA comment period (Attachment D), but did not receive a SEPA appeal.

Whatcom County PDS received a preliminary draft of the new Critical Areas Review / Wetland Delineation report from Katrina Jackson, Northwest Wetlands Consulting (Attachment E) on September 20, 2012 and Critical Areas Staff completed a site visit on September 28, 2012 to review and verify the report.

With receipt of the preliminary wetland delineation report the Technical Review Committee (TRC) is prepared to recommend approval to the Whatcom County Hearing Examiner of the phasing request pursuant to the following conditions. These conditions are in addition to the conditions of approval (except where noted below) for the preliminary approval signed by the Hearing Examiner on September 15, 2005. If the phasing plan is approved by the Whatcom County Hearing Examiner, the request for a one year extension shall become unnecessary at this time.

Recommend Conditions of Approval for Proposed Modification to Preliminary Approval to Allow Phasing of Birch Bay Meadows (See Attachment F for Staff memos).

Current Planning (these are new conditions of approval):

1. Pursuant to WCC 21.05.039 (3) Phased Subdivision, each phase submitted after five years from the date of preliminary approval shall comply with the Whatcom County Development Standards in effect as of the date construction plans are submitted for each phase. Preliminary approval was given on September 15, 2005. All phases submitted shall comply with WCC 21.05.0396 (3).
2. Approval of this preliminary subdivision shall become invalid unless a final plat is submitted in proper form for final plat approval within ten years of the date of preliminary subdivision approval, which was September 15, 2005. This preliminary subdivision has been modified to include phasing, *and final plats for each additional phase may be recorded through the expiration date.* This expiration date may be extended pursuant to WCC 21.05.030(5) with the Whatcom County Hearing Examiner review and approval.
3. The subdivision shall be developed in accordance with the phasing plan, submitted February 14, 2012, unless a modification is requested by the applicant in order to meet the requirements of Condition 1 and the MDNS *or is beneficial to the design, development schedule, or necessary due to site conditions.* Whatcom County Technical Review Committee shall review and approve the modifications.
4. The playground shall be constructed with Phase 1 development.
5. The applicant shall comply with all state and federal authorizations, as required, and in particular for wetland impacts prior to beginning any ground disturbing activities or timber harvest.

SEPA Conditions (these are new conditions of approval):

1. Prior to approval of Phase I of Birch Bay Meadows long subdivision, a wetland delineation shall be provided to Whatcom County Planning & Development which is performed according to best available science and current critical areas regulations. All impacts to critical areas shall be mitigated according to best available science.
2. If archaeological materials (bones, shell midden, cobble tools, etc.) are observed during any site work associated with this permit, work in the area of discovery shall cease and the Whatcom County SEPA Administrator (676-6907), Nooksack Tribe (592-5176 ext. 3290), LNTHPO (384-2298) and Washington State Office Archaeology and Historic Preservation (360-586-3065) shall be contacted immediately to determine the significance of the discovery. If human remains are observed, the Whatcom County Sheriff (911) shall be contacted immediately. Compliance with all other applicable laws pertaining to archaeological resources is required.

Health Department (these are new conditions of approval):

1. SEWAGE: Sewer service from the Birch Bay Water & Sewer District is available to the property. Prior to final approval of each phase, applicant must provide proof that sewer infrastructure serving each lot has been installed, and that it has been inspected and approved by the Birch Bay Water & Sewer District.
2. DRINKING WATER: Water service from the Birch Bay Water & Sewer District is available to the property. Prior to final approval of each phase, applicant must provide proof that water infrastructure serving each lot has been installed, and that it has been inspected and approved by the Birch Bay Water & Sewer District.

Public Works – Engineering:

The following conditions have been reorganized and some minor revisions from the original 7/8/2005 conditions of approval. The traffic and stormwater conditions have minor changes due to review and submittal update status. Condition No. 6 is a revised condition on the secondary access to the project site.

Recommended Conditions of Approval:

1. All development shall comply with Whatcom County Development Standards.
2. Sight distance at all access road intersections shall meet Whatcom County Development Standards.
3. A Traffic Study has been submitted (Gibson Traffic Consultants, April 5, 2006) and approved by Whatcom County with recommended improvements

for offsite traffic mitigation at Birch Bay Lynden/Blaine Road intersection and the Birch Bay Lynden/Portal Way intersection. Traffic mitigation of \$100/ADT for project generated trips shall be applied for road/intersection improvements. Traffic mitigation to be based on project impact to the above County Road Projects existing at time of each phase with mitigation amount paid prior to final approval of each phase.

4. Roads A, B, & C shall be built to Urban Local Access Standards and have as a min., sidewalks on one side of the roadway that provides maximum use for lots within the plat. Roads D, E, & F shall be built to Urban Minor Access Standards. All plat roads shall be dedicated to Whatcom County.
5. County Engineering agrees with the applicant's proposal of one on street pocket parking space per lot.
6. It is in the public's best interest to have traffic circulation between adjacent neighborhoods. Having a permanent access between Birch Bay Meadows and Double R Ranch would benefit both subdivisions. Based on the number of proposed lots the applicant shall provide a secondary access. The drawing from APC, Inc. dated 2/2/2012 titled Secondary Full Time Access Road Exhibit, is the appropriate standard for that portion of the road within Double R Ranch. Given that Crocket Road is currently a privately maintained road within public rights-of-way, Birch Bay Meadows to be obligated to help maintain the road based on project vehicle use. The permanent secondary access to be built prior to final approval of phase III.
7. A temporary emergency access to be completed prior to final approval of phase II. Fire District 21 to determine type of access restriction for emergency access.
8. There are no lots with proposed direct access to Blaine Road.
9. The project site fronts and accesses Blaine Road a state highway (548). Applicant needs to contact Washington State Department of Transportation (WSDOT) for road approach access permits.
10. All signing and striping shall be installed per MUTCD standards at the developer's expense.
11. A preliminary Stormwater Design Report dated April 2005 by Associated Project Consultants has been submitted. The preliminary report addresses stormwater detention, water quality measures, and conveyance. A final Engineered Stormwater Design Report that addresses conveyance, detention, and water quality measures by a Washington State licensed civil engineer shall be submitted, to Whatcom County Engineering, for the entire project site with the first phase civil construction plans.

12. Provision for maintenance of private stormwater system will be required as set forth in Whatcom County Development Standards, Chapter 2, Section 220.
13. A Revocable Encroachment Permit will be obtained for work within the county right of way.
14. Erosion control plans shall be submitted and approved prior to any clearing or grading on the site.
15. All easements, any physical appurtenances such as fences or structures which may indicate encroachment, lines of possession, or conflict of title must be shown on the final mylar. [WAC 332-130-050(1)(b)]
16. Road name proposals for all roads must be submitted for approval. A map at 1"=400' scale of the lots shall be provided to Whatcom County Engineering for address assignment. Address fee of \$200.00 shall be paid prior to recording.
17. All road, stormwater facilities, and grading plans shall be designed and stamped by a Washington State licensed civil engineer and submitted for county engineering approval prior to construction. As-built road/stormwater plans and a letter of certification from a licensed engineer must be submitted to the County Engineer prior to acceptance of any roads into the County Road System.
18. Developer shall provide a plat layout to the post office to get approved mailbox location(s). The location and use of mailboxes shall not interfere with county road traffic.