

WHATCOM COUNTY HEARING EXAMINER

RE:

Administrative Appeals of)	APL2011-00011/SEP2010-0085/PLN2010-0024
SEPA Determinations of Non-Significance)	APL2011-00012/SEP2010-0088/PLN2010-0025
)	
)	FINDINGS OF FACT,
<i>Caitac USA, Corporation</i>)	CONCLUSIONS OF LAW,
)	AND ORDER ON MOTION TO DISMISS

SUMMARY OF MOTION AND DECISION

Summary of Motion: Caitac USA, Corporation (“Caitac”) filed a Motion with the Whatcom County Hearing Examiner requesting dismissal of the above referenced Appeals, which attempted to appeal two Determinations of Non-Significance (“DNSs” - SEP2010-00085 and SEP2010-00088). Caitac requested dismissal of the Appeals because they were not filed within ten days of the date the DNS’s were final, as required by WCC 16.08.170(A).

Summary of Decision: Caitac’s Motion to Dismiss is granted. The facts are not in dispute. The Hearing Examiner concludes that the Hearing Examiner has no jurisdiction to address an Appeal of a SEPA (“State Environmental Policy Act”) Threshold Determination which is not filed within ten days from when a Determination of Non-Significance issued by the Whatcom County Planning and Development Services is final. In the event the ten day filing deadline is a statute of limitation rather than jurisdictional, the Appeals still must be dismissed for being untimely filed. The Hearing Examiner does not have equitable authority and cannot grant equitable relief based on “substantial compliance,” as requested by the City.

FINDINGS OF FACT

I.

Appellant: City of Bellingham

Appellant Counsel: Alan Marriner

Property Location/Address: 205 West Smith Road

Assessor’s Parcel Numbers (APN): 390236 200270, 390236 445440, 390201 074504, 380201 202508 (SEP2010-00085) and APN: 390236 200270 (SEP2010-00088)

Zoning: Rural 10

Comprehensive Plan: Rural

Authorizing Ordinances: WCC 20.92
WCC 16.08

Parties of Record:

Caitac USA Corporation

Counsel: Robert Carmichael and Simi Jain
Zender Thurston, Attorneys At Law
1700 D Street, Bellingham, WA 98225

City of Bellingham

Counsel: Alan Marriner
Office of the City Attorney
210 Lottie Street, Bellingham, WA 98225

Whatcom County

Royce Buckingham, Whatcom County Civil Deputy Prosecutor
Sam Ryan, Director, Planning and Development Services
Tyler Schroeder, County SEPA Official, Planning and Development Services

Exhibits

- 1 Motion to Dismiss City of Bellingham's Appeal of Determinations of Non-Significance, brief prepared by Robert Carmichael, dated August 3, 2011, with attachments
 - 1-1 Declaration of Robert A. Carmichael in Support of Motion to Dismiss, dated August 2, 2011
 - 1-2 Declaration of Tyler Schroeder in Support of Motion to Dismiss, dated July 19, 2011
 - 1-3 Declaration of J.E. "Sam" Ryan in Support of Motion to Dismiss, dated July 19, 2011
 - 1-4 Declaration of Karen Reich in Support of Motion to Dismiss City of Bellingham's Appeal of Determinations of Non-Significance, dated August 3, 2011
 - 1-5 Declaration of Service, August 3, 2011

- 2 City of Bellingham's Motion to Dismiss, brief prepared by Alan Marriner, dated August 3, 2011, with attachments
 - 2-1 Declaration of Alan A. Marriner, dated August 3, 2011
 - 2-2 Certificate of Service, August 3, 2011
 - 2-3 Cover letter from Stephanie Landers, dated August 3, 2011

- 3 Response to City of Bellingham's Motion to Dismiss, submitted by Robert Carmichael, dated August 12, 2011, with attachments
 - 3-1 Declaration of Service, August 12, 2011
 - 3-2 Case Law
- 4 Declaration of Barbara Dykes, dated August 11, 2011, with attached Growth Management Hearings Board, Western Washington Region, State of Washington: C. Dean Martin, v Whatcom County, Final Decision and Order, Case No. 11-2-0002
- 5 Second Declaration of Alan Marriner, dated August 12, 2011
- 6 City of Bellingham's Response to Caitac's Motion to Dismiss, submitted by Alan Marriner, dated August 12, 2011
- 7 Certificate of Service [Exhibits 4, 5, 6 above], August 12, 2011 from Stephanie Landers, City of Bellingham
- 8 Declaration of Jennifer Paulson, dated August 16, 2011
- 9 Declaration of Dana Brown-Davis, dated August 16, 2011

II.

During the August 17, 2011, hearing on dispositive motions filed in these cases, the Parties were afforded the opportunity and invited to provide additional factual evidence beyond the declarations and attachments admitted as exhibits, and to raise any disputes of fact. No additional evidence or testimony was offered and no factual disputes were raised by any Party. Therefore, the Decision herein is based on the facts in the written record set forth in the foregoing exhibits and oral argument. The Hearing Examiner finds that there are no material facts in dispute.

III.

Whatcom County Planning and Development Services ("County Planning Division") issued two SEPA Threshold Determinations on June 1, 2011. The first SEPA Determination, SEP2010-00085, is a phased Determination of Non-Significance ("DNS") for a non-project action to rezone approximately 550 acres of Caitac's property from Rural 10A to Rural 5A, and approval of a development agreement. Exhibit 1-2, *Declaration of Schroeder, Exh. A-1*. The second Determination, SEP2010-00088, was also issued on June 1, 2011. The second Determination is a phased DNS for a non-project action to rezone approximately 9 acres of Caitac's property from Rural 10A to Tourist Commercial zone (TC), which will also require a Comprehensive Plan Amendment (initiated by the County Council) and approval of a development agreement. Exhibit 1-2, *Declaration of Schroeder, Exh. A-2*. The City of Bellingham filed a comment on both SEPA Determinations on or about June 15, 2011. Exhibit 1-2, *Declaration of Schroeder, Exh. B*.

IV.

The comment period for both of these SEPA DNSs terminated on June 15, 2011, at which point they became final Threshold Determinations by Whatcom County Planning. Exhibit 1-2, *Declaration of Schroeder, Exh. A-1, p.3, and Exh. A-2, p.3*. WCC 16.08.170(A) provides that Appeals of County procedural compliance with Chapter 197-11 WAC must be filed with the County Planning Division within 10 days of the date a DNS is final. WCC 16.08.170(A) reads as follows:

16.08.170 Appeals.

A. Whatcom County establishes the following administrative appeal procedures under RCW 43.21C.075 and WAC 197-11-680:

1. Any agency or aggrieved party may appeal the county's procedural compliance with Chapter 197-11 WAC for issuance of the following by filing with the county department of planning and development services (see WCC 16.08.200.A.2 for fee):

a. Appeal of the final DNS, following the comment period when applicable, must be made to the hearing examiner within 10 days of the date the DNS is final (see WAC 197-11-390 (2)(a));

Ten days from June 15, 2011, was June 25, 2011, which fell on a Saturday. The Appeal filing deadline was therefore no later than Monday, June 27, 2011. The City filed the above named Appeals at the County Planning Division office on Tuesday, June 28, 2011, the day after the Appeal Period expired.

V.

On both of the DNS notices, the stated deadline for appeal was noted as June 27, 2011, and the stated location for filing an Appeal of the DNS was the County Planning Division. Exhibit 1-2, *Declaration of Schroeder, Exh. A-1, p.3, and Exh. A-2, p.3*. Each subject DNS mailed to the City, on which the City commented, and from which the City appeals state:

“An aggrieved agency or person may appeal this determination to the Whatcom County Hearing Examiner. Application for appeal must be filed on a form provided by and submitted to the Whatcom County Current Planning Division located at 5280 Northwest Drive, Bellingham, WA 98226, during the ten days following the comment period, concluding June 27, 2010.”

Exhibit 1-2, *Declaration of Schroeder, Exh. A-1, p.3, and Exh. A-2, p.3*. The Appeal filing deadline of June 27, 2011, was not disputed by any Party. The City had actual written notice of both the deadline for filing the Appeal and the place where the Appeal was to be filed [Whatcom County Planning].

VI.

The County Planning Division office closes to the public at 4:30 p.m. (Monday through Friday) and is located approximately six miles from the County Courthouse and offices of the County Council. *Declaration of Sam Ryan*. The City attempted to file its Appeals of both SEPA Threshold Determinations at 4:50 p.m. on June 27, 2011, with the Whatcom County Council office after learning that the Hearing Examiner's office was closed. The County Council office refused to accept the City's SEPA Appeals to the Hearing Examiner because the Appeals needed to be filed with the County Planning Division office.

VII.

Shortly before attempting to file its Appeal with the County Council office, a representative of the City called the Council office [at approximately 4:30 p.m.] and asked a clerk about submitting Appeal documents at the Council office. The clerk was unsure and asked a Supervisor who, believing the filing was an appeal from a Decision by the Whatcom County Hearing Examiner, told the clerk the Council office could accept the Appeal. When the City attempted to file the two Appeals of the DNS issued by the County Planning Division office, the misunderstanding was corrected and the Council office refused the Appeals.

These Appeals were then filed with Whatcom County Planning and Development Services the next day, June 28, 2011.

VIII.

The Whatcom County Hearing Examiner's office does not accept Appeal filings and does not accept Appeal fees. All Appeals to the Hearing Examiner are filed with the County Planning Division office.

IX.

The City has previously properly filed a timely Appeal of a SEPA Determination of Non-Significance with the County Planning Division in *City of Bellingham v. Whatcom County and CLN LLC, et al., APL2009-0009 and APL2010-0013*.

X.

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.

Whatcom County vested its Hearing Examiner with the power to hear and decide those matters identified in the Whatcom County Code, including Appeals of SEPA-related

Determinations pursuant to Chapter 43.21C RCW and Chapter 197-11 WAC. RCW 36.70.970(1)(c); WAC 197-11-680; WCC 16.08.170(A); WCC 20.92.210(11).

II.

The Whatcom County Hearing Examiner's jurisdiction is limited to those matters over which the Hearing Examiner is given authority under Whatcom County Ordinances. WCC 20.92.110. The specific powers and duties of the Hearing Examiner are set forth in WCC 20.92.200. WCC 20.92.210(11), grants the Hearing Examiner final decision-making authority to hear SEPA Appeals, and reads as follows:

20.92.210 Final Decisions
(11) Appeals from SEPA determinations of significance, determinations of nonsignificance, and mitigated determinations of nonsignificance.

III.

WCC 16.08.170(A) requires that Appeals of SEPA Threshold Determinations to the Hearing Examiner be filed with the County Planning Division within ten days from when the Determination is final.

IV.

The Whatcom County Code does not provide the Hearing Examiner authority to extend the appeal period beyond ten days. The Hearing Examiner previously determined that he had no authority to extend a ten day SEPA appeal period. *SEPA Appeal of Building Industry Association of Whatcom County, Order to Dismiss, SEP01-0011 (Sep. 24, 2001) (Exhibit 1-4, Declaration of Karen Reich, Exh. G.*

V.

WCC 16.08.170(A) plainly requires that the appeal filing be made with the County Planning Division. Moreover, the longstanding and consistent administrative interpretation of WCC 16.08.170(A) is that Appeals must be filed with the County Planning Division regardless of the action at issue. WCC 16.08.170(A) makes no distinction between requirements for filing Appeals of SEPA Threshold Determinations linked with project specific actions or non-project actions, and the Hearing Examiner has the authority to hear both, if properly filed in a timely matter.

VI.

The Hearing Examiner does not have the authority to hear the above named Appeals as the Appeals were not filed in a timely manner. The Hearing Examiner has no authority to rule on issues or claims based in equity or to us Equitable Principals to go beyond plain statutory language. This is consistent with numerous past Decisions of the Hearing Examiner and the City did not cite authority to the contrary. The Hearing Examiner is required to implement the

ordinances as written and to exercise only the authority to which he is specifically granted. Jurisdiction to use Equitable Principals to go beyond the plain language of a statute is vested solely in the Superior Court and Appeals Court.

VII.

The City's Appeals in this matter were not timely filed and should be dismissed.

VIII.

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

Based on the Findings of Fact and Conclusions of Law entered above, the Hearing Examiner dismisses the Appeals of the City of Bellingham (APL2011-00011 and APL 2011-00012) appealing the Determinations of Non-Significance issued by the Whatcom County SEPA Responsible Official, SEP2010-00085 and SEP2010-00088.

DATED this 25th day of August 2011.

Michael Bobbink, Hearing Examiner