

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
	)	
<i>City of Bellingham</i>	)	FINDINGS OF FACT,
	)	CONCLUSIONS OF LAW,
	)	AND ORDER ON MOTION TO DISMISS

**SUMMARY OF MOTION AND DECISION**

Summary of Motion: The City of Bellingham (“City”) filed a Motion with the Whatcom County Hearing Examiner requesting dismissal of the above referenced Appeals, filed by the City. These were the City’s Appeals of two SEPA (State Environmental Policy Act RCW 43.21C) Threshold Determinations of (SEP2010-00085 and SEP2010-00088) (“DNSs”) which became final on June 15, 2011. The City contends that the Washington Growth Management Hearings Board and not the Whatcom County Hearing Examiner has jurisdiction to review its Appeals. Also, the City asserts that Whatcom County’s statutory Appeal Process is invalid as another reason why its Appeals should be dismissed.

Summary of Decision: The City’s Motion to Dismiss is denied. The facts are not in dispute. The Hearing Examiner concludes that the Hearing Examiner has jurisdiction to address an Appeal of a SEPA Threshold Determination pursuant to WCC 16.08.170(A). The Hearing Examiner does not have the authority to invalidate the Whatcom County Code, based on the City’s argument that the statutory process adopted by Ordinance is invalid because it conflicts with State law.

**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 , 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 , 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 the 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 written exhibits, and to identify and raise any disputed facts. No additional evidence or testimony was offered and no factual disputes were identified by any Party. Therefore, the Decision herein is based on the undisputed facts in the written record set forth in the admitted 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 ("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 these SEPA DNSs terminated on June 15, 2011, at which point they became final. 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; and 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, as agreed to by all Parties, was 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 DNS notices, the deadline for appeal was noted as June 27, 2011, and the location for filing was the County Planning Division. Exhibit 1-2, *Declaration of Schroeder, Exh. A-1, p.3, and Exh. A-2, p.3.* The DNSs 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.” [Emphasis added]

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.

#### 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 upon 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 after confirming the Appeals needed to be filed with the County Planning Division office.

## VII.

Shortly before attempting to file its Appeals 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.

The Hearing Examiner first considered Caitac's Motion to Dismiss for untimely filing of the Appeals in this matter by the City and granted Caitac's Motion to Dismiss by separate Findings of Fact, Conclusions of Law, and Order on Motion to Dismiss, of even date herewith. Therefore, the City's Motion to Dismiss is moot. Nonetheless, on matters of public importance which may re-occur, the Hearing Examiner has the discretion to rule on Appeals which are otherwise moot, and chooses to do so here.

## XI.

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 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. 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 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 power to hear ... "Appeals from SEPA determinations of significance, determinations of nonsignificance, and mitigated determinations of nonsignificance."

### **III.**

The City takes the position that the Washington Growth Management Hearings Board ("GMHB") has exclusive jurisdiction over SEPA Threshold Determinations when linked with a legislative action. The Hearing Examiner, however, is directed by Whatcom County Code to hear Appeals of all SEPA Threshold Determinations issued by Whatcom County. There is nothing in the Code suggesting that the Hearing Examiner can hear Appeals of Threshold SEPA Decisions relating to project actions but not legislative actions. WCC 20.92.210(11); WCC 16.08.170(A). In any case, all three of the GMHB's have ruled that exhaustion of administrative remedies requires making SEPA Appeals at the local level, where available, prior to raising the issue before the GMHB.

### **IV.**

The City also argues that WCC 20.92.245 precludes the Hearing Examiner from exercising jurisdiction over Appeals of SEPA Threshold Determinations on legislative matters. WCC 20.92.245, however, merely provides that the Hearing Examiner lacks jurisdiction to hear legislative matters, which is true. A SEPA Threshold Determination is not a legislative matter and therefore WCC 20.92.245 does not affect the Hearing Examiner's responsibility to hear and decide Appeals of SEPA Threshold Determinations as required by County Code. The Hearing Examiner has heard numerous Appeals of SEPA Threshold Determinations on proposed legislative actions, where the legislative action was taken pursuant to the Growth Management Act and ultimately appealable to the GMHB.

### **V.**

The City points out that in recent Whatcom County cases before the Growth Management Hearings Board SEPA challenges were raised without first having been appealed to the Hearing Examiner. The fact that the County or another Party did not make an argument on exhaustion of

remedies does not mean exhaustion is not required or that it cannot be raised in a future proceeding. As stated, recent Growth Management Hearings Board Decisions have required Parties to first exhaust local administrative remedies under SEPA prior to raising SEPA issues to the Board.

## VI.

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 denies the City of Bellingham's Motion to Dismiss its own Appeals (APL2011-00011 and APL 2011-00012) of the Determinations of Non-Significance issued by the Whatcom County SEPA Responsible Official, SEP2010-00085 and SEP2010-00088.*

DATED this 25<sup>th</sup> day of August 2011.

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Michael Bobbink, Hearing Examiner