

WHATCOM COUNTY HEARING EXAMINER

RE: Preliminary Long Subdivision ) LSS2000-0011  
Shoreline Substantial Development ) SHR2003-0007  
Administrative Appeal ) APL2001-0009  
Application by )  
*Derek Stebner* ) “Sleepy Hollow Subdivision”  
)  
*Concerned Neighbors* ) ORDER DENYING CONCERNED  
*of Lake Samish, Appellant* ) NEIGHBORS’ MOTION TO DISMISS

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**FINDINGS OF FACT**

**I.**

On April 24, 2009, Philip Buri, Attorney for Concerned Neighbors of Lake Samish, filed a Motion with the Hearing Examiner, requesting dismissal of the Sleepy Hollow Subdivision Application. The following exhibits were admitted in regard to this Motion to Dismiss:

Exhibits

- 1 Concerned Neighbors’ Motion to Dismiss Subdivision Application, brief dated April 24, 2009, with attachments
  - 1-1 Hearing Examiner’s Decision, Administrative Appeal, APL01-0007, dated July 25, 2001
  - 1-2 Cover Letter dated August 29, 2005, from Superior Court Judge Charles Snyder, with Memorandum Decision, cause No. 03-2-02445-3 attached
  - 1-3 Final Decision, Western Washington Growth Management Hearings Board, Case No. 03-2-0011
- 2 Declaration of Mark Herrenkohl in Support of Motion to Dismiss, dated April 24, 2009
- 3 Declaration of Service, dated April 24, 2009
- 4 Concerned Neighbors’ Statement of Supplemental Authorities in Support of Motion to Dismiss, dated June 2, 2009, with attached case law
- 5 Declaration of Service, dated June 2, 2009
- 6 Response to Motion to Dismiss Subdivision Application, dated June 5, 2009 with attached Exhibit A: Declaration of Bradley Swanson, dated June 5, 2009  
Exhibit B: Declaration of Jack Swanson, dated June 5, 2009

- 7 Declaration of Service, dated June 5, 2009
- 8 Concerned Neighbors' Reply Brief, dated June 9, 2009, with attached Reply Brief Case Law
- 9 Appellant's Supplemental Brief on Post Motion Hearing Issues, dated June 16, 2009, [Case Law stapled to Brief], with attachments:
  - 9-1 Declaration of Mark Herrenkohl in Support of Motion to Dismiss
  - 9-2 Declaration of Service, dated June 16, 2009
- 10 Applicant's Supplemental Briefing for Motion to Dismiss Subdivision Application, dated June 16, 2009, with attachments
  - 10-1 Declaration of Service, dated June 16, 2009
  - 10-2 Case Law
- 11 Appellant's Response to Applicant's Supplemental Brief, dated June 18, 2009, [Case Law provided via email], with Declaration of Service, dated June 18, 2009 [11-1]
- 12 Applicant's Response to Appellant's Supplemental Brief, dated June 19, 2009

A public hearing was held on the Motion on June 10, 2009. The record was left open after the hearing for submission of Supplemental Briefs by interested parties.

Parties of Record

Derek Stebner  
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Bellingham, WA 98225

Jack and Bradley Swanson  
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Bellingham, WA 98225

Darcy Jones  
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Philip Buri  
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Mark Herrenkohl  
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Bruce Clawson  
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Kolleen Kilpatrick  
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Bruce Harris  
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Royce Buckingham  
Civil Deputy Prosecutor

David Stalheim and Tyler Schroeder  
Planning and Development Services

Roger McCarthy  
Division of Engineering

## **II.**

On May 29, 1992, Steven LeCocq filed an application for a subdivision named Strader Place. After some initial work on the application, from February 1993 until November 1996, the project lay dormant. The LeCocqs revived the application in the summer of 1997, and a public hearing was set on the proposal for May 5, 1999.

Shortly before the May 1999 hearing, the LeCocqs cancelled it, later stating they wanted to

“attempt some major design changes.” In 2000, however, the LeCocqs sold the underlying property to Mercedes Holdings, Inc., a corporation owned and operated by Derek Stebner.

On November 27, 2000, Stebner and Mercedes Holding filed a new Long Subdivision Application for Sleepy Hollow, LSS 2000-00011. Both Whatcom County Planning and Development Services and this Hearing Examiner concluded that the new development was vested as of the date of the complete application for Strader Place Subdivision, May 29, 1992. The Hearing Examiner concluded,

The original owners of the property, the LeCocqs, obtained vested rights to proceed with their proposed subdivision when a complete application was filed in May 1992. At no time, thereafter, did the LeCocqs abandon or show an intent to abandon these vested rights. The vested rights existed and were transferred to the current property owner when the property was sold in early 2000. The current property owner has not abandoned or shown intent to abandon or relinquish the vested rights established in 1992. In spite of the nine years since the original vesting of these rights, the Appellant has not shown any legal basis which would allow the Hearing Examiner to rule that these rights have been extinguished.

Review of the Sleepy Hollow Long Subdivision Application proceeded under 1992 development regulations.

The Hearing Examiner’s Decision of July 5, 2001, on APL2001-0007, was not appealed.

From November 2000 until January 2004, the Sleepy Hollow Subdivision made its way through the planning process. Planning and Development Services ultimately approved a Mitigated Determination of Non-significance, a Shoreline Substantial Development Permit, and a Preliminary Plat.

### **III.**

During the period of time between the filing of the original subdivision in 1992 and today, there have been significant changes in the County Zoning Ordinances in the area of this subject parcel in the Lake Samish Watershed. These changes included a downzone from allowed two dwellings per acre to one dwelling per five acres. The County also designated Lake Samish a “high priority watershed” and placed it within the protection of a Water Resource Protection Overlay District, Water Resource Special Management Area, and Stormwater Special District.

### **IV.**

In January 2004, the Hearing Examiner began the open record hearing on the proposed subdivision, shoreline permit, and the SEPA Appeal filed by Concerned Neighbors. The proceedings were continued by the Hearing Examiner over an issue regarding proposed water rights. The

Applicant, Derek Stebner, requested time to submit additional information. The hearing was set to reconvene on February 11, 2004. At the Applicant's request, this hearing was rescheduled to April 7, 2004, and again rescheduled to June 16, 2004.

On May 19, 2004, the Applicant requested the hearing be postponed indefinitely, to be rescheduled at some point for a date in July or August 2004.

There was no request from the Applicant to reset the hearing. The Hearing Examiner did not set a new hearing date. Recently, Planning Staff and the Applicant indicated that the matter is ready or nearly ready for an additional hearing date. At this point, Concerned Neighbors filed a Motion requesting dismissal of the pending subdivision because of the more than five year period which has passed since the original public hearing on the matter.

During this period of more than five years, there has been on-going contact between the Applicant and the Whatcom County Planning and Development Services Department. These somewhat sporadic contacts are outlined in affidavits submitted by the Applicant. Whatcom County Planning and Development Services Department has indicated that the contacts indicated by the Applicant did take place. The Applicant has not exhibited an intent to abandon the application.

Whatcom County Planning and Development Services Department has taken the position that the current Applicant still has vested rights under the 1992 Zoning and Land Use Regulations in effect at the time of the original application. Planning's position is that there is no legal remedy available to allow Planning to decline to further process the application. Both the Planning Department and the Hearing Examiner have expressed concern over the fact that this subdivision proposal has now been in effect for more than seventeen years.

## V.

The Concerned Neighbors of Lake Samish claims to be injured on this on-going process, alleging prejudice from the delay based on Concerned Neighbors having to reorganize, raise money for costs and Attorneys' fees, and gather evidence to again prepare for a hearing.

The Applicant again argues that their vested rights remain in effect and cannot be extinguished by the Hearing Examiner because the Hearing Examiner lacks the jurisdiction and/or statutory authority to grant such a Motion.

## VI.

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 Applicant's vested rights in Subdivision Approval are a result of RCW 58.17.033, which was in effect at the time the original application was filed, and which reads as follows:

A proposed division of land, as defined in RCW 58.17.020, shall be considered under the subdivision or short subdivision ordinance, and zoning or other land use control ordinances, in effect on the land at the time a fully completed application for preliminary plat approval of the subdivision, or short plat approval of the short subdivision, has been submitted to the appropriate county, city, or town official.

The Legislature has not enacted a statute which would allow divesting of the vested rights of a subdivision after a certain period of time.

Whatcom County has no specific ordinance which would allow dismissal of a vested subdivision application based on the length of time the subdivision application has been pending.

The cases cited by Concerned Neighbors do indicate that the State Legislature, and perhaps, the Whatcom County Council would have the authority to pass a statute or ordinance which eliminates the vested interest in a subdivision application after a certain period of time or under certain circumstances. However, neither has done so.

In 2009, the Whatcom County Council passed an Ordinance which modifies WCC 21.05.037, and requires the Hearing Examiner, after the open record hearing starts, to take the following steps if the Hearing Examiner finds that the applicable criteria for Preliminary Long Subdivision Approval have not been met. The options given to the Hearing Examiner are as follows:

- (3) If the hearing examiner finds that the above criteria are not met, the hearing examiner may take one of the following actions:
  - (a) Specify the issues that require additional information and give the applicant a period of time up to three months to address those issues and return to the hearing examiner for further consideration.
  - (b) Issue a conditional approval specifying the actions needing to be taken to resolve minor nonconformance with the standards and criteria, and granting a specific limited time, typically 30 days, within which the applicant is to return to the hearing examiner for review.

(c) Deny the application

Had this Ordinance been in effect in 2005, when the original hearing on the Sleepy Hollow Subdivision was held, the Hearing Examiner would have had to either deny the application or give the Applicant additional time of no more than three months to address the issues of concern and to return to the Hearing Examiner for further consideration. In the future, it is unlikely that applications for Long Subdivision Approval will be allowed to languish for an extended period of time, as has happened in this matter.

**II.**

Concerned Neighbors has provided no statutory authority for the Hearing Examiner to dismiss this pending subdivision. Instead, Concerned Neighbors has suggested that the Hearing Examiner use equitable theories, such as laches or abandonment, as a basis for granting the Motion to Dismiss.

Equitable remedies are in the sole jurisdiction of the Superior Courts and Appellant Courts. The Hearing Examiner does not have the authority to rule on the basis of the Law of Equity. The Hearing Examiner is a decision-maker with a very specific and limited jurisdiction. That jurisdiction is limited to making decisions based on statutory law.

The Applicants do make a strong argument that vested rights under RCW 58.17.033 can be limited by the State Legislature or the Whatcom County Council. However since no limiting ordinances have been adopted and since the Courts have not given the Hearing Examiner any kind of authority to limit the Vested Rights Doctrine, the Hearing Examiner is left without the authority to dismiss a Long Subdivision Application which has vested, pursuant to RCW 58.17.033, based on how long the application has been pending.

If the vested rights in Long Subdivision Applications granted by RCW 58.17.033 can be extinguished without legislative authority, based on equitable remedies, such as laches or abandonment, such action would lie in the jurisdiction of the Courts and not the Hearing Examiner. The Motion to Dismiss should be denied.

**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**

*For the reasons set forth above, the Whatcom County Hearing Examiner denies the Motion of the Concerned Neighbors of Lake Samish. This decision is a final decision of the Hearing Examiner regarding the authority of the Hearing Examiner to dismiss pending, vested long subdivisions.*

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 2<sup>nd</sup> day of July 2009.

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Michael Bobbink, Hearing Examiner