

**BEFORE THE HEARING EXAMINER
FOR THE CITY OF BREMERTON**

In The Matter of the Appeal of)	No. BP16-00061
)	
William Broughton, on behalf of)	
Buckingham Properties of USA, Inc.)	
)	
Of the City's Denial of a Preliminary)	FINDINGS, CONCLUSIONS, AND
<u>Plat Extension</u>)	DECISION

SUMMARY OF DECISION

The appeal of the City's decision denying a request for a one-year plat extension is **DENIED**. Bremerton Municipal Code (BMC) 20.12.060(k) requires an applicant to demonstrate that required infrastructure improvements for an entire proposal would be complete within the one-year extension requested and that the extension requested is the minimum necessary to finalize the necessary infrastructure/improvements required for final subdivision approval.

Here, the Appellant acknowledges that it would be impossible to complete all infrastructure improvements for the proposal within one year. The Appellant argues, instead, that BMC 20.12.060(j) applies retroactively to the proposal, such that the first phase of the project could be completed within the timeline allowed by the one-year extension. BMC 20.12.060(j), however, does not apply to the proposed plat. Further, retroactive application of this ordinance cannot occur absent a clear expression of legislative intent to do so, which is lacking here.

SUMMARY OF PROCEEDINGS

Hearing Date:

The Hearing Examiner held an open record hearing on the appeal on October 31, 2016. The record was left open to allow the parties to submit additional evidence related to critical areas on-site. Following the submission of additional evidence, the Hearing Examiner requested clarification from the parties on the scope of the appeal. The parties provided a joint statement addressing the scope of the appeal and the record closed on November 21, 2016.

Testimony:

The following individuals presented testimony under oath at the open record appeal hearing:

Appellant's Witness:

Jeffrey Pantier, P.E.
Michael Oh

City Witnesses:

Allison Satter, City Planner

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Attorney Bill Broughton represented the Appellant; Attorney Kylie Purves represented the City

Exhibits:

The following exhibits were admitted into the record:

Appellant Documents:

- A-1. Technical Memorandum from Jonathan Kemp, EnCo, to Michael Oh, dated October 4, 2016, with five attachments
- A-2. West Hills Project Permit Summary, undated
- A-3. WA State Department of Natural Resources, Forest Practices Application/Notification – Notice of Decision, issued August 30, 2007
- A-4. WA Department of Fish and Wildlife Hydraulic Project Approval, issued November 2, 2006
- A-5. Letter from Lynn Fowler and Paul Wandling, P.E., to Triway Enterprises, dated May 1, 2008

City Documents:

- C-1. Hearing Examiner Decision on West Hills Preliminary Plat and Residential Cluster Development (No. BP06-00040), dated August 8, 2006
- C-2. Application for Plat Extension, received June 22, 2016
- C-3. Staff Decision on Buckingham Properties Preliminary Plat Extension (No. BP16-00061), dated August 4, 2016, with attachments
- C-4. Administrative Appeal, BP16-00061, received August 12, 2016
- C-5. Text of BMC 20.12.060
- C-6. Ordinance No. 5261, passed November 5, 2014
- C-7. City Planning Commission Staff Report, dated September 16, 2014, with attachments
- C-8. Planning Commission Minutes of Regular Meeting, dated September 16, 2014
- C-9. Planning Commission Minutes of Regular Meeting, dated July 15, 2014
- C-10. PowerPoint presentation for July 15, 2014, Planning Commission Regular Meeting
- C-11. Learn English, modal verbs, printed September 19, 2016
- C-12. Plat Plans (4 Sheets), received July 6, 2006

Orders and Pleadings

- Hearing Examiner's Pre-Hearing Order, dated August 19, 2016
- Brief of Appellant, dated September 12, 2016, with attachments
- Appellant's Motion to Continue, dated September 19, 2016
- City's Response to Brief of Appellant, dated September 19, 2016
- City of Bremerton's Witness List and Exhibit List, dated September 19, 2016
- Hearing Examiner's Response to Appellant's Motion to Continue and Revised Pre-Hearing Order, dated September 21, 2016
- Buckingham Properties Witness List and Exhibit List, dated October 22, 2016

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- Amended City of Bremerton’s Witness List and Exhibit List, dated October 27, 2016
- City’s Review of Appellant’s Ex. A-1, dated November 10, 2016
- Hearing Examiner’s Post-Hearing Request, dated November 10, 2016
- Parties’ Joint Response to Hearing Examiner’s Post-Hearing Request, dated November 14, 2016

The Hearing Examiner makes the following Findings and Conclusions based upon the admitted testimony and exhibits:

FINDINGS

Background

1. On August 8, 2006, the City of Bremerton Hearing Examiner granted approval for the West Hills Preliminary Plat and Residential Cluster Development (No. BP06-00040). The proposal called for subdividing approximately 203 acres of land into 629 lots—including townhome lots, detached single-family residential lots, and open spaces—in six phases over a five-year period. Condition 20 of the Hearing Examiner’s decision explicitly required that a final plat meeting applicable development standards and conditions be submitted for City of Bremerton (City) approval within five years of the date of preliminary plat approval. The legislature, however, subsequently revised RCW 58.17.140, allowing certain existing preliminary plats 10 years for project completion. Accordingly, the West Hills Preliminary Plat and Residential Cluster Development approval expired on August 8, 2016. *Exhibit C-1; Exhibit C-3.*
2. After receiving preliminary plat approval, the former owner (Triway Enterprises Olympic Powers Group, LLC) obtained necessary permits to begin work on plat improvements, including: Hydraulic Project Approval from the Washington State Department of Fish and Wildlife (WDFW), dated November 2, 2006; a Forest Practices Application from the Department of Natural Resources (DNR), dated August 30, 2007; and a grading permit for Phases I and II of the proposal, issued by the City, dated August 14, 2007. Some clearing and grading work occurred on the proposal but, in 2008, work stopped because of the recession. *Exhibit C-3; Exhibit A-2; Exhibit A-3; Exhibit A-4; Exhibit A-5.*
3. New owners, Buckingham Properties of USA, Inc. (Appellant), recently acquired the property. Because the previous grading permit had expired, the Appellant submitted a new site development permit on June 15, 2016, for clearing and grading of Phases I and II of the proposal. On June 22, 2016, the Appellant also submitted an application for a plat extension, under BMC 20.12.060(k). *Exhibit C-2; Exhibit C-3.*
4. BMC 20.12.060(k) provides that, should extenuating circumstances arise, an applicant may apply for a one-year extension of plat approval if the following criteria are met:
 - (1) The application for an extension is filed at least thirty (30) days prior to the preliminary subdivision expiration; and

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- (2) No project may receive more than two (2) extensions for the life of the project. This applies to standard and phased projects. Each extension shall not be granted for more than a single, one (1) year extension; and
- (3) The applicant can demonstrate tangible progress and reasonable diligence being made toward infrastructure completion such that it is clear that project completion will occur within the timeline of the extension requested (no more than one (1) year); and
- (4) The applicant demonstrates that the extension requested is the minimum necessary to finalize the necessary infrastructure/improvements required for final subdivision approval; and
- (5) The director finds there are no substantial changes in conditions that would render approval of the extension contrary to public health, safety or general welfare.

BMC 20.12.060(k).

5. On August 4, 2016, the City issued its decision denying the Appellant's request for a plat extension. That decision stated that the proposal would not satisfy the third and fourth criteria of BMC 20.12.060(k), specifically noting:
 - The Appellant indicated that all necessary infrastructure for Phase I of the proposal would be complete within one year.
 - Installation of culverts would be subject to timing restrictions to protect fish and would severely limit the Appellant's ability to complete infrastructure improvements within one year.
 - Given the limited nature of the permits submitted for development of the proposal and timelines under which such infrastructure must be constructed, the City is unable to make a finding of reasonable diligence in regards to pursuing infrastructure completion.
 - BMC 20.12.060(k)(3) requires that an applicant demonstrate that an entire proposal can be finished within the one-year extension timeline – not just a single phase of a multi-phase project.
 - The Appellant has not demonstrated how the proposed one-year extension is the minimum needed to complete infrastructure/improvements for the entire plat.

*Exhibit C-3.*¹

Appeal

6. On August 11, 2016, the Appellant timely appealed the City's decision to the Hearing Examiner, arguing that the City erred in denying the plat extension request because the

¹ The City's decision also expressed concerns that substantial changes related to the regulation of critical areas have occurred since 2006 that could impact the proposal. The parties later agreed that the Hearing Examiner need not address this issue. *Parties' Joint Response to Hearing Examiner's Post-Hearing Request, dated November 14, 2016.*

Appellant demonstrated tangible progress and reasonable diligence in completing infrastructure for Phase I of the proposal and that a one-year extension is the minimum necessary to finalize the necessary infrastructure/improvements required for final subdivision approval of Phase I. The Appellant also argued that code section BMC 20.12.060(j) is applicable to the proposal and, if the City applied that code provision, the Applicant could complete all plat improvements in the allowed timeframe. *Exhibit C-4.*

7. BMC 20.12.060(j), adopted in the fall of 2014, states that phased development may be permitted with a preliminary formal subdivision application, provided all of the following criteria are met:

(1) Phasing Timelines. The first phase submitted for final subdivision approval must be completed prior to the expiration of the preliminary plat (five (5) years or as otherwise defined by RCW 58.17.140). For each subsequent phase, required infrastructure shall be completed and a final subdivision application shall be submitted within two (2) years of the date of the previous phase's final subdivision approval. No project shall include more than a maximum of four (4) phases. Provided no extensions are granted, this allows for a total of eleven (11) years for project completion.

(2) Phasing Plan. A phasing plan must be submitted and approved with the preliminary subdivision application and must include a minimum of the following materials:

- (i) The proposed time limits for each phase shall be clearly indicated; and
- (ii) The plan shall identify the number, density of lots, open space areas, parks, roads, and stormwater facilities to be located and developed in accordance within each phase. Said feature location and size shall be clearly identified on the plans; and
- (iii) The plan shall include an analysis and supplemental plans as necessary that identify how each phase or as established in RCW 58.17.140 will adequately provide for services such as roadway design, utility, and public service systems, safe walking routes, stormwater, etc.

BMC 20.12.060(j).

8. Both the Appellant and City agree that the following issues are presented by the appeal:
- Whether BMC 20.12.060(j) applies to Appellant's project;
 - If BMC 20.12.060(j) does apply, whether criteria (3) and (4) are met when BMC 20.12.060(k) is read with BMC 20.12.060(j).

Parties' Joint Response to Hearing Examiner's Post-Hearing Request, dated November 14, 2016.

Briefs

9. Attorney William Broughton submitted a brief on behalf of the Appellant. The Appellant argues that the plain language of BMC 20.12.060(j) and its legislative history demonstrate that the ordinance should be applicable to the application as it was intended to apply to existing preliminary plats approved before the ordinance was passed. Specifically, the Appellant argues that the reference to RCW 58.17.140 in BMC 20.12.060(j) shows that the ordinance was intended to apply to existing plats because RCW 58.17.140 addresses timing requirements for plats approved before January 1, 2015, not just new proposals. It also argues that legislative history supports this interpretation because City staff testified before the Planning Commission at various points prior to the adoption of BMC 20.12.060(j) that subdivision proposals experiencing hardships should receive additional time for project completion. Finally, the Appellant argues that the prohibition in the ordinance against approval of projects with more than four proposed phases should not apply because the Appellant would limit the additional time for project approval to that allowed for a four-phase project, consistent with BMC 20.12.060(j). The brief specifically notes, however, that “[i]f the phasing provisions do not apply . . . it would be impossible for the applicant to complete the entire project within one (1) year.” *Brief of Appellant*.
10. Attorney Kylie Purves submitted a brief on behalf of the City. The City argues that, contrary to the Appellant’s assertions, the plain language of BMC 20.12.060(j) shows that it was not intended to apply to existing applications, that even if it were applicable the Appellant’s proposal would not satisfy the criteria for approval, and that the legislative history establishes that the Planning Commission only intended the ordinance to apply to future proposals. Specifically, the City argues that the language of the ordinance does not indicate that it would have retroactive applicability, especially because the ordinance states that phased development “may be permitted”. The City points out that “may” is a modal verb used to show that something is possible in the future. It also argues that the West Hills Preliminary Plat was approved for six phases and BMC 20.12.060(j)(1) explicitly prohibits projects from having more than four phases. Finally, the City notes that specific language from the staff report considered by the City Council at the time the phasing ordinance was enacted recommended that project phasing beyond five years be allowed for “new subdivision applications,” showing that legislative history supports the City’s interpretation of the inapplicability of the ordinance. *City’s Response to Brief of Appellant, dated September 19, 2016*.

Argument and Testimony

11. Mr. Broughton, representing the Appellant, reiterated the arguments made in the Appellant’s brief at the open record appeal hearing. He stressed that, if a one-year extension were granted, the Appellant would complete Phase I of the proposal within one year and the rest of the proposal as allowed by the phasing timeline set out in BMC 20.12.060(j). *Argument of Mr. Broughton*.

12. Jeff Pantier, P.E., testified for the Appellant about his work on the proposal. He stated that he helped develop the preliminary plat application materials for the plat that was approved in 2006 and explained how the original six phases of development were planned. He noted that the former property owner planned on obtaining final plat approval after completion of each phase, not the entire project. Mr. Pantier testified that work on the proposal stopped in May of 2008 because of the recession but, at that point, the former owner had obtained all necessary permits to move forward with Phases I and II of the proposal. After recently becoming re-involved with the proposal, Mr. Pantier resubmitted permit requests to WDFW for Hydraulic Project Approval and DNR for a Forest Practices Application because these permits had expired. He also submitted a request for a grading permit to the City because the previous grading permit had expired. Mr. Pantier testified that, because the City denied the request for the plat extension, it did not issue a grading permit and, because of this, WDFW and DNR did not act on the other permit requests. He stressed that, if the City granted a one-year extension, Phases I and II of the proposal could be completed within one year and that the final four phases of the proposal could be finished within four years. *Testimony of Mr. Pantier.*
13. On cross-examination, Mr. Pantier acknowledged that the Appellant would need a one-year extension to complete the first phase of the proposal and that the phasing provisions of BMC 20.12.060(j) would need to apply for completion of the rest of the project. *Testimony of Mr. Pantier.*
14. Michael Oh, an associate of the Appellant, testified that no financial issues are present to hinder the Appellant from moving forward with the proposal. *Testimony of Mr. Oh.*
15. City Senior Planner Allison Satter testified that, under BMC 20.12.060(k)(3), a one-year extension may only be granted if an applicant shows that the entire proposal could be completed within one year, not just a single phase of development. She testified that the City has consistently interpreted the ordinance this way since it was passed² and has issued two extensions under BMC 20.12.060(k) where the City expects that proposals will be completed within the one-year timeframe. Ms. Satter noted that, if a one-year extension and phasing were granted to the Appellant's proposal, it is possible that final plat approval for the West Hills project would not occur until 22 years after preliminary plat approval was first granted—something the City never intended in adopting the new plat extension and phasing provisions of the code. *Testimony of Ms. Satter.*
16. On cross-examination, Ms. Satter acknowledged that a phased proposal could apply for an extension but the whole proposal would still need to be completed within the one-year timeline. She also noted that processing a new plat application often takes four to six

² The City Council passed Ordinance No. 5261, which added BMC 20.12.060(j) and (k) to the code, on November 5, 2014. *Exhibit C-6.*

months but that, for this application, much of the information submitted could be reused and resubmitted, thus significantly reducing the time the City would need to review a new application. *Testimony of Ms. Satter.*

CONCLUSIONS

Jurisdiction

The Hearing Examiner has jurisdiction over this matter, under Chapter 2.13 BMC.

Review Authority

The Appellant has the burden of proof to show that the City erred when it denied the Appellant's request for a one-year extension under BMC 20.12.060(k). *See, Buechel v. State Dept. of Ecology*, 125 Wn.2d 196 (1994); *RCW 36.70C.130(1)(b)*. The Hearing Examiner's duty is to review the entire record before him to determine whether the Appellant has met this burden. To properly review the City's action, the Hearing Examiner must decide what facts are important to make a decision, determine those facts with reference to specific exhibits or testimony, draw conclusions from those facts, and make a decision based on those conclusions. *See Weyerhaeuser v. Pierce County*, 124 Wn.2d 26 (1994).

The Hearing Examiner must accord substantial deference to the City's interpretation of its own ordinances. *RCW 36.70C.130(1)(b)*; *Nw. Sportfishing Indus. Ass'n v. Washington Dept. of Ecology*, 172 Wn. App. 72 (2012); *Timberlake Christian Fellowship v. King County*, 114 Wn. App. 174, 180 (2002). The Hearing Examiner reviews the City's decision to determine if it is clearly erroneous, after allowing for such deference as is due the construction of a law by the agency with expertise. Under the "clearly erroneous" standard of review, the Hearing Examiner examines the entire record in light of the policy set forth in the ordinance and reverses the decision only if he has a definite and firm conviction that the City made a mistake. *Isla Verde International Holdings, Inc. v. City of Camas*, 146 Wn.2d 740, 751 (2002). When applying the clearly erroneous standard, the Hearing Examiner may not substitute his own judgment for the judgment of the City. *See Buechel*, 125 Wn.2d at 202.

Conclusion Based on Findings

The City did not err in determining that the Appellant's request for a one-year extension of the preliminary plat should be denied. The plain language of BMC 20.12.060(k)(3) states that "project completion" must be achievable within the one-year extension timeline—not completion of the first phase of a multi-phase project. Moreover, the plain language of BMC 20.12.060(j) and legislative history clearly reveal that the City Council did not intend that the ordinance have retroactive effect.

BMC 20.12.060(k)(3) clearly states that "tangible progress" and "reasonable diligence" toward infrastructure completion must be shown "such that it clear that project completion will occur within the timeline of the extension requested." *Project completion* – not completion of the individual phase of a multi-phase proposal. As the Washington Supreme Court has stated, "[i]f a

statute is clear on its face, its meaning is to be derived from the language of the statute alone.” *Kilian v. Atkinson*, 147 Wn.2d 16, 20 (2002). Moreover, as evinced by Ms. Slatter’s testimony, the City has consistently applied this interpretation of BMC 20.12.060(k)(3) since this code section was adopted by the City Council in November 2014. As noted above, the Hearing Examiner must accord substantial deference to the City’s interpretation of its own ordinances. Here, the City’s interpretation of its own ordinance, especially as it conforms to a plain language analysis of the ordinance itself, deserves deference.

While it is clear that the Appellant would not be able to complete the entire proposal within one year, this does not end the dispute the Appellant has with the City. The Appellant also argues that BMC 20.12.060(j) is applicable and that this phasing provision, when read together with BMC 20.12.060(k), would allow for completion of only one phase of the proposal within the timeline for a one-year extension thus providing the Appellant at least six more years in which to complete the final five phases of the proposal.

However, a plain reading of BMC 20.12.060(j) does not support the Appellant’s assertions that the ordinance is applicable to this proposal. The ordinance expressly states that phased projects should “include a maximum of four (4) phases.” Here, the West Hills Preliminary Plat was approved for six phases.

Legislative history also argues against the Appellant’s interpretation of the applicability of BMC 20.12.060(j). While City staff clearly testified on multiple occasions that the recession had created a need to allow for extra time to complete existing proposals, this fact alone does not support the Appellant’s assertions that the new phasing ordinance should apply to preexisting proposals. On the contrary, the staff report prepared for the Planning Commission’s September 16, 2014 meeting explicitly states that the Commission should recommend that the City Council “[a]dd language to allow for project phasing beyond 5 years for *new* subdivision applications.” *Exhibit C-7 (emphasis added)*.³

Finally, retroactive application of an ordinance has long been disfavored under Washington law. *See, e.g., In re Estate of Fotheringham*, 183 Wash. 579 (1935) (“It is undoubtedly the rule in this state that retroactive statutes are generally regarded with disfavor, and unless it clearly appears that such was the legislative intent, the court will not give the statute a retroactive effect.”); and *Corak v. Department of Labor & Indus.*, 2 Wn. App. 792 (1970) (“A statute is deemed to operate

³ In its brief, the Appellant stresses that the reference to RCW 58.17.140 in BMC 20.16.020(j) provides strong support for the idea that the City Council intended the ordinance to apply to existing applications as well. RCW 58.17.140, however, has been codified since 1969 and primarily addresses timing requirements that cities or counties must adhere to in approving or denying a preliminary plat application. During the recession, RCW 58.17.140 was twice amended to allow an applicant additional time to complete preliminary plat improvements for existing proposals. But the mere reference to RCW 58.17.140 in the City’s phasing ordinance does not require the Appellant’s interpretation that retroactivity of the ordinance was intended. A mere reference to the statute alone does not qualify as clear evidence of a legislative intent to apply an ordinance retroactively.

prospectively unless the legislature clearly manifests its intent that it operate retroactively.”). Nothing in the plain language of BMC 20.12.020(j) itself or the evidence of legislative intent provided by both parties indicates that the City Council intended retroactive application of the new phasing ordinance to previously approved proposals.

DECISION

The City did not err when it determined that, under BMC 20.12.060(k), the entire West Hills Preliminary Plat project could not be completed within one year requiring denial of the extension request, nor did it err in determining that BMC 20.12.060(j) is inapplicable to the project. Therefore, the appeal is **DENIED**.

DATED this 2nd day of December 2016



THEODORE PAUL HUNTER
Hearing Examiner
Sound Law Center