

BEFORE THE TOWN OF LACONNER HEARING EXAMINER

In the Matter of the Appeal of an)	
Administrative Interpretation)	
) SSDP LU07-01SH	
)	
In Re:)	
LaConner Associates, LLC) FINDINGS OF FACT,	
) CONCLUSIONS OF LAW	
) and ORDER	
)	

FINDINGS OF FACT

1. This matter involves an appeal by LaConner Associates LLC (Appellant) of a letter from the Town of LaConner (Town) Planner dated June 15, 2010. Pursuant to notice an open record public hearing was held before the undersigned hearing examiner on October 28, 2010.

2. At that October 28, 2010 hearing the Appellant presented testimony and a variety of documents including a supplemental notice of appeal with attachments, and a response to staff report dated October 28, 2010 along with a notebook containing exhibits tab 1-17. All of this material was admitted into the record along with the staff reports of April 19, 2007 and October 14, 2010. Additionally, any letters, reports, e-mails, etc. that are referenced herein have been admitted into the record.

3. The appeal involves a determination by the Planner that the shoreline substantial development permit (SSDP) #LU70-01SH, issued 5/1/07 and filed with Department of Ecology (DOE) on May 7, 2007, took effect on May 29, 2007 following the appeal period.

4. Shortly after granting of the SSDP the Town and the Appellant entered into a development agreement dated May 15, 2007 with an expiration date of May 15, 2014.

5. The May 1, 2007 SSDP incorporated the conditions and provisions of SP2000-41 and the revisions thereto issued on August 22, 2006

6. The shoreline permit 2000-41 provided as condition no. 3 that no encroachments on Town right of way could continue to exist now or in the future.

7. On March 25, 2008 the Town adopted ordinance 1006 which by its terms took effect "immediately upon publication." The ordinance recited notices, hearings and requirements concerning the vacation petition submitted by Appellant under the provisions of RCW 35.79.010.

8. A subsequent petition for vacation was filed and a public hearing held on June 8, 2010. Both the Planner and the Town Attorney opined that the new petition proposal did not comply with the provisions of the LaConner Municipal Code (LCMC) and RCW. The Council passed the motion 4-1. Ultimately ordinance 1051 was adopted by the Town Council on July 27, 2010.

9. By its provisions ordinance 1006 set forth conditions to be fulfilled before the actual vacation took effect. Chief among these conditions was the payment of \$175,000. Appellant did not fulfill the conditions of the ordinance and continued to negotiate with the Town.

10. Since ordinance 1006 expired within a one-year time period, if the conditions were not met, the Town subsequently adopted a similar ordinance 1031 to "amend ordinance 1006." Ordinance 1031 was adopted August 11, 2009 and extended the original terms and conditions to September 25, 2009.

11. According a letter from Appellant dated May 7, 2009 a meeting occurred March 13, 2007 between Mr. Jolley, Allen Edison, Mayor Hayes and Planner John Doyle. At that meeting the Appellant requested an interpretation of RCW 90.58.143 (Shoreline Management Act (SMA)) on whether an extension of the SSDP from 2007 was necessary given the issuance date of May 2, 2007. Appellant contended that on March 13, 2007 the two year time period had not yet commenced because the street vacation had not been completed and thus there was no opportunity to apply for a building permit.

12. The May 7, 2009 letter further requested the Planner that "if your interpretation of the code required an extension that it be granted." Appellant's claim that no extension request was made is without merit.

13. The Appellant further sent an e-mail May 14, 2009 to the Planner reiterating the SMA .143(4) provision that the two-year time period for commencement had not started because a building permit application had not yet been issued. There was never an application for a building permit.

14. By letter dated April 17, 2009 addressed to Appellant the Planner set forth his interpretation of the commencement date as May 29, 2007. The Planner noted a request for extension "due to economic hardship" and granted the extension from May 29, 2009 to May 29, 2010. The letter further stated that "Construction must commence on this project prior to May 29, 2010 or Shoreline Permit LU70-01SH will expire." A copy of the letter was sent to DOE in accordance with LCMC and SMA provisions.

15. On June 15, 2010 the Town issued a letter to Appellant noting that construction had not commenced by May 29, 2010 and that the SSDP was now expired under the terms of LCMC 10.10.550.

16. An appeal of the June 15, 2010 administrative decision was filed June 25, 2010. The Town conceded that if the timing of the appeal was correct the procedural elements had complied with LCMC 15.12.130.

17. Any conclusion herein which may be deemed a finding is hereby adopted as such.

CONCLUSIONS OF LAW

1. The notice provisions of state and local requirements for this hearing have been met.
2. The hearing examiner has authority for administrative interpretations under LCMC 15.12.130:
 - (1) *The hearing examiner shall hear and make a final decision with respect to all appeals of decisions made by the planning director pursuant to the town's land use control ordinances or the public works director pursuant to the town's utility and street development standards. Any such appeals must be filed with the clerk-treasurer no later than 10 days after date of service of the written administrative decision. Any such appeal shall contain the filing fee and, at a minimum, the following information:*
 - (a) *Name, address and daytime telephone number of the appellant and/or any representative;*
 - (b) *The decision or order, or part(s) thereof, being appealed;*
 - (c) *A precise statement as to why the appellant feels himself or herself aggrieved;*
 - (d) *A statement of the relief requested;*
 - (e) *A statement of any applicable legal authority.*
 - (2) *The filing fee must accompany the filing for the appeal for the examiner to acquire jurisdiction over the matter."*
3. An appeal is defined under LCMC 15.10.090 as a "request for reconsideration of a decision made as a result of an interpretation of any provision of this code."
4. Unfortunately LCMC 15.12 does not specify the nature of the appeal review by the Hearing Examiner, nor the burden of proof, nor the standard of review for an administrative appeal.
5. Although not specified in the code, it is the burden of Appellant to demonstrate both facts and legal interpretation that the Planner incorrectly interpreted the SMA and SMP in determining the SSDP had expired. The parties treated this hearing as a *de novo* open record hearing under the provisions of LCMC. Although not specified in LCMC the definitional reference to "reconsideration" leads to the conclusion that a certain amount of deference to the Planner's interpretation of LCMC provisions is accorded. See *Hayes v. Yount*, 87 Wash.2d 280 (1976).
6. The Town contends that a challenge to the interpretation of the effective date of May 29, 2010 should have occurred after the letter of April 17, 2009. The Town is correct.

7. Appellant contends that no request for an extension was ever made. That contention is rebuked by specific language in Appellant's May 7, 2009 letter requesting both an interpretation and an extension if needed. Appellant's reliance on LCMC 15.135.140 is misplaced because that section deals with permit revocations, not permit expiration.
8. If there is jurisdiction for a review of the code interpretation that led to the Planner's interpretation that the SSDP has expired, Appellant has failed, under any standard of review, to show the Town's position is incorrect. The main thrust of the appeal of the June 15, 2010 letter involves the Planner's interpretation of the SMP (LCMC 10.10.550).
 - (1) *The following time limits shall apply to all substantial development, conditional use or variance permits:*
 - (a) *Construction shall be commenced or, where no construction is involved, the use or activity shall be commenced within two years of the effective date of the shoreline permit; provided, that the town may authorize a single extension for a period not to exceed one year based on reasonable factors, if a request for extension has been filed before the expiration date and notice of the proposed extension is given to parties of record and the Department of Ecology.*
 - (b) *Authorization to conduct development activities shall terminate five years after the effective date of the shoreline permit; provided, that the town may authorize a single extension for a period not to exceed one year based on reasonable factors, if a request for extension has been filed before the expiration date and notice of the proposed extension is given to parties of record and the Department of Ecology.*
 - (2) *The effective date of a shoreline permit shall be the date of the last action required on the shoreline permit and all other government permits and approvals that authorize the development to proceed, including all administrative and legal actions on any such permit or approval. It is the responsibility of the applicant to inform the town of the pendency of permit applications filed with agencies other than the town and of any related administrative and legal actions on any permit or approval. If no notice of the pendency of other permits or approvals is given to the town prior to the date established by the shoreline permit or the provisions of this section, the expiration of a permit shall be based on the date of the shoreline permit.*
 - (3) *When permit approval is based on conditions, such conditions shall be satisfied prior to occupancy or use of the structure or prior to commencement of a nonstructural activity; provided, that an alternative compliance limit may be specified in the permit.*
 - (4) *Revisions to permits under WAC 173-27-100 may be authorized after the original permit authorization has expired under subsection (1) of this section; provided, that this procedure shall not be used to extend the original permit time requirements or to authorize substantial development after the time limits of the original permit.*
 - (5) *The town shall notify the Department of Ecology in writing of any change to the effective date of a permit, as authorized by this section, with an explanation of the basis for approval of the change. Any change to the time limits of a permit*

other than those authorized by this section shall require consideration of a new permit application.

This code provision is a mirror of SMA RCW 90.58.143.

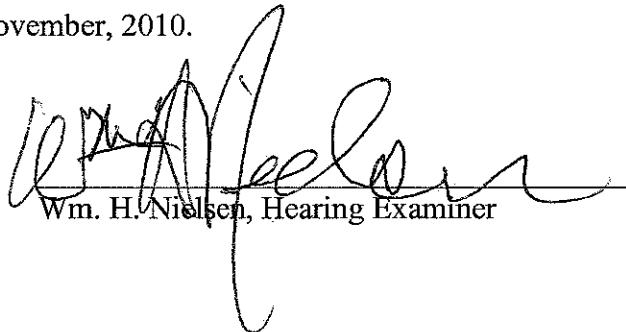
9. As most clearly demonstrated in Appellant's May 7, 2009 letter to the Planner, Appellant's contention is that a building permit was still required and Appellant was unable to complete that action until the Town completed the street vacation portion. Appellant's contentions include a reiteration of the claim that the street vacation portion of the development agreement was a necessary "approval" to even applying for the government approved building permit. The Town contends that the SMA and SMP provisions do not allow for inaction by the permit holder. The Town recognizes that shoreline development may require multiple permits. A permit is flexible if any required permits or administrative actions are pending. The Town contends that Appellant did not give notice of pendency of other permits or approvals which also require the expiration date to be based on the date of the permit itself.
10. Appellant did not present evidence of any other agency permits or approvals necessary to qualify for a different effective date.
11. The provisions of the SMA and the SMP are essentially the same. If there is any greater restriction in the SMP, the approved SMP takes precedence over the SMA.
12. The essential portions of LCMC 10.10.550 as they relate to these facts are as follows:
 - (1) (a) directs that "construction shall be commenced...within two years of the effective date of the shoreline permit," unless a one-year extension was granted.
 - (2) The "effective date" of the SSDP is defined as both the "last action required" on the SSDP and "all other government permits and approvals that authorize the development to proceed, including all administrative and legal actions on any such permit or approval. That paragraph continues with a requirement that the Appellant inform the Town of the pendency of permit applications "filed with agencies other than the Town..."
13. While the Town relies upon the concluding part of subsection (2) the plain language of that notification requirement is for "agencies other than the Town". Under these facts the Appellant was not required to notify the Town of pending applications for a street vacation or a building permit.
14. On March 25, 2008 the Town adopted ordinance 1006 to vacate a portion of First Street. By its terms the "ordinance shall take effect immediately upon publication", which occurred shortly thereafter.

15. By its terms the Town set forth conditions that needed satisfaction before the “vacation” would become effective. A lengthy delay and inaction allowed the expiration of the ordinance within the one year term from its adoption.
16. Thereafter ordinance 1031 reinstated the terms of ordinance 1006 and was adopted August 11, 2009. By its terms, ordinance 1031 extended the original terms and conditions to an expiration date of September 25, 2009.
17. Ultimately ordinance 1051 was adopted by the Town Council on July 27, 2010. That ordinance changed the conditions from the earlier vacation ordinances and was discussed and voted on at the June 8, 2010 Town Council meeting.
18. The Town contends that the street vacation was not a necessary approval in order for the Appellant to apply for a building permit. Appellant contends that the street vacation is necessary to prepare final plan designs and obtain financing necessary to proceed with the project. It is clear from both the SMA and SMP language that the inability to obtain financing is not a criterion for the determination of the SSDP effective date. Appellant has failed to demonstrate, under any standard of review, that the Town’s interpretation that a street vacation was not necessary in order to apply for a building permit is in error. Additionally, in adopting ordinance 1006 the Town granted Appellant’s request for vacation but did so with conditions that were unsatisfactory to Appellant. The ordinance was effective because of its terms but the street vacation did not become effective because of the failure to comply with the conditions. Regardless of the “fault” of either or both parties, it is inaccurate for Appellant to claim a failure of street vacation.
19. Appellant’s reliance on the development agreement of May 15, 2007 is likewise misplaced. The agreement dates are immaterial as to the effective date of the SSDP. Entry into a development agreement was certainly contemplated within the hearing on the SSDP but was not specifically made a condition.
20. The development agreement (section 18) is terminated if the development is not “substantially underway prior to expiration of such permits and/or approvals.” Specifically, nothing in the development agreement “shall extend the expiration date of any permit or approval.”
21. The reliance on LCMC 10.10.590 is misplaced. That section applies to appeals of civil penalties under the SMP not appeals of administrative interpretations.
22. Any finding herein which may be deemed a conclusion is hereby adopted as such.

ORDER

The appeal from the June 15, 2010 letter is denied.

DONE this 15th day of November, 2010.



A handwritten signature in black ink, appearing to read "Wm. H. Nielsen".

Wm. H. Nielsen, Hearing Examiner