



**DECISION AND ORDER of the  
SNOHOMISH COUNTY HEARING EXAMINER**

**Millie Judge**  
Hearing Examiner

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DATE OF DECISION: June 1, 2011  
APPELLANT: Thomas Barry, Metron & Associates, Inc.  
FILE NO.: 11-100746 CI  
TYPE OF REQUEST: Appeal of Code Interpretation (SCC 30.71.050)  
Re: Hosking SFDU Project PFN 07-113438 LU  
DECISION (SUMMARY): **Appeal Denied**  
TAX ACCOUNT NO: 004762-001-001-01

This matter having come before the Hearing Examiner on May 17, 2011, and the testimony of witnesses having been heard and all exhibits having been admitted into evidence and considered, the Hearing Examiner enters the following Findings of Fact, Conclusions of Law and Decision based on a preponderance of the evidence:

**FINDINGS OF FACT**

1. **The Record.** The official record for this proceeding consists of the Exhibits entered into evidence (Exhibits 1 through 8), as well as the testimony of witnesses received at the open record hearing. Exhibits 7 and 8 were marked as exhibits and added to the record by the Hearing Examiner at the public hearing. The entire record was admitted into evidence and considered by the Examiner in reaching the decision herein.

**NOTE:** For a complete record, an electronic recording of the hearing in this case is available in the Office of the Hearing Examiner.

2. **Parties of Record.** The Parties of Record are set forth in the Parties of Record Register and include interested parties who testified at the open record hearing.

3. **Public Hearing.** The Hearing Examiner held an open record appeal hearing on May 17, 2011. Witnesses were sworn, testimony was presented, and exhibits were entered into the record at the hearing. Linda Kuller, Roxanne Pilkenton, Howard Knight, and Stacy Abbott appeared and testified on behalf of the Snohomish County Planning and Development Services Department (PDS). Thomas Barry, Metron & Associates, Inc. and Don Hosking, Sr. appeared at the public hearing on behalf of the Appellants. Mr. Hosking did not testify during the hearing. No members of the public testified at the public hearing.

4. Don Hosking, Sr. is the owner of certain real property known as tax parcel 004762-001-001-01 (hereinafter, the "subject property"). In 2007, Mr. Hosking ("Appellant") filed an application seeking to develop five single-family detached residential units on a .47 acre site zoned Low

Density Multiple Residential (LDMR). The application was later revised to propose a triplex and duplex development. The Appellant hired Thomas E. Barry of Metron and Associates, Inc. to assist him in the application process. The application was known by PDS as the "Hosking SFDU Project, PFN 07-113438 LU." (Exhibit 6)

5. On March 31, 2009, PDS issued a "review completion meeting" letter for the subject application which was sent to both the Applicant and Metron and Associates, Inc. (Exhibit 6.1-G) In it PDS presented a list of comments based on planner review of the proposal and requested additional information in order to further evaluate the proposal. Id. The letter specifically stated: "*Note: This application will expire one year after the date of this memorandum if the applicant fails to provide the requested information per SCC 30.70.140(1).*" (Emphasis added; Exhibit 6.1-G)
6. On December 12, 2009, the subject property was annexed by the City of Lake Stevens. It is no longer within the jurisdiction of Snohomish County for purposes of processing a new development application. (Exhibit 7) Such application(s) would be subject to review and approval by the City. However, according to Mr. Barry, under the terms of the annexation interlocal agreement, the County and City have agreed that pending permit applications filed with PDS will be completed by the County and subject to its regulations.
7. On February 9, 2010, Mr. Barry sent an email to Roxanne Pilkenton requesting a submittal meeting for the Hosking SFDU Project. Ms. Pilkenton responded immediately that her first meeting date was February 19, 2010, which Mr. Barry accepted. (Exhibit 6.1-A.12-13)
8. Mr. Barry asserts that he sent a letter dated February 18, 2010 to Roxanne Pilkenton responding to the March 31, 2009 review letter. (See Exhibit 6.10-G) Mr. Barry asserts that the letter demonstrates that the project was still under review by PDS and, therefore, the permit application could not have expired. However, when this letter was presented to her during her testimony at the public hearing, Roxanne Pilkenton testified that she had never seen the letter before, and that it was not received by PDS, and that the copy provided by Mr. Barry does not carry a "received" date stamp on it from PDS. Ms. Pilkenton testified that she received nothing from the Applicant in terms of a response letter or revised set of plans prior to the expiration date of the permit application. This letter is not part of the application file.
9. On Friday, February 19, 2010, Mr. Barry met with Roxanne Pilkenton at PDS to discuss questions he still had about how to address issues raised in the March, 2009 review letter, specifically, items (a) through (m). At the meeting, Mr. Barry presented only the marked-up plans from PDS, and had no revised plans ready to submit to PDS. Ms. Pilkenton testified that at that time there still remained more work to be done by the Applicant to address the County's regulations. Although both Mr. Barry and Ms. Pilkenton characterized the items as "minor," the plans remained incomplete or in need of correction and as such, no submittals were accepted by PDS on that date. As noted above, Ms. Pilkenton did not recall Mr. Barry presenting a letter responding to the review comments with a date of February 18, 2010. (Testimony of Roxanne Pilkenton)
10. On March 18, 2010, Roxanne Pilkenton sent an email message to the Applicant, Don Hosking, informing him that, "I was able to meet with Tom Barry about your project. Tom was able to go over the markups and is going to contact me *once he is ready to submit.*" (Emphasis added) (Exhibit 6.1-A.14-15)
11. On March 31, 2010, the subject application known as "Hosking SFDU Project, PFN 07-113438 LU," expired.

12. The expiration of permit applications is governed by SCC 30.71.140. It states:

**30.70.140 Expiration and extension of application.**

(1) An application shall expire one year after the last date that additional information is requested if the applicant has failed to provide the information, except that (a) The department may grant one or more extensions pursuant to SCC 30.70.140(2) and (3) below; (b) The department may set an expiration date of less than one year when the permit application is the result of a code enforcement action; and (c) *No application shall expire when under review by the department following submittal of a complete application or timely resubmittal of an application when all required information has been provided.*

(2) The applicant may request an extension to a date certain prior to expiration of the application. The department may grant an extension request if the criteria of SCC 30.70.140(3) are met. If granted, the department shall set a reasonable expiration date that may be different from the date requested by the applicant.

(3) An applicant's extension request may only be granted when the following criteria are met: (a) A written request for extension is submitted at least 14 days prior to the expiration date; (b) The applicant demonstrates that circumstances beyond the control of the applicant prevent timely submittal of the requested information; and (c) The applicant provides a *reasonable schedule for submittal* of the requested information.

(4) The department may extend an expiration date for an application with no written request from an applicant when additional time for county processing or scheduling of appointments is required, when the department needs information or responses from other agencies, or under other similar circumstances.

(5) A permit application approved for issuance pursuant to subtitle 30.5 SCC but not paid for and issued shall expire six months after the date it is approved for issuance.

(Emphasis added).

13. It is clear from the record that there were no plans or other documents submitted to PDS which were "under review" when the permit expired on March 31, 2010.
14. After the permit expired, the Appellant sought a code interpretation of SCC 30.71.140(1)(c), relating to when and how a permit expires. (Exhibit 1.G) PDS issued its final code interpretation on March 17, 2011. (Exhibit 1.C) The code interpretation was both generally applicable to all projects, and with regard to its application to the Appellant's project application. Id.
15. The Code Interpretation clarified that the phrase "*timely resubmittal of an application*" as used in SCC 30.70.140(1)(c), means "*timely resubmittal of application materials.*" It further states, "When an applicant has failed to provide the additional information requested, it cannot be under review by the department and SCC 30.70.140(1)(c) cannot apply. (Exhibit 1.G) The conclusion as to the Appellant's development application was as follows:

The application expired one year from the issuance of the March 31, 2009, completion review memorandum. This document provided notification that failure to provide the requested information would result in the expiration of the application on March 31, 2010. No additional information or plan revisions were submitted to the project file for review.

(Exhibit 1.G)

16. Thomas Barry filed and signed the instant appeal of the Code Interpretation *on behalf of Mr. Hosking*. (Exhibit 1) PDS did not move to dismiss the appeal based on a lack of standing. Accordingly, the Hearing Examiner finds that this issue has been waived and the matter can proceed.
17. Mr. Barry argues that other applications have been granted extensions by PDS and that they have no clear policy with regard to when and how application expire. (Testimony of Thomas Barry; Exhibit 8) However, the evidence presented by PDS demonstrates that each case is evaluated against the criteria in SCC 30.70.140 on its own merit. (Testimony of Linda Kuller; Howard Knight) Where circumstances beyond the control of the applicant, (e.g. third party negotiations between public agencies) have caused delay, extensions have been granted.
18. Mr. Barry further argues that his good faith in working with PDS should be taken into consideration in determining when an application expires. Here, the evidence is clear that the required actions were not taken within the time required. The information was still not ready for submittal many months after the expiration of the permit, as shown by the communications via email that followed it. It is clear from the record that PDS had no basis for which to grant an extension to the Applicant under SCC 30.70.140 in this case.
19. Any Finding of Fact that should be deemed to be a Conclusion of Law is hereby adopted as such.

### **CONCLUSIONS OF LAW**

Based on the Findings of Fact entered above, the following Conclusions of Law are entered:

1. The Hearing Examiner is authorized to hear and decide this matter pursuant to Title 2 SCC and Chapter 30.71.030 and 30.71.050 SCC.
2. The Examiner concludes that the County's regulations are unambiguous with regard to their application in this case. SCC 30.70.140(1) clearly states that an application expires one year after the last date that additional information is requested if the applicant has failed to provide the information.
3. The Examiner concludes from the record that the Applicant and his consulting team were put on notice of the deadline for permit application expiration in the March 31, 2009 letter from PDS. (Exhibit 6.1-G)
4. The record demonstrates that the Applicant failed to timely provide the requested additional information within one year after it was requested. The testimony at the public hearing, along with correspondence between the parties, demonstrates that Mr. Barry still had not completed his work in responding to the March 31, 2009 letter months after the permit expired.

5. The Examiner concludes that a timely request (e.g., 14 days prior to permit expiration) for an extension of time was not received by PDS as required by SCC 30.70.140(2) and (3).
6. Additionally, the Applicant did not present information demonstrating that their failure to timely respond to the County's request for additional information was the result of circumstances beyond the control of the Applicant. (SCC 30.70.140(3)) Accordingly, the grounds for an extension of the permit expiration deadline were not met in this case.
7. In reviewing the Code Interpretation challenged here, the Examiner finds in light of the entire record that the PDS Code Interpretation issued on March 17, 2011, is consistent with the plain language of the County Code, and the appellant has failed to meet his burden of proof to show otherwise.
8. Furthermore, the Hearing Examiner concludes that the Code Interpretation, as applied to the subject application known as the "Hosking SFDU Project, PFN 07-113438 LU," correctly determined that the permit application expired as a matter of law on March 31, 2010.
9. In light of the entire record, the Appellant has failed to meet his burden of proof to show that the Code Interpretation is incorrect and should be overturned. The appeal should be denied.
10. Any Conclusion of Law that should be determined to be a Finding of Fact is hereby adopted as such.

### DECISION AND ORDER

The **appeal is denied with prejudice**. The permit application known as "Hosking SFDU Project, PFN 07-113438 LU," expired on March 31, 2010.

Decision issued this 1<sup>st</sup> day of June, 2011.

  
Millie Judge, Hearing Examiner

<b>EXPLANATION OF RECONSIDERATION AND APPEAL PROCEDURES</b>
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The decision of the Hearing Examiner is final and conclusive with right of appeal to Superior Court. However, reconsideration by the Examiner may also be sought by one or more parties of record. The following paragraphs summarize the reconsideration and appeal processes. For more information about reconsideration and appeal procedures, please see Chapter 30.85 SCC and Ch. 36.70C RCW, and the Superior Court Civil Rules and Rules of Civil Procedure.

#### Reconsideration

Any party of record may request reconsideration by the Examiner **within 10 days** from the date of this decision. A petition for reconsideration must be filed in writing with the Office of the Hearing Examiner, 2<sup>nd</sup> Floor, Robert J. Drewel Building, 3000 Rockefeller Avenue, Everett, Washington, (Mailing Address: M/S No. 405, 3000 Rockefeller Avenue, Everett WA 98201) **on or before JUNE 13, 2011**. There is no

fee for filing a petition for reconsideration. "The party seeking reconsideration shall mail or otherwise provide a copy of the petition for reconsideration to all parties to the appeal as of the date of filing." [SCC 30.85.210]

A petition for reconsideration does not have to be in a special form but must: contain the name, mailing address and daytime telephone number of the petitioner, together with the signature of the petitioner or of the petitioner's attorney, if any; identify the specific findings, conclusions, actions and/or conditions for which reconsideration is requested; state the relief requested; and, where applicable, identify the specific nature of any newly discovered evidence and/or changes proposed by the Applicant.

The grounds for seeking reconsideration are limited to the following:

- (a) The Hearing Examiner exceeded the Hearing Examiner's jurisdiction;
- (b) The Hearing Examiner failed to follow the applicable procedure in reaching the Hearing Examiner's decision;
- (c) The Hearing Examiner committed an error of law;
- (d) The Hearing Examiner's findings, conclusions and/or other elements of the decision are not supported by the record; and/or
- (e) New evidence which could not reasonably have been discovered prior to the hearing and which is material to the decision has been discovered.

Petitions for reconsideration will be processed and considered by the Hearing Examiner pursuant to the provisions of SCC 30.85.210. A matter that has been subjected to reconsideration once, shall not again be subject to reconsideration.

NOTE: Please include the County file number in any correspondence regarding this case.

### **Appeal**

The decision of the hearing examiner in this matter constitutes a final land use decision within the meaning of Chapter 36.70C RCW. Accordingly, any person with standing may file an appeal of this decision in Superior Court **within 21 days from the date of this decision** pursuant to the Land Use Petition Act (LUPA). (See, RCW 36.70C.040(4) for guidance on how to calculate the appeal period). In addition to meeting other requirements, appeals must comply with the specific requirements of Sections 36.70C.040, 36.70C.060 and 36.70C.070 RCW. Service on Snohomish County must be made by delivery of a copy of the petition to the Clerk of the County Council or the person identified by or pursuant to RCW 4.28.080 to receive service of process. (RCW 36.70C.060) Service on other parties must be made according to SCC 36.70C.040. The Office of the Hearing Examiner may not provide legal advice. If you have questions about filing a LUPA appeal, please consult with your attorney.

### **Staff Distribution:**

Department of Planning and Development Services: Linda Kuller /Roxanne Pilkenton

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