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AFTER RECORDING RETURN TO:
SKAGIT COUNTY HEARING EXAMINER
302 SOUTH FIRST STREET
MOUNT VERNON, WA 98273

DOCUMENT TITLE: ORDER ON PERMIT REVIEW SPU 92 018

HEARING OFFICER: SKAGIT COUNTY HEARING EXAMINER

APPLICANT: CHUCKANUT CREST GOLF COURSE

PETITIONER: HABITAT WATCH, INC.

ASSESSOR PARCEL NO: P48273, P48280, P50342, P50343, P50368, P50370, P50389,
P50390, P50407, P504105

ABBREVIATED LEGAL DESCRIPTION: The proposed project is located at within Section 25, Township 36 North, Range 3 East, W.M., and Section 30 and 31, Township 36 North, Range 4 East, W.M., all situate in Skagit County, Washington.

BEFORE THE SKAGIT COUNTY HEARING EXAMINER

In the Matter of the)
Review of an Application for a) SPU92-018
Special Use Permit for the)
CHUCKANUT CREST GOLF) **DECISION AND ORDER**
COURSE) **ON PERMIT REVIEW**
)
HABITAT WATCH, INC.)
)
Petitioner.)
_____)

PROCEDURE

This proceeding was initiated by a Petition for Revocation of Special Use Permit SPU92-018 filed by Habitat Watch, Inc. The petitioner was a party of record in the proceedings that resulted in the issuance of the permit on June 15, 1993.

The instant petition was filed on July 11, 2002. By letter dated July 16, 2002, the Planning and Permit Center advised the petitioner that the filing of the petition did not stay activities under the permit. Also on July 16, 2002, counsel appeared for the applicant, the Upper Skagit Indian Tribe.

On August 21, 2002, the County issued a Staff Report recommending that the Petition for Revocation be denied. Petitioner Habitat Watch filed a response to the Staff Report dated August 26, 2002.

Pursuant to SCC 14.16.900(2)(b)(iii) and after due notice, the Hearing Examiner conducted a hearing on the petition on August 28, 2002. Jeffrey M. Eustis, Attorney at Law, represented Habitat Watch. LeAnne M. Bremer, Attorney at Law, represented the Upper Skagit Indian Tribe. Linda Kuller, Senior Planner, represented the County Planning and Permit Center. A trial memorandum was presented on behalf of the Tribe at the hearing.

Testimony was taken, exhibits were entered and argument was heard. On the basis of the record, the following is entered:



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FINDINGS OF FACT

1. On June 15, 1993, the Skagit County Hearing Examiner approved a Special Use Permit (SPU 92 018) to Dr. David Moore to construct and operate a golf and country club to be called the Chuckanut Crest Golf Course.

2. The approval was issued after preparation and consideration of an Environmental Impact Statement (EIS) under the State Environmental Policy Act.

3. The decision expressly concluded that the use was allowed as a special use under the zoning code provisions then in effect. The decision imposed 16 conditions of approval on the project and determined that, as conditioned, it would be consistent with the then effective special use criteria.

4. Condition 15 of the approval was as follows:

The project shall be commenced within two years of the date of this order or the special use permit will become void.

5. Habitat Watch, as a party to the permit proceedings, filed a petition for reconsideration of the Examiner's decision. The Examiner upheld his decision in its entirety on July 12, 1993.

6. Neither Habitat Watch nor anyone else appealed the Examiner's initial decision or his decision after reconsideration.

7. In 1995 Dr. Moore requested an extension to the two-year period for starting the project. After notice and public hearing, the Examiner granted this request on April 21, 1995. Condition 15 was modified to read:

The project must be started by June 14, 1997 or the Special Use Permit will become void.

8. A new owner, Port Gardner Timber, later requested another two-year extension. An order was issued by the Hearing Examiner on April 23, 1997, extending the time to begin the project for two years from the date of June 14, 1997 -- that is to June 14, 1999. There is no record of public notice or of a public hearing in connection with this second extension.

9. In 1998 Port Gardner Timber requested yet another extension. On November 4, 1998, the Hearing Examiner issued an order which, among other, made the following finding:

This project has a history of difficulties in the past. These include



difficulties with the Washington State Department of Ecology in obtaining water rights, financial difficulties, litigation, and foreclosure by the present owner. A considerable amount of engineering and design work has been accomplished and that other work has progressed although no actual construction has begun.

10. The requested third extension was granted as follows:

NOW, THEREFORE, the Hearing Examiner Approves the request to extend the time to begin the project of this Special Use Permit SPU 91 018 for two (2) additional years until June 14, 2002. Condition No. 15 is modified to state:

15. The project must be started by June 14, 2002 or the Special Use Permit will become void.

All other conditions remain in effect.

11. The file number given in the above quoted language is evidently a typographical error. The correct number -- SPU 92 018 -- is given in the caption. There is also an obvious discrepancy between the language about an extension "for two (2) additional years" and the use of June 14, 2002 as the termination date for the extension. That date was three years from the previous deadline of June 14, 1999.

12. There is no record of public notice or of a public hearing in connection with this third extension.

13. All three of the extension orders provided notice concerning rights to appeal. No appeals were filed within the 14 or 15- day appeal period then in effect. Former SCC 14.01.061, 14.04.240. No appeal of any of these actions has ever been filed.

14. On September 14, 2000, the subject property was purchased by the Upper Skagit Indian Tribe (Tribe.). The Tribe wrote to the Skagit County Planning and Permit Center on December 1, 2000, advising of their ownership and drawing attention to the extended golf course project start date of June 14, 2002. The letter stated that "we are moving forward with this project and will make every effort to meet this condition."

15. The Tribe met with Permit Center officials on June 15, 2001, and discussed the status of the application. A letter from the Tribe's counsel, dated August 3, 2001, urged that the project is subject to the land use regulations in effect in 1992 when the golf course application was originally filed. The Permit Center responded by letter dated October 10, 2001, concurring in the Tribe's vesting analysis. The letter stated that land use regulations adopted after May 6, 1992 will not apply to this project.



16. The Tribe's planning consultant requested a pre-application meeting with the Permit Center by letter dated December 14, 2001, and such a meeting was held on January 3, 2002. At the pre-application meeting, the Permit Center agreed that the date of submittal of a complete grading permit application would serve as the start date for the project for purposes of Condition 15 of the Special Use Permit.

17. The Tribe submitted a grading permit application and related documents on February 15, 2002. The submission was complete and extensive including detailed plans for all aspects of the golf course's construction (e.g., roads; drainage; water and sewer mains; clearing; pond construction; irrigation system; grading details for tees, greens and fairways; seeding plans). A number of related reports and plans were provided as part of the submission (e.g., detailed materials on the treatment of wetland areas).

18. On April 4, 2002, a surveyor was retained and work on the ground began shortly thereafter involving staking for the fairway centerlines. The president of Habitat Watch's board testified that the organization first became aware that development activity for the project was underway about May 1 of this year.

19. The State Department of Natural Resources issued a Forest Practice Conversion permit for the project on May 13, 2002.

20. On June 5, 2002, an excavator, chain saws and logging equipment began work on site in connection with tree removal along the fairway centerlines.

21. Larger scale logging commenced on the site on July 3, 2002. On that date a petition-type letter was drawn up by neighbors for submission to a County commissioner. The letter expressed concerns about environmental impacts and questioned the procedure for the last permit extension. Numerous signatures were obtained.

22. On July 10, 2002, counsel for Habitat Watch submitted a Petition for Revocation of Special Use Permit to the Permit Center. The petition argued that the permit should be revoked for any one of three reasons: (a) the second and third permit extensions were invalid because notice and opportunity for hearing were not provided; (b) the third extension was for two years not three; (c) commencement of the project did not occur by June 14, 2002.

23. On July 16, 2002, the Permit Center advised Habitat Watch that the Petition for Revocation was not considered an appeal and therefore did not trigger the automatic stay provision (SCC 14.06.230) as to the Special Use Permit..

24. The grading permit sought by the Tribe was issued by the Permit Center on July 26, 2002.

25. A member of the Tribal Council who is also the Natural Resource Manager for the Tribe testified that the golf course is an important part of the tribe's efforts to



promote economic development through diversification. The Tribe purchased the property for around \$2.25 million. It has, to date, paid out approximately \$810,00 on the loan and approximately \$600,000 on development of the property.

26. The golf course will consist of 18 holes on 310 acres. Several buildings are also involved, but they are all essentially incidental to the golf course. The golf course represents the major construction feature of the project. It is the heart of the undertaking. Because of this, the grading permit here is the pivotal development permit.

27. On the record of this review proceeding, the Tribe is shown to have acted in good faith in reliance on representations by the Permit Center that the Special Use Permit was valid and in good standing, so long as project commencement under it occurred prior to June 14, 2002.

28. There is nothing in the record that suggests that the Tribe had any reason to investigate the various extensions of the permit prior to purchasing the property or to proceeding with the project.

29. The record contains no evidence of a failure to satisfy any of the 16 permit conditions, except for Condition 15 relating to the "start" of the project.

30. Prior to the adoption of the Unified Development Code (UDC) on July 24, 2000, the land use regulations of the County contained no provisions regarding when a Special Use Permit must be commenced or completed. If addressed at all, these matters were dealt with by the Hearing Examiner in permit conditions. In these proceedings, the Director of the Permit Center provided a memo stating that prior to the adoption of the UDC, the Planning and Permit Center generally rendered the interpretation that

the phrase "start date" stated in numerous Hearing Examiner's final orders and decisions was considered the date of development permit submittal or in certain cases, other actions that verified that the project had not been intentionally abandoned.

31. The concerns of Habitat Watch about the physical effects of the project were adjudicated in the initial permit proceeding. There is no evidence that the delay in starting the project has interfered with any interests in the physical environment that Habitat Watch has a present right to contest. The delay has involved no identified environmental harm to the Petitioner.

32. Assuming the permit extensions are legally valid, the Examiner finds that Condition 15 has been satisfied by the Tribe.

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



CONCLUSIONS OF LAW

1. The Hearing Examiner has jurisdiction to entertain this petition. SCC 14.16.900(2)(b)(iii). The cited subsection provides authority to order that a Special Use Permit be "revoked, suspended or modified based on a finding that the conditions have not been satisfied by the applicant."

2. Habitat Watch argues that the Staff's administrative interpretation of "start date" is not an adopted agency interpretation entitled to deference. However, there were no definitions to govern the meaning of this term in the land use regulations at the time the subject permit and its extensions were granted. Though not officially adopted, the interpretation used here -- that a project is started when a development permit application is filed -- is a reasonable one.

3. In general, land use permits run with the land they apply to. The purpose for establishing a date for project commencement is presumably to ensure that applicants are in earnest about their proposals, and are not acquiring permits for speculative purposes merely to increase property values. There is nothing to suggest that any such motive has played a role in the history of the subject permit.

4. But, given the purpose of the requirement, the filing of a development permit application (as opposed to an application for a permit authorizing the use) is appropriate as a "start time" because it represents a stage in the process at which substantial investment has been made in detailed specific plans, and therefore a stage at which it is unlikely that the developer will want to abandon the project. Grading permits and building permits are examples of development permits. The Special Use Permit granted here is a permit authorizing the use.

5. The Examiner concludes that the filing of the grading permit application was legally the start of the project for purposes of Condition 15 of the Special Use Permit.

6. Habitat Watch would apply the present definitions (adopted in July 2000) to the "start time" issue. SCC 14.16.900(2)(d) now provides that projects be commenced within 2 years of permit approval and that "commenced" means either:

- (1) the use permitted by the permit has been established or
- (2) a complete building permit has been filed . . . for the principal building which will allow the use.

The Examiner concludes that this recently adopted code provision on "commencement" is substantive and that it does not apply retroactively.

7. Even if SCC 14.16.900(2)(d) did apply here, the result would not be different. Under the facts, the grading permit is the critical permit that will establish the use. Under



current definitions a "building permit" is a document that authorizes construction of a "structure." A "structure" includes "any piece of work artificially built up." SCC 14.04.020. Thus, the grading permit application for the golf course is a type of "building permit" and, under these facts, should qualify under the "building permit" alternative in the above quotation.

8. Habitat Watch argues that the third permit extension was really for two years and not for three. The language of the extension order is indeed internally contradictory. However, the specific date of June 14, 2002 is used twice in the decision and the specific language for the modified condition contains that date. The Examiner concludes that resolving the ambiguity in favor of the specific date called out is reasonable and he defers to the Staff interpretation on this point.

9. Habitat Watch places most emphasis on the argument that the second and third permit extensions were invalid because they did not follow the issuance of public notice and the conduct of a public hearing. Their position is that because these extensions were issued on illegal procedure, they were void from the outset and cannot be legitimized now.

10. The version of the County Code in effect when the extensions were granted supports their contention that notice and hearing were required before an extension could be granted. See former 14.04.240(13).

11. The problem is that these extension decisions were not timely appealed. Indeed, no appeal of these actions has ever been filed. On the question of proper procedure, the Petition for Revocation constitutes a kind of collateral attack on the extensions. The remedy for such a defect is by appeal not collateral attack. Wenatchee Sportsmen Ass'n v. Chelan County, 141 Wn.2d 169 (2000).

12. Habitat Watch asserts that the failure to provide them with notice of the extension requests and extension decisions was a deprivation of due process and that lacking notice there was no way they could have timely availed themselves of their appeal rights. But, the solution to this due process problem is to adopt a "discovery" approach to the right to appeal. Under this approach, the appeal period starts to run when the potential appellant acquires actual or constructive knowledge. Larson v. Town of Colton, 94 Wn. App 383 (1999).

13. In the present case it is clear that Habitat Watch had information that should have (and did) put them on inquiry that the permit was still considered active, probably in early May, but at least as of June 5, 2002. Accordingly they should be held to have had constructive notice as of then. Using the presently effective appeal provision -- SCC 14.06.120(9) -- an appeal of the extensions which are now challenged should, therefore, have been filed within 14 days of the time constructive notice is deemed to have been received. If June 5 is used as the notice date, the appeal period ran as of June 19, 2002. If a date in May were used, the appeal period would have terminated even earlier.



14. In this situation where the appeal right has not been exercised, the rule that an illegally issued permit approval confers no rights does not apply. This is because the approvals of the extensions became valid once the opportunity to challenge them passed. See discussion of Wenatchee Sportsmen in Chelan County v. Nykreim, Docket 71067-8, Wash. Supreme Court, July 25, 2002.

15. In sum, Habitat Watch's argument that the extensions are void because they were adopted without proper procedure is overcome by their failure to timely appeal. Under the case law, once due process problems have been cured, the interest in finality of land use decisions appears to trump otherwise legitimate concerns over preventing *ex parte* permit decisions in violation of requirements for public notice.

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

DECISION

The Petition for Revocation of Special Use Permit is denied. The effectiveness of SPU 92-018 is affirmed. Condition 15 has been satisfied.

Wick Dufford

WICK DUFFORD, Hearing Examiner

Date of Action: September 30, 2002

Copies Transmitted to Parties: September 30, 2002

RECONSIDERATION/APPEAL

As provided in SCC 14.06.180, a request for reconsideration may be filed with the Planning and Permit Center within 10 days after the date of this decision. As provided in SCC 14.06.120(9), the decision may be appealed to the Board of County Commissioners by filing a written Notice of Appeal with the Planning and Permit Center within 14 days after the date of the decision, or decision on reconsideration, if applicable.



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