NOTICE OF DECISION

Appellant:	Robert Weeks 13746 Rosario Road Anacortes, WA 98221
Counsel:	Thomas Moser, Attorney at Law 1204 Cleveland Avenue Mount Vernon, WA 98273
Applicant/Respondent:	Larry B. Dent 2304 42nd Place Anacortes, WA 98221
Intervenor:	Evergreen Islands P. O. Box 223 Anacortes, WA 98221
File No:	PL 10-0493
Summary of Case:	Appellant appeals the preliminary approval of Short Plat SP93-0040, a three-lot short plat submitted on June 10, 1993, and given preliminary approval on November 3, 2010
Project Location:	At the intersection of Rosario Road and Edith Point Road, within a portion of SW1/4NW1/4 Sec. 11, T34N, R1E, W.M.
Public Hearing:	A trial-type hearing open to the public was held on January 26, 2011. Appellant was represented by Thomas Moser, Attorney at Law. The County was represented by Marge Swint, Senior Planner. Larry Dent appeared for himself. Tom Glade represented Evergreen Islands.
Decision:	The preliminary approval of Short Plat SP93-0040 is reversed.
Reconsideration/Appeal:	A Request for Reconsideration may be filed with PDS within 10 days of this decision (SCC 14.06.180). The decision may be appealed to the Board of County Commissioners within 14 days of the date of decision or decision on reconsideration, if applicable (SCC 14.06.110(13)).
Online Text:	The entire decision can be viewed at: www.skagitcounty.net/hearingexaminer

FINDINGS OF FACT

1. Robert Weeks appeals the preliminary approval of Short Plat SP93-0040. The approval was given on November 3, 2010. The appeal was timely filed on November 16, 2010. The Weeks are owners of property adjacent to the proposed plat.

2. The application for this short plat was submitted on June 10, 1993. The preliminary plat approval was given on November 3, 2010, seventeen years later.

3. The property in question is 3.31 acres in size, located on Fidalgo Island on the west side of Rosario Road at its intersection with Edith Point Road. It is within a portion of SW1/4NW1/4 Sec. 11, T34N, R1E, W.M. The parcel number is P103156.

4. The property is trapezoid-shaped with the western 25 feet being a steep downhill slope. The slope ultimately ends off the property at Burrows Bay. The property is above the bay and does not abut the water.

5. The properties in the vicinity are primarily residential. A gravel pit is located to the east across Rosario Road.

5. The original short plat application was filed by the San Juan-Fidalgo Holding Company, then owner of the property. The original application sought approval of four lots of 0.65 acres, 0.60 acres, 0.91 acres and 1.15 acres respectively.

6. On July 9, 1993, a day short of 30 days from the date the application was filed, the County Planning Department sent the applicant a letter stating that "we have completed our initial review of the referenced short subdivision application and cannot approve the application at this time." The letter detailed a number of corrections needed and said that "the application has been placed on hold until such time as the requested information is submitted."

7. At that time, former SCC 14.08.050(4) was in effect. That subsection, a part of the old Short Subdivision Ordinance, provided that proposed short plats may be approved, disapproved or "returned to the applicant for modification or correction" within 30 days from the date of the filing of a "complete application." In effect, the request for corrections constituted a return of the application.

8. Because the County's letter was sent within the 30-day processing period, it may be inferred that Planning regarded the application as a "complete application." It was just in need of additional information before a final decision could be made.

9. No further action on the application was taken until February 11, 2010 when a new applicant, Larry Dent, presented a revised short plat and requested a pre-development meeting with what is now Planning and Development Services (PDS).

10. A year or two after filing the initial short plat application San Juan-Fidalgo Holding Company went into bankruptcy proceedings. On June 3, 1996 the property was conveyed to Covenant Mortgage Corporation, a creditor. Larry Dent bought the parcel from this creditor on December 17, 1996.

11. Dent testified that he contacted the Planning Department in connection with his purchase of the property to confirm the status of the short plat application. He says he was told that it was "grandfathered" and not subject to a time restriction for completion of the needed items.

12. The subject property is within the area served by the Del Mar Community Water System. Dent's explanation of the hiatus in pursuing the short plat is that the time was consumed in straightening out the rights of the property to water from Del Mar. He said that his water entitlement was not determined until 2009.

13. After describing the disputes about water from Del Mar, Dent's statement says:

> I was in contact with the County Planning Department throughout the approximate ten year time period involved in resolving the above disputes, and was assured that the short plat remained vested and "grandfathered" and was not subject to a specific time limitation.

14. The County record is silent about pursuit of the application during the three-plus years between the time it was initially filed and Dent's purchase. Moreover, the County presented no evidence about contacts between Planning and Dent between the time of his purchase in 1996 and the revival of the short plat application in 2010. In this proceeding the only evidence about the ongoing vitality of the application is Dent's testimony. The record discloses no writing either from Dent or to him about the application until early 2010.

15. Current regulations, stemming from the regulatory reform legislation adopted by the legislature in 1995, give an applicant 180 days to submit requested additional information. If the information is not submitted within that timeframe, the application lapses unless an extension is requested. See SCC 14.06.100(3). In 1993 when the original short plat application was submitted, County Code contained no such explicit limitation in effect.

16. As to what law applies to the short plat application, the parties agree that under RCW 58.17.033, the original application vested to the land use control ordinances in effect at the time a completed application was submitted. The County identifies this date as June 10, 1993. There is a dispute about the zoning density that then applied to the property The County maintains that the minimum lot size at that time was 12,500 square feet. The Appellant contends that by virtue of Ordinance 14864, adopted May 24, 1993, the applicable minimum lot size was 5 acres. These positions depend on the construction put on Ordinance 14925, adopted June 29, 1993, which purported, ex post facto, to make June 14, 1993, the effective date of Ordinance 14864.

17. Appellant's contention on density is that if vesting occurred when the original application was filed, it was to a 5-acre minimum, not a 12,500 square-foot minimum. If the

12,500 square-foot minimum applied, the lots were large enough. However, if Appellant is correct, the lots were significantly undersized and application could not have been approved.

18. The County's letter of July 9, 1993 asking for more information said nothing about any problem with zoning or density. This must mean that when conducting initial review of the application, Planning thought it was vested to the 12,500 square foot minimum.

19. Had the thinking been otherwise, the County argues, Planning would not have accepted the application in the first place. Appellant argues that in those days of frequent ordinance changes there was much confusion about what zoning restrictions applied to particular parcels and that Planning simply made an error in accepting the application.

20. The requested pre-development meeting was held in late February 2010. Following the discussions made there, applicant Dent submitted a revised proposal on August 10, 2010. At the suggestion of the County, this revision sought approval of a three-lot short plat with lots of 0.72 acres (31,398 square feet), 0.68 acres (29,778 square feet) and 1.91 (83,125 square feet) acres respectively.

21. The current Comprehensive Plan and zoning designation for the subject property is Rural Intermediate which does not allow lots less than 2.5 acres in size. Thus under either current zoning or a 5-acre minimum, the lots in the proposed short plat are too small.

22. Appellant's expert witness was David Hough, former County Planning Director. His opinion was that approval of the short plat was clearly erroneous. Hough questioned the County's 2010 determination of prior vesting. He also identified a regulatory 30-day time limit and a statutory 90-day time limit for processing applications. He noted that these times were obviously exceeded, but that the record does not reflect any request or agreement for extending review time.

23. Appellant also called several neighbors and offered statements of other neighbors, all in opposition to the short plat approval. Concerns were expressed over the density, but also over drainage, runoff and land stability issues -- problems the neighbors fear the proposed development would exacerbate.

24. Intervenor Evergreen Islands identified a number of its members who would be adversely affected by the development. The group questioned whether the original application was complete and emphasized that under current regulations the short plat cannot be approved.

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

CONCLUSIONS OF LAW

1. The Hearing Examiner has jurisdiction over the subject matter of this appeal. The appeal relates to a Level I administrative decision. SCC 14.06.110(7).

2. The Appellant has the burden of proving that the administrative decision was "clearly erroneous." SCC 14.06.110(11).

3. The Examiner paraphrases the Appellants issues as these:

(a) The application was not complete and therefore it did not vest to the ordinances in effect on June 10, 1993. Absent vesting, the revised application must be processed under the regulations in effect currently. Under those regulations, it fails to meet the density requirements and must be disapproved.

(b) If the application vested, it vested to a regulatory regime under which the applicable minimum lot size was five acres. The plat lots proposed originally and as revised are less than five acres in size and thus the application must be disapproved.

(c) If the application vested, it vested to a regulatory regime requiring that it be processed in either 30 days (former SCC 14.08.050(4)) or in 90 days (RCW 58.17.140) and neither of these time frames were met. There is no evidence of any attempt by applicant to waive these times frames, and, in any event, they are not waivable.

(d) The application was never approved and lapsed due to inaction prior to its being revived in 2010.

4. There was no regulation in 1993 governing the completeness of applications nor was there a regulation specifically addressing vesting (See present SCC 14.06.090 and SCC 14.02.050). However, the statutory vesting of plat applications was already in effect under RCW 58.17.033 and former SCC 14.08.050(4) shows that the concept of completeness was known to the County. In its letter of July 9, 1993, Planning did not reject the application for incompleteness. It merely followed the code provision allowing a request for additional information after receipt of a "complete application." This approach is formalized in present practice where a letter of completeness may contain a request for additional information. (See SCC 14.06.100(3)). Under the circumstances there is not an adequate basis to overturn the County's determination that the application was complete.

5. The Examiner declines to opine on whether Ordinance 14864 effectively imposed a five acre minimum lot size as of June 10, 1993.

6. The 30 and 90 day processing times are limits imposed for the benefit of applicants. Waiver of such a limit would merely mean that an applicant does not object to the government taking more time than normal to process an application. When there is no request for extension, the time limits do not operate to impose a strict legal limit that would cause an application to lapse. This is evident from the language allowing the return of an application for modification or correction which presupposes the continued life of an application after the time frames elapse. Neither SCC 14.08.050(4), nor RCW 58.17.140 address any time limit for when modifications or corrections must be submitted or acted upon.

7. As noted above, under current regulations, an application lapses if the additional information sought is not provided with 180 days. SCC 14.06.100(3). Extensions may be granted, but clearly this process is not intended to be unlimited and extensions are granted only upon a demonstration that more time is really needed.

8. The vesting doctrine applies to substantive land use controls, such as zoning, setbacks, lots coverage and density. The doctrine does not, however, prevent the enactment of subsequent procedural requirements that apply to vested uses. SCC 14.06.100(3), adopted in 2000 through Ordinance 17938, is a procedural provision. As such it applied to the subject application after the date of its enactment. The information requested by the County was not supplied with 180 days of the time this requirement became effective. No requests for extension were ever made. Accordingly, the Examiner holds that the application lapsed.

9. Even if SCC 14.06.100(3) is regarded as substantive and therefore inapplicable here because of vesting, the application should be held to have lapsed, consistent with rationale for the vesting doctrine. The idea of vesting is to protect a developer from regulatory changes during a normally brief period of application processing during which legislative changes might be passed to defeat a proposed project. Here the record of pursuit of the application is blank for 17 years. The doctrine is not intended to immunize persons who file applications from future legal changes that occur years, over even decades, after the applications were filed -- changes to the general law that may have nothing to do with any specific land use application. If the vested rights doctrine has no temporal limit, it becomes a mechanism that invites speculation rather than simply protecting the legitimate investment-backed expectations of developers.

10. The Examiner, therefore, concludes that implicit in the vested rights doctrine is a responsibility on the part of applicants to prosecute their applications with diligence. Common sense dictates that at some point an application that is not being actively pursued becomes stale and is extinguished by the passage of time. Reasoning by analogy, the 180-day limit eventually adopted can be seen as a reasonable time in which to gather and submit information needed to decide on an application, absent a showing of extenuating circumstances.

11. Therefore, as an alternative holding, the Examiner concludes that the subject application lapsed within the three years of inaction that passed before the present applicant bought the property.

12. No issue of the present applicant's rights under the original application was briefed or argued, but in the future, the Examiner would be interested in an inquiry into the extent to which, if any, mere applications for uses of land are to be treated as running with the land. In the case of water rights, permit applications are viewed as personal, not as real property interests. Are land use applications similarly personal property that does not pass with the deed or do successors in interest automatically acquire the original applicant's interest in a land use application?

13. The Appellant carried his burden in this case.

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

DECISION

The Preliminary Plat Approval on Short Plat 93-0040 is reversed.

DONE this 16th day of February, 2011.

Wick Dufford, Hearing Examiner

Transmitted to: Applicant, Appellant, PDS on February 16, 2011

See Page 1, Notice of Decision, for Reconsideration and Appeal information.