

John Hutchings

District One

Gary Edwards

District Two

Bud Blake

District Three

HEARING EXAMINER

Creating Solutions for Our Future

**BEFORE THE HEARING EXAMINER
FOR THURSTON COUNTY**

In the Matter of the Appeal of

Appeal No. 17-114934-VE

Project No. 2014101488

Jim Hayes

of the October 20, 2017 Denial of a Requested Time Extension to allow Additional Time to Submit a Response to a Request for Information related to Project No. 2014101488 on Tax Parcel 22603110000 located at 19310 - 128th Avenue SE in Yelm, WA

FINDINGS, CONCLUSIONS, AND DECISION

SUMMARY OF DECISION

The appeal of the October 20, 2017 denial of a requested time extension for responding to a request for information in the processing of an administrative special use permit is **DENIED**. The permit lapsed.

SUMMARY OF RECORD

On November 3, 2017, Jim Hayes (Applicant and Appellant) appealed an October 20, 2017 administrative decision by the Thurston County Resource Stewardship Department¹ denying a requested time extension for an application for administrative special use permit (ASUP) to operate an I-502 marijuana producing and processing business at 19310 - 128th Avenue SE in Yelm, Washington. In processing that application, the Planning Department had requested additional information on April 12, 2017 that had not yet been submitted. The deadline for submittal of the information was October 9, 2017. The Applicant requested extension of time to

¹ Between the time the appeal was filed and the hearing was conducted, the name of the County's planning department changed from the Resource Stewardship Department to the Community Planning and Economic Development Department.

submit the information on October 12, 2017. The Department denied the request and the Applicant timely appealed.

Procedure

Prior to the pre-hearing conference to establish the schedule for the instant hearing, a motion was submitted on November 14, 2017 by counsel for neighboring property owners James and Michelle Brigham. The motion requested to consolidate their earlier filed appeal (17-103164 VE, March 2017) of a prior administrative decision issued in the Department's processing of the ASUP. In the alternative, the Brighams' November 2017 motion sought to intervene in the current appeal. The motion to intervene was granted, and the motion to consolidate was denied.²

On November 21, 2017, a pre-hearing conference was convened by telephone in the above captioned appeal. All three parties participated in setting the schedule for these proceedings.

Representation

Appellant Jim Hayes participated on his own behalf, *pro se*.

Travis H. Burns, Thurston County Deputy Prosecuting Attorney represented Thurston County.

Ben Cushman, Deschutes Law Group, PLLC represented Intervenors James and Michelle Brigham.

Testimony

Jim Hayes, Applicant/Appellant
Kraig Chalem, Compliance Supervisor, Thurston County
Tony Kantas, Associate Planner, Thurston County Resource Stewardship Department
Dawn Peebles, Environmental Health Specialist, Thurston County Health Department
Arthur Saint, Civil Engineer, Thurston County Public Works Department
Robert Manns, Compliance Officer, Thurston County
Mike Kain, Planning Manager, Thurston County Resource Stewardship Department
Michelle Horkings-Brigham, Intervenor

Exhibits

The following exhibits were admitted in the record:

Appellant Hayes's Exhibits (identified in Findings by "A" prefix)

- A-1. Memorandum from Arthur Saint to Tony Kantas, dated April 12, 2017
- A-2. Letter from Washington Forestry consultant to Tony Kantas, dated May 15, 2017
- A-3. Letter from Washington Forestry consultant to Tony Kantas, dated February 28, 2017
- A-4. Cushman document, from the record prepared for previous appeal by Brighams
- A-5. Photos of the site, received June 26, 2017

² The March 2017 appeal of the Brighams was stayed pending the outcome of the ASUP determination; their claims, which were ultimately a challenge to approval of the permit, were unripe as the permit decision had not been issued.

Thurston County Exhibits (identified in Findings by “T” prefix)

T-1. Planning Department's Staff Report with the following attachments:

- A. Master Application, submitted on April 8, 2014
- B. Special Use Permit Application, submitted on April 8, 2014
- C. Appeal of an Administrative Decision dated November 3, 2017
- D. Letter from Thurston County to Jim Hayes denying the time extension request, dated October 20, 2017
- E. Email from Jim Hayes requesting a time extension, dated October 12, 2017
- F. Email from the Applicant's engineer, KPFF, dated October 10, 2017
- G. Thurston County Narcotics Task Force Police Report, dated August 21, 2017
- H. Letter from Thurston County to Jim Hayes, dated August 8, 2017
- I. Memorandum from Thurston County Environmental Health Department, dated July 11, 2017
- J. Memorandum from Thurston County Environmental Health Department, dated December 13, 2016
- K. Letter from Washington Forestry Consultants, dated May 15, 2017
- L. Letter from Thurston County to Jim Hayes indicating that he had 180 days to submit a drainage design and erosion control plan associated with grading violation, dated April 12, 2017, with attached memo from Thurston County Public Works, dated April 12, 2017, requesting a drainage design and erosion control plan
- M. Thurston County Public Works email to Jim Hayes requesting a full drainage design and erosion control plan associated with grading violation, sent April 12, 2017
- N. Second Notice of Violation for growing marijuana without a permit, dated October 20, 2016
- O. Chronological History of Project No. 2014101488
- P. Letter from Thurston County Health Department, dated December 13, 2017
- Q. Notice of Public Hearing, mailed January 9, 2018 (via certified mail)

T-2. Tony Kantas letter to Jim Hayes, dated January 13, 2017

Intervenor Brigham's Exhibits (identified in Findings by “I” prefix)

- I-1. Jim Hayes Appeal, dated November 3, 2017 from Administrative Decision issued October 20, 2017
- I-2. Letter/Administrative Determination by Tony Kantas to Jim Hayes dated October 20, 2017, including attachments: (a) Letter from Kantas to Hayes, dated August 8, 2017 and (b) Letter from Kantas to Hayes, dated April 12, 2017

- I-3. Public Works Memorandum to Arthur Saint, P.E., from Mark Maurer, P.E., dated April 12, 2017
- I-4. Health Department Memorandum to Tony Kantas from Dawn Peebles, dated July 11, 2017
- I-5. Transmittal of public record responses to Brigham's from Thurston County Narcotics Task Force, November 13, 2017: (#1) emails with County personnel; (#2) September 9, 2017 Memo from Sheriff's Office re: evidence; (#3) August 28, 2017 email with Tony Kantas; (#4) August 21, 2017 Officer's Report; (#5) Search Warrant; (#6) Evidence Property Form; (#7) Inventory and Receipt of Property Form; (#8) photos; and exemption log
- I-6. Transmittal of public record response to Brigham's from Thurston County Narcotics Task Force, November 29, 2017 including McIver Affidavit and Application for Search Warrant, dated August 14, 2017
- I-7. *Lis Pendens* documents recorded November 6, 2008 pertaining to 2008 search and seizure of marijuana plants, paraphernalia, and firearms referenced in McIver's Officer's Report dated August 21, 2017, including: Complaint for Forfeiture and Summons to owners of 19310 128th Ave SE, Yelm (Clay Allen, Penny Hayes, Jim & Crystelle Hayes); Affidavit of Ryan Russell in Support of Probable Cause; Warrant; Notice of Seizure; and Release
- I-8. Current "Permit Status Lookup" print-out from Thurston County Permit Assistance Center on Tax Parcel 22603110000 (as of January 5, 2018)
- I-9. Email chain between Tony Kantas and Doreen Milward (Paralegal on behalf of Brighams) regarding status of Hayes ASUP: July 28, 2017
- I-10. KPFF submittal on March 31, 2017 of "Jim Hayes Property Site Plan"
- I-11. Letter from Tony Kantas to Jim Hayes, dated February 10, 2017 with attached Memorandum from Arthur Saint to Tony Kantas re: revised site plan requirement, dated February 3, 2017
- I-12. Letter from Tony Kantas to Jim Hayes re: status of ASUP and further requirements, dated January 13, 2017
- I-13. Letter from Tony Kantas to Jim Hayes, dated October 21, 2016 with attached Memorandum from Dawn Peebles to Tony Kantas, dated October 14, 2016 and Memorandum from Arthur Saint to Tony Kantas, dated September 16, 2016
- I-14. Second Notice of Violation issued October 20, 2016 by Robert Manns to property owners of 19310 128th Avenue SE, Yelm
- I-15. Photos taken by Michelle Brigham on November 28, 2016 with narrative explanation of photos, dated December 4, 2016
- I-16. Washington State Liquor and Cannabis Board Issued license to Organic Harvest re: Magnum Buds for Tier 3 on 19310 128th Avenue SE, Yelm, WA, on October 12, 2016

- I-17. Washington State Liquor and Cannabis Board Issued license to Blue Moose Consulting re: Blue Moose for Tier 2 on 19310 128th Avenue SE, Yelm, on September 14, 2016 and March 2, 2017
- I-18. Notice of Violation issued May 3, 2016 by Christina Chaput to property owners of 19310 128th Avenue SE, Yelm
- I-19. ASUP Application packet, submitted April 8, 2014
- I-20. Illustrative Exhibits: Google Earth aerial photos from 2017 and 2014; Thurston Geodata aerial photos from 2015 and 2012; Brighams' fly-over and other photos taken by Michelle Brigham in 2016 and 2017
- I-21. Brigham comment letter to Arthur Saint, dated March 29, 2017
- I-22. Brigham PowerPoint presentation, dated January 23, 2018

Other Documents in the Record:

- James and Michelle Brighams' Motion to Consolidate Appeals, or Alternatively, Motion to Intervene, dated May 22, 2017
- Order Ruling on Brighams' Motion to Consolidate Appeals or to Intervene, dated November 17, 2017
- Order Scheduling Hearing and Pre-Hearing Exchange, dated November 21, 2017
- Intervenor Brighams' Witness and Exhibit List, dated January 9, 2018
- Thurston County's Exhibit List, dated January 9, 2018
- Thurston County's Witness Disclosure, dated January 9, 2018
- Appellant Jim Hayes Exhibit and Witness List, emailed January 10, 2019
- Intervenor Brighams' Pre-Hearing Brief, dated January 16, 2018
- Thurston County's First Supplemental Exhibit List, dated, January 17, 2018

Upon consideration of the arguments, testimony, and exhibits admitted in the record, the Hearing Examiner enters the following findings and conclusions:

FINDINGS

Background

1. On April 8, 2014, Jim Hayes (Applicant and Appellant) submitted an application for administrative special use permit (ASUP) to allow production and processing of marijuana on real property at 19310 128th Avenue SE, Yelm, WA 98597 (subject property).³ The ASUP application was deemed complete by default on May 25, 2014, vesting under Ordinance No. 14978, adopted January 21, 2014. *Exhibits T.1 and T.1.O.*

³ The legal description of the subject property is a portion of Section 3, Township 16 North, Range 2 East; also known as Tax Parcel No. 22603110000. *Exhibit T1.*

2. In 2015, it was discovered the Applicant had built a residential structure at the northwest corner of the property without permits. The Applicant was notified that this code violation had to be resolved prior to the Planning Department's continued processing of the ASUP application. Also in 2015, the County amended its I-502 ordinance twice. First, Ordinance No. 15157 (adopted July 7, 2015) increased required setbacks to 100 feet and minimum lot sizes to five acres. Next, Ordinance No. 15210 (adopted November 10, 2015) prohibited marijuana production and processing in the RRR 1/5 zone, in which district the subject property is located. *Exhibits I.18, T.1.B, and T.1.O.* Ordinance No. 15210 meant that no further I-502 applications could be submitted for properties in the RRR 1/5 zone and that if the Applicant's ASUP were granted, it would be a legally nonconforming use.
3. On May 3, 2016, a notice of violation was issued to the Applicant for construction of a pole building in which the marijuana production business was operating without building permits. This notice required the Applicant to obtain building permits for both the commercial structure and the residential structure within 30 days. On June 28, 2016, the Department sent the Applicant notice that additional information was needed to continue processing the application. Department Staff conducted a site visit on July 20, 2016. The Applicant submitted a revised site plan and project narrative on August 23, 2016. A building permit and site application for the residential structure were submitted on August 26, 2016. A commercial building permit/site plan review application for the pole building was submitted on September 30, 2016. *Exhibit T.1.O.*
4. The Washington State Liquor and Cannabis Board (WSLCB) issued a Tier 2 (producer) permit to Blue Moose LLC to operate at the subject property on September 14, 2016. WSLCB issued a Tier 3 (producer and processor) permit to Magnum Buds/Organic Harvest LLC to produce and process marijuana at the subject property on October 12, 2016. *Exhibits T.1.O, I.16, and I.17.*
5. In October 2016, Department Staff conducted another site visit and observed marijuana being grown within the proposed ASUP project area. A second notice of violation was issued to Applicant on October 20, 2016 for growing marijuana without required County permits. *Exhibit I.14.* On December 15, 2016, the Applicant submitted an application for after the fact septic permit for a septic system that had been installed without permits. Also in December 2016, during a site visit conducted with representatives from WSLCB, it was discovered that a significant amount of grading had been performed on-site without a grading permit. The grading involved tree removal. *Exhibit T.1.O; Tony Kantas Testimony.*
6. In January 2017, Department Staff sent a letter to the Applicant listing inconsistencies between the ASUP application materials and the applications submitted to WSLCB. *Exhibit T.2.* In February 2017, the Department requested via letter sent by mail a revised site plan including the unpermitted grading. The Department forwarded an assessment by a third party consultant, Washington Forestry Consultants, Inc., that stated the amount of timber apparently harvested in the grading exceeded the 5,000 board feet allowed without approval of a forestland conversion application. The Applicant submitted after

the fact forestland conversion and associated SEPA review applications on March 31, 2017. SEPA review was required due to grading in excess of 500 cubic yards. *Exhibits T.1.O and A.2.*

7. Subsequently, the Applicant obtained re-review of his property by the third party forestry consultant and the consultant revised the estimated amount of timber harvested to be less than 5,000 board feet, nullifying the need for a forestland conversion application. *Exhibits T.1.O and A.3.*
8. On April 12, 2017, the County's Public Works Department forwarded to the Applicant a memo from the Resource Stewardship Water Resources Division by email to inform him that a drainage design and erosion plan was required to obtain approval of the after the fact grading permit. *Exhibit T.1.M.* On that same date, the Planning Department mailed a letter to the Applicant by certified mail, attaching the Public Works April 12th memo, and notifying the Applicant of a 180-day deadline to submit the requested drainage design and erosion control plan. This letter contained the statement: "All requested information must be submitted within 180 days of the date of this letter or your application will lapse." *Exhibits T.1 and T.1.L.*
9. On July 11, 2017, the Environmental Health Division notified the Applicant that additional information was needed to complete that Department's review of the ASUP. *Dawn Peebles Testimony; Exhibit T.1.I.*
10. On August 8, 2017, the Planning Department notified the Applicant by letter that forestland conversion and SEPA permits would not be required and informed the Applicant how to request a refund of the application fees. This letter reminded the Applicant that the ASUP application remained on hold awaiting additional information in response to the April 12, 2017 Public Works memo and the July 11, 2017 Environmental Health Division information request. The August 8th letter reiterated that the requested information had to be submitted within 180 days of the date of the Public Works memorandum or the ASUP application would lapse. It also contained the statement, "An extension may be requested prior to the lapse date, but it is the applicant's responsibility to know the lapse date." *Exhibit T.1.H.*
11. On August 17, 2017, Thurston County Narcotics Task Force searched the subject property pursuant to a warrant and found approximately 1,500 marijuana plants growing on site. The Task Force determined, in consultation with WSLCB enforcement staff who attended the site during the raid, that none of the marijuana was legally licensed to be grown on site. *Exhibit T.1.G.*
12. On October 10, 2017, Mark Steepy of KPFF, the Applicant's Engineering firm, emailed Thurston County staff members Tony Kantas, Arthur Saint, cc'ing the Applicant and stating as follows:

Tony/Arthur: Jim Hayes has reached out to us to get reengaged on his project. Attached is a memo he forwarded us that was written back in April. Although it

does not state this in the memo, Jim is under the impression that he has a 180-day clock to keep his Conditional Use Permit (CUP) application active. Is this true, and if so what is the date this clock started?

Jim has asked us to respond to this memo with a drainage design in compliance with what is outlined. I'm hopeful that by notifying you of our status to do this, that you can 'stop' the clock as to avoid canceling the CUP application and the work that has been completed to date.

Please advise. Thank you.

Exhibit T.1.F.

13. The Applicant followed up personally on October 12, 2017 asking for an extension of the 180-day timeline and providing the following (paraphrased) information as an explanation of why he needed one: After the County received the first letter from Washington Forestry Consultants, the Applicant was told by several members of County staff, including Kraig Chalem of Code Enforcement, that there was no reason to continue processing the ASUP application because the County Code would only allow residential use of the property during the six year moratorium. He stated that he was not given notice in writing that the County had determined he had not violated the forest practices ordinance until he visited the County on September 11, 2017, at which time he inquired about deadlines and was told he needed to act quickly to comply with the 180-day clock. He stated that he left the County offices and went directly to KPFF to engage them to perform the work needed to address the drainage report requirement. They had not been able to complete the work by October 12th and so he requested an additional two to three weeks to submit the report. *Exhibit T.1.E.*
14. On October 20, 2017, the Department replied indicating that the County Code did not provide discretion to extend the 180-day timeline if a request for extension was submitted after expiration of the timeline. The letter informed the Applicant of his right to appeal the denial of the requested extension. *Exhibit T.1.D.*
15. On November 3, 2017, the Applicant timely appealed. His appeal stated the following grounds:

This determination would cancel my ASUP permit process which would not allow for business of 502 on property. I appeal all findings on October 20th determination. Appropriate actions not taken with correct dating based on County process & previous memo from Department of Public Works 4/12. Asking for reversal of staff determination of dated deadline from expiration date of 180 days dated from 4/12 when the 180 days should have started from August 8th letter, which would give me 180 days starting from August 8th.

Exhibit T.1.C.

Arguments on Appeal
Appellant

16. At hearing, Appellant testified that he did not receive the April 12th letter that Mr. Kantas mailed to the subject property because he was in eastern Washington working on his other marijuana grow operation. He stated that although most communications from the County were emailed to him, this letter was not. He received the Public Works memo of the same date by email, but that memorandum does not include information about a 180-day deadline. *Jim Hayes Testimony.*
17. The Appellant argued that the entire approval process was a “moving target” exercise, with review information being “piecemealed” by various departments, with different deadlines from each department. Because he is not a developer, but just a property owner who wants to use his property for a small business, he had to both figure out the process as he went and pay for the technical information and physical work at the time of each request for information from the County. He felt that he should have received one letter from the County indicating all requirements and putting all deadlines in one place. He felt that this was an improper process. *Jim Hayes Testimony.*
18. The Appellant argued that the forest practices moratorium he was told would apply to his property when the County believed he had harvested more than 5,000 board feet of timber should have stopped the time clock on the ASUP, arguing that the definition of development moratorium in the ordinance at TCC 17.25.200 supported his position.⁴ He submitted a document prepared by the Intervenor during their previous appeal (which was dismissed) also argued that the forest practices moratorium stopped the clock on his permit applications. Because he was told by Mike Kain, Tony Kantas, and Kraig Chalem that a moratorium would be in effect, it was unreasonable for the County to expect him to continue to spend money developing the ASUP application. Further, he argued that the time it took the County to determine no moratorium would be imposed should be added to the 180-day deadline. The Appellant contended that because he did not get Mr. Kantas's April 12th letter until September 11th, the 180-day deadline should have started over on that date. The Appellant also argued that his information submitted to the County June 26, 2017, photos and information that ultimately showed less than 5,000 board feet had been cut, should have stopped 180-day clock. With any or all of these events stopping the time clock from the April 12th letter, his October 12th request for extension would not have been submitted after expiration of his deadline, and his permit application would not have lapsed. *Jim Hayes Testimony; Exhibit A.4.*
19. The Appellant argued that the marijuana seized from his property was being grown by others pursuant to a medical license. *Jim Hayes Testimony.*

⁴ TCC 17.25.200: “Development moratorium” means Thurston County shall deny any and all applications for permits or approvals for a period of time established in Chapter 76.09 RCW. This shall include but not be limited to building permits, septic system permits, right-of-way permits, subdivision approvals, or change of zoning relating to the legal description described on the forest practices permit. The moratorium does not apply to expansions, alterations, or maintenance of existing structures or their accessory structures, nor does the moratorium apply to boundary line adjustments done for purposes of conservation of open space or natural areas.

County

20. Tony Kantas's October 20, 2017 denial letter contained a recitation of facts leading up to the decision to deny the time extension. The recitation included: that the April 12th letter notifying of the 180-day deadline had been sent by certified mail; that the August 8, 2017 letter reminding of the 180-day timeline that had started April 12th was sent by certified mail; that the Appellant's engineer didn't inquire with the County whether there was a deadline until one day after the 180-days deadline had passed, and the Appellant didn't request an extension until three days after the deadline had passed; that the Appellant had applied for a forestland conversion/release from the six-year moratorium and had that application been approved, no moratorium would have applied to the property; that the forestland conversion code violation did not eliminate the need for the drainage and erosion control report; that a notice of violation (NOV) had been issued October 16, 2016 to Appellant for growing marijuana on the subject site without obtaining required permits and required removal of all marijuana plants; that on August 17, 2017 the Thurston County's Sheriff's Department and Washington State Liquor and Cannabis Board entered the property and confiscated approximately 1,500 marijuana plants from the site; and that the County Code provides no discretion to extend the 180-day timeline to submit information needed for an application to be approved. *Exhibit T.1; Tony Kantas Testimony; Mike Kain Testimony.*
21. The Thurston County Public Works Department reviews drainage and road issues. The April 12, 2017 memorandum responding to Appellant's engineer's drainage scoping report was prepared by the County's Resource Stewardship Water Resources Division, informing Public Works of the information needed to demonstrate compliance with the Drainage Design and Erosion Control Manual (DDECM). The need to comply with the DDECM was triggered by grading in excess of 500 cubic yards conducted on site by the Appellant without benefit of a permit; it was not required as a result of timber cutting. However, the drainage design and erosion control plan would have been required for the County to process the ASUP application because of the proposed grading and construction of buildings and/or impervious surfaces. Public Works Staff testified that the required drainage report had not been submitted to the County as of the date of hearing. *Exhibit T.1.L; Arthur Saint Testimony.*
22. As of the hearing date, the Environmental Health Division (EHD) had not received all information requested in the July 11, 2017 request for information. *Dawn Peebles Testimony.* The August 8, 2017 letter informed the Appellant that the requested information was required to be submitted within 180 days of EHD's memo. No extension had been requested for this deadline as of the hearing date. *Exhibit T.1.H; Tony Kantas Testimony.* More than 180 days passed prior to the hearing date from the date of EHD's July 11, 2017 memo.
23. County Staff noted that throughout review of the ASUP application, the Appellant responded to requested information at the last minute with insufficient and/or inaccurate information that often contradicted other information already submitted. *Exhibits T.1, T.1.O, and T.2; Tony Kantas Testimony.*

24. The County offered the following argument in support of the denial. Pursuant to TCC 20.60.030, Contents of application:

If the application is deemed incomplete or if additional information is required, the applicant shall have one hundred eighty calendar days to submit the required information to the department. The department shall notify the applicant as to when the one-hundred-eighty-day period will end. If the applicant does not submit the required information within the one-hundred-eighty-day period, the application shall lapse. Prior to the expiration date, the applicant may request in writing an extension of time. The director may grant an extension if the required studies or information warrant additional time.

Staff argued that TCC 20.60.030 provides no discretion regarding time extension requests that are requested after the 180-day expiration. *Exhibit T.1; Tony Kantas Testimony.*

25. Staff recalled that shortly after the August 8, 2017 letter was sent by certified mail, the Appellant stopped by the Thurston County Permit Assistance Center (PAC) and stated that he had not been able to retrieve his mail while in eastern Washington working on his other marijuana production facility. During that face to face meeting, the Appellant was verbally reminded that the report was required to be submitted within 180-days of April 12, 2017 and copies of both letters were provided to him during his visit at the PAC. There was no further communication until the October 10, 2017 email from the Appellant's engineer, which was sent one day after the 180-day expiration. Appellant's request for time extension was submitted three days after the 180-day expiration. *Exhibit T.1; Tony Kantas Testimony.*
26. County Staff also argued that the Appellant had failed repeatedly to correct code violations on site and to apply for required permits prior to undertaking activities related to the I-502 business that required permit issuance. Nearly all of the existing improvements on the subject property were installed without permits, including two residences, accessory buildings, and a septic system. Despite receiving notices of violation informing him of the requirement to obtain approved permits for these unpermitted improvements, which permits have not been issued to date, the Appellant continued to make improvements to the property without applying for and receiving required permits, including constructing buildings and extensive grading/vegetation removal. Pursuant to TCC 26.05.020.B, no permit or approval shall be granted pursuant to the Thurston County Code if any violation of this code as listed in TCC 26.05.010 exists on the subject property. The continual violations included growing marijuana on site without a land use permit, despite having been informed multiple times this was not allowed. In addition to having missed the 180-day deadline for submission of the drainage design and erosion control plan, Staff argued that the ASUP application should be revoked pursuant to TCC 26.05.040.A.3 due to the continual and uncorrected code violations on site. *Exhibit T.1; Tony Kantas Testimony.*

27. Regarding Appellant's argument that the timeline should have been tolled during the time he understood from the County that a six-year moratorium would likely be applied to development of his property, County Staff argued that there was no written communication to the Appellant indicating that the ASUP was on-hold pending approval of a forestland conversion. Rather, all written correspondence indicated that if a forestland conversion permit was not approved, the property would be subject to a six-year moratorium. No moratorium was ever imposed. The forestland conversion permit application was being reviewed concurrently with the proposed ASUP pursuant to RCW 36.70B.060. The August 8, 2017 letter reminded the Appellant of the 180-day deadline. *Exhibit T.1; Tony Kantas Testimony.*

Intervenors' Arguments

28. Neighboring property owners James and Michelle Brigham had long been reporting what they believed to be violations of County Code on the subject property to the County. Michelle Brigham testified at hearing about the nature and duration of conflicts she and her husband have experienced with the Appellant and others at the subject property. On the motion of their attorney, they were granted intervenor status and participated as a party of interest in the appeal proceedings. *Michelle Horkings-Brigham Testimony; Intervenors' Brief; Ruling on Motion.*
29. In their submittals, Intervenors supported and sought to corroborate County Staff's argument in the appeal. They noted that although no drainage and erosion control report had yet been submitted, the grading and impervious surfaces it is intended to address began to be conducted/installed in 2014 and have been expanding since without benefit of review for compliance with the DDECM. Responding to Appellant's arguments and evidence at hearing, Intervenors' counsel contended that nothing offered by the Appellant successfully excused his failure to meet 180-day deadline and that the late request for extension is fatal to the ASUP permit. To the extent that Appellant's comments about not being an experienced developer and the allegedly confusing nature of Staff's communication of deadlines is an argument in equity, Intervenors' counsel argued that the County's hearing examiner lacks jurisdiction to grant equitable relief. Intervenors asserted that the Appellant's lack of ability to understand the rules and procedures, and his failure to obtain legal advice towards successfully navigating the permitting process, are not adequate defenses. *Intervenors' Pre- Hearing Brief; Ben Cushman Argument.*

CONCLUSIONS

Jurisdiction

The Hearing Examiner is authorized to decide appeals of administrative decisions, including extensions of time for administrative special use permits, pursuant to Thurston County Code Sections 2.06.010.B and 20.60.020, Table 2 (extension of time, administrative special use permit).

Criteria for Approval

Pursuant to Thurston County Code 20.60.060, appeals of administrative decisions "may be taken to the hearing examiner by any person aggrieved ... by any order, requirement, permit, decision

or determination made by an administrative official in the administration or enforcement of this title Appeals shall be filed in writing with the department within fourteen calendar days of the date of the notice of the decision being appealed, on a form provided by the department. Appeals shall be considered in the manner prescribed by Chapter 2.06 TCC."

Conclusions Based on Findings

1. The record submitted fails to demonstrate that the October 20, 2017 denial of time extension to submit additional information was in error. Pursuant to TCC 20.60.030:

For an application to be deemed complete for purposes of beginning the formal project review and starting the review clock, the following basic submittal information shall be provided. During project review, additional information or studies may be requested in writing by the department if needed to address particular aspects of the project or site. While the project review clock will formally stop during the time that the additional information is being assembled, department review of other aspects of the project will continue.

If the application is deemed incomplete or if additional information is required, the applicant shall have one hundred eighty calendar days to submit the required information to the department. The department shall notify the applicant as to when the one-hundred-eighty-day period will end. If the applicant does not submit the required information within the one-hundred-eighty-day period, the application shall lapse. Prior to the expiration date, the applicant may request in writing an extension of time. The director may grant an extension if the required studies or information warrant additional time.

The record demonstrates that the County mailed the April 12, 2017 letter written by Mr. Kantas notifying the Appellant of the 180-day deadline for submission of the drainage plan to the subject property, known to be the Appellant's business address. The record submitted failed to establish any Code provision or policy that makes it the County's duty to provide further or other notice than was provided. However, on the same day, the Public Works Department emailed the Public Works memo regarding the need for the drainage plan to the Appellant. The Appellant acknowledged receipt of the April 12th email. The County further followed up with a second written notice to the Appellant's business address. The County satisfied all requirements for communicating the date and the effect of the 180-day deadline. The Appellant admitted to having the August 8, 2017 letter in hand not later than September 11, 2017 and admitted he knew as of this face to face meeting with Staff that an important deadline was looming. By his testimony, that face to face meeting occurred 28 days before the deadline. Responsibility for the fact that neither the engineering firm nor the Appellant contacted the County to inquire about the deadline or request an extension until after the lapse date can only be placed with the Appellant.⁵ *Findings 20, 21, and 25.*

⁵ Of note, TCC 20.60.030 gives the Director discretion over whether or not to grant even a timely requested extension. The language is, "the director may grant an extension if the required studies or information warrant additional time."


2. The Appellant's arguments about various issues that he feels should have stopped the clock are not persuasive. As was clearly communicated to the Appellant in writing and in person, it is an applicant's responsibility to know the lapse date and to timely request an extension if one is needed. *Findings 10, 16, 17, 18, 19, and 27; TCC 20.60.030.*
3. All arguments and evidence not addressed in these findings and conclusions are, respectfully, deemed not relevant and/or persuasive.

DECISION

Based on the above findings and conclusions, the appeal of the October 20, 2017 administrative decision is **DENIED**.

Decided February 7, 2018.

By:



Sharon A. Rice
Thurston County Hearing Examiner

THURSTON COUNTY
PROCEDURE FOR RECONSIDERATION AND APPEAL
OF HEARING EXAMINER DECISION TO THE BOARD

NOTE: THERE MAY BE NO EX PARTE (ONE-SIDED) CONTACT OUTSIDE A PUBLIC HEARING WITH EITHER THE HEARING EXAMINER OR WITH THE BOARD OF THURSTON COUNTY COMMISSIONERS ON APPEALS (Thurston County Code, Section 2.06.030).

If you do not agree with the decision of the Hearing Examiner, there are two (2) ways to seek review of the decision. They are described in A and B below. Unless reconsidered or appealed, decisions of the Hearing Examiner become final on the 15th day after the date of the decision.* The Hearing Examiner renders decisions within five (5) working days following a Request for Reconsideration unless a longer period is mutually agreed to by the Hearing Examiner, applicant, and requester.

The decision of the Hearing Examiner on an appeal of a SEPA threshold determination for a project action is final. The Hearing Examiner shall not entertain motions for reconsideration for such decisions. The decision of the Hearing Examiner regarding a SEPA threshold determination may only be appealed to Superior Court in conjunction with an appeal of the underlying action in accordance with RCW 43.21C.075 and TCC 17.09.160. TCC 17.09.160(K).

A. RECONSIDERATION BY THE HEARING EXAMINER (Not permitted for a decision on a SEPA threshold determination)

1. Any aggrieved person or agency that disagrees with the decision of the Examiner may request Reconsideration. All Reconsideration requests must include a legal citation and reason for the request. The Examiner shall have the discretion to either deny the motion without comment or to provide additional Findings and Conclusions based on the record.
2. Written Request for Reconsideration and the appropriate fee must be filed with the Resource Stewardship Department **within ten (10) days of the written decision**. The form is provided for this purpose on the opposite side of this notification.

B. APPEAL TO THE BOARD OF THURSTON COUNTY COMMISSIONERS (Not permitted for a decision on a SEPA threshold determination for a project action)

1. Appeals may be filed by any aggrieved person or agency directly affected by the Examiner's decision. The form is provided for this purpose on the opposite side of this notification.
2. Written notice of Appeal and the appropriate fee must be filed with the Resource Stewardship Department **within fourteen (14) days of the date of the Examiner's written decision**. The form is provided for this purpose on the opposite side of this notification.
3. An Appeal filed within the specified time period will stay the effective date of the Examiner's decision until it is adjudicated by the Board of Thurston County Commissioners or is withdrawn.
4. The notice of Appeal shall concisely specify the error or issue which the Board is asked to consider on Appeal, and shall cite by reference to section, paragraph and page, the provisions of law which are alleged to have been violated. The Board need not consider issues, which are not so identified. A written memorandum that the appellant may wish considered by the Board may accompany the notice. The memorandum shall not include the presentation of new evidence and shall be based only upon facts presented to the Examiner.
5. Notices of the Appeal hearing will be mailed to all parties of record who legibly provided a mailing address. This would include all persons who (a) gave oral or written comments to the Examiner or (b) listed their name as a person wishing to receive a copy of the decision on a sign-up sheet made available during the Examiner's hearing.
6. Unless all parties of record are given notice of a trip by the Board of Thurston County Commissioners to view the subject site, no one other than County staff may accompany the Board members during the site visit.

C. STANDING All Reconsideration and Appeal requests must clearly state why the appellant is an "aggrieved" party and demonstrate that standing in the Reconsideration or Appeal should be granted.

D. FILING FEES AND DEADLINE If you wish to file a Request for Reconsideration or Appeal of this determination, please do so in writing on the back of this form, accompanied by a nonrefundable fee of **\$688.00** for a Request for Reconsideration or **\$921.00** an Appeal. Any Request for Reconsideration or Appeal must be **received** in the Permit Assistance Center on the second floor of Building #1 in the Thurston County Courthouse complex no later than 4:00 p.m. per the requirements specified in A2 and B2 above. **Postmarks are not acceptable.** If your application fee and completed application form is not timely filed, you will be unable to request Reconsideration or Appeal this determination. The deadline will not be extended.

* Shoreline Permit decisions are not final until a 21-day appeal period to the state has elapsed following the date the County decision becomes final.



Project No. _____
Appeal Sequence No.: _____

☐ Check here for: RECONSIDERATION OF HEARING EXAMINER DECISION

THE APPELLANT, after review of the terms and conditions of the Hearing Examiner's decision hereby requests that the Hearing Examiner take the following information into consideration and further review under the provisions of Chapter 2.06.060 of the Thurston County Code:

(If more space is required, please attach additional sheet.)

☐ Check here for: APPEAL OF HEARING EXAMINER DECISION

TO THE BOARD OF THURSTON COUNTY COMMISSIONERS COMES NOW _____
on this _____ day of _____, 20__, as an APPELLANT in the matter of a Hearing Examiner's decision
rendered on _____, 20__, by _____ relating to _____

THE APPELLANT, after review and consideration of the reasons given by the Hearing Examiner for his decision, does now, under the provisions of Chapter 2.06.070 of the Thurston County Code, give written notice of APPEAL to the Board of Thurston County Commissioners of said decision and alleges the following errors in said Hearing Examiner decision:

Specific section, paragraph and page of regulation allegedly interpreted erroneously by Hearing Examiner:

1. Zoning Ordinance _____
2. Platting and Subdivision Ordinance _____
3. Comprehensive Plan _____
4. Critical Areas Ordinance _____
5. Shoreline Master Program _____
6. Other: _____

(If more space is required, please attach additional sheet.)

AND FURTHERMORE, requests that the Board of Thurston County Commissioners, having responsibility for final review of such decisions will upon review of the record of the matters and the allegations contained in this appeal, find in favor of the appellant and reverse the Hearing Examiner decision.

STANDING

On a separate sheet, explain why the appellant should be considered an aggrieved party and why standing should be granted to the appellant. This is required for both Reconsiderations and Appeals.

Signature required for both Reconsideration and Appeal Requests

APPELLANT NAME PRINTED

SIGNATURE OF APPELLANT

Address _____

Phone _____

Please do not write below - for Staff Use Only:

Fee of ☐ \$688.00 for Reconsideration or \$921.00 for Appeal. Received (check box): Initial _____ Receipt No. _____

Filed with the Resource Stewardship Department this _____ day of _____, 20__.

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