

Douglas County Hearing Examiner

Andrew L. Kottkamp, Hearing Examiner

IN THE MATTER OF

APP-08-03
Jack Hale

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**FINDINGS OF FACT,
CONCLUSIONS OF LAW
AND DECISION**

THIS MATTER having come on for hearing in front of the Douglas County Hearing Examiner on January 15, 2009, the Hearing Examiner having taken evidence hereby submits the following Findings of Fact, Conclusions of Law and Decision as follows:

I. FINDINGS OF FACT

1. The appellant is Jack Hale, 9106 East Charter Oak Dr., Scottsdale AZ.
2. The appellant filed an application for a binding site plan, which was given the identification number of BSP#07-01.
3. On October 8, 2008, the Douglas County Land Services issued a Notice of Action granting preliminary approval for BSP#07-01.
4. On October 22, 2008, Mr. Donald Dimmitt filed a Notice of Appeal of the Notice of Action for BSP#07-01 on behalf of Mr. Hale.
5. Chapter 2.13.070, DCC, authorizes the Douglas County Hearing Examiner to hear appeals alleging an error in a decision by the Director of Land Services in taking an action on a short plat or binding site plan.
6. Chapter 14.12, DCC, establishes procedures for appealing administrative decisions.
7. Conducting open record appeal proceedings of an administrative decision is categorically exempt from a threshold determination per WAC 197-11-800(11)(b).
8. Greater East Wenatchee Area Comprehensive Plan, Amendments Adopted January 8, 2008, Transportation Goals and Policies include the following:

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- Goal: Provide a balanced transportation system that meets the needs of the community by accommodating the movement of people, goods, and services at an optimum level of safety and efficiency.
 - Goal: To provide an effective transportation network with adequate capacity to meet the adopted Level of Service (LOS) Standard and the travel demand for the area.
 - Goal: Ensure adequate and safe access to Property via a system of public and private roads.
 - Policy T-4: Permanent cul-de-sacs shall only be permitted in situations where it can be demonstrated that the design provides an acceptable level of network circulation and the prohibition of cul-de-sacs creates an unreasonable economic burden.
9. Douglas County Code Section 12.52.030 General Design Principles for New Roads states *“The inclusion of permanent cul-de-sacs is strongly discouraged as they inhibit road and pedestrian network circulation (see 12.52.040 L for specific requirements) and are not consistent with the County Comprehensive Plan.”*
 10. Douglas County Code Section 12.52.040 Design Requirements – New and Reconstructed Roads, L. Cul-de-sacs and dead end roads, states *“Permanent cul-de-sacs and dead end roads are not normally permitted within new developments. Permanent cul-de-sacs will only be permitted where the applicant can (a) demonstrate that his/her design does provide an acceptable level of network circulation considering the terrain and adjacent existing roadway network, and (b) demonstrate that the prohibition of cul-de-sacs will place an unreasonable economic impact on the applicant.”*
 - 11, The August 2007, Grant Road @ Airport Way/Urban Industrial Avenue, Intersection Final Traffic Study prepared by Gibson Traffic Consultants identifies access improvements necessary to accommodate industrial development within the Pangborn Industrial Service Area.
 12. The October 23, 2007 Traffic Impact Analysis, Hale Study, 26.25 Acres Industrial Park, prepared by Gibson Traffic Consultants concurs with the recommendations contained within the August 2007 Grant Road @ Airport Way/Urban Industrial Avenue, Intersection Final Traffic Study prepared by Gibson Traffic Consultants.
 13. It is recommended that Condition of Approval 29, Seventh bullet be modified as follows: *“Half Street frontage improvements for Urban Industrial Avenue shall be completed in accordance with Figure 3-8, Urban Collector and the deviation accepted by the County Engineer on May 22, 2008.”*

14. Public and agency comments that were received were considered by the Hearing Examiner in rendering this Decision and forming Conditions of Approval.
15. The entire Planning Staff file was admitted into the record at the public hearing.
16. Public hearing after due legal notice was held on January 15, 2009. Appearing on behalf of the applicant was Don Dimmitt, Attorney at Law. Mr. Dimmitt provided legal argument in support of the appeal. Testifying on behalf of the applicant was Martin Davy. Mr. Davy presented evidence relating to the road dedication issue as it relates to potential phasing of the project. He further provided testimony regarding the immediate construction of the round-about.
17. Admitted into the record were the following exhibits:
 - 17.1 Exhibit 1: January 15, 2009, memo from Jennifer Lange to the Hearing Examiner with attachments.
 - 17.2 Exhibit 2: Site Plan submitted by Martin Davy with colorations showing the proposed location of the round-about, the road dedication proposed by the County and in green dashes, the potential for the loop road system in the event the large single parcel of the plat is sold in subsequent phases.
 - 17.3 Exhibit 3: Again showing the round-about and the proposed loop road without highlighting the dedication requested by the County.
 - 17.4 Exhibit 4: Aerial photograph of the site.
 - 17.5 Exhibit 5: Area map showing various configuration of tax parcels in the vicinity.
 - 17.6 Exhibit 6: Table 1 entitled "Trip Generation Summary" from Gibson Traffic Consultants.
 - 17.7 Exhibit 7: Copies of multiple pages of the Trip Generation Manual designated by facilities offered to illustrate variations of average daily trips for specific uses.
 - 17.8 Also admitted into the record was Mr. Dimmitt's letter to the Hearing Examiner dated January 13, 2009.
18. No member of the public testified at the hearing.
19. At the conclusion of the hearing, the Hearing Examiner left the record open until January 22, 2009, to allow the applicant an opportunity to respond to Jennifer Lange's memorandum to the Hearing Examiner admitted as Exhibit 1.
20. While the record was open, Mr. Dimmitt submitted a letter with attachments dated January 20, 2009. This letter and all attachments are admitted into the record by this reference.

21. The Douglas County Transportation & Land Services Notice of Action, BSP-O7-01 dated October 8, 2008, set forth 27 findings of fact.
22. Although the Hearing Examiner acknowledges that the Hearing Examiner's review of this matter is de novo, the Hearing Examiner does note that the appellant did not challenge in their Notice of Appeal any of the findings of fact.
23. The burden of proof is upon the appellant to show that the administrative decision is erroneous. DCC 14.12.010(B)(3).
24. Additionally, DCC 14.12.010(B)(3) requires the appellant to set forth specific reasons why appellant believes the opinion to be erroneous, including identification of each finding of fact, each conclusion and each condition or action ordered which the appellant alleges is erroneous.
25. The notice of appeal sets forth 4 conditions of approval that the appellant believed were erroneous. These were Condition of Approval No. 26 in its entirety; Condition of Approval No. 29, second bullet; Condition of Approval No. 29, fourth bullet; and Condition of Approval No. 29, seventh bullet.
26. At the open record public hearing, it was agreed by the County that Condition of Approval No. 29, seventh bullet, was erroneous, and that a deviation had been accepted by the County.
27. Condition of Approval No. 26 states in its entirety, "Construction of on site transportation improvements may be phased. Dedication of right-of-way to facilitate construction of future transportation improvements shall not be phased."
28. The appellant argues that to give the appellant flexibility to market and sell parcels within the binding site plan that are larger than those demonstrated in the application materials, that requiring dedication of land at this time will be a detriment to their ability to market larger parcels.
29. It is the County's position that having a looped roadway system through the development is preferred by the Douglas County Code and Douglas County Comprehensive Plan, that the condition was based upon the application materials submitted by the applicant and that if the applicant wishes to sell a larger parcel and to relocate the loop road, this can be accomplished through the amendment process.
30. While the convenience of the applicant in selling parcels in greater size than that demonstrated on the application materials may be impaired, the applicant has not demonstrated that Condition of Approval No. 26 is erroneous either in fact or in law.

31. Condition of Approval No. 29, second bullet, states in its entirety, “Prior to final approval of the binding site plan, the construction of the intersection mitigation (round-about) identified in the August, 2007, Traffic Impact Analysis shall be completed.”
32. The applicant’s position and evidence indicated that the construction of this round-about is beyond the control of the applicant and that there are other mechanisms that can be put in place to insure the construction of the round-about upon showing of the demonstrated need based upon average daily trips generated by applicant’s project and vicinity projects.
33. It is the County’s position that this condition is supported by the Douglas County Code and the facts as exist in the subject area. While there is the possibility recognized in the applicable traffic study that construction of an interim unsignalized intersection improvements (in lieu of the round-about intersection improvements) would be adequate until 2012 or at 35% of the development, this expense on the developers as well as the inconvenience to the citizens of Douglas County and traveling public are the basis for Condition of Approval 29, second bullet.
34. Further, Jennifer Lange testified that construction of the round-about will occur in 2009 as the County will attach the bond and move forward with the construction of the round-about if the responsible developer does not proceed. The Hearing Examiner finds that based upon this testimony and the evidence contained in the record that construction of this round-about will begin in 2009.
35. The Hearing Examiner finds that the appellant has failed to sustain the burden of proof to show that Condition of Approval No. 29, second bullet, is erroneous either in fact or law.
36. The applicant has appealed Condition of Approval 29, fourth bullet. This condition states in its entirety, “Additional right-of-way shall be dedicated to accommodate the required intersection improvements (round-about) at Grant Road and Urban Industrial Avenue. The intersection improvements (round-about) are currently under design by Ed Zontek, engineer for Batterman Ventures. The applicant shall coordinate with Douglas County throughout the design process for the final right-of-way configuration.”
37. The applicant’s position is that their dedication of land should account towards their pro rata share for the construction costs of the round-about. The applicants suggest additional language be added to the fourth bullet of Condition of Approval No. 29 that states, “The applicant may count this dedication as a credit toward any assessment established in the future as part of a road reimbursement agreement, road

- improvement district or other means to collect a pro rata participation in the round-about.”
38. The County’s position is that it is more appropriate to address questions regarding pro rata share if or when formation of a road reimbursement area are pursued. Jennifer Lange wrote in her January 15, 2009, memo to the Hearing Examiner, “At the time of consideration of the road reimbursement area formation request, all applicable information will be considered, including the recommendations contained within the Traffic Impact Analysis and any contributions required to facilitate development that may offset contributions toward the project costs. Inclusion of the recommended text may compound confusion regarding the valuation of the right-of-way dedication, which could be more appropriately addressed upon consideration of formation of a road reimbursement area.”
 39. The Hearing Examiner agrees with the appellant that this dedication may (as opposed to shall) count towards a credit of any assessment as part of a road reimbursement agreement.
 40. However, the Hearing Examiner agrees with the County that complicated issues such as valuation of the dedication when applied to the road reimbursement agreement should be more appropriately considered at the time of the road reimbursement area formation request.
 41. As a specific finding, the Hearing Examiner finds that at the time of the road reimbursement area formation request, the appellant shall be allowed to submit evidence regarding the valuation of this right-of-way dedication. However, the Hearing Examiner makes no finding as to how this valuation request is to be applied when determining the pro rata participation in the expenses of the round-about improvements.
 42. The applicant has failed to demonstrate that Condition of Approval No. 29, fourth bullet, is erroneous in either fact or law.
 43. All findings of fact contained in the October 8, 2008, Administrative Decision on BSP-07-01 are incorporated herein by this reference.
 44. Any Conclusion of Law that is more correctly a Finding of Fact is hereby incorporated as such by this reference.

II. CONCLUSIONS OF LAW

1. The Hearing Examiner has authority to render this decision.

2. The appeal of BSP-07-01 was timely filed.
3. The Administrative Decision dated October 8, 2008, relating to BSP-07-01 accurately sets forth findings of fact.
4. The Administrative Decision dated October 8, 2008, relating to BSP-07-01 sets forth conditions of approval that are measurable and are supported by factual findings contained in the October 8, 2008, Decision as well as this Decision.
5. As conditioned, the Administrative Decision dated October 8, 2008, regarding BSP-07-01 is consistent with the Douglas County Comprehensive Plan and Douglas County Code.
6. Any Finding of Fact that is more correctly a Conclusion of Law is hereby incorporated as such by this reference.

III. DECISION

The Administrative Decision dated October 8, 2008, regarding BSP-07-01 is hereby **AFFIRMED** in all respect with the exception that Condition of Approval No. 29, seventh bullet, is hereby modified to read in its entirety as follows:

“Half Street frontage improvements for Urban Industrial Avenue shall be completed in accordance with Figure 3-8, Urban Collector and the deviation accepted by the County Engineer on May 22, 2008.”

Dated this 3rd day of February, 2009.

DOUGLAS COUNTY HEARING EXAMINER



Andrew L. Kottkamp

Anyone aggrieved by this decision has twenty-one (21) days from the issuance of this decision, to file an appeal with Douglas County Superior Court, as provided for under the Judicial Review of Land Use Decisions, RCW 36.70C.040(3). The date of issuance is defined by RCW 36.70C.040 (4)(a) as “(t)hree days after a written decision is mailed by the local jurisdiction or, if not mailed, the date on which the local jurisdiction provides notice that a written decision is publicly available” or if this section does not apply, then pursuant to RCW 36.70C.040(3) (c) “...the date the decision is entered into the public record.” Anyone considering an appeal of this decision should seek legal advice.

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