

Douglas County Hearing Examiner

Andrew L. Kottkamp, Hearing Examiner

IN THE MATTER OF)	
)	
APP-08-05)	FINDINGS OF FACT,
Strider EW, LLC)	CONCLUSIONS OF LAW
)	AND DECISION

THIS MATTER having come on for hearing in front of the Douglas County Hearing Examiner on April 16, 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 Strider EW, LLC, c/o Mark A. Lackey, 900 Dupont Street, Bellingham, WA (hereinafter "Strider").
2. Chapter 2.13.070, DCC, authorizes the Douglas County Hearing Examiner to hear any other matters as specifically assigned to the examiner by the Board of County Commissioners or as prescribed by Douglas County Code.
3. Chapter 12.50.060 authorizes the Douglas County Hearing Examiner to hear appeals of any decision by the County Engineer in the interpretation, administration or enforcement of the Road Standards.
4. Chapter 14.12, DCC, establishes procedures for appealing administrative decisions.
5. On November 4, 2008, Strider filed a Notice of Appeal of the October 22, 2008 Administrative Interpretation. The Appellant requested that this appeal be placed on hold. The appeal of this Administrative Interpretation is not part of this appeal and is likely moot given Mr. Kulaas' memorandum to the Hearing Examiner dated April 15, 2009 (see Finding of Fact No. 22 infra).
6. The exhibits to "Nelson materials" reference materials submitted by Brian Nelson in the above-referenced matter that were admitted into the record at the open record public hearing referenced in Finding of Fact No. 21 infra.

APP-08-05
Strider EW, LLC
Page 1 of 8

7. On June 14, 1995, the Douglas County Board of Commissioners adopted Ordinance TLS 95-2-50 adopting an ordinance creating the Baker Flats Industrial Area Road Reimbursement District No. 1. (Nelson materials Exhibit 2)
8. The ordinance referenced in Finding of Fact No. 7 was not appealed.
9. On August 7, 1995, the Douglas County Board of Commissioners entered into the North Baker Flats Road Reimbursement Agreement with owners Brian and Leslie Nelson (hereinafter "Agreement"). (Nelson materials Exhibit 3)
10. On January 6, 1997, the Douglas County Board of Commissioners entered into an Amendment to the North Baker Flats Road Reimbursement Agreement with owners Brian and Leslie Nelson (hereinafter "Amended Agreement"). (Nelson materials Exhibit 4)
11. Neither the Agreement nor the Amended Agreement were appealed.
12. On or about March 11, 2008, Robert Stritzel as grantor transferred certain property located within Douglas County and covered by the Agreement and Amended Agreement to Strider (property hereinafter referred to as "Strider parcel"). (Nelson materials Exhibit 5)
13. On November 18, 2008, the Douglas County Transportation and Land Services issued a Determination of Liability to Strider submitting Douglas County Invoice # 6518 in the amount of \$134,757.41 for reimbursement pursuant to the Agreement and Amended Agreement and accumulated interest "through 11/19/08." It also set forth that interest continued to accrue at "\$15.51 per diem."
14. On December 3, 2008, Strider timely appealed this Determination of Liability.
15. On December 16, 2008, Douglas County Transportation and Land Services issued a Determination of Complete Application regarding Strider's appeal of the Determination of Liability. (Materials submitted by appellant Strider at the open record public hearing with exhibits, hereinafter referred to as "Strider materials," Exhibit 43)
16. Beginning on June 24, 2008, Mr. Brian Nelson through his authorized representatives began contacting Douglas County regarding activity on the Strider parcel.
17. From June 24, 2008, until shortly before November 19, 2008, Douglas County Transportation and Land Services had taken the position that the activity taking place on the Strider parcel was not "development" subject to activation of the Agreement and Amended Agreement.

18. Submitted as part of the Nelson materials include Exhibits 1-17, all of which are admitted into the record.
19. Also submitted as part of the Nelson materials was a Declaration of Brian Nelson dated April 8, 2009. This was admitted into the record. Submitted just prior to the open record public hearing by Nelson was a declaration by Brett Telford dated April 14, 2009. This declaration was admitted into the record.
20. Submitted at the open record public hearing as part of the Strider materials are Exhibits 1 through 60, all of which are admitted into the record. Also submitted in the Strider materials were an April 15, 2009, letter by attorneys Mark Lackey and Peter Dworkin. Also submitted as part of the Strider materials was a Declaration of James Gebhardt dated April 15, 2009. This was admitted into the record.
21. An open record public hearing upon due legal notice was held on April 16, 2009. Submitted at this hearing was an April 10, 2009, letter from Director of Land Services, Mark Kulaas, to Andrew Kottkamp with an attachment, that attachment being an April 9, 2009, letter from Peter Dworkin to the Clerk of Douglas County Hearing Examiner. This letter and attachment were admitted into the record.
22. Also admitted into the record was an April 15, 2009, memorandum from Mark Kulaas to Andy Kottkamp, Douglas County Hearing Examiner. This memorandum indicated that it was Mr. Kulaas' opinion that the definition of "development" relevant to this appeal was found in Douglas County Code 12.44.110.
23. DCC 12.44.110 describes development as follows: "'Development' means all subdivisions, short subdivisions, industrial or commercial building permits, conditional or special use permits, or building permits including structures, and all similar uses in unincorporated Douglas County, and other similar projects requiring land use permits or approval by Douglas County, except single-family residences on existing tax lot."
24. The Agreement, which was not challenged by any appeal and is otherwise in all respects valid and enforceable, provides that all properties within the Road Reimbursement Area, which include the Strider parcel, bear the burden of road improvements on a pro rata basis. The Agreement further provides, "The assessment shall become reimbursable to the Owners through the Douglas County Department of Transportation and Land Services when the property that is subject to the assessment pursuant to the terms of this Agreement and the County ordinance is subject to development as defined in the Douglas County Code. The payment of the assessment is a condition of the issuance of any permit or approval of development of the property assessed." (Nelson Exhibit 3, pages 5-6)

25. An issue before the Hearing Examiner is whether Strider's current use of the Strider parcel meets the definition of "development" as set forth in the Agreement and as development is defined in the Douglas County Code.
26. Additionally, the Hearing Examiner must determine at what point the reimbursable amount assessed shall bear interest. The Agreement states, "Each reimbursable amount assessed shall bear interest at the rate of eight percent (8%) per annum from the date of final completion of all road improvements, subject to expiration of the term of this agreement." (Nelson Exhibit 3, page 5)
27. The Agreement terminates fifteen (15) years from its effective date. (Nelson Exhibit 3, page 6)
28. The Hearing Examiner finds that the assessment becomes due and payable upon development of the Strider parcel while the assessment of interest becomes due and payable upon "final completion of all road improvements."
29. Development on property can take place without the issuance of a permit or formal approval of the development by Douglas County.
30. The Amended Agreement, dated January 6, 1997, signed by the Douglas County Board of Commissioners and owners Brian and Leslie Nelson, sets forth the Recital "B" as follows: "Owners have completed the road improvement as set forth in said agreement and provided Douglas County documents and records concerning the actual cost incurred by the owner in completing the road improvement as identified in said agreement." The reference to agreement was the Agreement described in Finding of Fact No. 9.
31. It is through Exhibit B of this Amended Agreement that the Strider (Stritzel) parcel pro rata share was determined pursuant to the Determination of Liability dated November 19, 2008 (Nelson Exhibit 6). Through the Amended Agreement, there was a legislative determination that the road improvements were complete. The Hearing Examiner finds that the legislative finding that the "owners have completed the road improvement as set forth in said agreement" (referencing the August 5, 1995, Agreement) does constitute a finding of the "date of final completion of all road improvements" referenced in the Agreement, thereby triggering accumulation of interest from that point forward.
32. At the open record public hearing on April 16, 2009, the Hearing Examiner left the record open to permit the Nelson and Strider representatives to submit documentation regarding the paving of the approximately 300 feet of the roadbed on Enterprise Drive to the edge of the Strider parcel.

33. Both Nelson and Strider submitted letters dated April 20, 2009. The Strider letter from Mr. Dworkin contained a Supplemental Declaration of James Gebhardt dated April 20, 2009. This letter from Mr. Dworkin and the Gebhardt Supplemental Declaration were admitted into the record.
34. Mr. Donald Dimmitt's letter dated April 20, 2009, was also admitted into the record as well a letter (the Hearing Examiner's copy is unsigned) from Brian Nelson dated April 17, 2009.
35. From the supplemental materials, the Hearing Examiner finds that the remaining 300 feet of unpaved Enterprise Drive was paved on June 17, 2008.
36. The substantial evidence before the Hearing Examiner supports the finding that the road improvements completed by Nelson were completed as set forth in the Amended Agreement despite the fact that final paving did not occur until June, 2008. The primary evidence supporting this finding is the legislative finding set forth in the Amended Agreement.
37. This determination of complete construction is also based upon Mr. Nelson's testimony that construction completed prior to entry of the Amended Agreement was the intersection of SR 2/97 and Enterprise Drive as well as all interior roads except for the paving of 300 feet of Enterprise to the north edge of the Strider parcel. The only unpaved portion of Enterprise Drive was a roadbed that was being utilized by heavy equipment from adjacent property owners, Basin Asphalt. This roadbed was also utilized to provide access to the Stritzel/Strider parcel, most noticeably after the unpermitted access to the Stritzel/Strider parcel directly off of Highway 2/97 was blocked by concrete barriers in 2008 and/or 2009. The delay in paving of this roadbed was due to a request by Basin Asphalt that Mr. Nelson not pave the roadbed as a convenience to their operations. This delay in paving was not done at Mr. Nelson's initiative but was due to Mr. Nelson's acquiescence to Basin Asphalt's request.
38. According to documents included in the file of record regarding construction costs and the calculation of the liability amount for Strider, it indicates that the final cost of the intersection at Enterprise Drive and State Road 2/97 was \$61,372.00 and that the County road costs, that being on Enterprise Drive, totaled \$7,758.00 for the total of \$69,130.00 which is the principal amount stated as due and owing in the November 19, 2008, Determination of Liability.
39. Regarding the issue of whether the current use of the property constitutes development, it was not disputed, and the Hearing Examiner hereby finds, that Strider's use of the property constitutes use as a construction contractor's offices and

yards as set forth in DCC 18.60.020, relating to permitted uses under the General Industrial District.

40. Those permitted uses under the general industrial district, while “permitted” still require authorization and/or permission from Douglas County Transportation and Land Services to conduct this activity and is subject to various requirements, such as having valid access to the property and potentially additional landscaping requirements.
41. In other words, even though a construction contractor’s offices and/or yards are permitted uses, Douglas County Transportation and Land Services still has authority to condition that permitted use based upon a showing that various requirements have been met.
42. Use of property as a construction contractor’s yard and/or office pursuant to DCC 18.60.020 requires “approval by Douglas County” as that phrase is used in DCC 12.44.110.
43. The evidence submitted by Nelson in their exhibits, specifically the Declaration of Brian Nelson as well as Exhibits 7, 9, 11, 12, 13 and 14 of the Nelson materials clearly establish that by November 18, 2008, Strider’s use of the Strider parcel was at a minimum as a construction contractor’s yard and possibly also construction contractor’s office.
44. The Hearing Examiner recognizes that there has been no enforcement action against Strider by Douglas County alleging a zoning violation for failure to provide verifiable access to the property. However, the Hearing Examiner finds that Strider does have valid access to the Strider parcel as a result of the intersection and road constructed by Nelson that is the subject of the Agreement and Amended Agreement. Strider’s use of the property as a construction contractor’s offices and/or yards is consistent with and included within the Douglas County definition of development set forth in 12.44.110. DCC 12.44.110 definition of development mentions a list of development permits that trigger the definition of development, but then specifically states that the term “development” includes not only all similar “projects requiring land use permits or approval by Douglas County” but also “all similar uses in unincorporated Douglas County”
45. The Hearing Examiner finds that the definition of development was intended to include the permitted use of construction contractor’s offices and/or yards within the general industrial zoning district because it is a use similar to other conditional and/or special commercial, industrial and conditional or special uses permitted in the district as well as it is a type of project and/or use requiring approval by Douglas County.

46. Any Conclusion of Law that is more correctly a Finding of Fact is hereby incorporated as such by this reference.

II. CONCLUSIONS OF LAW

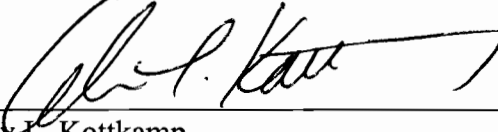
1. The Hearing Examiner has been granted authority to render this Decision.
2. Chapter 2.13.070, DCC, authorizes the Douglas County Hearing Examiner to hear any other matters as specifically assigned to the examiner by the Board of County Commissioners or as prescribed by Douglas County Code.
3. Chapter 12.50.060 authorizes the Douglas County Hearing Examiner to hear appeals of any decision by the County Engineer in the interpretation, administration or enforcement of the Road Standards.
4. Conducting open record appeal proceedings of an administrative decision is categorically exempt from a threshold determination per WAC 197-11-800(11)(b).
5. The Hearing Examiner concludes that the definition of development was intended to include the permitted use of construction contractor's offices and/or yards within the general industrial zoning district because it is a use similar to other conditional and/or special commercial, industrial and conditional or special uses permitted in the district as well as it is a type of project and/or use requiring approval by Douglas County.
6. Resolution No. TLS 95-16 adopted April 4, 1995, is valid and enforceable.
7. Ordinance No. TLS 95-2-50 adopted June 14, 1995, is valid and enforceable.
8. The Agreement dated August 7, 1995, is valid and enforceable.
9. The January 6, 1997, Amended Agreement is valid and enforceable.
10. The Douglas County definition of development contained in DCC 12.44.110 includes construction contractor's offices and yards as set forth in DCC 18.60.020(I).
11. Any Finding of Fact that is more correctly a Conclusion of Law is hereby incorporated as such by this reference.

III. DECISION

Based on the above Findings of Fact and Conclusions of Law, the Hearing Examiner hereby **AFFIRMS** in all respects the November 19, 2008, Determination of Liability.

Dated this 5th day of May, 2009.

DOUGLAS COUNTY HEARING EXAMINER



Andrew L. Kottkamp

Any aggrieved party or agency of record may request a reconsideration of this Hearing Examiner's decision. Motions for reconsideration must be filed with the Department within ten (10) days from the date of issuance as defined by RCW 36.70C.040(4)(a). Unless otherwise provided, the filing of a motion for reconsideration shall not stop or alter the running of the period provided to appeal the Hearing Examiners decision to Superior Court. Motions for reconsideration are governed by Douglas County Code 2.13.150.

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.