

CITY OF OAK HARBOR
HEARING EXAMINER

Administrative Appeal of)	No. BSP-10-00001
)	
<i>Alpine Village, Inc.</i>)	ORDER GRANTING CITY'S
)	MOTION TO DISMISS APPEAL

Preliminary Information

Hearing Date: January 10, 2011

Parties of Record:

Alpine Village, Inc.
C. Thomas Moser
1204 Cleveland Avenue
Mount Vernon, WA 98273

City of Oak Harbor
Kimberly J. Waldbaum
Keating, Bucklin & McCormack, Inc., P.S.
800 Fifth Avenue, Suite 4141
Seattle, WA 98104

Steve Powers
Development Services Director
City of Oak Harbor
865 SE Barrington Drive
Oak Harbor, WA 98277

Alice Smith
1085 SE Regatta Drive, A101
Oak Harbor, WA 98277

Pier Point Condominium Association
c/o Sue Karahalios
PO Box 144
Oak Harbor, WA 98277

Lois Lewis
c/o Pier Point Condominium Association
PO Box 144
Oak Harbor, WA 98277

Robert Severns
Pier Point Condominiums, Unit C-201
1085 SE Regatta
Oak Harbor, WA 98277

Exhibits:

- 1 Appellant's Opening Brief, dated December 21, 2010, prepared by C. Thomas Moser, Attorney for the Appellant, with attachments
 - 1-1 Staff Report, Appeal BSP-05-00001, July 31, 2005
 - 1-2 Preliminary Staff Analysis, Pier Point Condominiums
 - 1-3 Notice of Decision, May 2, 2005
 - 1-4 LUPA Petition and Appeal, no. 06-2-00816-7
 - 1-5 Verbatim Report of Court's Oral Ruling, February 15, 2007
 - 1-6 Order Dismissing LUPA Petition with Prejudice, February 15, 2007
 - 1-7 Declaration of Tom Burdett, May 21, 2006
 - 1-8 Declaration of William L. Massey, August 24, 2006
 - 1-9 Order Granting Plaintiff's Motion for Partial Summary Judgment, August 27, 2009
 - 1-10 Order Granting Plaintiff's Second Motion, November 23, 2009
- 2 Cover letter, dated December 23, 2010, from Kimberly Waldbaum, with attachments:
 - 2-1 City's Motion to Dismiss Appeal and to Strike the January 10, 2011 Hearing Date to hear the Motion to Dismiss, dated December 23, 2010, prepared by Kimberly Waldbaum
 - 2-2 Declaration of Service, December 23, 2010, Marlis Pehling
 - 2-3 Hearing Examiner Decision, BSP05-0001, November 15, 2006
 - 2-4 LUPA Petition and Appeal, No. 06-2-00816-7
 - 2-5 Order Dismissing LUPA Petition with Prejudice, February 15, 2007
- 3 Declaration of Steve Powers, December 29, 2010
- 4 Letter dated December 29, 2010, from Alice Smith
- 5 City's Response Brief, December 29, 2010, Kimberly Waldbaum
- 6 Letter, December 30, 2010, Sue Karahalios, Alice Smith, Robert Severns, and Rhonda Haines of Pier Point Condominium Association
- 7 Brief of Pier Point Condominium Owners Association, December 30, 2010, prepared by Sue Karahalios
- 8 Declarations of Lois Lewis, Samir and Michele Bishai, Alice Smith, David Jasman, Robert Severns, Sue Karahalios, Rhonda Severns, John Royce, Jr., December 30, 2010
- 9 Appellant's Response to City's Motion to Dismiss, January 3, 2011, C. Thomas Moser

- 10 Declaration of Pier Point Condominium Association, January 4, 2011, Sue Karahalios
- 11 Letter dated January 6, 2011, Lois Lewis
- 12 Declaration of Robert Severns, January 10, 2011
- 13 City's Reply in Support of Motion to Dismiss, January 6, 2011, Kimberly Waldbaum
- 14 Superior Court, No. 08-2-00229-7 Answer to Complaint for Quiet Title and Declaratory Judgment
- 15 Superior Court, No. 08-2-00229-7, Complaint for Quiet Title and Declaratory Judgment
- 16 Superior Court, No. 08-2-00229-7, Plaintiff's Response to Defendants' Motion for Partial Summary Judgment
- 17 Superior Court, No. 08-2-00229-7, Motion for Partial Summary Judgment Re: Quiet Title
- 18 Cover letter, dated November 2, 2006, from G. Tim Martin with enclosure:
 - 18-1 Supplemental Memorandum of Appellant Alpine Village, Inc., November 2, 2006, prepared by G. Tim Martin
 - 18-2 Verbatim Report of Proceedings (Excerpt), September 11, 2006

I.

The matter before the Hearing Examiner for the City of Oak Harbor is an Appeal of an Administrative Decision by the City denying a Binding Site Plan Amendment seeking to amend the construction schedule set forth in the Binding Site Plan for Pier Point Condominiums, SPR 9-91. The Binding Site Plan for Pier Point Condominiums was approved on November 19, 1991, and thereby amended on January 9, 1992.

Pursuant to the requirements of the Binding Site Plan Ordinance, the proposed 8-phased, 16-condominium unit development was to be completed by January 15, 1996.

II.

The above-named Appellant is seeking amendment to the "binding construction schedule" set forth in SPR 9-91, which granted Binding Site Plan approval for the Pier Point Condominium Project, and which required completion of all phases by October 1, 1996. Only four of the eight phases had been completed when the "binding construction schedule" expired.

The Appellant herein previously sought the same amendment in 2005, under file number BSP-05-0001. The City of Oak Harbor had made a formal Decision at that time not to process the amendment to the construction schedule contained in SPR 9-91. The City concluded that

there were no clear development rights for the un-built phases in the Pier Point Condominium, and that the City "...cannot process an amendment to the Pier Point Condominium BSP until the issues of whether lots 5 thru 8 are developable and can be constructed upon is settled between the owners of Pier Point Condominiums (buildings 1.4) and Island Construction and Alpine Village, Inc.

This Decision was appealed to the Hearing Examiner of the City of Oak Harbor. During the Appeal Process, the Hearing Examiner concluded that one of the issues that ultimately needed to be resolved was whether or not "the binding construction schedule" that was required for Binding Site Plan Approval could be amended after it had expired. This issue involved application of the City of Oak Harbor's Binding Site Plan Ordinance and was within the jurisdiction of the Hearing Examiner.

Based on this conclusion and the Hearing Examiner's request, the City of Oak Harbor submitted in writing the City's position that the "binding construction schedule" could be amended after it had expired. The Appellant, Alpine Village, Inc., submitted a detailed briefing, also arguing that a "binding construction schedule" could be amended after its expiration date.

The Hearing Examiner's Decision in BSP-05-0001, in Conclusion of Law III, and in reference to this specific legal issue, reads as follows:

The Hearing Examiner concludes that you cannot amend a Binding Site Plan to allow the schedule for phased condominium development to be changed after the deadline for completion of the development has past. This does not mean that there are no development rights left in the parcel and it does not help us determine ownership of any remaining development rights. It may be entirely appropriate to submit a new application for additional condominium development on this site, in accordance with applicable local and State regulations in affect (sic) at the time of a new application.

The Hearing Examiner's Decision that included the above Conclusion of Law was appealed to Superior Court, pursuant to the Land Use Petition Act. The LUPA Appeal was dismissed with prejudice because of Alpine Village, Inc.'s failure to name and serve necessary Parties. Because of this Dismissal, Superior Court did not address any of the issues raised in the Appeal on the merits.

III.

After Dismissal of the LUPA Appeal, Alpine Village, Inc. filed a Quiet Title Action in Superior Court and was granted partial summary judgment. This Quiet Title Action resolved some of the issues raised in the prior Alpine Village, Inc. Appeal of BSP-05-00001. The Superior Court Order in the Quiet Title Action did not resolve the issue as to whether or not a "binding construction schedule" in a Binding Site Plan for a phased condominium development can be amended after its expiration date.

IV.

Any Conclusion of Law which is deemed a Finding of Fact is hereby adopted as such. Based on the foregoing Findings of Fact, now are entered the following:

Conclusions of Law

I.

The City has requested the Hearing Examiner dismiss the Appeal of Alpine Village, Inc. based on issue preclusion. The Parties in this Appeal are the same Parties which took part in the previous Appeal which resulted in a written Decision of the Hearing Examiner, file No. BSP-05-0001, after the Hearing Examiner gave the Parties notice and an opportunity to be heard on the issue of whether or not a "binding construction schedule" within a Binding Site Plan could be amended after the expiration of the construction schedule. This issue is solely a legal issue and was addressed by both the City of Oak Harbor and Alpine Village, Inc., in writing and in oral argument, before the Hearing Examiner ruled.

II.

The Dismissal with prejudice under the Land Use Petition Act, RCW 36.70C of the Hearing Examiner's Decision in BSP-05-0001, resulted, as a matter of law, in a valid and final Decision which cannot be collaterally attacked or re-litigated.

The doctrine of the law of the case applies in this situation. The failure of the Appellant herein to successfully attack the prior Hearing Examiner Decision has resulted in the Hearing Examiner's Conclusion of Law III, in BSP-05-0001, becoming the law of the case barring the Appellants herein from re-litigating this issue.

III.

Collateral estoppel, or the *doctrine of res judicata*, applies to administrative decisions and is intended to prevent re-litigation of critical issues determined in a prior litigation.

The legal system's interest in finality and judicial economy underlie all of the arguments put forth by the City in the City's Motion to Dismiss. That same interest lead to the Hearing Examiner's decision to have the parties address the "binding construction schedule" issue as part of BSP-05-0001.

This attempt of Alpine Village, Inc. to re-litigate this legal issue by again seeking to amend the "binding construction schedule," set forth in the subject Binding Site Plan, should be denied.

Even if the Hearing Examiner was inclined to review, and perhaps modify the prior legal conclusion, it would be most inappropriate in this case, where the Parties are the same, the

Binding Site Plan under review is the same, and the relief requested by the Appellant is the same as that addressed and decided by the Hearing Examiner Decision in BSP-05-0001, dated November 15, 2006.

IV.

Any Finding of Fact deemed to be a Conclusion of Law is hereby adopted as such. Based on the foregoing Findings of Fact and Conclusions of Law, now is entered the following:

DECISION

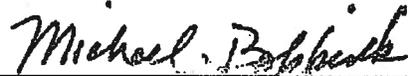
The City's Motion to Dismiss the above-captioned Appeal on the grounds of Issue Preclusion is hereby GRANTED.

NOTICE OF ADMINISTRATIVE APPEAL PROCEDURES
FROM FINAL DECISIONS OF
THE OAK HARBOR HEARING EXAMINER

This decision of the Hearing Examiner for the City of Oak Harbor is final ^{KG} ~~ten~~ ^{twenty-one} days after the issuance of this decision unless it is appealed to the Island County Superior Court within ten days of the issuance of this decision, pursuant to 30.70C R.C.W.

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DATED this 26th day of January 2011



Michael Bobbink, Hearing Examiner