

BEFORE THE HEARING EXAMINER
FOR THE CITY OF KENMORE

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CITY OF KENMORE

In Re: the Appeal of)
Mr. Dan Olsen, et al.) NO. OHE 2003-010
) (B96CS05)- 3rd Appeal
Of the Extension of a Commercial Site)
Development Permit for the Project) ORDER OF DISMISSAL
Known as "Lakepointe")
_____)

TO: Dan Olsen and Bonnie Olsen, Appellants
6504 NE 196th Street
Kenmore, WA 98028

Allan McFadden and Karen McFadden, Appellants
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Kenmore, WA 98028

Michael Kenyon, Attorney for City, *via fax to 425-392-7071*

Jack McCullough, Attorney for Applicant, *via fax to 206-448-3444*

Background & Summary

The City issued an extension of a commercial site development permit for the Lakepointe Project and the Appellants filed an appeal of that extension. The City seeks dismissal of that appeal, arguing that the Hearing Examiner has no jurisdiction to hear an appeal of the grant of an extension.

The Hearing Examiner, after considering the documents submitted and the arguments of all parties, concludes that a dismissal is appropriate. The City Council did not provide for an appeal of an administrative decision granting an extension of a commercial site development permit. Therefore, the appeal must be dismissed. The Appellants have exhausted any administrative remedy and may appeal the decision directly to Superior Court.

Documents Reviewed Prior to Ruling

The Hearing Examiner reviewed the following documents prior to issuance of this Order:

1. City of Kenmore Ordinance No. 02-0157, effective date December 5, 2003

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2. City Administrative Determination, dated January 30, 2003
3. Appeal of Administrative Determination, dated February 20, 2003
4. City Motion to Dismiss Appeal, dated March 11, 2003
5. Hearing Examiner Order, Time for Response to Motion to Dismiss, dated March 14, 2003
6. Appellant's Response to Motion to Dismiss, dated March 19, 2003
7. Applicant's Response to Motion to Dismiss, dated March 21, 2003.

Facts

Based on his review of the above-referenced documents, the Hearing Examiner enters the following findings:

1. On November 5, 2002, the City of Kenmore City Council passed Ordinance No. 02-0157, which became effective on December 5, 2002 (the "Ordinance"). The Ordinance allows the Director of Community Development to extend an approved commercial site development permit if the Director concludes that four specified criteria have been satisfied.
2. On January 30, 2003, the Director issued an administrative determination granting an 18-month extension to the LakePointe Project Commercial Site Development Permit. The administrative determination is part of a five page letter wherein each of the four criteria are described and findings are made as to whether the extension request complies with those four criteria.
3. On February 20, 2003, four residents of the City of Kenmore appealed the City's administrative determination to the Hearing Examiner. The Appellants allege that the City did not provide adequate notice and an appeal period for its administrative decision granting the extension of the permit. The Appellants argue that the City's administrative decision is "invalid" and that an appeal of that determination should be heard by the Hearing Examiner as a "Type II" decision.
4. On March 11, 2003, the City filed a motion to dismiss the appeal. In its motion, the City argues that the Ordinance did not specify the Director's decision as a Type II decision appealable to the Hearing Examiner, nor did it provide for any other form of administrative appeal. The City argues that the Hearing Examiner must act within the authority granted to him by the Ordinance, and that neither the Ordinance nor any other section of the Kenmore City Code authorizes the Hearing Examiner to hear an appeal of the Director's decision to extend the permit.
5. On March 14, 2003, the Hearing Examiner issued an order that established a date by which the Appellants and Applicants must respond to the City's motion, if they wished to do so. Both parties did file a timely response in writing.
6. On March 19, 2003, the Appellants responded by arguing that the Director's decision was discretionary and, therefore a Type II decision under Section

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19.25.020 of the Kenmore City Code. That section specifies which decisions are appealable and includes “site development permits”. The Appellants argue that phrase includes extensions to site development permits and, thus, the decision to extend is appealable to the Hearing Examiner as a Type 2 decision.

7. On March 21, 2003, the Applicant responded to the City’s motion. The Applicant argues that the Director’s decision is not a Type II decision and that the Hearing Examiner is limited to the jurisdiction provided in the Ordinance itself, which does not provide for an appeal. Additionally, the Applicant argues that even if the ministerial decisions are made using limited discretion, the Washington Supreme Court has recognized that local jurisdictions may limit the right to appeal for such decisions and that the City of Kenmore has done so for extensions of commercial site development permits.

Conclusion

Based on the findings described above, the Hearing Examiner enters the following conclusion:

The Hearing Examiner has no jurisdiction to hear this appeal. Thus, it must be dismissed. *Findings of Fact No. 1-7.*

Discussion

The jurisdiction of the Hearing Examiner is limited to that granted by the City Council in its ordinances and resolutions.¹ To determine if his jurisdiction extends to an acceptance of this appeal, the Hearing Examiner must review the Ordinance authorizing extensions to determine the intent of the City Council. A principle rule in statutory construction is that when the language of an ordinance is plain and unambiguous, the meaning and intent must be determined from the language itself.² The language of the Ordinance providing for the extension of a commercial site development permit is plain and unambiguous. It expressly grants the Director authority to extend the time limits of an approved commercial site development permit if four specific findings are made. Noticeably absent from the Ordinance is language that provides for an appeal of the Director’s decision. Had the City Council intended to provide for an appeal, it would have done so as it has for other land use decisions.³ Under the rules of governing the interpretation and application of an ordinance, the Hearing Examiner must conclude that it was the intent of the Kenmore City Council to not provide for an appeal of the grant of an extension of a commercial site development permit. The Ordinance does not provide for an appeal of the administrative decision to the Hearing Examiner, and the right to an appeal cannot be

¹ See, *Chaussee v. Snohomish County*, 38 Wn. App. 630 (1984).

² See *City of Bellevue, v. East Bellevue Community Council*, 138 Wn.2d 937, 944 (1999); *Roberts v. Johnson*, 137 Wn.2d 84, 91, (1999).

³ See, e.g., *Section 19.25.020 of the Kenmore City Code.*

inferred from other sections of the Kenmore City Code. Therefor, the City's motion to dismiss the appeal must be granted.

So ordered this 21st day of March 2003.



THEODORE PAUL HUNTER, Hearing Examiner