

KOTTKAMP & YEDINAK

435 Orondo Ave. | Wenatchee, WA 98801
PO Box 1667 | Wenatchee, WA 98807

Attorneys

Andrew L. Kottkamp

Nicholas A. Yedinak

Robert W. Grim

June 8, 2015

Kittitas County Comm. Development Svc
Attn: Jeff Watson
411 N. Ruby, Suite 2
Kittitas, WA 98926



Re: LP-07-00040

Dear Jeff:

Enclosed please find the Hearing Examiner's Decision regarding the above-referenced matter.

Should you have any questions, please do not hesitate to call.

Sincerely,



KELLY SERVIAN



KITTITAS COUNTY
LAND USE HEARING EXAMINER

IN THE MATTER OF)
)
LP-07-00040)
Big Buck Ridge)

RECOMMENDED FINDINGS OF
FACT, CONCLUSIONS OF
LAW AND DECISION

THIS MATTER having come on for hearing in front of the Kittitas County Hearing Examiner on April 23, 2015, the Hearing Examiner having taken evidence hereby submits the following Recommended Findings of Fact, Conclusions of Law and Decision as follows:

I. RECOMMENDED FINDINGS OF FACT

1. Wayne Nelson authorized agent for Becky Andrus, landowner, submitted a performance based cluster plat application on June 20th, 2007 to create 14 one acre single family parcels and approximately eleven acres of open space. The plat proposes a group B water system and onsite individual septic systems.
2. The subject property is 2 parcels, located approximately 1/2 mile north of Yakima Avenue in the City of Cle Elum at 140 Big Buck Ridge Road (outside city limits), Cle Elum WA, in a portion of Section 26, Township 20N, Range 15E, WM in Kittitas County, bearing Assessor's map numbers 20-15-26010-0010 and 20-15-26010-0009.
3. Site Information
Total Project Size: 25 acres
Number of Lots: 14
Domestic Water: Group B Community Water System (Proposed)
Sewage Disposal: Individual on-site septic systems (Proposed)
Power/Electricity: Puget Sound Energy
Fire Protection: Fire District 7
Irrigation District: None
4. Site Characteristics:
North: Light Development\Vacant
South: Power Lines; Undeveloped\Vacant
East: Undeveloped \Vacant
West: Subdivided Single Family under construction
5. The area is primarily covered in sparse forest. Topography starts relatively flat on the north end of the parcels then steadily gains in slope (up to 33%) as it progresses to the south.
6. The proposed project would have access from Bigbuck Ridge Road, a 60-foot private access

easement. A second access route would be required by the Kittitas County Road Standards (KCRS 12.01.095(2)). The applicant has not submitted any information as to the location of this required second access route.

7. The Comprehensive Plan designation is Rural.
8. At the time the initial application was submitted, the property was within the Rural-3 zoning district. The minimum lot size is one dwelling for each three acres, except as provided for in Kittitas County Code 16.09, Performance Based Cluster Platting (in effect at the time the application was submitted.)
9. The purpose and intent of the Rural-3 zone is to provide areas where residential development may occur on a low density basis. A primary goal and intent in siting R-3 zones will be to minimize adverse effects on adjacent natural resource lands.
10. The application for the Big Buck Ridge Plat was submitted to Community Development Services (CDS) on June 20, 2007. On July 18, 2007, staff issued a letter of incomplete application, requiring the applicant to provide an address list for all landowners within 300 feet of the proposal. The list was provided on July 23, 2007. This letter also stated, in part “when the additional information is received and the application is deemed complete, our review of the application will continue.”(emphasis added).
11. The language used in this letter provides that the County will affirmatively take action to deem the application complete. The County could have, but did not state that after the requested information was received, “then” the application would be deemed complete. The County’s use of the word “and” indicates a separate decision and action remained to be made even after the requested information was provided
12. No letter or other notice of Complete Application was issued by Kittitas County until the Notice of Application dated February 9th, 2015.
13. There is no evidence that the applicant ever requested that Kittitas County issue a letter of complete application.
14. The Notice of Application was issued on February 9, 2015. This notice was published in the official county paper of record and was mailed to jurisdictional government agencies, adjacent property owners and other interested parties. The last day to submit written comments was on February 24, 2015.
15. No Traffic Impact Study was submitted by the Applicant with either the Application Materials or the SEPA Environmental checklist dated 6/9/2007.
16. The SEPA Environmental checklist was a required component of the application.
17. Based upon review of the submitted application materials, including the environmental checklist, correspondence received during this 15 day comment period and other information on file with Community Development Services, a Mitigated Determination of Non-Significance

(MDNS) was issued on March 25, 2015. The appeal period ended on April 9, 2015 at 5:00 p.m. No appeals were filed.

18. The following agencies provided comments during the comment period: Washington State Department of Health, Washington State Department of Ecology, and Kittitas County Public Health. Kittitas County Public Works submitted correspondence on March 16, 2015.
19. An open record public hearing after due legal notice was held on April 23, 2015.
20. Public and agency comments that were received were considered by the Hearing Examiner in rendering this Decision.
21. Admitted into the record were the following exhibits:

- Exhibit 1. Application Receipt – 6/20/2007
- Exhibit 2. Closures – 6/19/2007
- Exhibit 3. Well Reports – Multiple Dates
- Exhibit 4. SEPA Checklist – 6/19/2007
- Exhibit 5. Plat Application 6/20/2007
- Exhibit 6. Preliminary Plat – 6/20/2007
- Exhibit 7. Public Health Form Letter – 6/20/2007
- Exhibit 8. Road Variance Request – 5/18/2007
- Exhibit 9. Deem Incomplete Letter – 7/18/2007
- Exhibit 10. Adjoining Property/Mailing Labels 7/23/2007
- Exhibit 11. Traffic Impact Analysis Required Letter – 8/16/2007
- Exhibit 12. Second Access Required Letter – 12/5/2007
- Exhibit 13. Sixty Days to Submit Letter – 2/9/2010
- Exhibit 14. TIA Correspondence Letter – 6/14/2010
- Exhibit 15. Extension Request – 6/15/2010
- Exhibit 16. Extension Granted Letter – 6/25/2010
- Exhibit 17. Extension Request – 10/19/2010
- Exhibit 18. Extension Granted Letter – 10/17/2010
- Exhibit 19. Extension Request – 6/27/2011
- Exhibit 20. Extension Granted Letter – 6/27/2011
- Exhibit 21. Extension Request – 9/29/2011
- Exhibit 22. Extension Granted Letter – 9/30/2011
- Exhibit 23. Extension Request – 1/11/2012
- Exhibit 24. Extension Granted Letter – 1/11/2012
- Exhibit 25. Comments – City of Cle Elum – 1/13/2012
- Exhibit 26. Extension Granted Letter – 10/23/2012
- Exhibit 27. Extension Request – 6/26/2012
- Exhibit 28. Extension Granted Letter – 6/26/2012
- Exhibit 29. Extension Request – 10/9/2012

Exhibit 30. Correspondence RE TIA – 10/23/2012
Exhibit 31. Traffic Impact Analysis – dated 2/19/2013 and received 2/20/2013
Exhibit 32. Memo from Public Works – 5/6/2013
Exhibit 33. Email from Public Works – 5/29/2013
Exhibit 34. Higgs Comments – 2/24/2015
Exhibit 35. Critical Areas Checklist – 1/21/2015
Exhibit 36. Planners Maps – 1/21/2015
Exhibit 37. Notice of Application Documentation – 2/9/2015
Exhibit 38. Newspaper Article – 2/12/2015
Exhibit 39. Owens Comments – 2/24/2015
Exhibit 40. Site Visit Photos – 12/19/2014
Exhibit 41. Carmody Comments – 2/24/2015
Exhibit 42. McDuff Comments - 2/24/2015
Exhibit 43. McKim Comments – 2/23/2015
Exhibit 44. Suman Comments – 2/23/2015
Exhibit 45. Rogers Comments – 2/23/2015
Exhibit 46. Skvarla Comments – 2/23/2015
Exhibit 47. Person Comments – 2/22/2015
Exhibit 48. Remeto Comments – 2/16/2015
Exhibit 49. McDonald Comments – 2/21/2015
Exhibit 50. Thompson Comments – 2/21/2015
Exhibit 51. Ecology Comments – 2/24/2015
Exhibit 52. Daly Comments – 2/18/2015
Exhibit 53. Burnett Comments – 2/16/2015
Exhibit 54. Johnson Comments – 2/16/2015
Exhibit 55. Clark Comments – 2/22/2015
Exhibit 56. Jones Comments – 2/16/2015
Exhibit 57. Kasowski Comments – 2/16/2015
Exhibit 58. Kittitas County Public Health Comments – 2/10/2015
Exhibit 59. Mulhbeier Comments – Beginning 2/13/2015
Exhibit 60. Washington State Department of Health Comments – 2/9/2015
Exhibit 61. City of Cle Elum Comments – 1/13/2012
Exhibit 62. Transmittal of Comments – 3/19/2015
Exhibit 63. Chapman Exhibit – 2/24/2015 (9:43 p.m.)
Exhibit 64. Ecology Exhibit – 3/3/2015
Exhibit 65. Public Works Exhibit – 3/16/2015
Exhibit 66. Washington State Department of Health Exhibit – 2/25/2015
Exhibit 67. Newspaper Article – 3/30/2015
Exhibit 68. Notice of SEPA Action and Public Hearing – 3/25/2015
Exhibit 69. Mitigated Determination of Non-Significance – 3/25/2015
Exhibit 70. Published Notice of SEPA Action and Public Hearing – 3/25/2015
Exhibit 71. Newspaper Article – 3/26/2015
Exhibit 72. Newspaper Article – 3/30/2015

- Exhibit 73. Road Maintenance Exhibit (Public Works) – 3/20/2015
- Exhibit 74. Request to Postpone Public Hearing – 3/31/2015
- Exhibit 75. Notice of SEPA Action & Postponement – 3/31/2015
- Exhibit 76. Staff Report
- Exhibit 77. Notice of Public Hearing Documentation – 4/14/2015
- Exhibit 78. Ordinance 2007-22 – 7/19/2007
- Exhibit 79. Chapter 17.30 Rural-3 Zone – 7/10/2007
- Exhibit 80. Hearing Examiner Public Hearing Staff Report – 4/23/2015
- Exhibit 81. Memorandum of Authorities – Applicant - 4/21/2015
- Exhibit 82. Staff Power Point Presentation from Public Hearing - 4/23/2015
- Exhibit 83. Exhibit from Melissa Bates – 4/23/2015
- Exhibit 84. Public Health Memorandum – 4/15/2015
- Exhibit 85. Fire Marshall Memorandum - 4/23/2015
- Exhibit 86. Revised Proposed Conditions of Approval - 4/23/15
- Exhibit 87. Hearings Examiner Public Hearing Agenda – 4/23/2015
- Exhibit 88. Hearings Examiner Public Hearing Sign In Sheet – 4/23/2015
- Exhibit 89. Affidavit of Publication Notice of Public Hearing – 4/17/2015
- Exhibit 90. Email Chain Regarding Hearing Record Documents – 4/29/2015
- Exhibit 91. Email Chain Regarding Clarification of Issues and Disclosure – 4/29/2015
- Exhibit 92. Applicant’s Motion to Supplement the Record 5/8/2015
- Exhibit 93. Email Correspondence Between All Parties 5/8/2015 to 5/26/2015
- Exhibit 94. Letter from Applicant to Jan Ollivier Signed 2/16/2010
- Exhibit 95. Post Hearing Memorandum of Authorities Applicant
- Exhibit 96. Post Hearing Memorandum of Authorities Cle Elum Ridge Assoc.
5/22/2015

- 22. The Kittitas County Community Development Services recommended approval of this permit, subject to recommended conditions of approval.
- 23. Appearing and testifying on behalf of the applicant were Jeff Slothower and Wayne Nelson. Mr. Slothower and Mr. Nelson were both sworn in as witnesses and provided testimony as well as argument regarding alleged facts. Both testified that they were agents authorized to appear and testify on behalf of the applicant and property owner.
- 24. Appearing and testifying from the public were the following individuals:
 - 24.1 Kay Muhlbeier
 - 24.2 Kevin Daly
 - 24.3 Diedre Link
 - 24.4 Joe Skvarla
 - 24.5 Shirley Person
 - 24.6 Bruce Higgs
 - 24.7 James Carmody. Mr. Carmody, an attorney, was sworn in as a witness. He represents individuals who oppose the project.

25. At the conclusion of the hearing, the Hearing Examiner left the record open until May 15th, 2015 in order for the applicant, Mr. Carmody on behalf of his clients, and the County to respond to the Hearing Examiner's legal questions surrounding the law that applies to this matter and for the applicant to provide a response to the Fire Marshall's comments (Exhibit 84).
26. On May 14th, 2015, the Hearing Examiner granted the applicant's motion to reopen the record to allow the inclusion of 3 additional exhibits, and further ordered that the record remain open until May 22nd, 2015. The Hearing Examiner indicated that his written Recommended Decision would be issued June 9th, 2015.
27. The applicant was required, by Kittitas County approval of the Andrus rezone (Ordinance No. 2006-57)(RZ-06-00023) to submit a traffic impact analysis at the time of a project action.
28. It is clear that the traffic impact analysis was intended to be submitted with the application materials for any future development of the rezoned land in order to provide for a meaningful analysis of the traffic impacts, by staff, agencies and the public
29. On July 18th, 2007, Kittitas County issued a letter of incomplete application requesting additional information. The requested information was provided by the applicant on July 23rd, 2007. However, Kittitas County never issued a letter of complete application. Instead, the County issued notice to the applicant, by letter dated August 16th, 2007, that the traffic impact analysis was required to be submitted before any further evaluation of LP 04-40 could continue.
30. The Traffic Impact Study was dated February 19th, 2013 but was not submitted until February 20th, 2013.
31. The Notice of Application was issued by Kittitas County on February 9th, 2015.
32. The Kittitas County Code provides that the Notice of Application must be provided within 14 days of the determination of the complete application. (KCC 15A.03.060). This project application did not legally vest until the applicant had submitted a fully complete application.
33. The Traffic Impact Analysis was required to be submitted in order for there to be a fully complete application. The applicant was aware, at the time of the enactment of Ordinance 2006-57 that the Traffic Impact Analysis was required to be submitted at the time of a project action.
34. A project action, in the context of this ordinance, includes a cluster plat application.
35. The fact that Kittitas County refused to process LP07-40 until a Traffic Impact Analysis was submitted, and that a letter of complete application was never issued, and that the Notice of Application was only issued after the Traffic Impact Analysis was submitted, is clear evidence that the Traffic Impact Analysis was required to be submitted in order for there to be a complete application.

36. The one consistent action of Kittitas County is that they would not process this application, in any fashion, without a Traffic Impact Analysis. The applicant was aware of this fact. Nevertheless, the applicant purposefully delayed submitting the required traffic impact analysis. This delay by the applicant resulted in a delay in the vesting date for this application.
37. The Kittitas County Code does not allow for a “de facto” determination of complete application.
38. KCC 15A.03.040 (4) requires the county to, within 14 days after an applicant has submitted to the county the additional information identified by the county as being necessary for the complete application, to notify the applicant whether the application is complete or what additional information is necessary.
39. Kittitas County staff, instead of issuing a notice of complete application, repeatedly advised the applicant that additional information, the Traffic Impact Study, was necessary to be submitted before any further processing could occur.
40. The County letter to the applicant dated August 16th, 2007 is consistent with a determination of an incomplete application, rather than a “de facto” determination of a complete application.
41. Because the county did not declare application LP 07-40 to be void when the Traffic Impact Analysis was not provided within 180 days of the date the application was deemed to be incomplete, has created some confusion as to the vesting date. (See KCC 15A.03.040 (1) (b) and (4) (g)).
42. Kittitas County mistakenly did not declare the application to be void when it remained incomplete for 180 days. However, this mistake does not mandate, as a matter of law, and is not evidence of, a finding that the application was therefore complete on an arbitrary date.
43. The extensions granted by the county in submitting the traffic impact analysis are more consistent with the county extending the 180 day time frame of the application becoming void as a matter of law. This is most clearly evidenced by Exhibit 30, Kittitas County Planning Official Robert “Doc” Hansen’s October 23rd, 2012 letter to Cory and Becky Andrus.
44. Therefore, it is understandable as to why the County did not declare the application to be void after it remained incomplete for more than 180 days.
45. The County’s failure to declare the application as void after it remained incomplete for 180 days DOES NOT, as a matter of fact or law, render the application to be complete.
46. By operation of law, cluster subdivisions are no longer allowed in Kittitas County as of February 11th, 2013 by Ordinance 2013-001. This Ordinance eliminated three acre zones within the County and rezoned the subject property.
47. The very earliest that the Kittitas County could have declared the application to be complete was February 20th, 2013 upon the submission of the Traffic Impact Analysis.

48. However, because the Notice of Application was not issued until February 9th, 2015, and the Mitigated Determination of Non Significance was not issued until March 25, 2015, these actions are more consistent with a determination of a complete application taking place no earlier than 14 days prior to the Notice of Application (January 26th, 2015).
49. This application, LP 07.40, vested as a matter of fact and law, on January 26, 2015
50. Because this application did not vest prior to February 11th, 2013, this application is not consistent with the current Kittitas County Code.
51. Any Conclusion of Law that is more correctly a Finding of Fact is hereby incorporated as such by this reference.

II. RECOMMENDED CONCLUSIONS OF LAW

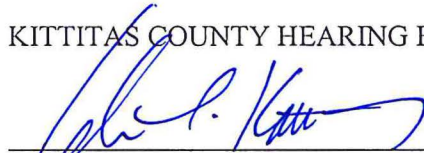
1. The Hearing Examiner has been granted authority to render this recommended decision.
2. The development fails to meet the goals, policies and implementation recommendations as set forth in the Kittitas County Comprehensive Plan.
3. This proposal is not consistent with applicable federal and state laws and regulations.
4. Public use and interest will not be served by approval of this proposal as conditioned.
5. The proposal may be inconsistent with Kittitas County Code Title 16 Subdivision, Title 17 Zoning, Title 17A Critical Areas, Title 15 Environmental, and Title 12 Roads and Bridges, as are currently in effect.
6. The proposed use may be inconsistent with the intent, purposes and regulations of the Kittitas County Code and Comprehensive Plan, as are currently in effect.
7. The proposed use may be contrary to the intent or purposes and regulations of the Kittitas County Code and the Comprehensive Plan, as are currently in effect.
8. Failure of the County to issue a notice of incomplete application does not make the application complete on an arbitrary date as a matter of law.
9. Vesting occurs upon the submission of a fully complete application (RCW 58.17.033) and the issuance of a determination of a complete application (KCC 15A.03.040).
10. Because this application did not vest until January 26, 2015, after the adoption of Kittitas County Ordinance 2013-001, the application must be processed according to the laws, rules and regulation in existence as of January 26th, 2015.
11. Any Finding of Fact that is more correctly a Conclusion of Law is hereby incorporated as such by this reference.

III. RECOMMENDED DECISION

Based on the above Recommended Findings of Fact and Recommended Conclusions of Law, the Hearing Examiner hereby recommends that Application LP-07-00040 be **REMANDED** to the Kittitas County Department of Community Development staff for processing according to the laws, rules and regulations in existence as of January 26th, 2015.

Dated this 8th day of June, 2015.

KITTITAS COUNTY HEARING EXAMINER



Andrew L. Kottkamp