

**NOTICE OF DECISION**

**BEFORE THE SKAGIT COUNTY HEARING EXAMINER**

**Applicant:** MLT, LLC  
Donald C. McRae  
P.O. Box 5860  
Eugene, OR 97405

**Agent:** Marianne Manville Ailles  
Skagit Surveyors and Engineers  
806 Metcalf Street  
Sedro-Woolley, WA 98284

**Request/File No:** Extension, Preliminary Plat of Moonlight Terrace, PL96-0295

**Location:** West side of Big Lake off Majestic Ridge Lane off West Big Lake Boulevard, within a portion of W1/2 Sec. 1, T33N, R4E, W.M. P16164, P16163, P16154, P121653, P29853

**Summary of Proposal:** Preliminary Plat was approved May 27, 2004. Original expiration date was May 27, 2009. Extension to May 27, 2011, was granted in September 2008. Current request is for extension to May 27, 2014.

**Land Use Designation:** Rural at the time of vesting -- August 27, 1996  
Current: Rural Reserve, Rural Resource-NRL, Rural Village

**SEPA Compliance:** MDNS for initial plat approval.

**Public Hearing:** April 20, 2011. Planning and Development Services recommended denial.

**Decision:** Denial

**Reconsideration:** A Request for Reconsideration may be filed with PDS within 10 days of this decision. The decision may be appealed to the Board of County Commissioners by filing an Appeal with PDS within 14 days of the date of the decision or decision on reconsideration, if applicable.

**Online Text:** The entire decision can be viewed at [www.skagitcounty.net/hearing examiner](http://www.skagitcounty.net/hearing_examiner)

## **FINDINGS OF FACT**

1. MLT, LLC (Donald McRae) seeks a second extension of the Preliminary Plat of Moonlight Terrace.

2. The proposed plat is to divide approximately 164.7 acres into 32 one-acre residential lots, with the remainder in protected open space. The application was deemed complete on August 27, 1996 and vested to the Rural zoning then in effect. The initial applicant was Shamrock Lands, Inc.

3. The zoning of the site is now Rural Reserve, Rural Resource-NRL, and Rural Village Residential. Under current zoning, nine standard lots would be allowed or, assuming CaRD density bonuses, up to 23 lots.

4. The property is on a hillside above Big Lake, located west of Big Lake Boulevard and west of Majestic Ridge Lane. It is within a portion of W1/2 Sec, T33N, R4, W.M. P16164, P16163, P16154, P121653, P29853

5. The preliminary plat was approved for applicant Port Gardner Timber (Bill Vaux) on May 27, 2004, with an expiration date five years thereafter. A request to extend the expiration date from May 27, 2009 was granted to the present applicant on September 15, 2008. The extension is to expire on May 27, 2011. The request now is for a further extension of the expiration date to May 27, 2014. This would mean a development period of ten years rather than the five years which is standard. See SCC 14.18.100(6) and former SCC 14.12.130.

6. The decision approving the preliminary plat did not address the eight year gap between the filing of the application and its approval. It did state that in the interim the arrangement of lots was reconfigured to a more environmentally sensitive design.

7. The 2008 decision approving an extension of the plat noted that the property in question had changed ownership twice since the initial application was submitted. It said that the current owners took possession in February of 2008 and "have been diligently pursuing completion of the preliminary plat requirements since they took over."

8. In the initial extension hearing, Staff sought a tight schedule, and asked for progress reports and a prohibition on further extensions. The Examiner approved a two year extension, required some reporting, but refused to prohibit further extensions.

9. Over the long life of this approval, only limited progress toward completion has been made. A grading permit (BP06-0048) was issued in 2006 and the clearing and roughing in of roads was started. But, as of now, no phase of construction has been completed. Clearing is not complete. The road bed is not cut to final grade. The stormwater management system has not been completed. Underground utilities have not been installed. The water system which includes construction of a large reservoir has not been started.

10. When the current owners took over in 2008, the development was in violation of water quality requirements as a result of sediment discharge into Big Lake. Without question, a

great effort has been made to correct this problem and, according to the applicant, in 2010 the requirements of the Department of Ecology Construction Stormwater General Permit were met. Nevertheless, in the current situation, there remains a potential environmental threat from the possibility of sediment-laden storm water flowing into Big Lake during heavy rains. The applicant argues that the solution to this problem is to finish the work that is required for completion of the plat.

11. The applicant asserts that the collapse of the housing market and attendant inability to obtain financing for projects such as this provides "good cause" for approving this extension. In making the point about economic conditions, the applicant paints a very grim picture. The application states:

Banks are still not making loans on residential land developments. This is due to the oversupply of existing developed lots, lack of sales and regulatory agencies' requirements that banks reduce their portfolio of real estate related loans. These obstacles will gradually work themselves out over time. The consensus is lenders will be getting back into residential development loans in 2012.

Whenever the needed financing is obtained, the applicant says they will need two full construction seasons to complete this subdivision's construction.

12. The Staff argue the extreme uncertainty of relying on an improved financing picture at any particular time. Staff take note of the modest progress made over the seven years since this project was approved and urge that there are no convincing reasons to think that the barriers to moving forward will be overcome within the time frame of the requested extension. The Examiner agrees that the unsubstantiated prediction of likely conditions in 2012 does not provide confidence that this project will be completed by 2014.

13. As a general proposition, the Staff assert that external market factors cannot operate to provide "good cause" for another permit extension. They say this rationale could be used to justify virtually unlimited time extensions.

14. The initial extension was granted using former SCC 14.12.130(c)(ii) which was in effect at the time the plat vested. That section allowed extensions upon a showing of "good cause." It has since been repealed and the current version of the Code is silent on the question of extensions.

15. The County did not appeal the initial extension, but Staff now argue that the Examiner should not rely on former SCC 14.12.130(C)(ii) in this case, but should instead be governed by the provisions of SCC 14.18.100(6) which became effective in 2000 when the former provision was repealed. As relevant, that subsection states:

(b) Preliminary long subdivision approvals shall be valid for 60 months.

(c) If any condition is not satisfied and the final subdivision is not recorded within the approval period, the preliminary plat approval shall be null and void.

Staff's view is that the "null and void" language and the absence of any provision for extensions shows an intent to limit the life of preliminary plat approvals to the five year period.

16. Staff goes on to argue that the provisions of the current law on the time frame for preliminary plat validity and the disallowance of extensions should be applied here because SCC 14.18.100(6) is not covered by the vesting statute.

17. No argument is made that the Moonlight Terrace proposal is not vested to the substantive provisions of zoning, such as density, setbacks, and lot coverage, which were in effect in 1996. However, Staff asserts that the vesting doctrine applies only to such substantive provisions and not to procedural requirements.

18. RCW 58.17.033, the relevant vesting statute, says that subdivisions shall be considered under the "land use control ordinances" in effect at the time a completed application was filed. Staff argues that SCC 14.18.100(6) is not a "land use control ordinance" within the meaning of the statute.

19. The applicant opposes the Staff's position on grounds that the issue of the applicability of former SCC 14.12.130(C)(ii) to this project was decided in the first extension case and that the County is now precluded from re-arguing on grounds of finality. They say that the County's failure to appeal the initial extension prevents them from now arguing that the later enacted Code provision applies here.

20. The applicant states in his application that without the requested extension, the project will be abandoned. If the project is abandoned with partly constructed infrastructure, the applicant's consultant raises the specter of the development of "deep ravines with significant impact on the Big Lake ecosystem."

21. Public comments were split on between opposition and support for the extension. Those living near the site who testified expressed concerns over the siltation of Big Lake and the raising of the lake bed that has occurred below the development area in recent years. However, they expressed the opinion that the extension would likely only make things worse.

22. The record reflects that the County Commissioners are considering legislation to legislatively adopt a one year extension to preliminary plat approvals. The applicant was adamant that such a limited extension would not give him enough time to complete his project under even the most optimistic recovery scenario.

23. Any conclusion herein which may be deemed a finding is hereby adopted as such.

## **CONCLUSIONS OF LAW**

1. After reflecting on the arguments of the parties, the Hearing Examiner has decided that he lacks jurisdiction to extend the preliminary plat's approval. This is because he lacks the power to do so under the County Code.

2. SCC 14.18.100(6) should be applied to this case. Under that subsection, a preliminary long plat approval is valid for 60 months and no more. If the final subdivision is not recorded within that time frame, the approval is "null and void."

3. It is true that in response to a 2004 extension application the Examiner stated that "nothing here suggests that the County, by repealing the explicit extension provision, intended to limit the vesting period for preliminary plats." However, having considered the County's argument in this case, the Examiner has concluded that rationale was incorrect. The Examiner now holds that the absence of any provision for extensions in the Code coupled with the "null and void" language constitute a statutory formulation that forecloses the granting of extensions.

4. There is no bar of finality to applying SCC 14.18.100(6) to this application. The original approval created no rights to permit extensions. Each extension application creates a distinct case with its own hearing and its own record. The instant application is a new case, subject to the provisions of law in place when the application was made. The rationale used in an earlier separate case does not prevent the result reached here.

5. The Examiner has determined that SCC 14.18.100(6) should be applied because it constitutes a procedural provision that is not subject to the vesting rule. Vesting applies to substantive "land use controls." Such controls govern the use of the physical aspects of the use of land and the types of use permitted, not provisions for the subsequent discretionary extension of permits.

6. Because of his decision on jurisdiction, the Examiner need not decide whether "good cause" for an extension was shown. However, given the extensive record in this case, the Examiner has made findings sufficient for a conclusion on that issue, should his decision on the applicability of SCC 14.18.100(6) be overturned on appeal.

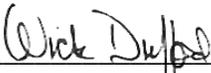
7. The Examiner suggests that the extent to which current national economic conditions should serve generally as a basis for adjusting the duration of pending development approvals is a legislative question that should be addressed by the legislative authorities

8. Any finding herein which may be deemed a conclusion is hereby adopted as such.

**DECISION**

The requested extension of the Preliminary Plat for Moonlight Terrace (PL96-0295) is denied.

**DONE** this 6th day of May, 2011.

  
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Wick Dufford, Hearing Examiner

Transmitted to Applicant, May 6, 2011

See Notice of Decision, Page 1, for Appeal and Reconsideration information.