



COUNTY COMMISSIONERS

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District Three

HEARING EXAMINER

Creating Solutions for Our Future

**BEFORE THE HEARING EXAMINER
FOR THURSTON COUNTY**

In the Matter of the Application of)	NO. 2019100758
)	
Scott Manke)	
)	Order Reopening the Record
For a Reasonable Use Exception,)	
Shoreline Conditional Use Permit, and)	
<u>Shoreline Substantial Development Permit</u>)	

A hearing in the above-captioned application was conducted on October 22, 2019. After accepting evidence and testimony from all persons present, the Examiner took the matter under advisement and considered whether the record showed compliance with the permit criteria for approval. A decision denying the reasonable use exception (RUE), shoreline substantial development permit (SSDP), and shoreline conditional use permit (SCUP) for the various previously built structures on the subject property, and for construction of a new residential addition, was issued on November 14, 2019 (Decision).

On November 25, 2019, a request for reconsideration of the Decision was timely submitted by the Applicant. Pursuant to Hearing Examiner Rules of Procedure, Rule 9.4(b)(2), the undersigned requested a response to the reconsideration request from the County and a reply by the Applicant. The record of the hearing, request for reconsideration, responses, and reply have been considered in reaching the instant decision on reconsideration.

Summary of Request

The reconsideration request, while opposing specific items in several/most of the Decision’s conclusions, does not chiefly allege procedural or factual error. Rather, the request asserts that the Applicant had been unaware that Planning Staff would take the position that the project failed to comply with permit criteria for approval and that the Applicant had no knowledge that mitigation of the unpermitted previously built structures would be sought. Citing fairness as grounds supporting the request, the reconsideration letter stated the following:

This may have been evident to the examiner, but the applicant was somewhat caught off guard by the staff report recommending denial of all the requested approvals. The applicant's communication with staff up until the time the report was issued a few days before the hearing did not alert the applicant's team to the breadth and depth of staff's concerns. In fact, communications with the staff suggested a different recommendation.

In any event, it appears that additional information is or could be available that would address many of the hearing examiner's and staff's concerns. We would like an opportunity to present that information in light of the decision that was issued. As important, the applicant would like a chance to present mitigation proposals that could address some or all of the impacts identified in the hearing examiner's decision. In particular, we know there's a potential for drainage to be rerouted in such a way that stormwater is moved away from the bank, even to the point of improving existing conditions.

It is especially important to dig hard into this because one of the consequences of the decision is the required removal of existing improvements. We understand that there was at least some testimony from County staff that removal of the improvements could cause more damage than leaving them in place. The applicant's experts would certainly attest to that. That makes it imperative that all of the alternatives, including mitigation, be fully considered. *Reconsideration Request.*

Attached to the four page letter requesting reconsideration were the following items: 1) a County reconsideration request form; 2) a "Comments on Hearing Examiner's Findings in support of request for reconsideration" prepared by Sitts & Hill (five pages); a letter from Grette Associates (the Applicant's critical areas consultant) to Planner Leah Davis, dated October 21, 2019 (three pages with three annotated photographs of the site); and a receipt for filing the reconsideration request.

Responding to the request of the undersigned for response by County Staff, Planner Leah Davis submitted a one page memo stating that the reconsideration materials submitted did not alter the analysis stated in the staff report. Also submitted, while not requested, was a memorandum from County Hydrogeologist Mark Biever reiterating the portion of his hearing testimony in which he submitted that removal of the structures might do more harm to the critical areas than retaining them.

In reply, the Applicant contended (partially paraphrased/abbreviated):

We propose that the examiner reopen the hearing for the limited purpose of considering specific and limited items as follows:

- 1) The potential for mitigation to address any potential impacts of the improvements and consider a proposal revised to limit the improvements that would remain and would incorporate mitigation not previously proposed because it was not clear from pre-hearing discussions with the County that mitigation was required;

2) Evidence of the impacts of removing the improvements, which we believe should be considered because removal of unpermitted structures may be the outcome of permit denial; and

3) The above items be considered in review of the criteria for permit approval.

“We recognize that this is not an ordinary request, or certainly not a common one. But we believe it would be fair. ...”

As an alternative to a re-opened hearing, the Applicant requested that the examiner consider remanding the matter to Staff and directing them to consider additional information in a written exchange.

Jurisdiction

Pursuant to Thurston County Code (TCC) 2.06.060,

Any aggrieved person ... who disagrees with the decision of the Examiner may make a written request for reconsideration by the Examiner within ten days of the date of the written decision. The request for reconsideration shall be filed with the Development Services Department upon forms prescribed by the Department. If the Examiner chooses to reconsider, the Examiner may take such further action as he or she deems proper and may render a revised decision

Rule 9.4, Procedure for Reconsideration and Reopening Hearing

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b. Reconsideration.

- 1) Any party of record may file a written request with the Hearings Examiner for reconsideration within ten (10) days of the date of the Hearings Examiner's recommendation or decision. The request shall explicitly set forth alleged errors of procedure or fact. The request may also include direction to a specific issue that was inadvertently omitted from the Hearings Examiner's recommendation or decision.
- 2) Additional evidence may only be submitted upon a Request for Reconsideration if it is new evidence not available at the time of the public hearing, upon a showing of significant relevance and good cause for delay in its submission. At the Examiner's discretion, parties of record will be given notice of the consideration of such evidence and granted an opportunity to review such evidence and file rebuttal arguments.
- 3) The Hearings Examiner shall respond to the request for reconsideration by either denying the request or approving the request by modifying or amending the recommendation / decision based on the established record or setting the matter for an additional public hearing.

Other Applicable Rules

Rule 2, Jurisdiction:

The Hearings Examiner's jurisdiction is limited to those issues where ordinance or other appropriate authority grants the Hearings Examiner the authority to make a decision, recommendation, or issue an order pursuant to TCC 2.06.010.

Any party may challenge the Examiner's legal authority to hear any case on jurisdictional grounds, or the Examiner may independently raise the jurisdictional issue. If the Examiner lacks jurisdiction, the matter cannot be heard and decided by the Examiner.

Rule 4.1, Expeditious Proceedings

It is the policy of the Office of the Hearings Examiner that, to the extent practicable and consistent with requirements of law, public hearings shall be conducted expeditiously. In the conduct of such proceedings the Hearings Examiner, County staff, and all parties, or their agents, shall make every effort at each stage of a proceeding to avoid delay.

Rule 5.2, Rights of Applicant

Every Applicant shall have the right of notice, cross-examination, presentation of evidence, objection, motion, argument, and all other rights essential to a fair hearing. Further, the Applicant shall have right to timely access of the County's staff report.

Rule 6.1, Presiding Official

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b. The Hearings Examiner shall have all of the authority and duties as granted him/her in state statutes, TCC and other County ordinances. Included in the duties of the Hearings Examiner are the following: to conduct fair and impartial hearings; to take all necessary action to avoid delay in the disposition of proceedings; and, to maintain order. He/she shall have all powers necessary to that end, including the following:

...

2. to conduct fair and impartial proceedings;
3. to rule upon offers of proof and receive evidence;
4. to regulate the course of the hearings and the conduct of the parties and their agents;
5. to question any party presenting testimony at the hearing;
6. to hold conferences for settlement, simplification of the issues, or any other proper purpose;
7. to require briefs on legal issues;
8. to consider and rule upon all procedural and other motions appropriate to the proceedings; and,
9. to make and file recommendations or decisions.

Rule 7.6, Evidence

- a. Burden of proof. In each proceeding, the Applicant shall have the burden of proof to show compliance with applicable laws and regulations of Washington State and Thurston County.
- b. Admissibility. The hearing generally will not be conducted according to court rules relating to evidence and procedure. Any relevant evidence shall be admitted if it is the type that possesses probative value commonly accepted by reasonably prudent persons in the conduct of their affairs. The rules of privilege shall be effective to the extent recognized by law. The Hearings Examiner shall exercise discretion on the admissibility of all evidence.

Discussion

Aside from contending that they did not have adequate advance notice that Staff would not recommend approval of the permits as presented at hearing (indeed, implying they had been led to believe otherwise), Applicant representatives did not allege error of fact or procedure in the Decision denying the permits.

Within the pre-hearing evidence, there are two letters from Planning Staff to the Applicant requesting more information that do not address the project's lack of proposed mitigation (Exhibits 1.E and 1.K). Analysis in the staff report and in testimony was brief and not terribly descriptive, in terms of addressing each building's existing or proposed setbacks from the various critical areas and other facts supporting staff's conclusion that the proposal did not satisfy permit criteria. It is not possible to know what communications occurred that are not included in the record, or why Staff would not have informed the Applicant that stronger demonstrations of compliance with permit criteria would be needed to secure Staff's approval recommendation. In her response memo, Planning Staff did not respond to the assertion that the Applicant did not know that Staff would not be recommending approval and thus could not provide more information prior to the close of the hearing.

On the other hand, at least as of receipt of the staff report (which the reconsideration request acknowledges was a "few days before the hearing"), the Applicant was on notice that mitigation was found lacking and that Staff would not recommend approval. The staff report mentions lack of mitigation multiple times in its Critical Areas Ordinance discussion, as well as in the RUE discussion for criteria 2, 3, 5, and 6. Recommended condition of approval 10 requested that the Applicant be required to provide "a meaningful mitigation plan for all impacts, existing and proposed" to be reviewed and approved by Planning Staff prior to occupancy certificate issuance.

In the examiner's opening remarks at hearing, Applicant representatives were reminded that the burden was theirs and that the County's hearing examiner is limited to considering information introduced prior to the close of the record. During the hearing, there were repeated examiner questions asked of County and Applicant witnesses on the subjects of identification of impacts of the unpermitted structures and the lack of mitigation proposed.

Typically, the burden is on the Applicant to offer to supplement the record prior to its close. They made no such offer until after receipt of the Decision. Allowing the record to be supplemented in these circumstances would be highly unusual and, arguably, irregular.

These disclaimers given however, the Hearing Examiner Rules of Procedure confer discretion and autonomy on the examiner in running the proceedings. County representatives did not object on the procedural grounds of the Applicant's failure to supplement the record before it closed. With the exception of the proposed residential addition, the unpermitted structures are already in place; reopening the record won't authorize new, additional impacts. There is no prejudice to the only other party (the County) in granting the Applicant's request to supplement the record on a limited basis. Should the Decision be appealed, there is at least some likelihood the matter would be remanded with direction to supplement the record with the requested information. At this stage of the matter, there is a "no harm, no foul" argument to be made as to allowing supplementation of the record.

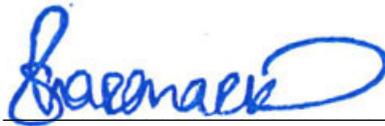
As to the argument that denial of the permits necessarily results in removal of unpermitted structures from critical areas, which may have adverse impacts on the critical areas, this is not relevant to the decision on the requested permits. In the instant permit application proceedings, the County's examiner has no jurisdiction over how code violations are enforced and lacks authority to order removal or retention of the unpermitted structures. The examiner's authority is strictly limited to the determination of whether the evidence demonstrates compliance with the permit criteria for approval, or not.

Decision

While lack of timeliness would usually be a bar to the requested supplemental evidence, based on the unusual facts of the instant case and on the discretion granted to the hearing examiner over admissibility of evidence, the record is reopened to be supplemented with additional evidence as follows.

1. The Applicant shall have until January 27, 2020 to submit additional critical areas documentation prepared by appropriate professionals revising the proposal to limit the improvements that would remain and incorporating mitigation not previously proposed for the impacts of the unpermitted structures and those anticipated by the proposed residential addition.
2. No evidence speaking to the impacts of the removal of the unpermitted structures is invited or will be admitted. The question of whether or not removal of the structures would result in impacts is outside the scope of consideration for the permits sought. The scope of the new evidence allowed is limited to whether the supplemented record demonstrates compliance of the proposal, with revisions if any, with the criteria for approval of the requested RUE, SSDP, and SCUP.
3. County Staff shall have until February 10, 2020 to submit analysis of the supplemented record for compliance with the criteria for approval of the requested RUE, SSDP, and SCUP.
4. The Applicant shall have until February 14, 2020 to submit a reply to Staff's analysis addressing criteria for approval.
5. The reconsideration request and attachments, the County's replies, the Applicant's response, and all information submitted in response to the instant Order will be added to the record.
6. By February 24, 2020, the undersigned will issue an order that either a) decides the reconsideration request on the basis of the additional written materials submitted or b) reconvenes the hearing if it appears that additional testimony is needed to develop the discussion on compliance with criteria for approval.

Decided December 23, 2019.



Sharon A. Rice
Thurston County Hearing Examiner