



200711140043
Skagit County Auditor

11/14/2007 Page 1 of 8 10:46AM

AFTER RECORDING RETURN TO:
SKAGIT COUNTY HEARING EXAMINER
302 SOUTH FIRST STREET
MOUNT VERNON, WA 98273

DOCUMENT TITLE: ORDER ON APPEAL AP07-0574

HEARING OFFICER: SKAGIT COUNTY HEARING EXAMINER

APPELLANT: DAVID ALLAN

APPLICANT: RALPH WEICHE

ASSESSOR NO: P119253

LEGAL DESCRIPTION: The project is located at the end of Flinn Road, extending southward approximately 1,000 feet; within a portion of Section 22, Township 36N, Range 3 E, W.M., Skagit County, Washington.

BEFORE THE SKAGIT COUNTY HEARING EXAMINER

DAVID ALLAN

Appellant,

v.

**SKAGIT COUNTY and RALPH
WEICHE,**

Respondents.

BP06-0363

**ORDER DEFERRING
DECISION**

This matter, the appeal of a Mitigated Determination of Non-Significance for a Grading Permit, came on for hearing before the Hearing Examiner on September 19, 2007.

David Allan, Appellant, represented himself. Brandon Black, Senior Planner, represented the County. Testimony was received from landowners who are project proponents: Ralph Weiche and Loyd Fetterly. Additional testimony was given by Bill Dowe, Deputy Director of Planning and Development Services; and from Dave Lervik, project engineer.

Based on the record made, the Hearing Examiner enters the following:

FINDINGS

1. On April 13, 2006, Lincoln Aldridge, on behalf of Ralph Weiche, filed a Grading Permit application #BP06-0363. In connection with this application a State Environmental Policy Act (SEPA) checklist was submitted. The checklist gave the name of the proposed project as "Flinn Road Extension (Private)."

2. The application describes the project as the widening of a road from 12 feet wide to 20 feet in order to bring the road up to standards. The extension proposed is about 1,000 linear feet from the end of Flinn Road. The location is within Sec. 22, T36N, R3E, W.M. No improvements to the existing County maintained portion of Flinn Road are proposed.

3. Lervik Engineering prepared a "Drainage Report and Grading Plan" for the "Flinn Road Widening Project" which was submitted with the application. The plan stated that it was prepared in support of constructing a private gravel access road to serve four residential homes. The site of the extension is described as a gravel logging road.



4. On May 19, 2006, David Allan submitted a letter to the County in response to application #BP06-0363, asserting that development of the four residential lots has caused flooding and road closures for three years. He urged that no further development be allowed until these problems are resolved. He said that he currently owns the only residence on Flinn Road, a home dating back to 1911. He gave the address of 15547 Flinn Road, Bow.

5. On May 5, 2006, the County asked for additional reports to deal with potential effects on critical areas. These reports were not received until May 25, 2007. They included a Geologic Hazard Report by GeoEngineers and a Wetland and Stream Delineation by Gribble Environmental Consulting Company.

6. On June 19, 2007, the County's Critical Areas staff signed off on the Grading Permit indicating their conclusion that the proposal complies with Chapter 14.24 SCC, the Critical Areas Ordinance.

7. On June 28, 2007, a Mitigated Determination on Non-Significance (MDNS) was issued by the County. The following mitigating conditions were imposed:

(1) Temporary erosion/sedimentation control measures, as approved by the Skagit County Department of Public Works, shall be in place prior to the placement of any fill material. The applicant shall maintain all temporary erosion/sedimentation control measures in accordance with the Skagit County Drainage Ordinance. Said measures shall remain in place until completion of the Project.

(2) The applicant shall comply with Northwest Clean Air Agency requirements.

(3) The applicant shall comply with the provision of Chapter 14.32 of the Skagit County Code, the Skagit County Drainage Ordinance, as it relates to increased runoff from additional impervious surfaces.

(4) The applicant shall comply with Fire Code Standards. A cul-de-sac or other approved turn around may be required at the end of this project.

(5) An engineered soils compaction report shall be required for all structures placed on fill material.

(6) The applicant shall comply with all relevant provisions of 14.24 of the Skagit County Code (Skagit County Critical Areas Ordinance).

8. The MDNS document stated that that the MDNS was appealable, identifying an appeal deadline of July 12, 2007. On July 11, 2007, David Allan timely appealed the MDNS.



9. The Grading Permit application has been held in abeyance pending the outcome of the MDNS appeal.

10. The Appeal document complained of work that occurred before the instant permit process. The appellant contended that unspecified development and management activities on the road and adjacent properties have caused flood damage to his property and closures on Flinn Road. He is seeking the preparation of a comprehensive plan for drainage and improvement to Flinn Road including provisions for protection and maintenance of the road.

11. Lloyd Fetterly, an owner of one of the lots to be served by the road extension, submitted a written response to the appeal. He said that the purpose of the road project is to serve proposed residences with a road that meets county standards. He noted that the project has been designed by a professional engineer and includes drainage plans. He asserted that the resulting unpaved road, with no impervious surfaces, will not affect off-site drainage. He averred that the Appellant's environmental and development problems entirely predate the present application for a private road. In addition Fetterly stated that the home site of the project opponent is not in the line of drainage from the project area.

12. The County Staff responded to the appeal through a Memorandum dated September 19, 2006. The Staff maintained that the existing conditions in the project area are not due to the proposed project, and stated that the flooding of Flinn Road and concerns raised regarding property damage are a result of the topography of the area and the fact that Flinn Road is located within a low area within the Floodplain. They argued that the appeal has no relevance to the instant proposal and clearly does not meet that standard of showing the Administrative Official's decision on the MDNS to be clearly erroneous.

13. The Appellant's written reply asserted that clearing, ditching and culverts have been constructed on the former remnant of a logging road over the last three years and that road closures due to flooding have greatly increased since this work was done. He attached statements from two other residents of the area to the same effect.

14. Appellant asserted that his property is both below and in the path of the discharge of the new ditches and culverts and that "it is not rational to expect this added discharge does not contribute to the flooding of Flinn Road."

15. Appellant testified that over that last three years approximately four acres in the area of the road extension have been cleared and that hundreds of yards of material have been moved in connection with work on the logging road. He stated that civil litigation is currently pending regarding the damage that prior development has caused to his property.



16. David Lervik, the professional engineer, developed material for the application, stated that he observed that some work had been done in the area before he was called in. In his written report he described the existing road as constructed of crushed rock and varying in width from 12 to 16 feet. His plans called for building a new roadway to Skagit County private roadway standards while preserving the existing flow regimes and avoiding the creation of new discharge points. His Drainage Analysis verified that the post-development discharge would not significantly increase and that no impacts to downstream properties are to be anticipated.

17. Lervik testified that the drainage from the area feeds a wetland on the valley floor. He said that the project has been designed to meet County drainage standards, that the proposed road extension will not appreciably increase runoff, and that detention will not be necessary. The Examiner was persuaded by this testimony.

18. Brandon Black, the County's senior planner, testified that he cannot tell from the information in the file whether the prior work done in the area needed permits. He said that the County is aware that the lower Flinn Road area has been subject to flooding for many years. He reiterated that the grading project must conform to all County drainage requirements and that there is nothing to show that work under the proposed permit will cause damage.

19. An MDNS is a threshold determination under the State Environmental Policy Act (SEPA), in effect, concluding that no Environmental Impact Statement needs to be written for a particular project. The Appellant's presentation was not directed to whether this conclusion was right or wrong. Instead it centered on events pre-dating the permit application, focusing not on effects of the proposed grading permit, but on the effects of other work already done.

20. The preponderance of evidence does not demonstrate that work under the proposed Grading Permit, as conditioned by the MDNS, will, more likely than not, have a significant adverse impact on the environment.

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

CONCLUSIONS OF LAW

Jurisdiction

1. This is an orphan DNS appeal, not combined with consideration of the underlying proposal. The Hearing Examiner has concluded that the hearing session on the subject appeal was premature and should not have been held until after issuance of the Grading Permit sought.



2. The situation requires a consideration of the relationship between Building Permits and Development Permits. Building Permits relate to structural issues. Development Permits relate to land use issues.

3. The MDNS issued here is a threshold determination under the State Environmental Policy Act (SEPA). SCC 14.12.210(1) says that a final threshold determination is "administratively appealable as a Level I decision, pursuant to Skagit County Code 14.06. Chapter 14.06 SCC is devoted to the application, review and approval processes for Development Permits. SCC 14.06.010, 050.

4. A Grading Permit is generally thought of as a type of Building Permit. Note the file number here: "BP06-0363". The structural issues involved with Building Permits are not appealable to the Hearing Examiner, but are dealt with under a separate system delineated in Chapter 15.16 SCC. The Hearing Examiner's jurisdiction is limited to land use appeals under Chapter 14 SCC.

5. In the course of building permit processing, questions of land use compliance may arise. These are referred to the land use staff and a determination is made as to whether the proposed action will be consistent with the various land use regulations, for example, critical areas requirements (see SCC 14.24.060) and drainage requirements. (see SCC 14.32.070).

6. The administrative approval of a Building Permit, therefore, includes a determination that applicable land use requirements are met. Under SCC 14.06.050(1)(a)(vi), the County Code makes the land use compliance aspect of a Building Permit approval appealable to the Hearing Examiner.

7. Thus, to the extent that land use issues are involved, a Building Permit becomes a Development Permit.

8. SCC 14.06.070(2)(d) requires that any appeal of a determination of nonsignificance (DNS) shall be combined with and processed at the same time as the hearing on or appeals of the underlying Development Permit. Nowhere in the administrative appeal procedures adopted by the County does Title 14 expressly allow for orphan DNS appeals,

9. This combining of the SEPA appeal with the underlying permit appeal is a key element of the appeal procedure mandated by State law. RCW 43.21C.075 (1),(2)(a). The County's SEPA appeal provisions explicitly purport to implement the State statute. SCC 14.12.210.

10. This case demonstrates one reason why the combined appeal process is desirable. The appeal that was filed is fundamentally directed toward the merits of permit issuance on the drainage issues. It is not really directed toward SEPA compliance.



There is no pre-decision hearing on a Grading Permit. The subject appeal was probably filed because it appeared to be the only opportunity for a hearing available.

11. The County should provide notice in its Grading Permit issuance that an appeal to the Hearing Examiner of the land use issues decided is available as a Level I appeal under SCC 14.06.050(1)(a)(vi). This appears to be an implicit Code requirement.

12. In the meantime, the entry of the SEPA decision should be deferred until after any appeal of the land use aspects of the Grading Permit is heard, or until after the running of the appeal period on the Grading Permit if no such appeal is made.

13. Because it does not seem appropriate to allow the Appellant a second bite at the apple as far challenging SEPA compliance is concerned, the Examiner is here setting forth conclusions on the merits of the MDNS appeal. But the decision will be held in abeyance until substantive Grading Permit issues, if any, have been finally resolved.

14. Under the approach being taken, the hearing process will be stretched out and may involve two hearing sessions. However, at least in form, the requirement for a single combined hearing will be preserved.

15. If an appeal of the Grading Permit is made, it needs to address the probable effects the proposed future grading will have. Moreover, the lawfulness of prior work is not relevant to issuance of the permit.

MDNS Appeal Merits

16. The decision to issue the MDNS was not shown to be clearly wrong.

17. There is a dispute over the effects of prior work in the area. The answer to that question does not resolve the issue of whether the MDNS was properly issued for future work. Currently pending litigation is apparently addressed to the issue of prior impacts.

18. On the merits, the appeal should be dismissed.

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

DECISION

The proceeding is continued until the Grading Permit is issued and an appeal of the land use issues under such permit is heard or the appeal period runs absent an appeal.



The final decision will combine the decision on the MDNS appeal with the decision on any appeal of the substantive permit. Until that final decision can be entered, entry of the decision on the MDNS appeal will be deferred.

Wick Dufford

Wick Dufford, Hearing Examiner

So Ordered this 4th day of October, 2007.

APPEAL

The appeal period shall commence only after the entry of a final decision.

