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MOUNT VERNON, WA 98273

DOCUMENT TITLE: ORDER ON APPEAL AP 03 0822

HEARING OFFICER: SKAGIT COUNTY HEARING EXAMINER

APPELLANT: C. ROBERT JOHNSON

ASSESSOR PARCEL NO: P24807

LEGAL DESCRIPTION: The proposed project is located at 14067 McLaughlin Road, Mount Vernon, WA; a portion of Section 15, Township 34 North, Range 4 East W.M., Skagit County, Washington.

BEFORE THE SKAGIT COUNTY HEARING EXAMINER

In the Matter of the Appeal of)
)
C. ROBERT JOHNSON)
)
From the Issuance of a Mitigated)
Determination of Non-Significance)
In Connection with Proposed Grading and)
Filling for Clear Valley LLC, an Operating)
Dairy, at 14067 McLaughlin Road)
_____)

PL03-0822

**FINDINGS OF FACT,
CONCLUSIONS OF LAW
AND DECISION**

This is an appeal of a Mitigated Determination of Non-Significance (MDNS), issued under the State Environmental Policy Act (SEPA). The matter came on regularly for hearing before the Hearing Examiner on December 10, 2003

Appellant C. Robert Johnson appeared pro se. Tom Moser, Attorney at Law, represented Clear Valley LLC. Brandon Black, Planner, represented the Planning and Permit Center.

Testimony was taken, exhibits were entered, and argument was made.

PROCEDURE

Prior to the hearing, Clear Valley LLC moved to dismiss the appeal. The basis for the Motion was that the appeal did not correctly identify the decision appealed from and that the appeal did not state the remedy sought. The Motion was denied.

The appeal was made by a layperson. On the Notice of Appeal he did check the box indicating the appeal concerned an administrative decision. The appeal was filed within the appeal period for the MDNS and was understood by the County to relate to the issuance of the MDNS. The County so-advised Clear Valley and they appeared at the hearing prepared to answer a SEPA appeal. The implicit relief requested in such an appeal is the preparation of an Environmental Impact Statement.

The purpose of pleadings, including appeal notices, is principally to provide notice to the County and applicants of the existence of an appeal and, in general, to advise of the reasons the appellant believes the decision was wrong. Some latitude is given to lay appellants so that their access to the appeals process will not be denied on the basis of technicalities. Here, although the appeal is far from a model of clarity, the Examiner concluded that the notice function was adequately performed and that the hearing should move ahead.



Normally, an appeal of a SEPA threshold determination is held in conjunction with the hearing on the merits of the underlying permit. The permit sought in this case is a grading permit, a type of building permit, bearing the file number BP03-0857. No public hearing is provided for such permits. Therefore, the allowed administrative appeal of the SEPA threshold determination was held without a concurrent hearing on the grading permit. That permit, in fact, has not yet been issued. Under the County's view of the law, further processing of that permit is stayed until the MDNS matter is resolved.

FINDINGS OF FACT

1. Clear Valley LLC is an operating dairy located at 14067 McLaughlin Road, within a portion of Sec. 15, T34N, R4E, W.M. The farm encompasses approximately 782 acres. It is situated in unincorporated Skagit County, but is just to the north of the Mount Vernon City limits. The zoning is Agricultural-Natural Resource Land.

2. On July 16, 2003, Clear Valley applied for a grading permit for the placement of 150,000 cubic yards of fill material to bring the existing grade up to a level that will lend more efficiency to farm operations.

3. On September 18, 2003 an MDNS was issued by the Planning and Permit Center after review of an Environmental Checklist submitted by the applicant and other material on file. The MDNS contained the following conditions:

- (1.) Temporary erosion/sedimentation control measures as approved by 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 Code 14.32. Said measures shall remain in place until completion of the project.
- (2.) The applicant shall comply with Northwest Air Pollution Authority requirements.
- (3) The applicant shall comply with the provisions 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.
- (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 (Skagit County Critical Areas Ordinance.)

4. These conditions are a selective flagging of various County regulations that the applicant would be required to comply with in any event. Collectively they represent the County's judgment that compliance with existing development regulations will provide adequate protection from or mitigation for any adverse environmental impacts that the project might otherwise have.

5. Compliance with the requirements of the applicable laws and ordinances must be assumed unless some compelling evidence undermining such an assumption is presented. No such evidence was presented here.

6. The majority of the dairy farm is located in the Nookachamps Valley with all the buildings and improvements on an isolated knoll above the local floodplain. Nookachamps Creek lies to the east. Trumpeter Creek, running easterly, lies to the south. To the northwest is Barney Lake. The proposed filling operations will be about 1000 feet from any watercourse or water body.

7. The proposal will create a level pad on the knoll that will allow the feed, grain, and shavings storage facilities to be relocated to the east of their present position and placed at the same elevation as existing improvements on the farm. In addition, composting operations will be moved to the east and carried out on a flat concrete surface. The project will involve no excavation. The placement of the fill will not reduce flood storage.

8. The proposal, if approved, means that the dairy will be taking clean fill from various construction sites in the vicinity which will be trucked into the site. The relocation of facilities will make pickup and delivery of compost easier and will bring feed closer to the cows. It will also move the area of concentrated daily activity further east from the growing residential development to the west within the City of Mount Vernon.

9. The composting effort produces a dry material from manure that is used by landscapers to enhance topsoils. It reduces the amount of manure that has to be lagooned and ultimately spread on fields. This sort of operation is strongly encouraged by the Department of Ecology as an environmentally sound way to handle manure from dairy operations.

10. Barney Lake is an important wildlife area, a winter habitat for trumpeter swans. It is owned by the Skagit Land Trust. There is a substantial expanse of open pasture between the fill site and the lake. An engineering firm has prepared a drainage plan, under which the elevated pad on the farm will taper to the fields at a 3:1 slope that is seeded with native vegetation. Silt fences will be used during construction.

11. The project is expected to take 2 to 4 years to complete, depending on the level of construction activity in the vicinity. Average daily truck traffic estimated for the project is between 20 and 30 trips a day.

12. The farm lies on the north side of McLaughlin Road which runs east and west. About a half mile to the west of the farm is north-south running Martin Road. A row of homes



lies along McLaughlin east of its intersection with Martin. Trucks delivering fill will have to use Martin Road and then turn onto McLaughlin to reach the site. The nearest major road paralleling McLaughlin Road is College Way about a half mile to the south.

13. McLaughlin Road is 24 feet wide with a chip seal surface. There is adequate room for two dump trucks going in opposite directions to pass on it. School busses use Martin Road and drop students at the intersection with McLaughlin Road, requiring students to walk home along McLaughlin. The record does not disclose a history of accidents along either McLaughlin Road or Martin Road. However, the applicant has volunteered to provide a safe turnaround for school busses on McLaughlin Road so that students can be dropped off adjacent to their homes. The applicant has also proposed to limit the filling operation to Monday through Friday from 8:00 a.m. to 5:00 p.m.

14. The existing system of drainage ditches on either side of McLaughlin Road insures that there is no sheet flow from the road to the lake. The distances involved militate against significant contamination of the lake or area watercourses by material washed from the road.

15. Two earlier grading permits were granted for fill operations at this site -- one in 1992 (to a prior owner) and another in 1999. The 1999 permit was extended until March 2005 to finish grading work previously proposed.

16. Some enforcement actions were initiated against prior projects as a result of complaints, primarily generated by the instant appellant. It is unclear on this record what the merits of the complaints were. More importantly, the instant record does not demonstrate that any significant adverse environmental impacts have resulted from the earlier projects.

17. However, concerns remain among a number of neighbors. In response to the Notice of Development, a petition opposing the proposed project with 54 signatures was submitted. Three emails in opposition were also received. After the MDNS was issued the Permit Center received a long letter of opposition with a letterhead styled "Neighbors Opposed to Permit BP03-0857 c/o Robert Johnson." The record does not disclose who the members of "Neighbors Opposed to Permit BP03-0857" are or if in fact there is any such formal organization.

18. There were also two letters of support for the project and a petition in support with 12 names.

19. The County interprets the appeal as raising issues in the following six areas: (1) Air quality, (2) Water quality, (3) Animals, (4) Environmental Health, (5) Land and Shoreline Use, and (6) Transportation.

20. The relevant case presented by the appellant did no more than make allegations in the areas of Air quality, Animals, and Land and Shoreline Use. He did not prove the likelihood of adverse environmental impacts in these areas. He did not show that dust is likely to be generated at levels that will constitute a nuisance or a health hazard. He did not show that noise generated by the trucks will exceed the applicable noise levels. He did not show that animals not



listed in the Environmental Checklist are likely to be affected by this project. He attempted to introduce information about the motives of the applicant, but failed to connect this line of thought with adverse environmental impacts.

21. The appellant primarily focused his presentation on Water quality, Environmental Health and Transportation. As to Water quality, he demonstrated that many of the wells in the area are shallow. However, he did not prove that asphalt was ever buried at the site, or if it was buried there, that leachates from the asphalt would in all probability migrate into the regional ground and surface water, or, if such migration did occur, that the leachates would, more likely than not, cause measurable contamination.

22. Moreover, there was no proof that fill material has in the past been washed into Barney Lake or any of the nearby watercourses from the fill site or from McLaughlin road. The preponderance of evidence was that there is little or no possibility of significant sedimentation of surface waters with materials from the fill site or with materials left on the roadway.

23. As to Environmental Health, the applicant pointed out that diesel exhaust is a carcinogen. However, he did not demonstrate that diesel exhaust is likely to be emitted by the trucks in such quantities and over such durations that exposure will probably cause adverse effects to the health of area residents.

24. As to Transportation, the appellant's estimate of the number of truck trips was not shown to be realistic. On the record presented, the applicant's estimate of 20 to 30 trips per day appears to be reasonable. Nevertheless it is true that the streets are relatively narrow without significant shoulder areas. The situation presents an existing hazardous situation for pedestrians, and the increased truck traffic will inevitably increase the hazard along the delivery routes. However, no traffic study or evaluative information on risk was presented, so that, on the record made, it is not possible to determine that the increased hazard is significant. The City of Mount Vernon, where the roads lie, did not comment on the risks presented by increased truck traffic.

25. The appellant suggested an alternate access route in the form of a new and separate road north from College Way to the dairy. The intervening area is largely in critical area and flood plain. The alternative was not shown to be practical.

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

CONCLUSIONS OF LAW

1. The Hearing Examiner has jurisdiction over the persons and the subject matter of this appeal. SCC 14.12.210(1).

2. The appellants has the burden of proving that the issuance of the MDNS was "clearly erroneous." SCC 14.06.110(11). The determination of the administrative official in issuing the threshold decision "shall carry substantial weight in any appeal proceeding." SCC 14.12.210(4).



3. The issuance of a DNS or MDNS is a decision that no environmental impact statement (EIS) must be written. An EIS is required only for "major actions significantly affecting the quality of the environment." RCW 43.21C.030. The term significant is defined by the state SEPA rules as "a reasonable likelihood of more than a moderate adverse impact on the environment." WAC 197-11-794(1). The threshold determination about the need for an EIS is reached through a formalized, step by step process, including the preparation and evaluation of an Environmental Checklist. See WAC 197-11-330.

4. The Planning and Permit Center followed the correct procedures in reaching the threshold determination in this case.

5. The appellant did not carry his burden to show that that the environmental impacts of the project will likely be "significant" or that the Planning and Permit Center was "clearly erroneous" in issuing the MDNS.

6. Though the need for an EIS was not demonstrated, it does appear that additional information and evaluation of the risk to pedestrians posed by the project would be helpful to the decision on the merits of this application.

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

DECISION

The MDNS is affirmed. The appeal is denied.



Wick Dufford, Hearing Examiner

Date of Action: January 15, 2004

Date Transmitted to Parties: January 15, 2004

RECONSIDERATION

A request for reconsideration may be filed at the Planning and Permit Center within 10 calendar days of the date of the decision, pursuant to SCC 14.06.180.

APPEAL

Any appeal hereof shall be in accordance with SCC 14.12.210.

