NOTICE OF DECISION

BEFORE THE SKAGIT COUNTY HEARING EXAMINER

Matter Appealed:	Administrative Order to Abate Violation, dated January 9, 2015
Appellants:	Lori and Paul Lindsay 3431 Old Highway 99 North Road Burlington, WA 98233
File No:	PL15-0018 (CE14-0158)
Location:	3431 Old Highway 99 North Road
Land Use Designation:	Rural Intermediate (RI)
Subject:	Structures constructed for growing marijuana
Appeal Hearing:	March 19, 2015. Ryan Walters, Deputy Prosecuting Attorney, represented Skagit County. Justin Rothboeck, Attorney at Law, represented the Appellants. Lori Scott and Larry Hurlimann presented oral argument for Intervenors.
Witnesses:	County: Sandra Perkins, Code Enforcement Officer, Brandon Black, Senior Planner Appellants: Lori Lindsay, Paul Lindsay, Brandon Black Jack Moore, Building Official Dale Pernula, Planning Director
Decision/Date:	The Administrative Order to Abate Violation is affirmed as amended. April 7, 2015.
Reconsideration/Appeal:	A Request for Reconsideration may be filed with Planning and Development Services within 10 calendar days of this decision. The decision may be appealed to the Board of County Commissioners by filing an appeal with the clerk of the Board within 14 days of the decision or decision on reconsideration, if applicable.
Online Text:	The entire decision can be viewed at: www.skagitcounty.net/hearing examiner

BEFORE THE SKAGIT COUNTY HEARING EXAMINER

In the Matter of the Appeal of an Administrative Order to Abate Violation,	)	
	)	File No. PL15-0018 (CE14-0158)
SKAGIT COUNTY,	)	
Enforcing Agency,	)	
	)	**FINDINGS OF FACT, CONCLUSIONS OF LAW AND DECISION**
v.	)	
LORI & PAUL LINDSAY,	)	
Appellants,	)	
LARRY & CAMBRIA HURLIMANN, JOHN AND LORI SCOTT,	)	
Intervenors.	)	

PROCEDURAL BACKGROUND

This appeal concerns an Administrative Order to Abate Violation issued by the Skagit County Department of Planning and Development Services (PDS) on January 9, 2015.

The Order directed Lori and Paul Lindsay to remove "greenhouse structures" from their property, or to reconfigure the structures by (a) removing the covering at both ends, (b) removing all heat and illumination from inside each structure, (c) replacing the metal framing with PVC pipe, and (d) removing the structures entirely, beginning no later than May 1, 2015 and continue to remove them for at least 180 days each year. The Order provided a 30 day period for compliance.

The Lindsays filed a timely appeal of the Order on January 23, 2015. The appeal asserted the following:

1. The Order was clearly erroneous when it ruled the structure at the Lindsays' property is a "wholesale greenhouse operation."
2. The County's interpretation of the term "greenhouse" is clearly erroneous and is applied to the Lindsays in a discriminatory manner.
3. The County approved the use of the structures now present, the Lindsays detrimentally relied on that approval, and forcing the Lindsays to remove the structure now is manifestly unfair.
4. Brandon Black, on behalf of Skagit County Planning and Development, told the Lindsays in an open meeting that the Lindsays were "the reason for" the current Skagit County moratorium on marijuana businesses. This suggests that

the Lindsays are the target of improper and discriminatory county law making.

5. The County was clearly erroneous when it failed to apply the International Building Code definition of "Membrane Covered Structure" to distinguish hoop houses from greenhouses.
6. The Order was clearly erroneous when it mandated that the removal of artificial light was required to create a compliant structure.
7. The Order was clearly erroneous when it mandated that the removal of metal hoops and the replacement of those hoops with PVC was required to create a compliant structure.
8. The County failed to provide sufficient guidance to distinguish a hoop house from a greenhouse and it is manifestly unfair for the county to allow a hoop house, then arbitrarily create definitions and requirements to exclude the Lindsays structures.
9. Enforcing the Order would constitute a taking.

Subsequent to the filing of the appeal, Cambria Hurlimann and Lori Scott, neighbors of the Lindsays, filed requests that the appeal be dismissed as frivolous under Hearing Examiner 3.09(d). The Examiner granted intervenor status to the Hurlimanns and Scotts. Counsel for the Appellants, thereupon, filed a response, urging that the petitioners lack standing to move for dismissal and that the elements required for dismissal were not established.

A Prehearing Conference was held on February 11, 2015, at which time argument on the requests for dismissal were to be heard. The moving parties presented argument in support. The Appellants were given additional time to respond. Additional argument was provided and the Examiner denied the motions by Order dated February 27, 2015.

By motion dated March 6, 2015, Appellants requested that the appeal hearing and the accrual of fees be deferred. The basis for the request was the failure of the County as of that date to fully respond to a public records request made by counsel for Appellants. PDS responded in writing to this motion on March 11, 2015. On March 12, 2015, the Examiner by written order denied Appellants' motion.

The matter came on for hearing, as scheduled in the Prehearing Order, on March 19, 2015. Pursuant to that order the County had provided a Staff Report on March 4, 2015, and the parties had submitted lists of witnesses and exhibits.

At the hearing, the Appellants were represented by Justin Rothboeck, Attorney at Law; the County was represented by Ryan Walters, Deputy Prosecuting Attorney; the Intervenors presented argument through Lori Scott and Larry Hurlimann. The County called two witnesses: Sandra Perkins, Code Compliance Officer, and Brandon Black, Senior Planner. The Appellants called Lori Lindsay; Paul Lindsay; Jack Moore, County Building Official; Brandon Black; and Dale Pernula, County Planning Director.

Exhibits were admitted: C-1 through C-13 for the County; A-1 through A-18 for Appellants. Likewise included in the record were Exhibits I-1 and I-2, submitted by the Intervenors and relating to public opposition to the Lindsays' greenhouses.

FINDINGS OF FACT

1. Lori and Paul Lindsay have erected two structures on their property at 3431 Old Highway 99 North Road in order to house a marijuana growing operation. The property is within a Rural Intermediate (RI) Zone.

2. The structures are large enclosures supported by metal framing with a clear covering over the whole, including the ends.

3. Observations have been made of smoke emitted adjacent to the structures and of artificial lighting within them.

4. The immediate neighborhood around the Lindsay property is largely residential. Agriculture is a permitted use in the RI zone. Agricultural processing facilities and greenhouses are not permitted in the zone.

5. December 4, 2013, the County produced a guidance document for public consumption, entitled "I-502 Marijuana Permitting." In that document the County provided detailed information on the zoning constraints governing various types of activities involving marijuana production, processing and distribution.

6. The document identified those zones in which outdoor production (agriculture) would be allowed, those in which agricultural processing would be allowed, and those in which production inside a greenhouse would be allowed. The guidance document explicitly answered the question "Why doesn't indoor production qualify as 'agriculture," and included a separate section headed " 'Agriculture' is intended to be soil-based." The document concluded:

> I-502 production that is not outdoors does not qualify as agriculture and more clearly fits into the other uses (greenhouse or manufacturing) identified above.

7. Following an initial discussion with County staff on November 25, 2013, the Lindsays met with County staff on December 5, 2013, to discuss their options for developing a marijuana growing operation on their property.

8. Prior to the December 5 meeting, the County prepared written comments specifically addressing the Lindsays' case, that were given to the Lindsays at the meeting. The notes explicitly stated that agricultural processing facilities and greenhouses for the use proposed are not permitted within the RI zone. The notes went on to say, "Hoop structures would be permitted provided they are open-ended and not permanent. The intent is to allow for outdoor soil-based operations."

9. On the same date, December 5, 2013, Jack Moore, County Building Official sent a letter to the Lindsays advising them of building permit requirements for a "predevelopment proposal for cannabis production/processing." The letter advised that there is an exception to the building permit requirement for certain "membrane structures."

10. In the summer of 2014, the Lindsays submitted drawings for a building permit to the County. (BP14-0356). The drawings were consistent with the Staff's earlier recommendations. They showed open-ended hoop structures made of PVC plastic pipes.

11. During that summer, the Lindsays did in fact erect a hoop structure, framed with PVC pipes. However, in August, the structure was leveled in a wind storm.

12. Following this, the Lindsays say they had conversations in August and September with Jack Moore. They testified that the subject was the building permit exemption for membrane covered structures and whether end caps would be permissible. They say they were told that they could use end caps.

13. Jack Moore in his testimony did not recall meeting with or talking to the Lindsays in August or September of 2014. He did remember a phone conversation referred to him by PDS during this time-frame in which building permit exemptions were discussed with a customer, but said he did not know who he was talking to.

14. There was no testimony that Moore advised the Lindsays about the land use requirements for growing marijuana in a Rural Intermediate zone.

15. Subsequently, the Lindsays erected the structures which are the subject of this hearing. Photographic evidence establishes that the structures have rigid metal framing and are entirely covered, including the ends. Smoke is shown flowing out of a stack by the one of the structures.

16. October 29, 2014, the County opened a code enforcement file (CE14-0158) relating to development on the Lindsay property, after receiving photographs and a Request for Investigation from neighbors. The County staff determined that the structures erected on the Lindsay's land are "wholesale greenhouses". The Code Compliance officer sent a letter to the Lindsays stating that such structures are not permitted in the RI zone and asking that they be removed by December 3, 2014. The removal date was subsequently held in abeyance by the County in order to accommodate further meetings between the Lindsays and staff.

17. Several meetings were subsequently held between the Lindsays and County staff at which the County maintained its position that the structures built are not allowed in the zone.

18. At a final meeting, held January 9, 2015, County staff personally served the Lindsays with the Administrative Order to Abate Violation which is under appeal. The Order asserts that the structures built "constitute permanent greenhouses which are not allowed in the Rural Intermediate zone." The Order states that PDS considers the original proposal for "temporary hoop structures" built from PVC plastic pipe to be allowed in the RI zone. It goes on to explain that, as defined in SCC 14.04.020, "temporary" means occupied and existing on a lot for no more than 180 days during any 12-month period.

19. The Order provides the following alternatives for compliance with County code:

1. Remove the greenhouse structures entirely by February 9, 2015; or

2. A. Remove the covering on both ends of each structure by February 9, 2015; and
   B. Remove all heat and illumination from each structure by February 9, 2015; and
   C. Replace the metal framing with PVC pipe by February 9, 2015; and
   D. Remove the structures entirely, beginning no later than May 1, 2015, and continue to remove them for at least 180 days each year.

20. The Order also states that corrective action must be taken by the specified deadlines or civil penalties of $100 a day will accrue until the violation is abated.

21. The timely appeal of the Order by the Lindsays effected a stay of the deadlines set and of the accrual of penalties. SCC 14.06.230.

22. On the record made, the Examiner finds that the County went to extraordinary lengths to educate the Lindsays about what sort of structures could be used for the purposes of growing marijuana.

23. The structures now in place on the Lindsays' property are greenhouse structures

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

CONCLUSIONS OF LAW

1. The Hearing Examiner has jurisdiction over this proceeding. SCC 14.44.290; SCC 14.06.110(7).

2. In this appeal, the appellants bear the burden of proving that the administrative decision (here the Order to Abate) was clearly erroneous. SCC 14.06.110(11).

3. The uses permitted uses in the RI zone include "agriculture." SCC 14.16.300(2)(a). As defined, in SCC 14.04.020, "agriculture" includes the "commercial production of horticultural . . . products . . . including those activities directly pertaining to the production of crops . . ."

4. " Agricultural Processing Facility" and "Greenhouse" are also defined terms under SCC 14.04.020. An "Agricultural Processing Facility" is "a facility which adds value to, refines, or processes raw agricultural goods" . . . . A "Greenhouse" is "a building whose roof and sides are largely of glass or other transparent or translucent material and in which the temperature and humidity can be regulated for the cultivation of delicate or out-of -season plants."

5. The list of permitted uses in the RI zone under SCC 14.16.300 includes neither "agricultural processing facilities," nor "greenhouses."

6. The County has the authority in administering the Code to interpret terms as to meaning, application or intent. Here, the County has interpreted "agriculture" as meaning "outdoor soil-based operations", and has produced a guidance document explicitly stating that indoor production does not qualify as "agriculture". The appellants failed to show that this published interpretation by the County was "clearly erroneous".

7. The language of the Land Use Code and its authoritative interpretation by County officials charged with its implementation ultimately governs in the determination of land use issues. However, public opinion is relevant and entitled to consideration in determining the probable intent of Code provisions.

8. The Administrative Order to Abate Violation given here, while correct in describing what is and is not allowed, must be amended because the passage of time has rendered some of its terms inapplicable.

9. The Hearing Examiner's jurisdiction is limited to that expressly granted. He has no power to consider or to grant equitable relief.

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

DECISION

The Administrative Order to Abate Violation is affirmed, provided that the corrective action required is amended to read as follows:

> "To comply with County code:
>
> 1. No greenhouse structures may be maintained at any time on the property for use in the growing of marijuana. The structures now in place must be removed by May 1, 2015.
>
> 2. Temporary hoop structures built from PVC plastic pipe may be erected for use in the growing of marijuana for no more than 180 days during any 12 month period."

Civil penalties of $100 per day will start to accrue if the corrective action required is not completed by May 1, 2015.

SO ORDERED, this 7th day of April, 2015.

Wick Dufford, Hearing Examiner