BEFORE THE SKAGIT COUNTY HEARING EXAMINER

CONCRETE NOR'WEST/MILES SAND AND GRAVEL, Appellant, v. SKAGIT COUNTY, Respondent.	NO. PL-18-0020 CONCRETE NOR'WEST/MILES SAND & GRAVEL'S RESPONSE TO MOTION FOR SUMMARY JUDGMENT

1. INTRODUCTION:

The central question in this appeal is whether applicant Miles Sand & Gravel (Miles) has provided Skagit County with sufficient information to complete its review of Miles' Special Use Permit application. Stated differently: Is there an adequate record for the County to provide a recommendation to the Hearing Examiner and for the Examiner to conduct the public hearing? The unqualified answer to this question is: Yes.

The record shows that Miles Sand & Gravel (Miles) has submitted final and complete copies of its:

- Traffic Report
- Noise and Vibration Study
- Critical Areas Assessments
- Full Plan Sets
- Cultural Resources Assessment
- Hydrogeologic Site Assessment
- Alternative Road Standard Request
- Special Use Application Narrative

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All of this information has been updated, corrected, or revised since the spring of 2018 at the County's request. The County's Planning Staff has indicated that it is satisfied with these submissions and Miles is aware of no outstanding requests for information by the County. Because the County cannot identify any missing information, this matter should proceed to the public hearing.

But rather than hold a public hearing, the County would have the Examiner rule by motion that all of the effort since spring 2018 by Miles (and its engineers, consultants and staff members), the County (with all of its various departments and experts), and the Examiner himself, has been a complete waste of time. That is because, according to the County, this entire appeal must be determined based on the state of the record as it existed at that time, a year and a half ago. This is ridiculous. Miles has been working for over a year to meet the County's requests, even as they changed over time and even when completely new requirements were imposed. The County's refusal to provide Miles with a written request for outstanding information – as required by its code (SCC 14.06.100(5)) and as ordered by the Examiner – has made this process exceedingly difficult.

The County has the burden under its code to provide a written request for any specific requirements still needed to complete the application. Because the County cannot identify any missing information, the Examiner should deny this summary judgment motion.

2. BACKGROUND:

Miles filed its Special Use Permit Application on March 7, 2016, and the County deemed the application complete on March 22, 2016. Notice of the application was

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published, a SEPA Mitigated Determination of Nonsignificance (MDNS) was issued, and the matter was sent to the Hearing Examiner for a public hearing.

One the eve of the public hearing, however, the County determined that notice of the application had not been properly given. As a result, the hearing was continued. The County then recirculated a notice of the application for public comment and provided an opportunity for additional public comment with a deadline of December 30, 2016.

A. The County denies Miles' application as incomplete.

On April 5, 2018, after a lengthy comment period and numerous submittals, the County denied the application on the basis that it "continue[s] to be incomplete." In its denial letter, the County cited alleged deficiencies that echoed those identified by objecting neighbors without providing its own analysis or applying its own expertise, thereby effectively delegating its duties and powers to the public. On April 12, 2018, Miles filed this appeal in response to the County's letter determination.[1]

B. Miles and the County agree to continue the review process.

Soon after filing the appeal, however, Miles and the County reached an agreement on a plan for producing all of the information the County deemed necessary for its review. Declaration of Dan Cox (Cox Decl.), ¶ 6. Miles and the County agreed to place the appeal on hold and to continue the permit review process.

On May 11, 2018, Miles' attorney sent a confirming letter to the County's attorney, outlining the parties' agreed plan of action for getting additional information to the County. Cox Decl., ¶ 7 & Ex. A. The letter described the submittals that Miles and the

[1] The Appeal is attached as an addendum to this response.

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County had agreed upon. Miles followed up by submitting the agreed-upon materials and reports on September 14, 2018. Ex. B to Cox Decl.[2]

Despite Miles' submittals, on February 22, 2019, the County sent a letter to Miles stating that the application was again incomplete. Ex. E to Cox Decl. The determination of incompleteness was based in large part on comments and requirements that were never previously provided by the County. *Id.* In other words, the County imposed new requirements beyond the agreed list.

C. The Examiner directs the County to provide a written request for specific information.

On March 22, 2019, Miles' attorney wrote to the Examiner, requesting that this matter be scheduled again for hearing, with a prehearing conference as an initial step, stating:

> You will recall that we had a prior prehearing conference and, on the same day we came before you, met with the County attorney and staff and reached an agreement on a path that would produce all the information the County found necessary for its review. Since that time, the Applicant has made several submittals to the County. In the 5 months after submittal, we received no written comments, only a February 22 letter stating that the Application was incomplete, in large part on the basis of comments never previously made by the County. The Applicant has been forced to shoot in the dark.

Cox Decl., Ex. F. In response, the Examiner sent a Memorandum to the parties, stating the following:

> [I]n consideration of the present impasse and to get matters moving, Examiner has decided to accept the Applicant's suggestion that the County be required to forward a formal written request to the Applicant stating the "specific requirements" still needed for a complete application.

Ex. G to Cox Decl.

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[2] In December 2018 and January 2019, Miles submitted the same materials and reports, with minor changes, based on oral requests from the County's attorney. Exs. C and D to Cox Decl.

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Despite this clear directive, the County did not provide Miles with a formal written request stating the "specific requirements." Cox Decl., ¶ 11. So, Miles' attorney wrote another letter on April, 25, 2019 to the County, stating:

> To date, we have heard nothing from the County. When I emailed Ms. Nicoll on April 18th asking for an update on the status of the document complying with the [March 29, 2019] Order I received a response stating that it had been sent and referring me back to the February 22, 2019 letter from the County. I immediately replied on April 18th reminding Ms. Nicoll that the Hearing Examiner (after the February 22, 2019) letter had issued the March 29th Order. Since that time I have received absolutely nothing from the County.
>
> This lack of responsiveness on basic questions is deeply troubling. It is particularly disturbing since the neighbors are objecting the Applicant's lack of responsiveness.

Cox Decl., Ex. H.

When the County failed to respond to this letter, Miles' attorney drafted yet another letter to the Examiner on May 17, 2019, stating:

> We have not received that written request, though we have continued to request it since your order was issued....
>
> Nonetheless, in the interest of avoiding further delay, we will accept the [County's] February 22, 2019 letter as being the County's "best effort" to explain what it is looking for and will respond accordingly.

Ex. I to Cox Decl. This letter also requested that Miles be permitted to communicate with County Staff directly, to allow the normal kinds of staff-to-staff communications that predominate in normal application review. *Id.* This was in response to the fact that the County attorney was acting as a middleman in the process.

D. Miles and the Planning Staff attempt to work together to complete the application.

On August 7, 2019, the parties attended a conference with the Hearing Examiner to review the status of the matter. At the conference, the Examiner set dates for motions

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and the hearing, and the parties agreed to engage in face-to-face discussions at the staff level in an effort to produce a resolution regarding application completeness. Cox Decl., ¶ 15

The next week, Dan Cox, General Manager for Miles, met with Betsy Stevenson, who had just recently replaced John Cooper as the County's lead planner on the application.[3] Cox Decl., ¶ 16. To help bring Ms. Stevenson up to speed on the project, Mr. Cox provided her with an overview of the project and a historical review of the application process to date. Ms. Stevenson indicated at that time that many of her questions had been answered through this review, but that it would still take her some time to get fully caught up. *Id.* Two days later, on August 16, 2019, Mr. Cox sent Ms. Stevenson a Report List, at her request, summarizing the applicant's most recent studies and submittals. *Id.*, ¶ 18 & Ex. K.

On August 27, 2019, Mr. Cox met with officials from Public Works and the Fire Marshall on site regarding the Alternative Road Standard Request for the project's internal haul road. At that meeting, both Public Works and the Fire Marshall provided Miles with verbal approval of the Alternative Road Standard Request with two conditions, both of which were acceptable to Miles. *Id.*, ¶ 20.

The following week, Mr. Cox initiated a conference call with Ms. Stevenson and Kristen Wallace from Ramboll US Corporation (Ramboll), the author of the Noise and Vibration study. During the call, Ms. Stevenson raised all of the concerns she had

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[3] For several years Miles worked extensively with John Cooper, a long-time County employee assigned to this project. However, he was removed from the project just before the August 7, 2019 prehearing conference. The County's removal of the lead planner at a crucial point in the review process was harmful, and it made determining the County's requirements more difficult for Miles. Given the history of this matter, Miles questions why Mr. Cooper was reassigned at this critical juncture

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regarding the Noise and Vibration Study and Ms. Wallace agreed to make the requested changes. *Id.*, ¶ 21.

E. Planning Staff indicate that they have all the information they need.

Mr. Cox followed up with Ms. Stevenson by phone on September 18, 2019. During that call, Ms. Stevenson affirmed that Public Works and the Fire Marshall had verbally committed to approve the Alternative Road Standard Request with the conditions discussed above. *Id.*, ¶ 23.

Ms. Stevenson also told Mr. Cox during the September 18, 2019 call that she had reviewed the updated Traffic Report prepared by DN Traffic Consultants, along with the most recent addendum to the report, and said that she was satisfied with the report and the traffic figures in that document. *Id.*, ¶ 24.

Finally, Ms. Stevenson told Mr. Cox that she had the information she needed to complete review of the application, but that she had questions for County attorney Julie Nicoll. Specifically, she wanted to understand Ms. Nicoll's August 7, 2019 letter to Miles, in which Ms. Nicoll made a broad and vague statement that Miles' submittals do not address all of the County's requests for additional information. *Id.*, ¶ 25 & Ex. N. According to Ms. Stevenson, she was confused by Ms. Nicoll's statement and was unsure what other information the County needed. *Id.*

On October 1, 2019, Miles submitted an updated Noise and Vibration study prepared by Ramboll in response to the questions Ms. Stevenson raised during the prior conference call. Ms. Stevenson reviewed the updated study and had one further request for clarification. *Id.*, ¶ 26. Ramboll made the requested change and Miles submitted a final updated Noise and Vibration study on October 7, 2019. *Id.* ¶¶ 27-28 & Ex. O.

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On that same day, Mr. Cox called Ms. Stevenson to ask if there were any outstanding items that the County needed from Miles. Ms. Stevenson stated she could not think of any other information that the County needed for review. *Id.*, ¶ 29.

3. EVIDENCE RULE 408 ISSUE

The County has taken the extraordinary position that "the Hearing Examiner shall not consider any evidence with respect to the parties' settlement discussions after the appeal was filed in April 2018," based on Evidence Rule (ER) 408. This argument is factually and legally incorrect.

A. ER 408 does not apply factually.

There is no confidential "settlement" process involved here. While the term settlement has been used by the parties on occasion, the fact is that the Applicant and the County simply agreed on a plan of action for getting additional information to the County so it would complete its review. Cox Decl., ¶ 6. The documents submitted after April 5, 2018, and the correspondence between the Applicant and the County during that time, were not created to facilitate settlement of a legal claim; they were created to facilitate the County's review of the permit application.

For example, since April 2018, the Applicant has provided County Planning Staff with submissions related to its application (e.g., updated traffic report, updated noise and vibration study, etc.) for review. These were part of the County's permit review process. Surely the County does not consider these to be confidential settlement documents. They are part of the public record.[4]

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[4] In fact, the documents are readily available for public review on the County's website: https://www.skagitcounty.net/Departments/PlanningAndPermit/gravelmine.htm.

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That leaves correspondence between the Applicant and the County post-April 2018 – i.e., letters and emails discussing the Applicant's submissions and the County's review. Again, these documents are part of the County's permit review process and are public records. Moreover, nearly all have been shared with the Hearing Examiner. See, e.g., Cox Decl., Exs. F, I. Prior to filing its motion for summary judgment, the County never claimed that these communications were "confidential" or that they should not be shared with the Hearing Examiner.

These documents and communications were submitted and exchanged as part of the County's review process for the specific purpose of processing Miles' application, as required by County code. ER 408 does not apply.

B. ER 408 does not apply legally.

ER 408 does not apply to this administrative appeal.

> The general legal principles which apply to appeals from lower to higher courts do not apply to administrative review of administrative determinations. The scope and nature of an administrative appeal or review must be determined by the provisions of the statutes and ordinances which authorize them.

Messer v. Snohomish Cy. Bd. of Adjustment, 19 Wn. App. 780, 787, 578 P.2d 50 (1978) (citations omitted). Because hearing examiner hearings are administrative in nature, due process does not require all the formal procedures or rules of evidence of a trial in court. 17 William B. Stoebuck and John W. Weaver, WASHINGTON PRACTICE: REAL ESTATE: PROPERTY LAW § 4.7, at 185 (2d ed.2004); *see Shoemaker v. City of Bremerton*, 109 Wn.2d 504, 511, 745 P.2d 858 (1987) (rules of evidence generally do not apply during administrative hearings).

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The Hearing Examiner is part of the County's codified system for appeals of administrative determinations. Skagit County Code (SCC) 14.02.070. The rules governing hearing procedures are laid out in the RULES OF PROCEDURE FOR HEARING FOR THE SKAGIT COUNTY OFFICE OF THE HEARING EXAMINER (Rules of Procedure). SCC 14.02.070(8). Rule of Procedure 1.11, which governs "evidence," states:

> (a) Evidence, including hearsay evidence, is admissible if in the judgment of the Examiner it is the kind of evidence upon which reasonably prudent persons are accustomed to rely in the conduct of their affairs.
>
> ...
>
> (c) The Examiner shall exclude evidence that is privileged or excludable on constitutional or statutory grounds.

The County does not claim that the application submissions and communications that occurred after April 2018 are somehow privileged or excludable on constitutional or statutory grounds. Instead, the County relies on an evidence rule that does not apply to these circumstances, either factually or legally.

The County denied Miles' application as incomplete in April 2018. As discussed, Miles and the County then created a plan of action for getting additional information to the County to complete its review. For more than a year, Miles has lived up to its obligations and has provided the County with all of the information it has requested. The Planning Staff has reviewed this information and has indicated that it is sufficient. Cox Decl., ¶¶ 23-29. The County has made no written request for any specific information that Miles has not provided. The question for the Examiner is whether Miles has submitted a complete application. Under the Rules of Procedure, the Examiner may review any relevant evidence to make this determination.

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C. Even if ER 408 did apply, the evidence would still be admissible.

Even if the submissions and communications the County seeks to exclude were made for the purpose of settling a legal claim and not for permit review, and even if ER 408 applied to this administrative appeal, the evidence would still be admissible under an exception to the rule. The rule states:

> In a civil case, evidence of (1) furnishing or offering or promising to furnish, or (2) accepting or offering or promising to accept a valuable consideration in compromising or attempting to compromise a claim which was disputed as to either validity or amount, is not admissible to prove liability for or invalidity of the claim or its amount. Evidence of conduct or statements made in compromise negotiations is likewise not admissible. This rule does not require exclusion of any evidence otherwise discoverable merely because it is presented in the course of compromise negotiations. This rule also does not require exclusion when the evidence is offered for another purpose, such as proving bias or prejudice of a witness, negating a contention of undue delay, or proving an effort to obstruct a criminal investigation or prosecution.

In this case, the County alleges that Miles failed to provide it requested information in a timely manner. Miles has the burden of showing that this is false. Negating a contention of undue delay is a specific "other purpose" exemption under ER 408.[5]

D. The County's claim of ER 408 does not relieve it of its obligations.

On March 29, 2019, the Hearing Examiner issued a Memorandum to the parties that contained an order:

> [T]hat the County be required to forward a formal written request to the Applicant stating the 'specific requirements' still needed for a complete application.

Cox Decl., Ex. G. This order was made after April 2018.

[5] The evidence would also be exempt under ER 408 to show a pattern of behavior on the part of the County.

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The County failed to comply with this order and this failure has resulted in delay and unnecessary costs to Miles. The County cannot skirt its legal requirements, and the Examiner's order, by claiming that it occurred in the course of settlement discussions. This is not factually or legally accurate.

E. The County's argument would erase over a year's worth of the effort made by Miles and the County's Planning Staff.

Finally, the County's argument, besides being contrary to law, would erase over a year of hard work by Miles and the County, and would ignore all the costs in time and money that have been expended in an attempt simply to provide the County with what it wants.

4. THE EXAMINER SHOULD DENY THE COUNTY'S MOTION

The County has moved for dismissal under Hearing Examiner Rule of Procedure 3.09 and Civil Rule (CR) 56. Under Rule of Procedure 3.09, an appeal may be dismissed prior to the hearing if the Examiner determines that:

(a) The appeal was not timely filed.
(b) The appeal is based on grounds or seeks relief outside the authority of the Examiner.
(c) The appellant lacks standing to bring the appeal. (See Rule 3.04.)
(d) The appeal is without merit on its face, patently frivolous, or brought merely for purposes of delay.

For summary judgment, the facts and all reasonable inferences must be viewed in the light most favorable to the non-moving party, and summary judgment should be granted only if, from all the evidence, reasonable persons could reach but one conclusion. The burden is on the moving party to demonstrate that there is no issue of material fact. *Scott v. Pac. W. Mountain Resort*, 119 Wn.2d 484, 502-03, 834 P.2d 6 (1992). The County fails to meet its burden under either rule.

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According to the County overly-simplistic argument, the Examiner should grant its motion because the County (1) asked for information and (2) Miles did not provide it. County's Mot. S.J., pp. 2-6. This argument ignores the many issues surrounding the County's supposed pre-denial "requests" for information and ignores the County's failure – both before and after April 5, 2018 – to request specific outstanding information "in writing," a violation of SCC 14.06.100(5) and a specific order from the Examiner.

A. The County's bases for denial in its April 5, 2019 letter are improper.

The Examiner should not limit his review to the status of the application materials on April 5, 2018, as there is no legal, reasonable, or practical basis for doing so. But even if he did, the County's argument would still fail because the County's bases for denial at that time are not proper under SCC 14.06.100, .105.

For example, the first cited basis for denial in the County's April 5, 2019 letter is Miles' failure to provide plans indicating a 300-foot buffer from the edge of the wetland to the gravel mining operation. Ex. 1 to Declaration of Julie Nicoll (Nicoll Decl.). As Miles' appeal makes clear, this "request" ignores the previous determination that a 200-foot buffer was consistent with County standards and, more importantly, the depicted buffer does not affect the completeness of the application. In this instance the County is not requesting "information" under SCC 14.06.100(5); rather, it is asking for substantive changes in the proposal. This is an issue for the Hearing Examiner. If the Examiner should determine that a 300-foot buffer is required, that condition can be imposed at the time of

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the public hearing and the plan can be revised. It is not, however, a proper basis for denial under SCC 14.06.105.[6]

Another basis involves the County's purported requests for information regarding Miles' Noise and Vibration Study. The noise study was submitted by Miles on February 23, 2018. Miles was not provided with any County comments about alleged defects until the application was denied. Thus, Miles did not have an opportunity to provide additional information under SCC 14.06.105. Moreover, the alleged deficiencies in the denial letter came directly from an objecting neighbor. The County did not provide its own analysis or apply its own expertise. Instead, it delegated its duties and powers to the public.

These are just two examples. Each and every basis for denial in the County's April 5, 2018 letter is flawed, as Miles' April 12, 2018 appeal letter makes clear. The appeal clearly is not meritless or frivolous.

B. The County has failed to provide a request "in writing" for the information it claims it is missing.

Ultimately, the status of the application materials on April 5, 2018, is immaterial. The County continued application review and accepted agreed-upon materials and reports submitted by Miles after that date. The key question for the Hearing Examiner at this point is whether Miles has provided the County with sufficient evidence for it to complete its review. If it has, then the matter must proceed to a public hearing on the merits of the proposal. Because the County has not identified in writing any missing information that it needs to complete its review, the answer to this question is: Yes.

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[6] In any event, Miles submitted an alternative revised plan in July 2019 that included the 300-foot buffer.

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SCC 14.06.100(5) allows a County administrative official to request additional information or studies "if new information is required or substantial changes in the proposed action occur." Such a request must be "in writing."

In March 2019, when the record showed that the County was continuing to claim that Miles' application was incomplete, but had also not provided a request in writing for specific information, the Hearing Examiner ordered that "the County be required to forward a formal written request to the Applicant stating the 'specific requirements' still needed for a complete application."

The County to this day has not complied with the Examiner's mandate. Instead, the County has provided unhelpful comments broadly stating, for example, that "the application materials contain conflicting information about the scope of the project." See Ex. N to Cox Decl.

It is undisputed that Miles has provided the County with an updated and revised traffic study, noise and vibration study, critical areas assessments, full plan sets, cultural resources assessment, hydrological site assessment, alternative road standard request, and special use narrative. It is also undisputed that the County has not identified in writing any missing information that it needs to complete its review. Given these undisputed facts, this matter should proceed to a public hearing.

5. CONCLUSION:

The County has not met its burden under Rule of Procedure 3.09 or CR 56 and the Hearing Examiner should deny the County's motion for dismissal/summary judgment. Moreover, because the County has not identified any missing information it needs to complete its review, the Examiner has several options moving forward:

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First, the Examiner could at this time, based on the record, rule that Miles' application is complete. Instead of conducting the appeal hearing on October 23, 2019, the Examiner could set a date for a public hearing on the merits of Miles' application or instruct the staff to do so.

Second, the Examiner could stay the October 23, 2019 appeal hearing and require the County to put in writing, in a letter to Miles and the Examiner, all "specific requirements" it still needs to complete the application. Given the history in this case, five days should be a sufficient amount of time for the County to provide this letter.

Third, in its ruling on the County's summary judgment motion, due on October 18, 2019, the Examiner could provide the parties with direction as to what specific issues, information, and/or documents the Examiner would like to review at the October 23, 2019 appeal hearing. The County's all-or-nothing approach in its summary judgment motion does not provide the parties or the Examiner with much direction as to the hearing. (For example, will the County challenge the sufficiency of all or some of Miles' expert reports and studies even though Ms. Stevenson says she and the staff are satisfied?) If the October 23, 2019 appeal hearing is to be held, it would be helpful to the parties to know what specific issues will be discussed and analyzed.

Dated this 16th day of October, 2019.

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