

BEFORE THE SKAGIT COUNTY HEARING EXAMINER

In the Matter of the Appeal of)	
)	
MILES SAND AND GRAVEL)	ORDER DENYING APPEAL
AND CONCRETE NOR'WEST,)	
Appellant,)	
)	PL21-0348
v.)	
)	
SKAGIT COUNTY,)	
)	
Respondent.)	
_____)	

This matter has proceeded through the submission of written briefs per Order of the Hearing Examiner. The Appellant, is the Applicant for a Special Use Permit. The Applicant was represented by William T. Lynn and Reuben Schutz, Attorneys at Law. The County was represented by Jason D'Avignon, Deputy Prosecuting Attorney.

ACTION APPEALED

The appeal, dated June 24, 2021, concerns a determination by the County of the need for Applicant to complete and submit Critical Areas Standard Review in relation to the operation of a proposed gravel mine. The County's determination, dated June 17, 2021, stated:

Critical Areas Standard Review has not been completed as to the whole of the proposed mine's operations. In particular, the use of the haul road to transport minerals from the proposed mine.

FACTUAL SETTING

The Applicant seeks a mining Special Use Permit to develop a gravel mine on 68 acres north of Grip Road and south of the Samish River.

Gravel will be transported from the mine site over a haul road that traverses forest land, before connecting to Grip Road. The haul road is a private road currently used by the Applicant in connection with permitted forest practice activities. The mine site is within the County's Mineral Resources Overlay on Rural Resource-Natural Resource Land

PROCEDURAL BACKGROUND

The Special Use Permit application was filed on March 7, 2016 (PL16-00097/98). On March 22, 2016, the County deemed the application complete for continued processing.

Two years later, on April 5, 2018, the County denied the application on the basis that it was incomplete. The Applicant appealed. After a conference, the Examiner continued the matter to accommodate settlement discussions.

The Applicant submitted additional materials but, on February 22, 2019, the County sent a letter that it still considered the application incomplete. Thereafter, the Applicant sought a written specification of the items of information the County desired and the Examiner ordered that such a specification be provided.

The County did not comply with this order and ultimately moved for Summary Judgment in Applicant's appeal of the permit denial. On October 17, 2019, the Examiner denied the motion and granted judgment to the Applicant, deeming the application to be complete and calling for a new Staff Report, followed by a hearing on the merits in due course. No new Staff Report has been issued.

Now, nearly another two years later, this new appeal has been filed in response to the County's recent determination that the Applicant must now complete and submit Critical Areas Standard review.

In the interim, on April 15, 2021, the County withdrew its initial Mitigated Determination of Non-Significance. (MDNS) and issued a new one. The new MDNS elicited a significant amount of public comment.

Thereafter, on May 11, 2021, the County withdrew its second MDNS. That County action was not appealed. No new threshold decision under SEPA has yet been made.

The County's determination of June 17, 2021, calling for submission of Critical Areas Standard Review, was timely appealed by the Applicant and, on July 6, 2021, the Hearing Examiner entered a briefing schedule on the matter.

POSITIONS OF PARTIES

The Appellant urges that (1) the parties are bound by the Hearing Examiner's October 17, 2019 ruling that the application is complete, and that (2) in any event, critical area's review is not required in this situation.

The County argues that in the absence of a SEPA threshold determination the application cannot be heard on the merits and that the haul road is subject to the Critical Areas Ordinance

DISCUSSION

Finality of the Examiner's Completeness Order

The Examiner's prior Order deeming the application complete was not appealed. It became final.

The Applicant's responses to the County's more recent requests for information do not necessarily show an intent to waive completeness. As relevant here, this is particularly true as to information sought that is unrelated to critical areas. Therefore, no waiver can be found.

The Washington Court has strongly endorsed the concept of finality in dispute resolution. Normally this means that a final decision that is not timely appealed cannot later be attacked and must be given full affect. *Wenatchee Sportsmen v. Chelan County*, 141 Wn.2d 169, 4P.3d 123 (2000), *Habitat Watch v. Skagit County*, 155 Wn.2d 397, 120 P.3d 56(2006).

However, the County's recent withdrawal of the MDNS puts this case on a different footing. That action also was not appealed and therefore, must itself be viewed as final. This means that SEPA compliance has not been achieved.

In circumstances where an application is still pending, the finality doctrine cannot operate to render compliance with the procedural requirements of SEPA unnecessary. In the posture of the case at present, a threshold determination is needed to determine whether the preparation of an environmental impact statement is required.

The result is that what was a complete application has been rendered incomplete.

Applicability of the Critical Areas Ordinance to the Existing Logging Road

The need to comply with SEPA, makes it necessary to address whether the planned haul road is subject to the Critical Areas Ordinance.

The Applicant urges that this issue is governed by the ordinance itself. Critical areas review is required only where a "development activity" is planned or where an activity may disturb the soil, water, or existing vegetation. SCC 14.24.060. The Applicant asserts that the proposed road use is not a "development," as that term is defined by the County Code.

"Development," as defined by SCC 14.04.020, does not include site disturbance for internal logging roads. The Code's language in context refers to disturbance contemplated by building a logging road. The activity contemplated here is about using a logging road for a completely different purpose. It is a form of site disturbance. Therefore, the haul road use for the gravel mine does not fall outside the definition of "development."

Moreover, the new use of the road is subject to critical areas review because it presents a potential to disturb the soil, water or existing vegetation along its route. Evaluating a project for that potential is the whole point of requiring critical areas review.

Additionally, the Applicant argues that the haul road is exempt from critical areas review because normal maintenance of private roads is listed as exempt under SCC 14.24.070(3). It is not road maintenance that is the focus of the County's order. The maintenance exemption has nothing to do with how new use of the road for gravel hauling may impair functions and values of critical areas or their buffers.

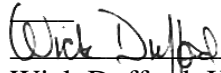
The goals, policies and purposes of the Critical Areas Ordinance are explicitly considered policies of the County under SEPA. SCC 14.24.060(3). SEPA is not limited in its reach by issues of governmental jurisdiction. The point of review under SEPA is to determine whether

significant adverse environmental impacts are likely. Therefore, SEPA compliance, which is still undetermined for this application, necessarily calls for the completion and submission of the critical areas review called for by the County.

ORDER

The appeal (PL21-0348) is denied. The County's Determination of need to complete Critical Areas Standard Review is affirmed.

SO ORDERED, this 30th day of August, 2021.



Wick Dufford, Hearing Examiner

Transmitted to the Parties and Counsel, this 30th, day of August. 2021.