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BEFORE THE SKAGIT COUNTY HEARING EXAMINER

**CONCRETE NOR'WEST/MILES SAND
& GRAVEL,**

Appellants,

v.

SKAGIT COUNTY,

Respondent.

PL18-0200

**SKAGIT COUNTY'S MOTION FOR
SUMMARY JUDGMENT AND TO DISMISS**

Skagit County hereby moves to dismiss Appellants' claims in their entirety pursuant to Hearing Examiner Rule 3.09 since the appeal is without merit. Skagit County also moves for summary judgment under Civil Rule 56 since there are no genuine issues of material fact and Skagit County is entitled to judgment as a matter of law that Appellants failed to timely submit requested information pursuant to Skagit County Code ("SCC") 14.06.105 and the application was incomplete at the time of the denial on April 5, 2018. A copy of the April 5, 2018 denial letter is attached as Exhibit 1 to the Declaration of Julie S. Nicoll (hereinafter "Nicoll Decl."). Appellants filed an appeal of the County's denial on April 16, 2018. *See* Ex. 9 to Nicoll Decl.

Pursuant to Hearing Examiner Rule 3.17, Appellants have the burden to establish by a preponderance of the evidence that the County's April 5, 2018 decision was clearly erroneous.

**SKAGIT COUNTY'S MOTION FOR SUMMARY
JUDGMENT AND TO DISMISS**

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1 Appellants have failed to meet their burden of proof since they have not presented any evidence
2 that the application was in fact complete on April 5, 2018. Instead of addressing the application
3 deficiencies outlined by the County, Appellants argue why the submittal of additional
4 information is unnecessary. Accordingly, since the parties do not dispute what information the
5 Appellants have submitted to the County to date, Skagit County seeks a legal ruling on whether
6 its April 5, 2018 denial of application PL16-0097 should be upheld as a matter of law.
7

8 I. BACKGROUND

9 In 2017, after extensive public comments were received on the Appellants' application
10 and the County conducted additional review of the materials, Skagit County sought additional
11 information from Appellants. Pursuant to SCC 14.06.100(5), "the determination of
12 completeness shall not preclude the Administrative Official from requesting, in writing,
13 additional information or studies either at the time of the notice of completeness or,
14 subsequently, if new information is required or substantial changes in the proposed action occur,
15 consistent with SCC 14.06.105." On March 14, 2017, Skagit County Planning & Development
16 Services sent a letter to the Appellants seeking additional information regarding various aspects
17 of the application pursuant to SCC 14.06.100(5). *See* Ex. 2 to Nicoll Decl. On May 15, 2017,
18 Appellants responded to the County, addressing some of the outstanding concerns, but not all of
19 the issues addressed in the March 14, 2017 letter. *See* Ex. 3 to Nicoll Decl. In response, Skagit
20 County replied on July 6, 2017, highlighting the continued deficiencies in the application. *See*
21 Ex. 4 to Nicoll Decl.
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24 On September 20, 2017, Appellants replied to the County, submitting an example of their
25 Environmental Protection Plan and instead of providing all of the additional information
26 requested in the County's July 6, 2017 letter, Appellants argued why they should not be required
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1 to submit any further information. *See* Ex. 5 to Nicoll Decl. Skagit County responded by letter
2 dated October 24, 2017 stating that the application remains incomplete as described in prior
3 correspondence dated March 14, 2017 and July 6, 2017, copies of which were enclosed. *See* Ex.
4 6 to Nicoll Decl. Skagit County reiterated in the October 24, 2017 letter that additional
5 information was requested pursuant to SCC 14.06.100(5), and that the Department could not
6 continue processing the application without this information. Appellants were put on notice that
7 they had 120 days to submit the information requested on July 6, 2017 pursuant to SCC
8 14.06.105(1). Skagit County stated that if the requested information was not submitted on or
9 before November 3, 2017, it would deny the application for failure to timely submit the
10 requested information. No additional information was provided by Appellants on or before
11 November 3, 2017. However, Appellants sought an extension of the deadline, and in the interest
12 of reaching an amicable resolution to this matter, the County granted an extension to February
13 25, 2018. This extension is referenced in a letter Appellants sent to Skagit County on November
14 21, 2017. *See* Ex. 7 to Nicoll Decl. As noted in the Appellants' February 23, 2018 letter, the
15 parties also met in person on November 20, 2017 to discuss the outstanding issues in the
16 application. *See* Ex. 8 to Nicoll Decl.

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19 After careful review and consideration of the revised application materials submitted on
20 February 23, 2018, the County sent a letter to Appellants on April 5, 2018 with its final decision
21 to deny the application since the Appellants failed to submit the additional requested information
22 and the application remained incomplete. *See* Ex. 1 to Nicoll Decl. The following issues were
23 addressed in the April 5, 2018 denial letter:
24

- 25 1. Skagit County failed to receive the requested updates to the application materials
26 (including but not limited to the application form, project description, SEPA
27 checklist, Traffic Study, and Fish & Wildlife Assessment) and all supporting

1 documentation to address numerous factual inaccuracies and to ensure consistency
2 with the current project plans. This request was reiterated in the March 14, 2017 and
3 July 6, 2017 letters, and at the in-person meeting with Appellants on November 20,
4 2017.

- 5 2. Skagit County failed to receive the requested plans indicating a 300-foot buffer from
6 the edge of the wetlands to the gravel mining operation pursuant to SCC 14.24 as
7 reiterated in the July 6, 2017 letter.
- 8 3. Skagit County failed to receive updated application materials addressing the access
9 road's compliance with SCC 14.36.010 (Skagit County Road Standards) and SCC
10 15.040.030(2)(f). The revised application form transmitted on February 23, 2018
11 failed to address the access road.
- 12 4. Skagit County failed to receive a site-specific Spill Control Plan to address potential
13 water pollution impacts under SCC 14.16.900(1)(b)(v)(C). This issue was addressed
14 in the County's July 6, 2017 letter, again on October 24, 2017, and in person on
15 November 20, 2017. The revised Spill Control Plan submitted on February 23, 2018
16 remains incomplete since it fails to address on-site operations and site-specific
17 equipment, and does not contain a site plan.
- 18 5. Skagit County also received a Noise and Vibration Study that was inaccurate and
19 incomplete for the operations proposed. With respect to the Noise and Vibration
20 Study submitted on February 23, 2018, several underlying assumptions in the study
21 appear to be incorrect. For example, page 7 of the study states the primary noise
22 source will be a "front-end loader excavating material from the floor of the pit."
23 However, a front-end loader is not used to excavate material. In addition, the Noise
24 Study fails to analyze other heavy equipment (excavator, dozer and dump trucks) that
25 may be used at the site according to the application. The Noise and Vibration Study
26 also inaccurately states that the proposed mine "would be situated in the middle of
27 726 acres of continuously owned property" and presumes that "most of the existing
buffers would remain intact." It is our understanding that the surrounding properties
may be harvested and buffers de-forested, which may impact noise transmission off-
site. It is unclear whether this was addressed in the Noise and Vibration Study.
6. Appellants' revised application materials also failed to provide sufficient evidence
showing compliance with the criteria in SCC 14.16.900(1)(b)(v) as noted in the
March 14, 2017 letter. Specifically, there have been numerous public comments on
the "potential adverse effects on the general public health, safety and welfare" of the
proposed operations, which Appellants have failed to address.

The April 5, 2018 denial letter further stated that since the information that was requested on March
14, 2017 and again on July 6, 2017 was not provided (despite an extension through the end of

1 February 2018), Skagit County denied application PL16-0097 pursuant to SCC 14.06.105. The
2 letter also informed Appellants that they may only reinstate review by submitting a new
3 application consistent with all current requirements pursuant to SCC 14.06.105(4).
4

5 **II. STANDARD OF REVIEW**

6 Pursuant to Hearing Examiner Rule 3.09(d), an appeal may be dismissed prior to hearing
7 if the Examiner determines that “the appeal is without merit on its face, patently frivolous, or
8 brought merely for purposes of delay.”

9 Under Civil Rule 56, summary judgment is a procedure available to avoid unnecessary
10 trials where there is no genuine issue of material fact. *Jacobson v. State*, 89 Wn.2d 104, 108,
11 569 P.2d 1152 (1977). Summary judgment is appropriate if reasonable persons could reach but
12 one conclusion from all the evidence presented. *Vallandigham v. Clover Park Sch. Dist. No. 400*,
13 154 Wn.2d 16, 26 (2005). The facts and all reasonable inferences from them must be viewed in
14 the light most favorable to the non-moving party. *Scott v. Pac. W. Mountain Resort*, 119 Wn.2d
15 484, 502-03 (1992).
16

17 **III. ARGUMENT**

18 Skagit County’s April 5, 2018 denial of the application should be upheld as a matter of
19 law and this appeal should be dismissed since it is without merit. There are no material facts in
20 dispute on what application materials the Appellants have or have not submitted to Skagit
21 County. The remaining question for the Hearing Examiner is whether the County’s denial of the
22 incomplete application on April 5, 2018 was proper under Skagit County Code. The record
23 demonstrates the reasonable information requests made by the County under SCC 14.06.100(5)
24 and Appellants’ failure to submit all of the information requested prior to the County’s denial.
25 The County gave Appellants several opportunities to remedy the deficiencies in their application
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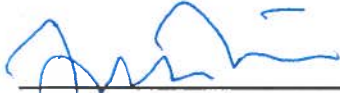
1 prior to the issuance of the denial letter. The County properly denied the application pursuant to
2 SCC 14.06.105 since the County never received sufficient information from Appellants to
3 complete its analysis of the potential project impacts. For example, as noted in the prior
4 correspondence described above, the application materials contain conflicting information about
5 the scope of the proposed project. Without clarity on the scope of the proposed operations, it is
6 impossible for the County, Hearing Examiner, and the community to evaluate the potential
7 project impacts.
8

9 Since the appeal was filed, the County has also worked in good faith to settle this matter
10 with Appellants. Despite the parties' best efforts, no settlement has been reached to date.
11 Pursuant to Evidence Rule 408, statements made in compromise negotiations are not admissible.
12 Therefore, the Hearing Examiner shall not consider any evidence with respect to parties'
13 settlement discussions after the appeal was filed in April 2018. The issue on appeal is solely the
14 status of the application materials on April 5, 2018 when the County denied the application. Any
15 effort to cure defects after this appeal was filed is moot and is not an issue before the Hearing
16 Examiner. Pursuant to SCC 14.06.105(4), Appellants may only reinstate review by submitting a
17 new application consistent with all current requirements.
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19 In conclusion, based on the undisputed record, the application remained incomplete at the
20 time of the County's denial as a matter of law. Therefore, Skagit County respectfully requests a
21 ruling from the Hearing Examiner upholding the County's April 5, 2018 denial and a finding that
22 no further review of application PL16-0097 is warranted pursuant to SCC 14.06.105. This appeal
23 should be dismissed as lacking any merit.
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1 Dated this 9th day of October, 2019.

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3 **SKAGIT COUNTY PROSECUTING**
4 **ATTORNEY'S OFFICE**

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