

**CORRECTED/REVISED DECISION OF THE SNOHOMISH COUNTY
HEARING EXAMINER PRO TEMPORE**

Date of Decision: August 9, 2011

Date of Revised Decision: August 24, 2011 (see Page 11)

Subject: Appeals of a Mitigated Determination of Non-Significance (MDNS), and of Building and Grading Permits for Mill Creek Kennels

File Nos: 07-103180-001-00-CP
07-103180-003-00-CP
07-103180-000-00-CG

Appellant: William McElroy

Applicant: **RAYMOND P. McGUNNIGLE**

Respondent/
County: Departments of Planning and Development Service and Public Works

DECISION

SUMMARY: The appeals are **DENIED**. The MDNS is upheld. The building and grading permits are affirmed.

This matter came before the Hearing Examiner Pro Tempore on July 20, 2011, in an open-record hearing. Appellant William McElroy represented himself. Applicant McGunnigle was represented by Peter Eglick, Attorney at Law. The County was represented by Roxanne Pilkenton, PDS.

A preliminary motion to dismiss on grounds of improper notice was denied.

Appellant's case on the merits was presented almost entirely by William McElroy. He called neighbor Mike Bickford for testimony on the subject of notice and neighbor Ed Pemberton for testimony on notice and the existence of a Type 5 stream in the area.

Testifying for the Applicant were Andy Shepherd, Land Planner, ESM Consulting (project description); Raymond (Pat) McGunnigle, Applicant (project description and kennel experience); and John Zielsdorf, mechanical contractor (ventilators).

Testifying for the County was Roxanne Pilkenton, PDS (project review); Frank Scherf, PDS (existence of Type 5 stream); and Paul Dragoo, PSD (critical area regulations).

The record admitted contained 138 exhibits.

The testimony of witnesses having been heard and the exhibits admitted having been considered, the Examiner makes the following Findings of Fact, Conclusions of Law and Decision.

FINDINGS OF FACT

1. Raymond (Pat) McGunnigle seeks to construct a 9,240 square foot indoor kennel and exercise area for the boarding of dogs. He also wishes to construct an associated 864 square foot office, with space provided for necessary grooming of dogs being boarded.
2. The kennel will have a maximum capacity of 50 dogs. Full capacity is not likely to be reached except for a few weeks a year during holidays. Otherwise, based on experience, occupancy will vary between 35% and 70%.
3. In connection with the kennel and the office, two commercial building permits were sought. In addition a grading permit was applied for to allow 1,680 cubic yards of cut and 2,187 cubic yards of fill in connection with construction of the kennel and office.
4. Review under the State Environmental Policy Act (SEPA) was required for this project.
5. The site contains 8.73 acres, and is located at 17226 51st Avenue, SE, Bothell, in Sec. 9, T27N, R5E, W.M. The property is zoned R-5. The use category for the development is "commercial kennel," a use permitted outright in the R-5 zone. (See SCC 30.22.110)
6. The site is bounded by a high tension power line to the west, 51st Avenue SE to the east, and residential parcels to the south and north. The immediate neighborhood is made up of medium to large sized lots developed with large single-family residences and various outbuildings. The surrounding area is also zoned R-5.
7. The subject property is developed with a single-family home, accessory dwellings, a tennis court, a detached garage and other miscellaneous buildings. The proposed kennel and office will be in the western portion of the property.
8. Vegetation consists of lawn/pasture and forested areas. About 50% of the site is wooded. The topography is generally flat except for an area of steeper slope in the southwest corner of the property.

9. The site lies within the Snohomish County Ground Water Management Area and above the Cross Valley Sole Source Aquifer. The closest surface water is Little Bear Creek, located approximately 450 feet east of the site. The creek flows in a generally south to southeasterly direction.
10. The proposed facility will be operated under a unique concept -- keeping the dogs indoors all the time. The intent is to provide both sleeping/feeding areas and exercise space within the cement floored kennel building. With 130 square feet per run per dog, there will be room for each dog to run and exercise. Dogs will be washed and incidental grooming will be performed in the office building.
11. Fecal materials will be collected, physically removed from the kennel in double bags, and disposed of by Waste Management. Urine will be washed from the enclosed kennel into a tandem septic system that includes UV light treatment to reduce bacterial, viral or parasitical contaminants. The runoff from the tub for washing dogs will also drain to this system. There will be a hair trap at the entry to the septic tank to filter out hair from the kennel and washing tub. There will be two separate drainfields near the northwest corner of the site, one for the kennel and the other for the office.
12. The kennel building will be constructed according to rigorous sound-proofing standards, will have double doors, and will contain no windows.
13. The office building will be used as the intake for dropping dogs off and for incidental dog grooming. There will be no separate grooming business. Dog washing and grooming will be conducted as needed in conjunction with maintaining standards of cleanliness in the kennel. It will be a minor use involving only one or two dogs at a time.
14. The State Department of Health has approved the new Group B water system that will serve the kennel and residential connections.
15. The Applicant provided credible testimony about his former operation of a boarding kennel for over 30 years at another site. His previous kennel boarded as many as 100 dogs and the water usage data he compiled for the prior operation was used in sizing the septic system for the present project. Thus, the estimate was probably conservative in regard to the amount of flow actually needed. He stated that it is impossible to get all of the dogs in the kennel barking at once, and noted that in his 30-years of prior experience, he received no complaints about noise.
16. The applications for the building permits and grading permit were originally submitted to PDS on September 7, 2007. After SEPA review, PDS issued a Mitigated Determination of Non-Significance (MDNS) on January 14, 2010. The MDNS was timely appealed by William McElroy.

17. The commercial building and grading permits were approved and PDS issued a Notice of Decision on February 28, 2011. This decision was likewise timely appealed by William McElroy.

18. The MDNS issued January 4, 2010, stated the following:

The lead agency has determined that the requirements for environmental analysis, protection, and mitigation measures have been adequately addressed in the development regulations and comprehensive plan adopted under chapter 36.70A RCS, and in other applicable local, state, or federal laws or rules, as provided by RCW 43.21C.240 and WAC 197-11-158.

The following specific conditions were added:

Noise

1. The proposed kennel building shall house no more than 50 canines. The proposal implements an all indoor design for the proposed kennel;
2. All kennel activities and services provided by the kennel shall occur indoors;
3. All recommendations of the detailed noise analysis of the proposed dog kennel operation prepared by JR Engineering dated 19 November 2008 shall be implemented to ensure compliance with applicable Snohomish County noise standards pursuant to SCC Chapter 10.01 (Noise).

Water and Air Quality

Animal waste shall be hauled off site by Waste Management weekly and bagged according to their requirements. The effluent from the kennel runs, after solid wastes are picked up and bagged, shall be handled in a two tandem septic system that includes UV light treatment so as to ensure that no bacterial, viral or parasitical contaminants enter the environment. The runoff from the dog washing facility shall also run into this system. There will be a hair trap at the entry point into the septic tank to filter out hair from the kennel and grooming facility. The proposed kennel shall follow the guidelines regarding Ecology's basic requirements for the management of dog kennel wastes; Ecology's recommendations for designing a dedicated septic system for the dog kennel waste; Ecology's best management practices (BMP) to protect the septic system, the ground water, and local surface waters outlined in the Department of Ecology's (DOE) letter dated 24 June 2009.

19. The Appellant challenged the adequacy of the MDNS on issues of (1) odor, (2) noise and (3) use of a permit-exempt water well. In his brief, he asserted a

number of inaccuracies in the SEPA checklist and sought to add an issue related to the characterization of the kennel drainfield as an underground injection well.

20. In his appeal of the underlying building and grading permits, Appellant challenged:
- (1) the size of the kennel building,
 - (2) the need to restore the site to its original contours after illegal clearing and grading by a prior owner,
 - (3) the number of dogs allowed,
 - (4) the legality of grooming parlor. In his hearing brief he raised a question of the adequacy of notice.

Notice

21. Notice of these decisions was duly given to parties of record, alerting them to their appeal rights. The only testimony on the notice issue was made by persons who actually did file appeals. Two of these were dismissed for technical reasons. The record does not support a finding of defective notice of the decisions.

Odor

22. The Appellant argued that the SEPA checklist was inaccurate because it failed to identify any odors which would be generated by the kennel when completed. He faulted the Applicant for failing to carry out an odor study.
23. The County contended that the waste management regime specified in the MDNS (bagging, UV light treatment) will adequately control any unpleasant odors. The Appellant simply says that this is not so. He asserted that odors will reach the outdoor environment through the ventilation system.
24. An expert for the Applicant testified that odor eliminating ionizers can be inserted into the ventilation system, effectively eliminating odors to the outside. The Appellant presented no evidence to support his contentions about odor.

Noise

25. The Appellant argued that the noise analysis of the kennel prepared by JR. Engineering is incomplete and inadequate, alleging that noise exceeding maximum permissible levels will occur.
26. The Appellant's contention is that standards will be exceeded by the barking that occurs when the kennel is at the maximum capacity of 50 dogs. The noise study assumed that at most only 22 dogs would likely be barking at any one instant. This was not shown to be an unreasonable assumption.

27. The study made recommendations for sound-proofing construction that would meet a conservative 39 dbA limit for exterior noise as the design standard for the project. This would meet relevant standards. Exterior sound levels projected included the effects of reduced transmission loss due to doors and roof vents.
28. Appellant expressed concern about noise transmitted through the ventilation system, as well as noise from the ventilation system itself. The Applicant's ventilation expert said that the ventilators will be designed to protect against the transmission of noise outside of the building. He said the units are "tunable" meaning that baffles can be installed that will effectively keep noise from going out.
29. Appellant noted that there was no discussion of noise control in connection with the office/grooming building. This building will be located about 170 feet from the Appellant's single-family dwelling structure. No more than three dogs will likely be in the building at once. Dogs typically do not bark when they are being groomed. The grooming will take place indoors. There is nothing in the record to suggest that barking noise from this minor source will violate standards or present a problem for neighbors.
30. Appellant's contentions about noise violations were not supported by the evidence.

Well

31. At hearing the Appellant did not pursue the issue raised in his appeal that excessive withdrawals of ground water would adversely affect other wells and overtax the capacity of the aquifer. Instead he brought forth an argument stemming from a new Department of Ecology program that would classify the septic system for the kennel as an underground injection control (UIC) well.
32. The UIC well assertions appear to branch into several lines related to the potential for pollution of the nearby stream or the underlying aquifer. They are: (a) injection wells are prohibited at this site; (b) the septic system is undersized to meet the requirements of the DOE's letter of June 14, 2009 (referred to in the MDNS); (c) the state regulations will require the Applicant to register this injection well; (d) the wastewater should be classified as industrial waste, (e) the kennel is located in a "critical area" requiring a high level of groundwater protection; (f) hydraulic conductivity tests were not conducted; (g) there is a possibility of surface water contamination.
33. Much of the discussion on these points deals with various regulations under the auspices of agencies other than the County. The Applicant states they have every intention of meeting all relevant regulatory requirements. However, regardless of the regulations applied, there is no credible evidence supporting

the likelihood that either streams or the aquifer will be adversely affected by this development.

34. A hydrogeologic report, dated October 24, 2008, was prepared for the Applicant by ZZA-Terracon, Consulting Engineers, to evaluate potential impacts of the project on groundwater. In their opinion the proposed development presents a low risk of impacting groundwater quality in the Cross Valley Aquifer because the project location is underlain by relatively impermeable glacial till. They recommended preparation of a Waste Management Plan with specific procedures on how kennel waste will be handled.
35. Lay testimony about the existence of an intermittent stream on or adjacent to the southwest corner of the subject property was contradicted by a professional wetland ecologist who visited the site and found no stream or wetland within 200 feet of the area. Absent expert proof, the Examiner finds that no wetlands, streams or other critical areas exist on the property or within the near vicinity.
36. The DOE letter of June 14, 2009, written by Rod Thompson, was based on tentative criteria for dog kennel septic system design that were suggested pending "actual research ... on what technology can be used to properly treat dog fecal waste." The system sizing suggestion was not based on actual flow data. Moreover, fecal waste is being hauled away and will not be introduced into the septic system. Actual usage data developed by the Applicant at his previous kennel shows much smaller flows should be anticipated. In a subsequent e-mail to Applicant's representative, Gerald Shervey, PE, Industrial Unit Supervisor for DOE stated, "I agree it would be appropriate to use actual flow records from a similar dog kennel operation rather than the flows Rod assumed for his guidance letter."
37. The County noted that the project is vested to critical area regulations effective at the time the application was deemed complete -- namely, September 12, 2007. These regulations did not regulate critical aquifers and UIC wells. The vesting date was prior to the effective date of the current critical area regulations which do cover such subjects. Thus, as a matter of County requirements, any prohibition of UIC wells does not apply to this project.
38. The Applicant did not show that injection wells were prohibited at the site at the time of application, that the septic system designed is undersized, or that ground water contamination is probable. The research carried out for the Applicant showed no need for a study of hydraulic conductivity. Surface water pollution was not shown to be likely.
39. Whatever requirements for registration or otherwise may be applied to the septic system by other government agencies, the Applicant is committed to (and required to) comply with them. The applicability of these requirements, however,

is a separate matter from the issue of what the likely environmental impacts of the proposed development will be.

40. In general, the various SEPA checklist shortcomings listed by Appellant were shown to be unneeded given the facts for the site as related to environmental elements likely to be affected. The Applicant did not demonstrate that it is more likely than not that significant adverse environmental impacts will result from this project, as conditioned by the MDNS.

Size of kennel building

41. As noted, the "commercial kennel" use is permitted outright in the R-5 zone. The subject proposal meets all of the dimensional requirements for this zone. (SCC 30.22.100, 110) There is no limit on the size of such a kennel.
42. The Appellant argues that the proposal should be reviewed as a "home occupation" which has a size limitation that the kennel building exceeds. The "home occupation" category is a general rubric covering a wide variety of unspecified business activities that might be carried on in a home or residential accessory. "Home occupation" rules do not apply to specific uses that are identified by name as allowed within a zone.

Prior Grading

43. Grading was done by prior owners of the subject property. A County inspection showed that under 100 cubic yards of dirt were moved on site. The Appellant failed to prove that there are any streams on or within the near vicinity of the property. There is no proof that prior grading activities on the site created a significant risk that the current project will result in contamination of public waters.

Number of Dogs

44. The Appellant argues that the definition of "commercial kennel" used in the licensing title of the County Code should govern here. However, the building and grading permits are regulated by the Unified Development Code, under a different title. The applicable definition is at SCC 30.91K.010:

Kennel, commercial (commercial kennel) means a place where (a) four or more adult dogs, cats or combination thereof are kept whether or not for compensation, including facilities known and operated as animal shelters and boarding facilities, (b) the occupant of the property keeps and owns more than 10 and not more than 25 adult dogs, or (c) dogs are sold, but not including small animal hospitals where pets are kept for treatment only, pet shops, private kennels, or zoological parks.

The various descriptions in the definition are stated in the alternative. The subject proposal meets description (a) in that four or more adult dogs will be boarded. The boarding of 50 dogs does not violate the applicable definition.

Grooming

45. A "grooming parlor" is not an outright permitted use in the R-5 zone. The Appellant therefore argues that the grooming activity proposed cannot legally be allowed. The Applicant does not propose to operate a grooming parlor, a business where dogs are bathed, clipped and groomed for compensation. (SCC 30.91G.090) Dogs will not be taken in at the Applicant's kennel solely for the purpose of grooming. Such grooming as occurs will be incidental to the boarding of the dogs. An incidental use which occurs in connection with a permitted use is allowed.
46. 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 subject matter of this proceeding. SCC 30.71.020(4),030.
2. SEPA is intended to promote informed decision making by government when undertaking "major actions significantly affecting the quality of the environment." Under SEPA a threshold determination is necessary to determine whether the action in question will have a significant adverse environmental effect. If it will not, then a Determination of Non-Significance (DNS) may be issued, meaning that the detailed review contained in an Environmental Impact Statement will not be needed.
3. In making a threshold determination, the responsible official must consider mitigation measures which the Applicant can undertake which would reduce otherwise "significant" environmental impacts to below the level of "significance." Conditions may be imposed within a DNS that will result in this reduced impact. A DNS so conditioned is called a Mitigated Determination of Non-Significance (MDNS).
4. Review of an MDNS is under the "clearly erroneous" standard. (SCC 30.61.310) To find a decision clearly erroneous, the decision maker must be "left with a definite and firm conviction that a mistake has been committed." In appeals, the burden of proof is on the Appellant. The decision of the responsible official is entitled to "substantial weight".

5. On the record made here, the Hearing Examiner concludes that the Appellant failed to carry his burden. The MDNS was not shown to be clearly erroneous.
6. Strictly speaking, the questions raised by Appellant concerning the UIC well and the possibility of surface and ground water pollution, were beyond the proper scope of this appeal. SCC 30.71.050(6) explicitly states that no new substantive issues may be raised after the closing of the time for filing of the original appeal. However, rather than relying on this limitation, the County chose to address the Appellant's argument of a new issue.
7. The Examiner has considered the record made by the Applicant and the presentations by Appellant and the County and concludes that, even when the various contentions surrounding the UIC well subject are considered, the Appellant did not make a case for overturning the MDNS.
8. The Appellant did not show that the size of the kennel, the prior grading, the number of dogs to be boarded or the incidental grooming provide any basis for denying the building and grading permits issued. The correct definitions were correctly applied under the code.
9. The MDNS should be amended to reflect the current thinking of the DOE in regard to the design of the septic system for the dog kennel.
10. Any finding herein which may be deemed a conclusion is hereby adopted as such.

DECISION

The MDNS is modified as follows. The last sentence under "Mitigation Measure" on page 4 is amended to read:

The proposed kennel shall follow the guidelines regarding Ecology's basic requirements for the management of dog kennel wastes; Ecology's recommendations for designing a dedicated septic system for the dog kennel waste; and Ecology's best management practices (BMPs) to protect the new septic system, the ground water, and local surface waters outlined in the Department of Ecology letter dated 24 June 2009, as modified by the e-mail of Gerald Shervey, dated 13 July 2011.

The appeal is denied. The MDNS, as modified, is affirmed. The building permits and grading permit are affirmed.

Decision issued this 9th day of August, 2011.

Corrected decision issued this 24th day of August, 2011



Wick Dufford, Hearing Examiner Pro Tempore

EXPLANATION OF RECONSIDERATION AND APPEAL PROCEDURES

~~The decision of the Hearing Examiner is final and conclusive with right of appeal to the County Council. However, reconsideration by the Examiner may also be sought by one or more parties of record. The following paragraphs summarize the reconsideration and appeal processes. For more information about reconsideration and appeal procedures, please see Chapter 30.72 SCC and the respective Examiner and Council Rules of Procedure.~~

The decision of the Hearing Examiner is final and conclusive with right of judicial review in Superior Court pursuant to the Land Use Petition Act, Chapter 36.70C RCW. However, reconsideration by the Examiner may also be sought by one or more parties of record. (The Examiner's action on reconsideration would be subject to appeal to Court.) The following paragraphs summarize the reconsideration and appeal processes. For more information about reconsideration procedures, please see Chapter 30.72 SCC and the Examiner rules of procedure.¹

Reconsideration

Any party of record may request reconsideration by the Examiner **within 10 days** from the date of this decision. A petition for reconsideration must be filed in writing with the Office of the Hearing Examiner, 2nd Floor, Robert J. Drewel Building, 3000 Rockefeller Avenue, Everett, Washington, (Mailing Address: M/S No. 405, 3000 Rockefeller Avenue, Everett WA 98201) **on or before August 29, 2011. September 6, 2011.**² There is no fee for filing a petition for reconsideration. "The petitioner for reconsideration shall mail or otherwise provide a copy of the petition for reconsideration to all parties of record on the date of filing." [SCC 30.72.065]

A petition for reconsideration does not have to be in a special form but must: contain the name, mailing address and daytime telephone number of the petitioner, together with the signature of the petitioner or of the petitioner's attorney, if any; identify the specific findings, conclusions, actions and/or conditions for which reconsideration is requested; state the relief requested; and,

¹ Scrivener's error – corrected August 24, 2011

² Scrivener's error – corrected August 24, 2011

where applicable, identify the specific nature of any newly discovered evidence and/or changes proposed by the Applicant.

The grounds for seeking reconsideration are limited to the following:

- (a) The Hearing Examiner exceeded the Hearing Examiner's jurisdiction;
- (b) The Hearing Examiner failed to follow the applicable procedure in reaching the Hearing Examiner's decision;
- (c) The Hearing Examiner committed an error of law;
- (d) The Hearing Examiner's findings, conclusions and/or conditions are not supported by the record;
- (e) New evidence which could not reasonably have been produced and which is material to the decision is discovered; or
- (f) The Applicant proposed changes to the application in response to deficiencies identified in the decision.

Petitions for reconsideration will be processed and considered by the Hearing Examiner pursuant to the provisions of SCC 30.72.065. Please include the County file number in any correspondence regarding this case.

EXPLANATION OF APPEAL PROCEDURES

The following paragraphs summarize the appeal process. For more information about appeals to Superior Court, please see Chapter 36.70C RCW, RCW 43.21C.075, WAC 197-11-680, Chapter 30.85 SCC and applicable court rules.

Pursuant to Chapter 30.85 SCC and Chapter 36.70C RCW, any person having standing under RCW 36.70C.060 may file a Land Use Petition in Superior Court. Service on parties must be as required by RCW 36.70C.040.

The cost of transcribing the record of proceedings, of copying photographs, video tapes, and oversized documents, and of staff time spent in copying and assembling the record and preparing the return for filing with the court shall be borne by the petitioner. [RCW 36.70C.110] Please include the county file number in any correspondence regarding this case.

Distribution:

Parties of Record

The following statement is provided pursuant to RCW 36.70B.130: "Affected property owners may request a change in valuation for property tax purposes notwithstanding any program of revaluation." A copy of this Decision is being provided to the Snohomish County Assessor as required by RCW 36.70B.130.