



**CORRECTED (See page 3)
DECISION of the
SNOHOMISH COUNTY HEARING EXAMINER**

Hearing Examiner's Office

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Millie Judge
Hearing Examiner

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DECISION DATE: July 18, 2011
DATE OF CORRECTION: July 29, 2011
APPELLANT: **RIVERSIDE TOPSOIL, INC**
FILE NO.: 08-108868
TYPE OF CASE: Appeal of Notice of Violation
LOCATION: 7407 Lowell-Snohomish River Road, Snohomish WA 98290
TAX PARCEL NO. 280514-002-008-00
DECISION (SUMMARY): **DENIED**
COMPLIANCE DATE: September 19, 2011

This matter having come before the Hearing Examiner on June 22 and 30, 2011, and the testimony of witnesses having been heard and all exhibits having been admitted into evidence and considered, the Hearing Examiner enters the following Findings of Fact, Conclusions of Law and Decision based on a preponderance of the evidence:

NOTE: For a complete record, an electronic recording of the hearing in this case is available in the Office of the Hearing Examiner.

FINDINGS OF FACT

1. **The Record.** The official record for this proceeding consists of the Exhibits entered into evidence (Exhibits 1 through 107), as well as the testimony of witnesses received at the open record hearing. The entire record was admitted into evidence and considered by the Examiner in reaching the decision herein.
2. **Parties of Record.** The Parties of Record are set forth in the Parties of Record Register and include interested parties who testified at the open record hearing.
3. **Public Hearing.** Notice of the appeal hearing was issued as required by SCC 30.85.200. (Exhibits 33) The Hearing Examiner held an open record appeal hearing on June 21, 2011. At the end of the day, the hearing was continued to June 30, 2011, at which time the hearing was completed. At the hearings, witnesses were sworn, testimony was presented, and exhibits were entered into the record.

Deputy Prosecuting Attorney Justin Kasting appeared as the attorney for the County, Respondents. Senior Code Enforcement Officer Craig Odegaard appeared and testified on behalf of the Snohomish County Department of Planning and Development Services Department (PDS). Additional witnesses for PDS included Tom Rowe, Permitting Manager and Howard Knight, Permitting Supervisor.

Attorney Tom Graafstra of Weed, Graafstra and Benson, Inc. PS appeared on behalf of Appellants. John Misich and Verne Woolley, co-owners of Riverside Topsoil, Inc., appeared and testified, along with witnesses Gene Miller, GFM Associates, a land use planner, and Harold Ruppert, Environmental Manager for O2 Compost. No members of the public testified at the public hearing.

4. Riverside Topsoil, Inc. (hereinafter "Appellant") is the owner of certain real property known as tax parcel 280514-002-0008-00, located at 7404 Lowell-Snohomish River Road, in Snohomish, Washington. The property is located within Ag-10 and Flood Hazard zones (hereinafter, the "subject property"). (Exhibits 2, 3, 4)
5. On October 2, 2009, the Appellants filed a timely appeal challenging Counts 1-5 of a Notice of Violation (NOV) issued to them by PDS on September 22, 2009. (Exhibits 15 and 19) The NOV was sent to the Appellants by regular and certified mail. (Exhibit 17) The NOV alleged five separate violations, which can be summarized in part, as follows:
 - (1) Building Permit Violation. Allowing the construction and placement of structures (office and two story accessory building) on the above-described property without first obtaining building permits or approvals pursuant to SCC 30.52A.020, adopting the International Building Code, 2006 Edition, Section 105.1;
 - (2) Flood Hazard Permit Violation. Allowing development to occur in a designated flood hazard area on the subject property without first obtaining the necessary permits as required by SCC 30.42C.020;
 - (3) Shoreline Substantial Development Permit Violation. Allowing substantial development (construction and placement of structures and placement of obstructions such as broken concrete and asphalt), to occur within a shoreline of the state without first obtaining the necessary permit(s) as required by SCC 30.44.205;
 - (4) Zoning Code Violation. Allowing a commercial business to operate on the subject property in violation of the zoning regulations as set forth in SCC 30.22.110; and
 - (5) Grading Violation. Allowing grading to occur on the subject property in violation of the grading regulations as required by SCC 30.63B.010.
6. As to Count (1) of the NOV (the building permit violations), the Appellant claims that all structures are permitted under permits issued or exempt from permitting requirements. (Exhibit 19) However, PDS proved that the two structures were placed on the subject property on or before September 22, 2009 (Exhibits 11, 12), which Riverside Topsoil uses as an office/scale and storage shed. PDS further proved that the Appellant was required to first obtain permits or approvals for such structures according to Section 1.05.1 of the International Building Code, and as that Section was clarified by SCC 30.52A.146(2), which amended the Code to include factory-built structures. Senior Code Enforcement Officer Craig Odegaard testified that he performed a search of the County's computerized permit

tracking system known as "AMANDA," and the results (shown in Exhibits 5 and 6) reveal that no permits were obtained by the Appellant. The Appellant failed to prove that these two structures are either permitted structures or exempt from the County's building permit regulations. Instead, Appellant concedes that such permits are needed in its hearing brief (Exhibit 96 at p. 8), since no permits were obtained. The Hearing Examiner finds that the PDS proved that building permits are required and the Appellant has waived its appeal as to this issue.

7. As to Count (2) of the NOV, (the flood hazard violations) PDS proved that the subject property is within a "special flood hazard area" under the County Code. (Exhibits 2, 3, 4 and 73) SCC 30.43C.020 requires that Appellant first obtain a flood hazard permit prior to undertaking any "development" in a special flood hazard area. Here, PDS demonstrated that the placement of the two structures on the subject property, along with the importation of significant amounts of fill and materials used in its commercial business constitute "development" within the meaning of the Code. (SCC 30.91D.250) (Testimony of Craig Odegaard; Testimony of Tom Rowe) Appellants argue that John Misich previously obtained a flood hazard permit (Exhibits 73 and 80) for the subject property, related to his dairy and compositing activities. However, the permit has expired by its own terms and did not include the placement of the two structures at issue here, nor did it include the significant change to the amount of fill and material that would be imported onto the site and stored in the flood hazard area. Special Condition 4 clearly stated that separate flood hazard permits would be required for any structures associated with the project. Special Condition 6 required removal of certain stockpiles, not the addition of more stockpiles such as was shown here. (Exhibit 73; See also, photos in Exhibits 80 through 107) They also argue that Riverside Topsoil obtained all of its current permits for its operation by the end of 2002, including a flood hazard permit. (Exhibit 96, at p. 2) However, Appellant later concedes that a new flood hazard permit is required in its hearing brief. The Hearing Examiner finds that PDS proved that a flood hazard permit is required and the Appellant has waived its appeal as to this issue.
8. As to Count (3) of the NOV, (the shoreline substantial development permit ("SSDP") violation), PDS proved that the subject property is situated within a designated "rural" shoreline of the State. (Exhibits 2, 3, 4 and 68) According to the County's shoreline master program regulations, "substantial development" is not allowed in the shoreline environment without first obtaining a SSDP. (SCC 30.44.205) PDS proved that the Appellant placed structures, asphalt and concrete, and is running a commercial business in the shoreline without having first obtained a SSDP. The value of the structures and revenue generated from the development activity exceeds the required threshold of ~~\$2,500~~ \$5,718¹, triggering

¹The Shoreline Management Act, Chapter 90.58 RCW, was originally enacted in 1971. RCW 90.58.030 (3)(e) defines a "substantial development" to include any development of which the total cost or fair market value exceeds five thousand (\$5,000) dollars. Chapter 230, Laws of 2002 (EHB 2623) requires the Office of Financial Management to adjust this dollar threshold for inflation every five years, beginning July 1, 2007. The adjustment is to be based upon changes in the consumer price index for the urban areas of Seattle, Washington, during that five-year time period. The new dollar threshold shall be transmitted to the office of the code reviser for publication in the Washington state register at least one month before the new threshold takes effect.

In accordance with the requirements set forth above, the office of financial management submits for publication the new dollar threshold. The new dollar threshold is five thousand seven hundred and eighteen dollars (\$5,718).

the permit requirement. Here, Appellant claims it is entitled to rely on the SSDP that was issued to John Misich in October 26, 2001.

That permit authorized the "construction of a manure lagoon to store dairy waste, and a compost facility consisting of a concrete slab with leachate control components to compost dairy waste, yard clippings and other organic material." (Exhibit 68) The project covered by the SSDP was the (agricultural) waste management component of a farm plan prepared by Mr. Misich for his active dairy operation by the Natural Resources Conservation Services (NRCS) of the USDA. The waste management system consisted of one earthen manure lagoon and one adjoining concrete waste storage structure, to be located "on the Misich Dairy farm." (*Emphasis added*). (Exhibit 68) The concrete pad was limited in size to 485 feet x 300 feet x 6 inches. *Id.* By its own terms, substantial work under the permit was required to be commenced within two years from the date of issuance and it expired five years from the date of issuance, on October 26, 2006. *Id.*

It is uncontroverted that Mr. Misich sold his entire dairy herd and closed down those operations in the mid-1990s. In 2003, the Misich family sold the subject property to Riverside Topsoil, Inc., who began operating a composting facility on the property. (Testimony of John Misich, Appellant's Brief at pp. 1-2) John Misich continues to own agricultural properties in the area including a 65-acre parcel immediately adjacent to the subject property and two additional parcels, 5-acre and 7.5 acre in size, within the section. He now owns 110 beef cows that he pastures on various parcels in the Snohomish River valley. (Testimony of John Misich) Although Mr. Misich is one of three co-owners of Riverside Topsoil, Inc., the corporation is considered a separate legal entity for permitting purposes.

As of the date of the NOV, the SSDP was expired. (Testimony of Craig Odegaard) (Exhibit 7) There is no evidence in the record that the SSDP was renewed prior to its expiration or transferred to Riverside Topsoil Inc. Even if there was, there is clear evidence in the record that the activities of Riverside Topsoil Inc. exceed the scope and purpose of the SSDP, both in terms of the type of activities being conducted in the shoreline and the extent and type of materials being stored and sold on the property. The Hearing Examiner finds that the composting operation of Riverside Topsoil Inc. requires a new SSDP and that no such permit was obtained prior to Appellant opening its commercial business on the subject property in violation of SCC 30.44.205. Therefore, the Examiner finds that Count 3 has been proven by a preponderance of the evidence.

9. As to Count (4) of the NOV (the zoning code violation), PDS has proven that Appellant is operating a commercial business on the subject property in violation of SCC 30.22.110. (Exhibits 11, 12, 90, 91, 99, 100, 101, 102, 103, 104, 105, 106 and 107) (Testimony of Craig Odegaard, Tom Rowe, Howard Knight). The subject property is located on land zoned Ag-10. (Exhibit 4) According to the County's zoning regulations, commercial composting or topsoil businesses are not allowed in the Ag-10 zone as permitted or conditional uses. The only way in which such a use could be permitted is as an accessory use to a farm or agricultural activity. Here, PDS argues that the Misich dairy farm ceased its operations in the mid-1990s and that the composting activity operated on the subject property is the primary use. They argue that composting activities that use agricultural waste from the current herd of beef cows owned by John Misich is not farming, but merely a commercial use. The Hearing Examiner agrees. The evidence clearly shows that the subject property is a stand-alone topsoil and composting facility that is commercial and/or industrial in nature. The subject property is no longer a farm. Farming is not the primary purpose of the topsoil

operation. The fact that it imports materials from adjacent farms does not render it a farming activity. SCC 30.22.110 is being violated by Riverside Topsoil's operations. The Examiner finds that Count 4 has been proven by a preponderance of the evidence.

10. As to Count (5) of the NOV (the grading violation), PDS has proven that Appellant is engaged in grading on the subject property without first obtaining the required permits and approvals in violation of SCC 30.63B.010 SCC. (See, Exhibits 11, 12, 90, 91, 99, 100, 101, 102, 103, 104, 105, 106 and 107) (Testimony of Craig Odegaard, Tom Rowe) As noted above, John Misich obtained a grading permit in 2004 in conjunction with the SSDP. However, that permit authorized grading associated with the construction of the concrete dairy waste pad and construction of the manure lagoon. It expired in 2004. The activities here of grading imported materials to mix topsoil and compost, and placing fill comprised of asphalt and broken concrete, are not within the scope of the earlier grading permits. The need for a grading permit is acknowledged in the Appellant's Brief at p. 8. The Examiner finds that Count 5 has been proven by a preponderance of the evidence.
11. Any Finding of Fact which should be deemed a Conclusion of Law in this Decision is hereby adopted as such.

CONCLUSIONS OF LAW

1. The Examiner has original jurisdiction over the appeal of a Notice of Violation pursuant to Ch. 2.02 SCC and 30.85.190 SCC.
2. The five violations alleged in the NOV have been proven by a preponderance of the evidence.
3. The Examiner concludes that the appeal should be denied in its entirety.
4. Commercial penalties should be imposed in accordance with SCC 30.85.170.
5. Any Conclusion of Law in this Decision which should be deemed a Finding of Fact is hereby adopted as such.

DECISION AND ORDER

The appeal is **DENIED** in its entirety.

A new compliance date of **September 19, 2011 at 4:00 p.m.** is hereby established requiring the Appellant to cure the violations specified in the Notice of Violation by such date.

Penalties shall be imposed as provided in SCC 30.85.170 for commercial violations.

Dated this 18th day of July, 2011.

Corrected decision dated this 29th day of July, 2011



Millie M. Judge, Hearing Examiner

EXPLANATION OF RECONSIDERATION AND APPEAL PROCEDURES

The decision of the Hearing Examiner is final and conclusive with a right of appeal to Superior Court. 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 30.85 SCC, the Snohomish County Hearing Examiner Rules and Superior Court Civil Rules.

Reconsideration

Any party of record may request reconsideration by the Hearing 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 July 28, 2011**. 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 30.85.210]

A petition for reconsideration shall meet the requirements of SCC 30.85.210(3). 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; and/or
- (e) New evidence which could not reasonably have been discovered prior to the hearing and which is material to the decision has been discovered;

Petitions for reconsideration will be processed and considered by the Hearing Examiner pursuant to the provisions of SCC 30.85.210.

Appeal

An appeal to Superior Court may be filed by any aggrieved party of record **within 21 days from the date of this decision** pursuant to Chapter 36.70C RCW, the Land Use Petition Act. An aggrieved party need not file a petition for reconsideration but may file an appeal directly to the Superior Court.

NOTE: *Please include the County file number in any correspondence regarding this case.*

Staff Distribution:

Department of Planning and Development Services: Craig Odegaard, Tom Rowe, Howard Knight

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.

PARTIES OF RECORD REGISTER
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APPEAL – NOTICE OF VIOLATION

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