Snohomish County

Hearing Examiner's Office

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DECISION AND ORDER of the SNOHOMISH COUNTY HEARING EXAMINER

DATE OF DECISION: May 6, 2011

APPELLANT: Fred and Christine Zylstra

FILE NO.: 10 106208 CT

TYPE OF REQUEST: Appeal of Notice of Violation (NOV)

DECISION (SUMMARY): **NOV Dismissed without prejudice**

LOCATION: 14118 Shorts School Road, Snohomish WA 98290

TAX ACCOUNT NOs: 280631-001-007-00 and 280631-001-006-00

NOTE: To obtain a complete record of the proceedings, an electronic recording of this hearing is available through the Office of the Hearing Examiner.

This matter having come before the Hearing Examiner on April 14, 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:

FINDINGS OF FACT

Based on a preponderance of the evidence of record, the following findings of fact are entered:

1. Fred and Christine Zylstra are the owners of certain real property known as tax parcels 280631-001-007-00 and 280631-001-006-00, located at 14118 Shorts School Road, Snohomish WA 98290 (hereinafter, the "subject property"). (Exhibit 8) Fred Zylstra ("Appellant") has owned the subject property since 1990, purchasing the land from his parents, who originally bought the land in 1966. He has lived there since he was 13 years old. Mr. Zylstra uses the land for farming. (Testimony of Fred Zylstra) The subject property is zoned A-10 FHZ (Agriculture-10 acres Flood Hazard Zone), and it is within the mapped density fringe and floodway areas of the Snohomish River. (Exhibits 4, 16, and 23)

2. PDS received a complaint from the County's Public Works Director, Steve Thomsen, about potential illegal grading and filling using large dump trucks on the subject property. On August 24, 2010, Ken Nejbauer and Craig Odegaard, PDS Code Enforcement Officers, visited the subject property. Afterward, Ken Nejbauer prepared the following Complaint Investigation Report:

> We walked back to the property where the grading was being done. What we found was about 800 plus feet of soil that was put down for a new road. The road was about 10 feet wide and averaged about 5 feet deep. 160 feet of the northern part of this road had dump truck piles of soil that had not been leveled yet for the road. We also drove back to the property from a road just south of there. That is what appears how [sic] the dump trucks are getting onto the property. As we were driving to the back of the property, I noticed that to the south and southwest of me there were more piles of soil and also what appeared to be a partial road that was being constructed, similar to the one we were investigating. There was a truck with two guys back by the new road. We started to drive to where the truck was parked and as we started to drive, the guys drove toward us. They stopped us on the road and one of them identified himself as Jason Marshal (sic) and said that he was a contractor working for the owner. He said that he did not want us on the property. We turned around and left the property.

(Exhibit 2) They took photographs of the subject property during their visit. (Exhibit 9) Mr. Nejbauer took measurements of the soil using a measuring wheel. He believes the soil brought onto the property in places was between five and six feet deep, based on the fact that he is approximately 5'-6" in height, and the soil piles were higher than his height with his arm extended. (Testimony of Ken Nejbauer) Based on his site investigation, Officer Nejbauer determined that it was likely that a violation had occurred on the subject property of "grading without permits in the floodway and density fringe." (Exhibit 2) He performed additional investigation and research as to the status of the subject property. (Exhibit 3)

3. Officer Nejbauer sent a letter to Mr. Zylstra on August 27, 2010, asking him to contact Code Enforcement Officer Ken Nejbauer. (Exhibit 18) On September 2, 1010, Mr. Zylstra called Ken Nejbauer in response to the letter. (Exhibit 3) Officer Nejbauer informed him that a Warning Notice was being sent to him. (See, Exhibit 21) Mr. Zylstra told Officer Nejbauer that the grading that he was doing was "shoring up the dike." (Exhibit 3) On October 16, 2010, Mr. Zylstra wrote a letter in response to the Warning Notice, asserting that the "Right to Plow" allows for construction of farm or agricultural roads/access. The letter further stated: "The activities in question meet the specifics of the "Right to Plow, as it is an agricultural access to enable me to properly maintain the dike and property line fences of the northeast portion of the tax account listed." (Exhibit 22)

4. On November 2, 2010, PDS issued a NOV against Fred Zylstra, alleging the following violation and providing a correction date of January 3, 2011:

> Land disturbing activity has occurred on the above-described properties without first obtaining the required permit(s) in accordance with Snohomish County Code 30.63B.030 and 30.63B.070. The land disturbing activity involved clearing over 7,000 square feet of area and grading over 1,000 cubic yards of soil within a critical area (floodway and density fringe) and its setback or buffer as defined in SCC 30.91C.340(4). The suggested corrective action is to cease all land disturbing activities and obtain the necessary permit(s), comply with the drainage requirements of Chapter 30.63A SCC and/or obtain any additional permits that are deemed necessary through review of the application(s).

(Exhibit 26) Officer Nejbauer testified at the public hearing that the NOV was issued for grading without permit(s). He stated that a "grading permit" is the same as "land disturbing activity

permit" is required for the type of activity performed on the subject property because it is in a flood hazard area and the density fringe. A flood hazard permit is also required.

5. On November 16, 2010, Mr. Zylstra filed a timely appeal of the NOV, admitting that certain clearing, grading and filling activities had occurred on the subject property, but asserting that they are normal agricultural activities for which no permits are required under the Right to Plow ordinance. (Exhibit 1) Subsequent to filing his appeal, Gene Miller filed a document entitled, "Appeal Supplement" (Exhibit 30) raising additional legal and procedural challenges to the NOV.

6. After a request for delay of the hearing by the Appellant for several reasons, a public hearing was held on the appeal of the NOV on April 19, 2011. Notice of the public hearing was sent to all parties of record. (Exhibits 39 and 39A) At the hearing, Gene Miller of GFM Associates, LLC, appeared on behalf of Appellant. Mr. Zylstra and Jason Marshall testified in support of the appeal. PDS was represented by Code Enforcement Officer Ken Nejbauer and Craig Odegaard. In addition to their testimony, Tom Rowe testified in support of the violation on behalf of PDS. No members of the public appeared or testified. All witnesses were sworn and testified under oath.

7. At the public hearing, Officers Craig Odegaard and Ken Nejbauer testified as to the facts of the alleged violation. Gene Miller moved to suppress the evidence gathered by PDS in support of the violation, based on the fact that they had trespassed onto private property without a search warrant. (Exhibit 30; Testimony of Gene Miller) Additionally, Mr. Miller moved to dismiss the NOV based on the fact that the violations incorrectly referenced the County's new Land Disturbing Activity permit regulations (Section 30.63B.030 and 30.63B.070), which were not in effect at the time of the violation. The Hearing Examiner reserved ruling on the motions. The Examiner's consideration of these motions is discussed in the Conclusions of Law, below.

8. Officer Ken Nejbauer testified that the purpose of their visit to the subject property was to investigate and to contact the owner. Officer Nejbauer stated that they drove onto the access road where trucks were presumed to have entered the property off Short School Road because they saw trucks in the distance and wanted to speak to the owner. On cross-examination, Officer Nejbauer testified that the access road was open and no gates or locks were disturbed to enter the property. Officer Nejbauer testified that they attempted to talk to Jason Marshall, the contractor for the owner, but once he asked them to leave, they promptly left the property.

9. In response to the appeal (Exhibit 1), Officer Nejbauer testified that he prepared a calculation using only Mr. Zylstra's numbers, as set forth in his appeal statement, as to how much grading, filling and clearing was done for road construction on the subject property. He testified that Mr. Zylstra admits to having imported 650 cubic yards of soil to raise the road bed. Mr. Zylstra asserts that this only raised the road bed up by $7/10^{th}$ of a foot. However, Mr. Nejbauer calculated that it actually raises the road bed up by 2.16 feet in height.[1] They also believe there is more soil that was present on the site, but they were not able to verify the quantity because they were asked to leave; but they could see the additional dirt piles from the access road.

[1] Officer Nejbauer's mathematical calculations were as follows: 1 cu. yd soil = 27 cu. ft. soil. 27 cu. ft. x 650 cu. yds. = 17,550 cu. ft. of soil imported onto the property. The road is 900 feet long and an average of 9 feet in width according to Mr. Zylstra. This means that the road base is (900 x 9) = 8,100 square feet. The imported soil is divided by the road base (17,500/8,100) = 2.16 feet. The new road base was raised by 2.16 feet.

10. In response to the appeal supplement filed by Gene Miller (Exhibit 30), PDS offered the testimony of PDS Manager, Tom Rowe. Mr. Rowe testified that he has worked for PDS for 27 years. Mr. Rowe stated that he believes a violation exists on the subject property based on the changes shown in the photographs (Exhibit 9) to the contours of the land, which in his opinion are beyond normal (agricultural) maintenance, and require a permit when performed in the flood hazard zone and shoreline area. He further testified that the Right to Plow exemption from grading permit requirements do not apply when another permit is required. Additionally, the road that he saw constructed by Mr. Zylstra was not within the original footprint of any existing road. Mr. Rowe testified that the *Dugger* case cited by Mr. Zylstra in his defense is not applicable here. Mr. Rowe stated that the land where the violation occurred is also a critical area.

11. Where a violation is found to exist, the imposition of monetary penalties is governed by Chapter 30.85 SCC. The penalty for the violation is set by Table 30.85.170 at $1,500 for days 1-14 for a commercial violation. The maximum penalty that may be imposed for violations existing up to 75 days is $25,000.

CONCLUSIONS OF LAW

Based on the findings of fact entered above, the following conclusions of law are entered:

1. The Hearing Examiner is authorized to hear and decide this matter pursuant to Title 2 SCC and Chapter 30.85 SCC.

2. Motions to Dismiss. Prior to considering the merits of the case, the Examiner must rule on the motions made by the Appellant. Ordinarily, legal issues that are not raised in an appeal statement cannot be added afterward. However, in the present case, the legal issues go to the facial validity of the NOV, as well as the evidence gathered in support of the same, and as such must be considered. The Examiner considers each argument in turn.

   A. Warrantless Search. Appellant asserts that County staff illegally entered on to Mr. Zylstra's private property (a farm field) and obtained evidence in support of the NOV without a search warrant. Appellant asserts that the evidence must be suppressed from the case. Although the Appellant did not specifically cite to the Fourth Amendment prohibition against unreasonable searches and seizures, or Article 1, Section 7 of the Washington Constitution, the Examiner concludes that the Appellant, a non-lawyer, stated the argument with sufficient clarity as to put PDS on notice that they were raising these constitutional protections to bar the enforcement action.

   Whether the Fourth Amendment to the U.S. Constitution provides in part that "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated . . . ." In deciding whether an unconstitutional search has occurred, the court considers whether the defendant had a legitimate expectation of privacy and whether that expectation is one that society is willing to recognize as reasonable. *Katz v. United States*, 389 U.S. 347, 361, 88 S. Ct. 507, 19 L. Ed. 2d 576 (1967) (Harlan, J., concurring); *State v. Young*, 123 Wn.2d 173, 189, 867 P.2d 593 (1994). A legitimate expectation of privacy is one which includes an actual and subjective expectation of privacy. *Katz*, 389 U.S. at 361 (Harlan, J., concurring). "People have a reasonable expectation of privacy in their own homes." *Young*, 123 Wn.2d at 189 (quoting *Payton v. New York*, 445 U.S.

573, 589, 100 S. Ct. 1371, 63 L. Ed. 2d 639 (1980)). *State v. Rose,* 128 Wn.2d 388, 392, 909 P.2d 280 (1996).

Similarly, Article 1, Section 7 of the Washington State Constitution provides that "[n]o person shall be disturbed in his private affairs, or his home invaded, without authority of law." Because of its "unique language", it generally provides more protection against government intrusions than does the Fourth Amendment. *State v. Hansen*, 42 Wn. App. 755, 762-63, 714 P.2d 309, *aff'd on other grounds*, 107 Wn.2d 331, 728 P.2d 593 (1986).

> Unlike the inquiry into subjective and reasonable expectations of privacy that must be made when the Fourth Amendment is implicated, the critical inquiry under the Washington State Constitution focuses on "those privacy interests which citizens of this state have held, and should be entitled to hold, safe from governmental trespass absent a warrant". (*Italics ours.) Young*, 123 Wn.2d at 181 (*quoting State v. Myrick*, 102 Wn.2d 506, 511, 688 P.2d 151 (1984)); *Boland,* 115 Wn.2d at 577. In other words, did the law enforcement officers unreasonably intrude into the defendant's "private affairs"? *Myrick,* 102 Wn.2d at 510.

Rose, 128 Wn.2d at 392. Unlike the Federal Constitution, however, Article 1, Section 7 of the Washington Constitution has been interpreted to protect fields as well as the curtilege to a home from warrantless entry, where it can be shown under the facts that the owner had a reasonable expectation of privacy in the field. This has traditionally been shown through the placement of fences, thick vegetation or no trespass signs. *State v. Myrick*, 102 Wn.2d 06, 688 P.2d 151 (1984); *State v. Thorson*, 98 Wn. App. 528, 990 P.2d 446 (1990). However, the existence of "no trespass" signs is not always dispositive on the issue of privacy. It is a factor that is to be considered in conjunction with other manifestations of privacy, such as a closed gate or a fence. Accord, *State v. Dixson*, 307 Or. 195, 766 P.2d 1015 (1988). Together, such factors can establish that an access road is not impliedly open.

Otherwise, without such efforts to establish privacy, there appears to be a general presumption that access roads to a property or home are open for travel without trespass. In *State v. Chaussee*, 72 Wn. App. 704, 710, 866 P.2d 643 (1994), the defendant placed signs on a neighbor's property, and there was no fence or gate present. In *State v. Hornback*, 73 Wn. App. at 743-44, the property had no closed gate and a house was visible from the street. In both of these cases, the courts concluded that "No Trespassing" signs did not withdraw implied permission allowing an officer to enter an access route to the house. Division Three similarly concluded that a police officer did not unreasonably intrude onto "open fields" because the fields were "not posted and were clearly visible to [the defendants'] neighbors and to any passersby." *Hansen*, 42 Wn. App. at 763.

Where a violation of Article 1, Section 7 of the Wash. Const. is found, all of the evidence obtained as a result of the illegal search is suppressed at trial. See, *State v. White*, 97 Wn.2d 92, 112, 640 P.2d 1061 (1982); *State v. Crawley*, 61 Wn. App. 29, 34-35, 808 P.2d 773, *rev. denied*, 117 Wn.2d 1009 (1991). However, there are exceptions to this rule. If evidence of the violation was obtained in a manner sufficiently attenuated from the illegal search that it is purged from its taint, then it may be admissible. See, *Wong Sun v. United States*, 371 U.S.471, 9 L. Ed. 2d 441, 83 S. Ct. 407 (1963); *State v. Stortroen*, 53 Wn. App. 654, 660-61, 769 P.2d 321 (1989). This is a fact-specific evaluation based on the circumstances in each case. *United States v. Kapperman*, 764 F.2d 786 (11th Cir. 1985).

Here, the Examiner concludes that the Appellant did not sufficiently present barriers to his open field beyond a "no trespass" sign that would imply that the access road was not open for Code Enforcement Officers to enter in order to seek contact with the owner. There was no locked gate or fence. The road was open and the property was not obstructed from view by passing vehicles by rows of shrubs, fencing or other privacy measures. Trucks were entering and exiting the property from the access road off of Short School Road. The Officers did not enter at night and made no effort to hide their entrance from those on the property and, in fact, drove directly toward them attempting to speak to the owner. Under these facts, the Examiner concludes that no violation of Article 1, Section 7 or the Fourth Amendment occurred. Accordingly, the evidence shall not be suppressed.

Furthermore, assuming arguendo that the Examiner had concluded that a violation had occurred, the Examiner notes that the Appellant admitted to the activities for which the NOV was issued, but asserts that his actions were not illegal. Such admissions (both in his appeal statement and during his testimony) are legally admissible and can be considered by the Examiner.

Based on the foregoing, the motion to suppress evidence should be denied.

B. Motion to Dismiss based on Citation to New Regulations. Appellant further argues that the regulations cited in the NOV were not in effect at the time of the violation and, therefore, he cannot be found liable for violating them. The Examiner agrees. The County's new Land Disturbing Activity ("LDA") regulations (replacing the former Grading Code) did not take effect until September 30, 2010. (See, Ordinance No. 10-23). The evidence in the record (and on the face of the NOV) clearly shows that the alleged violation(s) occurred on August 24, 2010. The new LDA regulations were not yet in effect and are not retroactive. Id.

A search of Chapter 30.85 SCC (code enforcement regulations) does not reveal any legislative statement that each and every day constitutes a new violation, which would allow the Examiner to determine that a violation which has not been removed did occur on or after September 30, 2010.

PDS did not clearly respond to the legal issue raised here. Officer Nejbauer merely asserted that the regulations were in effect. Tom Rowe testified that the content of the requirements are essentially the same as between the new and old Codes, but the new Code has renumbered some of the requirements. PDS did not make any effort to amend the NOV as allowed under Chapter 30.85 SCC. Accordingly, the Hearing Examiner concludes that the cited regulations were not in effect and the Appellant cannot be held legally responsible for compliance with them for actions taken prior to their effective date (September 30, 2011). However, the Appellant is liable for any violations that may have taken place pursuant to the Grading Code that was in effect on August 24, 2010, former Chapter 30.63B SCC, and PDS may file a new NOV if it believes sufficient evidence of such a violation exists.

Based on the foregoing, the motion to dismiss should be granted.

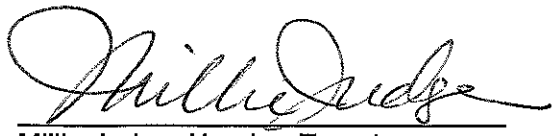
DECISION AND ORDER

Based on the Findings of Fact and Conclusions of Law entered above, the decision and order of the Hearing Examiner on the request for imposition of a monetary penalty is as follows:

1. The Notice of Violation is dismissed without prejudice.

2. The motion to suppress evidence is rendered moot by the dismissal of this case.

Decision issued this 6th day of May, 2011.



Millie Judge, Hearing Examiner

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 30.85 SCC and Ch. 36.70C RCW, and the Superior Court Civil Rules and Rules of Civil Procedure.

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, 2011.** There is no fee for filing a petition for reconsideration. "The party seeking reconsideration shall mail or otherwise provide a copy of the petition for reconsideration to all parties to the appeal as of the date of filing." [SCC 30.85.210]

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, 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 other elements of the decision are not supported by the record; and/or
(e) New evidence which could not reasonably have been discovered prior to the hearing nd whichis 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. A matter that has been subjected to reconsideration once, shall not again be subject to reconsideration.

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

Appeal

The decision of the hearing examiner in this matter constitutes a final land use decision within the meaning of Chapter 36.70C RCW. Accordingly, any person with standing may file an appeal of this decision in Superior Court **within 21 days from the date of this decision** pursuant to the Land Use Petition Act (LUPA). (See, RCW 36.70C.040(4) for guidance on how to calculate the appeal period). In addition to meeting other requirements, appeals must comply with the specific requirements of Sections 36.70C.040, 36.70C.060 and 36.70C.070 RCW. Service on Snohomish County must be made by delivery of a copy of the petition to the Clerk of the County Council or the person identified by or pursuant to RCW 4.28.080 to receive service of process. (RCW 36.70C.060) Service on other parties must be made according to SCC 36.70C.040. The Office of the Hearing Examiner may not provide legal advice. If you have questions about filing a LUPA appeal, please consult with your attorney.

Staff Distribution:

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APPEAL – NOTICE OF VIOLATION

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