Snohomish County

DECISION AND ORDER of the SNOHOMISH COUNTY HEARING EXAMINER

Hearing Examiner's Office
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DATE OF DECISION: November 15, 2011

APPELLANT: ***FRED AND CHRISTINE ZYLSTRA***

FILE NO.: 11-103713 CT

TYPE OF REQUEST: Appeal of Notice of Violation

DECISION (SUMMARY): The appeal is **Denied**

LOCATION: 14118 Shorts School Road, Snohomish WA 98290

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

INTRODUCTION

This matter having come before the Hearing Examiner on September 20, 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:

Based on a preponderance of the evidence of record, the following Findings of Fact are entered:

FINDINGS OF FACT

1. The Record. The official record for this proceeding consists of the following:

   (a) The Exhibits entered into evidence (Exhibits 1 through 47), as well as the testimony of witnesses received at the open record hearing.

   (b) The Exhibits entered into evidence (Exhibits 1 through 40) and the testimony of witnesses from an earlier public hearing on Case No. 10-106208 CT, *In re the Appeal of Fred Zylstra*, which was dismissed without prejudice after a full hearing on the merits due to an error in the Notice of Violation, which cited to the wrong set of regulations. The evidence in this case was incorporated by reference at the request of PDS and the Hearing Examiner takes official notice of such evidence.

   (c) At the close of the public hearing, the record was left open for the submittal of briefs by each party on the issue of the Appellant's motion to suppress evidence,

according to the schedule established at the hearing. The record was closed with the submission of the Appellant's reply brief on October 20, 2011. The briefs were marked as Exhibit 45 (Appellant's brief), Exhibit 46 (PDS's Response Brief) and Exhibit 47 (Appellant's Reply Brief), and added to the record. The entire record was admitted into evidence and considered by the Examiner in reaching the decision herein.

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

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. The Hearing Examiner held an open record appeal hearing on September 20, 2011. Witnesses were sworn, testimony was presented, and exhibits were entered into the record at the hearing. Ken Nejbauer and Tom Rowe appeared and testified on behalf of Snohomish County Planning and Development Services Department (PDS). Paul Anderson, Department of Ecology, was called by PDS as a witness. Fred Zylstra, Gene Miller and Jason Marshall appeared and testified on behalf of the Appellant at the public hearing. Appellant was represented by his attorney, Craig Gourley, only for the purpose of moving to suppress evidence. No members of the public testified at the hearing.

4. 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) Mr. Zylstra leases a portion of his land to Jason Marshall, who maintains a herd of cattle on the property. (Testimony of Jason Marshall)

5. 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)

6. Officer Nejbauer sent a letter to Mr. Zylstra on August 27, 2010, asking Mr. Zylstra to contact him. (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)

7. On November 2, 2010, PDS issued a Notice of Violation (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" which 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.

8. On June 10, 2011, Gene Miller filed a timely appeal of the NOV on behalf of Fred Zylstra. (Exhibit 1)

9. The public hearing was delayed at the request of the Appellant. (Exhibit 39) A public hearing was held on the appeal of the NOV on September 20, 2011. Notice of the public hearing was sent to all Parties of Record. (Exhibits 40 and 40A)

10. At the public hearing, Officers Craig Odegaard and Ken Nejbauer testified as to the facts of the alleged violation. Gene Miller, GFM Associates, LLC, represented Mr. Zylstra at the hearing. He 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 (LDA) 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 the motion to suppress evidence is discussed in the Conclusions of Law, below.

11. Officer Ken Nejbauer testified that the purpose of their visit to the subject property was to investigate the complaint and to contact the owner. They entered to the north of the site around noon, walking onto the neighboring KRKO property, with permission from the owner, Andy Skotdahl. They walked to the French Slough Dike in the direction of the Snohomish River through an open field. Once at the dike, they took photographs and measurements of the road construction activities. (Exhibit 10) There were no barriers, fences, screens or privacy measures in place along or near the French Slough Dike. Next, Officer Nejbauer and Officer Odegaard got back into their vehicle and drove along Short School Road to the entrance of a farm field on the Zylstra property, and drove down the access road directly toward trucks visible from the entrance, attempting to contact the owner. Officer Nejbauer testified that he did not notice any "no trespassing" signs when they drove onto the access road and that the gate was open. After a brief exchange with Jason Marshall, they exited the property at his request.

12. In response to the appeal, Officer Nejbauer testified that he prepared a calculation using only Mr. Zylstra's numbers, as set forth in his letter dated November 16, 2010, where he explained how much grading, filling and clearing was done for road construction on the subject property. (Exhibit 19) Officer Nejbauer 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 7/10th 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.

13. In the appeal, Appellant cited to several laws, regulations and constitutional principles that he asserts bar the application of the County's regulations in this case. We examine each argument in turn.

A. <u>Exemption Claims</u>. Appellant first argues that the activity here is exempt under each of the cited code violations, former SCC 30.63B.010 (grading), SCC 30.44.205 (shoreline) and SCC 30.43C.020 (flood hazard). Appellant claims that the activity here is "road maintenance and construction," and also claims it is exempt from any permit requirements under the "Right to Plow [sic]" exemption.

(i) <u>Grading Permit Exemption Claims</u>. In order for road maintenance and construction to be exempt from the Grading Permit requirements of former SCC 30.63B.010(2)(b) ("maintenance and repair"), it must meet two requirements: (1) The activity must occur outside of a critical area and at least two feet from a property boundary line; and (2) it must meet the definition of "maintenance and repair."

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[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.

As to the first requirement, the evidence shows that the portion of the subject property on which the grading and filling was performed is within a critical area. (Testimony of Tom Rowe) The County has designated critical areas pursuant to the Growth Management Act (RCW 36.70A.060 and 36.70A.170). Critical areas include "frequently flooded areas." Frequently flooded areas are regulated pursuant to Chapter 30.65 SCC. (SCC 30.62.005)

It is undisputed that the subject property has been designated by the Federal Emergency Management Agency (FEMA) as part of the "floodway" of the Snohomish River pursuant to SCC 30.65.040. As a result, the Zylstra property is regulated as a special flood hazard area. (Exhibits 4, 5, 6, 7, 17 and 18) The "floodway" means the regular channel of the river, plus adjacent land areas that must be reserved in order to discharge the base flood without cumulatively increasing the water surface elevation more than one foot. (SCC 30.91F.430). The Hearing Examiner finds that the subject property is within a critical area (a frequently flooded area) and, therefore, the exemption from Grading Permit requirements found in SCC 30.63B.010(2)(b) is not available to Mr. Zylstra.

Appellant next argues that a Grading Permit is not required because the activity falls within the "Right to Plow" [sic] exemption. The "Right to Farm" exemption is set forth in *former* SCC 30.63B.025. It exempts certain agricultural activities from the permit requirements of the Grading Code in some circumstances. However, the exemption does not apply when the activity requires another permit from Snohomish County. (SCC 30.63B.025(3)) As discussed below, the evidence in the record clearly demonstrates that the grading and filling activities required a Special Flood Hazard Permit and a Shoreline Substantial Development Permit. (See also, Testimony of Paul Anderson and Tom Rowe) Therefore, the Right to Farm exemption does not apply and the activities were not exempt from the requirement of obtaining a Grading Permit.

(ii) <u>Shoreline Permit Exemption Claim.</u> As shown through the County's zoning maps (Exhibit 32), the testimony of Paul Anderson, from the Washington State Department of Ecology and the testimony of Tom Rowe, both of the tax parcels in question are within the designated shoreline management area. The evidence also shows that the activities of filling and grading approximately 700 cubic yards of soil constitute "development" within the meaning of the Shoreline regulations and, therefore, require a shoreline substantial development permit (SSDP). (SCC 30.44.205; 30.44.610) For purposes of the shoreline regulations, SCC 30.91D.230 defines "development" as follows:

> "Development" means a use consisting of the construction or exterior alteration of structures; dredging; drilling; <u>dumping; filling; removal of sand, gravel, or minerals</u>; bulkheading; driving of piling; placing of obstructions; or any project of a permanent or temporary nature which interferes with the normal public use of the surface of the waters overlying lands subject to this title.
>
> *This definition applies only to "Shoreline" regulations in chapter 30.44 SCC.*

However, Mr. Zylstra claims that these activities are exempt from the SSDP requirements pursuant to SCC 30.44.110(2) as "normal maintenance or repair of existing structures or developments, including damage by accident, fire or elements," or through SCC 30.44.110(12) Operation and maintenance of a system of dikes.

With regard to the first claim, the phrase "normal maintenance or repair" is defined in SCC 30.91M.095 [sic] to mean:

> "Normal maintenance or repair" of existing structures or developments, including damage by accident, fire or elements. "Normal maintenance" includes those usual acts to prevent a decline, lapse, or cessation from a lawfully established condition. "Normal repair" means to restore a development to a state comparable to its original condition, including but not limited to its size, shape, configuration, location and external appearance, within a reasonable period after decay or partial destruction, except where repair causes substantial adverse effects the environment. Replacement of a structure or development may be authorized as repair where such replacement is the common method of repair for the type of structure or development and the replacement structure or development is comparable to the original structure or development including but not limited to its size, shape, configuration, location, and external appearance and the replacement does not cause substantial adverse effects to shoreline resources or environment.
>
> *This definition applies only to "Shorelines" regulations in chapter 30.44 SCC and "Critical areas" regulations in chapters 30.62A, 30.62B and 30.62C SCC.*

Tom Rowe testified that in his opinion, the activities that Mr. Zylstra performed were not "normal maintenance or repair" according to the County Code definition. He based this conclusion on Mr. Zylstra's own words in his letter to the County received on November 16, 2011, which he states demonstrates that Appellant was not maintaining or restoring the dike road to its original footprint. (Exhibit 19) Mr. Zylstra clearly stated that he had *improved* the dike road, he did not maintain or restore it. Using Mr. Zylstra's estimates, Officer Nejbauer calculated that Appellant imported 17,550 cubic feet of soil (fill) onto the subject property, and through his grading activity, raised the road base by 2.16 feet. (Testimony of Ken Nejbauer) This is a critical difference, in that it is determinative of whether a grading permit is required. In his letter to the County, Appellant stated:

> Because the existing access was too narrow and unstable to safely operate farm vehicles and machinery, I improved it July through September, 2010. The activity included mowing the invasive vegetation, consisting primarily of blackberry bushes which encroached on the fence lines (electric) and the slope of the French Slough Dike. In addition, the sandy soil of the existing access was amended by adding hard clay. The length of this access is approximately 900 feet. By amending the too narrow and unstable existing access of sandy loam with hard clay, <u>I have a wider (8'-10'),</u> firmer and safer access so I can now service my fences and maintain the dike by mowing and controlling invasive species of vegetation. Approximately 650-700 cubic yards of clay was used, which increased the average grade by approximately seven-tenths of a foot. It was capped with two-tenths of a foot of pitrun to provide traction, then overseeded with a blend of Fescue grasses suitable for dikes.

(Emphasis added) (Exhibit 19). Additionally, in his phone conversation with Ken Nejbauer on September 2, 2010, Mr. Zylstra admitted that he was "shoring up the dike." (Exhibit 3) The Hearing Examiner finds by a preponderance of the evidence that activities performed

here was not "normal maintenance and repair." Instead, the dumping and grading of approximately 17,550 cubic feet (700 cubic yards) of soil constituted the expansion of the road and therefore, was "development" within the meaning of the shoreline regulations. Therefore, the exemption set forth in SCC 30.44.110(2) does not apply.

As to the second claim under SCC 30.44.110(12), the regulations provide the following permit exemption:

> (12) Operation and maintenance of any system of dikes, ditches, drains, or other facilities existing on the effective date of the 1975 amendatory Shoreline Management Act which were created, developed, or utilized primarily as a part of an agricultural drainage or diking system; provided that any new development associated with said diking or drainage systems, which would (1) reclaim lands which are not being used for agricultural purposes at the time the development is proposed, (2) increase the level of protection provided, or (3) enlarge the land area for which protection is provided, shall not be considered operation and maintenance under this exemption.

At the hearing, Appellant offered no evidence to show that (a) Mr. Zylstra was authorized to engage in maintenance activities on the dike owned and operated by the French Slough Diking District; (b) that the dike was in existence in 1975; or (c) that the dike was created primarily as part of an agricultural drainage or diking system. Even if Appellant had offered such information, the evidence in the record proves that Mr. Zylstra intended and, in fact did, enlarge the existing road's width and depth. In addition, Appellant admitted in a phone conversation with PDS staff that he was "shoring up" the dike. This statement can be interpreted to mean that he was increasing the level of protection provided. (Exhibits 3, 10, 11, 19, 20, 25, 26, 41) Based on a preponderance of the evidence, the exemption offered by SCC 30.44.110(12) does not apply in this case.

Given that no exemption was proven to be applicable, the Appellant was required to obtain a SSDP prior to engaging in the development activities on the subject property.

(iii) Flood Hazard Permit Exemption Claim. Appellant claims he is exempt from the County's Special Flood Hazard regulations based on a "road maintenance and repair" exemption. PDS alleges that the Zylstra's activities constituted "development" within the meaning of SCC 30.91D.250. That Section provides:

> "Development in special flood hazard areas" means any manmade change to improved or unimproved real estate, including but not limited to buildings or other structures, dams, walls, wharves, embankments, levees, dikes, piles, bridges, improved roads, abutments, projections, channel rectifications, conduits, culverts, wires, fences, rocks, gravel, refuse deposits, mining, dredging, filling, grading, paving, excavation or drilling, and works as defined in this subtitle.
>
> *This definition applies only to "Flood hazard" regulations in chapter 30.43C, 30.43D, and 30.65 SCC.*

(Emphasis added). PDS proved that the subject property on which the filling and grading activities occurred is within a "special flood hazard area" (identified as a "floodway" of the Snohomish River) as defined by SCC 30.65.040 and SCC.30.65.050. (Exhibit 17) Appellant made no attempt to dispute these facts and presented no evidence in support of

his claim of exemption. A review of the regulations reveals that there are no exemptions from the requirement to obtain a Flood Hazard Permit under Chapter 30.43C SCC (Flood Hazard Permits). Additionally, the regulations set forth in Chapter 30.65 SCC (Special Flood Hazard Areas) must also be met.

The Hearing Examiner notes that the Appellant's grading and filling activity are *prohibited* unless the requirements of SCC 30.65.230(b) are met. That section provides that all encroachments, including fill, new construction and other development, is simply prohibited in a floodway unless a registered engineer verifies through a hydrologic and hydraulic analysis that the individual and cumulative effects of the development activity will not "...materially cause water to be diverted from the established floodway, cause erosion, obstruct the natural flow of water, reduce the carrying capacity of the floodway or result in any increase in flood levels during the occurrence of the base flood discharge." (SCC 30.65.230)

Here, Appellant was required to obtain a Flood Hazard Permit, and must prove that the activities which were performed in the floodway are not prohibited. Finding no evidence on which to base such an exemption, the Hearing Examiner finds that the Appellant was required to obtain a Flood Hazard Permit and meet the requirements of SCC 30.65.230, among other regulations, prior to engaging in the grading and filling activities on the subject property.

In summary, the Hearing Examiner finds that the activities cited in the NOV were not exempt from the permit requirements cited and this basis for the appeal must be denied.

B. Critical Areas Claim. The Appellant next asserts that the subject property where the grading and filling occurred is not within a critical area as stated in the NOV. The NOV alleges the following violation (in part):

> Allowing grading to occur on the above described property without the necessary permits and/or approvals as required by the Snohomish County Code, Section 30.63B.010. The grading activity involved grading over 600 cubic yards of soil *within a critical area (floodway, density fringe and fish & wildlife conservation area)* as defined in Snohomish County Code, Section 30.91C.340(4). . . ."

(Emphasis added) (Exhibit 1). SCC 30.91C.340(4) includes "fish and wildlife habitat conservation areas" and "frequently flooded areas" as part of the definition of critical areas. Appellant asserts that Chapter 30.62 SCC, regulating critical areas, does not identify frequently flooded areas as critical areas. This is factually incorrect. Those areas are critical areas, but they are simply regulated separately under the County's flood hazard regulations. SCC 30.62.005 states:

> "The county's regulations pertaining to aquifer recharge areas and *frequently flooded areas*, as defined in chapter 36.70A RCW, are contained in chapters 30.64 and 30.65 SCC, which are incorporated herein by this reference."

(Emphasis added); (See, SCC 30.62.005). Accordingly, the Hearing Examiner finds no legal basis to support such a claim and this basis for appeal must be denied.

C. No violation of County Code as has been ruled upon in previous Hearing Examiner decisions. Mr. Zylstra next argues that he was correct to have assumed that his activities

were legal, because he advised PDS of this fact several times and the "Right to Plow" [sic] provisions permit him to undertake agricultural activities without the need for permits. (Exhibit 1) In making this argument, the Appellant has failed to state a legal basis upon which relief can be granted. As noted in Finding of Fact 10.A, above, the activities were not exempt under the Right to Farm provisions of the Grading Code because Flood Hazard and Shoreline Permits were required. As a result, a Grading Permit was also required. Accordingly, the appeal on this basis must be denied.

D. Constitutional Grounds. The Appellant raised several constitutional grounds for the dismissal of the NOV and/or to bar the introduction and consideration of certain evidence in this case. The Hearing Examiner does not have the legal authority to decide substantive constitutional claims brought in an appeal. However, to the extent an appellant raises a constitutional claim as a procedural bar to the introduction of evidence or as it relates to procedural due process in an appeal hearing, the Hearing Examiner may address such claims.

(i) Suppression of Evidence based on 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 pursuant to the Fourth Amendment prohibition against unreasonable searches and seizures, and Article 1, Section 7 of the Washington Constitution.

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.[2]

Where a violation of Article 1, Section 7 of the Washington Constitution 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).

Absent express efforts to create privacy, there appears to be a general presumption in the case law that access roads to a property or home are open for travel without trespass or violation of the Fourth Amendment or Article 1, Section 7 of the Washington Constitution. In *State v. Chaussee*, 72 Wn. App. 704, 710, 866 P.2d 643 (1994), the defendant placed No Trespassing 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.

Here, PDS Code Enforcement Officers made a site visit at noon. They made no effort to hide their entrance from those on the property. They entered to the north of the site onto the neighboring KRKO property, with permission from the owner, Andy Skotdahl. They walked to the French Slough Dike in the direction of the Snohomish River through an open field. Once at the dike, they took photographs and measurements of the road construction activities. There were no barriers, fences, screens or privacy measures in place along or near the French Slough Dike. Next, they got in their vehicle and drove along Short School Road to the entrance of the Zylstra property, and drove down the access road directly toward trucks visible from the entrance, attempting to contact the owner. Officer Nejbauer testified that he did not notice any "no trespassing" signs when they drove onto the access road. After a brief exchange with Jason Marshall, they exited the property at his request.

[2] Appellant cites to an unpublished opinion, *Albut v. King County*, in support of his claim that the photographs and other evidence taken from the subject property was gathered in violation of Article 1, Section 7 and/or the Fourth Amendment. However, unpublished opinions are not to be cited pursuant to RAP 10.6.

PDS argues that Zylstra's claim must be denied based on the doctrine of collateral estoppel. This doctrine bars re-litigation of issues where (a) the issues in a prior case were identical; (b) there was a final decision reached on the merits; (c) the party against whom the plea is asserted must have been a party to the prior adjudication; and (d) the application of the doctrine will not work an injustice on the party against whom the doctrine is applied. *Christensen v. Grant County Hosp. Distr. No. 1*, 152 Wn.2d 299, 306, 96 P.3d 957 (2004); *Reninger v. Department of Corrections,* 134 Wn.2d 437, 449, 951 P.2d 782 (1998) *citing Southcenter Joint Venture v. National Democratic Party Comm.*, 113 Wn.2d 413, 780 P.2d 1282 (1989). However, the Hearing Examiner finds that the claim of collateral estoppel must fail because the second element of the test is missing in this case. The Hearing Examiner did not reach a final decision on the merits of the first NOV. The case was dismissed based on a procedural error—the citation to a regulation that was not yet in effect at the time of the alleged violation. Accordingly, collateral estoppel does not act as a bar to the motion to suppress evidence in this case.

Here, the Examiner concludes that the Appellant did not sufficiently present barriers to his open field that would imply that the farm field was not open for Code Enforcement Officers to enter. The Examiner concludes that Mr. Zylstra had no reasonable expectation of privacy in the open field or on the dike owned by the French Slough Diking District. In order to create an expectation of privacy in an open field, the courts require that a landowner must make visible efforts to create privacy, through the placement of privacy 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). No such efforts were made as to the fields to the north of the access road adjacent to the KRKO property. The "no trespass" signs were not visible to the Officers on the day of their visit. The gate was wide open and passable for anyone to enter. The owner had made no attempt to obstruct views onto the property by passing vehicles. There are no planted rows of shrubs or trees, no privacy fencing or other privacy measures. Trucks entering and exiting the property from the access road off of Short School Road are plainly visible to passersby.

Additionally, there was no showing by the Appellant that the property on which the construction work was done was under his legal control and not that of the French Slough Diking District. Mr. Zylstra testified that Exhibit 32 is a photograph of the subject property and that the dike is located where the area shaded in grey meets the area shaded in green. He stated that the road in question is on the river side of the dike, and exists to gain access to the dike for maintenance. The evidence in the record shows that Code Enforcement Officers entered onto an open field to access the dike, which is owned by the French Slough Diking District. In fact, Mr. Zylstra told Officer Nejbauer that he was "shoring up the dike" in a telephone call on September 2, 2010. Based on this evidence, the Hearing Examiner concludes that the evidence obtained by Code Enforcement Officers was most likely located on the property controlled by the French Slough Diking District. (Exhibit 19)

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. (Exhibit 19) Such admission is legally admissible and can be considered by the Examiner.

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

(ii) Failure to provide Miranda Warnings. Appellant argues that because any violation of the Snohomish County Code may be considered a misdemeanor pursuant to SCC 1.01.100, he should be afforded the protections announced in *State v. Miranda* and other Constitutional protections afforded defendants in criminal proceedings. Since PDS admits it did not read Mr. Zylstra his Miranda rights, Appellant argues that the case should be dismissed and/or transferred to a criminal court. Appellant presents no case law in support of this claim. PDS did not respond to this issue.

The Fifth Amendment to the U.S. Constitution provides that "[n]o person shall be compelled in any criminal case to be a witness against him/herself. Similarly, the Washington Constitution provides that "[n]o person shall be compelled in any criminal case to give evidence against himself, or be twice put in jeopardy for the same offense. (Wash. Const. art. I, § 9). The protection provided by the Washington State Constitution is co-extensive with the federal constitution. *See, State v. Russell*, 125 Wn.2d 24, 59-62, 882 P.2d 747 (1994); *State v. Earls*, 116 Wn.2d 364, 374-75, 805 P.2d 211 (1991); *Dutil v. State*, 93 Wn.2d 84, 606 P.2d 269 (1980); *State v. Moore*, 79 Wn.2d 51, 57, 483 P.2d 630 (1971).

This Fifth Amendment right can be triggered in one of two ways: (a) either a suspect states affirmatively that they do not wish to answer any questions without their lawyer present; or (b) a suspect is taken into custody and interrogated by law enforcement. Such an interrogation is presumed to be involuntary. In *Miranda v. Arizona*, 384 U.S. 436 (1966), the Supreme Court announced rules requiring people who are taken into custody to be advised of certain rights or warnings: (a) that he/she has the right to remain silent; (b) that any statement he/she does make can and will be used as evidence against them in a court of law; (c) that he/she has the right to consult with counsel before answering any questions; (d) that he/she has the right to have an attorney present during questioning; and (e) that if he/she cannot afford an attorney, one will be appointed for them without cost prior to questioning if desired. *State v. Creach*, 77 Wn.2d 194, 199, 461 P.2d 329 (1969). In 2000, the Supreme Court reaffirmed its ruling in *Miranda.* In *Dickerson v. United States*, 530 U.S. 428, 120 S. Ct. 2326, 147 L. Ed.2d 405 (2000), the Court declared that the rules announced in *Miranda* are constitutionally based, and cannot be superseded by Congressional legislation.

In the present case, the communications between Zylstra and PDS Code Enforcement officers occurred via letter initiated by Mr. Zylstra in response to a Warning Notice sent by PDS notifying him of a potential code enforcement case, and through a telephone call between Ken Nejbauer and Mr. Zylstra. The Fifth Amendment and Washington Constitutional protections against self-incrimination expressly apply only to criminal cases. This case involves a civil code enforcement action. Accordingly, the warnings required by Miranda do not apply. Even if they did, no Miranda warnings were required as a result of their telephone conversations. *State v. Denton*, 58 Wn. App. 251, 792 P.2d 537 (1990); *Saleh v. Fleming*, 512 F.3d 548 (9th Cir. 2008). Furthermore, Mr. Zylstra was never in custody and was not interrogated by code enforcement officers.

PDS Officers did attempt to engage in a conversation with Jason Marshall, an employee of Mr. Zylstra, while performing a site investigation. They spoke briefly while they were in passing cars on the subject property. Mr. Marshall was not in custody and was free to leave in his car, which he did after telling the Officers to leave the property. Assuming this conversation was a "terry stop" for purposes of Miranda, the Courts have ruled that when a suspect has been stopped on reasonable suspicion for an investigation, Miranda warnings are not necessary. *State v. Heritage*, 152 Wn.2d 210, 95 P.3d 345 (2004); *State v. Marshall*, 47 Wn. App. 322 (1987).

The Hearing Examiner finds that the protections afforded by the Fifth Amendment to the U.S. Constitution and Article 1, Section 9 of the Washington Constitution, prohibiting a person from being compelled in a criminal case to be a witness (or give evidence) against him or herself, simply do not apply here. The proceedings before the Hearing Examiner are civil in nature. The appeal on this basis must be denied.

(iii) Double Jeopardy. Appellant claims that PDS has violated the Double Jeopardy clause by filing two NOVs against him arising out of the same actions. As noted in Finding of Fact No. 7, the Hearing Examiner dismissed a NOV against Mr. Zylstra based on the fact that PDS had cited the wrong version of the Grading Code (new regulations that were not in effect at the time of the violation). After the dismissal, PDS filed a new NOV against Zylstra with the corrected citation to the Grading Code (*former* SCC 30.63B.010).

The double jeopardy clause of the Fifth Amendment to the United States Constitution provides that no person shall "be subject for the same offense to be twice put in jeopardy of life or limb." The double jeopardy clause protects against (1) a second prosecution for the same offense after acquittal; (2) a second prosecution for the same offense after conviction; and (3) multiple punishments for the same offense. *State v. McCLendon*, 131 Wn.2d 853, 935 P.2d 1334 (1997).

Similarly, the double jeopardy clause of the Washington State Constitution guarantees that "No person shall . . . be twice put in jeopardy for the same offense". Const. art. I, § 9. The Fifth Amendment applies to the states through the Fourteenth Amendment. *Benton v. Maryland*, 395 U.S. 784, 794, 23 L. Ed. 2d 707, 89 S. Ct. 2056 (1969). In terms of whether the State Constitution provides more protection to an individual defendant than that found under the Fifth Amendment, the Washington State Supreme Court held that Const. art. I, § 9 is given the same interpretation the Supreme Court gives to the Fifth Amendment. *State v. Gocken*, 127 Wn.2d 95, 101-102, 896 P.2d 1267 (1995).

Appellant appears to be making a "successive prosecution" claim. In the successive prosecution context, the Supreme Court has ruled double jeopardy applies if the two offenses for which the defendant is punished or tried cannot survive the "same elements" test. *United States v. Dixon*, 509 U.S. 688, 125 L. Ed. 2d 556, 568, 113 S. Ct. 2849 (1993). The "same elements" test, commonly referred to as the *Blockburger* test, examines whether each offense contains an element not contained in the other. The applicable rule is that where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of a fact which the other does not. *Blockburger v. United States*, 284 U.S. 299, 304, 76 L. Ed. 306, 52 S. Ct. 180 (1932); *Dixon*, 125 L. Ed. 2d at 568. The *Blockburger* test is now the exclusive standard for reviewing whether successive prosecutions violate the double jeopardy clause of the Fifth Amendment. *State v. Gocken*, 127 Wn.2d 95, 896 P.2d 1267 (1995).

Before a court will consider whether the *Blockburger* test is met, it must first consider whether jeopardy attaches at all in the context of this civil code enforcement action. Jeopardy does not attach to a legal proceeding that does not constitute "punishment." *State v. Catlett*, 133 Wn.2d 355, 945 P.2d 700 (1997). To answer this question, the courts have looked to whether civil penalties constitute "punishment." Id.

The Washington State Supreme Court has adopted a two-part test for defining "punishment" for double jeopardy purposes. See, *Beckett v. Department of Soc. & Health*

Servs., 87 Wn.2d 184, 188-90, 550 P.2d 529 (1976), over-ruled on other grounds by *Dunner v. McLaughlin*, 100 Wn.2d 832, 676 P.2d 444 (1984); *O'Day v. King County*, 109 Wn.2d 796, 817-18, 749 P.2d 142 (1988); *In re Personal Restraint of Young*, 122 Wn.2d 1, 18-19, 857 P.2d 989 (1993). In *State v. Catlett*, 133 Wn.2d, 355, 365-366, 945 P.2d 700 (1995), the Supreme Court articulated the test as follows:

> The categorization of a particular statute as civil or criminal is largely a matter of statutory construction. *Allen v. Illinois*, 478 U.S. 364, 368, 92 L. Ed. 2d 296, 106 S. Ct. 2988 (1986); *United States v. Ward*, 448 U.S. 242, 248, 65 L. Ed. 2d 742, 100 S. Ct. 2636 (1980). The Supreme Court has adopted a 2-part analysis:
>
>> First, we have set out to determine whether Congress, in establishing the penalizing mechanism, indicated either expressly or impliedly a preference for one label or the other. Second, where Congress has indicated an intention to establish a civil penalty, we have inquired further whether the statutory scheme was so punitive either in purpose or effect as to negate that intention.
>
> (Citations omitted.) *Ward*, 448 U.S. at 248-49. Thus, we look first to the language of the Statute [sic] and the legislative history, then turn to an analysis of the purpose and effect of the statutory scheme. *Young*, 122 Wn.2d at 18-19. Absent any indication that a criminal purpose was intended, or actually served by the statute, the stated civil goals of the Legislature are controlling. *See, Mendoza-Martinez*, 372 U.S. at 168-69.

In the present context, we look to the intent of the Snohomish County Council in adopting the code enforcement provision of Chapter 30.85 SCC. SCC 30.85.010 ("purpose") provides:

> The purpose of the enforcement procedures found in this chapter is to establish an efficient system to enforce the land use and development codes of Snohomish County for the benefit of the public health, safety and welfare, and the environment. To achieve this purpose, this chapter provides procedures for:
> (1) Efficient notice and opportunities to correct violations;
> (2) Progressive monetary penalties proportionate to violations;
> (3) Contesting a citation or appealing a notice of violation;
> (4) Collecting civil penalties; and
> (5) Abatement and remediation of violations.

As to the first part of the test, SCC 30.85.010 expressly states that the procedures are civil in nature and that enforcement process is remedial in nature, not punitive. As to the second part of the test, the Hearing Examiner is unable to find that the regulatory provisions of Chapter 30.85 SCC (including the civil penalty schedule), are so punitive in purpose or effect, as to negate the stated "civil" nature of those regulations. Absent any indication that a criminal purpose was intended, or actually served by Chapter 30.85 SCC, the stated civil goals of the County Council are controlling. *State v. Catlett*, supra.

Accordingly, the Hearing Examiner finds that jeopardy does not attach in the civil code enforcement matter here and the double jeopardy clause protections of the Fifth Amendment and Article 1, Section 9 of the Washington Constitution do not apply.

E. NOV Fails to Meet Code Requirements

(i) Appellant claims that the compliance date cannot be achieved as a result of the current permitting process and is therefore unreasonable. The Hearing Examiner finds that the Appellant failed to present any evidence in support of this claim. Accordingly, the Appellant has failed to meet his burden of proof as to this claim and it should be denied.

(ii) Appellant next claims that the penalties referenced exceed the limits of SCC 1.01.100 and are therefore unenforceable. Appellant failed to provide any evidence in support of this claim. 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. Accordingly, the Appellant has failed to meet his burden of proof as to this claim and it should be denied.

(iii) Appellant argues that the appeal fee noted is inconsistent with the provisions of SCC 2.02.125 which is $100.00. Again, Appellant failed to provide any evidence to support this claim. Accordingly, the Appellant has failed to meet his burden of proof as to this claim and it should be denied.

F. Lack of Criminal Intent to Violate the Code. Appellant argues that his ignorance of the law means that he had no intent to violate the County's regulations. (Exhibit 1) In making this argument, the Appellant has failed to state a legal basis upon which relief can be granted. As noted above, the proceedings here are civil in nature, and not criminal. Intent is not a necessary element of the violation alleged in the NOV. The Examiner does not judge whether the Appellant intended to violate the County Code. The Examiner simply weighs the evidence and determines whether the Appellant's actions (failing to obtain permits prior to engaging in the filling and grading activities in a critical area, shoreline area and flood hazard area) constitute a violation of the Code. Here, the Examiner finds that PDS proved that the violations exist by a preponderance of the evidence and that the Appellant's claims of exemption should be denied.

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. Notice of the public hearing was properly issued.

3. The Hearing Examiner concludes that the Appellant engaged in filling and grading activities on property which is situated within a critical area, the shoreline environment and within a special flood hazard area. PDS proved that prior to engaging in such activities, Mr. Zylstra was first required to obtain a Grading Permit, a Shoreline Substantial Development Permit and Flood Hazard Permit, and that he failed to do so.

4. The Hearing Examiner concludes that Appellant failed to prove that his filling and grading activities on the subject property were exempt from the requirements to first obtain a Grading Permit, Shoreline Substantial Development Permit and a Special Flood Hazard

Permit. The Right to Farm exemption does not apply in this case. Accordingly, the appeal must be denied as to those claims.

5. The Appellant argues that the violation did not occur within a critical area. Based on a preponderance of the evidence, PDS proved that the grading and filling occurred within a critical area as stated in the NOV. Accordingly, the appeal must be denied on this basis.

6. Appellant argues that he was correct to have assumed that his activities were legal, because he advised PDS of this fact several times and the "Right to Plow" [sic] provisions permit him to undertake agricultural activities without the need for permits. The Appellant has failed to state a legal basis upon which relief can be granted. Accordingly, this ground for appeal must be denied.

7. Appellant claims that the evidence gathered by PDS on the subject property should be suppressed since officers did not first obtain a search warrant. Based on the foregoing Findings of Fact, the Hearing Examiner concludes that the evidence was gathered in an open field in plain sight, and the Appellant had no reasonable expectation of privacy in that field under the facts shown. The Examiner concludes that no violation of the Fourth Amendment and/or Article 1, Section 7 of the Washington Constitution occurred. The motion to suppress must be denied.

8. Appellant claims that his statement admitting to the filling and grading activities should be suppressed based on the County's failure to advise him of his *Miranda* rights. The Hearing Examiner concludes that *Miranda* warnings were not required in the present case, and the statement is admissible in these proceedings. The motion to suppress the Appellant's statement must be denied.

9. Appellant claims that PDS has violated the Double Jeopardy clause. The Hearing Examiner concludes that the proceedings are civil in nature and the Double Jeopardy clause does not apply. Accordingly, the appeal on this basis must be denied.

10. The Appellant failed to prove that the NOV does not meet the requirements of the Snohomish County Code. Accordingly, the appeal must be denied as to those grounds.

11. The Appellants claim, that he lacked the criminal intent to violate the County Code, fails to state a legal basis upon which relief can be granted. The proceedings here are civil in nature and criminal *mens rea* is not relevant to the violations alleged in the NOV. Accordingly, the appeal on this ground must be denied.

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 motion to suppress evidence (photographs, measurements, descriptions of the fill and grading) (Exhibit 10 and testimony of PDS officers) is denied.

2. The motion to suppress Fred Zylstra's statement (Exhibit 19) to the grading and filling activity is denied.

3. The appeal is denied. PDS proved by a clear preponderance of the evidence that all three violations alleged in the NOV occurred, and that Fred Zylstra was responsible for the violations.

4. A new compliance deadline is established for January 30, 2012 at 4:00 p.m.

5. If compliance is not achieved to the satisfaction of PDS by the compliance deadline as to each violation, a monetary penalty shall be assessed and will accrue on a daily basis as provided by SCC 30.85.170. Based on the fact that the violations in this case occurred in a critical area, triple monetary penalties shall be imposed for each violation if compliance is not achieved by the deadline. (SCC 30.85.170(7)(a)).

Decision issued this 15th day of November, 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, NOVEMBER 28, 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 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. 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.

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