



**FINAL DECISION of the
SNOHOMISH COUNTY HEARING EXAMINER**

Millie Judge
Hearing Examiner

M/S 405
3000 Rockefeller Ave.
Everett, WA 98201

(425) 388-3538
FAX (425) 388-3201

DECISION DATE: July 5, 2011

APPELLANT: **Herbert and Marlene Cartmell**

FILE NO.: 11-101702 CT

TYPE OF CASE: Appeal of Notice of Violation – [Count 2 Only]

DECISION (SUMMARY): **Appeal Granted as to Count 2**

LOCATION: 23926 57th Avenue SE, Woodinville WA 98072-8677

This matter having come before the Hearing Examiner on June 21, 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

1. **The Record.** The official record for this proceeding consists of the Exhibits entered into evidence (Exhibits 1 through 24), 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.

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 June 21, 2011. Witnesses were sworn, testimony was presented, and exhibits were entered into the record at the hearing. Notice of the appeal hearing was issued as required by SCC 30.85.200. (Exhibits 12, 19) Ed Soderman appeared and testified on behalf of the Snohomish County Planning and Development Services Department (PDS). Herbert Cartmell, Appellant, appeared at the public hearing along with Bill Wilder and Jay Evans, supporting witnesses. No other members of the public testified at the public hearing.

4. Appeal. Herbert and Marlene Cartmell (hereinafter "Appellants") are the owners of certain real property known as tax parcel 006-877-00000600, located at 23926 57th Avenue, Woodinville, Washington. The property is located within the Highland Park Estates plat in the R-5 zone (hereinafter, the "subject property"). (Exhibits 3, 4, 5, 6, 7) The Appellants challenge Count 2 of a Notice of Violation (NOV) issued to them by PDS on March 23, 2011, which alleges that their Pigeon Loft is located within the 30-foot setback area from the property line, in violation of the County's zoning regulations, SCC 30.23.110(1). (Exhibit 9) The NOV was sent to the Appellants by regular and certified mail. (Exhibit 8)
5. Herb Cartmell is the owner of more than a dozen racing pigeons and serves on the Board of Directors of the American Pigeon Racing Union. After receiving a complaint from a citizen, Code Enforcement Officer Ed Soderman performed an investigation and found that Mr. Cartmell constructed a Pigeon Loft, 320 square feet in size, and placed it sixteen feet from his property line. (Exhibit 10) The Loft houses the Appellants' American Racing Pigeons and has been certified by the American Racing Pigeon Union, Inc. as meeting national standards. (Exhibit 24) The Loft resembles a large, painted garden shed with attractive white trim and pop-out window roosts for the birds. It is situated next to their driveway within the family's garden. Large shrubs and Evergreen trees line the Cartmell's driveway and screen all but the tip of the structure's roof from view by neighboring properties. (Exhibits 14-5, 22) Mr. Cartmell offered evidence of the fact that racing pigeons enjoy special protections under State law as shown by RCW 9.61.200, and that it is a class 2 civil infraction to remove an identification band. (Exhibit 21)
6. Jay Evans testified at the appeal hearing that he is the closest landowner to the structure, and that he has no complaints about its location or operation. Instead, he testified that his family enjoys the Pigeons and the Loft, and that his children are regularly invited to handle and help feed the birds. (See, Exhibit 22, 14-5B, 14-5D and 14-5E) They have not noticed any nuisance odors or noise from the Loft.
7. Bill Wilder, Treasurer of the local pigeon racing club, testified that there have been no complaints from the Cartmell's neighbors. He asserted that the original complainant in this case was from a person who has a personal vendetta against Appellant Herb Cartmell, and lives more than 20 miles away from the site.
8. Additionally, Avarad L. Wilson, a neighbor, retired educator and former Commissioner with the Boy Scouts of America sent a letter of support noting that the Pigeon Loft is in good repair, clean and painted, and that the pigeons are well cared for and not a bother to the neighborhood. (Exhibit 23)
9. Appellants were issued a NOV for allegedly violating SCC 30.23.110(1). They allege that the violation does not exist based on the fact that the regulation cited does not apply because (a) they are not engaged in agriculture; (b) even if keeping pigeons was deemed to be an agricultural activity, the pigeons are in fact pets and therefore the exemptions applies; and (c) there have been no complaints from actual neighbors. (Exhibit 1)
10. In response, Officer Soderman argues that in order to be deemed a "household pet," the pigeons must reside in the Appellants' residence at least part of the time, and his investigation revealed that the pigeons do not reside at any time in the Cartmell's home. PDS cited as precedent for this definition a 2004 Hearing Examiner decision known as "*In re the appeal of Mohammad Shahid, File No. 04-100199.*" (Exhibit 16)

11. Having considered the *Shahid* decision, the Examiner finds that: (a) the cited 2004 decision is not binding precedent as to this Examiner's decision; (b) the facts of the 2004 case were quite different from the present situation and included the housing of chickens, which clearly is an agricultural activity; and (c) the Hearing Examiner rejects former Deputy Hearing Examiner Good's definition of a "household pet," as it is too narrow and not based on any common definition of the term. See, for example, Exhibits 14-3 and 14-4, in which Appellant provided five alternative definitions for the term, from State law and other reputable sources, none of which is anywhere near as narrow as the term adopted in the earlier decision. (Exhibit 14-4) Finding no prior expression of legislative intent from the County Council that it would place such a severe restriction on the common term "household pet," the Hearing Examiner declines to adopt such a restrictive definition.
12. The Zoning Code at Section 30.23.110 ("Special setbacks for certain uses") is a supplement to the normal setback required by the underlying zone for the specified use. Here, the Appellants were cited for violating subsection (1), "Agriculture," which requires a 30 foot setback except for structures used for housing or feeding household pets. The exception for the term "household pets" is undefined in the County Code. However, we need not reach the exception if the use is not found to be "agriculture." The Examiner has searched the remaining uses listed in the special setback provisions of SCC 30.23.110 and finds that nothing therein applies specifically to the keeping of pigeons or construction of pigeon lofts.
13. The term "agriculture" is defined at SCC 30.91A.110 to mean: "...tilling of the soil, raising of crops, horticulture, viticulture, small livestock, poultry, pasturing, grazing, dairying and/or small animal husbandry including all uses customarily incidental thereto. Agriculture includes farming and farm activities, as defined under "farm" herein."
14. The only two terms in the definition of "agriculture" that could cover pigeons are possibly "poultry" or "small animal husbandry." The term "poultry" is undefined in the County Code. However, the USDA has defined poultry to include "domesticated fowl," but that term specifically and repeatedly *excludes doves and pigeons*. (See, Exhibits 14-2A, 14-2B, 14-2C) Additionally, the County's definition of "small animal husbandry" is the "raising of mink, fox, nutria, rabbits, pigs, sheep, goats, chickens, turkeys, guinea hens, and similar small animals and fowl not for the primary consumption of or use by the occupants of the premises. (SCC 30.91S.440) The County's regulations do not further define the term "fowl," and the USDA does not include pigeons or doves in its definition of "fowl." (Exhibits 14-2A, 14-2B, 14-2C)
15. 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.
2. Appellants were cited in the NOV for violating the special setback provision found in SCC 30.23.110(1) relating to "agricultural uses," by keeping racing pigeons in a Loft within 30 feet of the property line. Having considered the definition of "agriculture," the Hearing Examiner concludes that the housing of racing pigeons in *not* "agriculture" which would fall within the

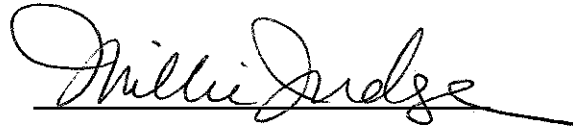
requirements of SCC 30.23.110(1). Therefore, the Hearing Examiner concludes that the NOV was issued in error.

3. The Examiner does not need to reach the issue of whether pigeons might be considered "household pets" under some scenario because SCC 30.23.100(1) does not apply to them under the facts presented.
4. The Examiner concludes that the appeal should be granted.
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 **GRANTED as to Count 2** of the Notice of Violation. **Count 2 is hereby dismissed with prejudice.**

Dated this 5th 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 15, 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: Ed Soderman

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
CARTMELL 11 101702 CT
APPEAL – NOTICE OF VIOLATION

HERBERT & MARLENE CARTMELL
23926 57TH AVE SE
WOODINVILLE WA 98072

DEPT OF PLAN & DEV SERV
ED SODERMAN
3000 ROCKEFELLER AVEM/S 604
EVERETT WA 98201

BILL WILDER
3429 NEWPORT WAY S
SEATTLE WA 98134

JAY EVANS
23922 57TH AVE SE
WOODINVILLE WA 98072

AVARD WILSON
5520 240TH ST SE
WOODINVILLE WA 98072