



**DECISION AND ORDER of the
SNOHOMISH COUNTY HEARING EXAMINER**

Millie Judge
Hearing Examiner

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DATE OF DECISION: December 13, 2012
APPELLANT: Randall Whalen
FILE NO.: 09-108271 GR
TYPE OF REQUEST: Appeal of Grading Permit
Re: Loveless & Dillon, Inc.

DECISION (SUMMARY): **Appeal is Granted in Part; Denied in Part**

TAX ACCOUNT NO: 270535-004-023-00, 270535-004-059-00, 270535-004-058-00
270535-004-057-00, 270535-004-001-00

This matter having come before the Hearing Examiner on November 28, 2012, 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 28), as well as the testimony of witnesses received at the Open Record Hearing. The record was left open for one day to allow PDS to submit additional evidence relating to the question of whether the County's Shoreline Master Program had been appealed and to submit additional authorities relating to the designation of Thomas Lake. That information was added to the record as Exhibits 28, 28-A and 28-B. 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 Hearing Examiner's Office.

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 Wednesday, November 28, 2012. Witnesses were sworn, testimony was presented, and exhibits were entered into the record at the hearing. Snohomish County Department of Planning and Development Services (PDS) was represented by Brian Dorsey, Deputy Prosecuting Attorney, the Appellant was represented by Richard Arambaru of Arambaru & Eustis, and the Applicant was represented by consultant, Gene Miller, of GFM Associates. Testifying witnesses included Howard Knight of PDS, Sara Cooke, Ph.D. of Cooke Scientific, Randall Whalen, and Rod Loveless.

4. The original appeal filed by Randall Whalen sought to challenge the issuance of three documents: a Grading Permit (GR 09-108271) issued to Loveless and Dillon, Inc., PDS's recommendation of approval of a Forest Practices Permit Application sent to them by the Washington State Department of Natural Resources (DNR), and a Land Disturbing Activity (LDA) Permit (11-107953-LDA) issued by PDS to Rod Loveless for a driveway. (See, Exhibits 1, 2, 3) The appeals were combined into a single document and the Appellant paid only one filing fee of \$500.
5. Pre-hearing Motions to Dismiss. The Applicant moved to dismiss the appeals on various grounds. (See, Exhibit 6) The Hearing Examiner granted the Motion as to the Forest Practices Permit. (Exhibit 12) The Hearing Examiner issued an Order Clarifying Briefing Schedule on November 5, 2012 and asked for additional briefing from the parties on the issue of whether the Appellant was required to pay separate filing fees for each of the three appeals and if so, whether the failure to pay more than one filing fee was grounds for dismissal. (Exhibit 13)
6. At the start of the Open Record Hearing, having received the briefs and responses of the parties on the question of the payment of filing fees, the Hearing Examiner dismissed the LDA Permit appeal for failure to pay the \$500 filing fee. The Hearing Examiner finds that SCC 30.71.050(4) clearly states that "*Each appeal filed on a non-shoreline Type 1 decision shall be accompanied by a filing fee in the amount of \$500. . .*" (Emphasis added) In the present case, the Appellant attempted to file three separate appeals of PDS permit decisions through a single filing. The Examiner found that the DNR permit was merely a recommendation and not a final permit decision appealable under SCC 30.71.045 and .050. The remaining appeals required a filing fee be paid for each of them. Given that the Appellant only paid \$500, the Examiner determined that only one appeal could stand. At the hearing, the Appellant elected to apply the fee toward the Grading Permit appeal and not the LDA permit. PDS had no objection to this election. As such, the Examiner dismissed the LDA appeal for failure to pay the \$500 fee. The hearing proceeded on the remaining issue of the Grading Permit appeal, for which the Examiner found a filing fee had been paid.
7. Mr. Whalen raised twelve issues in his appeal. (Exhibit 1) The Hearing Examiner finds that issue 4.12 is moot, given that it challenges the LDA Permit which was dismissed.
8. One of the primary issues before the Hearing Examiner is whether the Grading Permit is vested to Chapter 30.62 SCC (the "old" Critical Areas Regulations) or Chapter 30.62A SCC (the "new" Critical Areas Regulations). A ruling on this issue essentially will impact appeal issues 4.4, 4.5, 4.6, 4.10, and 4.11. (Exhibit 1)
9. The Applicant, Loveless and Dillon, Inc., own certain parcels of land in southeast Snohomish County in a rural area outside of Woodinville, off of 79th Avenue SE. The parcels all surround the Hooven Bog, which is a forested, Category-1 wetland. The bog and fen is believed to have been created when the glaciers receded and ice melted away leaving a bowl-shaped area with little flow. This led to an acidic system which is extremely rare and sensitive. Hooven Bog consists of the wetland/bog, fen, a mature forest over 80 years old, and a lake over 20 acres in size. (Testimony of Dr. Cooke) Research has shown that these systems are very sensitive to any disturbance or changes in soil pH. (Id.)
10. In 2007, the Applicant sought to construct five single-family residences on the various lots they own. However, the access easement to the five lots was no longer viable because it was under at least a foot of water and within the ordinary high water mark (OHWM) of Hooven Bog. The bog has been expanding over time. (See, Exhibits 24 and 19-52) The access easement was

created as part of an earlier property segregation of the 25-acre parcel that divided the property into five, 5-acre tracts. (File No. S-11-77)

11. The Applicant applied for five separate Residential Permits for these lots on September 18, 2007.¹ (Exhibits 19-2, 19-3, 19-4, 19-5 and 19-6) These five parcels are known today as Lots 1, 2, 3, 4 and 5 on the building permit applications. At the same time, the Applicant submitted Boundary Line Adjustments to conform the lots to the Residential Applications. (Exhibit 19-7)
12. Each application consisted of a Residential Application form (which includes required building permit, mechanical permit and plumbing permit applications), detailing the nature of the structure to be built in terms of dimensions, its utilities, bulk and size, and number of bedrooms. See, SCC 30.52F.158 (International Residential Code or "IRC" Section 105.1). The application also included a site plan detailing the proposed residence, its placement on the site, setbacks, driveway and impervious surfaces, access easement, drainfield and reserve area, and buffers from the wetland. The proposed buffers were 75 feet from the residence and 100 feet from the edge of the wetland. The Applicant claimed the buffer reduction was approved on November 7, 2006 in Note 6 of the site plan, pursuant to WAC 246-272-09501. (Exhibit 19-2)
13. No grading permit was sought as part of the Residential Application. During the appeal hearing, Gene Miller testified in his opening statement that the Applicant did not believe that they needed a grading permit for the work proposed in conjunction with the Building Permit. He believed that the work of site preparation, septic drainfield preparation and the like was exempt from the requirements of a Grading Permit under the terms of the County Code. (Testimony of Gene Miller) In 2007, grading activities were governed by the regulations set forth in *former* Chapter 30.63B SCC (the Grading Code). New regulations (known as the Land Disturbing Activity or "LDA" regulations) went into effect September 10, 2010, which superseded the Grading Code, as part of the County's compliance with its new Clean Water Act (NPDES Phase I) Permit. In terms of the grading and filling for the access road, the Hearing Examiner finds that there is no credible reading of Ch. 30.63B SCC that would have exempted the grading activity within a critical area such as the Hooven Bog. A permit was required. The question is whether it was required as part of the Residential Application. For the reasons set forth below, the Examiner finds that it was not.
14. PDS determined on September 27, 2007 that the building permit applications could not be processed until additional information was submitted. (Exhibit 19-8) Primarily, PDS found the applications were deficient because they did not include a Critical Areas Study, given that there is a Category 1 Wetland located on part of all five lots.
15. The Critical Area Study was completed by Shejia Wynn in September, 2007. The Washington State Department of Ecology (DOE) objected to the site plan on April 23, 2008, based on the fact that the Study acknowledged the Category 1 Wetland, but the proposed buffer reductions did not meet the requirements of the Critical Areas Regulations and no mitigation was proposed. (See, *former* Chapter 30.62 SCC)
16. On October 1, 2007, the County's new Critical Areas Regulations (Chapter 30.62A SCC) went into effect, dramatically changing the protections that would be required for development activities adjacent to a Category 1 wetland such as the Hooven Bog.

¹ Throughout these proceedings the parties have referred to these permits as "building" permits. The Examiner will do the same for purposes of clarity.

17. On June 25, 2009, PDS Code Enforcement initiated a code enforcement action against Loveless & Dillon, Inc., having discovered that they had illegally filled and graded an area within the Hooven Bog to provide access to the five building lots.
18. On July 24, 2009, Paul Anderson from the Washington State Department of Ecology (DOE) started an investigation into the illegal fill and grading activity. Mr. Anderson determined that the activity had occurred within an access easement (approximately 10,000 square feet in area). DOE alleged that Loveless and Dillon, Inc had dumped a mixture of gravel and cement in that area which was within the waterway of the Hooven Bog. Photographs of the Hooven Bog dated April 21, 2008 show the access road covered by at least one foot of water. (Exhibit 19-12) Mr. Anderson estimated that the fill was approximately 20 feet wide, 500 feet long and 1.5 feet deep. The new fill extended beyond the width of the former access easement. Serious concerns were raised about the impact of the cement on the sensitive Hooven Bog environment. In addition to informing the PDS Code Enforcement Division, Mr. Anderson sought the assistance of the US Army Corps of Engineers (Corps), and the Environmental Protection Agency (EPA) on July 27, 2009. (Exhibit 19-12) The Corps subsequently asserted federal jurisdiction over the subject property.
19. On July 24, 2009 and September 9, 2009, DOE demanded that the fill material be removed from the Hooven Bog prior to any other activity being permitted on the subject property. (Exhibit 19-13; 19-15) The Applicant did not comply.
20. On November 30, 2009, Loveless & Dillon, Inc. submitted a Grading Permit Application to cure the code violation (09-108271 GR). However, the Grading Permit Application expanded the scope of grading to cover "after the fact" the unpermitted grading and filling, but also the extension of an access road in the east/west direction to serve the proposed five homes on Lots 1 through 5. (See Exhibits 19-11; 19-17) In addition, the Applicant submitted a Forest Practice Permit Application for the County's review and recommendation to the Department of Natural Resources. On December 30, 2009, PDS wrote to the Applicant notifying them that their Grading Permit Application and Forest Practice Permit submittal did not reflect what was necessary to address the code violations. In that letter, Michael Braaten, Senior Site Inspector, PDS, wrote,

These applications do not reflect the action required by code enforcement to bring the site into compliance. I have discussed this project with Tom Rowe (Manager for permitting) and Michael McCrary (Manager for Code Enforcement) and have placed the current Grading and Forest Practices applications on hold *pending the submittal and issuance of a Grading Permit that will be strictly limited to the resolution of the code enforcement file.*

(Exhibit 19-25). As shown in the email correspondence on the back of that letter, PDS clearly notified the Applicant that the only activity that would be permitted under a Grading Permit was the removal of the illegal fill. The Applicant was told that rebuilding the road would require state and federal authorization and would be the subject of separate permits from the County after the code enforcement violation was remedied. (Exhibit 19-25)

21. On April 23, 2010, DOE wrote to Loveless & Dillon, Inc., notifying them that seven months had elapsed and the illegal fill had not yet been removed, and that the presence of the crushed concrete was an on-going threat to the water quality and biological function of the Hooven Bog. (Exhibit 19-26) The DOE issued formal Order No. 7727 directing Loveless & Dillon, Inc. to remediate the "unlawful discharge of polluting matters into waters of the State" and install best management measures along the 79th Avenue SE corridor within the Hooven Bog to protect water quality during removal of the unauthorized fill. (Exhibit 19-27) On July 8, 2010, the DOE

wrote to Loveless & Dillon, Inc., notifying them that the majority of the crushed concrete had been removed to their satisfaction, meeting the requirements of Order 7727.

22. After additional work was performed in October of 2010 (including the removal of additional fill, replacement of culverts and the creation of a swale through the existing fill), the Corps determined on December 20, 2010, that the violation had been resolved to their satisfaction for purposes of compliance with Section 404 of the Clean Water Act. (Exhibit 19-30) The Corps warned that any future violations related to dredging or filling in the Hooven Bog would be referred to the U.S. Attorney for prosecution. Id.
23. During the pendency of the code enforcement action, PDS granted the Applicant an extension of time on its five building permits until May 9, 2011. (Exhibit 24) On April 27, 2011, the Applicant sought a second extension of time for the building permits. Id. PDS denied the request on the grounds that an applicant is only entitled to a single, 18-month extension of time under SCC 30.52F.174, which was previously granted. In May, 2011, the Applicant filed a LUPA appeal in Superior Court, seeking to compel the extension. A Settlement Agreement dated June 21, 2011, was reached granting the Applicant another extension of time until May 9, 2012. (Exhibits 19-33; 19-35)
24. The issue of whether the second extension of the building permits was lawful under the County Code is not before the Hearing Examiner in this appeal of the Grading Permit.
25. Despite its earlier insistence that the Applicant file a new Grading Permit Application limited solely to the code enforcement matter (See Paragraph 19, above), PDS never required it and no Grading Permit was ever issued limited solely to permitting after the fact the illegal filling and grading in the Hooven Bog. Instead, PDS agreed to resume processing the Grading Permit and Forest Practices applications received in 2009, as part of its settlement of the LUPA appeal. (Exhibit 19-35) The Applicant was required to complete the items described in the Review Completion Letter dated June 17, 2011. (Exhibit 24) Nine months later, the Applicant submitted additional information on March 16, 2012. Id. PDS staff found additional deficiencies with those submittals and required additional information to be submitted to perfect the application sufficiently to issue a SEPA threshold determination. A Mitigated Determination of Nonsignificance (MDNS) (Exhibit 19-55) was issued on May 4, 2012, with conditions requiring additional supporting documentation and restricting construction access via the existing road through the Hooven Bog. Id.
26. The SEPA determination also covered a Land Disturbing Activity Permit (LDA Permit) submitted by the Applicant on October 14, 2011. (11-107953 LDA) The LDA application was for an alternative access road for the five building lots, which is the only viable method of access to those lots.
27. The five building permits for the subject property expired on May 9, 2012.
28. PDS issued Notices of Decision approving the Grading and LDA Permit applications on October 8, 2012. Randall Whalen filed the instant appeal on October 22, 2012.
29. As to the issue of whether the Hooven Bog constitutes a lake, triggering review under the County's Shoreline Master Program (SMP) regulations, the parties agreed at the hearing that the open water area within the Hooven Bog is over 20 acres in size. PDS stated that the County's new SMP designates the Hooven Bog as a lake, subject to shoreline jurisdiction. However, they argue that the new SMP is not yet in effect given that it has been appealed. (Exhibits 28.B-1) and Exhibit 28.B-2); (RCW 90.58.190(4)). PDS further argues that the Hooven Bog is not a lake within the meaning of the "old" SMP. Citing a trial court opinion relating to a matter on Thomas Lake in Snohomish County, PDS argues that the Courts have determined

that the DOE must designate lakes through rulemaking procedures in order for them to qualify for shoreline jurisdiction. (Exhibit 28.A) This was not done for the Hooven Bog, therefore, PDS argues that the SMP does not apply to it, regardless of its size. Appellants disagree and argue that the SMP does apply to the development activity on the site.

30. Dr. Sarah Cooke, of Cooke Scientific, an expert specializing in bogs, fens and wetlands, testified on behalf of the Appellant on the issues relating to the impact of the grading activity on the Hooven Bog. She testified that she performed a site visit to the Hooven Bog, but has also studied it, performing before and after condition-based research based on all ecosystem factors. She stated that the Hooven Bog is a bog and fen that includes a lake and mature (80-year-old) forest. It is an environment created by receding glaciers that has little flow, resulting in a very sensitive and rare habitat in which acid-loving vegetation thrives. She stated that this is very important habitat. Dr. Cooke noted that the Hooven Bog is the second largest bog in the region, and that there are only a handful of these bogs left. Dr. Cooke testified that bogs are very sensitive to any disturbance in the area. As to the Grading Permit, Dr. Cooke testified that the buffers provided for the critical area are too small in light of best available science to provide the needed protection to the Hooven Bog. She stated that the buffers should be a minimum of 300 feet in size. She testified that one of the "harms" resulting from grading on the access easement includes soil compaction, which occurs when heavy equipment is run over the peat soils. She stated that this changes the groundwater regime connected to the bog. In addition, Dr. Cooke testified that the illegal cement was placed in the bog and remained for 1-1/2 years before most of it was removed. She testified that calcium carbonate is the worst possible thing you can place into a bog. It dissolves acid and the calcium ions travel through groundwater into the entire system damaging, and ultimately, killing the sensitive vegetation. She noted on cross-examination that although most of the cement was removed, some remains with crushed gravel on top of it and is still leaching into the Bog.
31. Any Finding of Fact that should be deemed to be a Conclusion of Law is hereby adopted as such.

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 Chapter 30.71.030.
2. A central question on appeal is whether the Grading Permit filed on November 30, 2009 by Loveless and Dillon, Inc, is subject to the vesting date afforded to the five Building Permit Applications, which is September 18, 2007.
3. The vested rights doctrine. The Washington vested rights rule promotes a "date certain" vesting point. (*Abbey Rd. Group, LLC v. City of Bonney Lake*, 167 Wash.2d 242, 251, 218 P.3d 180 (2009)). The Washington Supreme Court long ago rejected any requirement for a change of position and substantial reliance to vest development rights and held:

Notwithstanding the weight of authority, we prefer to have a date certain upon which the right vests to construct in accordance with the building permit....The more practical rule to administer, we feel, is that the right vests when the party, property owner or not, applies for his building permit, if that permit is thereafter issued. This rule, of course, assumes that the permit applied for and granted be consistent with the zoning ordinances and building codes in force at the time of application for the permit.

(*Abbey Rd. Group, LLC, supra, quoting Hull v. Hunt*, 53 Wash.2d 125, 130, 331 P.2d 856 (1958)).

Thus, Washington's date certain common law vested rights doctrine "entitles developers to have a *land development proposal* processed under the regulations in effect at the time a complete building permit application is filed, regardless of subsequent changes in zoning or other land use regulations." (*Erickson*, 123 Wash.2d at 867-68, 872 P.2d 1090 (citations omitted)). In 1987, the legislature codified Washington's common law vested rights doctrine. According to RCW 19.27.095 building permits vest as follows:

A valid and fully complete building permit application for a structure, that is permitted under the zoning or other land use control ordinances in effect on the date of the application shall be considered under the building permit ordinance in effect at the time of application, and the zoning or other land use control ordinances in effect on the date of application.

PDS argues that this matter is controlled by *Adams v. Thurston County*, and that the building permit applications provided vesting for any later permits sought or needed by the Applicant related to the construction of five single-family residences on the subject property. In *Adams*, the Court specified the vested rights rule as follows:

Under Washington law, property development rights vest at the time a developer files a complete and legally sufficient building permit or preliminary plat application. (RCW 19.27.095(1); RCW 58.17.033(1); see *Valley View Indus. Park v. Redmond*, 107 Wn.2d 621, 638, 733 P.2d 182 (1987)). The date on which development rights vest determines which land use laws, rules, and policies will apply to that development. The development is controlled by the law in effect at the time of vesting, not laws enacted later. (*West Main Assocs. v. Bellevue*, 106 Wn.2d 47, 50-51, 720 P.2d 782 (1986) (*West Main I*); *Victoria Tower Partnership v. Seattle*, 49 Wn. App. 755, 761-62, 745 P.2d 1328 (1987) (*Victoria Tower I*)). The purpose of the rule is to allow developers to fix the rules that will govern their land development. (*West Main I*, 106 Wn.2d at 51).

Adams v. Thurston County, 70 Wn. App. 471, 855 P.2d 284 (1993). The Hearing Examiner agrees that *Adams* adequately describes the vested rights doctrine as codified in RCW 19.27.095. However, vesting is not without limits. We must define what activity (or set of activities) is covered within the scope of vesting. In RCW 19.27.095, the Legislature stated that *the building permit for a structure* is vested once a complete application is filed.² PDS argues that the building permit application provides vested rights for other, later permit applications relating to the same property. In this case, PDS considered the Grading Permit, filed in November 30, 2009, to cure a code enforcement violation committed by the Applicant in June of

² For subdivisions, however, the Supreme Court has held that the right that vests is, "the right to have *the uses disclosed in [the applicant's] application* considered by the county or local government under the laws in existence at the time of the application." *Noble Manor v. Pierce County*, 133 Wash.2d at 283, 943 P.2d 1378 (1997); *New Castle Investments v. City of LaCenter*, 98 Wn. App. 224, 989 P.2d 569 (1999).

2009, as part of the five Building Permit applications that vested on September 18, 2007. The Hearing Examiner concludes that PDS erred in making such a determination.

Under the plain language of RCW 19.27.095, the activity vested by the Applicant's Building Permit application was *the right to build a residential structure*. As such, a Grading Permit filed in 2009 could not have been subject to the vesting provided for the 2007 Building Permit.

4. In order to obtain a building permit for a single-family residence, a person must file a Residential Application meeting the requirements of SCC 30.52F.168. It provides:

To obtain a permit, the applicant shall first file an application in writing on a form furnished by the department for that purpose. Building permit applications shall comply with the submittal requirements as provided by the department pursuant to SCC 30.70.030. Such application shall:

- (1) Identify and describe the work to be covered by the permit.
- (2) Describe the land on which the proposed work is to be done by legal description, street address or similar description that will readily identify and definitely locate the proposed building or work.
- (3) Indicate the use and occupancy for which the proposed work is intended.
- (4) Be accompanied by construction documents and other information as required in SCC 30.52F.188.
- (5) State the valuation of the proposed work.
- (6) Be signed by the applicant or the applicant's authorized agent.
- (7) Give such other data and information as required by the building official.

SCC 30.52F.188 requires:

Construction documents shall be drawn upon suitable material. Electronic media documents are permitted to be submitted when approved by the building official. Construction documents shall be of sufficient clarity to indicate the location, nature and extent of the work proposed and show in detail that it will conform to the provisions of the residential code and relevant laws, ordinances, rules and regulations, as determined by the building official. Where required by the building official, all braced wall lines shall be identified on the construction documents and all pertinent information including, but not limited to, bracing methods, location and length of braced wall panels, foundation requirements of braced wall panels at top and bottom shall be provided.

(Emphasis added). As noted above, the submittal must identify and describe the work to be covered by the permit. Construction drawings must show the nature and extent of the work proposed and that it will conform to the County's regulations. Id.

Here, each application consisted of a Residential Application Form (which includes required building permit, mechanical permit and plumbing permit applications), detailing the nature of the structure to be built in terms of dimensions, its utilities, bulk and size, and number of bedrooms. See, SCC 30.52F.158 (International Residential Code or "IRC" Section 105.1). The application also included a site plan detailing the proposed residence, its placement on the site, setbacks, driveway and impervious surfaces, access easement, drainfield and reserve area, and buffers from the wetland. The proposed buffers were 75 feet from the residence and 100 feet from edge of the wetland. Nowhere in the Residential Applications or site plan does the

Applicant describe the nature and extent of the work to include grading, excavating or filling of the Hooven Bog for purposes of providing the road access to the five lots.

There is no requirement that a person file a Grading Permit Application to achieve a completed Residential Application. *Id.* Here, the Applicant filed complete applications for five separate Residential Applications (“Building Permits”) on September 18, 2007. The Building Permit Applications did not address the grading and fill issue associated with the code enforcement violation, or any other grading associated with the development of the single-family residences. (Testimony of Howard Knight; Exhibits 19-3, 19-4, 19-5, 19-6, and 19-7) No such activities are disclosed in any of the five Building Permit Applications. Assuming that Loveless and Dillon, Inc. had disclosed the illegal filling and grading activity within the building permit applications, the activities were not “permitted under the zoning or other land use control ordinances in effect on the date of the application” as required by RCW 19.27.095 and, therefore, vesting could not have occurred.

5. The Applicant argued that the grading activity was omitted because they believed that any grading that was necessary for development of the site was exempt from permit requirements. (Testimony of Gene Miller) However, no good faith reading of the County’s Grading Code could lead to such a conclusion because the activity occurred within the waterway of a bog, which is an obvious critical area. Virtually every exemption in SCC 30.63B.020 provides that the exempt activity *cannot* occur within a critical area. The activity was not exempt and would have been prohibited, absent Loveless and Dillon’s illegal activity. Even if the building permit statute granted broader vesting rights, the vested rights doctrine still would not cover illegal activities as a matter of public policy.
6. In addition, as discussed above at Finding of Fact No. 20, PDS treated the Grading Permit as an application separate and apart from the building permit process, as evidenced by the discussion between PDS and the Applicant on curing the code enforcement violation. (See, Exhibit 19-25; Testimony of Howard Knight) The site plan approved for the Grading Permit (Exhibit 19-60) clearly shows that the grading activity approved after the code violation was only related to the access easement area, and not any of the building lots. Accordingly, the Hearing Examiner concludes that the grading and filling activities related to the code enforcement matter were not within the scope of the Building Permits. Therefore, the Grading Permit was not vested to the regulations in effect on the date that a complete Building Permit Application was filed (September 18, 2007). PDS erred when it made that determination. Instead, the Grading Permit should have been given a vesting date of November 30, 2009, when a complete application for that permit was received by PDS.
7. In the alternative, the Appellant also argues that if PDS was correct in determining that the grading permits were vested as part of the 2007 building permits, those vested rights lapsed when the building permits expired in 2012. No court has ever decided this issue. The Hearing Examiner does not decide this issue, as it is not necessary to resolve this case.
8. In light of the entire record, the Hearing Examiner concludes that the Appellant has met his burden of proof to show that PDS incorrectly determined the vesting date for the subject grading permit application. The Grading Permit was not reviewed under the regulations that were in effect on the date of vesting. In particular, the County’s Critical Areas Regulations set forth in Chapter 30.62A SCC apply to the subject Grading Permit and the project was not reviewed under, and does not comply with, those regulations. Therefore, the decision of PDS granting approval of the Grading Permit was in error and should be reversed. The Hearing Examiner concludes that the appeal as to issue Nos. 4.4, and 4.5 should be granted. (Exhibit 1)

9. As to appeal issue No. 4.1, Appellant alleges that PDS failed to provide proper notice to them as a party of record as to changes or modifications relating to the permit applications for the subject property. SCC 30.71.030 governs the administrative process of review of a Grading Permit (which is a Type 1 permit). That Section provides:

A Type 1 permit or decision is administratively made by the department. When a complete application is filed, the department provides notice of application, accepts written comments, and then issues a decision approving, approving with modifications or conditions, or denying the application. The department's decision is appealable to the hearing examiner, or, for a shoreline substantial development permit, shoreline conditional use permit, and shoreline variance, to the state shorelines hearings board. The hearing examiner's decision on appeal of a Type 1 application is the final county decision. Further appeal may be taken pursuant to a land use petition filed in superior court. For shoreline appeals, the state shorelines hearings board acts in place of the county hearing examiner.

Once permit review is completed, the County Code requires PDS to provide notice of the decision as specified under SCC 30.71.040. Appellant presented no evidence or argument in support of appeal issue No. 4.1, demonstrating what information is required beyond the broad language of SCC 30.71.040. Accordingly, the Examiner concludes that the Appellant has failed to meet his burden of proof to show by a preponderance of the evidence that PDS failed to comply with SCC 30.71.030. The appeal as to issue No. 4.1 should be denied.

10. As to appeal issue No. 4.2, Appellant alleges that the Notice of Decision for the Grading Permit (Exhibit 19-72) is vague and does not refer to a site plan or other document. SCC 30.71.040 governs the notice required for Type 1 decisions. It provides:

- (1) Written notice of a department decision on a Type 1 application shall be mailed to the applicant and all parties of record in the manner prescribed in SCC 30.70.045. The notice may include a written staff report if one has been prepared.
- (2) The notice shall specify the appeal process and time period for filing an appeal.
- (3) The county may provide additional public notice of a decision by notifying the news media and community organizations, placing notices in appropriate regional, neighborhood, ethnic, or trade journals or neighborhood/community newspapers, or by publishing notice in agency newsletters or on the county or department web page.

The Hearing Examiner concludes that SCC 30.71.040 provides no specific content requirements when it comes to the issuance of a Notice of Decision. PDS agreed that Exhibit 19-60 is the approved site plan for Grading Permit No. 09-108271. (Testimony of Howard Knight) Mr. Knight admitted that the site plan had incorrect labels placed on the Native Growth Protection Areas, reading "Buffer Disturbed Area" instead of the phrase, "Buffer Reduction Area." Id.

The Notice of Decision states that the activity reviewed ". . . includes 300 cubic yards of excavation and fill in order to rectify a grading violation within an existing access driveway and to extend the driveway to access 5 existing lots." (Exhibit 19-72) However, Mr. Knight admitted that Exhibit 19-60 is to be used in conjunction with more than just the Grading Permit. It is also

the site plan for a Forest Practices Permit and LDA permit also filed by the Applicant. (Testimony of Howard Knight). However, he stated that the only grading activity authorized by GP No. 09-108271 was that grading described above, which was necessary to cure the code violation. The Hearing Examiner concludes that this description of grading, coupled with the site plan, is sufficient to meet the requirements of SCC 30.71.040. The Appellant has failed to cite to any Code provision that would require more specificity than that set forth in Exhibits 19-72 and 19-60. Accordingly, the Hearing Examiner concludes that the appeal as to issue 4.2 should be denied. Although this issue should be denied, PDS must correct the site plan labels as to the critical areas relating to the Buffer Reduction Area to avoid confusion if the site plan is used for other permitting purposes.

11. As to appeal issue No. 4.6, Appellant argues that the Grading Permit (and other permits not before the Examiner) should either be denied or not be processed because they are “part of one development permit action” relating to the building permits, which have now expired. Appellant argues that to do so would violate the principle of “piecemealing of permits,” citing *Merkel v. Port of Brownsville*, 8 Wn. App. 844, 509 P.2d 390 (1973). However, the Hearing Examiner finds that the prohibition on piecemealing review of permits is a doctrine that relates solely to SEPA. (See, Ch. 43.21C RCW) SEPA was not appealed in this case and the Hearing Examiner concludes that the doctrine is not applicable in a grading permit appeal where SEPA is not at issue. Accordingly, the Examiner concludes that appeal issue No. 4.6 should be denied.
12. As to appeal issue No. 4.7, Appellant argues that the Grading Permit and other permits considered on the subject property are for a project subject to DOE’s Construction Stormwater General (NPDES) Permit and work cannot be approved or proceed until such a permit is issued. The parties agree that such a permit is required. (Exhibit 24) However, Appellant fails to cite to any specific County Code(s) or State laws or regulations that require PDS to refrain from completing its permitting process until DOE issues an NPDES permit. SCC 30.63B.040 requires applicants for grading permits to comply with other laws and regulations, despite the issuance of an approved grading permit, but does not require a stay of the permit pending those other approvals. The Hearing Examiner concludes that Appellant has failed to meet his burden of proof to show such an action violated the County Code. Accordingly, the Examiner concludes that appeal issue No. 4.7 should be denied.
13. As to appeal issue No. 4.8, the Appellant argues that the Hooven Bog is a lake more than 20 acres in size and is, therefore, subject to the County’s SMP development regulations; and no development can proceed until required SMP permits are issued. PDS demonstrated that the Hooven Bog was not designated as a lake by DOE through rulemaking as of November 30, 2009, when the Grading Permit application vested. (Exhibit 28) Although the Hooven Bog lake is now considered a “shoreline” within the meaning of the County’s newly adopted SMP, PDS also demonstrated (Exhibit 28) that the regulations have been appealed and, therefore, are not yet in effect pursuant to RCW 90.58.190(4). As a result, the SMA regulations do not apply to the Grading Permit Application. Accordingly, the Examiner concludes that appeal issue No. 4.8 should be denied.
14. As to appeal issue No. 4.9, Appellant argues that no sedimentation and erosion control plans or SWPPP has been submitted or approved by PDS as required by County ordinances. PDS responded that these documents were not required because the Grading Permit was an “after-the-fact” approval of work that had already been done. (Testimony of Howard Knight) Appellant fails to cite to specific Codes that may be violated by PDS’s failure to require such documents. The Hearing Examiner concludes that Appellant has failed to meet his burden of proof to show

such an action violated the County Code. Accordingly, the Examiner concludes that appeal issue No. 4.9 should be denied.

15. As to appeal issue No. 4.10, Appellant argues that the Grading Permit will result in harm to the Hooven Bog, contrary to the terms of the Snohomish County Ordinances. Although the reference to "County Ordinances" is vague, the Examiner concludes that the Appellant is referring to Chapter 30.62A SCC, the Critical Areas Regulations. As noted in Finding of Fact No. 30, Appellants presented Dr. Sarah Cooke, of Cooke Scientific, an expert specializing in bogs, fens and wetlands, in support of this claim at the appeal hearing. Dr. Cooke testified that bogs are very sensitive to any disturbance in the area. As to the Grading Permit, Dr. Cooke testified that the buffers provided for the critical area are too small in light of best available science to provide the needed protection to the Hooven Bog. The buffers should be a minimum of 300 feet in size. She testified that one of the "harms" resulting from grading on the access easement includes soil compaction, which occurs when heavy equipment is run over the peat soils. She stated that this changes the groundwater regime connected to the bog. In addition, Dr. Cooke testified that the illegal cement was placed in the bog and remained for 1-1/2 years before most of it was removed. She testified that calcium carbonate is the worst possible thing you can place into a bog. It dissolves acid and the calcium ions travel through groundwater into the entire system damaging and ultimately, killing the sensitive vegetation. She noted on cross-examination, that although most of the cement was removed, some remains with crushed gravel on top of it and is still leaching into the Bog. Neither the Applicant nor PDS offered evidence refuting Dr. Cooke's testimony demonstrating harm to the Bog.

Appellants have shown that the grading activity did cause "harm" to the Bog; however, the Grading Permit was issued as an "after-the-fact" approval of illegal activity. The Permit did not require complete removal of the calcium carbonate and does not specify NGPAs that meet the requirements of Chapter 30.62A SCC. Additionally, the Permit did not specify any required mitigation or restoration activities to eliminate the "harm" caused to the Bog in violation of SCC 30.63B.040, 30.62A.150 and 30.62A.310 and 30.62A.320. This was in error. Accordingly, the Hearing Examiner concludes that the Decision issuing a Grading Permit to Loveless and Dillon, Inc. was made in error and should be reversed. Appeal issue No. 4.10 should be granted.

16. As to appeal issue No. 4.11, Appellant argues that the Grading Permit will result in a net loss of critical functions and values in violation of SCC 30.62A.310(2). The Hearing Examiner concludes that in light of the testimony provided from Dr. Cooke, and the analysis presented in Conclusion of Law No. 15, the Appellant did prove by a preponderance of the evidence that the impacts to the Hooven Bog permitted by the Grading Permit, without adequate protection, mitigation and restoration, result in a net loss of critical functions and values in violation of SCC 30.62A.310(2). Accordingly, the Hearing Examiner concludes that the Decision issuing a Grading Permit to Loveless and Dillon, Inc. was made in error and should be reversed. Appeal issue No. 4.11 should be granted.
17. As to appeal issue No. 4.12, Appellant argues that the driveway permit (LDA Permit) is designed as a "secondary access" to the property in question, but in fact is actually the primary access, meaning that all EDDS standards must be met. The Hearing Examiner concludes that this issue is not before the Examiner in this appeal, as the LDA Permit has been dismissed for failure to pay the required filing fee. Accordingly, the Examiner does not address this issue.
18. Any Conclusion of Law that should be determined to be a Finding of Fact is hereby adopted as such.

DECISION AND ORDER

The Appeal is **GRANTED IN PART** and **DENIED IN PART**.

As to appeal issue Nos. 4.1, 4.2, 4.6, 4.7, 4.8, 4.9, and 4.12, **the appeal is denied.**

As to appeal issue Nos. 4.4, 4.5, 4.10 and 4.11, **the appeal is granted.**

Appeal issue No. 4.12 is **dismissed as moot.**

The Grading Permit known as File No. 09-108271 is reversed and remanded to PDS for processing under the laws and regulations in effect on November 30, 2009. Any Critical Area Site Plan (CASP) recorded pursuant to Grading Permit File No. 09-108271 shall be null and void.

Decision issued this 13th day of December, 2012.



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 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 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 December 24, 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 RCW 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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