



MARYSVILLE HEARING EXAMINER

September 8, 2011

7:00 p.m.

City Hall

CALL TO ORDER

The meeting was called to order by Hearing Examiner Ron McConnell at 6:57 p.m.

ATTENDANCE

Staff: Cheryl Dungan, Planning Manager - Land Use
Gloria Hirashima, Chief Administrative Officer
Laurie Hugdahl, Recording Secretary

PUBLIC HEARING

PA10013 - Qwuloolt Estuary Restoration Project - Appeal of the July 20, 2011 City of Marysville Administrative Shoreline Substantial Development Permit approval to allow the following: prepare staging areas; excavate connection to Allen & Jones Creek(s); creation of internal berms for protection from wave energy; stockpiling of material; cathodic protection of sewer trunk line; construct water quality treatment wetland; excavation of outlet channel; raise portion of city trail; private drainage system adjustments; and Phase 1 Christofferson grading project.

Applicant: The Tulalip Tribes of WA
Kurt Nelson
7515 Totem Beach Road
Tulalip, WA 98271

Location: North of Ebey Slough, south and west of Sunnyside Blvd, east of 47th Ave NE

Hearing Examiner McConnell explained that this was the continuation of the Public Hearing on Case No. PA10013. On August 11 he heard the Conditional Shoreline Substantial Development Permit portion of the hearing. Tonight he will hear the Appeal portion. When the hearing is complete he will prepare one report that addresses both the Conditional Shoreline Substantial Development Permit and the Appeal portions of the case. Since the last hearing he has received additional exhibits numbered 131 through 144. Also, tonight he received an additional memo

from John and Jane Mack dated September 8, 2011 entitled *Request to Respond to Testimony*. Hearing Examiner McConnell reviewed the process from this point forward. Tonight's hearing is for the purpose of looking at grounds based on MMC 22G.010.530 - *Appeal of Administrative Interpretations and Approval*. This gives the grounds for appeal and gives him guidance to follow to determine:

- If the Community Development Director exceeded her jurisdiction in making this determination,
- If she failed to follow the applicable decision in reaching her decision,
- If she committed an error of law or misinterpreted the applicable city regulation, ordinance or other state law or regulation,
- If the director's findings, conclusions or conditions are not supported by the recorded, or
- If newly discovered evidence alleged to be material to the director's decision prior to the determination.

John Mack 15316 77th Ave NE Arlington WA 98223, expressed concern about not having time to respond to the Tribes' response. He requested more time to be able to prepare an adequate response. Hearing Examiner McConnell stated that he would need to consult with the Applicant about Mr. Mack's request for a Continuance.

Kurt Nelson, representative for the Tribes, stated that they have already addressed the issues Mr. Mack has raised. They have not given any new information and neither has Mr. Mack. He feels there has been sufficient time. Hearing Examiner McConnell concurred that there was no new information in the responses.

Mr. Mack stated that he has not been privy to the prior information that they were referring to. Planning Manager Dungan stated that Mr. Mack had been on the mailing list and also that the file is public record. Mr. Mack stated that he just recently became aware of his right for review of public documents. Hearing Examiner McConnell reiterated that that none of this is new information. Mr. Mack requested that the Hearing Examiner read his letter that he had submitted before making a decision.

The Hearing Examiner recessed the meeting at 7:10 p.m. to read Mr. Mack's letter. The meeting reconvened at 7:11 p.m. Mr. McConnell reported that the issues Mr. Mack raised in the letter were variations and themes of issues he had raised already. Hearing Examiner McConnell commented on the fact that he did not have authority on federal, state or tribal matters. Mr. Mack stated that he has been confused about who does have jurisdiction. Hearing Examiner McConnell stated that he can only focus on what the City's rules are. He stated that that he rejected the request for a continuance and commented on the lack of specific facts in the original appeal.

Staff Presentation:

Planning Manager Dungan reviewed the Project Description, Staff Response to Appellant's Contentions, and Staff Recommendation as contained in the *Staff Recommendation* dated August 31, 2011. Staff is recommending that the Hearing Examiner uphold the *July 20, 2011 Administrative Shoreline Substantial Development Permit Approval*.

Mr. Mack asked about the dyke easement. Planning Manager replied that the Tribes are required to either acquire the property or obtain flood easements over the property prior to inundation. This is already one of the City's required conditions. Hearing Examiner stated that all the conditions must be met before the project begins. Planning Manager Dungan stated that there was a condition in the Conditional Shoreline Permit that addressed property ownership or acquiring flood easements prior to construction. She added that the Tribes are allowed to construct on areas where they have other easements or property under their ownership.

Public comment:

John Mack, 15316 77th Avenue NE, Arlington, WA 98223, stated that he has provided a written response requesting more time since he has only had two days to prepare a response to the request he received from the Tribes.

Applicant:

Kurt Nelson, Environmental Division Manager, Tulalip Tribes Natural and Cultural Resources Dept., 6406 Marine Drive, Tulalip, WA, concurred with the evaluation that the City provided in regards to the Appeal. He added that the Tulalip Tribes Shoreline Substantial Development Permit that was appealed allows for ten actions to take place on the site. None of these actions on the permit will create the problems that John Mack has suggested in the Appeal that will occur. They are not breaching the dyke or flooding the property. This project has been in planning and design since 2004. They have performed wetland assessments, cultural resource assessment, vegetative assessments, geotechnical assessments, a groundwater assessment, and modeled hydrodynamics one-dimensionally and three-dimensionally to help them determine how the area would respond to the tidal influences and to help them design the project elements to protect City of Marysville residents and infrastructure. The project designs have been designed by the Tribes' consultants, but have been reviewed by the Army Corps of Engineers and its independent consultants. All the assessments are in the Exhibits which are part of the record. He invited anyone to visit the Marysville mitigation site at the mouth of Allen Creek to observe what has happened at that particular location. He discussed the many public benefits to this project. He summarized that they believe they have adequately addressed the concerns expressed by Mr. Mack as they relate to the Substantial Shoreline Permit. They also believe that the project design, modeling, site investigations and extensive reviews by experts that went into design

adequately address the landowners' concerns. They requested that the Shoreline Permit be approved.

Erick Stockdale, Wetlands and Federal Permitting Unit Supervisor, Washington State Department of Ecology, 3190 160th Ave SE Bellevue, WA 98008, stated that the DOE feels that these kinds of projects are critical for the recovery of Puget Sound. This is why they have invested time, energy, and financial support for this project. He commented on the enormous amount of material in the record. Although the issues that Mr. Mack has raised don't pertain to the ten actions allowed under the administrative approval, the questions that he has asked have already been asked and answered. He stated that the biggest risk of this is the safety of the levee. The Corps of Engineers has been working with the Tribes on the design and implementation of this. They will also be involved in the actual construction of the levee. He referred to the significant benefits to the City and its citizens in terms of increased flood protection, increased property values in the area, and benefits to habitat, improved water quality, aesthetics, passive recreation and green infrastructure. Additionally, they are structuring an agreement with the City that 14 acres that the City owns will be turned into advanced mitigation area that the city will be able to use for small wetland impacts. He commented that because of the timing of the Appeal, the project has been delayed for a year and the benefits to the Sound will also be delayed for a year. He emphasized that they are more than willing to purchase the property from Mr. Mack, with or without the uplands, but they are limited by market value. Mr. Mack has rejected the establishment of the value of the property based on an appraisal. Mr. Stockdale stated that they have a legally binding easement on the property and they do not need to buy the property in order to start building.

Mr. Mack asked for the Tribes' response to wetland mitigations (Exhibit 141). This was provided to him. He discussed an apparent contradiction in the response about the site not being used for mitigation and then that it is being used for mitigation. He stated that this is one example of an issue that he needs more time to respond to.

Mr. Nelson clarified that the issue referred to by Mr. Mack was only the Tribes responding to Mr. Mack's allegations. He stated that he had clearly stated at the last hearing that some of the area would be used for mitigation. Mr. Mack argued that the comments did not accurately reflect his comments.

Chris Lundberg, 5015 60th Avenue NE, Marysville, WA, commented that there has been a lot of work done to make sure things are done right. He concurred with Mr. Mack's concerns about not having enough time. He wondered who was in charge and if there would be a hotline that homeowners can call if there is a problem. CAO Hirashima stated that people can call either the City of Marysville or the Tulalip Tribes. Mr. Lundberg expressed concern about the smell at the wetland mitigation site and the fact that once the project is done it will be too late if there is a problem.

He generally spoke in support of the project, but wanted to have protection in case something goes wrong.

Josh Meidav, Restoration Ecologist, Tulalip Tribes, 6406 Marine Drive, Tulalip, WA, raised the question of whether or not anyone would be able to separate the smell of the sewage treatment plant from the wetland mitigation site.

Mr. Mack pointed out that Ms. Hirashima had acknowledged that they are anticipating problems. He expressed concern about the encroachment on private property that this project presents in terms of smells, rodents, etc. Hearing Examiner McConnell replied that with any project there will be issues and this is no different. If something happens, the City will try to address it. Mr. Mack requested a cement wall all the way down to hardpan to prevent any saltwater infiltration of his property. He asked the Tribes if this had been considered. Mr. Mack stated that they are only 35% completed with the design and that it had not. Mr. Mack asked if this is generally something that is done.

Steve Winter, ESA Consultants, 509 Shilshole Ave NW, Seattle, WA, stated that they have definitely looked at saltwater intrusion. They will be reintroducing tidal water to the site and the tidal water will be engaging the face of the levee on a daily basis. He reiterated that their levee design is only 35% completed. Certain elements have not been nailed down yet such as what needs to go into the levee.

Mr. Mack asked if there is a possibility of saltwater infiltration. Mr. Winter commented that they will be looking at the way the water moves and the impact of that movement. Based on their initial work, they are looking at a lot more fresh water coming from precipitation on the outboard side of the levee than they would be looking at infiltration of saltwater. The northern area of the site on the outboard side of the levee will be part of a new drainage system that will be developed over there to drain south past the industrial area into the stormwater detention facility that is also being designed right now. Mr. Mack expressed concern that he would receive saltwater infiltration on his property as well as elevated groundwater levels. He asked if they would consider this a trespass on his property. Mr. Winter disagreed that there would be elevated groundwater levels on his property. He reiterated that this is one of the key design parameters that they will be looking at. Mr. Mack argued that it was *possible* and that it would create a trespass on his personal property.

Mr. Lundberg asked if this project would exacerbate property that already has a problem draining. Mr. Winter explained that it depends on the area under discussion. They have looked closely at drainage especially in the southeastern side. Areas that already have drainage issues will not be any better, but they are working to make sure that it is not any worse. They have looked at all the drainage systems there and are designing retrofits onto those to make sure the outlets will still function under tidal and flood conditions.

Erick Stockdale stated that he worked with the developer for what used to be the Portenga farm who sold them an easement for the 12.7-foot elevation. Tidal waters will not come anywhere near the property boundaries in that area as a result of the foresight that the developer had.

Josh Meiday clarified that the Tribes' interpretation of the mitigation issue was correct. He referred to the last sentence of Mr. Mack's letter of August 4, which implies that Mr. Mack does not believe is currently part of the project. This explains the Tribes' understanding and the subsequent response regarding the mitigation.

Mr. Mack disagreed with this interpretation. He argued that there is a possibility that this project would result in a trespass on his property. He again requested a Continuance for 30 days to allow him time to form an adequate response.

Hearing Examiner McConnell reiterated his denial of the request for a Continuance and stated while he fully understood the concerns raised by Mr. Mack, he did not think that 30-days would make a difference in this situation.

Planning Manager Dungan commented that in this instance any appeal to the Hearing Examiner Decisions would be appealed to the Shoreline Hearing Board and then to the Superior Court.

ADJOURNMENT:

Hearing Examiner McConnell closed the hearing at 8:29 p.m. and stated he would have a determination out very shortly.



Laurie Hugdahl, Recording Secretary