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APR 30 2013
SKAGIT COUNTY
PDS

April 30, 2013

Wick Dufford, Hearing Examiner
Skagit County Office of Land Use Hearings
1800 Continental Place
Mount Vernon, WA 98273



For H.E. JAH
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SKAGIT COUNTY
PDS

John Cooper, Planner/Geologist
Skagit County Planning & Development Services
1800 Continental Place
Mount Vernon, WA 98273

Re: **Skagit County Dike District No. 12; Shoreline Substantial Development Application
PL12-0144; Supplemental Comments Re Extension of Comment Period**

91 JMS.

Dear Mr. Dufford and Mr. Cooper:

This matter went to Hearing on April 24, 2013, on the above matter involving Skagit County Dike, Drainage and Irrigation District No. 12 and a Substantial Development Permit PL12-0144. This permit was submitted on July 9, 2013 by Skagit County Dike District No. 12. The required hearing was heard by the Hearing Examiner on April 24, 2013. In addition, at the end of the Hearing the Hearing Examiner extended the comment period for one additional week. Please accept the following as additional and supplemental comments on behalf of Skagit County Dike, Drainage and Irrigation District No. 12.

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I. BACKGROUND

At the Hearing, there was testimony in favor of the permit for the Dike District 12 by John Semrau, of Semrau and Associates, Dike District 12's engineer, and the Dike District's attorney John R. Shultz, along with Dan Lefeber, Operations Manager of Dike District 12, and Margaret Fleek, Planning Director for City of Burlington. The County read the staff Findings of Fact, and a number of witnesses testified for and against issuance of the permit.

By way of history, this matter was published initially on November 22 and 29, 2012, providing 30 day comment period to all affected property owners which ended on December 28, 2012. Pursuant to SCC 14.06.150(2)(b)(viii), the Notice of Development Application must include a 30 day comment period. After publication, the notice provided in this case closed on December 28, 2012. At the Hearing, the County noted that two comments were received on January 2, 2013, which were after the closure of the comment period.

Accordingly, these comments were not made timely and should be rejected for consideration in the final decision. Further, it appears that the two comments, by Dike District 20 and by DeVries

Dairy are essentially one and the same entities. These in reality should be considered as only one comment, but should be rejected in any event because of the lack of timely filing.



II. OBJECTION TO APRIL 22, 2013 COMMENTS

In addition, a second Notice for the Public Hearing of April 24, 2013 was published. This allowed additional comments until April 23, 2013. Another comment was then received by the County on April 22, 2013, from Larry Kunzler who was not able to appear or speak at the Hearing. The Hearing Examiner at the Hearing accepted these comments as testimony, rather than as comments.

The comments, comprising 23 pages, were extensive and Applicant Dike District had little time to review and refute the claims which were submitted on April 22, 2013. In addition, after review, it was apparent that these comments contained personal attacks, hyperbole, opinionated criticism, and false and defamatory accusations against the Applicant. Much of the comments appear to be based on personal opinions and character attacks, rather than evidence and factual information to assist the Hearing Examiner in reaching a decision.



If these comments as submitted are accepted as testimony, they were not subject to having the witness sworn in, with testimony under oath, and assurances that the comments were to be accurate and truthful. Without testimony under oath, this allowed the comments to include statements of exaggeration, hearsay, misinformation, and false allegations against the Applicant and its foremen and present Commissioners. These comments even state on page 2 of 23 that: "It is with a great sense of personal outrage that I submit these comments to the Honorable Hearing Examiner regarding the above listed permit application." False allegations of illegal activities of the current Applicant are then made, including work and filling without a permit. These allegations were also made by another speaker at the Hearing.




In addition, the commentator noted that he was unaware of the need to file comments until April 19, but at the same time noted that on February 25th he had met with Planning Department representatives to look at all active files regarding permits. At that time, the published notice of November 2012 should have been in the file for review.



Any claims that work was done without a permit are false. There were numerous permits during this entire process. This was testified to by Margaret Fleek with the City of Burlington, and John Semrau of Semrau Engineering, both of whom have been involved in this project for many years, and since 2003. Any claims alleging illegal activity by the Applicant entity, or present Commissioners are false and defamatory. The testimony was clear at the Hearing that all necessary permits were obtained, and under the work and consultation of three different engineering firms, the City of Burlington, and the Army Corps of Engineers.


At the Hearing, there was considerable evidence, both testimonial and documentary and including the City of Burlington's issuance of a Substantial Development Permit in July of 2012, as well as evidence of other Fill and Grade Permits during the project. There was testimony and evidence regarding the following:


1. Fill and Grade Permit BP07-0267 on March 15, 2007 and issued for construction May 15, 2010; BP07-0267 expires on May 14, 2013, with a six month extension recently filed.
2. Fill and Grade Permit BP03-0564/BP06-0817 with Shoreline Exemption PL03-0487 submitted on May 16, 2003, reissued on July 27, 2009.
3. Fill and Grade Permit BP07-1051 submitted on August 24, 2007 issued November 5, 2010 and will expire on November 14, 2013.

In reference to additional comments submitted by the commentator on April 22, 2013, he notes at page 3 of 23, an allegation of placement of fill in areas without permits. These allegations are false, as the District had permits at the time. Moreover, this activity relates to a different area, and is not relevant to the current permit under consideration. 


Also, at page 6 of 23 it is noted that the “entire location of the proposed project sits atop volcanic lahars.” This is not completely accurate and is misleading, and was studied extensively in a 393 page Report by Golder Associates, dated November 20, 2009.


On page 7 of 23 of these comments, there is the accusation that: “The fact is that DD12 got caught putting fill in the floodplain in the below newspaper article without a permit and decided it was time to apply for a permit, something they clearly in the past were not used to doing.” This is a false and defamatory accusation against the Applicant Dike District, including former and current Commissioners. In fact, the newspaper article dealt strictly with what was referenced in the title: “County could ask cities, dike districts for money to advance flood study.” This dealt with a request by the County for funding for the GI Study, which by this time had been continuing for over 20 years, without any completion. In fact, it was DD12 that invited the newspaper onsite to do the article. **This article does not have a single reference to improper placement of fill, lack of permits, or past practices in obtaining a permit.** The commenter’s accusations falsely and completely mischaracterize the content of the article. This comment should be completely and summarily rejected.

On page 9 of 23, the commenter again, based on his “personal opinion” reiterated that he had commented extensively, including 20 pages of comments in the original DEIS. Recently, however, he claims that he and others were not notified regarding the Hearing or the project. If the commenter had submitted over 20 pages of detailed comments in the original DEIS, and had reviewed the DEIS, he should have had prior knowledge about the current project which was also contained in the final EIS. In conjunction with new notices published November 2012 and April 2013 this should have provided ample notice of hearing, and time to comment or testify. 

On page 12 of 23, the commentator notes that fill is prohibited in floodways, and the Applicant’s proposal should be denied. However, if properly permitted, fill is not prohibited for construction of levees, as it is the levee which defines the area of the floodway. The levee is the controlling feature of the floodway, and the fill and engineering design in the present permit have been fully analyzed and approved by a number of engineers, the Army Corps of Engineers, the City of Burlington, and Skagit County. The permit should be approved, given the fact that Skagit 

County PDS has agreed that the design, project and permit all comply with appropriate regulations and permit requirements.

Accepting these particular comments as testimony, without having them made under oath renders the current process prejudicial to Applicants, who have followed the rules and properly submitted evidence and testified under oath. Allowing those comments as testimony taints the integrity of the process due to the fact they were not made under oath, based, in the commentator's own words on his "personal outrage" and including false accusations. This goes to the weight of the comments and testimony, and the fact that false statements, unfounded allegations, misquotes, and misleading information can be avoided if testimony is made under oath, and is accurate and reliable. 

However, if not under oath, then unsubstantiated and unfounded claims should be viewed as unreliable and not be given the weight of credible and believable testimony, as would be statements under oath. Applicant would request that these comments, in fact, should be stricken in their entirety, given the partisan and opinionated nature of claims, as they are prejudicial to the Applicant, and not helpful to the Hearing Examiner in making a reasoned and objective decision.  At the very least, the Hearing Examiner should judge the weight of this evidence as merely comments by an Angry Citizen which appear to be motivated by personal animus, and not testimony under oath, and in the final decision, give these comments little weight or credibility.

III. OBJECTION TO REQUEST FOR DELAY RE GI STUDY

The County had made one reference to delaying this project pending the completion of the GI Study. At the Hearing there was testimony about the long-term nature of the Army Corps General Investigation Study. This has gone on now for over 20 years without even a project identified, after costing millions of dollars in continual study, and with no conclusion or benefits. The recent three year "reset" with the Corps is now going into its second year, and still has not identified a project. The future is uncertain, but even if somehow results are obtained after further study, final approval of a project, submission of a USACE Chief's Report at USACE HQ, and then approval by Congress, allocation of funding, and release of funding, there will be substantial prejudice in delaying this matter another three years.

Permits have been obtained costing many thousands of dollars, and will require renewal at indeterminate times, because of continuing uncertainty. Further there will be the obvious exposure to additional flooding possible during the next three years, and protection of valuable infrastructure in the County. Substantial improvements have now been made regarding widening and raising the levee only to existing heights, and no levee will work with incomplete segments unless it can be allowed to be completed for the entire engineered length. Any gap in the completion of a levee renders the remaining structure ineffective.

Time is of the essence, flood disasters do not follow timetables set by the community, and this work simply must be completed without further delay. The Dike District would ask the Hearing Examiner to reject any requests or requirement that this project be delayed, and least of all delayed for the completion of a tenuous and previously-proven ineffective process with the

Wick Dufford, Hearing Examiner
John Cooper, Planner/Geologist
April 30, 2013
Page 5

Corps, which is ultimately subject to Congressional appropriation of monies which the Corps does not have. An ounce of prevention at the present is worth a pound of cure which may not occur even in the distant future.

In addition, in the Dike District's case, deadlines are running for additional permit filings, which could result in costly delays in not only permit fees, but delayed maintenance or the ability to protect the levees, within the appropriate work periods or fish windows. Also, additional delays inject uncertainty in time periods, commencement of work, and whether or not extension of permits are necessary, and the timing during which those permit applications should be made and work performed.

IV. CONCLUSION

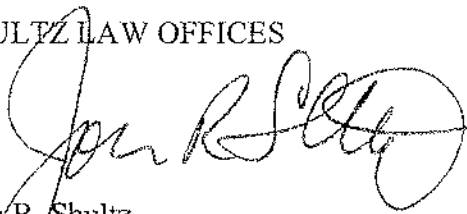
In reference to comments and testimony already received, and as noted in the Hearing, all of these comments were also received as part of the EIS, and were considered in the final decision on the EIS, and in the Staff Findings for this permit. Additional delays, and review of issues already resolved should not stop progress on this permit, and further delays are damaging to the community in terms of lost opportunity for flood control, maintenance and disruption of significant work already done and approved by City of Burlington, numerous Engineering firms and the Army Corps of Engineers.

It should be further noted that the issue at hand is approval of the Substantial Development Permit, and not the EIS which has long-since been approved. Testimony at the Hearing was that the County has found all submissions of the Applicant Dike District's permit to be in compliance with laws and regulations of Skagit County and would recommend approval of the Shoreline Substantial Development Permit request PL12-0191, subject to remaining conditions which are acceptable to Applicant.

Please call or contact our office, or the Applicant Dike District 12 Commissioners, should you have any further questions or wish to discuss this matter.

Very truly yours,

SHULTZ LAW OFFICES



John R. Shultz
Attorney for Skagit County Dike, Drainage and Irrigation District No. 12
JRS:ees
c:client