

**BEFORE THE HEARING EXAMINER  
IN AND FOR THE COUNTY OF THURSTON**

In the Matter of the Application of	)	
	)	Project # 2010-101170
<b>Maytown Sand &amp; Gravel, LLC</b>	)	
	)	App. No. 11-101509VE
For Approval of a Amendment	)	
Special Use Permit SUPT-02-0612; and	)	App. No. 11-101508VE
	)	
In the matter of the Appeals of	)	
	)	
<b>Friends of Rocky Prairie</b>	)	
	)	<b>DECISION ON RECONSIDERATION</b>
and	)	
	)	
<b>Maytown Sand &amp; Gravel, LLC</b>	)	
	)	
Of the County's January 19, 2011	)	
<u>SEPA Threshold Determination</u>	)	

**SUMMARY OF DECISION**

The Thurston County Resource Stewardship Department's request for reconsideration is **DENIED for lack of jurisdiction.**

**Background**

The above-captioned matters were heard by the Thurston County Hearing Examiner *pro tem* on March 7, 8, and 9, 2011. On April 8, 2011, findings, conclusions, and a decision were issued (the Decision) approving Maytown Sand & Gravel LLC's (MSG) request for special use permit (SUP) amendment, denying the Friends of Rocky Prairie (FORP) SEPA appeal, and disposing of the MSG SEPA appeal as follows. Conclusion II.A.2 stated:

MSG has successfully demonstrated that the proposed changes to the water monitoring conditions would not impact the environment and should not be considered an "action" pursuant to the SEPA regulations, rendering environmental threshold review superfluous. However, it is not clear that the Hearing Examiner has jurisdictional authority to hear challenges to the SEPA Responsible Official's procedural determination of whether a proposal is an "action" requiring SEPA review. *TCC 17.09.160.A; WAC 197-11-680(3)(a)(iii); Chaussee v. Snohomish*

*County Council.*<sup>1</sup> In the event that conclusion II.A.2 is reversed by a reviewing body for lack of jurisdiction or on other grounds, the remaining conclusions are entered based on the evidence in the record.<sup>2</sup> *Decision, page 31.*

On April 18, 2011, Thurston County Resource Stewardship Department (Department) submitted a timely request for reconsideration, arguing that the Conclusion II.A.2 erred in finding that the SUP amendment application was not an "action" for the purposes of SEPA review on two grounds:

1. That interim procedural determinations are outside the scope of the examiner's jurisdiction; and
2. That the SUP amendment was in fact an "action" for SEPA review purposes.

The reconsideration request is limited to Conclusion II.A.2, which disposed of the MSG SEPA appeal. MSG argued no other issues in its SEPA appeal aside from the allegedly unlawful environmental threshold review. The reconsideration request does not challenge the outcome of the Decision with respect to the FORP SEPA Appeal or the SUP Amendment.

### **JURISDICTION**

Pursuant to Thurston County Code (TCC) 2.06.060,

Any aggrieved person ... who disagrees with the decision of the Examiner may make a written request for reconsideration by the Examiner within ten days of the date of the written decision. The request for reconsideration shall be filed with the Development Services Department upon forms prescribed by the Department. If the Examiner chooses to reconsider, the Examiner may take such further action as he or she deems proper and may render a revised decision ... .

However, pursuant to TCC 17.09.160.K,

The decision of the hearing examiner on an appeal of a threshold determination for a project action is final. The hearing examiner shall not entertain motions for reconsideration. The decision of the hearing examiner may only be appealed to Superior Court in conjunction with an appeal of the underlying action in accordance

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<sup>1</sup> TCC 17.09.160.A: Only final threshold determinations in the form of a determination of significance (DS) mitigated determination of non-significance (MDNS), or a determination of non-significance shall be appealable to the hearing examiner... . WAC 197-11-680(3)(a)(iii): Appeals on SEPA procedures shall be limited to review of a final threshold determination and final EIS. *Chaussee v. Snohomish County Council*, 38 Wn. App. 630, 636, 689 P.2d 1084 (1984) "[examiners are] creatures of the legislature without inherent or common-law powers [that] may exercise only those powers conferred either expressly or by necessary implication."

<sup>2</sup> The Applicant requested a full disposition of the issues of both appeals in case of remand. *Hempelmann argument; Exhibit 2b, page 11.*

with RCW 43.12.075, the State Environmental Policy Act, and Section 17.09.160.T of this section.

### **Submittals**

The following submittals were reviewed in issuing this decision on reconsideration:

- The County's April 18, 2011 Request for Reconsideration
- The April 19, 2011 Post-Hearing Order setting a submission schedule for responses and reply to request for reconsideration
- MSG's April 26, 2011 Response to Request for Reconsideration
- Interested Party Port of Tacoma's April 26, 2011 Response to Request for Reconsideration
- FORP's April 26, 2011 Response to Request for Reconsideration
- The County's April 29, 2011 Reply to the Responses

## **DISCUSSION**

### ***I. County's Assignment of Error on Reconsideration***

On reconsideration, the County argued that the only issues appealable to the Examiner in the SEPA context are environmental threshold determinations, e.g., "whether or not an EIS is required for the proposal.... Whether the proposal is considered an action is not an issue the hearing examiner can decide." *Reconsideration Request, page 3*.

The County also reasserted its arguments, offered at hearing, that the proposed SUP amendments were properly considered an action and subjected to environmental threshold review.

### ***II. Reconsideration Not Available in Environmental Appeals***

Pursuant to Thurston County Code 17.09.160.K,

The decision of the hearing examiner on an appeal of a threshold determination for a project action is final. The hearing examiner shall not entertain motions for reconsideration. The decision of the hearing examiner may only be appealed to Superior Court in conjunction with an appeal of the underlying action in accordance with RCW 43.12.075, the State Environmental Policy Act, and Section 17.09.160.T of this section. (emphasis added)

Thurston County Code (TCC) 17.09.160.A states: "Only final threshold determinations, in the form of a determination of significance (DS), mitigated determination of non-significance (MDNS), or determination of non-significance (DNS) shall be appealable to the hearing examiner..."

The County argued (Reconsideration Request, page 3):

Since all of the provisions relating to SEPA appeals are limited to a challenge of threshold determinations, the provision regarding consideration under TCC 17.09.160.K only applied to hearing examiner decisions involving whether to accept or reject the decision that an EIS is not required. The hearing examiner's conclusion that the amendment application was not an action is not a decision involving accepting or rejecting the environmental review officer's decision that an EIS is not required. Accordingly, the limit on reconsideration under TCC 17.09.160.K does not apply to this motion.

In responses to the reconsideration request, MSG and the Port argued that TCC 17.09.160.K bars the County's motion.

### *III. Discussion*

In the MSG SEPA appeal, the sole argument was that the proposed SUP amendment did not constitute an "action" triggering review under SEPA and that review was thus improper.

The effect of the April 8, 2011 Decision was to deny the MSG SEPA. In so doing, the Decision addressed all SEPA arguments properly argued by the parties and upheld the County Responsible Official's environmental threshold determination (an MDNS).

The County did not raise a jurisdictional question as to the Examiner's authority to decide the MSG SEPA appeal at hearing. The jurisdictional question was first raised (by the examiner) in the contested conclusion itself:

...However, it is not clear that the Hearing Examiner has jurisdictional authority to hear challenges to the SEPA Responsible Official's procedural determination of whether a proposal is an "action" requiring SEPA review. *TCC 17.09.160.A; WAC 197-11-680(3)(a)(iii) Chaussee v. Snohomish County Council.*<sup>3</sup> ...

*Conclusion II.A.2, Decision, page 31.* The statement contested by the County was not necessary to the outcome of the decision. It is, in effect, dicta.

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<sup>3</sup> "TCC 17.09.160.A: Only final threshold determinations in the form of a determination of significance (DS) mitigated determination of non-significance (MDNS), or a determination of non-significance shall be appealable to the hearing examiner... . WAC 197-11-680(3)(a)(iii): Appeals on SEPA procedures shall be limited to review of a final threshold determination and final EIS. *Chaussee v. Snohomish County Council*, 38 Wn. App. 630, 636, 689 P.2d 1084 (1984) "[examiners are] creatures of the legislature without inherent or common-law powers [that] may exercise only those powers conferred either expressly or by necessary implication." *Decision, page 31.*

## DECISION AND ORDER

1. The County issued an MDNS and MSG appealed. The contested conclusion represents the disposition of the MSG SEPA appeal. The Examiner lacks jurisdictional authority to consider reconsideration requests on SEPA appeal decisions per TCC 17.09.160.K.
2. The request for reconsideration is **DENIED for lack of jurisdiction.**
3. This decision on reconsideration shall be appended to the April 8, 2011 Decision, along with the submittals identified herein.

DECIDED May 4, 2011.



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Sharon A. Rice  
Thurston County Hearing Examiner *pro tem*