



COUNTY COMMISSIONERS

John Hutchings

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HEARING EXAMINER

Creating Solutions for Our Future

**BEFORE THE HEARING EXAMINER
FOR THURSTON COUNTY**

In the Matter of the)
Request for Reconsideration)
submitted by)

Patrick Townsend, Kathryn Townsend,)
and Anneke Jensen)

of the February 17, 2017 Decision)
Denying an appeal of a May 3, 2016)
Mitigated Determination of)
Non-Significance and approving)
a Shoreline Substantial Development)
Permit for an Intertidal Geoduck)
Aquaculture Operation on private tidelands)
at 930 - 76th Avenue NW, Olympia, WA)

APPEAL No. 16-106159 VE

Project No. 2014108800

Sohn SSDP

Summary of Request

On February 17, 2017, the Thurston County Hearing Examiner issued a decision (Decision) denying the appeal of Patrick Townsend, Kathryn Townsend, and Anneke Jensen of a May 3, 2016 MDNS issued in review of a requested shoreline substantial development permit (SSDP) to operate a geoduck aquacultural operation on 1.1 acres of privately owned tidelands at 930 - 76th Avenue NW in Olympia, Washington. Based on the record created during a three day consolidated appeal and permit hearing and post-hearing briefing, the Decision approved the SSDP with conditions.

On February 27, 2017, Appellants Patrick Townsend, Kathryn Townsend, and Anneke Jensen (Appellants) submitted a request for reconsideration.¹

¹ The attorney who represented the Appellants at hearing did not sign or apparently participate in the request for reconsideration.

Upon receipt of the request, the undersigned offered the Applicant and the County an opportunity to submit responses to the reconsideration request. Legal counsel for the Applicant submitted a response dated March 6, 2017. Noting it concurred with the Applicant's response, the County did not submit a separate response.

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

Pursuant to TCC 17.09.160.K,

Hearing Examiner's Decision on Appeals of Threshold Determinations for Project Actions is Final. 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 43.21C.075, the State Environmental Policy Act and Section 17.09.160T of this section. (emphasis added)

Pursuant to Hearing Examiner Rules of Procedure,

Rule 9.4, Procedure for Reconsideration and Reopening Hearing

....

b. Reconsideration.

- 1) Any party of record may file a written request with the Hearings Examiner for reconsideration within ten (10) days of the date of the Hearings Examiner's recommendation or decision. The request shall explicitly set forth alleged errors of procedure or fact. The request may also include direction to a specific issue that was inadvertently omitted from the Hearings Examiner's recommendation or decision.
- 2) Additional evidence may only be submitted upon a Request for Reconsideration if it is new evidence not available at the time of the public hearing, upon a showing of significant relevance and good cause for delay in its submission. At the Examiner's discretion, parties of record will be given notice of the consideration of such evidence and granted an opportunity to review such evidence and file rebuttal arguments.

- 3) The Hearings Examiner shall respond to the request for reconsideration by either denying the request or approving the request by modifying or amending the recommendation / decision based on the established record or setting the matter for an additional public hearing.

Request For Reconsideration

The request for reconsideration asked the undersigned to reconsider the denial of the appeal of the MDNS and requested that an EIS be required before the project may continue. Arguing that the more than 100 letters and testimony of 17 individuals in opposition to the project were not given "precedence" over the evidence offered by one community member and Taylor Shellfish, Appellants contended that their testimony was ignored.

In the request, the Appellants interlineated comments on many findings in the Decision generally disagreeing with the information as presented in those findings. The comments requested additional information about documents in the record, offered new and repeated previously delivered testimony on various topics, objected to the exclusion of (and reoffered) photos that were not admitted in evidence when offered by Appellants' counsel, re-raised the dismissed appeal issue of tideland boundaries, disapproved of word choices, challenged the reliability of County and Applicant witnesses, and suggested the undersigned do some internet research at specific websites. The request reiterated arguments with regard to the pristine nature of Zangle Cove, plastic aquaculture debris, the visual impacts of the presence of aquaculture gear, and ecosystem impacts. Appellants assigned error to finding 38, contending that Mr. Townsend did calculate the number of hours that the geoduck operation would be visible per day from April through September and disagreeing with the information included in the finding from multiple exhibits. The request contended that the moral/ethical component of the proposal was overlooked and that Appellants' point of view was not considered.

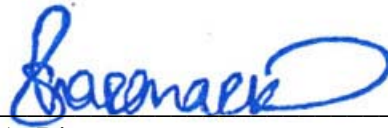
The request did not allege that the record failed to demonstrate compliance with SSDP criteria for approval.

Decision

1. The Appellants' request for reconsideration of the Decision with regard to the MDNS is not allowed by County Code. The SEPA appeal Decision may not be reconsidered. *TCC 17.09.160.K*. Finding 38 addressed the issue of visual impacts in the SEPA appeal.
2. To the extent that the request for reconsideration intended to challenge approval of the SSDP, the request is denied. The comments submitted do not successfully show error of fact or procedure. New information submitted was not supported by a showing that it was not available at the time of the public hearing nor a showing of good cause for delay. Land use decisions are made based on the record presented; examiners are not allowed to instigate and rely on independent research on topics within the scope of a hearing before a Decision is issued or on request for reconsideration. When a shoreline permit applicant submits evidence demonstrating compliance with the criteria for permit approval established in the County code and the policies and development standards established in the shoreline master program, and that evidence is not effectively refuted by other

evidence in the record, the permit must be approved. As noted in the Decision, Washington courts have held that while the opposition of the community may be given substantial weight, it cannot alone justify a local land use decision. *Sunderland Servs. v. Pasco*, 127 Wn.2d 782, 797 (1995); *Maranatha Mining, Inc. v. Pierce County*, 59 Wn. App. 795, 805 (1990).

Decided March 13, 2017.



Sharon A. Rice
Thurston County Hearing Examiner

THURSTON COUNTY
PROCEDURE FOR APPEAL TO BOARD
AFTER HEARING EXAMINER RECONSIDERATION

NOTE: THERE MAY BE NO EX PARTE (ONE-SIDED) CONTACT OUTSIDE A PUBLIC HEARING WITH EITHER THE HEARING EXAMINER OR WITH THE BOARD OF THURSTON COUNTY COMMISSIONERS ON APPEALS (Thurston County Code, Section 2.06.030).

If you do not agree with the decision of the Hearing Examiner after reconsideration, you may file an appeal. The appeal process is described in A below. Unless appealed, decisions of the Hearing Examiner after reconsideration become final on the 11th day after the date of the reconsideration decision. **The Board of Thurston County Commissioners renders decisions within 60 days following a notice of appeal unless the Board, the applicant, and the appellant mutually agree to a longer period.

An appeal of a SEPA decision must be filed in Superior Court pursuant to the Land Use Petition Act, RCW Chapter 36.70C. An appeal of a decision relating to SEPA shall be done in accordance with RCW 43.21C.075 and TCC 17.09.160 (T).

A. APPEAL TO THE BOARD OF THURSTON COUNTY COMMISSIONERS

1. Appeals may be filed by any aggrieved person or agency directly affected by the Examiner's decision. The form is provided for this purpose on the opposite side of this notification.
2. Written notice of appeal and the appropriate fee must be filed with the Resource Stewardship Department within **ten (10) days** of the date of the Hearing Examiner's decision on a reconsideration request.
3. An appeal filed within the specified time period will stay the effective date of the Examiner's decision until it is adjudicated by the Board of Thurston County Commissioners or is withdrawn.
4. The notice of appeal shall concisely specify the error or issue which the Board is asked to consider on appeal, and shall cite by reference to section, paragraph and page, the provisions of law which are alleged to have been violated. The Board need not consider issues, which are not so identified. A written memorandum that the appellant may wish considered by the Board may accompany the notice. The memorandum shall not include the presentation of new evidence and shall be based only upon facts presented to the Examiner.
5. Notices of the appeal hearing will be mailed to all parties of record who legibly provided a mailing address. This would include all persons who (a) gave oral or written comments to the Examiner or (b) listed their name as a person wishing to receive a copy of the decision on a sign-up sheet made available during the Examiner's hearing.
6. Unless all parties of record are given notice of a trip by the Board of Thurston County Commissioners to view the subject site, no one other than County staff may accompany the Board members during the site visit.

B. STANDING All appeal requests must clearly state why the appellant is an "aggrieved" party and demonstrate that standing in the appeal should be granted.

C. FILING FEES AND DEADLINE If you wish to appeal this determination, please do so in writing on the back of this form accompanied by a non-refundable fee of **\$890.00**. Any appeal must be **received** in the Permit Assistance Center on the second floor of Building #1 in the Thurston County Courthouse complex no later than 4:00 p.m. per the requirements specified in A2 above. **Postmarks are not acceptable.** If your application fee as well as completed application form is not filed by this time, you will be unable to appeal this determination. This deadline may not be extended.

**** Shoreline Permit decisions are not final until a 30-day appeal period to the state has elapsed following the date the County decision becomes final.**



Project No. _____

Appeal Sequence No. _____

APPEAL OF HEARING EXAMINER DECISION AFTER RECONSIDERATION

TO THE BOARD OF THURSTON COUNTY COMMISSIONERS COMES NOW _____
on this ____ day of _____ 20__, as an APPELLANT in the matter of a Hearing Examiner's decision
rendered on _____, by _____ relating
to _____

THE APPELLANT, after review and consideration of the reasons given by the Hearing Examiner for his decision, does
now, under the provisions of Chapter 2.06.070 of the Thurston County Code, give written notice of APPEAL to the Board of
Thurston County Commissioners of said decision and alleges the following errors in said Hearing Examiner decision:

Specific section, paragraph and page of regulation allegedly interpreted erroneously by Hearing Examiner:

1. Zoning Ordinance _____
2. Platting and Subdivision Ordinance _____
3. Comprehensive Plan _____
4. Critical Areas Ordinance _____
5. Shoreline Master Program _____
6. Other: _____

(If more space is required, please attach additional sheet.)

AND FURTHERMORE, requests that the Board of Thurston County Commissioners, having responsibility for final review
of such decisions will upon review of the record of the matters and the allegations contained in this appeal, find in favor of
the appellant and reverse the Hearing Examiner decision.

STANDING

On a separate sheet, explain why the appellant should be considered an aggrieved party and why standing should be granted
to the appellant.

APPELLANT NAME PRINTED

SIGNATURE OF APPELLANT

Address _____

Phone _____

Please do not write below - for Staff Use Only:

Fee of \$890.00 Received: Initial _____ Receipt No. _____ Filed with the Resource Stewardship Department this _____ day of
_____, 20____.

Q:\Planning\Forms\Current Appeal Forms\2015.Appeal.rec.doc