

Douglas County Hearing Examiner

Andrew L. Kottkamp, Hearing Examiner

IN THE MATTER OF)	FINDINGS OF FACT,
)	CONCLUSIONS OF LAW,
SP#69-A)	DECISION AND CONCLUSIONS
Calvin White Compliance)	OF LAW

THIS MATTER having come on for hearing in front of the Douglas County Hearing Examiner on January 21, 2010, the Hearing Examiner having taken evidence hereby submits the following Findings of Fact, Conclusions of Law, Decision and Conclusions of Law as follows:

I. FINDINGS OF FACT

1. On August 20, 2009 the Douglas County Hearing Examiner signed a stipulated order in the matter of the compliance review for SP-69-A.
2. The property owner of record of tax parcel #22212230003 is the Calvin and Janae White Family LTD Partnership
3. Comments from reviewing agencies have been considered and addressed where appropriate.
4. Surrounding property owners were given the opportunity to comment on the proposals.
5. Proper legal requirements were met and surrounding property owners were given the opportunity to comment on the proposal at a public hearing.
6. Site remediation plans have been submitted for the onsite violation in response to the conditions of the stipulated order. A Wetland Management and Mitigation Plan was submitted by Grette and Associates Inc, on December 23, 2009 and amended on January 6, 2010. A supplemental geotechnical review was submitted by Nelson Geotechnical Associates Inc. on December 29, 2009 and amended on January 5, 2010.

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7. The subject property is located within the shoreline jurisdiction, regulated by the Douglas County Shoreline Master Program. The subject property was reviewed under the provisions of the Douglas County Shoreline Master Program and the Provisions of Title 19 of Douglas County Code.
8. WAC 173-27 PARTII establishes provisions for the joint agency enforcement of shoreline permit violations.
9. Federal, state and local agencies participated in the remediation process for this violation.
10. The Nelson Geotechnical Report dated June 23, 2009, indicates on page seven (Conclusion and Recommendations) that the rock walls on the site are stable for the short term use and marginally stable for the long term.
11. Nelson Geotechnical Inc. has indicated that “It is our opinion from a geotechnical standpoint that the wetland management and mitigation plan as prepared by Grette Associates is suitable for mitigating this site based on the prevailing conditions, and if constructed as recommended in this supplemental report. It is our opinion that the removal of the rockeries and reconstruction of the slopes as proposed will not impact the stability of the site slopes or present long-term effects to the site area, provided work is properly performed. The proposed restoration plan, with the recommendations provided in this letter, meets the above referenced Douglas County codes.”
12. Larry Lehman, the project biologist with Grette and Associates, has indicated that: “Following the installation of the native riparian and shrub steppe species, together with the regarding of the property, a highly functional riparian area will be provided. The proposed planting will establish large trees along this portion of the shoreline, where none previously existed and together with the shrubs and groundcover will provide a three-tiered riparian habitat. The installation of approximately 0.5 acre of native riparian and shrub steppe vegetation will greatly increase the function and value of the shoreline in front of the White residence, over the pre-project conditions. Further, it will even increase the functions and values of riparian habitat over the permitted conditions in the original SDP.”
13. Bob Steele, Regional Habitat Program Manager with WDFW has indicated that, “Thus based on Engineer McCoy’s review of the latest Nelson Geotechnical Associates supplemental geotechnical engineering evaluation dated December 29, 2009 as amended (attached) and based on Engineer McCoy’s and my review of the most recent Grette Associates Wetland Management & Mitigation Plan dated December 22, 2009 as amended and for abatement of Mr. White’s Shorelines Violation, WDFW feels that our agency’s fish & wildlife habitat restoration goals as mentioned above will be met if these two abatement plans are properly and professionally implemented according to these two plans as amended, and as approved by Douglas County and all of the applicable permitting agencies (as a Hydraulic Project Approval Permit from WDFW will also be required for this violation abatement/restoration project).”

14. Open record public hearing was held on January 21, 2010. Appearing and speaking on behalf of the applicant was Larry Lehman. Mr. Lehman testified that all of the proposed conditions of approval were acceptable to the applicant. He did raise a concern with the last sentence of proposed Condition of Approval No. 10. His concern was that WDFW may require “additional or more stringent measures” under the HPA permit. The concern was that these additional or more stringent measures may increase timeframe. They asked for some language within the conditions that would address this potential situation.
15. Also testifying was Calvin White. Mr. White reiterated that all proposed conditions of approval were acceptable including proposed Condition of Approval No. 18.
16. Also testifying was Eric Pentico of Washington State Department of Fish & Wildlife. He indicated that his supervisor is Bob Steele. Mr. Pentico testified that his understanding was that any “additional or more stringent measures” would be minor and would not materially change previously suggested conditions.
17. Also testifying was Mike Bocatch. Mr. Bocatch, a member of the public, testified as to his concerns that Mr. White and/or certain companies may be subject to ongoing bankruptcies that may impact his financial ability to complete this project. The Hearing Examiner indicated that to his understanding there was no bankruptcy in place that impacted this project. Even if there were, a bankruptcy filing would be beyond the control of the Hearing Examiner.
18. The supplemental report from Nelson Geotechnical states: “Large rocks and boulders should be removed from the structural fill material”.
19. Any Conclusion of Law that is more correctly a Finding of Fact is hereby incorporated as such by this reference.

II. CONCLUSIONS OF LAW

1. The Hearing Examiner has the authority to render this decision.
2. This Decision is consistent with all requirements of the Douglas County Shoreline Master Program and Title 19 of Douglas County Code.
3. Proposed remediation is in conformance with the enforcement guidelines established by WAC 173-27 PARTII.
4. Public interests will be served by approval of this remediation plan.
5. Site monitoring and verification of compliance with the approved remediation plans by Nelson Geotechnical Associates Inc. and Grette and Associates Inc. is necessary to ensure compliance with the conditions of approval to remediate the onsite violation.

6. The National Academy of Sciences (2004) issued a report evaluating the success of compensatory mitigation to achieve no net loss of functions in the nation's wetland resources. The conclusion of the report was that "The goal of no net loss of wetlands is not being met for wetland functions by the mitigation program." Recommendations within this report further stated that, "A critical element for determining the success and compliance of a mitigation project is to formally identify the purpose of the project (goals), the steps required to accomplish that purpose (objectives), and identify measurable indicators to determine that the purpose has been accomplished (performance standards)."
7. As conditioned, professional monitoring and verification, and surety agreement requirements will establish a commitment for implementation of the plans and remediation design.
8. As conditioned, impacts of the violation can be mitigated.
9. As conditioned, site remediation will not detrimentally affect the public health, safety and general welfare.
10. After review of the Nelson Geotechnical Report dated June 23, 2009, it is apparent that all rockery structures at this parcel are of structural concern. Page seven (Conclusion and Recommendations) of the geotechnical report states that the walls are stable for the short term use and marginally stable for the long term. The recommendation to resolve this matter is to remove the rockery and reconstruct in accordance with the International Building Code (IBC) and Associated Rockery Contractor (ARC) guidelines.
11. The current state of the rock walls on the subject property are in violation of the IBC and abatement is required under Section 302 #8 and #9 of the Uniform Code for the Abatement of Dangerous Buildings.
12. Any Finding of Fact that is more correctly a Conclusion of Law is hereby incorporated as such by this reference.

III. DECISION

Based on the above Findings of Fact and Conclusions of Law, the Hearing Examiner hereby finds that the applicant is not in compliance with the requirements set forth in SP 69-A and the Hearing Examiner further orders the following remedial measures:

IV. CONDITIONS

1. The conditions contained herein are binding upon the current or future property owner of record for parcel number 22212230003.
2. Site remediation shall proceed in conformance with the Wetland Management and Mitigation Plan submitted by Grette and Associates Inc, on December 23, 2009 and amended on January 6, 2010; and as amended and provided for in the supplemental geotechnical review submitted by Nelson Geotechnical Associates Inc. on December 29, 2009 and amended on January 5, 2009, except as modified by conditions below.
3. All site remediation shall occur within the time period of July 2010 through September 2010 with the exception of mitigation plantings, which shall be installed no later than May 31, 2011.
4. No later than October 31, 2010, the engineer and biologist of record must submit written verification that site remediation has occurred in compliance with the conditions contained herein.
5. No later than June 15, 2011, the biologist of record must submit written verification that mitigation plantings have been installed consistent with the conditions contained herein. The biologist of record shall be onsite to direct the mitigation planting to ensure that plant and rock material are placed consistent with the conditions of approval.
6. Douglas County shall remove the notice to title for the subject violation upon successful completion of the conditions of approval contained herein.
7. Written notice shall be provided to Douglas County Land Services 7 days prior to site work commencing.
8. Rock from the removal of retaining walls onsite that exceeds the quantity necessary for onsite habitat features noted in the Wetland Management and Mitigation Plan dated January 6, 2010, prepared by Grette and Associates Inc., and shall be removed outside of the shoreline jurisdiction.
9. The applicant, the property owner of record for parcel number 22212230003, shall comply with all applicable local, state and federal regulations and the applicant is responsible for securing any and all state and federal agency permits, as may be required.
10. As noted in the Wetland Management and Mitigation Plan prepared by Grette and Associates Inc., prior to the removal of the fill, a silt curtain will be installed encompassing the portion of the shoreline that is currently being worked on. The WDFW has indicated that additional or more stringent measures may be required

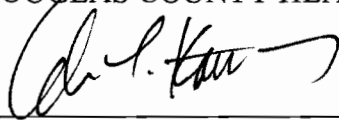
under the HPA permit for impacts water ward of the ordinary high-water mark of the Columbia River.

11. Prior to site work commencing, the applicant, shall obtain all necessary permits from agencies with jurisdiction and provide copies of the permit approvals to Douglas County. This may include, but is not limited to: the Washington State Department of Fish and Wildlife (Hydraulic Project Approval).
12. Where a condition imposed herein may be found inconsistent with the requirements of the Washington State Department of Fish and Wildlife, HPA Permit, the Douglas County Land Services Director shall have discretion to allow for project redesign consistent with the approval granted by said agency; if the redesign can be found consistent with the Douglas County Code, the Douglas County Regional Shoreline Master Program, and the Shoreline Management Act.
13. Onsite monitoring and monitoring reports shall be submitted to Douglas County Transportation and Land Services 1 year after mitigation installation; 3 years after mitigation installation; and 5 years after mitigation installation. Monitoring reports shall be submitted by a qualified professional biologist. The biologist must verify that the conditions of approval remain satisfied.
14. Mitigation sites shall be maintained to ensure that the mitigation and management plan objectives are successful. Maintenance shall include corrective actions to rectify problems, include rigorous, as-needed elimination of undesirable plants; protection of shrubs and small trees from competition by grasses and herbaceous plants, and repair and replacement of any dead plants.
15. A performance surety agreement in conformance with Chapter 7 of the Douglas County Regional Shoreline Master Program, must be entered into by the property owner of record for parcel number 22212230003 and Douglas County by May 31, 2011. The surety agreement must include the complete costs for the mitigation and monitoring which may include but not be limited to: the cost of installation, delivery, plant material, soil amendments, permanent irrigation, seed mix, and 3 monitoring visits and reports by a qualified professional biologist, including Washington State Sales Tax. Douglas County must approve the quote for said improvements.
16. Sequential release of funds associated with the surety agreement shall be reviewed for conformance with the conditions contained herein. Release of funds may occur in increments of 1/3 for substantial conformance with the conditions of approval. Verification of conformance with the conditions of approval after 1 year of mitigation installation shall also allow for the full release of funds associated with irrigation systems, clearing and grubbing and any soil amendments. If the standards that are not met are only minimally out of compliance and contingency actions are actively being

- pursued by the property owner to bring the project into compliance, the county may choose to consider a partial release of the scheduled increment. Non-compliance can result in one or more of the following actions: carryover of the surety amount to the next review period; use of funds to remedy the nonconformance; scheduling a hearing with the Douglas County Hearing Examiner to review conformance with the conditions of approval and to determine what actions may be appropriate.
17. If any of the conditions of approval contained herein are not met, a hearing shall be held for revocation of the authorization for activities and uses permitted by Shoreline Permit SP#69 and SP#69-A, that were not necessary for the establishment of the single family residence, driveway and highway beam in their current location. An order of rescission for these permits shall include a requirement to remove all associated improvements, and abate onsite violations. The decision and order shall forward the rescinded permits to the Douglas County Prosecutor to direct abatement of the violations in conformance with the provisions of the Douglas County Regional Shoreline Master Program and Title 19 of Douglas County Code. Abatement would be coordinated with State and Federal agencies.
 18. Within thirty days from the date of the decision of the Hearing Examiner on this matter, the property owner of record for parcel number 22212230003 , shall submit a schedule for the submittal of required building and engineering plans and reconstruction to bring into compliance rockeries permitted by SP#69-A that is in violation of the International Building Code. The schedule shall provide for the reconstruction of rockeries within the calendar year of 2010.
 19. In the event that, pursuant to Condition of Approval No. 10, WDFW adds additional or more stringent measures under the HPA permit, and such conditions or measures are required through no new action and/or fault of the property owner and/or Mr. and Mrs. Calvin White, and further that these additional measures create the argument that additional time for compliance by the property owner will be needed, then the property owner, Douglas County and/or WDFW may request a new hearing in front of the Hearing Examiner to consider revised compliance dates.

SO ORDERED this 25th day of January, 2010.

DOUGLAS COUNTY HEARING EXAMINER



Andrew L. Kottkamp

Anyone aggrieved by this decision has twenty-one (21) days from the “date of filing” as defined in WAC 461-08-305 and RCW 90.58.140(6) to file a petition for review with the Shorelines Hearings Board as provided for in RCW 90.58.180 and Chapter 461-08 WAC, the rules of practice and procedure of the Shorelines Hearings Board.