

May 9, 2008

**OFFICE OF THE HEARING EXAMINER
KING COUNTY, WASHINGTON**

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REPORT AND DECISION

SUBJECT: Water and Land Resources Division File: **Account # 862170-0010; Thomas**

NATHAN THOMAS
Surface Water Management Rate Adjustment Appeal

Location: 43306 Southeast North Bend Way

Appellant: **Nathan Thomas**
P.O. Box 1055
Sun Valley, Idaho 83353
Telephone: (208) 622-7235

King County: Department of Natural Resources and Parks
Water and Land Resources Division
represented by Diane Schneider (formerly Richard Rice)
201 South Jackson Street, Suite 600
Seattle, Washington 98104-3855
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SUMMARY OF RECOMMENDATIONS/DECISION:

Department's Preliminary Recommendation:	Deny appeal
Department's Final Recommendation:	Deny appeal
Examiner's Decision:	Deny majority of appeal; sustain in part

EXAMINER PROCEEDINGS:

Hearing opened:	November 13, 2007
Hearing closed:	November 13, 2007

Participants at the public hearing and the exhibits offered and entered are listed in the attached minutes.
A verbatim recording of the hearing is available in the office of the King County Hearing Examiner.

FINDINGS, CONCLUSIONS & DECISION: Having reviewed the record in this matter, the Examiner now makes and enters the following:

FINDINGS OF FACT:

1. The subject property is a 1.09 acre (47,480 square foot) parcel located at 43306 Southeast North Bend Way (on the north side of the road), in the unincorporated county. It is zoned Community Business (CB) and has been utilized for the past 12-14 years as a landscaping materials storage and distribution business operated by North Bend Sand and Gravel. The property is owned by Appellant Nathan Thomas.
2. The operational characteristics of the landscape material business onsite are that various types of materials are stored onsite in bulk, such as sand, gravel, bark, woodchips, topsoil and other types of soil, paving materials, concrete blocks, etc. Storage is primarily in storage chambers ("bins"), which are erected out of concrete ecology blocks and are hard-sided for containment and assistance in loading. There are two rows of bins on the property (Areas B and H; see exh. no. 1-E, p. 3), arrayed north-south, with one row backing onto the east property boundary and the second running parallel but set back somewhat from the west property boundary, with an intervening informal materials storage and associated vehicle maneuvering area (Area A). Areas F and G to the north of the two rows of bins and the interior yard (Areas I and J) between them are used for storage of piles of assorted blocks and paving materials, a small paved area (Area D) fronting several storage trailers (Area C), and a storage shed (E) in the northeast part of the site. Heavy equipment such as wheeled loaders, backhoes and heavy dump trucks are utilized in the offloading, loading, moving and storage of the landscape materials onsite.
3. On January 3, 2006, the DNR Water and Land Resources Division informed the Appellant of a surface water management (SWM) fee for the calendar years 2005 and 2006 totaling \$2,742.55 based upon DNR's calculation that the subject property is 69.7 percent impervious surface.
4. Under the King County Code, KCC 9.08.070, non-residential properties with over 10 percent of impervious surface area are charged SWM fees on a sliding scale of \$277.39 per acre to \$1,737.74 per acre (current fee; \$255.01 acre to \$1,598.06 per acre prior to 2007), depending on the amount (area percentage) of impervious surface.
5. On January 23, 2006, the Appellant filed a rate adjustment letter with DNR asserting that the county's calculation was erroneous in that the landscape material is contended not to be impervious and the property is asserted not to create or contribute to drainage runoff of any kind or character. The Appellant asserts that the manner of billing was also incorrect in that it imposed a retroactive fee for the year 2005.
6. DNR reviewed the SWM fee for the subject property for the years 2005 and 2006¹ and indicated that it would communicate with the Appellant regarding its review findings.
7. On August 28, 2007, DNR issued a rate adjustment of the SWM fee for the subject property noting that the adjusted impervious acreage percentage had been lowered from 69.7 to 63.7 percent, which changed the rate class from heavy to moderately heavy and lowered the rate to from \$1,258.05 per acre \$918.03 per acre.

¹ Also informing the Appellant that by code the county had the right to backbill for two years if it discovers that a property was billed incorrectly, but that the property had been backbilled only one year due to the timing of the error's discovery in 2005.

8. The Appellant had previously sent an appeal letter of the SWM fee (on October 25, 2006), and DNRP considered that to apply to the fee adjustment noted in its August 28, 2007 letter. The matter was then submitted to the Hearing Examiner Office and set for hearing.
9. The Appellant has stipulated to the following areas (as depicted on exh. no. 1-E) as comprising impervious surfaces (and therefore subject to the SWM fees under county code): Areas D, E, F, I and J. Also, the preponderance of the evidence shows that no offsite areas such as public right-of-way have been erroneously included in the calculation.
10. Of the remaining areas, a portion of the area west of the west row of bins (that depicted as A) consists of rough pile storage of landscape materials and its associated vehicle maneuvering area. The preponderance of the evidence in the record demonstrates that the area depicted as A is subject to heavy vehicle compaction and infiltration of fines (finely grained material) from stored materials (washing into the interstices between gravel pieces, essentially siltation - silting up and "clogging" the formerly pervious gravel), which individually, and even more so in combination, lead to a very effective imperviousness over time. The Examiner notes that the business has been operated onsite for a dozen or more years, and therefore the compaction and siltation by fines has been occurring over a substantially long period of time. Also in evidence is the showing that water tends to pond on the site in areas which are compacted by heavy vehicle equipment maneuvering and/or compacted by the weight of stored materials, and by the same imperviousness also sheetflows off the site.
11. Areas B and H are the constructed storage bins for landscaping materials in two rows on the property. The bin areas are shown to be underlain by either intentionally improved hard surfaces and/or equally impervious surfaces formed by heavily compacted and fine-infiltrated material.
12. Area C is the area occupied by trailers. There is little evidence clearly depicting the trailers and the surrounding area and no persuasive showing in the record that the area underneath such trailers is impervious. No ponding is demonstrated in Area C. Pursuant to KCC 9.08.010.K and the agency measurement protocol, "portable items, *other than sheds and other structures*, should not be included in the impervious area calculations unless the ground underneath them is considered impervious. Portable items can include, but are limited to, such things as picnic tables, *cars*, stacked lumber, stored plastic, garbage dumpster, etc." (See Exhibit no. 1-H) The trailers are generally similar to cars in their portability and above-ground elevation except for wheels, and thus according to the protocol should not be counted in the impervious area calculations unless the ground underneath is considered impervious. Again, there is no evidence showing that the area underneath the trailers is impervious, and Area C should not be counted in the impervious surface area calculation.
13. Area G consists of piles of assorted blocks and paving materials. This area, compacted by dint of the weight of the stored materials and/or by the heavy equipment loading and unloading such materials, and again silted up by the infiltration of fines and forming an effective impediment to surface water infiltration, is found to be impervious surface.
14. The area where the impervious surface area calculation is not supported by the evidence in the record is Area C, encompassing 1,262 square feet in area. Deducting that area from the 30,276 square feet of impervious surface found in the recalculated measurement by DNR results in a square footage of impervious surface on site of 29,014 square feet. This adjustment reduces the percentage of impervious surface onsite to 61.1 percent. The total impervious area in acreage onsite consists of .6661 acre. There is no change to the rate classification. [KCC 9.08.070.C]

15. In summary, except for Area C currently accommodating the trailers onsite as noted above, the preponderance of the evidence in the record supports the areas found to be impervious by DNRP in its revised calculation.
16. The Appellant complains that DNRP made “no effort to mitigate” the findings of impervious surfaces on the subject property, but the Examiner concludes that any information which may mitigate DNRP’s field investigations and calculation of impervious surface area is fundamentally the property owner’s burden to present, not the county’s. The county can only take mitigating factors into consideration, if it is able to under the law, only if it becomes aware of them, and the property owner is usually the most familiar with particular property characteristics, especially those which may not be obvious.

CONCLUSIONS:

1. Except for Area C which should be deducted from the impervious surface calculation considered in this appeal, the revised rate calculation was correctly performed under the applicable law and implementing measurement protocol, and is sustained.
2. The appeal is accordingly denied, except with respect to Area C, for which it is sustained and that area required to be deducted from the calculation and the fee amount recalculated accordingly.

DECISION:

The appeal of DNRP’s Surface Water Management fee calculation of impervious surface area on the subject property is DENIED, except that it is sustained with respect to Area C as noted above, the square footage of which (1,262 square feet) shall be deducted from the impervious surface area calculation, and the percentage of impervious surface revised and the fees reduced accordingly.

ORDERED May 9, 2008.

Peter T. Donahue
King County Hearing Examiner

NOTICE OF RIGHT TO APPEAL

Pursuant to Chapter 20.24, King County Code, the King County Council has directed that the Examiner make the final decision on behalf of the County regarding Surface Water Management Rate Adjustment appeals. The Examiner's decision shall be final and conclusive unless proceedings for review of the decision are properly commenced in Superior Court within twenty-one (21) days of issuance of the Examiner's decision.

MINUTES OF THE NOVEMBER 13, 2007, PUBLIC HEARING ON WATER AND LAND
RESOURCES DIVISION FILE: ACCOUNT #862170-0010.

Peter T. Donahue was the Hearing Examiner in this matter. Participating in the hearing were Richard Rice and Brian Sleight, representing the Department, and Nathan Thomas, the Appellant.

The following Exhibit was offered and entered into the record:

Exhibit No. 1 Water and Land Resources Division Report to the Examiner (A-0)

PTD:gao
Thomas RPT