Pacific Topsoils

145 Wash.App. 1021 (2008) | Cited 0 times | Court of Appeals of Washington | June 23, 2008

UNPUBLISHED OPINION

Appellant Pacific Topsoils, Inc. has failed to show that a land use hearing examiner's order was vague or in excess of the examiner's authority. The order adequately addressed the violations presented by the City of Everett. The trial court properly dismissed Pacific's challenge to the order.

Dave and Sandra Forman are the owners of Pacific Topsoils, a wholesale and retail landscaping supply company located in North Everett. The business is located on a piece of property zoned for heavy industrial use bordering the Snohomish River. Pacific purchased the lot from Weyerhaeuser in 2005. Pacific stores large piles of woody debris on the lot. The wood is ground up and added to the topsoil mixtures.

Pacific learned that it was not in compliance with the Everett Municipal Code when it received a letter from the City in February 2006. John Jimerson, a senior planner for the City, contacted Pacific based on complaints from neighboring landowners that Pacific's piles of wood scraps had a negative impact on their ability to market their property. The City's letter alleged that Pacific had been improperly storing piles of construction debris on their property. The City informed Pacific that "City regulations require that outdoor storage of material and equipment be screened from view."[1] The City suggested that either solid fencing or the planting of fast growing landscaping would satisfy the requirement. The City also advised Pacific that they needed to apply for a shoreline substantial development permit in order to continue stockpiling and processing wood in the 200 foot shoreline buffer bordering the water's edge. The City enclosed an application for a shoreline permit along with its letter.

Inspectors from the City's planning and community development visited Pacific on March 22, 2006 and again on June 28, 2006. The inspectors found that Pacific was still using its property for outdoor storage of scrap wood without appropriate fencing to screen the piles from view. The June 28 inspection showed that Pacific was continuing to store wood in the shoreline buffer area.

The City issued a citation to Pacific Topsoils on June 30, 2006. The citation alleged that Pacific had improperly stored scrap wood outdoors without prior review and approval as required by the Everett Municipal Code, EMC 19.41.100. The code requires that a "site plan" be submitted for outdoor use of commercial property and that the edges of an outdoor storage area must be surrounded by a "sight-obscuring fence or other appropriate screening approved by the planning department." EMC 19.41.100(B)(2) and (B)(3)(b). The citation also alleged that Pacific had engaged in substantial

development along the shorelines of Everett without a shoreline permit in violation of EMC 19.33D.020. This ordinance states: "No substantial development shall be undertaken on the shorelines of Everett without first obtaining a shoreline permit from the city." EMC 19.33D.020(B).

The citation advised Pacific that it could eliminate the violation by submitting a "completed shoreline permit application including plans detailing the screening of outdoor storage activities, and other supporting documents to the City of Everett's Planning Department no later than July 14, 2006, 5:00 p.m."[2] Otherwise, Pacific should appear at a hearing scheduled on July 20, 2006. The citation warned that the City could fine Pacific and take its own corrective action if Pacific did not correct the problem or appear at the hearing.

Pacific did not appear at the hearing. Representatives of the City appeared and submitted evidence to demonstrate to the hearing examiner that Pacific was violating EMC 19.41.100(B)(3)(b) by failing to fence its woody debris piles. City officials acknowledged that recent photographs showed that Pacific had moved the wood piles out of the shoreline area, so a shoreline permit was no longer necessary. The City sought an order requiring Pacific to comply with the outdoor storage ordinance. The hearing examiner issued the following written order which is the focus of this appeal:

1. Pacific Topsoils, Inc. shall abate all violations of EMC 19.41.100 (B2), and 19.41.100 (B3) on the property located on parcel number 29 0516 002 005 00, Everett, Washington. Abatement shall be complied with the approval of the City of Everett of the site plan which shall include a sight obscuring fencing plan.

2. Pacific Topsoils, Inc. shall be fined $500.00 for said violation. Of this $500.00 fine, payment of $450.00 will be suspended upon compliance with the following conditions:

3. Application materials for all necessary permits must be submitted to the City of Everett, Planning and Community Development Department no later than August 3, 2006.

4. Upon approval of permits all necessary actions must be completed no later than 30 days from the date of the approval of the permit.

5. Pacific Topsoils shall not violate any ordinance set forth in EMC 1.20.020 or any ordinance or regulation that identifies the enforcement procedure described in Chapter 1.20 EMC as the enforcement procedure for said regulations or ordinance, for the next twelve (12) months.

6. Pacific Topsoils shall pay $500.00 of the $500.00 fine no later than August 10, 2006. . . .

7. Pacific Topsoils shall not store any materials in the shoreline buffer as established by the shoreline laws of Washington State and the City of Everett.

8. This written Order shall be controlling over any conflicts with oral Orders issued at the Public Hearing.

9. If the owner fails to abate the identified violations as directed by this Order, the City of Everett is authorized to undertake and complete the abatement in conformance with the provisions of the Everett Municipal Code, Chapter 1.20, at the full expense of the owner and the City may act without further order or direction of the Violations Hearing Examiner.[3]

Pacific filed a land use petition in Snohomish County Superior Court on August 11, 2006. The court dismissed the petition. This appeal followed.

As the party seeking relief from the hearing examiner's decision, Pacific bore the burden of proving one of the six bases for relief set forth in the Land Use Petition Act. Pacific relies on subsections (e) and (f):

(e) The land use decision is outside the authority or jurisdiction of the body or officer making the decision; or

(f) The land use decision violates the constitutional rights of the party seeking relief.

RCW 36.70C.130(1)(e) and (f). These grounds present questions of law that we review de novo. Abbey Rd. Group v. City of Bonney Lake, 141 Wn. App. 184, 192 (2007); Quality Rock Products, Inc. v. Thurston County, 139 Wn. App. 125, 133 (2007). Under the Land Use Petition Act, an appellate court stands "in the shoes of the superior court" and review is limited to the record before the hearing examiner. Pavlina v. City of Vancouver, 122 Wn. App. 520, 525, 94 P.3d 366 (2004).

One of the grounds alleged by Pacific's petition is that the order is unconstitutionally vague. The City responds that Pacific's vagueness challenge to the terms of the order is premature because Pacific has not yet tried to comply with the order and there has been no action taken to enforce the order's conditions. However, because the City failed to present this argument during the first level of appellate review in the superior court, we decline to consider it. See State v. Clark, 124 Wn.2d 90, 104-05, 875 P.2d 613 (1994).

Pacific's primary argument is that the hearing examiner exceeded his authority by imposing Condition 7, which states: "Pacific Topsoils shall not store any materials in the shoreline buffer as established by the shoreline laws of Washington State and the City of Everett."[4] As Pacific points out, the shoreline laws require a permit for "substantial development" in the shoreline buffer area. Pacific contends the City failed to establish that the woody debris piles meet the definition of "substantial development" - "any development of which the total cost or fair market value exceeds five thousand dollars, or any development which materially interferes with the normal public use of the water or shorelines of the state." RCW 90.58.030(3)(e). Pacific worries that the City will unjustly interpret the

order as forbidding the placement of any materials within the shoreline buffer, even materials for which a permit would ordinarily not be required.

When the City issued the citation on June 30, Pacific had wood piles in the shoreline buffer. Sometime between June 30 and July 17, Pacific moved the piles out of the shoreline area. As a result, the alleged shoreline violation was a non-issue at the hearing. The City did not attempt to establish that the piles required a permit or that their presence violated the shoreline laws, and the examiner did not find a violation. This does not, however, mean that Condition 7 must be stricken from the order.

Condition 7 is simply a condition relating to the $500.00 fine the order imposed on Pacific Topsoil. Of this amount, the order suspends $450.00 "upon compliance with the following conditions."[5] One of them -- Condition 7 -- is to comply with the shoreline laws by keeping material out of the buffer that does not belong there under the law. In this context, the order is most naturally understood as the hearing examiner making sure that Pacific is aware of its obligation to comply with the shoreline laws. The simple message of Condition 7 is, as the City put it at oral argument, "let's continue to keep it a non-issue." Similarly, the order conditions the suspension upon Pacific refraining from violating other city ordinances.

We conclude the hearing examiner did not exceed his authority by suspending $450.00 of a $500.00 fine on condition that Pacific not store any materials in the buffer in violation of the shoreline laws, and the other conditions stated in the order.

Pacific also argues that several sections of the order are unconstitutionally vague. We disagree. The order makes it plain that to come into compliance with the outdoor storage regulations of the Everett Municipal Code, Pacific needs to submit a site plan and fence the piles of wood scraps, or else remove the piles from its lot.

Pacific contends the hearing examiner's order is vague because it does not specify a height for the fencing required under the outdoor storage ordinance and does not identify, in Condition 3, the permits that are "necessary." The height issue was not ripe for decision by the hearing examiner. The citation was for failure to submit a site plan and fence the piles from view. To abate that violation, Pacific needs to submit a site plan to the City that includes a fencing component in compliance with EMC 19.41.100(B)(3)(b). Pacific has not yet done that, so far as we know from the record before us, and so the planning department has not made any decision about how high the fence should be. Consequently, the hearing examiner was not in a position to make any rulings about fence height. If Pacific does submit a site plan and the City denies it on the basis that the proposed fence is not tall enough, then Pacific can appeal that decision. EMC 19.41.100(B)(6). And as Pacific goes through that process, it will find out what permits the City deems necessary. If Pacific thinks the City is wrong, then Pacific can appeal that decision too.

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The order entered by the hearing examiner is reasonably intelligible and does not exceed the examiner's authority. The trial court properly dismissed Pacific's LUPA petition.

The City claims it is entitled, as the prevailing party on appeal, to an award of fees under RCW 4.84.370. However, this statute allows for an award of fees only when there was a decision by a county, city or town "to issue, condition, or deny" certain types of development permits. In this case there was no decision to issue, condition or deny a permit. The problem is that Pacific has never applied for a permit. The decision of the hearing examiner enforced Pacific's obligation to apply for a permit, rather than reviewing a decision on a permit application. Accordingly, we deny the City's claim for fees.

Affirmed.

1. Clerk's Papers at 91.

2. Clerk's Papers at 140.

3. Clerk's Papers at 72-73.

4. Clerk's Papers at 72.

5. Clerk's Papers at 72.