

CITY OF SPOKANE HEARING EXAMINER

Re: Shoreline Substantial Development) FINDINGS, CONCLUSIONS,
Conditional Use Permit Application by) AND DECISION
Burlington Northern and Santa Fe)
Railroad for property located at)
approximately 800 East Front Avenue) FILE NO. Z2009-23-SCUP

SUMMARY OF PROPOSAL AND DECISION

Proposal: The applicant seeks a shoreline substantial development conditional use permit to allow for the cleanup of contaminated soils on property located within the shoreline jurisdiction. Some of the contaminated soil is located below the ordinary high-water mark of the Spokane River and its removal is therefore considered dredging.

Decision: Approval, subject to conditions.

FINDINGS OF FACT
BACKGROUND INFORMATION

Applicant: Burlington Northern and Santa Fe (BNSF) Railroad
c/o Bruce Sheppard
2454 South Occidental Avenue
Seattle, WA 98134

Agent: John Rudders
GeoEngineers, Inc.
523 East 2nd Avenue
Spokane, WA 99202

Property Address: 800 East Front Avenue in the City and County of Spokane, Washington

Property Location: The property is located on the north side of the Spokane River just west of Hamilton Street in the City of Spokane, Washington.

Legal Description: Dennis and Bradley's Add, PT of Blk 18, 100,000 square feet of PT of Blk 18 & 17 and VAC STS ADJ INC in lease #BF34199 EXC Hamilton Street, Bridge R/W.

Zoning: CC1-EC (Type 1 Centers and Corridors – Employment Corridor)

Comprehensive Plan Map Designation: The Comprehensive Plan designates this property as CC Core.

Site Description: The site consists of two parcels totaling about 82,980 square feet in area, some of which is located under water. There is a 45,950 square foot brick warehouse located approximately in the center of the site with paved parking on the north and west. Originally there was a small foundry and coke building just to the south of the warehouse but it was removed during the 1950's. Fill material comprised of metal waste and slag generated at that foundry was discarded at the south portion of the site toward the river. That fill material was contaminated with arsenic and lead.

Surrounding Conditions: The property adjacent to the north is zoned CC1-EC and is developed with a retail store where Habitat for Humanity sells surplus building supplies. East of the site is the Hamilton Street bridge and the property beyond which is also owned by BNSF is also zoned CC1-EC. To the west is a parking lot owned by Gonzaga University which is CC1-EC, and to the south, across the Spokane River, the property is zoned GC-150 (General Commercial 150 foot height limit) and HI (Heavy Industrial) and that property was the former Brown's Building Supply site.

Project Description: This proposal is part of the Washington State Department of Ecology's (DOE) Voluntary Cleanup Program under the State Model Toxics Control Act (MTCA). It became necessary because the concentrations of lead and arsenic found in the ground water beneath the subject site exceed the maximum levels allowed under MTCA. Approximately 1,400 cubic yards of contaminated soil within 50 feet of the ordinary high-water mark of the Spokane River and approximately 265 cubic yards of contaminated soil below the ordinary high-water mark are to be removed. This site is then to be filled with clean soil and capped. The riparian zone will then be replanted pursuant to a planting plan which has been submitted by the applicant.

PROCEDURAL INFORMATION

Authorizing Ordinances: Spokane Municipal Code Sections 11.15, 17G.060.170, and the Shoreline Master Program Regulations set forth in the 1982 Supplement, Chapter 13.05 and 13.27

Hearing Date: October 8, 2009

Notices: Mailed: May 20 and August 14, 2009
Posted: May 20 and August 21, 2009

Site Visit: None Made

SEPA: A Determination of Nonsignificance was issued by the City on April 16, 2007.

Testimony:

Kathleen Weinand
City of Spokane, Current Planning
808 West Spokane Boulevard
Spokane, WA 99201

Bruce Williams
GeoEngineers, Inc.
523 East 2nd Avenue
Spokane, WA 99202

Exhibits:

1. Planning Services Staff Report
2. Application, including:
 - 2A General application
 - 2B Conditional Use Permit application
 - 2C Notification Map application
 - 2D Joint Aquatic Resources Permit application form (JARPA)
 - 2E Floodplain Development Permit application
 - 2F Site Plans
 - 2G Conditional Use Permit counter complete checklist
3. Fire Department comments
4. Engineering Services comments
5. Traffic Engineering comments
6. Department of Ecology comments
7. Spokane Tribe of Indians comments
8. Northwest Pipeline comments
9. Notice map and parcel listing
10. Notices
11. Affidavit of mailing 05-20 and 08-14-09
12. Affidavit of posting 05-20 and 08-21-09
13. SEPA Determination of Nonsignificance
14. Environmental Checklist
15. Hydraulic Project Approval
16. Cleanup Action Plan
17. Appendix A, Summary of Specifications for Remediation Excavation
18. Specification for Remedial Action
19. Re-Planting Plan
20. Revised Habitat Management Plan
21. Cultural Resource Survey
22. Community Meeting sign in sheet
23. Hearing File Preparation Checklist
24. Letter dated 06-18-09 to Kathleen Weinand from Bruce Williams

- re: introduction and purpose of remedial action
- 25. Emails dated 07-01-09 and 07-02-09 to/from Sandy Scott and Kathleen Weinand
re: citizen inquiry
- 26. Letter dated 07-01-09 to Interested Parties from Kathleen Weinand
re: requesting comments
- 27. Letter dated 07-22-09 to Bruce Sheppard from Kathleen Weinand
re: copy of comments received
- 28. Email dated 08-06-09 from Kathleen Weinand to Jon Rudders
re: request for engineer certification
- 29. Letter dated 08-11-09 to Kathleen Weinand from Tony Mathis
re: response to request dated 08-06-09
- 30. Letter dated 08-13-09 to Jon Rudders from Kathleen Weinand
re: notice of application and hearing instructions

FINDINGS AND CONCLUSIONS

To be approved, the proposed shoreline conditional use permit must comply with the criteria set forth in Spokane Municipal Code Section 17G.060.170. The Hearing Examiner has reviewed the proposed conditional use permit application and the evidence of record with regard to this section and makes the following findings and conclusions:

1. The proposal is allowed under the provisions of the land use codes.

The site is located within the upriver (urban) environment under the Shoreline Master Program. While the master program doesn't specifically cover the type of dredging necessary here to remove contaminated soil, it does in general require a conditional use permit for any dredging activities. The proposal must comply with the general regulations for dredging activities which are set forth in the regulations in Sections 13.27.041 through 13.27.045.

The applicant has submitted a habitat management plan that addresses the performance standards for activities in the designated fish and wildlife habitat conservation areas outlined in SMC 17E.020. Staff has found that the submitted plan will result in a net gain in the functions and values of the riparian habitat area and the Hearing Examiner agrees. Therefore this criterion has been met.

2. The proposal is consistent with the comprehensive plan designation and goals, objectives, and policies for the property.

The Hearing Examiner finds that this criterion has been met and in so doing hereby adopts and incorporates the findings as set forth in the Planning Services Staff report Exhibit #1, Page 4.

3. The proposal meets the concurrency requirements of Chapter 17D.010.

The proposal was circulated all applicable City departments and outside agencies that have jurisdiction over land use and shoreline proposals. No department or agency has made a determination that concurrency can't be achieved. As staff notes, the proposal is just a cleanup action and it will not generate additional demand on City services once the work has been completed.

4. If approval of a site plan is required, the property is suitable for the proposed use and site plan considering the physical characteristics of the property, including but not limited to: size, shape, location, topography, soils, slope, drainage characteristics, the existence of ground or surface water, and the existence of natural, historic, or cultural features.

Because the action is one in which contaminated soil will be removed and clean fill will be brought in, there is no site plan approval required. There is, however, a new plantings plan which will follow the remedial action and planting in accordance with that plan will be a condition of this approval.

5. The proposal will not have a significant adverse impact on the environment or the surrounding properties, and if necessary, conditions can be placed on the proposal to avoid significant effect or interference with the use or neighboring property or the surrounding area, considering the design and intensity of the proposed use.

The City issued a Determination of Nonsignificance (DNS) under the State Environmental Policy Act (SEPA) on October 16, 2007. That determination found that the proposal should not have significant adverse impacts on the environment. As this is a cleanup action, it should have a positive affect on the environment and surrounding properties including the Spokane River. There may be some short term noise and traffic impacts during the cleanup however they will not be significant.

6. For shoreline conditional use permits the following additional criteria apply:

- a. The proposed use will not interfere with the normal public use of the shorelines;

There does not appear to be public access to the shoreline on this site currently. Sites adjacent which have public access would not be adversely affected by this cleanup action. If public access is given to this site sometime in the future, the remedial action should have a positive impact on that access.

- b. The cumulative impact of several additional conditional use permits on the shoreline in the area will not preclude achieving the goals of the Shoreline Master Program;

In this area there is only one other current proposal for a conditional use permit along the shoreline and that is on the south side of the river. That proposal is to extend Riverside Avenue to meet with Trent Avenue and the road would intersect the shoreline jurisdiction in two places. If there are other proposals similar to the subject proposal in which a conditional use permit is applied for in order to do a site cleanup and remove contaminated soil, then it would have a beneficial affect on the shoreline and would not preclude achieving the goals of the Shoreline Master Program.

DECISION

Based on the findings and conclusions above, it is the decision of the Hearing Examiner to approve the proposed shoreline conditional use permit, subject to the following conditions:

1. Approval is for a shoreline substantial development conditional use permit to allow the removal of contaminated soil on site, the importation of clean fill to replace the contaminated soil, the capping of the site and the replanting of the site in accordance with the recommendations in the habitat management plan. Any proposed changes to the plans are to be submitted to Planning Services for review and approval. If Planning Services determines those proposed changes to be substantial they are to be forwarded to the Hearing Examiner for review and approval.
2. Prior to the commencement of the cleanup action the applicant shall post a performance bond to the Planning Services Department for the plantings, monitoring activities and other recommendations of the habitat management plan and replanting plan. The initial plantings shall be completed according to the plans within the next growing season after the completion of the soil removal and replacement. Once the plantings are completed an as-built report shall be submitted to the Planning Services Department and the site will be inspected for compliance with the plans by Planning Services Department staff.
3. The applicant shall comply with the requirements of the Washington State Department of Ecology in regards to its water quality program. In addition the applicant is to comply with the City's storm-water requirements which are in SMC 17D.060 during the excavation, fill and cap and construction process. Any existing subsurface drainage facility (drywell, catch basin, swale, etc.) must comply with Ecology's Underground Injection Control Requirements and be registered.
4. Emergency access to the site must be maintained during cleanup. The permit from the City's Fire Protection Engineer will be required to remove any underground storage tanks located during excavation.
5. All conditions of any other permit or plan required for this project, such as the conditions

related to the Hydraulic Project Approval set forth in Exhibit #15 shall become conditions of this approval and must be complied with.

6. This approval does not waive the applicant's obligation to comply with all other requirements of the Spokane Municipal Code as well as requirements of City Departments and outside agencies with jurisdiction over land development.

7. Spokane Municipal Code 17G.060.240 regulates the expiration of this approval, and Table 17G.060-3 sets forth the time frame for the expiration of all approvals.

8. Prior to the issuance of any grading permits, the applicant shall submit evidence to this file that the property owner has signed and caused the following statement to be recorded with the Spokane County Auditor's Office:

COVENANT

Development of this property is subject to certain conditions on file with the City of Spokane Planning Department and the Office of the City of Spokane Hearing Examiner. The property may not be developed except in accordance with these conditions. A copy of these conditions is attached to this Covenant.

This statement shall be identified as a Covenant. The owner's signature shall be notarized.

9. This approval is subject to the above-stated conditions. By accepting this approval the applicant acknowledges that these conditions are reasonable and agrees to comply with them. The filing of the above required covenant constitutes the applicant's written agreement to comply with all conditions of approval. The property may not be developed except in accordance with these conditions and failure to comply with them may result in the revocation of this approval.

DATED this 14th day of October 2009.



Greg Smith
City of Spokane Hearing Examiner

NOTICE OF RIGHT TO APPEAL

Appeals of decisions by the Hearing Examiner are governed by Spokane Municipal Code 17G.060.210 and 17G.050.

Decisions of the Hearing Examiner regarding shoreline conditional use permits are reviewed by the Washington State Department of Ecology. After review, they may be appealed to the Washington State Shoreline Hearings Board. **All appeals must be filed with the Shoreline Hearings Board within twenty-one (21) calendar days of the date of the Ecology decision.**