BEFORE the HEARING EXAMINER for the
CITY of SAMMAMISH

DECISION

FILE NO.:	CVC2016-00004
APPELLANT:	Don and Kathleen Miller C/o Jane Koler Land Use & Property Law, PLLC 6659 Kimball Drive, Suite B-201 Gig Harbor, WA 98335 jane@jkolerlaw.com SERVICE BY E- MAIL (First class mail service only if requested)
RESPONDENT:	City of Sammamish C/o Charlotte Archer Kenyon Disend 11 Front Street South Issaquah, WA 98027-3820 charlotte@kenyondisend.com/hillary@kenyondisend.com SERVICE BY E- MAIL (First class mail service only if requested)
TYPE OF CASE:	Appeal from a Notice and Order
EXAMINER DECISION:	Appeal DENIED
DATE OF DECISION:	November 15, 2017

INTRODUCTION [1]

Don and Kathleen Miller (hereinafter referred to in the singular as "Miller" for simplicity [2]) appeal from a Notice and Order ("Notice") issued by the Sammamish Department of Community Development ("Department"). The Notice was dated March 24, 2017, and was recorded on March 27, 2017. (Exhibit 13 [3])

Miller filed the subject appeal on April 5, 2017. (Exhibit 9001) The appeal was timely filed in accordance with Sammamish Municipal Code ("SMC") 20.10.080(1) and 23.110.010(1).

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1 Any statement in this section deemed to be either a Finding of Fact or a Conclusion of Law is hereby adopted as such.

2 Only Don Miller participated in the open record hearing. Statements attributed to "Miller" are those of Don Miller.

3 Exhibit citations are provided for the reader's benefit and indicate: 1) The source of a quote or specific fact; and/or 2) The major document(s) upon which a stated fact is based. While the Examiner considers all relevant documents in the record, typically only major documents are cited. The Examiner's Decision is based upon all documents in the record.

The subject property is located at 1603 248th Avenue SE, Sammamish, Washington 98075. The subject property bears King County Assessor's Parcel Number 022406-9070 ("Parcel 9070"). (Exhibit 15)

The Sammamish Hearing Examiner ("Examiner") set the matter for a May 22, 2017, hearing. (Exhibits 2; 3) Miller moved for continuation of the hearing date, as a result of which the Examiner rescheduled the hearing to June 19, 2017. (Exhibits 9004 – 9010) On June 6, 2017, Respondent City of Sammamish ("City") advised the Examiner that the parties were working toward settlement of the appeal and asked for additional time; after consulting with the parties, the Examiner rescheduled the hearing for July 25, 2017. (Exhibit 9011) On July 7, 2017, the parties advised the Examiner that they desired more time to pursue settlement; the Examiner rescheduled the hearing for August 24, 2017. (Exhibits 9012 – 9014)

The Examiner convened the open record hearing on August 24, 2017. The City gave notice of the hearing as required by SMC 20.10.180(2). (Exhibits 9014; 16) When the hearing was not able to be completed on August 24th, the parties agreed to reconvene the following day, August 25, 2017, to complete the hearing. The Examiner announced that continuation on the record at the close of the August 24th hearing. Later that evening, Attorney Koler's Legal Assistant advised the Examiner by e-mail that Ms. Koler could not possibly attend a hearing the next day due to prior commitments. The parties exchanged e-mails over the course of the weekend and, on Monday, August 28, 2017, agreed to reconvene on October 23, 2017, at 11:00 a.m. to complete the hearing. [4] (Exhibit 9019) The hearing was reconvened on and concluded on October 23, 2017.

Pursuant to City of Sammamish Hearing Examiner Rule of Procedure ("RoP") 224(c), the Examiner entered the following administrative exhibits into the hearing record:

Exhibit 9001:	Appeal of Type 2 Land Use Decision (form), filed April 5, 2017
Exhibit 9001.1:	Appeal of Notice and Order, filed April 5, 2017
Exhibit 9001.2:	Exhibit 1 to Exhibit 9001.1, filed April 5, 2017
Exhibit 9002:	Letter, Examiner to Principal Parties, April 7, 2017
Exhibit 9003:	E-mail chain, Examiner and Principal Parties, April 14, 2017 (establishing date for the appeal hearing)
Exhibit 9004:	Millers' Motion for Continuance of Administrative Hearing and Subjoined Declaration of Jane Koler, filed May 15, 2017
Exhibit 9005:	Declaration of Jennifer Lord, filed may 15, 2017
Exhibit 9006:	E-mail chain, Examiner and Principal Parties, May 15 – 17, 2017 (relating to Exhibit 9004)
Exhibit 9007:	City of Sammamish's Response to Motion to Continue, filed May 17, 2017
Exhibit 9008:	Declaration of Hillary Graber in Support of the City's Response to Request for Continuance, filed May 17, 2017; and
Exhibit 9009:	Interlocutory Order Postponing a Hearing, issued May 17, 2017
Exhibit 9010:	Notice of Public Hearing, issued May 19, 2017
Exhibit 9011:	E-mail string, June 6 – 7, 2017 (rescheduling hearing to July 25, 2017)

[4] That was the earliest date that all parties were available.

Exhibit 9012:	E-mail string, July 7, 2017 (rescheduling hearing to August 24, 2017)
Exhibit 9013:	E-mail, Koler to Examiner and City, July 7, 2017 (concurring with new hearing date)
Exhibit 9014:	Notice of Public Hearing, issued July 21, 2017
Exhibit 9015:	Motion to Order Parties to Mediate Alleged Wetland Issues, filed at 11:28 a.m. on August 10, 2017 (with Exhibits A – C to be cited as Exhibits 9015A – 9015C)
Exhibit 9016:	Millers' Motion for Continuance of Administrative Hearing and Subjoined Declaration of Jane Koler, filed at 2:06 p.m. on August 10, 2017
Exhibit 9017:	[Millers'] Hearing Memorandum, filed August 11, 2017 (with Exhibits A – C to be cited as Exhibits 9017A – 9017C)
Exhibit 9018:	Interlocutory Order Denying Motions, issued August 15, 2017
Exhibit 9019:	E-mail string among principal parties and the Examiner, August 24 – 28, 2017 (setting replacement continuation date)

Pursuant to RoP 224(d), the Respondent City pre-filed Exhibits 1 – 37 and provided an index listing of those exhibits. Appellant Miller did not object to entry of those exhibits. The Examiner entered those exhibits into the hearing record. Pursuant to RoP 224(i) the Examiner accepted additional exhibits during the hearing from the City as follows:

Exhibit 38:	Annotated property sketch
Exhibit 39:	Three site photographs taken September 8, 2017

Pursuant to RoP 224(d), Appellant Miller pre-filed only a Hearing Memorandum which, because of the events occurring when it was filed, was assigned Exhibit Number 9017. Respondent City did not object to entry of Appellant's Hearing Memorandum. The Examiner entered Exhibit 9017 into the hearing record.

At the August 24, 2017, hearing, Appellant Miller sought entry of a Supplemental Hearing Memorandum and eight exhibits which had been filed the day before the hearing. After hearing from Respondent City, the Examiner determined that Appellant Miller's proposed Exhibits A, A-1, B, and C were duplicates of documents previously submitted by Miller which were already exhibits and would not be further duplicated in the record. [5] Pursuant to RoP 224(i) the Examiner accepted additional exhibits during the hearing from Appellant Miller as follows:

Exhibit 1001:	Appellants' Supplemental Hearing Memorandum, received on August 23, 2017, at 4:14 p.m.
Exhibit 1002:	1% Real Estate Excise Tax, Parcel 9070, American Pacific Corporation to Donald and Ida Morin, July 30, 1975, received on August 23, 2017, at 4:14 p.m.
Exhibit 1003:	1% Real Estate Excise Tax, Parcel 9070, Donald and Ida Morin to Marvin and Vera Federman, August 25, 1978, received on August 23, 2017, at 4:14 p.m.
Exhibit 1004:	Edgar K. Sewell Curriculum Vitae, received on August 23, 2017, at 4:14 p.m.

[5] Proposed Exhibits A and A-1 were duplicates of both Exhibits 9015A and 9017A; proposed Exhibit B was a duplicate of both Exhibits 9015B and 9017B; and proposed Exhibit C was a duplicate of both Exhibits 9015C and 9017C.

Exhibit 1005: 1936 aerial photograph, submitted during the hearing
Exhibit 1006: Declaration of Thomas Beltran, October 20, 2017, submitted during the hearing

At the close of the hearing on October 23rd, Respondent City asked leave to file a Statement of Additional Authority in response to Appellants' Supplemental Hearing Memorandum. The Examiner held the record open through close of business on November 6, 2017, for that purpose. The hearing record closed on November 6, 2017, with receipt of the following exhibit:

Exhibit 40: City of Sammamish's Statement of Additional Authority, filed November 6, 2017

The Deputy City Clerk has the record copy of all exhibit index lists and exhibits.

At the close of the hearing the Examiner requested 10 additional working days for issuance of the Decision. Both Principal Parties agreed to the Examiner's request. [6]

The action taken herein and the requirements, limitations and/or conditions imposed by this decision are, to the best of the Examiner's knowledge or belief, only such as are lawful and within the authority of the Examiner to take pursuant to applicable law and policy.

INTERLOCUTORY ORDERS

The Examiner issued two Interlocutory Orders before the hearing convened.

On May 17, 2017, the Examiner granted Appellant Miller's Motion for Continuance of Administrative Hearing. (Exhibits 9004 – 9009)

On August 15, 2017, the Examiner denied Appellant Miller's Motion to Order Parties to Mediate Alleged Wetland Issues (which included a request for another continuance of the hearing date). (Exhibits 9015 – 9018)

Both Interlocutory Orders are incorporated herein by reference as set forth in full.

FINDINGS OF FACT

1. On March 24, 2017, the City's Code Compliance Officer ("CCO") issued a Notice and Order to Abate Civil Code Violation (the "Notice") to Miller. The CCO mailed the Notice to Miller by certified U.S. mail on March 27, 2017. (Exhibits 13; 14) Service by mail is "presumed effective" three business days after the Notice is mailed. [SMC 23.90.010(1)(c)]

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6 Significant, unexpected changes occurred to the Examiner's schedule after close of the hearing. Thus, the Examiner has not used any of the additional time.

The Notice, *inter alia*: identifies Parcel 9070 as the subject property; provides a lengthy historical background; charges violation of SMC 16.20.195, 21A.50.110(1), 21A.50.120(1), 21A.50.290, and 21A.50.310(8); sets forth a set of remedial actions to be taken within 60 days of the date of service of the Notice; and assesses a "civil penalty for environmental damage and/or critical areas ordinance violations" in the amount of $15,000 plus site restoration costs; assesses daily civil penalties, potentially rising to $500 per day up to a maximum of $50,000; and sets forth Miller's right to appeal. (Exhibit 13; quote from Exhibit 13, Bates 007, § 10.A)

The basic charge in the Notice is that Miller filled regulated wetlands and their buffers and performed grading activities (including importation of more than 50 cubic yards ("cy") of fill material) on Parcel 9070 without benefit of required permits. (Exhibit 13, § 5)

2. On April 5, 2017, six calendar days after the presumed date of service, Miller filed a timely appeal from the Notice. (Exhibits 9001; 9001.1) The Miller appeal contains three basic challenges: 1) The Notice deprives Miller of constitutionally guaranteed due process of law (Exhibit 9001.1, § 2); 2) Agricultural activities are exempt from wetland regulations (Exhibit 9001.1, § 3); and 3) The City lacks authority to impose either the $15,000 civil penalty or the $500 per day civil penalty (Exhibit 9001.1, § 4).

3. Appellant Miller submitted two hearing memoranda. (Exhibits 9017; 1001) Respondent City submitted two hearing memoranda and one Statement of Additional Authority. (Exhibits 25; 37; 40) The Examiner has considered the pleadings of the parties in preparing this Decision.

4. Parcel 9070 is a 2.29 acre rectangular tract fronting on the west side of 248th Avenue SE. Parcel 9070 is a near square of approximately 320 feet on a side. Its major man-made features are a double-wide mobile home and detached garage in the southwest quarter of the property, an open-air riding arena in the northwest quarter of the property (although recent aerial photographs seem to indicate that the fence around the arena has been removed), and a small workshop in the north central portion of the site. (Exhibits 1, Figure 5; 15; 23)

5. Donald and Ira Morin ("Morin") purchased Parcel 9070 in 1975. (Exhibit 1002) They sold Parcel 9070 three years later (1978) to Marvin and Vera Federman ("Federman"). (Exhibit 1003) Federman sold Parcel 9070 16 years later (1994) to Judy Wendl ("Wendl"). (Exhibits 15; 32 [7]) Parcel 9070 was foreclosed on in 1998 by Bankers Trust Company of California, NA ("Bankers Trust"). (Exhibits 15; 34) Miller purchased Parcel 9070 from Bankers Trust in 1999. [8] (Exhibits 15; 35)

Parcel 9070 was described as residential, bare land in the 1978 transaction between Morin and Federman. (Exhibit 1003) The 1994 transaction described the property as land with a mobile home;

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7 Two months later Wendl recorded a deed to correct a name spelling error in the earlier deed. (Exhibit 33)

8 Miller seemed unclear during his testimony as to when he had purchased Parcel 9070. The Examiner finds the recorded tax documents and the King County Assessor's records to be compelling evidence of property transaction dates.

no principal use was listed; it was not classified as agricultural land for current use taxation purposes. (Exhibit 32) When Wendl corrected the name misspelling later in 1994 she listed the property as residential. (Exhibit 33) The 1998 foreclosure again indicated that Parcel 9070 was not classified as agricultural land for current use taxation purposes. This time the principal use was listed as commercial/industrial. (Exhibit 34) When Miller purchased Parcel 9070 in 1999 the transaction again indicated that Parcel 9070 was not classified as agricultural land for current use taxation purposes; its principal use was listed as residential. (Exhibit 35)

6. Morin testified that he purchased Parcel 9070 for his daughter's horses. He testified that he found the lowest spot on the property and dug a pond that the horses could use for water. He testified that he spread the spoils from the pond around the perimeter of the pond. He testified that the area was dry before he dug the pond and that he had to continually fill the pond with water from a garden hose. He testified that a neighbor had a well which she let him use to fill his pond. (Testimony; see also Exhibit 9015.B) He did not testify about the depth of the pond. Miller later testified that he had no idea how big or deep the pond had been. (Testimony)

   The pond is visible in aerial photographs from 2000 on. [9] It was located in the southeast quarter of the site and contained an island. (Exhibits 20 – 24) The pond covered an area of approximately 50 feet (east-west) by 70 feet (north-south). The island was about 30 feet by 20 feet. (Dimension approximations based on Exhibit 20.) Pond depth cannot be determined from the aerial photographs in the record.

7. In or around 2005 developer CamWest was investigating the feasibility of developing a 38-lot residential subdivision on an assemblage of four parcels totaling 16.57 acres. Two of the four parcels fronted on 248th Avenue SE; Parcel 9070 was the southerly of those two parcels. The other two parcels were offset to the west and south with some overlap with Parcel 9070. (Exhibit 1, Bates 006 and Figures 3 – 5)

   CamWest entered into some type of agreement with Miller under which it and its agents could conduct feasibility studies on Parcel 9070. (Testimony; Miller never clearly stated the nature or terms of the agreement.) One result of that agreement was the preparation of a Sensitive Areas Report (the "Talasaea Report") in 2005 by Talasaea Consultants, Inc. ("Talasaea"), a consulting firm retained by CamWest to study the four parcels. Talasaea did field work for its report in June, 2005. (Exhibit 1, Bates 003)

   Talasaea delineated 10 wetlands within the 16.57 acre assemblage, two of which (Wetlands K and L) together with their regulatory buffers covered most of the east half of Parcel 9070. (Exhibit 1, Figure 5) Talasaea used then-accepted Federal and State wetland delineation methods in its study. (Exhibit 1, § 3.2)

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[9] The only earlier aerial photograph in the record dates from around 1936, long before Morin dug the pond. (Exhibit 1005)

Wetland K covered 0.12 acres and surrounded the dug pond. Talasaea found that Wetland K received hydrologic support from a high water table in the surrounding area and was seasonally dry. Wetland K extended nearly to the southern boundary of Parcel 9070. Vegetation within the wetland included blackberry, black cottonwood, Pacific willow, and creeping buttercup. Beyond a scrub/shrub fringe area, the wetland's buffer consisted of mown grass. Talasaea determined that Wetland K was a Class 3 wetland. (Exhibit 1, Fig. 5 and Bates 014)

Wetland L covered 0.11 acres. Its soils were primarily dark loam. Its vegetation cover was mostly mown grass. Wetland L received hydrologic support from Wetland K. Like Wetland K, Wetland L was categorized as a Class 3 wetland. (Exhibit 1, Fig. 5 and Bates 014)

Talasaea dug one pair of test pits for each of Wetlands K and L: One test pit within the wetland and the other nearby but outside the delineated edge of the wetland. Test Pits 2 and 4 are the "within" sites and Test Pits 1 and 3 are the "outside" sites. (Exhibit 1, Figure 5, Test Pits 1/2 and 3/4 [10]) The corresponding Routine Wetland Determination Data Forms in Exhibit 1 are: Test Pit 1 = Bates 038; Test Pit 2 = Bates 039; Test Pit 3 = Bates 040; and Test Pit 4 = Bates 041.

At Test Pit 2 (Wetland K) Talasaea found hydrophytic vegetation and hydric soils. It noted the absence of hydrology, but attributed that "to time of year." (Exhibit 1, Bates 039) At Test Pit 4 (Wetland L) Talasaea found wetland hydrology and soils but not hydric vegetation, the lack of which it attributed "to use of the area as pasture." (Exhibit 1, Bates 041) Interestingly, Talasaea noted that Test Pit 3, in the buffer between the two delineated wetlands, "may be site of past fill to create pond. Below 11" may be original wetland soil." (Exhibit 1, Bates 040) That comment refers to the finding of high chroma soils in the upper 11" above lower chroma soils, an unusual occurrence. (Testimony)

The City's former wetland biologist ("Curry") reviewed and concurred in Talasaea's findings in April 2006. Curry noted at that time that additional wetland areas might exist along Parcel 9070's 248th Avenue SE frontage. (Exhibit 2, Bates 002)

CamWest ultimately did not buy Parcel 9070. Miller testified that he never saw the Talasaea Report. (Testimony)

8. In or around 2008 the owner of the acreage parcel to the south of Parcel 9070 retained Altmann Oliver Associates, LLC ("Altmann Oliver") to perform a Critical Areas Study (the "Altmann Oliver Report") in association with a potential residential development of that parcel. Altmann Oliver performed field work on the abutting property in April, 2008. It used the then-accepted State wetland delineation methodology to identify two wetlands on the abutting property. It did not question Wetland K as previously delineated by Talasaea on Parcel 9070. (Exhibit 19) Altmann Oliver advised its client that the regulatory buffer for Wetland K would intrude into the client's property. (Exhibit 19, Bates 003) Altmann Oliver also rated Wetland K using the then-current State-approved

[10] Test Pits 1/2 are denoted as TP-1 and TP-2 and are located at the southwest corner of Wetland K. Test Pits 3/4 are denoted as TP-3 and TP-4 and are located in the area where the two wetland buffers overlap.

wetland rating form. Altmann Oliver concluded that Wetland K was a Category III wetland with a total functional score of 47 of which 11 were habitat function points. (Exhibit 19, Bates 008 – 022)

9. In September, 2011, a sign was posted at the driveway entrance to Parcel 9070 indicating that wanted fill dirt was wanted. (Exhibit 36) Neither when that sign was first posted nor when it was removed can be determined from the hearing record.

10. In or around 2016 Summit Homes, LLC ("Summit") entered into an agreement with Miller to purchase Parcel 9070 for development of a three-lot short subdivision. Summit retained Altman Oliver to prepare a critical areas study for the application, generally using the previous Talasaea Report as a starting point. As of June 8, 2016, Summit was planning to move forward with its project. (Exhibits 6; 7) On August 16, 2016, Summit informed the City that it had dropped the project because Miller "was steadfast that he should not have a wetland on his site." (Exhibit 8)

11. Summit developed a residential subdivision (the *Ivy Subdivision*) on the property abutting the south side of Parcel 9070. (The property that Altmann Oliver had studied in 2008.) The *Ivy Subdivision* includes a Native Growth Protection Area ("NGPA") along its north edge to encompass that portion of former Wetland K's required regulatory buffer that crosses the common property line. (Exhibit 17, Bates 005 and 008, Figure 4)

Miller testified that Summit raised the grade along its side of the common property line by some five feet. (Testimony) However, the area to which Miller refers is the NGPA area in which Summit would have been prevented by City regulations from doing any work. Photo 4 in Exhibit 17 (at Bates 012) shows that the elevation on Miller's side of the common property line is about 2.5 feet higher than the elevation within the NGPA on the *Ivy Subdivision* side of the common property line. (Exhibit 17; and testimony) That evidence indicates that Miller raised the grade on his side of the common property line, not the other way around. The Examiner finds the photographic evidence more compelling than Miller's testimony.

Miller testified that at some point during construction of *Ivy Subdivision* he obtained 40 – 50 cy of dirt from the Summit site and placed it on Parcel 9070. He also testified that he asked the driver hauling dirt from the Summit site to give him a few loads. Miller testified that about three weeks later he found 15 – 20 truck loads of dirt dumped on Parcel 9070. At a conservative estimate of 5 cy per truck load, the 15 – 20 loads represented 75 – 100 cy of dirt. Miller testified that the City posted a Stop Work Order on Parcel 9070 about two days later. (Testimony)

12. The City posted the Stop Work Order on February 10, 2017. (Exhibit 10) The City had been investigating grading activities on Parcel 9070 for over a year by that time.

On January 12, 2016, Curry informed the CCO that she had received a complaint of wetland filling and grading on Parcel 9070. She stated that she had been told that the Wetland K pond had been completely filled and that Wetland L had been filled and graded. (Exhibit 2, Bates 001) Curry

personally observed Parcel 9070 on February 1, 2016, and concluded that filling and grading had occurred. (Exhibit 3, Bates 001)

On February 12, 2016, the CCO sent Miller a "knock and talk" letter informing him of the complaint and the City's belief that regulated wetlands had been filled and that grading had occurred on Parcel 9070, both without benefit of required City permits. (Exhibit 4; and testimony)

Sometime around the end of February, 2016, Miller called the CCO and admitted that filling and grading had occurred over time. Miller insisted that there were no wetlands on Parcel 9070 and that he had not violated any City codes. The CCO told Miller that he needed to obtain permits for the grading that had occurred. (Testimony)

Miller did not further contact the City. Thus, on April 14, 2016, the CCO sent Miller a second letter advising that he would be subject to civil penalties if he failed to comply with City codes. The letter gave Miller until May 12, 2016, to begin the permit process. (Exhibit 5)

The CCO became aware of the Summit proposal to develop Parcel 9070 (See Finding of Fact 10, above.) and put the code enforcement case on hold. (Testimony)

The CCO attempted unsuccessfully to contact Miller in September, 2016, after Summit had abandoned its plan to purchase Parcel 9070. (Testimony)

The CCO received another complaint in February, 2017. He personally observed Parcel 9070 on February 9, 2017, at which time he observed clear indications of recent grading activity. (Exhibit 9; and testimony)

The Stop Work Order was issued the following day. The Stop Work Order listed five code violations: SMC 16.15.070: Clearing and grading within a wetland without required permits; SMC 21A.50.110(1): Violation of the critical area review requirement; SMC 21A.50.120(1): Violation of critical area study requirements; SMC 21A.50.290: Clearing and grading had harmed a regulated wetland system; and SMC 21A.50.310(8): Failure to provide required restoration. (Exhibit 10) Miller did not appeal the Stop Work Order. (Testimony) A Stop Work Order that is not timely appealed "renders the stop work order a final determination that the civil code violation occurred and that work was properly ordered to cease." [SMC 23.70.010(3)]

When the CCO was unable to obtain any follow-through from Miller after the Stop Work Order had been posted, he prepared and issued the Notice which is at issue in this case. (Testimony; see Exhibit 13)

13. Miller testified that Exhibit 39 (photographs dated September 8, 2017) depicts the dirt that Summit dumped on Parcel 9070. He said the dumping occurred before the Stop Work Order was issued, but

that he had used a tractor to grade out and flatten the piles after the Stop Work Order was issued. (Testimony)

14. Miller testified that he sells air and vacuum equipment to service stations. At one time he contemplated allowing a boat dealer to store boats on Parcel 9070. He keeps chickens and ducks; he used to have horses and llamas. He sells eggs and ducks from which he estimates that he earns about $200 per month. He sought unsuccessfully to have Parcel 9070 classified as agricultural land for current use taxation purposes about one year ago; he did not earn enough money from agricultural pursuits to qualify for that classification. (Exhibit 38; and testimony)

15. Miller conceded that he needs a clearing and grading permit for the large dump of Summit dirt on Parcel 9070. (Statement of counsel.)

16. The Washington State Department of Ecology ("Ecology") was provided with the Talasaea Report, the Altmann Oliver Report, and the pre-hearing reports of Miller's and the City's consultants. After reviewing all those materials, Ecology's wetland specialist concluded that "the Talasaea delineation is the only on-site description of wetland conditions that preceded the fill material. Therefore, [Ecology] concur[s] with the Talasaea delineation of Wetlands K and L on the Miller property." (Exhibit 28, Bates 2)

17. Any Conclusion of Law deemed to be a Finding of Fact is hereby adopted as such.

LEGAL FRAMEWORK [11]

The Examiner is legally required to decide this case within the framework created by the following principles:

Authority

An appeal from a Notice and Order requires an open record hearing before the Examiner. The Examiner makes a final decision on the appeal which is subject to the right of reconsideration and appeal to Superior Court. [SMC 20.10.240, 20.10.250, 20.10.260, and 23.110.010(4)]

Review Criteria

> At the conclusion of the appeal hearing, the hearing examiner shall issue an order to the person responsible for the violation which includes the following information:
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> (a) The decision regarding the alleged violation including findings of fact and conclusions based thereon in support of the decision;
>
> (b) The required corrective action;
>
> (c) The date by which the correction must be completed;

[11] Any statement in this section deemed to be either a Finding of Fact or a Conclusion of Law is hereby adopted as such.

(d) The civil penalties assessed based on the provisions of this title and the fee resolution; and
(e) The date after which the City may proceed with abatement of the unlawful condition if the required correction is not completed.

[SMC 23.110.010(3)]

Standard of Review
The standard of review is preponderance of the evidence. The Department has the burden of presenting a *prima facie* case to prove the charged violation(s); the appellant has the burden of presenting an affirmative defense. [RoP 316(a)]

Scope of Consideration
The Examiner has considered: all of the evidence and testimony; applicable adopted laws, ordinances, plans, and policies; and the pleadings, positions, and arguments of the parties of record.

CONCLUSIONS OF LAW

1. All constitutional arguments raised by Miller are beyond the scope of the Examiner's jurisdiction and will not be addressed. [*Exendine v. City of Sammamish*, 127 Wn. App. 574, 113 P.3d 494 (2005), rev. denied 156 Wn.2d 1018 (2006)]

2. Technically, Miller cannot now challenge four of the five cited code violations within the Notice because those same code sections were stated as violations in the Stop Work Order which Miller did not appeal. Under SMC 23.70.010(3), Miller's failure to timely appeal the Stop Work Order makes those violations unchallengeable verities.

3. There is compelling evidence and testimony that Miller either caused or allowed well in excess of 50 cy of dirt to be dumped on Parcel 9070 and that he used that dirt to fill in the former pond and low areas where Wetlands K and L had been.

4. There is compelling evidence that Wetlands K and L were regulated wetlands before they were filled. Morin and Miller both argued that neither area was ever a wetland. But neither is an expert at identifying and delineating a wetland. Talasaea and Altman Oliver, on the other hand, are experts. Curry is also an expert and she also saw the property before any filling occurred. Those three are the only voices in this appeal who saw Parcel 9070 before the filling occurred (other than Morin and Miller). Talasaea and Altman Oliver were working at the behest of land developers. It makes no sense that they would identify imaginary wetlands which would reduce the development yield which their clients could realize. Their reports have credibility. Miller, on the other hand, has a lot to lose if

Parcel 9070 contains two regulated wetlands. [12] The Examiner accords greater credibility to the Talasaea Report and the Altmann Oliver Report than to the lay opinions of Morin and Miller.

5. There is no compelling evidence or testimony that the filling and grading had anything to do with agricultural activities, if, in fact, real agricultural activities actually occur on Parcel 9070. Even if there were such evidence, the SMC does not exempt agricultural activities from its wetland regulations. By definition, a "farm pond" is not a wetland. [SMC 21A.15.1415] But according to the Talasaea Report, wetland conditions existed around the fringe of the pond. The pond was not a regulated wetland, but the area surrounding it was, as was Wetland L.

   The City's wetland regulations are contained in Chapter 21A.50 SMC, especially in SMC 21A.50.290 - .322. Those regulations contain no exemption for agricultural activities. The "Complete exemptions" section of Chapter 21A.50 SMC does not exempt agricultural activities. [SMC 21A.50.050]

   Subsection 21A.50.060(2) SMC provides that "landscaping, and other existing uses that do not meet the requirements of this chapter, which were legally established according to the regulations in place at their time of establishment, may be maintained and no critical areas study or review is required." This section does not protect Miller from the Notice. First, even if the farm pond were considered "landscaping" or an "existing use," filling it in would not constitute "maintenance" in any normal meaning of the word. Maintenance is to maintain something, not to obliterate it. Second, Wetland L was not landscaping, so the provision would not apply to it at all.

   Subsection 21A.50.060(4) SMC applies directly to landscaping. But there, landscaping within a wetland or its buffer "may be revised or replaced with similar features or features with less impact to the critical area or buffer". [Subsection (4)(b)] Obliterating a regulated wetland by filling it hardly qualifies as "less impact to the critical area or buffer."

6. Miller's challenges to the assessed penalties are challenges to the legality/constitutionality of duly enacted City ordinances. The Examiner has no authority to rule on such challenges. [*Exendine, supra*]

7. Miller argues that the City has a duty to inform him that wetlands exist on his property before it can enforce its wetland regulations against his property. In essence, Miller suggests that the City must undertake formal wetland delineations on every parcel in the City (how the City is to obtain authorization from every property owner to enter onto private property to undertake such delineations is not explained) and inform the owners of the results before any municipal wetland regulations can be enforced.

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12 The Examiner is largely ignoring the testimony and evidence from Miller's and the City's wetland experts for the simple reason that neither was apparently able to explore below the fill depth to positively ascertain what is at depth. The Examiner finds the studies done before any filing occurred to be the more reliable indicators of wetland conditions on Parcel 9070.

Miller is incorrect. The City does not owe such a duty to Miller or to any other property owner within the City. This is somewhat analogous to the concept that *pro se* litigants "are bound by the same rules of procedure and substantive law as attorneys." [*Westberg v. All-Purpose Structures, Inc.*, 86 Wn. App. 405, 411, 936 P.2d 1175 (1997); *Patterson v. Superintendent of Pub. Instruction*, 76 Wn. App. 666, 671, 887 P.2d 411 (1994), review denied, 126 Wn.2d 1018 (1995)] Section 21A.50.090 SMC warns that not all critical areas "are fully mapped." Section 21A.50.100(1) SMC places the responsibility on the applicant to disclose critical areas within a proposed development site.

8. Miller argues that SMC 16.15.050(8)(a) allows landscape maintenance using up to 50 cy without need for a clearing and grading permit. That subsection does so provide, but Miller does not qualify for that exemption. First, the exemption applies to "Normal and routine maintenance of existing lawns and landscaping," not obliteration of the landscaping. Further, the concluding clause in that subsection makes the exemption "subject to the limitations in critical areas and their buffers as set out in Chapter 21A.50 SMC". It is not an open-ended exemption. Here, the evidence indicates that well more than 50 cy of dirt was imported onto Parcel 9070 without benefit of any permit and used to fill former wetlands. The exemption simply does not apply.

9. Miller criticizes the Notice for not providing sufficient identification of the alleged violations. The Examiner disagrees. The Notice contains an extensive Background section which explains in detail what violations the City believes Miller has committed. (Exhibit 13, § 5) In addition, SMC 23.60.020(2) requires only that the Notice contain "[a] statement of each ordinance, regulation, code provision or permit requirement violated". The Notice fulfills that requirement in § 7.

10. Miller criticizes the Notice for not providing sufficient guidance regarding required corrections. The "Required Actions" section of the Notice (Exhibit 13, § 8) does include flexibility. The Examiner concurs with the City that it is unrealistic to mandate a specific solution in this case since so many variables are involved. The property owner should have some input into the result.

11. Miller challenges calculation of the amount of the Chapter 21A.50 SMC civil penalty. Section 23.100.010 SMC provides for assessment of a civil penalty up to $25,000 plus restoration costs for critical areas violations. The Notice assessed a $15,000 civil penalty under this authority. In 2013 the Department developed a set of guidelines for determining the amount of civil penalty that should be imposed in different circumstances. The CCO applied that methodology in this case. (Exhibit 12) This is not an *ad hoc* guidance document, but rather one that has been in existence for over four years. It provides a rational basis to assess the critical areas civil penalty.

12. Miller wants the City to cite "Summit for illegally dumping excess dirt on the Miller property." (Exhibit 9017, p. 18, l. 19) The Miller testimony shows that Miller asked Summit for dirt. That he may (or may not) have received more than he expected is a private problem between Miller and Summit. A property owner is ultimately responsible for what happens on his property.

13. Title 23 SMC does not indicate whether time periods contained in a Notice are automatically stayed during the pendency of an appeal. Common sense says they generally should be.

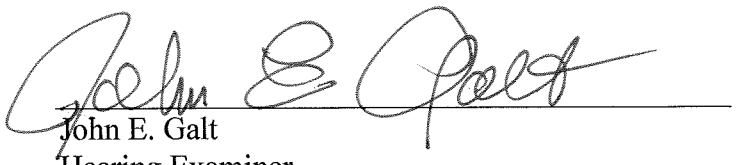
    The Notice gave Miller 60 (calendar) days in which to take the required corrective actions. (Exhibit 13, §§ 8 and 9) Six of those days passed before Miller filed his appeal. Therefore, Miller has 54 days remaining in the compliance period.

14. Any Finding of Fact deemed to be a Conclusion of Law is hereby adopted as such.

DECISION

Based upon the preceding Findings of Fact and Conclusions of Law, and the testimony and evidence submitted at the open record hearing, the Examiner **DENIES** the appeal of Don and Kathleen Miller. Fifty-four (54) days remain in the compliance period established by Sections 8 and 9 in the Notice.

Decision issued November 15, 2017.



John E. Galt
Hearing Examiner

HEARING PARTICIPANTS [13]

Jane Koler, unsworn counsel

Donald Morin
Chris Hankins
Don Miller

Charlotte Archer, unsworn counsel
Hillary Graber, unsworn counsel
Nell Lund
Ed Sewall

NOTICE of RIGHT of RECONSIDERATION

This Decision is final subject to the right of any party of record to file with the Examiner (in care of the City of Sammamish, ATTN: Lita Hachey, 801 228th Avenue SE, Sammamish, WA 98075) a written request for reconsideration within 10 calendar days following the issuance of this Decision in accordance with the procedures of SMC 20.10.260 and Hearing Examiner Rule of Procedure 504. Any request for reconsideration shall specify the error which forms the basis of the request. See SMC 20.10.260 and Hearing Examiner Rule of Procedure 504 for additional information and requirements regarding reconsideration.

A request for reconsideration is not a prerequisite to judicial review of this Decision. [SMC 20.10.260(3)]

NOTICE of RIGHT of JUDICIAL REVIEW

This Decision is final and conclusive subject to the right of review in Superior Court in accordance with the procedures of Chapter 36.70C RCW, the Land Use Petition Act.. See Chapter 36.70C RCW and SMC 20.10.250 for additional information and requirements regarding judicial review.

The following statement is provided pursuant to RCW 36.70B.130: "Affected property owners may request a change in valuation for property tax purposes notwithstanding any program of revaluation."

[13] The official Parties of Record register is maintained by the City's Hearing Clerk.