

**SAN JUAN COUNTY
HEARING EXAMINER**

FINDINGS, CONCLUSIONS AND DECISION

Appellant: Morgan Foley
138 Rhone Street
PO Box 947
Friday Harbor, WA 98250

Attorney: Phil Serka
400 North Commercial St., PO Box 5158
Bellingham, WA 98227-5158

Request: Appeal of Notice and Order for failing septic tank

Parcel No: 452431006 (violation site)

Location: 2080 Roche Harbor Road
San Juan Island

Public Hearing: February 23, 2015

Application Policies and Regulations: SJCC 18.50.070; RCW 90.58.220.

Decision: Appeal sustained, NOV overturned.

S.J.C. COMMUNITY

MAR 11 2015

DEVELOPMENT & PLANNING

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**BEFORE THE HEARING EXAMINER FOR THE COUNTY
OF SAN JUAN**

Phil Olbrechts, Hearing Examiner

RE: Appeal of Notice of Violation Morgan Foley PCI000-14-0003	FINDINGS OF FACT, CONCLUSIONS OF LAW AND FINAL DECISION. S.J.C. COMMUNITY MAR 11 2015
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SUMMARY

DEVELOPMENT & PLANNING

The appellant has appealed a Notice of Violation alleging that the appellant illegally dumped 66 tires onto a shoreline. The appeal is sustained. The preponderance of evidence and substantial evidence in the record does not establish that the appellant illegally dumped the 66 tires in question. The County incorrectly applied the conclusions of a statistical analysis to the facts of this case.

The County did an exemplary job in attempting to prove its case. Unfortunately, it appears that the keystone of its case was incorrectly applied. The County's key evidence was a statistical analysis prepared by a Bellingham statistics professor. The County used this statistical analysis to assert that there was a 1 in 51,000 chance that seven models of tires found at the illegal dump site would also be randomly present in photographs taken of tires on the appellant's property before he had the tires removed. Under the County argument, given the unlikelihood of this coincidence, the preponderance of evidence established that the tires found at the illegal dump site came from the piles of tires photographed on the applicant's property.

The County's statistical analysis was fully credible and well done. It's application to this appeal was not credible. The statistical analysis was based upon 9 of the 66 tires found at the illegal dump site, where all of the tires from the dump site were taken for each size of tire represented in the 9 tire sample. The analysis assessed what the odds are of finding in a random dump site that "1 tire of size 235/85R16, 1 of size 225/75R15, 2 of size 245/75R16, 2 of size 205/60R15 and 3 of size 235/75R15 would contain a Cooper Radial Discoverer L/T, a Good Year Tempo, a Toyo Open Country

1 *A/T, a Daytona SR, a Goodyear F32-S All Winter Radial, and a Federal MS351 A/T*
2 *LT...*” The report concluded that those odds are 1 in 51,000.

3 The statistical report made no direct conclusions of the likelihood that the appellant
4 had dumped tires on the shoreline. It was left to staff to apply the results of that study
5 to this appeal. It does not appear the conclusions of the study were correctly applied.
6 Used correctly, the study establishes that if the appellants property also had 1 tire of
7 size 235/85R16, 1 of size 225/75R15, 2 of size 245/75R16, 2 of size 205/60R15 and 3
8 of size 235/75R15, there would be a 1 in 51,000 chance that the models would be
9 composed of a Cooper Radial Discoverer L/T, a Good Year Tempo, a Toyo Open
10 Country A/T, a Daytona SR, a Goodyear F32-S All Winter Radial, and a Federal
11 MS351 A/T LT. Staff at no point identified that it had matched both the numbers of
12 tires for each size as well as the same set of models between the appellant’s property
13 and tire dump site. In point of fact, staff repeatedly asserted throughout the appeal that
14 the number of tires was completely irrelevant and that all that mattered for purposes of
15 applying the 1 in 51,000 odds was that staff was able to find seven models amongst
16 the 66 tires at the dump site that matched seven models photographed at the
17 appellant’s property.

18 Given that the record does not clearly identify whether the numbers of tires of each
19 size were matched to the appellant’s property and the position of staff that the
20 numbers are not relevant, it cannot be concluded that the findings of the analysis were
21 applied correctly. It is possible that the County’s position has been misunderstood.
22 The methodology of how the study was applied was not well documented. More
23 importantly, the author of the study was not present at the appeal hearing to clarify
24 whether her study had been correctly applied. The County is encouraged to request
25 reconsideration pursuant to SJCC 2.22.210(O) if it can clarify from the administrative
record that the study was correctly applied. If there is only a 1 in 51,000 chance that
the appellant’s property and the illegal dump site contained the same seven tire models
as asserted by staff, then the preponderance of evidence clearly would support a
finding that the tires came from the appellant’s property.

EXHIBITS

1. 7/14/14 Appeal statement.
2. 8/1/14 County Motion to Dismiss
3. 8/22/14 Order on Motion to Dismiss
4. 9/4/14 Email Order Withdrawing Order on Motion to Dismiss
5. 9/9/14 Foley Motion for Reconsideration
6. 9/11/14 Foley Declaration in Support of Motion to Dismiss
7. Re-Issued Order on Motion to Dismiss
8. Prehearing Order
9. County Preliminary Witness and Exhibit List, including all exhibits identified
in the List except for Ex. H and I.
10. Foley Preliminary Witness and Exhibit List

11. Foley Memorandum of Law
12. Foley Motion to Exclude
13. Email correspondence between all parties

FINDINGS OF FACT

1. Appellant. The appellant is Morgan Foley.
2. Appeal. This appeal is of a Notice of Violation (“NOV”) issued June 2, 2014 and served on June 5, 2014. The NOV asserted that the appellant had dumped 66 tires in violation of SJCC 18.50.070(B) and RCW 90.58.220 onto the San Juan Island shoreline at 2080 Roche Harbor Road (“Land Bank Property”). The NOV required the appellant to reimburse the County for removing the tires in the amount of \$4,700 and also to pay a penalty of \$1,000. The appellant filed an appeal of the NOV on July 14, 2014.
3. Source of Tires. San Juan County believes the tires were dumped in response to prior code enforcement actions requiring the appellant to remove tires from its property. These prior code enforcement actions, based upon unauthorized land use practices on the appellant’s property, culminated in a court order from the San Juan District Court ordering the appellant to remove all tires within 30 days of sentencing. The order was filed on March 14, 2012. See Ex. 9(K).
4. Initial Investigation of Illegal Dump. On March 11, 2014, Christopher Laws, San Juan County Code Enforcement Officer, was notified of 66 tires having been dumped on the San Juan Island shoreline on the Land Bank Property. Mr. Laws photographed the tires and found that many of the tires were similar to tires he had observed through multiple visits of the appellants property as part of the code enforcement actions referenced in Finding of Fact No. 3.
5. Timing of Tire Removal from Appellant Property. The appellant removed the tires from his property sometime between November 8, 2011 and February 11, 2012. This is based upon the fact that the tires were last photographed on the appellant’s property on November 8, 2011 and the next time that Mr. Laws visited the site on February 11, 2012 the tires were gone.
6. Similarities Between Appellant and Land Bank Tires. Mr. Laws compared the tires found at the Land Bank Property to photographs he had taken of the appellant’s tires before the appellant removed them from his property pursuant to the court order identified in Finding of Fact No. 3. Mr. Laws found many similarities between the tires including tread patterns, models and sizes. Of particular interest to Mr. Laws was the fact that the rims had been removed from the land bank property tires, just as they had been from the tires stored on the appellant’s property prior to their removal pursuant to court order. Photographic

1 comparisons between the tires on the appellant's property and those on the land
2 bank property were prepared by Mr. Laws, to identify tires on the appellant's
3 property that Mr. Laws believes to be those identified in photographs of tires on
4 the land bank property.

5 7. Appellant Interview. On April 25, 2014 Christopher Laws visited the appellant at
6 his residence along with San Juan County Deputy Jeff Ascher. Deputy Ascher
7 has extensive experience in interrogation techniques and in detecting when
8 suspects are lying. He has served in the San Juan County Sheriff's Office for 29
9 years. Deputy Ascher asked the appellant how he had disposed of the tires.
10 According to Deputy Ascher, the appellant responded that he had disposed of the
11 tires by sending them to Beacon Battery in Bellingham as well as S&B Recycling
12 in Bellingham. The appellant said he had receipts to prove he had sent them
13 there. He went into his house to get them and then returned to say he didn't have
14 them. Christopher Laws then showed the appellant pictures of the tires dumped at
15 the Land Bank Property. At this point the appellant stated that he had left tires on
16 a flatbed truck on a wooded parcel owned by Boyd Crumpacker. Deputy Ascher
17 testified at the appeal hearing that he did not believe that the appellant was being
18 truthful in his responses to how the tires were removed, due to his nervous
19 behavior, rapid/shifty eye movements and lack of eye contact. Deputy Ascher has
20 known the appellant for several years and through that experience knows when
21 the appellant is at ease in his responses.

22 8. Follow Up on Recycling Centers. Christopher Laws contacted Beacon Recycling
23 and S&B Recycling to see if they had any receipts for receipt of tires from the
24 applicant in the period between November 8, 2011 and February 11, 2013¹.
25 Neither recycler had any receipts. At the appeal hearing the appellant stated that
he did not tell Deputy Ascher that he had sent tires to S&B recycling and that
S&B recycling in fact doesn't recycle tires. The appellant also disclosed for the
first time that some of the tires had been disposed of by Mr. Crumpacker to a
Mount Vernon recycling facility.

9. Follow Up on Crumpacker. On May 15, 2014 Christopher Laws interviewed Mr.
Crumpacker. Mr. Crumpacker stated that Mr. Foley had stashed tires on his
property on a flatbed truck "nine months or so" prior to May 15, 2014, which
would have meant the tires were placed on the truck around mid-August, 2013.
This was outside the range of dates the tires were removed from the appellant's
property as determined in Finding of Fact No. 5, which was between November 8,

¹ This is the period of time in which page 6 of the staff report asserts that the tires were removed. However, at page 7 where the recyclers are question, the staff report characterizes this time period as between November 8, 2011 and February 11, 2013 instead of February 12, 2012. Given that the expanded time frame used for the questioning of the recyclers expands the time period for searching for receipts, it is concluded that this discrepancy in the staff report does not materially undermine the County's case.

1 2011 and February 11, 2012 or 2013. Christopher Laws and Deputy Ascher
2 investigated the truck and found the tires loaded on the truck to still have rims.

3 10. Commission of Statistical Analysis. Christopher Laws had a statistics professor at
4 Western University prepare a statistical analysis of the likelihood that several tires
5 of a particular model and size would be found at both the Land Bank Property and
6 on the appellant's property. Specifically, the report assessed the odds of finding
7 at a random dump site that "*1 tire of size 235/85R16, 1 of size 225/75R15, 2 of
8 size 245/75R16, 2 of size 205/60R15 and 3 of size 235/75R15 would contain a
9 Cooper Radial Discoverer L/T, a Good Year Tempo, a Toyo Open Country A/T, a
10 Daytona SR, a Goodyear F32-S All Winter Radial, and a Federal MS351 A/T
11 LT...*" It is important to note that the numbers of each size of tire were a part of
12 the professor's calculations. Indeed, the ultimate conclusion of the report is that
13 "...*the probability that a site like this (with these numbers of tires of these sizes)
14 would have these tire models by chance 1 only about 1 out of 51,000 such sites.*"
15 (emphasis added).

16 11. Application of Statistical Analysis. The staff report interprets the statistical
17 analysis as concluding that there is "*a 1 in 51,000 chance to find the combination
18 of models found at the Land Bank Property and Foley Property*". Nothing in the
19 statistical report directly makes this determination and this determination is not
20 supported by the record. The statistical analysis is entirely based upon the nine
21 tires identified in Finding of Fact No. 10, found at the Land Bank Property. Ms.
22 Anderson at no point expresses the opinion in her report that the 1 in 51,000
23 chance applies between the Foley and Land Bank Property tires. Consequently, it
24 was up to staff to show that the nine tires identified in FOF No. 11 were all
25 present in the same numbers on the Foley property. Only then would the 1 in
51,000 probability apply. There is no evidence in the record anywhere that the
type and numbers of tires identified in FOF No. 11 were present on the Foley
property. In point of fact, Mr. Laws repeatedly asserted during the hearing that
the number of tires of any particular size was irrelevant and all that mattered for
comparison purposes was the model of the tires. This position is clearly at odds
with the significance placed on the numbers of tires in the statistical report. In
addition to the reliance upon numbers identified in the quoted portions of the
report, mathematical calculations in the statistical analysis incorporate the number
of tires for each tire size. There is no question that the 1 in 51,000 was based
upon the number of tires for each size.

23 12. Statistical Analysis Based Upon Number of Tires of each Tire Size in Addition to
24 Models. Nothing in the statistical analysis suggests that the number of tires of
25 each size need not match the same number of tires at the appellant's property. In
point of fact, as identified in the previous two findings of fact, the statistical report
was very explicit that the number of tires matters. The introduction notes that the
general type of inquiry is "*Given that we saw two randomly chosen tires of a
particular size, what is the probability that they would have been of these two*

1 *models?”* In short, the statistical analysis presents the probability of “if you have
2 x tires of size y, the probably of having models w and z is t”. Staff appears to
3 simply ignore x and y and concludes that the probability of having models w and
4 z is t.

5 13. Preponderance Doesn't Establish Appellant Dumped Tires. In the absence of
6 proof that the statistical analysis was correctly applied to this case, the evidence is
7 too circumstantial to otherwise establish that the appellant was responsible for the
8 illegal dumping of tires at the land bank property. The appellant's behavior was
9 highly suspicious and duplicitous when he was interviewed about the illegal
10 dumping, but it's just as likely that this was because he was illegally directing the
11 tires to be dumped in the woods as opposed to the shoreline. The photographs
12 submitted by the County show that some of the tires at the dump site were of the
13 same size and model as the tires that were on the appellant's property, but the
14 photographs are not clear enough to show that they are in fact the same tires.
15 Given the appellant's duplicitous behavior during his interview and his illegal
16 removal of tires to the Crumpacker property, he certainly is more likely than most
17 other people to have dumped the tires at the Land Bank Property at the time he
18 had to remove the tires from his property. However, without some information on
19 the likelihood that others may have dumped the tires, such as one of the other
20 recyclers on the island, the evidence is too circumstantial to conclude that more
21 likely than not the appellant dumped the tires.

22 14. The appeal hearing on this matter was held on February 23, 2015 in the Island
23 Bank Annexation in Friday Harbor.

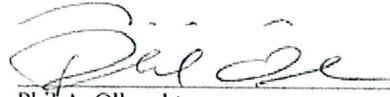
24 CONCLUSIONS OF LAW

- 25 1. SJCC 18.100.140 provides that appeals of Notices of Violation are to be heard by
the hearing examiner.
2. The Notice of Violation subject to this appeal, Case No. PCI000-14-0003, asserts
that the appellant illegally dumped tires onto the Land Bank Property in violation
of SJCC 18.50.070(B) and RCW 90.58.220. As determined in the Findings of
Fact herein, the preponderance of evidence does not establish that the appellant
was responsible for dumping tires onto the Land Bank Property.

DECISION

The appeal is sustained and no violation is found to support imposition of the penalties
or costs assessed by the NOV.

1 Dated this 10th day of March, 2015.

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3 
4 Phil A. Olbrechts

5 County of San Juan Hearing Examiner

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7 **Effective Date, Appeal Right, and Valuation Notices**

8 Hearing examiner decisions become effective when mailed or such later date in
9 accordance with the laws and ordinance requirements governing the matter under
10 consideration. SJCC 2.22.170.

11 This land use decision is final and in accordance with Section 3.70 of the San Juan
12 County Charter. Such decisions are not subject to administrative appeal to the San
13 Juan County Council. See also, SJCC 2.22.100. This decision appears to qualify as a
14 land use decision as defined by RCW 36.70C.020(2)(c) and is hence appealable to
15 superior court as governed by the Land Use Petition Act, Chapter 36.70C RCW.
16 However, the status of a decision regarding sanitary health regulations as a land use
17 decision has not been directly addressed by the courts and consultation with an
18 attorney is recommended to ensure that the appeal is filed in the proper forum.

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20 Affected property owners may request a change in valuation for property tax purposes
21 notwithstanding any program of revaluation.
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