August 22, 2008

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REPORT AND DECISION

SUBJECT: Department of Development and Environmental Services File No. **E0800168**

JANICE and CHRISTOPHER ANDERSON, JUNE MARTIN, JOHN and MARLENE KORENEK, JENNIFER PRATT and DAVID KAPPY
Code Enforcement Appeal

Location: 15233—115th Avenue Southwest

Appellants: Janice and Christopher Anderson, June Martin, John and Marlene Korenek, Jennifer Pratt and David Kappy
represented by **Janice Anderson**
15245—115th Avenue
Vashon, Washington 98070
Telephone: (206) 408-7050

King County: Department of Development and Environmental Services
represented by **Sheryl Lux**
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EXAMINER PROCEEDINGS:

Hearing opened:	July 29, 2008
Hearing continued:	July 29, 2008
Hearing reconvened:	August 21, 2008
Hearing closed:	August 21, 2008

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. Beginning February 23, 2008 King County Department of Development and Environmental Services (DDES) Code Enforcement Section began to receive a series of complaints concerning property owned by Shelly and Tina Middling located at 15233 115th Avenue Southwest on Vashon Island. These complaints by various neighboring residents described truckloads of logs being transported to and from the Middling property, log cutting and a firewood selling business. A March 21, 2008 letter from Code Enforcement Officer Sheryl Lux to the Middling sisters, sent after completion of an onsite inspection, suggested that the firewood cutting business could be allowed as a home occupation if certain standards were met. Later, on April 28, 2008, Officer Lux determined that the Middling property did in fact qualify for home occupation treatment and informed the complainants that the enforcement file was being closed. Janice and Christopher Anderson, on behalf of themselves and other neighbors, on May 13, 2008 filed an appeal of the DDES determination not to further pursue enforcement action against the Middling property.

2. The property in question encompasses 10.19 acres located in the RA-10 zone near the north end of the paved portion of 115th Avenue Southwest. As shown by the Appellants' photographs, 115th Avenue Southwest narrows north of its intersection with Southwest 156th Street, with a gravel private easement driveway veering northwest across the Anderson parcel a distance of about 500 feet before entering the Middling property. The eastern half of the Middling property is heavily wooded but the western half has been cleared, with residential development located in the northwest corner and log storage and firewood operations further south. Creek systems lie both to the east and west, in each instance lying 300 feet or more from developed portions of the Middling parcel.

3. The appeal by the Andersons and their neighbors raise a number of concerns, many relating to the neighborhood impacts of the firewood business. These complaints include speeding dump trucks with untethered loads of logs, noise from chainsaw operations and dust emissions. The Andersons are also concerned that the gravel easement road across their property is deteriorating from heavy truck use and worry that the water lines under the easement road serving their residence may ultimately be threatened. While there is unrebutted testimony that firewood operations on the Middling parcel have been conducted in varying intensities over many years, there is little question that the level of business activity has increased dramatically since late 2007. Some sense of this can be derived from a comparison of the aerial photographs in Exhibit 6, which show that in 2007 the log pile on the property had increased to four or five times the size shown in an earlier 2005 photo.

4. A further major allegation within the Anderson appeal is that a relatively recent major landslide on Pitbull Creek within the Shingle Mill Creek watershed is the consequence of the firewood operation on the Middling property. The Appellants have provided no evidence in support of this contention, nor even a plausible theory of how it might be true. As noted above, the creeks are all protected by significant forest buffers, and there is no logical reason to conclude that the distant rumbling of the Middling dump trucks would precipitate a major landslide event.

5. A more legitimate question is whether the firewood business can accurately be described as a home occupation. The firewood business is operated by Rick Middling, who is the brother of the property owners, Shelly and Tina Middling. The property is the Middling family home that Shelly and Tina inherited in 1991. Neither Shelly nor Tina are owners of the firewood business nor paid any rent for the use of the property. Shelly Middling has testified that she performs some bookkeeping, invoicing and filing for the business that occupies perhaps 10 hours a week of her time. In addition she has a full-time, 40 hour per week job offsite. The level of her

employment in the firewood business is unsupported by any documentation as to either time or amounts paid. It appears that some of the payment is in-kind in the form of fuel for heating the residence. Ms. Middling testified that she files neither W-2 nor unemployment insurance forms with respect to this employment.

CONCLUSIONS:

1. The King County Code offers minimum guidance as to the procedures to be followed in deciding a complainant-generated code enforcement appeal. KCC 23.36.010A allows a complainant who is an aggrieved person and requests to be advised of a complaint investigation to appeal a determination not to issue a citation or order. Beyond these generalities, no help is provided. There is no standard of proof nor indication whether the DDES administrative decision is entitled to deference on appeal. Under such circumstances our view is that the DDES determination should not be overturned unless a code violation clearly has been demonstrated.

2. There are a few easy questions that can be readily dismissed. First, the Appellant would like the Middling property to be evaluated pursuant to the relatively stringent home industry standards stated at KCC 21A.30.090, rather than the more flexible home occupation standards of KCC 21A.30.085. But the code scheme is clear in specifying that the home industry requirements only apply to activities that fail to qualify for home occupation treatment. Since DDES has specifically concluded that the Middling operations meet the requirements for a home occupation under KCC 21A.30.085, the more demanding home industry requirements do not apply.

3. Issues of damage to the private easement driveway across the Anderson property are beyond the jurisdiction of this proceeding. The question of whether the Middlings' commercial use of the easement driveway is permitted constitutes a private matter concerning the easement terms and involves the resolution of property rights. These issues are within the exclusive purview of a superior court to determine.

4. The questions whether the Middling firewood operation complies with the requirements of KCC 21A.30.085 essentially resolve into two major concerns. The first is whether Shelly Middling's relationship to her brother's business is sufficient to support a finding that such activity is accessory to the residential use, and the second is whether the firewood business itself must in some way comply with the use tables contained in KCC Chapter 21A.08. As recited in part C of her staff report, Ms. Lux has explicitly determined that the dimensional and intensity requirements of KCC 21A.30.085 are being met by the Middling operation, and these findings have not been challenged by the Appellants.

5. Based on the record before us, it is clear that the relationship of Shelly Middling to her brother's firewood business on the subject property is minimal but not entirely nonexistent. She does some paperwork for the business and gets some money and firewood in return. It appears to be a family relationship more than a business one. She and her sister live on the family homestead and to some extent must view it as an asset for use of the family as a whole. Since the applicable home occupation code provision merely states that a resident may "conduct" home occupations as accessory activities, the very broad code language does not impose any degree of business formality. The code provides no firm basis to overturn DDES' determination that Shelly Middling's relationship to her brother's business operation is sufficient to meet the home occupation code requirement.

6. With respect to the use itself, DDES appears to have taken the position that any use can be legitimized as a home occupation so long as the dimensional and intensity requirements are met. This interpretation goes too far. While the home occupation standards do indeed introduce an element of flexibility to the use permissibility question, qualification as a home occupation is not totally devoid of substantive use restraints. Section E. of KCC 21A.30.085 makes this clear by implication when it lists specific permitted activities for home occupations in the A, F and RA zones. If the home occupation use category were indeed totally unrestricted, these specific allowances would be superfluous.

7. The better view is that uses that are absolutely prohibited in the zone in every shape and form are also prohibited as home occupations. For example, dry cleaning plants, crematoriums, adult entertainment businesses and tire retreading operations are all completely prohibited in the RA zone; and no attempt to squeeze them into the home occupation mold can change that outcome.

8. On the other hand, if a use is permitted within the zone at all under any circumstances, then it should be permitted as a home occupation under the specific requirements of KCC 21A.30.085. The home occupation standards effectively serve to replace any other specific requirements imposed by KCC Chapter 21A.08. As documented in part by Ms. Lux, a firewood business is allowed within the RA zone subject to certain limitations, most notably the requirement that the product be grown onsite. This approach is elaborated at KCC 21A.08.070A with respect to forest product sales and at KCC 21A.08.080A with respect to wood processing uses. As noted by Ms. Lux, log storage is permitted separately as a business service under KCC 21A.08.060A. In short, a firewood business use is permitted in the RA zone subject to certain code restrictions, which restrictions are supplanted by the requirements of KCC 21A.30.085 if home occupation standards can be met.

9. Having concluded that the firewood business use is permitted in the RA zone as a home occupation, the last question to be addressed is whether the various noise, traffic, dust and hours of operation concerns raised by the Appellants offer a separate legal basis for limiting or conditioning the exercise of the home occupation. Unfortunately for the Appellants, the code approach appears to be that the size restrictions placed on the home occupation will provide, in most instances, adequate mitigation of offsite impacts. Subsection H of KCC 21A.30.085 deals with a limited range of offsite impact issues, none of which relate to the Middling firewood operation. No basis exists within the code for attempting to regulate other offsite impacts through the code enforcement procedure.

10. The record does not demonstrate the existence of a clear code violation on the Middling property. The complainant appeal therefore must be denied.

DECISION:

The Anderson, *et al*, appeal of DDES' failure to issue a code enforcement citation or notice and order to the Middling property for its firewood operation is DENIED, and the April 28, 2008 DDES determination to close the complaint file is affirmed.

ORDERED this 22nd day of August, 2008.

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Stafford L. Smith
King County Hearing Examiner *pro tem*

NOTICE OF RIGHT TO APPEAL

The action of the hearing examiner on this matter shall be final and conclusive unless a proceeding for review pursuant to the Land Use Petition Act is commenced by filing a land use petition in the Superior Court for King County and serving all necessary parties within twenty-one (21) days of the issuance of this decision. The Land Use Petition Act defines the date on which a land use decision is issued by the Hearing Examiner as three days after a written decision is mailed.

MINUTES OF THE JULY 29 AND AUGUST 21, 2008, PUBLIC HEARING ON DEPARTMENT OF DEVELOPMENT AND ENVIRONMENTAL SERVICES FILE NO. E0800168.

Stafford L. Smith was the Hearing Examiner in this matter. Participating in the hearing were Sheryl Lux, representing the Department; Janice Anderson, representing the Appellants, June Martin, Christopher Anderson, Shelly Middling and Tina Middling.

The following Exhibits were offered and entered into the record on July 29, 2008:

Exhibit No. 1	DDES staff report to the Hearing Examiner for July 29, 2008
Exhibit No. 2	Copy of the Notice and Statement of Appeal
Exhibit No. 3	Copy of March 21, 2008 violation letter
Exhibit No. 4	Copy of notarized letter from Shelly Middling received March 27, 2008
Exhibit No. 5	Copies of codes cited in the Notice & Order
Exhibit No. 6	Copy of 2005 and 2007 aerials from GIS
Exhibit No. 7	Copy of 2007 aerial with business areas
Exhibit No. 8	Copies of photographs taken by Sheryl Lux on March 14, 2008
Exhibit No. 9	Four letters from property owners
Exhibit No. 10	Photographs taken July 28 of neighborhood road
Exhibit No. 11	Watershed map
Exhibit No. 12	Online Permit Detail printout
Exhibit No. 13	Photographs of Pit Bull Creek

The following Exhibits were offered and entered into the record on August 21, 2008:

Exhibit No. 14	Washington State Labor and Industries records for UBI 602 734-704
Exhibit No. 15	King County Executive's statement, posted August 31, 2006, on proposed changes to rural zoning codes

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