June 13, 2017

OFFICE OF THE HEARING EXAMINER
KING COUNTY, WASHINGTON

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ORDER ON SUBMITTING ADDITIONAL DOCUMENTS FOR THE RECORD

SUBJECT: Department of Permitting and Environmental Review file no. **E0700414**

STEVEN SKIRVIN
Code Enforcement Appeal

Location: 33522 SE 49th Street

Appellants: Steven and Phil Skirvin
represented by **Michael Scruggs**
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(So that it does not get lost at the end of this document, the crucial date by which we are seeking a response is **Wednesday, June 28, 2017**.)

This case involves a garage a previous owner placed on the property between 1995 and 1998. The Appellants had no inkling when they purchased the property out of foreclosure in 2004 that there was any problem with the garage. In 2007, DPER received a code enforcement complaint that the garage had been built over the drainfield. DPER started an action against the then-current owner (Appellants). Appellants have begun DPER's permit process.

While DPER's initial review has spotted a few potential problems with permitting the garage under the DPER-administered codes, none of these issues appear to be real roadblocks. Ex. 1 at 002. Instead, the resolution killer is septic-related; Public Health has already denied Appellants' ABC permit because the garage and driveway were built over a portion of the active drainfield. Ex. 10. Absent a waiver of the building permit requirement, we agree with the DPER representative's assessment that she does "not see a resolution to the case except to remove the structure." Ex. 1 at 002.

Per KCC 23.36.030(B), the examiner may waive "strict" compliance with permit requirements "in order to avoid doing substantial injustice to a non-culpable property owner." We have used this escape hatch sparingly, only explicitly doing so in *Larson—ENFR120330* and *Mulvihill—E0800382*. The parties disagree to what extent we *should* do so here, but more fundamentally they disagree about what we even *can* do here. While DPER agrees that we can (in the sense of having authority to) waive County regulations like building setbacks (e.g., the corner of the garage might stray into the setback), DPER asserts that we do not have jurisdiction to waive Critical Areas Code (CAC) requirements or Public Health on-site sewage (OSS) requirements.

As a matter fact, the CAC requirements do not appear to be a boulder in the road. Ex. 11 (Report of Pesha Klein). As a matter of law, DPER's assertion that we lack authority to waive CAC requirements stems from the state's Growth Management Act (GMA) mandating the County to adopt ordinances like KCC chapter 21A.24. We do not agree that the origin of a County code changes our authority. However the relevant current County codes are written, absent a successful challenge to the Growth Management Hearings Board or beyond, those County codes are presumptively GMA-compliant. DPER is the agency tasked with administering those codes, and (where the examiner has specific jurisdiction to review a specific DPER action) the examiner is the ultimate County decision-maker in such matters.[1] We may get a case wrong, and our decision is appealable to superior court, but *why* the ordinance was passed (a voluntary local choice versus a response to a state mandate) does not change our authority.

This was true even in *Mulvihill—E0800382*, which involved state shorelines.[2] While DPER has the primary responsibility for administering shoreline-related regulatory programs, Washington's Department of Ecology also has a review capacity. *See, e.g.*, RCW 90.58.050. We *sua sponte* alerted Ecology to the possible examiner-waiving-strict-compliance issue, to encourage Ecology to weigh in, but even the stronger state role in shorelines (as opposed to other critical areas) did not bar us from exercising our KCC 23.36.030.B. discretion and waving certain requirements there. We have jurisdiction to waive strict compliance with CAC-related permit requirements.

Conversely, unlike the critical areas code, we are never the ultimate decision-maker as it relates to OSS. Such calls are made first by Public Health and on appeal by the Sewage Review Committee (SRC). *See* BHC 13.12.040. Thus, in *Larson—ENFR120330*, we clarified that:

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[1] Obviously there are DPER actions related to critical areas, such as subdivisions or rezones, where the examiner has jurisdiction to act on DPER's determinations, but where the King County Council (not the examiner) is the final County decision-maker. *See* KCC 20.22.220.B. & C. Conversely, the examiner makes the final County decision in enforcement action like today's case. KCC 20.22.040.X.

[2] http://www.kingcounty.gov/~/media/independent/hearing-examiner/documents/case-digest/appeals/code-enforcement/2015/E0800382_Mulvihill.ashx?la=en

> Ms. Larson needs to follow the usual rules for submitting an already-built-construction (ABC) pre-screening meeting request, for applying to the Health Department to legalize the water and septic, and for applying for (and obtaining) a building permit for the house. However, if Ms. Larson wishes to permit the house as a dwelling unit, DPER should waive the minimum parcel size requirement and, if the existing house and mobile home are already over the square foot limitations of KCC 21A.08.030(6)(a)(4)(a), waive the square foot limitation as it relates to what already exists on the site.
> …
> The Health Department is not a party to this case, nor does the Board of Health Code contain the same non-culpable owner language of Title 23. Although the Health Department endeavors, like DPER, to find a permit solution, it may be that, given the lot size restrictions, there is an unsolvable septic or water barrier to an ADU on this property. Nothing in this Report and Decision speaks directly to Health Department review.

To be sure, a building permit application *gets* to the Health Department through a DPER-administered and examiner-reviewed code, KCC 21A.28.020.A., but DPER's role as it relates to OSS is ministerial: DPER has to route a building permit applicant to Public Health, and Public Health makes the substantive determinations related to a building's compatibility with an OSS, with the SRC reviewing any appeal of Public Health's determination. The more we have mulled it over—and we have given considerable mental bandwidth to this topic—the more we have reached the inescapable conclusion that asking us to waive the building permit requirement is essentially asking us to waive the OSS-compatibility requirement, especially where—far from a mere speculative concern that OSS concerns *might* be triggered—Public Health has *already* determined that the garage (as currently constructed) is incompatible with the OSS.

"An administrative tribunal, such as the hearing examiner in this case, has only the authority granted it by statute or ordinance." *HJS Dev., Inc. v. Pierce County ex rel. Dept. of Planning & Land Services*, 148 Wn.2d 451, 471, 61 P.3d 1141, 1151 (2003). The SRC, not the examiner, is the designated County tribunal for OSS-related questions. *See* BHC 13.12.040. Waiving the building permit requirement would essentially be usurping the SRC; this we may not do. Such a usurpation would be made even worse because an appellant before the SRC must notify the greater of all owners of property within 300 feet of the property or the nearest 15 property owners of the pending appeal, meaning we would be usurping neighbor rights as well. BHC 13.12.060. We not waive the requirement that Appellants either demolish the garage or submit a building permit application to DPER that contains Public Health's signoff.

Appellants stated at Thursday's hearing that they will choose demolition over taking another run at the Public Health process. Balancing their chance of success in the SRC appeal process, the likely cost of that process, and the comparative value of the garage, this seems wise and avoids throwing good money after bad. But that is not our strategic call to make. What is our call to make is that at the close of hearing, Appellant offered an alternative argument that if we do not waive the building permit (and thus OSS) requirements, we should *postpone* the date by which the demolition must be completed.

At some point, delaying OSS-compliance is equivalent to overriding the OSS requirement. But that equivalency could only kick in past a certain date. In a typical code enforcement case—even one where the current owner constructed the building, we deny the owner's appeal, and there is no possible KCC 23.36.030.B. waiver—we often make at least minor adjustments. For example, if at hearing DPER requests that we order an appellant to submit an application to Public Health or demolish the structure within 30 days, and we deny the appeal but extend the deadline to 60 days, one would be hard pressed to assert that we had usurped Public Health or the SRC or exceeded KCC 20.22.030.D's grant of authority that, in denying an appeal, an examiner may include any "modifications…as the examiner finds necessary."

Even though administrative tribunals such as examiners have only the authority granted by statute or ordinance, *HJS Dev.*, 148 Wn.2d at 471, administrative tribunals have "implied statutory authority" where "necessary…to carry out their statutorily delegated authority." *Irondale Community Action Neighbors v. WWGMHB*, 163 Wn. App. 513, 523, 262 P.3d 81, 87 (2011). It is not necessary for an examiner to waive OSS-related restrictions—the SRC being the available tribunal—but is it necessary, in every enforcement appeal we deny, for the examiner to set compliance deadlines. This does not give us *carte blanche* to interminably extend deadlines, but it does mean that setting a deadline is a question of degrees and discretion, not of statutory authority.

The parties paused Thursday's closing arguments to discuss potential resolution, including potentially entering into a voluntary compliance agreement (VCA), a viable option where the existence of a violation is not in dispute. If parties enter a VCA, the current appeal would be dismissed as moot, and if a subsequent dispute over the VCA erupts, there could be a later appeal back to the examiner. KCC 23.02.100. As VCAs are only available prior to an examiner ruling on a case, KCC 23.02.090.B., we are not issuing a ruling today; we are giving the parties time to try to come up with their own solution. Because the parties requested that we put some thoughts in writing, we do so today, emphasizing that this is not our actual ruling.

First, although many past code enforcement scenarios we have worked on have involved property owners with sometimes significant health concerns, this is the first we have encountered with a resident on hospice, receiving only palliative care for his terminal cancer, previous interventions having failed. The idea of working some arrangement to kick out the trigger date for the garage's removal until after Steve Skirvin's demise—with an ample buffer post-demise for the family to grieve and sort out affairs prior to needing to undertake demolition—seems well warranted. We do not necessarily agree that the wife's condition warrants a significantly expanded timeline. That is not to sound cold or lacking in empathy, only to note that the wife's described condition—and the potentially open-ended nature of her scenario—is more in line with the usual cases we see, and unlike a terminal diagnose on hospice care.

Second, there is no information in the record to controvert Appellants' testimony that the septic system has not experienced any problems and that at the last routine cleanout, the contractor told Appellants the system appeared to be working fine.

Third, Appellants still have not-completely-answered public records requests in to both DPER and Public Health. Appellants' counsel provided a concise explanation for what he hopes those records might show, and if and when we issue a decision, we can retain jurisdiction to reopen our decision, should later records disclosures unearth new information. But nothing we could reasonably foresee coming out of those disclosures would change our view. Some hypothetical smoking gun in Public Health's files might provide Appellants with ammunition to challenge Public Health's denial, but that challenge would need to come via Public Health or the SRC, not via us. Similarly, DPER's records might show something questionable about the complainant or process, but while DPER is primarily complaint-driven, DPER need not only enforce pursuant to a reliable complaint. KCC 23.02.040.A. (DPER may act in response to "reliable complaints" or to "field observations"). The fact that the complainant has moved away or had his or her concerns resolved also does not change the equation. As we described in *Frandsen—ENFR140325*

> The Frandsens discussed [at hearing] their efforts to ameliorate [the complainant's] concerns…. If undertaken earlier, such actions might have been sufficient to dis-incentivize [the complainant] from filing a code enforcement complaint, and thus the issue might never have reached DPER. But once DPER was roped in, the ball shifted to DPER's court and to application of the zoning code.[3]

Fourth, to the extent the parties can work out a VCA, that would be preferable. However, to the extent DPER is worried that acting a certain way here might set a bad precedent or might exceed its authority (given that there is no perfect DPER-administered corollary to KCC 23.36.030.B.), we are willing to take the heat for issuing an order. However it would still help immensely if the parties could, through off-our-record back-and-forth, come up with a detailed timeline/triggering requirements that the parties can live with, even if that is something that we review and then enter on our own accord.

And finally, if the parties cannot come to a resolution, the parties can separately submit proposals we can weigh. In any event, we will continue to hold the record open until **Wednesday, June 28, 2017**. If the parties are still making progress but have not yet reached a stopping point by then, or if the parties reach loggerheads by June 28 but want a little longer to present their respective position on the timing/sequence of demolition, either party may move us to hold the record open awhile longer.

DATED June 13, 2017.

David Spohr
Hearing Examiner

DS/ed

[3] Available at http://www.kingcounty.gov/~/media/independent/hearing-examiner/documents/case-digest/appeals/code-enforcement/2015/ENFR140325_Frandsen.ashx?la=en.

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CERTIFICATE OF SERVICE

SUBJECT: Department of Permitting and Environmental Review file no. **E0700414**

STEVEN SKIRVIN
Code Enforcement Appeal

I, Elizabeth Dop, certify under penalty of perjury under the laws of the State of Washington that I transmitted the **ORDER ON SUBMITTING ADDITIONAL DOCUMENTS FOR THE RECORD** to those listed on the attached page as follows:

☒ EMAILED to all County staff listed as parties/interested persons and parties with e-mail addresses on record.

☒ caused to be placed with the United States Postal Service, with sufficient postage, as FIRST CLASS MAIL in an envelope addressed to the non-County employee parties/interested persons to addresses on record.

DATED June 13, 2017.

Elizabeth Dop
Legislative Secretary

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Department of Permitting and Environmental Review

Breazeal, Jeri
Department of Permitting and Environmental Review

Deraitus, Elizabeth
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