



Notice of Hearing Examiner Decision

08/13/2018

To: Interested Parties and Parties of Record

RE: Project Name: Administrative Appeal – Wertz Permit 17-03442
Applicant: Virginia M. Olson and Theodore R. Smith Sr.
1600 NW Christa Shore Ln., Silverdale WA and
6230 1st Avenue NW, Seattle WA
Application: Administrative Appeal
Permit Number: 18-03147

Enclosed is the Decision issued by the Kitsap County Hearing Examiner for the above project appeal.

The applicant is encouraged to review the Kitsap County Office of Hearing Examiner Rules of Procedure found at:

<https://spf.kitsapgov.com/dcd/HEDocs/HE-Rules-for-Kitsap-County.pdf>

The Decision of the Hearing Examiner is final, unless appealed, as provided under Washington law.

Please note affected property owners may request a change in valuation for property tax purposes, notwithstanding any program of revaluation. Please contact the Assessor's Office at 360-337-5777 to determine if a change in valuation is applicable due to the issued Decision.

The complete case file is available for review at the Department of Community Development, Monday through Thursday, 8:00 AM to 4:00 PM and Friday 9:00 AM to 1:00 PM, except holidays. If you wish to view the case file or have other questions, please contact Help@Kitsap1.com or (360) 337-5777.

CC: Applicants: Virginia M. Olson, christine@chrismutchler.com; Theodore R. Smith Sr., trsmith6230@gmail.com
Applicants' Authorized Representative: Theodore R. Smith, Jr.
theodorersmith@gmail.com
Kitsap County Prosecutor
Kitsap County Assessor
DCD
Kitsap Sun
Interested Parties: Judy Wertz, jdujudyjw@aol.com; Ron Templeton, ron@thwpllc.com; Gregg Olsen, greggolsen@msn.com

KITSAP COUNTY HEARING EXAMINER

DECISION ON MOTIONS TO DISMISS FOR LACK OF JURISDICTION

**Wertz SFR Appeal
Appeal No. 18-03147; SFR Permit No. 17-03442**

August 13, 2018

1. FINDINGS OF FACT

1.1 Procedural Background

1.1.1 Kitsap County Department of Community Development ("DCD") issued a building permit to Ms. Wertz, the Applicant, to construct a home. Her neighbors, Ms. Olson and Mr. Smith, Sr., appealed.

1.1.2 The Applicant moved to dismiss for lack of jurisdiction. DCD joined the motion. The Appellants filed a response. DCD and the Applicant filed replies.¹

1.1.3 The Applicant submitted a site plan, construction drawings, the Site Development Activity Permit, the Shoreline Variance Decision, and several photographs of the site.

1.1.4 DCD submitted a declaration from its Chief Building Official addressing its long standing Kitsap County Code ("KCC") interpretation that there is no Hearing Examiner jurisdiction over building permit appeals, along with an e-mail to the Appellant stating a similar position. The declaration also stated DCD had never moved to dismiss a court appeal of a building permit based on a failure to exhaust administrative remedies.

1.1.5 Argument was heard on August 9, 2018. The parties were represented by counsel, with Mr. Smith appearing for the Appellants, Mr. Templeton for the Applicant, and Ms. Zippel for DCD.

1.2 Decision Appealed

1.2.1 The DCD decision under appeal is a building permit. The permit is for one residence, which has undergone previous permitting. A shoreline variance was required, which is a permit requiring Hearing Examiner review and decision, following an open record hearing, with final approval by the State Department of Ecology. After this process, a Site Development Activity Permit must be obtained. DCD issues this permit under KCC Title 12, which addresses County stormwater requirements. There is no record of any appeals being filed of these decisions. Only the building permit is before the Examiner.

¹ The Pre-Hearing Order (July 31, 2018), established briefing deadlines, and set a date for oral argument, per party agreement. The Hearing Examiner Clerk's Exhibit List lists the parties' filings.

1.2.2 DCD has long interpreted its code as not providing for the appeal of building permits to the Hearing Examiner. Consistent with this position, in addressing judicial appeals of its building permits, the County has not requested dismissal based on a failure to exhaust administrative remedies.

2. CONCLUSIONS OF LAW

2.1 KCC Title 21 establishes permit review and appeal procedures for Type 1-IV decisions. The County Code vests the Hearing Examiner with jurisdiction to hear appeals of Type 1 and 2 decisions.

Except as otherwise noted, these provisions apply to administrative appeals of final decisions regarding project permit applications subject to a Type I or II procedure. ... The hearing examiner shall hear appeals of Type I and II decisions in a de novo open-record hearing...²

Because building permits are exempted from Title 21, they are not Type I or II decisions.³ There is no language in Title 21 providing for the administrative appeal of building permits to the Hearing Examiner. Without such language, the Appellant looked to KCC Title 14, governing building permits.

2.2 The County adopted the International Building Code through Title 14,⁴ amending it to provide for the administrative appeal of technical building issues.

In order to hear and decide appeals of orders, decisions or determinations made by the building official relative to the application and interpretation of the technical provisions of this code, there shall be a consolidated board of appeals in accordance with Article 15, Kitsap County Code Sections 14.04.950 through 14.04.990. Appeals of administrative provisions shall be in accordance with Kitsap County Code Chapter 21.04.⁵

During oral argument, DCD's counsel provided an example of technical issues which can be raised, such as the type of fire sprinkler the building code authorizes. The appeal did not raise the technical issues subject to review by the consolidated board of appeals. This is not in dispute.⁶

2.3 The last sentence in the above building code section states that appeals of administrative provisions shall follow Ch. 21.04 KCC. This sentence is reasonably interpreted as identifying procedures for processing technical building permit appeals before the consolidated board of appeals. However, the Appellants read the sentence as providing a separate appeal

² KCC 21.04.290(A) and (C).

³ KCC 21.04.100, Table, Line 53.

⁴ KCC 14.04.040.

⁵ KCC 14.04.285, amending IBC 113.1, emphasis added.

⁶ Appellant's Reply, pg. 4. ("The current Appeal is primarily concerned with the presence of a wall inside a critical area buffer and building setback. This Appeal does not rely on an understanding or discussion of any technical codes under KCC Title 14.").

track, and giving the Hearings Examiner jurisdiction to hear non-technical building permit appeal issues. The challenge with this interpretation is that the sentence does not mention the Hearing Examiner. While the language is imperfect, the sentence's most logical construction is that it relates to the language on technical appeals, and requires appeal processing consistency with Ch. 21.04, KCC. Ambiguous or not though, nothing in the sentence creates a new appeal track to the Hearing Examiner, or otherwise transforms a building permit into a Type 1 or 2 decision subject to appeal to the Examiner.

2.4 This construction follows how the KCC addresses State Environmental Policy Act, Ch. 43.21C RCW ("SEPA") appeals associated with a building permit.

Administrative appeals are not allowed for SEPA determinations and/or final environmental impact statements (EISs) on nonproject legislative actions **or project actions that are otherwise exempt from administrative appeal processes.**⁷

An example of a project action exempt from administrative appeal processes is a building permit. As an exempt decision, SEPA issues raised with a building permit appeal would not be subject to Hearing Examiner review.

2.5 DCD's long standing code interpretation is that it provides no administrative appeal of building permit decisions.⁸ DCD stated it has never moved to dismiss a building permit appeal filed in superior court for failing to exhaust local administrative remedies.⁹ This is consistent with earlier litigation, where a building permit appeal was filed directly in superior court. While dismissed for other reasons,¹⁰ Kitsap County did not move to dismiss based on a failure to exhaust administrative remedies.¹¹

2.6 It is possible the Examiner does not have the exact code provisions present in that case before her.¹² However, the jurisdictional framework used *Asche* is consistent with DCD's position that it has never viewed the KCC as providing an administrative appeal of building permits, except for technical issues reviewed by the consolidated board of appeals under Title 14. This was reiterated in *Durland*, which summarized the case in part: "county code did not provide for administrative challenge to building permit."¹³

⁷ KCC 21.04.290(E)(2), emphasis added.

⁸ Declaration of Jeff Rimack, DCD Asst. Director and Chief Building Officer. This was also addressed in briefing and at oral argument.

⁹ *Id.*

¹⁰ Failure to appeal through the Land Use Petition Act, Ch. 36.70C RCW.

¹¹ *Asche v. Bloomquist*, 132 Wn. App. 784, 133 P.3d 475 (2006).

¹² There have been code revisions over the last six years, although it is not clear that the language governing administrative appeals has changed.

¹³ *Durland v. San Juan County*, 182 Wn.2d 55, 64, 340 P.3d 191 (2014), citing to *Asche v. Bloomquist*, 132 Wn. App. 784, 791, 133 P.3d 475 (2006), emphasis added.

2.7 There is no language in Title 21 providing that a building permit is subject to its administrative appeal procedures. And, except for technical building code issues, Title 14 does not provide for building permit appeal. In neither title is the Examiner identified as the entity which hears building permit appeals.

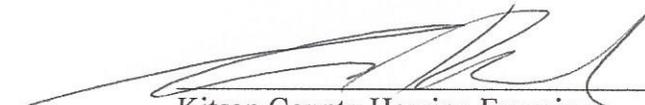
2.8 It would be helpful for Title 14 to include a statement that building permits are not appealable to the Hearing Examiner. But, such a statement is not required to foreclose jurisdiction. What is required to create appellate jurisdiction is affirmative language. The parties have not identified code language which instills the Hearing Examiner with jurisdiction over building permit appeals.

2.9 The Applicant also requested dismissal based on prior review processes for the same project. The Applicant argued these earlier permitting processes addressed the issues raised, and as those decisions were not appealed, this bars the present appeal. Parsing what was before DCD in determining whether to issue the building permit versus what was decided through other permitting processes and no longer at issue has the potential to go beyond the narrow jurisdictional question presented.¹⁴ In any event, there is no need to address the argument, as the Examiner has determined she lacks jurisdiction.¹⁵

DECISION

The Hearing Examiner, pursuant to the above Findings of Fact and Conclusions of Law, dismisses the appeal based on a lack of jurisdiction.

THIS DECISION is entered this 13th day of August, 2018.


Kitsap County Hearing Examiner
Susan Elizabeth Drummond

¹⁴ Where there was a question on what could be raised, this was addressed through both a motion to dismiss and issue clarification. Decision, Kitsap Quarry Service Road Expansion, SDAP Appeal, HE #18-00903 (May 16, 2018), § 2. However, that case was only partially dismissed.

¹⁵ The Applicant attached various materials regarding the site and its permitting history. It is possible that the materials may address some of the Appellants' concerns. However, that is between the Appellants and Applicant.