



## Notice of Hearing Examiner Decision

06/17/2020

To: Interested Parties and Parties of Record

RE: Project Name: Loving Appeal of Public Works ROW Permit 19-04911  
Appellant: Ahmis Loving  
P.O. Box 13  
Port Gamble, WA 98364  
Application: Administrative Appeal  
Permit Number: 19-05410

The Kitsap County Hearing Examiner has **issued the attached decision** regarding application #**19-05410, Loving Appeal of Public Works Right-of-Way (ROW) Permit 19-04911 – Administrative Appeal.**

**THE DECISION OF THE HEARING EXAMINER IS FINAL, UNLESS TIMELY APPEALED, AS PROVIDED UNDER WASHINGTON LAW.**

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>

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](mailto:Help@Kitsap1.com) or (360) 337-5777.

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Interested Parties:  
None

**KITSAP COUNTY HEARING EXAMINER**

**Appeal of County Public Works  
Right-of-Way Permit #19-04911  
HE Appeal #19-05410**

**DECISION**

**June 15, 2020**

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**I. FINDINGS**

**1. Background.**

**1.1** The Appellant, Ms. Loving, appealed a Public Works' permit authorizing work to re-align 420 square feet of right-of-way. The work took 20 minutes. Ms. Loving does not allege the permit improperly authorized right-of-way re-alignment. To the contrary, she desired the work. Her issues instead primarily relate to whether the correct permitting processes were followed. The actual road work was not objected to.

**1.2** A hearing was held May 28, 2020. Due to the COVID-19 response, the hearing was held remotely. Appellant Ms. Loving testified, as did Mr. Anunson, the Applicant. Public Works called the Kitsap County Public Works Real Estate Services Manager, Ms. Foster, and Kitsap County Engineer Mr. Brand.

**2. Jurisdiction.**

**2.1** The County moved to dismiss. The motion was centered on whether the code provided for this appeal. Although it may not have been the intent to provide for same, the code language allows appeals of a final Public Works' ruling, so the Examiner denied the motion without prejudice.<sup>1</sup>

**2.2** The code allows only an “aggrieved party” to appeal,<sup>2</sup> and requires “a brief statement as to how the appellant is aggrieved by the decision being appealed.”<sup>3</sup> In her appeal statement, Ms. Loving explains how certain permit review requirements were not followed, but not how this aggrieved her.

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<sup>1</sup> KCC 11.36.150 (“aggrieved party may appeal any administrative interpretation or departmental ruling related to this chapter by following the process set forth in Section 21.04.120...”).

<sup>2</sup> KCC 11.36.150.

<sup>3</sup> KCC 21.04.290(B)(2).

**2.3** At the hearing, Ms. Loving stated she believed a Category 2 review process (instead of the Category 4 process used) would have resulted in a road maintenance agreement and identification of who would use the road and for what purpose. However, even assuming such relief is available, which the Examiner questions,<sup>4</sup> the Examiner is concerned that the matter is more of a neighbor dispute rather than an actual legal controversy. The HE Rules define “an aggrieved person.”<sup>5</sup> It is not clear that Ms. Loving falls within this category. However, given the matter proceeded to hearing, and the Examiner has discretion in interpreting the HE Rules, the Examiner addresses the issues.

**3. Appeal Issues.** The issues focus on which permit review process should have been used, application requirements, notice, and whether the work complied with code requirements outside of Ch.11.36 KCC (Permits and Standards for Use and Improvements to County Right-of-Way).

**3.1 Permit Review Process.** Public Works used a "Category 4" review process to approve the right of way work. Ms. Loving believed a Category 2 process should have been used, although the process is for opening closed right of way to provide property access.

“Category 2 right-of-way use permit” means a permit issued, pursuant to this chapter, authorizing use of and improvements to an **unopened** county right-of-way **for access to a lot, tract, or parcel of land**. Upon the completion of road and drainage improvements required under a Category 2 permit the maintenance responsibilities rest with the applicant and all abutting property owners having access to the road.<sup>6</sup>

View Drive NE is included in the Primary Road System adopted by the Board of County Commissioners and on file with the County Engineer.<sup>7</sup> The road was dedicated through a 1937 plat.<sup>8</sup> The work was on a six foot wide by 70 foot long section of its east side.

County Engineer Brand described View Drive NE as open and unmaintained County right-of-way. “The County considers unmaintained right of way that is and has been used by the travelling public as open right of way.”<sup>9</sup> The “minor work” which occurred “is considered to be general maintenance and not a right of way opening.”<sup>10</sup> Once open, “the entire right of way is deemed open to public travel. This is the case if like View Drive NE the road and other improvements constructed take up only some but not all of the right of way.”<sup>11</sup>

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<sup>4</sup> Work completed was de minimus and Applicant Anunson does not abut the right of way.

<sup>5</sup> HER 2.1.1.

<sup>6</sup> KCC 11.36.040(5), emphasis added. Even if this process were used, as Mr. Anunson’s property does not abut the right of way, it is not clear that a maintenance agreement would apply to him.

<sup>7</sup> Ch. 11.08 KCC; PW 6 (County Road Log).

<sup>8</sup> PW 7.

<sup>9</sup> Declaration of Mr. Brand, P.E., County Engineer (March 31, 2020), ¶ 3

<sup>10</sup> Declaration of Mr. Brand, P.E., County Engineer (March 31, 2020), ¶ 4.

<sup>11</sup> Declaration of Mr. Brand, P.E., County Engineer (March 31, 2020), ¶ 5.

The parties do not contest the road is in use. Consistent with case law defining the term open right of way, the right of way here is passable and without barriers restricting passage.<sup>12</sup> The County Code is consistent. “Unopened right-of-way means a county right-of-way that exists by dedication or deed, but for which no vehicular roadway has been constructed by the county or other parties through an approved county permitting procedure.”<sup>13</sup>

The road section is passable and passed by vehicles. And, it is unnecessary that every piece of a right of way be routinely traveled to be considered open.<sup>14</sup> The work involved open right of way, and was not done to provide access. Ms. Loving focuses on the “approved county permitting procedure,” as a necessary component of opening a road. However, the 1937 plat (a County permitting process) authorized the road. Ms. Loving did not identify the County permitting process which applied and was not followed when the road was constructed.

Category 2 permits address right-of-way opening and more substantive improvements, not the minor maintenance work which occurred here. The Code requires that “[a]t a minimum, the applicant will be required to construct half a road on the applicant’s side of the right-of-way to the requirements set forth in the permit.”<sup>15</sup> This is not a requirement which could be met here as Applicant Anunson, is not an adjacent property owner. As detailed in code and hearing testimony from the County Engineer, the process is not used for the work which occurred here.

The work was instead approved through a Category 4 permit approval. This process authorizes “**temporary access and use of county right-of-way for limited, short duration activities** other than residential access (i.e., logging activities, installation of utilities).<sup>16</sup> None of the five permit categories better describe the minor work completed. Temporary use includes all uses intended to last less than a year.<sup>17</sup> The use here lasted 20 minutes. As part of this use, minor maintenance work to adjust road alignment was completed. While none of the five categories are perfect fits for this work, Public Works certainly did not err in using the Category 4 review process.

**3.2 Application Requirements.** Application requirements are imposed in applying for a right-of-way permit. In a Category 4 review, these include provision of:

- The name, address and phone number of the applicant and representative, if applicable;
- A legal description of the applicant’s property to be served by the permit;
- A statement regarding the purpose of access to the applicant’s property;
- An assessor’s map showing all parcels to be accessed;

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<sup>12</sup> *City of Spokane Valley v. Spokane County*, 145 Wn. App. 825, 832, 187 P.3d 40 (2008). RCW 36.75.010(11).

<sup>13</sup> KCC 11.36.040(14).

<sup>14</sup> Declaration of Mr. Brand, P.E., County Engineer (March 31, 2020), ¶ 5.

<sup>15</sup> KCC 11.36.060(2)(a).

<sup>16</sup> KCC 11.36.040(12), emphasis added.

<sup>17</sup> KCC 11.36.060(4).

- Application fees paid per Section 11.36.100;
- Plans prepared by a professional engineer addressing the road construction, safety, erosion control, drainage, and right-of-way restoration requirements of the permit, when required by county engineer.<sup>18</sup>

The County Engineer has discretion in determining what information and materials are necessary to approve the permit.

The county engineer may issue a permit to the applicant upon filing of a complete application, payment of fees, posting of the required financial sureties, recording of covenant and dedication of additional right-of-way, if required. Issuance of the permit authorizes the construction of road and drainage improvements and use of the county right-of-way for the purposes identified in the permit.<sup>19</sup>

Public Works had sufficient application materials to meet code, review the permit, and issue it. Public Works had Applicant Anunson's contact information. The legal description of the applicant's property to be served would not be necessary as the road work was not completed to serve his property. The improvements were not for applicant access. Public Works had mapping of the area although, again, the improvements were not to establish access. The application fee was paid, and the engineering plans required are at County Engineer discretion. The necessary and relevant application materials were provided to process the application.

**3.3 Other Code Requirements.** Ms. Loving did not substantiate that the work encroached on a critical area or violated any specific code requirement. Critical area location was not documented nor the code section allegedly violated identified, and no other code provision was specifically identified as not having been followed. Also, regarding critical areas and other "non-Public Works" requirements, addressing compliance is within County Engineer discretion.<sup>20</sup> Ms. Loving substantiated no code violations.<sup>21</sup>

**3.4 Notice.** The code requires certified mailed notice to adjacent property owners. Following comment, "[a]ny objections made by abutting property owners shall be resolved by the applicant to the satisfaction of the department."<sup>22</sup> This notice did not occur. That was not disputed. However, the work done did resolve the real issue in contention over road alignment.

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<sup>18</sup> KCC 11.36.060(4)(f).

<sup>19</sup> KCC 11.36.050.

<sup>20</sup> KCC 11.36.060(4)(g), emphasis added ("Approval and issuance of the permits prescribed in this chapter does not constitute approval of other applicable permits or requirements that may be required by other county ordinances.... It shall be the responsibility of the applicant to obtain all other permits and approvals required by other county.... Examples of additional permits that may be required include ... SEPA, Critical Areas, Grading, Building, Forest Practice, Site Development Activity Permit, etc.").

<sup>21</sup> Exhibit 1 (Right of Way Permit and Plans), with standard conditions.

<sup>22</sup> KCC 11.36.060(4)(c).

## II. CONCLUSIONS

1. The Examiner may hear certain Ch. 11.36 KCC appeals.<sup>23</sup> While the Examiner questions whether this dispute is in the best forum, given the limited, if any legal “aggrievement,” the matter did go to hearing, and the Examiner addressed the issues.

2. As the appellant, Ms. Loving did not meet her burden to demonstrate Public Works erred in utilizing the Category 4 permit review process to approve the limited road work Ms. Loving desired. And, excepting notice, permit review requirements were followed.

### DECISION

There was no substantive error in permit issuance. Procedurally, the required notice did not occur. To address the issue, Public Works should provide notice. This would occur after-the-fact, and while a permit revision could occur, this Decision does not require same. The work has been completed and no substantive errors were substantiated. Despite questions on the lack of harm, and thus legal standing, providing and documenting after the fact notice should occur.

Absent a timely appeal, this Decision is final.<sup>24</sup>

DECISION entered June 15, 2020.



Kitsap County Hearing Examiner  
Susan Elizabeth Drummond

<sup>23</sup> KCC 11.36.150.

<sup>24</sup> See Ch. 36.70C RCW (any appeal to be filed within 21 days to superior court).