

62993-0

62993-0

NO. 62993-0-I

WASHINGTON STATE COURT OF APPEALS
DIVISION ONE

KING COUNTY,

Appellant,

v.

PALMER COKING COAL COMPANY, ET AL.,

Respondents.

APPELLANT'S OPENING BRIEF

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I. ASSIGNMENTS OF ERROR

1. Appellant assigns error to paragraph #4 of the Superior Court's Order Granting in Part and Denying in Part Cross-Motions for Summary Judgment, and to paragraphs 3 and 4 of the Superior Court's rulings in support of its Order.
2. Appellant assigns error to the Superior Court's Order declaring the February 2, 2008 Code Interpretation invalid as to Cross-Appellants' legal lot applications.
3. The Superior Court erred when it ruled that the DDES Director exceeded her authority when she applied the February 2, 2008 Final Code Interpretation to Cross-Appellants' legal lot recognition applications.
3. The Superior Court erred when it ruled that the February 2, 2008 Code Interpretation is not entitled to the deferential standard of review ordinarily accorded to an administrative agency's interpretation of an ambiguous ordinance because the Code Interpretation was not consistent with past administrative practices.
4. The Superior Court erred when it ruled that the February 2, 2008 Code Interpretation is not entitled to the deferential standard of review ordinarily accorded to an

administrative agency's interpretation of an ambiguous ordinance because the Code Interpretation was not consistent with the clear intent of the legislative body.

5. The trial court erred when it failed to consider the facts regarding prior agency action in the light most favorable to King County.

II. STATEMENT OF ISSUES

1. **DID THE SUPERIOR COURT ERR WHEN IT RULED THAT A DDES FINAL CODE INTERPRETATION OF THE AMBIGUOUS PHRASE "APPROVED ROAD" IS NOT ENTITLED TO DEFERENCE BECAUSE IT IS NOT CONSISTENT WITH PAST LOT RECOGNITION PRACTICES WHERE A 2004 CODE CHANGE MADE APPROVED ROADS MANDATORY?**
 - a) Did the Superior Court err when it interpreted Cowiche Canyon Conservancy v. Bosley and Sleasman v. City of Lacey as applicable to a formal agency code interpretation procedure?
 - b) Do common law vesting principles apply to a request for agency recognition of legal status, where the requested agency action is not supported by any regulation in effect at the time of application?
2. **DID THE SUPERIOR COURT ERR WHEN IT RULED THAT DDES' FINAL CODE INTERPRETATION IS NOT ENTITLED TO DEFERENCE BECAUSE IT IS NOT CONSISTENT WITH THE CLEAR INTENT OF THE LEGISLATIVE BODY?**
 - a) Did the Superior Court apply the wrong standard of review under the Land Use Petition Act when it required a showing of "clear legislative intent" before giving deference to an administrative

agency's interpretation of an ambiguous Code section?

- b) Was DDES' Final Code Interpretation's conclusion that the phrase "approved road" contained in the County Code's legal lot recognition ordinance meant a road meeting the 1993 Road Standards consistent with the intent of the King County Council where Cross-Appellants seek legal recognition of 250 substandard lots in a resource zone?**

III. STATEMENT OF THE CASE

A. PROCEDURAL HISTORY

In October of 2007 Palmer Coking Coal Company, a large land owner in King County, applied to the King County Department of Development and Environmental Services (DDES) for legal lot recognition of 98 substandard parcels in the forest zone of unincorporated King County. In November of 2007 White River Forests, LLC and FTGA Timberlands LLC, subsidiaries of John Hancock Life Insurance Company (White River), applied to DDES for legal lot recognition of 153 substandard parcels in the forest zone. (Declaration of Stephen Gradden in Support of Petitioners White River's Motion for Summary Judgment at pp 3, (Gradden Dec.) CP 227-228. White River applicants own at least 140,000 acres of land in unincorporated King County. Most of the parcels proposed in the legal lot recognition at issue were approximately 40 acres, and were based on historic land survey quarter-quarter sections. Declaration of John W. Davis in Support of Petitioners White River's

Motion for Summary Judgment at p. 6, CP 237. Both the White River and the Palmer Coking Coal applications were prepared and submitted by Graddon Consulting and Research, Inc. in late 2007. See Gradden Dec., Declaration of Stephen Gradden in Support of Petitioners Palmer Coking Coal Company Motion for Summary Judgment, CP 333-341. (Graddon, Palmer and White River are hereinafter referred to collectively as the LLD applicants.) Palmer Coking Coal sought recognition of 93 substandard parcels in the forest zone.

Upon reviewing the 251 applications DDES mainline staff concluded that the proposed lots were primarily accessed by logging roads. Faced with such a large number of applications and because the King County Code requires that pre-1937 parcels must have been provided with "approved sewage disposal or water systems or roads" in order to qualify for legal lot status, DDES mainline staff sought assistance from upper management. KCC 19A.08.070(a)(1)(a), Attached as Appendix A, Declaration of Joe Miles (Miles Dec.) at pp 3-4, CP 367-374.

The question what is an "approved road" was then referred to the King County Regulatory Review Committee, and, in February of 2008 the DDES Director, Stephanie Warden, issued a Final Code Interpretation concluding *inter alia* that an "approved road" must conform to the 1993

King County Road Standards. Miles Decl. at pp 4, CP 367-374, and see Final Code Interpretation attached as Appendix B.

On April 4, 2008 DDES issued its legal lot determination letters recognizing 38 of White River's proposed 153 lots and 23 of PCCC's proposed 98 lots. The remaining proposed lots were not recognized because there was insufficient information provided by which DDES could conclude that the proposed lots were served by an "approved road." Miles Decl. at pp 8-11, CP 367-374.

The LLD applicants timely appealed both the Final Code Interpretation and the Lot Recognition decisions to the King County Superior Court pursuant to the Land Use Petition Act, RCW 36.70C (LUPA). All of the appeals were consolidated under one cause number.

In an effort to address the 190 lot denials more efficiently, the parties agreed, with the superior court's approval, to resolve a number of legal issues via cross motions for summary judgment. Judge Trickey resolved all issues presented in King County's favor, with the critical exception of DDES' authority to apply its Final Code Interpretation to the LLD applications. Based upon his analysis of Sleasman v. City of Lacey, 159 Wash.2d 896, 71 P.3d 990 (2007) and Cowiche Canyon Conservancy v. Bosley, 118 Wash.2d 801, 828 P.2d 549 (1992), Judge Trickey concluded that if DDES could not show that the Code Interpretation was

consistent with the clear intent of the County Council, or that DDES had required lot recognition applicants to meet the 1993 Road Standards in the past, the Final Code Interpretation could not be applied to the pending applications. See Order Granting in Part and Denying in Part Cross-Motions for Summary Judgment and Court's Oral Ruling, Attached as Appendix C, CP 624-640. Judge Trickey then certified his decision to this court for review pursuant to CR 54.

B. REGULATORY OVERVIEW

King County Code (KCC) section 19A governs land segregation in unincorporated King County. KCC 19A is administered by the King County Department of Development and Environmental Services. KCC 19A.04.100. KCC 19A.08 governs the administration of 19A and describes exemptions to King County's subdivision and short subdivision Codes. Under KCC 19A.08.040(B) parcels forty acres and larger are exempt from the King County Subdivision Code except "within the resource zones, each lot or tract shall be of a size that meets the minimum lot size requirements of KCC 21A.12.040(A)", Appendix D. Under KCC 21A.12.040(A) the minimum lot size in the forest zone is 80 acres. Appendix E. Thus, in the forest zone only parcels 80 acres or larger are exempt from the King County Subdivision Code.

King County's exemption threshold is consistent with the RCW 58.17 definition of a "lot" as a ". . . fractional part of divided lands having fixed boundaries, [and] being of sufficient area and dimension to meet minimum zoning requirements for width and area . . ." RCW 58.17.020(9). RCW 58.17.040(2), the Washington State statute governing exemptions from State subdivision requirements, sets a five acre subdivision exemption threshold ". . . unless the governing city, town, or county in which the land is situated shall have adopted a subdivision ordinance requiring plat approval [of larger lot divisions]." Land divided in violation of applicable subdivision regulations may not be sold, leased, transferred, or developed. RCW 58.17.200, RCW 58.17.210, RCW 58.17.300.

In King County a property owner may request that DDES determine whether a lot was legally segregated under previous subdivision regulations. KCC 19A.08.070, Appendix A. KCC 19A.08.070(A) contains a variety of tests that may be applied to the administrative determination, depending upon the time frame the applicant asserts that their lot was created. See id. Under KCC 19A.07.080 all applicants for legal lot recognition must demonstrate to DDES' satisfaction that their proposed lot was created "in compliance with applicable state and local land segregation statutes or codes in effect at the time the lot was created

....." For proposed lots segregated prior to June 9, 1937 (the date that the first state subdivision law was enacted) the applicant must also show that the lot "has been provided with approved sewage disposal or water systems or roads" and that the lot was either conveyed as an individually described parcel to separate noncontiguous ownerships, or that it was recognized as a separate tax lot by the County assessor. KCC 19A.08.070(A)(1)(a) and (b). See full text of KCC 19A.08.070, attached as Appendix A.

An earlier version KCC 19A.08.070(1) was drafted entirely in the disjunctive, such that a legal lot could be recognized if it had approved water, sewer or roads, **or** if it had been separately conveyed, or if had been recognized by the assessor. The current version of 19A was adopted in 2004, changing the first regulatory "or" to an "and," requiring existing improvements before any pre-1937 parcel could be recognized. See King County Ordinance # 15031, attached as Appendix F.

IV. ARGUMENT

The DDES Director acted within her directly delegated authority when she issued the Final Code Interpretation which is the subject of this appeal. Administrative interpretations of ambiguous land use regulations have long been entitled to deference in Washington State. Washington appellate authority does not require a showing of a clear legislative intent

nor a history of consistent application before a formal agency interpretation is entitled to deference. Indeed, if there were a significant history of agency action or a clear understanding of legislative intent there would be little need for a Formal Code Interpretation. To the extent that the trial court made a factual conclusion regarding any pattern of contrary agency interpretation of the phrase "approved road", the trial court failed to consider the facts on summary judgment in the manner most favorable to DDES as the non-moving party on this issue.

1. **THE SUPERIOR COURT ERRED WHEN IT RULED THAT THE DDES DIRECTOR EXCEEDED HER JURISDICTION BY APPLYING HER FINAL CODE INTERPRETATION TO THE LLD APPLICANTS, AND THAT HER FORMAL CODE INTERPRETATION OF THE AMBIGUOUS PHASE "APPROVED ROAD" IS NOT ENTITLED TO DEFERENCE.**

It is the long-established rule in Washington that when a local land use Code is ambiguous "the court should give great weight to the **contemporaneous construction** of an ordinance by the officials charged with its enforcement." Morin v. Johnson, 49 Wash.2d 275, 279, 300 P.2d 569 (1956) (emphasis added), Hama Hama Co. v. Shorelines Hearings Board, 85 Wash.2d 441, 448, 536 P.2d 157, 161 (1975), Cowiche Canyon Conservancy v. Bosley, 118 Wash.2d 801, 828 P.2d 549 (1992), Dev't Services v. City of Seattle, 138 Wash.2d 107, 117, 979 P.2d. 387 (1999),

Port of Seattle v. Pollution Control Hearings Board, 151 Wash.2d 568, 90 P.3d 659 (2004), Milestone Homes, Inc. v. City of Bonney Lake, 145 Wash.App. 118, 186 P.3d 357 (Div. 2, 2008). The agency deference rule is so well established that the King County Council adopted a formal procedure authorizing agency directors to interpret ambiguous land use Codes. See KCC 2.100 et seq, attached as Appendix G.

KCC 2.100 establishes the procedure by which King County Agencies will render a formal interpretation of a development regulation. KCC 2.100.010. The purpose of a Code Interpretation is to clarify conflicting or ambiguous provisions in King County's development regulations. Id. A "Code interpretation" is a formal statement regarding the meaning of a particular provision of the County's Code. KCC 2.100.020(B). A person may request a Code interpretation, or the Director may issue one on his or her own initiative. KCC 2.100.030(A). A Code interpretation remains in effect unless rescinded or reversed on appeal and governs all staff review and decisions. KCC 2.100.040(G) and (H). The DDES Director's code interpretation of the phrase "approved roads" was adopted pursuant to KCC 2100.030(A), governs review of the subject LLD applications and was entitled to deference.

The Washington legislature also codified the agency deference rule in RCW 36.70C, the Land Use Petition Act. LUPA is "the exclusive

means of judicial review of land use decisions" and as such it governs appellate review of DDES' Final Code Interpretation regarding the meaning of the ambiguous phrase "approved roads." See RCW 36.70C.030(1). Under LUPA the superior court reviews the agency record (and approved supplemental materials) and may overturn a land use decision "only if the party seeking relief has carried the burden of establishing that one of the standards set forth [therein] has been met." RCW 36.70C.130(1). DDES' interpretation of its subdivision code is a question of law subject to de novo review under LUPA. Milestone Homes, Inc. v. City of Bonney Lake, 145 Wash.App. at 126.

Rulings on summary judgment are also reviewed de novo. Cowiche County Conservancy v. Bosley, 118 Wash.2d 801, 811, 828 P.2d 549 (1992). On summary judgment all facts and inferences there from are considered in the light most favorable to the nonmoving party. Summary judgment should be granted if there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. Id.

Here, before the LLD applicants are entitled to relief they must show that the Final Code Interpretation is "an erroneous interpretation of the law, after allowing such deference as is due the construction of a law by a local jurisdiction with expertise." RCW 36.70C.130(b).

In this case the Superior Court's decision that the Final Code Interpretation was not an erroneous interpretation of the law, but that it was not entitled to deference and exceeded the Director's authority as applied to the LLD applicants was both internally inconsistent and incorrect. It should be reversed.

- a) **The Superior Court misapplied Cowiche Canyon Conservancy v. Bosley and Sleasman v. City of Lacey's discussion of established agency procedures to DDES' formal agency Code interpretation of a recently enacted Code change.**

Judge Trickey erred when he concluded that DDES' Final Code Interpretation was in excess of the Director's discretion as applied to the LLD applicants. Judge Trickey misapplied Sleasman and Cowiche County when he concluded that those cases require an administrative agency to show a pattern of application before a formal interpretation of an ambiguous Code section is entitled to deference.

Cowiche County involved alleged violations of the Shoreline Management Act (SMA) based upon the removal of three railroad trestles and placement of gates on either side of a railroad right-of-way. 118 Wash.2d 801, at 804. The case started as a private matter, but the State Department of Ecology (DOE) joined in. Id. DOE undertook no independent investigation and acted solely based upon telephone communications. Id. The trial court granted summary

judgment in favor of DOE regarding SMA permit requirements based on the meaning of the word "development." *Id.* at 811. "Exterior alteration of a structure" is included in the SMA definition of "development." *Id.* at 812, citing RCW 90.58.030(3)(d). DOE argued that the trestle removal was a "development" because it was "exterior alteration of a structure." DOE also provided testimony to support the proposition that it had previously interpreted "development" to include bridge removal. *Id.* at 814.

On further review the Supreme Court disagreed with DOE's analysis. The Supreme Court reasoned that "removal" was not the same as "alteration," and that "alter" was unambiguous. The Supreme Court noted that DOE could not offer trial testimony to prove a question of law, that the trial testimony offered was merely a conclusory assertion, and that the record tended to show that DOE had no agency interpretation of "development" that would include trestle removal. The Court stated "**[t]he agency either has an agency interpretation or it does not.**" *Id.* at 814 (emphasis added).

The Court reasoned

If an agency is asserting that its interpretation of an ambiguous statute is entitled to great weight it is incumbent on that agency to show that it has adopted and applied such interpretation as a matter of agency policy. It need not be by formal adoption equivalent to

an agency rule, but it must represent a policy decision by the person or persons responsible.

Id. (emphasis added). The Supreme Court concluded that there was no agency interpretation, rather only a legal argument which conflicted with the plain language of the SMA. Id. at 815.

Similarly, in Sleasman v. City of Lacey, 159 Wash.2d 639, 151 P.3d 990 (2007), a Code enforcement matter, the City of Lacey argued that its interpretation of the phrase "partially developed" was entitled to deference. The Sleasmans had cleared trees from the residential lot upon which they resided without a permit. Id. at 641. A hearing examiner upheld the alleged Code violation and the Sleasmans appealed raising an equal protection claim. Id. The superior court concluded that "partially developed" was not unconstitutionally vague, that the Sleasmans' lot was partially developed" and they were subject to the permit requirement. Id. at 641-642. The Court of Appeals agreed with the trial court that the phrase was "clear and unambiguous," but also gave deference to the City. Id. at 642.

The Supreme Court, Justice Sanders writing, agreed that "partially developed" was "clear and unambiguous," but reversed based upon the plain meaning of the word "developed." Justice

Sanders concluded that the Sleasman's residential lot was developed rather than "partially developed," and that Lacey's permit requirement did not apply to them. *Id.* at 643-644.

After concluding that Lacey's code was unambiguous Justice Sanders explained that the City's construction was not entitled to deference because "partially developed" was unambiguous. *Id.* at 646. He continued with a general, dicta discussion of the deference rule. Sanders explained that even if "developed" was ambiguous Lacey's interpretation would not be entitled to deference because it was not part of a pattern of past enforcement but rather "only a bi-product of current litigation." *Id.* Justice Sanders explained that **"[o]ften when an agency or executive body is charged with an ordinance's administration and enforcement, it will interpret ambiguous language within that ordinance."** *Id.* (emphasis added). Sanders cited Cowiche Canyon for the point that "the agency must show it adopted its interpretation 'as a matter of agency policy.'" *Id.* citing Cowiche Canyon v. Bosley, 118 Wash.2d at 815 (emphasis added). Sanders explained "[w]hile the construction does not have to be memorialized as a formal rule, it cannot merely 'bootstrap a legal argument into the place of agency interpretation,' but must prove an established practice of enforcement." *Id.*

Cowiche and Sleasman both support the conclusion that DDES' Final Code Interpretation is entitled to deference here. Although Judge Trickey correctly concluded that "approved road" is ambiguous, unlike the Code terms at issue in Cowiche and Sleasman, he incorrectly applied their analysis to the completely different situation presented in this case. CP 627. Cowiche and Sleasman were both Code enforcement cases in which the agencies cloaked their legal arguments in "agency policy" language. Cowiche and Sleasman apply if there is no formally adopted Code interpretation. In that circumstance the agency must prove that a policy really existed before its litigation construction is entitled to deference. Cowiche and Sleasman do not require an agency to show a pattern of enforcement in addition to a formal, published Code interpretation. Because the DDES Director adopted her Final Code Interpretation as a matter of agency policy pursuant to KCC 2.100 the analysis in Cowiche and Sleasman supports the conclusion that the final code interpretation is entitled to great weight. To conclude otherwise would eliminate the effectiveness of KCC 2.100 and essentially created a first time exception to every agency code interpretation. Clearly that is not what the Cowiche court intended when it stated that "**either the agency has a policy or it does not**".

b) **The law of vesting does not apply to legal lot recognition petitions or non-existent agency policies.**

Vesting doctrine does not apply to the facts of this case. The LLD applicants are not developers or permit applicants, and they can identify no law or policy in existence at the time of their applications that would require DDES to recognize their substandard lots as legal.

Washington's doctrine of vested rights entitles developers to have a land development proposal processed under the regulations in effect at the time a complete building permit application is filed, regardless of subsequent changes in zoning or other land use restrictions. West Main Assocs. v. Bellevue, 106 Wash.2d 47, 720 P.2d 782 (1986), Erickson and Associates v. McLerran, 123 Wash.2d 864, 867-868, 872 P.2d 1090 (1994), RCW 58.17.033, RCW 19.27.095.

Washington courts recognize that "society suffers if property owners cannot plan developments with reasonable certainty, and cannot carry out the developments they begin." West Main Assoc. v. City of Bellevue, 106 Wash.2d at 51.

Washington's common law vesting policies have two primary supporting philosophies: fairness and certainty. See The Quest for the Best Test to Vest: Washington's Vested Rights Doctrine Beats the Rest, Gregory Overstreet and Diana Kirchheim, 23 Seattle U. Law

Rev. 1043. The doctrine attempts to balance the public interest in health, safety, and welfare with the need to protect a land owners' investment-backed expectations.¹ Id. at 1057. "The purpose of vesting doctrine is to allow developers to determine, or 'fix,' the rules that will govern their land development. The doctrine is supported by notions of fundamental fairness." West Main Assoc. v. City of Bellevue, 106 Wash.2d at 51.

In developing vested rights doctrine the Washington Supreme Court

. . . recognized the tension between public and private interests. The court balanced the private property and due process rights against the public interest by selecting a vesting point which prevents "permit speculation", and which demonstrates substantial commitment by the developer, such that the good faith of the applicant is generally assured. The application for a building permit demonstrates the requisite level of commitment. [The Supreme Court has] explained "the costs of preparing plans and meeting the requirements of most building departments is such that there will generally be a good faith expectation of acquiring title or possession for the purposes of building ...

¹ Washington's common law rule was adopted into the State subdivision Code as follows:

A proposed subdivision of land, as defined in RCW 58.17.020, shall be considered under the subdivision or short subdivision ordinance, and zoning or other land use control ordinances, in effect at the time a fully completed application for preliminary plat approval of the subdivision, or short plat approval of the subdivision, has been submitted to the appropriate county, city, or town official.

RCW 58.17.033(1).

Erickson and Assoc. Inc. v. McLerran, 123 Wash.2d at 874. The basic rule is that ministerial permits vest, and discretionary matters do not. Best Test at pg. 1077 citing *inter alia*, Norco Constr. Inc. v. King County, 97 Wash. 2d 680, 649 P.2d 103 (1982)(pre-RCW 58.17.033 preliminary plat application), Besselman v. City of Moses Lake, 46 Wash.2d 279, 280 P.2d 689 (1955)(rezone), Teed v. King County, 36 Wash.App. 635, 943 P.2d 179 (1984)(rezone), Erickson and Assoc. v. McLerran, 123 Wash.2d, 864, 872 P.2d 1090 (1994) (Master Use Permit). Although vesting principles are not limited to a particular type of permit application, they have not been extended beyond the realm of actual land development.

In contrast to permit applications which are entitled to vest, a legal lot recognition application does not seek to partition or develop land. Instead it is a request for a formal statement that the parcels at issue are legally entitled to an exception from current zoning regulations. The LLD applicants here are not permit applicants who are invested in a development project. Instead the large national interests behind the LLD applications admittedly seek "to ...maximize the development rights for the properties, thereby increasing property values." Davis Dec. at paragraph 6, CP 237. The LLD applicants never intend to develop their property, but instead to "move forward

with either a sale of development rights or to participate in TDR transactions." Davis Dec. at paragraph 11, CP 238. They have not and do not intend to actually change the present use of their holdings. Instead the claimed intended ". . . result would be conservation of working forests. . ." Davis Dec. at paragraph 13, CP 238. There is no investment-backed expectation to protect. Washington's common law vested rights doctrine does not apply because the LLD applicants will hold the same huge tracts of forest land whether they are able to double the number of development rights they can sell or not.

The LLD applicants also have not identified anything they can vest *to*. Judge Trickey's apparent factual conclusion that DDES had a practice of approving legal lots based upon forest roads was not supported by substantial evidence even if there were evidence of such a practice there is no vested right to agency action in violation of applicable regulations.

With regard to prior agency action Judge Trickey orally noted "here is what I have concluded based on the record. This is a new interpretation that the Department has directed. In fact it is contradictory to the way the policy on lot recognition and what was the road was done in the past." CP 637, appendix C, oral ruling at page 10. Judge Trickey's factual conclusion that a prior policy regarding the meaning of "approved

road" existed was not supported by any evidence in the record, but it was the basis for his legal ruling that Director Warden exceeded her authority when she applied her Code Interpretation to the LLD applicants. Both decisions should be reversed.

Factual findings on summary judgment are "reviewed for substantial evidence." Pope v. University of Washington, 121 Wash.2d 479, 490, 852 P.2d 1055 (1993). Only where no dispute exists as to the material facts may the court dispose of such questions on review of summary judgment. Backman v. Northwest Pub. Center, 147 Wash.App. 791, 796, 197 P.3d 1187, 1189 (Wash.App. Div. 1, 2008) citing Champagne v. Thurston County, 163 Wash.2d 69, 81-82, 178 P.3d 936 (2008). Here the facts presented establish that no prior policy regarding the meaning of "approved roads" existed.

Prior to 2004 the King County Code did not require existing infrastructure as an element for recognition of pre-1937 lots. App. F. The LLD applicants' own consultant established that in the past DDES did not require any evidence of roads at all for pre-1937 legal lot recognition. In fact at the time of the LLD Applications "neither the DDES instructions nor application form specif[ied] that lot access information (i.e., easements, deeds, or dedicated rights of way) [were] required with the application submittal." Second Declaration of Stephen J. Graddon in

Support of Petitioners White River's Opposition to County's Motion for Partial Summary Judgment at paragraph 2 (Second Graddon Dec.). CP 497. The LLD applicants did not even know of the Code's "approved road" requirement until their petition was denied in April of 2008. Second Graddon Dec. at paragraph 7, CP 498.

Despite excessive hyperbole in their Summary Judgment briefing, the LLD applicants identified just one instance since the 2004 Code change in which DDES approved a pre-1937 legal lot determination in the forest zone. See Appendix E to the Declaration of Lawrence Costich in Support of Petitioners White Rivers Motion for Summary (Costich Dec.), CP 220-226. That application, granted before the applications at issue here, involved only sixteen lots in contrast to hundreds (directly relevant to public safety issues related to access), and made no mention of roads. Id. A second application referred to by LLD applicants granted after theirs was denied, did not involve a pre-1937 lot. Miles Dec. at paragraph 23, CP 373. Thus the "approved roads" requirement did not apply at all. Because the LLD applicants cannot and did not show a previous DDES "policy" of granting pre-1937 legal lot determination applications based upon the existence of forest or logging roads, Judge Trickey's factual conclusion that the Final Code Interpretation was contrary to previous

agency policy regarding what a road was not supported by substantial facts in the record and therefore should be reversed.

Judge Trickey's ruling that application of the Formal Code Interpretation exceeded the DDES Director's authority is legally erroneous and should also be reversed. The LLD applications could not vest to a non-existent agency policy. Milestone Homes, Inc. v. City of Bonney Lake, 145 Wash.App. 118, 186 P.3d 357. Neither can proper agency action be foreclosed because of a possible past error in another case involving another property or because agency officers have failed to properly enforce zoning regulations. Mercer Island v. Steinmann, 9 Wash.App. 479, 513 P.2d 80 (1973), Buechel v. State Department of Ecology, 125 Wash.2d 196, 884 P.2d 910 (1994).

In Milestone Homes, *supra*, a developer filed a preliminary plat application with the City of Bonney Lake proposing a 25 lot subdivision. In order to satisfy Bonney Lake's density requirements Milestone Homes included five previously platted and developed lots in their plat application (with the owners' permission). 145 Wash.App. at 120-121. The city council denied the plat, finding that "the proposed subdivision does not comply with the BLMC since it includes lots external to the proposed subdivision lot, and those lots are not proposed to be subdivided." Id. at 123.

On LUPA review the superior court reversed the city council. The superior court considered supplemental documents Milestone produced to prove that a prior city planner told Milestone it could include the five developed lots in its subdivision. Id. Milestone argued that the city council had erroneously interpreted the law and erroneously applied the law to the facts. Id. at 126. The superior court concluded that there was ambiguity in Bonney Lake's ordinances and that therefore property owners should be able to "do what they want with their property." Id. at 124.

Division Two reversed the superior court, specifically distinguishing Cowiche and Sleasman. Division Two reasoned "[h]ere, there is no evidence that a developer has ever tried to include parts of a previous subdivision to satisfy the density requirements for the new development. Bonney Lake argues persuasively that it cannot show a pattern of enforcement because no developer has ever submitted a similar plat application" Id. at 130. Division Two concluded that the Bonney Lake code was unambiguous and reversed.

In Buechel v. State Department of Ecology, The Shoreline Hearings Board denied Buechel's request for a variance to allow a residence on a substandard lot adjacent to Hood Canal. Buechel, 125 Wash.2d at 198. Although Buechel owned an 8,500 square yard parcel (the minimum lot size was 10,000), 7,500.00 yards of it was

under water. Id. at 200. The remaining buildable area was within the setback from the ordinary high water mark on a bulkhead. Id. at 199. The Shoreline Hearings Board concluded that Buechel did not meet variance criteria. Id. at 200. Buechel appealed, arguing *inter alia* that the Board's decision was arbitrary and capricious because a neighbor had recently been allowed to build a small home on an adjacent bulkhead. Id. at 210. The Supreme Court was not persuaded. The Court reasoned "[t]he proper action on a land use decision cannot be foreclosed because of a possible past error in another case involving another property. No authority is cited for the proposition that the Board can be estopped from enforcing existing regulations by prior decision not even considered by the Board." Id. at 211. Relying in part on City of Mercer Island v. Steinmann, a unanimous Court concluded "the Department is not estopped from attempting to enforce zoning law because of a prior decision regarding other property." Id.

In Steinmann, 9 Wash.App. 479, 483, 513 P.2d 80 (Wash.App. 1973), Division One adopted the rule that "[t]he governmental zoning power may not be forfeited by the action of local officers in disregard of the statute and the ordinance." Steinmann had been granted a permit to build additions onto his

house, which he then rented out in violation of applicable regulations. Id. at 481. Mercer Island sued to enforce its Code and Steinmann claimed equitable estoppel based on his building permit. Id. Division One denied Steinmann's appeal noting that "[t]he public has an interest in zoning that cannot thus be set at naught. The plaintiff landowner is presumed to have known of the invalidity of the exception and to have acted at his peril." Id. at 483 (internal citations omitted).

In this case the record shows at most that DDES granted one pre-1937 legal lot determination application in the forest zone after 2004. There is no substantial evidence regarding application of the "approved roads" language contained in KCC 19A prior to the Formal Code Interpretation. Whether there was no application to trigger adoption of a policy, like in Milestone Homes, an error or failure to enforce the regulatory language, as discussed in Steinmann and Buechel, the LLD applicants cannot establish a vested right based upon an unrelated application on another property.

DDES Director Stephanie Warden did not exceed her jurisdiction by applying her February 2008 Final Code Interpretation to the LLD applicants. Instead Director Warden acted precisely within the authority granted her by KCC 2.100. Faced with an

ambiguous Code provision and an application for recognition of 251 substandard lots in a resource zone Director Warden issued a formal policy statement regarding DDES' interpretation of "approved road." That formal agency Code interpretation was entitled to great deference. Judge Trickey erred by failing to give Director Warden's Code Interpretation the deference due to it.

2. **THE SUPERIOR COURT ERRED WHEN IT FAILED TO GIVE DEFERENCE TO DDES' FINAL CODE INTERPRETATION BASED ON ITS CONCLUSION THAT THE CODE INTERPRETATION IS NOT CONSISTENT WITH THE CLEAR INTENT OF THE LEGISLATIVE BODY.**

Judge Trickey applied the wrong standard of review when he found that the Director's Final Code Interpretation requiring pre-1937 parcels to have been provided with approved roads meeting the 1993 King County Road Standards was not entitled to deference and could not be applied to the LLD applicants. An agency interpretation of an ambiguous ordinance is entitled to deference, even if it approaches lawmaking unless the agency interpretation *conflicts* with legislative intent. In this case the DDES Director's Final Code Interpretation did not conflict with legislative intent, instead it was consistent with the King County Council's intent to restrict recognition of substandard parcels unless served by some type of amenity.

- a) **The Superior Court applied the wrong standard of review when it required a showing of "clear legislative intent" before giving deference to DDES' interpretation of the phrase "approved road" contained in KCC 19A.08.070(A)(1)(a).**

If an ambiguous regulation falls within an administrative agency's expertise the agency's interpretation is accorded great weight, provided that it *does not conflict* with the statute. Port of Seattle v. Pollution Control Hearings Boards, 151 Wash.2d 568, 587, 90 P.3d 659 (2004)(emphasis added). The primary foundation and rationale for the deference rule is that agency expertise is often a valuable aid in interpreting and applying an ambiguous statute in harmony with the policies and goals the legislature sought to achieve by its enactment. The Director's interpretation does not exceed her authority even if her interpretation approaches 'lawmaking,' and she may appropriately 'fill in the gaps' where necessary to the effectuation of a general statutory scheme. Hama Hama Co. v. Shorelines Hearings Bd., 85 Wash.2d 441, 448, 536 P.2d 157, 161 - 162 (internal citations omitted). An administrative agency's statutory construction is valid as long as it does not purport to 'amend' the statute. Id.

Because Judge Trickey's ruling that the Final Code Interpretation cannot be applied to the LLD applicants is not based on a finding that it actually conflicts with legislative intent it should be reversed.

In his ruling Judge Trickey concluded that Director Warden's Code Interpretation did not "*clearly reflect* legislative intent." App. C. at paragraph (D)(1). In his oral ruling Judge Trickey additionally stated ". . . this is in effect a new interpretation sort of reaching in - - in the Court's view - - to the 1993 King County Road Standards. Sort of just inserts that into this ordinance, when it is not really in there. I cannot see that it was the legislative intent by the council in adopting either the original ordinance or the amendments that this would be the way that it should do." App. C., oral ruling at page 10, CP 637.

Judge Trickey did not come to any conclusion with regard to what the council *did* mean by approved roads. Neither did he conclude that the Final Code Interpretation was in direct conflict with the council's intent. Because the council's intent regarding "approved roads" remains unclear Judge Trickey erred by refusing to give deference to the agency interpretation. The law does not require the agency to prove that its interpretation is "clearly consistent" with legislative intent. The deference doctrine recognizes that, as is the case here, legislative intent is often anything but clear.

- b) **DDES' interpretation of the phrase "approved road" as meeting the 1993 King County Road Standards is consistent with the King County Council's intent to limit recognition of substandard lots lacking in basic amenities such as sewers, roads and water systems.**

In September of 1998 the King County Executive proposed a large collection of changes to King County land segregation codes. Sims transmission letter, Appendix H², CP 312-313. Sims' proposal was to disallow recognition of any unrecorded short plats or subdivisions not previously recorded or sold as individual parcels. CP 312-313. In October of 1999 the Clerk of the King County Council posted a Notice of Hearing on the segregation amendments in newspapers all over King County. Affidavit of Posting, Appendix I, and see i.e. notices attached to App. I. Ms. Norris' Notice of Public Hearing described the changes to the Code on determining and maintaining the legal status of a lot as follows:

The provisions of this section reflect current practices except in regards to the recognition of lots created prior to June 9, 1937. As proposed, such lot would be recognized only if the lot has been sold to individual, non-contiguous ownership, or is currently developed with a residence or is improved with access, water service, or sewage disposal improvements.

Id.

² All following references are to documents transferred by the King County Superior Court Clerk's Office as "exhibit 53." Because they were not given individual Clerk's numbers they will simply be referenced as appendices.

During the legislative process a variety of alternative changes to the lot recognition statute were considered, many of which would have been less restrictive. Appendix J. The only proposed additional amendment adopted added language allowing lot approval for parcels that had been given separate tax identification numbers. Appendix J, K. The council adopted Ordinance 13694 in early 2004, and the description of its effect on lot recognition remained exactly the same. Appendix K. The Council restricted legal recognition for pre-1937 lots even further in 2004 when applied the improvement requirement to all pre-1937 lots. Appendix F.

Director Warden's 2008 Code Interpretation of the phrase "approved road" was not in conflict with the King County Council's intent when it adopted Ordinances 13694 and 15031. Instead Director Warden's interpretation was a good faith effort to determine what the council intended. As the Clerk of the Council's description makes clear, the council only intended that pre-1937 lots that were "*currently developed*" would be entitled to recognition. Appendix K. Because the 1993 King County Road Standards were in effect in 2000 when Ordinance 13694 was adopted, Director Warden's conclusion that those standards would determine what an "approved road" was is entirely consistent with the legislative intent.

Judge Trickey applied the wrong standard of review, but he also was incorrect as a matter of law when he concluded that Director Warden's Final Code Interpretation was not clearly consistent with the intent of the legislature. Director Warden's Final Code Interpretation was clearly consistent with the legislative intent and was *not in conflict* with it. Judge Trickey's decision that the Final Code Interpretation was not entitled to deference and could not be applied to the LLD applicants was wrong.

V. CONCLUSION

This case should be remanded to Judge Trickey with directions to give Director Warden's Final Code Interpretation regarding the meaning of the phrase "approved roads" great deference and to apply the Code Interpretation to the individual LLD applications. The 2008 LLD applications have no vested right to an exemption from KCC 19A.07.080(A)(1)(a), nor to an interpretation of "approved roads" that would necessarily include forest or logging roads. Judge Trickey's decision that Director Warden's 2008 Final Code Interpretation exceeded her authority as applied to the LLD applicants should be reversed.

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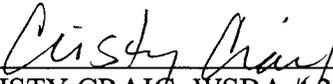
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DATED this 28th day of July, 2009.

DANIEL T. SATTERBERG
King County Prosecuting Attorney

Respectfully submitted



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APPENDIX A

19A.08.070 Determining and maintaining legal status of a lot.

A. A property owner may request that the department determine whether a lot was legally segregated. The property owner shall demonstrate to the satisfaction of the department that, a lot was created, in compliance with applicable state and local land segregation statutes or codes in effect at the time the lot was created, including, but not limited to, demonstrating that the lot was created:

1. Prior to June 9, 1937, and has been:
 - a. provided with approved sewage disposal or water systems or roads; and
 - b.(1) conveyed as an individually described parcel to separate, noncontiguous ownerships through a fee simple transfer or purchase prior to October 1, 1972; or
 - (2) recognized prior to October 1, 1972, as a separate tax lot by the county assessor;
2. Through a review and approval process recognized by the county for the creation of four lots or less from June 9, 1937, to October 1, 1972, or the subdivision process on or after June 9, 1937;
3. Through the short subdivision process on or after October 1, 1972; or
4. Through the following alternative means allowed by the state statute or county code:
 - a. for the raising of agricultural crops or livestock, in parcels greater than ten acres, between September 3, 1948, and August 11, 1969;
 - b. for cemeteries or other burial plots, while used for that purpose, on or after August 11, 1969;
 - c. at a size five acres or greater, recorded between August 11, 1969, and October 1, 1972, and did not contain a dedication;
 - d. at a size twenty acres or greater, recognized prior to January 1, 2000, provided, however, for remnant lots not less than seventeen acres and no more than one per quarter section;
 - e. upon a court order entered between August 11, 1969, to July 1, 1974;
 - f. through testamentary provisions or the laws of descent after August 10, 1969;
 - g. through an assessor's plat made in accordance with RCW 58.18.010 after August 10, 1969;
 - h. as a result of deeding land to a public body after April 3, 1977, and that is consistent with King County zoning code, access and board of health requirements so as to qualify as a building site pursuant to K.C.C. 19A.04.050; or
 - i. by a partial fulfillment deed pursuant to a real estate contract recorded prior to October 1, 1972, and no more than four lots were created per the deed.

B. In requesting a determination, the property owner shall submit evidence, deemed acceptable to the department, such as:

1. Recorded subdivisions or division of land into four lots or less;
2. King County documents indicating approval of a short subdivision;
3. Recorded deeds or contracts describing the lot or lots either individually or as part of a conjunctive legal description (e.g. Lot 1 and Lot 2); or
4. Historic tax records or other similar evidence, describing the lot as an individual parcel. The department shall give great weight to the existence of historic tax records or tax parcels in making its determination.

C. Once the department has determined that the lot was legally created, the department shall continue to acknowledge the lot as such, unless the property owner reaggregates or merges the lot with another lot or lots in order to:

1. Create a parcel of land that would qualify as a building site, or
2. Implement a deed restriction or condition, a covenant or court decision.

D. The department's determination shall not be construed as a guarantee that the lot constitutes a building site as defined in K.C.C. 19A.04.050.

E. Reaggregation of lots after January 1, 2000, shall only be the result of a deliberate action by a property owner expressly requesting a permanent merger of two or more lots. (Ord. 15031 § 2, 2004: Ord. 13694 § 42, 1999).

APPENDIX B



King County

Department of Development and Environmental Services

900 Oakesdale Avenue Southwest
Renton, WA 98057-5212

206-296-6600 TTY 206-296-7217

www.kingcounty.gov

FINAL CODE INTERPRETATION L08CI002

Background

The Department of Development and Environmental Services (DDES) has recently received several applications for lot recognition that rely upon "forest roads" or "logging roads" to satisfy the criteria set forth in K.C.C. 19A.08.070A.1.a. K.C.C. Title 19A does not include a definition of the term "road."

K.C.C. 2.100.030A allows the Director of DDES to issue a code interpretation on the Director's own initiative. The Director has determined that a code interpretation on this issue will provide certainty to permit applicants and ensure consistent application of the King County Code.

Discussion

Prior to 1937, the creation of lots did not receive any significant review by King County. There was no review to ensure that appropriate infrastructure, such as sewer, water, and roads, were available. Indeed, such infrastructure was often not in place when the lot was created. In many cases, lots were created in blocks of equal size, e.g. 5,000 square feet, that could then be combined in different combinations based on the desires of the property owner and potential purchasers. As a result, many pre-1937 lots are not consistent with King County's current zoning.

In 1937, the Washington Legislature adopted the first state subdivision regulations. Those regulations for the first time included requirements for consideration of issues related to the public health, safety, and welfare as part of the subdivision process. In 1969, the Washington Legislature updated its subdivision regulations. Those regulations are codified in RCW Title 58. Current subdivision law continues to state that one purpose of the subdivision process is to ensure that the subdivision of land "promote[s] the public health, safety, and general welfare..." RCW 58.17.010. The subdivision process accomplishes this by establishing uniform procedural standards, requiring consideration of factors relating to the public health and general welfare, and requiring public notice and an opportunity to comment.

K.C.C. Title 19A is King County's implementation of RCW Chapter 58.17. Prior to January 1, 2000, the King County Code addressed lot recognition through its definition of "separate lot." These were defined as lots "created in compliance with the subdivision or short subdivision laws

in effect at the time of the creation of the lot." Former K.C.C. 19.04.420. This did not address those lots that were created prior to subdivision laws. Effective January 1, 2000, K.C.C. Title 19A was amended to include a specific provision establishing standards for when King County will recognize lots established under all of the prior regulatory schemes.

K.C.C. 19A.08.070A divides legal lot recognition standards into three different periods: One period covers years prior to 1937, before the adoption of state subdivision standards and consideration of public health, safety, and welfare. The second period covers the years between 1937 and 1972, when state law governed creation of more than four lots and King County regulations governed the creation of four or fewer lots. The third period covers the years since 1972, when King County adopted its regulations implementing the 1969 state subdivision statute.

With respect to recognition of pre-1937 lots, K.C.C. 19A.08.070A.1 provides:

A. A property owner may request that the department determine whether a lot was legally segregated. The property owner shall demonstrate to the satisfaction of the department that, [sic] a lot was created, [sic] in compliance with applicable state and local land segregation statutes or codes in effect at the time the lot was created, including, but not limited to, demonstrating that the lot was created:

1. Prior to June 9, 1937, and has been:

a. provided with approved sewage disposal or water systems or roads;

and

b.(1) conveyed as an individually described parcel to separate, noncontiguous ownerships through a fee simple transfer or purchase prior to October 1, 1972; or

(2) recognized prior to October 1, 1972, as a separate tax lot by the county assessor;

Thus, under existing K.C.C. 19A.08.070A, in order for a pre-1937 lot to receive recognition as a separate lot, it must meet two conditions. First, prior to October 1, 1972, the lot must either have been conveyed as an individual parcel or have been recognized by the county assessor as a separate tax lot. Second, the lot must have been provided with "approved" roads, sewage disposal, or water. K.C.C. Title 19A does not provide guidance on the approval process for this infrastructure or provide a definition for a road. Therefore, other relevant provisions of the King County Code must be examined in order to determine this provision's meaning.

As noted above, prior to the January 1, 2000 effective date of K.C.C. Title 19A, King County's subdivision law did not specifically address the issue of pre-1937 lots. The provision was recommended by the King County Executive in order to address a growing concern that pre-1937 lots, which were created during a period when no public health, safety, or welfare review was required, were being recognized without undergoing the subdivision process. These lots often lacked even basic infrastructure. The obvious purpose of the King County Council in adopting this provision was to limit the circumstances under which pre-1937 lots would be recognized as legal lots.

In a prior consideration of a related issue, DDES concluded that in order for a pre-1937 lot to be recognized, the approved infrastructure must have been provided to the lot prior to the January 1, 2000 effective date of K.C.C. Title 19A. See, *Regulatory Review Committee Meeting Minutes, September 28, 2006*. The Committee was not asked to consider the questions of how to determine when infrastructure has been provided, as required by K.C.C. 19A.08.070A.1., or what standards were to be used to determine if the infrastructure was approved.

For purposes of determining whether approved infrastructure has in fact been provided, the definitions and the standards used to approve infrastructure that were in effect on January 1, 2000 would be consistent with the Regulatory Review Committee's analysis of K.C.C. 19A.08.070A.1. This approach implements the intent of K.C.C. 19A.08.070A.1. to limit lot recognition to those circumstances where approved infrastructure has been provided. At the same time, it does not place the impossible burden on property owners to demonstrate that the infrastructure meets current standards. Requiring that the infrastructure criteria had to be approved prior to 1937 would impose too stringent a burden on applicants, because very few lots had any approved infrastructure prior to 1937.

Likewise, applying the definition of "road" in effect at the time of the application for lot recognition would also unnecessarily limit the recognition of lots. Road standards are updated on an ongoing basis. The most recent King County Road Standards were adopted in 2007. Limiting lot recognition by holding applicants to ever-evolving criteria could potentially prohibit future lot recognition.

On January 1, 2000, the 1993 King County Road Standards ("*1993 Road Standards*") were in effect. The 1993 Road Standards will be used to determine whether an approved road has been provided to a pre-1937 lot, as required by K.C.C. 19A.08.070A.1.

The 1993 Road Standards defined several terms that are relevant to an interpretation of K.C.C. 19A.08.070A.1.

The 1993 Road Standards define a "road" as "A facility providing public or private access including the roadway and all other improvements inside the right-of-way." The "right-of-way" is defined as "Land, property, or property interest (e.g., an easement), usually in a strip, acquired for or devoted to transportation purposes." A "roadway" is defined as "Pavement width plus any non-paved shoulders." By way of contrast, a "driveway" is "a privately maintained access to residential, commercial, or industrial properties." *1993 Roads Standards*.

From these definitions, several characteristics of a road can be gleaned. One important characteristic is that the road must be located within a right-of-way, easement or similar instrument that was dedicated for transportation purposes prior to 2000. The road must also be used or devoted to transportation purposes. For example, a driveway does not meet this test because it is not devoted to transportation purposes -- it only provides access to the property. In this respect, a logging road that only provides access to forest lands for hauling timber on a temporary basis is not devoted to transportation purposes.

A second important characteristic for a road is that the road must have a defined form and must be surfaced. For example, an unimproved track that follows a right-of-way is not a roadway.

Assuming that a road meets these standards, K.C.C. 19A.08.070A.1 also requires that the road was "approved." To meet this element of the test, the road must have been constructed to the standards in effect at the time the road was approved by King County or other public agency with authority to approve the road.

Under this requirement, a public road or highway constructed to county or state highway standards at the time would be considered approved. However, even if it meets the standard for a road, a logging road or forest service road would generally not meet the test for approval. The Washington State Forest Practice Rules establish standards for logging roads. These standards (see *Chapter 222.24 WAC* and *Forest Practice Board Manual, Chapter 3*) are intended to promote forest management, protect water quality and riparian habitats and prevent potential or actual damage to public resources. These standards are not intended to promote or protect the public health, safety and general welfare, the standards that apply under the subdivision statutes. As a result, logging roads will generally not meet this test.

In summary, roads built for the primary use of providing safe access to local residences and businesses or to provide safe transportation within urban and rural areas are approved roads within the meaning of K.C.C. 19A.08.070A.1. These roads are built within a right-of-way and consist of a smooth, durable surface.

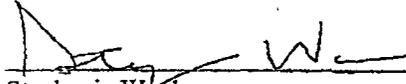
In contrast, "logging roads," "forest service roads," and other similar rudimentary access roads are not approved roads for purposes of K.C.C. 19A.08.070A.1. These roads are built for the purposes of the logging industry for logging and forest management purposes, not for transportation purposes, and were not subject to an appropriate approval process. In a similar manner, temporary construction access or dozer bladed access do not qualify.

Decision

Under K.C.C. 19A.08.070A.1.a, in order for a pre-1937 lot to be recognized, it must have been provided with approved water, sewerage, or roads prior to January 1, 2000. A forest service or logging road that has been constructed under state forest practice regulations or similar regulations does not meet the definition of "road" for purposes of lot recognition under K.C.C. 19A.08.070A.1.a. For purposes of K.C.C. 19A.08.070A.1.a, a road must have been constructed prior to January 1, 2000 and meet the requirements of the 1993 King County Road Standards.

Appeal of Code Interpretations

Under K.C.C. 2.100.050, a code interpretation that is not related to permit or code enforcement action that is pending before the Department is final when the Director issues the Code Interpretation. The Director determines that this code interpretation is final on the date it is issued.



Stephanie Warden
Director
Development and Environmental Services

2/22/08
Date

APPENDIX C

FILED
KING COUNTY, WASHINGTON

The Honorable Michael Trickey

JAN 14 2009

SUPERIOR COURT CLERK
BRANDI SYME
DEPUTY

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
FOR THE COUNTY OF KING

PALMER COKING COAL COMPANY, a)
Washington Partnership, WHITE RIVER FOREST)
LLC, a Delaware limited liability company, and)
JOHN HANCOCK LIFE INSURANCE)
COMPANY, a Massachusetts life insurance)
company)

No. 08-2-14133-1 SEA

Petitioners,

**ORDER GRANTING IN PART
AND DENYING IN PART CROSS-
MOTIONS FOR PARTIAL
SUMMARY JUDGMENT**

vs.

KING COUNTY, a municipal corporation of the)
State of Washington,)

Respondent.

THIS MATTER has come before the Court on the following cross-motions for summary judgment: Respondent King County's Motion for Partial Summary Judgment, Petitioner White River Forests LLC's and Petitioner John Hancock Life Insurance Company's Motion for Summary Judgment, and Petitioner Palmer Coking Coal Company's Motion for Summary Judgment. Petitioner White River Forests LLC and Petitioner John Hancock Life Insurance Company are collectively referred to herein as "Petitioner White River." Petitioner White River was represented by Lawrence Costich, Petitioner Palmer Coking Coal Company by Michele McFadden,

ORIGINAL

1 and Respondent King County by Stephen Hobbs and Cristy Craig. The Court heard oral argument
2 by all parties on September 22, 2008.

3 A. The Court considered the following documents:

- 4 1. Respondent King County's Motion for Partial Summary Judgment, with
5 attached exhibits;
- 6 2. Petitioner White River's Motion for Summary Judgment and declarations in
7 support thereof;
- 8 3. Petitioner Palmer Coking Coal Company's Motion for Summary Judgment
9 and declarations in support thereof;
- 10 4. Petitioner White River's opposition to King County's Motion for Partial
11 Summary Judgment and declarations in support thereof;
- 12 5. Petitioner Palmer Coking Coal Company's Opposition to King County's
13 Motion for Partial Summary Judgment and declarations in support thereof;
- 14 6. Respondent King County's Response to Petitioner White River's Motion for
15 Summary Judgment and declaration in support thereof;
- 16 7. Respondent King County's Response to Palmer Coking Coal Company's
17 Motion for Summary Judgment and declaration in support thereof;
- 18 8. Petitioner White River's Reply to King County's Response and declarations
19 in support thereof;
- 20 9. Petitioner Palmer Coking Coal Company's Reply to King County's
21 Response and declarations in support thereof;
- 22 10. Respondent King County's Reply to Petitioner White River's Opposition;
- 23 11. Respondent King County's Reply to Palmer Coking Coal Company's
Opposition;
12. Petitioner White River's and Petitioner Palmer Coking Coal Company's
Supplemental Reply on Summary Judgment;
13. Respondent King County's Supplemental Reply on Summary Judgment;
14. The five Land Use Petition Act appeals consolidated under this cause
number; and
15. The files and records herein.

1 B. The court declines to enter any findings of fact, since this is a summary judgment order
2 only under CR 56.

3 C. The Court, having issued an Oral Ruling from the bench on October 16, 2008, and heard
4 argument over the form of competing proposed orders on December 5, 2008, HEREBY ORDERS
5 THAT:

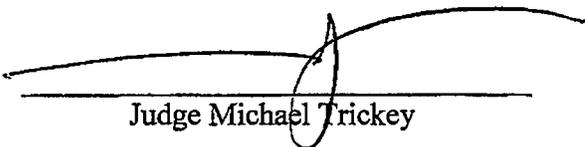
- 6 1. Respondent King County's Motion for Partial Summary Judgment is GRANTED
7 IN PART and DENIED IN PART.
- 8 2. Petitioners White River Forest LLC and John Hancock Life Insurance Company's
9 Motion for Summary Judgment is GRANTED IN PART and DENIED IN PART.
- 10 3. Petitioner Palmer Coking Coal's Motion for Summary Judgment is DENIED in its
11 entirety.
- 12 4. The DDES Director's February 22, 2008 Final Code Interpretation is hereby
13 declared to be invalid as to Petitioners' legal lot recognition Applications.
- 14 5. All remaining issues are reserved for hearing on Petitioners' LUPA appeal.
- 15 6. The Court's oral ruling is hereby incorporated by reference.

16 D. The Court's ORDER is based upon the following rulings for which there are no genuine
17 issues as matters of law:

- 18 1. The King County Council has the authority to require infrastructure for legal lot
19 recognition, and acted properly and within its legislative authority when it adopted
20 KCC 19A.08.070(A)(1)(a), conditioning legal lot recognition for pre-1937 parcels a
21 showing that a parcel has been provided with approved sewage disposal or water
22 systems or roads.
- 23 2. Neither KCC 19A 08.070(A)(4)(d) or KCC 19A.08.070(B)(4) supersede the
"approved road" requirement in KCC 19A.08.070(A)(1).
3. Although the language "approved roads" as used in KCC 19A.08.(A)(1)(a) is
ambiguous, because the DDES Director's February 22, 2008 Final Code
Interpretation was not consistent with past administrative practices, and does not
clearly reflect legislative intent, the Director exceeded her authority when she
applied that decision to Petitioners' legal lot recognition applications.

- 1 4. The Final Code Interpretation is not entitled to a deferential standard of review
2 ordinarily accorded to an administrative agency's interpretation because it was not
3 consistent with past administrative practices, or the clear intent of the legislative
4 body;
- 5 5. The Final Code Interpretation is not an erroneous interpretation of the law under
6 RCW 36.70C.130(1)(b);
- 7 6. The Final Code Interpretation is not a clearly erroneous application of the law to the
8 facts under RCW 36.70C.130(1)(d) (LUPA).
- 9 7. DDES was not obligated to analyze the Petitioners' Applications pursuant to the
10 alternative provisions in KCC19A.08.070(A)(4)(d), and the DDES Decisions
11 denying recognition of Petitioners' Lots, was not an erroneous interpretation of this
12 code provision.
- 13 8. DDES did not violate KCC 19A.08.070(B)(4), requiring DDES to give "great
14 weight" to historic tax records when it reviewed Petitioners' Applications, and the
15 DDES Decisions were not clearly erroneous applications of this code provision to
16 the facts;
- 17 9. DDES did not fail to follow the procedures prescribed by KCC19A.08.070(A) when
18 it applied the February 22, 2008 Final Code Interpretation to its review of
19 Petitioners' Applications, including prohibiting gated roads and requiring dedicated
20 rights-of-way to historically created lots;
- 21 10. The DDES Decisions were not a clearly erroneous application of law to the facts
22 with respect to applying the legal standard at the time Petitioners' Lots were created
- 23 11. DDES has the authority to apply contemporary development standards to
historically created and recognized lots; and
12. The DDES Director did not usurp the authority of the King County Road Engineer
by adopting the 1993 King County Road Standards to clarify the ambiguous term
"approved roads" in her February 28, 2008 Final Code Interpretation.

SIGNED this 12th day of January, 2009.



Judge Michael Trickey

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IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON

IN AND FOR THE COUNTY OF KING

PALMER COKING COAL CO., a Washinton)
Partnership, and WHITE RIVER FOREST,)
LLC, a Delaware corporation and JOHN)
HANCOCK LIFE INSUURANCE COMPANY, a)
Massachusetts Life Insurance Company,)
PETITIONERS,)

CASE NO.
08-2-14133-1SEA

VERSUS)
KING COUNTY, a Municipal corporation)
of the State of Washington,)
DEFENDANT.)

Proceedings Before Honorable MICHAEL J. TRICKEY

KING COUNTY COURTHOUSE
SEATTLE, WASHINGTON

DATED: SEPTEMBER 22, 2008

A P P E A R A N C E S:

FOR THE PLAINTIFFS:

White River LLC and John Hancock:
BY: LAWRENCE COSTICH, ESQ.,
Palmer Coking Coal Company:
BY: MICHELLE McFADDEN, ESQ.

FOR THE DEFENDANT:

BY: STEVEN HOBBS, ESQ.

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PROCEEDINGS
(Open court.)

08:30:00 4 THE BAILLIFF: All rise, Court is in session.
08:30:02 5 Michael J. Trickey presiding in the Superior Court in
08:30:04 6 the State of Washington in and for the King County.

08:32:45 7 THE COURT: Thank you. Good morning.
08:32:46 8 Please be seated.

08:32:52 9 All right. This is Palmer Coking Coal et
08:33:07 10 al., versus King County, 08-2-14133-1. I believe that
08:33:13 11 all counsel are present.

08:33:14 12 Good morning, welcome back.

08:33:15 13 This matter was argued to the Court on a
08:33:18 14 number of summary judgment motions on Monday,
08:33:21 15 September 22nd, then we returned today for the Court's
08:33:29 16 oral ruling.

08:33:30 17 After that date, there was a briefing
08:33:33 18 schedule set. I received the briefs. I have received
08:33:36 19 the briefs.

08:33:38 20 I am prepared to rule at this point. This
08:33:42 21 is a Land Use Petition Act appeal of various decisions
08:33:47 22 regarding lot designation and segregation. But those
08:33:51 23 issues are not, the actual decisions on segregating
08:33:54 24 the lots are not before the Court today for a
08:33:56 25 decision.

08:33:57 1 Rather the parties have asked the Court to
08:33:59 2 rule on a number of what they characterize as legal
08:34:02 3 issues to sort of set the context for the trial, which
08:34:05 4 is now set for December, if I recall correctly.

08:34:09 5 The standards for review are in RCW
08:34:16 6 36.70.(C) 130, subsection 1. I think that the ones
08:34:20 7 that apply here, are:

08:34:21 8 "B. That the land use decision is
08:34:23 9 erroneous interpretation of the law, allowing for such
08:34:27 10 deference as is due the construction of a law by local
08:34:30 11 jurisdiction with expertise.

08:34:32 12 "D, land use decision is a clearly an
08:34:35 13 erroneous application of the law to the facts.

08:34:37 14 "E, the land use decision is outside of the
08:34:40 15 authority or the jurisdiction of the body or office
08:34:43 16 making the decision.

08:34:49 17 The issues are framed by the parties in
08:34:50 18 sort of different ways. I want to spend a moment
08:34:52 19 going through that.

08:34:53 20 King County motion for partial summary
08:34:55 21 judgment asks the Court to rule on three legal issues.
08:34:59 22 I am going to reference their motion at pages 3 and 4.
08:35:03 23 The first issue concerns the requirement that for lots
08:35:06 24 created prior to June 9, 1937, the owner must
8:35:11 25 demonstrate that the lot has been provided with

08:35:13 1 approved sewage disposal or water system as roads, as
08:35:17 2 the condition of the legal lot recognition,
08:35:22 3 referencing the applicable King County ordinance which
08:35:26 4 is King County code 19A.08.070. I will talk more
08:35:31 5 about that later.

08:35:33 6 The second question is looking at 19A
08:35:39 7 08.070, (a), 4, (d), which provides in parts that lots
08:35:45 8 may be recognized at a size 20 acres or greater,
08:35:49 9 recognized prior to January 2000, essentially what
08:35:55 10 condition King County is asking that a lawful
08:35:59 11 conclusion, or an exercise of the County's authority,
08:36:02 12 King County position on this is that this reflects a
08:36:05 13 previously existing exemption under State law or
08:36:09 14 County ordinance.

08:36:10 15 This goes back to a key argument of the
08:36:17 16 petitioners here. If a lot was previously recognized
08:36:21 17 by King County under an exemption that was expired.
08:36:25 18 It must continue to be recognized by King County.

08:36:29 19 The third issue that the County identified
08:36:30 20 is look at the 19A.08.070, whether the DDES Director
08:36:36 21 that is the authority to interpret the meaning of the
08:36:38 22 term approved roads, as is used in the King County
08:36:42 23 code, whether she abused her authority in issuing the
08:36:46 24 final court interpretation on this issue.

08:36:48 25 The final code interpretation is referenced

08:36:51 1 at various parts of the proceeding. But it is just
08:36:56 2 for reference Exhibit B to the King County's moving
08:37:00 3 papers and it was entitled "Final Code
08:37:04 4 Interpretation," signed by Stephanie Warden, Director
08:37:09 5 of Developmental Services, issued on February 22,
08:37:13 6 2008.

08:37:13 7 Petitioner White River, focuses its
08:37:22 8 briefing on this final interpretation and asks the
08:37:26 9 Court to declare that it is either erroneous
08:37:30 10 interpretation of law for various reasons, or a
08:37:32 11 clearly erroneous application of law, or that she
08:37:36 12 exceeded her authority in creating it.

08:37:39 13 Palmer Coking Coal, in their papers,
08:37:49 14 identifies five issues that they -- six issues that
08:37:52 15 they think that the Court should rule on as a matter
08:37:54 16 of law. Rather than going over those I will state for
08:37:59 17 the reference, they are referenced in their moving
08:38:00 18 papers at page 2 and 3. So let me start with the
08:38:10 19 County's motions.

08:38:12 20 I will indicate my rules as follows:

08:38:22 21 This is a significant issue, because it
08:38:26 22 requires both the King County as well as the Court to
08:38:29 23 look at the law regarding the rights of property
08:38:32 24 owners versus the ability of government to manage
08:38:36 25 development and make sure that there is an adequate

08:38:39 1 infrastructure to protect the public interests in that
08:38:43 2 development.

08:38:44 3 The first issue that the King County raised
08:38:47 4 is whether or not the County can impose the
08:38:50 5 requirement that the lots have been provided with
08:38:53 6 approved sewage disposal water system, or road, as a
08:38:56 7 condition of of legal lot recognition, that is 19A
08:39:02 8 08.070, (a), (1)(a).

08:39:09 9 Let me take a second and read that a
08:39:11 10 property owner may request that the department
08:39:13 11 determine whether a lot was legally segregated the
08:39:16 12 property owner shall demonstrate to the satisfaction
08:39:18 13 of the Department, that a lot was created in
08:39:21 14 compliance with the applicable state and local land
08:39:24 15 segregation statutes or codes in effect, that the time
08:39:28 16 that the lot was created, including but limited, that
08:39:31 17 demonstrating that the lot was created prior to
08:39:34 18 June 9, 1937, and has been, A, provided with an
08:39:39 19 approved sewage disposal or water systems or road;.

08:39:42 20 And, B, subsection 1, conveyed as an
08:39:47 21 individually described parcel to separate
08:39:51 22 non-contiguous ownership through a fee simple transfer
08:39:55 23 or purchase prior to October 1, 1972.

08:39:58 24 Or, 2, recognized prior to October 1, 1972,
9:40:02 25 as a separate tax lot by the County assessor.

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08.070 A has a sub2, 3, 4, and then there is also 070 B, particularly subsection 4, which is part of this here.

This ordinance is ordinance 13694, Section 42, was most recently amended by the County Council in 2004 under what is called the Peltz amendment.

I have looked at the case law in this carefully. I am going to grant the County's motion on this. I think that it is within the authority of the Council to adopt this ordinance.

It was not violating the case law, as I have read it, submitted by both sides, to essentially say that the County would have to recognize the lots, without any additional conditions. I don't think that is what all of the authority says.

So I think that as a matter of law, I will grant that request. I think that the County in the exercise of its appropriate police power, can impose the additional conditions before recognizing the pre1937 lots.

Second issue raised by the County was A, (4) D, 070 A 4, D 4, provides in part through the following alternative means allowed by the State statute or County code, "at a size 20 acres or greater, recognized prior to January 1, 2000, provided

08:41:49 1 for remanent lots not less than seventeen acres and
08:41:52 2 not less than one per quarter section."

08:41:56 3 I think that the County is entitled to the
08:41:58 4 summary judgment on this issue, as well as a matter of
08:42:00 5 law. I think that the lot size, that this was,
08:42:04 6 again, appropriate exercise of the power, under the
08:42:07 7 State statutes referenced in the briefing as delegated
08:42:12 8 to the County and managing and recognizing this lot.

08:42:16 9 Then there is the third issue about the
08:42:18 10 DDES Director authority. That is also the summary
08:42:21 11 judgment by White River.

08:42:26 12 In this, I reach a different result. I am
08:42:28 13 going to deny the County's requests for summary
08:42:33 14 judgment. I am going to grant White River's motion
08:42:35 15 for summary judgment on this. I want to take a moment
08:42:38 16 to explain that.

08:42:39 17 It appears from the records presented to
08:42:43 18 me, that the -- first of all, let me say, the term
08:42:47 19 "approved roads" in the ordinance, to me, is
08:42:52 20 ambiguous. It is not at all clear.

08:42:54 21 Approved by whom?

08:42:56 22 Approved for what purpose?

08:42:57 23 And approved when?

08:42:59 24 I think that it is, in fact, ambiguous
08:43:02 25 term.

08:43:02 1 Then the issue is, what deference, if any,
08:43:05 2 does the Court give to the DDES interpretation?

08:43:10 3 There was a lot of law that I have been
08:43:13 4 studying on that, that was the subject of a lot of the
08:43:16 5 supplemental briefing. Just to reference those cases,
08:43:19 6 that Sleasman, S-L-E-A-S-M-A-N versus Lacey, 159
08:43:25 7 WA.2d, 639, from 2007; Morin, M-O-R-I-N, Versus
08:43:31 8 Johnson, 49 WA.2d, 275 from 1956; Milestone Homes v.
08:43:33 9 City of Bonney Lake, M-I-L-E-S-T-O-N-E, 145 Wn.App.
08:43:44 10 118, a Division II case, I believe from 2008; the
08:43:48 11 Developmental Services of America versus Seattle, 138
08:43:52 12 Wn.2d 107 from 1999, and I hope that I am pronouncing
08:43:58 13 this correctly C-O-W-I-C-H-E, Cowiche Canyon
08:44:03 14 Conservancy, 118 Wash.2d, 801 from 1992.

08:44:10 15 There are a lot of principles in there. It
08:44:12 16 is a fundamental tenant as administrative law,
08:44:15 17 particularly in the land use cases where the governing
08:44:20 18 authority creates an agency to administer the subject
08:44:23 19 matter, particularly in the enforcement of the
08:44:25 20 regulations that often courts give great deference to
08:44:28 21 that.

08:44:28 22 In fact, that is part of the standard
08:44:30 23 review here, in the Land Use Review Act, 36.70 C,
08:44:36 24 however, in reading these cases, here is what I have
08:44:40 25 concluded based on the record. This is a new

08:41:42 1 interpretation that the Department has directed.

08:44:44 2 In fact, it is contradictory to the way
08:44:48 3 that the policy on lot recognition and what was the
08:44:51 4 road was done in the past.

08:44:53 5 Much of the case law talks about whether or
08:44:57 6 not this is an established practice and whether or not
08:44:59 7 it is worked out over time and talks about whether or
08:45:03 8 not the legislative authority of the County had
08:45:06 9 adjudicated, for example, whether a subplot was
08:45:09 10 appropriated or a zoning violation.

08:45:12 11 Again, we give great deference to that, but
08:45:14 12 that is not the case we have here.

08:45:16 13 So, this is in effect a new interpretation
08:45:21 14 sort of reaching in -- in the Court's view -- to the
08:45:23 15 1993 King County Road Standards. Sort of just inserts
08:45:27 16 that into this ordinance, when it is not really in
08:45:31 17 there.

08:45:31 18 I cannot see that it was the legislative
08:45:34 19 intent by the counsel in adopting either the original
08:45:37 20 ordinance or the amendments that this would be the way
08:45:40 21 that it should do.

08:45:43 22 I think, and I reached this reluctantly,
08:45:45 23 because I think that it is appropriate to give
08:45:47 24 deference. I cannot give deference in this case,
08:45:50 25 because I think that the DDES Director did exceed her

08:45:54 1 authority on that adjudication with regard to what
08:45:57 2 approved road is only.

08:45:59 3 The rest of the issues raised by White
08:46:02 4 River I am going to deny.

08:46:05 5 I think that given my analysis on that, I
08:46:08 6 think that there are lots of legal and factual issues
08:46:11 7 with regard to the motions raised by Palmer Coking
08:46:17 8 Coal.

08:46:17 9 All six issues that they have raised, I
08:46:19 10 think that some of it is encompassed by what I have
08:46:22 11 already said, but much of it is compassed by that
08:46:27 12 these are facts specific in the Court's view, so I am
08:46:30 13 going to Palmer Coking Coal's motions for summary
08:46:34 14 judgment.

08:46:37 15 MR. HOBBS: I appreciate that rulings.

08:46:39 16 I will need a brief time to think about
08:46:42 17 whether it is an appropriate to file a motion for
08:46:44 18 reconsideration, assuming that the ruling stand.

08:46:46 19 I suspect that we will be moving to pursue
08:46:51 20 an appeal immediately.

08:46:52 21 THE COURT: I assume whatever way I ruled,
08:46:55 22 somebody was going to appeal.

08:46:57 23 MR. HOBBS: That wasn't entirely clear.

08:46:59 24 Perhaps we can discuss the matter.

08:47:01 25 THE COURT: This is what I was going to

08:47:03 1 suggest, you are anticipating what I was going to
08:47:05 2 suggest.

08:47:06 3 My reading of my rulings is now that it
08:47:08 4 would not be useful to anybody to proceed with the
08:47:11 5 trial.

08:47:11 6 MR. HOBBS: Right.

08:47:12 7 THE COURT: Somebody has to figure out if I
08:47:15 8 am right or wrong that means the Court of Appeals or
08:47:17 9 the Supreme Court. What I would propose to do is let
08:47:19 10 you folks talk, and then I would either Stay this or
08:47:23 11 certify it up on 54 (b), whatever you think that it is
08:47:26 12 appropriate the way to get it adjudicated, if you want
08:47:29 13 to file a motion we can certainly do that.

08:47:32 14 MR. HOBBS: Just wondering, we will think
08:47:33 15 about that and discuss and get back to you today or
08:47:36 16 tomorrow.

08:47:36 17 THE COURT: Whenever, I am here -- I am
08:47:38 18 here the rest of this week and then I am here next
08:47:42 19 week. But the week of the 27th I am out on the family
08:47:46 20 leave, I am here for the next week or so.

08:47:49 21 MR. HOBBS: Thank you, your Honor. I
08:47:51 22 appreciate it.

08:47:51 23 THE COURT: Any further questions?

08:47:55 24 MR. COSTICH: No, your Honor.

08:47:56 25 THE COURT: Thank you. I thought that it

08:47:58 1 was well briefed and well argued on all sides.

08:48:00 2 MR. COSTICH: Thank you.

08:48:02 3 THE BAILIFF: All rise. Court is in recess.

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08:48:05 6 (Court was recessed.)

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APPENDIX D

Chapter 21A.12
DEVELOPMENT STANDARDS - DENSITY AND DIMENSIONS

Sections:

- 21A.12.010 Purpose.
- 21A.12.020 Interpretation of tables.
- 21A.12.030 Densities and dimensions - residential zones.
- 21A.12.040 Densities and dimensions - Resource and commercial/industrial zones.
- 21A.12.050 Measurement methods.
- 21A.12.060 Minimum urban residential density.
- 21A.12.070 Calculations - allowable dwelling units lots or floor area.
- 21A.12.080 Calculations - site area used for base density and maximum density floor area calculations.
- 21A.12.085 Calculations - Site area used for minimum density calculations.
- 21A.12.087 Minimum density adjustments for moderate slopes.
- 21A.12.090 Lot area - Prohibited reduction.
- 21A.12.100 Lot area - Minimum lot area for construction.
- 21A.12.110 Measurement of setbacks.
- 21A.12.120 Setbacks - Specific building or use.
- 21A.12.122 Setbacks - Livestock buildings and manure storage areas.
- 21A.12.130 Setbacks - Modifications.
- 21A.12.140 Setbacks - from regional utility corridors.
- 21A.12.150 Setbacks - From alley.
- 21A.12.160 Setbacks - Required modifications.
- 21A.12.170 Setbacks - projections and structures allowed.
- 21A.12.180 Height - Exceptions to limits.
- 21A.12.190 Height - Limits near major airports.
- 21A.12.200 Lot or site divided by zone boundary.
- 21A.12.210 Sight distance requirements.
- 21A.12.220 Nonresidential land uses in residential zones.
- 21A.12.230 Personal services and retail uses in R-4 through R-48 zones.
- 21A.12.240 Joint use driveway and easement width.
- 21A.12.250 General personal service use, office/outpatient use allowed restrictions.

26. Impervious surface does not include access easements serving neighboring property and driveways to the extent that they extend beyond the street setback due to location within an access panhandle or due to the application of King County Code requirements to locate features over which the applicant does not have control.

27. Only in accordance with K.C.C. 21A.34.040.F.1.g. and F.6. (Ord. 16267 § 25, 2008: Ord. 15245 § 6, 2005: Ord. 15051 § 126, 2004: Ord. 15032 § 17, 2004: Ord. 14808 § 4, 2003: Ord. 14807 § 7, 2003: Ord. 14429 § 2, 2002: Ord. 14190 § 33, 2001: Ord. 14045 § 18, 2001: Ord. 13881 § 1, 2000: Ord. 13571 § 1, 1999: Ord. 13527 § 1, 1999: Ord. 13274 § 10, 1998: Ord. 13086 § 1, 1998: Ord. 13022 § 16, 1998: Ord. 12822 § 6, 1997: Ord. 12549 § 1, 1996: Ord. 12523 § 3, 1996: Ord. 12320 § 2, 1996: Ord. 11978 § 4, 1995: Ord. 11886 § 5, 1995: Ord. 11821 § 2, 1995: Ord. 11802 § 3, 1995: Ord. 11798 § 1, 1995: Ord. 11621 § 41, 1994: Ord. 11555 § 5, 1994: Ord. 11157 § 15, 1993: Ord. 10870 § 340, 1993).

21A.12.040 Densities and dimensions - resource and commercial/industrial zones.

A. Densities and dimensions - resource and commercial/industrial zones.

ZONES	RESOURCE				COMMERCIAL/INDUSTRIAL				
	AGRICULTURE	F O R E S T	M I N E R A L		NEIGHBOR- HOOD BUSINESS	COMMUNIT Y BUSINESS	REGIONAL BUSINESS	O F F I C E	I N D U S T R I A L
STANDARDS	A-10	A-35	F	M	NB	CB	RB	O	I
Base Density: Dwelling Unit/Acre	0.1 du/ac	.0286 du/ac	.0125 du/ac		8 du/ac (2)	48 du/ac (2)	36 du/ac (2) 48 du/ac (1)	48 du/ac (2)	
Maximum Density: Dwelling Unit/Acre					12 du/ac (3) 16 du/ac (15)	72 du/ac (16) 96 du/ac (17)	48 du/ac (3) 72 du/ac (16) 96 du/ac (17)	72 du/ac (16) 96 du/ac (17)	
Minimum Lot Area	10 acres	35 acres	80 acres	10 acres					
Maximum Lot Depth/ Width Ratio	4 to 1	4 to 1							
Minimum Street Setback	30 ft (4)	30 ft (4)	50 ft (4)	(12)	10 ft (5)	10 ft (5)	10 ft (5)	10 ft	25 ft
Minimum Interior Setback	10 ft (4)	10 ft (4)	100 ft (4)	(12)	20 ft (7) (14)	20 ft (7)	20 ft (7)	20 ft (7)	20 ft (7) 50 ft (8)
Base Height (10)	35 ft	35 ft	35 ft	35 ft	35 ft 45 ft (6)	35 ft 60 ft (6) 65 ft (17)	35 ft 65 ft (6)	45 ft 65 ft (6)	45 ft
Maximum Floor/Lot Ratio: Square Feet					1/1 (9)	1.5/1 (9)	2.5/1 (9)	2.5/1 (9)	2.5/1
Maximum Impervious Surface: Percentage (13)	15% 35% (11)	10% 35% (11)	10% 35% (11)		85%	85%	90%	75%	90%

B. Development conditions.

1. In the RB zone on property located within the Potential Annexation Area of a rural city, this density is not allowed.

2. These densities are allowed only through the application of mixed-use development standards and, in the NB zone on property in the urban area designated commercial outside of center, for stand-alone townhouse development.

3. These densities may only be achieved through the application of residential density incentives or transfer of development rights in mixed-use developments and, in the NB zone on property in the urban area designated commercial outside of center, for stand-alone townhouse development. See K.C.C. chapters 21A.34 and 21A.37.

(King County 12-2008)

4.a. in the F zone, scaling stations may be located thirty-five feet from property lines. Residences shall have a setback of at least thirty feet from all property lines.

b. for lots between one acre and two and one half acres in size, the setback requirements of the R-1 zone shall apply. For lots under one acre, the setback requirements of the R-4 zone shall apply.

c. for developments consisting of three or more single-detached dwellings located on a single parcel, the setback shall be ten feet along any property line abutting R-1 through R-8, RA and UR zones.

5. Gas station pump islands shall be placed no closer than twenty-five feet to street front lines.

6. This base height allowed only for mixed-use developments and for stand-alone townhouse development in the NB zone on property designated commercial outside of center in the urban area.

7. Required on property lines adjoining residential zones.

8. Required on property lines adjoining residential zones for industrial uses established by conditional use permits.

9. The floor-to-lot ratio for mixed use developments shall conform to K.C.C. chapter 21A.14.

10. Height limits may be increased if portions of the structure building that exceed the base height limit provide one additional foot of street and interior setback for each foot above the base height limit, provided the maximum height may exceed seventy-five feet only in mixed use developments. Netting or fencing and support structures for the netting or fencing used to contain golf balls in the operation of golf courses or golf driving ranges are exempt from the additional interior setback requirement provided that the maximum height shall not exceed seventy-five feet.

11. Applicable only to lots containing less than one acre of lot area. Development on lots containing less than fifteen thousand square feet of lot area shall be governed by impervious surface standards of the nearest comparable R-4 through R-8 zone.

12. See K.C.C. 21A.22.060 for setback requirements in the mineral zone.

13. The impervious surface area for any lot may be increased beyond the total amount permitted in this chapter subject to approval of a conditional use permit.

14. Required on property lines adjoining residential zones unless a stand-alone townhouse development on property designated commercial outside of center in the urban area is proposed to be located adjacent to property upon which an existing townhouse development is located.

15. Only as provided for walkable communities under K.C.C. 21A.34.040.F.8. well-served by transit or for mixed-use development through the application of residential density incentives under K.C.C. 21A.34.040.F.1.g.

16. Only for mixed-use development through the application of residential density incentives under K.C.C. chapter 21A.34 or the transfer of development rights under K.C.C. chapter 21A.37. In the RB zone on property located within the Potential Annexation Area of a rural city, this density is not allowed.

17. Only for mixed-use development through the application of residential density incentives through the application of residential density incentives under K.C.C. chapter 21A.34 or the transfer of development rights under K.C.C. chapter 21A.37. Upper-level setbacks are required for any facade facing a pedestrian street for any portion of the structure greater than forty-five feet in height. The upper level setback shall be at least one foot for every two feet of height above forty-five feet, up to a maximum required setback of fifteen feet. The first four feet of horizontal projection of decks, balconies with open railings, eaves, cornices, and gutters shall be permitted in required setbacks. In the RB zone on property located within the Potential Annexation Area of a rural city, this density is not allowed. (Ord. 16267 § 26, 2008: Ord. 14190 § 34, 2001: Ord. 14045 § 19, 2001: Ord. 13086 § 2, 1998: Ord. 13022 § 17, 1998: Ord. 12929 § 2, 1997: Ord. 12522 § 4, 1996: Ord. 11821 § 3, 1995: Ord. 11802 § 4, 1995: Ord. 11621 § 42, 1994: Ord. 10870 § 341, 1993).

21A.12.050 Measurement methods. The following provisions shall be used to determine compliance with this title:

A. Street setbacks shall be measured from the existing edge of a street right-of-way or temporary turnaround, except as provided by K.C.C. 21A.12.150;

B. Lot widths shall be measured by scaling a circle of the applicable diameter within the boundaries of the lot, provided that an access easement shall not be included within the circle;

C. Building height shall be measured from the average finished grade to the highest point of the roof. The average finished grade shall be determined by first delineating the smallest square or rectangle which can enclose the building and then averaging the elevations taken at the midpoint of each side of the square or rectangle, provided that the measured elevations do not include berms;

APPENDIX E

21A.12.030 - 21A.12.040

26. Impervious surface does not include access easements serving neighboring property and driveways to the extent that they extend beyond the street setback due to location within an access panhandle or due to the application of King County Code requirements to locate features over which the applicant does not have control. (Ord. 15245 § 6, 2005; Ord. 15051 § 126, 2004; Ord. 15032 § 17, 2004; Ord. 14808 § 4, 2003; Ord. 14807 § 7, 2003; Ord. 14429 § 2, 2002; Ord. 14190 § 33, 2001; Ord. 14045 § 18, 2001; Ord. 13881 § 1, 2000; Ord. 13571 § 1, 1999; Ord. 13527 § 1, 1999; Ord. 13274 § 10, 1998; Ord. 13086 § 1, 1998; Ord. 13022 § 16, 1998; Ord. 12822 § 6, 1997; Ord. 12549 § 1, 1996; Ord. 12523 § 3, 1996; Ord. 12320 § 2, 1996; Ord. 11978 § 4, 1995; Ord. 11886 § 5, 1995; Ord. 11821 § 2, 1995; Ord. 11802 § 3, 1995; Ord. 11798 § 1, 1995; Ord. 11621 § 41, 1994; Ord. 11555 § 5, 1994; Ord. 11157 § 15, 1993; Ord. 10870 § 340, 1993).

21A.12.040 Densities and dimensions - resource and commercial/industrial zones.
A. Densities and dimensions - resource and commercial/industrial zones.

ZONES	RESOURCE				COMMERCIAL/INDUSTRIAL				
	AGRICULTURE	F O R E S T	M I N E R A L	NEIGHBOR- HOOD BUSINESS	COMMUNIT Y BUSINESS	REGIONAL BUSINESS	O F F I C E	I N D U S T R I A L	
STANDARDS	A-10	A-35	F	M	NB	CB	RB	O	I
Base Density: Dwelling Unit/Acre	0.1 du/ac	.0286 du/ac	.0125 du/ac		8 du/ac (2)	18 du/ac (2)	36 du/ac (2)	36 du/ac (2)	
Maximum Density: Dwelling Unit/Acre					12 du/ac (3)	24 du/ac (3)	48 du/ac (3)	48 du/ac (3)	
Minimum Lot Area	10 acres	35 acres	80 acres	10 acres					
Maximum Lot Depth/ Width Ratio	4 to 1	4 to 1							
Minimum Street Setback	30 ft (4)	30 ft (4)	50 ft (4)	(12)	10 ft (5)	10 ft (5)	10 ft (5)	10 ft	25 ft
Minimum Interior Setback	10 ft (4)	10 ft (4)	100 ft (4)	(12)	20 ft (7) (14)	20 ft (7)	20 ft (7)	20 ft (7)	20 ft (7) 50 ft (8)
Base Height (10)	35 ft	35 ft	35 ft	35 ft	35 ft 45 ft (6)	35 ft 60 ft (6)	35 ft 65 ft (6)	45 ft 60 ft (6)	45 ft
Maximum Floor/Lot Ratio: Square Feet					1/1 (9)	1.5/1 (9)	2.5/1 (9)	2.5/1 (9)	2.5/1
Maximum Impervious Surface: Percentage (13)	15% 35% (11)	10% 35% (11)	10% 35% (11)		85%	85%	90%	75%	90%

B. Development conditions.

1. Reserved.
2. These densities are allowed only through the application of mixed-use development standards and for stand-alone townhouse development in the NB zone on property designated commercial outside of center in the urban area.
3. These densities may only be achieved through the application of residential density incentives or transfer of development rights in mixed-use developments and for stand-alone townhouse development in the NB zone on property designated commercial outside of center in the urban area. See K.C.C. chapters 21A.34 and 21A.37.

4.a. in the F zone, scaling stations may be located thirty-five feet from property lines. Residences shall have a setback of at least thirty feet from all property lines.

b. for lots between one acre and two and one half acres in size, the setback requirements of the R-1 zone shall apply. For lots under one acre, the setback requirements of the R-4 zone shall apply.

c. for developments consisting of three or more single-detached dwellings located on a single parcel, the setback shall be ten feet along any property line abutting R-1 through R-8, RA and UR zones.

5. Gas station pump islands shall be placed no closer than twenty-five feet to street front lines.

6. This base height allowed only for mixed-use developments and for stand-alone townhouse development in the NB zone on property designated commercial outside of center in the urban area.

7. Required on property lines adjoining residential zones.

8. Required on property lines adjoining residential zones for industrial uses established by conditional use permits.

9. The floor-to-lot ratio for mixed use developments shall conform to K.C.C. chapter 21A.14.

10. Height limits may be increased if portions of the structure building that exceed the base height limit provide one additional foot of street and interior setback for each foot above the base height limit, provided the maximum height may exceed seventy-five feet only in mixed use developments. Netting or fencing and support structures for the netting or fencing used to contain golf balls in the operation of golf courses or golf driving ranges are exempt from the additional interior setback requirement provided that the maximum height shall not exceed seventy-five feet.

11. Applicable only to lots containing less than one acre of lot area. Development on lots containing less than fifteen thousand square feet of lot area shall be governed by impervious surface standards of the nearest comparable R-4 through R-8 zone.

12. See K.C.C. 21A.22.060 for setback requirements in the mineral zone.

13. The impervious surface area for any lot may be increased beyond the total amount permitted in this chapter subject to approval of a conditional use permit.

14. Required on property lines adjoining residential zones unless a stand-alone townhouse development on property designated commercial outside of center in the urban area is proposed to be located adjacent to property upon which an existing townhouse development is located. (Ord. 14190 § 34, 2001; Ord. 14045 § 19, 2001; Ord. 13086 § 2, 1998; Ord. 13022 § 17, 1998; Ord. 12929 § 2, 1997; Ord. 12522 § 4, 1996; Ord. 11821 § 3, 1995; Ord. 11802 § 4, 1995; Ord. 11621 § 42, 1994; Ord. 10870 § 341, 1993).

21A.12.050 Measurement methods. The following provisions shall be used to determine compliance with this title:

A. Street setbacks shall be measured from the existing edge of a street right-of-way or temporary turnaround, except as provided by K.C.C. 21A.12.150;

B. Lot widths shall be measured by scaling a circle of the applicable diameter within the boundaries of the lot, provided that an access easement shall not be included within the circle;

C. Building height shall be measured from the average finished grade to the highest point of the roof. The average finished grade shall be determined by first delineating the smallest square or rectangle which can enclose the building and then averaging the elevations taken at the midpoint of each side of the square or rectangle, provided that the measured elevations do not include berms;

D. Lot area shall be the total horizontal land area contained within the boundaries of a lot; and

E. Impervious surface calculations shall not include areas of turf, landscaping, natural vegetation or flow control or water quality treatment facilities. (Ord. 15051 § 127, 2004; Ord. 13190 § 16, 1998; Ord. 10870 § 342, 1993).

21A.12.060 Minimum urban residential density. Minimum density for residential development in the urban areas designated by the Comprehensive Plan shall be based on the tables in K.C.C. 21A.12.030, adjusted as provided in 21A.12.070 through 21A.12.080.

A. A proposal may be phased, if compliance with the minimum density requirement results in noncompliance with of K.C.C. chapter 21A.28, if the overall density of the proposal is consistent with this section.

APPENDIX F

15031

39.5

9-27-04 Council Mtg.

Sponsor: Dwight Pelz

Proposed No.: 2004-0117

1 AMENDMENT TO PROPOSED ORDINANCE 2004-0117, VERSION 2
2

3 On page 2, delete lines 27 through 34 and insert the following:

4 "1. Prior to June 9, 1937, and ~~((the lot))~~ has been:

5 a. ~~((P))~~ provided with approved sewage disposal or water systems or roads (~~(;~~
6 ~~or))~~; and

7 b1. ~~((C))~~ conveyed as an individually described parcel to separate,
8 noncontiguous ownerships through a fee simple transfer or purchase prior to October 1,
9 1972, or

10 b2. ~~((e-R))~~ recognized prior to October 1, 1972, as a separate tax lot by the
11 county assessor(~~(;)~~);

12
13
14 **EFFECT:** This amendment clarifies that to determine legal lot status for pre-1937 lots, a
15 property owner must demonstrate that the lot has infrastructure (sewage disposal or water
16 or roads) and that prior to October 1, 1972 it was either: 1) conveyed to someone as an
17 individual parcel or 2) recognized by the Assessor as a separate tax lot.
18

D.P. moved 10-1 SH "NO"
Hague / PUR Et.

GO A

17 result in the creation of more than six lots within the boundaries of the original
18 subdivision or short subdivision.

19 SECTION 2. Ordinance 13694, Section 42, and K.C.C. 19A.08.070 are each
20 hereby amended to read as follows:

21 **Determining and maintaining legal status of a lot.**

22 A. A property owner may request that the department determine whether a lot
23 was legally segregated. The property owner shall demonstrate to the satisfaction of the
24 department that, a lot was created, in compliance with applicable state and local land
25 segregation statutes or codes in effect at the time the lot was created, including, but not
26 limited to, demonstrating that the lot was created:

27 1. Prior to June 9, 1937, and ~~((the lot))~~ has been:

28 a. ~~((P))~~ provided with approved sewage disposal or water systems or roads ~~((~~
29 ~~or))~~; and

30 b. ~~((C))~~ conveyed as an individually described parcel to separate,
31 noncontiguous ownerships through a fee simple transfer or purchase prior to October 1,
32 1972, or

33 c. ~~((R))~~ recognized prior to October 1, 1972, as a separate tax lot by the county
34 assessor;

35 2. Through a review and approval process recognized by the county for the
36 creation of four lots or less from June 9, 1937, to October 1, 1972, or the subdivision
37 process on or after June 9, 1937;

38 3. Through the short subdivision process on or after October 1, 1972; or

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4. Through the following alternative means allowed by the state statute or county code:

a. ~~((F))~~for the raising of agricultural crops or livestock, in parcels greater than ten acres, between September 3, 1948, and August 11, 1969;

b. ~~((F))~~for cemeteries or other burial plots, while used for that purpose, on or after August 11, 1969;

c. ~~((A))~~at a size five acres or greater, recorded between August 11, 1969, and October 1, 1972, and did not contain a dedication;

d. ~~((A))~~at a size twenty acres or greater, recognized prior to ~~((the effective date of this title))~~ January 1, 2000, provided, however, for remnant lots not less than seventeen acres and no more than one per quarter section;

e. ~~((U))~~upon a court order entered between August 11, 1969, to July 1, 1947;

f. ~~((F))~~through testamentary provisions or the laws of descent after August 10, 1969;

g. ~~((F))~~through an assessor's plat made in accordance with RCW 58.18.010 after August 10, 1969;

h. ~~((A))~~as a result of deeding land to a public body after April 3, 1977, and that is consistent with King County zoning code, access and board of health requirements so as to qualify as a building site pursuant to K.C.C. 19A.04.050; or

i. ~~((B))~~by a partial fulfillment deed pursuant to a real estate contract recorded prior to October 1, 1972, and no more than four lots were created per the deed.

B. In requesting a determination, the property owner shall submit evidence, deemed acceptable to the department, such as:

- 62 1. Recorded subdivisions or division of land into four lots or less;
- 63 2. King County documents indicating approval of a short subdivision;
- 64 3. Recorded deeds or contracts describing the lot or lots either individually or as
- 65 part of a conjunctive legal description (e.g. Lot 1 and Lot 2); or
- 66 4. Historic tax records or other similar evidence, describing the lot as an
- 67 individual parcel. The department shall give great weight to the existence of historic tax
- 68 records or tax parcels in making its determination.

69 C. Once the department has determined that the lot was legally created, the

70 department shall continue to acknowledge the lot as such, unless the property owner re((-

71))aggregates or merges the lot with another lot or lots in order to:

- 72 1. Create a parcel of land that would qualify as a building site, or
- 73 2. Implement a deed restriction or condition a covenant or court decision.

74 D. The department's determination shall not be construed as a guarantee that the

75 lot constitutes a building site as defined in K.C.C. 19A.04.050.

76 E. Re((-))aggregation of lots after January 1, 2000, shall only be the result of a

77 deliberate action by a property owner expressly requesting a permanent merger of two or

78 more lots.

79 SECTION 3. Ordinance 13694, Section 59, and K.C.C. 19A.12.050 are each

80 hereby amended to read as follows:

81 **Limitations for short subdivisions.**

82 A: Inside the Urban Growth Area, a maximum of nine lots may be created by a

83 single application. Outside the Urban Growth Area, a maximum of four lots may be

84 created by a single application.

APPENDIX G

2.100.010 Purpose. This chapter establishes the procedure by which King County will render a formal interpretation of a development regulation. The purpose of such an interpretation includes clarifying conflicting or ambiguous provisions in King County's development regulations. (Ord. 14033 § 3, 2001).

2.100.020 Definitions.

A. "Code interpretation" means a formal statement regarding the meaning or requirements of a particular provision in King County's development regulations.

B. "Department" means the King County department with primary responsibility for administering or implementing a particular development regulation.

C. "Development regulation" means the controls placed on development or land use activities by the county including, but not limited to, zoning ordinances, critical areas ordinances, shoreline master programs, official controls, planned unit development ordinances, subdivision ordinances and binding site plan ordinances, together with any amendments thereto. A development regulation does not include a decision to approve a project permit application, as defined in RCW 36.70B.020, even though the decision may be expressed in an ordinance by the county.

D. "Director" means the director or the director's designee of the King County department with primary responsibility for administering or implementing a particular development regulation.

E. "Party of record" means a person who has submitted written comments, testified, asked to be notified or is the sponsor of a petition entered as part of the official county record on a specific development proposal. (Ord. 14033 § 2, 2001).

2.100.030 Requests – acknowledgement – notice.

A. A person may request a code interpretation by submitting a request in accordance with this chapter. The director may also issue a code interpretation on the director's own initiative.

B. A request for a code interpretation must be submitted in writing to the director of the department with primary responsibility administering or implementing the development regulation that is the subject of the request. If the person is uncertain as to the appropriate department to which the code interpretation request should be submitted, the person shall submit the request to the director of the department of development and environmental services, who shall make the determination and forward the request to the appropriate department, and notify the person as to which department is responsible for responding to the request.

C. A code interpretation request must:

1. Be in writing and shall be clearly labeled "Request for Code Interpretation." Failure to satisfy this requirement relieves the director of any obligation to acknowledge or otherwise process the request;

2. Identify the person seeking the code interpretation and provide an address to which correspondence regarding the requested code interpretation should be mailed;

3. Identify the specific section or sections of King County's development regulations for which an interpretation is requested;

4. Identify the parcel or site, if the code interpretation request involves a particular parcel of property or site;

5. Identify the code enforcement action, if the code interpretation request involves a code enforcement case;

6. Be accompanied by the fee required under K.C.C. 2.100.070; and

7. Be limited to a single subject, which may require interpretation of one or more code sections.

D.1. Within fifteen business days after receiving a code interpretation request, the director shall acknowledge receipt of the request. The director shall mail the acknowledgment to the person submitting the request at the address provided in the request. The acknowledgment shall include the following information, as applicable:

a. If the director determines that the code interpretation request does not contain the information required under this section, the director shall identify in the acknowledgment the deficiencies in the code interpretation request. In such a situation, the director is under no obligation to process the code interpretation request until a code interpretation request complying with this chapter is submitted;

b. If the director determines that the code interpretation request is ambiguous or unclear, the director may request that the person making the request to clarify the request. The director is under no obligation to process the code interpretation request until an adequately clarified code interpretation request is submitted;

c. If the director determines that the code interpretation request presents substantially the same issue as is pending before an adjudicatory body, such as the King County hearing examiner, the King County council when acting as a quasi-judicial body, any other quasi-judicial agency or any local, state or federal court, the director shall so state in the acknowledgment. The director is then under no obligation to further process the code interpretation request; and

d. If a code interpretation is requested regarding an issue that the director has previously addressed through a code interpretation, the director is not obligated to issue another code interpretation and shall so state in the acknowledgment required by this section and shall identify the previous code interpretation.

2. If the director determines that the code interpretation request relates to a particular parcel of property, the director shall cause notice of the code interpretation request to be given to the taxpayer of record for the subject parcel.

3. If the code interpretation request relates to a specific development project pending before the county, the director shall cause notice of the code interpretation request to be given to all parties of record for that project, including the applicant.

4. The notice required under this section must include a copy of the code interpretation request and a copy of the director's acknowledgment. Notice required under this section may be by United States mail or other appropriate method of delivery. (Ord. 15605 § 1, 2006; Ord. 14033 § 4, 2001).

APPENDIX H



King County Executive
RON SIMS

September 11, 1998

The Honorable Louise Miller, Chair
King County Council
Room 1200
C O U R T H O U S E

Dear Councilmember Miller:

I am pleased to transmit to the Metropolitan King County Council a proposed land segregation ordinance. This proposed ordinance replaces an original proposal transmitted in January 1996. As you will recall, the original proposal was significantly amended to reflect only the elements necessary to implement Engrossed Substitute House Bill 1724. The remainder was deferred for later consideration. As with the original, this proposed ordinance would repeal the existing subdivision code (K.C.C. Title 19) and replace it with a new land segregation code. Specifically, we are proposing:

1. An increase in the subdivision exemption level allowed under state law, from twenty acres to eighty acres. The effect of this amendment would be that all requests to subdivide property up to eighty acres would be subject to the county's subdivision process. We believe this amendment is necessary to address numerous site and access issues that exist for subdivisions in excess of twenty acres.
2. Revision of the binding site plan review and condominium processes. The effect of these amendments would be to simplify the processes and to consolidate provisions for both commercial and industrial binding site plans with those for mobile homes and condominiums. The amendments are necessary to improve permit processing and site plan review.
3. Consolidation of the boundary line adjustment process, clarification of exactly what will be reviewed under this process, distinguishing among four common types of boundary line adjustments by complexity, and requiring surveys and recording for all boundary line adjustments. The effect of these amendments would be to simplify most boundary line adjustments and to strengthen the County's authority to review complex boundary line adjustments. The amendments are necessary to ensure that buildable lots are in fact being created.

13691

KING COUNTY COURTHOUSE 516 THIRD AVENUE, ROOM 400 SEATTLE, WA 98104-3271
(206) 296-4040 296-0194 FAX 296-0200 TDD Email: ron.sims@metrokc.gov

The Honorable Louise Miller, Chair
September 11, 1998
Page 2

4. Consolidation of requirements that are common to both formal subdivisions and short subdivisions in a "general provisions" section. The effect of these amendments would be to simplify review of land segregation code requirements.

5. Requiring public street rights-of-way and road corridor setbacks for binding site plans, subdivisions and short subdivisions. These amendments are necessary to ensure adequate right-of-way for future development

6. Requiring minimum subdivision improvements consistent with a consensus reached with the local development community. The effect of these amendments would be to require minimum improvements, such as roadways to all lots within the subdivision instead of accepting financial guarantees in their place. The amendments are necessary to ensure adequate facilities and access to subdivisions prior to construction of buildings.

7. Exclusion of the exemption that currently allows public agencies to segregate land for public purposes without going through the subdivision process. We are excluding the exemption because we do not believe the County has authority under state law to allow it.

8. Requiring reaggregation of lots under the same ownership which do not meet the minimum density, lot area and width required in the A, P, and RA zones.

9. No recognition of unrecorded short plats and subdivisions that were not previously recorded or sold as individual parcels.

Further amendments that were recommended in the 1996 Rural Phasing Report prepared by the Office of Budget and Strategic Planning are not fully addressed in this ordinance. Following legal and policy analysis that is under way now, future ordinances will address these suggested amendments, including "rounding up" of density calculations in the rural area.

The proposed ordinance has received extensive public review. Public involvement in drafting the land segregation ordinance occurred as follows:

April, 1995 Twelve-member focus group meeting to define broad issues of concern with participation from industry, environmental and citizen constituents.

May 10, 1995 Technical review committee meetings.
through
September 5, 1995

13694

APPENDIX I

Masuo, Janet

From: Masuo, Janet
Sent: Wednesday, October 20, 1999 8:56 AM
To: 'issaquah press'
Subject: legal notice for Wed. Oct. 27

13694

Adrienne,

Here is a **Notice of Public Hearing** for consideration of Proposed Substitute Ordinance No. 98-585 by the Metropolitan King County Council relating to the segregation of land, adding a new title to the King County Code; creating definitions, establishing the authority and procedures for the segregation of land, which is for publication in your paper on **Wednesday, October 27, 1999**.

Please fax a copy of the legal to 205-8165, ATTENTION: Janet, as soon as possible.

Please provide a tear sheet and three (3) Affidavits of Publication. Include the proposed number on the billing statement. **We have a new address, Room W-1025 King County Courthouse, 516 Third Avenue, Seattle, WA 98104.** If you have any questions, call me at 296-0304.

Thanks,
Janet

98-585

**METROPOLITAN KING COUNTY COUNCIL
NOTICE OF PUBLIC HEARING
98-585**

NOTICE IS HEREBY GIVEN, that a public hearing will be held before the Metropolitan King County Council, Room 1001, King County Courthouse, Seattle, Washington on the 6th day of December 1999, at 1:30 p.m., to consider adoption of Proposed Substitute Ordinance No. 98-585.

SUMMARY: Proposed Substitute Ordinance 98-585 is the first comprehensive revision of King County's land segregation laws since the adoption of original provisions in 1948. The ordinance eliminates conflicts with state subdivision statutes and internal inconsistencies, and reflects current understanding of state statutes due to recent case law and State Attorney General legal opinions. The ordinance is reorganized to better reflect statutory additions made over time (e.g. binding site plans). Lastly, the ordinance eliminates sections setting substantive standards (e.g. road standards and zoning code) which are now codified elsewhere and apply to all development.

Most of the sections of the proposed substitute ordinance carry forward procedural provisions of the existing subdivision code. All sections of the ordinance were subject to significant discussion and review with the King County Prosecuting Attorney during the development of this legislation, as well as during the review by the Council's Growth Management Committee. The following are specific sections that amend current practices:

Sections 8 and 22 (Definitions): These sections contain two critical definitions, "building site" (Section 8) and "lot" (Section 22). These definitions reinforce the fact that although a lot may be determined to have been legally created through a recognized segregation process, it is still subject to current development standards in order to qualify as a buildable site.

Section 38 (Exemptions): The following are not subject to the subdivision requirement of this ordinance:

- Divisions into parcels 40 acres or larger (currently, divisions into lots of 20 acres or larger are exempt).
- Dedications of land 5 acres or greater for public parks and open space (this is a new provision).
- Divisions of land caused by the construction of a new public arterial street or freeway (currently, divisions can occur because of a public road, a stream or river, or a rights-of-way tract for railroads and public utilities).

Section 41 (Determining and maintaining legal status of a lot): The provisions of this section reflect current practices except in regards to the recognition of lots created prior to June 9, 1937. As proposed, such lot would be recognized only if the lot has been sold to individual, non-contiguous ownership, or is currently developed with a residence or is improved with access, water service, or sewage disposal improvements.

Section 79 (Procedures and limitations of the boundary line adjustment process): The provisions of this section limit the type of actions that can be approved through the boundary line adjustment process. It would no longer allow the movement and expansion of small unbuildable lots into undeveloped areas in a manner circumventing subdivision requirements. Boundary line adjustments would allow the creation of one new building site and may involve up to four lots. Other actions that go beyond the provisions for boundary line adjustments would be subject to the short subdivision or subdivision procedures of this ordinance.

DATED at Seattle, Washington, this 27th day of October, 1999.

A copy of Proposed Substitute Ordinance No. 98-585 and/ or a summary of the legislation will be mailed upon request to the Clerk of the Council, Room W 1025, King County Courthouse, 516 Third Avenue, Seattle, WA 98104. The documents are also available on the Internet at <http://www.metrokc.gov/mkcc/clerk>.

METROPOLITAN KING COUNTY COUNCIL
KING COUNTY, WASHINGTON

Anne Noris
Clerk of the Council

13694

Masuo, Janet

mid ok

From: Masuo, Janet
Sent: Wednesday, October 20, 1999 9:00 AM
To: 'Barbara'
Subject: legal notice for Wed. Oct. 27

13694

Barbara,

Here is a **Notice of Public Hearing** for consideration of Proposed Substitute Ordinance No. 98-585, by the Metropolitan King County Council relating to the segregation of land, adding a new title to the King County Code; creating definitions, establishing the authority and procedures for the segregation of land, which is for publication in your paper on **Wednesday, October 27, 1999**.

Please fax a copy of the legal to 205-8165, ATTENTION: Janet, as soon as possible. Please provide a tear sheet and **three (3) Affidavits of Publication**. Include the proposed number on the billing statement. We have a new address, Room W-1025 King County Courthouse, 516 Third Avenue, Seattle, WA 98104. If you have any questions, call me at 296-0304.

Thanks,
Janet

98-585

METROPOLITAN KING COUNTY COUNCIL
NOTICE OF PUBLIC HEARING
98-585

NOTICE IS HEREBY GIVEN, that a public hearing will be held before the Metropolitan King County Council, Room 1001, King County Courthouse, Seattle, Washington on the 6th day of December 1999, at 1:30 p.m., to consider adoption of Proposed Substitute Ordinance No. 98-585.

SUMMARY: Proposed Substitute Ordinance 98-585 is the first comprehensive revision of King County's land segregation laws since the adoption of original provisions in 1948. The ordinance eliminates conflicts with state subdivision statutes and internal inconsistencies, and reflects current understanding of state statutes due to recent case law and State Attorney General legal opinions. The ordinance is reorganized to better reflect statutory additions made over time (e.g. binding site plans). Lastly, the ordinance eliminates sections setting substantive standards (e.g. road standards and zoning code) which are now codified elsewhere and apply to all development.

Most of the sections of the proposed substitute ordinance carry forward procedural provisions of the existing subdivision code. All sections of the ordinance were subject to significant discussion and review with the King County Prosecuting Attorney during the development of this legislation, as well as during the review by the Council's Growth Management Committee. The following are specific sections that amend current practices:

Sections 8 and 22 (Definitions): These sections contain two critical definitions, "building site" (Section 8) and "lot" (Section 22). These definitions reinforce the fact that although a lot may be determined to have been legally created through a recognized segregation process, it is still subject to current development standards in order to qualify as a buildable site.

Section 38 (Exemptions): The following are not subject to the subdivision requirement of this ordinance:

- Divisions into parcels 40 acres or larger (currently, divisions into lots of 20 acres or larger are exempt).
- Dedications of land 5 acres or greater for public parks and open space (this is a new provision).
- Divisions of land caused by the construction of a new public arterial street or freeway (currently, divisions can occur because of a public road, a stream or river, or a rights-of-way tract for railroads and public utilities).

Section 41 (Determining and maintaining legal status of a lot): The provisions of this section reflect current practices except in regards to the recognition of lots created prior to June 9, 1937. As proposed, such lot would be recognized only if the lot has been sold to individual, non-contiguous ownership, or is currently developed with a residence or is improved with access, water service, or sewage disposal improvements.

Section 79 (Procedures and limitations of the boundary line adjustment process): The provisions of this section limit the type of actions that can be approved through the boundary line adjustment process. It would no longer allow the movement and expansion of small unbuildable lots into undeveloped areas in a manner circumventing subdivision requirements. Boundary line adjustments would allow the creation of one new building site and may involve up to four lots. Other actions that go beyond the provisions for boundary line adjustments would be subject to the short subdivision or subdivision procedures of this ordinance.

DATED at Seattle, Washington, this 27th day of October, 1999.

A copy of Proposed Substitute Ordinance No. 98-585 and/ or a summary of the legislation will be mailed upon request to the Clerk of the Council, Room W 1025, King County Courthouse, 516 Third Avenue, Seattle, WA 98104. The documents are also available on the Internet at <http://www.metrokc.gov/mkcc/clerk>.

METROPOLITAN KING COUNTY COUNCIL
KING COUNTY, WASHINGTON

Anne Noris
Clerk of the Council

13694

APPENDIX J

12-06-99

13694 **14**
Brian Derdowski

rb

Sponsor:

Brian Derdowski

Proposed No.:

98-585

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**AMENDMENT TO PROPOSED SUBSTITUTE ORDINANCE NO. 98-585, DATED
September 30, 1999:**

On page 14, line 319, delete 'between September 30, 1972, and' and insert "prior to"

Effect: Amendment recognizes all lots 20 acres or greater created prior to the effective date of this ordinance.

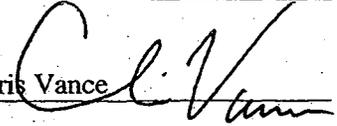
13694

12

11/30/1999

Sponsor:

Chris Vance



Proposed No.:

98-585

1 AMENDMENT TO PROPOSED SUBSTITUTE ORDINANCE NO. 98-585, DATED

2 Sep. 30, 1999:

3 On page 14, line 303, delete the entire line and insert the following: "Non-platted lots
4 created prior to June 9, 1937, or 2. Platted lots created prior to June 9, 1937 and the lot has
5 been:"

6
7 On page 14, line 311, insert the following:

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9 "By the division of land into four or fewer lots prior to October 1, 1972"

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13 **Effect:** Amendment creates a distinction between lots created prior to June 9, 1937,
14 according to whether or not they have been platted.
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AMENDMENT	SPONSOR	SECTION NUMBER	DESCRIPTION OF AMENDMENT	EXECUTIVE RESPONSE	OTHER NOTES
9.1 <i>COJ Withdraw</i>	Vance	38 79	Utilizes existing subdivision code text relative to boundary line adjustments	Do not support <u>Rationale:</u> Contrary to regulatory reform. Returns to status quo language, which is ambiguous for the public and staff.	Item 1 includes provision that appears to limit uses on a parcel as a result of a boundary line adjustment Item 2 cannot be adopted if any of amendments 21 through 27 are adopted
10	Vance	38	Eliminates a section that only allows for segregation by future roadways (not current roadways); new language allows for land segregation where natural divisions already exist.	Do not support <u>Rationale:</u> This would add back exemptions which legal counsel have advised are not authorized by state law.	
<i>Platted 10-2 m. 1 B.D. as per 10-2 by RMC</i>	McKenna	41	Specifies that lots must have been created through compliance with applicable statutes in effect at the time they are created.	Support <u>Rationale:</u> This does not substantially change any requirements.	
<i>CV 12 Withdraw</i>	Vance	41	Creates a distinction between lots created prior to June 9, 1937 according to whether or not they have been platted. Recognizes all divisions of land into four or fewer lots prior to October 1, 1972.	Page 14, line 303 -- Do not support <u>Rationale:</u> The Executive does not support recognition of pre-1937 lots except as provided in the proposed substitute ordinance. Page 14, line 311 -- Do not support <u>Rationale:</u> This provision already exists in Section 41(A)(2) on Page 14, line 308.	Conflicts with amendment 12A in regards to platted versus non-platted lots Change on Item 2 (division of 4 lots or less) is better formatted in amendment 12A

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AMENDMENT	SPONSOR	SECTION NUMBER	DESCRIPTION OF AMENDMENT	EXECUTIVE RESPONSE	OTHER NOTES
12A	Vance	41	Creates a distinction between lots created prior to June 9, 1937 according to whether or not they have been platted, BY NOT recognizing non-platted lots	Do not support <u>Rationale:</u> The Executive does not support recognition of pre-1937 lots except as provided in the proposed substitute ordinance.	Item 1 conflicts with amendment 12 in regards to platted versus non-platted lots. This amendment only recognizes platted lots Item 1 also conflicts with amendment 13.02 Change on Item 2 (division of 4 lots or less) is better formatted in this amendment
13	Vance	41	Creates a distinction between lots created prior to June 9, 1937 according to whether or not they have been platted. Eliminates a detailed listing of criteria to determine if a lot is legal.	Do not support <u>Rationale:</u> This proposed amendment would have the opposite effect of that noted on the amendment, and would be contrary to public policy. The amendment would limit county recognition of legally short-platted lots between 1972 (when a county short plat process became effective) and 1999.	Item 1 is identical to amendment 12, Item 1, which conflicts with amendment 12A in regards to platted versus non-platted lots. Item 2 would likely result in an administrative rule similar to that adopted by the executive in 1992.
13.02	Miller	41	Amendment recognizes all lots created prior to June 9, 1937 that are currently recognized as a separate tax lot by the county assessor	Do not support <u>Rationale:</u> Tax lot numbers have not been limited to legally created lots. Historically, it was possible to receive multiple tax lot numbers for a single legal lot.	Provides a more comprehensive and simpler solution relative to recognition of older pre-1937 lots Cannot be approved if amendments 12, 12A (Item 1) 13.02

13694

APPENDIX K

Masuo, Janet

From: Masuo, Janet
Sent: Wednesday, December 29, 1999 9:27 AM
To: 'Gail'
Subject: legal for Wed. Jan. 5

Gail,

Here is a **Notice of Adoption** for Ordinance No. 13694 relating to land segregation; which is for publication in your paper on **Wednesday, January 5, 2000**.

Please fax a copy of the legal to 205-8165, ATTENTION: Janet as soon as possible. Please provide a tear sheet and **three (3) Affidavits of Publication**. Include the proposed number on the billing statement. If you have any questions, call Janet at 296-0304.

Thanks,
Janet

13694

METROPOLITAN KING COUNTY COUNCIL
NOTICE OF ADOPTION
13694

NOTICE IS HEREBY GIVEN, that a public hearing was held before the Metropolitan King County Council, Room 1001, King County Courthouse, Seattle, Washington on the 6th day of December 1999, at 1:30 p.m., to consider adoption of Proposed Substitute Ordinance No. 98-585. Ordinance No. 13694 was adopted on December 13, 1999.

SUMMARY: Ordinance No. 13694 is the first comprehensive revision of King County's land segregation laws since the adoption of original provisions in 1948. The ordinance eliminates conflicts with state subdivision statutes and internal inconsistencies, and reflects current understanding of state statutes due to recent case law and State Attorney General legal opinions. The ordinance is reorganized to better reflect statutory additions made over time (e.g. binding site plans). Lastly, the ordinance eliminates sections setting substantive standards (e.g. road standards and zoning code) which are now codified elsewhere and apply to all development.

Most of the sections of the proposed substitute ordinance carry forward procedural provisions of the existing subdivision code. All sections of the ordinance were subject to significant discussion and review with the King County Prosecuting Attorney during the development of this legislation, as well as during the review by the Council's Growth Management Committee. The following are specific sections that amend current practices:

Sections 8 and 22 (Definitions): These sections contain two critical definitions, "building site" (Section 8) and "lot" (Section 22). These definitions reinforce the fact that although a lot may be determined to have been legally created through a recognized segregation process, it is still subject to current development standards in order to qualify as a buildable site.

Section 38 (Exemptions): The following are not subject to the subdivision requirement of this ordinance:

- Divisions into parcels 40 acres or larger (currently, divisions into lots of 20 acres or larger are exempt).
- Dedications of land 5 acres or greater for public parks and open space (this is a new provision).
- Divisions of land caused by the construction of a new public arterial street or freeway (currently, divisions

can occur because of a public road, a stream or river, or a rights-of-way tract for railroads and public utilities).

Section 41 (Determining and maintaining legal status of a lot): The provisions of this section reflect current practices except in regards to the recognition of lots created prior to June 9, 1937. As proposed, such lot would be recognized only if the lot has been sold to individual, non-contiguous ownership, or is currently developed with a residence or is improved with access, water service, or sewage disposal improvements.

Section 79 (Procedures and limitations of the boundary line adjustment process): The provisions of this section limit the type of actions that can be approved through the boundary line adjustment process. It would no longer allow the movement and expansion of small unbuildable lots into undeveloped areas in a manner circumventing subdivision requirements. Boundary line adjustments would allow the creation of one new building site and may involve up to four lots. Other actions that go beyond the provisions for boundary line adjustments would be subject to the short subdivision or subdivision procedures of this ordinance.

DATED at Seattle, Washington, this 5th day of January, 2000.

A copy of Ordinance No. 13694 will be mailed upon request to the Clerk of the Council, Room W 1025, King County Courthouse, 516 Third Avenue, Seattle, WA 98104.

METROPOLITAN KING COUNTY COUNCIL
KING COUNTY, WASHINGTON

Anne Noris
Clerk of the Council

..Drafter

Clerk 03/15/2000

..title

AN ORDINANCE relating to land segregation, proposing a technical correction to clarify intent of original legislation; and amending Ordinance 13694, Section 42, and K.C.C. 19A.08.070.

..body

BE IT ORDAINED BY THE COUNCIL OF KING COUNTY:

SECTION 1. Ordinance 13694, Section 42, and K.C.C. 19A.08.070 are each hereby amended to read as follows:

Determining and maintaining legal status of a lot. A. A property owner may request that the department determine whether a lot was legally segregated. The property owner shall demonstrate to the satisfaction of the department that ~~((;))~~ a lot was created ~~((;))~~ in compliance with applicable state and local land segregation statutes or codes in effect at the time the lot was created, including, but not limited to, demonstrating that the lot was created:

1. ~~((Prior to))~~ Before June 9, 1937, and the lot has been:
 - a. ~~((P))~~ provided with approved sewage disposal or water systems or roads ~~((; or))~~;
 - b. ~~((C))~~ conveyed as an individually described parcel to separate, noncontiguous ownerships through a fee simple transfer or purchase ~~((prior to))~~ before October 1, 1972; or
 - c. ~~((R))~~ recognized ~~((prior to))~~ before October 1, 1972, as a separate tax lot by the county assessor;
2. Through a review and approval process recognized by the county for the creation of four lots or less from June 9, 1937, to October 1, 1972, or the subdivision process on or after June 9, 1937;
3. Through the short subdivision process on or after October 1, 1972; or
4. Through the following alternative means allowed by the state statute or county code:
 - a. ~~((F))~~ for the raising of agricultural crops or livestock, in parcels greater than ten acres, between September 3, 1948, and August 11, 1969;
 - b. ~~((F))~~ for cemeteries or other burial plots, while used for that purpose, on or after August 11, 1969;
 - c. ~~((A))~~ at a size five acres or greater, recorded between August 11, 1969, and October 1, 1972, and did not contain a dedication;
 - d. ~~((A))~~ at a size twenty acres or greater, recognized ~~((prior to the effective date of this title))~~ before January 1, 2000, provided, however, for remnant lots not less than seventeen acres and no more than one per quarter section;
 - e. ~~((U))~~ upon a court order entered between August 11, 1969, to July 1, 1974;
 - f. ~~((F))~~ through testamentary provisions or the laws of descent after August 10, 1969;
 - g. ~~((F))~~ through an assessor's plat made in accordance with RCW 58.18.010 after August 10, 1969;
 - h. ~~((A))~~ as a result of deeding land to a public body after April 3, 1977, and that

is consistent with King County zoning code, access and board of health requirements so as to qualify as a building site ~~((pursuant to))~~ under K.C.C. 19A.04.050; or

i. ~~((B))~~ by a partial fulfillment deed pursuant to a real estate contract recorded ~~((prior to))~~ before October 1, 1972, and no more than four lots were created per the deed.

B. In requesting a determination, the property owner shall submit evidence, deemed acceptable to the department, such as:

1. Recorded subdivisions or division of land into four lots or less;
2. King County documents indicating approval of a short subdivision;
3. Recorded deeds or contracts describing the lot or lots either individually or as part of a conjunctive legal description ~~((e.g.))~~ for example, Lot 1 and Lot 2); or
4. Historic tax records or other similar evidence, describing the lot as an individual parcel. The department shall give great weight to the existence of historic tax records or tax parcels in making its determination.

C. Once the department has determined that the lot was legally created, the department shall continue to acknowledge the lot as such, unless the property owner ~~re((-))~~ aggregates or merges the lot with another lot or lots in order to:

1. Create a parcel of land that would qualify as a building site~~((;))~~; or
2. Implement a deed restriction or condition, a covenant or a court decision.

D. The department's determination shall not be construed as a guarantee that the lot constitutes a building site as defined in K.C.C. 19A.04.050.

E. Reaggregation of lots after January 1, 2000, shall only be the result of a deliberate action by a property owner expressly requesting a permanent merger of two or more lots.

..Ad Requirements

30 day notice official paper, posted outside Chambers