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NO. 66432-8

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COURT OF APPEALS  
FOR THE STATE OF WASHINGTON  
DIVISION I

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KING COUNTY a Washington municipal corporation, JEFFREY L. SPENCER, a single man, and RONALD A. SHEAR, a single man,

**Appellants,**

vs.

KING COUNTY DEPARTMENT OF DEVELOPMENT AND ENVIRONMENTAL SERVICES, an executive agency,

**Respondent.**

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**REPLY BRIEF OF APPELLANTS SHEAR AND SPENCER**

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## I. INTRODUCTION

The Hearing Examiner in an unchallenged finding of fact<sup>1</sup> found that “DDES adopted the position that closing down operations on the Spencer property was a holy crusade where nothing short of total victory would be acceptable.” Hearing Examiner’s Finding of Fact “FOF” No. 6, HE,<sup>2</sup> CP 252-53. Respondent King County Department of Development and Environmental Services (“DDES”) continues such “holy crusade” in its Consolidated Response Brief (the “Response”) by selectively using photographs and inventing facts to paint Appellants Shear and Spencer as bad actors who were determined to flout the King County Code. Despite this transparent attempt to taint Shear and Spencer, DDES cannot meet its more important legal burden to establish that the Hearing Examiner erred.

The first four pages of the Response include photographs of the Spencer property, evidently intended to show the expansion of the Shear’s use of the property over time. Shear has always acknowledged that BRC, Inc.’s operation expanded beginning in 2003. *See, e.g.*, Transcript of Hearing (“TR”), Sub No. 16A, Shear Testimony 6/26/09, 1156. The Hearing Examiner acknowledged the expanded use when he required a

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<sup>1</sup> As DDES notes in its Response at p. 16, “No party has appealed the Examiner’s Findings of Fact therefore they are verities on appeal.” *Citing First Pioneer Trading Co., Inc. v. Pierce County*, 146 Wn. App. 606, 617, 191 P.3d 928, 933 (Div. 2, 2008).

<sup>2</sup> The Hearing Examiner’s report and decision is referred to herein as the “Decision”, and cited as “HE”. The Decision is included as an exhibit or appendix to various documents that are themselves within the Clerk’s Papers, including as Appendix A to the King County Hearing Examiner’s Response Brief on LUPA Appeal (Sub. No. 29), at CP 250-82.

Conditional Use Permit (“CUP”) that Shear and Spencer chose not to contest. Conclusions of Law (“COL”) No. 23, HE, CP 270. It is no secret that Shear’s business activities vary seasonably and depending upon economic circumstances. TR, Sub No. 16A, Shear Testimony 11/12/09, 2589-2590. At any particular moment, a photograph could show no activity and no equipment or full activity with a lot of equipment. Certain pieces of equipment were mobile and sometimes brought to the site of the material. TR, Sub No. 16A, Spencer Testimony 6/30/09, 1738-1739. TR, Sub No. 16A, Shear Testimony 6/26/09, 1176.

The photographs in the Response’s introduction prove nothing material, particularly because the first photograph is from May 13, 2005, Response at p. 1, and the material period for the Hearing Examiner’s determination that there was a lawful nonconforming use was September of 2004. COL Nos. 8-21, HE, CP 266-270. Indeed the Hearing Examiner found that “[a]s is frequently the case in such disputes, the most reliable information relating to the history of property use on the Spencer parcel is provided by aerial photographs.” FOF No. 16, HE, CP 255. The Hearing Examiner found that the 2004 aerial photo showed significant changes on the Spencer parcel. FOF No. 19, HE, CP 255. Thus the Hearing Examiner concluded that the photographic evidence and the rest of the record demonstrated that “prior to September 2004 all of the essential first-stage site preparation activities were underway,” and that such evidence supported the Hearing Examiner’s finding of a lawful nonconforming use. COL No. 11,

HE, CP 267. Photographs of the site support, rather than negate, the finding of a lawful nonconforming use.

Even more egregiously, the Response actually asserts facts not in evidence. First the response states that Appellants Shear and Spencer “completely ignored the stop work order” issued in May 2005. Response at p. 2. There is nothing in the record to support this assertion because it is untrue and should be stricken; in fact, Appellant Shear met with Lamar Reed from DDES who agreed to allow Shear’s operation to continue because it was potentially “grandfathered in” (*i.e.*, a lawful nonconforming use). See Motion to Strike filed simultaneously with this Reply, and supporting declaration of Ronald A. Shear. Similarly, the Response states that the Hearing Examiner “granted Shear and Spencer’s appeal regarding DDES’s wetland allegation despite finding their wetland expert not credible.” Response at p. 4. The Hearing Examiner made no such finding, stating that:

[A] credibility evaluation is only a necessity if the DDES case, standing alone, supports a positive wetland finding on the Spencer property sufficient to uphold the notice and order. If the DDES case falls short of the mark in some essential respect, it simply fails on its own merits, and no credibility finding is required.

FOF No. 29, HE, CP 258. Leaving aside for the moment that DDES did not appeal the Hearing Examiner’s wetlands findings to the trial court and that they are therefore not relevant in the present appeal, the Hearing Examiner did find that the DDES wetlands case failed on its own merits because its expert, Mr. Sloan, failed to conclusively document the current presence of

wetlands immediately west of Shear's operation. FOF No. 39, HE, CP 260. In sum, DDES has elected to use its Response to sling mud at Appellants Shear and Spencer rather than to meet its legal burden.

DDES, as the LUPA petitioner, continues to carry the burden of establishing that the Hearing Examiner erred under at least one of LUPA's six standards of review. *See Pinecrest Homeowners Ass'n.*, 151 Wn.2d 279, 288, 87 P.3d 1176 (2004); Rules of Procedure for King County Hearing Examiner (3/31/95) ("HE Rules"), XI.B.8.b. DDES failed to meet such burden in the Response for five primary reasons: (1) the Response neither refuted nor even bothered to address the substantial deference due to the Hearing Examiner's legal and factual determinations, which the trial court fatally failed to apply to its decision; (2) the Response ignored and misread the plain language of the statute regarding prospective use that supported the Hearing Examiner's decision (the "Decision"), relying instead on deceptive and cherry-picked dictionary definitions and distinguishable case law from other jurisdictions; (3) the Response did not adequately refute that the trial court applied an incorrect standard ("conclusive evidence") when it incorrectly determined that the Hearing Examiner's finding regarding the timing of crushing and grinding upon the subject property precluded a lawful nonconforming use; (4) the Response did not adequately refute that DDES failed to meet its evidentiary burden regarding an enforceable flood hazard standard; and (5) the Response failed to show that the reasonable conditions imposed by

the Hearing Examiner upon DDES's subsequent permitting process were beyond his jurisdiction.

This Court should reverse the trial court and affirm the Hearing Examiner's Decision. In the alternative, if this Court finds that the Hearing Examiner exceeded his jurisdiction when he placed certain conditions directing DDES's subsequent permitting process, this Court should remand to the Hearing Examiner for a decision consistent with such finding.

## II. ARGUMENT

A. DDES neither refuted nor even bothered to address the substantial deference due to the Hearing Examiner's legal and factual determinations.

Appellants Shear and Spencer's opening appeal brief ("Opening Brief") contained multiple citations for the premise that a reviewing court must give substantial deference to the Hearing Examiner's legal and factual determinations. *See, e.g.*, Opening Brief at p. 15, *citing Lanzce G. Douglass, Inc. v. City of Spokane Valley*, 154 Wn. App. 408, 415, 225 P.3d 448 (2010) (substantial deference due to the Hearing Examiner as the local authority with expertise in land use regulations), *reconsideration denied, citing City of Medina v. T-Mobile USA, Inc.*, 123 Wn. App. 19, 24, 95 P.3d 377 (2004). Appellants Shear and Spencer also asserted, with authority, that this Court reviews the evidence and any inferences in a light most favorable to the party that prevailed before the Hearing

Examiner, as the Hearing Examiner was the highest forum exercising fact-finding authority. Opening Brief at p. 15, *citing Lanzce G. Douglass, Inc.*, 154 Wn. App. at 415 (*citing City of Univ. Place v. McGuire*, 144 Wn.2d 640, 652, 30 P.3d 453 (2001)). These assertions went wholly unchallenged in the Response.

Indeed, the Response at pages 9-10 states only that the Superior Court concluded that DDES met its burden under RCW 36.70C.130(b) and (e), but provides no argument whatsoever for why this Court should come to the same conclusions. Upon review to this Court, the Superior Court's conclusions of law are wholly irrelevant. This Court reviews questions of law *de novo* to determine whether the facts and law supported the Hearing Examiner's land use Decision. *HJS Dev. Inc. v. Pierce County*, 148 Wn.2d 451, 468, 61 P.3d 1141 (2003). On review of a Superior Court's land use decision, this Court stands in the shoes of the Superior Court and reviews the administrative record before the administrative tribunal—not the Superior Court record. *Id.* DDES's Response suggests that despite the Hearing Examiner's exhaustive findings and expertise on the subject matter at issue, DDES wants this Court to defer instead to the Superior Court. This suggestion is incorrect and disregards the well-recognized deference due to the Hearing Examiner.

- B. DDES ignored and misread the plain language of the statute regarding prospective use that supported the Hearing Examiner's Decision, relying instead on deceptive and cherry-picked dictionary definitions and distinguishable case law from other jurisdictions.

As the Response acknowledges, a nonconforming use is one which existed prior to the effective date of a zoning restriction. Response at p. 11, *citing* McQuillin, Municipal Corporations, Zoning, § 25.180. However, the Response also states that a nonconforming use "...must be the same before and after the zoning restriction becomes effective." Response at p. 11, *citing* McQuillin, Municipal Corporations, Zoning, § 25.188. This is not the law in Washington, and DDES provides no authority to suggest that it is.

DDES does not adequately refute the fact that for the purposes of determining whether a use is established, the King County Code contains clear language that is prospective in application as follows:

Establishment of uses. The use of a property is defined by the activity for which the building or lot is intended, designed, arranged, occupied or maintained. The use is considered permanently established when that use will or has been in continuous operation for a period exceeding sixty days.

KCC 21A.08.010. (Emphasis added.) As the Response points out, "[s]tatutes must be interpreted and construed so that all the language used is given effect, with no portion rendered meaningless or superfluous."

Response at p. 15, citing *Davis v. Dep't of Licensing*, 137 Wn.2d 957, 963, 977 P.2d 554 (1999). Shear and Spencer have consistently asserted that the statute's inclusion of "will or has been" clearly indicates a prospective intent to capture uses that are underway and continuous but are not ones that "have been" established for more than 60 days at the moment of inquiry. The Response provides no alternate explanation for the inclusion of the phrase "will or has been" and thus chooses to ignore the word "will" in clear contravention of the rule of statutory interpretation which DDES itself cites.

Instead of providing any meaningful explanation for the County's use of the phrase "will or has been," DDES trots out dictionary definitions of the word "operation" that in fact support Shear and Spencer's position. The following is the identical definition of "operation" from the American Heritage Dictionary cited at page 15 of the Response, with emphasis added at different parts of the definition:

- (1) **An act, process, or way of operating.**
- (2) The condition of being operative or functioning: in operation.
- (3) **A process or series of acts performed to effect a certain purpose or result: *the operation of preparing a meal for 20.***
- (4) **A process or method of productive activity....**

The American Heritage Dictionary, Second College Ed., Houghton, Mifflin Co., 1985. (Emphasis added, italics in original.) Here, the

following is the identical definition from Funk and Wagnalls' Standard Desk Dictionary cited at page 15 of the Response, with emphasis added at the same part of the definition emphasized by DDES:

1. The act or process of operating.
2. A method of operating; mode of action.
3. A course or series of acts to effect a certain purpose.
3. An act of transaction esp. in the stock market.
4. A course or series of acts to effect a certain purpose: process.
5. **The state of being in action: to be in operation.**

Funk and Wagnalls' Standard Desk Dictionary, Volume 2 N-Z, Funk and Wagnalls Publishing Co., 1976. (Emphasis added.)

Shear and Spencer assert, and the Hearing Examiner determined, that they were "in action" and engaging in a "process or method of productive activity" at the point when Ordinance No. 15032 was adopted. The Hearing Examiner's conclusion, which as above is entitled to substantial deference, was that Appellant Shear's operation involved three states: site preparation, grinding of raw material, and transportation of product off site. COL No. 11, HE, CP 267. The Hearing Examiner concluded that prior to September 2004 "all of the essential first-stage site preparation activities were underway," *id.*, and that a materials processing facility was in existence on the Spencer site in April of 2004. COL No. 15, HE, CP 268. That conclusion, together with the conclusion that Shear's operation also met the definition of an interim recycling facility

immediately prior to the adoption of Ordinance No. 15032, lead the Hearing Examiner to determine that Shear's operation was a legal nonconforming use. COL No. 20, HE, CP 269.

In the Response, DDES cites two general land use treatises for the premise that "mere intention" or preparation is not sufficient to show an actual use, *see* Response at p. 16. However, the Response cites to no Washington authority, nor authority from other states interpreting analogous prospective language (all of the cases cited in pages 18-19 of the Response were distinguished in the Opening Brief), to refute the Hearing Examiner's finding that a nonconforming use existed by virtue of Shear's preparatory "first stage" steps in his operation, particularly in light of these steps' position in a "committed" (*see* COL No. 13, HE, CP 267) operation that continued "without major interruption." COL No. 14, HE, CP 267-28. The Hearing Examiner's application of the prospective nature of the King County Code requirements was a correct interpretation of the law and is entitled to deference. DDES has not met its burden to prove otherwise.

- C. DDES did not adequately refute that the trial court applied an incorrect standard (“conclusive evidence”) when it incorrectly determined that the Hearing Examiner’s finding regarding the timing of crushing and grinding upon the subject property precluded a lawful nonconforming use.

DDES’s argument that that the Hearing Examiner’s factual findings that crushing and grinding operations did not begin until 2005 preclude his legal conclusion that there was a lawful nonconforming use requires two distinct, and incorrect, assumptions: (1) that there must be “conclusive” evidence at all, and (2) that “actual crushing and grinding of materials” is necessary to establish a materials processing facility. DDES’s Response does not support either of these two assumptions and therefore fails.

DDES correctly reports that the Hearing Examiner described the evidence in great detail. Response at p. 17. And, as previously described, the Hearing Examiner relied on such evidence to find an active operation as of September 2004. *See* COL No. 20, HE, CP 269. Yet DDES claims that somehow the Hearing Examiner’s extensive findings show that the Superior Court did not impose an improper burden of proof. This claim strains credulity given that it was DDES that framed the issue for the Superior Court of whether the finding that there was “no conclusive evidence that actual crushing operations and grinding began before September of 2004” itself, standing alone, precluded the Hearing

Examiner's finding of a nonconforming use. *See* DDES Brief on LUPA Appeal Issue #1, 1, CP 50. DDES asserted, and the Superior Court determined, that the Hearing Examiner's single finding, even amid all of the other extensive findings, was enough to cut off the court's contemplation of a nonconforming use.

DDES once again relies on dictionary definitions to claim that neither it nor the Superior Court was relying on the term "conclusive evidence" as a legal standard. DDES cites Funk and Wagnalls' Standard Desk Dictionary for its definition of conclusive as "[p]utting an end to a question, decisive." Response at p. 17. DDES then states that because the evidence was not sufficient to "end uncertainty" regarding crushing or grinding (the Response adds pulverizing, which was not within the Hearing Examiner's statement, in COL No. 10 at CP 267, regarding the lack of conclusive evidence), Appellant Shear failed to meet his burden of proof. This bizarre and circular argument also fails to acknowledge that there was indeed evidence of grinding in 2003. TR, Sub No. 16A, Spencer Testimony 6/30/09, 1736-1740. "Conclusive evidence" was never the standard required of Shear and Spencer to support the Hearing Examiner's finding of a nonconforming use—"substantial evidence" was, and is. *See Bierman v. City of Spokane*, 90 Wn. App. 816, 821, 960 P.2d

434 (1998); *Satsop Valley Homeowners Ass'n., Inc. v. NW Rock, Inc.*, 126 Wn.App. 536, 541, 108 P.3d 1247 (2005).

DDES's argument regarding whether actual crushing and grinding was required relies on its rejection of the prospective language in the King County Code, as refuted above. It also requires this Court to ignore the plain language of the definition of a materials processing facility in Ordinance No. 15032 and KCC 21A.06.742 as follows:

Materials Processing Facility. Materials processing facility: a site or establishment, not accessory to a mineral extraction or sawmill use, that is primarily engaged in crushing, grinding, pulverizing or otherwise preparing earth materials, vegetation, organic waste, construction and demolition materials or source separated organic materials and that is not the final disposal site.

Ord. No. 15032 § 6, 2004. (Emphasis added.) Although crushing and grinding are among the activities that characterize a materials processing facility (and again, as above, there was evidence of grinding prior to enactment of the ordinance), they are not required.

D. DDES did not adequately refute that it failed to meet its evidentiary burden regarding an enforceable flood hazard standard.

DDES's Response Brief makes two basic arguments on the issue of the enforcement of the County flood hazard regulations. First, DDES argues that the Hearing Examiner erred as a matter of law by determining that the County code lacks an enforceable standard. Secondly, DDES

argues that it meets its evidentiary burden of proving a violation. Neither argument is persuasive.

First, DDES reiterates the point that there is an enforceable standard but presents no meaningful evidence to support that position. The Response Brief merely lists a litany of code sections and notes the Hearing Examiner's duty to enforce the code. Response at pp. 20-21.

The Decision articulates detailed findings on why the determination of the existence of a flood hazard area is different than the determination of a wetland. FOF No. 42, HE, CP 261. The Decision further notes that the County recognizes that the existence and quality of data for floodplain analysis are shifting and dynamic, and that County codes establish numerous sources of data that can be relied upon for flood hazard determinations. FOF No. 44, HE, CP 261. But the critical error in DDES's analysis, which the Hearing Examiner aptly noted and which DDES conveniently glosses over in the Response, is that the County staff has unilaterally established a priority for the use of data, and no such priority is found within the County code. *Id.* The Decision also noted that the available data for the Spencer property in 2006 was "poor and generally outdated." FOF No. 45, HE, CP 261-262. The best data at the time was Exhibit 54a which showed only the western third of the Spencer property as within a flood plain. FOF No. 50-51, HE, CP 263, referencing

Exhibits before the Hearing Examiner (“EHE”), Sub. No. 18, Ex. 54a.<sup>3</sup> All of these factual determinations lend credence and support to Conclusion of Law No. 2 which provides that there is no clear and intelligible flood hazard standard. COL No. 2, HE, CP 265.

The DDES Response mostly ignores these important factual points. The best that DDES can muster is that if the flood plain maps are out of date, that is merely an issue of “limited relevance.” Response at p. 22. This is an incredibly cynical position. What the County is arguing, in less polite words, is that its code and regulations can be outdated, illogical, arbitrary, and unintelligible—and that it does not matter because what it, DDES, says is the law is the law. This position does not comport with either the Hearing Examiner’s duties under HE Rule X1.B.8.b or common law notions of procedural due process. *See, e.g., Burien Bark Supply v. King County*, 106 Wn.2d 868, 871, 725 P.2d 994 (1986). *Anderson v. City of Issaquah*, 70 Wn.App. 64, 75, 851 P.2d 744 (1993).

In concluding this first part of its argument, DDES then digresses with an irrelevant point at pages 21 -22 that somehow Spencer and Shear

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<sup>3</sup> As indicated in the Opening Brief, the Court received all referenced documentary exhibits (as opposed to pleadings or decisions issued by the Hearing Examiner) under Sub. No. 18, but the exhibits, some of which were oversized, were collected together in a box labeled “Sub. No. 18” and were not assigned clerk’s papers numbers. We will refer to such exhibits throughout using the format “EHE, Sub No. 18, Ex. \_\_\_\_”.

failed to avail themselves of an available process by which a floodplain map can be amended. The argument misses the point—this is a code enforcement proceeding, not a permit proceeding. Even DDES more or less concedes this point in its own language: “If a **permit applicant** disagrees with the information contained on the FIRM, FEMA has a formal process...by which the FEMA map can be amended....” Response at p. 21. (Emphasis added.)

Next DDES argues futilely that it met its evidentiary burden to show that a violation occurred. As a starting point, DDES’s initial LUPA Petition, at Paragraph 9.1(a), makes the opposite allegation; *i.e.*, that the Hearing Examiner never made a factual determination of whether the Spencer property is actually within a flood hazard area. LUPA Petition, CP 4. Thus, even if the Court determines that the Hearing Examiner did commit legal error by determining, in his Conclusion of Law No. 2, that the County has no enforceable standards for flood hazard violations, the case is still missing an important element: the factual determination of whether a violation actually occurred. A remand would be required for this determination because DDES must prove by a preponderance of evidence that a violation was committed. KCC 23.20.080(D). No findings on the current record would support such a determination.

Nonetheless, DDES now attempts to shift its position on this point by arguing that the Spencer parcel is within the flood hazard area of all of the FEMA maps introduced into evidence. Response at pp. 21, 25, and 26. However, this DDES argument awkwardly ignores the fact that BRC, Inc.'s operations exist only in the eastern third of the Spencer property. As the Hearing Examiner noted in the uncontroverted Findings of Fact Nos. 50-51, the best evidence at the time of the purported violation was Exhibit 54a which shows only the western third of the Spencer property in the flood plain. FOF No. 50-51, HE, CP 263, referencing EHE, Sub. No. 18, Ex. 54a. The logical inference is therefore that DDES did not and cannot sustain its burden of proof on the flood hazard area violation.

E. DDES failed to show that the reasonable conditions imposed by the Hearing Examiner upon DDES's subsequent permitting process were beyond his jurisdiction.

DDES is apparently unwilling to acknowledge its fundamental animosity towards Appellant Shear's operation. Because of this unwillingness, the Response raised red herrings such as Shear and Spencer's purported failure to take advantage of a process to amend a FEMA flood map. See Response at 21. If Shear had thought BRC, Inc. was operating legally and had no idea that DDES considered the Spencer property to be a Flood Hazard Area, why would Shear have applied to amend a FEMA flood map? In fact such process may be available in a permit application, but DDES does not explain how such a process could

be available in a contested code enforcement action such as this one where the County/DDES was required to prove the existence of the Flood Hazard Area as part of its *prima facie* case. In any event, such an application would have been futile given what the Hearing Examiner called DDES's "holy crusade" to shut down Appellant Shear's operation. FOF No. 6, HE, CP 252-53. The Hearing Examiner also observed that DDES "subscribes to what might be characterized as the 'innumerable bites at the apple doctrine,'" such that even if a property owner prevails on 9 out of 10 alleged violations, "DDES believes that its success on the one item still entitles it to submit the property owner to the full gamut of review requirements, including those upon which the property owner prevailed on appeal." COL No. 39, HE, CP 274.

The Hearing Examiner imposed reasonable conditions upon the permitting process in order to prevent DDES from taking another, unfair and unlawful, "bite at the apple." In the Response, DDES relied on a strained and deceptive reading of the King County Code to support its position that the Hearing Examiner exceeded his jurisdiction. The Response states that KCC 20.24.100 "authorizes the Examiner to impose a nonexclusive list of conditions including 'setbacks, screenings, covenants, easements, road improvements and dedications of additional road right-of way and performance bonds as authorized by county ordinances.'" Response at p. 29. In fact, KCC 20.24.100 states that the Examiner may impose conditions "including, but not limited to, setbacks, screenings in the form of landscaping or fencing, covenants...." (Emphasis added.) The

phrase “but not limited to” makes absurd DDES’s subsequent argument that “[i]t is a basic tenant of statutory construction that, when the legislature lists various items in a statute but omits others, the courts should assume that the items omitted were left out intentionally.” Response at p. 30, *citing State v. Gamble*, 146 Wn. App. 813, 817-818, 192 P.3d 399, 401 (Wn. App. Div. 2, 2008). The County Council provided examples of conditions an Examiner could impose, not an exclusive list, and DDES provides no authority to show that limitations upon agency decision making could not be imposed by an Examiner. The Opening Brief distinguishes *In Re King County Hearing Examiner* upon which DDES still relies. *See* Opening Brief at p. 45-46.

DDES also creates a phantom argument that the Decision abrogates DDES’s duty to implement the State Environmental Review Act (“SEPA”) process with respect to the prospective review of Shear’s permit application contemplated by the Decision. *See* Response at p. 32-33. First, nothing in the Decision explicitly directs DDES to suspend the SEPA review process. The gist of the Decision is simply to allow (1) Shear and Spencer to enjoy the fruits of their appeal and (2) avoid a relitigation of issues already adjudicated. After extensive study and testimony, the Hearing Examiner determined that the County had not proven that Mr. Spencer’s farm field qualifies as a protected wetland. Why are more studies needed?

The Decision can be harmonized with the provisions of SEPA that acknowledge that the environmental analysis wheel does not always need

reinvention. A primary purpose of SEPA is to ensure that "...environmental amenities and values will be given appropriate consideration in decision making along with economic and technical considerations..." RCW 43.21C.030(2)(a) and (2)(b). SEPA and the adopted rules at WAC Chapter 197-11 are intended to require agencies to consider environmental information (impacts, alternatives, and mitigation) before committing to a particular course of action. WAC 197-11-055(2)(c). Nothing in the Decision undermines this policy of considering environmental issues. Here, certain environmental issues have been exhaustively considered, in the context of wetlands and flood hazard area. Other potential impacts have not been addressed such as, by way of example, traffic, noise, and air quality, among other things. Nothing in the Decision prevents DDES from examining these environmental impacts.

A major portion of the SEPA Rules (WAC Chapter 197-11) deals exactly with the issues and process for using existing environmental documents. See Part Six "Using Existing Environmental Documents" in the SEPA Rules, WAC 197-11-600 through 197-11-640. By way of illustration, WAC 197-11-600(2) provides that an agency may use environmental documents that have previously been prepared in order to evaluate proposed actions, alternatives, or environmental impacts. The proposals may be the same as, or different than, those analyzed in the existing documents. Procedurally, WAC 197-11-600 provides that existing documents may be used for a proposal by employing one or more methods including:

(a) "Adoption," where an agency may use all or part of an existing environmental document to meet its responsibilities under SEPA. Agencies acting on the same proposal for which an environmental document was prepared are not required to adopt the document;

(b) "Incorporation by reference," where an agency preparing an environmental document includes all or part of an existing document by reference.

WAC 197-11-600(4)(a) and (b).

Condition 2(C) of the Decision does not prohibit review of environmental impacts. It does direct DDES to utilize existing options under SEPA to avoid redundant review by an agency otherwise bent on a "holy crusade." As our Supreme Court has stated in *Parkridge v. Seattle*, supra 89 Wash.2d at 466, 573 P.2d 359:

The State Environmental Policy Act of 1971 and the other statutes and ordinances administered by the building department serve legitimate functions, none of which is intended for use by a governmental agency to block the construction of projects, merely because they are unpopular. We make the statement in light of the history of this matter and because the building permit application will be before the building department for further processing.

It is not hard to realize here that the Hearing Examiner was sending the same admonition to DDES that Division One sent to the City of Seattle in *Parkridge*.

### III. CONCLUSION

Shear and Spencer respectfully request that this Court reverse the trial court and affirm the Hearing Examiner's Decision. In the alternative, if this Court finds that the Hearing Examiner's Decision lacks clarity and

certainty as to the existence of Shear's nonconforming use status or the existence of a flood hazard area violation, Shear and Spencer respectfully request that this Court remand to the Hearing Examiner for a decision clarifying the Hearing Examiner's findings. Further in the alternative, if this Court finds that the Hearing Examiner exceeded his jurisdiction when he placed certain conditions directing DDES's subsequent permitting process, Shear and Spencer respectfully request that this Court remand to the Hearing Examiner for a decision consistent with such finding.

Respectfully submitted this 20 day of July, 2011.

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**IV. CERTIFICATE OF SERVICE**

I certify that on the 20<sup>th</sup> day of July, 2011, I caused a true and correct copy of this REPLY BRIEF OF APPELLANTS SHEAR AND SPENCER to be served on the following in the manner indicated below:

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WAC 197-11-055  
Timing of the SEPA process.

(1) **Integrating SEPA and agency activities.** The SEPA process shall be integrated with agency activities at the earliest possible time to ensure that planning and decisions reflect environmental values, to avoid delays later in the process, and to seek to resolve potential problems.

(2) **Timing of review of proposals.** The lead agency shall prepare its threshold determination and environmental impact statement (EIS), if required, at the earliest possible point in the planning and decision-making process, when the principal features of a proposal and its environmental impacts can be reasonably identified.

(a) A proposal exists when an agency is presented with an application or has a goal and is actively preparing to make a decision on one or more alternative means of accomplishing that goal *and* the environmental effects can be meaningfully evaluated.

(i) The fact that proposals may require future agency approvals or environmental review shall not preclude current consideration, as long as proposed future activities are specific enough to allow some evaluation of their probable environmental impacts.

(ii) Preliminary steps or decisions are sometimes needed before an action is sufficiently definite to allow meaningful environmental analysis.

(b) Agencies shall identify the times at which the environmental review shall be conducted either in their procedures or on a case-by-case basis. Agencies may also organize environmental review in phases, as specified in WAC 197-11-060(5).

(c) Appropriate consideration of environmental information shall be completed before an agency commits to a particular course of action (WAC 197-11-070).

(d) A GMA county/city is subject to additional timing requirements (see WAC 197-11-310).

(3) **Applications and rule making.** The timing of environmental review for applications and for rule making shall be as follows:

(a) At the latest, the lead agency shall begin environmental review, if required, when an application is complete. The lead agency may initiate review earlier and may have informal conferences with applicants. A final threshold determination or FEIS shall normally precede or accompany the final staff recommendation, if any, in a quasi-judicial proceeding on an application. Agency procedures shall specify the type and timing of environmental documents that shall be submitted to planning commissions and similar advisory bodies (WAC 197-11-906).

(b) For rule making, the DNS or DEIS shall normally accompany the proposed rule. An FEIS, if any, shall be issued at least seven days before adoption of a final rule (WAC 197-11-460(4)).

(4) **Applicant review at conceptual stage.** In general, agencies should adopt procedures for environmental review and for preparation of EISs on private proposals at the conceptual stage rather than the final detailed design stage.

(a) If an agency's only action is a decision on a building permit or other license that requires detailed project plans and specifications, agencies shall provide applicants with the opportunity for environmental review under SEPA prior to requiring applicants to submit such detailed project plans and specifications.

(b) Agencies may specify the amount of detail needed from applicants for such early environmental review, consistent with WAC 197-11-100 and 197-11-335, in their SEPA or permit procedures.

(c) This subsection does not preclude agencies or applicants from preliminary discussions or exploration of ideas and options prior to commencing formal environmental review.

(5) An overall decision to proceed with a course of action may involve a series of actions or decisions by one or more agencies. If several agencies have jurisdiction over a proposal, they should coordinate their SEPA processes wherever possible. The agencies shall comply with lead agency determination requirements in WAC 197-11-050 and 197-11-922.

(6) To meet the requirement to insure that environmental values and amenities are given appropriate consideration along with economic and technical considerations, environmental documents and analyses shall be circulated and reviewed with other planning documents to the fullest extent possible.

(7) For their own public proposals, lead agencies may extend the time limits prescribed in these rules.

Statutory Authority: RCW 43.21C.110. 84-05-020 (Order DE 83-39), § 197-11-055, filed 2/10/84, effective 4/4/84.]

## WAC 197-11-600

## When to use existing environmental documents.

(1) This section contains criteria for determining whether an environmental document must be used unchanged and describes when existing documents may be used to meet all or part of an agency's responsibilities under SEPA.

(2) An agency may use environmental documents that have previously been prepared in order to evaluate proposed actions, alternatives, or environmental impacts. The proposals may be the same as, or different than, those analyzed in the existing documents.

(3) Any agency acting on the same proposal shall use an environmental document unchanged, except in the following cases:

(a) For DNSs, an agency with jurisdiction is dissatisfied with the DNS, in which case it may assume lead agency status (WAC 197-11-340 (2)(e) and 197-11-948).

(b) For DNSs and EISs, preparation of a new threshold determination or supplemental EIS is required if there are:

(i) Substantial changes to a proposal so that the proposal is likely to have significant adverse environmental impacts (or lack of significant adverse impacts, if a DS is being withdrawn); or

(ii) New information indicating a proposal's probable significant adverse environmental impacts. (This includes discovery of misrepresentation or lack of material disclosure.) A new threshold determination or SEIS is not required if probable significant adverse environmental impacts are covered by the range of alternatives and impacts analyzed in the existing environmental documents.

(c) For EISs, the agency concludes that its written comments on the DEIS warrant additional discussion for purposes of its action than that found in the lead agency's FEIS (in which case the agency may prepare a supplemental EIS at its own expense).

(4) Existing documents may be used for a proposal by employing one or more of the following methods:

(a) "Adoption," where an agency may use all or part of an existing environmental document to meet its responsibilities under SEPA. Agencies acting on the same proposal for which an environmental document was prepared are not required to adopt the document; or

(b) "Incorporation by reference," where an agency preparing an environmental document includes all or part of an existing document by reference.

(c) An addendum, that adds analyses or information about a proposal but does not substantially change the analysis of significant impacts and alternatives in the existing environmental document.

(d) Preparation of a SEIS if there are:

(i) Substantial changes so that the proposal is likely to have significant adverse environmental impacts; or

(ii) New information indicating a proposal's probable significant adverse environmental impacts.

(e) If a proposal is substantially similar to one covered in an existing EIS, that EIS may be adopted; additional information may be provided in an addendum or SEIS (see (c) and (d) of this subsection).

[Statutory Authority: 1995 c 347 (ESHB 1724) and RCW 43.21C.110. 97-21-030 (Order 95-16), § 197-11-600, filed 10/10/97, effective 11/10/97. Statutory Authority: RCW 43.21C.110. 84-05-020 (Order DE 83-39), § 197-11-600, filed 2/10/84, effective 4/4/84.]

WAC 197-11-610  
Use of NEPA documents.

(1) An agency may adopt any environmental analysis prepared under the National Environmental Policy Act (NEPA) by following WAC 197-11-600 and 197-11-630.

(2) A NEPA environmental assessment may be adopted to satisfy requirements for a determination of nonsignificance or EIS, if the requirements of WAC 197-11-600 and 197-11-630 are met.

(3) An agency may adopt a NEPA EIS as a substitute for preparing a SEPA EIS if:

(a) The requirements of WAC 197-11-600 and 197-11-630 are met (in which case the procedures in Parts Three through Five of these rules for preparing an EIS shall not apply); and

(b) The federal EIS is not found inadequate: (i) By a court; (ii) by the council on environmental quality (CEQ) (or is at issue in a predecision referral to CEQ) under the NEPA regulations; or (iii) by the administrator of the United States Environmental Protection Agency under section 309 of the Clean Air Act, 42 U.S.C 1857.

(4) Subsequent use by another agency of a federal EIS, adopted under subsection (3) of this section, for the same (or substantially the same) proposal does not require adoption, unless the criteria in WAC 197-11-600(3) are met.

(5) If the lead agency has not held a public hearing within its jurisdiction to obtain comments on the adequacy of adopting a federal environmental document as a substitute for preparing a SEPA EIS, a public hearing for such comments shall be held if, within thirty days of circulating its statement of adoption, a written request is received from at least fifty persons who reside within the agency's jurisdiction or are adversely affected by the environmental impact of the proposal. The agency shall reconsider its adoption of the federal document in light of public hearing comments.

[Statutory Authority: RCW 43.21C.110. 84-05-020 (Order DE 83-39), § 197-11-610, filed 2/10/84, effective 4/4/84.]

WAC 197-11-620

Supplemental environmental impact statement — Procedures.

(1) An SEIS shall be prepared in the same way as a draft and final EIS (WAC 197-11-400 to 197-11-600), except that scoping is optional. The SEIS should not include analysis of actions, alternatives, or impacts that is in the previously prepared EIS.

(2) The fact sheet and cover letter or memo for the SEIS shall indicate the EIS that is being supplemented.

(3) Unless the SEPA lead agency wants to prepare the SEIS, an agency with jurisdiction which needs the SEIS for its action shall be responsible for SEIS preparation.

[Statutory Authority: RCW 43.21C.110. 84-05-020 (Order DE 83-39), § 197-11-620, filed 2/10/84, effective 4/4/84.]

WAC 197-11-625  
Addenda — Procedures.

(1) An addendum shall clearly identify the proposal for which it is written and the environmental document it adds to or modifies.

(2) An agency is not required to prepare a draft addendum.

(3) An addendum for a DEIS shall be circulated to recipients of the initial DEIS under WAC 197-11-455.

(4) If an addendum to a final EIS is prepared prior to any agency decision on a proposal, the addendum shall be circulated to the recipients of the final EIS.

(5) Agencies are encouraged to circulate addenda to interested persons. Unless otherwise provided in these rules, however, agencies are not required to circulate an addendum.

[Statutory Authority: RCW 43.21C.110. 84-05-020 (Order DE 83-39), § 197-11-625, filed 2/10/84, effective 4/4/84.]

WAC 197-11-630  
Adoption — Procedures.

(1) The agency adopting an existing environmental document must independently review the content of the document and determine that it meets the adopting agency's environmental review standards and needs for the proposal. However a document is not required to meet the adopting agency's own procedures for the preparation of environmental documents (such as circulation, commenting, and hearing requirements) to be adopted.

(2) An agency shall adopt an environmental document by identifying the document and stating why it is being adopted, using the adoption form substantially as in WAC 197-11-965. The adopting agency shall ensure that the adopted document is readily available to agencies and the public by:

(a) Sending a copy to agencies with jurisdiction that have not received the document, as shown by the distribution list for the adopted document; and

(b) Placing copies in libraries and other public offices, or by distributing copies to those who request one.

(3) When an existing EIS is adopted and:

(a) A supplemental environmental impact statement or addendum is not being prepared, the agency shall circulate its statement of adoption as follows:

(i) The agency shall send copies of the adoption notice to the department of ecology, to agencies with jurisdiction, to cities/counties in which the proposal will be implemented, and to local agencies or political subdivisions whose public services would be changed as a result of implementation of the proposal.

(ii) The agency is encouraged to send the adoption notice to persons or organizations that have expressed an interest in the proposal or are known by the agency to have an interest in the type of proposal being considered, or the lead agency should announce the adoption in agency newsletters or through other means.

(iii) No action shall be taken on the proposal until seven days after the statement of adoption has been issued. The date of issuance shall be the date the statement of adoption has been sent to the department of ecology and other agencies and is publicly available.

(b) A SEIS is being prepared, the agency shall include the statement of adoption in the SEIS; or

(c) An addendum is being prepared, the agency shall include the statement of adoption with the addendum and circulate both as in subsection (3)(a) of this section.

(4) A copy of the adopted document must accompany the current proposal to the decision maker; the statement of adoption may be included.

(5) If known, the adopting agency shall disclose in its adoption notice when the adopted document or proposal it addresses is the subject of a pending appeal or has been found inadequate on appeal.

[Statutory Authority: RCW 43.21C.110. 84-05-020 (Order DE 83-39), § 197-11-630, filed 2/10/84, effective 4/4/84.]

WAC 197-11-635

Incorporation by reference — Procedures.

(1) Agencies should use existing studies and incorporate material by reference whenever appropriate.

(2) Material incorporated by reference (a) shall be cited, its location identified, and its relevant content briefly described; and (b) shall be made available for public review during applicable comment periods.

[Statutory Authority: RCW 43.21C.110. 84-05-020 (Order DE 83-39), § 197-11-635, filed 2/10/84, effective 4/4/84.]

WAC 197-11-640  
Combining documents.

The SEPA process shall be combined with the existing planning, review, and project approval processes being used by each agency with jurisdiction. When environmental documents are required, they shall accompany a proposal through the existing agency review processes. Any environmental document in compliance with SEPA may be combined with any other agency documents to reduce duplication and paperwork and improve decision making. The page limits in these rules shall be met, or the combined document shall contain, at or near the beginning of the document, a separate summary of environmental considerations, as specified by WAC 197-11-440(4). SEPA page limits need not be met for joint state-federal EISs prepared under both SEPA and NEPA, in which case the NEPA page restrictions (40 CFR 1502.7) shall apply.

[Statutory Authority: RCW 43.21C.110. 84-05-020 (Order DE 83-39), § 197-11-640, filed 2/10/84, effective 4/4/84.]