

66432-8

66432-8

FILED
COURT OF APPEALS DIV I
STATE OF WASHINGTON

2011 JUL 20 PM 4:46

NO. 66432-8-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

RONALD A. SHEAR, ET AL.,

Appellants,

v.

KING COUNTY DEPARTMENT OF DEVELOPMENT AND
ENVIRONMENTAL SERVICES,

Respondent.

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE Jay V. White

**REPLY BRIEF OF APPELLANT KING COUNTY HEARING
EXAMINER**

DANIEL T. SATTERBERG
King County Prosecuting Attorney

CHERYL D. CARLSON, WSBA No. 19844
Senior Deputy Prosecuting Attorney
Attorneys for Appellant King County Hearing Examiner
Office of the Prosecuting Attorney
516 Third Avenue, Rm. W400
Seattle, WA 98104-2385
(206) 296-9015

ORIGINAL

TABLE OF CONTENTS

	Page
I. SUMMARY OF ARGUMENT	1
A. Standing Issue Waived.....	1
B. The Examiner Had Authority to Condition Subsequent Permit Review Proceedings in a Manner that Would Give Full Force and Effect to his Findings and Conclusions and Doing So Does Not Foreclose Environmental Review Under SEPA.....	1
C. The Examiner's Decision on the Flood Hazard Issue was Not Outside his Jurisdiction.....	1
II. ARGUMENT	2
A. The Examiner Concedes that Under LUPA, the Issue of Lack of Standing was Not Raised During an Initial Hearing Pursuant to LUPA and was Therefore Waived.....	2
B. Conditioning Future Permit Review to Give Preclusive Effect to Settled Issues Did Not Exceed the Examiner's Jurisdiction or Require Violation of Code or SEPA	3
1. Conditioning future permit processing to achieve finality and ensure fairness does not exceed the Examiner's jurisdiction	3
2. Requiring the Department to recognize the preclusive effect of the Examiner's decision has not been shown to require violation of the Code or SEPA.....	7

C. The Examiner's Resolution of the Flood Hazard Issue was not Based on Impermissible Constitutional Grounds and did not Exceed his Jurisdiction..... 12

III. CONCLUSION..... 14

TABLE OF AUTHORITIES

Table of Washington Cases	Page
<u>Anderson v. Pierce County</u> , 86 Wn.App. 290, 936 P.2d 432 (1997).....	8
<u>Conom v. Snohomish County</u> , 155 Wn.2d 154, 118 P.3d 344 (2005).....	2
<u>Exendine v. City of Sammamish</u> , 127 Wash.App. 574, 113 P.3d 494 (2005).....	13
<u>Hilltop Terrace Homeowner's Assoc. v. Island County</u> , 126 Wn.2d 22, 891 P.2d 29 (1995).....	4
<u>In re King County Hearing Examiner</u> , 135 Wash.App. 312, 144 P.2d 345 (2006).....	5
<u>International Assoc. of Firefighters, Local 1789 v. Spokane Airports</u> , 103 Wn. App. 764, 14 P.3d 193 (2000).....	2
<u>Moss v. City of Bellingham</u> , 109 Wn.App. 6, 31 P.3d 703 (2001)	9
<u>Pinecrest Homeowners Assoc. v. Glen A. Cloninger & Assoc.</u> , 151 Wn.2d 279, 87 P.3d 1176 (2004).....	12
<u>Save Our Rural Environment v. Snohomish County</u> , 99 Wn.2d, 363, 662 P.2d 816 (1983).....	8
<u>Wells v. Whatcom County Water Dist. No. 10</u> , 105 Wash.App. 143, 19 P.3d 453 (2001).....	13

STATUTES

Washington Statutes

RAP 2.5.....	2
RCW 36.70C.080(3).....	2

WAC 197-11-315.....	8
WAC 197-11-335.....	9
WAC 197-11-340.....	10
WAC 197-11-350.....	10
WAC 197-11-350.....	9
WAC 197-11-960.....	9
County Code Provisions	
KCC 20.24.010	4, 6
KCC 20.24.020	4
KCC 20.24.020(B).....	5
KCC 20.24.080(B).....	6
KCC 20.24.100	4
KCC 20.44.030(B).....	8
KCC 23.20.080(D).....	12

I. SUMMARY OF ARGUMENT

A. Standing Issue Waived.

The Examiner concedes that the standing issue was waived by not raising it at the prehearing stage of the LUPA proceedings and therefore withdraws the issue from this appeal.

B. The Examiner Had Authority to Condition Subsequent Permit Review Proceedings in a Manner that Would Give Full Force and Effect to his Findings and Conclusions and Doing So Does Not Foreclose Environmental Review Under SEPA.

The Examiner had jurisdiction to resolve the issues presented at hearing pertaining to the Department's notice and order charges asserting that the subject parcel contained jurisdictional wetlands and that it was in a flood hazard area. Having resolved those issues in the appellants' favor, the Examiner's decision is entitled to preclusive effect in any subsequent permit processing proceedings undertaken by the Department. Requiring the Department to acknowledge the preclusive effect of the Examiner's Decision does not "exempt" Spencer and Shear from applicable environmental regulations as the Department contends.

C. The Examiner's Decision on the Flood Hazard Issue was Not Outside his Jurisdiction.

The Examiner did not appeal the flood hazard issue because the Superior Court concluded that the decision on that issue was an error of

law and the Examiner's participation in these proceedings has been limited to jurisdictional issues. To the extent the Department now invites the Court to consider concluding that the Examiner's resolution of the flood hazard issue was beyond his jurisdiction, the Examiner notes that the decision on the flood hazard issue was not based on constitutional grounds. Rather, the Examiner concluded that the Department failed to meet its burden of proof to enforce ambiguous and ill-defined standards. That decision did not exceed the authority or jurisdiction of the Examiner.

II. ARGUMENT

A. The Examiner Concedes that Under LUPA, the Issue of Lack of Standing was Not Raised During an Initial Hearing Pursuant to LUPA and was Therefore Waived.

Standing is a jurisdictional issue that can generally be raised for the first time on appeal. International Association of Firefighters, Local 1789 v. Spokane Airports, 103 Wn. App. 764, 768, 14 P.3d 193 (2000); RAP 2.5. However, the LUPA statute provides that lack of standing will be waived if not raised during an initial hearing. RCW 36.70C.080 (3). The Examiner acknowledges that upon the parties' agreement no LUPA initial hearing was conducted. For that reason, the Examiner concedes that the issue of lack of standing was waived. Conom v. Snohomish County, 155 Wn.2d 154, 158, 118 P.3d 344 (2005) (under LUPA, defense

of lack of standing is waived if not raised by timely motion noted to be heard at the initial hearing).

The Examiner acknowledges the error in raising the issue in these proceedings and respectfully withdraws the argument.

B. Conditioning Future Permit Review to Give Preclusive Effect to Settled Issues Did Not Exceed the Examiner's Jurisdiction or Require Violation of the Code or SEPA.

The Examiner had jurisdiction to resolve the issues presented at hearing pertaining to the Department's notice and order charges asserting that the subject parcel contained wetlands and that it was in a flood hazard area. Having done so, the Examiner's decision is entitled to preclusive effect in any subsequent permit processing proceedings.

1. Conditioning future permit processing to achieve finality and ensure fairness does not exceed the Examiner's jurisdiction.

The Examiner's purpose in conditioning future permit review processes related to the materials processing operations on the Spencer property was to achieve some measure of finality for Spencer and Shear as the substantially prevailing appellants in the code enforcement proceedings. The contentious nature of the protracted proceedings motivated the Examiner to ensure that the essential issues resolved in the hearing process would not be reopened during subsequent permit review proceedings. The Examiner's decision in this regard is consistent with his

authority to consider and apply County land use policies and regulations and to impose conditions that will promote the principles of fairness and the interests of both the public and private elements of the community. KCC 20.24.010; KCC 20.24.020; KCC 20.24.100.

Common law principles also support the conclusion that a matter previously litigated between the same parties should not be revisited endlessly in subsequent proceedings. The principles of res judicata apply to quasi-judicial land use decisions. Hilltop Terrace Homeowner's Assoc. v. Island County, 126 Wn.2d 22, 891 P.2d 29 (1995). Precluding the Department from reopening factual issues resolved after thorough and lengthy code enforcement proceedings that fully vetted the critical areas issues serves to provide finality to the issue and protect the prevailing litigants against having to refight the battle over the existence of critical areas in subsequent permit processing proceedings.

In this case, as the Department's briefing reflects, the Examiner's Decision on the code enforcement action against Spencer and Shear was issued after "extensive pretrial proceedings, including exhaustive discovery, discovery motions, dispositive motions, intervention and then withdrawal by the neighboring farmer, . . . eight days of hearings, and the submission of multiple post-hearing briefs discussing a wide variety of regulatory and constitutional issues . . ." Respondent's Consolidated

Response Brief, p. 3. There is no question that over the course of the lengthy code enforcement proceedings, the critical areas issues were fully explored and debated. Under such circumstances, it was within the Examiner's authority to ensure that the issues not be reopened and relitigated during the permit review process.

The Department's reliance on In re King County Hearing Examiner, 135 Wn.App. 312, 144 P.2d 345 (2006) in support of its contention that the Examiner exceeded his jurisdiction by placing conditions on subsequent permit review is distinguishable on its facts and therefore not instructive.

In Hearing Examiner, an appeal contesting the adequacy of an agency's environmental impact statement (EIS) for a proposed project was denied outright after the hearing examiner determined that the EIS at issue was adequate. Despite having found the EIS adequate and having denied the appeal for that reason, the hearing examiner nevertheless required the project proponent to prepare a supplemental EIS. Having resolved the appeal in favor of the agency, the court concluded that the Examiner had no basis to impose additional conditions on the agency. Under those circumstances, the supplemental EIS requirement was deemed to exceed the examiner's authority under KCC 20.24.020(B).

Here, where the appellants prevailed on many of the fundamental issues arising out of the Department's notice and order, the conditions imposed by the Examiner were tethered to the grant of authority in KCC 20.24.080(B) that allows the Examiner to condition the grant of an appeal. As such, the conditions imposed by the Examiner in this case are not extraneous and unauthorized demands on the agency but rather a means of ensuring that the issues resolved by the Examiner in Spencer and Shear's favor would have preclusive effect in subsequent permit review proceedings: "the conditions attached to this appeal decision will place appropriate limitations on further review designed to preserve to the Appellants the successful elements of their appeal and will retain Hearing Examiner jurisdiction to the extent necessary to assure that these limitations are observed." (CP 275)

The Examiner's attempt to preserve to the appellants the fruits of their successful appeal was eminently reasonable and fully justified in light of the Examiner's observation that the Department had "adopted the position that closing down operations on the Spencer property was a holy crusade where nothing short of total victory would be acceptable." (CP 253) The Examiner is authorized to impose conditions on the grant of an appeal in order to carry out official laws, policies and objectives of King County. KCC 20.24.080 (B). Among those official laws, policies and

objectives is ensuring fundamental fairness in public hearings, including code enforcement proceedings. KCC 20.24.010. Finality and fairness to the prevailing litigants were the twin objectives of the conditions set forth in the Examiner's decision.

2. Requiring the Department to recognize the preclusive effect of the Examiner's decision has not been shown to require violation of the Code or SEPA.

The Department's suggestion that the Examiner's decision will require it to disregard both Code and SEPA regulations is misplaced and speculative. The Examiner's decision neither instructs nor requires the Department to ignore code or statutory requirements.

In challenging the Examiner's authority to require the Department to abide by his conclusion that no critical areas violations existed on the subject property, the Department raises the specter of an inevitable conflict between the conditions imposed and the Code or the SEPA statute. The Department contends that the Examiner's conditions would, in effect, exempt Spencer and Shear from environmental review. Contrary to the Department's assertion, however, noncompliance with SEPA is not an inevitable result of adhering to the Examiner's factual conclusions about the nonexistence of critical areas on the subject parcel. Requiring the Department to give effect to the Examiner's critical areas findings does

not, and has not been shown to, equate with a mandate that DDES violate SEPA rules.

The Department posits that the Examiner exceeded his jurisdiction because any permits required by the Examiner's decision are "subject to" SEPA. Even if the permit process is subject to SEPA, giving preclusive effect to the Examiner's critical areas findings does not lead inexorably to the conclusion that the statute will be violated. The absence of the disputed critical areas, as found by the Examiner, would merely be one piece of the environmental data taken into account by the Department in performing SEPA review. SEPA review is designed to evaluate the potential environmental impacts of a proposal, not to establish an exclusive means of identifying the underlying characteristics of the permitted property, usurp local decision-making, or dictate a particular result. Save Our Rural Environment v. Snohomish County, 99 Wn.2d, 363, 662 P.2d 816 (1983).

If a proposal is not categorically exempt from SEPA, an applicant typically prepares an environmental checklist. WAC 197-11-315; 20.44.030 (B). Based on this checklist, the agency makes a threshold determination as to whether the proposal would significantly affect the quality of the environment. Anderson v. Pierce County, 86 Wn.App. 290, 936 P.2d 432 (1997). The Department would not be required to forego

that process as a result of the Examiner's decision. As would presumably be reflected in the applicant's checklist, it would simply be required to acknowledge that the Examiner's decision established that the property was not burdened by jurisdictional wetlands or other critical areas.

In deciding whether an EIS is required for a proposed project, the Department is to consider the information provided by an applicant on the environmental checklist (WAC 197-11-960) and make its threshold determination, "based upon information reasonably sufficient to evaluate the environmental impact of a proposal." Moss v. City of Bellingham, 109 Wn.App. 6, 14, 31 P.3d 703 (2001); WAC 197-11-335. After extensive hearing proceedings, the Examiner's decision reflects more than sufficient information about the nature and extent of critical areas on the Spencer property to satisfy the Department's informational burden and allow it to conduct any required environmental review pertaining to the potential impacts of the operations that triggered the permit process.

The fact that no jurisdictional wetlands or other critical areas were present on the property, as the Examiner concluded, would also not require a change in the scope of any formal EIS that may be necessary, although the scope of review may take that fact into account. Establishing the parameters of an EIS ("scoping") only occurs if there has been a determination of significance. WAC 197-11-360. Indeed, an EIS would

not be necessary at all if the Department were to conclude that no significant environmental impacts would result from the proposal under review. The Department could simply issue a determination of nonsignificance (DNS) which may or may not include mitigation requirements. WAC 197-11-340; WAC 197-11-350.

The Department's argument that the Examiner's condition precluding the reopening of settled critical areas issues during the subsequent permit review process would violate the Code because the Department is constrained to use consultants on a pre-approved list to prepare an EIS – assuming an EIS is even determined to be necessary – is also unpersuasive. The fact that the Examiner's decision disallows a wholesale reevaluation of the existence of jurisdictional wetlands or other critical areas determinations settled during the code enforcement proceedings has no bearing on a subsequent decision by the County to employ an approved consultant to prepare an EIS. All that would be required would be for a selected consultant to take into account the fact that the subject property does not contain the disputed critical areas, as determined by the Examiner after exhaustive proceedings on that issue.

The Department also impliedly suggests that allowing the Department to revisit the Examiner's critical wetlands areas conclusions in the context of subsequent permit proceedings is necessary because the

Examiner found the Spencer-Shear wetlands expert not to be credible. While critical of aspects of Spencer and Shear's wetlands expert's demeanor, the Examiner also concluded that the Department itself failed to establish the existence of jurisdictional wetlands on the Spencer property. Regardless, the existence of wetlands or other critical areas is not a matter of discretion which DDES is entitled to revisit at each and every opportunity. The Examiner's decision is entitled to preclusive effect during any subsequent permit review process. Neither the Code nor SEPA require that the Department be allowed to relitigate ad infinitum a factual issue settled by the Examiner.

The Department's claim that the Examiner's critical areas findings present an insurmountable impediment to SEPA compliance does not find traction in the statute itself. The "severe limitations" decried by the Department are nothing more than the Examiner's effort to prevent DDES from taking "innumerable bites" at the same regulatory apple. Having lost on the critical areas issues – issues which received lengthy and thorough review before the Examiner – the Department seeks to avoid that decision by reintroducing the entire question through subsequent permit review processes. The Examiner explicitly tried to protect against that in his decision.

The Department retains the burden under LUPA of proving that the Examiner's decision was erroneous. Pinecrest Homeowners Assoc. v. Glen A. Cloninger & Assoc., 151 Wn.2d 279, 288, 87 P.3d 1176 (2004). Since the Department has not established that the conditions imposed by the Examiner necessarily violate SEPA or the Code, the argument cannot be the basis for concluding that the Department satisfied its burden of proof under LUPA.

C. The Examiner's Resolution of the Flood Hazard Issue was not Based on Impermissible Constitutional Grounds and did not Exceed his Jurisdiction.

The Examiner did not conclude that the County's flood hazard regulations are unconstitutional, but rather that the Department failed to meet its burden of proof on the question of whether the Spencer property is in a flood prone critical area.

The burden of proof in code enforcement proceedings is on the Department. KCC 23.20.080 (D). As the government agency attempting to enforce alleged code violations with respect to the Spencer-Shear property, DDES has the additional burden of presenting a "*prima facie*" case based on competent evidence demonstrating that the legal standard for imposing such burden or penalty has been met." Rules of Procedure of the King County Hearing Examiner ("Hearing Examiner Rules"), § XI(B)(8)(b). (CP 294-302)

In considering the flood hazard issue, the Examiner was concerned about the labyrinthine and unsettled state of the County's flood hazard regulations as applied in the enforcement context and, consequently, the arbitrariness and unpredictability of their application to an individual property such as the Spencer parcel. This concern, however, manifested itself not as a determination that the regulations were unconstitutional, as the Department suggests, but rather that DDES had simply been unable to articulate their applicability to the Spencer-Shear property sufficiently coherently to meet its burden in the enforcement proceedings of proving that the Spencer property is, in fact, in a flood prone area.

The Examiner's conclusion was that the Department did not satisfy its burden to prove that the Spencer property is in a flood hazard, not that the regulations themselves were unconstitutional. Since the Examiner did not enforce, interpret or rule on constitutional issues, the Department's reliance on Exendine v. City of Sammamish, 127 Wn.App. 574, 113 P.3d 494 (2005) is misplaced. It was not beyond the Examiner's jurisdictional purview to reject the Department's contention that the Spencer property is in a flood hazard area on other than constitutional grounds. Wells v. Whatcom County Water Dist. No. 10, 105 Wn.App. 143, 156, 19 P.3d 453 (2001) (jurisdictional challenge to hearing examiner's decision rejected where the decision, read in context, made clear that the decision was not

based on constitutional considerations beyond the hearing examiner's authority).

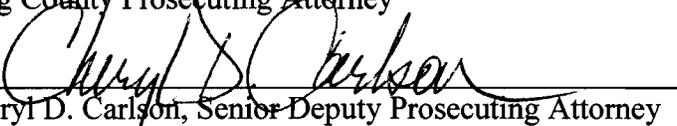
III. CONCLUSION

The Superior Court erred in concluding that the Examiner exceeded his jurisdiction by imposing conditions on subsequent permit review where the Examiner largely granted the underlying appeal – and imposed permit review conditions in order to achieve some measure of finality in protracted and disputatious proceedings by precluding further debate during the permit review process on disputed issues already resolved by the Examiner – and where no showing was made as to how the permit review conditions insolubly conflict with other code or statutory requirements.

The Court should find that DDES failed to meet its burden of proof under LUPA and reverse the Superior Court's Order as to its conclusion that the Examiner exceeded his jurisdiction by imposing conditions on subsequent permit review.

Respectfully submitted this 20th day of July, 2011.

DANIEL T. SATTERBERG
King County Prosecuting Attorney

By: 
Cheryl D. Carlson, Senior Deputy Prosecuting Attorney
WSBA No. 19844
Attorneys for Appellant King County Hearing Examiner

FILED
COURT OF APPEALS DIV I
STATE OF WASHINGTON
2011 JUL 20 PM 4:47

NO. 66432-8-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

RONALD A. SHEAR, ET AL.,

Appellants,

v.

KING COUNTY DEPARTMENT OF DEVELOPMENT &
ENVIROMENTAL SERVICES ,

Respondent.

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE JAY V. WHITE

CERTIFICATE OF SERVICE

DANIEL T. SATTERBERG
King County Prosecuting Attorney

CHERYL D. CARLSON, WSBA #19844
Senior Deputy Prosecuting Attorney
Attorneys for Appellant King County Hearing Examiner

King County Prosecuting Attorney
W400 King County Courthouse
516 3rd Avenue
Seattle, Washington 98104

ORIGINAL

I, LuAnna Yellow Robe, hereby certify and declare under penalty of perjury under the laws of the state of Washington as follows:

1. I am a legal secretary employed by King County Prosecutor's Office, am over the age of 18, am not a party to this action and am competent to testify herein.
2. On July 20, 2011, I did cause to be delivered a true and correct copy of the Reply Brief Of Appellant King County Hearing Examiner and this Certificate of Service to:

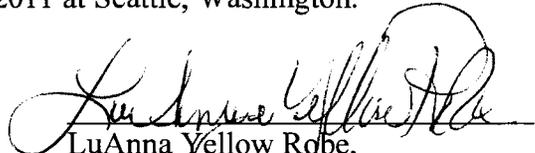
Cristy Craig, KCPAO
King County Courthouse
516 3rd Avenue – W400
Seattle, WA 98104
Via Hand Delivery & Email
Cristy.craig@kingcounty.gov

Robert E. West, Jr.
West Law Offices, P.S.
332 First Street NE
Auburn, WA 98002
Via U.S. Mail & Email
rwest@westlawoffices.com
Assitant to Robert West,
Rosemary at
rosemary@westlawoffices.com

Brian Lawler & Denise Hamel
Socius Law Group PLLC
Two Union Square,
601 Union Street, Suite 4950
Seattle, WA 98101
Via U.S. Mail & Email
blawler@sociuslaw.com
dhamel@sociuslaw.com

I declare under penalty of perjury under the laws of the State of
Washington that the foregoing is true and correct.

DATED this 20th day of July, 2011 at Seattle, Washington.


LuAnna Yellow Robe,
Legal Assistant to
CHERYL D. CARLSON,
WSBA #19844
Senior Deputy Prosecuting Attorney
Attorney for King County