BEFORE THE HEARING EXAMINER
FOR THE SNOHOMISH HEALTH DISTRICT

In the Matter of the Appeal of	)	Permit No. 1170-81
	)	
Brad Whitsell	)	**Whitsell Appeal**
	)	
	)	
	)	
Of a Denial of an On-Site Sewage Disposal System Permit	)	FINDINGS, CONCLUSIONS, AND DECISION

SUMMARY OF DECISION

This appeal addresses whether the Snohomish Health District (SHD) erred in denying an application submitted by Brad Whitsell (Appellant) to retroactively approve the connection of a single-family residence to an existing septic system located on his property at 9905 353rd Drive NE, Granite Falls, WA. Specifically, this appeal addresses whether SHD erred in determining that the Appellant could not satisfy the criteria for a setback reduction under Washington Administrative Code (WAC) 246-272A-0210(4) that would allow for the minimum required 100-foot setback from the on-site septic system and an existing well to be reduced to a minimum of 75 feet.

Because the Appellant has not met his burden of demonstrating that SHD clearly erred by determining that the existing on-site septic system would be required to be upgraded to incorporate enhanced treatment components in order to qualify for a setback reduction under WAC 246-272A-0210(4), the appeal is **DENIED.**

SUMMARY OF PROCEEDINGS

Hearing:
The Snohomish Health District Hearing Examiner held an open record appeal hearing on this matter on November 29 and December 2, 2022, using remote access technology. The record was left open until December 9, 2022, to allow the parties to submit closing briefs.

Testimony:
The following individuals presented testimony under oath at the open record appeal hearing:

Appellant Witnesses:
Bruce Straughn
Brad Whitsell, Appellant

Snohomish Health District Witnesses:
Ragina Gray, Snohomish Health District – Environmental Health Director

Lucas Larson, Snohomish Health District – Land Use Permitting Section Supervisor

Attorney Peter C. Ojala represented the Appellant at the open record hearing.
Attorney Nikki Thompson represented the Snohomish Health District at the open record hearing.

Exhibits:
The following exhibits were admitted into the record at the open record hearing:

Appellant's Exhibits:[1]
A-1. Davis On-Site Sewage Disposal System Permit Application (Permit No. 1170-81), issued October 29, 1981
A-2. As-Built Drawing (Permit No. 565-82), dated July 23, 1982
A-3. Sewage Disposal Design Drawing, dated June 25, 1982
A-4. Washington State Department of Health Guide for Granting Waivers from State On-Site Sewage System Regulations, dated April 2017
A-5. Whitsell On-Site Sewage Permit Application (Permit No. 1170-81), denied June 10, 2022
A-6. Memorandum from Attorney Peter C. Ojala re: Application of WAC 246-272A-0210, dated August 11, 2022, with attachments
A-7. RCW 18.104.065
A-8. RCW 18.210.005; RCW 18.210.010; RCW 18.210.190; WAC 196-32-040
A-9. WAC 173-160-111
A-10. Screenshot from Washington State Department of Licensing Website – (Ragina Gray)
A-11. Screenshot from Washington State Department of Licensing Website – (Corrina Ong)
A-12. WAC 173-160-990 – Well Construction Illustrations
A-13. Resume of Bruce Straughn
A-14. WAC 246-272A-0210; WAC 246-272A-0230

SHD Exhibits:
D-1. Pilchuck "Y" Tracts Plat, recorded July 27, 1953
D-2. Statutory Warranty Deed, dated January 2, 2007
D-3. Water Well Report, dated June 7, 2007
D-4. On-Site Sewage Disposal System Easement (201009130329), dated September 13, 2010
D-5. On-Site Sewage Disposal System Easement (201009140551), dated September 13, 2010
D-6. Historical Building Clearance Approval Materials (Assessor's Tax Account No. 005441-000-006-00)
D-7. Historical Building Clearance Approval Materials (Assessor's Tax Account No. 005441-000-007-00)
D-8. Critical Areas Site Plan, approved January 21, 2015
D-9. Shared Well Water Agreement, dated November 20, 2018
D-10. Covenants, dated November 28, 2018

[1] For consistency, this decision redesignates the Appellant's submitted exhibits as Exhibits A-1 through A-14 and the Snohomish Health District's submitted exhibits as D-1 through D-24.

D-11. Building Clearance Review Denial Report, dated June 28, 2021
D-12. Construction Clearance Application, denied June 28, 2021
D-13. Email from Snohomish Health District Environmental Health Specialist Steve Rice to Washington State Department of Ecology Well Construction Coordinator Noel Philip, dated July 28, 2021, with email string
D-14. Water Supply Information Report, dated June 28, 2021
D-15. Request for Step One Appeal, dated July 14, 2021
D-16. Letter Denying Step One Appeal, dated August 27, 2021
D-17. Water Bacteriological Analysis, dated April 15, 2022
D-18. As-Built Drawing Denial Report, dated June 10, 2022
D-19. Whitsell On-Site Sewage Permit Application (Permit No. 1170-81), denied June 10, 2022
D-20. Request for Step One Appeal, dated June 18, 2022
D-21. Email from Noel Philip to Corinna Ong, dated August 5, 2022
D-22. Letter Denying Step One Appeal, dated August 19, 2021
D-23. Request for a Step Two Appeal, dated September 7, 2022
D-24. Email from Lucas Larson to Regina Gray, dated October 20, 2022, with email string

Briefs and Memoranda:

- Snohomish Health District Hearing Brief, received November 17, 2022
- Appellant Hearing Brief, received November 28, 2022
- Snohomish Health District Post Hearing Memorandum, dated December 9, 2022
- Appellant Post Hearing Memorandum, dated December 9, 2022

The Hearing Examiner enters the following findings and conclusions based upon the testimony and exhibits admitted at the open record hearing:

FINDINGS

Background

1. Brad Whitsell is the owner of a 0.3-acre property located at 9905 353rd Drive NE, in Granite Falls. The property is located along, and within the floodplain of, the Pilchuck River. The property contains an existing on-site septic system that was approved in 1981, which was designed to serve a one-bedroom cabin. At the time that the original septic system was approved in 1981, a reserve septic drain field was not required. The one-bedroom cabin on the property was later removed, after which the use of the existing on-site septic system ceased for a period of time. *Exhibits A-1 through A-3; Exhibits D-1 through D-10; Exhibit D-13; Exhibit D-21.*

2. After acquiring the property in 2007, the Mr. Whitsell constructed an open-sided storage structure, which he later converted to a one-bedroom residence and connected to the existing on-site septic system, without required permits. Mr. Whitsell also had an on-site well drilled approximately 82 feet from the existing on-site septic system, without first applying to the Snohomish Health District (SHD) for an individual water supply site

inspection. In 2010, Mr. Whitsell granted an easement to an adjacent property for a reserve drain field on his property. In 2018, Mr. Whitsell granted a water easement to the same adjacent property and connected the adjacent property to his well, again without first receiving approval from SHD.[2] *Exhibits A-1 through A-3; Exhibits D-1 through D-10; Exhibit D-13; Exhibit D-21.*

Clearance Application and Denial

3. Mr. Whitsell sought after-the-fact permit approval from Snohomish County for the former storage structure that was converted to a residence on the property. In conjunction with the permit request, Mr. Whitsell submitted a clearance application to SHD for approval of the on-site septic system and water supply, which SHD received on April 10, 2021. SHD Environmental Health Specialist Corinna Ong reviewed the clearance application and disapproved the on-site septic system and well. *Exhibit D-11; Exhibit D-12; Exhibit D-14.*

4. Ms. Ong's clearance denial report, dated June 28, 2021, stated that the application was disapproved for the following reasons:

> The Health District has determined that your proposed project does not under present conditions meet the minimum requirements of Snohomish Health District Code, Title 5, Chapter 5.05 (WAC 246-272A) and Snohomish Health District Sanitary Code, Title 5, Chapter 5.15 for a building clearance for the following reason(s):
>
> 1. A reserve area was never designated. In addition, there is an easement granting reserve area for the benefit of parcel 00544100000600. However, it appears that a septic designer was not involved as there are no site plans depicting the location of the easement. As such, a reserve area must be designated for both lots prior to clearance approval…
> 2. Your proposed source of water is not consistent with recommendations contained in the "Department of Ecology Availability and Adequacy Guidelines for Individual Water Supplies". Please refer to the attached report for deficiencies.
> 3. Due to FEMA's reclassification of flood hazard zones, it appears that the well is within a floodway zone, which is an unacceptable

[2] SHD's hearing brief notes that, in August 2022, the Appellant executed a second water easement to a different property owner that would result in a third connection to the on-site well. A third connection would classify the water source as a public water system. This water easement, however, was terminated on October 31, 2022. *Snohomish Health District Hearing Brief, received November 17, 2022.* Accordingly, issues regarding the well's potential classification as a public water system are not before the Hearing Examiner in this appeal.

> location. Please submit a well site application and a statement from Department of Ecology regarding the location of the well.

Exhibit E-11.

5. On July 14, 2021, Mr. Whitsell requested a "Step One" appeal from SHD's denial of the clearance application, entailing an appeal to SHD's Director under the Snohomish Health District Code (SHDC). Mr. Whitsell submitted an appeal letter, which provided a description of development that had occurred on the property, and which primarily took issue with the clearance application being denied based on the lack of a proposed septic reserve area, stressing that locating a reserve area on the property would be difficult due to the small size of the property and other site conditions. On July 27, 2021, Washington State Department of Ecology (DOE) Well Construction Coordinator Noel Philip informed SHD that DOE would consider the location of the on-site well as compliant with floodway regulations because it was constructed at its location prior to FEMA's reclassification of the area as within a floodway zone. Mr. Philip noted, however, that DOE would not interject should SHD determine that the well site is noncompliant. *Exhibit D-13; Exhibit D-15.*

6. On August 27, 2021, SHD Environmental Health Division Director Ragina Gray issued a letter denying the Step One appeal, which noted in pertinent part:

> There remains no legal path toward approving your building clearance without a designated reserve area. Extensive research into the historical files for both lot 6 and lot 7 [the subject property] show that you were aware as far back as 1982 of the need for a designated reserve area. You granted lot 6 the right to a reserve area on lot 7 through an easement recorded in 2010. That easement is problematic for you now as you need a reserve area on lot 7 in order for your application to be approved, thus legitimizing your septic system and your drinking water source.
>
> We received acknowledgement from the Department of Ecology that the existing well site location is acceptable, even though FEMA has determined it is now in a floodway. However, we still cannot approve it as a viable drinking water source until we can verify that it does not interfere with any existing on-site sewage system or reserve area.
>
> In order for SHD to approve your application, you need to hire a licensed septic designer to designate on a site plan the following information:
> 1. The entire area included in the granted easement for the benefit of lot 6.
> 2. A reserve area adequate for lot 7 that does not encroach upon the easement area for lot 6.

3. The well site for lot 7.
4. The 100' setback requirements for any drinking water source that may be impacted by the existing on-site sewage system location or the reserve areas for lot 6 and lot 7. This includes the well sites for any wells on neighboring lots that would have a setback that includes any portion of lot 7.

Exhibit D-16.

As-Built Plan Submittal and Denial

7. Mr. Whitsell did not further appeal Director Gray's Step One appeal decision to the Snohomish Health District Hearing Examiner (i.e., a "Step Two" appeal) but, instead, retained Bruce Straughn, of Pilchuck Septic Designs, LLC, to prepare as-built plans for the on-site septic system for SHD's review. Mr. Straughn's project narrative, dated May 6, 2022, submitted with the as-built plans notes that the existing septic system is located less than 100 feet from the on-site well and, therefore, a setback reduction to a minimum of 75 feet would be required, as allowed under WAC 246-272A-0210(4)[3] if certain conditions are met. WAC 246-272A-0210(4) specifically provides:

> The horizontal separation between an [on-site sewage system (OSS)] dispersal component and an individual water well, individual spring, or surface water that is not a public water source can be reduced to a minimum of seventy-five feet, by the local health officer, and be described as a conforming system upon signed approval by the health officer if the applicant demonstrates:
> (a) Adequate protective site-specific conditions, such as physical settings with low hydro-geologic susceptibility from contaminant infiltration. Examples of such conditions include evidence of confining layers and/or aquatards separating potable water from the OSS treatment zone, excessive depth to groundwater, down-gradient contaminant source, or outside the zone of influence; or
> (b) Design and proper operation of an OSS system assuring enhanced treatment performance beyond that accomplished by meeting the vertical separation and effluent distribution requirements described in WAC 246-272A-0239 Table VI; or
> (c) Evidence of protective conditions involving both (a) and (b) of this subsection.

[3] Snohomish Health District Code (SHDC) 5.05.010 adopts Chapter 246-272A WAC by reference. For clarity, this decision refers to applicable provisions of Chapter 246-272A WAC without further reference to the adopting provision under SHDC 5.05.010.

Mr. Straughn's project narrative asserted that the requirements of WAC 246-272A-0210(4)(b) could be met by implementing the following measures:

- [U]tilizing sand lined trenches with a minimum of 24" of imported [American Society for Testing and Materials (ASTM)] C-33 sand in the area of the existing septic system drainfield. A diagram of this layout is shown on the attached as-built drawing. The area shown represents 400 [square feet] of trench area for 240 [gallons per day] at 0.6 g/sq ft/day. Contaminated soil and/or drain-rock removed during excavation for the sand-lined trenches would be disposed of in accordance with local solid waste regulations.
- An alternative would be in install a sub-surface drip system (450 sq ft) with pre-treatment meeting Treatment Level B. There is adequate area to accomplish that using the space between the existing trenches together with the area between the existing system and the easement area.

Exhibit A-5.

8. Ms. Ong thereafter reviewed and denied Mr. Whitsell's as-built plans for the on-site sewage system. Ms. Ong's as-built denial report, dated June 10, 2022, states:

> Your sewage disposal system As-Built drawing was not accepted for the following reason(s):
>
> 1. Proposal to excavate the existing drainfield and install sand lined trenches is not acceptable. The reserve area must be a separate area of land that is protected and maintained for future replacement of the failed OSS. Please depict the proposed driplines and demonstrate the appropriate setback to the easement and to the existing drainfield trenches.
> 2. The well is less than 100 ft from the existing drainfield and proposed reserve area. WAC 246-272A-0210(4) states that the Health Officer can reduce the setback to 75 ft. However, the Health District does not support a reduction to this setback. Per item #4 on the Step One Appeal Letter dated 8/27/2021, the 100 ft setback must be maintained. Refer to the attached letter.
> 3. Neighboring wells and drainfields not depicted/addressed in the application. Please verify all appropriate setbacks are met to the existing well, drainfield, and proposed reserve area.
> 4. Waterline not depicted on the drawing.

Exhibit D-18.

9. On July 8, 2022, Attorney Tanner J. Hoidal, on behalf of Mr. Whitsell, requested a Step One appeal from SHD's decision not to accept the submitted as-built plan for the on-site septic system. Attorney Hoidal submitted a memorandum with the Step One appeal request, which asserted:
   - Mr. Whitsell will submit depictions of the proposed driplines.
   - The Step One Appeal denial letter, dated August 27, 2021, and referenced in the as-built denial report, was issued prior to Mr. Whitsell retaining a licensed septic designer. The as-built denial report merely recites the setback requirements of WAC 246-272A-0210, which may be reduced upon demonstrating compliance with WAC 246-272A-0210(4)(a) or (b). The design options submitted by Mr. Whitsell's septic designer satisfy the requirements under WAC 246-272A-0210(4)(b), and, therefore, a setback reduction would be appropriate.
   - Mr. Whitsell will depict and address neighboring wells in the application and will verify that appropriate setbacks would be met.
   - Mr. Whitsell will submit a revised drawing depicting the waterline.

   Exhibit D-20.

10. On August 19, 2022, Director Gray issued a letter denying the Step One appeal, which noted in pertinent part:
   - [A] reserve area was never designated for your existing on-site sewage system. The regulations at the time allowed for that, but for any new construction, current regulations must be met. In addition, there is an easement granting reserve area for the benefit of parcel 00544100000600. Your licensed on-site sewage system designer has provided a proposed as-built drawing showing a reserve area with enhanced treatment components and has requested acceptance of the system, even though a private well does not maintain the 100-foot minimum required horizontal setback from the existing on-site sewage system trench or proposed reserve area.
   - [T]he distance between your well and the existing on-site sewage system trench and proposed reserve area is the main sticking point in this case. Because the setback is less than 100 feet, your proposed source of water is not consistent with the Department of Ecology's recommendations.
   - [SHD] cannot consider a waiver or alternative setback based solely on a design concept for a proposed future reserve area. The existing on-site sewage system must also meet the enhanced treatment requirements. In short, both the primary system and proposed reserve area must incorporate enhanced treatment components within the space available that is unencumbered by the easement.
   - In order for [SHD] to consider a reduced setback, you must also take steps to ensure that the well itself has enhanced protection.

- [T]he path forward involves a primary on-site sewage system that incorporates enhanced treatment components, providing for a reserve area within the available unencumbered space that also includes enhanced treatment components, and either retrofitting the existing well to include an extended surface seal or constructing a new well with DOE approval. Either of the latter will require a variance from Ecology. Additionally, the second connection to your well must be legitimized with [SHD].

Exhibit D-22.

Step Two Appeal

11. On September 7, 2022, Attorney Hoidal, on behalf of Mr. Whitsell (hereafter "Appellant"), requested a "Step Two" appeal—entailing review of the Step One appeal denial by the Snohomish Health District Hearing Examiner under the SHDC—from SHD's decision not to accept the submitted as-built plan for the on-site septic system. The Step Two appeal request asserts that the following reasons justify granting the appeal:
    - The application and on-site sewage system are compliant with the requirements of Chapter 246-272A WAC and Title 5 Snohomish Health District Code (SHDC).
    - The Appellant's proposal would comply with all code requirements.
    - SHD's decision to deny the request for a setback reduction is contrary to law.
    - SHD's request to depict the waterline and the location of neighboring wells and drainfields do not justify denial of the submitted as-built plans. Alternatively, the Appellant can easily meet these requirements.
    - SHD's decision is not consistent with the requirements of Chapter 246-272A WAC and the SHDC. The existing well is located in an approved and/or approvable well site location, and the project qualifies for a setback reduction under the facts and circumstances.

    Exhibit D-23.

Prehearing Briefs

12. On November 17, 2022, the Hearing Examiner received a hearing brief from SHD, which asserts:
    - SHD regulations require that a proposed on-site sewage disposal system be designed in compliance with Title 5 SHDC and Chapter 246-272A WAC. As detailed in SHD's Step One appeal denial letter, the main issue in this case involves the request to reduce the minimum required 100-foot setback from the on-site well and the existing drainfield and proposed reserve area.
    - WAC 246-272A-0214(4) provides that a health officer "can" reduce the 100-foot setback to a minimum of 75 feet if:
        (a) Adequate protective site-specific conditions, such as physical settings with low hydrogeologic susceptibility from contaminant infiltration. Examples of such

conditions include evidence of confining layers and/or aquatards separating potable water from the OSS treatment zone, excessive depth to ground water, down-gradient contamination source, or outside the zone of influence; or

(b) Design and proper operation of an OSS system assuring enhanced treatment performance beyond that accomplished by meeting the vertical separation and effluent distribution requirements described in WAC 246-272A-0230 Table VI; or

(c) Evidence of protective conditions involving both (a) and (b) of this subsection.

- The above provisions allow for an evaluation of site-specific conditions to determine whether the requirements of subsections (a), (b), or (c) can be met to apply a setback reduction. The health officer, however, is under no obligation to grant a setback reduction regardless of the evidence provided in support of any of the subsections. SHD has offered to approve a setback reduction if the Appellant satisfies subsection (c).
- The Appellant has provided SHD with seven examples where health jurisdictions have approved a setback reduction under WAC 246-272A-0210(4). These examples, however, are inapplicable to the present case because they either involved a setback reduction from an on-site sewage disposal system and surface water (as opposed to an individual water well) or were consistent with SHD's position that a setback reduction must be justified by satisfying the requirements of subsection (c).
- The well log submitted by the Appellant contains distinct differences from the setback approval examples discussed above. Although a well seal of 18 inches exists, a confining layer in the soil is not documented by the log until 24 to 30 inches of depth. The log describes the area above 24 inches in depth as consisting of gravel, sand, and boulders. Thus, the well surface seal does not extend into a confining layer so as to meet the requirements of WAC 246-272A-0210(4)(a). Accordingly, the Appellant has not demonstrated that the proposal satisfies subsection (c), which requires evidence of protective conditions involving both subsections (a) and (b).
- The well located on the subject property is a shared well, which increases the concern of protecting the water supply for individuals residing on the neighboring parcel served by the shared well.
- SHD properly denied the as-built plans submitted by the Appellant. SHD will not approve a reduced drainfield setback based solely on a design concept for a proposed future reserve area. Both the primary system and the proposed reserve area must incorporate enhanced treatment components within the available space that is unencumbered by a drainfield easement. The Appellant has not provided a

design demonstrating that this would be accomplished. In addition, SHD has not received a water supply application, and it is not possible to evaluate the on-site septic system without also analyzing the well and its location.

Snohomish Health District Hearing Brief, received November 17, 2022.

13. On November 28, 2022, the Hearing Examiner received a hearing brief from the Appellant, which asserts:

- The language of WAC 246-272A-0210(4) plainly provides that an applicant need only meet one of the criteria of WAC 246-272A-0210(4) to qualify for a setback reduction. The Appellant's as-built design meets the criteria set forth in WAC 246-272A-0210(4)(b) and therefore qualifies for a setback reduction.
- The use of the word "can" in WAC 246-272A-0210 does not provide SHD with unfettered discretion to deny any and all setback reduction requests when an applicant shows that one of the conditions of WAC 246-272A-0210(4) is met.
- The existing well on the property was installed in 2007, and SHD's ability to challenge the well location or construction has long passed under the three-year statute of limitation of Revised Code of Washington (RCW) 18.104.065. DOE has indicated that it has no issues with the well location, and SHD code provisions regarding alternative setbacks refer to matters pertaining to the on-site sewage system and not the well. Moreover, the existing well meets the minimum requirements for formation sealing.

Appellant Hearing Brief, received November 28, 2022.

Appeal Hearing

Appellant's Case

14. Attorney Peter C. Ojala represented the Appellant at the hearing and provided an opening statement in which he described the permitting history associated with the existing on-site septic system and the circumstances leading to the Step Two appeal. He stated that the primary issue between the Appellant and SHD relates to requirements for a setback reduction between the on-site septic system and the existing well on the property. Attorney Ojala asserted that the Appellant has met the criteria for a setback reduction under WAC 246-272A-0210(4)(b) and that the Appellant's expert witness, Bruce Straughn, would provide testimony demonstrating that the Appellant has also met the setback reduction criteria under WAC 246-272A-0210(4)(a) due to the site's unique geological conditions. He noted that, although SHD has requested the Appellant to submit a water well application, this appeal concerns only the on-site septic system. Attorney Ojala stressed that the Appellant has not requested a variance or waiver from setback requirements but, rather, requests only to apply the alternative, reduced setback requirements allowed by code. *Statements of Attorney Ojala.*

15. On-site wastewater treatment systems designer Bruce Straughn testified about the as-built plan that he had submitted to SHD on behalf of the Appellant. He stated that the as-built

plan depicts the existing on-site septic system and primary drainfield, as well as the proposed septic reserve area. Mr. Straughn explained that there would be sufficient area on the property to locate the proposed reserve area entirely on-site and no more than 75 feet from the existing on-site well, without encroaching on an easement associated with a neighboring parcel. He stated that the submitted as-built plans and associated narrative proposed two methods for meeting reserve area requirements. Mr. Straughn explained that the first method, as depicted in the as-built plans, would involve excavating out the existing drainfield trenches, filling the trenches with sand, and locating a new drainfield on top of the sand-filled trenches. He further explained that the narrative provided with the as-built plans proposed an alternative design that would involve a subsurface drip system with pretreatment meeting treatment level B standards. Mr. Straughn stated that there would be adequate space on the property to incorporate either alternative and that a third alternative involving a sunlight trench system could also be feasible.

Addressing the requirements for a setback reduction under WAC 246-272A-0210(4)(a), Mr. Straughn testified that this subsection addresses protective site conditions to prevent containment infiltrations, such as confining layers and/or aquatards separating potable water from the on-site septic system treatment zone. He explained that an *aquatard* is a land formation that slows or stops the movement of water in a vertical direction, such as a clay layer or hard pan. Mr. Straughn stated that the water well report (admitted as Exhibit D-3), which was generated in 2007 when the well was drilled, shows that the site conditions include confining layers or aquatards sufficient to meet the requirements of WAC 246-272A-0210(4)(a), and he noted that the provision does not address any standards for well construction. Specifically, Mr. Straughn noted that the water well report provides a description of soil layers that were encountered during the well drilling process and indicates that a silty clay layer was encountered at a depth of 24 to 30 feet, which he stated acts as a confining layer preventing the vertical movement of water. He also explained how the existing well was constructed in accordance with applicable construction standards, which include protective measures ensuring that aquifers located below the required minimum 18-foot surface seal of the well would not be impacted in the event that aquifers located closer to the surface are contaminated by a septic system failure. Mr. Straughn stated that, contrary to SHD's position, a surface seal extending to the confining layer would not be required because construction standards require only a formation seal below the 18-foot minimum, which adequately protects the drinking supply.

Addressing the requirements for a setback reduction under WAC 246-272A-0210(4)(b), Mr. Straughn testified that this subsection addresses on-site septic system design measures that provide enhanced treatment performance beyond that accomplished by meeting standard vertical separation and effluent distribution requirements. He explained that the reserve drainfield could include enhanced treatment meeting the requirements of

WAC 246-272A-0210(4)(b) but conceded that the existing on-site septic systems would not because it is an old gravity system that does not have pretreatment components. Although Mr. Straughn admitted that the existing septic system does not meet the requirements of WAC 246-272A-0210(4)(b), he asserted that the Appellant would nonetheless qualify for a setback reduction because the requirements of subsection (a) have been satisfied. In support of his assertion that an applicant may qualify for a setback reduction by satisfying only subsection (a), Mr. Straughn noted that the Washington State Department of Health (DOH) has adopted criteria for a setback waiver (i.e., a reduction of the 100-foot standard setback to less than 75 feet) that may be implemented by local health departments without further DOH oversight, which essentially require a showing of both WAC 246-272A-0210(4)(a) and (b). Mr. Straughn noted that DOE had indicated that it had no issues with the location of the existing well within a floodway.

In response to questioning from Attorney Nikki Thompson on cross-examination, Mr. Straughn testified that he attended the Step One appeal conference and recalled discussing the requirements that the as-built plans include a depiction of the waterline and identify neighboring wells and drainfields to verify that appropriate setbacks would be met.[4] He noted that revised plans incorporating these requirements have not yet been submitted to SHD but stated that he could make these requested revisions. Mr. Straughn conceded that, if the requirements of WAC 246-272A-0210(4)(b) would be required to be met in order to qualify for a setback reduction, enhanced treatment methods would be required for both the septic reserve area and the on-site septic system. He also clarified that DOE's indication that it had no issue with the location of the existing well within the designated floodway was unrelated to any issues with the location of the existing well in relation to the existing on-site septic system and proposed reserve area. *Testimony of Mr. Straughn.*

16. Appellant Brad Whitsell testified that he purchased the property in 2007 and has been using the existing on-site septic system since that time without any issues. He noted that there have been no complaints regarding odors or operation of the system. Mr. Whitsell further noted that he has had the on-site well tested approximately four or five times over the past 15 years and that no water quality issues have been identified. *Testimony of Mr. Whitsell.*

[4] When referring to the Step One appeal process at the hearing, the attorneys and witnesses interchangeably used the terms "meeting," "hearing," and "conference." The attorneys clarified that, unlike in a Step Two appeal, the Step One appeal process does not include a formal hearing but, instead, uses a collaborative process in which the parties meet and attempt to resolve issues underlying an SHD decision to deny a permit request. *Statements of Attorney Thompson; Statements of Attorney Ojala.* For clarity, the decision refers to this process as a Step One appeal "conference."

SHD's Case

17. Attorney Nikki Thompson provided an opening statement in which she asserted that SHD does not have blanket policy to deny requests for a setback reduction and that SHD staff has tried to work with the Appellant to find an acceptable solution, which would ultimately require that the existing on-site septic system be upgraded to include enhanced treatment components satisfying the requirements of WAC 246-272A-0210(4)(b). She argued that SHD's authority to approve a setback reduction under WAC 246-272A-0210 is discretionary and does not require such approval even if the approval criteria are satisfied. Attorney Thompson contended that subsection (c) of WAC 246-272A-0210(4)—which allows for a setback reduction when evidence of protective measures involving both subsections (a) and (b) are incorporated—would be redundant under the Appellant's interpretation that SHD lacks authority to require satisfaction of both subsections (a) and (b) before approving a setback reduction request. She stressed that SHD is willing to continue working with the Appellant to revise the septic system and reserve drainfield design to incorporate measures necessary to qualify for a setback reduction. Attorney Thompson stated that SHD could consider the new evidence presented at the hearing regarding protective measures provided by the well's existing formation seal. She noted that, even if the on-site septic system were to be approved, SHD would still have to approve the well site before Snohomish County approves of after-the-fact permits associated with the prior development of the site. Attorney Thompson argued that SHD's requirement in this case that the Appellant satisfy subsection (c) of WAC 246-272A-0210(4) (i.e., satisfy both subsections (a) and (b)) is particularly justified here in light of the existing well's location in an environmentally sensitive area and connection to a second property. *Statements of Attorney Thompson.*

18. SHD Environmental Health Director Ragina Gray testified that she was involved in several conversations with SHD staff regarding the Appellant's application and how to move forward with the request. She noted that SHD does not have a blanket policy opposing setback reductions and is willing to continue working with the Appellant to ensure that the requirements for such a reduction can be met. *Testimony of Ms. Gray.*

19. SHD Land Use Permitting Section Supervisor Lucas Larson testified that it is SHD's position that it has discretion to require an applicant to meet the requirements of WAC 246-272A-0210(4)(a), (b), or both (i.e., subsection (c)) before approving a request for a setback reduction or, alternatively, to determine that a setback reduction would not be appropriate at all under certain circumstances. He stated that SHD is willing to approve a setback reduction in this case provided that an appropriate solution can be achieved. Mr. Larson noted that the Appellant provided seven examples of decisions approving setback reductions, one of which was issued by SHD and the others of which were issued by other local health jurisdictions. He stated that the examples provided by the Appellant are distinct from the current matter and/or do not contradict SHD's position that the Appellant would have to satisfy the requirements of both subsections (a) and (b) to

qualify for a setback reduction. In this regard, Mr. Larson pointed out that some of the decisions involved a setback from surface water, as opposed to an individual water supply, and that the other decisions involved projects that met the requirements of both subsections (a) and (b). He noted that the projects analyzed in these later examples involved wells with surface seals extending to the confining layer. Mr. Larson explained that, unlike these later examples, the Appellant's well log indicates that the surface seal for the existing on-site well does not extend to the confining layer. He stressed, however, that SHD has not yet had the opportunity to evaluate whether the formation seal on the existing well, as described by Mr. Straughn in his testimony, would be sufficient to meet the requirements of WAC 246-272A-0210(4)(a). Mr. Larson stated that requiring the Appellant to meet the requirements of both subsections (a) and (b), as opposed to only one of the subsections, is appropriate due to site conditions and because it would ensure adequate protection for current and future residents of the subject property and for the second property connected to the water supply. He stated that, although the current matter relates to the existing on-site septic system and proposed reserve drainfield area, the Appellant will ultimately need to obtain well site approval before Snohomish County approves of after-the-fact permits, for which no application has yet been submitted.

In response to questioning from Attorney Ojala on cross examination, Mr. Larson explained that the example approval decisions discussed above did not explicitly state that the wells' inclusion of a surface seal extending to the confining layer was required to meet the requirements of subsection (a), and he reiterated that SHD has not had the opportunity to evaluate the new information provided by Mr. Straughn regarding protections provided by the well's formation seal. He also conceded that, although the facts underlying those decisions indicate that both subsections (a) and (b) were met, the decisions do not indicate that both subsections were required to be met to qualify for a setback reduction. Mr. Larson stated that he agreed with Mr. Straughn's testimony that standard well construction practices would result in a well with a bentonite seal extending to the confining layer, and he noted that SHD does not have any evidence that standard well construction practices were not employed here. He explained that, to meet the requirements for a setback reduction, the Appellant would have to increase the treatment level of the existing primary drainfield to meet subsection (b) and potentially provide increased protections for the on-site well to meet subsection (a), depending on further analysis of the new information provided by Mr. Straughn at the hearing. Mr. Larson reiterated that SHD's position remains that both subsections (a) and (b) must be met by the Appellant to qualify for a setback reduction and, therefore, even if SHD determines through further analysis that the Appellant's existing on-site well includes protections meeting the requirements of subsection (a), the existing primary drainfield must be upgraded in accordance with the requirements of subsection (b). *Testimony of Mr. Larson.*

Appellant Rebuttal Witnesses

20. On rebuttal, Mr. Straughn reiterated his earlier testimony regarding standard well construction practices that result in a formation seal extending to a confining layer. He also noted that the only way to definitively determine whether a formation seal extending to the confining layer was included in the well construction in accordance with standard practices would be to destroy the well and rebuild it. *Testimony of Mr. Straughn.*

Closing Arguments

21. In closing, Attorney Thompson argued that the language of WAC 246-272A-0210 is permissive and that interpreting the code provisions to mandate approval of a setback reduction if certain conditions are met would be problematic and would set a bad precedent. *Argument of Attorney Thompson.*

22. Attorney Ojala argued in closing that the requested setback reduction to a minimum of 75 feet constitutes a setback alternative rather than a waiver of setback requirements and that the code mandates that the request for a setback reduction to 75 feet must be approved when either subsection (a) or (b) has been satisfied. *Argument of Attorney Ojala.*

Post-Hearing Briefs

23. At the close of the hearing, the Hearing Examiner ruled that the record would be left open until December 9, 2022, to allow the parties to submit closing briefs specifically addressing their positions on what should occur should the Hearing Examiner ultimately decide that neither party fully prevails. Attorney Thompson, on behalf of SHD, submitted a closing brief in which she stated that SHD is willing to consider subsection (a) met, based on Mr. Straughn's hearing testimony regarding the existing well containing a formation seal extending to the confining layer. She noted, however, that SHD maintains its position that both subsections (a) and (b) must be satisfied in order to qualify for a setback reduction and that the evidence shows that the existing on-site septic system does not include enhanced treatment components as required under subsection (b). Accordingly, Attorney Thompson asserts that the Appellant must improve the current system by incorporating enhanced treatment components and must demonstrate that the proposed reserve area would also include enhanced treatment components to qualify for a setback reduction. *Snohomish Health District Post Hearing Memorandum, dated December 9, 2022.*

24. Attorney Ojala, on behalf of the Appellant, submitted a closing brief, in which he maintained the argument that the Appellant need only satisfy subsection (a), but proposed reasonable conditions that could be included in the grant of the appeal, such as conditions requiring Mr. Straughn to submit a written opinion consistent with his expert testimony at the hearing, test-monitoring the well water quality and requiring enhancement of the existing on-site septic system in the event that such testing reveals water quality issues, and requiring the Appellant to submit revised as-built plans in accordance with both the

SHD's request in the Step One appeal denial letter and Mr. Straughn's testimony. *Appellant Post Hearing Memorandum, dated December 9, 2022.*

CONCLUSIONS

Jurisdiction[5]

The Hearing Examiner has jurisdiction to hear and decide Step Two appeals from any decision or order of SHD with respect to applications made to SHD. *SHDC 1.20.020; SHDC 1.20.030; SHDC 1.20.050; SHDC 1.20.070.*

Criteria for Review

An aggrieved party appealing an SHD decision or order related to an application made to SHD bears the burden of proving that SHD erred in issuing its decision or order. *SHDC 1.20.070.E.5.*

The Hearing Examiner's decision on a Step Two appeal shall include the following:

a. Findings based upon the record and conclusions therefrom which support the decision. Such findings and conclusions shall also set forth the manner by which the decision would conform to the applicable regulations.
b. A decision on the appeal which may be to grant, grant in part, return to the appellant for modification, deny or grant with such conditions, modifications, restrictions as the Examiner finds necessary to comply with the applicable regulations.
c. A statement which indicates the procedure for appealing the Examiner's decision. The Examiner's decision shall be mailed to the appellant, the Health Officer, and any other person who specifically requested notice of the decision by signing a register provided for such purpose at the hearing.

SHDC 1.20.070.E.7.

Role of the Hearing Examiner on Appeal

The responsibility of the Hearing Examiner is to review SHD's decision or order related to the application and to determine, based on facts and law, if an error was made. To properly review SHD's determination, the Hearing Examiner must decide what facts are important to make a decision, determine those facts with reference to specific exhibits or testimony, draw conclusions from those facts, and make a decision based on those conclusions. *See Weyerhaeuser v. Pierce County,* 124 Wn.2d 26, 873 P.2d 498 (1994). The Hearing Examiner must accord substantial deference to SHD's interpretation of its own code provisions. *Cockle v. Department of Labor and Industries,* 142 Wn.2d 801, 829, 16 P.3d 583 (2001); *Doe v. Boeing Co*., 121 Wn.2d 8, 15,

[5] The Hearing Examiner notes that, in January 2023, the Snohomish Health District was incorporated into the governmental functions of Snohomish County itself and, accordingly, the Snohomish County Hearing Examiner would have jurisdiction over similar matters in the future. That said, the parties concurred that the undersigned Hearing Examiner should conclude the review of the current appeal.

846 P.2d 531 (1993); *Superior Asphalt & Concrete v. Dep't of Labor & Indus.*, 84 Wn. App. 401, 405, 929 P.2d 1120 (1996); *McTavish v. City of Bellevue*, 89 Wn. App 561, 564, 949 P.2d 837 (1988).

The Hearing Examiner reviews SHD's decision to determine if it is clearly erroneous, after allowing for such deference as is due the construction of a law by the agency with expertise. Under the "clearly erroneous" standard of review, the Hearing Examiner examines the entire record in light of the policy set forth in the ordinance and reverses the decision only if he has a definite and firm conviction that SHD made a mistake. *Isla Verde International Holdings, Inc. v. City of Camas*, 146 Wn.2d 740, 751, 49 P.3d 867 (2002); s*ee Buttnick v. Seattle,* 105 Wn.2d 857, 860, 719 P.2d 93 (1986). When applying the clearly erroneous standard, the Hearing Examiner must not substitute his own judgment for the judgment of SHD. *See Buechel v. Department of Ecology,* 125 Wn.2d 196, 202, 884 P.2d 910 (1994).

Appeal of Hearing Examiner's Decision

SHDC 1.20.080 provides the procedures for appealing the decision of the Hearing Examiner and states in relevant part:

A. *General*. The decision of the Examiner shall be final and conclusive unless appealed by the appellant or Health Officer to the Board of Health.

B. *Initiation of Appeal to Board of Health – Appellant.* Any appellant wishing to appeal the decision of the Hearing Examiner to the Board of Health must file in writing a statement with the Health Officer within 15 days of the date of the decision of the Hearing Examiner. Such notice may be delivered personally to the Administration Office of Snohomish Health District (Attention: Health Officer) or sent by certified mail. The appellant shall submit specific statements in writing of the reason why error is assigned to the decision of the Examiner, and a copy of the Hearing Examiner decision which shall be accompanied by a fee as established by the Board of Health in the fee schedule.

C. *Initiation of Appeal to Board of Health – Health Officer.* The Health Officer may appeal the decision of the Hearing Examiner to the Board of Health if the Health Officer believes that the Examiner's decision may jeopardize the public health or is contrary to the applicable regulations. The notice of appeal by the Health Officer shall be filed with the Chair (or Vice-Chair in absence of the Chair) of the Board of Health in writing within 15 days of the date of the decision of the Hearing Examiner. Such notice shall contain a statement of the reason why the Health Officer believes that the Examiner made an error in issuing the decision and provide a copy of the Hearing Examiner decision. The Health Officer shall send a copy of the notice of appeal to the appellant by certified mail.

D. *Stay of Examiner's Decision.* When an appeal of the Examiner's decision is made to the Board of Health, the filing of such appeal shall stay the effective date of the Examiner's decision until such time as the appeal is adjudicated or withdrawn.

Conclusions Based on Findings

The Appellant has not met his burden of showing that SHD erred in its decision not to accept as-built plans submitted for approval of the existing on-site septic system and proposed septic reserve area. As a threshold issue underlying this appeal, the parties disagree about SHD's authority to deny a requested setback reduction from the minimum required 100-foot horizontal separation between an on-site well and the existing on-site septic system and proposed reserve area on the property. As noted in Footnote 3 of the above findings, SHDC 5.05.010 adopts Chapter 246-272A WAC by reference. As pertinent to this appeal, WAC 246-272A.0210(1) Table IV provides that on-site sewage systems shall be designed and installed to meet a minimum horizontal separation of 100 feet from wells. WAC 246-272A.0210(4), however, allows for this minimum required horizontal separation to be reduced to a minimum of 75 feet if certain conditions are met, stating:

> The horizontal separation between an OSS dispersal component and an individual water well, individual spring, or surface water that is not a public water source can be reduced to a minimum of seventy-five feet, by the local health officer, and be described as a conforming system upon signed approval by the health officer if the applicant demonstrates:
> (a) Adequate protective site-specific conditions, such as physical settings with low hydro-geologic susceptibility from contaminant infiltration. Examples of such conditions include evidence of confining layers and/or aquatards separating potable water from the OSS treatment zone, excessive depth to groundwater, down-gradient contaminant source, or outside the zone of influence; or
> (b) Design and proper operation of an OSS system assuring enhanced treatment performance beyond that accomplished by meeting the vertical separation and effluent distribution requirements described in WAC 246-272A-0230 Table VI; or
> (c) Evidence of protective conditions involving both (a) and (b) of this subsection.

The Appellant contends that the code provision's use of the term "or" between each of the above subsections conclusively establishes that an applicant need only meet one of the criteria listed above to qualify for a setback reduction and, therefore, upon such a showing, divests SHD of authority to deny a requested setback reduction. The Appellant thus argues that SHD erred by not accepting the as-built plans submitted in support of on-site septic system approval because, although the existing on-site septic system does not meet the enhanced treatment performance

standards of subsection (b), SHD conceded after the hearing that site conditions and the formation seal associated the existing well demonstrate that subsection (a) has been met and, further, that the proposed septic reserve area could include enhanced treatment components sufficient to meet subsection (b). In contrast, SHD argues that the provision's use of the word "can" demonstrates that SHD's authority to approve a setback reduction is wholly discretionary and, thus, allows SHD to deny a setback reduction even if all criteria under WAC 246-272A.0210(4) are met. SHD also asserts that the language of subsection (c) would be rendered meaningless if the code provision does not allow it to require a showing of both subsections (a) and (b) to allow a setback reduction. The Hearing Examiner agrees with SHD.

Administrative regulations are to be construed according to the rules of statutory interpretation. *Overlake Hosp. Ass'n v. Dep't of Health*, 170 Wn.2d 43, 52, 239 P.3d 1095 (2010). When interpreting an administrative regulation, the Hearing Examiner's "objective is to ascertain and give effect" to the intent of the legislative body promulgating the regulation. *City of Seattle v. Swanson,* 193 Wn. App. 795, 810, 373 P.3d 342 (2016). This inquiry begins with the plain language of the regulation, and when the meaning of the regulation is plain on its face, the Hearing Examiner must give effect to that plain meaning as an expression of legislative intent. *Swanson*, 193 Wn. App. at 810. "If the plain language is subject to only one interpretation," this inquiry is at an end. *Swanson*, 193 Wn. App. at 810. In ascertaining the plain meaning of a code provision, the Hearing Examiner considers the provision "'within the context of the regulatory and statutory scheme as a whole.'" *Swanson*, 193 Wn. App. at 811 (quoting *Rayonier, Inc. v. Dalman*, 122 Wn.2d 801, 807, 863 P.2d 64 (1993)). And the Hearing Examiner must not interpret a code provision in a manner that would render meaningless portions of the language contained therein. *G-P Gypsum Corp. v. Dep't of Revenue*, 169 Wn.2d 304, 309, 237 P.3d 256 (2010).

Here, SHD indicates that it would approve the requested setback reduction if the Appellant demonstrates that the on-site septic system and proposed reserve area would meet the requirements of WAC 246-272A.0210(4)(c) (i.e., if the requirements of both subsections (a) and (b) would be met). Accordingly, the issue of whether SHD has discretion to deny a setback reduction even if all the criteria under WAC 246-272A.0210(4) are satisfied is not squarely before the Hearing Examiner in this appeal. The Hearing Examiner notes, however, that WAC 246-272A.0210(4)'s use of the word "can," rather than to "shall" or "must," appears to indicate that local health jurisdictions are provided with discretion to authorize a setback reduction, but are not mandated to do so, if certain conditions are met.

Turning to the issue of whether SHD has authority to require that an applicant meet both subsections (a) and (b) before approving a setback reduction, the Hearing Examiner agrees with SHD that subsection (c) would be rendered meaningless under the Appellant's interpretation. Subsection (c) plainly provides that a local health jurisdiction may require "[e]vidence of protective conditions involving both [subsections] (a) and (b)" before approving a setback reduction request. Therefore, the provision's use of the term "or" merely indicates that SHD had

three options when reviewing the requested setback reductions: (1) to require that subsection (a) be met; (2) to require that subsection (b) be met; or (3) to require that both subsections (a) and (b) be met. Here, SHD exercised is discretionary authority to require that both subsections (a) and (b) be met, and the Appellant's expert witness conceded at the hearing that the existing on-site septic system does not contain enhanced treatment components sufficient to satisfy subsection (b). Accordingly, the Appellant cannot meet his burden to demonstrate that SHD erred by not approving the as-built plans submitted in support of on-site septic system approval.

Although the Hearing Examiner ultimately determines that the Appellant cannot prevail in this Step Two appeal, it should be noted that several issues underlying SHD's decision have been resolved through this appeal process. Following the expert testimony of Mr. Straughn regarding site conditions and protections provided by the formation seal associated with the existing on-site well, SHD accepted that the requirements of WAC 246-272A.0210(4)(a) have been met. Mr. Straughn also provided testimony establishing that the proposed reserve area could be designed to incorporate enhanced treatment components that would satisfy the requirements of WAC 246-272A.0210(4)(b). Accordingly, putting aside potential issues that may be associated with a required well site application that has not yet been submitted and is not before the Hearing Examiner in this appeal, the only remaining issue to be resolved regarding on-site septic system approval relates to upgrading the existing on-site septic system with enhanced treatment components to meet the requirements of WAC 246-272A.0210(4)(b) and demonstrating that the proposed reserve area would also contain required enhanced treatment components . The Hearing Examiner encourages the Appellant and City to continue working together to resolve that issue. *Findings 1 – 24.*

DECISION

Based on the above findings and conclusions, the appeal of SHD's decision is **DENIED**.

DECIDED this 23rd day of January 2023.

ANDREW M. REEVES
Hearing Examiner
Sound Law Center