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BEFORE THE HEALTH DISTRICT HEARING EXAMINER

In Re. the Matter of the Appeal by:

Case No.

Brad Whitsell,  
Appellant,  
  
Snohomish Health District,  
  
Respondent.

**BRAD WHITSELL’S STEP 2 APPEAL  
HEARING BRIEF SHD 1.20.070(E)(4)**

RE: Appeal of Denial of On-site Sewage  
Disposal System Permit for Property  
Located at 9905 353<sup>rd</sup> Dr. NE, Granite Falls

**I. INTRODUCTION & BACKGROUND**

Appellants submit this Information – Documentation – Admission by Appellant pursuant to SHD 1.20.070(E)(4) and agreement of counsel.

This is a unique case because the OSS has been approved since the 1980s, and a well has been installed since 2007, all with prior approvals.

Later, Mr. Whitsell has converted the building on the site to a residence, and now seeks after the fact permits from Snohomish County. The Health District must sign off as well. This matter

1 arises out of the District’s unyielding refusal to grant a small setback reduction to an applicant who  
2 meets the criteria for the same. This case therefore revolves around the singular issue of whether  
3 Mr. Whitsell’s OSS as built plans meet the criteria for a reduction of the standard 100ft setback  
4 from private drinking wells to 75’ under WAC 246-272A-0210(4).  
5

## 6 II. ISSUES

- 7 (1) Does Mr. Whitsell’s OSS as built design qualify for a reduction of the general 100ft setback  
8 from a private drinking well to the alternative 75ft where the OSS as built design meets the  
9 specific alternative requirements of WAC 246-272A-0210(4)(b)?

10 Short Answer: Yes. Yes. Brad Whitsell’s property’s as-built design by Mr. Bruce Straughn,  
11 shows an enhanced treatment component performance level and method of distribution for  
12 the soil type and depth on the property, qualifying the site for the “minimum of seventy-five  
13 feet” between the soil dispersal component and the non-public well, allowed by WAC 246-  
14 272A-0210(4)(b) as an alternative requirement.

- 15 (2) Can the District impose additional conditions on an applicant prior to granting an alternative  
16 75ft setback from a private drinking well even though the applicant already meets the meets  
17 the specific alternative requirements of WAC 246-272A-0210(4)(b)?

18 Short Answer: No. There is no basis under state or local health codes to impose additional  
19 conditions on an applicant who otherwise already qualifies for an alternative 75ft setback  
20 from a private drinking well in accordance with WAC 246-272A-0210(4)(b), particularly  
21 where there is no evidence of any condition on site which indicates a greater potential for  
22 contamination or pollution, and where DOH guidelines provide that 75ft is the minimum  
23 setback requirement from a well, and there has been no evidence of contamination.  
24

## 25 III. EVIDENCE RELIED ON & WITNESS LIST

26 In support of his Step 2 Appeal, Mr. Whitsell relies on the following materials, provided  
herewith:

- WAC codes.
- Whitsell OSS As Built Plan (district submits this, but its tucked away attached to one of their denial reports. Should include as standalone exhibit).

- Application Guide for Granting Waivers from State On-Site Sewage System Regulations Chapter 246-272A WAC manual (the “Manual”)
- The neighboring as-builts and well locations.
- The exhibits in the combined exhibit list, including those above.

At hearing, Mr. Whitsell expects to call and rely on the expert testimony of Bruce Straughn, licensed septic system designer and owner of Pilchuck Septic Designs, LLC. Mr. Straughn formerly worked for and had supervisory roles at the Snohomish Health District. Mr. Straughn is expected to testify based upon his professional experience and opinion as to how the as-built design meets the current Health District and State codes, the relationship between the septic system and the well physical and regulatory, and the applicable codes and practices of the Health District.

#### IV. AUTHORITY & ARGUMENT

The Health District, according to custom and practice, denied Mr. Whitsell’s initial clearance application in June 2021.<sup>1</sup> After this, Mr. Whitsell engaged Mr. Bruce Straughn to address the septic code concerns.

##### A. Setback argument

- Mr. Whitesell’s OSS as built design meets the criteria set forth in WAC 246-272A-0210(4)(b) and therefore qualifies for a reduced setback

The On-Site Sewage System Regulations Chapter 246-272A are to be followed by the Snohomish County Health District. The general separation between the dispersal component and an individual water well is 100’ as provided in Table IV in WAC 246-272A-0210. However, WAC 246-272A-0210(4) provides a specific alternative minimum required distance of 75’.

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<sup>1</sup> The Health District submittal report has a typo that says 6/28/2022 – really it was 6/28/2021.

1 WAC 246-272A-0210(4) provides, in relevant part:

2 “(4) The horizontal separation between an OSS dispersal component and an  
3 individual water well, individual spring, or surface water that is not a public water  
4 source can be reduced to a minimum of seventy-five feet, by the local health officer,  
5 and be described as a conforming system upon signed approval by the health officer  
6 if the applicant demonstrates:

7 (a) Adequate protective site-specific conditions, such as physical settings with  
8 low hydro-geologic susceptibility from contaminant infiltration. Examples of such  
9 conditions include evidence of confining layers and/or aquatards separating potable  
10 water from the OSS treatment zone, excessive depth to groundwater, down-gradient  
11 contaminant source, or outside the zone of influence; or

12 (b) Design and proper operation of an OSS system assuring enhanced treatment  
13 performance beyond that accomplished by meeting the vertical separation and  
14 effluent distribution requirements described in WAC 246-272A-0230 Table VI; or  
15 ....”

16 WAC 246-272A-230 Table VI, in turn, provides

17 **TABLE VI**  
18 **Treatment Component Performance Levels and**  
19 **Method of Distribution<sup>1</sup>**

Vertical Separation in inches	Soil Type		
	1	2	3-6
12 < 18	A - pressure with timed dosing	B - pressure with timed dosing	B - pressure with timed dosing
≥18 < 24	B - pressure with timed dosing	B - pressure with timed dosing	B - pressure with timed dosing
≥24 < 36	B - pressure with timed dosing	C - pressure	E - pressure
≥36 < 60	B - pressure with timed dosing	E - pressure	E - gravity
≥60	C - pressure	E - gravity	E - gravity

20 <sup>1</sup> The treatment component performance levels correspond with those established for treatment components under the product testing requirements in WAC 246-272A-0110.

1 Accordingly, WAC 246-272A-0210(4) has a minimum requirement of 75 feet horizontal  
2 separation from the soil dispersal component to a non-public well, when there is enhanced treatment  
3 of performance under WAC 246-272A-0210(4)(b) beyond the WAC 246-272A-0230 Table VI  
4 requirements.

5 Here, Mr. Whitsell's as built design meets the criteria set forth in WAC 246-272A-  
6 0210(4)(b), because it uses the enhanced treatment performance shown under WAC 246-272A-230  
7 Table VI. The as built design shows the soil type for an E-Pressure system, with an  
8 upgraded/enhanced treatment system to a "B – pressure with timed dosing", meeting the alternative  
9 setback criteria set forth under WAC 246-272A-0210(4)(b), qualifying him for a reduction of the  
10 baseline 100' setback requirements.

11  
12 i. No waiver or additional criteria needed for reduction in setback

13 Despite meeting the reduced setback requirements of WAC 246-272A-0210(4)(b), the  
14 District seems to take the position (without citing any authority) that District can merely decline to  
15 grant a reduced setback based off the word "can" as used in WAC 246-272A-0210 and/or it can  
16 require an applicant to meet additional criteria in WAC 246-272A-0210(4) before granting a  
17 reduction to the baseline 100' setback requirement.<sup>2</sup>

18  
19 First, the language of WAC 246-272A-0210(4) is clear in that an applicant need only meet  
20 one of the criteria set forth in WAC 246-272A-0210(4)(a), (b), or (c) – not all of them – to qualify  
21 for a reduction of the general 100' setback requirement. There is language in WAC 246-272A-  
22

23  
24 <sup>2</sup> See District Brief at pg. 7 lines 6-11 "WAC 246-272A-0210(4) states the health officer "can" reduce the setback if  
25 either subsections (a), (b), or (c) - evidence of both (a) and (b) exist. This section allows for evaluation of all relative  
26 site-specific conditions to determine the appropriateness of either subsection (a), (b), (c). The health officer is under  
no obligation to reduce this setback, regardless of the evidence provided in support of either option. However, SHD  
has offered an option to the appellant where SHD would agree to approve the reduction if subsection (c) was  
satisfied."

1 0210(2) that allows the District to “increase the minimum horizontal separations” “[i]f any  
2 condition indicates a greater potential for contamination or pollution” such as “excessively  
3 permeable soils, unconfined aquifers, shallow or saturated soils, dug wells, and improperly  
4 abandoned wells.”<sup>3</sup> However, the District does not assert WAC 246-272A-0210(2) as a basis for  
5 imposing additional conditions on Mr. Whitsell, nor is there any evidence of any condition on site  
6 which indicates a greater potential for contamination or pollution. In fact, the existing septic system  
7 on the property has been there since 1981 without any issues or instances of contamination. The  
8 existing well on the property likewise has had no instances of contamination since its installation in  
9 2007.

11 Second, the word “can” as used in WAC 246-272A-0210 does not give the District  
12 unfettered discretion to deny any and all reductions in setback when an applicant shows he/she has  
13 met one of the condition(s) of WAC 246-272A-0210(4). The 100’ setback requirement under WAC  
14 246-272A-0210 table IV is a baseline requirement, while the 75’ requirement under WAC 246-  
15 272A-0210(4) is an alterative requirement.

17 A guiding case synonymous with the facts and codes at issue here is the case of *Griffin v.*  
18 *Thurston County*. In that case, the Court reviewed an application with several “requirements,” most  
19 of which the court found were met because the application met “alternative requirements,” though  
20 the Court ultimately ruled Griffin did not meet the code because he needed a “waiver” request, and  
21 a waiver request was not allowed in Griffin’s particular case. For example, the Court found that the  
22 setback requirement from the surface water of Puget Sound was 100’, or 75’ with an ‘enhanced  
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<sup>3</sup> See WAC 246-272A-0210(2)

1 treatment performance’ standard under Thurston County code, as a “specific articulated  
2 alternative[.]” *Griffin v. Thurston County Bd. of Health*, 165 Wn.2d 50, 57 (2008).

3 The Court explained:

4 “Griffin's proposal also included a 75-foot setback from the surface water of Puget  
5 Sound. Table I requires a 100-foot setback, and TCSC article IV, section 10.3 allows  
6 the health officer to approve a reduced setback if the applicant demonstrates that the  
7 OSS has “enhanced treatment performance.” TCSC art. IV, § 10.1, tbl. I; TCSC art.  
8 IV, § 10.3.2. The requirement consists of the 100-foot setback or approval of a  
9 reduced setback based on enhanced performance. The health officer approved the  
10 reduced setback based on Griffin's showing of enhanced performance in the OSS.  
11 Griffin met the requirement.”

12 *Griffin v. Thurston Cty. Bd. of Health*, 165 Wn.2d 50, 61, 196 P.3d 141, 146 (2008).

13 Here, similar to *Griffin*, Mr. Whitsell’s OSS as-built, as designed by Mr. Bruce Straughn,  
14 includes “enhanced treatment performance” through the “B – pressure with timed dosing” treatment  
15 system, qualifying the design for the specifically articulated alternative of 75’ between the soil  
16 dispersal component and the private well on his property under WAC 246-272A-0210(4).  
17 Accordingly, Mr. Whitsell’s system is a “conforming system” under WAC 246-272A-0210(4)(b),  
18 without a waiver or the need to meet any additional requirements beyond that of WAC 246-272A-  
19 0210(4)(b).

20 State law and the “Application Guide for Granting Waivers from State On-Site Sewage  
21 System Regulations Chapter 246-272A WAC” manual likewise demonstrate that Mr. Whitsell’s  
22 OSS As Built Design qualifies for a setback reduction and that he need not meet any additional  
23 conditions under WAC 246-272A-0210(4).

24 According to the Manual, there are three types of “waivers.” Class A waivers are pre  
25 approved waivers where the DOH has specific evaluation criteria and mitigation measures already  
26

1 in place for state wide use. The criteria and mitigation measures are listed in the Tables in the DOH  
2 Manual. The other classes of waivers, classes B and C, demand further scrutiny and agreement from  
3 the DOH before they can be granted.

4 As shown in the Manual, there is a Class A waiver table for horizontal separation from a  
5 non-public well to a soil dispersal component, and that the minimum setback requirement is 75', not  
6 100'. Specifically, the Manual provides, in relevant part: “[s]oil dispersal component 75 feet from  
7 non-public well or suction line” can be reduced from 75’ to a minimum of 50’ under a Class A  
8 waiver if certain conditions are met. Notably, the Manual points out that the requirement to be  
9 waived is the 75’ minimum alternative setback distance in WAC 246-272A-0210(4), not the general  
10 100’ setback distance in WAC 246-272A-0210(1) Table IV.

11  
12 ii. Well considerations

13 The Well was installed in 2007, and any ability to challenge the well location or  
14 construction has long passed under the three-year statute of limitations. RCW 18.104.065.

15 Relying on hearsay<sup>4</sup>, the District also takes the position that Mr. Whitsells’ as built system  
16 does not meet the requirements of WAC 246-272A-0210(4)(a) because “the well surface seal does  
17 not extend into a confining layer to justify WAC 246-272A-210(4)(a).”<sup>5</sup> Similar to WAC 246-  
18 272A-210(4)(b), subsection (a) provides that the District may **reduce** the setback when the  
19 applicant demonstrates:  
20  
21

22 “Adequate protective site-specific conditions, such as physical settings with low  
23 hydro-geologic susceptibility from contaminant infiltration. Examples of such  
24 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...”

25 <sup>4</sup> See District Brief at pgs. 8-9 referencing an email from Noel Philip, WA State Dept. of Ecology dated August 5,  
2022

26 <sup>5</sup> See District Brief at pg. 8 lines 19-24



1 WAC 246-272A-210(4)(a) [emphasis added]

2  
3 WAC 173-160-111(13) defines a confining layer as: "... a layer of low hydraulic  
4 conductivity material that significantly limits vertical movement of groundwater." WAC 173-160-  
5 111(13). The standards for surface seals are set forth in WAC 173-160-231, a copy of which is  
6 provided with this brief.<sup>6</sup> WAC 173-160-231(1)(c) requires that "The surface seal must extend  
7 from land surface to a minimum depth of eighteen feet."

8  
9 In turn, WAC 173-160-241 sets forth the various requirements for formation sealing, which  
10 allows for consolidated formations "[i]n drilled wells that penetrate an aquifer, either within or  
11 overlain by a consolidated formation"<sup>7</sup> by using the following but not exclusive procedure:

12 "Procedure two - An upper drill hole at least four inches greater in diameter than the  
13 nominal size of the permanent casing extends from land surface **to a depth of at  
14 least eighteen feet**. An unperforated permanent casing shall be driven into the  
15 consolidated formation and sealed in a manner that establishes a watertight seal  
16 between the formation and the casing. Throughout the driving of the well casing to  
17 the consolidated formation, the annular space between the upper drill hole and the  
18 permanent casing shall be kept at least one-half full with unhydrated bentonite, or  
19 bentonite slurry. The remainder of the annular space to land surface shall be filled  
20 with cement grout, neat cement, or bentonite. See Figure 2."

21 WAC 173-160-241(3)(b) [emphasis added]

22 Likewise, the depth under -241(3)(c) is likewise 18 feet.

23 Mr. Straughn is expected to testify that, based on the well log, the surface seal extends to 18'  
24 below the ground surface. That is the minimum required by code. He interprets the well log to  
25 indicate the first potentially confining layer (blue silty clay) to begin at 24 feet, but the well meets  
26 code.

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<sup>6</sup> See Exhibit

<sup>7</sup> See WAC 173-160-241(3), also provided herewith as Exhibit X

1 Testimony is expected to show that in Mr. Straughn’s experience well drillers cannot predict  
2 if they will encounter a confining layer above an aquifer, so they drill all wells as if they will. Some  
3 drillers keep the top 18’ (that is 4” wider in diameter than the permanent casing) at least one-half  
4 filled with bentonite as they drill. Most use a temporary casing with a 10” diameter as referenced in  
5 section (3)(c). It is not possible to determine after the fact if the rule was followed. Ecology used to  
6 contract with the Health District to inspect wells during construction to verify proper techniques  
7 were followed. The Health District has not offered any records pertaining to Whitsell’s well during  
8 construction to show it was not properly constructed. It was approved by Ecology. It was not  
9 challenged. The law and evidence show that in Ecology’s eyes “Ecology is OK with the well site  
10 even though the new delineation by FEMA puts it in the floodway.” (July 27, 2021 email from  
11 Philip Noel, Ecology to Steve Rice, SHD). Further, Ecology has recognized that it does not have  
12 jurisdiction to require the well to be relocated or the well seal altered as being impossible and also  
13 outside the three-year statute of limitations. (August 5, 2022 email from Philip Noel, Ecology, to  
14 Corinna Ong, SHD). The well is a well. The Health District code regarding alternative setbacks  
15 refers to matters pertaining to addressing the OSS, not the well itself. Accordingly, the well issue is  
16 not dispositive.

## 19 V. CONCLUSION

20 For the reasons set forth herein, Mr. Whitsell respectfully requests that the Hearing  
21 Examiner issue a decision under SHD 1.20.070(E)(7), including but not limited to reversing the  
22 decision of the Snohomish Health District and entering a decision approving the alternative setback  
23 of 75 feet from the OSS to the well, demonstrating compliance with the code, and remanding with  
24 directions for final approval.  
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1 OJALA LAW INC., P.S.

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3 Peter C. Ojala, WSBA #42163

4 Attorney for Brad Whitsell

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WHITSELL STEP 2  
APPEAL BRIEF - 11

MATTER #

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