

MEMORANDUM

To: Hearing Examiner Reeves
From: Peter Ojala, Attorney for Brad Whitsell
Date: December 9, 2022
RE: Step 2 Appeal Requested Memo

Mr. Whitsell believes the facts show the decision(s) on appeal (Ex. 22) to the extent that they denied Mr. Whitsell's applications because of the horizontal setback criteria in WAC 246-272A-0210(4) were not met for *both* (1) the reserve and (2) the existing primary system, should be reversed given the uncontroverted testimony of Mr. Straughn of site specific conditions showing compliance with -0210(4)(a) (reserve and primary) and -0210(4)(b) (reserve), and therefore the reserve also meets -0210(4)(c). The facts show the alternative minimum setback of 75' is appropriate. However, should the appeal not be granted outright in favor of Mr. Whitsell, he proposes the following Proposed Order to illustrate his position should he not fully prevail.

PROPOSED ORDER

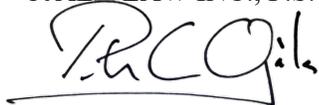
1. The Hearing Examiner has jurisdiction and authority under SCC 1.20.070(E)(7)(b) to “grant, grant in part, return to the appellant for modification, deny or grant with such conditions, modifications, restrictions as the Examiner finds necessary to comply with the applicable regulations.”
2. Based upon the undisputed testimonial evidence at the Hearing by Mr. Bruce Straughn R.S., an expert in the fields of septic design and well installation with respect to on-site septic systems (OSS), with 30 years of experience in OSS at the Snohomish Health District, there are not any major material factual disputes, rather the legal conclusions under the rules based upon those facts. The applicant has met its burden of proof that the Health Officer erred in requiring additional conditions not required by the health code and in interpreting the 75 foot alternative minimum setback requirements under the unambiguous language in WAC 246-272A-0210(4). Accordingly, the Step One Appeal Denial appeal is GRANTED and returned to the Applicant for modifications consistent with this opinion.
3. **Existing primary system.** The appeal is granted, with conditions, with respect to the Health District's interpretation of WAC 246-272A-0210(4) with respect to the existing **primary system**. Evidence of adequate protective site-specific conditions, such as physical settings with low hydro-geologic susceptibility from contaminant infiltration, alone, is a *sufficient* basis to meet the specifically articulated alternative horizontal separation (setback) of 75 feet from the OSS dispersal component to an individual well. WAC 246-272A-0210(4)(a). Ex. 3 is the water well report, and as testified to by Mr. Straughn and Mr. Lucas, there is a presence of a confining layer/aquitard (blue silty clay) from a depth of 24 to 30 feet, separating the potable water from the adjacent lots' OSS treatment zones because of the low hydro-geologic susceptibility. Further, the undisputed facts show an approval of a previously permitted as-built existing primary septic system (1980s) 75 feet from an existing Ecology approved well (2007) that has a surface seal to 18' and a formation seal in the form of bentonite clay into a sufficiently thick confining layer at a depth of 24 to 30 feet, under normal modern (2007 era) drilling practices. (Ex. 3). Mr. Straughn persuasively testified that the existing primary system meets WAC 246-272A-0210(4)(a). In addition, and highly relevant to the Hearing Examiner which may distinguish this case from a case in the future where there is a new application, is the fact that the OSS has been used since at least 2007 and the well has been tested multiple times with no bacteria indications. However, the Health District did not have Mr. Straughn's expert opinion in any written form in front of it when processing the as-built application or “construction clearance” (nor did the Health District specifically ask for or indicate they would be open to considering such an opinion either until *perhaps* after the Step One Denial at this hearing). This is understandable because the Health District personnel testified that they were not aware of approving a 75 foot alternative horizontal

separation to an individual well before, and they testified they were uncertain what information they would require to meet only WAC 246-272A-0210(4)(a).

4. This appeal is granted with respect to the existing primary system meeting the WAC 246-272A-0210(4)(a) and hence the alternative horizontal separation of 75 feet is approved, with the condition that Mr. Straughn provide a written and stamped opinion consistent with his testimony at the hearing to the Health Department for the file regarding the site-specific conditions.
5. A further reasonable condition of approval of the existing primary system shall be that the well water quality is monitored and reported twice per year for bacteria, similar to the test results shown in Ex. 17. If there are water quality test results that show a problem or concern, upon sufficient evidence of cause from the existing on-site system on Lot 7, the Health District may require the landowner of existing system on Lot 7 to be enhanced in accordance with Mr. Straughn's reserve enhanced treatment design in Ex. E (or other similar equally protective or greater design).
6. **Reserve.** The appeal is also granted with respect to the Health District's interpretation of WAC 246-272A-0210(4)(a) with respect to the **reserve** design in Ex. E, for the same site specific reasons the appeal was granted for the **existing primary system**. In addition, Mr. Straughn persuasively testified his enhanced treatment design in Ex. E also meets the requirements of WAC 246-272A-0210(4)(b) alone, given the soil types on the property. (Ex. E). However, because the enhanced reserve design also meets the criteria solely in WAC 246-272A-0210(4)(b), as well as WAC 246-272A-0210(4)(a), it necessarily also meets WAC 246-272A-0210(4)(c). Accordingly, the appeal is granted with respect to the 75' alternative horizontal setback to the **reserve area** design by Mr. Straughn shown in the area in Exhibit E
7. Several other items were listed in the Step One Denial letter as being outstanding, but that both parties indicated at the Hearing and in their arguments these items were not of a dispositive concern. Under SHD 1.20.070.E.7.b, the Hearing Examiner finds the following conditions and modifications are necessary to comply with the applicable regulations:
 - a. The Applicant shall modify the Ex. E site depiction plan to show the reserve area modification shown consistent with Mr. Straughn's testimony at the hearing that there is adequate space for the reserve trenches and driplines outside the appropriate setback to the easement and to the existing drainfield trenches, by either slightly rotating the diagram or showing the reserve trenches more clearly.
 - b. The Applicant shall modify the Ex. E site depiction plan to show condition that the neighboring wells and drainfields are at appropriate horizontal distances/setbacks to the existing well, drainfield, and proposed reserve area. Mr. Straughn testified that he reviewed these items and the site can meet these constraints.
 - c. The Applicant shall modify the Ex. E site depiction site plan to show the waterline from the well to the house on Lot 7 be depicted.
8. This decision does not excuse the Applicant from applying for a well site application should one be required, but those are separate regulations and procedures than the present appeal.

Very Truly Yours,

OJALA LAW INC., P.S.



PETER C. OJALA