December 31, 2009

OFFICE OF THE HEARING EXAMINER
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ORDER OF SUMMARY DISMISSAL FOR LACK OF JURISDICTION

SUBJECT: Department of Public Health File: **Applewhite dba Pops Pizza and Pasta**

APPLEWHITE dba POPS PIZZA AND PASTA
Health Department Appeal

Location: 1400 South 312th Street, Federal Way

Appellant: Bryan Applewhite
represented by **Bill H. Williamson**, Attorney at Law
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King County: Department of Public Health (Board of Health; BOH)
represented by **Jane McKenzie**, Deputy Prosecuting Attorney
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1. Appellant's Amended Notice and Statement of Appeal challenged health permit fees and the findings of a BOH Food Establishment Inspection Report, on a variety of bases articulated in such Statement, and, among other elements of relief, seeks injunctive relief.

2. The subject Food Establishment Inspection Report, contrary to Appellant's contention, does not constitute a formal BOH Notice and Order as such term is articulated in BOH rules and regulations. A Notice and Order is legally and formally distinguishable. [See KCBOH 1.08.100 *et seq.*] Any articulation of an opportunity of "appeal" of "the findings of an inspection report" expressed in the body of a Report (*e.g.*, "Form C" as offered by Appellant) does not have legal effect of conferring formal Notice and Order status on such Reports.

3. Health permit and other fees are established by and through Chapter 2.10 KCBOH. Such fees do not constitute Notices and Orders.

4. Jurisdiction of the Hearing Examiner is set forth in KCC 20.24.080. Absent express establishment of jurisdiction, the Examiner is without subject matter jurisdiction to hear "appeal" claims.

5. Among the express grants of hearing examiner jurisdiction set forth in KCC 20.24.080 are "appeals of citations, notices and orders, notices of noncompliance and stop work orders issued pursuant to K.C.C. Title 23 or Title 1.08 of the rules and regulations of the King County Board of Health." [KCC 20.24.080.3]

6. Only the "notice and order" form of formal enforcement actions appealable to the Examiner is established in the BOH code; the other formal enforcement action forms expressed in KCC 20.24.080.3 are authorized for use by other county departments, such as by the Department of Development and Environmental Services (DDES) and the Department of Parks and Natural Resources (DNRP). [See, *e.g.*, KCC 23.02.070 and .100]

7. Certain administrative actions of the BOH must be effected through the Notice and Order procedure, such as suspensions and revocations of permits. [KCBOH 1.08.180 and .190] Fees and food establishment inspection reports are not required to be, and are not, effected through the Notice and Order procedure.

8. No administrative actions of BOH other than formal Notices and Orders are subject to administrative appeal jurisdiction of the Hearing Examiner, particularly in this case fee rates and inspection reports. As noted above, since the articulation of "appeal" of "the findings of an inspection report" expressed in a Food Establishment Inspection Report does not have the legal effect of conferring formal Notice and Order status on such Reports, it does not invoke Hearing Examiner appeal jurisdiction thereby (nor in any other preemptive manner).

9. Absent a formal Notice and Order context, the Examiner is deprived of subject matter jurisdiction over the BOH administrative actions subject to the appeal.

10. As the Examiner has no subject matter jurisdiction in this case, the only Examiner action permissible is to dismiss the appeal. [*Shoop v. Kittitas County*, 108 Wn. App. 388, 390, 30 P.3d 529 (2001) citing *Inland Foundry Co. v. Spokane County Air Pollution Control Auth.*, 98 Wn. App. 121, 123-24, 989 P.2d 102 (1999); *KSLW v. City of Renton*, 47 Wn. App. 587, 595, 736 P.2d 664 (1986)] Accordingly, Appellant's motion for discovery and the remaining issues raised in Respondent's motion to dismiss may not be addressed.

ORDER:

Appellant's Appeal in this matter is dismissed for lack of subject matter jurisdiction.

ORDERED December 31, 2009.

Peter T. Donahue
King County Hearing Examiner

PTD:vsm
Applewhite ORD3