

January 19, 1999

**OFFICE OF THE HEARING EXAMINER
KING COUNTY, WASHINGTON**

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**SECOND CLARIFICATION OF EXAMINER'S REPORT AND DECISION
ON AN APPEAL FROM NOTICE AND ORDER; AND,
DECISION ON REQUEST FOR RECONSIDERATION.**

SUBJECT: Department of Development and Environmental Services File No. **E9800568**
TONY AMBROSE / JOHN BREITHAUPT
Code Enforcement Appeal
(This Department file formerly identified with Michelle Larsen)

Location: 30400 NE Tolt Hill Road (approximately), Carnation
Appellant: Tony Ambrose, *represented by* **Ian Macrae**, Attorney At Law
PO Box 1329, Fall City, WA 98024
Appellant: **John Breithaupt**, 16648 NE 12th Street, Bellevue, WA 98008

SUBJECT: Department of Development and Environmental Services File No. **E9800569**
TONY AMBROSE / JOHN BREITHAUPT
Code Enforcement Appeal

Location: 30408 NE Tolt Hill Road, Carnation
Appellant: Tony Ambrose, *represented by* **Ian Macrae**, Attorney At Law
PO Box 1329, Fall City, WA 98024
Appellant: John Breithaupt, 16648 NE 12th Street, Bellevue, WA 98008

SUMMARY:

Department's Preliminary Recommendation:	Deny appeals
Department's Final Recommendation:	Deny appeals
Examiner's Decision:	Appeals denied

PRELIMINARY MATTERS:

Notice of appeal received by Examiner: July 15, 1998

Statement of appeal received by Examiner: July 15, 1998
EXAMINER PROCEEDINGS:

Pre-Hearing Conference:	August 17, 1998
Hearing Opened:	November 10, 1998, 9:30 a.m.
Hearing Closed:	November 10, 1998, 3:25 p.m.
Examiner’s Report and Decision:	November 24, 1998
Department’s Request For Clarification:	December 1, 1998
First Clarification Of Decision Issued:	December 7, 1998
Appellant’s Request for Reconsideration Or Clarification:	December 18, 1998
Department’s Response:	January 4, 1999
Appellant’s Reply:	January 13, 1999
Second Clarification Of Decision Issued:	January 19, 1999

Participants at the public hearing and the exhibits offered and entered are listed in the attached minutes. A verbatim recording of the hearing is available in the office of the King County Hearing Examiner.

FINDINGS AND CONCLUSIONS, CLARIFICATION, & DECISION: Having reviewed the record in this matter, the Examiner now makes and enters the following:

FINDINGS AND CONCLUSIONS:

1. **Reconsideration Argument.**

Before 1996 the standards contained in KCC 20.24.250 regarding “reconsideration of final action,” applied only to the King County Council. Ordinance 12196, Section 45 (1996) expanded to include the Examiner these limitations on the basis for reconsideration. Since 1996, this Examiner has entertained several requests for reconsideration. This is the first in which a party argued for the limiting standards contained in KCC 20.24.250.¹ In this therefore unusual case, the Department Of Development And Environmental Services (“DDES” or the “Department”) argues that the reconsideration request of Tony Ambrose (the “Appellant”) does not rely upon any of the three necessary grounds for reconsideration stated in KCC 20.24.250.A. In his January 13, 1999 Reply, the Appellant implicitly concedes that point, arguing only that the Examiner has “the inherent power to correct, clarify, expand upon or otherwise alter [his] decision in the interest of justice and judicial economy.”

2. **Reconsideration Authority Examined.**

KCC 20.24.250.D states:

Authority of the Council and Examiner to reconsider does not affect the finality of a decision when made.

¹ KCC 20.24.250. Reconsideration of final action. Any final action by the county council or hearing examiner may be reconsidered by the council or examiner respectively if: 1) The action was based in whole or in part on erroneous facts or information; 2) The action when taken failed to comply with existing laws or regulations applicable thereto; or 3) An error of procedure occurred which prevented consideration of the interests of persons directly affected by the action.

Consequently, a request for reconsideration does not stay any appeal period. Recognizing and underscoring this fact, the Hearing Examiner's Rules, Section IX.G (in part) informs:

. . . the filing of a request for reconsideration shall not stay the time limit for taking an appeal of the Examiner's Recommendation or Decision unless an order to that effect is entered by the Examiner.

This rule makes expiration of the appeal period for the Examiner's November 24, 1998 Decision all the more problematic to the Appellant.

As noted above, the Appellant argues that the Examiner has "the inherent power to correct, clarify, expand upon or otherwise alter [his] decision in the interest of justice and judicial economy." With respect to statements by the Examiner that augment and clarify, but do not change effect or meaning, I conclude that the Appellant is correct. However, with respect to any change in the Examiner's November 24, 1998 Decision and Order (hereinafter, on these pages, "the Order" or the "Examiner's Order") that changes the *effect* of the Order, the Examiner is limited, as DDES argues, by KCC 20.24.250. The Examiner may have had authority to conduct a broad reconsideration, or "rethinking," of his decisions before 1996, but not any more. Reconsiderations based upon inherent authority exercised in the "interest of justice and judicial economy" may have been permissible before 1996, but not any more.

Therefore, the Examiner's November 24, 1998 Order will not be reconsidered, rethought, or revised. Hopefully, the following Clarification will contribute to a resolution of this Code Enforcement matter in a manner that is satisfactory to all parties.

CLARIFICATION:

A. **Overview.**

The Examiner's November 24, 1998 Order was written with confidence that all parties will participate with *respect* toward all other parties; that the participation of both parties, the Department and the Appellant, will be reasonable and in good faith; that the Appellant will not "drag his feet" or "dig in" with resistance to reasonable requests and direction from the Department; and, that the Department will exercise its authority reasonably and conscientiously with a presumption that there is a good faith basis for any action or inaction on the part of Mr. Ambrose.

The Examiner's Order assumes that the Department and its Grading Section representatives recognize that they are all public servants, in service to the public; and, that Mr. Ambrose, regardless of his Code violation, is a member of the public who deserves the same high level of service that would be received by any other citizen doing business with the Department.

B. **Order, Page 6, Paragraph 6.**

The sixth paragraph of the Examiner's Order states:

Any failure by the Department to meet any deadline specified in this Order shall result in complete voidance of this Order.

It was not my intention to retain jurisdiction in this matter; and, indeed, I can not do so without the concurrence of both parties. In my experience, Code Enforcement Appellants and the Department routinely agree to allow the Examiner continuing jurisdiction, particularly prior to hearing and particularly in those cases where there is no imminent significant hazard or threat to the public health, safety and welfare. In this case, the Department declines, and in fact *argues against* continued jurisdiction. Considering the time limits established by KCC 20.24.098 and considering the circumstances and positions taken in this matter, there can be no continuing jurisdiction by the Examiner.

It is my intention that if the Department does not meet any deadline specified in the Order, the result will be complete voidance of all Code Enforcement action against Mr. Ambrose; that any liens upon the property would be removed; and, that the Department's Notice and Order upon Mr. Ambrose would be voided with prejudice.

C. Order, Page 6, Paragraph 7.

The seventh paragraph of the Order states:

Any failure to meet any deadline contained in this Order by Tony Ambrose shall result in a \$100.00 (one hundred dollar) fine for each such deadline failure. Any failure by Tony Ambrose to comply with this Order shall result in complete restoration of the Department's June 15, 1998 Notice and Order, including civil penalties and prosecutorial options.

Again, I assume, and expect the Department to assume, wholesome intention and good faith on the part of Appellant Ambrose. I would not expect that a good faith, but perhaps incomplete, submittal would result in any fine at all. The term "any failure by Tony Ambrose to comply with *this Order*" means that complete restoration of the June 15, 1998 Notice and Order (with its civil penalty) would occur if (and only if), in brutally obvious bad faith, Mr. Ambrose digs in his heels and wholly refuses to comply with the compliance schedule or submittal requirements.

D. The importance of being on schedule.

On balance, *paragraphs six and seven* of the Order (preceding paragraphs 4 and 5 of this Clarification) are intended to be highly motivational. If the Department fails to live up to the timeliness standards it expects of the Appellant, the Department loses its entire case and any right to pursue it further. If the Appellant is not timely in his submittals and actions, a \$100.00 (one hundred dollar) fine results for each such deadline failure. And, if the Appellant refuses to comply altogether, he, too, loses everything.

E. Comparing Appellants Breithaupt and Ambrose.

It is disingenuous to suggest that Breithaupt must pay \$500.00 (five hundred dollars) at the same time that Ambrose pays \$25,000.00 (twenty-five thousand dollars) in civil penalties. That is not the case. The civil penalty assessed upon Appellant Ambrose is \$ZERO, provided that Appellant Ambrose complies with the Order in good faith.

Considering the physical circumstances of the property, as well as the appeals to equity made by the Appellant, I concluded that the actual costs of permit application and site restoration should be the only costs incurred by Appellant Ambrose.

F. **Regarding Potential Severity Of Enforcement.**

The Appellant expresses concern that the Department will impose the full \$25,000.00 (twenty-five thousand dollar) fine “for some hyper-technical, innocent violation.” That is not my intention. Earnest good faith efforts can never be fined \$25,000.00 (twenty-five thousand dollars) under this Order, or under the law. Again, the full penalty may be imposed only if Appellant Ambrose refuses (fails) to comply. Incomplete or amateurish submittals must be remedied as immediately as possible, of course. However, Mr. Ambrose’s representative and the Department both must surely recognize that the Department could not defensibly impose a \$25,000.00 (twenty-five thousand dollar) fine “for some hyper-technical, innocent violation”; that such draconian enforcement would be found arbitrary and capricious or worse. When I said in my December 7, 1998 Clarification that “if Mr. Ambrose fails to comply for any reason, he will automatically be subject to the Department’s Notice and Order (which authorizes among other things a \$25,000.00 civil penalty), I meant: *No reason is good enough to refuse to comply*. The \$25,000.00 (twenty-five thousand dollar) fine is not excessive because it does not exist. If Appellant Ambrose makes earnest, good faith efforts to comply with the schedule contained in the Order, and the requirements contained in the Department’s directives, it will never exist. I am convinced that, if the Department were to attempt to impose such a fine for a hyper-technical innocent violation (as the Appellant fears) it would find itself in deep trouble.

G. **Inaccurate Facts Or Findings.**

Appellant Ambrose’s attorney suggests, in essence, that Appellant Breithaupt has committed perjury; that is, offered sworn testimony that was false. If Mr. MaCrae’s allegation is correct, then we have a basis for the Examiner to reconsider his Decision pursuant to KCC 20.24.250.A.1.

I will not reopen or reconsider this case on that allegation alone. If Mr. MaCrae brings forward convincing evidence that the order was based, in whole or in part, on erroneous facts or information, then I would have the authority to enter into reconsideration on the affected issue. However, having studied the Order and this Clarification, I doubt that a change in the disputed Breithaupt testimony would change any aspect of the Order as it applies to Mr. Ambrose. Whether it would affect the Order as it applies to Mr. Breithaupt will not be addressed here in order to avoid pre-judgment of that issue. If Mr. Ambrose believes he was misled by Mr. Breithaupt, then he may wish to consider bringing a civil action against him in some other forum.

H. **Alleged Failure To Timely Inspect Premises Following The Order; Late Mailings Or Notifications.**

I have not fully investigated allegations of untimely or incomplete notices, directives, or inspections by the Department because the implementation of the Order is not within my jurisdiction. My jurisdiction ended November 24, 1998.²

² Pursuant to Chapter 20.24, King County Code, the King County Council has directed that the Examiner make the final decision on behalf of the County regarding code enforcement appeals. The Examiner’s decision shall be final and conclusive unless within twenty (20) days from the date of the decision an aggrieved party or person applies for

RST:vam

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