December 22, 2023

OFFICE OF THE HEARING EXAMINER
KING COUNTY, WASHINGTON

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ORDER ON RECONSIDERATION

SUBJECT: Department of Local Services file nos. **UTRC230001 and UTRC230002**

WOODINVILLE WATER DISTRICT
Appeal of Timely and Reasonable Water Service

Location: South side of the eastern intersection of NE Old Woodinville-Duvall Road and NE Woodinville-Duvall Road

Appellant: Seyed Malek & Sarvenaz Jenabi (UTRC230001)
Farhad Farzami & Seiran Khaledian (UTRC230002)
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Overview

Appellants challenged a Utilities Technical Review Committee (Committee) determination that the local utility's offer of water service was "reasonable." Appellants then moved for summary judgment, arguing that they (not the Committee) got to decide "reasonable"; we denied their motion. Appellants timely moved for reconsideration. After further briefing and extensive re-review, we now find that Appellants' unilateral determination is, odd as it seems, currently definitive as to "reasonable." We encourage Council to consider how it wants the process to work for future, single-source applications. Yet under the current controlling standard we decide this case on, we partially grant Appellants' motion. We remand the application to Public Health.

Procedural Matters

Appellants, whose abutting properties sit within the Woodinville Water District's (District's) service area, sought to connect to the District's water system. Believing the District's offer of service was not "reasonable" due to the costs Appellants would incur implementing it, they brought their challenge to the Committee. After a lengthy process before the Committee, the Committee found that Appellants had failed to meet their burden to show the District's offered water service was not reasonable.

Appellants appealed the Committee's decision to us. Although their initial appeal focused on the merits of the reasonableness question (namely the costs involved with implementing the District's offer), they then switched gears and asserted that, under the 1989 East King County Coordinated Water System Plan (Plan) the Council adopted the following year, they—and not the Committee—got to decide whether the District's offer was "reasonable." Appellants cited to Plan section V.2.A.2, which provides that (emphasis added):

> The review of development applications which propose to use a private well or spring source to serve a single service will be coordinated with [Public Health] in the following manner.
>
> First, if the proposed development is outside the designated service areas of existing purveyors, the application will be referred to [Public Health] for direct action. [Public Health] will develop guidelines for source development which will be available to applicants. In cases where [Public Health] determines that use of a private system would entail a health hazard, construction can be denied. This would require the applicant to contact an appropriate existing adjacent system.
>
> Second, where the proposed development is within the designated service area of an existing utility, [Local Services] will refer the applicant to that utility. The intent of this referral is to bring the applicant and utility together for an examination of the alternatives of connecting to the existing public system. Should the utility not be willing or able to provide timely service *or the applicant considers the conditions of service to be unreasonable,* the applicant will be referred to [Public Health] for action as described in the first instance above.[1]

We entertained briefing on Appellants' motion for summary judgment. We found that, absurd as it seemed, that provision unambiguously handed one disputant (an applicant) a trump card in a dispute between an applicant and a district as to whether the district's offer of service qualified as "reasonable." Yet we did not find that 1989 Plan provision controlling in the light of later

[1] https://kingcounty.gov/~/media/depts/dnrp/documents/EastKingCountyCoordWaterSysPlanVol1-1989.ashx?la=en at p. 98 (§ V.2.A.2) (italics added).

code amendments and the statutory canon of avoiding a reading that produces absurd results. We denied Appellants' motion for summary judgment.

Appellants timely moved for reconsideration, to which Local Services submitted an opposition and Appellants submitted a reply.

Local Services correctly asserts that Appellants seek reconsideration under the wrong legal standard—Civil Rule 59—the reconsideration standard that applies to the courts. An examiner operates not under the court's rules but under comprehensive examiner rules adopted by Council.[2] Often, when counsel or laypeople unfamiliar with the examiner system erroneously bring motions under the civil rules instead of the actual examiner rules, that oversight is outcome-determinative.[3] Here, however, per our rules we may grant a motion for reconsideration if the movant shows that our determination "failed to comply with existing laws, regulations, or adopted policies." Exam. R. XI.A.3. That does not seem materially different from CR 59(A)(8)'s allowance for reconsideration based on an "[e]rror in law"; if anything, the examiner's rule is slightly broader.

Local Services also asserts that Appellants' citations to the rules and regulations from a different part of King County and to other counties are improper at the reconsideration stage, being outside our existing evidential record. An examiner "may reconsider a determination *based on the existing evidential record*." Exam. R. XI.A.3 (emphasis added). Here, however, we do not consider Appellants' citations as evidence but as references to other laws, regulations, and policies.

Analysis

Appellants cite essentially three new sources of argument regarding who gets to decide whether a district's offer of service is deemed "reasonable."

The first is a water system plan from South (as opposed to the East) King County with a flowchart, showing the same decision tree as the (East) Plan: within a designated service area, where the purveyor agrees to serve that property, if the applicant does not agree to the purveyor's conditions, the matter is referred to Public Health. Mot. at 12. That adds nothing to the analysis because that South plan was, like the East plan, from 1989, thus predating even the Growth Management Act, let alone later County developments.

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[2] For future reference, https://kingcounty.gov/en/legacy/independent/hearing-examiner/rules.aspx.

[3] For example, in the discovery context, our rules expressly state that, "Discovery in the examiner process is not designed to duplicate the robust pre-trial discovery common to civil litigation." Exam. R. IX.A. "Contrary to civil litigation, where the thumb is on the scale in favor of greater pre-trial discovery, outside of [expert witnesses and the County file], in examiner proceedings the thumb is on the scale against greater pre-hearing discovery." Exam. R. IX.C.1. We have not infrequently had to disappoint counsel, say, seeking to depose a witness before a hearing, by pointing them to the above examiner rules and to the rule that, "Requests to depose individuals otherwise available for hearing…and, in the absence of compelling circumstances, will not be granted." Exam. R. IX.D.3.

Second, while Appellants focused their initial briefing on the Plan's subsection V.2.A.2, on reconsideration they discuss V.2.A.3. Appellants' note that while A.2 sets the standard for development applications for a single-service connection, A.3 is the subsection involving two or more service connections. They assert that only disputes involving an application for two or more service connections should go to the Committee for resolution. Mot. at 3-6. The Plan does distinguish between applications involving a single service versus multiple services. Yet that argument still essentially relies on the 1989 Plan (which predated the Growth Management Act ushering in the modern era of land-use law) remaining black-letter law and not having been constructively amended in the intervening 34 years by later state or county adoptions.

However, looking afresh at the full language of the most pertinent subsequent County development—section 8 from 1991's ordinance 10095—we find it less clear that the Plan's V.2.A.2 has been constructively amended. Although neither party analyzed the full language of B.3.a in either briefing round, on closer re-reading that section is not as broad a grant of Committee authority over reasonable service disputes as we initially made it out to be.[4] While we treated B.3.a as a blanket grant of jurisdiction for the Committee to determine whether any existing water purveyor can provide service in a timely and reasonable manner, what is now codified as KCC 13.24.090.B.3.a actually says, in its entirety, that the Committee shall:

> Serve as the appeal body to hear issues relating to the creation of new public water systems and the extension of existing public water service within the boundaries of a critical water supply service area *as provided for in the utility service review procedures contained in the coordinated water system plans*, based on whether an existing water purveyor can provide service in a timely and reasonable manner (WAC 246-293-190).

Council's inclusion of the caveat we italicized at least suggests that Council did *not* intend the Committee's designation as the appeal body for timely-and-reasonable disputes to override earlier review procedures in coordinated water system plans. So, our initial finding that KCC 13.24.090.B.3.a superseded the 1989's Plan's review procedures potentially overstated things.

Similarly, re-reading the 1996 amendment to the Plan, the amendment did not definitively override V.2.A.2. The text cites to state authority to establish a dispute resolution process and the amendment's drafters "encouraged [the County] to make certain that the [Committee's] processes facilitate any appeals."[5] Yet it does not revisit the distinction the 1989 plan made between single-source applications and multiple source applications. Per the 1989 plan there was no need to elevate a dispute involving the reasonableness of a district's offer for a single-service

[4] We cited it in our order as the County authorizing the Committee to "[s]erve as the appeal body to hear issues relating to…. whether an existing water purveyor can provide service in a timely and reasonable manner." In hindsight our ellipses left out text that appears relevant to today's discussion.

[5] https://kingcounty.gov/en/-/media/depts/dnrp/documents/EastKingCountyCoordWaterSysPlan-1996.ashx?la=en&hash=382B4D33760C04FA18B53160DE462876 at 41.

water source to any arbiter because, per V.2.A.2, the applicant got to unilaterally decide reasonableness, ending that discussion. And encouraging the County to do something is not the same thing as changing the controlling standard. Council has not substantively changed the appeal language in KCC 13.24.090 since 1991. So, V.2.A.2 has not unambiguously been sent to the scrap heap as we originally surmised.

And that brings us to the third item Appellants inject on reconsideration—examples of how other counties continue to treat single-source applications. In our order we wrote that:

> Typically, if two parties (here an applicant and a water district) are unable to reach an agreement, there is some mechanism whereby another entity (an agency, arbitrator, commission, board, examiner, court, etc.) has authority to weigh the facts and law and decide the parties' dispute. There may be presumptions of which disputant is correct, or rules on who bears the burden of proof, the standard of proof, the mechanism of review, etc., but it would be absurd to hand one disputant a trump card.

We observed that it "would have been equally absurd if the language had read, 'Should the utility consider its conditions of service reasonable, the applicant will be required to…,' and thus allowed a district to unilaterally decide reasonableness." And, per the Court's guidance that we avoid a reading that produces absurd results, because we do not presume that the legislature intended absurd results,[6] we conclude that it would be absurd to find that "one party to a dispute gets to unilaterally render a decision unreviewable by a third-party" in the face of an available third-party (the Committee) to referee such disputes.

However, in its motion for reconsideration Appellants demonstrated that V.2.A.2's seemingly antiquated and fossilized trump card approach for single-connection applications is alive and kicking in three and likely four nearby counties.

- Jefferson County's 1997 plan is not entirely clear. It notes that applicants are directed to the designated utility, to "bring the applicant and water utilities together for discussion and examination" without clarifying who determines whether the utility is not able to provide reasonable service. Yet between the chart distinguishing "Utility Service *Desired*/Available" (emphasis added) and later text distinguishing single-service connections from multiple service connections, the plan at least implies that a single-source applicant may unilaterally refuse a utility's offer [7]

[6] *Tingey v. Haisch*, 159 Wn.2d 652, 664, 152 P.3d 1020 (2007).

[7] https://weblink.cityofpt.us/WebLink/DocView.aspx?id=202765&dbid=0&repo=PTDocuments&cr=1 at 99-101 (§ 5.6).

- Skagit County's 2000 plan is clearer. It includes the same "Utility Service *Desired*/Available" flow chart for a "Private/Single Family Supply" application. Then the text explains that for an individual residential development within a designated service area of an existing utility, the applicant and utility must come together for discussion and examination, but "[s]hould the utility not be willing or able to provide timely service *or the applicant considers the condition of service to be unreasonable*, an individual water system may be developed upon a showing of an adequate water supply."[8]

- Kitsap County's 2005 plan requires an applicant to "obtain a feasibility of water service statement from the applicable water purveyor," but clarifies that "the applicant retains the permissive judgment to either drill a private well or connect to the utility."[9] Kitsap's plan predates *Hirst* and the amendments to RCW 19.27.097 requiring proof of a legal right to draw water (discussed below), but a single-source applicant still gets to unilaterally turn down a purveyor's offer.

- And Snohomish County clarifies that, per its 2011 plan, for building permits for an individual/single family water supply within a designated service area, the applicant and utility are to converse, and the applicant should *consider* the merits of the public water service, but the applicant's acceptance of the utility's service is "totally optional to the building permit applicant, even if the utility is willing to provide service."[10]

In its reply to Appellants' reconsideration motion, Local Services does not dispute Appellants characterization of any of those counties' systems or assert that they are no longer controlling within that county.

Given that three, and likely four, Western Washington counties still essentially follow Plan's V.2.A.2's process and hand an applicant for a single-family residence a trump card on the "reasonable" service question, we can no longer find that a strict application V.2.A.2 would produce an "absurd" result. Given decades of developments, including a functioning tribunal (the Committee) well-versed in "reasonable" service—allowing any one party to a dispute, be it an applicant or a district, a trump card seems a fundamentally bad idea. And that is not our subjective determination; per Comp Plan F-233, in both urban growth and rural areas:

> all new construction… shall be served by an existing Group A public water systems except in the circumstance when no Group A public water system can

[8] https://www.skagitcounty.net/PlanningAndPermit/Documents/CWSP2000/2000CWSP.pdf at § 5.4.1 (emphasis added).

[9] https://kitsappublichealth.org/environment/files/regulations/CWSP2005.pdf at 3 (§ 1.2.10).

[10] https://snohomishcountywa.gov/DocumentCenter/View/8062/97---Coordinated-Water-System-Plan-Implementation-PDF?bidId= at 3.

> provide service in a timely and reasonable manner per [RCW] 70.116.060 and 43.20.260 or when no existing system is willing and able to provide safe and reliable potable water with reasonable economy and efficiency per [RCW] 19.27.097.

That absolute language of "all" and "shall" is undercut by a system where an individual applicant can essentially say, "No thanks" to a purveyor's service offer.

Thus, we encourage Council to review KCC 13.24.090.B.3.a and to consider removing some of the caveats to, or to otherwise extending, the Committee's jurisdiction to hear *all* disputes over "reasonable" service. It seems odd that a 34-year-old Plan—one that predated GMA and the modern Committee appeal process and seemingly inconsistent with the Comp Plan—would still control the dispute resolution mechanism today. Moreover, our ruling today seemingly applies not only to these Appellants, or even to future single-source applicants in East King County, but to those in South King County and perhaps those covered by other County plans with similar plan language as well. The topic seems worth another look sooner rather than later.

However, being a bad idea is not the same thing as producing an "absurd" result. As three (or four) other counties currently apply a decision tree similar to section V.2.A.2, we can no longer call the result produced by section V.2.A.2 "absurd." And outside of the absurdity category, regardless of our policy preferences, our role is to interpret laws "as they are written, and not as we would like them to be written." *Brown v. State*, 155 Wn.2d 254, 268 (2005) (citations omitted).

Local Services objects that Appellants' reliance on section V.2.A.2 is "not only contrary to county code provisions" (a premise we now reject) but to "state law as well." Opp. at 4. That was true of Appellants' *initial* summary judgment motion. There, Appellants requested not only that we reverse the Committee's determination on whether the district's offer was "reasonable," but they asserted that, "The only basis for denying Appellants' request to construct a private well is if Public Health determines that construction of the well 'would entail a health hazard.'" Mot. at 9.

However, as we explained in our order, Appellants' assumption that a finding that the District's offer of water services is "unreasonable" defines the next steps and means they can site a private well unless there is a health hazard, was incorrect on several levels. Per V.2.A.2 itself, their application is to be treated as development outside an existing purveyor's designated service area and explicitly notes that guidelines for source development will be generated to apply for such applications. One of the guidelines developed since 1989 was KCC 13.24.138, which sets a priority ranking for water uses. Even under the Plan, no applicant within a designated service area is entitled to more favorable treatment than other applicants outside a designated service area.

Moreover, we explained that the County had in 1990 [when it adopted the 1989 Plan], and has today, no authority to overrule state law. RCW 19.27.097 provides that:

> *Each applicant* for a building permit of a building necessitating potable water *shall provide* evidence of an adequate water supply for the intended use of the building. Evidence may be in the form of a water right permit from the department of ecology, a letter from an approved water purveyor stating the ability to provide water, or another form sufficient to verify the existence of an adequate water supply. An application for a water right shall not be sufficient proof of an adequate water supply,

though there are different rules for different water resource inventory areas.

Our finding that a district's offer is "unreasonable" is in no way a license to override state law or even a finding on what state law requires; it only resolves the dispute here between Appellants and the District over whether the District's offer of service for a single hookup was "reasonable." Our ruling today simply puts Appellants and the County in the same place as they would be if, say, the Committee had determined that the District's offer was not reasonable.

In neither briefing round has Local Services pointed to anything in state law that dictates *who* gets to decide whether a district's offer of service is "reasonable" for a particular class of cases.

- Local Services' initial citation to *Hirst* is unavailing because *Hirst* involved permit-exempt wells and the right to draw water and seems irrelevant to who—in a dispute between a district and applicant—gets to decide whether a district's offer of service is reasonable.

- RCW 43.20.260 discusses service being available "in a timely and reasonable manner," without mandating who decides reasonableness.

- RCW 70A.100.060(5) allows the pertinent legislative authority (here, the Council) to "develop and utilize a *mechanism* for addressing disputes that arise in the implementation of the coordinated water system plan," without mandating anything specific about that mechanism.

- Within WAC 246-293-190, subsection (a)(i) requires an existing purveyor to provide service (within their area) in a "reasonable" manner, while subsection (b)(i) requires applicants outside a service area to inquire whether a nearby purveyor will provide water service in a "reasonable" manner, but nowhere does that WAC mandate who gets to determine whether a service offer is "reasonable."

Per Local Services' argument, Snohomish's, (likely) Jefferson's, Kitsap's, and Skagit's similar procedures for those seeking to develop a single-family home would also violate state law. That is certainly possible. Just as *Hirst* upended a seemingly well-settled system for permit-exempt

wells, it is possible the courts might step in again and change the landscape. But for now, there is no county or state rule superseding V.2.A.2. for single-source residential applications.

Conclusion

Per section V.A.2.A of the 1996 Plan, once each applicant considered the District's conditions of service to be unreasonable, there was no call for the Committee to make on whether the District's offer was, by some objective standard, reasonable. Appellants' determination was conclusive, meaning they were to be treated like any other building permit applicant with no "reasonable" offer of water service from the designated service area's purveyor. The Committee had no authority to second-guess their determination.

Nothing we say here today is designed to dictate what the next steps are for these Appellants or any single-hook-up building permit applicant with no "reasonable" water service offer. An examiner has no general appellate authority over building permits. KCC 20.20.020.E (Type 1 permits have no administrative appeal). KCC 20.22.040.R gives the examiner jurisdiction over appeals of Committee "determinations on water service availability under KCC 13.24.090," but as explained above there was no "reasonableness" determination for the Committee to make here about the District's offer.

We remand this matter to Public Health to proceed as it would with any other building permit application where there is no "reasonable" water service offer from a district.

The examiner's role is at an end. We cancel our March 13 and 14, 2024, hearing.

DATED December 22, 2023.

David Spohr
King County Hearing Examiner

NOTICE OF RIGHT TO APPEAL

King County Code 20.22.040 directs the Examiner to make the County's final decision for this type of case. This decision shall be final and conclusive unless proceedings for review of the decision are timely and properly commenced in superior court. Appeals are governed by the Land Use Petition Act, Chapter 36.70C RCW.

December 22, 2023

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CERTIFICATE OF SERVICE

SUBJECT: Department of Local Services file nos. **UTRC230001 and UTRC230002**

WOODINVILLE WATER DISTRICT
Appeal of Timely and Reasonable Water Service

I, Lauren Olson, certify under penalty of perjury under the laws of the State of Washington that I transmitted the **ORDER ON RECONSIDERATION** to those listed on the attached page as follows:

☒ EMAILED to all County staff listed as parties/interested persons and parties with e-mail addresses on record.

☒ placed with the United States Postal Service, through Quadient-Impress, with sufficient postage, as FIRST CLASS MAIL in an envelope addressed to the non-County employee parties/interested persons to addresses on record.

DATED December 22, 2023.

Lauren Olson

Lauren Olson
Legislative Secretary

Cardwell, Daniel
Department of Local Services

Cepeda, Carlos
Helsell Fetterman, LLP

Dirini, Nidal
Helsell Fetterman, LLP

Gribben, Brandon
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