

**BEFORE THE HEARING EXAMINER
FOR ISLAND COUNTY**

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| In the Matter of the Appeal of |) | No. SPR 188/21 |
| |) | No. APP 481/21 |
| Kyle Green |) | |
| |) | FINDINGS, CONCLUSIONS, |
| <u>Of a Site Plan Review</u> |) | AND DECISION |

SUMMARY OF DECISION

This appeal concerns whether Island County erred in approving South Whidbey Homeless Coalition’s request for a Type II Site Plan Review to allow for the first phase of a proposal to convert a vacant church building for an overnight shelter for up to 12 guests, with the second phase of the proposal to include up to 30 guests. Because the County’s review process in this matter allowed for the fully identified project to be reviewed in a piecemeal fashion, bypassing the Type III review process designed to address emergency night-to-night shelter uses in the county for up to 30 guests without addressing the full impacts of the proposed use, the appeal is **GRANTED**.

SUMMARY OF PROCEEDINGS

Hearing Date:

The Hearing Examiner convened an open record appeal hearing on February 28, 2022, using remote access technology. The record was left open until March 11, 2022, to allow the parties to submit closing briefs.

Testimony:

The following individuals presented testimony under oath at the open record hearing:

Appellant Witnesses:

Michael Thorpe
Judy Thorpe
Bethany Hestbeck
Steve Hutchinson
Al Lindell
Linda Cesar
Reid Shockey
Kyle Green, Appellant

County Witness:

Mary Engle, County Planning Director

Applicant Witnesses:

None

Findings, Conclusions, and Decision

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Kyle Green represented the Appellant at the hearing.
Shellie Moore represented the Applicant at the hearing.
Planning Director Mary Engle represented the County at the hearing.

Exhibits:

See Attachment A, following the decision, for a list of exhibits and motions, orders, briefs, and other pleadings.

The Hearing Examiner enters the following findings and conclusions based on the evidence received:

FINDINGS

Background and Application

1. On September 14, 2020, South Whidbey Homeless Coalition (Applicant) submitted to Island County (County) an application for a zoning code interpretation (No. 234/20 ZCI) concerning a proposal to convert a vacant church located on an approximately 1.94-acre parcel at 331 Morris Road¹ into an emergency overnight shelter for up to 30 guests. The County determined that the ZCI application was complete on September 18, 2020. On October 7, 2020, the County published notice of the ZCI application in the *Whidbey News Times* as required under Island County Code (ICC) 16.19.140.A.1, with a comment deadline of October 14, 2020. ICC 17.03.190.B.3.e provides that applications for a zoning code interpretation (ZCI) shall include a “description of a schedule for phases of the project.” The ZCI application materials included in the record before the Hearing Examiner do not provide any information suggesting that the Applicant intended to complete the proposed 30-person emergency shelter in phases, and the County’s notice materials for the ZCI request states that the proposal is to “[o]perate an emergency night-to-night shelter for up to 30 people.” *Exhibit C-1; Exhibit A-20; Exhibit A-39.*
2. The County received 106 comments on the proposal from 99 members of the public in response to its ZCI application notice materials, many of which expressed opposition to the proposed overnight shelter use of the vacant church. Some of the comments expressing opposition to the proposal during this public comment period expressed concerns about the availability of services to overnight shelter guests in a rural area and about the potential crime impacts to the neighborhood from shelter guests. Because requests for a zoning code interpretation are processed as Type II administrative decisions that do not include an open record hearing, input on the proposal from members of the public was limited to the written comments submitted during the applicable comment period. *ICC 16.19.040; ICC 17.03.190.C. Exhibit C-1; Exhibit A-20; Exhibits A-30 through A-37; Exhibit A-39.*

¹ The property is identified as Island County Assessor’s Parcel No. R13101-331-0830. *Exhibit C-1.*

3. Although the record currently before the Hearing Examiner in this appeal from a site plan review (SPR) approval does not contain a formal code interpretation for application No. 234/20 ZCI,² the decision approving the SPR references the County’s prior code interpretation, stating in relevant part:

A recent Zoning Code Interpretation (ZCI 234/20) determined a “night-to-night” shelter is a permitted use in the Rural zone. . . .

1. Emergency night-to-night shelters shall be defined as follows. A facility providing, without charge, single-night, temporary lodging, with or without meals, for people with no ordinary or regular home or residence address. Emergency night-to-night shelters shall be contained within the structure of, and operated by a public institution, not-for-profit corporation, or charitable organization. Emergency night-to-night shelters shall differ from group homes, assisted living facilities, supportive housing, and other forms of housing in that emergency shelters shall not provide for permanent residency or extended services to the same guests.
2. Emergency night-to-night shelters for 12 people or less shall be a Type II decision. . . .
3. Emergency night-to-night shelters for 13-30 people shall be a Type III decision and subject to the criteria for Class B essential public facilities per ICC 17.03.180.CC. . . .
4. Parcels 2.5 acres or greater in size shall be preferred for emergency night-to-night shelters for 13-30 people. For parcels less than 2.5 acres, justification shall be provided which demonstrates how neighboring properties shall not be affected by noise, lighting, glare, unsightly structures or parking areas, or other nuisances. . . .
5. All Emergency night-to-night shelters located farther than a half mile from an Urban Growth Area shall provide a location alternatives analysis consistent with the provisions of ICC 17.03.180.CC.3.c. . . .

² In addition to not being included in the record currently before the Hearing Examiner, it is unclear whether a formal code interpretation was made available to the public or whether the public was provided with an opportunity to appeal the code interpretation, as contemplated under ICC 17.03.190.C (stating that applications for a code interpretation shall follow the review process for Type II decisions) and ICC 16.19.190.B (providing the procedures for appeal of a Type II decision).

6. Emergency night-to-night shelters in the Rural Zone shall not be permitted if the extension of public sewer service is required. Emergency night-to-night shelters must be designed so that onsite sewage disposal systems are adequate to support the facility. . . .
7. Emergency night-to-night shelters must be served by public water systems. . . .
8. Emergency night-to-night shelters shall take primary access, in order of priority, off a county arterial, county collector road highway, or state highway. An access permit may be required. . . .
9. Emergency night-to-night shelters shall not be located within any Aircraft Accident Potential Zone Overlays; to include the Clear Zone, APZ 1, and APZ II. . . .
10. Food service for guests and staff of the shelter is permitted in conjunction with an emergency night-to-night shelter. Food service shall conform with the provision of Title VIII of Island County Code for health, welfare, and sanitation. Food sales, table service, and cooked-to-order food is prohibited except as part of an approved restaurant. . . .
11. All emergency night-to-night shelters shall be subject to the following Island County Code provisions:
 - a. Lighting, site coverage, and non-residential design and screening guidelines set forth in ICC 17.03.180;
 - b. The provisions of Title VIII of Island County Code for the service of potable water sewage disposal, solid waste handling, and food service;
 - c. The provisions of Title XI of Island County Code for land development, clearing and grading, stormwater and surface water, and transportation concurrency;
 - d. Where applicable, the provisions of Title XIII of Island County Code for water system and fire flow standards; and
 - e. The provisions of Title XIV of Island County Code for building and construction. . . .
12. Review of applications for emergency night-to-night shelters shall also address:
 - a. Transportation of guests to and from the site;
 - b. Hours of operation;

- c. Staffing of the facility;
- d. Proximity of the shelter to services for the guests;
- e. Noise management; and Management of complaints from neighboring residents or businesses.

Exhibit C-1.

4. Following the code interpretation discussed above, the Applicant applied for Type II SPR administrative approval for “Phase I” of the church conversion project to allow up to 12 guests at the proposed overnight shelter, with a “Future Phase II” of the project identified as requiring additional permitting to allow up to 30 guests at the shelter. *Exhibit C-1.* Regarding phasing of the project, the Applicant specifically stated in the SPR application form, “Seeking Type II approval initially (up to 12 resident[s]/guests) to be closely followed by Type III approval (up to 30 guests).” *Exhibit A-23.* The County determined that the Type II SPR application was complete on June 3, 2021, and provided notice of the application consistent with ICC 16.19.140.A.1, with a comment deadline of June 24, 2021. The County received 49 comments on the proposal in response to its notice materials, the majority of which expressed opposition to the proposal. The County also received a petition opposing the project that contained approximately 430 signatures. Comments opposing the project generally raised concerns about the property’s distance from services and necessities, shelter guests leaving the property and wandering the local area, the size of the property, water and septic conditions, noise impacts, the related zoning code interpretation being incorrect or incomplete, and potential crime impacts. As with the earlier zoning code interpretation, the Type II administrative process for reviewing the SPR request to allow the first phase of the proposal does not include an open record hearing component and, therefore, input on the proposal from members of the public was limited to the written comments submitted during the applicable comment period. *Exhibit C-1; Exhibit A-23.*
5. While review of the Type II SPR application was still ongoing, the Applicant submitted its application for a Type III SPR for the second phase of the project to allow up to 30 shelter guests. The County deemed the Type III SPR application complete on August 30, 2021. The same day, the County routed the Type III SPR application materials to reviewing departments and agencies and requested that any comments on the proposal be submitted by September 22, 2021. *Exhibit A-111; Exhibit A-113.*
6. On December 3, 2021, (well after the County deemed complete the application for a Type III SPR to allow up to 30 shelter guests) the County issued a decision³ approving, with conditions, the requested Type II SPR to allow for Phase I of the proposal. In reviewing the request for a Type II SPR to allow the first phase of the proposed emergency shelter use, the County determined that Phase I was categorically exempt from SEPA environmental review, in accord with WAC 197-11-800(6)(b)(i)-(ii), because the request involved a change

³ The County’s decision approving a Type II SPR for phase I of the proposal is contained within a document titled, “Staff Report & Recommendation Site Plan Review – Type II SPR 188/21.” *Exhibit C-1.*

of use for an existing building that would not change the character of the building. The County also determined that, with conditions, the proposal would meet the requirements for a night-to-night emergency shelter use in the Rural zoning district pursuant to the County's code interpretation described above, noting in relevant part:

- Whidbey Homeless Coalition's phase one plan call for up to 12 people and is being processed as a Type II decision.
- The proposed use is only up to 12 people in this phase, making a Type III decision unnecessary for this phase.
- The parcel is only approximately 1.94 acres, however, as phase one only requests approval for up to 12 people, the preference for parcels larger than 2.5 acres does not apply. The Applicant has provided a letter stating that the large field and parking lot can act as a buffer between the building and the neighbors.
- The Applicant provided a letter addressing requirements for a location alternatives analysis and detailing how the shelter's function or service areas is best served by a location outside of an Urban Growth Area.
- Public sewer facilities do not have to be extended to services the parcel. A Septic Permit has been applied for with Island County Environmental Health for the project.
- The project would be served by public water system 0055X, The Haven Well System, a group A water system located on-site.
- Access permit PW21-0483 has been issued for the site for ingress and egress off of Morris Road.
- The project is no located in a mapped Aircraft Accident Potential Zone.
- No food service has been proposed as part of phase one.
- County Departments provided comments on the proposal's compliance with relevant code sections.
- The Applicant's letter addresses requirements related to transportation of shelter guests, hours of operation, staffing of the facility, proximity of the shelter to services, noise management, and management of complaints from neighboring residents or businesses.

Exhibit C-1.

7. The County's decision approving the Type II SPR to allow Phase I of the proposal stated that the decision could be appealed by December 17, 2021. *Exhibit C-1.*

Appeal

8. On December 16, 2021, Kyle Green (Appellant), timely appealed the County's decision approving a Type II SPR to allow Phase I of the proposal. The appeal contends that, in approving the SPR, the County failed to adhere to several regulatory standards, address concerns from neighbors and local businesses, or impose reasonable conditions to address impacts of the proposed use. The Appellant later filed an appeal statement on December 23,

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2021, which requested that the Hearing Examiner reverse the County's SPR decision, asserting that the decision was arbitrary, capricious, and contrary to law. *Appeal; Exhibit A-130; Exhibit A-131.*

9. On January 3, 2022, the Appellant submitted a letter prepared by Reid Shockey, of Shockey Planning Group, Inc., that addressed the alleged errors and the bases for appeal of the SPR decision. Mr. Shockey's letter asserts:
- The County should have followed the review procedures for, and analyzed the impacts of, the ultimate buildout of an overnight shelter facility for 30 occupants. The County is allowing the public to comment on only a part of a larger project without a complete assessment of the total long-range impacts.
 - The County should have conducted a SEPA environmental analysis of the entire project.
 - Actions taken by the County Commission to fund and facilitate the acquisition of the subject property prior to permitting being completed tainted the permit review process.
 - The decision document labeled "Staff Report & Recommendation" is misleading and is signed by a County Planner rather than by the County Planning Director. Although decisions may be signed by the Director's designee, this designation does not appear in the "Staff Report & Recommendation." A corrected decision document addressing public comments must be reprocessed. If not reprocessed, a non-decision will allow the first phase of a two-phase project to proceed without assessing the impacts of, or setting appropriate conditions for, the full project buildout.
 - The County's code interpretation amounts to a de facto code waiver. Under ICC 17.03.180.L, the minimum lot size for group homes in the Rural zoning district serving 7 to 12 persons is 2.5 acres. The code interpretation allowing for the emergency night-to-night shelter use in the Rural zone contains no minimum lot size requirement for shelters serving fewer than 13 guests and contains only a preference for a minimum 2.5-acre property for shelters serving 13 to 30 guests. The code interpretation is being used as a waiver or variance, which is not allowed when the code standards is clear. If another standard is desired, the code must be formally amended.
 - The approved site plan does not contain enough detail to serve its intended purpose to depict how impacts would be mitigated. Parking is not specified, and buffer areas do not reflect the type and location of vegetation that would be used to buffer the use from neighboring properties.
 - Mitigation of impacts from a full buildout of the shelter should include an agreed code of conduct to protect the health, safety, and welfare of the shelter guests, employees, and surrounding residents and businesses.

Letter from Reid Shockey - Alleged Errors and Basis for Appeal, dated January 3, 2022.

10. The Hearing Examiner issued a pre-hearing order on January 7, 2022, which set an appeal hearing date for February 28, 2022, and provided instructions and deadlines for the filing of dispositive motions and the submission of witness lists and documentary evidence. *Hearing Examiner's Pre-Hearing Order, dated January 7, 2022.*
11. On February 7, 2022, the County submitted a document entitled "Island County Dispositive Motion." Although this document was labeled as a dispositive motion, it did not provide any argument for dismissing the appeal. On February 11, 2022, the Appellant requested a continuance of the scheduled appeal hearing on the grounds that he had not received documents from the County pursuant to a Public Records Act (PRA) request. On February 14, 2022, the Appellant submitted a letter from Mr. Shockey addressing the County's motion to dismiss. On February 18, 2022, the Hearing Examiner entered an order denying both the County's dispositive motion and the Appellant's request for a continuance. *County Dispositive Motion, dated February 7, 2022; Appellant's Request for a Continuance, dated February 11, 2022; Letter from Reid Shockey – Response to Dispositive Motion, dated February 14, 2022; Hearing Examiner's Decision on County's Dispositive Motion and Appellant's Request for a Continuance, dated February 18, 2022.*
12. On February 22, 2022, Mr. Shockey requested a continuance of the appeal hearing due to technological issues with the County's website that, he asserted, prevented him from reviewing information and correspondence regarding Mr. Green's appeal. On February 24, 2022, the Hearing Examiner entered an order denying Mr. Shockey's request. The Hearing Examiner's February 24, 2022, order noted that Mr. Shockey did not appeal the County's SPR decision and is not representing Mr. Green in his appeal of the SPR decision. Shortly after issuing the order denying Mr. Shockey's continuance request, the Appellant filed a request for a continuance of the appeal hearing, asserting that the continuance was necessary to allow him to review information provided by the County in response to his PRA request. On February 25, 2022, the Hearing Examiner entered an order denying the Appellant's request for a continuance, noting that the request was nearly identical to the Appellant's previous request for a continuance that was denied on February 18, 2022, and that nothing of note had changed since that date. *Reid Shockey's Request for a Continuance, dated February 22, 2022; Hearing Examiner's Decision on Mr. Shockey's Request for a Continuance, dated February 25, 2022; Appellant's Second Request for a Continuance, dated February 24, 2022; Hearing Examiner's Decision on Appellant's Continuance Request, dated February 25, 2022.*

Appeal Hearing

13. At the outset of the appeal hearing, the parties discussed the proposed exhibits and other procedural matters. No objections to the admission of any exhibits were made. In addition, Mr. Green renewed his request to have the hearing continued until the County had responded to all outstanding requests he had made under the PRA. The Hearing

Examiner denied Mr. Green's request, noting that he had already addressed this issue in several earlier decisions/orders. *Oral Ruling of the Hearing Examiner.*

Appellant's Witnesses

14. Area resident Michael Thorpe testified generally about his concerns with the proposal and stressed his belief that, because the County facilitated the purchase of the subject property, there has been a conflict of interest inherent in the County's review process. Mr. Thorpe noted that other jurisdictions have addressed siting homeless shelters through the Comprehensive Plan process, such as the City of Bellevue, and that this public process should be used to allow citizen input in such matters. Finally, Mr. Thorpe noted that one of the Appellant's witnesses, Traci Clements, was unable to attend the appeal hearing, and, accordingly, he read a statement of opposition from her (Exhibit A-133) into the record. *Testimony of Mr. Thorpe.*
15. Judy Thorpe testified about her professional background as a safety professional and officer and stressed that, with homeless individuals, stability to address basic needs (such as regular access to restroom and shower facilities) is vital, along with access to drug/alcohol counselors and social workers, and access to a safe environment. Ms. Thorpe stated that, with the subject proposal, the only consideration seems to have been the convenience of finding an available building. Unfortunately, however, the site is not in a location where law enforcement could quickly respond to issues; there is a gun range nearby; and the site is not close to the types of resources that are necessary to address the needs of the proposed clientele. Ms. Thorpe also expressed concern over the noise impacts the neighboring airfield would have on those staying at the shelter. *Testimony of Ms. Thorpe.*
16. Bethany Hestbeck testified that she has young children and is concerned about the detrimental impacts the proposal will have on neighboring residences. *Testimony of Ms. Hestbeck.*
17. Steve Hutchinson testified that he has been a long-time area resident and believes the subject site is inappropriate for the proposed use. In particular, Mr. Hutchinson stressed his belief that the nearby airfield would have detrimental impacts for those residing at the shelter, particularly from noise. Mr. Hutchinson noted that he has spoken with Navy personnel about the proposal and they conveyed a belief that the site is inappropriate for the proposed use but, ultimately, left the decision to the County. Mr. Hutchinson also expressed concern over whether the former church can be appropriately retrofitted for the proposed use, and stressed that the area saw an increase in crime after a similar use (Ryan House) began in the area. *Testimony of Mr. Hutchinson.*

18. Al Lindell testified about his concerns, and the concerns' of others, related to the proposal being sited so close to an existing gun range and potential liability issues related to trespass in particular. *Testimony of Mr. Lindell.*
19. Linda Cesar testified that she has been an area business owner but, with Ryan's House opening and, now, this proposal, she intends to sell her business. She believes facilities like these have led to increased crime (in particular theft) in the area and that the community lacks adequate resources to appropriately address all the problems that come with operation of facilities like these. *Testimony of Ms. Cesar.*
20. Reid Shockey testified that he is the President of Shockey Planning Group, Inc., which has advised private and public sector clients on land use permitting issues for 41 years. He asserted that the County made several procedural errors in reviewing the Applicant's proposal, particularly regarding the zoning code interpretation and SEPA environmental review. Mr. Shockey stated, for instance, that the entire proposed project should have been reviewed by the Hearing Examiner under the County's Type III process for review of a class B essential public facility use and that the permit should not have been deemed categorically exempt from SEPA environmental review. He also stated that County code required the County Planning Director to issue and sign both the zoning code interpretation and the determination that the project was exempt from SEPA but that the code interpretation and SEPA determination were contained only within the SPR decision signed by a County planner.

Mr. Shockey noted that the County was fully aware that the Applicant intended to convert the prior church use of the property for a 30-guest overnight shelter facility, and he asserted that the County violated the code and SEPA by processing the application in a piecemeal fashion. He acknowledged that a proper SEPA analysis of the project may result in a determination of nonsignificance or mitigated determination of nonsignificance but asserted that a proper SEPA analysis must be conducted to ensure that the cumulative impacts of the entire project would not have a probable significant adverse impact on the environment. Mr. Shockey stated that the proposal should be resubmitted with a proper SEPA environmental checklist addressing a 30-guest facility and that decision should be reissued with the proper signatures indicating the Planning Director's review and approval. He also noted that ICC 17.03.190.A provides that the purpose of a code interpretation is to clarify ambiguities the County's zoning code, and he asserted that the County's code interpretation here was flawed because it modified unambiguous language requiring a minimum 2.5-acre parcel to serve the Applicant's proposed use. Mr. Shockey stated that he does not believe there was any malicious intent to bypass code and state law requirements but that he believes the County erred by processing the project application in a piecemeal fashion. He testified that he previously worked as the Community Developer Director for the City of Everett and, in that capacity, if a project

came before him with SEPA exempt and SEPA non-exempt components, he would require the Applicant to submit a SEPA environmental checklist.

In response to questioning from County Planning Director Mary Engle on cross-examination, Mr. Shockey testified that he has previously worked within the planning department of a city government. He stated that, in his work as a land use consultant, he has advised clients that have made changes to a project. Mr. Engle also stated that, in his work as the Community Development Director for the City of Everett, he has likely approved an application for a project and then received a new application for another portion of the project. *Testimony of Mr. Shockey.*

21. Appellant Kyle Green testified that he moved to a rural area of Whidbey Island approximately three years ago so that he would have only a few, sparse neighbors, and he noted that the Applicant's proposal would impact the rural nature of the community by allowing it to bus people from Oak Harbor to the proposed location and back on a daily basis. He described his experience working in the building trade and his familiarity with building and zoning codes. Mr. Green stated that, in his opinion, the County subverted code requirements by reviewing and issuing SPR approval for only one phase of the proposal. He also stated that the site plan review approval for Phase I of the proposal would endanger the lives of shelter guests because the existing church building was not designed for the proposed emergency shelter use.

In response to questioning from County Planning Director Mary Engle on cross-examination, Mr. Green stated that, although not all of his pending PRA requests specifically relate to documents reviewed or generated as part of the County's Type II SPR decision, all of the PRA requests are relevant to the appeal from that decision. *Testimony of Mr. Green.*

County's Argument and Witness

22. County Planning Director Mary Engle represented the County at the hearing and testified on the County's behalf. Ms. Engle stated that this appeal concerns only the individual SPR permit approved by the County. She noted that, during the preapplication process associated with permit review, an applicant is provided with an opportunity to meet with County staff or an outside entity to discuss the proposed project requiring a permit. Ms. Engle explained that, during the preapplication conference, County staff heard the Applicant's initial plans, but noted that the Applicant may change these plans prior to submitting a permit application. She stated that, in her experience, several Applicants change their plans in light of information provided by County staff regarding what can and cannot be done on their property. Ms. Engle asserted that the application for Phase I of the project was processed correctly by County staff. Regarding the zoning code interpretation referenced in the Type II SPR decision, she testified that the interpretation predated her time at the County and that she does not believe that the interpretation

decision was made available to the public. Ms. Engle stated that the Applicant submitted application materials for the second phase of the project while the Type II SPR application for the first phase of the project was still under review. She acknowledged that, typically, a phased development project involving different levels of review is reviewed by the highest review authority through a consolidated permit process, but she stated that, here, the County administratively reviewed the first phase of the proposal through the Type II review process because it was the only phase of the proposal included with the application. Ms. Engle explained that the County approved the first phase of the proposal consistent with code requirements because it was not aware at that time whether the Applicant would ever proceed with the second phase of the proposal.

In response to questions from Mr. Green on cross-examination, Ms. Engle testified that she has been with the County planning department since August 2020 and that she previously worked as the County Assessor. She stated that the County code allows for phased development and that this allowance for phased development does not conflict with SEPA because some parts of a project may be exempt. Ms. Engle explained that the only modifications to the existing church structure that would be required for the first phase of the proposal would be modifications required to meet fire flow standards, as noted in the staff report and recommendation for the Type II SPR permit. *Argument and Testimony of Director Engle.*

23. At the close of the hearing, the Appellant, Mr. Green, renewed his request for a continuance, which the Hearing Examiner denied. The Hearing Examiner left the record open until March 11, 2022, to allow the parties to submit closing briefs. *Argument of Mr. Green; Oral Ruling of Hearing Examiner.*

Closing Briefs

24. Following the appeal hearing, the Appellant filed a closing brief, which asserts:
- The County committed procedural and substantive errors during its review of the Applicant's proposal, which require reversal of the SPR determination and rejection of the application.
 - Review of the application violated the SEPA review process designed to ensure comprehensive and unitary review of a project's environmental impacts. The Applicant has attempted to thwart SEPA by seeking review on only a portion of the project. This is what is known as 'piecemeal review' and is prohibited by Washington State law.
 - Piecemeal review is only permissible if the first phase of the project is independent of the second and if the consequences of the ultimate development cannot be initially assessed. *Cathcart-Maltby-Clearview Comm'ty Coun. v. Snohomish Cy.*, 96 Wn.2d 201, 210, 634 P.2d 853 (1981).
 - Piecemeal review is impermissible where a "series of interrelated steps [constitutes] an integrated plan" and the current project is dependent upon

subsequent phases. *Cheney v. Mountlake Terrace*, 87 Wn.2d 338, 345, 552 P.2d 184 (1976).

- Here, the Applicant has already submitted plans to expand the number of persons housed in its facility and, therefore, the first phase of the project is not independent of the second phase. For this reason alone, the Hearing Examiner should require that the entire project be evaluated under SEPA.
- The project should also be rejected on substantive grounds. The Applicant sought approval of a site plan that is not allowed under the code. The code requires a minimum lot size of 2.5 acres for the proposed facility. County staff cannot subvert the code simply because a project is a good idea or is needed.

Appellant's Closing Brief, dated March 10, 2022.

25. Shellie Moore submitted a closing brief on behalf of the Applicant, which asserts:

- The Whidbey Homeless Coalition was formed in 2014 to address the growing issue of homelessness in our community. Our mission is “Making homelessness a brief and rare experience on Whidbey Island.”
- In January 2021, we were able to purchase a vacant church for a permanent location for a night-to-night shelter due to a grant from the Washington Department of Commerce. Washington State has mandated that all counties provide emergency shelter, and it was proper for Island County to partner with our non-profit organization to help fulfill that obligation.
- The proposed emergency shelter is consistent with Comprehensive Plan goals and policies promoting fair access to housing and shelter for all persons; identifying appropriate locations to support and facilitate the development of emergency shelters and short-term housing for those in need; and ensuring that community housing and shelter needs are considered and addressed in county housing policies, programs, funding, and local zoning regulations. The user's guide in Chapter 17 of the zoning code states that the Comprehensive Plan shall control when there is a conflict between the Comprehensive Plan and the zoning code.
- The Applicant has been diligent in posting notice for and holding community meetings, as well as in responding to public concerns. The County has thoughtfully considered and catalogued the public concerns raised at community meetings and received by letters, emails, and petitions.

Applicant's Closing Brief, dated March 8, 2022.

CONCLUSIONS

Jurisdiction

The Hearing Examiner has authority to hear and decide appeals from Type II administrative land use decisions, including decisions approving site plan review. *ICC 16.13.110.A.9.; ICC 16.15.090; ICC 16.19.040; ICC 16.19.180; ICC 16.19.190.B.1.*

Review Criteria

The responsibility of the Hearing Examiner is to review the County decision and to determine, based on facts and law, if an error was made. The Appellant has the burden of proof to show that the County erred when denying the Appellant's request. The Hearing Examiner must accord substantial deference to the County's interpretation of its own ordinances. *Cockle v. Department of Labor and Industries*, 142 Wn.2d 801, 829, 16 P.3d 583 (2001); *Doe v. Boeing Co.*, 121 Wn.2d 8, 15, 846 P.2d 531 (1993); *Superior Asphalt & Concrete v. Dep't of Labor & Indus.*, 84 Wn. App. 401, 405, 929 P.2d 1120 (1996); *McTavish v. City of Bellevue*, 89 Wn. App 561, 564, 949 P.2d 837 (1998).

The Hearing Examiner's duty is to review the entire record before him to determine whether the Appellant has met this burden. To properly review the County's determination, the Hearing Examiner must decide what facts are important to make a decision, determine those facts with reference to specific exhibits or testimony, draw conclusions from those facts, and make a decision based on those conclusions. See *Weyerhaeuser v. Pierce County*, 124 Wn.2d 26, 873 P.2d 498 (1994).

The Hearing Examiner reviews the County's decision to determine if it is clearly erroneous, after allowing for such deference as is due to the construction of a law by the agency with expertise. Under the "clearly erroneous" standard of review, the Hearing Examiner examines the entire record in light of the policy set forth in the ordinance and reverses the decision only if the Hearing Examiner has a definite and firm conviction that the County made a mistake. *Seven Hills, LLC v. Chelan Cnty.*, 495 P.3d 778, 784 (2021); see *Buttnick v. Seattle*, 105 Wn.2d 857, 860, 719 P.2d 93 (1986). When applying the clearly erroneous standard, the Hearing Examiner must not substitute his own judgment for the judgment of the County. See *Buechel v. Department of Ecology*, 125 Wn.2d 196, 202, 884 P.2d 910 (1994). In other words, the County's decision must be upheld if substantial evidence supports it and the Hearing Examiner is not left with a definite and firm conviction that a mistake has occurred.

Conclusions Based on Findings

The Appellant has met its burden of showing that the County erred in approving South Whidbey Homeless Coalition's request for a Type II Site Plan Review to convert a vacant church building to an overnight shelter for up to 12 guests, because the County was fully aware that the full scope of the proposal would include an overnight shelter use for up to 30 guests at the time such decision was rendered. A stated purpose of the County's site plan review (SPR) procedures is to "provide a predictable and clear review process for such development proposals." ICC 16.15.010.B. Consistent with this purpose, ICC 16.15.040 provides detailed guidelines on the requirements for an SPR application, including the requirement that the application contain a "description of and schedule for phases of the project." ICC 16.15.040.C.5. In addition, ICC 16.15.090 provides that SPR applications shall be processed under the land use review process of Chapter 16.19 ICC. Similar to the purpose of the County's SPR procedures, ICC 16.19.010 provides that the purpose of the County's land use review process is to "provide a concise

and easily understood process for the review of land use and development proposals.” This purpose is achieved in part by “[e]stablishing uniform processes for the review of land use and development proposals” and by “[c]onsolidating the application, review and approval processes.” *ICC 16.19.010.A; ICC 16.19.010.B*. Under the County’s land use review process, Type II SPR applications are reviewed without an open record hearing and administratively decided by the County Planning Director, whereas Type III SPR application are reviewed and decided by the Hearing Examiner following an open record hearing. *See ICC 16.19.040; ICC 16.19.160; ICC 16.19.170*. The Hearing Examiner also has authority to review Type II permit applications associated with a Type III permit application concerning the same proposed project through the County’s consolidated permit review process. *ICC 16.19.040.A.5; ICC 16.19.130*.

In accordance with the procedures outlined above (and consistent with the purpose of the County’s SPR and land use review procedures to provide a clear, uniform, and consolidated process), clearly identified phased project proposals requiring different levels of review should be reviewed by the highest review authority through a consolidated permit process, not in a piecemeal fashion. Pursuant to the County’s earlier zoning code interpretation—a process that, incidentally, did not require a public hearing either—emergency night-to-night shelters for up to 12 people are processed as a Type II decision, and emergency night-to-night shelters for 13 to 30 people are processed as a Type III decision and subject to the criteria for Class B essential public facilities. Substantial evidence in the record demonstrates that, *from the outset and consistently throughout the permit review process*, the Applicant has intended for the project to provide an emergency night-to-night shelter for up to 30 people, which would require Hearing Examiner approval through the Type III decision process involving an open record public hearing.

The Applicant clearly and unequivocally stated its intent to provide an emergency night-to-shelter for up to 30 people in its initial application for a zoning code interpretation and in its application for Type II SPR approval for Phase I of the project, in which it noted that the Type II application would be “closely followed” by a Type III application for approval of Phase II. The County was aware of Applicant’s intent for the project to include an emergency night-to-night shelter for up to 30 guests because it received and began processing the Type III application for Phase II of the project *months before* administratively approving the Type II SPR for Phase I of the project. Thus, this is not a situation where an applicant has stated only a vague intention to potentially expand on a proposal through future project phases, where a project proponent changes the details of a project during the iterative permit approval process, or where the County was not aware of specific details regarding future project phases. Instead, the County knew that the full project would eventually include an emergency night-to-night shelter for up to 30 guests and, accordingly, should have processed the application through the Type III process required for 30-person emergency night-to-night shelter uses in the Rural zoning district under the County’s zoning code interpretation. Processing the application in this manner would be consistent with the uniform and consolidated approach promoted under the County code and would still have allowed for phasing of the project upon approval by the Hearing Examiner, while ensuring that

members of the public could voice their concerns at the open record hearing required for Type III applications.

In addition, processing the application in this consolidated manner, and in accord with the Type III application process required for 30-person emergency night-to-night shelter uses in the Rural zone, would avoid the piecemeal review prohibited under SEPA. *See Murden Cove Preservation Ass'n v. Kitsap County*, 41 Wn. App. 515, 526, 704 P.2d 1242 (1985) (stating “Piecemeal review is permissible if the first phase of the project is independent of the second and if the consequences of the ultimate development cannot be initially assessed. . . . Piecemeal review is impermissible where a series of interrelated steps [constitutes] an integrated plan and the current project is dependent upon subsequent phases.”) (Internal quotation marks and citations omitted.)

To be clear, the Hearing Examiner is not determining that the Type II SPR application at issue in this appeal fails to meet the applicable criteria for approval. Moreover, nothing in the record reflects that the Applicant attempted to circumvent the appropriate review process that should have occurred. Nevertheless, process matters. And, here, the Hearing Examiner is left with the firm conviction that the appropriate process for reviewing and approving the application was not followed and, therefore, vacating the administrative decision approving the Type II SPR is warranted. That said, the record also reflects that the County has been reviewing the Type III SPR that was always contemplated by the Applicant and, accordingly, review of “Phase I” of the proposal may be reconsidered by the Hearing Examiner through the required, consolidated review of the phased project. *Findings 1 – 25.*

DECISION

Because the Appellant has met its burden to show that the County clearly erred in administratively approving the request for site plan review to allow for an overnight shelter use for up to 12 guests, the appeal is **GRANTED** and the administrative decision approving the Type II SPR application (No. SPR 188/21) is **VACATED**.

DECIDED this 4th day of April 2022.



ANDREW M. REEVES
Hearing Examiner
Sound Law Center

ATTACHMENT A

Motions, Orders, and Briefs

- Appeal, dated December 16, 2021
- Appeal Statement, dated December 23, 2021
- Letter from Reid Shockey, Shockey Planning Group, Inc., – Alleged Errors and Basis for Appeal, dated January 3, 2022
- Hearing Examiner’s Pre-Hearing Order, dated January 7, 2022.
- County Dispositive Motion, dated February 7, 2022
- Appellant’s Request for a Continuance, dated February 11, 2022
- Letter from Reid Shockey – Response to Dispositive Motion, dated February 14, 2022
- Hearing Examiner’s Decision on County’s Dispositive Motion and Appellant’s Request for Continuance, dated February 18, 2022
- Reid Shockey’s Request for a Continuance, dated February 22, 2022
- Hearing Examiner’s Decision on Mr. Shockey’s Request for a Continuance, dated February 24, 2022
- Appellant’s Second Request for a Continuance, dated February 24, 2022
- Hearing Examiner’s Decision on Appellant’s Continuance Request, dated February 25, 2022
- Applicant’s Closing Brief, dated March 8, 2022
- Appellant’s Closing Brief, dated March 10, 2022

The following exhibits were admitted into the record:

County Exhibits:

- C-1. Staff Report & Recommendation Site Plan Review – Type II (No. SPR 188/21), dated December 3, 2021
- C-2. Public Comment Summary (Page 7 of Staff Report & Recommendation)
- C-3. Portion of Application for Type II Site Plan Review
- C-4. SEPA Exemption Determination (Page 2 of Staff Report & Recommendation)

Applicant Exhibits:

None submitted

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*Appellant Exhibits:*⁴

- A-1. Nothing submitted
- A-2. Nothing submitted
- A-3. Nothing submitted
- A-4. Nothing submitted
- A-5. Nothing submitted
- A-6. Nothing submitted
- A-7. Nothing submitted
- A-8. Nothing submitted
- A-9. Nothing submitted
- A-10. Information on “Accident Potential Zones” (APZs)
- A-11. Site Plan Review Application (Whidbey Homeless Coalition)
- A-12. Nothing submitted
- A-13. Approved Plot Plan for 331 Morris Road, dated December 3, 2021
- A-14. Site Plans and Schematics
- A-15. Supplemental Application Forms (Whidbey Homeless Coalition)
- A-16. Building Inspection Report, 357 W. Morris Road, dated October 16, 1995
- A-17. Request for Comments (Permit #188/21), dated June 8, 2021
- A-18. Building Permit for Water Tank Storage Addition, received October 15, 2021;
Memorandum from Senior Planner John Lanier, dated December 9, 2021
- A-19. County Comprehensive Plan
- A-20. Affidavit of Publication and Published Notice (No. 234/20 ZCI), dated October 13, 2020
- A-21. Fire Sprinkler System Application, received November 24, 2021
- A-22. Permit Information for 1995 Church Proposal
- A-23. Complete Application Materials (Whidbey Homeless Coalition)
- A-24. Letter from Planner John Lanier, dated October 1, 2021
- A-25. Comment from Michael Thorpe, dated September 21, 2021
- A-26. Comment from Robert Segault, dated September 21, 2021
- A-27. Comment from Kimberly Robinett, dated September 21, 2021
- A-28. Letter from Executive Director Jonathan Kline, Whidbey Homeless Coalition, dated
October 15, 2021
- A-29. Nothing submitted
- A-30. Comment from Jennifer Bartholomew, dated October 14, 2020
- A-31. Comment from N. Cameron, dated October 9, 2020
- A-32. Comment from Ray Heltsley, dated October 7, 2020
- A-33. Comment from Thomas Kieffer, received October 9, 2020
- A-34. Comment from Al Lindell, received October 13, 2020

⁴ The Appellant’s “Exhibits” were submitted as over 100 separate PDF documents, most with little to no identifying information. Many of the exhibits include duplicative information and appear to address concerns unrelated to, or beyond the scope of the current appeal. That said, the Hearing Examiner has made every effort to accurately convey what each proposed exhibit included and, where appropriate, identify instances where no identifiable exhibit was received.

- A-35. Comment from Roxallane and David Medley, dated October 8, 2020
- A-36. Comment from Alice Schisel, received October 16, 2020
- A-37. Comment from Gary and Beverly Sheehan, dated October 8, 2020
- A-38. Nothing submitted
- A-39. Information on No. 234/20 ZCI
- A-40. Identical to Exhibit A-39
- A-41. Comment from Wayne Flaaten, dated September 22, 2021
- A-42. Comment from Kyle Green, dated September 22, 2021
- A-43. Comment from Becky Hart, dated September 21, 2021
- A-44. Comment from Julie Lloyd, dated September 3, 2021
- A-45. Comment from George Lloyd, dated September 21, 2021
- A-46. Comment from Charles McDonald, dated August 18, 2021
- A-47. Comment from Erica McDonald, dated August 23, 2021
- A-48. Comment from April Miller, dated September 22, 2021
- A-49. Appellant's Witness List
- A-50. 2018 International Residential Code
- A-51. 2018 International Building Code
- A-52. 2018 International Fire Code
- A-53. Email from Stephanie Montgomery to Kyle Green, dated February 22, 2022
- A-54. PRA Exemption & Redaction Table
- A-55. Island County Public Records Disclosure Contract Information (2020)
- A-56. Email from Stephanie Montgomery to Kyle Green, dated January 21, 2022
- A-57. Email from Reid Shockey to Virginia Shaddy, dated February 22, 2022
- A-58. Hearing Examiner's Decision on County's Dispositive Motion and Appellant's Request for Continuance, dated February 18, 2022
- A-59. Email from Mary Engle to Kyle Green, dated January 8, 2022
- A-60. Email from Kyle Green to Stephanie Montgomery, dated February 11, 2022
- A-61. Email from Stephanie Montgomery to Kyle Green, dated February 5, 2022
- A-62. Email from Stephanie Montgomery to Kyle Green, undated
- A-63. Email from Stephanie Montgomery to Kyle Green, dated January 21, 2022
- A-64. County Resolution C-119-17, dated December 5, 2017
- A-65. Comment from Judy Thorpe, dated September 21, 2021
- A-66. Comment from Sarah Wescott, dated September 21, 2021
- A-67. Comment from Tracy Wessel, dated September 22, 2021
- A-68. Comment from William Szczepaniak, dated September 22, 2021
- A-69. Comment from Jill Zitnick, undated
- A-70. Notice of Application (No. SPR 188/21), undated
- A-71. Determination of Complete Application (No. SPR 188/21), dated June 2, 2021
- A-72. Same as Exhibit A-24
- A-73. Nothing submitted
- A-74. WA Energy Code Compliance Information
- A-75. Residential Sprinkler System Information

- A-76. Plan Information for Phase II, with Review Markup
- A-77. Letter from Clea Barenburg (re: ZCI 234/20), dated October 15, 2020
- A-78. Structural Engineering Report for Fire Suppression System Addition, dated September 15, 2021
- A-79. Findings of Fact, Ebey's Landing National Historical Reserve (Historic Preservation Commission), dated September 23, 2021
- A-80. Narrative of Proposal, received November 19, 2021 (Storage Tank Addition)
- A-81. Letter from Dustin Curb, dated November 24, 2020 (re: ZCI 234/20)
- A-82. Master Building Application (Tenant Improvements), received October 15, 2021
- A-83. Nothing submitted
- A-84. Comment from Trenna Atkins, dated September 21, 2021
- A-85. Comment from Verleen and Ron Boyer, dated September 18, 2021
- A-86. Comment from Coralee Hill, dated June 17, 2021
- A-87. Comment from Nick Daly, dated October 7, 2020
- A-88. Comment from Julie and George Lloyd, dated October 8, 2020
- A-89. Comment from George Lloyd, dated May 6, 2021
- A-90. Comment from George Lloyd, dated May 6, 2021
- A-91. Comment from Larry Memmer, dated October 9, 2020
- A-92. "Petition to Oppose the Creation of a Homeless Shelter in Coupeville," received September 20, 2021
- A-93. "Petition to Oppose the Creation of a Homeless Shelter in Coupeville," received September 20, 2021
- A-94. "Petition to Oppose the Creation of a Homeless Shelter in Coupeville," received September 20, 2021
- A-95. "Petition to Oppose the Creation of a Homeless Shelter in Coupeville," received September 20, 2021
- A-96. "Petition to Oppose the Creation of a Homeless Shelter in Coupeville," received September 20, 2021
- A-97. "Petition to Oppose the Creation of a Homeless Shelter in Coupeville," received September 20, 2021
- A-98. Nothing submitted
- A-99. Seller Disclosure Form, dated April 9, 2021
- A-100. Plan Information for the Hunter Residence
- A-101. Chapter 197-11 Washington Administrative Code
- A-102. Chapter 36.70A Revised Code of Washington
- A-103. Email from City of Oak Harbor to Kyle Green, dated January 12, 2022
- A-104. Nothing submitted
- A-105. PRA Exemption and Redaction Table
- A-106. Request for Continuance from Kyle Green, dated February 12, 2022
- A-107. Email from Mary Engle to Kyle Green, dated January 9, 2022
- A-108. Email from Mary Engle to Kyle Green, dated January 9, 2022
- A-109. Email from Mary Engle to Kyle Green, dated January 9, 2022

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- A-110. Email from Mary Engle to Kyle Green, dated January 9, 2022
- A-111. County Request for Comments for “No. 241/21” (Phase 2), dated August 30, 2021
- A-112. Same as Exhibit A-111
- A-113. Notice of Complete Application (#241/21 SPR), dated August 30, 2021
- A-114. Notice of Application (No. 241/21 SPR), undated
- A-115. Affidavit of Mailing, dated August 30, 2021
- A-116. Site Plan Review Application (Phase II)
- A-117. Master Land Development Permit Application
- A-118. Notice of Complete Application, dated June 29, 2021
- A-119. Description of Proposal
- A-120. Certificate of Appropriateness Application, dated April 22, 2021
- A-121. Affidavit of Posting, dated April 20, 2021
- A-122. Same as Exhibit A-120
- A-123. Notice of Complete Application (#EBY-21-037), dated June 29, 2021
- A-124. Legal Description of Property
- A-125. Affidavit of Mailing (#EBY-21-037), dated June 29, 2021
- A-126. Review Comments, Public Works, dated August 2, 2021
- A-127. Same as Exhibit A-120
- A-128. Site Information
- A-129. Same as Exhibit A-79
- A-130. Appeal Statement, dated December 23, 2021
- A-131. Appeal Statement (signed), dated December 23, 2021
- A-132. Comments from Michael Thorpe, received February 28, 2022
- A-133. Comments from Traci Clements, received February 28, 2022
- A-134. Comments from Kyle Green, received February 28, 2022