



## Notice of Hearing Examiner Decision

07/26/2019

To: Interested Parties and Parties of Record

RE:           Project Name: Westsound Support Services, LLC Admin Appeal  
              Applicant: Westsound Support Services, LLC  
                          2540 Cascades Pass Blvd Suite  
                          100 Bremerton, WA 98312  
              Application: Administrative Appeal  
              Permit Number: 19-01136

Enclosed is the Decision issued by the Kitsap County Hearing Examiner for the above project.

The applicant is encouraged to review the Kitsap County Office of Hearing Examiner Rules of Procedure found at:

<https://spf.kitsapgov.com/dcd/HEDocs/HE-Rules-for-Kitsap-County.pdf>

The Decision of the Hearing Examiner is final, unless timely appealed, as provided under Washington law.

Please note affected property owners may request a change in valuation for property tax purposes, notwithstanding any program of revaluation. Please contact the Assessor's Office at 360-337-5777 to determine if a change in valuation is applicable due to the issued Decision.

The complete case file is available for review at the Department of Community Development, Monday through Thursday, 8:00 AM to 4:00 PM and Friday 9:00 AM to 1:00 PM, except holidays. If you wish to view the case file or have other questions, please contact [Help@Kitsap1.com](mailto:Help@Kitsap1.com) or (360) 337-5777.

CC: Applicant: Westsound Support Services, LLC  
Authorized Agent: Alan Frey, [afrey@afrey@ktssinc.com](mailto:afrey@afrey@ktssinc.com)  
Appellant Representative: James Carmody, [carmody@mftlaw.com](mailto:carmody@mftlaw.com)  
Owner: Timothy & Lisa Calnan, 2811 NE Fernwood Ct, Bremerton, WA 98310-5366  
Intervenor: Andrew Morrison, Morrison Legal Services, [andrew@morrisonlegalservices.com](mailto:andrew@morrisonlegalservices.com)  
Intervenor: Dee Boughton – Washington State for Public Safety, [dee@crosssoundlaw.com](mailto:dee@crosssoundlaw.com)

Interested Parties:

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DCD

DSE

Kitsap County Prosecutor's Office

Kitsap County Assessor's Office

Kitsap Sun

**KITSAP COUNTY HEARING EXAMINER**

**Westsound Support Services, LLC  
Administrative Appeal No. 19-01136**

**FINDINGS, CONCLUSIONS OF LAW, AND DECISION**

**July 25, 2019**

**1. FINDINGS OF FACT, PROCEDURAL**

**1.1 Nature of Appeal.** Kitsap County Department of Community Development ("DCD") issued a Notice of Violation to parties operating a Less Restrictive Alternative for Sexually Violent Predators in the County's Rural Residential zone. Westsound Support Services, LLC, appealed.

**1.2 Property Location.** 17373 Viking Way NW, Poulsbo, with Assessor Tax Account number 272601-2-001-2009.

**1.3 Property Owner.** Mr. and Ms. Calnan, 2811 NE Fernwood Court, Bremerton, WA 98310-5366.

**1.4 Use Operators.** Westsound Support Services, LLC. Phil Havers, Registered Agent, Havers Law Offices, Inc. PS. 9226 Bayshore Drive NW, Suite 220, Silverdale, WA 98383. Kitsap Tenant Support Services, Inc., c/o Alan Frey, Program Manager, P.O. Box 5209, Bremerton, WA 98312.

**1.5 Pre-Hearing Procedures.** Through a pre-hearing conference, hearing deadlines were established by party agreement and two parties were granted intervention (Mr. Deaville, and WA State for Public Safety).<sup>1</sup> After DCD filed the record, the parties filed supplemental exhibits, witness lists, opening briefs,<sup>2</sup> supplemental witness lists, and reply briefs. The Hearing Examiner conducted an unaccompanied site visit on the morning of June 13, entering the driveway, but not proceeding past the closed and locked gate.

**1.6 Record.** The index of record is on file with the Hearing Examiner Clerk, but besides the post-hearing closing briefs from all parties, admitted documents are:<sup>3</sup>

<b>PARTY</b>	<b>EXHIBIT NUMBERING</b>
DCD	DCD-01 - DCD-15
Appellant	A-1, A-2, and A-11 – A-19 <sup>4</sup> and WSS-1 - WSS-19

<sup>1</sup> Pre-Hearing Order (April 3, 2019).

<sup>2</sup> Appellant's motion for an overlength brief was granted.

<sup>3</sup> As the index includes briefing, witness lists, and other legal materials, not all documents are evidentiary.

<sup>4</sup> To address a motion to strike, the Appellant withdrew A-3 –A-10. The exhibits had been attached to briefing, rather than being submitted with the exhibits, and were not intended to serve as evidence (other than A-9, which was

Intervenor WA State for Public Safety	WSPS-1 - WSPS-9
Intervenor Deaville	WD-1 - WD-2

Although there were pre-hearing exhibit submittal deadlines, on hearing day two the Appellant provided the Declaration of Mr. Frey, with Attachments A-E. The Declaration was admitted without objection. The Appellant withdrew Attachments A and E; Attachment B was already in the record so was admitted; and, Attachment C was an RCW so was admitted. Objections were raised to D (on transportation) and F (use comparison chart) as the documents provided new evidence after established deadlines. However, as Mr. Frey testified on the information they contained, the Examiner admitted them.

**1.7 Hearing.** The hearing was held on May 23, and continued to June 13 to allow the Appellant to present its last witness. At the hearing, counsel for the parties were Ms. Zippel for DCD; Mr. Carmody for Appellant Westsound Support Services, LLC; Mr. Morrison for Intervenor Deaville; and, Mr. Boughton and Mr. Seaman for Intervenor WA State for Public Safety. They called these witnesses:

DCD: Mr. Bolger, DCD Assistant Director  
 Mr. Diener, Manager, Development Services and Engineering  
 Ms. Williams, DCD Planner  
 Ms. Washburn, County Sheriff’s Office/Detective Division, Investigative Support Specialist

Appellant:  
 Mr. Duncan, Dept. of Corrections, Civil Commitment Program Manager  
 Mr. Irvin, Dept. of Corrections, Civil Commitment Unit, Community Corrections Officer  
 Mr. Frey, Administrator, Westsound Support Services, LLC  
 Mr. Morrison, Counsel for Mr. Deaville

Intervenor, WA State for Public Safety:  
 Ms. Anderbery, Neighbor  
 Mr. Busby, Neighbor  
 Ms. Benson, Neighbor and WSPS Executive Director  
 Ms. Trujillo, Neighbor

Intervenor Deaville:  
 No witnesses independent of the Appellant.

The parties agreed to a July 11 closing brief deadline. All parties submitted briefs.

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already in the record as WSS-7). Appellant also withdrew Ex. A-20/WSS-20 (the document was submitted to refresh witness testimony, but as Mr. Bolger was not on the e-mail chain, it did not serve that purpose).

## 2. FINDINGS OF FACT, SUBSTANTIVE

### 2.1 Zoning and Comprehensive Plan. The site is within the Rural Residential zone.

This zone promotes low-density residential development and agricultural activities that are consistent with rural character. It is applied to areas that are relatively unconstrained by environmentally sensitive areas or other significant landscape features. These areas are provided with limited public services.<sup>5</sup>

The zone implements the Comprehensive Plan, which under the Growth Management Act, Ch. 36.70A RCW ("GMA"), provides for the urban areas to serve as the centers for "housing opportunities,"<sup>6</sup> and provides for restricting urban services within rural areas and ensuring the "natural landscape ... predominate[s] over the built environment" in rural areas.<sup>7</sup>

**2.2 Sexually Violent Predators and State's Civil Commitment Statute.** A person determined to be a Sexually Violent Predator per Ch. 71.09 RCW, who has served mandated prison time, may be civilly committed. Upon civil commitment, a Sexually Violent Predator may be placed at a total confinement facility such as the state run facility at McNeil Island, but may subsequently be conditionally released to a Less Restrictive Alternative,<sup>8</sup> with a superior court setting conditions of release.<sup>9</sup> A Less Restrictive Alternative can vary from the individual residing with his or her family to being situated in a group facility which must provide court ordered services and security.<sup>10</sup> The Appellant's facility is the latter type, so is referred to here as an LRA Facility.

**2.3 County Zoning: LRA Facility.** When the Appellant first started taking Sexually Violent Predators in 2018, the zoning code did not provide for the use.<sup>11</sup> In February, 2019, the County adopted zoning which specifically provides for the use as a "Group Residential Facility - Secured High Risk," conditionally allowing the use in five zoning designations.<sup>12</sup> While allowed conditionally within the urban area, the County Code does not now allow an LRA Facility in the Rural Residential zoning. This was not contested.

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<sup>5</sup> KCC 17.130.010.

<sup>6</sup> Comprehensive Plan, pg. 1-11 ("[H]ealthy urban areas that are the region's centers for diverse employment, housing opportunities.... [R]ural areas and communities have unique historical characters, appearances, and functions that should be retained and enhanced.").

<sup>7</sup> Comprehensive Plan, pg. 1-13 ("As per the Growth Management Act, the rural area of Kitsap County is much less developed than the urban areas. This allows for the natural landscape to predominate over the built environment. Kitsap County has a maximum density in the rural area of one dwelling unit per five acres. This zoning allows for large amounts of undeveloped land and for the protection of critical areas and rural character. ... Kitsap County has five adopted zoning classifications in the rural areas that are intended to prevent the inappropriate conversion of undeveloped land. Further, the provision of urban level of governmental services to the rural area is restricted.").

<sup>8</sup> RCW 71.09.090.

<sup>9</sup> RCW 71.09.096.

<sup>10</sup> RCW 71.09.020(6).

<sup>11</sup> Ex. DCD-01 (Notice of Violation), attaching Interim Zoning Ordinance 566-2019, pg. 1, ¶ 8 ("[T]he Kitsap County Board of County Commissioners ... has determined that current county regulations do not define LRA facilities or mitigate their land use and life safety impacts to protect both the residents of potential LRA facilities within Kitsap County as well as the neighbors.").

<sup>12</sup> Ex. DCD-01 (Notice of Violation), attaching Interim Zoning Ordinance 566-2019.

**2.4 Non-Conforming Use.** The County Ordinance adopting the new zoning stated that such uses were not provided for in the code.<sup>13</sup> But DCD considered whether this use could have been treated as a legal, non-conforming use by categorizing it as similar to an allowed use.

[W]hen a use is not specifically listed in this title, it shall be understood that the use may be allowed if it is determined by the director that the use is similar to other uses listed. It is further recognized that every conceivable use cannot be identified. In anticipation that new uses will evolve over time, this section establishes the director's authority to compare a proposed use and measure it against those listed in this title for determining similarity. In determining similarity, as well as when considering all other uses, the director shall make all of the following findings:

A. The proposed use shall meet the intent of, and be consistent with the goals, objectives and policies of the Kitsap County Comprehensive Plan;

B. The proposed use shall meet the stated purpose and general intent of the Comprehensive Plan land use designation and zoning classification in which the use is proposed to be located;

C. The proposed use shall not adversely impact the public health, safety and general welfare of the residents of the county; and

D. The proposed use shall share characteristics in common with, and not be of greater intensity, density or generate more environmental impact than, those uses listed in the land use zone in which it is to be located.

If determined similar, the unspecified use shall meet all of the code requirements and follow the approval process prescribed for the listed use.<sup>14</sup>

The County completed this review and determined that the zoning code had not allowed the use in the County's Rural Residential zoning. The use would need to be moved to one of the urban zones in which it is allowed, through a compliance schedule, if the operators prefer.<sup>15</sup>

**2.5 Informal Communications with Appellant.** Before reviewing the above code section and making its final, appealable decision, DCD told the Appellant via e-mail that it would be determining use classification, and expected to treat the use similarly to an adult family home.<sup>16</sup> The e-mail was sent in December of 2018, before DCD had learned more about this type of use, which it not encountered in the land use planning context.<sup>17</sup> DCD acknowledged it "may respond to informal inquiries regarding code applicability and clarification prior to or

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<sup>13</sup> Ex. DCD-01 (Notice of Violation), attaching Interim Zoning Ordinance 566-2019, pg. 1, ¶ 8.

<sup>14</sup> KCC 17.100.040.

<sup>15</sup> Ex. DCD-01 (Notice of Violation), pg. 5.

<sup>16</sup> Appellant's Transcript, pg. 43 ("I think he said ... we will be making a determination -- that if we could make that determination that he would have been good to go as an adult family home, as a like use. But we were never able to make that determination because we couldn't establish the findings to support that."); Ex. DCD-11, pg. 86.

<sup>17</sup> Appellant's Transcript, Testimony, Mr. Bolger, pg. 30.

outside of the context of a specific project permit application. These interpretations are neither subject to appeal nor binding on the Department."<sup>18</sup> The e-mail was that type of informal inquiry and response. It was not a final decision, and was not appealable under the County Code. The Applicant did not request a formal determination on whether the use was allowed before it began accepting Sexually Violent Predators.<sup>19</sup>

**2.6 General Use Classification.** In assessing LRA Facility permissibility in the Rural Residential zone, DCD did not assess the Appellant's facility specifically. "[W]e look at the use in general. ... We don't look at the one facility... [T]his violation is not relative to this particular home in this particular site. It's allowing this use in this particular zone that is the issue for the Department."<sup>20</sup> In other words, DCD's assessment was of the appropriateness of the use in general for the Rural Residential zone. Either the code allows the use or it does not. If allowed, this would mean that not only the Appellant's operation, but any others classified as an LRA Facility, would be allowed in the Rural Residential designation.<sup>21</sup>

**2.7 DCD Analysis.** DCD determined that siting an LRA Facility within the Rural Residential zone was not consistent with the Comprehensive Plan. The Plan provides for a clear demarcation between rural and urban areas. DCD found the use inconsistent with the Plan,<sup>22</sup> as "[t]he facility is an intensification of rural areas and is not compatible with typical rural uses allowed," presents a strain on rural infrastructure beyond what is typically allowed, and does not serve rural residential or resource needs.<sup>23</sup> Regarding Plan housing objectives,<sup>24</sup> the County found the use is allowed in other more appropriate zones.<sup>25</sup> DCD determined that an LRA Facility does not meet the Rural Residential zone purpose, as it is a more intensive use which requires services not typical of low density residential development. DCD elected not to address whether the use adversely affects "the public health, safety, and general welfare" of county residents, instead deferring to superior court imposition of safety conditions to protect the public safety.<sup>26</sup> DCD found that the LRA Facility "has a greater intensity of use than other uses allowed in the zone. Use intensity is characterized by 24/7 security and a one to one staff to resident ratio, and provides "a greater intensity than other uses allowed in the zone..."<sup>27</sup> Hearing testimony further described this use, which for a rural area, requires considerable support services to operate.

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<sup>18</sup> Appellant's Transcript, pg. 104.

<sup>19</sup> Testimony, Mr. Frey (The Appellant did not contact Kitsap County to ask about zoning restrictions until about the time the DCD e-mail was sent in December, 2018, with the location identified around December of 2017).

<sup>20</sup> Appellant's Transcript, Testimony, Mr. Bolger, pgs. 59 and 71.

<sup>21</sup> The Appellant's operation consists of two separate residences, and the Appellant's internal policy is four SVP's per residence. The Appellant's present plan is to add two placements. However, if someone were to purchase the operation, it could become more intensive. Testimony, Mr. Frey.

<sup>22</sup> Ex. DCD-01 (Notice of Violation), pg. 3, Land Use Goal 13, Land Use Policies 50, 53, and 59.

<sup>23</sup> Ex. DCD-01 (Notice of Violation), pg. 3.

<sup>24</sup> Ex. DCD-01 (Notice of Violation), pg. 4, Housing and Human Services Goal 4 and Housing and Human Services Policy 13.

<sup>25</sup> Ex. DCD-01 (Notice of Violation), pg. 4.

<sup>26</sup> KCC 17.100.040(C); Ex. DCD-01 (Notice of Violation), pg. 4; Appellant's Transcript, Testimony, Mr. Bolger, pg. 6. The Decision does not address whether such deference is required.

<sup>27</sup> Ex. DCD-01 (Notice of Violation), pg. 4; Appellant's Transcript, Testimony, Mr. Bolger, pg. 63 ("in a less restrictive alternative, there is no limit to the number of residents based on our code or the use.") and pgs. 66 and 68.

**2.8 Use Description.** There are significant differences between the standard rural residential use and an LRA Facility with its security needs, staffing ratios, and lack of occupant number limits. DCD explained:

[The two structures] are inhabited by residents who require one to one paid staff to be present on the site. ... [T]hey have 24/7 security associated with it. So, no, this isn't a typical kind of low-density residential development.<sup>28</sup>

Residents cannot freely leave without supervision,<sup>29</sup> and the use (in this case) has its doors and windows equipped with alarms to alert staff if residents leave their rooms, and measures to block views to the outside.<sup>30</sup> Court ordered provisions, such as electronic home monitoring, “eyes-on” staffing, and one to one staffing for trips off site, are standard.<sup>31</sup> On-site and off-site travel includes Sheriff’s Office visits (once every 90 days), transition team member visits, off-site appointments, and on-site appointments by treatment staff. Staff working at the facility do not live there, but rotate in and out through shifts.<sup>32</sup> A treatment team for an individual can include a facility representative, a sex offense treatment provider therapist, one to two individuals from McNeil Island, and a community correction officer (this was the type of team described as associated with Appellant’s facility).<sup>33</sup>

Appellant's facility was not assessed for its specific impacts. It presently houses four Sexually Violent Predators, with the Appellant anticipating providing for two more individuals within the two residential structures on the 15 acre site. Twenty-four hour care and monitoring and intensive off-site therapy is provided. Services include one to one staffing and chaperones when a resident leaves the site.<sup>34</sup>

The residential use depends on outside care providers and non-resident employees to ensure state and superior court oversight requirement are met. Use operation does not depend on rural resources, and the use itself is not related to a rural based use, such as farming. Single family structures may be utilized for an LRA Facility, as is this case for the Appellant's facility,<sup>35</sup> but given the support services required, and the way such a use can function day to day, DCD found these factors make the use more appropriate for an urban location as opposed to a rural one. DCD determined an LRA Facility is not a traditional rural use and is not permitted in the Rural Residential zone.<sup>36</sup> This finding was consistent with the types of residential uses prohibited in this zone.

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<sup>28</sup> Appellant's Transcript, Testimony, Mr. Bolger, pg. 76; Testimony, Ms. Williams; *see also* Ex. DCD-06, pg. 101 (minimum one to one resident to staff ratio); Ex. DCD-07, pg. 95 (one to one resident to staff ratio).

<sup>29</sup> Testimony, Ms. Williams.

<sup>30</sup> *See e.g.*, Exs. DCD 10 and Ex. DCD 11, pg. 519.

<sup>31</sup> Testimony, Mr. Frey.

<sup>32</sup> Testimony, Ms. Williams, Mr. Frey, and Ms. Washburn.

<sup>33</sup> Testimony, Mr. Frey.

<sup>34</sup> Ex. DCD-01 (Notice of Violation), pg. 2.

<sup>35</sup> Two structures are on the lot. County Code permits one per lot. Given the use change, a request for the change must be made, which did not occur. KCC 17.105.100; KCC 17.570.030. Appellant's Transcript, Testimony, Mr. Bolger, pgs. 98-99; Testimony, Ms. Williams. *See also*, Testimony, Mr. Frey (use was previously a farm).

<sup>36</sup> Frey Declaration, Attachment D, included informal traffic counts. Employee shifts per day ranged from about 4-7 (25% of shifts may be double shifts; there may be some carpooling). The four residents often took weekday escorted trips, with some in one vehicle. Visits from law enforcement and treatment team members were not

**2.9 Allowed Residential Uses in the Rural Residential Zoning Designation.** More intensive residential uses are generally prohibited within the Rural Residential designation due to GMA restrictions on rural residential development.<sup>37</sup> Residential densities and uses are strictly limited in rural zones, with minimum five acre lot sizes for single family homes and prohibitions on more intensive residential uses. For example, boarding houses, caretaker dwellings, convalescent home or congregate care facility, cottage housing developments, multi-family dwellings, hotels, and residential care facilities are all prohibited.<sup>38</sup> Several of these uses involve individual units with common areas and limited services.<sup>39</sup>

**2.10 Adult Family Home and Preemption.** According to DCD, the primary reason the adult family home use is allowed in the Rural Residential zone is that state law requires it, preempting local government in this arena. The parties did not dispute that the Intensive LRA is not an adult family home and does not have the state license required to operate as one; the Appellant's contract with the state is to provide for Sexually Violent Predators.<sup>40</sup> Individuals placed at the facility require the specialized support services the use provides, which is provided for through Ch. 71.09 RCW.<sup>41</sup>

Due to preemption regarding adult family homes, there is a critical distinction between adult family homes and an LRA Facility. The County does not view those same preemption issues as being present with the latter use. DCD explained:

The State ... supersedes the local jurisdiction and being able to do that [a similar use analysis on an adult family home] ... In this case we have a situation where it's not a licensed facility by the State, where we're not precluded from making ... zoning determinations and looking at compatibility. So, it's not ... apples to apples in this case. ... That adult family home is permitted because of State statute superseding our local code. ... As I said before, the intensification -- the intensity of a use for an adult family home could be inappropriate based on our local code for the zone in which it's located. But, we have no authority to regulate that. In this case, we do have the ability to make the review. And so, whether the intensity is the same in one case, we have the authority to regulate it in a less restrictive alternative. In the case of an adult family home, we don't. So, ... it's not ... a balanced equation.<sup>42</sup>

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addressed. The numbers are from before the Appellant's planned expansion to six residents, which would change the figures. The Appellant does not take residents on weekend trips presently due to concerns on children presence, but that policy could change in future. Testimony, Mr. Frey.

<sup>37</sup> One example is how accessory dwelling units are treated. Within urban designations, an ADU is permitted outright. KCC 17.410.060(B)(3)(a). Within a rural designation, ADUs are treated as conditional uses and must meet ten additional criteria, including not exceeding half the size of the primary structure or 900 square feet, whichever is smaller. KCC 17.410.060(B)(3)(e).

<sup>38</sup> KCC 17.410.042 (Rural, resource, and urban residential zones use table).

<sup>39</sup> Testimony, Ms. Williams. KCC 17.110.180 (A congregate care facility is "any building in which people live in individual housing units which provide for independent living while providing common living areas and limited services such as health care, meals and housekeeping."); KCC 17.110.660 (Residential care facility may have 5-25 residents).

<sup>40</sup> Testimony, Mr. Frey.

<sup>41</sup> Testimony, Mr. Frey.

<sup>42</sup> Appellant's Transcript, Testimony, Mr. Bolger, pgs. 30, 40-41, 55, and 57. *See also* pg. 64.

Adult family homes and LRA Facilities, though distinct, can have similar impacts in a number of areas. However, in one case those impacts can be considered, and in the other they cannot. With the LRA Facility, impacts can be considered in determining the property use classification. DCD considered those impacts, and found the residential use more intensive than what would otherwise be authorized.

**2.11 Use Unplanned For.** Until the recent amendments, the zoning code had not addressed this use.<sup>43</sup> The County has had only one other Sexually Violent Predator released into Kitsap County; that was 15 years ago, and he resides at his own home with a family member.<sup>44</sup> This is the first time the County has dealt with facilities specifically designed for statutorily designated Sexually Violent Predators. There are other group houses but, as Sheriff Office testimony explained, the situation is different. The occupants are not designated as Sexually Violent Predators. Residents come and go as they please; “it is not lock down.”<sup>45</sup> With the security and support restrictions required for an LRA Facility comes the need for greater outside support services; site visits; and for a rural residential use, a significant number of on-site employees. Given these factors, an LRA Facility shares characteristics most with the non-preempted uses the County prohibits within the Rural Residential zone.

### 3. CONCLUSIONS

**3.1 Standard of Review.** DCD issued a Notice of Violation. In such a situation, the parties agreed that DCD has the burden of proof, although to establish a legal, non-conforming use, the burden is on the applicant or property owner.<sup>46</sup> Given the enforcement context, the Decision applies the burden of proof to DCD.

**3.2 E-Mail Exchange Not a Decision.** The e-mail exchange between the use operator and DCD on use authorization was not binding under the KCC. Even if viewed as an informal interpretation, it is neither final nor appealable.<sup>47</sup> On its face, the e-mail stated that a determination was forthcoming. That determination was then issued, and that is what was appealed to the Examiner. Under the KCC, the informal exchange cannot be relied on to preclude a different Decision outcome.<sup>48</sup>

**3.3 Zoning Code Not Before the Examiner.** The question before the Examiner is not the validity of the Rural Residential zoning. The zoning code is not on appeal to the Examiner, an appeal over which the Examiner would lack jurisdiction. In summary, the issue

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<sup>43</sup> The Appellant may have a similar situation. Ex. DCD-06, pg. 101 (Mr. Frey has “never worked with a SVP.”).

<sup>44</sup> Testimony, Ms. Washburn.

<sup>45</sup> Testimony, Ms. Washburn. Testimony from Mr. Irvin described the requirements as “supervision on steroids.”

<sup>46</sup> KCC 17.100.070 (“This title shall be liberally interpreted and construed to secure the public health, safety, and welfare and the rule of strict construction shall have no application.”); KCC 17.570.050(A) “In all proceedings other than criminal, the owner, occupant or user shall have the burden to show that the use or structure was lawfully established.”).

<sup>47</sup> See e.g., KCC 21.04.040(C)(2) (“The director may respond to informal inquiries regarding code applicability and clarification prior to or outside of the context of a specific project permit application. These interpretations are neither subject to appeal nor binding on the department.”).

<sup>48</sup> More generally, see *City of Mercer Island v. Steinmann, Jr.*, 9 Wash. App. 479, 481-82, 513 P.2d 80 (1973); *Laymon v. Washington State Dept. of Natural Resources*, 99 Wash. App. 518, 525-26, 994 P.2d 232 (2000).

before the Examiner is whether the Rural Residential zone allowed an LRA Facility before the code was revised to provide for the use in specific urban area zones. The parties did not dispute that the use is not permitted in the Rural Residential zone under the present zoning.

**3.4 DCD Analysis.** DCD properly considered an LRA Facility as not allowed in the Rural Residential zoning designation, and as more appropriate for location within the urban area. The Rural Residential zone, pursuant to GMA and the Comprehensive Plan, strictly limits rural residential uses. As detailed in the findings above, the Comprehensive Plan is structured so that rural residential uses are not accompanied by an influx of non-resident employees and care providers in a shared housing use. This is illustrated by the code prohibition on facilities such as congregate care and residential care facilities within the Rural Residential zone. Much was made of adult family homes at the hearing, as they are allowed, but DCD explained that it had no choice in the matter due to preemption.

An LRA Facility, if placed in the Rural Residential designation, would not be consistent with Comprehensive Plan "goals, objectives and policies," or meet the Plan's "stated purpose and general intent."<sup>49</sup> Consistent with this, although impacts bear similarities to the preempted adult family home use, the use also shares characteristics in common with, and is of a similar intensity to the types of residential uses which are prohibited in the Rural Residential zone.<sup>50</sup> DCD met its burden of proof to demonstrate the use is one not properly sited within the Rural Residential zone.

**3.5 Examiner Jurisdiction.** Examiner authority is limited to that granted by code.<sup>51</sup> Under the KCC, the Examiner has authority to assess DCD's Notice of Violation for consistency with the relevant local code criteria.<sup>52</sup> The KCC does not provide the Examiner authority to address federal Fair Housing Act or Washington Housing Policy Act claims, even assuming those statutes apply.<sup>53</sup>

The Appellant raised a new preemption argument involving RCW 9.94A.8445, which was not raised in its appeal or during the hearing, but through a post-hearing notification to the parties that it would be addressed in the parties' simultaneous submission of closing briefs. The Hearing Examiner Rules preclude consideration of the newly raised issue. "Briefs must be limited to the specific issues set forth in the appellant's statement of appeal."<sup>54</sup> Given the lateness of the argument, it would be improper for the Examiner to consider it, even if jurisdiction was present. Also, preemption involves consideration of the reach of local constitutional police power,<sup>55</sup> and the Examiner lacks jurisdiction over constitutional issues.

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<sup>49</sup> KCC 17.100.040(A) and (B).

<sup>50</sup> LCC 17.100.040(D).

<sup>51</sup> See *Chaussee v. Snohomish County Council*, 38 Wn. App. 630, 636, 689 P.2d 1084 (1984).

<sup>52</sup> See KCC 21.04.290(C); KCC 17.100.040.

<sup>53</sup> Intervenor Deaville's Reply to WSPS Memorandum, pgs. 5-6 ("sex offender status" does not make a person "disabled for purposes of federal and state law.")

<sup>54</sup> HE Rule 2.2.3.

<sup>55</sup> *Kitsap County v. Kitsap Rifle & Revolver*, 1 Wn. App.2d 393, 404-405, 405 P.3d 1026 (2017); Wash. Const., Art. 11, § 11.

4. **DECISION**

DCD's Notice of Violation is upheld, and the appeal is dismissed. Unless timely appealed, the Decision is final.

THIS DECISION is entered July 25, 2019.

A handwritten signature in black ink, appearing to read 'S. Drummond', written over a horizontal line.

Kitsap County Hearing Examiner  
Susan Elizabeth Drummond