

WHATCOM COUNTY HEARING EXAMINER

RE: Health Department Administrative Appeal) HD-APL2019-0001  
Philip Cragg, Appellant )  
)  
Appeal of Renewal of On Site Septic )  
System Permit for Eric Weins )  
Phillip Craig Appellant ) FINDINGS OF FACT,  
) CONCLUSIONS OF LAW,  
) AND DECISION

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**SUMMARY OF APPLICATION AND DECISION**

The Appellant, Mr. Cragg, has appealed a renewal of a septic system permit issued to Eric Weins for a lot located at 663 Maple Avenue, Point Roberts, Washington, by the Whatcom County Environmental Health Department.

Decision: The Hearing Examiner denies the Appeal.

**FINDINGS OF FACT**

**INTRODUCTION**

The following Findings of Fact and Conclusions of Law are based upon consideration of the exhibits admitted and evidence presented at the public hearing.

I.

Appellant: Philip Cragg

Applicants: Ernest and Carol Wiens

Property Address: 663 Maple Avenue  
Point Roberts, Washington 98281

Assessor's Parcel Number: 405311 179475 0000

Zoning: Residential Rural [RR2]

Comprehensive Plan: Rural Community

Subarea: Point Roberts

Lot Size: 4,423.67 sq. ft.

Roads: Public

Water and Sewer Supply: Public Water and On-Site Sewage System [OSS]

Fire Protection: Fire District No. 5

Law Enforcement: Whatcom County Sheriff's Office

Public Schools: School District No. 503

Topography: The subject site has a slight elevation change. The lowest grade elevation is 50.50 feet and the highest grade elevation is 54.00 feet.

Vegetation: The subject site is vegetated.

Adjacent Land Uses:

North:	RR2- Residential
East:	RR2 - Residential
South:	RR2 – Residential
West:	RR2 - Residential

Authorizing Codes, Policies, Plans, and Programs

Whatcom County Code Title 24, Health Regulations

Whatcom County Code Title 24.05.250, Appeals: Standing

Whatcom County Code Title 24.05.090(I), "Renewal" (extension)

Legal Notices: Posted – Notice of Public Hearing, March 7, 2019  
Published – Notice of Public Hearing, April 18, 2019

Hearing Date: May 1, 2019

Parties of Record

Philip Cragg  
655 Maple Avenue  
Point Roberts, WA 98982

Bernard Buettner  
710 Kendor Drive  
Point Roberts, WA 98982

Ernest and Carol Wiens  
1551 Celeste Crescent  
Port Coquitlam, BC V3C 1E4

Philip Martinez  
Environmental Health Specialist/OSS

Darin Klein, Environmental Health Supervisor

Royce Buckingham  
Whatcom County Prosecuting Attorney

### Exhibits

- 1 Environmental Health Department Administrative Appeal, HD-APL2019-0001, with attachments
  - 1-1 Admin Appeal & Customer Receipt, March 8, 2019
  - 1-2 Statement of Appeal, dated March 8, 2019, prepared by Philip Cragg
  - 1-3 Email from Mr. Cragg to Philip Martinez, dated January 15, 2019 re: Septic designer omission to place drainage ditch on south side of property
  - 1-4 Email from Mr. Cragg of Site pictures sent to Mr. Martinez of Mr. Wiens property, January 15, 2019
  - 1-5 Email dated January 15, 2019 from Mr. Cragg to Ms. Cierebiej, Environmental Health Specialist re: Variance Hearing, with 16 site pictures
  - 1-6 Ronald Robinson On-Site Sewage System Permit Application, dated 11/29/2015 with Health Department File Notes
  - 1-7 Pacific Shore Contracting Inc., Instruction Sheet for Glendon biofilter basin & Septic for Ronald Robinson's Lot, dated November 29, 2015, with Site Plan and Color photo of site
- 2 Staff Report, dated March 13, 2019 from Darin Klein, Environmental Health Supervisor re: Appeals of On-Site Sewage System permit extension requested by Ernie Wiens Maple Avenue, Point Roberts, Washington
- 3 Ronald Robinson On-Site Sewage System Construction Permit: Permit Approval Date, 02/23/2016 and Permit Expiration Date, 04/30/2020, with On-Site Sewage System Soil Logs, 11/29/2015; Pacific Shore Contracting Inc., instruction sheet, Nov. 29, 2015 and Glendon Biofilter, Worksheet, Dec 28, 2009, and Containment Vessel Layout, March 2, 2012; Dept of Archaeology & Historic Preservation Letter dated Jan. 7, 2016 to Philip Martinez re: Archaeology – Concur with Survey, Please follow Inadvertent Discovery Process: OSS Application Residential Lot on Maple Avenue; Email from Lummi Nation Tribal Historic Preservation Office dated Jan. 8, 2016 to Philip Martinez re: Proposed residential development on Maple Ave, Pt. Roberts, WA; Whatcom County Hearing Examiner Zoning Variance, VAR2018-0003, Ernest Wiens, Applicant and Administrative Appeal, Philip Cragg, Appellant, APL2018-0010: Summary of Application and Decision, with attached Staff Report, pages 15-16; and Email from Sarah Cierebiej dated February 26, 2019 re: waiving renewal fee for Mr. Wiens since project was held up by going to the Hearing Examiner.
- 4 Hearing Affidavit Notice, April 18 & Certificate of Posting Hearing Notice, April 17, 2019

- 5 Emails dated April 26 from John Connery re: Septic & Drainage System issues with response from County Wastewater Management Section, dated April 26, 2019
- 6 Email from Bernie Buettner, April 27, 2019, to Darin Klein, Environmental Health opposing requested septic system
- 7 Email from Deirdre Gair, April 28 to Darin Klein, Environmental Health opposing requested septic system
- 8 Email from Gordon Page, April 26 to Randal Freeby [DOH] with response dated April 29 to Mr. Page, and final comment from Mr. Page to Mr. Freeby, dated April 29, 2019
- 9 Email from Julian Noel, April 29 to Randal Freeby [DOH] with Mr. Freeby's response to Mr. Noel, dated April 29, 2019
- 10 County Health Department Legal Memorandum, HDA APL2019-0001, prepared by Royce Buckingham, Whatcom County Civil Deputy Prosecuting Attorney, with attachments:
  - 10-1 County Health Dept. On-Site Sewage System Construction Permit: Expiration Date: 04/30/2020, with File Notes, Soil Logs, Pacific Shore Contracting, Inc. dated Nov. 29, 2015
  - 10-2 Email from Philip Martinez to Neil Harvey, dated Dec. 8, 2015, with response from Neil Harvey to Philip Martinez, Jan. 4, 2016
  - 10-3 Letter from State Historic Preservation officer, dated Jan 7, 2016 to Philip Martinez re: Archaeology-Concur with Survey Inadvertent Discovery Process
  - 10-4 Email from Lummi Nation Tribal Historic Preservation Office, dated Jan. 8, 2016 to Philip Martinez re: Proposed residential development on Maple Ave., with attached location map dated Jan 29, 2014
  - 10-5 Whatcom County Hearing Examiner Decision, VAR2018-0003/APL2018-0010, dated January 18, 2019, with attached Staff Report, pages 15-16 Wiens Variance, VAR2018-0003
- 11 Appeal to the Hearing Examiner of Administrative Official's Decision, Comments prepared by Appellant Philip Cragg, submitted May 1, 2019, with attachments
  - 11-1 Health Department Title 24 Code Sections
  - 11-2 In the Whatcom County Hearing, VAR2018-0003
  - 11-3 Fact Timeline
  - 11-4 Drainfield Map
  - 11-5 Septic permit for 663 Maple Ave Point Roberts, WA: email from Philip Cragg dated April 4, 2019 to Darin Klein re: request for copy of the Health Dept Review done at time of extension, with second email request from Mr. Cragg dated April 11, 2019, with reply from Darin Klein, dated April 12, 2019 granting Mr. Cragg to pay for and pick-up copies of the permit review documents; with email response from Mr. Cragg explaining he familiar with the filed Permit Application and is asking for the county protocol/review process for permit review; response from Mr. Klein explaining that there is not a written protocol re: how to read and review an application.
- 12 5 additional Public Comments in support of Appeal, received April 30, 2019
- 13 Aggrieved Party Letter from Philip Cragg dated May 1, 2019

- 14 Hearing Examiner Memo to Philip Cragg, Darin Klein, and Royce Buckingham, dated May 3, 2019 re: Appellant's Standing to Appeal the Decision of the Health Department
- 15 Mr. Cragg's Letter, dated May 10, 2019 re: Response to Hearing Examiner's Memo to Appellant's Standing

## II.

Ernest and Carol Wiens are the owners of a small lot, addressed as 633 Maple Avenue, Point Roberts, Washington. The lot is undeveloped and they wish to build a single-family residence on the property. They were granted approval for an on-site Septic system on February 23, 2016. The Permit was valid for 3 years. The Wiens' requested and were granted renewal of the Permit after it expired on February 23, 2019. The Health Department renewed the Permit with a new expiration date of April 30, 2020. Philip Cragg, the Appellant, herein appealed the Permit Renewal.

Mr. Cragg is the owner of an adjacent lot, addressed as 655 Maple Avenue, Point Roberts, Washington. This property is currently developed with a two-story single-family residence. It is located up-gradient and about around 80 feet from the location of the proposed septic system. Mr. Cragg's real concern is that development of the empty lot in front of his two-story home, which currently has excellent water view of the Salish Sea, will eliminate the view; thereby, substantially reducing both the value and enjoyment of his home.

This is the second Appeal filed by Mr. Cragg in regards to the Weins' attempt to obtain the permits necessary to develop their property. After a building permit was issued in 2018, Mr. Cragg, through his lawyer, contacted Whatcom County Planning with concerns about the building permit issued. These concerns resulted in a formal Decision by Whatcom County, dated June 25, 2018, suspending the building permit and giving the Weins' a written Notice of Additional Requirements before the building permit could be reinstated. The additional requirements included, either a revision of the building and site plan and/or Variance Approval, regarding the length of the proposed garage and for placing the required outdoor parking space partially within the side yard setback area.

Mr. Cragg appealed this decision, alleging the additional requirements should have also

necessitated re-location of the drain field outside of the setback area or a Variance approving the location already approved by the Health Department. Mr. Cragg also attempted to challenge the validity of the Septic System Permit, alleging it was erroneously Approved originally. Mr Cragg's attempt to challenge the original OSS approval was denied by the Hearing Examiner because it was not filed in a timely manner.

The Weins' requested that the Appeal be continued and heard concurrent with their Variance application. The Weins' then applied for Variances, and the Appeal and Variance requests were resolved by the Hearing Examiner in a Decision, dated January 18, 2019, about 35 days before the original expiration date of the OSS Permit on February 23, 2019. The Hearing Examiner granted the two Variance requests and upheld the Approved Septic System location, and further concluded that, if a Variance was required to locate the septic system within the front yard setback, it was approved. The Decision also denied the attempt by Mr. Cragg to challenge the validity of the original Permit because it was not filed in a timely manner. [See Decision in VAR 2018-0003 and APL 2018-0010, part of Exhibit 3, and Exhibit 10-5 in this file]. This Decision was not appealed and remains the law of the case in this matter.

On February 26, 2019, the Health Department granted the Septic Permit Renewal Request with a new expiration date of April 30, 2020. This Renewal Approval was based on the Health Officer's in-house review of the file.

Mr. Cragg then filed this Appeal, challenging the Renewal of the OSS Permit. After the Appeal was filed, the Health Department decided additional review was appropriate, and the Health Department Official met with the Septic System designer on-site to further evaluate the situation, on March 12, 2019. The Department determined that there were no changes in the situation from the initial approval and no reason not to let the decision to Renew the Permit to stand.

### III.

Any Conclusion of Law which is deemed a Finding of Fact is hereby adopted as such. Based on the foregoing Findings of Fact, now are entered the following

## CONCLUSIONS OF LAW

### I.

Mr. Cragg argues that the Renewal of the Septic Permit was erroneously granted because the request for and granting of the Permit Renewal was done after the permit expired.

WCC 24.05 governs regulation of on-site septic systems. The only section dealing with permit expiration is .090.I, which is set forth in full below:

- I. **A permit shall expire three years from the date of issuance.  
A permit may be renewed for one year upon review by the health officer.**

Obviously this permit expired. The Code Section gives the Health Officer the authority to renew it for one year after a review. The language is barebones but is not ambiguous. The term "renewed" is not a defined term in the Health Code. Under rules of statutory construction, it is to be given its common meaning. Dictionary.com gives us this for renew:

verb (used with object)

to begin or take up again, as an acquaintance, a conversation, etc.; resume.

**to make effective for an additional period:**

to renew a lease.

to **restore** or replenish:

to renew a stock of goods.

to make, say, or do again.

SEE MORE

verb (used without object)

to begin again; **recommence**.

to renew a lease, note, etc.

(emphasis added)

It gives "reinstate" as a synonym. The Health Officer reinstated the permit after review. The Appellant would have us add a requirement that this must be done before the permit expires. In support of this, he points out that there are a number of Code Sections that require an "extension" request be made before expiration of applicable time limits. The Hearing Examiner indeed found a number of examples in various Chapters of the Whatcom County Code that specifically require "extension requests" to be made before expiration of

applicable time limits. However, under the applicable rules of statutory construction, the failure to do so in regards to septic permits is interpreted as supporting the position that the legislative authority did not intend to do so. If the legislative authority intended this restriction, it is presumed they would have said so, as they specifically did in many other places in the Code.

The Health Official properly interpreted the Ordinance language and used his reasonable discretion by reviewing and granting a renewal after permit expiration.

## II.

The Appellant also argues that the Renewal Decision was erroneous because it was done without a review by the Health Department. This claim is not supported by the record. An in-house File Review was done before the original approval of the renewal and the reviewing officer concluded renewal was appropriate. After the Appeal was filed, additional on-site review was done with the OSS designer and the renewal was left in place. The additional review after the Appeal was filed was both appropriate and professional. The Health Department retains the right to change its mind anytime for just cause. The fact that the Department took a second look after the Appeal was filed is an appropriate exercise of its duty to protect the public health, safety and welfare. The Hearing Examiner concludes that the required review was appropriately done.

## III.

The Department testified that their normal procedures in regard to a Septic Permit Renewal Request is to consider it anytime within one year of expiration of the original permit, but to require final install within one year of the expiration date. Based on the simple language of the Renewal Section, that interpretation is very reasonable and could in no way be deemed arbitrary and capricious.

In this case, the Department extended the expiration date by a little over one year and two months. It explains this by citing the time periods where the Applicant could not go forward because of pending Appeals. The prior Appeal delayed the Weins' exercise of their permit



rights between the date that Appeal was filed, and that is a valid factor to consider when reviewing an extension request. However, the delay took place before the expiration and a one year extension was appropriate when the Renewal was granted. However, this second Appeal has significantly diminished the one year period the legislative body found to be an appropriate amount of time for an extension.

Courts routinely stay the running of expiration time frames due to litigation. To not do so would allow opponents to tie up approved development proposals in litigation until applicable time limits have run; thus, defeating the proposal even if it merited approval. That would obviously be a denial of fundamental fairness and due process and is therefore unacceptable. By filing this Appeal, the Appellant has already delayed the one year construction period extension of the septic system for approximately 3 months. The impact of any further Appeals, if any, will be for the Courts to rule on. However, in this case Mr. Cragg's Appeal has thwarted the Weins' attempts to install their septic system and the Hearing Examiner concludes that the delays caused by this Appeal, along with the delay caused by the earlier Appeal, stayed the running of the requisite renewal time period and can appropriately be used to extend the expiration dates to give the permit holders a one year period to install the septic system. The length of the extension should be one year from the date this Decision is final.

#### IV.

Mr. Cragg again attempts to collaterally challenge the original Approval of the OSS Permit by again raising claims that do not meet the applicable requirements for approval. To allow him to do so now, by challenging the Renewal, when he did not appeal the original Permit in a timely manner, would be allowing an impermissible collateral attack on the permit after failing to appeal the original permit.

#### V.

The County has challenged the Standing of the Appellant to appeal the Renewal. As pointed out in the County's Hearing Brief, the Renewal is a ministerial process and the only basis for Standing the Appellant has invoked is that he would be harmed if the installed system failed to function properly. As indicated above, this is just another attempt by the

Appellant to attack a properly granted OSS permit after the Appeal period has long expired. Since the Appellant has no legal right to attack the adequacy of the original permit, he cannot raise the same claims collaterally by attempting to appeal the procedural Renewal Decision and arguing that his Standing is based on the potential impacts from a possible failure of the system. The Appellant has not established Standing and is not an aggrieved party. The Appeal should be dismissed for lack of Standing.

VI.

Any Finding of Fact deemed to be a Conclusion of Law is hereby adopted as such. Based on the foregoing Findings of Fact and Conclusions of Law, now is entered the following

**DECISION**

The Health Department properly renewed the On Site Septic Permit with the exception of the granting of more than a one year period from the date of the Renewal Decision, as set forth above. The Appellant does not have Standing to Appeal the Decision and the Appeal is dismissed. The renewal of the OSS Permit is valid for one year from the date of this Decision.

**NOTICE OF APPEAL PROCEDURES FROM FINAL DECISIONS OF  
THE WHATCOM COUNTY HEARING EXAMINER**

This action of the Hearing Examiner is final.

The applicant, any party of record, or any county department may appeal any final decision of the hearing examiner to Superior Court or other body as specified by WCC 22.05.020. The appellant shall file a written notice of appeal within 21 calendar days of the final decision of the hearing examiner, as provided in RCW 36.70C.040.

More detailed information about appeal procedures is contained in the Whatcom County Code Title 22 and Title 23.60 and which is available at <http://www.codepublishing.com/WA/WhatcomCounty>.

DATED this 21<sup>st</sup> day of May 2019.

*Michael Bobbink*

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Michael Bobbink, Hearing Examiner