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BEFORE THE HEARING EXAMINER, SKAGIT COUNTY, WASHINGTON

In the matter of the

APPEAL to the SKAGIT COUNTY
HEARING EXAMINER,

FRIENDS OF GUEMES ISLAND,

Petitioner.

NO.

FRIENDS MOTION FOR STAY OF
COMMUTER-HOUR FERRY
SERVICE AND RULING THAT
EXAMINER DOES NOT HAVE
JURISDICTION TO HEAR THIS
DNS APPEAL

**I. REQUEST FOR IMMEDIATE STAY OF WEEKDAY
COMMUTER-HOUR FERRY SERVICE**

Pursuant to this challenge of the DNS associated with the action authorized by Resolution #R20060184, Friends requests an immediate stay of the weekday commuter-hour ferry service newly authorized by this Resolution absent the Administrative Official certifying there would be "imminent peril to life and/or property." SCC 14.06.230(1).

II. INTRODUCTION

Friends of Guemes Island ("Friends") files this motion with its appeal. Besides the immediate stay requested above, Friends requests that the Examiner find that he does not have jurisdiction to administratively review the adequacy of the DNS attached to the appeal

FRIENDS MOTION FOR STAY OF COMMUTER-HOUR FERRY
SERVICE AND RULING THAT EXAMINER DOES NOT
HAVE JURISDICTION TO HEAR THIS DNS APPEAL - 1

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1 on two grounds. First, the appeal states that Friends does not appeal the Responsible
2 Official's determination that, "There is no agency appeal."¹ Without a valid administrative
3 appeal of this provision of the DNS, this provision is final and therefore there is no
4 administrative appeal possible. Second, Skagit County Code only authorizes DNS appeals
5 pursuant to Chapter 14.06. SCC 14.12.210(1). Chapter 14.06 only applies to decisions
6 regarding development permits. Therefore because the underlying action, the adoption of
7 Resolution #R20060184, is not a project action or related to a development permit the
8 Examiner does not have authority or jurisdiction to hear this appeal.
9

10 III. STATEMENT OF FACTS

11 Skagit County adopted Resolution #R20060184 (attached to the appeal) on May 30,
12 2006 to add scheduled weekday commuter-hour ferry service for the Guemes Island Ferry.
13 No SEPA review was provided prior to the adoption of this Resolution. Friends of Guemes
14 Island filed a SEPA appeal of the Resolution in Snohomish County Superior Court
15 challenging non-compliance with SEPA requirements for a final threshold determination or
16 final EIS prior to adopting the Resolution. See WAC 197-11-070(1). After Friends filed a
17 motion for summary judgment on this issue, the County adopted a DNS with date July 27,
18 2006 which was later mailed to Friends as an attachment to the County's Response to
19 Friends' summary judgment motion.
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22 At the summary judgment hearing on August 18, 2006, the Judge ruled that an
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25 ¹ Friends explicitly states in its appeal that it does not appeal the statement on
26 the DNS that there is "no agency appeal."

1 administrative appeal filed by Friends by August 21, 2006 would be considered timely-filed.²
2 The Judge also ruled that Resolution #R20060184 is not a project action but is a non-project
3 action that requires a threshold determination. The County argued in its brief to the Court
4 that SCC 14.12.210(1) provides for an administrative appeal of a DNS. Friends argued in
5 its briefs that the DNS itself (attached to the appeal) states there is no administrative appeal
6 and that such an appeal is not authorized for the subject DNS. On August 21, 2006 Friends
7 filed its administrative appeal of all aspects of the DNS except the Responsible Official's
8 statement in the DNS that "There is no agency appeal." This motion is filed to request the
9 Examiner's ruling on whether or not, under the circumstances, there is an agency appeal on
10 this non-project DNS.
11

12 IV. ANALYSIS

13 Skagit County Code provides for an appeal of a DNS pursuant to SCC 14.06.

14 A final environmental threshold determination is
15 administratively appealable as a Level I decision, pursuant to
16 Skagit County Code 14.06.

17 SCC 14.12.210(1). SCC 14.06, however, only authorizes DNS appeals to the Hearing
18 Examiner when the DNS is related to a development permit.³ SCC 14.06.010, -.020, -.050,
19 -.070.
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22 ² The written Order of the Court should be prepared and filed in about one
23 week. A.O. Denny can confirm the Court's rulings.

24 ³ State law and regulation allow an agency the option to authorize an appeal
25 process for a DNS for non-project or legislative action, but Skagit County has not
26 implemented this option. Under this option, all non-project and legislative decisions of the
BOCC would be subject to reversal by the Examiner in agency SEPA review. RCW
43.21C.075; RCW 197-11-680.

1 The Definitions section of the Unified Development Code provides that a
2 development permit is a “project action.”

3 Development permit, or development permit application: any
4 land use discretionary, or environmental permit or license
5 required from a local government **for a project action**,
6 including, but not limited to, construction or exterior alteration
7 of structures, dredging, drilling, dumping, filling, earth
8 movement, clearing or removal of vegetation, Class IV general
9 forest practices, Class III forest practices with conversion
10 option harvest plans as defined in WAC 222-16, or other site
11 disturbance which either requires a permit, approval or
12 authorization from the County or is proposed by a public
13 agency, but excluding the adoption of amendment of a
14 Comprehensive Plan, subarea plan, community plan, functional
15 plan, development regulation or any amendments thereto.

16 SCC 14.04.020 (“Development Permit”) (emphasis supplied). The Court has found that
17 adding scheduled weekday commuter hours of service for the Guemes Island Ferry is a non-
18 project action. Therefore it is not related to a development permit, and SCC 14.06 does not
19 provide an agency appeal both according to code and according to the unappealed
20 interpretation of the Responsible Official.

21 Because the interpretation of the Responsible Official that “There is no agency
22 appeal” has not been appealed, the Examiner should not consider this matter further and find
23 that whether or not the Examiner might believe there is an administrative appeal, the
24 unappealed decision of the Responsible Official was final.

25 However, if the Examiner reaches this issue on the merits he should still conclude
26 that SCC 14.06 only authorizes the Hearing Examiner to hear DNS appeals related to
27 development permits and he does not have jurisdiction to hear DNS appeals for non-project
28 or legislative actions. The initial support for this conclusion is found in the Intent section of

1 SCC 14.06 which states:

2 The intent of this Chapter is to combine and consolidate the
3 application, review, and approval processes for development
4 permits as defined by Chapter 14.04 SCC. In addition, this
5 Chapter is intended to establish roles and responsibilities of the
6 Administrative Official, Hearing Examiner, Planning
7 Commission, and Board of County Commissioners relating to
8 development permits.

7 SCC 14.06.010.

8 Therefore, the intent of SCC 14.06 is to provide review processes for development
9 permits as defined in SCC 14.04.020 (“Development Permits”) which limits review to
10 project actions and excludes non-project actions. Further this Intent section states that it
11 establishes the role and responsibilities of the Hearing Examiner “relating to development
12 permits.” The Examiner would be illegally expanding his jurisdictions to conclude that
13 authority “pursuant to SCC 14.06” would extend beyond responsibilities “related to
14 development permits.” In re Electric Lightwave, Inc., 123 Wn.2d 530, 536, 869 P.2d 1045
15 (1994) (“An agency possesses only those powers granted by statute.”)
16

17 The Purpose section of SCC 14.06 further supports the conclusion that SCC 14.06
18 only relates to project actions associated with development permits. This Purpose section
19 states, in full:

20 This Chapter describes how the County will process
21 applications for development permits subject to review under
22 SCC Title 14.

23 SCC 14.06.020.

24 SCC 14.06 states that it categorizes applications for development permits into four
25 categories: “Applications for **development permits** shall be categorized as 1 of 4 levels as
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1 follows.” SCC 14.06.050(1) (emphasis supplied). Level I applications include applications
2 for “Threshold determinations pursuant to Chapter 14.12 SCC (SEPA).” SCC
3 14.06.050(1)(a)(ix). However as stated in SCC 14.06.050(1), such threshold determinations
4 must be “applications for development permits.” A development permit includes an
5 “environmental permit or license required from a local government for a **project action.**”
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7 SCC 14.04.020 (“Development Permit”) (emphasis supplied). Because the Court found that
8 the addition of commuter hours of operation to the Ferry schedule is a non-project action, the
9 Responsible Official correctly interpreted that there was no agency appeal for this type of
10 DNS.⁴

11 Finally, SCC 14.04.070(2)(d) supports the conclusion of the Responsible Official
12 when it states:

13 Any appeals of a determination of nonsignificance shall be
14 combined with and processed at the same time as the hearings
15 or appeals of the underlying development permit.

16 This states that “Any appeals” allowed on a DNS by Skagit County Code must be associated
17 with “hearings or appeals of the underlying development permit.” This precludes any
18 appeals that are not associated with an underlying development permit. Because there is no
19 development permit associated with the DNS under review, the Responsible Official was
20 correct in finding that “There is no agency appeal.”
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22 SCC 14.12.210(4) provides, “The procedural determination by the County’s

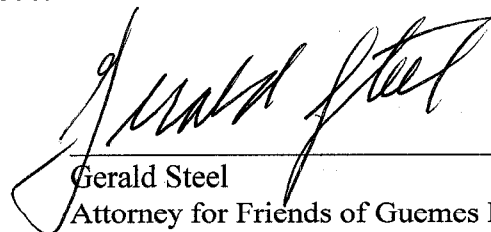
23 ⁴ Had the Court determined that Resolution #R20060184 was a project action,
24 there still would not have been an appeal of the DNS available because RCW 43.21C.075(2)
25 does not allow an agency appeal of a DNS for a project action when there is no permit
26 application and no pre-decision or post-decision hearing provided on the underlying action
after the DNS appeal is filed.

1 Responsible Official shall carry substantial weight in any appeal proceeding.” If the
2 Examiner reaches the merits of this issue, he should still find that the code should be
3 interpreted in support of the Responsible Official’s interpretation that, “There is no agency
4 appeal.”

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6 **V. CONCLUSION**

7 During the pendency of this administrative appeal, Friends requests that the changes
8 to the Guemes Island ferry schedule implemented by Resolution #R20060184 be stayed.
9 However, Friends further requests that its administrative appeal be denied on the grounds
10 that the Responsible Official stated in the DNS that, “There is no administrative appeal” and
11 this statement has not been challenged in this appeal. If the Examiner finds he must review
12 codes to decide this motion, then this administrative appeal should still be denied on the
13 grounds that the Unified Development Code only provides for appeal of a DNS that is
14 associated with a development permit and project action and it does not provide for an
15 agency appeal of a DNS for either a non-project action or for a legislative action. The
16 Superior Court has already decided that an administrative appeal filed on August 21, 2006
17 is timely-filed and that Resolution #R20060184 is a non-project action requiring a threshold
18 determination. If the Examiner finds he does not have jurisdiction to hear this DNS appeal,
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Petitioner requests that its appeal fee be refunded.

Dated this 19th day of August, 2006.



Gerald Steel
Attorney for Friends of Guemes Island

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