

**Julie Kjorsvik**

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**From:** Lynn Brewer <lbrewer@integrityinstitute.com>  
**Sent:** Monday, July 02, 2012 3:11 PM  
**To:** Julie Kjorsvik  
**Subject:** Brewer Notice of Appeal VA-12-00002 (with corrections)  
**Attachments:** Brewer Notice of Appeal (with corrections) - Kittitas County BOCC.pdf; ATT00001.htm; image001.png; ATT00002.htm

Julie -

Attached is the corrected Notice of Appeal with the exhibit changes.

Can you please confirm you have received this e-mail and the attached Notice of Appeal. It should be stamped with today's date and the other one destroyed. The exhibits remain exactly the same.

Thanks so much.

RECEIVED

JUL -2 2012

1st  2nd  3rd   
KITTITAS COUNTY BOARD OF COMMISSIONERS  
Neil C.  
Kirk H.

BREWER NOTICE OF APPEAL – VARIANCE DECISION (VA-12-00002)

Douglas Richard Brewer (Appellant)  
Lynn Brewer (Appellant)  
P.O. Box 145  
Easton, WA 98925

ZONING SETBACK VARIANCE # (VA-12-00002)

DATE OF DECISION: June 18, 2012

DEADLINE and DATE OF FILING OF APPEAL: July 2, 2012

NOTICE OF APPEAL

Appellants, and each of them, hereby respectfully request the Kittitas Board of County Commissioners (BOCC) review of the denial by Kittitas County Community Development Services (KCCDS) of the Appellants' zoning setback variance request and submit the following information in support of their appeal in accordance with KCC 15A.07.010(2):

- a. **Decision:** VA-12-00002 Denial of Brewer Zoning Setback Variance
- b. **Name and Address of Appellant:**

Douglas R. Brewer / Lynn Brewer (Homeowner / Applicant / Appellant)  
Mailing Address: P.O. Box 145; Easton, WA 98925  
Physical Address: 770 Kachess River Road; Easton, WA 98925

The interest in this matter is that Appellants are the homeowners of the subject property and Applicants of the Variance

- c. **The reason why the Appellants believe the decision of Kittitas County Community Development Services (KCCDS) is wrong is based upon the following:**

- 1) **Unusual Circumstances or Conditions Apply and Preservation of Substantial Property Right Possessed by Other Owners in the Same Vicinity**

When Appellants bought their lot in 2004, the property was zoned Forest and Range, which provided for 10' side setbacks. The home AND proposed garage/shop was noted on the original 2004 site plan submitted and

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approved by KCCDS at the 10' side setback afforded Appellants under Forest & Range **which Appellants believe grandfathers them in at a minimum of 10' setbacks as established by Forest & Range** (See Exhibit A attached hereto). Unbeknownst to Appellants, their property was subsequently rezoned as Rural Residential, causing the side setbacks to be moved to 15'. Appellants applied for a 5' variance. As Appellants were unaware of the rezoning at the time they applied for the variance, KCCDS sent out Appellants' Variance Application and noted the new Rural Residential zoning setbacks of 15' which if then granted a 5' variance, Appellants would be afforded the same benefit as they had been at the time their building permit was issued in 2004, and the same benefit granted to all other property owners who built prior to the rezoning. If the 5' variance is denied, it means that:

- i. The rezoning has caused **unusual circumstances or conditions to the property or the intended use that does not apply to the other properties in the area** since all other building on lots were done at 10' setbacks afforded by Forest & Range.
- ii. Appellants are being **denied the preservation and enjoyment of a substantial property right of the applicant possessed by owners of other properties in the same area** who were permitted to build similar shops/garages because they had been built prior to the rezoning.

2) **Variance is Not Materially Detrimental to the Public Welfare or Injurious to Property in the Vicinity**

KCCDS claims that the granting of the variance would be "materially detrimental to the public welfare or injurious to property in the vicinity." Appellants disagree. As noted in the "Proposal" in the Notice of Application prepared and written by KCCDS (See Exhibit B attached hereto):

*"Douglas Brewer has submitted zoning setback variance application to encroach 5 feet into the side setback. The subject property is zoned Rural Residential."*

The Application and language of the Proposal set forth above as written by KCCDS when it sent out the variance for comment established the foundation for the variance as Rural Residential and Appellants have accepted the County's proposed 5' setback variance from Rural Residential would essentially grandfather their property and therefore argue the variance should not have been denied.

The encroachment of 5' into the Rural Residential Side Setback would essentially return the property to Forest & Range and thus would not be detrimental to the public welfare or injurious to property in the vicinity as all

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other properties in the sub-division were built at Forest & Range setbacks. Furthermore, the proposed garage/shop was noted on the original site plan in 2004 approved by KCCDS at the 10' setback afforded by Forest & Range and as such Appellants take the position that they are grandfathered in. Meaning, so long as the 5' variance from Rural Residential setbacks is granted to allow building at a 10' setback, both the Appellants and KCCDS are in agreement.

However, Appellants argue that by KCCDS changing its Proposal, after the period of comment, without amendment, and simply denying the variance has left Appellants with no other alternative but to file this Appeal. Appellants believe the confusion over the rezoning has had a detrimental impact on their ability to build and without the 5' variance, returning the property to its prior zoning as approved at the time the site plan was developed, submitted, and approved, Appellants will find themselves unable to build the proposed shop as their home was positioned to allow minimal space to build the proposed shop as set forth in 2004. Appellants now find themselves unduly restricted by the rezoning and the proposed 5' variance provides sufficient remedy without being materially detrimental to the public welfare or injurious to properties in the vicinity.

3) Decision Adversely affects the realization of the comprehensive development pattern in the area.

KCCDS claims that the 5' variance, if granted, will adversely affect the comprehensive development pattern in the area. Appellants disagree. The Lake Easton Estates sub-division is a cluster sub-division built under Forest & Range zoning consisting of 52 lots of approximately ½ acre. (See Exhibit C attached hereto). With the exception of the handful of lots that have not yet been developed, all homes in the area were built with Forest & Range setbacks and Appellants were approved in 2004 for 10' side setbacks and the proposed shop was duly noted on those plans and therefore approved by KCCDS.

Contrary to KCCDS's argument, **the failure to grant the variance will have a detrimental impact on the development pattern in the area as THERE WILL BE UNINTENDED CONSEQUENCES adversely affecting the comprehensive development pattern in the area as Lots 39, 41, 43, and 32, as highlighted in yellow on Exhibit C, would likely become unbuildable, or at the very least, significantly restricted in the buildable area, if no variance is given to Lot 27 as it sets a precedence that would disable the aforementioned lot owners. As noted in the attached letter from lot owner 41 (See Exhibit D attached hereto), the rezoning has created a detrimental impact as it increased the side setbacks from 10' under Forest & Range to 15' under Rural Residential and increased backyard setbacks from 10' to 25' substantially reducing the buildable area on each lot, particularly if no relief from the**

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sanitary protection areas are provided by the state of Washington. Rural Residential set backs are based upon 5 acre lots which allow for sufficient room to build with the greater setbacks whereas Forest & Range cluster subdivisions provide for far smaller lots of ½ acre making the increased setbacks detrimental to homeowners. The impact of a reduction of square footage on a ½ lot is significant when you reduce the buildable area from 5 acres to ½ acre. By its very nature, **the rezoning created unusual circumstances that adversely affect the comprehensive development pattern in the area.**

4) **Health and Safety Issues:**

KCCDS states three reasons the variance is being denied that are capricious when considering Appellants' variance would afford them the same setbacks had no rezoning occurred thus the following arguments are spurious as these issues did not exist prior to the rezoning:

- a. *Be detrimental to the public health, safety, and general welfare;*
- b. *Adversely affect the established surrounding vicinity and planned uses;*
- c. *Be injurious to the uses, property, or improvements adjacent to, and in the vicinity of, the site upon which the proposed use is to be located.*

We submit, given all homes to date in Lake Easton Estates have been built under Forest & Range and no "health and safety" issues were present under Forest & Range, the arguments presented by KCCDS in the denial do not meet the doctrine of fairness.

This leaves us to believe that the "public safety issues" relate to a wellhead that sits at the FRONT of the property and although should have had no bearing on the request for a SIDE setback variance, we feel the need to address the matter as part of the appeal since the issue is now part of the official record. Furthermore, any variance related to the wellhead falls specifically under the jurisdiction of the Washington State Department of Health as set forth in the WAC and any granting of a variance to build near the wellhead is to be presented to Washington State Department Health as dictated by the WAC.

Although Appellants have attempted to determine the specific "health and safety" issues KCCDS determined to be present as the basis for the denial (given no such issues existed under Forest & Range), and have been informed verbally by staff member Dan Valoff that the wellhead at the front of the property had absolutely no bearing on the denial, we have strong reason to believe the comments submitted by Mr. James Rivard of Kittitas County Public Health (*See Exhibit E attached hereto*) presented the only health and safety issues upon which KCCDS could have relied.

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Lake Easton Estates has 9 Group B wells servicing the 52 - ½ acre lots. Group B wells are required to have a 100' sanitary control area. Although the well house for Appellants home sits on the adjacent lot, the wellhead is on Lot 27 owned by Appellants. Mr. Rivard was presented the Water Users' Declaration and CC&Rs for Lake Easton Estates and falsely drew the conclusion:

*"To the best of my knowledge and ability to interpret the attached documents and the documents included within the link, I **have to recommend that the variance be denied.** It appears as though the shop is within the 100 foot sanitary circle. Community water systems such as Group A and Group B **typically** have a restrictive covenant that does not allow for the construction of structures within the sanitary circle to protect public health and the water supply from potential contaminants."*

The "attached documents" to Mr. Rivard's email, upon which Mr. Rivard relied, are the Lake Easton Estates Water Users' Declaration and CC&Rs, as required under the WAC to be filed as part of the installation of the Group B wells. Despite Mr. Rivard's speculation as to the presence of "restrictive covenants," no such restrictive covenants exist within Lake Easton Estates either in the Water Users' Declaration or CC&Rs that prohibit any building within the 100' sanitary protection area surrounding the wellheads but merely establish the types of building that can occur. This is evidenced by the fact that the **100' Sanitary Circle of every Group B well in Lake Easton Estates has been encroached except for the one on Appellants' property.**

For clarification, the specific language regarding the restrictive covenants in the Water User's Declaration recorded on January 27, 1995 with Kittitas County in Volume 362 Page 1370-1376 (Property Affected Lot 41) and a duplicate copy recorded on January 27, 1995 in Volume 362 Page 1349-1355 (Property Affected Lot 31), state the following:

**"8. Prohibited Practices. No person will construct, maintain or suffer to be constructed or maintained upon the property above described and within 100 feet of the well herein described, so long as the same is operated to furnish water for public consumption, any of the following: Septic tanks and drainfields, sewer lines, underground storage tanks, County or State roads, railroad tracks, vehicles, structures, barns, feeding stations, grazing animals, or enclosures for maintaining fowl or animal manure, liquid or dry chemical storage, herbicides, insecticides, hazardous waste or garbage of any kind."**

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In fact, we actually find **Kittitas County itself has violated Lake Easton Estates Water User's Declaration, and thus the WAC, by approving the installation of "County roads" within the 100' sanitary circles (as noted on Exhibit E), despite the specific "prohibited practices."** Therefore, for Kittitas County to now deny Appellants the opportunity to build within the 100' setback, when the County itself is in violation of the Water User's Declaration would be capricious and violate the doctrine of fairness. Presumably if the County Roads encroachment on the 100' setback do not create a public health and safety issue, then clearly our proposed shop does not, particularly given its limited use and similarities to the uses of other property owners in Lake Easton Estates.

Additionally, the Lake Easton Estates Restrictive Covenants (CC&Rs) recorded on or about the 23<sup>rd</sup> day of February 1990 in Volume 302 page 636-691 Restrictive Covenants (CC&Rs) do not deny the right to build within 100' of the well, but rather is very specific about what types of building / uses are prohibited, namely:

6.3 Wells and Waterworks. . . .

The Declarant, its successors and assigns, including all Lot Owners, will not construct, maintain or suffer to be constructed or maintained upon the Properties, or any Lot, and within one hundred feet (100') of any well herein described, so long as the same is operated to furnish water for public consumption, any potential source of contamination, such as **cesspools, sewers, privies, septic tanks, drainfields, manure piles, garbage of any kind or description, barns, chicken houses, rabbit hutches, pigpens, or other enclosures or structures for the keeping or maintenance of fowls, or animals, or storage of liquid or dry chemicals, herbicides, or insecticides."**

Except for Appellants' home, every other home built in Lake Easton Estates on a lot with a Group B well has been afforded the right to encroach the sanitary protection area (as highlighted in green on "Exhibit C") which demonstrates that KCCDS does not believe building within the sanitary protection area creates any public health, safety and general welfare issues given KCCDS approved every single building permit. Therefore, any argument by KCCDS that the proposed building if built by Appellants within the sanitary protection area is a health and safety issue is capricious. Given our shop will be similar in nature and presumably used for the same purposes as our neighbors, Appellants argue that without a written policy and procedure by the County prohibiting any building, then we believe the proposed building which will encroach the sanitary circle should be allowed. The Public Health Department, as noted in the attached email from Ms. Holly Duncan, marked as Exhibit F, Kittitas County bases its standards on the WAC and **no other Kittitas County Code exists which prohibit such building within the 100' sanitary circles.**

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To the best of our knowledge, KCCDS has not required a single variance from the State of Washington, prior to issuing building permits within Lake Easton Estates where these homes have encroached the 100' sanitary circle which means, if true, KCCDS has further violated state law. Appellants have an open records request to determine to what extent such actions may have occurred and have been informed that the response to this records request shall be expected by August 31, 2012.

Any variance for building within the sanitary protection area is governed by WAC 246-291-100(4) and thus falls to the State of Washington Department of Health to administer. As noted in the attached email from Danielle Russell from the Washington State Department of Health to Appellants, the State of Washington does allow for building within the sanitary protection areas and has a very specific process for approval of variance requests. (*See Exhibit G attached hereto*). Appellants have begun the process for obtaining the requested variance and expect with a proper mitigation plan, the variance will be allowed but KCCDS is not responsible for the issuance of that sanitary protection area variance and thus should not have based its decision to deny the Appellants' side setback variance application on the location of the wellhead.

**d. Desired outcome:**

Appellants hereby request that the BOCC approve a variance that would grant Appellants the right to encroach the Rural Residential side setback by 5' thereby returning the property to its zoning under which Appellants had been afforded when they bought the property and in accordance with the site plan attached hereto as Exhibit A. Given, this site plan was approved by KCCDS in 2004 when the Appellants obtained their original building permit showing the future garage which they now seek to build, Appellants believe the variance should be approved given their grandfather status. Any issues that KCCDS now claims would prevent Appellants the right to build at 10' setbacks, were created with the property rezoning.

Appellants are willing to avoid any "public safety, welfare or health" issues that could be caused by further encroachment on the side setback by compromising on the variance application and accept KCCDS's position in the Proposal sent out for comment, that the 5' setback variance request was based upon Rural Residential zoning. The side setback would be "grandfathered" to its original state. As noted in *Exhibit H*, Kittitas County has allowed properties to be "grandfathered" when zoning changes occur due to the Growth Management Act responsibilities of Kittitas County.

Appellants further request that KCCDS defer any arguments they may use on the placement of the wellhead and the wellhead protection area to the State of Washington Department of Health as noted in Exhibit G so that Appellants may proceed with the variance process for the wellhead.

Had Appellants' property been zoned Range & Forest and a 5' variance request denied, Appellants could have still built the proposed building at a 10' setback. The fact that the



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property is now Rural Residential, the only relief Appellants have in order to be able to build the proposed shop as set forth in the 2004 site plan is to obtain a 5' variance to return the property to a Forest & Range zoning setback. This means that Appellants are forced to pay an additional \$500 to appeal the matter necessitated only because of the rezoning. Based upon this, Appellants would hereby request a refund of the \$500 fee paid to appeal this matter as we feel as though the rezoning created sufficient unusual circumstances that based upon the written proposal of KCCDS in Appellants' Variance Application would have allowed for the 5' variance from Rural Residential and would have returned the property to Forest & Range making this appeal unnecessary.

**e. Appeal fee has been submitted herewith.**

***LIST OF EXHIBITS ATTACHED HERETO:***

- A – Original 2004 Site Plan approved by KCCDS showing “future garage”*
- B – Notice of Application Dated May 22, 2012 as prepared and sent out by KCCDS*
- C – Subdivision Plat Map (COMPAS Mapping System) showing Wellhead Sanitary Protection Areas noted by circles  
Properties highlighted in yellow (unbuildable if no variance is approved)  
Properties highlighted in green (properties where sanitary protection areas have been encroached by buildings)*
- D – Letter dated July 1 2012 from JoDee Marlatt, owner of Lot 41 regarding unintended consequences.*
- E – Email from James Rivard to Dan Valoff regarding restrictive covenants and request that variance be denied*
- F – Email from Holly Duncan of Kittitas County Public Health Department regarding Kittitas County's reliance upon the WAC standards for building within 100' sanitary circles.*
- G – Email from Danielle Russell of the Washington State Department of Health to Appellants regarding process for approval of wellhead variance requests*
- H – Letter from Kittitas County Planning Department to Attorney Dohn regarding “grandfather” of zoning due as part of Kittitas County Growth Management Act.*