KITTITAS COUNTY HEARING EXAMINER
KITTITAS COUNTY, WASHINGTON

SHREE HOLDINGS SIGN VARIANCE **VA-19-00002**	**Kittitas County's Second Supplemental Brief**

COUNTY CODE REGARDING VARIANCES

Appeals of variances are governed by KCC 17.84.010 which provides as follows:

> Pursuant to Title 15A of this code, Project permit application process, the administrator, upon receiving a properly filed application or petition, may permit and authorize a variance from the requirements of this title only when unusual circumstances cause undue hardship in the application of it. The granting of such a variance shall be in the public interest. A variance shall be made only when all of the following conditions and facts exist:
>
> 1. Unusual circumstances or conditions applying to the property and/or the intended use that do not apply generally to other property in the same vicinity or district, such as topography;
> 2. Such variance is necessary for the preservation and enjoyment of a substantial property right of the applicant possessed by the owners of other properties in the same vicinity or district;
> 3. The authorization of such variance will not be materially detrimental to the public welfare or injurious to property in the vicinity or district in which the property is located;
> 4. That the granting of such variance will not adversely affect the realization of the comprehensive development pattern. A variance so authorized shall become void after the expiration of one year if no substantial construction has taken place;
> 5. Pursuant to Title 15A of this code, the Hearing Examiner, upon receiving a properly filed appeal to an administrative determination for approval or denial of a variance, may permit and authorize a variance from the requirements of this title only when unusual circumstances cause undue hardship in the application of it. The granting of such a variance shall be in the public interest. A variance shall be made only when all of the conditions and facts identified within subsections A through D of this section are found by the Hearing Examiner to exist.

County code is clear that the initial determination of a request for a variance is made by the administrator and that someone unsatisfied with that decision can appeal that administrative

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determination to the Hearing Examiner. Said another way, the Hearing Examiner only has jurisdiction over applications that have already received the county's administrative decision. Therefore, proposed changes to a variance request during the appeal process are a problem because it renders the 'application' no longer what the county made a decision upon, and if what is now before the Hearing Examiner is no longer something the county rendered a decision upon, then the Hearing Examiner has no jurisdiction over it. Said another way, if the Hearing Examiner were to make a decision upon an application that was different than the application upon which the county rendered a decision, the Hearing Examiner would be making an initial determination on a variance request which is outside of what is contemplated in our code.

FACTUAL RECAP

The Appellants (Shree) made application for a "larger and taller sign than" Kittitas county code allowed in March of 2019. AR index #4 pg.1.[1] The application was for a sign located fifty (50) feet from the fueling island in conformance with state law. AR 6 pgs. 1 and 2. Seeking to answer the first variance criteria (unusual circumstance or condition) the Shrees state that "Due to the overpass motorists traveling eastbound on I-90 are unable to see the sign until after they have passed the off ramp." Id. They described the new sign as allowing motorists to "see our business early enough to make a decision to exit." Id. at pg.2. In other words, because of the overpass (the magnitude of its obstruction was not defined, nor was the degree of mitigation necessary to overcome that obstruction), motorists were driving past them before they realized there was a gas station there.

Seeking to answer the second variance criteria (necessary to preserve a commonly held property right) they said the approval of the variance "will allow the property owners the opportunity to expand their business, providing both jobs and additional opportunities for other commercial properties and businesses that rely on out of the area travelers." AR index#4 pg. 1. This answer was unresponsive to the variance criteria.

In April of 2019 Kittitas County sent the Shrees a request for additional information. AR index#9. That request asked how their sign was an unusual circumstance and why the WSDOT signs failed to mitigate whatever deficiency that might be. Id. The letter stated that they had failed to describe a substantial property right that was necessary to protect with the variance. Id.

[1] Citations to the index number, then what page within that number. (The PDF page numbers seem off.)

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The letter asked for a fall radius showing where the sign would fall if it failed, it did not ask that the location be moved from the original application. Id. The letter requested a revised site plan showing the fall radius with a concern for the distances from certain property lines, not from the fueling island. Id.

In June of 2019 Shree sent their 'resubmittal' to the county. AR index #s10, 11, and 12. In the resubmitted application, the answer to the first variance criteria (unusual circumstance) was "The property location, interstate boundaries topography, elevation of exist-vs-overpass, approach and access negatively affects the recognition and timely reaction to take advantage of the services and benefits provided by the businesses located at the site it limits the full utilization of the property to attract customers, thus it would have a negative impact on income." AR index 12 pg.1. In other words, they kept contending that motorists could not see that there was a gas station here until they were past the exit. There is no description of the magnitude of the obstruction or impairment or of the magnitude of height and size needed to mitigate that impairment. As to the efficacy of the WSDOT signs, the applicant merely said that if those do anything, then why does everyone else use big signs? Id. When answering the property rights question in the variance criteria, they merely said that a larger sign will economically benefit everyone. Id at pg. 7. This again does not answer the question. The sign requested was described as being 87.5 feet tall. AR 12 index#12 pg. 8. The sign was described as being in the "fall zone radius" in the exhibit attached. Id. That exhibit is at AR index#12 pg. 10, and shows the sign location/fall radius now being some distance greater than 87.5 feet from the fueling island. The August 31, 2018 email from WSDOT indicating approval of the sign location was attached (AR index#12 pg.13) without the supporting diagram showing that said approval was predicated upon a fifty-foot distance from the fueling island which was no longer the case.

Kittitas County issued its denial of the variance request in September of 2019. AR index#25. In response to the Shree's answer to the 'unusual circumstances' criteria of the variance provisions (the topography and overpass 'affects the recognition and timely reaction to…the business located at the site.") the county found that the applicant had failed to demonstrate any unusual circumstance or condition. AR index#25 pg.2. There had been no demonstration how or to what extent the Shree's sign situation was deficient much less a demonstration why the proposed sign was necessary to mitigate that deficiency or why the WSDOT signs did not serve as mitigation. In response to the Shree's answer to the second

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criteria (a bigger sign will economically benefit them and other neighboring businesses AR index#25 pg.2.) the county found that the appellant had failed to demonstrate the existence of a property right that was negatively impacted by application of county code. AR index#25 pg.3.

In September of 2019 the Shrees filed this appeal. In that appeal document they mentioned that there had been a flag test showing that the proposed sign needed to be at least sixty-five feet tall and about 1,000 sq. ft. in face area. AR index#27 pg.1. On page three of the appeal document appellants write that they "would be happy to provide further supporting documentation and details about the topography and visibility restrictions during the appeal process."

Appellant's brief did not contain documentation related to the flag test or supporting the need for a sign whose face was over 1,000 sq.ft. as promised in the appeal document. They did, however, argue that the view of their business was obscured by the neighbor's building and that the neighboring business "has HUGE RED LETTER WALL SIGNS on all three faces fronting Interstate-90." Their brief pages 16, 18, 19. In response, the county, in its brief pointed out the lack of factual support for the variance criteria.

Supplemental briefing was approved. The appellants were allowed to "supplement their records with submissions being made no later than January 10, 2020." By email on January 9, 2020, Mr. Carmody indicated that they would not be making any additional submissions. Their supplemental brief (a reply essentially) merely challenged the county's legal authority. The county's supplemental brief bolstered that authority, reiterated the lack of factual support for the need for the variance, and pointed out certain arguments the appellant seemed to not be taking issue with. Even though the county was consistently challenging the factual basis for granting the variance, and the appellants had said they "would be happy to provide further supporting documentation and details about the topography and visibility restrictions during the appeal," no such disclosure was made.

The hearing was held on February 13th. At the hearing, appellants submitted the Declaration of Dan Risk. Beginning at paragraph #7, Mr. Risk describes an industry standard practice of conducting a flag test to determine, due to local topography, how high a sign needs to be. At paragraph #11 he concludes that the bottom of the sign needed to be at least 45 feet off the ground. (Given that the proposed sign is about 25 feet tall, that would mean the sign needs to be at least 70 feet tall.) In paragraph #13 he describes essentially another industry standard for

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determining needed size of a sign face. This formula necessitates that the sign be a little over 1,100 sq.ft. in face area. He includes various material to support what he says as exhibits as well as a design for the sign and a pair of pictures apparently taken from the 'sign's eye view' during the flag test (Exhibit B). I want to draw our attention to those photos. Notice that the countryside is snow-covered in both pictures. *Hence, these pictures were taken, and the flag test was done, in winter*. Remember also that the appellant mentioned the existence of the flag test and its results in its appeal document in September of 2019. Hence, at the latest, this flag test was done last winter (winter of 2018/2019). That would be consistent with what Mr. Risk said about it being an industry standard in establishing a sign's height and size *prior* to design. That would make sense that it was done *prior* to the Shree's initial application in March of 2019.

At the hearing, appellants articulated that the neighboring business, a legal nonconforming use, so overshadows and distracts from their business that the property right-to adequately advertise onsite activity- is compromised. After making its case, Ms. Saini testified as to what is inadequate about the WSDOT signs. She stated, essentially, that what she, as a gas station owner, needs from a sign is to alert motorists (chiefly truckers) as to what are her fuel prices which change on a daily basis. The appellants expressed an intention to not violate state law and have their sign within fifty feet of the fueling island.

WHERE WE ARE NOW

Kittitas County has been asking, at least since April of 2019, (1) What are the unique circumstances that necessitate a variance for a sign of this height and size? (2) Why don't the WSDOT signs make up for folks missing Shree's gas station? (3) What property right is being impinged by the application of the county code? And now, over ten month later, after all this delay and expense, the answers finally have been divulged.

As stated above, the property right was the ability to adequately advertise one's business upon one's own site. That was hampered by the domineering presence of the neighboring building with its distracting giant wall signs and its location with relation to the building itself of appellant's business. This idea was never clearly articulated until oral argument. The county had been asking for this for over ten months.

Ms. Saini's statement about needing to give notice on fuel prices (1) made complete sense, and (2) was completely different than what the county had been told for the last ten months. The county had consistently been told that folks could not see that there was a gas

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station there, and so missed getting off at the exit, not that she needed to get info to motorists as to her fuel prices. Again, it would have been nice to have had this answer when the county asked for it 10 months ago.

In many ways, the main series of questions the county had were answered by the declaration of Mr. Risk. This gives a clear industry standard as to why this sign needs to be 87.5 feet tall and the face size that is requested. The late timing of the disclosure of this information is the most troubling, as will be discussed later.

The building official's concern about fall radius, as shown in the record, had to do with distance from property lines (I-90 being one of them) not from the fueling island. A site location with distances from property lines, as requested by the building official, yet 50 feet from the fueling island as required by state law should be workable and legally within the scope of the initial and resubmitted application in this matter. In speaking with county employees immediately after the hearing, I was told that if they had been given this information when they had asked for it back in April, they would have approved the project and this sign would be built by now. Indeed, the choice to delay getting this information to the county-information that existed and the county asked for in April of 2019-has resulted in delays and costs to the Saini family, as well as a waste of taxpayer dollars in dealing with this appeal.

As frustrating as this has been, now that the requested information has actually been divulged to the county, it appears that the applicants have met their burden to receive a variance for an 87.5-foot sign that is 1,176 sq.ft. in size and will be located within fifty feet from the nearest fueling island and the appropriate distance from property lines as requested by the building official. The county sees no benefit to reprocessing a new variance application if the Hearing Examiner determines it should be granted.

ANSWERS THAT NEED TO BE PROVIDED

The county asked for justification for the unique circumstance that made a variance necessary in April of 2019. The flag test and its data had been done the previous winter. It was used in designing the sign that was being proposed, and so the information *existed* in April of 2019. For whatever reason that information was not given to the county when requested that April or as part of the applications' resubmittal in June. It was mentioned but not provided in the appellants appeal document. It was not submitted with appellants appeal brief. The county complained about the lack of variance justification in its brief, yet the information was not

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included in appellants supplemental brief or as part of the extended briefing schedule. The county complained again about the lack of factual support for the variance in its supplemental brief. The information was finally divulged at hearing where neither the county nor the Hearing Examiner had time to read it or discuss it intelligently. This delay, for whatever reason, had a huge impact on this matter. This declaration *completely* answered the county's question as to height and justified issuance of the variance. If this had been divulged to the county when they had asked for it in April, (the information and photos existed at that time) the project could have been approved and the sign would have been built by now. Whoever chose to not divulge this information owes the applicants an explanation because that decision cost them all this delay and attorney fees since April of 2019. Whoever chose not to disclose this to the county when they asked for it in April of 2019 and then made the continuing decision to not disclose it until the hearing, has done the applicant a tremendous disservice and is responsible for the delay and costs the applicant has been subjected to since April of 2019. Not to mention wasting the County's/ taxpayer's money defending a matter because, had the county been given the information it asked for, the county would have approved this variance in April of 2019.

The county asked for justification for the size of the sign in April of 2019. Instead of providing it as part of the resubmittal in June, this too was not provided until the hearing. Like the flag test information, this completely answered the county's question but, for some reason was withheld at every step so as to drag it out to the last possible minute. Whoever made that decision to wait to the last minute, to draw the process out as long as possible, owes the appellant an explanation because they are responsible for the delay in this project and all the costs associated therewith since April of 2019. Had this information been given to the county when it asked for it in April, this project would have been approved then and build by now. Whoever chose to not disclose that until the hearing on appeal did the appellant a great disservice.

The County asked in April of 2019 why the WSDOT signs were insufficient to remedy any alleged shortcoming. The applicant kept saying that the problem was that travelers could not tell there was a gas station there until they had already passed the exit. The county kept asking about the WSDOT signs in each brief. It was not until rebuttal testimony at hearing that Ms. Saini said that what she needs a sign to do is advise motorists, chiefly truckers, what her fuel prices are and those change daily, hence the WSDOT signs are relatively ineffective. This answer makes perfect sense. It is also completely different than what the county had been told

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over the last 10 months. (The county had been told the problem was giving notice of the presence of a gas station, not specifically of daily pricing.) Ms. Saini mentioned that for every question Mr. Caulkins has, she has twenty answers. The county does not question that. What the county questions is why the person acting as the agent for the appellant who filled out and submitted the resubmittal application did not include those answers to the county. It is not believable that Ms. Saini failed to say this about fuel price notice to the agent in trying to answer the county's questions, yet it was omitted. It was also omitted at every step of this matter. That omission needs to be explained to the applicant because it is a part of the delay and cost the applicant has suffered since April 2019.

CONCLUSION

The requested information has actually finally been divulged to the county, and it appears that the applicants have met their burden to receive a variance for an 87.5-foot sign that is 1,176 sq.ft. in size and will be located within fifty feet from the nearest fueling island and the appropriate distance from property lines as requested by the building official.

Submitted this the 28th day of February 2020.

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