



CITY OF EDMONDS

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HEARING EXAMINER

GARY HAAKENSON
MAYOR

RECEIVED

FEB 22 2010

PLANNING DEPT.

In the Matter of the Appeal of the)	NO. APL20090004
)	
Ken Reidy)	
)	
of a November 13, 2009)	
Notice of Civil Violation of Edmonds)	
Community Development Code Sections)	
18.70.000, 16.20.030, 16.20.040,)	FINDINGS, CONCLUSIONS,
19.05.000, and 19.05.010 on property)	AND ORDER
at 771 Daley Street, Edmonds, WA)	
_____)	

SUMMARY OF DECISION AND ORDER

The appeal of the Notice of Civil Violation is **DENIED**. The Appellant shall abate the code violation by March 12, 2010 or be subject to penalties per the order below.

SUMMARY OF RECORD

Request:

Ken Reidy (Appellant) appeals a November 13, 2009 Notice of Civil Violation (NOV) issued by City of Edmonds. The NOV alleges violations of the Edmonds Community Development Code (ECDC) Sections 18.70.000, 16.20.030, 16.20.040, 19.05.000, and 19.05.010 relating to the placement of an accessory structure adjacent to the north property boundary of Appellant's property at 771 Daley Street, Edmonds Washington. Appellant's issues on appeal are detailed in the following findings (see Findings 22 and 23).

Hearing Date:

The City of Edmonds Hearing Examiner conducted an open record appeal hearing on February 4, 2010, having conducted a site visit prior to the hearing.

Testimony:

At the open record hearing, the following individuals presented testimony under oath:

For Appellant

Ken Reidy, Appellant¹

Finis Tupper, witness for Appellant

¹ Although the Appellant was represented by counsel in the underlying action through at least November 2009 and written legal argument dated November 2009 was submitted by counsel, the Appellant appeared at hearing *pro se*.

For the City of Edmonds

Stephen Clifton, City of Edmonds Community Services Director and Acting Director of Economic Development

Jeanie McConnell, City of Edmonds Public Works Engineering Program Manager

For Interested Party Thuesen

Eric Thuesen, Interested Party

Attorney Representation:

Scott Snyder represented the City of Edmonds.

Duana Koloušková represented Mr. Thuesen.

Exhibits:

The following exhibits were admitted in the record:

*Exhibits submitted by the Appellant:*²

- A1 Mr. Reidy's pre-hearing brief (submitted at hearing, 76 pages), with the following attachments:
- A. Email from Scott Snyder (S. Snyder) to Matthew Cruz (M. Cruz), dated November 2, 2009
 - B. Letter to Duana Koloušková (D. Koloušková) from S. Snyder, dated August 6, 2009
 - C. Document³ purporting to contain information emailed from S. Snyder to D. Koloušková on July 13, 2007
 - D. Email from D. Koloušková to S. Snyder, dated July 29, 2009
 - E. Letter from D. Koloušková to Ann Bullis, Building Official, et al, dated November 5, 2009
 - F. Email from Appellant to S. Snyder, dated April 3, 2009
 - G. Email from S. Snyder to Appellant, dated April 3, 2009
 - H. Email from Sandy Watson to M. Cruz, dated April 1, 2009
 - I. Letter to D. Koloušková and M. Cruz from S. Snyder, dated April 1, 2009
 - J. Email from Appellant to Gary Haakenson, dated April 30, 2009
 - K. Letter from M. Cruz to Eric Thuesen (E. Thuesen), dated July 12, 2007 and Email from M. Cruz to Appellant, forwarding email from E. Thuesen, dated July 19, 2007

² On February 16, 2010, twelve days after adjournment and the close of the record, the Appellant sought to submit additional argument and briefing into the record. Notice of the public hearing established the public hearing as the end of the comment period. *Exhibit C23*. The material was not timely and is not admitted.

³ This document is apparently cut and pasted from an email to another person, but it does not contain the typical printed email header information (From, To, Date, Subject, etc), rendering this document less credible as evidence than other emails or correspondence. It was not relied on.

- L. Letter from M. Cruz to David Gebert, Edmonds Development Services, dated July 27, 2007, with enclosures
- M. A portion of a written communication from M Cruz to an unidentified person, undated and emails and an email from Jeanie McConnell to S. Snyder dated September 24, 2009
- N. Email from Jeanie McConnell to E. Thuesen, dated August 13, 2009
- O. Letter to E. Thuesen from Robert English, City Engineer, dated February 24, 2009
- P. Plat survey for Holy Rosary Parish, prepared December 289, 1996 by Lovell-Saunders & Assoc.
- Q. Enlarged detail from survey of Reidy property depicting location of shed in question in relation to recorded property boundary

A2 "Declaration and Brief of Finis Tupper", undated⁴

*Exhibits submitted by the City:*⁵

- C1 City of Edmonds Building and Engineering Divisions' Staff Report to Hearing Examiner
- C2 City's Prehearing Legal Brief to Hearing Examiner
- C3 Zoning and vicinity map
- C4 Aerial Map
- C5 Letter of appeal from Appellant, dated November 24, 2009, with attachments:
 - Att. 1 Notice of Civil Violation
 - Att. 2 Settlement Agreement and Release, July 24, 2007
 - Att. 3 1962 Building Permit Application (copy not fully legible)
- C6 Notice of Civil Violation, dated November 13, 2009
- C7 Photo of posted November 13, 2009 Notice of Civil Violation
- C8 Order to Correct Violation Notice, dated August 25, 2009
- C9 Photo of posted August 25, 2009 Order to Correct Violation Notice
- C10 Letter appealing August 24, 2009 Order to Correct Violation Notice
- C11 Withdrawal of appeal of August 24, 2009 Order to Correct Violation Notice
- C12 Copy of building permit for shed in question, BLD19620239
- C13 Reidy survey (submitted by Appellant), dated February 13, 2008 depicting shed location
- C14 Copies of photos of shed and vacated alley
- C15 Letter from Counsel for Appellant dated March 17, 2009
- C16 April 3, 2009 Order to Correct Violation and resulting Appellant's schedule for demolition of the portion of the shed in question and concrete slab
- C17 Complaint in Thuesen v. City of Edmonds (appealing vacation of right-of-way)
- C18 Order of the Honorable Eric J. Lucas, Snohomish County Superior Court, Cause No. 06-2-120190-0
- C19 Findings, Conclusion, and Decision of City of Edmonds Hearing Examiner (File Nos. AP-06-45 and AP-06-48)

⁴ The City objected to the admission of this document on relevance grounds, as the witness was present had submitted testimony; however, on Appellant's motion it was admitted.

⁵ In the City's Staff Report (Exhibit C1), exhibits are listed within Section 9 of the report, and all City references in the staff report to its own exhibits are preceded by a "9"; for example, the Staff Report is listed at Exhibit 9.1. In the instant decision, the 9 has been replaced by "C", to indicate City Exhibits, and the Staff Report is Exhibit C1.

- C20 Settlement Agreement on Cross Appeals (Thuesen v. Edmonds)
- C21 Plat of City of Edmonds
- C22 Edmonds Community Development Code Chapter 19.80 and Ordinance 3740
- C23 Public Hearing Notice documents, including notice of appeal, notice of hearing examiner hearing, and affidavits of mailing and posting
- C24 Request for Code Enforcement Action and Violation Report, dated July 11, 2007
- C25 Approved Civil Drawings for two-lot Short Plat S-05-09, dated July 20, 2007
- C26 Email to City from E. Thuesen, dated August 8, 2007
- C27 Revised Civil Drawings for two-lot Short Plat S-05-09, approved August 10, 2007
- C28 Letter to City from Counsel for Appellant, dated November 7, 2007
- C29 Vera Reidy Notification regarding Order to Correct, dated November 12, 2007
- C30 City Council Resolution 1178
- C31 Alley vacation Ordinance 3729
- C32 1959 Zoning Ordinance
- C33 Letter from E. Thuesen, dated January 10, 2010
- C34 Ordinance No. 3779

Exhibits submitted by Interested Party Thuesen:

IP1 Legal Memorandum of Counsel for Eric Thuesen, with attachments:

Att. 1 Letter from Eric Thuesen, dated February 2, 2010

Att. 2 Engineering plans for the retaining wall on the adjacent parcel that conflicts with existing shed placement

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Upon consideration of the testimony and exhibits submitted at the open record hearing, the Hearing Examiner enters the following findings and conclusions:

FINDINGS

Background Facts and History of Proceedings

1. On July 11, 2007, the City of Edmonds received a request for code enforcement action relating to an accessory structure (a tool shed) and railroad ties at 771 Daley Street in Edmonds (the subject property). The complaint alleged that the structure obstructed a 7.5-foot City right-of-way (an unopened alley) north of the subject property and extended onto the neighboring parcel to the north, addressed as 509 - 9th Avenue North. *Exhibit C24*.
2. The subject property, located on the corner of Daley Street and 8th Avenue North, has an R-6 zoning designation. Pursuant to ECDC 16.20.040.E, on corner lots, all setbacks other than from the street are regulated as side setbacks. The RS-6 zone requires a minimum five-foot side yard setback for all structures. *Exhibit C3; ECDC 16.20.030, Site Development Standards*. Adopted in 1959, the zoning code in effect in 1962 required a five-foot side yard setback for accessory structures. *Exhibits C1 and C32*.

3. North of the subject property is a 7.5-foot wide City right-of-way running the whole length of the city block between 8th and 9th Avenues North. It is legally described as: "That portion of unopened alley right-of-way as dedicated per the Plat of the City of Edmonds recorded in Volume 2 of Plats, Page 39 of records of Snohomish County, Washington lying northerly of and immediately adjacent to Lots 20 through 38, Block 82 of said plat." *Exhibit C31*.
4. In its archives, the City found a building permit for a tool shed on site issued on July 31, 1962. The permit states that 15 foot front and five-foot side and rear setbacks were required in the placement of the tool shed. Language at the bottom of the permit states: "NOTE - This permit does not cover plumbing, sewer, or electrical installations, nor does it permit any work to be done in the Right of Way areas. Driveways and walkways must be planned to meet the official grades of streets and alleys, and plans for future sidewalk development." *Exhibit C12*.
5. A survey submitted by the Appellant depicts a small "outbuilding" near the north lot line, denoting an additional "lean to shed" attached to the north of the outbuilding. The exact measurement is not in the record, but it appears that the "outbuilding" portion of the accessory structure is setback slightly less than five feet from the rear lot line. The Appellant's survey clearly shows the portion of the structure labeled "lean to shed" and the underlying concrete slab extending off-site for the entire 7.5-foot width of the alley and slightly onto the parcel to the north of the alley. *Exhibit C13*.
6. In the staff report to the hearing examiner in the instant matter, the City stated: "No building permit was found for the addition to the shed within the five foot side yard setback, nor has the Appellant submitted a copy of a permit issued by the City of Edmonds for the shed addition into the setback." *Exhibit C1, page 3*.
7. The Appellant contended that the structure existed in its current configuration and location at the time he purchased the property in 1994. Appellant argued that there's no proof that the structure was ever added onto. *Reidy Testimony*.
8. Eric Thuesen Custom Homes LLC/Eric Thuesen (Plat Applicant/Interested Party) submitted an application to short plat the affected parcel to the north, which is addressed as 509 - 9th Avenue North into two lots (File No S-05-09, two lot short plat). The Plat Applicant and neighbors Scott and Maria Mallory, et al, requested reconsideration of the City's administrative approval of the two lot short plat. The Appellant in the instant matter was a member of the "Mallory et al" appellant group. In a decision on reconsideration issued July 26, 2006, the Hearing Examiner upheld the short plat approval, limited to two lots, with conditions relating to wetland identification. *Exhibit C19*.
9. The Plat Applicant appealed the two lot short plat to the Snohomish County Superior Court via a Land Use Petition Act (LUPA) petition. The Superior Court remanded for clarification of wetland boundaries, which had bearing on whether two or three lots could be created by the short plat. Although both the City and the Plat Applicant appealed the

Superior Court decision to the Court of Appeals, neither requested a stay and the remand proceeded. The ensuing Hearing Examiner decision clarifying wetland boundaries resulted in an acknowledged ability for the site to be divided into either two or three parcels. The Superior Court's LUPA remand order established that the three lot plat would be reviewed under the same code in effect on the date the two lot plat application vested. As of the instant appeal, the Plat Applicant has approval of both a two-lot and a three-lot short plat of the parcel to the north of the alley. *Exhibits C18 and C19; Thuesen Testimony*. The City and the Plat Applicant entered into a settlement agreement on July 20, 2007, through which the cross appeals to the Court of Appeals were withdrawn. *Exhibit C20*.

10. The Appellant was a party of record at the reconsideration and remand proceedings concerning the short plat application. *Exhibit C19*. At no time during the short plat appeal process did the Appellant forward any claim to the portion of the right-of-way that is encumbered by the tool shed, concrete slab, and railroad tie staircase. The Appellant did not appeal the City's short plat approval after remand from Superior Court. *Exhibit C1*.
11. Due to topography, the initial design of the neighboring short plat involved a retaining wall proposed in the unopened alley between the Appellant's and Plat Applicant's properties. Also on July 20, 2007, the Plat Applicant's civil drawings for the two lot short plat were approved with a redline note indicating that the proposed retaining wall "shall not be constructed until encroachment permit is finalized and issue with structure encroaching into alley right-of-way has been resolved". *Exhibits C1 and C25*. Subsequently the Plat Applicant withdrew his encroachment permit and submitted revised civil drawings that contained the retaining wall wholly within his private property. The revised plans were approved by the City on August 10, 2007. *Exhibits C1, C26, and C27*.
12. On November 7, 2007, the City notified the Appellant via his attorney that the encroachment of the accessory structure into the alley right-of-way was unlawful and had to be terminated. The letter notified the Appellant that the City intended to initiate formal enforcement proceedings if the unlawful encroachment wasn't removed by December 31, 2007. In the letter, the City suggested that the Appellant could initiate alley vacation proceedings, but did not guarantee the outcome and did not toll or waive enforcement during the pendency of such proceedings. *Exhibit C28*.
13. Passing Resolution No. 1178, the City Council initiated alley vacation proceedings on June 24, 2008. *Exhibit C30*. Public hearing on the alley vacation was held on July 22, 2008 and continued on September 16, 2008. On March 17, 2009, the City Council adopted Ordinance No. 3729 vacating the platted but unbuilt public alley. Ordinance 3729 reserved a temporary construction easement for the installation of a driveway and retaining wall proposed in the approved short plat applications for the parcel to the north. The ordinance identified the area covered by temporary construction easement in an attached Exhibit B and provided the temporary easement was void after five years or construction of the named improvements, whichever occurred first. The effective date of

the ordinance was March 27, 2009. Exhibit B described the area covered by easement as: "[t]he 7.5 feet of alley right-of-way as dedicated per Plat of the City of Edmonds recorded in Volume 2 of Plats, Page 39, records of Snohomish County, Washington lying northerly of and immediately adjacent to Lots 36 through 38, Block 82 of said plat." *Exhibit C31.*

14. The Appellant participated in the public hearing on the proposed vacation ordinance. He voiced support for the alley vacation and opposition to the reservation of a construction easement. He did not appeal the alley vacation after its adoption. The short plat Applicant appealed the alley vacation to the Snohomish County Superior Court. *Exhibit C10, Attachment B, Attachment C, Edmonds City Council Approved Minutes, September 16, 2008; Exhibits C1 and C17.*
15. The Appellant filed a quiet title action in Snohomish County Superior Court on March 19, 2009, claiming ownership by adverse possession of the affected portion of the alley and the plat Applicant's property within the footprint of the shed and railroad tie staircase. *Exhibit C10, Attachment B, Verified Complaint to Quiet Title.*
16. On April 3, 2009, the City issued an Order to Correct (OTC) to the Appellant, alleging violations of ECDC sections 18.70.000 (failure to obtain encroachment permit for a structure located in a city easement), 16.26.030 (extension of a permitted structure into the required side yard setback), and 19.05.000, 19.05.010, and IRC (International Residential Code) 105 (violation of side yard setback). The OTC required the Appellant to submit a work plan and schedule establishing by when and what means he would remove the allegedly offending structure from the side yard setback and off-site easement area. The OTC gave 20 days for submission of the work plan but stipulated that implementation of the work plan would be stayed until approval of S-07-76 or final approval of the civil construction plans for S-07-76, whichever was first. *Exhibit C16.*
17. On May 1, 2009, the Appellant submitted the required work plan in response to the OTC. The work plan identified the scope of work as follows:
 - Demo and remove from site existing wood frame structure and dispose in a legal manner. Demo material to be removed from site every day as there is no location available for dumpster or storage.
 - Saw cut existing concrete floor along former northern property line, approximately 15 feet.
 - Demo concrete pads and footings.
 - Repair/replace roof members and/or facia in area where structure is removed. Re-side in this area and paint to match existing.
 - Clean up materials every day, no storage facility will be allowed on site.
 - Obtain all applicable permits from City of Edmonds.

The work plan requested that the homeowner be allowed 60 days to obtain financing for the project, obtain competitive bids, schedule the work with contractor, oversee project, and report on completion to the City. *Exhibit C16.*

18. On August 13, 2009, the City approved civil construction plans for short plat file number S-07-76, ending the stay granted in the previous OTC. A new Order to Correct was issued on August 24, 2009 repeating the same alleged code violations from the April 3, 2009 OTC and adding the following language:

The order posted April 3, 2009 is hereby amended to require removal of the slab and lean-to structure, which were added illegally to the permitted tool shed, in accordance with your work plan of May 1, 2009. The removal of the slab and lean-to structure shall be removed within 21 calendar days of this order.

Exhibit C1; Exhibit C8.

19. The August 24, 2009 OTC was posted conspicuously at 771 Daley Street and mailed to the property owner (the Appellant). *Exhibits C1 and C9.*
20. The Appellant appealed the August 24, 2009 OTC on several grounds, including the assertion that enforcement of the alleged code violations should be stayed during the pendency of his quiet title action. The appeal was scheduled for hearing, but on November 4, 2009, the Appellant withdrew his appeal of the August 24, 2009 OTC. *Exhibits C10 and C11.*
21. Notice of Civil Violation (NOV) was issued on November 13, 2009, alleging violations of the following sections of the ECDC: 18.70.000 (failure to obtain encroachment permit on City easement for shed structure); 16.20.030 (development standards); 16.20.040 (site development exemptions); 19.05.000 (International Residential Code); 19.05.010 (work exempt from permit) and International Residential Code 105 (work without a permit). The NOV described the violations as follows:

1. Maintenance of a shed structure within the seven and one half foot construction easement retained by the City of Edmonds associated with the alley vacation approved under Ordinance No. 3729;
2. Extension of a permitted structure into the side yard setback without a permit; and
3. Violation of a side yard setback.

The NOV required the following corrective action: "Obtain demolition permit and remove slab and lean-to structure, which was added illegally to the permitted tool shed, in accordance with Ken Reidy's work plan received May 1, 2009. When demolition is complete, schedule a final demolition inspection. *Exhibit C9.*

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Issues on Appeal

22. The Appellant timely appealed the NOV on November 24, 2009. The Appellant identified the following issues on appeal:

1. Appellant asserts the City owns no interest to enforce by this action.
 - a. The City failed to satisfy an implied condition of the original dedication when it failed to acquire the adjacent 7.5 feet of right-of-way needed to open a full right-of-way;
 - b. The City abandoned its interest in the right-of-way well before it vacated its interest in 2009;
 - c. The construction easement asserted by the City as the basis of this action was illegally reserved and is therefore invalid;
 - i. Invalid for lack of public notice;
 - ii. Reserved construction easement violates ECDC 20.70.140;
 1. Easement cannot be imposed as a condition of vacation pursuant to ECDC 20.70.140;
 2. Easement was not reserved by resolution;
 3. Easement was granted for purely private, not public purposes; and
 4. Easement constitute unlawful taking of Appellant's property interest
 - iii. City's reliance on any other provision cannot reasonably be defended;
 - iv. Any code ambiguities should be construed against the City.
2. Additional challenge to the City's interest in the temporary construction easement retained by Ordinance No. 3729 (listed in the appeal document as "The City should quiet its interest before attempting to enforce its interest");
3. Under *Halverson v. Bellevue*, the City must compel the Interested Party to resolve the Appellant's prescriptive claims before it can approve any subdivision of the Interested Party's property (listed in the appeal document as "The City's illegal conduct and position in this matter is explained, but not excused, by its entry into a settlement agreement on July 24, 2007 with Eric Thuesen"); and
4. The *Nykreim*⁶ doctrine binds the City to accept the size and placement of the Reidys' entire shed because the City cannot prove that it did not permit construction of the entire shed.

Exhibit C5.

23. Appellant testified that he filed the May 1, 2009 work plan under protest. In his testimony and the materials submitted on the day of hearing, the Appellant argued that the method, timing, and nature of code enforcement attempted by the City constitute harassment of him personally in order to advance the interests of the Interested Party. He argued that the City should not be allowed to enforce against him if it does not enforce against all similar code violations in the area or the City. The Appellant argued that other

⁶ *Nykreim v. Chelan County*, 146 Wn.2d 904 (2002).

construction techniques could be employed by the Plat Applicant that would not require use of the right of way, and he disputed whether it is possible for a developer to vest to specific construction techniques. *Reidy Testimony; Exhibit A1.*

24. The City argued:

- Appellant's appeal is a collateral attack on the vacation ordinance, and the included reservation of temporary construction easement, which ordinance is beyond any appeal period and presumed valid. Appellant did not appeal the ordinance.
- Appellant's appeal is a collateral attack on the short plat approval, which he did not timely appeal when preliminary approval became "final" in 2007 and is now vested. The City argued that it has a duty to proceed in accordance with the Plat Applicant's vested plat approval, and is subject to liability if it fails to do so.
- The Hearing Examiner lacks authority to try title or consider equitable defenses.
- The City argued that Appellant's argument on the *Nykreim* doctrine was the only appeal grounds forwarded that fall within the scope of the Examiner's jurisdiction and that the Appellant misconstrued *Nykreim* to the extent he argued the doctrine protects illegally built structures.

Exhibits C1 and C2; Snyder Comments.

25. The City's Code Enforcement process is complaint driven, and the City does not pursue enforcement in the absence of complaints. The sought after abatement of Appellant's illegally placed structure is the result of the July 2007 complaint. *McConnell Testimony; Exhibit C24.*

26. Interested Party Thuesen argued:

- Appellant does not dispute the facts that constitute code violation (intrusion of accessory structure into side yard setback and City right-of-way);
- Appellant did not legally challenge either the vacation ordinance or the preliminary plat approvals and cannot do so now through the code enforcement process.
- Appellant's title arguments are beyond the scope of the Examiner's authority.
- "While the Hearing Examiner does not have authority to revisit the approval issued for Thuesen's property, it is essential that the Examiner be aware that Appellant's unlawful structures directly impede Thuesen's ability to complete construction of certain of plat improvement (namely those related to the access drive and retaining wall). The prompt abatement of Appellant's violation is essential for Thuesen to complete his authorized plat improvements."
- That the City cannot be equitably estopped from enforcing its code because other code violations exist.

Exhibit IPI; Kolouškova comments.

27. Interested Party Thuesen testified that although the plat design no longer calls for placement of the retaining wall in the former City right-of-way, he still needs to use the alley during construction. The retaining wall in question would run along the property line at the location of the existing shed and its construction would require over excavation and access during construction. Because his plat was preliminarily approved in 2007 and there is a five year deadline for preliminary plat improvement completion, he needs to be able to use the alley during the dry season in 2010 to stay on schedule. Mr. Thuesen argued that the encroaching shed has already delayed construction of plat improvements for two years. *Thuesen Testimony; Exhibit IP1, Atts. 1 and 2.*
28. The Appellant does not dispute that the 1962 building permit required a five foot setback from the property boundary; nor does the Appellant argue that the shed as it stands today honors the setback required in the original permit or complies with the development standards applicable in the R-6 zone. *Exhibit C1; Reidy Testimony.*
29. At hearing, the Appellant argued that the alleged violation of "failure to obtain encroachment permit" makes no sense and shouldn't be enforced if it is in fact possible he can apply for and receive approval of an encroachment permit, thereby maintaining his shed. He requested that the alleged violation of ECDC 18.70.000 be dropped. The Appellant also argued that the City offered no proof that he illegally extended the structure beyond the scope authorized by the building permit, nor that the structure hasn't been exactly as it exists today since construction. He asked that the alleged violation of International Residential Code 105 "Work without a permit" be dropped. *Reidy Testimony.*
30. The City conceded that it cannot prove whether or on what date the Appellant or any predecessor in interest altered or extended the shed from its original footprint.⁷ *Exhibit C2; Snyder Comments.*
31. The City's Engineering Program Manager clarified that it is not a particular construction technique that the short plat applications have vested to, but the location of the on-site access road. *McConnell Testimony.*
32. On the record, the City emphasized that it only asks that the portion of the structure that extends into and beyond the required five-foot setback be removed, so the structure is brought into compliance with the building permit and zoning code. *Exhibit C2; Snyder Comments.*
33. The City requested that the appeal be denied and that the Appellant be ordered to comply with the corrective action as stated in the November 13, 2009 Notice of Civil Violation within 21 calendar days of the decision in the instant appeal. The City further requested that a fine of \$2,100.00, or \$100 per days, be levied if the corrective action is not completed by that date. *Exhibit C1; Snyder Comments.*

⁷ Interested Party Thuesen made an offer of proof concerning the date of extension of the tool shed through aerial photographs that were not supplied as of the hearing date and time. At adjournment, the City asked to have the photos admitted. The record was not held open for submission of the photos.

34. Notice of the instant appeal hearing was mailed to the Appellant and posted at the Civic Center, Library, and Public Safety buildings on January 26, 2010, more than five calendar days before the hearing date. *Exhibit C23*.

CONCLUSIONS

Jurisdiction:

The Hearing Examiner has jurisdiction to hear and decide appeals from Notices of Civil Violations, to order abatement, and to assess penalties pursuant to ECDC 20.110.040.

Notice of Civil Violation, Appeal to Hearing Examiner ECDC 20.110.040:

C. Appeal to Hearing Examiner.

1. General. A person to whom the notice of civil violation is directed may appeal the notice of civil violation by filing a written notice of appeal with the community services director within 10 days of the date the notice is placed in the mail, or seven days from the date the notice is posted conspicuously on the property or served personally on the person responsible for the violation.
2. Notice of Hearing. Notice of hearing will be sent by mail, posted on the site, or served in person upon the violating party no less than five calendar days before the time fixed for the hearing.
3. Hearing by City Violations Hearing Examiner.
 - a. At the time stated in the notice, the violations hearing examiner will hear all relevant objections and protests and shall receive testimony under oath. Said hearings may be continued from time to time. If continued to a date certain, no new posting is required.
 - b. If the violations hearing examiner finds that a violation of the Edmonds Community Development Code exists and that there is sufficient cause to abate the same, the hearing examiner will prepare findings and an order within 24 hours which shall specify:
 - i. The nature of the violation; and
 - ii. The amount of fine per day; and
 - iii. The method of abatement; and
 - iv. The time by which abatement is to be completed.⁸

D. Appeal to Superior Court.

Action taken by the hearing examiner constitutes a final decision and shall be appealable only to the Snohomish County Superior Court; provided that any petition

⁸ Due to the complexity of the matter and the volume of information submitted on the day of the hearing, the Appellant and the City agreed on the record to extend the time for the hearing examiner's written findings, conclusions, and order to 10 business days and waived putting the agreed extension in writing. *Reidy Testimony; Snyder Comments*. The deadline for decision became February 19, 2010 because the 15th was a legal holiday.

for review shall be filed no later than 10 working days after the service of the written order of the hearing examiner.

E. Abatement by the City.

If the violation has not been corrected by the time ordered by the violations hearing examiner, or by the correction date ordered by the notice of civil violation, an abatement notice shall be sent by mail to the person responsible for the violation at their last known address, shall be posted in a conspicuous location on the site, or served personally on the person responsible for the violation no less than 10 working days prior to abatement by the city. The city, its employees, or agents are expressly authorized to enter said property for the purposes of abatement of said violation. The actual cost of abatement, including any incidental cost such as, but not limited to: staff time; legal costs; cost of postage or service; and any other reasonable, incidental cost shall be calculated and added to the monetary penalties. The city shall be free to employ appropriate contractors to remedy the situation and may pass through all costs of such contractors as incidental costs of abatement.

F. Monetary Penalties.⁹

Except for violations provisions of Chapter 17.95 ECDC and ECDC 20.110.030 (I) provide for another penalty, violations shall be assessed at the rate of \$100.00 per day or a portion of day thereof, for each and every day after the service of the notice of civil violation. Violations of the provisions of Chapter 17.95 ECDC and ECDC 20.110.030 (I) shall be assessed at a fine of up to \$250.00 per day or a portion thereof following notice of civil violation. The violations hearing examiner may also grant an extension of the date upon which fines begin in order to allow for a reasonable period of abatement. Such an extension shall not exceed 10 calendar days. Following a finding of the Hearing Examiner of the existence of a violation at the appeal hearing on the expiration of the appeal period, continuing fines may be assessed by the provision of additional notice of civil violation pursuant to 20.110.040(B)(2) and an opportunity for hearing. No additional fine for a continuing violation may be assessed without the provision of notice and the opportunity for hearing.

Conclusions Based on Findings:

1. The City's Hearing Examiner is a "creature of the legislature without inherent or common-law powers and may exercise only those powers conferred either expressly or by necessary implication." *Chaussee v. Snohomish County Council*, 38 Wn. App. 630 (1984). The authority to hear challenges of the City's legislative enactments and title-based arguments, including those based in the theory of adverse possession, is neither expressly nor impliedly granted. Appellant's arguments in appeal issues 1 and 2, enumerated in Finding 22 above and Exhibit C5, are outside the scope of these proceedings and may not be considered.

⁹ ECDC 20.110.040.F was amended pursuant to Ordinance 3779, which became effective January 29, 2010.

2. As enumerated in Finding 22 above and Exhibit C5, Appellant's issue 3 is a challenge to either the City's approval of the Interested Party's two-lot preliminary short plat, or the three-lot short plat, or both. The Appellant argued that the City wrongly failed to require the Interested Party to resolve the Appellant's prescriptive claims prior to short plat approval. The Examiner lacks authority to hear challenges of land use decisions issued years ago, through code enforcement or any other process in the city code. See *Chaussee*, cited above.
3. As enumerated in Finding 22 above and Exhibit C5, Appellant's issue 4 would bar the City from correcting the alleged code violation based on the *Nykreim* doctrine, addressing - if obliquely - the issue of possible defenses for failure to comply with applicable codes. The Appellant argued that "without evidence that the entire shed was not permitted, the City is bound by *Nykreim* to the entire shed as it exists today." See *Exhibit C5, page 8*. However, this is an oversimplification of the *Nykreim* doctrine, which stands for the proposition that a local government cannot condition or revoke a vested land use right after the 21-day LUPA appeal period has passed. In the instant case, *Nykreim* only protects the land use authorized by the issued permit. The Appellant concedes that the existing accessory structure fails to comport with the issued building permit. The argument offered in support of appeal issue 4 is not persuasive and does not constitute a defense to the alleged code violation.
4. The City satisfied its *prima facie* case of establishing violation of ECDC 16.20.030, Development Standards and of the existing building permit. The 1962 building permit clearly required a five-foot setback from the north property line and clearly prohibited intrusion into the then-alley right-of-way. Both the current code and the zoning code in effect in 1962 required a five-foot setback from side lot lines for accessory structures. Appellant concedes his improvements encroach on the required side yard setback and the entire alley width. The City notified the Appellant that the accessory structure was considered illegal and required abatement in November 2007. The Appellant took no corrective action. The Appellant's March 2009 quiet title complaint does not constitute a defense to the undisputed violation of the building permit or the side yard setback for code enforcement purposes. *Findings 1, 2, 3, 4,5, 17, 18, 21, 28*.
5. Pursuant to ECDC 18.70.000, "[a]n encroachment permit is required to encroach upon any portion of city public space, right-of-way, or easement area with permanent structures. To encroach means to construct, erect or maintain in, over or under any public place, right-of-way, easement, roadway, parking strip and/or sidewalk, including the airspace above them, any structures permanent in nature ..." (*Underline added*) In this code provision, the term "maintain in" means to allow to remain and not to remove. While it is undisputed that the Appellant "maintained [his shed] in" a public right-of-way and/or easement, this code provision calls for submission of an application to correct the defect. Had the Applicant applied for an encroachment permit, it would have been denied. Given the totality of the circumstances, violation of ECDC 18.70.000 is more appropriately treated as a component part of the established violation of ECDC 16.20.030 rather than as a separate violation. *Findings 1, 2, 3, 4, 5,29*.

6. ECDC 19.05.000 adopted the International Residential Code (IRC). As explained by Staff, IRC Section 105.1, Permit Required, requires any owner who intends to construct, enlarge, alter, repair, or move, demolish, or change the occupancy of a building to first make application to the building official and obtain the required permit. *IRC, §105.1; see Exhibit C1, page 5.* The City did not prove that the Appellant extended or enlarged the accessory structure and the Appellant disputes the same. The City did not did not make a *prima facie* showing as to expansion (which would have required a permit) and did not prove violation of IRC Section 105.1. *Findings 5, 6, 7, 30.*
7. The record contains no evidence of any violation of ECDC 16.20.040, Site Development Exceptions, ECDC 19.05.010, Work Exempt from Permit or ECDC 19.05.000 (IRC adopted).
8. The grounds for appeal in the August 31, 2009 appeal of the August 24, 2009 OTC were abandoned when the Appellant withdrew his appeal on November 4, 2009. *Finding 20.*
9. The testimony and declaration of Appellant's witness Finis Tupper addressing the duration of the existing accessory structure in its current configuration and other similar encroachments into public alleys in the vicinity of the subject property are not relevant and were not relied on. Mr. Tupper's arguments on title and the "legality" of the vacation ordinance have been addressed above in conclusions 1 and 2. The Examiner lacks authority to consider constitutional arguments. See *Chaussee*.
10. Based on the discretion afforded to the Examiner by ECDC 20.110. 040.C.3, the Examiner concludes that the balance of the arguments forwarded in the Appellant's brief, in the record at A1, are not relevant to the question of whether code violation has been established and they will not be addressed.

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DECISION

Based on the preceding findings and conclusions, the appeal of the Notice of Civil Violation is **DENIED**. The Appellant shall abate the illegal placement of the accessory structure consistent with the order below or be subject to monetary penalties, as established below.

ORDER

1. That portion of the accessory structure and underlying concrete slab that extends into the five-foot setback from the original north property boundary and beyond into the former unopened alley (currently a temporary construction easement) exists in violation of ECDC 16.20.030.
2. The Appellant shall complete the corrective action required in the November 13, 2009 Notice of Civil Violation no later than March 12, 2010 pursuant to the Appellant's work plan received by the City on May 1, 2009.

3. If the required corrective action is not complete by March 12, 2010, the Appellant shall pay fines totaling \$2,100.00 (\$100 per day) no later than March 22, 2010.
4. If the required corrective action is not complete by March 12, 2010, the Appellant shall be subject to additional Notice of Civil Violation and additional penalties, after due notice, consistent with ECDC 20.110.040.F as amended by Ordinance 3779.

ORDERED this 19th day of February 2010.

Towell Rice Taylor LLC
City of Edmonds Hearing Examiners
By:



Sharon A. Rice



CITY OF EDMONDS

121 5TH AVENUE NORTH • Edmonds, WA 98020 • (425) 771-0220 • FAX (425) 771-0221

HEARING EXAMINER

OFFICE OF THE HEARING EXAMINER CITY OF EDMONDS, WASHINGTON

GARY HAAKENSON
MAYOR

In the matter of the appeal of)
)
Ken Reidy)
)
of a November 13, 2009)
Notice of Civil Violation)
at 771 Daley Street in Edmonds, WA)

Case No. APL200900024

DECISION AND ORDER

I, Sharon A. Rice, the undersigned, do hereby declare:

1. That I am a partner in the firm of Toweill Rice Taylor LLC, which maintains a professional services agreement with the City of Edmonds, Washington for the provision of Hearing Examiner services, and make this declaration in that capacity; That I am now and at all times herein mentioned have been a citizen of the United States, a resident of the State of Washington, over the age of eighteen (18), and competent to be a witness and make service herein;
2. That on February 18, 2010 I did serve a copy of the DECISION AND ORDER in case No. APL20090004 upon the following individuals at the addresses below by first class US Mail:

Ken & Vera Reidy
771 Daley Street
Edmonds, WA 98020

Eric Thuesen
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Matthew Cruz, Attorney
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Edmonds Building Division
121 - 5th Avenue North
Edmonds, WA 98020
Attn: Diane Cunningham

Clerk of the Edmonds City Council
121- 5th Avenue North
Edmonds, WA 98020

I hereby declare under penalty of Washington's perjury laws that the foregoing is true and correct:

DATED THIS 18th day of February 2010 at Edmonds, Washington.

Sharon A. Rice, Hearing Examiner for Edmonds, Washington