



Notice of Hearing Examiner Decision

12/05/2018

To: Interested Parties and Parties of Record

RE: Project Name: Request for Revocation of Edgewater House
Conditional Use Permit

Authorized
Representative: Josiah Kipperburg
11967 Luna Vista Ave
Olalla, WA
Application: Conditional Use Permit
Permit Number: #14-00208

Enclosed is the Decision issued by the Kitsap County Hearing Examiner for the above project.

The applicant is encouraged to review the Kitsap County Office of Hearing Examiner Rules of Procedure found at:

<https://spf.kitsapgov.com/dcd/HEDocs/HE-Rules-for-Kitsap-County.pdf>

The Decision of the Hearing Examiner is final, unless appealed, as provided under Washington law.

Please note affected property owners may request a change in valuation for property tax purposes, notwithstanding any program of revaluation. Please contact the Assessor's Office at 360-337-5777 to determine if a change in valuation is applicable due to the issued Decision.

The complete case file is available for review at the Department of Community Development, Monday through Thursday, 8:00 AM to 4:00 PM and Friday 9:00 AM to 1:00 PM, except holidays. If you wish to view the case file or have other questions, please contact Help@Kitsap1.com or (360) 337-5777.

CC: Authorized Representative: Josiah Kipperburg, kipperburg@gmail.com
Owner: Marilyn Kipperburg, PO Box 547 Olalla, WA
Interested Parties: None

**KITSAP COUNTY HEARING EXAMINER
FINDINGS OF FACT, CONCLUSIONS OF LAW, AND DECISION**

**ON REQUEST FOR REVOCATION OF
CONDITIONAL USE PERMIT 14-00208 (EDGEWATER HOUSE)**

December 5, 2018

1. FINDINGS OF FACT

1.1 Background. The Edgewater House provides an event venue, primarily for weddings, beside Puget Sound's Colvos Passage, in rural Kitsap County. The business started operation without required permits. The County learned about the situation and the property owner proceeded with securing the County approvals. In 2014, the County Hearing Examiner authorized the use after-the-fact through CUP 14-00208, with approval contingent on compliance with specified conditions. One condition required a development permit to be applied for within three months. This did not occur, and over the next four years, additional compliance issues accrued. Due to a neighbor complaint, the matter came to the attention of Kitsap County Department of Community Development ("DCD"), and DCD has requested CUP revocation, alleging the use violates ten CUP conditions.¹

1.2 Applicants/Property Owners and Property Location. Marilyn Kipperberg (Owner) and Josiah Kipperberg (Applicant). 11967 Luna Vista Avenue SE, Olalla, WA 98359. Assessor's Account No. 342302-2-055-2007.

1.3 Pre-Hearing Procedures. DCD scheduled a hearing, providing e-mail notice in September to the Applicant, with formal notice issued on November 14, 2018.² Upon DCD request, which the Applicant did not object to, the Hearing Examiner conducted a site visit on November 25, 2018.³ Mr. Kipperberg led a short tour, joined by a neighbor, Mr. Soule, but not DCD. Before the hearing, DCD submitted ten exhibits, including the Staff Report.⁴

1.4 Hearing. The Hearing Examiner held an open record hearing on November 29, 2018. 12 exhibits were admitted without objection. These were the ten DCD submitted before the hearing to the Examiner and Applicant, and two additional DCD exhibits (events calendar and e-mails). DCD and the Applicant presented sworn testimony from several witnesses.

DCD Witnesses:

- Jim Bolger (DCD Assistant Director)
- Scott Diener (DCD Manager, Development Services and Engineering)
- David Lynam (DCD Manager, Building and Fire Safety and Fire Marshall)

¹ Exhibit 10 (Staff Report), addressing Conditions 1, 4, 5, 7-8, 12-16, and 27. Condition 15 does not have a requirement. It states the violating any conditions is grounds for initiating revocation proceedings.

² Exhibits 12 and 8.

³ Exhibit 9 (Pre-Hearing Order, November 21, 2018, which also includes the site visit request).

⁴ See Clerk's Index of Exhibits.

Applicant Witnesses

- Josiah Kipperberg (Applicant)
- Douglas Soule (Neighbor)
- Gretchen Costanzo (Neighbor).

1.5 Alleged CUP Violations. DCD alleged the Applicant has not complied with ten conditions and requested CUP revocation. The Applicant did not contest all allegations, but requested additional time to resolve outstanding issues.

1.6 Building, Fire, Health, and ADU (Accessory Dwelling Unit) Approvals.

1.6.1 Conditions. DCD alleged violations of five conditions requiring local permits to address compliance with building, fire, health, and zoning requirements. As required approvals have not been obtained, facts are present to substantiate these allegations.

Condition 1 (obtain required permits).⁵ All required permits shall be obtained prior to hosting any additional wedding events.

Condition 5 (obtain building, fire, and health approvals before hosting indoor events). Approval from the Building Official, Fire Marshall, and the Health Department shall be obtained prior to hosting events in any of the buildings.

Condition 7 (septic approval required before expanding sewage load). The property has an approved 3-bedroom septic system that serves the three-bedroom single-family residence and is approved to serve a bathroom in the garage. The septic system is not approved for the additional use for public events. There can be no additional bedrooms or dwelling units located on the property with the existing septic system.

Condition 8 (obtain ADU permit or decommission). A permit for the existing unpermitted ADU and bedroom shall be obtained prior to occupation or use, or they shall be decommissioned and used only as storage.

Condition 16 (outdoor events only). Approved for outdoor events only. If at any time any of the buildings are used for assembly, a fire code permit shall be applied for. Water availability, hydrants, fire flow, fire alarms and fire sprinklers may be required. Health Department approval of the septic field size shall be obtained prior to use of any of the buildings for event functions. The house is not rated, nor shall be used for public assembly or occupancy. Portable toilets and sinks, or trailer toilets, shall be provided during events. The single-family residence shall not be accessible for toilet or hand washing use during events.

⁵The language in parenthesis is only the Examiner's summary of the condition, and is not the condition itself.

1.6.2 ADU. The site includes a single family residence and detached garage. The primary structure is authorized for use as a residence, with DCD approving the garage in 2004. The garage approval was for a structure with parking bays and unfinished storage areas on the second and third floors, along with a ground floor and a second floor bathroom. The two stories above the garage are now built with a bathroom and kitchen for two separate habitable areas, so constitute accessory dwelling units, or ADU's. One unit is now used as an office, but also has kitchen facilities. No building permits, health district approval, fire, or ADU approvals,⁶ have been issued for these living units as the CUP requires. The Applicant did not provide contrary evidence, other than identifying various challenges with the permitting process.

1.6.3 Indoor Events. The Applicant confirmed the primary residence, garage bathrooms, and area above the garage are being used for wedding and other events. The garage's residential units have been rented with wedding events for use by the wedding couple, and DCD observed wedding guests using the garage bathrooms during its site visit. The garage's ground floor now includes two bathrooms, one marked for each gender. DCD did not observe portable toilets being provided for wedding guests. The residence is routinely used for weddings. A separate bridal suite and den are located inside for the bride and groom parties. Wedding attendees use the upstairs pool room, and the upstairs balcony for pictures. The bridal suite restroom is reserved for the bride's entourage, with other restrooms available for guests. DCD does not object to the residence's incidental use for keeping coats, bags, and presents, or temporarily storing catered foods, but usage extends beyond Condition 16's prohibition on using the garage and residence for events without required approvals.

1.6.4 Building and Septic Requirements. Lateral support for the living units above the garage may be inadequate. Engineering calculations are necessary to assess the structure's ability to support uses beyond the originally approved storage use.⁷ The deck inside the primary residence may also lack structural stability, but wedding parties still use it for photography due to the water views.⁸ The expanded septic usage from indoor event activities presents health concerns. Using the structures for other than a single-family residence without the required approvals is dangerous, and is defined by code as a public nuisance.⁹

1.7 Post-CUP Issuance Project Changes.

Condition 13 (if use expands, approvals required): The decision set forth herein is based upon representations made and exhibits contained in the project application #14 00208. Any change(s) or deviation(s) in such plans, proposals, or conditions of approval imposed shall be subject to further review and approval of the County and potentially the Hearing Examiner.

⁶ The conversion of space from unfinished storage to ADU was not permitted, nor would two ADUs be permissible (only one would be).

⁷ DCD Hearing Testimony; Exhibit 5 (DCD letter to Applicant) ("An engineered analysis prepared by a professional engineer or architect is required. ... Provide beam calculations for all critical load-bearing beams accounting for added 3rd floor loads.").

⁸ DCD Hearing Testimony, including from Mr. Lynam, DCD Manager, Building and Fire Safety, identified structural stability concerns with both the residence and area above the garage for wedding event use.

⁹ KCC 14.04.870(C) (9), (13) and (17).

As addressed in § 1.6, garage modifications after CUP approval, and indoor use by wedding guests have not been approved by DCD or the Hearing Examiner. DCD has established a violation of Condition 13.

1.8 Requirement to Submit Development Application within Three Months.

Condition 12 (submit development permit application in 90 days): This Conditional Use Permit approval shall automatically become void if no development permit application is accepted as complete by the Department of Community Development within three months of the Notice of Decision date or the resolution of any appeals.

The Applicant's deadline for submitting a development application was December 24, 2015. As this condition was not met by the 90-day deadline, or over the past four years, CUP revocation, particularly given the other non-compliance issues, is warranted.

1.9 Compliance with Law.

Condition 14 (comply with code). The authorization granted herein is subject to all applicable federal, state, and local laws, regulations, and ordinances. Compliance with such laws, regulations, and ordinances is a condition to the approvals granted and is a continuing requirement of such approvals. By accepting this/these approvals, the Applicants represent that the development and activities allowed will comply with such laws, regulations, and ordinances. If, during the term of the approval granted, the development and activities permitted do not comply with such laws, regulations, or ordinances, the Applicants agree to promptly bring such development or activities into compliance.

The KCC requires certain approvals (building, health approval, zoning, and fire review and approval). As addressed in § 1.6, complete permit applications have been not been submitted and required approvals have not been secured. DCD has presented evidence sufficient to establish a violation of Condition 14.

1.10 Reporting Requirement and Limit on Annual Number of Events.

1.10.1 The CUP requires event reporting so use intensity can be confirmed.

Condition 4 (event list). The Applicant shall provide to DCD a list of planned events each season.

Condition 27 (25 events per year). The conditional use shall be limited to 25 wedding or similar events a year without written approval of the DCD Director. Wedding or similar events in excess of 25 shall not take place without written approval of the DCD Director.

1.10.2 The Applicant must provide DCD an event list for each season, but only did so for 2018. This was not disputed. DCD said 25 events were identified; the Applicant stated 22 were. The calendar at Exhibits 11 identified 24, with two marked as cancelled. The calendar did not include all events. On August 25, 2018, when no event was identified, DCD conducted a site visit, and found a wedding occurring.¹⁰ As it is not clear if more than 25 events are occurring each year, the Examiner finds no Condition 27 violation, but finds that Condition 4's reporting requirements have not been complied with. This has made it difficult for DCD to verify Condition 27 compliance.

1.11 Any CUP Violation is Grounds to Initiate CUP Revocation.

Condition 15: Any violation of the conditions of approval shall be grounds to initiate revocation of this Conditional Use Permit.

Consistent with Condition 15, DCD initiated the CUP revocation process after working with the Applicant to achieve compliance.

1.12 DCD's Work with the Applicant to Achieve Compliance.

1.12.1 The Applicant met with DCD on July 17, 2017. DCD provided the Applicant an August 31, 2017 deadline to apply for the required permits. On September 20, 2017 the Applicant applied to convert the house and outbuildings into a commercial wedding venue.¹¹ The application did not include detailed construction drawings and necessary calculations, and had other omissions, so DCD returned it to the Applicant, to provide added information.¹²

1.12.2 DCD notified the Applicant that present event use violated the CUP and ordered commercial uses at the site be discontinued. And, DCD made multiple requests to the Applicant to comply with the CUP, explaining that without compliance, the CUP could be subject to a revocation hearing.

1.12.3 In February 2018, the Applicant submitted hand-drawn building plans for the detached garage.¹³ The plans lacked architectural information and engineering calculations and did not represent the condition of the buildings as confirmed by site inspection. DCD received no further information, and the application was deemed abandoned.

1.12.4 DCD met with the Applicant on November 14, 2018 on site to evaluate conditions. The Applicant provided access to most areas of the property and accompanied staff throughout their visit. The Applicant confirmed that the detached garage still contained living units on the second and third floor, that neither had been converted from living units, and he used one for an office, and the second for storage.

¹⁰ See CUP Condition 6 ("DCD shall have the authority to conduct unobtrusive visits and inspect building uses during any event.").

¹¹ Exhibit 6.

¹² Exhibit 7 ("The information submitted is not sufficient enough for staff to determine what is being requested, or what the existing conditions on the site area. Please provide the following:").

¹³ Exhibit 7, last four pages (hand written notation identifies pages as part of Exhibit 8, but included with Exhibit 7).

1.12.5 DCD observed during an unannounced inspection of an unscheduled event in August 2018 that wedding guests used bathrooms in the lower garage unit. The Applicant confirmed this was the case and that he had tried to use portable toilets but guests preferred the bathrooms. Inspection of the lower garage units showed two separate bathrooms, one for “Women” and one for “Men,” which lack Health District approval.

1.12.6 DCD testified at the hearing, including through Mr. Diener, on this review process, and on DCD's work to achieve compliance without resorting to CUP revocation. These efforts were more extensive than detailed here, and support DCD's contention that it only turned to this process when compliance could not be achieved by working with the Applicant.

1.13 Alternatives to CUP Revocation.

1.13.1 The Applicant's arguments centered less on CUP condition compliance, than on revocation reasonableness. Testimony from Mr. Soule and Ms. Costanzo echoed these concerns, with an expressed hope for creative or "out of the box" solutions.¹⁴ The Examiner agrees with the Applicant and two neighbors who testified that local businesses are important to the community, and the wedding venue is beautiful, but DCD established non-compliance with life safety, health, and other code requirements.

1.13.2 Not all alleged violations would be apparent to the casual onlooker visiting the site. Other than building officials, structural engineers, and fire marshals, most of us think little about structural integrity or septic operations. That is due to most jurisdictions having enforced life safety and health requirements. As the state requires, Kitsap County has an adopted building code.¹⁵ That code requires that structures such as decks and second story improvements be built to carry anticipated loads. Septic system requirements require systems be constructed to handle anticipated sewage loads to protect the public health and environment. This is particularly important for near shoreline uses.

1.13.3 The Examiner cannot waive these requirements. Even if this authority were present though, these requirements were written to achieve reasonable public, health and safety objectives.¹⁶ There is no evidence suggesting the Applicant objected to compliance when the conditions were included in the CUP, or that the conditions are unreasonable. There were concerns raised about issues outside of these conditions, such as management of an adjacent park, but no concerns were raised about the conditions themselves.

1.13.4 Alternative or creative approaches can make sense to achieve code compliance. For example, in 2014, instead of moving to shut down the venue, the use was authorized after-the-fact. DCD then worked to secure compliance outside of the revocation process for several years and delayed revocation proceedings until after the wedding season. The Applicant stated he needed more time, saying certain factors, such as the County's online permitting software, had presented challenges. If there was evidence that the Applicant could

¹⁴ DCD objected to Mr. Soule's testimony based on relevance and lack of knowledge of the proceeding. The Examiner did not strike the testimony, but noted it would be given appropriate weight.

¹⁵ KCC, Title 14.

¹⁶ DCD Hearing Testimony, including from DCD Manager, Building and Fire Safety, Mr. Lynam.

immediately comply, that might present a different situation. But, compliance issues have been outstanding for four years, and longer, as the CUP itself addressed an unpermitted use. Prompt compliance with the CUP conditions is not likely.

1.13.5 Even if within Examiner authority, there is not a good alternative to revocation as this would cause non-enforcement of code requirements. If non-enforcement became widespread, eventually the public would worry more about life safety, sewage treatment, and other health issues, because those charged with dealing with these concerns hoped for, but did not insist on enforcement. Without accountability, a system of laws will not remain functional, which is why permit revocation was built into the KCC and CUP. The Examiner sympathizes with the challenges permitting can present and agrees with the neighbors on the site's inherent beauty, but DCD has substantiated CUP condition violations which have persisted for several years.

2. CONCLUSIONS OF LAW

2.1 The CUP authorizes revocation based on a failure to comply with permit conditions. "Any violation of the conditions of approval shall be grounds to initiate revocation of this Conditional Use Permit."¹⁷ KCC revocation authority is consistent.

Any approval granted in accordance with the procedures of this chapter may be revoked if any one or more of the following grounds are established: ... The approval or permit granted is being, or recently has been, exercised contrary to the terms or conditions of such approval or permit, or in violation of any statute, resolution, code, law or regulation; The use for which the approval or permit was granted was so exercised as to be detrimental to the public health or safety, or to constitute a nuisance....¹⁸

Revocation is also specifically addressed for Examiner issued CUP's. "Any ... hearing examiner conditional use permit ... may be revoked if any of the conditions or terms of such permit or variance are violated, or if any law or ordinance is violated in connection therewith."¹⁹

2.2. These KCC provisions authorize revocation where a permit or code violation is established, meaning DCD must establish the violation by a preponderance of evidence.²⁰ In interpreting Title 17 requirements, public health and safety is emphasized, as these provisions "shall be liberally interpreted and construed to secure the public health, safety, and welfare and the rule of strict construction shall have no application."²¹

2.3 When revoking a CUP, the Applicant is provided notice and an opportunity to address the allegations at a hearing.²² Hearing notice was provided consistent with KCC

¹⁷ CUP Condition 15.

¹⁸ KCC 21.04.280(A)(3) and (4).

¹⁹ KCC 17.600.010.

²⁰ See also KCC 2.116.120(C), preponderance of evidence standard established for district court enforcement.

²¹ KCC 17.100.070.

²² KCC 21.04.280 and Ch. 17.600 KCC.

requirements and provided the Applicant an adequate opportunity to address DCD's allegations. The Applicant was provided the Staff Report before the hearing, and addressed the allegations at the hearing through his own argument and testimony, and by calling witnesses. There were no objections as to the notice and opportunity afforded to rebut the allegations.

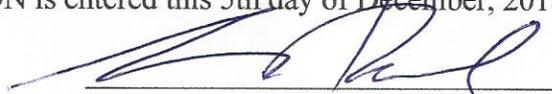
2.4 DCD has produced evidence sufficient to establish nine CUP condition violations. Given the burden of proof, the Examiner does not base this decision on a CUP Condition 27 violation. However, as addressed in the Findings, the Examiner concludes DCD has demonstrated the Applicant has not complied with CUP Conditions 1, 5, 7, 8, 16, 13, 12, 14, and 4. These violations have been ongoing over a number of years, despite opportunities provided to correct them, so DCD's request to revoke CUP 14-00208 should be granted.

DECISION

Based on the Findings and Conclusions, the Examiner grants DCD's request. CUP 14-00208 is revoked.

Alternative approaches to addressing code issues to support some wedding/event venue use may exist. This may require additional permitting and/or code compliance measures, but these are not questions before the Examiner. It would be up to the Applicant to work with DCD to outline a code compliant approach.

THIS DECISION is entered this 5th day of December, 2018.



Kitsap County Hearing Examiner
Susan Elizabeth Drummond