

August 27, 2009

**OFFICE OF THE HEARING EXAMINER
KING COUNTY, WASHINGTON**

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ORDER OF DISMISSAL BY DEFAULT

SUBJECT: Department of Development and Environmental Services File No. **A09F0006**

BHAG SINGH KHELA

Fee Appeal

Location: 10818 Southeast 236th Street

Appellant: **Bhag Singh Khela**
10818 Southeast 236th Street
Kent, Washington 98031
Telephone: (253) 852-7740

King County: Department of Development and Environmental Services (DDES)
represented by **Steve Bottheim**
900 Oakesdale Avenue Southwest
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1. Appellant Khela filed on April 13, 2009 a development review fee waiver request with Respondent DDES, disputing certain DDES fees billed for the review and approval of a three-lot short plat processed under county file L04S0056.¹
2. DDES denied the waiver request by letter dated April 27, 2009.
3. On May 14, 2009, Mr. Khela filed an appeal of DDES's denial to the Hearing Examiner.
4. On June 5, 2009, DDES filed a motion to dismiss the appeal based on its asserted untimeliness. DDES cited as support for its motion the initial one-time appeal grace period provision for development permit fee appeals, set forth in KCC 27.50.100, which reads:
 - A. Applicants with fee disputes on billings that the agency first issued between January 1, 2004, and the effective date of this section may, for one year after the effective date of this section, commence billing appeals under this chapter.

¹ Development permit fees are authorized by Title 27 KCC.

5. DDES notes that ordinance 10626 enacting the subject code section was effective March 17, 2008, and contends therefore that an appeal received more than one year later, *i.e.*, after March 17, 2009, is not eligible for consideration due to untimeliness.
6. However, there is scant evidence submitted for the record of the dates of DDES's fee estimates and fee billings for the subject project. The only document even approaching substantial evidence in this regard is Mr. Khela's fee waiver request received April 13, 2009, which states in part, "The current estimated fees for engineering review in the amount of \$17,665 submitted on 4/30/08 appear to be reasonable and I have paid \$11,871.67 toward these costs. However, the fees assessed in association with this second application total \$34,115.35 (see statement #133279)." By this evidence, a fee *estimate* date is apparent, April 30, 2008. But a fee estimate is a different matter (and a different category of appealable action) than a fee *billing*.
7. Excerpts of DDES billable time logs listing staff time hours for the short plat review show staff time expenditures from December 2004 through January 2008, but the excerpts give no indication of the actual fee billing date. Nor can there be any reliance for a billing date on DDES's indication in its waiver denial letter that a fee estimate was issued "at the time of the 2004 short plat application." Again, a fee estimate is a different matter than a fee billing.
8. One additional sliver of evidence is the documentation of a project fee payment of \$257.46 received March 4, 2008. But it is not sufficiently reliable to infer that the payment was in response to a billing. It is possible that it was a prepayment. More compelling of the unreliability of such an inference is that the payment is identified as a transfer from a variance case, file L07V0061, which further undercuts any presumption that the payment was in response to billing.
9. The Examiner also cannot simply accept by presumption DDES's implied assertion (by its citation to the KCC 27.50.100 grace period, to which the noted March 17 dates are relevant) that the fee billing first occurred between January 1, 2004 and March 17, 2008, and that therefore the fees in dispute were subject to the KCC 27.50.100 appeal grace period. And as noted there is no evidence showing that the billing occurred *after* March 17, 2008, either (in which case a different appeal time period would pertain).
10. As there is no evidence presented regarding the billing dates for the fees at issue, the Examiner cannot find as a fact when the billings occurred, which is crucial to determining the timeliness of appeal.
11. In considering summary dismissal, "the facts, and all reasonable inferences to be drawn from them, are viewed in the light most favorable to the nonmoving party," in this instance Mr. Khela. [*Lybbert v. Grant County*, 141 Wn.2d 29, 34, 1 P.3rd 1124 (2000)] That issue is moot here regarding the fee billing date since as noted there simply cannot be any facts found regarding the billing date.
12. "If there is no genuine issue of material fact, summary judgment will be granted if the moving party is entitled to judgment as a matter of law." [*Id.*] Here, there is an issue of material fact outstanding. Without a finding of fact of the billing date, it cannot be determined that Mr. Khela's appeal is untimely. DDES's motion for dismissal on untimeliness must therefore be denied.

13. Nevertheless, Mr. Khela is in default in this proceeding. He did not respond in any way to DDES's motion to dismiss, and failed to appear at the motion hearing, for which due notice was given by the Hearing Examiner's Office.
14. At the motion hearing, DDES moved for dismissal based on failure of the Appellant to prosecute his appeal by appearing at the motion hearing.
15. Dismissal for default by failure to appear is authorized by Hearing Examiner Rule of Procedure (ROP) XI.F.3.
16. As Appellant Khela failed to respond to the motion for dismissal and failed to appear at the hearing on the motion, he is in default and the appeal shall accordingly be dismissed for default.

ORDER:

DDES's motion for dismissal on untimeliness is denied. Its motion for dismissal for default is granted. The instant appeal is dismissed on grounds of Appellant default.

ORDERED August 27, 2009.

Peter T. Donahue
King County Hearing Examiner

NOTICE

County code provides that the Hearing Examiner decision on fee appeals under Chapter 27.50 KCC is the final decision for the county.

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