

**BEFORE THE HEARING EXAMINER
FOR ISLAND COUNTY**

In the Matter of the Appeal of)	No. COV 19/002 – COF 375/19
)	No. APP 229/22
)	
John and Cyndi Wagoner)	
)	
)	FINDINGS, CONCLUSIONS,
<u>Of a Supplemental Enforcement Order</u>)	AND DECISION

SUMMARY OF DECISION

Because the record does not reflect that Island County (County) has met its burden of demonstrating, by a preponderance of the evidence, that property owners John and Cyndi Wagoner (Appellants) are currently in violation of the County’s “Flood Damage Prevention Ordinance,” Chapter 14.02A Island County Code, the appeal is **GRANTED**.

SUMMARY OF PROCEEDINGS

Hearing Date:

The Hearing Examiner convened an open record appeal hearing on October 25, 2022, using remote access technology.

Testimony:

The following individuals presented testimony under oath at the open record hearing:

County Witnesses:

Mary Engle, County Planning Director

Appellant Witnesses:

John Wagoner, Appellant

None of the parties were represented by counsel at the hearing.

Exhibits:

The following exhibits were admitted into the record:

County’s Exhibits:

- C-1. Letter from the Federal Emergency Management Agency (FEMA) to Island County Commissioner Jill Johnson, dated March 13, 2014, with National Flood Insurance Program (NFIP) Community Assistance Visit (CAV) Narrative, dated September 10, 2013
- C-2. Steps Taken Towards NFIP Compliance Timeline, updated February 12, 2021

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- C-3. Initial Enforcement Order (No. COV 19/002), dated March 14, 2022
- C-4. Email Thread between John Wagoner and County Building Official Dustin Curb, dated June 30, 2022, with Pea Gravel Installation Quote from Austin's Lend-A-Hand Corporation, dated June 27, 2022
- C-5. Email from County Planning Director Mary Engle to John Wagoner, dated August 3, 2022
- C-6. Email Thread between County Planning Director Mary Engle to John Wagoner, dated August 16, 2022
- C-7. Supplemental Enforcement Order (No. COV 19/002), dated August 17, 2022
- C-8. Steps Taken Towards NFIP Compliance Timeline, updated October 7, 2022

Appellant's Exhibits

- A-1. Appellant Presentation Signboard

Motions, Orders, Other Materials, and Briefs

- Appeal Letter, dated August 22, 2022
- Pre-Hearing Order, dated September 21, 2022
- County Witness and Document List, dated October 17, 2022
- Letter from County Planning Director Hiller West, dated December 4, 2019
- Letter from County Planning and Community Development Director Jessica Carpenter, dated April 21, 2020
- Elevation Certificate, dated August 20, 2012
- Notice of Violation and Enforcement Order, dated December 17, 2019

FINDINGS

Background

1. John and Cyndi Wagoner are the owners of real property located at 256 Driftwood Shores Road, on Camano Island, within unincorporated Island County. In August 2011, the County issued its final building inspection approval for a residence constructed on the property. Nothing in the record reflects that, at the time the final inspection occurred, the County had any concerns about the residence or, specifically, that the residence failed to comply with the County's adopted floodplain regulations, including regulations specifically associated with crawlspace requirements. *Exhibit C-3; Testimony of John Wagoner.*
2. On or about September 10, 2013, representatives from the Department of Homeland Security's Federal Emergency Management Agency (FEMA) performed a Community Assistance Visit (CAV) within Island County to ensure compliance with FEMA's National Flood Insurance Program (NFIP). FEMA issued its CAV findings in a report dated March 13, 2014. Based on the findings in the report, FEMA requested that the County provide documents demonstrating that construction on 13 properties situated within special flood hazard areas in the county, including the subject property located at 256 Driftwood Shores Road, comply with the County's flood damage prevention ordinance, Chapter 14.02A Island

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County Code (ICC). The County has conveyed that FEMA determined that the residence on the subject property was not in compliance with provisions of the flood damage protection ordinance at the time it was constructed and received final building inspection approval in 2011, specifically the crawlspace standards of ICC 14.02A.050.B.1.b.

As pertinent to this appeal, ICC 14.02A.050.B.1.b provides:

Crawlspaces within floodplains are allowed subject to the following requirements:

- (i) The interior grade of the crawlspace below the base flood elevation (BFE) must not be more than two (2) feet below the lowest adjacent exterior grade (LAG);
- (ii) The height of the below-grade crawlspace, measured from the interior grade of the crawlspace to the top of the crawlspace foundation wall must not exceed four (4) feet at any point. The height limitation is the maximum allowable unsupported wall height according to the engineering analysis and building code requirements for flood hazard areas:

....

Although the subject property and other properties within the county were identified as noncompliant with the County's flood damage protection ordinance at this time, no action was undertaken by any entity to compel property owners to rectify the situation until several years later, as detailed below. *Exhibits C-1 through C-3; Exhibit C-7.*

3. On December 4, 2019, former County Department of Planning and Community Development Director Hiller West issued a letter to the subject property owners, which provided in relevant part:

Island County recently received a letter from [FEMA], which explains that the County "will be placed on probationary status with the [NFIP] on March 30, 2020, unless measures are taken prior to that date to correct identified deficiencies in your community's flood plain management program. Your property commonly known as 256 Driftwood Shores Rd., Camano Island, WA, 98282, has been identified as a property requiring deficiency resolution.

...

Your property is located in FEMA flood zone and you must bring your property into conformance with the base floor elevation requirements set out in Island County Code (ICC) 14.02A.050 which are applicable to your parcel, or otherwise pursue a variance under ICC 14.02A.040.

...

Failure to respond to this notice by December 16, 2019 will result in

issuance of a formal Notice of Violation and Enforcement Order.

Letter from County Planning Director Hiller West, dated December 4, 2019.

4. On December 17, 2019, former Director West issued a Notice of Violation and Enforcement Order (NOV) against John and Cyndi Wagoner (Appellants) as owners of the subject property at 256 Driftwood Shores Road. The NOV asserted:
- The property owners have failed to obtain certification of crawlspace filled to lowest adjacent grade.
 - The property owners have failed to construct and/or provide certification that foundation is 48 inches, crawlspace brought up to grade and certification that space is only used for parking, access, or storage.
 - The property owners were most recently notified via Official Notice on or around December 6, 2019, via United States First Class Mail and certified mail with return receipt requested, to make arrangements to enter into a compliance schedule by December 16, 2019, to avoid further enforcement.
 - The property owners have failed to respond to that Notice or any prior notification or request for compliance.
 - The property owners are in violation of flood elevation requirements set forth in ICC 14.02A.040 and ICC 14.02A.050.
 - The property owners have failed to satisfy requirements for Island County's participation in the NFIP, which will cause irreparable harm to Island County if compliance cannot be secured.
 - The property owners are hereby ordered to perform, resolve, and remedy the following violations occurring on the property:
 - Obtain certification of crawlspace filled to lowest adjacent grade from the County Department of Planning and Community Development.
 - Construct and/or provide required floor joists to be 3.3 feet thick, crawlspace brought up to grade and certification that space is only used for parking, access, or storage; If space is livable, crawl space to be elevated to BFE and Certification provided for compliance.
 - Obtain inspection and approval from the County Department of Planning and Community Development concerning the resolution and remedy of the violations enumerated, and provide necessary documents concerning the resolution and remedy of the of the violations enumerated, and provide necessary documents and materials as may be required by the County Department of Planning and Community Development.

The NOV required the property owners to remedy the violations by no later than January 17, 2020. The NOV also provided instructions on how to appeal the NOV, which stated, "The burden of proof regarding modification or reversal shall rest with the appellant." *Notice of Violation and Enforcement Order, dated December 17, 2019.*

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5. On April 21, 2020, former County Department of Planning and Community Development Director Jessica Carpenter issued a letter stating that FEMA had granted the County deferment until July 28, 2020, before making a final determination on whether the County had made the required effort to avoid being placed on probation from the NFIP, due to COVID-19 pandemic. The letter further stated:

Andy Griffin, Building Official, and I will continue to develop the required timelines and milestones with you in order to remedy the violations to the maximum extent possible, as well as address the other issues previously identified in the 2013 Community Assistance Visit (CAV).

Though construction activities are not allowed to occur at this time, please proceed with plans and coordination that is needed to meet deadlines and to remedy any violations that your property and/or structure may have in order to attain FEMA compliance. The expectation is to purchase or secure the proper materials and/or equipment to be filled or installed, and retain the contractors necessary to construct the work. This will provide the actions needed and establish milestones for attaining the FEMA-NFIP compliance objectives.

Letter from County Planning and Community Development Director Jessica Carpenter, dated April 21, 2020.

6. Following receipt of the April 21, 2020, letter from former Director Carpenter, the property owners engaged in several communications with the County about the alleged violation. On May 14, 2020, the Appellants told former Director Carpenter that they would not take further action to gain compliance. *Exhibit C-2.*

Initial Enforcement Order

7. On March 14, 2022, Director Engle issued an Initial Enforcement Order (IEO) against the Appellants for violations for Chapter 17.03 ICC. The IEO summarized the alleged violations as follows:

The Planning Director has found the above-named person(s) to be in violation of The Island County Flood Damage Prevention Ordinance, ICC 14.02A. This Ordinance was recently amended (C-18-21/PLG-006-21) and now allows Island County Planning and Community Development ("Planning") through Island County Code Enforcement ("ICCE") to enforce Federal Emergency Management Agency ("FEMA") non-compliance violations as standard violations of county code. The above-named persons(s) are currently in violation of the FEMA Flood Zone Regulations due to deficiencies in the original construction of their residence, which is located in FEMA Flood Zone designation AE-14.

...

It has now been over two (2) years since the current administration of Island County Planning & Community Development first contacted the parcel owner in an attempt to gain compliance with the Island County Flood Damage Prevention Ordinance. ICCE has personally visited the property, posted notices, sent certified mail notices and has been unable to gain any type of compliance from the parcel owner(s). Building Official Dustin Curb has also personally spoken to the parcel owners and has explained exactly what needed to be completed in order to comply.

The IEO included the following order:

A. You are hereby ORDERED to bring your property into compliance with the Island County Flood Damage Prevention Ordinance (ICC 14.02.A). Specifically, you must address the following deficiencies to your property:

1. Crawl space of the residence is sub-grade, needs to be raised 1.4 feet to bring it even with exterior grade.

This task must also be accomplished within 15 days of receipt of this order.

B. You are hereby ordered to allow inspection of your property by Island County Building Inspectors in order to gauge compliance as outlined in ICC 17.03.260.A

The IEO notified the Appellants that they were being assessed a \$1,000 civil penalty for violations that occurred on the property prior to issuance of the IEO, which could be reduced if the corrective action described above was completed by the time prescribed, and that the Appellants may be subject to a civil penalty of up to \$500 per day from the date of the IEO for each day that the violation continues. In addition, the IEO explained that the IEO could be appealed to the Island County Hearing Examiner within 14 calendar days of the date it is served. *Exhibit C-3.*

8. Following receipt of the March 14, 2022, IEO from former Director Carpenter, the property owners engaged in several communications with the County about the alleged violation, including communications with current County Department of Planning and Community Development Director Mary Engle, County Building Official Dustin Curb, and County Commissioner Janet St. Clair. On June 27, 2022, the Appellant received a quote from Austin's Lend-A-Hand for installation of 60 yards of pea gravel to bring the crawl space

into compliance with County flood zone rules. On August 15, 2022, Appellant John Wagoner stated that he would be open to discussing options with County staff, but otherwise would be appealing the enforcement order. *Exhibits C-4 through C-6; Exhibit C-8.*

Supplemental Enforcement Order

9. On August 17, 2022, Director Engle issued a Supplemental Enforcement Order (SEO) against the Appellants for violations for Chapter 17.03 ICC, alleging the same violations as the IEO. The SEO also alleges that the Appellants failed to comply with the IEO that was properly served on March 14, 2022, and that the County had not received any documentation from the Appellant or any correspondence regarding the enforcement order.

The SEO included the following order:

- A. Per section III of the [IEO], you are hereby ORDERED to bring your property into compliance with the County Flood Damage Prevention Ordinance (ICC 14.02.A). Specifically, you must address the deficiencies listed in the initial enforcement order. These deficiencies must be addressed within 14 days of the date of the Supplemental Enforcement Order.
- B. Per section IV of the [IEO], you are hereby ASSESSED the penalty of \$500 per day since the date of the initial order.

As of August 17, 2022, 157 days have passed since the date of the initial order. As there has been no compliance or appeal, the current assessed fines are \$78,500 dollars, plus the outstanding \$1,000 fine assessed by the Initial Enforcement Order.

- C. You are hereby ordered to allow inspection of your property by County Building Inspectors in order to gauge compliance as outlined in ICC 17.03.260.A.

The SEO notified the Appellants that they would be assessed an additional civil penalty of up to \$500 per day from the date of the SEO for each day that the violation continues. In addition, the SEO explained that the SEO could be appealed to the Island County Hearing Examiner within 14 calendar days of the date it is served. *Exhibit C-7.*

Appeal

10. On August 22, 2022, the Appellants timely appealed the SEO, with an appeal statement that disputed several of the factual assertions contained in the County's code enforcement documents, asserting:
- There is no evidence that there has been any wrongdoing by the property owner.

- The property owner had attempted on numerous occasions to contact County staff, but had been unable to establish contact.
- The property owners are self-insured, do not use FEMA insurance coverage, and do not intend to apply for FEMA insurance coverage.
- The property previously was insured under FEMA, at which time FEMA staff inspected the property and found it be in compliance with flood zone regulations.
- The County previously inspected the residence during construction, found it to be in compliance and issued a final occupancy permit for the residence. The County is now trying to pose requirements and fines after-the-fact. The change in regulations is not the fault of residents and County staff should not be pressuring residents to come into compliance at their own expense.

Exhibit C-8; Appeal Letter, dated August 22, 2022.

Appeal Hearing

County's Arguments and Witnesses

11. County Planning Director Mary Engle represented the County at the hearing and testified as a witness for the County. She testified that when she became the Interim Planning Director in August 2020, one of the first priorities placed upon her was to address the issues raised by FEMA in its Community Assistance Visit (CAV), which she explained is basically an audit of the County's records to evaluate the County's compliance with FEMA's National Flood Insurance Program (NFIP). Director Engle stated that the CAV identified 13 properties that were not in compliance and that FEMA instructed the County to bring the properties into compliance, as well as to update its code to prevent similar issues from arising in the future. She noted that she was hired as the full-time Planning Director in April 2021, after resigning as the County Assessor and explained that some of the code enforcement documents submitted for the record were served on the Appellants by former Planning Directors Hiller West and Jessica Carpenter before she became the Planning Director.

Director Engle stated that, after meeting with FEMA, County staff, and a consultant hired by the County, she began to implement a plan to compel the owners of the 13 noncompliant properties to bring their properties into compliance. She noted that 4 of the 13 properties have been brought into compliance and that several other remaining property owners have provided the County with timelines for bringing their properties into compliance. Director Engle stressed that the County's probationary period for resolving the issues identified in the CAV ends in August 2022 and that FEMA could remove the County from its NFIP if it determines that the County has not substantially fulfilled its obligation to bring the properties into compliance. She acknowledged that, pursuant to ICC 17.03.260.E.3.b., the County has the burden in this appeal to demonstrate that the Appellants committed a violation by a preponderance of the evidence. She also acknowledged that the County had previously issued a permit for final occupancy for the residence on the property.

In response to questioning by John Wagoner on cross examination, Director Engle testified that she had acknowledged in discussions with Mr. Wagoner, that the noncompliance with flood zone regulations was a result of County error. *Argument and Testimony of Director Engle.*

Appellant's Argument and Witness

12. Appellant John Wagoner represented the Appellants at the hearing. He stated that the residence on the property received all of the necessary County approvals when it was constructed in 2011. He stressed that the County is now addressing the noncompliance after-the-fact and that the residence was determined to be in compliance at the time it was built. He stated that the change in regulations is the responsibility of the County but that the County was trying to put the burden of the error on residents. Mr. Wagoner noted that the property was also inspected by FEMA staff in 2012 because FEMA insurance was required for the mortgage. He stressed that FEMA staff did not identify the crawlspace as an issue during inspection the Appellants were issued flood insurance at the time. Mr. Wagoner stated that he would be open to discussing compliance options with County staff.

In response to questioning by Director Engle on cross examination, Mr. Wagoner stated that there was currently no mortgage or need for flood insurance for the property. He also stated that he understood that the residence would have to be brought into compliance with flood zone regulations if a property owner wanted flood insurance in the future. *Testimony and Argument of Mr. Wagoner.*

CONCLUSIONS

Jurisdiction

The Hearing Examiner has authority to hear and decide appeals from enforcement orders issued by the County Planning Director. *ICC 16.13.110.A.7; ICC 17.03.260.E.3.*

Review Criteria

ICC 17.03.260.E.3 provides:

- a. An enforcement order, including a supplemental order, any assessed civil penalty, or both, may be appealed to the Island County Hearing Examiner within fourteen (14) calendar days of service on the person(s) to whom such order is directed, in accordance with the provisions of chapter 16.19. Lack of actual receipt of an enforcement order, served by certified mail, due to extraordinary circumstances, such as the alleged violator not receiving mail due to being on a trip or in the hospital, shall toll the time period for filing an appeal. The burden of proving such extraordinary circumstances is on the party making such a claim. The hearing before the hearing examiner may be stayed for a period not to exceed sixty (60) days

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- for the purpose of negotiating an agreed order upon a written request from the alleged violator.
- b. The hearing examiner shall hold at least one (1) public hearing thereon as provided in section 16.13.100. The hearing examiner has the authority to reject or modify the enforcement order including the civil penalty. The burden of proof regarding commission of a violation is upon the Planning Director.
 - c. The enforcement order shall become final upon issuance of the hearing examiner's written decision.

Conclusions Based on Findings

The County has not proven by a preponderance of the evidence that the Appellants committed the violation alleged in the Supplemental Enforcement Order (SEO), issued on August 17, 2022. At the outset it must be noted that, although Director Engle has made clear that FEMA’s directive to the County to bring properties within its jurisdiction into compliance with applicable floodplain development regulations (at the risk of the County losing its ability to participate in FEMA’s National Flood Insurance Program) has driven the County’s code enforcement efforts in this matter, ultimately this is an appeal from the County’s issuance of an SEO against the Appellants.

Because this is a code enforcement matter, however, the County’s ability to remedy the violations identified by FEMA in its CAV – which has not been made a part of the record before the Hearing Examiner in this appeal – is limited by the tools provided to it by the municipal code, and the sole issue before the Hearing Examiner is whether the County has proven by a preponderance of the evidence that the property owners have violated the crawlspace standards of ICC 14.02A.050.B.1.b. While the Hearing Examiner acknowledges the pressure placed on the County to comply with FEMA’s directive and the County’s extensive efforts to adhere to this directive to allow its continued participation in the NFIP, this has no bearing on the Hearing Examiner’s ultimate determination of whether the County has met its burden to prove the violation alleged in the SEO.

The facts underlying this appeal are largely undisputed. The parties do not contest that the subject property is currently not in compliance with provisions of the County’s flood damage prevention ordinance, specifically ICC 14.02A.050.B.1.b, which provides in relevant part:

Crawlspaces within floodplains are allowed subject to the following requirements:

- (i) The interior grade of the crawlspace below the base flood elevation (BFE) must not be more than two (2) feet below the lowest adjacent exterior grade (LAG);
- (ii) The height of the below-grade crawlspace, measured from the interior grade of the crawlspace to the top of the crawlspace foundation wall must not exceed four (4) feet at any point. The height limitation is the

maximum allowable unsupported wall height according to the engineering analysis and building code requirements for flood hazard areas[.]

The County alleges in the August 17, 2022, SEO that the violation of the provisions described above occurred during the construction of the residence, and the SEO does not allege that the property's current noncompliance with the flood damage prevention ordinance was due to any action or inaction on the part of the Appellants following construction of the residence. It is undisputed, however, that the residence received final occupancy approval from the County in 2011. This final inspection process ostensibly entailed an inspection of the crawlspace to ensure compliance with the County's floodplain development regulations. Moreover, John Wagoner testified that the property was inspected in 2012 by FEMA staff when the Appellant was applying for flood insurance and that FEMA staff did not identify any crawlspace issues during the inspection. The Hearing Examiner determines that this undisputed evidence firmly establishes that the County deemed the residence as a legally conforming structure in 2011 and, therefore, the County cannot meet its burden to prove the violation alleged in the SEO.¹

The legally conforming status of the structure, as established by the County's final inspection approval, now constrains the County's ability to compel the property owners to bring the property into compliance with its floodplain development regulations. This limitation is due in part to language in the County code's flood hazard reduction provisions that limits application of the floodplain development standards to *new construction* or to substantial improvements of existing legally nonconforming construction. *See ICC 14.02A.050*. The County code also confirms that the use of legally established nonconforming structures may be continued, transferred, or conveyed as if conforming. *See e.g., ICC 17.03.230.D.1*.

Although the Hearing Examiner ultimately determines that the County has failed to meet its burden in this code enforcement appeal, he notes that the County has undertaken efforts to compel compliance with floodplain development regulations to the extent feasible under the code enforcement authority provided to it under the municipal code and, accordingly, requests that FEMA consider denial of flood insurance coverage for the individual property at issue under Section 1316 of the National Flood Insurance Act of 1968, as opposed to revocation of the County's participation in the NFIP. *Findings 1 – 12*.

DECISION

Because the County has not met its burden to demonstrate by a preponderance of the evidence that the Appellants have violated provisions of the County's Flood Damage Prevention Ordinance, Chapter 14.02A Island County Code, the appeal is **GRANTED**. The County shall rescind the SEO and cease enforcement actions related to this appeal. With the Appellants'

¹ Alternatively, the County's issuance of the final building permit in 2011 established the residence as a legally nonconforming structure. Even if this were the case, nothing in the municipal code appears to grant the County the authority to require alterations to a legally nonconforming structure unless additions or alterations to such structure were proposed (or, theoretically, in the case of a threat to life/safety).

permission, however, the County may seek alternative solutions to remedying the crawlspace situation on the property.

DECIDED this 3rd day of February 2023.



ANDREW M. REEVES
Hearing Examiner
Sound Law Center