ATTACHMENT 2

King County

KING COUNTY OFFICE OF CITIZEN COMPLAINTS – OMBUDSMAN
400 Yesler Way, Room 240
Seattle, WA 98104
206-296-3452

MEMORANDUM

June 7, 2007

TO: The Honorable Metropolitan King County Councilmembers

FR: Amy Calderwood, Ombudsman-Director AC
David Spohr, Senior Deputy Ombudsman DS

RE: Recommendation to Amend County Code Provisions Concerning Waiver Requirements in Voluntary Compliance Agreements

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EXECUTIVE SUMMARY

The King County Code requires that where "an administrative action [is] dictated by laws whose results are unfair or otherwise objectionable" the Ombudsman's Office "shall bring to the attention of the council [our] views concerning desirable legislative change." KCC 2.25.130(B). We believe that certain provisions of the code pertaining to voluntary compliance agreements ("VCAs") used to resolve code enforcement disputes create such an unfair and objectionable situation. We recommend that the current procedure, which forces a citizen wishing to benefit from a VCA to grant DDES essentially unfettered discretion in future conflicts that might arise under that VCA, be amended to allow for recourse to the County hearing examiner.

As currently written, a citizen seeking to avoid the adversarial process and consensually resolve an alleged code violation can often enter into a VCA with DDES to bring her activities or property into compliance. However, KCC 23.02.090 (as augmented by .100) mandates that a citizen desiring a VCA must first execute two distinct types of waivers. The citizen must admit (and waive any right to challenge DDES's present opinion that) her present activities constitute a code violation. We will refer to this as a "current waiver." For reasons discussed below, we do *not* conclude that the "current waiver" requirements need amendment.

However, a citizen must also waive both the right to challenge DDES's determination at any point in the future that the terms of that VCA have been violated, as well as the right to challenge DDES's future selection of a remedy ("future waiver"). This gives DDES essentially unfettered discretion in future conflicts that might arise as to whether the terms of the VCA have been sufficiently satisfied. It creates a sharp and unwarranted departure from the bedrock legal principles that would otherwise govern such agreements. It forces a citizen to either accept immediate civil enforcement or sign an agreement that allows DDES to unilaterally decide all future (and at the time of signing, inherently unknown) questions concerning compliance. It places in DDES's hands the sole determination of what remedies under Title 23 are warranted. We believe this creates an unfair and objectionable result.

We recommend that the Council amend the code to remove the "future waiver" requirements. In subsequent cases, if DDES comes to believe that a VCA signer has not complied with the terms of the VCA, and if the parties are not able to informally resolve the dispute, DDES should proceed via the traditional notice and order route. A citizen would be allowed to appeal DDES's notice and order determination to the hearing examiner. Hearings would not re-examine whether the original condition had been a code violation, the initial violation having already been admitted. Instead, hearings would apply the standard tools for resolving contract disputes to determine whether the VCA had been adequately complied with and the remedy for a violation.

In addition, a VCA format more palatable to a larger percentage of the citizenry might speed up overall compliance times. While DDES is not able to track the number of VCAs entered into, it appears that only a very small percentage of the approximately 1500 annual code enforcement cases are resolved via VCAs. It could be argued that the one-sided language of VCAs has been an impediment to effective resolution of code enforcement cases. A system employing VCAs allowing more equal terms should appeal to a larger segment of the citizenry and lead to a larger percentage of disputes being resolved through agreement instead of the adversarial process.

BACKGROUND

Procedural History

Having observed several code enforcement cases where an individual was reluctant to sign a VCA, we carefully parsed the relevant code provisions, KCC 23.02.090 (as augmented by .100). We were concerned that eligibility for a VCA required a citizen to forgo so many rights, especially in relation to future, inherently indeterminate events.[1] Pursuant to the requirement that our Office "shall bring to the attention of the council [our] views concerning desirable legislative change" where "an administrative action [is] dictated by laws whose results are unfair or otherwise objectionable," KCC 2.25.130(B), we began an inquiry.

On April 20, we presented some preliminary analysis and sought DDES's input. Attachment 1. On May 17, DDES responded that it was not persuaded that changes to either the "current" or the "future" waiver provisions were necessary. Attachment 2. After careful consideration, we agree with DDES's assessment that the "current waiver" requirements do not warrant a recommendation from this Office. However, we bring to the attention of the Council our views concerning removal of the "future waiver" requirements and creation of an appeal process to allow the hearing examiner to determine whether a VCA has been adequately complied with and the adequacy of DDES's selected remedy.

Summary of Pertinent Code Sections

KCC 23.02.090 and the explicatory KCC 23.02.100 provide extensive discussion of the required waivers. All emphasis in the code references cited in this memorandum has been added.

Waiver of Present Challenges Regarding Code Violations ("Current Waivers")

KCC 23.02.090(C)(9) requires that a citizen entering a VCA "waives the right to administratively appeal, and thereby admits, that the conditions described in the voluntary compliance agreement existed and constituted a civil code violation." KCC 23.02.090(C)(10) tracks this, requiring:

> An acknowledgment that the person responsible for code compliance understands that he or she has the right to be served with a citation, notice and order or stop work order for any violation identified in the voluntary compliance agreement, has the right to administratively appeal any such a citation, notice and order or stop work order, and that he or she is knowingly, voluntarily and intelligently waiving those rights."

KCC 23.02.090(D) re-emphasizes the effect of such a waiver.

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[1] We emphasize that we do not question DDES's inclusion of such waivers in VCAs. The waiver requirements discussed herein are mandatory. KCC 23.02.090(C) (all VCAs "shall include" certain explicitly enumerated provisions). Thus DDES's inclusion of such waivers is an "administrative action . . . dictated" by the code. KCC 2.25.130(B).

Waiver of Future Challenges Regarding VCA Conformance ("Future Waiver")

KCC 23.02.090(C)(7) requires that VCAs include:

> An acknowledgment that *if the department determines* that the terms of the voluntary compliance agreement are not met, the county may, without issuing a citation, notice and order or stop work order, impose any remedy authorized by this title, which includes the assessment of the civil penalties identified in the voluntary compliance agreement, abatement of the violation, assessment of the costs incurred by the county to pursue code compliance and to abate the violation, including legal and incidental expenses, and the suspension, revocation or limitation of a development permit.

KCC 23.02.090(C)(9) tracks this language, noting that "if the department determines the terms of the voluntary compliance agreement are not met, the person is subject to and liable for any remedy authorized by this title."

KCC 23.02.090(D) requires that a citizen entering into a VCA agree that if the department finds a violation of the VCA, he or she is liable for civil penalties, costs, and "is subject to all other remedies provided for in this title."

Finally, KCC 23.02.100 reiterates that:

> If the terms of the voluntary compliance agreement are *not completely met*, the department may abate the violation in accordance with this title, and the person responsible for code compliance may, *without being issued a citation, notice and order or stop work order, be assessed a civil fine or penalty*, in accordance with the penalty provisions of this title, plus all costs incurred by the county to pursue code compliance and to abate the violation, including legal and incidental expenses as provided for in this title, and may be subject to other remedies authorized by this title....

Miscellaneous Code Provisions

Two other provisions heighten the impact of the above provisions. First, extensions of time limits in VCAs are possible, but only at the sole discretion of DDES. KCC 23.02.090(E). Second, VCAs have to be "recorded against the property in the office of records and elections." KCC 23.02.090(C)(6).

ANALYSIS

The "Current Waiver" Provisions Do Not Qualify As Unfair or Objectionable

As noted above, a citizen entering into a VCA must admit that a specified code violation presently exists and must waive her right to have that violation determined by a neutral third party through the hearing examiner process. KCC 23.02.090(C)(9) & (10). Certainly, this "current waiver" creates frustration for some, including those citizens who might have a legitimate difference of opinion as to whether they are violating the code but who nonetheless wish to resolve a dispute and avoid the adversarial process. Although our rationale may be

different, this Office nonetheless agrees with DDES's conclusion that retention of the "current waiver" provisions does not create an "unfair" or "objectionable" situation requiring this Office to suggest a legislative change to the Council. KCC 2.25.130(B).

First, VCAs typically establish a timeline of several months or, in certain circumstances, over a year, for the citizen to bring the property into compliance. If at the end of the compliance period a dispute arose, and if the citizen had reserved the right to contest DDES's original determination that a violation existed, the parties would have returned to square one after a lengthy, perhaps fruitless process. An aggrieved neighbor, such as the complainant who started the original Code Enforcement case, would certainly have been made worse off, as DDES and the citizen would have only delayed the onset of what often can be a very lengthy hearing process to determine whether a code violation existed.

Second, when assessing whether or not to sign a VCA that includes a "current" waiver, a citizen has all the information (or avenues for obtaining that information) available to her to allow an informed decision. She can analyze the facts of the case, including the current condition of the property as compared to the relevant code she is accused of violating.[2] She can intelligently weigh the pros and cons of contesting (through the hearing examiner process) DDES's present assessment versus simply admitting to a violation. If she strongly believes she is not in violation, she can purse the adversarial process. The situation does not appear to create the potential for any surprises nor traps for the unwary.

While there are reasonable counter arguments, retaining the "current waiver" requirement does not appear to this Office to qualify as "unfair" or "objectionable."

The "Future Waiver" Provisions Are Unfair and Objectionable

The equities are significantly different for "future waivers," that is, a citizen giving up the right to challenge either DDES's determination (perhaps months or even years after a VCA has been signed) that she has not sufficiently met the terms of a VCA or DDES's selection of a remedy. The "future waiver" requirements abrogate the typical rules by which agreements are interpreted, with all such changes disfavoring the citizen. Neither of the above rationales that support a "current waiver" applies to "future waivers." The individual is being asked to give up the rights she would otherwise have in a dispute that has not yet occurred and cannot be accurately predicted. And allowing recourse to the hearing examiner will not create a situation where the parties return to square one.

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[2] We are aware of certain instances in the past where Code Enforcement had sent out violation letters which did *not* include a reference to the specific code section DDES believed was being violated. We brought this to the attention of the head of the Land Services Division, who assured us that this would not be repeated in the future. We are not aware of any such omissions in letters sent to potential violators since that communication. Thus it now appears reasonable to presume that citizens analyzing whether to enter into a VCA will have been provided with a reference to, and thus the ability to review, the specific code section they are alleged to have violated.

The "Future Waiver" Provisions Abrogate the Time-Tested Approach to Resolving Disputes Over Agreements

The "future waiver" requirements upset centuries-old principles for handling disputes over (potentially) abridged agreements. The citizen is being asked, with what we believe to be insufficient justification, to unilaterally cede rights she would normally have were a conflict involving implementation of a VCA to arise. Such waivers appear to eliminate (or at least require an expensive resort to the courts to protect) at least six rights a party to an agreement would typical have in a standard dispute over performance of that agreement:

- A party to an agreement normally has the right to have a third-party neutral (such as a judge, hearing examiner, or arbitrator) decide whether it has breached that agreement. Instead, the code places one of the parties (DDES) in the sole position of deciding whether the other party (the citizen) has breached the agreement. KCC 23.02.090(C)(7) ("*if the department determines* that the terms of the voluntary compliance agreement are not met....").

- A party (DDES) typically must meet (to the satisfaction of a third party) a specific burden of proof, such as "preponderance of the evidence," to show the failure of the other party (the citizen) to meet the terms of the agreement. Instead, the code does not require that DDES meets any burden of proof in order to conclusively, and unilaterally, determine that the VCA has been violated.

- Even in situations where one party (the citizen) does not contest the existence of some minor or technical breach, the aggrieved party (DDES) would usually have the burden to show (to a third party) that such breach was material. Instead, the code allows DDES to abate the property if it unilaterally determines that the VCA terms "are not *completely* met." KCC 23.02.100.

- Similarly, an offending party (the citizen) would normally have the right to plead (to a third-party) the affirmative defense of "substantial performance," even in situations where she does not contest her failure to completely perform every term of the agreement. Again, the code allows DDES to abate the property where it unilaterally determines that the VCA terms "are not *completely* met." KCC 23.02.100.

- The offending party (the citizen) would usually have the right to plead (to a third-party) an excuse or mitigating circumstance for such non-performance (or at least for such failure to timely perform), a right available even in situations where the materiality of a breach and lack of substantial performance were not contested. Instead, the code gives one party (DDES) sole discretion to determine whether "circumstances render full and timely compliance under the original conditions unattainable." KCC 23.02.090(C)(7).

- Finally, even in situations where a violation of the agreement, the materiality of the breach, insubstantial performance, and lack of a sufficient excuse or mitigating circumstance are not contested, a breaching party (the citizen) would

> typically have recourse to argue (to a third party) that the remedy demanded by the other party (DDES) was consistent with the agreement. Instead, the code allows one party (DDES) unilateral discretion in selecting an appropriate remedy, even those remedies not specifically enumerated in the VCA, without citizen recourse. KCC 23.02.090(C)(7) ("if the department determines" a breach it may "impose any remedy authorized by this title"); KCC 23.02.090(C)(9) ("if the department determines the terms of the voluntary compliance agreement are not met, the person is subject to and liable for any remedy authorized by this title"); KCC 23.02.090(D) ("if the department determines" a breach, citizen is "subject to all other remedies provided for in this title").

The code's approach to handling disputes that arise in the course of implementing a VCA would appear to abrogate centuries of law surrounding the interpretation of agreements. Allowing unilateral control by one party to an agreement is a sharp departure from the typical legal standard. Such a departure is not somehow warranted because of the subject matter of the agreement. Even in the analogous scenario of plea bargain/non-prosecution agreements resolving and avoiding prosecution for serious crimes, the government does not get the unilateral, unreviewable discretion to punish an alleged violator over what the government perceives as a breach of an agreement.

An instructive discussion of these issues comes from *United States v. Castaneda*, 162 F.3d 832 (11th Cir. 1998), a case analyzing the interpretation of such nonprosecution and plea bargain agreements. Rather than create a special subspecies of law where the government unilaterally decides all issues related to such agreements, the Circuit determined that such agreements were "contractual in nature" and were "therefore interpreted in accordance with general principles of contract law." *Id.* at 835. A third-party had authority to determine whether a violation had occurred; the government was not allowed to "unilaterally" make that determination. *Id.* at 836. The government had the burden to prove, by a preponderance of the evidence, both that the citizen had breached the agreement, and that the breach was "sufficiently material to warrant rescission." *Id.* The citizen was allowed to argue "substantial performance," and the government could not prosecute on the basis of "some technical or minor deficiency in performance." *Id.* at 837-840.

Thus, even where a citizen may be guilty of serious criminal wrongdoing, the plea bargain or non-prosecution agreement she enters into does not hand the government the unchecked power to unilaterally determine compliance and enforce penalties.[3] A third-party decides the issue,

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[3] DDES stated in its May 17th letter that the code gives it similar "total authority" related to notice and orders and hearing examiner orders. The reference to notices and orders is inapposite. To be sure, if the citizen fails to timely appeal a notice and order, it becomes a final, binding determination that a violation existed. KCC 23.24.020(D). That is no different from other governmental land use decisions which become binding once the opportunity to challenge them has passed. *See, e.g., Chelan County v. Nykreim*, 146 Wash. 2d 904, 925 (2002) (citing RCW 36.70C.040(2)). The crucial difference is that the citizen retains the right to appeal the notice and order, a right which, if exercised, allows a third-party neutral to decide the accuracy of DDES's determination. The reference to hearing examiner orders is correct, but troubling. That DDES can unilaterally interpret a hearing examiner order, with a citizen disputing DDES's interpretation having no ability to request that the hearing examiner clarify, creates a potential imbalance that itself might warrant a separate code amendment. That, however, is beyond the scope of this memorandum. Suffice to say, such a potential inequity does not warrant additional, unchecked DDES discretion in the context of VCA interpretation.

using the time-honored principles courts and others apply to such disputes. If even those guilty of serious criminal transgressions are not required to waive all future rights in order to benefit from such an agreement, it seems unbalanced that one who has committed a simple civil infraction must do otherwise. The current paradigm can be amended to bring VCAs in line. The County has a fine hearing examiner who is fully competent and capable of hearing such disputes and deciding them according to general contract principles.

"Future Waiver" Provisions Do Not Allow An Informed Decision and the Rational Supporting "Current Waivers" Does Not Apply

On page five, we discussed two issues that militate in favor of maintaining a "current waiver" requirement. Neither of those justifications applies to "future waivers."

First, demanding that a citizen execute a "future waiver" in order to benefit from a VCA is far more objectionable then simply requiring a citizen to sign a "current waiver." As discussed above, a citizen can weigh all the pros and cons of contesting a violation versus signing a "current waiver" and admitting to a violation. However, in the "future waiver" scenario, a citizen cannot possibly foresee exactly what dispute might arise as to whether she will be adjudged by a future (perhaps presently unknown) DDES employee to have fully complied with a VCA. She cannot know whether DDES will require strict compliance with a certain element of the VCA as it relates to her.[4] She cannot accurately predict what impediments might delay (or make impossible) her performance. Especially since the code authorizes DDES to "impose any remedy authorized by this title," even if not specifically enumerated in the VCA, she cannot know precisely what remedies DDES would impose in a given situation. In a sense, a citizen is being required to face an inherently unknowable situation without the usual rights she would have.

Not surprisingly, while DDES states that they are not able to track the number of VCAs entered into, it appears that a very small percentage of the approximately 1500 annual code enforcement cases are resolved via VCA. It would appear that citizens have been understandably reluctant to sign such a one-sided agreement. For this reason, we believe the future waiver restrictions create a serious impediment to consensual resolution of Code Enforcement cases.

We emphasize that we are not criticizing DDES's handling of particular cases. Instead, any system which allows one party such absolute control courts trouble. For any party, not just a government agency, allowing "unfettered discretion invites abuse." *State v. Montiel*, 122 P.3d 571, 576 (Utah 2005). In respect to government agencies in particular, creating "absolute and uncontrolled discretion in an agency . . . would be an intolerable invitation to abuse." *City of New York v. Torres*, 164 Misc.2d 1037, 1042 (N.Y. Supp. 1995). There is currently no realistic check or balance. King County should not fault (by depriving of the benefits of a VCA) a citizen who does not wish to give another party such unilateral discretion to resolve any future, unknown, disputes.

[4] DDES notes in its May 17th letter that it "does not require strict compliance with every single element of a voluntary compliance agreement." The issue this memorandum is addressing is not what DDES chooses to do in a specific case, but simply that the code allows no review of DDES's unilateral decision.

Second, if a dispute arises as to compliance with a VCA, allowing third-party review would not return the parties to square one. As long as the citizen had executed a "current waiver," any subsequent appeal would be limited in scope. The parties would *not* start all over and contest whether the citizen's original activities had constituted a code violation; the initial violation would already have been admitted. The dispute would be limited simply to enforcing the agreement, pursuant to the standards of contract law described above.

In fact, a form of a VCA that would be more acceptable to a larger percentage of the citizenry might actually speed up overall compliance times. As noted above, it appears that only a very small percentage of the approximately 1500 annual code enforcement cases are resolved via VCAs. Even where there is no actual dispute that the current situation creates a violation demanding compliance, the dominant strategy for citizens choosing between signing a VCA that includes the future waivers or being served with a notice and order appears to be to decline the VCA. The notice and order wherein DDES states that code violation has occurred is served. The citizen appeals to the hearing examiner and then tries to cure the violations while the appeal makes its way through the sometimes lengthy hearing examiner process, attempting to complete compliance before the hearing examiner issues a ruling on the merits. We believe that is a poor use of DDES and hearing examiner resources where no real dispute exists as to whether the initial situation is a violation, but simply where a citizen is not prepared to sign a VCA that hands DDES complete discretion to determine the future outcome.

Certainly, in any given case where a VCA is signed, DDES is correct that having a dispute be submittable to the hearing examiner would create "another layer of appeals" and thus take more time. Allowing DDES to impose its will unilaterally would be the quickest route to final resolution. However, if the code were amended to remove the "future waiver" provisions, only a subset of those amended VCAs would wind up in a compliance dispute requiring third-party intervention. The true time comparison is not contrasting the time it would take a single current case with a compliance dispute to reach closure versus a case with an amended VCA allowing hearing examiner involvement. Instead, the true comparison is whether the current system, where relatively few cases initially proceed down the VCA path and more head directly to the adversarial process, promotes speedier overall compliance than a scenario where a fairer VCA format leads to a higher percentage of cases initially utilizing VCAs and less heading directly to the adversarial process. With a major impediment to resolution – a VCA containing unreasonable future waivers – removed, we would hope to see more VCAs signed and faster, not slower, resolution of the entire code enforcement caseload.

CONCLUSION AND RECOMMENDATION

The current structure of the VCA ordinance, where one party to an agreement (a citizen) must cede unilateral control to the other party (DDES) in order to enter into an agreement, creates what we believe is an "unfair or otherwise objectionable" situation that warrants a code amendment. DDES does not agree, but we are not surprised that any party exercising such complete control would be reluctant to part with that unfettered discretion.

We accordingly provide our "views concerning desirable legislative change." KCC 2.25.130(B). We believe KCC 23.02.090 (as augmented by .100) should be simplified to remove the future waivers. The procedure for resolving disputes over whether a VCA has been met should simply

mirror the existing procedure for resolving disputes over whether a code section has been violated. If DDES believes that a VCA signer has not complied with the terms of the VCA, and the parties are not able to informally resolve the dispute, DDES would issue a notice and order, stating that (and why) it concludes the citizen has inadequately met the terms (or certain of the terms) of the VCA, and stating the remedy(ies) it intends to impose.[5] The citizen would then be provided with the same 14- and 21-day periods to appeal DDES's determination(s) to the hearing examiner.

Failure to timely appeal would presumably result in a final, binding determination that the VCA had been violated and that DDES's proposed remedy was reasonable, to the same extent that any failure to appeal any other land use decision would. Conversely, where a citizen timely disputed the notice and order and appealed to the hearing examiner, the hearing examiner would apply the standard tools for resolving such contract disputes and render a decision.

We believe such a code amendment would not seriously delay the speed with which DDES resolves its overall enforcement docket. In fact, a less objectionable (and thus more frequently signed) VCA format may even decrease overall compliance times. Regardless, we believe that one-sided terms of the current VCA format need to amended to reflect the standard rights and responsibilities parties to other agreements have.

Attachment 1: April 20, 2007 memorandum from Ombudsman to DDES
Attachment 2: May 17, 2007 memorandum from DDES to Ombudsman

Cc via .pdf only to: Stephanie Warden (*Stephanie.Warden@metrokc.gov*)
Harry Reinert (*Harry.Reinert@metrokc.gov*)
Joe Miles (*Joe.Miles@metrokc.gov*)
Deidre Andrus (*Deidre.Andrus@metrokc.gov*)
Jina Kim (*Jina.kim@metrokc.gov*)
Cristy Craig (*Christy.Craig@metrokc.gov*)

[5] In addition to a notice and order, the Code also allows DDES to issue citations or stop work orders. Nothing in this recommendation is intended to remove those other tools DDES, but simply to insure that a citizen does not have to waive (in order to enter into a VCA) whatever rights she might otherwise have in respect to future DDES action.

King County
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206-296-6600 TTY 206-296-7217
www.metrokc.gov

May 17, 2007

TO: Amy Calderwood, Ombudsman – Director
Via: David Spohr, Senior Deputy Ombudsman

FR: Stephanie Warden, Director, Department of Development and Environmental Services (DDES)
Via: Joe Miles, Land Use Services Division Director, DDES

RE: Waiver Requirements for Voluntary Compliance Agreements

Thank you for your memorandum of April 20, 2007, regarding Title 23 of the King County Code as it relates to the Voluntary Compliance Agreement (VCA). Voluntary Compliance Agreements can serve as a valuable tool in achieving compliance with the county's regulations. If successful, they can reduce costs in time and money for both the County and the property owner. We are not persuaded that changes to the county code provisions are necessary, but your letter points out some issues that would benefit from further discussion.

Under current county code, when the department has been verified a violation of county code on private property, the property owner or other individual has the option of entering into a voluntary compliance agreement to correct the violation. This is an alternative to having the county proceed with a Notice and Order. A property owner who believes there has been no violation is not required to enter into the agreement and can contest the Notice and Order in front of the Hearing Examiner. In these circumstances, allowing the property owner who has entered into a voluntary compliance agreement to appeal the determination that a violation was committed is unnecessary and counter-productive. The agreement to forgo appeal rights allows the property owner to negotiate timelines for compliance and to minimize time spent appealing the case. From DDES' perspective, if a property owner who has entered into an agreement is able to contest the finding of violation, the value of the agreement is lost.

Your memorandum also raises concerns about the way that compliance with the agreement is determined and whether the property owner can challenge the Department's conclusions. You note that the county code appears to give the Department total authority to determine whether a property owner has complied with the agreement. In fact, the code has similar provisions not just for voluntary compliance agreements, but also for a notice and order and for hearing

examiner orders. In practice, however, DDES does not require strict compliance with every single element of a voluntary compliance agreement. In many cases, particularly with some of our more difficult cases, we will sign off when the violator has substantially complied. We are sensitive to the appearance of fairness issues. But we also are concerned that adding another layer of appeals in what are often difficult cases could undermine the benefit of voluntary compliance agreements.

Finally, you asked for information about voluntary compliance agreements. Unfortunately, the data we have is fairly limited. Prior to September 2006, DDES' recordkeeping system did not catalogue cases by category. As such we are unable to determine how many voluntary compliance agreements were signed between 2004 through 2006. Most code enforcement cases are initiated by citizen complaint. Cases opened as a result of citizen complaints in the requested years are as follows:

- 2004: 1547
- 2005: 1397
- 2006: 1741

Thank you for opening the dialogue on this issue. DDES would welcome a meeting where we can discuss these issues in more detail. I am sure that together we can come up with solutions that address your concerns adequately, address fairness issues, and allow DDES Code Enforcement to continue their work in an efficient and effective manner.

Please contact my assistant, Cathy Ortiz, at 206-296-6704, if you would like to schedule a meeting to further discuss these issues.

Thank you.

cc: Deidre Andrus, Supervisor, Code Enforcement, Land use Services Division (LUSD), Department of Development and Environmental Services (DDES)
Harry Reinert, Special Projects Manager, Director's Office, DDES

KING COUNTY
OFFICE OF CITIZEN COMPLAINTS - OMBUDSMAN

Amy Calderwood, Ombudsman - Director

MEMORANDUM

April 20, 2007

TO: Stephanie Warden, Director, Department of Development and Environmental Services

FR: Amy Calderwood, Ombudsman-Director
Via: David Spohr, Senior Deputy Ombudsman

RE: Waiver Requirements for Voluntary Compliance Agreements

Introduction

We write to share preliminary concerns regarding the non-discretionary waiver provisions mandated by KCC 23.02.090 for voluntary compliance agreements ("VCAs") entered into between DDES and a person responsible for an alleged code violation. The code contains two distinct types of waiver requirements for VCAs: waiving any right to challenge DDES's current opinion that a violation exists (which we will refer to as a "current waiver") and waiving any future right to challenge DDES's determination that the terms of that VCA have later been violated or DDES's response ("future waiver"). We seek your input as we develop possible recommendations to the King County Council.

We do not question DDES's inclusion of such waivers in VCAs. The waiver requirements discussed herein are, by code, mandatory. KCC 23.02.090(C) (all VCAs "shall include" certain explicitly enumerated provisions). Instead, this Office is exploring whether requiring that a citizen desiring the benefits of a VCA execute such waivers as a condition of eligibility creates a situation where "an administrative action [is] dictated by laws whose results are unfair or otherwise objectionable," in which case this Office "shall bring to the attention of the council [our] views concerning desirable legislative change." KCC 2.25.130(B). We seek DDES's input before approaching the Council.

What follows are summaries of the relevant code sections, followed by some preliminary analysis and then a request of DDES.

Pertinent Code Sections

KCC 23.02.090 and the explicatory KCC 23.02.100 provide extensive discussion of the required waivers. All italics in the code references cited in this memorandum have been added.

Waiver of Present Challenges Regarding the Current Situation ("Current Waiver")

KCC 23.02.090(C)(9) requires that a citizen entering a VCA "waives the right to administratively appeal, and thereby admits, that the conditions described in the voluntary compliance agreement existed and constituted a civil code violation." KCC 23.02.090(C)(10) tracks this, requiring:

> An acknowledgment that the person responsible for code compliance understands that he or she has the *right to be served with a citation, notice and order or stop work order* for any violation identified in the voluntary compliance agreement, has the *right to administratively appeal* any such a citation, notice and order or stop work order, and that he or she is knowingly, voluntarily and intelligently *waiving those rights*."

KCC 23.02.090(D) re-emphasizes the effect of such a waiver.

Waiver of Future Challenges Regarding VCA Conformance ("Future Waiver")

KCC 23.02.090(C)(7) requires that VCAs include:

> An acknowledgment that *if the department determines* that the terms of the voluntary compliance agreement are not met, the county may, without issuing a citation, notice and order or stop work order, impose any remedy authorized by this title, which includes the assessment of the civil penalties identified in the voluntary compliance agreement, abatement of the violation, assessment of the costs incurred by the county to pursue code compliance and to abate the violation, including legal and incidental expenses, and the suspension, revocation or limitation of a development permit.

KCC 23.02.090(C)(9) tracks this language, noting that "if the department determines the terms of the voluntary compliance agreement are not met, the person is subject to and liable for any remedy authorized by this title."

KCC 23.02.090(D) requires that a citizen entering into a VCA agree that if the department finds a violation of the VCA, he or she is liable for civil penalties, costs, and "is subject to all other remedies provided for in this title."

Finally, KCC 23.02.100 reiterates that:

> Failure to meet terms of voluntary compliance agreement. If the terms of the voluntary compliance agreement are *not completely met*, the department may abate the violation in accordance with this title, and the person responsible for code compliance may, *without being issued a citation, notice and order or stop work order, be assessed a civil fine or penalty*, in accordance with the penalty provisions of this title, plus all costs incurred by the county to pursue code compliance and to abate the violation, including legal and incidental expenses as provided for in this title, and may be subject to other remedies authorized by this title....

Miscellaneous Code Provisions

Two other provisions heighten the stakes for entering into a VCA. First, extensions of time limits in VCAs are possible, but only at the sole discretion of DDES. KCC 23.02.090(E). Second, VCAs have to be "recorded against the property in the office of records and elections." KCC 23.02.090(C)(6).

Preliminary Analysis

In the "current" situation, a citizen must admit that a specified code violation presently exists and must waive her right to have that violation determined by a neutral third-party through the hearing examiner process.

More importantly, it appears that VCAs must contain several waivers of "future" rights a citizen would normally have were a dispute involving implementation of a VCA to arise. At first blush such waivers appear to eliminate (or at least require an expensive resort to the courts to protect) at least six rights a party to a typical agreement would normally have in a standard dispute over performance of that agreement:

- The code places one of the parties (DDES) in the sole position of deciding whether the other party (the citizen) has breached the agreement, instead of allowing a third-party (such as the hearing examiner) to determine whether such a breach has occurred. KCC 23.02.090(C)(7) ("*if the department determines* that the terms of the voluntary compliance agreement are not met....").

- The code does not require that the party (DDES) allowed to make that unilateral breach determination need meet any specific burden of proof.

- The code does not require that the aggrieved party (DDES) show that such breach is material or substantial before a remedy such as abatement is available, a right a party (the citizen) would normally have even in situations where she does not contest the existence of some minor breach. KCC 23.02.100 ("If the terms of the voluntary compliance agreement are *not completely met*, the department may abate the violation ....").

- Similarly, the code does not allow the offending party (the citizen) to plead (to the hearing examiner or other third-party) the affirmative defense of substantial performance, a right a party to an agreement would normally have even in situations where she does not contest her failure to completely perform every term of the agreement. *Id.*

- The code does not allow the offending party (the citizen) to plead (to the hearing examiner or other third-party) an excuse or mitigating circumstance for such non-performance or at least for such timely non-performance; a party to an agreement would normally have that right even in situations where the materiality of a breach and lack of substantial performance was not contested. Instead, one party