

August 3, 2010

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

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**ORDER IMPOSING PROCEDURAL SANCTION ON DDES, GRANTING APPELLANT
MOTION FOR DISMISSAL OF NOTICE AND ORDER, AND CANCELLING SCHEDULED
PRE-HEARING CONFERENCE**

SUBJECT: Department of Development and Environmental Services File No. **E07G0404**

STEVEN CAPEDER
Code Enforcement Appeal

Location: 13523 West Snoqualmie Valley Road NE

Appellant: Steven Capeder
represented by **Bob Johns**
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1. In response to Appellant's July 29, 2010 motion for summary dismissal with prejudice due to DDES's failure to respond to Appellant's motion for summary dismissal as required, the Examiner convened a telephone conference with the parties on August 2, 2010. Appearing were Mr. Johns on behalf of Appellant Capeder and Mr. Garnett on behalf of respondent DDES.
2. Appellant Capeder had earlier on June 21, 2010 filed a motion for summary dismissal of the April 27, 2010 Notice and Order in this case, contending that the Notice and Order contains procedurally inadequate information in its description of the found violation. The Appellant also claims that the Notice and Order's citations of authority with respect to the RCW and WAC are frivolous, and that the Notice and Order should also be dismissed because of DDES's failure to process the appeal and forward it to the Examiner's Office in a timely manner.

3. DDES is required by KCC 23.24.030 to include in the Notice and Order a brief description of the found violation. In this case, DDES's description consists of the following:

Clearing and/or grading without the required permits, inspections and approvals, within environmentally critical areas, Steep Slope, erosion, and/or their buffers, placement of culverts in streams in violation of Sections 16.82.050, 16.82.051, 21A.24.045, 21A.24.310
4. On July 8, 2010, the Examiner issued a notice of motion hearing and pre-hearing conference and established a motion briefing schedule, requiring that DDES file a response to the motion by no later than July 27, 2010. DDES failed to file such response and asserted in the telephonic conference that its reasons for such failure were a large amount of DDES vacation and layoff-related personnel absences and the inability to timely retain legal counsel due to the unavailability of a certain deputy prosecuting attorney because of a conflict of interest. However, at no time did DDES file a motion for extension of the briefing schedule.
5. In response to DDES's failure to timely respond to the requirement of a response to Appellant's motion for dismissal, and in the absence of sufficiently mitigating circumstances (precluding at least the filing of an extension request), the Examiner imposed a sanction in the telephonic conference that the motion for dismissal would be adjudicated without permitting DDES an opportunity to argue against it.
6. The Examiner concurs with Appellant's complaints that the Notice and Order insufficiently informs the party charged of the particulars of the alleged violation. First, the allegation of "clearing and/or grading" is impermissibly vague by its utter lack of certainty as to which activity occurred. Second, the allegation that such activity occurred within "Steep Slope, erosion and/or their buffers" is also impermissibly vague as to what type of critical area is at issue and as to whether it is discrete critical area or buffer area, or both. The Notice and Order is also impermissibly vague in that it fails to state in reasonable terms the location of such violations on the property, which is 20 acres in area. Neither does it indicate the approximate time period in which such violations occurred, if known. (Information of discovery by DDES could be stated in lieu of the time of activity, if such time is indeterminant.)
7. In summary, the Notice and Order does not provide a sufficient description of the alleged violation, but instead presents a vague and meandering charge which gives insufficient notice to the charged party as to what constitutes the violation, and precludes a reasonable defense and/or even the opportunity to voluntarily correct the violation by compliance actions. It accordingly violates fundamental due process as well as the Notice and Order content requirements of KCC 23.24.030.C.
8. Accordingly, the Appellant's motion for dismissal of the Notice and Order as defective shall be granted on the above grounds.
9. The Appellant's charges of insufficient citation of legal authority for bringing a code enforcement action in the instant case, while persuasive as to the citations to the RCW and WAC, do not convince of a fatal flaw in the Notice and Order, since the county's basic code enforcement authority in Chapter 21A.50 KCC and Title 23 KCC is cited. Those grounds for dismissal are not sustained.
10. While DDES's processing of the Notice and Order appeal in this case appears to have been tardy, the Examiner finds no provision in the code for dismissal based on such tardiness, and finds no substantial prejudice to the Appellant thereby since it has involved a few weeks' time rather than

a problematically lengthier period. Important in this conclusion is that, if proven, the violation asserted involves an ongoing matter of failure to obtain necessary regulatory permits and activity in environmentally critical areas which may have resulted in adverse environmental impacts. The public interest in administering the regulatory permit program and ensuring that necessary permits are obtained, and in precluding, or, if necessary, requiring abatement and/or correction of, adverse impacts militates against a hasty dismissal based on tardy processing of the appeal.

11. For the above public interest reasons noted, the Examiner shall not dismiss the Notice and Order with prejudice, but instead without prejudice. DDES would therefore be permitted to refile a Notice and Order for the subject violation if it determines that such enforcement action is necessary. As noted in the telephone conference, the Examiner encourages the parties to communicate fully and thoroughly and in good faith to ensure that ensuing enforcement considerations are conducted in a manner with full mutual understanding of the issues and of the lawful evidentiary bases for any enforcement actions taken. As always, the Examiner also strongly encourages the parties to attempt to resolve the issues through agreement.
12. If any new Notice and Order is issued in the instant matter, in order to cure the impermissible vagueness of the description of violation DDES must include a more particular statement, akin to a bill of particulars, in order to provide sufficient notice to the charged party of the alleged violations in order to a) defend against them if that response is chosen, and/or b) correct the violations by compliance.
13. The Applicant also requests an order directing DDES to remove from the Appellant's property title any notice of enforcement action filed pursuant to KCC 23.24.040. As the dismissal herein shall be without prejudice, for the reasons noted above, the Examiner shall refrain from directing such removal immediately, and shall instead direct that it be removed promptly if DDES decides not to pursue enforcement in this matter in a manner which requires that such notice be filed against the property.

ORDER:

1. The Notice and Order issued by DDES under the referenced file number on April 27, 2010 is DISMISSED WITHOUT PREJUDICE due to its unenforceable vagueness.
2. In any new Notice and Order issued regarding the subject allegations, DDES shall provide a more particular statement/bill of particulars, which as a minimum provides sufficient specificity of the activities in question, the particular critical areas and/or related buffers in which they are alleged to have occurred, their locations on the property and the temporal context of their having occurred, if known, or the temporal context of their discovery.
3. Should DDES demur from filing a new Notice and Order or other formal action requiring notice on title, DDES shall promptly remove any notice on title which has been filed pursuant to KCC 23.24.040.
4. The motion hearing/prehearing conference scheduled to be convened this date was cancelled during the telephone conference.

ORDERED August 3, 2010.



Peter T. Donahue
King County Hearing Examiner

NOTICE OF RIGHT TO APPEAL

The Examiner's decision shall be final and conclusive unless proceedings for review of the decision are properly commenced in Superior Court within 21 days of issuance of the Examiner's decision. (The Land Use Petition Act defines the date on which a land use decision is issued by the Hearing Examiner as three days after a written decision is mailed.)

PTD:gao
E07G0404 ORD