

September 14, 2010

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REPORT AND DECISION

SUBJECT: Department of Development and Environmental Services File No. **E08G0029**

KATHY AND STEVEN COVERT
Code Enforcement Appeal

Location: 38811 – 264th Avenue SE

Appellant: **Kathy and Steven Covert**
38811–264th Avenue SE
Enumclaw, Washington 98022
Telephone: (253) 495-5630
Email: steven.covert@hotmail.com

King County: Department of Development and Environmental Services (DDES)
represented by Mary Impson
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SUMMARY OF RECOMMENDATIONS/DECISION:

Department's Preliminary Recommendation:	Deny appeal, with revised compliance schedule
Department's Final Recommendation:	Deny appeal, with further revised compliance schedule
Examiner's Decision:	Deny appeal, with further revised compliance schedule

EXAMINER PROCEEDINGS:

Prehearing conference cancelled and on-call continuance granted:	July 17, 2009
Hearing opened:	September 2, 2010
Hearing closed:	September 2, 2010

Participants at the public hearing and the exhibits offered and entered are listed in the attached minutes. A verbatim recording of the hearing is available in the office of the King County Hearing Examiner.

FINDINGS, CONCLUSIONS & DECISION: Having reviewed the record in this matter, the Examiner now makes and enters the following:

FINDINGS OF FACT:

1. On May 28, 2009, the King County Department of Development and Environmental Services (DDES) issued a code enforcement Notice and Order to Kathy L. Pearce that found a code violation on a property zoned RA-10 and RA-5 located at 3881 1 264th Avenue SE in the unincorporated area between Enumclaw and Black Diamond. The property is in very close proximity to Bass Lake, which lies nearby to the northwest. The Notice and Order cited Ms. Pearce (now Kathy Covert) and the property with the following violation of county code:
 - A. Grading (placement of fill in excess of 100 cubic yards) within a critical area (wetland and/or buffer, aquatic area and/or buffer) without the required permit and/or inspections.

The Notice and Order required compliance by obtainment of the required grading permits, inspections and approvals, initiated by the submittal of a complete application by September 8, 2009.
2. Steven and Kathy Covert, joint property owners, filed an appeal of the Notice and Order, making the following claims:
 - A. The Coverts are innocent parties to the activity, stating that “Kathy (Covert)’s deceased husband (Arthur W. Pearce) allowed the fill to be placed on the property.”
 - B. The fill location appears to be outside of the sensitive areas¹ buffer in effect at the time the fill was placed on the property.
 - C. The Appellants understand that even if the fill was outside of sensitive/critical area buffers, a clearing and grading permit is required. The Appellants are willing to obtain a permit and develop a plan to remove the material from the site.
3. The Coverts failed to appear at the appeal hearing; nobody appeared as their representative or otherwise on their behalf. The Appellants therefore did not make any presentation in support of their claim of innocent party status. (The burden of proof in a claim of innocent party status for code enforcement purposes rests on the person making the claim.) The evidence in the record shows that the fill in question existed onsite as early as sometime in the year 2000. The evidence in the record also shows that on October 24, 2000, Ms. Covert’s now-deceased former husband, Mr. Pearce, quit claimed the subject property to Ms. Covert. However, the Quit Claim Deed indicates that the consideration was “not separate from community property.” DDES testified at hearing that its knowledge was that Ms. Covert was married to Mr. Pearce and living on the property at the time the fill occurred. The preponderance of the evidence in the record is not persuasive that Kathy Covert is an innocent party in this violation matter.
4. It can be concluded from the evidence in the record that Steven Covert is an innocent party, as the activity occurred during Ms. Covert’s previous marriage, Mr. Covert was not an owner of the property at that time, and he was otherwise not a perpetrator of the grading violation in question.

¹ The predecessor ordinance to the Critical Areas Ordinance (CAO) was entitled the Sensitive Areas Ordinance (SAO).

(It should be noted by the Coverts that innocent party status relieves an innocent property owner only of the possible assignment of fines and penalties accruing from an unresolved code violation. The burden of *correcting* the violation, including any costs associated with required abatement by the county should matters come to that, remains and is an assumed burden of the current property ownership. [See KCC 23.02.130.B])

5. DDES has not met its burden of proof to demonstrate that the subject fill was placed in a critical/sensitive area, or within regulatory buffers of such areas. Indeed, DDES in its testimony stated that the fill “*may*” be within a sensitive area/critical area buffer. DDES went on to testify that “if it is determined during the permit process that it (the fill) is outside” of sensitive/critical areas, then the fill activity would not be subject to the pertinent regulatory requirements pertaining to such areas.
6. The only “evidence” of location of the property in relation to sensitive/critical areas is a set of county Geographic Information System (GIS) maps, which graphically depict “SAO (Sensitive Areas Ordinance) Wetland (1998)” on approximately the western half of the site, with the boundary a diagonal north-northeast/south-southwest line roughly parallel to the property’s curving road frontage on 264th Avenue SE. Two circular lobes of “Aquatic Areas Buffer (2004)” encumber the northern quarter, approximately, of the western-half of the property (and therefore the northern corner of the portion previously designated as “SAO Wetland (1998)”). The “Aquatic Areas Buffer (2004)” designated area onsite appears to be dimensionally tied to a northwesterly extending slough/stream (designated as a “Watercourse (WLR)” on the GIS map) running to Bass Lake from a boat ramp within a narrow state recreation site abutting the north side of the property. But the GIS maps expressly state a caveat: “King County makes no representations or warranties, express or implied, as to the accuracy, completeness, timeliness or rights to the use of such information,” and are therefore insufficient as sole evidence of critical/sensitive area presence.
7. No other evidence is submitted in the record which is persuasive of the presence of sensitive/critical area and/or buffers on the property. The preponderance of the evidence in the record does not demonstrate that the violation of critical area and/or buffer found by the Notice and Order actually occurred. Accordingly, the Notice and Order shall not be sustained in such regard.
8. Grading by placement of fill in excess of 100 cubic yards is shown by a preponderance of the evidence to have been performed on the property. The Notice and Order shall be sustained in that regard.
9. The Appellants acknowledge that the remedy for the violation by placement of fill is to obtain a grading permit, which may require that the fill be removed from the site.

CONCLUSIONS:

1. The violation found in the Notice and Order with respect to critical areas violation is not sustained by the evidence and shall be reversed.
2. The basic grading violation found in the Notice and Order is demonstrated by a preponderance of the evidence, and the Notice and Order shall therefore be sustained in that regard, with the compliance schedule revised to account for the time taken up by the continuance and the appeal hearing process.

3. Kathy Covert not having been found to be an innocent party to this matter, she is subject to potential fines and penalties pertaining to the sustained violation. Steven Covert is found to be an innocent party, and he is thus not subject to any fines or penalties. As noted above, as the current property owners the Coverts bear the burden of correcting the sustained violation. If the matter is not corrected by the Coverts, any costs of abatement undertaken by the county will be subject to assignment to the Coverts and/or the property.

DECISION:

The appeal of the Notice and Order is SUSTAINED with respect to the charged violation of critical area regulations, and the Notice and Order REVERSED in such regard. With respect to the basic grading violation, the appeal is DENIED and the Notice and Order SUSTAINED, except that the COMPLIANCE SCHEDULE is REVISED as stated in the following order.

ORDER:

1. A *complete* application for a grading permit and/or reinstatement of the previously submitted permit application shall be submitted to DDES *by no later than December 13, 2010*. Thereafter, all pertinent timeframes and stated deadlines for additional information, response comments, supplementary submittals, etc., if any, shall be diligently observed by the Appellants through to final approval. The permit shall be promptly obtained and the work performed in compliance with the schedules imposed by the permit, with diligent communication to DDES requesting inspections and final inspection and approval.
2. The Appellants shall immediately inquire of DDES as to the necessity of a pre-application meeting prior to submittal of the subject grading permit application/renewal. If DDES requires such a pre-application meeting, the Appellants shall schedule such meeting sufficiently in advance in order to comply with the above deadline for submittal of the required complete application.
3. DDES is authorized to grant deadline extensions for any of the above requirements if warranted, in DDES's sole judgment, by circumstances beyond the Appellants' diligent effort and control. DDES is also authorized to grant extensions for seasonal reasons (potential for erosion, other environmental damage concerns, etc.).
4. No fines or penalties shall be assessed by DDES against Mr. Covert. No fines or penalties shall be assessed against Ms. Covert and/or the property if the above compliance requirements and deadlines are complied with in full (noting the possibility of deadline extension pursuant to the above allowances). However, if the above compliance requirements and deadlines are not complied with in full, DDES may impose penalties against Ms. Covert and/or the property as authorized by county code retroactive to the date of this decision. If the county proceeds with abatement efforts, costs for such abatement may be assigned to the Coverts and/or the property as provided by county code and state law.

ORDERED September 14, 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.)

MINUTES OF THE SEPTEMBER 2, 2010, PUBLIC HEARING ON THE CODE ENFORCEMENT APPEAL OF KATHY AND STEVEN COVERT, DEPARTMENT OF DEVELOPMENT AND ENVIRONMENTAL SERVICES FILE NO. E08G0029

Peter T. Donahue was the Hearing Examiner in this matter. Participating in the hearing were Mary Impson and Robert Manns representing the Department.

The following Exhibits were offered and entered into the record:

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| Exhibit No. 1 | DDES staff report to the Hearing Examiner for E08G0029 |
| Exhibit No. 2 | Photographs of the subject property taken by Code Enforcement Officer Mary Impson on January 31, 2008, May 6, 2009 and February 25, 2010 |
| Exhibit No. 3 | Stop Work Order posted on the subject property on January 31, 2008 |
| Exhibit No. 4 | Aerial photographs (1996, 1998, 2000, 2002, 2005 and 2007) and topographical maps (shoreline management designations, channel migration hazard areas, wetlands and FEMA cross sections, floodways and floodplains) of the subject property |
| Exhibit No. 5 | Quit Claim Deed granting ownership of subject property from Arthur Pearce to Kathy Pearce, recorded January 8, 2001 |
| Exhibit No. 6 | Letter of violation from DDES to Arthur Pearce, dated February 14, 2008 |
| Exhibit No. 7 | Copy of the Notice and Order issued May 28, 2009 |
| Exhibit No. 8 | Copies of codes cited in the Notice and Order |
| Exhibit No. 9 | Copy of cover letter to Notice and Statement of Appeal, dated June 15, 2009 |
| Exhibit No. 10 | Copy of the Notice and Statement of Appeal received June 16, 2009 |
| Exhibit No. 11 | Letter from Robert Manns, DDES Site Development Specialist, informing Kathy Pearce of deadline to submit site plan and grading application and permit fees, dated February 23, 2010 |
| Exhibit No. 12 | Printout of DDES log notes entries for E08G0029 from January 29, 2008 through August 3, 2010 |
| Exhibit No. 13 | Printout of DDES log notes entries for A08PM048 from February 22, 2008 through July 21, 2010 |

PTD:vsm
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