

May 6, 2010

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

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REPORT AND DECISION

SUBJECT: Department of Development and Environmental Services File No. **E09G0267**

JAMES AND RAMONA CASSADY

Code Enforcement Appeal

Location: E Lake Desire Drive SE (Parcel 40084-00315)

Appellant: **James and Ramona Cassady**
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Renton, Washington 98058-2451
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King County: Department of Development and Environmental Services (DDES)
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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 revised compliance schedule
Examiner's Decision:	Deny appeal, with further revised compliance schedule

EXAMINER PROCEEDINGS:

Pre-hearing Conference:	April 1, 2010
Hearing opened:	April 20, 2010
Hearing closed:	April 20, 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 January 28, 2010, the King County Department of Development and Environmental Services (DDES) issued a code enforcement Notice and Order to Appellants James and Ramona Cassady regarding property located on E Lake Desire Drive SE (parcel no. 400840-0315). The site is a waterfront lot on Lake Desire in the unincorporated area between Renton and Maple Valley. The Notice and Order cited the Cassadys and the property with the following violation of county code:
 - A. Clearing and grading (placement of fill and wood chips to create path access approximately 1,000 square feet in area) within a critical area (wetland) and/or buffer.The Notice and Order required that a restoration permit be applied for, after a pre-application meeting.
2. The Cassadys filed an appeal of the Notice and Order, making the following claims:
 - A. Trimming/cutting of vegetation is permitted for survey purposes as an allowed alteration in wetland/wetland buffer areas. [See KCC 21A.24.045.D.18]
 - B. A trail may be constructed in a wetland consisting of pervious materials as an allowed alteration. [See KCC 21A.24.045.D.47]
3. The Appellants also cite in their appeal as a defense another allowed critical area alteration, removal of *purple loosestrife*, a noxious weed which is addressed by the county Noxious Weed Control Program and encouraged/required to be cleared and removed from affected properties. [see KCC 21A.24.045.D.23] However, the *purple loosestrife* problem area onsite is not within the area addressed by the finding of code violation; the *purple loosestrife* is on the waterfront whereas the violation area is inland (see following Findings). (Even if the *purple loosestrife* was located in the area in question, clearing it alone and bagging it for removal, as recommended, would not necessitate the type and amount of clearing conducted on the property nor the spreading of woodchip surfacing in the cleared area.)
4. The preponderance of the evidence in the record indicates that the entirety of the property is wetland. DDES conducted its wetland field analysis properly, using the applicable triple-parameter approach (presence of vegetation species, hydrology and hydric soils), and offered persuasive testimony of logical inferences of the property's wetland characteristics that may be drawn from that analysis. The Appellants claimed at hearing that some of the area in question may constitute a non-wetland "island" within the wetland area (noting that most of it is "walkable," which is not an exclusively determinative factor of wetland presence); even if that were the case, the "island" would constitute wetland buffer (it is directly proximate to wetland areas if indeed it is non-wetland), with mostly identical critical area clearing restrictions and allowances as those applying to actual wetland areas. [KCC 21A.24.045.D]¹ The claim of non-wetland "island," which is not substantiated by actual evidence, therefore provides little to no relief in this case. (See Finding 5.B.)

¹ One of the differences is regarding the relative allowance of trails; see Finding 5.B.

5. The Appellants' claims of their clearing and grading actions being allowed alterations under the critical area regulations are not persuasive:
- A. The land area cleared was acknowledged at hearing by Appellant James Cassady to consist of a 60-by-60-foot area approximately 75 feet into the property from E Lake Desire Road SE, accessed by a relatively wide (car width) pathway which was also cleared. The relatively large cleared area, blocky in extent rather than linear, belies its necessity to be cleared for "survey" purposes and thus be eligible as an allowed alteration under KCC 21A.24.045.D.18. The Appellants acknowledge that the clearing was conducted to "gain access" into their property, but it also is apparent that the clearing was also conducted to provide an open recreation area. That area now accommodates a picnic table as well as providing an extensive open space area. It is certainly an understandable desire on the part of the Appellants to use their property for recreational purposes, but it is also a perhaps difficult and uncomfortable fact of life that under the county's critical area regulations, properties which contain wetlands, wetland buffers and other critical areas must undergo significant permit review before such areas are disturbed, and it may be that not all disturbances are approved.
- B. The land area cleared is also a much more extensive area than could reasonably constitute a "trail." At the very least, a trail's width is required by KCC 21A.24.045.D.47.e to be "minimized to the maximum extent practical." A 60-foot-wide area is not a trail "minimized to the maximum extent practical." Also, the allowance limits trail construction to being "allowed *in the buffer* or for *crossing* a...wetland or...aquatic area," and even then, the trail portions crossing wetlands "shall be constructed as a *raised boardwalk or bridge*." [KCC 21A.24.045.D.47, emphasis added]² The 60-by-60 foot area and the pathway gaining access to it are not shown to be solely within buffer area or crossing a wetland and, again, their widths belie any reasonable trail/trail crossing function. Another test of alteration allowance of a trail is that "there is not another feasible location with less adverse impact on the critical area and its buffer." [KCC 21A.24.045.D.47.c] That has not been demonstrated. All of the above limitations to allowed alterations are problematic to the Appellants' appeal claims in this regard and point to the necessity of obtaining a clearing/grading permit, not only to comply with permit requirements but also to ensure proper review for and assurance of eligibility as allowed alterations in critical areas.
- C. Code prohibitions also pertain to the laying down (fill) of woodchips in critical areas. The Appellants' assertion that woodchips are harmless organic material, though perhaps meritorious from a substance standpoint, is beside the point. Deposition of material, such as the subject woodchips, constitutes "fill." [KCC 16.82.020.L] "Fill" constitutes "grading." [KCC 16.82.020.O and 21A.06.565] "Grading" is not allowed in wetland and wetland buffers. [KCC 21A.24.045.C] The cited installation of woodchips is therefore prohibited by the code.³ If a property owner desires to perform such installation, a formal alteration exception is required. [See KCC 21A.24.070] (It may be on restoration review that the county permits the woodchips to remain in place as part of the restoration, as removal may entail greater damage than leaving them in place and allowing them to decompose over time. That is DDES's administrative call to make.)

² It should be noted that trail alterations to Category I wetlands are not permitted (KCC 21A.24.045.D.47), but no evidence is offered into the record as to the property's wetland type.

³ The allowance of trail construction in wetland and wetland buffer areas noted above in Finding 5.B would seem to preempt the grading prohibition (see KCC 21A.24.045.C), but the preemption would be limited to qualifying trails.

6. In the final analysis, the Appellants' claims of critical area alteration allowances of their work by KCC 21A.24.045 are unpersuasive. The preponderance of the evidence in the record supports the finding of the Notice and Order that clearing and grading was conducted within critical areas and/or buffers in violation of county code. The Notice and Order finding of violation is therefore correct.
7. The Appellants assert their lack of financial resources to obtain permits and perform the necessary restoration. The Examiner does not have authority to engage in such issue, but at hearing directed the Appellants to inquire of DDES for options available under its permit fee structure.

CONCLUSIONS:

1. As the Notice and Order's finding of violation is correct, the appeal shall be denied and the Notice and Order sustained, except that the compliance schedule merits revision given the time taken up to adjudicate the appeal.

DECISION:

The appeal is DENIED and the Notice and Order sustained, provided that the compliance schedule is revised as stated in the following Order.

ORDER:

1. An onsite pre-application meeting with DDES Critical Area and Site Development staff shall be scheduled by the Appellants to be held *by no later than June 21, 2010*.
2. *By no later than 45 days* from the close of the pre-application meeting, a *complete* clearing/grading/restoration permit application shall be submitted to DDES. After submittal, all pertinent timeframes for necessary supplementation, response comments, etc., if any, shall be diligently observed by the Appellants through permit issuance and obtainment and final inspection approval.
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 and/or weather reasons (potential for erosion, habitat disturbance, other environmental damage considerations, etc.). **Given the critical area sensitivity of the site, DDES may require that any work be conducted during the dry season or under other seasonal limitation; the work shall be subject to any DDES restrictions in such regard.**

4. No fines or penalties shall be assessed by DDES against the Cassadys and/or the property if the above deadlines are complied with in full (noting the possibility of deadline extension pursuant to the above allowances.) However, if the above compliance deadlines are not complied with in full, DDES may impose penalties as authorized by county code retroactive to the date of this decision.

ORDERED May 6, 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 APRIL 20, 2010, PUBLIC HEARING ON DEPARTMENT OF DEVELOPMENT AND ENVIRONMENTAL SERVICES FILE NO. E09G0267

Peter T. Donahue was the Hearing Examiner in this matter. Participating in the hearing were Holly Sawin and Peshia Klein representing the Department and James Cassady, the Appellant.

The following Exhibits were offered and entered into the record:

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| Exhibit No. 1 | Department of Development and Environmental Services (DDES) staff report to the Hearing Examiner for E09G0267 |
| Exhibit No. 2 | Copy of the Notice & Order issued January 28, 2010 |
| Exhibit No. 3a | Copy of the Notice and Statement of Appeal received February 18, 2010 |
| Exhibit No. 3b | Copy of the Statement of Appeal received February 25, 2010 |
| Exhibit No. 4 | Copy of codes cited in the Notice & Order |
| Exhibit No. 5 | Email from Peshia Klein to Holly Sawin dated April 7, 2010 with attached Wetland Data form completed by Peshia Klein dated April 7, 2010 |
| Exhibit No. 6a | Photographs of subject property taken by Holly Sawin on November 16, 2009 |
| Exhibit No. 6b | Photographs of subject property taken by Holly Sawin on April 7, 2010 |
| Exhibit No. 7 | 2009 and 2007 aerial photos of subject property from KC GIS |
| Exhibit No. 8a | Letter from Kimiora Ward dated June 29, 2009 to James & Ramona Cassady |
| Exhibit No. 8b | Letter from Kimiora Ward dated July 31, 2009 to James & Ramona Cassady |
| Exhibit No. 8c | KC GIS map of Purple Loosestrife location on subject parcel as surveyed in 2008 & 2009 |
| Exhibit No. 8d | King County Noxious Weed Control Program Weed Alert on Purple Loosestrife |