

November 24, 1998

OFFICE OF THE HEARING EXAMINER
KING COUNTY, WASHINGTON
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REPORT AND DECISION ON AN APPEAL FROM NOTICE AND ORDER.

SUBJECT: Department of Development and Environmental Services File No. **E9800568**
TONY AMBROSE / JOHN BREITHAUPT
Code Enforcement Appeal
(This Department file formerly identified with Michelle Larsen)

Location: 30400 NE Tolt Hill Road (approximately), Carnation

Appellant: Tony Ambrose
30408 NE Tolt Hill Road
Carnation, WA 98014
Represented by
Ian Macrae, Esq.
PO Box 1329
Fall City, WA 98024

Appellant: John Breithaupt
16648 NE 12th Street
Bellevue, WA 98008

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Bellevue, WA 98008

SUMMARY OF RECOMMENDATIONS:

Department's Preliminary: Deny appeals
Department's Final: Deny appeals
Examiner: Deny appeals

PRELIMINARY MATTERS:

Notice of appeal received by Examiner: July 15, 1998
Statement of appeal received by Examiner: July 15, 1998

EXAMINER PROCEEDINGS:

Pre-Hearing Conference: August 17, 1998
Hearing Opened: November 10, 1998, 9:30 a.m.
Hearing Closed: November 10, 1998, 3:25 p.m.

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.

ISSUES/TOPICS ADDRESSED:

- Erosion
- Trees

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

FINDINGS:

1. On May 5, 1998, the Department of Development and Environmental Services (hereinafter, the "Department", or "DDES") conducted an on-site investigation of the subject abutting properties in response to a citizen complaint. As a result of this investigation, the Department determined that logging and land clearing had occurred within sensitive areas and a critical drainage area without a valid clearing permit, and that no erosion/sedimentation control measures were in place. The Department consequently posted a "Stop Work" order on site. The facts contained in this finding are uncontested.
2. KCC Title 23 provides a schedule for civil penalties for code violations. Having reviewed the history of this same property and property owner, DDES File E9800094 (February 19, 1997 Notice and Order) and a related Forest Practice Permit Application (dated April 7, 1998; denied by Washington State Department of Natural Resources ["DNR"]), the Department determined the assessment of civil penalties indicated. The Department takes care to distinguish between Appellant Breithaupt and Appellant Ambrose.
 - a. **Appellant Breithaupt.** Breithaupt, then a commercial logger retained by Appellant Ambrose, has no previous history of code violations in King County. Therefore, the Department does not seek civil penalties from Appellant Briethaupt. Rather, the Department seeks to retain Appellant Breithaupt in these proceedings in order to be able to require him to participate in any remedial measures on the property which may be ordered by the Examiner.

Further, through the course of the hearing, Appellant Breithaupt further set himself apart from Appellant Ambrose by declaring that he agreed with the temporary on-site protective measures sought by the Department, calling them "reasonable." He further distinguished himself from Appellant Ambrose by his testimony that Appellant Ambrose had specifically advised him that he (Ambrose) had accomplished the requisite paperwork to conduct logging and land clearing on the properties. That testimony is un rebutted. Appellant Breithaupt asks that the Examiner, in consideration of the facts contained in this finding, dismiss him as a party to these proceedings. The Examiner, requiring further evidence, deferred that motion to the conclusion of the hearing.

- b. **Appellant Ambrose.** Appellant Ambrose assumes ownership of both properties,

releasing former spouse Michelle Larsen from liability in this matter. Appellant Ambrose argues that the Department's directions have been confusing, that the Department consistently failed to return his telephone calls when he had called to ask for further direction, and that he was unfamiliar with the regulations and means available to press his case to the County.

With regard to the substantive issues, Appellant Ambrose argues that no harm was done, that most of the tree cutting was selective and without significant damage to ground cover or understory, and that he has already installed those sedimentation/erosion control measures that are necessary (principally, seeding and intermittently installed run-off diverters called "water bars"). Appellant Ambrose asks that the appeal be granted based upon the considerations described in this finding and in Findings Nos. 3, 4, 6 and 8, below.

3. There is no disagreement among the parties that the County has officially designated the subject properties as sensitive areas and as being located within a critical drainage area. The sensitive areas designations are these: "Landslide hazard," "Erosion hazard," and "Steep slopes." Appellant Ambrose argues that these designations are based upon broad generalized studies and not upon site-specific official geological or soils investigation. In contrast, Appellant Ambrose refers to Exhibit No. 32, a letter report prepared by Liu and Associates, which indicates that the erosion/sedimentation potential is not so great as indicated by the Department.

The Department responds that no soil or surficial geological investigation automatically exempts any person from grading permit requirements; and that, due to the logging and clearing activities undertaken by Appellant Ambrose upon the property, the Liu report must be brought up-to-date in order to be reliable. In support of this position, the Department's representative testifies that -- although seeding may produce an appearance of surficial stability -- the gradual underground decay of the roots of cut trees may in some cases create instability.

4. In addition to those arguments described above, Appellant Ambrose also argues that his reading skills diminished his ability to understand grading and permit requirements; and that, due to his financial circumstances, *any* requirement to conduct studies or site remediation, or to pay civil penalties, would be unfair, onerous and burdensome. The Department does not respond.
5. KCC 20.24.150 requires the Department to issue its report to the Examiner two weeks prior to the hearing. The Department in this case missed that deadline by one week, a fact which the Department openly acknowledges. Appellant Ambrose, represented by an attorney, does not object or ask for a continuance.
6. By operation of the Washington State Forest Practices Act ("FPA") and implementing Washington Administrative Code ("WAC") provisions, King County has jurisdiction with respect to the activities undertaken on the subject property that are the subject of this appeal review. See WAC 22-16-050. A critical distinction in this determination is the fact that the subject (approximately) five-acre parcels were platted in 1976 (that is, *since* 1961). Activities undertaken on abutting properties of larger acreages (approximately 60 acres, according to testimony) were exempt from County review and County standards. Subject only to State FPA standards administered by DNR, less detailed review and site remediation has been required. Appellant Ambrose argues that these differences in treatment are unfair.
7. The hearing record contains disputes as to which site features may be old skid roads, old logging

roads, or new skid roads. However, the photographic evidence suggests that this distinction is irrelevant. The photographs show where log skidding laid the ground bare regardless of past site history.

8. On-site inclinometer readings taken by Department staff verify that the hillside slopes of concern exceed 40% gradient, a requisite criterion for County sensitive areas regulation pursuant to KCC Chapter 21A.24. The soils on the subject property are comprised of glacial till, a sandy/gravelly material characterized by high permeability, but prone to erosion during peak storm events. The Appellant argues that, based upon the storm event history of the past year, no harm has been done. The Department responds that the concern is cumulative in two ways: First, basin-wide; second, through future time, as cut tree stumps/roots decompose. Appellant Ambrose, on the other hand, argues that considering all of the tree cutting and clearing in total, and considering further the (partial) selectiveness of the cutting, together with current site conditions, the case against him must be deemed *de minimus* and therefore not warranting prosecution.
9. Except as noted above, the facts and analysis contained in the Land Use Services Division Preliminary Report dated November 3, 1998 are correct and are incorporated here by reference.
10. Any portion of any of the following conclusions which may be construed as a finding is incorporated here by reference.

CONCLUSIONS:

1. The preponderance of the evidence, including but not limited to numerous photographs, document that the logging/clearing activities alleged by the Department did in fact occur. Further, the preponderance of the evidence amply demonstrates that these activities occurred in the absence of permit approvals required by King County Code.
- 2.a The failure of a public service employee to return telephone calls from members of the public always reflects poorly upon that employee and public service in general. The private sector has the liberty to choose which phone calls to return; public service does not, in this Examiner's judgment.
- 2.b Nonetheless, the decision of a County employee not to return phone calls that inquire as to permitting requirements in no way justifies a property owner to "take the law into his own hands" and do what he wants to do just because he wants to do it. One is tempted to ask the question, "What part of 'you need a permit' don't you get?" The hearing record shows that, in spite of several phone calls from Appellant Ambrose not being returned, there had been considerable communication between the Department and Appellant Ambrose that established clearly and unequivocally that a grading permit was required. Therefore, the violations of County grading (KCC 16.82) and sensitive areas (KCC 20.24) requirements were deliberate and willful.
3. The inconsistency between State-regulated lands/activities and County-regulated lands/activities is unfortunate. However, it is not grounds to ignore local regulations nor is it grounds for exempting someone from the consequence of unlawful activities after the fact.
4. The arguments related to the economic circumstances and reading skills of Appellant Ambrose could be heard in a court of petite equity, but not here. Conclusion Nos. 1 and 2.b, above, speaks more directly to the issues at hand.

5. Appellant Ambrose's attorney asks whether the Department is seeking a civil penalty for "disobedience" or environmental damage. The question is unnecessary because both principles are inherent in the penalty provisions of KCC Title 23. The KCC Title 23 civil penalty schedule acknowledges the presumed superior knowledge commercial operators by imposing heavier fines on them. The code also provides for increasing penalties for second or third violations (i.e., "disobedience") even for residential non-commercial violators. Nonetheless, the underlying purpose of the regulations at issue is *environmental protection*.
6. There are reasons for the environmental sensitive area designations on the subject property. These designations are not strewn about the County at random. They are applied to the property based upon specific standards. Although the Liu report suggests a "no harm done" short-term finding, it does not support any conclusion that the subject property has been improperly designated or that there are not cumulative long-term effects visited by such activities occurring basin-wide or through long-term (not necessarily seen) slope stability degradation.
7. Appellant Breithaupt complied with the "Stop Work" order; complied with the corrective action on-site at the time it was ordered; and has consistently expressed willingness to comply with the reasonable requests of the Code Enforcement officers. Further, as noted above, this incident occurs as a first violation for Appellant Breithaupt. Finally, also as noted above, Appellant Breithaupt's testimony that Appellant Ambrose advised him that the necessary paperwork had been completed stands un rebutted. Nonetheless, accepting such information without corroborating evidence should be regarded as professional error on his part. This Conclusion No. 7 directs the second order indicated below.

DECISION:

- A. APPELLANT AMBROSE: The appeal is DENIED.
- B. APPELLANT BREITHAUPT: The motion to dismiss the code enforcement action against Appellant Breithaupt is DENIED; and, the appeal is DENIED.

ORDER:

Appellant Ambrose and the Department shall comply with this schedule:

1. Not later than January 8, 1999, the Department shall communicate in writing to Tony Ambrose, by certified mail, legal service, or personal hand delivery, the specific requirements in addition to and in support of grading permit application.
2. Not later than February 15, 1999, Tony Ambrose shall file complete grading permit application with the Department, including all application and review fees then due.
3. Not later than December 4, 1998, the Department shall communicate to Tony Ambrose, by certified mail, legal service, or personal hand delivery, its written instructions for *temporary* erosion and sedimentation measures required, if any. Tony Ambrose shall allow any DDES personnel on the property that the Department determines necessary to comply with this Order.
4. Not later than December 21, 1998, Tony Ambrose shall complete any required temporary erosion and sedimentation control measures ordered by the Department.

- 5. Based upon the Department’s assessment of the quality and anticipated effectiveness of temporary erosion and sedimentation control measures, the Department may at its discretion waive permit application requirements. In so doing, the Department may, however, require full value performance bonding for a period not to exceed two years.
- 6. Any failure by the Department to meet any deadline specified in this Order shall result in complete avoidance of this Order.
- 7. Any failure to meet any deadline contained in this Order by Tony Ambrose shall result in a \$100.00 fine for each such deadline failure. Any failure by Tony Ambrose to comply with this Order shall result in complete restoration of the Department's June 15, 1998, Notice and Order, including civil penalties and prosecutorial options.
- 8. Any recorded notice of lien on the property shall not be removed until the permit and implementation requirements of the Department have been satisfied.
- 9. Not later than March 19, 1998, John Breithaupt shall pay a civil penalty in the manner instructed by the Department in the amount of \$500.00. Upon Mr. Briethaupt's failure to do so, the Department may place liens upon the property of John Breithaupt in the manner contemplated by KCC Title 23; and, the King County Prosecuting Attorney may pursue any legal recourse available to him.

ORDERED this 24th day of November, 1998.

R. S. Titus, Deputy
King County Hearing Examiner

TRANSMITTED this 24th day of November, 1998, by certified and regular mail, to the following parties:

Tony Ambrose	John Breithaupt	Ian Macrae
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TRANSMITTED this 24th day of November, 1998, by regular and/or interoffice mail, to the following:

Paul Carkeek	Ken Dinsmore
Susan Casey	Jon Pederson
Michelle Larsen	Randy Sandin

Pursuant to Chapter 20.24, King County Code, the King County Council has directed that the Examiner make the final decision on behalf of the County regarding code enforcement appeals. The Examiner's decision shall be final and conclusive unless within twenty (20) days from the date of the decision an aggrieved party or person applies for a writ of certiorari from the Superior Court in and for the County of King, State of Washington, for the purpose of review of the decision.

MINUTES OF THE NOVEMBER 10, 1998 PUBLIC HEARING ON DEPARTMENT OF DEVELOPMENT AND ENVIRONMENTAL SERVICES FILE NOS. E9800568 AND E9800569 – AMBROSE AND BREITHAUPT:

R.S. Titus was the Hearing Examiner in this matter. Participating in the hearing were Jon Pederson, Susan Casey, Paul Carkeek, Tony Ambrose, John Breithaupt, and Ian Macrae.

The following exhibits were offered and entered into the record:

- Exhibit No. 1 Department of Development & Environmental Services Preliminary Report to the Hearing Examiner for the November 10, 1998 public hearing
- Exhibit No. 2 May 5, 1998: LUSD Complaint Investigation Request Form for Code Enforcement cases E9800568 and E9800569
- Exhibit No. 3 May 5, 1998: Stop Work Order posted on subject property for clearing violation
- Exhibit No. 4 May 5, 1998: Stop Work Order posted on subject property, by Washington State Dept. of Natural Resources, for Forest Practices violation
- Exhibit No. 5 February 19, 1997: Notice and Order of Code Violation issued for previous violation on subject properties
- Exhibit No. 6 April 10, 1998: Disapproved Forest Practices Application for subject properties from Washington State Dept. of Natural Resources
- Exhibit No. 7 February 9, 1998: Time Accounting Record Sheet indicating field visit to subject property
- Exhibit No. 8 June 15, 1998: Notice and Order of Code Violation issued to Michelle Larsen and John Breithaupt for Case #E9800568
- Exhibit No. 9 June 16, 1998: Notice and Order of Code Violation issued to Tony Ambrose and John Breithaupt for Case #E9800569
- Exhibit No. 10 June 17, 1998: Notice of Appeal received from John Breithaupt for Case #E9800568 and E9800569
- Exhibit No. 11 June 24 and July 28, 1998: Notice of Appeal and Correction, received from Tony Ambrose for Code Enforcement Case #E9800569
- Exhibit No. 12 June 24, 1998: Notice of Appeal received from Michelle Larsen for Code Enforcement Case #E9800568
- Exhibit No. 13 August 3, 1998: Notice of Pre-Hearing Conference for Code Enforcement Case #E9800568, issued by King County Hearing Examiner
- Exhibit No. 14 August 19, 1998: Pre-Hearing Order, for Code Enforcement Case #E9800568 & E9800569, issued by King County Hearing Examiner
- Exhibit No. 15 August 21, 1998: Memo from LUSD to Hearing Examiner advising on status of erosion-sedimentation control agreement
- Exhibit No. 16 August 21, 1998: "Draft" Erosion Control Agreement faxed to Paul Carkeek for review
- Exhibit No. 17 August 26, 1998: Final Erosion Control Agreement faxed to Paul Carkeek for review
- Exhibit No. 18 August 26, 1998: Letter from Ian Macrae, responding to Erosion Control Agreement dated August 26, 1998
- Exhibit No. 19 September 1, 1998: Memorandum from LUSD to Hearing Examiner advising status of Erosion-Sedimentation Control Agreement
- Exhibit No. 20 September 23, 1998: Copy of letter from John Breithaupt to Hearing Examiner
- Exhibit No. 21 June 1998, September 1997: King County Code Chapter 16.82 – Grading
- Exhibit No. 22 December 1994, December 1995: King County Code Chapter 21A.24 – Environmentally Sensitive Areas
- Exhibit No. 23 June 1995, December 1995: King County Code Chapter 23.08 – Enforcement (General)
- Exhibit No. 24 November 16, 1992: King County Assessor's Map of subject parcels
- Exhibit No. 25 December 1990: King County Sensitive Areas Folio – Landslide Hazard Areas, Erosion Hazard Areas
- Exhibit No. 26 October 14, 1998: King County Situs File Property Information Records for Parcels #2025079051 —Larsen, and 2025079052 – Ambrose
- Exhibit No. 27 May 24, 1989: King County Public Rule – West Snoqualmie Critical Drainage Area
- Exhibit No. 28 May 5, 1998: Photographs of subject property taken by Jon Pederson, June 1998

Exhibit No. 29 May 27, 1976: Copy of recorded short plat #1275043, including subject property

Exhibit No. 30 June 16 – September 23, 1998: Log notes for Code Enforcement Case #E9800568 and E9800569

Exhibit No. 31 Document releasing Michelle Larsen from subject action

Exhibit No. 32 Liu & Associates letter to Tony Ambrose dated July 22, 1997

Exhibit No. 33 Thirteen (13) photographs of subject property taken by Paul Carkeek, October 26, 1998

Exhibit No. 34 Permit #B96R1790 Condition of Approval, 30408 NE Tolt Hill Road

RST:gb/daz

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