

June 2, 2014

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

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REPORT AND DECISION

SUBJECT: Department of Permitting and Environmental Review file no. **E07G0137**

MICHELLE BURTIS AND JEFF KISSINGER

Post-Compliance Civil Penalty Appeal

Location: 30025 NE 172nd Street, Duvall

Appellants: **Jeff Kissinger Michelle Burtis**
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King County: Department of Permitting and Environmental Review
represented by **Jeri Breazeal**
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SUMMARY OF RECOMMENDATIONS/DECISION:

Department's Preliminary Recommendation:	Deny appeal
Department's Final Recommendation:	Deny appeal
Examiner's Decision:	Grant appeal

EXAMINER PROCEEDINGS:

Hearing Opened:	May 13, 2014
Hearing Closed:	May 13, 2014
Record Closed:	May 23, 2014

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

FINDINGS and CONCLUSIONS:

Background

1. On January 29, 2008, the Department of Planning and Environmental Services (“DDES” (now the Department of Permitting and Environmental Review (“DPER”)) issued to Michelle Burtis and Jeff Kissinger a Notice and Order alleging four violations, only one of which is at issue in this Post-Compliance Civil Penalty Appeal: operation of a motorized racetrack on a residential site. Ms. Burtis and Mr. Kissinger (“Appellants”) appealed the Notice and Order. Hearing Examiner Donahue determined that the code did not prohibit motorized vehicles on a trail and that DDES had not made the case that the trail constituted a commercial racetrack. Hearing Examiner Donahue’s June 20, 2008 Revised Report and Decision (“Decision”) on the appeal included the following orders:

5. (Added) Off-road motorized vehicle use, on a residential accessory and/or defined “trails” use basis, may be conducted on the property pending the permit and regulatory compliance required above, except that such use shall be excluded from regulated critical areas and required buffers as established by Chapter 21A.24 KCC; from areas specifically subject to erosion/sedimentation/ drainage control requirements established by DDES in writing; and from areas specifically required to be restored from impermissible grading/clearing, until and unless DDES releases any such areas to off-road motorcycle use resumption (no later than as of the date appropriate regulatory compliance has been achieved, which at the Appellant’s reasonable choice may be on a subarea basis; in other words, areas may be released from the exclusion on an area portion basis). In order to effect the exclusions, DDES shall delineate such areas in the field no later than **July 2, 2008**, in cooperation with the Appellants and/or a delegated representative(s) who shall contemporaneously mark the boundaries of such areas in the field in conformity with established temporary boundary-marking protocols and standards (visible durable tape, etc.).

6. (Added) No penalties shall be assessed by DDES against Appellants Burtis and Kissinger and/or the property if the above compliance requirements and deadlines are complied with in full. If they are not, DDES may assess penalties against the Appellants and/or the property retroactive to the date of this order as provided by county code.

2. The Decision does not prohibit pedestrian or other non-motorized use of the trails.
3. DDES informally flagged the critical areas on March 30, 2009. Exhibit (“Ex.”) 1; Ex. 7.
4. Based on site visits conducted between March 30, 2009 and June 4, 2013, DPER determined that Appellants had continued to ride motorcycles within areas which DPER

describes variously, and somewhat inconsistently, as “through the critical areas” (Ex. 2, p. 1); “in areas flagged as wetland areas” (Ex. 3, p. 1); “the area over the stream and within the identified buffers” (Ex. 3, Authorization for Waiver/Adjustment of Civil Fines/Civil Penalties (“Civil Penalty Authorization”).

5. In August, 2013, DPER assessed civil penalties of \$2,250.00 for 60 days at \$25.00 per day (Base Code Violation Charge) based on the Appellants’ “riding motorcycles in the defined wetland areas.” (Ex. 3, Civil Penalty Authorization, p. 2) The Product Line Manager’s Recommendation states:

“Site inspections observed the track areas within the defined wetland area were recently disturbed and not revegetating as would be expected if left undisturbed over 4 years.”

6. Appellants timely filed a request for reduction or waiver/adjustment of the penalties, which DPER denied. Ex. 3. Appellants timely appealed. Ex. 4.
7. In communications with DPER preceding filing of the appeal, Appellants asserted that DPER may not assess fines because it did not delineate the critical areas by the deadline set forth in the Decision. Ex. 3.
8. In their appeal, Appellants contend that they have been in compliance since March 30, 2009. They do not contend that DPER may not assess fines because it did not delineate the critical areas by the deadline set forth in the Decision. Ex. 4. Therefore, that issue is not before the Hearing Examiner.

Appeal Issues

9. As stated in the April 3, 2014 Decision on Motion to Grant Appeal and Second Prehearing Order (“Prehearing Order”) in this case, the Hearing Examiner preliminarily determined that the issues should be framed as follows:
 - A. Has DPER presented a *prima facie* case based upon competent evidence demonstrating that Appellants operated off-road motorized vehicles in a critical area after DDES flagged the critical areas on March 30, 2009?
 - B. If DPER has presented a *prima facie* case, have Appellants demonstrated by a preponderance of the evidence that they did not operate motorized vehicles in a critical area after March 30, 2009?

The Hearing Examiner offered the parties the opportunity to present argument that the issues should be framed differently. Neither party presented argument.

10. Issue B was framed somewhat inexactly in the Prehearing Order. It should have referred to operation of motorcycles or off-road vehicles rather than motorized vehicles. In addition, it became apparent during the hearing that DPER does not contend that Appellants operated motorcycles or off-road motorized vehicles (“ORVs”) with a critical area itself, but rather, within a stream or wetland buffer. Therefore, the Appeal Issues are clarified as follows:

- A. Has DPER presented a *prima facie* case based upon competent evidence demonstrating that Appellants operated off-road motorized vehicles in a critical area buffer after DDES flagged the critical areas on March 30, 2009?
- B. If DPER has presented a *prima facie* case, have Appellants demonstrated by a preponderance of the evidence that they did not operate off-road motorized vehicles in a critical area buffer after March 30, 2009?

Prima Facie Case

11. DPER's determination that Appellants violated Order 5 is based entirely on circumstantial evidence. DPER has not witnessed the riding of motorcycles within critical areas or their buffers.
12. DPER presented photographic evidence of only one site visit that it conducted after March 30, 2009. Ex. 9. This site visit occurred on May 8, 2012, 3 years after DDES flagged the critical areas. Ex. 9 contains four photographs of an area Appellants refer to as the South Crossing. Officer Breazeal testified that the lower photograph on page 1 is of a trail leading down to a stream crossing. Vehicular tracks are visible in the photographs on page 1 and the upper photograph on page 2. Officer Breazeal testified that the areas shown in Ex. 9 are within a 65-foot stream buffer on the west side of the stream.
13. Mr. Bottheim, DPER Environmental Scientist III, testified that he conducted a site visit on June 4, 2013 with Mr. Kissinger to review a proposed drainage plan. He testified that his observations were consistent with the conclusion in the Invoice Appeal Report to the Hearing Examiner (Ex. 1) that motor vehicles have used trails within the critical area buffers and that the conditions shown in the lower photograph on page 2 of Ex. 9 were consistent with his observations in his site visit approximately 13 months after that photograph was taken. He testified that a wetland is located to the right of the trail shown in the lower photograph. Although he did not observe any fresh tracks or motorized vehicles, in his opinion, conditions are present that would allow vegetation to reestablish itself had the area not been disturbed by motor vehicles.
14. As with Officer Breazeal, his testimony focused on the South Crossing. DPER did not present evidence of off-road motorized vehicle use of any of the other trails. DPER did not present evidence of off-road motor vehicle use within a wetland.
15. At the conclusion of DPER's case, the Appellants moved that their appeal be granted as DPER has not made a *prima facie* case. The Examiner deferred ruling on the motion, asking Appellants to present their case.
16. "*Prima facie* evidence means evidence which suffices for the proof of a particular fact until contradicted and overcome by other evidence." *State of Washington v. Gilbert*, 3 Wn.App. 491, 475 P.2d 797 (1970). It has also been defined as "evidence of sufficient circumstances which would support a logical and reasonable inference" of the facts sought to be proved. *State of Washington v. Bernal*, 109 Wn.App. 150, 156, 33 P.3d 1106 (2001).

17. DPER presented a *prima facie* case that motorized vehicles had been operated in a critical area buffer after DDES flagged the critical areas on March 30, 2009. In the context of this case, DPER's inference that the motorized vehicles were motorcycles or ORVs is logical and reasonable. Its inference that the area shown in Ex. 9 would have revegetated but for the operation of motorcycles or ORVs is also logical and reasonable.

The Appellants' Case

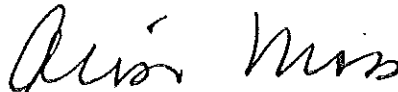
18. Appellant Kissinger testified that work shown on page Ex. 9 resulted from the removal of several trees that had been damaged by winter storms and threatened his pump house, not use of the trail by motorcycles or ORVs. He also testified that the trees shown on page 1 of Ex. 9 are not within a buffer. He marked the lower photograph on page 2 of Ex. 9 to show the area that is within the buffer. The marked photograph is Ex. 14. DPER did not contest Mr. Kissinger's testimony on this point.
19. Appellant Kissinger's testimony is persuasive. A comparison of Ex. 9 with Ex. 15, discussed below, demonstrates that the vehicular tracks in Ex. 9 are substantially larger than those that would be made by motorcycles or ORVs. Appellants have overcome the inference that the tracks shown in Ex. 9 are those of motorcycles or ORVs.
20. Appellant Kissinger also presented extensive photographic evidence which he contends demonstrates that the area shown in Ex. 9 has not revegetated due to compaction of the soils from motorcycle or ORV activity prior to March, 2009, placement of straw for erosion control, leaf deposition, and shading. Ex. 15, p. 1 provides photographs of straw placed for erosion control in June, 2009 at the direction of DPER in the area of the South Crossing. Straw is also evident in a portion of this area in one of DPER's May, 2012 photographs. Ex. 9, p. 2, upper photograph. Officer Breazeal testified that this straw-mulched area leads down to a creek.
21. Appellant Kissinger testified that the lower photograph on Ex. 9, p. 1 and Ex. 15, photograph 2-1 portray the same area. A comparison of these two photographs supports Appellants' contention that they have not operated motorcycles or ORVs on this trail – at least in the period from May, 2012 - March, 2014. The 2014 photograph shows leaf deposition, small downed branches, and no evidence of motorized vehicle use. Similarly, Ex. 15, photographs 2-2 through 2-4, also taken in the area of the South Crossing, show the trail covered by leaves and no evidence of recent tracks from motorcycles or ORVs.
22. Ex. 15, photographs 8-2, 17-2, 17-4 and 18-1 through 19-4 also documents conditions on the South Crossing trail as of March 17, 2014. The trail shows no evidence of recent motorcycle or ORV use. Rather, it is covered with leaves and a crossed in several places by downed trees.
23. Ex. 15, photographs 8-3 and 8-4 are a side-by-side comparison of a trail used by motorcycles and one used only by pedestrians, respectively. The difference is apparent. The trail used by motorcycles has a defined rut and little leaf deposition. The trail used by pedestrian has no rut and is covered by leaves. Photograph 8-3 is illustrative of the conditions the Hearing Examiner would have expected to see in DPER's evidence (Ex. 9) had Appellants operated motorcycles or ORVs within the buffer area (marked on Ex. 14).

24. The photographs on pages 10 and 12-15 of Ex. 15 show trails outside of the buffer which are subject to routine motorcycle use. These trails are largely bare, although leaves are accumulated on one the side of the trail shown in Photographs 15-1 and 15-3.
25. Appellants provided photographs of several areas on their property and on neighbors' property that have not been subject to off-road vehicle use but lack extensive understory in support of their contention that leaf deposition and shading inhibit understory growth.
26. In rebuttal, DPER contended that a comparison of the condition of the South Crossing trail in May, 2012, as shown in Ex. 9, with its condition 10 months later as shown in Ex. 15 photographs 18-3 and 17-4 indicates that the trail is narrower in 2014 and is more vegetated. The Hearing Examiner is unable to reach that conclusion. The photographs are at different scales and are taken from somewhat different vantage points. In addition, Appellant Kissinger testified that the stream had eroded the trail (center of photograph 18-3), making it more narrow. For these reasons, photographs 18-3 and 17-4 are probative of the assertion that lack of vegetation demonstrates motorcycle or ORV use in the critical area buffer within the South Crossing trail.
27. In the unusual posture of this case, Appellants have demonstrated by a preponderance of the evidence that they did not operate off-road motorized vehicles in a critical area buffer after March 30, 2009.

DECISION:

The Appeal is **GRANTED**.

ORDERED June 2, 2014.



Alison Moss
Hearing Examiner pro tem

NOTICE OF RIGHT TO APPEAL

Pursuant to King County Code Chapter 20.24, 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 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 MAY 13, 2014, HEARING ON DEPARTMENT OF PERMITTING AND ENVIRONMENTAL REVIEW FILE NO. E07G0137.

Alison Moss was the Hearing Examiner in this matter. Jeri Breazeal and Steve Bottheim participated in the hearing on behalf of the department and Jeff Kissinger and Michelle Burtis, the Appellants.

The following exhibits were offered and entered into the record:

- | | |
|----------------|--|
| Exhibit no. 1 | Permitting and Environmental Review staff report to the Hearing Examiner for file no. E07G0137 |
| Exhibit no. 2 | Copy of billing request and invoice |
| Exhibit no. 3 | Copy of Waiver/Adjustment form dated December 10, 2013 |
| Exhibit no. 4 | Copy of appeal received December 27, 2013 |
| Exhibit no. 5 | Copy of Hearing Examiner Decision dated June 20, 2008 |
| Exhibit no. 6 | Copy of the Notice and Order issued January 29, 2008 |
| Exhibit no. 7 | Photographs taken March 30, 2009 |
| Exhibit no. 8 | Offered but not entered |
| Exhibit no. 9 | Photograph taken May 8, 2012 |
| Exhibit no. 10 | Copy of the delineation map |
| Exhibit no. 11 | Copy of the delineation report |
| Exhibit no. 12 | Copies of aerials dated 2009 & 2013 |
| Exhibit no. 13 | Email from Doug Dobkins to Jeff Kissinger dated April 8, 2008 |
| Exhibit no. 14 | Photograph dated May 8, 2012 annotated by Jeff Kissinger |
| Exhibit no. 15 | Description photographs taken by Jeff Kissinger |
| Exhibit no. 16 | Email from Matt Caskey to Jeff Kissinger dated June 2, 2009 |

AM/gao

June 2, 2014

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CERTIFICATE OF SERVICE

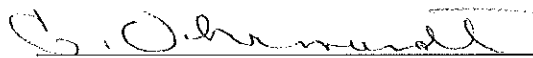
SUBJECT: Department of Permitting and Environmental Review file no. **E07G0137**

MICHELLE BURTIS AND JEFF KISSINGER
Post-Compliance Civil Penalty Appeal

I, Ginger Ohrmundt, certify under penalty of perjury under the laws of the State of Washington that I transmitted the **REPORT AND DECISION** to those listed on the attached page as follows:

- EMAILED to all County staff listed as parties of record/interested persons and primary parties with e-mail addresses on record.
- caused to be placed with the United States Postal Service, with sufficient postage, as **FIRST CLASS MAIL** in an envelope addressed to the non-County employee parties of record/interested persons at the addresses indicated on the list attached to the original Certificate of Service.
- caused to be placed with the United States Postal Service, with sufficient postage, as **CERTIFIED MAIL** with a return receipt requested in an envelope addressed to the primary parties.

DATED June 2, 2014.



Ginger A. Ohrmundt
Legislative Secretary II

All Parties of Record

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