

November 25, 2020

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

King County Courthouse
516 Third Avenue Room 1200
Seattle, Washington 98104
Telephone (206) 477-0860
hearingexaminer@kingcounty.gov
www.kingcounty.gov/independent/hearing-examiner

REPORT AND DECISION

SUBJECT: Department of Local Services file no. **ENFR140884**

DAVID AND STACEE PERRY
Code Enforcement Appeal

Location: [REDACTED] Renton

Appellants: David and Stacey Perry
represented by **Aaron Smith**
Law Office of Aaron M Smith
999 3rd Avenue Suite 700
Seattle, WA 98104
Telephone: (425) 298-3557
Email: aaron@amsmithlaw.com

King County: Department of Local Services
represented by **Holly Sawin**
Department of Local Services
35030 SE Douglas Street Suite 210
Snoqualmie, WA 98065
Telephone: (206) 477-0291
Email: holly.sawin@kingcounty.gov

RECOMMENDATION/DECISION:

Department's Recommendation: Deny appeal

Examiner's Decision: Grant appeal in part; deny appeal in part

FINDINGS AND CONCLUSIONS:

Hearing Opened: November 17, 2020

Hearing Closed: November 17, 2020

After hearing the witnesses' testimony and observing their demeanor, studying the exhibits admitted into evidence, and considering the parties' arguments and the relevant law, the Examiner enters these Findings of Facts and Conclusions of Law:

Findings of Fact

1. David and Stacey Perry are record owners of property located in unincorporated King County at 17422 SE 196th Drive (Parcel 7702600790) ("Property").
2. On October 2, 2018, the Department of Permitting and Environmental Review (now the Department of Local Services, Permitting Division ("Department"))¹ issued a Notice & Order to the Perrys for the Property alleging: (1) clearing, grading, placement of fill (gravel and dirt) and hardscaping (retaining wall and pavers) within a wetland, wetland buffer, residential shoreline, and aquatic buffer in violation of enumerated provisions of the King County Code; and (2) construction and placement of a dock within a residential shoreline (Shady Lake), an aquatic buffer, a wetland, and wetland buffer in violation of enumerated provisions of the King County Code. Ex. D2.
3. The Perrys ("Appellants") filed a timely appeal of alleged violation (1). Exs. D1, D3. They contended that KCC 21A.24.180 required a site plan to be recorded with a Sensitive Areas Notice on Title ("SANT"); the SANT recorded on the Property's title in 2005 did not include a site plan; and, therefore, it was not clear that a wetland existed on the property outside of Shady Lake. The appeal does not address the allegation that Appellants placed fill and hardscaping in a residential shoreline and aquatic buffer. Nor does it address alleged violation (2).
4. The Department has the burden to prove the appealed allegations in the Notice & Order by a preponderance of the evidence. KCC 20.22.080.G; Hearing Examiner Rules of Procedure and Mediation XV.E and XV.F.

Background

5. Historically, a one-bedroom cabin existed on the Property. Testimony of Dennis O'Neil. It was in dilapidated shape during the time Mr. O'Neil owned the property (2000-2004). As a condition of selling the Property, he demolished the cabin. Testimony of Dennis O'Neil.
6. Thuat Luong Nguyen ("Nguyen") acquired the property in 2004 and applied for and obtained a building permit (B04L2410) for a new residence on the Property. As a condition of the building permit, he recorded a SANT ("2005 SANT") indicating that there was a Class 2 wetland on the Property and advising:

¹ The title of the Department has changed several times over the history of permitting and enforcement actions for the Property. For ease of reference, this Decision will refer to the Department of Local Services, Permitting Division and its predecessor agencies as the Department.

This property contains sensitive areas and/or sensitive areas buffers, as defined by the King County Sensitive Areas Ordinance, KCC 21A.24. ... Limitations may exist on actions in or affecting the sensitive areas or their buffers present on this property. For further information regarding such limitation, please contact the Land Use Services Division of King County or its successor agency.

The 2005 SANT did not include a site plan. Ex. D1; Ex. D5.

7. The building permit was vested to the Sensitive Areas Ordinance (“SAO”) prior to the 2005 effective date of the Critical Areas Code (“CAO”). Ex. D10-001.
8. The Department adopted a public rule to implement the notice provisions of the SAO, former KCC 21A.24.170 and 21A.24.180. The public rule required that a site plan identifying “sensitive areas setback areas” be attached to and included as part of the SANT “to the extent required by K.C.C. 21A.24.180.” Public Rule 21A-24-944; Ex. A7-002. The public rule applied to the 2005 SANT. Testimony of Laura Casey.
9. The version of KCC 21A.24.180.A in effect in 2004 required that sensitive areas tracks be used to delineate and protect wetlands and buffers in subdivisions, short subdivisions or binding site plans and be recorded on documents of title for all affected lots. This subsection does not apply to the 2005 SANT, as that application was for a building permit, not a subdivision, short subdivision or binding site plan. Subsection B is similarly not applicable, as it applies to required sensitive areas tracts. The building permit did not require a sensitive areas tract. Finally, Subsection C required that site plans submitted as part of development proposals for building permits, master plan developments and clearing and grading permits delineate wetlands, buffers and building setbacks. While this subsection arguably required Nguyen to delineate the wetland, buffer, and setback on a site plan, it did not require that the site plan be recorded. Ordinance 10780, Section 465.
10. Even though not required by the letter of KCC 21A.24.180 (Ordinance 10780, Section 465), it appears to have been the Department’s practice to require site plans be recorded with SANTS. Ex. A8; Ex. A16; Ex. A21.
11. Environmental Scientist Laura Casey testified that in 2005, based on advice from the Prosecuting Attorney’s Office, the Department stopped recording site plans with SANTS because regulatory buffers change as regulations are revised, leading to confusion by property owners. *See also*, Ex. D1-003. Ms. Casey’s testimony is credible and supported by the record, which includes only one SANT in 2005 which attached a site plan. That SANT is dated January 1, 2005. Ex. A21-004.
12. The Examiner takes notice of the fact that the CAO went into on January 1, 2005, and generally required substantially larger wetland buffers than the SAO. The CAO also required aquatic area buffers, which the SAO did not.
13. Mr. Perry does not recall whether he reviewed the SANT when he purchased the Property. He did not make inquiry of the Department regarding the sensitive areas

restrictions on the Property. Testimony of David Perry. We cannot know if he might have done so had the SANT included a site plan.

14. In 2007 Nguyen applied for and obtained a permit (B07Q0277) to add a deck to the residence. The Department considered the permit for the deck vested to the code in place at the time the original building permit application was received in 2004. Ex. D1; Ex. D10-001. The conditions of approval required that a 50-foot buffer be provided from the edge of the Class 2 wetland, but allowed lawn within the buffer to be maintained in its existing condition. It also required a four-foot-high permanent fence be installed and maintained in perpetuity and that three western red cedar trees be installed and maintained as buffer restoration for prior clearing of invasive species. Comments in the Department's Accela permit tracking system indicate that the fence was to be placed at the edge of the newly seeded lawn, i.e. somewhat within the required 50-foot buffer. Ex. D6-010; testimony of Laura Casey. Nguyen installed the fence and planted the required trees. Ex. D6.
15. The fence as installed was approximately 28.5 feet north (waterward) of the deck. Ex. D6-001; Ex. D9-003, May 17, 2019, aerial photograph; testimony of Laura Casey. It is located within the 50-foot wetland buffer. Ex. D6-010. Consequently, the southern boundary of the wetland is somewhat less than 78.5 feet north of the deck (50-foot buffer + 28.5 distance from deck to fence).
16. The Perrys purchased the Property in 2010. At that time, the fence had been removed, with some remnants stacked below the deck, and the Property was overgrown. Ex. A8-003, -006; testimony of David Perry.
17. The boundaries of the wetland have not been delineated. Testimony of Laura Casey.
18. Appellants submitted an application for a grading permit, GRDE19-0021.

Alleged Violation 1: Clearing, grading, placement of fill (gravel and dirt) and hardscaping (retaining wall and pavers) within a wetland, wetland buffer, residential shoreline, and aquatic buffer.

19. Appellants contend that the 2005 SANT was defective because it did not include a site plan showing the location of the wetland and wetland buffer. Ex. D3-002. However, as found above, the applicable version of KCC 21A.24.180 did not require that a site plan be recorded with the SANT.
20. They further contend that “had a site plan been attached to the SANT, it is clear that it would have diagrammed the maintained, landscaped areas which included ‘lawn down to the shore.’” Ex. A14-004. Appellants’ own exhibits demonstrate this contention is meritless. They include thirteen SANTs recorded in 2000-2004, none of which depicted landscaping or other improvements on the properties other than a residence (3 SANTs), a driveway (1 SANT), and a dock (1 SANT). Ex. A8; A16-004; A21-004. Underscoring this finding is the fact that Appellants contended that the buffer area shown on the site plan contained in Ex. A16-004 consisted of grass and that the property maintained a dock in Shady Lane. Neither grass nor a dock are depicted on the site plan.

21. Appellants also contend that the Class 2 wetland referred to in the 2005 SANT was Shady Lake itself. There is support in the record for their contention that in 2000-2004, the Department considered Shady Lake to be a Class 2 wetland. Ex. A8-007-014. The Examiner also takes notice of the fact that on King County iMap Shady Lake is depicted as a “wetland (1990 SA0).” Thus, it may have been the case that the 2005 SANT referred to Shady Lake. Nevertheless, as found above, in 2007, the Department determined that a wetland extended to within 78.5 feet of the proposed deck.
22. The fence required by B07Q0277 is evident in the May 17, 2009 aerial photograph. Ex. D9-001. As found above, the wetland has not been delineated. However, it is clear that some or all of the area waterward of the fence is comprised either wetland or wetland buffer.
23. The April 23, 2011, aerial photograph in Ex. D9-001 evidences extensive clearing from the deck to the Shady Lake. The 2015 aerial photograph in Ex. D9-003 shows construction of retaining walls within the required 50-foot wetland buffer. The May 19, 2017, aerial photograph in Ex. D9-002 depicts landscaping (primarily lawn) from the deck to the lake.
24. Shady Lake is a shoreline of the state with high function, requiring a 165-foot buffer. KCC 21A.24.358.B.1; testimony of Laura Casey. As found above, the house and deck were permitted under the SAO, which did not require an aquatic area buffer from Shady Lake. Ex. D10-001.
25. Clearing is permitted in a wetland, wetland buffer, aquatic area and/or aquatic area buffer only in limited circumstances not relevant here. KCC 21A.24.045.C; 21A.24.045.D.14, 18, 20. Grading is not permitted in a wetland or buffer. KCC 21A.24.045.C. It is permitted in an aquatic area or aquatic area buffer only in limited circumstances not relevant here. KCC 21A.24.045.D.14.
26. Maintenance of lawn and landscaping within wetlands, wetland buffers, and aquatic area buffers is “allowed within the existing landscaped areas or other previously disturbed areas.” KCC 21A.24.045.D.59.
27. The Appellants contend that a lawn approximately 30 feet in width has been maintained to the edge of Shady Lake and that they should be able to maintain the lawn as a nonconforming site improvement. Appellants’ closing argument.
28. A nonconforming site improvement may be continued; however, the nonconforming status is forfeited if the improvement is discontinued for more than 12 months. KCC 21A.32.025; 21A.32.045.
29. In enforcement case E0100133, the Department determined that the then-property owners, the O’Neils, had demonstrated that they had maintained lawn and landscaping to the lake until 1998. Ex. D1-002. Code Enforcement Officer Sutton observed a grass strip running to the shore that is approximately 30 feet wide in the center of the parcel in October 2003. Ex. A3-004. However, the evidence in the record for maintenance of a lawn ends in 2003.

30. The Department has shown by a preponderance of the evidence that the Perrys' predecessors-in-interest did not maintain the lawn to the lake's edge. The conditions for permit B07Q0227 for the deck indicate that "Landscaped areas (i.e. installed lawn) may be maintained in existing condition." Ex. D6-008. Ex. D6-002 depicts the condition existing at that time: the area north (waterward) of the fence was not maintained lawn. The contrast between the newly reseeded lawn landward (toward the house) of the fence and the area waterward of the fence is clear in the photographs contained in Ex. D6-004, -005.
31. The Department's exhibits demonstrate that the Department authorized maintenance of a lawn north (waterward) 28.5 feet from the deck in 2007 and again in 2015 and 2019. Ex. D6, Ex. D8-003, Ex. D10-002.
32. The Department did not contend or establish that the Perrys or their predecessors-in-interest abandoned the lawn between the required fence and the deck. The aerial photographs in Ex. D9 demonstrate that, at some time between May 17, 2009, and April 23, 2011, the fence and much of the lawn within 28.5 feet of the deck had been removed. However, the lawn was soon reestablished. Ex. D9-003 (2015 aerial photograph).
33. Appellants provided photographic evidence that at some time someone placed plastic sheeting along the shoreline to create a bed for a sand beach and laid down plywood along the lake edge and covered with sand and pea gravel. Ex. A13-006, -007, -008. It is not clear from the record when this beach was installed or who installed it. At the hearing in this matter, the Department concurred that Appellants had not.
34. The person responsible for code compliance is the person who caused the violation, if that can be determined, or the owner or other person entitled to control, use, or occupy the property where the violation occurred. KCC 23.02.020.K. Where a property owner affirmatively demonstrates that the action which resulted in the violation was taken without the owner's knowledge or consent, the owner is responsible only for bringing the property into compliance to the extent reasonably feasible under the circumstances. KCC 23.02.130.

Alleged Violation 2: Construction and placement of the dock within Shady Lake.

35. Appellants concede that they placed a dock within Shady Lake without the required permit(s). At several of the prehearing conferences in this matter and at the hearing, the discussion focused on whether a dock can be permitted.
36. Appellants also contend that the Property had a seasonal dock which was likely removed sometime around the demolition of the previous structure on the Property, which demolition, as found above, occurred in 2004. Ex. A8-004. Thus, even assuming there was an historic seasonal dock, it had been removed six years prior to the Perrys' purchase of the Property and does not satisfy the standards for reestablishment of a nonconforming use or site improvement. KCC 21A.32.045.C.1.
37. In 2006, Laura Casey visited the site and observed significant wetland and buffer vegetation, consisting of water lilies, cattails, spirea and other shrub and emergent plants,

- some of which was in the lake and some of which was landward from the ordinary high water mark. At the time, KCC 21A.24.045.D.9.c permitted a dock only if “there is not any significant vegetation where the alteration is proposed and the loss of vegetation was not the result of any violation of law.” Consequently, the Department denied the Nguyen application for a shoreline exemption. The Department explained that the property owner could build a trail across the wetland buffer to a viewing platform located outside the upland edge of the wetland. Ex. D8.
38. The current code authorizes a seasonal floating dock in certain categories of wetlands, wetland buffers, along the lake shoreline or its buffer “where the vegetation where the alteration is proposed does not consist of dominant native wetland herbaceous or woody vegetation six feet in width or greater and the lack of this vegetation is not the result of any violation of law.” KCC 21A.24.045.D.9.a. The Staff Report and Ms. Casey’s testimony indicate the native wetland vegetation Ms. Casey observed in 2006 had a width of at least 6 feet. Ex. D1-003; testimony of Laura Casey.
 39. Appellants questioned Ms. Casey’s ability to recall the vegetation on the property some 14 years later, but did not provide any evidence that the vegetation was less than 6 feet in width. The Examiner finds Ms. Casey’s testimony credible.
 40. At some point, some or all of this native vegetation was removed without permits.
 41. The Department has taken the position that the dock cannot be permitted. Ex. Ex. D1-004; D10-002; D11-002; testimony of Laura Casey.
 42. At the hearing in this matter, Ms. Casey concurred that the Code allows a trail to be constructed across the wetland as well as the wetland buffer, provided that the portion crossing the wetland is on a raised boardwalk or bridge. Testimony of Laura Casey; KCC 21A.24.045.D.47. In Ex. D10, Ms. Casey advises Officer Sawin that a path can be allowed to the lake edge.
 43. While that is not an issue to be resolved in this matter, the Examiner observes that it seems that the interplay of KCC 21A.24.045.D.9.a and 21A.24.045.D.47 on this Property might be resolved by restoring the native vegetation along the shoreline and allowing a trail on a raised boardwalk or bridge to access a floating dock waterward of the native vegetation.
 44. Any Finding of Fact is more properly considered a Conclusion of Law is hereby adopted as a Conclusion of Law.

CONCLUSIONS

1. Any Conclusion of Law which is more properly considered a Finding of Fact is hereby adopted as a Finding of Fact.

2. The Department has not borne its burden of proof by a preponderance of the evidence of clearing, grading or placement of fill within a wetland, wetland buffer and aquatic buffer within the area between the required fence and the deck (28.5 feet north of the deck).
3. Appellants' predecessors-in-interest failure to maintain the lawn to the lake forfeited the nonconforming status of site improvement (lawn) from the point 28.5 feet north of the deck to the lake.
4. The Department has borne its burden of proof by a preponderance of the evidence of clearing, grading or placement of fill and hardscaping within a wetland, wetland buffer, and aquatic buffer in violation of the code provisions enumerated in the Notice & Order within the area waterward of the required fence.
5. Appellants concede that they placed a dock in Shady Lake, a residential shoreline without permits. The Department has borne its burden of proof by a preponderance of the evidence the dock was placed in a wetland; it has not borne its burden of proof that it was placed in an aquatic buffer or wetland buffer.
6. Appellants contend that "We also should not have any expectation that a property purchaser is bound by all conditions on previously issued permits or the accompanying notes from agency officials." Ex. A14-008. They provide no authority for this, frankly astonishing, proposition. The Examiner assumes that, after diligent search, they have found none. *Hood Canal Sand & Gravel, LLC v. Goldmark*, 195 Wn. App. 284, 296-97, 381 P. 3d 95 (2016) (quoting *DeHeer v. Seattle Post-Intelligencer*, 60 Wn. 2d 122, 126, 372 P. 2d 193 (1962)). Nor would the Examiner expect them to find authority for their contention, as it would allow easy circumvention of permit conditions intended to protect the environment, life and safety by simply transferring the affected property.

DECISION

1. The appeal is **granted** as to the area 28.5' north of the deck. This area is maintained lawn/landscaping.
2. The appeal is **denied** as to clearing, grading, and placement of fill in the area waterward from a point 28.5 feet north of the deck.
3. The appeal is **denied** as to construction and placement of a dock within critical areas.
4. No penalties shall be assessed against the Appellants or the subject property if the following actions are completed:
 - A. Meet all deadlines for requested information associated with application GRDE19-0021 and pick up the permit within the required deadline. Obtain all final permit approvals within **one year** of permit issuance.
 - B. Remove the dock and associated construction materials from all critical areas or apply for a permit by **January 24, 2021**.

ORDERED November 25, 2020.

Alison Moss
Hearing Examiner pro tem

NOTICE OF RIGHT TO APPEAL

King County Code 20.22.040 directs the Examiner to make the County's final decision for this type of case. This decision shall be final and conclusive unless proceedings for review of the decision are timely and properly commenced in superior court. Appeals are governed by the Land Use Petition Act, Chapter 36.70C RCW.

MINUTES OF THE NOVEMBER 17, 2020, HEARING IN THE APPEAL OF DAVID AND STACEE PERRY, DEPARTMENT OF LOCAL SERVICES FILE NO. ENFR140884

Alison Moss was the Hearing Examiner in this matter. Participating in the hearing were Holly Sawin, Laura Casey, Aaron Smith, Dennis O'Neil, and David Perry. A verbatim recording of the hearing is available in the Hearing Examiner's Office.

The following exhibits were offered and entered into the record by the Department:

- | | |
|-----------------|---|
| Exhibit no. D1 | Department of Local Services staff report to the Hearing Examiner |
| Exhibit no. D2 | Notice and order, issued October 2, 2018 |
| Exhibit no. D3 | Appeal, received October 26, 2018 |
| Exhibit no. D4 | Codes cited in the notice and order |
| Exhibit no. D5 | Sensitive Areas Notice on Title (SANT) Recording No. 20050616001466 and Shoreline Conditions associated with single family residence permit B04L2410 |
| Exhibit no. D6 | Photographs of subject property with comments associated with deck permit |
| Exhibit no. D7 | Photographs of subject property taken by Officer Sawin, dated October 28, 2014 |
| Exhibit no. D8 | A. Denial of Shoreline Exemption Application (L06SX020), Laura Casey, dated July 5, 2006
B. PREA15-0006 Critical Areas and Shorelines Comments, Laura Casey, dated January 21, 2015 and PREA15-0006 comments |
| Exhibit no. D9 | Aerial photographs of subject property, dated 2007, 2009, 2011, 2015, 2017 |
| Exhibit no. D10 | Critical Area and Shorelines Comments, Laura Casey to Holly Sawin, dated February 19, 2019 |

- Exhibit no. D11 A. GRDE19-0021 Review letter requesting additional information,
February 21, 2020, Laura Casey to applicant and attorney
B. GRDE19-0021 Response to Attorney Smith's letter, June 25, 2020,
Laura Casey to applicant and attorney
- Exhibit no. D12 Statement of Qualifications – Laura Casey

The following exhibits were offered and entered into the record by the Appellants:

- Exhibit no. A1 Appellants Narrative
- Exhibit no. A2 E0100133 Enforcement Correspondence
- Exhibit no. A3 E0100133 Enforcement Notes
- Exhibit no. A4 E0100133 Letters from Neighbors
- Exhibit no. A5 B04L2410 Application Acknowledgement
- Exhibit no. A6 Sensitive Areas Notice on Title
- Exhibit no. A7 Public Rule 21A-24
- Exhibit no. A8 Letter from Aaron Smith To Laura Casey 6/15/2020
- Exhibit no. A9 B07Q0227 Application Acknowledgment and Diagram
- Exhibit no. A10 B07Q0227 Permit Conditions
- Exhibit no. A11 LO7GC060 Clearing Permit
- Exhibit no. A12 GOOGLE EARTH AERIAL PHOTOGRAPHS
- Exhibit no. A13 Historical Photographs
- Exhibit no. A14 Appellants Rebuttal
- Exhibit no. A15 Permitting Comments for B04L2410
- Exhibit no. A16 Sensitive Areas Notice on Title for 17408 SE 196th DR.
- Exhibit no. A17 Records Request Correspondence (G001601-071620)
- Exhibit no. A18 Death Record for Thuat Nguyen
- Exhibit no. A19 Permitting Comments for B07Q0227
- Exhibit no. A20 Aerial Photos with Measurements
- Exhibit no. A21 Correspondence with Laura Casey re GRDE 19-0021

AM/lo

November 25, 2020

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CERTIFICATE OF SERVICE

SUBJECT: Department of Local Services file no. **ENFR140884**

DAVID AND STACEE PERRY

Code Enforcement Appeal

I, Lauren Olson, 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/interested persons and parties with e-mail addresses on record.

placed with the United States Postal Service, with sufficient postage, as FIRST CLASS MAIL in an envelope addressed to the non-County employee parties/interested persons to addresses on record.

DATED November 25, 2020.



Lauren Olson
Legislative Secretary

Casey, Laura

Department of Local Services

Hill, Elizabeth

Ombudsman's Office

Lux, Sheryl

Department of Local Services

McAbee, John

Hardcopy

Molstad, Neil

O'Neil, Dennis

Perry, David/Stacee

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Sawin, Holly

Department of Local Services

Smith, Aaron

Law Office of Aaron M Smith

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