

September 28, 2023

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

King County Courthouse
516 Third Avenue Room 1200
Seattle, Washington 98104
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www.kingcounty.gov/independent/hearing-examiner

REPORT AND DECISION

SUBJECT: Department of Local Services file no. **CAEX190004**

HOANG CRITICAL AREAS ALTERATION EXCEPTION

Alteration Exception and SEPA Appeal

Location: [REDACTED] Renton

Appellants: **Clyde and Claudia Dickson**

[REDACTED]
Renton, WA 98059

Telephone: [REDACTED]

Email: [REDACTED]

Applicant: **Dan Smith**

[REDACTED]
Puyallup, WA 98372

Telephone: [REDACTED]

Email: [REDACTED]

King County: Department of Local Services
represented by **Gregory Goforth**
Department of Local Services
919 SW Grady Way Suite 300
Renton, WA 98057
Telephone: (206) 477-0251
Email: ggoforth@kingcounty.gov

Department's Recommendation: Deny appeal, with added right-of-way maintenance condition.

Examiner's Decision: Deny appeal, with added right-of-way maintenance condition.

FINDINGS AND CONCLUSIONS:

Overview

1. In May 2023, the Department of Local Services' Permitting Division (Permitting) granted Applicant Dan Smith's submittal for a critical areas alteration exception, as part of a single-family home permitting process. Ex. D1. In June, neighbors Clyde and Claudia Dickson (Appellants) timely challenged that approval. Ex. A1. We held a July prehearing conference. In its August staff report, Permitting recommended denying the appeal but with an added condition that the Applicant ensure the right-of-way is cleared prior to building permit approval.
2. We went to hearing on September 14. After entertaining the witnesses' testimony and observing their demeanor, studying the exhibits admitted into evidence, and considering the parties' arguments and the relevant law, we find that, with the added condition Permitting suggests, the Appellants have not met their burden of proof.

Analysis

3. The Applicant prepared, among other documents, a February 2022 floodplain study and a June 2022 drainage engineering plan for the project. Exs. D5, D4. Based on the Appellants' initial drainage-related comment during the review process, Permitting required the Applicant to perform a downstream analysis. That November 2022 analysis determined that, given the management practices and requirements the project will need to meet to obtain a building permit, the project would not aggravate existing issues or create additional drainage problems. Ex. D3 at 010.
4. In its May 2023 approval, Local Services analyzed those and other documents and concurred that, among other criteria, the project meets the drainage requirements. Ex. D1 at 003–04, ¶ 6. Appellants challenged this on drainage grounds. Ex. A1
5. This posture here was somewhat unfortunate. As clarified in their follow-up written submittal and in their hearing testimony, the thrust of Appellants' challenge is that the County should do a reassessment of drainage and wetlands and development strategies in the whole neighborhood and have a community meeting to discuss such approaches. Ex. A2. That is unfortunately not how Permitting's review of a specific application, or the examiner's review of Permitting's decision on a specific application, goes.
6. For certain proposed land uses such as recreational camps, public school facilities, or self-storage facilities, the code requires a would-be applicant to hold a community meeting. *See* KCC chapter 21.08. That is not a requirement for proposed single-family residence, and Permitting had no authority to require it here. Instead, for Type 2 permits such as an alteration exception, once Permitting receives an application, it mails out notice of the application to owners of property within 500 feet of the site (a minimum of 20 different property owners) and requires an applicant to post a sign.¹ Only Appellants

¹ KCC 20.20.060. Note, Appellants' June appeal statement raised only drainage, and not issues with how Permitting or the Applicant provided notice of the project, nor did Appellants amend their appeal statement by the August 24 deadline we listed in our prehearing order for such an amendment. "The scope of an appeal shall be limited to matters or issues raised in the initial appeal and any amendment to the appeal the examiner may authorize." KCC 20.22.080.

took the time to comment on this application. We return to the community meeting idea at the end, but it does not modify how we have to review today's appeal.

7. As to the standards applicable to Permitting's and our review (see exhibit D1, pages 5–9), Appellants do not point to any specific alleged code shortcoming. Reading through their appeal in a generous light, as we do for unrepresented parties, their challenge most comfortably fits into KCC 21A.24.070.A.3.d's requirement that the:

development proposal does not pose an unreasonable threat to the public health, safety or welfare on or off the development proposal site and is consistent with the general purposes of this chapter and the public interest.
8. With one exception, as explained below, Appellants have not proven, by a preponderance of the evidence, that the proposal violates that requirement or that the County erroneously issued the alteration exception. Exam. R. XV.E.1 & F.1.
9. Appellants' hearing submittals amounted to two pages of commentary. Exs. A1, A2. While they challenged the accuracy of the studies and maps in Permitting's decision, they did not produce any studies of their own, nor any potentially more accurate maps, nor even any pictures. That is not to minimize Appellants' concerns; as they wisely summed up, the drainage problem is bigger than this one applicant's proposal. But they have not met their burden of proof that *this* project fails to meet the applicable drainage standards or will, in the *long* run, cause an unreasonable threat to the public health, safety, or welfare off the development proposal site.
10. The *short* run is different. Permitting explained that while most of the site's mature vegetation will be removed during construction, there is a vigorous replanting plan, and as those plantings take hold and mature, the site will eventually meet the relevant drainage criteria, despite all the new impervious surface construction will add. Yet neither Permitting nor the Applicant had an answer to Appellants' assertion that new vegetation and saplings would not soak up enough water to replace the water-retention qualities of the mature trees the project will remove. We will not even know for several years whether enough of the newly-planted vegetation has survived, which is why Permitting requires a several-year bond.
11. The added short-term runoff the project will produce before the newly-planted vegetation matures might not matter so much if the roadside ditch were in the maintained state the Applicant showed it had been in 2018—low-cut grasses lining both sides. A simple drive-by of the site now backs up Appellants' and Permitting's testimony about how clogged the ditch is south (downstream) of the site—overgrown, choked off not only by grasses and bushes but even a few fast-growing trees. We found persuasive Permitting's testimony that with so much built-up biomass currently in the channel, the channel cannot accommodate flows, and routine maintenance (trimming the channel back to shorter grasses) would improve channel capacity. Thus, in the short run—before vegetation replanted on the project site matures to soak up excess site water, especially in face of so much additional impervious surfaces—the project causes an unreasonable threat to the public health, safety, or welfare off the development proposal site.

12. In its staff report, and again at hearing, Permitting's suggested remedy is requiring that the Applicant facilitate ditch maintenance of the first 300 feet south of the project, either by convincing the Roads Maintenance Division (Roads) to do it or by the Applicant obtaining a right-of-way permit and doing it themselves. The Applicant objects, as 156th Ave SE is a public right-of-way that Roads is supposed to maintain; the Applicant counters that the Applicant should not be required to do any right-of-way work.
13. It is true that neither Permitting nor the examiner can require an applicant to address problems not of their making. But RCW 82.02.020 does not restrict charges on proposed development that a county can demonstrate are reasonably necessary as a direct result of the proposed development. And the Supreme Court has confirmed that requiring developers to internalize the negative externalities of their development is a hallmark of responsible land use policy and remains constitutionally sound. *Koontz v. St. Johns River Water Management District*, 570 U.S. 595, 605 (2013). There is a nexus between (a) excess water running off the site after the site is cleared and impervious surfaces are laid but prior to replanted vegetation maturing on site and (b) requiring the right-of-way be cleared of vegetation currently choking the downstream flow path. See *Nollan v. California Coastal Comm'n*, 483 U.S. 825 (1987). And requiring the Applicant to bear the cost of a one-time right-of-way maintenance for the first 300 feet is roughly proportional to the project's impacts. *Dolan v. City of Tigard*, 512 U.S. 374 (1994).
14. That does not mean that the Applicant will not be able to convince Roads to undertake such maintenance before the building permit would otherwise be approved. We have no idea how Roads sequences/prioritizes maintenance projects. But just as Appellants erroneously assumed Permitting had authority or responsibility to require a community meeting to address neighborhood-wide drainage concerns, the Applicant erroneously assumes Permitting has authority or responsibility to lobby Roads to clear 156th Ave SE ditch. This is the *Applicant's* project, not Permitting's. If the Applicant can get Roads to clear the ditch before building permit approval, that is wonderful. The excess water the site development here will create in the short run will not care who cleared the ditch and gave it in unchoked path to flow. Maintenance just needs to be completed by *someone* before the building permit here is approved.
15. Finally, as to the public meeting, at hearing Permitting committed to sending Appellants a list of those within the County the neighbors could contact to see about a community meeting and a discussion of neighborhood-wide drainage issues. We expect Permitting to follow through on that commitment by October 31, 2023.

DECISION:

We deny the appeal, except that Condition 19 is added to Permitting's May 2023 critical areas alteration exception approval such that:

As a condition of building permit approval, required maintenance of the 156th Ave SE drainage ditch from the subject parcel to the drainage easement approximately 300 feet south of the parcel shall be performed either by the Applicant getting the King County Roads Maintenance Division (206-477-8100/maint.roads@kingcounty.gov) to do it or by the Applicant obtaining a Right-of-Way Use permit and conducting the maintenance themselves.

ORDERED September 28, 2023.



David Spohr
Hearing Examiner

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 SEPTEMBER 14, 2023, HEARING IN THE APPEAL OF HOANG CRITICAL AREAS ALTERATION EXCEPTION, DEPARTMENT OF LOCAL SERVICES FILE NO. CAEX190004

David Spohr was the Hearing Examiner in this matter. Participating in the hearing were Camille Beasley, Clyde and Claude Dickson, Gregory Goforth, Lorie Hammerli, Dan Smith. 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 | Critical Areas Alteration Exception (CAEX19-0004) Report and Decision, dated May 10, 2023 |
| Exhibit no. D2 | Notice of Decision, dated May 10, 2023 |
| Exhibit no. D3 | Level one Downstream Analysis Report by CES NW Inc., dated November 2022 |
| Exhibit no. D4 | Drainage Assessment, by C.E.S. NW, Inc., dated June 24, 2022 |
| Exhibit no. D5 | Minor Floodplain Study, by C.E.S. NW, Inc., dated February 1, 2022 |
| Exhibit no. D6 | Permitting's Staff report, dated August 30, 2023 |
| Exhibit no. D7 | iMap screenshot shared September 14, 2023 |
| Exhibit no. A1 | Dicksons' appeal, dated June 3, 2023 |
| Exhibit no. A2 | Dicksons' follow-up letter, dated September 5, 2023 |

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CERTIFICATE OF SERVICE

SUBJECT: Department of Local Services file no. **CAEX190004**

HOANG CRITICAL AREAS ALTERATION EXCEPTION

Alteration Exception and SEPA Appeal

I, Jessica Oscoy, 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, Quadiant-Impress, with sufficient postage, as FIRST CLASS MAIL in an envelope addressed to the non-County employee parties/interested persons to addresses on record.

DATED September 28, 2023.



Jessica Oscoy
Office Manager

Beasley, Camille

Department of Local Services

Breazeal, Jeri

Department of Local Services

Campbell, Thomas

Department of Local Services

Deming, Tom

Habitat Technologies

Hardcopy

Dickson, Clyde/Claudia

Hardcopy

Goforth, Gregory

Department of Local Services

Hammerli, Lorie

Department of Local Services

Klein, Pasha

Department of Local Services

Maple, Daniel

ABC Arborist

Hardcopy

Markakis, Dawn

CES-NW, Inc

Hardcopy

Peck, Bryan

Hardcopy

Smith, Dan PE

Hardcopy

Whalen, LaDonna

Department of Local Services