November 7, 2008

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REPORT AND DECISION

SUBJECT: Department of Development and Environmental Services File No. **E0300676**

RON & SUSAN BLAN
Code Enforcement Appeal

Location: 27524 Southeast 193rd Street

Appellant: Susan Blan
represented by **Lara B. Fowler**
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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:

Hearing opened:	July 3, 2008
Hearing closed:	July 3, 2008

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. This Report and Decision encompasses disposition of appeals by Susan Blan of two respective code enforcement Notices and Orders issued by the King County Department of Development and Environmental Services (DDES) to Ronald and Susan Blan for activities conducted on their subject property. The two appeals were consolidated for concurrent consideration.

2. On November 4, 2005, DDES issued a code enforcement Notice and Order to the Blans that found code violations on their RA-5 zoned property located at 27524 Southeast 193rd Street in the unincorporated Hobart area northeast of Maple Valley. The November 4, 2005 Notice and Order cited the Blans and the property with the following violation of County Code:

   A. Construction of an accessory structure (green-metallic 2-bay garage/shop) without required permits, inspections and approvals.

   The Notice and Order required compliance by January 4, 2006, either by application for the required permits, inspections and approvals with the filing of a complete application by such date, or by obtainment of a demolition permit and removal of the non-permitted construction and debris from the premises by such date. In the event that a permit was applied for but not approved, then demolition was required to be accomplished within 30 days of permit denial.

3. Ms. Blan filed an appeal of the November 4, 2005 Notice and Order. The appeal consideration was continued on-call with the concurrence of the parties, pending intended permit obtainment under permit file B06M0441. (The Blans' permit obtainment efforts remained ongoing until the appeal was heard in consolidated fashion with the companion (second) appeal described below.)

4. On March 20, 2008, DDES issued a Supplemental Notice and Order to the Blans for the same property, restating the previously found structural violation noted above, and finding an additional violation comprised of:

   B. Clearing and grading within wetland, wetland buffer and aquatic area buffers.

   The March 20, 2008 Supplemental Notice and Order required compliance by submitting necessary supplemental information for then-pending building permit B06M0441 by May 27, 2008 and obtainment of the required permit, inspections and approvals; or, alternatively, obtainment of a demolition permit and removal of the non-permitted construction and demolition debris by June 23, 2008. In addition, the Notice and Order required the submittal of a complete clearing/grading permit application by June 23, 2008 along with a wetland delineation and a restoration and monitoring plan. (Alternatively, the clearing/grading violations could be addressed through the above-noted building permit review, meeting the building permit time schedule.)

5. Ms. Blan also appealed the March 20, 2008 Supplemental Notice and Order, timely filing the required appeal documents.

6. The summarized consolidated appeal claims are as follows:

   A. The subject garage/storage structure was built (without permits) around 1999 (around the time period during which the Blans purchased the property; testimony indicates that the structure was built as part of the transaction). An Already Built Construction (ABC) building permit has been applied for by the Blans to bring the structure into compliance. However, the Blans express frustration with the permit process because of their perception that they have been subjected to "moving goalposts" imposed by DDES, particularly with respect to mitigation requirements, with new requirements added sequentially over time. In addition, the Blans state their understanding that DDES gave assurances that a variance from the required sensitive area building setback line (see later findings) would likely be obtainable.

   B. The Supplemental Notice and Order's finding that clearing and grading had been conducted within wetland, wetland buffer and aquatic area buffers is disputed. In so disputing the matter, the Blans rely principally on their assertion of a prior inspection by the County, during which inspection they assert that the County inspector declared that only a 50 foot wide buffer was required from the pond[1] and wetland areas onsite (the property has frontage on Mill Pond; see next finding). The Blans also note that in some areas the inspector stated that there "was no buffer" in the asserted 50 foot regulatory buffer, which quality the Blans contend is "similar to all of the other homes built next to the pond" (see later finding regarding misunderstanding on the part of the Appellant/Noticees of the distinction between *physical* vegetative growth/earthwork "buffer" and *regulatory* "buffer" requirements established in the sensitive area/critical area regulations of the zoning code[2]).

   C. The appeal also states disagreement with the requirement of what are felt to be onerous restoration measures, including an impact analysis, monitoring plan, bond and recordation of a critical areas notice on the property. The Blans also contest the Supplemental Notice and Order's time schedules, asserting that they are unreasonable and not able to be met.

   D. Lastly, the Statement of Appeal notes that there have been some personal disagreements which have aggravated the issues of conflict in this case.

7. The property possesses waterfront on its western edges, on a pond which in the distant past (until the 1940's) was used as a mill pond by a lumber mill. The pond is an aquatic area as defined by the code. Non-pond wetland areas also extend generally easterly from the pond well into the property. The wetland areas have been delineated by an independent wetlands consultant and the delineation accepted by DDES (see exhibit no. 9 for the graphic delineation). Although the Blans note the historic use of the pond as a mill pond, there has been no assertion made that the wetlands onsite, or the pond itself for that matter, are exempt from the regulatory definition of "wetland" and "aquatic area." The preponderance of the evidence in the record demonstrates that the onsite wetland and pond areas are code-defined and -regulated sensitive/critical areas (see below for the regulatory distinction between "sensitive areas" and "critical areas").

[1] Measured from the ordinary high water mark (OHWM).
[2] Chapter 21A.24 KCC. Also regulated by county grading regulations in the building code; Chapter 16.82 KCC.

Clearing and grading

8. Fresh earth fill was placed in defined wetland areas on the property in or around early 2005. Such fill was documented in its fresh state in photographs taken on February 25, 2005. (See, e.g., exhibit nos. 7A, photos 1, 5 and 7; and exhibit no. 9) The fill constitutes grading as defined by county code. Under Chapters 21A.24 and 16.82 (see, e.g., KCC 16.82.050 and .051.B), grading within sensitive/critical areas must be conducted under the auspices of a grading permit, regardless of the dimensional area and volume affected.

9. Later, additional earth disturbance occurred, and fresh fill placed, in wetland and related regulatory buffer areas on the property, with berming a part of that fill activity. (See, e.g., exhibit no. 7F, photos 1-4, and photo 6 depicting the berming; photography taken June 21, 2006)

10. Also, other later earth disturbance qualifying as clearing and grading was performed on the property, as evidenced by extensive freshly exposed and/or placed dirt. (See, e.g., exhibit no. 7F, photos 5, 7-11 and 13-15; photography taken June 21, 2006)

11. As part of their defense to the charge of clearing and grading without required permits, etc., the Appellant testified that flooding and erosion in the wetland area was caused by the running up of a runaway dock onto their pond shoreline, which flooding required them to dewater the low-lying area next to the pond. The dewatering affected a low-lying wetland area on the property and included grading activity and the construction of a low berm.

12. Regardless of the Appellant's assertions of prior and longtime presence of maintained lawn in the graded/disturbed areas, and the reasons for the earth disturbance, the substantial fill, berming, grading and/or surface scalping activities constitute regulated clearing and grading. Even if there is a consistent history of maintaining lawn in an area, that status does not preempt the critical area/sensitive area and buffer regulations and allow general clearing, earth grading and ground scalping within those areas without permit approval.

13. Also, regardless of the actual *physical presence* of landscape/vegetative buffer materials (*e.g.*, earth berming, plant life such as shrubbery, etc.) existing within a regulatory buffer area, the regulatorily required buffer width and area still pertain *as a regulatory measure*. The Appellant/Noticees seem to labor under the misunderstanding[3] that if there is no significant vegetation actually present within the regulatory buffer, then the regulatory buffer need not be observed and maintained, i.e., that the property is in effect exempt from the buffer requirement, that the regulatory measures applying a buffer width requirement are not applicable and have no regulatory effect. This is not the case. The sensitive area/critical area buffer regulations and land use and activity restrictions applied by Chapters 21A.24 and 16.82 KCC are fully applicable dimensionally and qualitatively regardless of the presence or absence of actual significant above-ground-level vegetation within the required regulatory buffer areas.

14. The above-noted (in findings 8-10) work of clearing and grading occurred within regulated wetland areas and/or wetland/aquatic buffer areas and was conducted fairly recently and long after the advent of the County's sensitive area and critical area regulations. The Supplemental Notice and Order's finding of violation by such actions is correct and is sustained.

[3] Perhaps the understandable confusion arises in part from DDES field staff's verbal comments noting the lack of *actual* (physical) buffer vegetation within at least parts of the regulatory buffer area onsite, and terming that absence a lack of "buffer" without being careful of the layperson's unfamiliarity with the semantic distinctions.

15. The 50 foot regulatory buffer width noted above in the appeal claim discussion is stipulated by DDES to have been expressed to the Blans in error. The actual regulatory buffer width required by the prior sensitive areas ordinance (SAO) in effect at the time that the subject clearing and grading was conducted[4] is 100 feet of width from the pond/wetlands/aquatic areas.[5] Because of that error, DDES is stipulating that only clearing and grading within 50 feet of the pond OHWM and wetland edges need be subject to a clearing and grading permit and any required mitigation/restoration. That stipulation, however, does not apply to the intrusion of the garage/storage structure into the regulatory buffer area (see below). The structural intrusion, though outside of the 50 foot width, is subject to the correct (SAO) buffer requirements and necessary compensatory mitigation.

Dirt bike/pedestrian path

16. A raised dirt bike/pedestrian path was formed and graded on the property at some time not evident from the record presented. The unrefuted testimony by Ms. Blan is that trails on the property date from the historic mill period, and her testimony that "we never put that in" offered no evidence of the temporal period (the time) of its installation. (The Appellant testified that it was built by "kids," but her testimony did not state a date of construction.)

17. DDES asserts that a 2005 aerial photo of the site demonstrates that the path construction and other clearing were then newly evident, when compared to an earlier (2002) aerial photo. (See exhibit nos. 7d and e.) But the comparative 2002 aerial (exhibit no. 7e) is of poor resolution and thus of little assistance in making a competent comparison. The comparative vegetation growth is difficult to discern with any firm clarity, the comparison is therefore largely inconclusive, and the newly visible path area is accordingly not persuasively demonstrated by the evidence to be new construction during the period asserted (during the Blan ownership). It could have just as likely been existing but obscured by vegetation in the earlier photos. In addition, it could also have become newly evident by increased usage, turning a vegetated, overgrown path into a usage-cleared bare dirt one. These are just speculations on the Examiner's part, but they demonstrate the point that in the final analysis it cannot be found persuasively by the preponderance of the record that the path was constructed during the Blans' ownership of the property. (And there is certainly no evidence that they were personally involved in its construction prior to their ownership.)

18. In the final analysis, it cannot be found from the evidence presented that the dirt bike track/ramp comprises work that was performed in violation of county code.

19. With respect to the construction of the dirt bike/pedestrian path, the Supplemental Notice and Order's finding of violation of clearing and grading regulations is not supported by a preponderance of the evidence and is therefore not sustained.

Garage/storage structure

20. The Appellant stipulates that a building permit is required for the garage/storage structure. The structure was constructed within the SAO-imposed 100 foot buffer width from the aquatic/ wetland areas. It intrudes into the SAO regulatory buffer area for an area of 960 square feet

[4] DDES is conceding, based on the understood dates of the pertinent work, that the SAO is the applicable regulation in this matter, in lieu of the currently applicable critical areas regulations (CAO) effective since January 2005.
[5] With the effectiveness of the CAO, the pertinent critical areas buffer was increased to 110 feet.

(measured to include, in addition to the actual required buffer area, the area which is required to be maintained between a structure and the buffer area, in this case 15 feet of width). If the CAO had been applied, the buffer area impacted would be 1,508 square feet.[6] Because of DDES's stipulation that it will permit the SAO standards to pertain to the subject structure, based on its date of construction, the area of improper structural impact at issue in this case is therefore the lesser area, 960 square feet. This intrusion is subject to mitigation in the review of the building permit.

Mitigation

21. The regulatory review for the garage/storage structure building permit, and for the grading site work within the 50 foot wide buffer area being recognized by DDES in this case, whether reviewed independently or in combination, requires two sensitive area impact mitigation/ restoration proposals for final review and approval: a) for the building intrusion into the sensitive area buffer width and additional 15 foot building setback from the sensitive area buffer line; and b) for the clearing and grading within 50 feet of the pond's OHWM and the wetland edges.

CONCLUSIONS:

1. The Appellant/Noticees have stipulated to the requirement of a building permit for the garage/storage structure. The pertinent finding of violation in the Supplemental Notice and Order, by the construction of the building without required permits, inspections and approvals, is accordingly sustained. The building permit shall be required to be obtained, or alternatively, the structure may be demolished and removed in compliance with applicable regulations. The compliance schedule shall be adjusted to reflect the time taken up by the appeal process.

2. The violations found in the Notice and Order with regard to clearing and grading performed without a permit are sustained, except with respect to the dirt bike/pedestrian path area as noted above. The work was conducted in violation of permit requirements and in violation of county code sensitive area/critical area buffer restrictions governing wetlands, aquatic areas and respective regulatory buffers.

3. Both violations are the responsibility of the Blans, as they occurred during their ownership of the property.

4. The appeal shall accordingly be denied, except that the violation found regarding clearing and grading work in the dirt bike/pedestrian path construction is not sustained and except that the compliance schedule shall be revised as noted below.

5. Any forthcoming specific county requirements of related buffer impact mitigation measures, restoration, consideration of buffer averaging, etc., including items such as monitoring, bond, recordation of critical area map, etc., are matters inherent in the building/grading permit review and related administrative decisions yet to be completed, and are therefore not ripe for adjudication in this code enforcement appeal proceeding as requested by the Appellant.[7] They

[6] The amounts of intrusion in the area of buffer and building setback have been calculated by DDES using the Appellant's accepted wetland delineation as a base. (See Exhibit 9)

[7] The Appellant requests as relief that the Examiner determine what mitigation is appropriate for the subject grading and construction activities.

may be subject to appeal or other claims for relief through whatever avenues of review are then available; the Examiner makes no findings and conclusions which would prejudice consideration of those issues in the future. (One caveat to such conclusion is that the Examiner will formally recognize in the compliance order below that the clearing/grading activity area requiring mitigation (other than any area directly associated with the garage/storage structure installation) is limited to the area within 50 feet of the pond OHWM and wetland edges.)

6. While the Examiner is appreciative of a concern about "moving goalposts" (and would find goalpost shifting arising from other than receipt of new information or correction of unfortunate error to be troubling), the issue is generally a matter under DDES's administrative authority and responsibility, not the Examiner's in the context of this appeal consideration. Relief must be sought through the executive chain of command and/or perhaps litigation.[8]

7. The Appellant also requests that the Examiner make a formal determination that related prior code enforcement case E03G0261 is closed. The Examiner's jurisdiction over code enforcement proceedings is limited to appellate review of Notices and Orders, Stop Work Orders and citations, and that case (E03G0261) has not been brought forward on appeal and thereby brought under Examiner jurisdiction. Administrative closure of cases is not a matter under Examiner jurisdiction. The Examiner will note, however, that matters brought before the Examiner on appeal could be the subject of motions claiming collateral estoppel, etc.

DECISION:

With the exception of the grading violation component regarding the dirt bike/pedestrian path noted above, which is reversed as unproven, the Notice and Order is sustained and the appeal denied, provided that the compliance schedule is revised as stated in the following order.

ORDER:

1. Submit all DDES-requested information necessary to continue processing building permit B06M0441 *by no later than* **January 15, 2009**. Thereafter, all pertinent timeframes and stated deadlines for additional information, response comments, supplementary submittals, etc., if any, shall be diligently observed by the Appellant/Noticees through to permit issuance and final inspection.

2. If the Appellant/Noticees decide to no longer pursue a building permit for the garage/storage structure, all pertinent non-permitted structural work shall be demolished and the demolition debris removed from the property *by no later than* **February 17, 2009**. (A demolition permit may be required; the Appellant shall consult with DDES regarding any such requirement.)

3. In the event that the requested building permit is pursued and is ultimately denied, the pertinent non-permitted structural work shall be demolished and the demolition debris removed *by no later than* **60 days after such denial**.

[8] The Examiner in any case has no authority to grant equitable relief based on improper or unfair administration of the permit process (such as by improperly "moving goalposts"), failing to follow through on an assertedly assured variance approval, unequal enforcement, etc. The Examiner is generally limited to applying the law as duly enacted by statute and ordinance, and as established by case law precedent, and has no authority to adjudicate common law issues such as claims in equity. Equity claims would instead have to be brought in a court of general jurisdiction, the Superior Court. [*Chaussee v. Snohomish County*, 38 Wn. App. 630; 689 P.2d 1084 (1984)]

4. A complete clearing/grading application for the subject clearing and grading work (only that performed within 50 feet of the pond OHWM and/or wetlands, except for any clearing/grading directly associated with the garage/storage structure installation) found in violation of county code shall be submitted *by no later than* **January 15, 2009**. The permit application shall be accompanied by a mitigation/restoration plan, and any required pertinent monitoring, bond, recordation aspects. (Alternative to such separate submittal, the clearing/grading work may be addressed as a part of the above-noted building permit review, with supplementation of the permit application with such materials by the same deadline, *no later than* **January 15, 2009**.)

5. DDES is authorized to grant deadline extensions for any of the above requirements if warranted, in DDES's sole judgment, by circumstances beyond the Appellant's/Noticees' diligent effort and control. DDES is also authorized to grant extensions of finalization of the required restoration/mitigation work due for seasonal reasons (potential for erosion, other environmental damage considerations, etc.).

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

ORDERED November 7, 2008.

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Peter T. Donahue
King County Hearing Examiner

NOTICE OF RIGHT TO APPEAL

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 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 JULY 3, 2008, PUBLIC HEARING ON DEPARTMENT OF DEVELOPMENT AND ENVIRONMENTAL SERVICES FILE NO. E0300676

Peter T. Donahue was the Hearing Examiner in this matter. Participating in the hearing were Holly Sawin representing the Department, Lara Fowler, the Appellant's representative, and Susan Blan, the Appellant.

The following Exhibits were offered and entered into the record:

Exhibit No. 1	DDES staff report to the Hearing Examiner for E0300676
Exhibit No. 2a	Copy of the Notice & Order issued November 4, 2005
Exhibit No. 2b	Copy of the Supplemental Notice and Order issued March 0, 2008
Exhibit No. 3a	Copy of the Notice and Statement of Appeal dated November 21, 2005
Exhibit No. 3b	Copy of Notice of Appeal of Supplemental Notice and Order received April 7, 2008
Exhibit No. 3c	Copy of Statement of Appeal received April 15, 2008
Exhibit No. 4	Copies of codes cited in the Notice & Order
Exhibit No. 5	Copy of the Stop Work Order posted August 8, 2003
Exhibit No. 6a	Copy of the Stop Work Order posted February 25, 2005
Exhibit No. 6b	Copy of Violation Letter dated March 1, 2005
Exhibit No. 6c	Copy of Stop Work Order posted June 22, 2006
Exhibit No. 7a	Photographs of subject property taken by Holly Sawin on February 25, 2005
Exhibit No. 7b	Photograph of detached garage on subject property, reprinted from King County Department of Assessment's RealProperty database.
Exhibit No. 7c	Aerial photograph of subject property taken in 2007
Exhibit No. 7d	Aerial photograph of subject property taken in 2005
Exhibit No. 7e	Aerial photograph of subject property taken in 2002
Exhibit No. 7f	Photographs of subject property taken by Greg Sutton and Scott Spooner on June 21, 2006
Exhibit No. 7g	Duplicate version of Exhibit 7c with annotations denoting areas where Exhibit 7f photos were taken
Exhibit No. 7h	Annotated, by Appellant, version of Exhibit 7c
Exhibit No. 8	Letter from Scott Spooner to Appellants detailing required mitigation to correct non-permitted clearing/grading in wetland, dated January 8, 2008
Exhibit No. 9	Wetland delineation of subject property, prepared by Sewall Wetland consulting, hand notes added by Scott Spooner
Exhibit No. 10	Site plan depicting wetland and wetland buffer as submitted for building permit application R9008456
Exhibit No. 11	Email from Holly Sawin to Appellants clarifying Appellant's questions, dated February 21, 2008
Exhibit No. 12	Declaration of Dick Peacock, signed July 2, 2008
Exhibit No. 13	Photographs of lumber mill located on subject property taken in 1915
Exhibit No. 14a	Declaration of Susan Blan, signed July 2, 2008
Exhibit No. 14b	Declaration of Ronald Blan, signed July 2, 2008
Exhibit No. 15	Declaration of Harold Barcelou, signed June 30, 2008
Exhibit No. 16a	Email from Holly Sawin to Steve Bottheim regarding status of violations, sent November 15, 2007
Exhibit No. 16b	String of emails between Scoot Spooner and Jim Lewis regarding outstanding issues on subject property, dated January 9, 10 and 11, 2008
Exhibit No. 17	Copies of DDES case log notes, printed June 3, 2008
Exhibit No. 18	Press Release regarding DDES Fee Amnesty Program, 2005
Exhibit No. 19	Application for Health Department Approval of Building Permit, approved January 10, 2006
Exhibit No. 20	DDES's Summary of Charges and Payments, dated June 16, 2008
Exhibit No. 21	DDES's Application Acknowledgment for permit application received March 7, 2006
Exhibit No. 22	Notes regarding Permit B06M0441, written May 4, 2006
Exhibit No. 23	Letter from Scott Spooner to Appellants detailing mitigation requirements, dated May 12, 2006

Exhibit No. 24	Emails to and from Holly Sawin and Scott Spooner, dated October 17, 2006
Exhibit No. 25	Email from Gary Downing to Scott Spooner regarding permit fees and review process, sent October 30, 2006
Exhibit No. 26	Email from Holly Sawin to Scott Spooner regarding wetland delineation, sent October 16, 2006
Exhibit No. 27	Emails between Scott Spooner and Holly Sawin regarding number of permits required, sent September 12 and 13, 2008
Exhibit No. 28	Email from Sewall Wetland to Appellants with draft delineation map attached, sent October 5, 2007
Exhibit No. 29	Printout of DDES case tracking system log notes through June 17, 2005
Exhibit No. 30	Photographs of subject property taken by Lara Fowler on June 29, 2008
Exhibit No. 31	Printout of DDES case tracking system log notes through February 6, 2008
Exhibit No. 32	Copy of King County Code Chapter 21A.24 Environmentally Sensitive Areas
Exhibit No. 33	Photographs of subject property taken 1984 and 1999
Exhibit No. 34a	Aerial photograph of subject property taken in 2000
Exhibit No. 34b	Aerial photograph of subject property taken in 1996

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