February 6, 2008

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REPORT AND DECISION

SUBJECT: Department of Development and Environmental Services File No. **E06G0465**

CARLOS CERNA
Code Enforcement Appeal

Location: 16915 Southeast Petrovitsky Road

Appellants: Carlos Cerna
represented by **Steve Hammond**
CAPR
718 Griffin Avenue #7
Enumclaw, Washington 98022
Telephone: (253) 332-2312

King County: Department of Development and Environmental Services (DDES)
represented by **Holly Sawin**
900 Oakesdale Avenue Southwest
Renton, Washington 98055-1219
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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:	December 20, 2007
Hearing closed:	December 20, 2007

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. On October 3, 2007, the King County Department of Development and Environmental Services (DDES) issued a Notice and Order to Appellant Carlos Cerna that found code violations on a 2.4-acre Rural Area-5 (RA-5)-zoned property located at 16915 Southeast Petrovitsky Road in the unincorporated Renton area. The Notice and Order cited Mr. Cerna and the property with two violations of county code:

   A. Operation of a landscaping business, with the residence used for commercial purposes (not occupied as a residence) in a zone not allowing such use.[1]

   B. Clearing in excess of clearing limits and creation of new impervious surface in excess of maximum impervious surface allowed.

   The found violations were required by the Notice and Order to be corrected by relocation of the landscaping business to a zone permitting such use by December 7, 2007, and by submittal of a complete clearing/grading permit application by said date, meeting all deadlines for information responses in the permit review, complying with permit conditions, and obtaining final approval.

2. Mr. Cerna filed a timely appeal of the Notice and Order, making the following claims:

   A. That a "global solution" is necessary so that compliance with one correction requirement of the Notice and Order "does not preclude" complying with the other correction requirement. By this, the Appellant means that the Appellant should be relieved from complying with the clearing/grading correction requirements if the landscaping business cannot be permitted onsite, as it would be a fruitless expense.

   B. DDES has not provided a definition of "allowed nursery" so that the Appellant can understand the compliance requirements for the landscaping business use to be located in the subject RA-5 zone.

   The Appellant does not contest the fundamental clearing/grading violations found by the Notice and Order.

3. The land use conducted onsite is a landscape contractor use, which falls in the zoning code use classification of a "construction and trade" business service. [KCC 21A.08.060.A] In the RA-5 zone, such use (the "construction and trade" use) is "limited to landscape and horticultural services (SIC 078) that are accessory to a use classified as retail nurseries, lawn and garden supply store (SIC 5261) and provided that construction equipment for the accessory use shall not be stored on the premises." [KCC 21A.08.060.B.34]

[1] In using the term "the residence" in this violation finding, DDES means a formerly residential structure, *i.e.* a structure originally built and occupied as a residence but which has since been converted to another use.

4. Recently enacted ordinance 15974 (effective November 30, 2007) revised the allowances of retail nurseries in the RA zones. In the RA zones, such as the subject RA-5 zone, a retail nursery is allowed as a permitted use subject to a limitation of 2,000 square feet of covered sales area and as a conditional use for covered sales areas between 2,001 square feet and 3,500 square feet. Retail nurseries are also subject to other conditions, including a minimum site area requirement of 4.5 acres.

5. The landscape contractor use conducted onsite is not accessory to a lawn and garden supply store, as no such use is established on the site. No retail nursery is established onsite, either. (The subject property at 2.4 acres in area does not meet the minimum lot size requirement of 4.5 acres for a retail nursery in the RA-5 zone. The landscape contractor use therefore could not qualify as accessory to a retail nursery on the site absent a variance to the minimum acreage requirement, since a retail nursery could not be established under the 4.5 acre minimum lot size.)

6. Because of the zoning code limitations on the establishment of construction and trade uses in the RA-5 zone, the subject landscaping business is not permitted either outright or conditionally on the subject property in the form it has been established. At present, it also cannot be established as an accessory use. It could only be operated as a home occupation, or as a home industry under a conditional use permit. The landscaping business cannot qualify at present for such categories as there is no domestic residency on the subject property (a residence would have to be permanently occupied onsite by the operator(s) of the home occupation/ industry business as his/her/their domestic residence), and the size and extent of the landscaping business onsite exceeds the regulatory limitations applying to home occupations and home industries with respect to numbers of employees, vehicles, size of outdoor operations, etc.

7. The preponderance of the evidence in the record demonstrates that the subject landscape contractor business has been established on the property, and that such use is not permitted in the RA-5 zone.

8. As the landscape contractor business does not conform to applicable zoning regulations, it cannot remain onsite and must relocate from the property or drastically revise/reduce the extent and nature of the business operations on the property to conform to the above-noted home occupation/home industry limits and qualifications. (But also see Conclusion 3 regarding the possibility of legislative remedy.)

9. As noted above, in his appeal the Appellant did not contest charge no. 2 of the Notice and Order regarding the exceeding of clearing/grading area and impervious surface area limitations. The Appellant wishes to perform the necessary restoration to resolve the clearing/grading issues, but as noted does not want the restoration to be a "wasted" expense. The Appellant does desire to be able to maintain the business in its present location. That retention is supported by a couple of nearby property owners/occupants (and a few clients/business associates); the record does not indicate any complaining adjacent or nearby property owners/occupants (the formal complaint was made by a county employee in the course of official business).

10. The land use context surrounding the property consists of a wide variety of land uses, some of which appear to be nonconforming if zoned similarly (RA-5) and/or seem relatively intense with respect to lot coverage, impervious surface and land use compared to typical RA-5 uses.

11. In summary, the preponderance of the evidence supports the findings of violating actions cited in the Notice and Order.

CONCLUSIONS:

1. The actions cited in the Notice and Order, which are found to have occurred as charged, were undertaken in violation of county code regulations.

2. With respect to the "global solution" sought by the Appellant to address the circumstances in which the landscape contractor business is mired, the Examiner has no authority to waive the correction requirement for the clearing and grading violation merely because the expense involved in such remedial action may not ultimately be in furtherance of maintaining the business onsite. It must be noted that the work was undertaken without benefit of required permits; permit review would likely have revealed the problematic nature of the business use being undertaken on the site. Such a waiver by the Examiner would not be proper or lawful.

3. As to the timing required for achieving compliance, the Examiner finds that given the absence of complaints by adjacent or nearby property owners/occupants; the very mixed land use context surrounding the property; and the understandably difficult nature of relocating a site-established business use, a relatively relaxed compliance schedule is in order and acceptable in these circumstances. That will allow either a) a reasonable and business-supportive timeline for securing another location and relocating the business; and/or b) action on the legislative front which the Appellant may wish to pursue (and seemed implied as a possibility), such as a comprehensive plan amendment and corollary zoning reclassification, or a revision to the zoning code to permit the landscape contractor use in the subject RA-5 zone on an outright or conditional basis without having to conform to the present limitations noted above.

4. It must be understood that the relatively relaxed schedule does not relieve the Appellant of the basic burden of relocating or gaining legislative acceptability of the current use (or perhaps legislative acceptability of some more-limited use with which the Appellant may be able to comply). Also, the Examiner takes no position on the merits of any requested/proposed legislative action; that would be inappropriate. This report and decision makes no endorsement pro or con, and only provides a reasonable amount of time for the pursuit of relocation and/or legislative remedy.

5. The clearing/grading permit compliance must proceed on a more immediate remedial basis, since such work is required regardless whether the business relocates or not.

DECISION:

The appeal is DENIED and the Notice and Order sustained, except that the compliance schedule shall be revised as stated in the following order.

ORDER:

1. The subject landscape contractor use shall be relocated to an appropriate zone where the use is permitted outright (or conditionally, under a duly approved conditional use permit) *by no later than* **October 30, 2009**. Alternatively, the use in some form may be retained onsite if it is able to comply with current county regulations or, further alternatively, regulations which may be adopted and become effective prior to such date (**October 30, 2009**) through legislative enactment of either revision to zoning code regulations and/or a zoning reclassification of the

subject property. If such legislative relief is under formal consideration with a reasonable prospect of enactment, DDES may within its sole discretion extend such deadline in anticipation of regulatory acceptability of the use on the subject property.

2. A clearing/grading permit shall be obtained and implemented for the subject clearing/grading work on the subject property, with a complete permit application to be submitted to the county *by no later than* **April 7, 2008**. (A pre-application meeting with DDES may be required. The Appellant should inquire as to whether that is the case.) Diligent response shall be made to all requests for further information from the county necessary for review and decision on the permit application. The work shall be completed and the permit fully complied with *by no later than* **October 31, 2008**, regardless of the normal duration of such a permit, so that the work is completed before the typical onset of the 2008-2009 wet season. DDES may in its sole discretion extend such deadline for compliance if circumstances beyond the Appellant's or successor land owner's control, such as a delay in permit issuance through no fault of the Appellant or successor, compel an extension of such deadline for a reasonable time period, particularly if advisable to avoid adverse environmental impacts during inclement weather.

3. No penalties shall be assessed by DDES against Mr. Cerna and/or the property if the above deadlines are complied with. If any one of the deadlines is not complied with, DDES may assess penalties against Mr. Cerna and/or the property retroactive to the date of this order as provided by county code.

ORDERED February 6, 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 twenty-one (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 DECEMBER 20, 2007, PUBLIC HEARING ON DEPARTMENT OF DEVELOPMENT AND ENVIRONMENTAL SERVICES FILE NO. E06G0465

Peter T. Donahue was the Hearing Examiner in this matter. Participating in the hearing were Holly Sawin and Lamar Reed representing the Department; Steve Hammond representing the Appellant, and Carlos Cerna.

The following Exhibits were offered and entered into the record:

Exhibit No. 1	DDES staff report to the Hearing Examiner for E06G0465
Exhibit No. 2	Copy of the Notice & Order issued October 3, 2007
Exhibit No. 3	Copy of the Notice and Statement of Appeal received October 19, 2007
Exhibit No. 4a	Copies of codes cited in the Notice & Order
Exhibit No. 4b	Ordinance 15974, adopted December 10, 2007
Exhibit No. 5a	Aerial photograph of subject property, taken 2005
Exhibit No. 5b	Photographs of subject property taken by Holly Sawin, dated October 31, 2006
Exhibit No. 5c	Aerial photograph of subject property downloaded from MSN maps, date not known, but taken post-clearing
Exhibit No. 6	Letter from Ramon Locsin, DDES, to Carlos Cerna regarding clarification of clearing and grading issues with pre-application attached, dated February 13, 2007
Exhibit No. 7	*Landscape and Horticulture Services*, Standard Industrial Classification Manual, Executive Office of the President, Office of Management and Budget, 1987.
Exhibit No. 8	Report and Decision on Appeal from Notice and Order for E9701343, Office of The Hearing Examiner, King County, dated November 24, 1998
Exhibit No. 9	Email from Ramon Locsin, DDES, to Carlos Cerna and Steve Hammond regarding granting of extension of time for clearing and grading permit application, dated May 3, 2007
Exhibit No. 10	Email from Holly Sawin, DDES, to Carlos Cerna and Steve Hammond regarding clearing violation, dated May 3, 2007
Exhibit No. 11	Photographs of area surrounding subject property
Exhibit No. 12	Details of King County impound lot, located in proximity to subject property
Exhibit No. 13	Proposed restoration “Plan A”, dated November 25, 2007
Exhibit No. 14	Letters in support of Carlos Cerna from neighbors and clients

PTD:vsm
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