January 15, 2008

OFFICE OF THE HEARING EXAMINER
KING COUNTY, WASHINGTON
400 Yesler Way, Room 404
Seattle, Washington 98104
Telephone (206) 296-4660
Facsimile (206) 296-1654
Email: hearex@metrokc.gov

REPORT AND DECISION

SUBJECT: Department of Development and Environmental Services File No. **E06G0499**

JEREMY AND THOMAS BIGFORD
Code Enforcement Appeal

Location: 24341 – 270th Avenue Southeast

Appellant: **Jeremy Bigford**
25027 – 21st Avenue South
Kent, Washington 98032
Telephone: (253) 332-6005

and

Thomas J. Bigford
P.O. Box 557
Black Diamond, Washington 98010

King County: Department of Development and Environmental Services (DDES)
represented by **Holly Sawin**
900 Oakesdale Avenue Southwest
Renton, Washington 98055-1219
Telephone: (206) 296-6772
Facsimile: (206) 296-6604

SUMMARY OF RECOMMENDATION/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: November 1, 2007
Hearing Closed: November 1, 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:

1. On August 10, 2007, the King County Department of Development and Environmental Services (DDES) issued a code enforcement Notice and Order to Appellants Jeremy and Thomas Bigford and the subject property, located at 24341—270th Avenue Southeast. The Notice and Order found three violations of county code:

   A. Storage of semi-trailers on an RA-5 zoned parcel without an established primary use.
   B. Grading in excess of 100 cubic yards, excavation of greater than five feet in vertical depth and grading within steep slope buffer without permits.
   C. Accumulation of inoperable vehicles and vehicle parts and parking/storage of vehicles on non-impervious (unimproved) surfaces.

   The Notice and Order required correction of the found violations by removal of the semi-trailers and inoperable vehicles by September 14, 2007, and submittal of a complete grading permit application within 30 days (September 9, 2007).

2. The Appellants filed an appeal of the Notice and Order, making the following assertions regarding the trailers: the accommodation of semi-trailers on the site has not been shown to be in violation of county code; KCC 21A.08.060 allows storage on the property if less than 3,500 square feet; and storage in trailers is legal during building construction (a barn is under construction on the subject property). If the trailer violation is upheld, the Appellants request additional time for their removal. No appeal claim is made regarding the grading permit and inoperable vehicles/vehicle parts issues.

3. The Appellants are in the process of obtaining a grading permit for the grading work subject to the Notice and Order. The permit is evidently ready to be issued by DDES, pending securing of the required bond.

4. The inoperable vehicles found by the Notice and Order to be stored on the exterior of the site have been removed. No evidence has been presented that vehicle parts are in exterior storage on the property.

5. DDES testified that its *ad hoc* policy regarding the allowance of temporary construction storage in vehicular trailers on property undergoing development construction is to allow one such trailer, but only for storage of materials to be used specifically in a permit-issued construction activity. Several trailers are placed onsite and are being used for storage of materials. DDES in its written report asserts via hearsay that Appellant Jeremy Bigford stated that the materials are intended for a residential construction not yet issued a building permit, but the direct evidence in the record only indicates that "building materials" are being stored in the onsite trailers, and not their intended purpose.

6. Placement of storage trailers is not a permitted primary use of property in the subject RA-5 zone. [Chapter 21A.08 KCC] DDES is correct in its finding in the Notice and Order that placement of semi-trailers as an asserted accessory use on the subject property without a lawful primary use violates the zoning code. A building under construction which has not been granted final inspection approval and/or a Certificate of Occupancy (as such Certificate may be required) is by code not permitted to accommodate a use. [KCC 16.02.460] A use to be accommodated or supported by a building therefore cannot be lawfully established until the building is approved for occupancy. DDES is accordingly correct in its implied interpretation of the code that a land use is not lawfully established on a property merely by virtue of underway construction of a structure *to be used* upon completion (*i.e.*, in the future).

7. In the final analysis, the semi-trailers onsite at present cannot be considered to be legitimately used as an accessory use component[1] of a primary agricultural use as claimed by the Appellants (or whatever land use for which the barn is intended under the building permit) merely because a barn is under construction on the property. Only when the barn is completed and approved for use could a use accessory to the barn's primary land use be lawfully undertaken.[2] (In addition, the Appellants' citation to KCC 21A.08.060.B.36.a as allowing the trailer storage is misplaced: that allowance is for storage "limited to agricultural products" [KCC 21A.08.060.B.36.e] and only "accessory to agricultural uses" [KCC 21A.08.060.B.36]. As already found above, no primary agricultural use is yet established on the property, so that accessory allowance is not applicable to the violation at hand, and the use of the trailers is currently for storage of building materials, not agricultural products.)

8. In the Notice and Order, DDES cited the RA-5 home occupation regulations, KCC 21A.30.085, as being violated by the placement of the trailers onsite, even though there is no suggestion evident in the record that a home occupation use has been asserted in an affirmative defense to the violation charge. Presumably, the citation was made to address the possibility of such an assertion, or to inform the Appellants that home occupation regulations apply in case they consider that approach to seeking allowance of the trailers. DDES noted that under the home occupation regulations, outside storage of home-occupation-related materials or equipment) is limited to one percent of the property area (with a minimum allowance of 440 square feet and up to a maximum of 5,000 square feet) and must be screened by vegetation (as well as set back 25 feet from any property lines).

[1] See KCC 21A.06.025.2 ("Storage of agricultural products or equipment used on site.")
[2] There is no indication in the record that any such use is already pre-established on the property (prior to the barn construction).

9. From a permanent land use standpoint, then, the semi-trailers onsite can only be lawfully permitted under the zoning code[3] to be placed on/remain on the property if engaged in a lawfully established use of the property. The alternative use of vehicle trailers for temporary storage of construction equipment and materials during a construction project is relatively commonplace, but evidently is not expressly regulated by county code and/or state law and apparently has fallen by default to an unwritten *ad hoc* "policy" under DDES's administrative discretion. DDES testified that its practice is to allow one such trailer for use directly related to permitted construction. The placement of three semi-trailers onsite obviously exceeds DDES's informal allowance, and any use not related to a currently permitted construction activity would also fall outside of DDES's allowance.

10. To the extent that the Appellant's arguments may fall in the category of claiming unfairness or unequal enforcement, or even enforcement of vague regulations or an *ad hoc* policy, those arguments lie in the area of equity issues under the common law, which are outside of the examiner's jurisdiction to adjudicate (see Conclusion 1 below).

11. As noted, no appeal was made of the grading permit violation found in the Notice and Order. The Appellants indicate that they intend to obtain the grading permit found necessary by the Notice and Order.

12. In summary, charge 1 of the Notice and Order is supported by a preponderance of the evidence and shall be sustained. Charge 2, the grading violation, has not been contested by the appeal, and therefore shall be sustained as uncontested, except that the compliance schedule which has been obviated by the time taken up by the instant appeal shall be revised accordingly. Charge 3 has been resolved by (a) removal of the inoperable vehicles and (b) the lack of *prima facie* evidence proving the accumulation of vehicle parts in exterior storage on the property.

CONCLUSIONS:

1. The Appellant's implied argument that the subject code enforcement action is unfair and selective constitutes a claim of *equitable estoppel*, essentially that the County should be barred from code enforcement in this case because similar violations are not being enforced equally. The Examiner is without jurisdiction to consider matters of equity in the law, such as the asserted *estoppel*. They must instead be taken to a court of general jurisdiction, the Superior Court. The Examiner is generally limited to applying "black letter" law as duly enacted by statute, ordinance and rule, and has no authority to adjudicate common law issues such as claims in equity. [*Chaussee v. Snohomish County*, 38 Wn.App. 630; 689 P.2d 1084 (1984)]

2. The Notice and Order is correct in its finding of the cited violations, with the exception of the vehicle parts charge. Additionally, the inoperable vehicle storage onsite has been resolved. The Notice and Order shall be sustained with respect to the semi-trailers placement and the grading permit violation, with revisions to the compliance elements and schedule as noted in the order below.

[3] Only the zoning code is cited as violated by the trailers; building code compliance such as for structural adequacy is not addressed by the Notice and Order and therefore does not factor in deciding the appeal.

DECISION:

The appeal is DENIED and the Notice and Order sustained, with the exception of the vehicle parts component of violation charge no. 3, and noting that the remainder of charge no. 3 has been resolved by removal, and also with the exception that the compliance requirements shall be revised as stated in the following order.

ORDER:

1. Any and all semi-trailers shall be removed from the subject property *by no later than* **March 17, 2008**. The only exceptions from such requirement of removal shall be if (a) a trailer(s) is expressly permitted in writing by DDES to remain onsite for use as a construction materials storage shelter/job shack; (b) a trailer(s) is utilized as a legitimate and qualifying accessory use component of an established primary use on the property, *e.g.*, use as a hauling trailer for agricultural goods associated with a primary agricultural use of the property (see KCC 21A.06.025.2 and 21A.08.060.B.36); and/or (c) a trailer(s) is permitted under the home occupation or home industry regulations of KCC 21A.30.085 and .090, respectively; **and** under any of those allowances is permitted under other regulations such as the building code and vehicle regulations.

2. The grading permit being sought by the Appellants shall be obtained and in hand *by no later than* **March 17, 2008**. DDES in its sole discretion may extend such deadline if it concludes in writing that circumstances beyond the Appellant's control have caused delay in the issuance of said grading permit.

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

ORDERED January 15, 2008.

_____

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 NOVEMBER 1, 2007, PUBLIC HEARING ON DEPARTMENT OF DEVELOPMENT AND ENVIRONMENTAL SERVICES FILE NO. E06G0499.

Peter T. Donahue was the Hearing Examiner in this matter. Participating in the hearing were Holly Sawin, representing the Department, and Jeremy Bigford, one of the Appellants.

The following Exhibits were offered and entered into the record:

Exhibit No. 1	DDES staff report to the Hearing Examiner for November 1, 2007
Exhibit No. 2	Copy of the Notice & Order issued August 10, 2007
Exhibit No. 3	Copies of codes cited in the Notice & Order
Exhibit No. 4	Copy of the Notice and Statement of Appeal received August 23, 2007
Exhibit No. 5	Letter from Ramon Locsin, DDES to Mr. Jeremy Bigford dated October 1, 2007
Exhibit No. 6	Photographs of the subject property
Exhibit No. 7	Approved replanting and restoration plan for grading permit L07CG166
Exhibit No. 8	Copy of 21A.08.060
Exhibit No. 9	Copy of 23.10.040

PTD :vsm
E06G0499 RPT