July 11, 2017

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

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# REPORT AND DECISION

SUBJECT: Department of Permitting and Environmental Review file no. **E08G0471**

**THOMAS G. AND THOMAS A. LAPHAM**
Code Enforcement Appeal

Location: 28333 NE 21st Street, Carnation

Appellants: **Thomas G. and Kelly Lapham**
28333 NE 21st Street
Carnation, WA 98014
Telephone: (206) 779-8962
Email: tom@kulchin.com

King County: Department of Permitting and Environmental Review
*represented by* **LaDonna Whalen**
35030 SE Douglas Street Suite 210
Snoqualmie, WA 98065
Telephone: (206) 477-5567
Email: ladonna.whalen@kingcounty.gov

SUMMARY OF RECOMMENDATIONS/DECISION:

| | |
|---|---|
| Department's Preliminary Recommendation: | Deny appeal |
| Department's Final Recommendation: | Deny appeal |
| Examiner's Decision: | Deny appeal, but retain jurisdiction |

EXAMINER PROCEEDINGS:

| | |
|---|---|
| Hearing Opened: | June 27, 2017 |
| Hearing Record Closed: | June 30, 2017 |

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 Hearing Examiner's Office.

FINDINGS AND CONCLUSIONS:

1. There are two components of every code enforcement appeal: (i) was there a violation, and (ii) what is the remedy. On one level, today's case is simple: (i) vegetation was cleared in excess of the amount that can be accomplished without a permit, and (ii) a clearing permit is required. However, what is not evident is (i) precisely how much clearing the Laphams are responsible for and thus (ii) the *scope* of the required clearing permit.

2. In April, DPER issued a notice and order, citing the Laphams with clearing vegetation exceeding a cumulative area of 7,000 square feet. Ex. 2. Exhibit 5, taken at the end of 2008, shows a fairly extensive, recently-cleared (meaning, after the Laphams purchased the property earlier in 2008) area in the northeast corner, identified as Area #1; Exhibit 7 at 001 shows an aerial view of this clearing, comparing the situation from 2005 to 2009.[1] Area #2, in the north central portion shows some clearing between 2007 and 2009.[2] Area #3 is in the northwest corner, near the residence; unlike the other two areas where the 2008 clearing is obvious, the clearing between 2007 and 2009 is not so obvious from the aerial view.[3]

3. We found the Laphams about as forthright as any appellants we can remember. We incorporate their testimony into our findings of fact. The Laphams purchased the property to create the small, non-profit farm they run for rescued farm animals and for schoolchildren and other youth groups to visit. As to Area #1, the previous owner kept horses there. Ex. 10 at 002. Mr. Lapham took out a fair amount of brush in this area (by tractor and by hand), an area he categorized as 75% blackberry and 25% other. Mr. Lapham described his efforts to grass some of this area, and later to work with King Conservation District (KCD) to make something out of this area. They obtained a farm management plan from KCD in 2015. Ex. 3 at 016–32. Area #2 contained a fenced-in structure the immediately-previous owners used for raising beef cows; Mr. Lapham removed blackberries from this area. Area #3 was an overgrown lawn area where he cleared some brush, especially to get to the pump house; some of this was blackberries, some not. In addition to removing understory, he took down several rotten trees. Ex. 10 at 007–09.

4. Unless specifically excepted, "any" clearing requires a permit. KCC 16.82.050.B. And the definition of clearing is quite broad: "the cutting, killing, grubbing or removing of vegetation or other organic material by physical, mechanical, chemical or any other similar means." KCC 16.82.020.D. The code does have some escape hatches, not

[1] While the 2008 clearing is obvious, because the 2015 aerial photo is winter (when trees are not leafed out) and contains a ton a shade, there is no obvious proof of any clearing in this area post-2009. Ex. 7, first three photos.
[2] Compare Exhibit 7 at 002 (bottom picture, 2007) with 003 (top picture, 2009). The 2015 aerial photo (Exhibit 7 at 003, bottom picture) is winter (when trees are not leafed out), contains a ton of shade, and also is from a different angle—more directly on top—making it difficult to compare 2015 to 2009.
[3] Exhibit 7 at 004 (2007 versus 2009). And again, the 2015 aerial is winter (when trees are not leafed out), contains a ton of shade, and is from a different angle—more directly on top—making it difficult to compare 2015 to 2009.

requiring a permit for clearing of less than 7,000 square feet (but the 7,000 square feet is "cumulative," not additional);[4] removal of noxious weeds, invasive vegetation (if less than 7000 square feet annually) or hazardous trees; and grazing livestock. KCC 16.82.050.B. & C.3. & C.7.

5. There is no question that far more than 7,000 square feet was cleared on this property, and thus that there was not much permit-exempt wiggle room for the Laphams to exercise when they purchased the property in 2008. While a good portion of the understory Mr. Lapham removed was blackberries (noxious and invasive), not all of it was. Some of the trees Mr. Lapham took down, which he described as "rotten," may have (depending on specific condition, location, and risk) counted as "hazardous," but likely not all of them. And some of the area may count as livestock grazing, but not all. A clearing permit is required.

6. Almost always, when we affirm a violation and the need to apply for permit, our jurisdiction terminates and the appellant/applicant and DPER are on their own. But this case is different. Unlike a thumbs up/thumbs down situation like, "Building X was built without the required permit, and so appellants need to obtain a building permit for X," or a clearing violation where the photographic record allows at least an approximate calculation of nonexempt clearing, the evidence does not allow us even a ballpark estimate about exactly how much non-exempt clearing the Laphams undertook. And the devil is often in the permit details—how much clearing is ascribed to the Laphams may dictate the intensity, complexity and expense of the review, and what (if any) remedy is required.

7. Our Rules allow us to "expressly retain jurisdiction for purposes within the scope of the original matter." Exam. R. XVI.C. This prerogative we exercise sparingly; we can recall only one previous instance, and that from 2014 and at *DPER*'s request, where we did so.[5] But we do so again today. Thus, if a dispute erupts *during* the clearing permit process about what the Laphams exactly are responsible for, the Laphams or DPER may petition us to weigh in.

DECISION:

1. The Laphams' appeal is DENIED. They shall follow the steps for bringing the property into compliance contained in DPER's April 11, 2017, notice and order (Exhibit 2), except that the due date for the pre-screening meeting request that starts the timeline shall be **August 11, 2017**.

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[4] The wording of the KCD sheet the Laphams discussed "clearing over 7,000 square feet" as the permit-triggering level, might be read as implying that so long as the particular applicant herself does not clear more than 7,000 square feet of vegetation, no clearing permit could be required. That is not actually the law, and despite the name "King" in the title, KCD is not a County agency.

[5] *Richardson—E0501037*, available at http://www.kingcounty.gov/~/media/independent/hearing-examiner/documents/case-digest/appeals/code-enforcement/2014/E0501037Supplement_Richardson.ashx?la=en. There was uncertainty there about which permit track and deadlines were appropriate, because the remedy depended on which direction the Richardsons decided to go with their business operations.

2. No penalties shall be assessed against the Laphams or the subject property if by those deadlines the Laphams have met DPER's requirements or have petitioned the Examiner to reassert jurisdiction.

ORDERED July 11, 2017.

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. Unless proceedings for review of the decision are timely and properly commenced in superior court (as governed by the Land Use Petition Act, Chapter 36.70C RCW), this decision shall be final and conclusive as to the existence of *a* clearing violation sufficient to trigger the necessity of applying for *a* clearing permit. However as explained above, the Examiner expressly retains jurisdiction to later weigh in on the precise extent of the clearing violation and thus the precise extent of any necessary remedial actions.

## MINUTES OF THE JUNE 27, 2017, HEARING IN THE APPEAL OF THOMAS G. AND THOMAS A. LAPHAM, DEPARTMENT OF PERMITTING AND ENVIRONMENTAL REVIEW FILE NO. E08G0471

David Spohr was the Hearing Examiner in this matter. Participating in the hearing were LaDonna Whalen, Thomas G. Lapham, Kelly Lapham, and Jeri Breazeal.

The following exhibits were offered and entered into the record:

| | |
|---|---|
| Exhibit no. 1 | Department of Permitting and Environmental Review staff report to the Hearing Examiner for file no. E08G0471 |
| Exhibit no. 2 | Notice and order, issued April 11, 2017 |
| Exhibit no. 3 | Notice and statement of appeal, received May 5, 2017 |
| Exhibit no. 4 | Codes cited in the notice and order |
| Exhibit no. 5 | Photographs of subject property, dated December 11, 2008 |
| Exhibit no. 6 | Photographs of subject property, dated April 11, 2017 |
| Exhibit no. 7 | Pictometery of affected areas, dated September 7, 2005, May 10, 2009, February 28, 2015, 2007, 2009, 2015 |
| Exhibit no. 8 | Aerial photographs of subject property, dated 2015, 2009, 2007 |
| Exhibit no. 9 | Sensitive area notice, dated June 13, 2996 |
| Exhibit no. 10 | Appellants' photographs of subject property |

DS/ed

July 11, 2017

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## CERTIFICATE OF SERVICE

SUBJECT: Department of Permitting and Environmental Review file no. **E08G0471**

**THOMAS G. AND THOMAS A. LAPHAM**
Code Enforcement Appeal

I, Elizabeth Dop, 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.

☒ caused to be 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 July 11, 2017.

Elizabeth Dop
Legislative Secretary

**Breazeal, Jeri**
Department of Permitting and Environmental Review

**Deraitus, Elizabeth**
Department of Permitting and Environmental Review

**Lapham, Thomas G.-Kelly**
Hardcopy

**Lux, Sheryl**
Department of Permitting and Environmental Review

**Whalen, LaDonna**
Department of Permitting and Environmental Review

**Williams, Toya**
Department of Permitting and Environmental Review