

February 6, 2003

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

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REPORT AND DECISION

SUBJECT: Department of Development and Environmental Services File No. **E0000995**

GARY L. GUSA
Code Enforcement Appeal

Location: 17409 East Lake Desire Drive Southeast

Appellant: **Gary L. Gusa**
3247 Kindred Avenue
Tokeland, WA 98590
Page: (206) 416-5496
Work Telephone: (425) 957-5775

King County: Department of Development and Environmental Services,
Site Development Services, *represented by*
Chris Tiffany
900 Oakesdale Avenue SW
Renton, WA 98055-1219
Telephone: (206) 296-7049
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SUMMARY OF DECISION/RECOMMENDATION:

Department's Preliminary Recommendation:
Department's Final Recommendation:
Examiner's Decision:

Deny appeal
Deny appeal
Appeal Granted

EXAMINER PROCEEDINGS:

Hearing Opened:
Hearing Closed:

February 4, 2003
February 4, 2003

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.

ISSUES/TOPICS ADDRESSED:

- Shoreline management
- Wetlands
- Sensitive areas
- Grading
- Bulkhead
- Landscape maintenance

SUMMARY:

Grants a code enforcement appeal concerning restoration of a normal protective bulkhead common to a single family residence and landscape maintenance.

FINDINGS, CONCLUSIONS & DECISION: Having reviewed the record in this matter, the Examiner now makes and enters the following:

FINDINGS:

1. On August 5, 2002, the Department of Development and Environmental Services (“DDES” or “Department”) served upon Gary L. Gusa (“Appellant”) a notice of King County code violation; civil penalty order; abatement order; notice of lien (“notice and order”). The Department received timely appeal on August 19, 2002.
2. The notice and order cites the Appellant for violations of the King County grading code (KCC 16.82.060), environmentally sensitive areas code (KCC 21A.24.320-.340) and the shoreline management code (KCC 25.32.010). It orders the Appellant to apply and obtain a valid grading permit and apply for and obtain either a shoreline management “substantial development permit” or a shoreline exemption.
3. The Appellant does not presently own the subject property but did at the time the work at issue was performed. The Department cites him as a “person responsible for code compliance” as defined by KCC 23.02.010.H. The “person responsible for code compliance” means either the person who caused the violation, if that can be determined, or the owner, lessor, tenant or other person entitled to control, user occupy or any combination of control, use or occupy, property where a civil code violation occurs. The Appellant does not dispute undertaking the actions that are at issue in this review.
4. This review concerns the placement of logs, backfill, turf and a rhododendron at the shoreline edge of Lake Desire. The subject property is located at 17409 East Lake Desire Drive Southeast, also identified as lot nos. 11 and 12 of the plat of Lake Desire Summer Homes (tax assessor parcel # 400840-0350). The hearing record indicates that it is now presently owned by Robert W. and Suzanne Gillet.
5. The Appellant argues the following:
 - A. That he believed the case was “closed” because it did not appear on the Department’s code enforcement web page.

- B. That the work performed comprised merely normal maintenance to a bulk head common to a single family residence.
 - C. That flooding due to beaver dam construction temporarily raised the lake level thereby “making the site appear as though the elements were placed in the lake.”
 - D. That photographs of the property taken prior to the El Nino storms of 1998 through 2000 show that he has merely replaced logs and turf at the shoreline.
 - E. That he was merely conducting normal and routine landscape maintenance of a lawn and bulk head which existed prior to the 1990 sensitive areas code enactment.
 - F. That, because he no longer owns the subject property, it would be difficult and inconvenient to make any corrections or changes which the Department might require.
7. From the code enforcement web page (<http://www.metrokc.gov/ddes/ce/>) there are two routes to obtaining information regarding the status of permits and code enforcement affecting a particular property: parcel viewer and permit search. By clicking permit search one encounters a disclaimer which reads:
- King County cannot warrant the accuracy, reliability or timeliness of any permit data in this system, and shall not be held liable for losses caused by using any of this information. Although permit tables are typically refreshed on a weekly basis, any person or entity who uses any information obtained from this system, does so with this understanding and acceptance.
- To research further one must click “I accept” at the conclusion of the disclaimer. However, if one pursues the alternative route by clicking parcel viewer on the code enforcement web page, no such disclaimer is encountered. The hearing record contains no indication of which route the Appellant followed to check the status of his property.
8. The photographic evidence of record supports a finding that the lawn historically has run to the water’s edge. The Department does not dispute this fact. The photographic evidence, coupled with the Appellant’s testimony, shows that logs historically have been placed laterally along the lawn edge at its interface with the lake. While the Department questions the evidence and testimony regarding this fact, it has produced no evidence to the contrary. From the Appellant’s photographs in evidence the laterally placed log(s) at the water’s edge appear to be either partially submerged or smaller than the replacement logs that are the subject of this review.
- The Appellant testifies that the “old bulkhead” (that is, the older, smaller logs placed laterally at the water’s edge) and lawn were already installed when he purchased the property in 1971. The hearing record contains no evidence contradicting this testimony.
9. The testimony of Mahoney and A. Gusa indicates that the previously existing (and probably smaller diameter) logs at the shoreline edge ran beneath the dock and included the area within which the Appellant deposited a couple of wheelbarrows of fill dirt and a rhododendron.

10. The complainant (apparently) and the Department contend that the Appellant's new bulkhead and backfill extend waterward further than the old bulkhead, thereby creating a landfill (albeit very small) within the lake's boundaries (beyond ordinary highwater). The Appellant testifies that flooding, due to beaver activity at the exit creek for Lake Desire, occurred after the bulkhead replacement project, raising the lake level "almost two feet higher," thereby creating the illusion of waterward encroachment by the recently placed logs and backfill. The hearing record contains no contradiction to this testimony.

Comparing older photos with more recent photos of the subject shoreline do not demonstrate any waterward encroachment. Compare exhibit nos. 15-4, 15-6 and 15-7 with exhibit nos. 2 and 3. The location of the old log bulkhead is shown in exhibit no. 15-4, most particularly the lower photograph. In that photograph, the old log runs along the lawn edge to meet a corner of the dock.¹ The Department's exhibit no. 3, page 3, photo 1, shows the new log meeting that dock at the same corner, thus verifying the Appellant's testimony regarding bulkhead location and confirming that the Appellant's project did not extend further waterward.

11. The hearing record contains no information regarding the ordinary high water mark, other than photographs.
12. The Department offered no evidence or testimony contesting the Appellant's assertions regarding erratic lake levels, the flooding effect of beaver activity or the El Nino storm damage of 1998-2000.
13. There is no dispute as to whether Lake Desire and its shoreline constitute an environmentally sensitive area regulated pursuant to KCC 21A.24. Nor does any dispute exist regarding whether development within 200 feet of the Lake Desire shoreline is subject to the substantial development permit requirements of the State Shoreline Management Act and KCC Title 25.
14. The record contains no evidence that filling occurred to an extent any greater than the "three or four wheelbarrow loads" to which the Appellant concedes.
15. Kelly O'Neil, a realtor representing prospective purchasers of the subject property, requested an opportunity to speak. The Department objected. Examiner's rules provide for intervention by a third party, but only before the introduction of evidence. Mr. O'Neil's request followed the introduction of nearly all evidence in this record. In the pre-hearing witness lists exchanged by the parties, neither party submitted Mr. O'Neil's name. The examiner sustained the Department's objection and denied Mr. O'Neil opportunity to speak.

CONCLUSIONS:

1. No grading permit is required. The preponderance of evidence in this review supports the conclusion that Appellant Gusa performed nothing more than normal and routine maintenance of an existing lawn and landscaping. As such, he is excepted from any grading permit requirement pursuant to KCC 16.82.050.Q.1.

¹ None of the photos of record depict the area beneath the dock under either new or old circumstances. The preponderance of evidence regarding that area is comprised of the testimony of A. Gusa and Mahoney as stated in finding no. 9.

2. No shoreline management substantial development permit is required. The hearing record contains no evidence that the work activity undertaken by the Appellant actually encroached upon or interfered with the waters of Lake Desire. Moreover, it certainly did not cross the \$5,000 threshold which triggers a substantial development permit requirement. Moreover, the work at issue clearly qualifies as a normal protective bulkhead common to a single family residence.
3. The Appellant failed to obtain a letter of shoreline management exemption. Thus, the notice and order correctly required the Appellant to obtain *either* a shoreline substantial development permit *or* a shoreline exemption. The order set forth below establishes that exemption and shall be accepted by all parties in lieu of such a letter.

DECISION:

1. Regarding regulated environmentally sensitive areas issues, the appeal is GRANTED.
2. Regarding shoreline management issues, the appeal is GRANTED and the following order entered.

ORDER:

This order shall be interpreted by all persons as a letter of shoreline management permit exemption.

The minor landfill of 3 or 4 wheelbarrow loads, replacement of shoreline bulkhead logs and replanting of lawn and ornamental shrubbery as described in this hearing record are exempt from shoreline management regulation pursuant to both WAC 173-27-040 (2) (b) and (c).²

ORDERED this 6th day of February, 2003.

T. T. Titus, Deputy
King County Hearing Examiner

TRANSMITTED this 6th day of February, 2003, via certified mail to the party listed below:

Gary L. Gusa
3247 Kindred Ave.
Tokeland WA 98590

² WAC 173-27-040 (2) (b) exempts “normal maintenance or repair of existing structures or developments, including damage by accident, fire or elements.” WAC 173-27-040 (2) (c) exempts construction of the normal protective bulkhead common to a single family residence.

TRANSMITTED this 6th day of February, 2003, to the parties and interested persons of record:

Robert W. & Suzanne Gillet
17409 E. Lake Desire Dr. SE
Renton WA 98058

Anthony Gusa
17527 - 149th Ave. SE, B8
Renton WA 98058

Byron A. Gusa
33602 SE 348th Street
Enumclaw WA 98022

Gary L. Gusa
3247 Kindred Ave.
Tokeland WA 98590

Shane Mahoney
37031 - 208th Ave. SE
Auburn WA 98092

Kelly O'Neil
Associates Realty, Inc.
5919 - 119th Ave. SE
Bellevue WA 98006

Elizabeth Deraitus
DDES/BSD
Code Enforcement Supervisor
MS OAK-DE-0100

Patricia Malone
DDES
Code Enforcement Section
MS OAK-DE-0100

Randy Sandin
DDES/LUSD
Site Development Services
MS OAK-DE-0100

Heather Staines
DDES/BSD
Code Enforcement-Finance
MS OAK-DE-0100

Chris Tiffany
DDES/BSD
Code Enforcement Section
MS OAK-DE-0100

NOTICE OF RIGHT TO APPEAL

The action of the hearing examiner on this matter shall be final and conclusive unless a proceeding for review pursuant to the Land Use Petition Act is commenced by filing a land use petition in the Superior Court for King County and serving all necessary parties within twenty-one (21) days of the issuance of this 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 FEBRUARY 4, 2003 PUBLIC HEARING ON DEPARTMENT OF DEVELOPMENT AND ENVIRONMENTAL SERVICES FILE NO. E0000995.

T. T. Titus was the Hearing Examiner in this matter. Participating in the hearing was Chris Tiffany, representing the Department; Gary L. Gusa, the Applicant; Anthony Gusa, Byron A. Gusa, Shane Mahoney, and Kelly O'Neil.

The following exhibits were offered and entered into the record:

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|----------------|---|
| Exhibit No. 1 | King County DDES Staff Report to the Hearing Examiner |
| Exhibit No. 2 | Photographs provided by Jean Thom, the Complainant in 1999 |
| Exhibit No. 3 | July 17, 2000 Photographs by Chris Tiffany |
| Exhibit No. 4 | July 17, 2000 Site Map drawn by Chris Tiffany |
| Exhibit No. 5 | August 15, 2000 Letter to Mr. Gusa from Chris Tiffany |
| Exhibit No. 6 | September 19, 2000 Letter to Chris Tiffany from Gary Gusa |
| Exhibit No. 7 | April 26, 2002 e-mail from a prospective buyer of the subject property |
| Exhibit No. 8 | June 12, 2002 e-mail routing a draft Notice and Order to Code Enforcement |
| Exhibit No. 9 | August 5, 2002 Notice and Order to Gary Gusa |
| Exhibit No. 10 | August 19, 2002 Appeal of the Notice and Order |
| Exhibit No. 11 | September 23, 2002 Notice of Pre-Hearing Conference |
| Exhibit No. 12 | October 16, 2002 Pre-Hearing Order |
| Exhibit No. 13 | King County Ordinance 3689 designating Shoreline Environments |

- Exhibit No. 14 King County Application for Shoreline Exemption
- Exhibit No. 15-1 Statutory Warranty Deed
 - 15-2 Memo to Bill Levinson from Greg Diener, P.E. dated August 26, 1999
 - 15-3 Letter to Gary Gusa from Mike Dykeman dated May 10, 1996
 - 15-4 Photos taken in July, 1997 and September, 1998
 - 15-5 Letter to Chris Tiffany from Gary Gusa dated September 13, 2000
 - 15-6 1978 Photograph
 - 15-7 1991 Photograph
 - 15-8 Mr. Gusa's Issues
 - 15-9 Mr. Gusa's Witness List
- Exhibit No. 16 Letter from David Fordham To Whom It May Concern dated January 27, 2003

TTT:gao
E0000995 RPT