July 1, 2011

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REPORT AND DECISION

SUBJECT: Department of Development and Environmental Services File No. **E06G0458**

DAVID CARMINE
Code Enforcement Appeal

Location: 17254 SE Petrovitsky Road

Appellant: David Carmine
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SUMMARY OF RECOMMENDATIONS/DECISION:

Department's Preliminary Recommendation:	Deny appeal
Department's Final Recommendation:	Deny appeal
Examiner's Decision:	Deny in part, grant in part

EXAMINER PROCEEDINGS:

Hearing opened: November 2, 2010
Hearing closed: December 2, 2010

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:

A. **Procedural Background**

1. On August 7, 2008, the King County Department of Development and Environmental Services code enforcement section issued a Notice and Order to David W. Carmine at 17254 Southeast Petrovitsky Road, Renton 98058 citing the property for unlawful clearing and grading within aquatic area buffers consisting of Shady Lake and an on-site stream and within a regulated wetland and/or its buffers The grading file number for this case reflects the fact that Mr. Carmine began the process for applying for a grading permit but never completed it. The property is a partially-wooded, narrow triangular residential lot that extends into Shady Lake along its southeast shoreline, with perhaps half an acre lying upland of the lake's ordinary high watermark.

2. Mr. Carmine filed a timely appeal of the Notice and Order. His very short appeal statement cited an alleged emergency need to deal with runoff flows flooding in from an adjoining property. After engaging counsel, Mr. Carmine was allowed to file an amended appeal statement challenging whether either the wetland or the aquatic areas cited by DDES are features regulated under the county's Critical Areas Ordinance (CAO). A pre-hearing order issued May 20, 2010 further focused on the questions of whether Shady Lake and the unspecified on-site stream are regulated aquatic areas and whether a regulated wetland exists on the property. As provided by the Hearing Examiner's Procedural Rules, in an enforcement proceeding the county agency must present a *prima facie* case that the minimum legal standard for posing a burden or penalty on the property has been met.

3. Prior to the scheduled code enforcement hearing, King County DDES brought a motion for partial summary judgment seeking a determination that Shady Lake's designation as a shoreline regulated under the Shoreline Management Act is dispositive as a matter of law of the question whether the lake is an aquatic area regulated under the CAO. The DDES motion was based on the definition contained at KCC 21A.06.072 C, which specifies that an aquatic area is "any non-wetland water feature including all shorelines of the state, rivers, streams, marine waters, inland bodies of open water including lakes and ponds, reservoirs and conveyance systems and impoundments of these features if any portion of the feature is formed from a stream or wetland and if any stream or wetland contributing flows is not created solely as a consequence of stormwater pond construction. "Aquatic area" does not include water features that are entirely artificially collected or conveyed storm or wastewater systems or entirely artificial channels, ponds, pools or other similar constructed water features."

   It is undisputed that if Shady Lake qualifies as an aquatic area under the CAO it is subject to a 115-foot protective buffer.

4. Vast amounts of hearing time were expended parsing KCC 21A.06.072 C and trying to make sense out of its various interrelated parts. Hearing Examiner Peter Donahue's September 7, 2010 order denying DDES's motion for partial summary judgment ruled that the term "all shorelines of the state" specified in the first sentence of the definition was not dispositive, *per se*, of the aquatic area designation issue. His analysis implicitly assumed that a shoreline of the state would only qualify as an aquatic area under the code if it also did not meet any of the exceptions listed in the definition. His order further concluded that Shady Lake's ability to meet the exception relating to "entirely artificially collected or conveyed storm or wastewater systems" was unclear and would require further review.

5. The evidential hearing on the Carmine code enforcement appeal was opened by Mr. Donahue on November 2, 2010 and concluded on December 2, 2010. At the closing of the DDES initial presentation Mr. Carmine moved for dismissal of the aquatic areas citations in the Notice and Order on the grounds that DDES had failed to make the *prima facie* showing necessary to support the Notice and Order. Mr. Donahue granted the dismissal motion with respect to the on-site stream channel but denied it with respect to Shady Lake.

6. On April 11, 2011 Examiner Donahue recused himself from further participation in the Carmine code enforcement appeal, which was reassigned to Hearing Examiner *pro tem* Stafford Smith. The review by the Examiner *pro tem* was based on the evidence previously submitted to the record, with a post-hearing conference held to allow the Examiner to ask clarifying questions. The parties also stipulated that the record should be amended to admit an additional exhibit specifying that the culvert under Petrovitsky Road immediately upstream of the Carmine property was constructed by the county in 1965.

B. **The Carmine Property and the Shady Lake Watershed**

7. Shady Lake is a 21-acre kettle lake that reaches a maximum depth of approximately 50 feet. Its watershed has been estimated to encompass about 317 acres. Kettle lakes are glacially-created intrusions into an aquifer and as such are primarily fed by groundwater. Due to its sub-surface source, a kettle lake is often an ogilotrophic feature characterized by clear water and little vegetation.

8. As a groundwater-fed kettle lake, Shady Lake in its natural state appears to have had a relatively stable water budget. There is no evidence that prior to the arrival of settlers in the 19th century Shady Lake either had a natural inlet or outlet of any consequence. At current count it now has 14 small inlets, all of which are culverted beneath the road system that loops around the lake. The largest of these appears to be an outlet channel from a drainage facility located northwest of the lake that serves the Villages at Shady Lake residential development. Portions of this channel may qualify as protected critical areas under the King County CAO.

9. The only outlet identified for Shady Lake lies near its southwest corner in a relatively flat area. This channel crosses through a state-owned public access tract, is culverted under Southeast 196 Drive, intersects the ditch system for Southeast Petrovitsky Road and then is released south of the road. The consensus seems to be that historically this outlet system eventually made its way to Swan Lake to the southwest, but back in the Twenties when Swan Lake was converted to the Lake Youngs Reservoir, this flow was redirected southeast so it now eventually discharges to Peterson Lake. This outlet is identified on late 19th century maps as Honey Creek, but there is some question whether significant flows exited this channel prior to logging of the area. All inlet and outlet systems from Shady Lake, whether they qualify in whole or in part as regulated critical areas under county code, have been channeled and constructed to a significant degree.

10. Since 1990 King County has undertaken to regulate surface water flows in this part of the world under its various Surface Water Design Manuals. This process includes requiring both public and private developers to model and regulate runoff flow releases and storage, as well as some direct county ownership of drainage facilities. Facilities under direct county ownership and maintenance in the Shady Lake neighborhood include the ditches and culverts within the county road rights-of-way, and within the watershed generation of surface water flows from King County-owned properties appears to be limited mainly to runoff from county roads. King County drainage activities in the watershed also include responding to private property-owner complaints regarding flooding, some installation of remedial drainage facilities and the occasional modeling of the stormwater storage capacity of Shady Lake and the conveyance capacity of its various inlets and outlets. The King County stormwater management system is also integrated into a larger federal and state system regulated under the authority of the federal Clean Water Act.

11. Southeast Petrovitsky Road, which borders the Carmine property on its west, features a constructed roadside ditch and culvert system owned and maintained by King County. A cross-culvert constructed in 1965 located approximately 110 feet north of the Carmine parcel transports stormwater runoff to the eastern side of the roadway, from which point it flows south to the Carmine property and east to Shady Lake. According to recollections of former residents, these flows, which now travel along or near the northern property line of the Carmine parcel, did not exist prior to the installation of the cross-culvert under Southeast Petrovitsky Road. Further, the consensus seems to be that flows through the Carmine property originating in the Petrovitsky Road ditch system were relatively inconsequential until the mid-1990s, when development activity within the watershed substantially increased. The Giberson drainage study performed in 1999 by the King County Land and Water Resources Division observed that "beginning in 1991, the duration and maximum water levels in Shady Lake have increased" and that "following recent upstream development, lake levels have risen faster and remained higher". The study notes that since 1995 "approximately 20 percent of the basin has been developed with Kent Junior High School No. 7, Cambridge at the Parks residential plat, a cleared site for a future Elementary school and a large shared stormwater detention/water quality treatment ponds facility". An appendix attached to the Giberson study inventoried drainage complaints in the Shady Lake basin and provided dates for eight of these complaints, all occurring in 1991 or later and most in the 1995-96 timeframe.

12. David Carmine testified that he began occupying the property subject to this appeal in 1996 under a rental agreement and purchased it in 2005. In 1996 a small swale along the northern property line connected to Shady Lake. Prior to his purchase in 2005, Mr. Carmine's activities on the property consisted mainly of clearing some of the dominant blackberry patch and planting a garden. Mr. Carmine testified in 2006 a major flooding event occurred that led him to take more aggressive action. He deepened the easterly 103 feet of the drainage channel along the northern property line, cleared more blackberries and performed more landscaping, including the placement of 40 yards of gravel and 20 yards of topsoil on the eastern half of the upland portion of the property. In exhibit no. 6 code enforcement officer Holly Sawin calculated the area of recent clearing by comparing aerial photographs taken in 2002, 2005 and 2007. Based on these comparisons she estimated that approximately 7,200 square feet of the property had been cleared since 2002 and that the eastern edge of the newly cleared area extends to within 25 feet of the Shady Lake water's edge. Ms. Sawin's estimates have not been seriously challenged by the Appellant.

13. That the increase overall in surface water flows to Shady Lake has resulted in at least seasonal rises in lake levels and their durations was documented in the Giberson study. This study estimated that wet weather water levels within the lake were formerly about 1.5 feet higher than dry weather levels, but that starting in the 1990s winter levels have risen another 1.5 feet, with such lake levels rising faster and remaining high for a longer time. The Appellant's consultant Mr. Neugebauer opined that the Giberson study understated the lake rise problem and testified to the existence of large quantities of sediment offshore from the Carmine parcel. Anecdotal observations suggest that the permanent lake level may also have risen since the 1990s, but no data has been offered to support this viewpoint. Mr. Neugebauer's testimony was to the effect that discharges from the cross-culvert north of the Carmine property have been of sufficient quantity and velocity to not only flood downstream properties but also scour parcels closest to the culvert.

14. The record suggests that the impacts to Shady Lake resulting from an increased stormwater runoff regime include a seasonal rise in wet weather lake levels and longer durations for these higher waters. A smaller rise in permanent lake water levels is also possible but not clearly established. The evidence suggests that increased stormwater flows on the Carmine property are erosive in nature, resulting in sediment buildup in the lake nearshore and at least some short-term adverse water quality impacts. But the technical literature is of the opinion that the more serious water quality impacts to Shady Lake overall probably result from failed septic systems along its edge, a situation that may have been at least partially remedied by a recently-installed sewer system. On the other hand, the testimony of Mr. Carmine and others was that installation of the sewer system itself may have perforated the groundwater table, thereby contributing additional fugitive surface flows.

15. Both the Appellant's consultant and his attorney have suggested at various times that if indeed there is a permanent rise in the base water elevation of Shady Lake, this fact should play into the legal analysis for an enforcement hearing. As noted previously, although seasonal increases are clearly established, no quantitative measurements of the lake's base level have been offered into the record. But even if one were to assume that the lake's base level has indeed risen, there is nothing within the county's regulatory scheme that would give such fact legal effect. First, it cannot be said that King County has directly caused this level of rise beyond the extent that it can be attributed to runoff from county roads. Failing to successfully regulate runoff from third-party development to prevent effects to Shady Lake is not the same thing as causing a direct impact to the lake. While one can argue that it is unfair for lakeside property owners to lose otherwise unrestricted development area to an encroaching water body and its regulatory buffer, such circumstance can only be taken into account to the extent that the county's regulations authorize some sort of equitable adjustment to occur.

C. **Wetland Testing**

16. The areas of greatest factual uncertainty in the record concern the relative credibility and weight to be given to the two wetland testing regimes carried out respectively by the SNR Company for the Appellant and Laura Casey for King County DDES. Testing for the presence of wetlands is required to be performed in conformity with the procedures and standards set out in the Washington State Wetlands Identification and Delineation Manual ("the Manual") dated March 1997 (exhibit no. 31). Since the level of labor and cost necessary to do a complete and thorough site evaluation in the manner described by the Manual can never really be justified for a small site like this, one is inevitably confronted by fragmentary studies and forced to determine which is the less unreliable. Neither wetland reviewer made any attempt to suggest (let alone delineate) any wetland boundaries, so the entire exercise resolves into a comparison of specific test hole

data results and the implications to be drawn therefrom. While DDES relied in a general way on the existence of wetland delineation studies performed on other lakeside properties further north, those off-site studies were neither introduced to the record nor described within any specificity. Their value in this proceeding is therefore minimal. At most they suggest that elsewhere along the Shady Lake fringe wetlands do in fact exist.

17. The two wetlands reviewers agreed that a finding of hydrophytic vegetation was appropriate for the Carmine site but they disagreed as to the presence of the other two key parameters, hydric soils and wetland hydrology. The disagreement as to hydrology was complicated further by a lack of certainty concerning the sources of water contributing to the various test holes in question. There was agreement that Shady Lake has lake fringe wetlands supported by the same groundwater hydrology that feeds the lake itself, and that the onsite drainage channel conveying runoff from the Petrovitsky Road culvert also supplies wetland hydrology. But there is nothing in the record that attempts to define the boundaries of influence between these two water sources.

18. Perhaps the most useful description within the record regarding the overall hydrological context for the uplands surrounding Shady Lake occurs within a study performed in 1994 for Kent Junior High School No. 7, then under review for construction of a new campus north of the lake (see appendices attached to exhibit no. 12). This study describes a scheme in which surface water infiltrates down to a shallow hardpan aquitard:

> "This groundwater may appear in occasional wetlands or is intercepted in local road ditches and conveyed to Shady Lake. Groundwater which may appear in wetlands must be of small quantities as evidenced by the number of Class II and III wetlands observed within the project limits, and consist of shallow subsurface flow along the underlying hardpan. Thus, it is closely related to surface runoff. Since downstream properties are of the same underlying geologic characteristics, one can reasonably deduce the same conditions downstream also. Therefore, any groundwater contribution to these wetlands is basically supported by surface runoff, as evidenced by the time of year in which they are observed."

This broad technical analysis, combined with Mr. Bertellotti's declaration and Ms. Krupp's testimony to the effect that the area upland of the lake in the vicinity of the Carmine parcel in the 1960s was "all high and dry", supports a finding that at least a measurable portion of the wetland hydrology currently existing on the Carmine parcel results from flows transported within the northern boundary ditch.

19. Although SNR dug eleven test pits throughout the neighborhood, the ones of greatest interest are holes S1 through S3 located in an area of prior clearing and hole S9 lying at the lake shoreline edge near the Carmine parcel southern boundary. Ms. Casey created two test pits relevant to this proceeding. Her hole number 1 is just east of SNR's S1 and S3, and her hole number 2 is between this more upland cluster and the lake. The pit logs for Ms. Casey's hole number 1 and SNR's holes S1 through S3 all agree that the first 12 inches of excavation encountered gravel fill and that the top layer of vegetation comprised a lawn planted from commercial seed.

All five holes reported that hydrophytic vegetation was to be considered present, but they differed about how such conclusion should be reached. Ms. Casey's data form for her sample plot number 1 reported that the site had been "recently significantly disturbed" due to the placement of the fill and therefore should be treated as an atypical situation under the state Manual. She justified using the atypical situations methodology by reference to page 71 of the Manual, which specifies such use when vegetation has been altered or removed or fill placed

pursuant to an action not previously authorized.

20. Mr. Neugebauer, on the other hand, using a wetland data determination form derived from U.S. Army Corps of Engineers (ACE) materials, declined to check the box on the forms asking whether the vegetation on site at the sampling point was "significantly disturbed", indicating instead that "normal circumstances" were present. While for sites S1 through S3 Mr. Neugebauer concluded that hydrophytic vegetation was present but hydric soils and wetland hydrology were not, on each form he appended the following explanatory remark:

> "The dominant vegetation observed at this test plot is planted turf grass which includes facultative varieties that make up at least 50% of the seed mix. This is not native vegetation. Although "are normal circumstances present" is checked above, the site has been heavily impacted by King County MS4 storm water that has been diverted onto it and this area was historically the site of a lumber mill and this sampling plot is located in a lawn area that is covered with approximately 1 foot of fill materials as is the property to the south."

21. As pointed out by Ms. Casey, the failure by Mr. Neugebauer to characterize sampling points S1 through S3 as significantly disturbed is contrary to the requirements of the state Manual, which states that both altered vegetation and fill placement warrant use of the atypical situations procedures. While the exact term "significantly disturbed" is not used by the atypical situations section of the Manual, application of the atypical situations procedures is clearly directed at significantly disturbed areas.

22. The situation is even more egregious with respect to Mr. Neugebauer's claim on the data forms for sampling points S1 through S3 that "normal circumstances" were present. Appendix A to the 1987 ACE Manual, which supplies the data sheet used by Mr. Neugebauer, defines "under normal circumstances" to mean the following:

> "As used in the definition of wetlands, this term refers to situations in which the vegetation has not been substantially altered by man's activities."

Moreover, it is clear that the standard meaning of "normal circumstances" specified in the 1987 ACE Manual informed the discussion contained within the May 2010 ACE regional supplement upon which Mr. Neugebauer relied upon as providing the most up-to-date information available (exhibit no. 38). For example, this document on page 99 states "to the extent possible, the hydrophytic vegetation decision should be based on the plant community that is normally present during the wet portion of the growing season in a normal rainfall year".

23. At the public hearing on this appeal, Mr. Neugebauer attempted to dance around his misuse of the basic ACE manual terminology, suggesting that by "normal circumstances" he was referring to what was normal within the highly disturbed neighborhood surrounding the Carmine parcel. This attempt at an explanation only made a bad situation worse. If offered a usage that not only finds no support in the relevant technical literature but literally stands the terminology on its head.

24. A second example of Mr. Neugebauer's use of poetic license also related to the question of hydrophytic plant life. He has invented the term "significant assemblages of dominant vegetation that would be identified as wetland vegetation", which first appeared on page 12 of his technical report and reappeared later at other locations. While Mr. Neugebauer never undertook to explain exactly what this novel term is supposed to mean, it clearly is not regulatory language applicable

to this proceeding. Thus it is at best a meaningless distraction and at worst an attempt to confuse the relevant review standard. While Mr. Neugebauer no doubt possesses the technical competence to perform a wetland study, the net effect of these manipulations is to highlight Mr. Neugebauer's partisan stance and undermine whatever credibility to which his report might otherwise be entitled.

25. Laura Casey's sample plot number 1 and SNR's sampling points S1 and S3 are clustered in the same area at about 60-70 feet from the water's edge of Shady Lake (Note: distances have been scaled off DDES's exhibit no. 6D, which appears to be roughly accurate. The scale shown on the site map aerial photo located at page 101 of exhibit no. 15 and enlarged as exhibit no. 33 is clearly wrong.) Ms. Casey's wetland testing was performed on June 10, 2010, and her data form identified the vegetation at plot number 1 as unspecified lawn grasses. She reported encountering standing water in the hole at eight inches depth below the surface and, based on the time of year, inferred that prolonged soils saturation existed. She observed 12 inches of fill directly below the lawn but was unable to retrieve native soils below this level due to the standing water. She noted that the soils mapping for this area shows an inclusion of Seattle Muck within an overall glacial context. As elaborated by her hearing testimony, use of the atypical situations methodology outlined within the state Manual was justified by the fact that the native vegetation had been removed and fill had been placed over the native soils. At Ms. Casey's sample plot number 1, the presence of both hydrophytic vegetation and hydric soils was inferred from a single observation of "standing water in hole at eight inches below surface in June, middle of growing season".

26. SNR's sampling points S1 and S3 were located in the immediate vicinity of Ms. Casey's sampling point number 1. SNR's tests were conducted on March 20, 2010. SNR agreed with Ms. Casey that the dominant vegetation observed in this area was planted turf grass and that the top 12 inches of material within the test holes was gravel fill. But SNR did not report encountering any standing water in either S1 or S3 and was able to excavate to a depth of 30 inches in each hole. In both cases SNR reported encountering soils ranging from moist to very wet, generally characterized to be within the Alderwood soil series. For sampling point S1, SNR logged a 10 YR2/1 color matrix and for S3 10 YR2/2. After some evasive qualifications, the SNR data sheets inferred for both S1 and S3 that hydrophytic vegetation was present but concluded that neither pit was in a wetland because of the absence of both hydric soils and wetland hydrology.

27. The hydrologic conclusions of both Ms. Casey and SNR were based on testing performed on a single site visit, a fact that greatly limits the evidential value of the resultant observations. In Ms. Casey's instance the matter is particularly problematic in that she was unable to make any direct soils observations for hole number 1 below the 12 inch fill layer. So her entire analytical edifice was built upon a single observation of standing water at a depth of eight inches below the surface in June. Her essential inferences were that saturation to the soil surface was present and that the presence of standing water as late into the season as June implied a length of saturation sufficient to support a positive hydrologic conclusion. Under cross-examination, Ms. Casey recalled anecdotally that June 2010 had been an unusually wet month and stated she had not checked her data against rainfall records.

28. Mr. Neugebauer in his testimony attempted to undermine Ms. Casey's hydrologic conclusion by suggesting that the eight inch standing water observation might have been caused by the localized perching of groundwater above a shallow aquitard, thereby resulting in a false groundwater reading. But Ms. Casey responded that the water in the hole was not the product of lateral seepage, and Mr. Neugebauer introduced no-site specific evidence in support of his

hypothesis. Moreover, his own test pit readings of no standing water at 30 inches in nearby locations tend to argue against the localized aquitard theory.

29. More interesting, perhaps, than speculation over a perched aquitard is the possibility that Ms. Casey's eight-inch standing water reading for her sample plot number 1 may provide evidence of a hydrology source unrelated to the Shady Lake groundwater table. Her sample plot number 2 also displayed free standing water within the test pit, but at a depth of 12 inches rather than eight. Since this second pit was located downslope closer to the lake by about 25 feet, one might expect its water level reading to be as high as pit number 1, if not a bit higher due to the gradient difference. One could reasonably surmise that an observed water elevation difference of four inches represented in absolute terms six inches or more of difference. What this seems to imply is that Ms. Casey's sample point number 1 intercepted flows emanating from the drainage ditch along the northern property line, suggesting a further inference that the wetland hydrology observed in her number 1 pit was substantially the result of surface water flows from the Petrovitsky Road ditch.

30. While soils map boundaries are necessarily approximate, the USDA mapping for the Seattle Muck inclusion extends from the southwestern corner of Shady Lake southwesterly across Petrovitsky Road. Because the Carmine parcel lies in the very middle of this mapped finger, unless the soils mapping feature is entirely fictional a reasonable inference would be that it includes the Carmine property. Moreover, as pointed out by Ms. Casey at the hearing, SNR's soils color log for sampling point S1 identifies a 10 YR2/1 matrix just below the fill layer which the state Manual identifies rather unequivocally as a hydric indicator. The Manual offers the following statement beginning at the bottom of page 25:

> "Mineral hydric soils usually have one of the following color features in the horizon immediately below the A horizon or ten inches (whichever is shallower):
>
> . . . (b) Matrix chroma of one or less in unmottled soils."

The note appearing below this quotation indicates that there are some exceptions to this rule involving unusually dark parent soils or burned-off areas where charcoal may be present. But SNR's data sheets uniformly reported site soils to be within the common Alderwood series, with no characteristics identified that would render unreliable the chroma 1 reading. Therefore SNR's own data indicated a color reading for hydric soils in sampling point S1 within the 12 inches to 30 inches range.

31. There are two other sampling pits that merit discussion. Ms. Casey's sample plot number 2 was located about 40 feet from the water's edge in an area on the Carmine parcel that had not been heavily disturbed. Ms. Casey was therefore able to perform positive tests for all three wetland parameters. Her measurement of 12 inches depth to free water was taken to indicate a saturated condition. Her data sheet showed a strong presence of emergent hydrophytic vegetation, including obligate species such as sedge and bulrush and FACW species like willow and spirea. Ms. Casey's data sheet identified organic muck within her test pit hole below the six inch depth, offering soils color identifications and supporting textural verification of the soils' organic origin. Except for questioning the soils' moisture content at the time of color identification, Ms. Casey's finding of wetland indicators at her sample plot number 2 was not challenged by the Appellant.

32. SNR's data sheets for sampling plat S9 are also of some interest, although it is not really clear how much. The location of this sampling point was near the south boundary line of the Carmine

parcel "waterward of the OHWM", in other words lying within the lake itself. Wetland hydrology was noted as being present as well as cattails and other obligate vegetation. Curiously, the data sheets suggested that planted turf grass was also present at the S9 location, which seems implausible due to its lakeshore location. S9 was also the location where SNR did some dissolved oxygen testing and determined that this was not an anaerobic or reducing environment. The soils at S9 were not found to be hydric mainly because they comprised sediments from recent erosion activity that had not been in place long enough to form a parent soil matrix.

33. It is hard to know what to make of the S9 data due to the fact that the test site location was within Shady Lake itself. Mr. Neugebauer tried to suggest that testing the lake hydrology for dissolved oxygen content tells us something important about the groundwater chemistry at the upland test hole locations, some of which could be tapped into the same groundwater source. While it may be possible for dissolved oxygen testing within the lake itself to inform us about the oxygen content in test holes located 40-70 feet upland from the lake's edge, Mr. Neugebauer failed to provide a technical basis for making such a linkage.

34. Based on what is admittedly a rather sketchy collection (or assemblage) of information, our conclusion is that based on site testing supported by soils mapping DDES presented a *prima facie* case for finding the presence of a wetland at both its sample plots 1 and 2. The Appellant did not offer substantial evidence demonstrating that the *prima facie* finding for sample plot number 2 was incorrect. The data is more murky with respect to the complex comprising SNR's stations S1 and S3 and Ms. Casey's sample plot number 1. The presence of hydrophytic vegetation is not in dispute, and SNR's chroma reading for test plot S1 supports a hydric soils finding. There is no easy way to reconcile the disparate hydrology readings between Ms. Casey's eight inch standing water observation in June and SNR's dry hole observations to 30 inches in March. Our cautious view is that if there is a wetland present in this area, it most likely is one based on hydrology originating in the drainage ditch, not in Shady Lake. This conclusion is suggested by the water level differences measured in Ms. Casey's two test holes and by the fact that the large gap between Ms. Casey's measurements and SNR's observations tend to indicate an ephemeral hydrology more typical of input from the ditch than a more stable lake groundwater source.

CONCLUSIONS:

1. The legal discussions within this proceeding have ranged far and wide, but they ultimately come down to questions about the meaning and effect of two basic critical areas definitions supplied by the King County Zoning Ordinance. Of greatest interest at the hearing was the definition for an "aquatic area" provided at KCC 21A.06.072 C. But, while less controversial, the definition for a "wetland" stated at KCC 21A.06.1391 is no less important to our review. One of the disadvantages of changing Hearing Examiners after the hearing closed is of course that the questions that fascinated the first Examiner may be less compelling to the mind of the second. Because the principle of judicial economy argues against deciding questions that are unnecessary to the outcome, the legal discussion in this report may leave unresolved some issues that occupied substantial time at the hearing.

2. As noted above, at the hearing after presentation of the DDES case in chief, the citation within the Notice and Order for clearing and grading within a stream aquatic area buffer was dismissed; thus it will not be a further part of our review. On the other hand, the pre-hearing denial of the DDES motion for partial summary judgment mostly left the door open for further consideration of the aquatic area issues affecting Shady Lake.

3. The question of whether Shady Lake qualifies as an aquatic area under the county's CAO must focus on Shady Lake itself, not its inlets or outfalls. The manipulated character of the inlets or outfalls can only factor into the equation to the extent that such facilities may operate to alter the essential character of the lake environment.

4. The base definition under KCC 21A.06.072C identifies an aquatic area as "any non-wetland water feature including all shorelines of the state, rivers, streams, marine waters, inland bodies of open water. . ." This base definition is subject to certain exceptions. The fact that Shady Lake is a listed shoreline of the state under the Shoreline Management Act and its implementing regulations satisfies the base definition requirement and by extension DDES's *prima facie* burden under Hearing Examiner Rule XI.B.8b. The burden of proving that one of the listed exceptions operates to exclude Shady Lake from the aquatic area definition despite the fact that it is a listed shoreline of the state devolves upon the Appellant in the form of an affirmative defense. Shady Lake might also qualify as an inland body of open water under the KCC 21A.06. 072C definition and thus be subject to the impoundment limitations stated therein. But the inland body of open water designation is redundant with respect to the base definition. It is sufficient that Shady Lake is a shoreline of the state; we need not bother with also trying to decipher the terminology of the definition's impoundment exception to the inland water provision. Contrary to DDES's assertion, the qualification of Shady Lake as an aquatic area due to its SMA listing is not strengthened or modified by the water typing provisions stated at KCC 21A.24.355. These provisions only come into play after an initial determination has been made that an aquatic area exists.

5. King County's incorporation of Shady Lake into the modeling for its surface water management control system and any resultant modification of inlet and outlet flow mechanisms based on such modeling does not automatically deprive Shady Lake of its critical area status. Such a deprivation could only occur if the surface water system usage operated to compromise or destroy the natural features or functions of Shady Lake that the CAO is designed to protect. There is no evidence that such has happened here.

6. As a kettle lake, Shady Lake is primarily fed by groundwater sources, with surface water hydrology only contributing a relatively small quantity to its overall water budget. The adverse effects attributable to surface water runoff being directed into Shady Lake are some increase in shoreline sedimentation buildup, some minor adverse water quality impacts, a seasonal rise in lake levels, and possibly a small rise in summer base levels as well. The technical literature suggests that the water quality impacts to Shady Lake from increased surface water runoff are less adverse overall than those resulting from the failure of lakeside septic systems. The Appellant has offered no evidence that the biological productivity or habitat values of Shady Lake have been impaired by inputs from surface water runoff. In the absence of evidence that surface water runoff has adversely affected Shady Lake's critical areas functions, any surface water management system use of the lake must be regarded as purely incidental and not determinative of its critical areas status. In like manner, employing definitions and concepts from the county's Surface Water Design Manual to describe Shady Lake and its functions is contextual and does not operate to modify the provisions of the Critical Areas Ordinance.

7. It is also within the context of Shady Lake being primarily fed by groundwater infiltration that the following exception stated by the last sentence of KCC 21A.06.072C must be analyzed:

> "Aquatic area" does not include water features that are entirely artificially collected or conveyed storm or wastewater systems or entirely artificial channels, ponds, pools or other similar constructed water features".

8. With respect to interpreting the first part of the exception set forth in the final sentence of KCC 21A.06.072 C that remained unresolved after Examiner Donahue's September 7, 2010 summary judgment order, the need to determine the degree of artificiality only arises after one has first concluded that Shady Lake is a stormwater collection or conveyance system. While the lake does perform some incidental stormwater collection and conveyance functions, the water feature itself is a groundwater-fed kettle lake. Groundwater infiltration into a kettle lake does not qualify as stormwater collection or conveyance within the meaning of the code definition. So this definition exception is totally inapplicable to Shady Lake, and the intriguing question of how much artificiality constitutes an entirety need not be resolved. The world contains all sorts of water features other than stormwater collection and conveyance systems, and as a groundwater-fed kettle lake Shady Lake just happens to be one of those other kinds of features. The definitional exception was never intended to apply to a kettle lake.

9. As an aquatic area regulated under the CAO, Shady Lake is subject to a 115 foot protected buffer from its water's edge. It is uncontested that Mr. Carmine performed clearing and grading within this 115 foot buffer. The fact that this clearing and grading occurred within the Shady Lake regulatory buffer is sufficient to uphold the DDES Notice and Order.

10. King County DDES met its burden to produce a *prima facie* case for wetland presence at both sampling plots 1 and 2 documented within Laura Casey's August 4, 2010 wetland report (exhibit no. 11). For plot number 2 DDES made a *prima facie* showing of hydric soils, hydrophytic vegetation and wetland hydrology. For sample plot number 1 DDES met the state Manual requirements for a wetland determination on a site that has been substantially altered and the native vegetation removed. The Appellant did not meet his resultant burden to demonstrate at plot number 2 by a preponderance of the evidence that the county's initial determination was incorrect. For the atypical site tested by Ms. Casey at sampling plot number 1, the county's entire analysis was predicated on inferences drawn from a single hydrological observation during the growing season. This single observation may be sufficient to support a *prima facie* case. But the framework of the evidence as a whole suggests that if a wetland is indeed present, its hydrology is primarily supplied by the drainage ditch that runs along the northern boundary of the Carmine site.

11. KCC 21A.06.1391 B excludes from the definition of a wetland "an artificial feature made from a non-wetland area", which may include "9. A wetland created after July 1, 1990 that was unintentionally made as a result of construction of a road, street or highway".

12. The cross-culvert beneath Petrovitsky Road that conveys the water which eventually enters the channel along the Carmine north property boundary was constructed in 1965. But the runoff that exits this culvert to create the erosive flow that supplied the hydrology to the wetland in the area of Ms. Casey's sampling plot number 1 was not present until the early to mid-1990s. The exception quoted above specifies only that the wetland itself shall be created after July 1, 1990. It is silent as to when the road construction work should have occurred. The fact that the culvert under Petrovitsky Road was created in the 60s is of no regulatory consequence so long as the wetland that resulted from such construction appeared after 1990. The evidence suggests such was the case here. Any wetland whose creation can be attributed to the flows from the Petrovitsky culvert is therefore excluded from the county's regulatory purview.

13. Since the relevant wetland testing that occurred on the Carmine site took place within the regulatory buffer for Shady Lake, a question arises as to how much the lake fringe wetland identified within Ms. Casey's second test pit adds to the regulatory buffer already attributable to the lake aquatic area. A boundary needs to be defined for the lake wetland so that its buffer can

be calculated, and this exercise requires some sense of where the unregulated road hydrology wetland ends and where the regulated lake fringe wetland begins.

14. In summary, based on the evidence of record and the applicable regulatory standards, the David Carmine appeal is granted with respect to the citations in the Notice and Order for clearing and grading within a stream buffer and within an artificially-created wetland and its buffer. The appeal is denied with respect to citations for clearing and grading within the Shady Lake aquatic area buffer and that portion of the on-site wetland and buffer adjacent to Shady Lake that forms part of a lake fringe wetland system. The conditions stated below outline further regulatory actions to be pursued consist with this decision.

DECISION:

The appeal of David W. Carmine is GRANTED in part and DENIED in part. The appeal is granted with respect to citations within the Notice and Order alleging unlawful or unpermitted clearing and grading within a stream buffer, and within a wetland and its buffer to the extent that the wetland hydrology is predominantly supplied by infiltration of surface water flows originating in the Petrovitsky Road ditch and culvert system. The appeal is denied with respect to allegations of clearing and grading within the aquatic area buffer for Shady Lake and within adjacent wetlands and buffers supported by lake groundwater hydrology.

ORDER:

1. No penalties shall be assessed against the Appellant or his property if within 60 days of the date of this order a complete application for a grading permit is filed with King County DDES for the performance of corrective action with respect to areas on the site illegally cleared and graded. These areas include the regulatory buffer for the Shady Lake aquatic area and the adjacent lake fringe wetland and its regulatory buffer. DDES may require the Appellant to submit a supplemental report delineating the boundary for the lake fringe wetland. For purposes of this condition, a wetland shall be categorized as forming part of the lake fringe wetland complex only if DDES documents that at least 50% of its hydrology is derived from the groundwater source that supplies Shady Lake.

2. If the deadline stated in condition number one is not met, DDES may impose penalties on the Appellant and his property retroactive to the date of this order.

ORDERED this 1st day of July, 2011.

Stafford L. Smith
King County Hearing Examiner *pro tem*

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 NOVEMBER 2, NOVEMBER 4, NOVEMBER 17, AND DECEMBER 8, 2010 PUBLIC HEARING ON DEPARTMENT OF DEVELOPMENT AND ENVIRONMENTAL SERVICES FILE NO. E06G0458.

Peter T. Donahue and Stafford L. Smith were the Hearing Examiners in this matter. Participating in the hearing were Jina Kim, Holly Sawin, Laura Casey and Douglas D. Navetski representing the Department; Justin D. Park representing the Appellant, David W. Carmine, Steven Neugebauer and Sylvia Krupp.

The following Exhibits were offered and entered into the record:

Exhibit No. 1	Department of Development and Environmental Services (DDES) staff report to the Hearing Examiner for E06G0458
Exhibit No. 2	Copy of the Notice and Order issued August 7, 2008
Exhibit No. 3A	Copy of the Notice and Statement of Appeal received August 26, 2008
Exhibit No. 3B	Amended Notice and Statement of Appeal received April 14, 2010
Exhibit No. 4	Copies of codes cited in the Notice and Order
Exhibit No. 5	Photographs of subject property taken by Holly Sawin
Exhibit No. 5A	Photo log of exhibit no. 5 with four attached photographs
Exhibit No. 6A	Printout of 1998 aerial photograph of subject property from King County GIS accessed on June 21, 2010
Exhibit No. 6B	Printout of 2002 aerial photograph of subject property from King County GIS accessed on June 21, 2010
Exhibit No. 6C	Printout of 2005 aerial photograph of subject property from King County GIS accessed on June 21, 2010
Exhibit No. 6D	Printout of 2007 aerial photograph of subject property from King County GIS accessed on June 21, 2010
Exhibit No. 6E	Printout of 2009 aerial photograph of subject property from King County GIS accessed on June 21, 2010
Exhibit No. 6F	Printout of aerial photograph of subject property of subject property from Bing.com (date of aerial unknown) accessed on June 21, 2010
Exhibit No. 6G	Printout of 2007 potential wetland influence and aquatic buffer of subject property from King County GIS accessed on June 21, 2010
Exhibit No. 6H	2004 aerial photograph of subject property by Aero-Metric dated April 25, 2004
Exhibit No. 6I	2000 aerial photograph of subject property by Aero-Metric dated October 7, 2000
Exhibit No. 7A	Wetland and aquatic area identification and rating report prepared by Laura Casey dated August 4, 2010
Exhibit No. 7B	Wetland determination data forms completed by Laura Casey from a June 10, 2010 site visit
Exhibit No. 7C	Wetland rating form completed by Laura Casey from a June 10, 2010 site visit
Exhibit No. 8	DDES violation letter sent to the property owner from Holly Sawin on December 27, 2006
Exhibit No. 9	Section map
Exhibit No. 10	Letter to Luann Highlander from Bill Kerschke dated January 25, 2010 with attached maps
Exhibit No. 11	Wetland and Aquatic Area Identification and Rating Report by Laura Casey dated August 4, 2010 (in full)
Exhibit No. 12	Giberson Drainage Study (Shady Lake) dated June 1999
Exhibit No. 13	King County Hearing Examiner report for L04P0017

Exhibit No. 14	Declaration of Richard Bertellotti dated October 22, 2010
Exhibit No. 15	Wetland Identification and Delineation Report prepared by SNR Company dated April 28, 2010
Exhibit No. 16	Aerial photograph dated 1936
Exhibit No. 17	Aerial photograph dated June 27, 1960
Exhibit No. 18	Aerial photograph dated April 9, 1968
Exhibit No. 19	Aerial photograph dated March 18, 1974
Exhibit No. 20	Aerial photograph dated 2002
Exhibit No. 21	Aerial photograph dated 2007
Exhibit No. 22	King County Road Services BMP listing for SE Petrovitsky Rd.
Exhibit No. 23	King County Drainage Investigation Report dated January 29, 2009
Exhibit No. 24	Flow Control BMP Effectiveness Study
Exhibit No. 25	Statutory Warranty Deed dated April 26, 2005
Exhibit No. 26A-F	Photographs of subject property
Exhibit No. 27	Laura Casey's Resume
Exhibit No. 28	Douglas D. Navetski's resume
Exhibit No. 29	Drainage map around Shady Lake
Exhibit No. 30	Phase I Municipal Storm water Permit
Exhibit No. 31	Washington State Wetlands Identification and Delineation Manual
Exhibit No. 32	Corps of Engineers Wetlands Delineation Manual
Exhibit No. 33	Attachment A to exhibits no. 15 annotated by Laura Casey
Exhibit No. 34	Web Soil Survey Information

The following Exhibits were offered and entered into the record on November 4, 2010:

Exhibit No. 35	Keys to Soil Taxonomy, Eleventh Edition, US Department of Agriculture
Exhibit No. 36	King County Drainage Investigation Report: Field Investigation of April 7, 2003 on property of Richard Hicuera

The following Exhibits were offered and entered into the record on November 17, 2010:

Exhibit No. 37	Curriculum Vitae of Steven Neugebauer
Exhibit No. 38	Regional Supplement to the Corps of Engineers Wetland Delineation Manual: Western Mountains, Valleys, and Coast Region (Version 2.), May 2010
Exhibit No. 39	Field Indicators of Hydric Soils in the United States, Version 7.0, 2010
Exhibit No. 40	Aerial photograph dated June 27, 1960 (exhibit no. 17) annotated by Sylvia Krupp

The following Exhibit was offered and entered into the record on December 8, 2010:

Exhibit No. 41	Two annotated maps showing geographic system of Shady Lake depicting topography; 16 photographs; 2009 aerials

The following Exhibit was entered into the record on January 12, 2011:

Exhibit No. 42	DDES's closing brief

The following Exhibit was entered into the record on June 10, 2011:

Exhibit No. 43	Stipulation regarding culvert construction

SLS:gao
E06G0458 RPT