



King County

Department of Development and Environmental Services

900 Oakesdale Avenue Southwest
Renton, WA 98057-5212

206-296-6600 TTY 206-296-7217

www.kingcounty.gov

FINAL CODE INTERPRETATION L09CI001

Background

On March 19, 2009, Mr. Paul Carkeek filed this Code Interpretation request on behalf of his client, Richard Lefebvre. Mr. Lefebvre owns a parcel zoned RA-5. A code enforcement case (E08G0467) has been filed alleging that there has been clearing and grading in a critical area or critical area buffer without required permits.

Mr. Carkeek states that Mr. Lefebvre is interested in farming his property. The property was farmed some time in the past, but has not been farmed recently. Areas of the property that were once farmed have mature trees and other native vegetation.

Mr. Carkeek poses two questions, one addresses the question of whether provisions of the Critical Areas Regulations prevent farming and are therefore contrary to the King County Comprehensive Plan (KCCP), and the other the question of whether the Code Enforcement Code prevents the Department of Development and Environmental Services (DDES) from approving a Farm Plan that would allow Mr. Lefebvre to achieve code compliance.

Discussion

Question 1: *Does the application of King County Code (K.C.C.) 21A.24.045C "Allowed alterations" and K.C.C. 21A.24.051 "Agricultural activities development standards" that prevent the establishment and/or reestablishment of farms within the Rural zone create inconsistencies with K.C.C. 21A.04.060 and contrary to the legislative intent of KCCP R-201 and R-204?*

K.C.C. 21A.24.045 sets forth standards that govern allowed alterations in critical areas and critical area buffers. For some critical areas, all alterations are allowed as long as the alterations are consistent with development standards and impact avoidance and mitigation requirements for that critical area. For other critical areas, only alterations identified in K.C.C. 21A.24.045C are allowed, unless the alteration is authorized through an alteration exception or some other mechanism. Aquatic areas, which include streams, rivers, lakes, and marine shorelines, fall into the latter category of critical area.

Some agricultural activities are allowed in aquatic area buffers as an allowed alteration under K.C.C. 21A.24.045C. For example, raising crops or grazing livestock is allowed in an aquatic area buffer if the agricultural activity has been in continuous existence since January 1, 2005. New or expanded agricultural activities are also allowed if the area is not forested, is not subject to limitations under a forest practices permit, and has a farm management plan approved by King County. K.C.C. 21A.24.045D.53 and D.54.

New non-residential structures are generally not allowed in aquatic area buffers. However, farm structures may be located in aquatic area buffers if the property is primarily devoted to agriculture and a farm management plan be implemented. K.C.C. 21A.24.045D.3.

Mr. Carkeek discusses King County Comprehensive Plan Policies and the stated purpose behind the RA zone in his analysis of this question. There are two problems with Mr. Carkeek's analysis. First, a Code Interpretation is not the proper forum to resolve a claim that regulations adopted by the King County Council are inconsistent with Comprehensive Plan policies. A code interpretation can only address ambiguities or attempt to resolve inconsistencies of code provisions. K.C.C. 2.100.010. A claim that regulations are inconsistent with the King County Comprehensive Plan must be made through an appeal of the regulations to the Growth Management Hearings Board. DDES does not have authority to either invalidate or modify those regulations.

Second, Mr. Carkeek's analysis appears to be premised on the idea that under the Comprehensive Plan agriculture in the rural area has a priority that preempts other policies and goals in the Comprehensive Plan. There is nothing in the Comprehensive Plan to suggest that agricultural uses in rural areas have this type of priority. In fact, King County Comprehensive Plan Policy R-204, cited by Mr. Carkeek, is clear that other policies must be taken into consideration. In its encouragement of farming and forestry in the rural area, R-204 states that "county environmental standards for forestry and agriculture should protect environmental quality ... while encouraging forestry and farming." K.C.C. 21A.24.045 and 21A.24.051 do exactly that. They allow alterations to critical areas that are associated with agricultural activities that are not allowed for non-agricultural activities. However, K.C.C. 21A.24.045 and 21A.24.051 do require that these alterations must be done in a manner designed to protect environmental quality.

In addition, the provisions of K.C.C. Chapter 21A.24 as they relate to agriculture go beyond what is required under the Growth Management Act (GMA) with respect to agriculture. The GMA requires counties to designate agricultural lands of long term commercial significance, Revised Code of Washington (RCW) 36.70A.170, and to ensure the conservation of designated agricultural lands, RCW 36.70A.060. King County's regulations go beyond these minimal GMA requirements by encouraging agriculture on designated agricultural lands, i.e. the Agricultural Production Districts, and on Rural Area zoned properties.

Thus, even if this were the proper forum to challenge development regulations as being inconsistent with the Comprehensive Plan, the challenge would fail because there is no inconsistency either with the King County Comprehensive Plan or with the Growth Management Act.

Question 2: *Does the application of K.C.C. 23.02.040 prevent DDES from allowing Mr. Lefebvre applying for and/or DDES approving a Farm Management Plan for the subject property, hence achieving code compliance?*

Mr. Lefebvre and Mr. Carkeek held a pre-application meeting with DDES staff to consider what permits were needed to address the code enforcement case. Mr. Carkeek's letter discusses several different sections of K.C.C. Title 23 and suggests that the primary purpose of the code enforcement process is to achieve code compliance and not enforcement.

In this case, Mr. Lefebvre has allegedly altered critical areas or critical area buffers without proper permits. As noted above, under two circumstances it is possible to obtain approval to alter a critical area buffer if a property is being used for agricultural purposes. The first is if the agricultural activities have been in continuous existence since January 1, 2005. K.C.C. 21A.24.045D.53. This condition does allow for periods where land lies fallow as a normal part of the agricultural process. That is not the case here.

The second circumstance allows for the expansion of existing or new agricultural into critical area buffers under some circumstances. K.C.C. 21A.24.045D.54. This is the relevant condition for Mr. Lefebvre's case. K.C.C. 21A.24.045D.54 provides as follows:

54. Allowed for expansion of existing or new agricultural activities where:
- a. the site is predominantly involved in the practice of agriculture;
 - b. there is no expansion into an area that:
 - (1) has been cleared under a class I, II, III, IV-S or nonconversion IV-G forest practice permit; or
 - (2) is more than ten thousand square feet with tree cover at a uniform density more than ninety trees per acre and with the predominant mainstream diameter of the trees at least four inches diameter at breast height, not including areas that are actively managed as agricultural crops for pulpwood, Christmas trees or ornamental nursery stock;
 - c. the activities are in compliance with an approved farm management plan in accordance with K.C.C. 21A.24.051; and
 - d. all best management practices associated with the activities specified in the farm management plan are installed and maintained.

Under this condition, it is possible to expand agricultural activities into a critical area buffer. The site must be predominately devoted to agriculture, expansion into forested areas is generally not allowed, and a farm plan must have been developed and implemented. Mr. Lefebvre's property is not currently predominately devoted to agriculture. However, upon a proper showing by Mr. Lefebvre that the property will be predominately devoted to agriculture upon permit issuance, this particular requirement would not prevent expansion of new agriculture into the critical area buffer. Obviously, the other requirements in K.C.C. 21A.24.045D.54 must also be met.

K.C.C. 21A.24.051 establishes the development standards for agricultural activities in critical areas, including requirements for farm management plans. Farm management plans that are used for compliance with King County's regulations must be approved by King County and are governed by goals adopted by the King County Council.

D. A property owner or applicant seeking to use the process to allow alterations in critical area buffers shall develop a farm management plan based on the following goals, which are listed in order of priority:

1. To maintain the productive agricultural land base and economic viability of agriculture on the site;
2. To maintain, restore or enhance critical areas to the maximum extent practical in accordance with the site specific goals of the landowner;
3. To the maximum extent practical in accordance with the site specific goals of the landowner, maintain and enhance natural hydrologic systems on the site;
4. To use federal, state and local best management practices and best available science for farm management to achieve the goals of the farm management plan; and
5. To monitor the effectiveness of best management practices and implement additional practices through adaptive management to achieve the goals of the farm management plan.

E. The property owner or applicant may develop the farm management plan as part of a program offered or approved by King County. The plan shall include, but is not limited to, the following elements:

1. A site inventory identifying critical areas, structures, cleared and forested areas, and other significant features on the site;
2. Site-specific performance standards and best management practices to maintain, restore or enhance critical areas and their buffers and maintain and enhance native vegetation on the site including the best management practices for the installation and maintenance of farm field access drives and agricultural drainages;
3. A plan for future changes to any existing structures or for any changes to the landscape that involve clearing or grading;
4. A plan for implementation of performance standards and best management practices;
5. A plan for monitoring the effectiveness of measures taken to protect critical areas and their buffers and to modify the farm management plan if adverse impacts occur; and
6. Documentation of compliance with flood compensatory storage and flood conveyance in accordance with K.C.C. 21A.24.240.

K.C.C. 21A.24.051. The King County Department of Natural Resources and Parks (DNRP) has adopted a public rule governing the development and content of Farm Management Plans. See, <http://www.kingcounty.gov/operations/policies/rules/utilities/put821pr.aspx>.

Mr. Lefebvre does not have an approved Farm Management Plan covering the activities involved in the code enforcement action.

Mr. Carkeek's analysis and discussion seems to suggest that, in the name of achieving code compliance, DDES may waive other code requirements, including requirements of the Critical Areas Code, as they relate to agricultural activities and farm plans. Under this theory, DDES could waive the requirement that Mr. Lefebvre obtain a farm plan and comply with other requirements of K.C.C. Chapter 21A.24.

K.C.C. 23.01.010 states that the purpose of Title 23 is to "is to identify processes and methods to encourage compliance with county laws and regulations." K.C.C. Title 23 includes several processes designed to achieve this purpose. These include voluntary compliance agreements, citations, and notices and orders. However, all of these processes are designed to achieve the purpose of K.C.C. Title 23 – compliance with the county code.

K.C.C. 23.02.040, referenced by Mr. Carkeek, sets forth the authority directors may use to "to discourage public nuisances, make efficient use of public resources and otherwise promote compliance with applicable code provisions." K.C.C. 23.02.040H provides that "In administering the provisions for code enforcement, the director shall have the authority to waive any one or more such provisions so as to avoid substantial injustice by application thereof to the acts or omissions of a public or private entity or individual, or acts or omissions on public or private property ..." The authority given a director here is to waive provisions related to code enforcement, not substantive provisions of the King County Code. This authority may be exercised in order to avoid substantial injustice from application of the code enforcement provisions. For example, a director may decide not to bring a code enforcement action in order to avoid a substantial injustice, even though there has been a code violation. This is different from a decision to waive requirements of the zoning code.

The answer to Question 2 is no. K.C.C. 23.02.040 does not prohibit DDES from considering a farm management plan under K.C.C. 21A.24.051 as a means of achieving code compliance in a code enforcement case. However, K.C.C. 23.02.040 also does not authorize DDES to waive requirements of K.C.C. Chapter 21A.24 in order to resolve a code enforcement action.

Decision

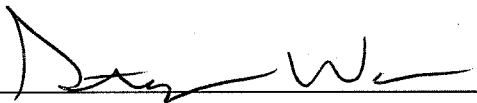
Question 1 – Is there an inconsistency between K.C.C. 21A.24.045 and 21A.24.051 and King County Comprehensive Plan Policies? A Code Interpretation is not the proper mechanism to question whether a development regulation is inconsistent with the comprehensive plan. Even if it were, the challenge would fail in this case, because there is no inconsistency between these two code sections and the King County Comprehensive Plan.

Question 2 – Does K.C.C. 23.02.040 prohibit an applicant from achieving code compliance for a code violation through a farm management plan? No. An applicant may achieve code compliance through any means that brings the use or activity into compliance with the King County Code. Under the facts of Mr. Lefebvre's case, a farm management plan may be necessary in order for Mr. Lefebvre to come into compliance with the King County Code.

However, K.C.C. 23.02.040H, which allows a director to waive code enforcement provisions, does not authorize DDES to waive requirements of K.C.C. Chapter 21A.24 in order to resolve a code enforcement action.

Finality of Code Interpretations

Under K.C.C. 2.100.040, a code interpretation that relates to a code enforcement action is final when issued by the director. In such a case, the code interpretation may be appealed to the Hearing Examiner when the Department takes its final action on the code enforcement complaint. The Director determines that this code interpretation relates Code Enforcement Complaint E08G0467. Therefore, this code interpretation is final when it is issued and may be appealed together with any appeal of the related Code Enforcement Action.



Stephanie Warden
Director
Development and Environmental Services

5/14/09
Date