August 12, 2002

OFFICE OF THE HEARING EXAMINER
KING COUNTY, WASHINGTON
850 Union Bank of California Building
900 Fourth Avenue
Seattle, Washington 98164
Telephone (206) 296-4660
Facsimile (206) 296-1654

REPORT AND DECISION ON CODE ENFORCEMENT APPEAL

SUBJECT: Department of Development and Environmental Services File No. **E9900796**

RAGING RIVER ACTION COMMITTEE
Code Enforcement Appeal
Pursuant to KCC 23.02.070.I

Location: 4651 – 332nd Avenue Southeast

Appellants: Raging River Action Committee, *represented by*
Jeffrey M. Eustis, Attorney at Law
505 Madison Street, Suite 209
Seattle, WA 98104
Telephone: (206) 625-9515
Facsimile: (206) 682-1376

Intervenor: Lyle & Kia Geels, *represented by*
William Hollowell, Attorney at Law
PO Box 1041
4471 Tolt Avenue
Carnation, WA 98014
Telephone: (425) 333-4848
Facsimile: (425) 333-4884

King County: Department of Development and Environmental Services
Code Enforcement Section, *represented by*
Pete Ramels, Attorney at Law
King County Prosecuting Attorney, Civil Division
King County Courthouse
516 – 3rd Avenue
Seattle, WA 98104
Telephone: (206) 296-9015
Facsimile: (206) 296-0191

SUMMARY OF RECOMMENDATIONS:

Department's Preliminary Recommendation:	Deny
Department's Final Recommendation:	Deny
Examiner's Decision:	Granted, in part; Denied in part

EXAMINER PROCEEDINGS:

Hearing Opened:	January 9, 2001
Hearing Closed:	May 21, 2002

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.

KEY WORDS:

- Pedestrian
- Easement
- Stream
- Sensitive Areas
- River
- Ingress/Egress
- Shoreline Management
- King County Road Standards
- Access

SUMMARY:

Grants in part the KCC 23.02.070.I complainant appeal of Raging River Action Committee regarding violations of plat conditions and sensitive areas regulations.

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

A. **Dedicated Public Access to Shoreline**

1. The final plat of Koba Garden Tracts was approved in August 1985. Appellant exhibit no. 1; Department exhibit no. 7.

2. Kia and Lyle Geels own and reside upon Lot 6 within the subdivision of Koba Garden Tracts.

3. An easement extending eastward from the turnaround at the terminus of SE 47th Place turnaround[1] crosses the north 20 feet of both lots 7 and 6 to the northwest corner of lot 6:

> 20' easement for ingress, egress and utilities.

This easement extends eastward to the 332nd Avenue SE turnaround. In addition, at its mid-point, it connects with a southeasterly extending easement identified on the face of the plat as follows:

> 20' easement for ingress and egress

[1] KCRS Section 1.10 defines "cul de sac" as meaning "short street having one end open to traffic and the other temporarily or permanently *terminated by a vehicle turnaround*." (Emphasis added.) The turnaround is also referred to by the KCRS as a "bulb." Ibid.

This language applies to that portion of the easement which crosses lots 6 and 7. As the easement extends the remainder of the distance to the 332nd Avenue SE turnaround, the language changes slightly:

> 20' easement for pedestrians, ingress, egress and utilities

In addition, the southeastern portion of the subject lot 6 is encumbered by a 30' wide flood control easement benefiting King County and a "15' drainage easement and building setback line." Note 3 on the face of the plat describes another public pedestrian easement.

> From the center of 30' flood control easement to rivers edge to be dedicated to public as pedestrian easement.

That language is repeated twice elsewhere on the plat. The declaration of dedication on the plat states in part:

> . . . the undersigned owners of interest in the land hereby subdivided . . . dedicate to the use of the public all easements and tracts shown on this plat for all public purposes as indicated thereon, including but not limited to parks, open space, utilities, and drainage unless such easements or tracts are specifically identified on this plat as being dedicated or conveyed to a person or entity other than the public.

4. The developer of the property prepared a public offering statement as required at that time by the Washington Land Development Registration Act. This statement described the public easement on the landward side of lot 6 as a "walking easement." It says in full:

> PUBLIC ACCESS TO WATERFRONT: The public access to the waterfront is from the walking easement between the two cul-de-sacs and is a 20 foot wide easement along the southeasterly line of lot number 18 to the River.

5. These easements are dedicated to the public as indicated by dedication language on the face of the plat which states in pertinent part as follows:

> The *undersigned owners* of interest in the land hereby subdivided... do hereby dedicate to the use of the public forever all streets and avenues not shown as private hereon and ... further *dedicate to the use of the public all the easements* and tracts shown on this plat *for all public purposes as indicated thereon*, including but not limited to parks, open space, utilities, and drainage unless such easements or tracts are specifically identified on this plat as being dedicated or conveyed to a person or entity other than the public.

Appellant exhibit no. 1, sheet 3 (emphasis added).

6. Also by dedication, the plat owners, for themselves and their successors, waive any claims for damages against King County on account of the construction or maintenance of roads or drainage systems within the subdivision. Appellant exhibit no. 1, sheet 3.

7. On April 9, 1987, Sno-Valley Investment Properties, Inc. conveyed to Glen and Barbara Lewis Lot 5 of Koba Garden Tracts, together with an easement over the northwesterly 20 feet of Lot 6, an area that had been previously dedicated to the county for public access. The owners of Lot 5 continue to use the 20 foot wide easement across Lot 6 for vehicle access to their property. Photographs, Appellant exhibit 30; Testimony, Ketter.

8. On or about October 26, 1988 the Geels purchased Lot 6 of Koba Garden Tracts. Appellant supplemental exhibit no. 32, statutory warranty deed from Sno-Valley Investment Properties to Geels.

9. On January 15, 1988 Sno-Valley Investment Properties obtained from King County Building and Land Development Division ("BALD")[2] a building permit for a house on Lot 6. Appellant exhibit no. 5.

10. The Geels' concrete driveway was in place by the summer of 1989. Photo, Appellant exhibit no. 33A. At the time of its construction there existed a gravel road connecting the cul-de-sac turnarounds that now exist at SE 47th Place and 332 Avenue SE. Photo, Appellant exhibit no. 33A. A gravel road, over these current streets and the easement between these streets, existed in 1985, prior to plat approval. 1985 Photo, Appellant exhibit no. 38.

11. Between 1989 and the mid 1990's what had been an open, graveled road over the 20' wide ingress and egress easement on Lot 6 became incorporated into the Geels' yard in the following ways, going from north to south:

    construction of a driveway,

    the erection of a solid board fence at the northerly end, the planting of a photinia bush,

    the planting of lawn,

    the creation of a flower bed,

    the planting of dogwood trees and box wood shrubs,

    the erection of mortar and stone monuments (in the public street right-of-way) at the driveway entrance and

    "private drive" signage at the driveway entrance.

12. In August 1996, DDES issued to the Geels a notice of a complaint for blocking of an access easement. Appellant exhibit no. 6. After conducting an inspection DDES determined that that blockage constituted a violation of the recorded plat. Appellant exhibit no. 7.

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[2] Department of Development and Environmental Services ("DDES") is the successor agency.

13. Even though the Geels had been advised by their neighboring property owners that their blockage of the access easement violated the conditions of the plat, the Geels continued to obstruct public access. In June 1998 Kia Geels confronted a neighborhood girl, Katrina Sasynuik (age 12) concerning the girl's bicycle use of the easement. Appellant exhibit no. 26. In August 1999, Kia Geels blocked Johann Sasynuik from using an easement along the levee of the Raging River.

14. Residents within Koba Gardens have objected to the Geels' denial of access to the easement across the Geels property. Appellant exhibit nos. 22, 23 and 24. During the summer of 1998 the Geels wrote to their neighbors that their use of the easement across the Geels' property would no longer be "tolerated.[3]" Appellant exhibit no. 21.

15. On July 1, 1999 DDES issued a violation notice. This notice cited the Geels for blockage of the public access, as well as improper removal of vegetation from along the Raging River, and for storage buildings within the shoreline setback in a sensitive area. Appellant exhibit no. 8.

16. At the time of the issuance of the July 1, 1999 violation notice, Kia Geels interfered with use and travel along the easement by DDES code enforcement officer Brenda Wood. Appellant exhibit nos. 9 and 10. An account of this incident by Ms. Geels appears at Appellant exhibit nos. 11 and 12. Investigating the incident shortly thereafter, DDES found Kia Geels' account to lack credibility. Appellant exhibit no. 10. Later, DDES Code Enforcement Supervisor Deraitus testified that in other matters she found Mrs. Geels credible.[4]

17. By letter dated April 20, 2000, DDES advised the Geels that a fence intruded into the easement and would need to be removed. Appellant exhibit no. 13.

18. By letter dated August 4, 2000 the King County Deputy Prosecuting Attorney wrote the Geels that the erection of a fence narrowed the 20 foot easement to just a few feet, that it constituted a physical encroachment on the easement in violation of its express terms and was not permitted and that the encroachment did not allow more than one person to pass through at a time. Appellant exhibit no. 14.

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[3] It is uncertain when the Geels learned that their property was encumbered by public pedestrian easement. Mrs. Geels testifies that it was not until County code enforcement involvement in the matter. The record shows, however, that a number of other Koba Gardens residents knew it and had so advised the Geels several times over the years. Property tax records of the easement, as required by RCW 84.36.210 are not in the record. RCW 84.36.210 provides additional useful guidance regarding tax exemption for public easements across private land:

> *Whenever the state, or any city, town, county or other municipal corporation has obtained a written easement for a right of way over and across any private property and the written instrument has been placed of record in the county auditor's office of the county in which the property is located, the easement rights shall be exempt from taxation. . .* and exempt from general tax foreclosure and sale for delinquent property taxes of the property over and across which the easement exists; and all property tax records the county and *tax statements relating to the servient property shall show the existence of such easement and that it is exempt from the tax*; and any notice of sale and tax deed relating to the servient property shall show that such easement exists and is expected from the sale of the servient property.

[4] When Supervisor Deraitus indicated to the County Ombudsman (Office of Citizen Complaint) that Geels lacked credibility she was referring to Geels' description of an altercation between her and Code Enforcement Officer Brenda Wood. When Deraitus later testified that she found Geels credible she was referring to Geels' chronology and description of landscape development on the subject property. Credibility that ebbs and flows, expands and contracts, must be regarded as suspect and therefore diminishes somewhat the weight of the testimony.

19. On August 23, 2000 DDES issued to the Geels a notice of civil code violation directing them to remove the easement restriction and blockage. Appellant exhibit no. 15.

20. The notices to the Geels of April 20, August 4, and August 23, 2000 went unheeded. By letter dated October 10, 2000 DDES notified the Geels that the signage and fencing interfered with public use of the easement, that an open corridor of at least 6 to 8 feet must be maintained and that the public had the right to use the full 20 foot width of the easement. Appellant exhibit no. 16.

21. On March 1, 2001, DDES issued to the Geels a Notice of King County code violation and civil penalty order ("notice and order") regarding interference with the easement and unpermitted pruning and cutting of vegetation within the stream buffer area. Appellant exhibit no. 17.

22. On each side of the Geels' driveway at its entrance fronting the cul-de-sac at SE 47th Place, there are two rock and mortar pillars or monuments, which stand within the public street right-of-way. One of the monuments is posted with the address of the Geels residence. The other monument bore a sign prior to issuance of the notice order which said "private driveway." Also, lying within the public access easement, are a landscaped garden, trees, shrubs, and a concrete driveway with curbs. Photos, Appellant's exhibit nos. 27 and 30; Testimony, Ketter.

    The notice and order directed the Geels to remove a "private drive" sign at the entrance to the dedicated public access easement, or at a minimum remove the word "private" and allowed them 29 days to do so. Sometime after the notice of violation the Geels partially chiseled and painted over the word "private" on their "private drive" sign. The DDES report states that this occurred by April 4, 2001. At the time of the hearing, the word "private" remains visible on the sign. Photo, Appellant exhibit no. 30.

    Approximately the northwestern seven feet of the 20 foot wide dedicated public access near the entrance of the driveway is landscaped. Another 11 feet of the 20 foot wide easement is improved with a concrete driveway with curbs. No portion of this area gives the appearance that it is dedicated public access. The "private drive" sign, with "private" partially effaced still gives the clear impression that the road is a private driveway. Testimony, Ketter; photographs in evidence. Even without the signage, the monuments and curbed driveway indicate no passage opportunity to the public.

23. At its northern end, approximately the southeastern 14 feet of the 20 foot wide public access easement is occupied by a large photinia hedge and fencing. Within the remaining approximately six foot wide area there are located off-set fence posts whose spacing requires that pedestrians pass at no more than one person at a time. Testimony, Ketter; photographs in evidence.

24. Photinia is a relatively rapidly growing plant. In the spring of 2002, the photinia was measured to have a height of about six feet and a width of five feet. Photinia can be expected to grow eight to 10 inches in height and width within a growing season. It can be expected to grow to a width and height of ten feet each. Testimony, Jackie Peterson. Presently, the distance between the photinia and the nearest center post is about 18 to 20 inches. Left untrimmed, the photinia could be expected to close off this space within approximately two years. Testimony, Peterson and Ketter.

25. A rope runs along the photinia and to the fence. The rope is placed about one-quarter to one-third up the main trunk of the photinia. Code Enforcement Supervisor Deraitus testified that she believed that the rope would restrain lateral growth of the photinia. However, given that its location is well below the area of growth, this rope will have no effect upon the lateral growth of the plant. Kia Geels testified that the rope was placed there for other reasons.

26. Appellant's exhibit no. 50 identifies posts (or nonstandard bollards[5]) placed across the easement by number (posts 1, 2 and 3). At its northerly end, the portion of the 20 foot wide dedicated public access that is actually open to passage has been reduced to 18 to 20 inches between post 1 (as identified on exhibit no. Appellant exhibit no. 50) and the photinia, 41 inches between posts 1 and 2 and 35 inches between post 2 and the adjacent fence. Appellant exhibit no. 50; testimony, Ketter. This information does not differ substantially from Department's exhibit no. 29, a hand drawn sketch by Code Enforcement Officer Jeri Breazeal. The arrangement of the photinia, the fence, and the posts permit no more than one person at a time to pass between lots 6 and 18.

27. Except for the approximately six foot wide opening in the fence between Lots 6 and 18, nothing about the appearance or layout of the grass, hedges, shrubs, trees, garden and monument within the 20 foot wide easement indicates that it has been dedicated to the public for ingress and egress. See photographs of record; particularly, Appellants exhibit nos. 27 and 31.

28. Within the portion of the 20 foot wide dedicated easement that is occupied by the Geels' driveway, it would be necessary for a pedestrian, or person in a wheel chair or on a bicycle to pull to the edge of the driveway, or off the driveway altogether to allow a vehicle to pass. Appellant RRAC argues that the lack of a separate area for pedestrians and non-motor vehicles means that such use of the easement is subordinated to the use of the driveway by the Geels when in fact it is the Geels who are the (uncontested) servient users of the easement.

29. For the majority of its length the full 20 foot width of the ingress and egress easement across Lot 6 is not usable by the public in fact or appearance, due to landscaping.

30. The dedicated 20 foot wide ingress and egress easement across Lot 6 connects with easements for ingress and egress across Lots 18 and 19 and across Lot 18, extending from SE 47th Place to the Raging River.

31. As provided for by its express terms and the terms of the plat dedication, the county and the public at large have been granted rights to use the 20 foot wide ingress and egress easement over Lot 6 of Koba Gardens tracts.

32. The placement of monuments, a flower bed, shrubs, hedges, trees, posts and fencing obstruct and interfere with use of the 20 foot wide easement by the county and the public at large both physically and visually. The physical obstruction of the easement has been reinforced through conduct by the Geels in confronting and challenging users of the easement, both orally and in writing. See finding nos. 13 and 14, above.

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[5] In civil engineering, a "bollard" is one of a series of posts placed so as to preclude the entry of vehicles to a particular area or route. KCRS Section 5.08 sets spacing standards for the use of bollards in King County, but allows the reviewing agency to exercise discretion. KCRS Drawing 5-013 illustrates typical bollards.

33. Applicable King County Shoreline Management Master Program policies:

Residential Development

Policy no. III.6 at page 46

Subdivisions should provide public pedestrian access to the shorelines within the development in accordance with the Public Access Element of this Master Program.

Public Access Element

Objective no. I.1.5 at page 6: Public access should be provided in new development.

Policy I.1.2. at page 6*: Public pedestrian easements should be provided in future land use authorizations*. . . . whenever shoreline features are appropriate for public use. *Shorelines of the state that include but are not limited to any of the following conditions should be considered for pedestrian easements:*

a. Where a proposed trail in the *King County Trail System* utilizes a route along the shoreline.

b. Areas of significant, historical, geological and/or biological circumstances.

c. Areas presently being legally used or historically having been legally used by the public along the shoreline for access.

d. Where public funds have been expended on or related to the water body.

Policy I.7.1. Where appropriate, utility and transportation rights of way on the shoreline should be made available for public access and use.

Policy I.7.2. Publicly owned street ends which abut the shoreline should be retained and/or reclaimed for public access.

34. In late November, 2000 Code Enforcement Supervisor Deraitus asked Don Gauthier, a Senior Engineer at DDES, to inspect the easement area to determine whether it was safe to allow the pedestrian easement to be in the same area of the driveway. She did this to double-check her earlier conclusions about the lack of a need to require a separate pathway for pedestrians. Mr. Gauthier reported back that the location of the driveway within the easement was safe for pedestrians and that there was no need for a separate path to be built for pedestrians outside the driveway.

a. Mr. Gauthier is an expert in interpreting and applying the King County Road Standards and in evaluating road safety issues. He has regularly performed that function for the Department for more than fifteen years. In addition to his visit in November, 2000, Mr. Gauthier also visited the site in early December, 2001 in preparation for this hearing.

b. In evaluating the safety of using the driveway within the pedestrian easement area, Mr. Gauthier determined that the site distances along the driveway provided sufficient visibility to allow pedestrians and vehicles to avoid one

another, that the area round the driveway provided adequate spaces for persons to step off the driveway if a vehicle was on it, that there was sufficient room for a pedestrian and easement to both be on the driveway, that the expected use for a single family home is ten vehicle trips per day, that because the driveway serves two homes an average of twenty trips per day could be expected, that the relatively short length of the driveway would limit the amount of time vehicles were on it, that such a low number of trips poses relatively little opportunity for pedestrians and vehicles to be on the driveway at the same time, and thus, that use of the driveway by pedestrians was safe.

c. Responding to a question from the Examiner during the hearing in this matter, Mr. Gauthier also examined the posts in the easement on the landward side of lot 6, at the point where the easement of question terminates. Mr. Gauthier examined whether these posts sufficiently complied with the Section 5.08 of the 1993 King County Road Standards. This section sets standards for bollards. This section does not limit acceptable bollard design to the standards stated therein, but rather, allows bollard design to be in accordance with "other design acceptable to the. . . Reviewing Agency," which in this case is the Department.

d. Mr. Gauthier concluded that the posts were of an acceptable design. He relied on his two inspections and on a diagram with measurements of the distances between the posts prepared by Code Enforcement Officer Breazeal. He concluded that the posts are acceptable bollard design because they are sufficient to discourage and prevent vehicle use of the easement while also allowing sufficient width for passage for pedestrian users and wheelchairs.

B. **Stream Buffer and Levee Road/Easement**

1. Lot 6 fronts on the Raging River. The bank of the Raging River fronting Lot 6 and the other river front lots within Koba Gardens was rip-rapped[6] by King County decades before the Koba Gardens area was platted. A county maintenance road traverses the top of the rip-rapped levee. For all periods relevant here, the levee has been maintained by King County. In the years since 1993, the levee road has become indistinguishable from the Geels lawn although it continues to be clearly demarcated as a road along the Raging River frontage of other neighboring lots in the vicinity. See photographs in evidence.

2. Along the river frontage there are three easements which traverse Lot 6. These easements are described in part as follows:

30' flood control easement from top break in dike slope . . .

From center of 30' mark flood control easement to river's edge to be dedicated to public for pedestrian easement [and]

[6] From the King County Surface Water Management Design Manual (1998) definitions: "Riprap" means a facing layer or protective mound of stones placed to prevent erosion or sloughing of a structure or embankment due to the flow of surface and storm water runoff. For illustration, see sections A, B, C and D of Appellant exhibit no. 40 or sheet 3 of Department exhibit no. 7.

15' drainage easement and building setback line [lying westerly or shoreward of the pedestrian easement].

Recorded final plat of Koba Garden Tracts, Appellant exhibit no. 1, Department exhibit no. 7.

3. The King County sensitive areas ordinance, codified as KCC 21A.24, became effective on November 27, 1990. The Raging River is a shoreline of the state pursuant to RCW 90.58 (shoreline management act) and is classified as a Class 1 stream pursuant to KCC 21A.24 (sensitive areas ordinance). KCC 21A.24.360. As a Class 1 salmonid-bearing stream, the Raging River is required to have a 100-foot wide buffer. KCC 21A.24.360.A.1. As a general rule, the alteration of the stream and stream buffer are not allowed. The term "alteration" includes cutting, pruning, topping, trimming, relocating or removing vegetation. KCC 21A.24.190.

4. Kia Geels testified that she and her husband first purchased the property, then constructed the house (which she says took about a year and a half to build) then moved in and began working in their yard the summer after they moved in.

5. Lyle and Kia Geels obtained title to Lot 6 on November 4, 1988. Appellant exhibit no. 32. Mrs. Geels testified that they purchased the property in 1986 and moved into their house in 1988. From the date of the statutory warranty deed, the Geels may not have moved in until 1990 or, they may not have taken title until the house was constructed. No one seems to remember. From photographs, however, it appears that the Geels' concrete driveway had been constructed by the summer of 1989. Appellant exhibit no. 33A.

6. Aerial photographs of the levee taken in 1985, 1989 and 1990 do not show any material change to the vegetation along the levee of the Raging River that would indicate that it had been landscaped prior to November 27, 1990.

   a. Appellant exhibit no. 38, a 1985 black and white aerial photograph, shows a discernable levee access road that appears to be bare of vegetation.

   b. In the 1989 aerial photographs, the levee road in front of the Geels' property and other Koba Garden lots appears bare. Stream bank vegetation in front of the Geels' property between the levee road and the river does not appear materially different than vegetation along the bank of adjoining properties. Appellant exhibit no. 33A.

   c. In a 1990 color photo the Geels' driveway is discernable. The levee access road appears bare of vegetation. From the green color, the bank in front of the Geels' property, between the levee road and the river appears to be vegetated in the same manner as other portions of the left bank of the Raging River. Appellant exhibit no. 37.

   d. Color photographs taken in March of 1990 show the levee road to be bare, graveled and free of vegetation, except for clumps of grass on the side of the traveled portion of the road. No significant vegetation appears on the stream bank, in front of Lot 6 or other Koba Garden lots shown in the photo. Appellant exhibit no. 33.

e. A color photograph taken in November of 1990 shows a levee road with clumps of grass and low lying vegetation along the stream bank. In 1990, the levee road and stream bank in front of Lot 6 do not appear materially different from other road and streambank portions within Koba Gardens. Appellant exhibit no. 33.

f. The 1989 and 1990 photographs do not support the testimony by Kia Geels that by 1989 they had added seven dump truck loads of topsoil and had seeded lawn within their rear yard. Nor do those photographs support her testimony that by 1989 a lawn had been planted over the levee road.

g. Thereafter, however, the Geels began *to seed with grass the gravel bed on the top of the levy that served as a road for levy maintenance and as a dedicated public walkway*. At that time the Geels also brought in several truck *loads of top soil, which they deposited both on the river side* and the landward side of their property.

7. Michael Kalvelage, who built houses within Koba Gardens and who used to regularly run along the levee road, testified that the first he recalled seeing planted lawn on the Geels' property was in July 1993. Mr. Kalvelage's testimony is corroborated by the testimony and observations of Johann Sasynuik, a neighboring riverside property owner.

8. From photographs taken in 1995 the surface of the levee road passing in front of Lot 6 appears to be covered in grass. Along the stream bank front of lot 6, vegetation does exist; but whether it has been planted and maintained or is native vegetation in a natural condition, cannot be determined. Appellant exhibit no. 33c.

9. In May 1998, the King County Water and Land Resources Division applied for and obtained a Hydraulic Project Approval (HPA) from Washington State Department of Fisheries and Wildlife for levee restoration work along the Raging River, including a portion in front of lot 6. Appellant exhibit no. 43. The approved HPA plans specify the placement of stake plant willows[7] along the river bank on lot 6. Appellant exhibit no. 43, plan sheet 2 of 3. These plantings were to be spaced apart a maximum of three feet (on center). The approved plans also directed WLRD to "[h]ydroseed all exposed soils with native grass seed mix where possible." WLRD did hydroseed on top of the levy, including disturbed areas on the River side of the Geels property. The record indicates that State Department of Fisheries and Wildlife still expect this work to be completed. Testimony, Fisher.[8] Revegetation was to occur within a year of project completion and to be maintained for three years thereafter. Appellant exhibit no. 43, HPA at 2.

Except for the northern 30 to 39 feet, revegetation of the stream bank on lot 6, as required by the 1998 HPA, had not occurred as of the date of these enforcement proceedings. Testimony, Fisher. Jon Koon, river bank restoration project manager for King County Water and Land Resources Division ("WLRD"), supervised the levee work in 1998. He testified that the willow stake plants were not put in place on Lot 6, except for the northerly segment, because WLRD did not get around to it.

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[7] The face of the plans include this directive: STAKE PLANT WILLOW 1'-2' ABOVE OHWM." OHWM means "ordinary high water mark."

[8] Some evidence (a letter from WDFW) regarding WDFW's request to complete the planting was not admitted because this review does not include actions of the state against the county.

The approved plans for the project show an area marked in cross hatch, which was the portion of the steep slope of the levy that was reconstructed. It was reconstructed by installing alternating layers of face rock and layers of willow plantings working from the bottom of the slope to the top. WLRD performed the work as called for in the cross-hatched area. The portion of reconstructed bank and planted willows extended about 30 feet (some would agrue 39 feet) onto the Geels property extending downstream from lot 7.

10. On July 1, 1999 DDES issued a violation notice to the Geels in part for removal of vegetation from along the Raging River. This notice included an order to replant vegetation and to apply for a permit. Appellant exhibit nos. 8 and 9.

11. On August 23, 2000 DDES issued a notice of civil code violation to the Geels to "cease all pruning or cutting of vegetation on the stream bank." Appellant exhibit no. 15.

12. On October 10, 2000, DDES represented to the Examiner that the alteration of vegetation on the Geels' property was from work performed by WLRD in 1998 and that as a result of that work no enforcement action was being pursued against the Geels. Department Supplemental Status Report at page 3 (October 10, 2000), Department exhibit no. 24. However, RRAC provided evidence that alteration of vegetation on the Geels' property had occurred *since* the 1998 WLRD work. Consequently, on March 1, 2001 DDES issued a notice and order, Appellant exhibit no. 17, which cited the Geels for:

> Pruning and cutting of vegetation in the required buffer of a Class 1 stream. Clearing within a sensitive area without the required permit(s) and/or approvals. . ..

In order to address this violation the Geels were directed to:

> Cease all pruning and cutting of vegetation on the stream bed; apply for and obtain a clearing/grading permit [including] . . . a sensitive areas restoration plan.

13. On April 30, 2001 the Geels obtained a short form, field-issued clearing permit for "restoration of willow plants along stream bank of Raging River." Appellant exhibit no. 20. This permit provided that:

> Natural revegetation of stream bank has occurred. No additional restoration is required at this time."

Prior to issuance of this permit, John Pederson did not confer with Elizabeth Deraitus or Jeri Breazeal in the Enforcement Section of DDES. At the time of the issuance of the clearing and grading permit, Mr. Pederson was not aware of the prior March 1, 2001 Notice and Order and did not understand that notice and order to have been jointly issued by both the Code Enforcement Section and Site Development Services Section.

14. RRAC and its members were provided no notice of the clearing and grading permit at the time of its issuance, even though the issuance of the permit by DDES addressed a condition of the notice and order which had been issued during continuance of these appeal proceedings to which RRAC is a party.

15. In June or July, 2001, John Pederson of DDES spoke with Kia Geels by phone and informed her that a portion of the stream bank would be considered existing landscaping that could be maintained, but that the portion that had been restored by the Rivers Section of the King County Department of Natural Resources could not be maintained. DDES Report, background finding No. 27, Department exhibit no. 1. RRAC and its members, parties to the proceeding which gave rise to further inspections such as Mr. Pederson's, were not provided notice that this authorization had been given.

16. On September 27, 2001, DDES issued to the Geels a compliance certificate stating in pertinent part as follows:

> The trail is clear and no vegetation on the bank has been cut.
>
> All requirements of the notice and order have been satisfied.

Department exhibit 13. *The certificate was issued even though DDES did not identify the portions of the levee worked on by WLRD until after the certificate's date of issuance.*

17. On October 18, 2001, John Pederson of DDES met at the Geels' property with Jon Koon of the Rivers Section of WLRD to clarify which portions of the levee that had been restored by the Rivers Section. John Pederson testified that the upstream (approximate) 30 feet of the Geels' property had been planted in willows by WLRD. RRAC and its members were provided no notice that this determination had been made.

18. Between the top of the bank and the river's edge, the bank on Lot 6 contains a variety of native vegetation. The upstream approximate 30 to 39 feet are planted in willows, which appears to be the same area planted by the Rivers Section in 1998. Downstream of that point are willow, lupine, red current, native blackberry, red twig dogwood, and birch. Some of these native species have been in place at least 10 years. Testimony, Peterson. Interspersed among these plants and higher up on the bank are exotic species, coreopsis, California poppy and a narcissus. Appellant exhibit no. 46; Testimony, Peterson. Outside of the area planted in willows, John Pederson also identified native species, including vine maple, red flowering current, black cottonwood and dogwood.

The identified native species are preferred species for bank stabilization and are recommended in a document published by King County Surface Water Management Division entitled "Guidelines for Bank Stabilization Projects." Appellant exhibit no. 47. These species also are contained on a Native Plant Species List (Appellant exhibit no. 41) used by the Rivers Section since 1998. Testimony, Koon.

19. The retention of native vegetation along stream banks is important for bank stability, reduction of erosion, recruitment of organic debris, and providing shade. Testimony, Glasgow and Fisher.

20. The Raging River, including the section at issue in this proceeding, provides rearing and spawning habitat for the Puget Sound Chinook salmon, a species list as threatened by the federal National Marine Fisheries Service. Testimony, Glasgow and Fisher.

21. The riparian habitat along Lot 6 has been heavily modified by County riprapping and generally provides poor habitat. Glasgow and Fisher. Photographs in evidence suggest

that substantially greater shade and habitat providing vegetation existed along this river bank before the Geels acquired the property. (See Finding no. 32, below). Native species planting, particularly willow, provides some mitigation by providing shade along the water edge and habitat for fish food sources.

22. The county grading ordinance, codified as KCC 16.82, contains the following exemption:

> Normal and routine maintenance of existing lawns and landscaping subject to the limitations on the use of pesticides in sensitive areas as set forth in KCC 21A.24. KCC 16.82.050.A.17.a. This exemption applies to lawns and landscaping that were "existing" on November 27, 1990, when the SAO became effective.

23. The sensitive areas protective regulations are established as a chapter (KCC 21A.24) of the county zoning code (KCC Title 21A). KCC 21A.06.670 (the "definitions" section of Title 21A) defines landscaping as follows:

> Landscaping: live vegetative materials required for a development. Said materials provided along the boundaries of a development site is referred to as perimeter landscaping.

Appellant RRAC seeks to apply this zoning definition (KCC 21A.06.670) to the grading code landscape maintenance exemption (KCC 16.82.050.A.17.a). DDES disputes the use of the zoning code's "landscape" definition in this way while asserting that the definition is intended for use in the application of KCC 21A.16, a chapter governing "landscaping and water use" and which applies principally to properties which abut less intensely zoned properties (e.g., commercial abutting residential), new plats, street frontages, parking areas and similar circumstances.

24. As commonly defined "landscaping" means "to adorn or improve (a section of ground) by contouring the land and planting flowers, shrubs, or trees." The American Heritage Dictionary of the English Language, at 736 (Houghton Mifflin, 1980). The online edition of this same dictionary (same publisher, 2000) makes no change in this definition. Also, "to change the natural features of (a plot of ground) so as to make it more attractive, as by adding lawns, bushes, trees, etc." Webster's New Wolrd Dictionary of the American Language, Second Concise Edition at 420 (World Publishing, 1972).

25. Randy Sandin, Supervisor, DDES site development services, testified that the levee road and rip-rapped bank on Lot 6 would be considered "landscaping" because it was altered and made part of the "landscape" of the Geels' yard. DDES based this determination upon the aerial photos of 1985 and 1990, the period of construction of the Geels' house and statements by Kia Geels. Based upon this same information, DDES has determined that the levee road and bank on the Geels' property were landscaped prior to the passage of the SAO. However, the earliest photographs presented in this proceeding showing the levee road to be planted in lawn were not taken until 1995. Appellant exhibit no. 95. The photographs taken in 1985, 1989, 1990 and 1995 show the vegetation along the river bank on Lot 6 to be indistinguishable from the vegetation along other portions of the river bank within Koba Garden which are not claimed to have been landscaped. See Appellant's exhibit nos. 37, 38 and 33.

26. Jackie Peterson, a horticulturalist, testified that she would not consider the rip-rapped bank to be "landscaping" because the plants and other features do not appear to have been placed for purposes of improving the appearance of the area. A number of the native plants appear to have been there for at least ten years. Plants not indigenous to this region appear to have been planted at the crest of the riprap bank and have self-sown down the bank, though the date of planting is uncertain.

CONCLUSIONS:

13. The arbitrary and capricious standard of review does not apply here. That is a judicial standard which a court of general jurisdiction may (or may not) apply to the county's final decision. The final county decision is entered below by this examiner. The case law authorities[9] cited by the Department all involve *court review* of administrative decisions and not internal review within an administrative agency (for example, King County). Although the Examiner exercises its functions independently from any county agency (including the Metropolitan King County Council), its powers are limited by and delegated to it by the Council. In so doing, the Council required the examiner to adopt rules of procedures, subject to the Council's approval. Examiners rule VI.B.7 provides that "the standard of proof is a preponderance of the evidence." That is appropriate considering that the examiner's review is administrative (*quasi* judicial, not general jurisdiction). We do not believe that rules applying to appellate court review of agency decisions should apply here. Examiner rule VI.B.7 will not be ignored.

    The Department argues that, due to the examiner's decision on this same issue early in the proceedings[10] that its case would somehow be prejudiced by now applying a lesser review standard. The harm done to the Department's case or anticipated by the Department as a result of reliance upon the earlier decision has not been articulated by the Department in this review record. We observe, however, that the examiner's prehearing order of January 17, 2001 at sections no. 7 specifically acknowledges that RRAC had reserved the right to continue to challenge the applicability of the arbitrary and capricious standard of review. All parties participating in these proceedings were thus provided early, fair and reasonable notice that the examiner's decision on the arbitrary and capricious standard was subject to reconsideration, depending upon the completed presentations of the respective parties.

14. Certainly the examiner has the authority to modify the Department's notice and order. KCC 20.24.080. However, the examiner is not compelled to do so. Rather, the examiner may exercise his discretion in order to effect a solution which best serves the public interest while recognizing private rights. We agree that the matter ought not to be remanded merely to allow the Department to "exercise its discretion"—something it has already done. The remand order below provides the Department guidance as to how to proceed regarding the issues decided in Appellant RRAC's favor, while at the same time providing the Department on behalf of King County an opportunity to apply its expertise and research to create detailed solutions which exceed the examiner's proper role.

15. Intervenor Geels must replace the pedestrian crushed rock improvements which they buried or otherwise obliterated. The river trail easement established as a travel route by the King County Department of Public Works for riprap river bank maintenance purposes and "dedicated to public

[9] *National Electric Contractors Association, et al v. Riveland*, 138 Wn. Sec. 9 (1999), City of Redmond v. Central Puget Sound Growth Management Hearings Board, 136 Wn. Sec. 38 (1998) and Heckler v. Chaney, 470 US 821 (1985) among others.
[10] Examiner's decision on Department's motions of June 6, 2000 and pre-hearing order of January 17, 2001.

for pedestrian easement" by the plattor, used historically—"for decades"—by pedestrians, equestrians, fishers, and others, was developed prior to platting and Intervenor Geels' acquisition of lot no. 6 of Koba Garden Tracts with crushed compacted rock surface. It is easily identified in the oldest photographs in evidence as well as those photographs taken since platting and acquisition by the Geels.

Over the last 12 to 14 years, the Geels have consistently and persistently trespassed upon that public dedicated easement for the purpose of obliterating any evidence of its existence (other than paper recorded at King County Records and Elections). Regardless of their intent, this is what they have done. Repeatedly through the past decade, neighboring property owners, some of whom are also Koba Garden Tracts owners, have repeatedly objected to this invasion and obstruction of the public pedestrian easement surfacing, principally achieved by the application of top soil, lawn, flowers and so on. In addition, Mrs. Geels has purposefully endeavored to personally stop members of the public and other residents of Koba Garden Tracts from using this public pedestrian easement. Although repeatedly advised by neighbors that they had an easement right to passage, Geels did not independently research the matter and thus now declare they had no knowledge of the easement until DDES served code enforcement action. All of this doesn't matter. What matters is that intervenor Geels must put the crushed rock surfacing back where it was, just as the King County Department of Public Works left it and the plattor dedicated it.

4. KCC 20.24 prohibits Intervenor Geels from cutting, removing or otherwise altering willows or other mitigation vegetation (if any) installed by King County. Likewise, Intervenor Geels is prohibited from cutting, otherwise altering or removing any other naturally occurring native species located within the area of willow mitigation planting. Finally, Intervenor Geels is prohibited from introducing non-native species within the willow planting area. This area is a sensitive areas mitigation site protected by KCC 21A.24 and installed pursuant to KCC 21A.24.380. No person has the right to alter that mitigation/sensitive area. The activities of the Geels within the replanted stream mitigation portion of the buffer area are not exempt from the KCC 21A.24 or KCC 16.82 as maintenance of existing lawns and landscaping. *Whenever King County Rivers Section gets around to complying with their Department of Fisheries and Wildlife HPA requirement to plant additional willows along the riprapped river bank, then that area also will fall subject to KCC 21A.24 sensitive areas protection* and will be protected from any non-native planting or cutting native species or other alteration by anyone (including Intervenor Geels). Such controls typically allow the removal of non-native invasive species. However, consultation with DDES is strongly advised in order to avoid misunderstandings which lead to further code enforcement.

The remainder of the Geels river frontage, "improved" by riprapping prior to platting and Geels purchase of the property, is not the protected sensitive area that RRAC wants it to be. Nor was the County road (later dedicated as public pedestrian easement) a protected sensitive area. Both predate the first sensitive areas ordinance. We cannot conclude that cutting or other alterations of vegetation or landform constitute a violation of KCC 20.24 sensitive areas controls when—the parties agree—the riverside has been characterized by riprap and compacted crushed rock road for decades prior to enactment of KCC 20.24. The Geels esthetic manipulation of that area once reconstructed by county bulldozers and dump trucks is not prohibited by sensitive areas regulation, except where mitigation has occurred. A riverbank riprapped with large quarry rock and topped with a maintenance road dedicated as a public pedestrian easement cannot under any standard be regarded as a regulated "sensitive area." There is no provision in KCC 21A.24 to support such an incredible proposition—except for a mitigation area such as the willow planting supervised by Mr. Koons of WLRD and required by State HPA approval.

5. The preponderance of evidence shows that indeed the sensitive areas mitigation willows cut by Geels have restored themselves. And, they complied with the (albeit inadequate) notice and order which they did not appeal. We see no need or authority to order penalties given these facts.

16. Regarding the disputed use of the easements, we reject Appellant RRAC's argument that the Department relied upon extrinsic evidence to create ambiguity. There was no need to do so. The plat is sufficiently ambiguous on its face as to require a more thorough review as to the intentions of the plattor. Nor do we agree with the Appellant that the phrase "pedestrians, ingress and egress" is unambiguous. The easements extending landward from the river to Southeast 47th Place and 332nd Avenue Southeast are ambiguous on the face of the plat. Some of this collection of easements is "for ingress/egress and utilities" without ever defining what "ingress/egress" means. Others say mysteriously only "pedestrians, ingress, egress and utilities." The apparently "boilerplate" dedication language provides little light to our understanding. The dedication declares the plattors intention to:

> . . . dedicate to the use of the public all the easements and tracts shown on this plat for all public purposes *as indicated thereon, including but not limited to parks, open space, utilities and drainage* unless such easements or tracts are specifically identified on this plat as being dedicated or conveyed to a person or entity other than the public.

Appellant exhibit no. 1; Department exhibit no. 7. Parks? Where are the parks? What was/is the plattor's intention—to dedicate easements for "all public purposes *as indicated thereon*" or to provide parks and open space? *Ingress/egress of what?* We find the language of the plat to be patently ambiguous. We simply do not know what or who is ingressing and egressing unless we look to the extrinsic evidence.

7. To comprehend the plattor's intent we look to *all* of the lines and words on the plat as well as to relevant extrinsic evidence.

a. The plattor's obvious motivation and intent was to obtain shoreline management approval. The Appellant mischaracterizes how that occurred, by saying that the County insisted upon the dedication "in return for an exemption to obtain a shoreline substantial development permit." That is incorrect as a matter of law. The shoreline management act applies to all "development" regardless of whether a *substantial development permit* is required. RCW 90.58.140(1); compared to RCW 90.58.140(2). Whereas *substantial development* requires a substantial development permit, *development* does not, even though *development*

> > shall not be undertaken on the shorelines of the state unless is it consistent with the policies of [RCW 90.58] and, after adoption or approval, as appropriate, the applicable guidelines, rules or master program.

Ibid. This is a small but necessary distinction. The plattor did not buy an exemption by providing pedestrian (or other) access to the shoreline. Rather, the plattor was compelled to comply with the shoreline management master program *in any event*. The pedestrian easements "required by the exemption letter" (a term used by the Department's counsel) would have been required regardless of whether the letter was ever written. The letter is merely a courtesy to the developer by providing him evidence for later reference should his compliance with the shoreline management act be challenged.

b. KCC 25.20.030.H provided sufficient basis to require public access from the newly platted cul-de-sac bulbs to the historic river trail/road. KCC Title 25 is based upon the King County Shoreline Management Master Program—that is, it implements the master program. KCSMP policy 6 at page 46 says that subdivisions should provide public pedestrian access to the shoreline.[11] KCMP policy 6 at page 46 in turn refers to KCSMP objective 3, policy 2 at page 6 ("public access element"):

> Within the shoreline environment pedestrian and non-motorized access should be encouraged.

c. Objective 5 of the same policy states further that public pedestrian easements "should be provided in future land use authorizations."

d. There is nothing about these policies that suggests King County then or since encourages truck, automobile, ATV or motorcycle access to a protected shoreline within a residential subdivision. The shoreline management act does not require *all* historic shoreline access to be retained. Rather it encourages continued shoreline access and places an obvious priority for pedestrian shoreline access in new land developments. We see no problem with bicycles and horses except that they are unmentioned in the law, policies, plat dedication and other evidence that applies.

e. Design aspects of the plat also support the pedestrian usage limitation of the disputed easement. No vehicle turnaround was or is provided. No parking was or is provided. If any vehicles at all are allowed to ingress/egress via these easements they are utility service vehicles and King County drainage and river maintenance vehicles—something so obvious that one need not look beyond the markings and words on the plat to determine.

f. The plattor's own words in the State Land Development registration (Department exhibit no. 34) also shows the pedestrian walkway purpose of the easements.

8. Similar to their treatment of the river bank road, Intervenor Geels has persistently and systematically obliterated any evidence of the public pedestrian/ingress/egress (easement from the cul-de-sac turnarounds to Raging River). They constructed large stone monuments indicating "private driveway" within the public right-of-way. Geels installed fences and large plantings thereby obstructing passage and planted lawn that obscures existence of the easement passage. In a word, Geels consistently and persistently thwarted the public's interest in its dominant estate. The Geels development and use of the property denies the Koba Garden Tracts homeowners and guests and members of the public their due and reasonable enjoyment of the

[11] Appellant RRAC argues that the shoreline management master program policies are not regulatory. We agree, but are not impressed. Adopted policy (Shoreline Master Program or King County Comprehensive Plan, for instance) provides remarkably useful guidance as to why planners, design review officials and other public administrators do what they do and require what they require. Formal plat design review is discretionary, involving various judgments regarding policy, land forms, access and other matters, unlike building permits which are ministerial. *But of course* the shoreline management master program policies give us guidance as to the intent of the plattor and his regulators. Moreover, the intention to provide pedestrian "walking" access is corroborated by Department exhibit no. 34, State Land Development Registration for Koba Garden Tracts (excerpt).

dominant estate—and have wholly blocked the allocation of rights of use established by the recorded plat.[12]

In the final analysis, it is unimportant whether Geels knew about the easement. If someone whacks a baseball into the neighbor's window, it makes no difference that s/he did not know where the ball would go. S/he is responsible. Perhaps "not knowing" adds some sense of moral sanctimony but it does nothing to indemnify or compensate for the damaged dominant estate.

9. Geels argue that the public has never "opened" the easement in question. We find no statute or case law that directs us to what "opening" might mean or constitute. We do observe however, from the photographs in evidence, that the walkways appeared plenty open at the time of plat dedication and at the time Geels acquired the property.

Rather, the key question is whether the dedication was *accepted*. Citing RCW 58.17.020, the court stated in *Richardson v. Cox*, 26 P.3d 970 (2001) at 976:

> Acceptance by the public is evidenced by approval of the final plat or short plat for filing with the appropriate governmental unit.

Yes, the public has accepted these dedicated public access easements and yes, the public's due and reasonable enjoyment of its easement rights have been discouraged and blocked in a variety of ways by Intervenor Geels (letter to Koba Garden residents, oral confrontation, obscuring evidence of walkway with landscaping, signage).

By dedicating the easement, the owner reserves no rights that would either be incompatible or interfere with the full public use. *Richardson* at 975.

10. The Appellants make much ado about the mixing of vehicles accessing the Geels residence and pedestrian traffic within the easement. We see no problem. Commercial parking lots having much higher volumes of vehicle usage at higher speeds than commonly seen within a residential driveway. Moreover, they routinely—almost universally—mix pedestrians and vehicles without violating any King County standards. We see no reason why use of the easement area for Geels vehicular ingress/egress and pedestrian access by members of the public and neighboring Koba Garden Tracts property owners can't be "mixed" provided that appropriate safety signage is posted[13].

11. Nor do we see any issue with location of the bollards, except that they are not removable. They are so common in situations such as this that the King County Department of Transportation has adopted design standards for them—design standards which are generally consistent with what appears on the ground within the easement of concern. They have been approved by the responsible review engineer (Gauthier) as provided by KCRS. See finding no. 36 above. The American Disabilities Act regards people in wheelchairs as pedestrians and requires that they be accommodated. Bollards can do that. Curbing, planting beds and photinia cannot. The problem

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[12] From *Richardson v. Cox*, 26 P.3d 970 (2001) at 972:
> [1-3] A property owner's dedication of land is a purposeful relinquishment of land for general and public use. The owner cannot reserve to himself any rights other than those compatible with the full exercise and enjoyment of the public uses to which the property has been devoted. RCW 58.17.020(3). On the other hand, an easement is a nonpossessory right to use in some way another's land without compensation. *City of Olympia v. Palzer*, 107 Wash.2d 225, 229, 728 P.2d 135 (1986). Regarding an easement, "'[t]he respective rights of the two parties . . . are not absolute, but must be construed to permit a due and reasonable enjoyment . . . so long as that is possible.'" *Thompson v. Smith*, 59 Wash.2d 397, 408-09, 367 P.2d 798 (1962) (quoting *City of Pasadena v. California-Michigan Land & Water Co.*, 17 Cal.2d 576, 583, 110 P.2d 983, 133 A.L.R 1186 (1941).

[13] For example, PUBLIC PEDESTRIAN SHORELINE ACCESS EASEMENT, WATCH FOR MOVING VEHICLES.

with the bollards is that they are not removable and therefore block county maintenance vehicle passage. That problem must be cured. Whether Mr. Koons of WLRD wants the bollards removed this week or last summer (when he was forced to find alternative access) is immaterial. This is an issue of fundamentally necessary maintenance access design.

12. It is highly problematic, however, when a servient interest holder wholly wipes out all visual indications that the easement is available to the dominant interest holder(s) contrary to the requirements of the plat of Koba Garden Tracts and its dedicated and recorded easements. Intervenor Geels has installed various features which give the public, including other Koba Garden Tracts residents and their guests, the distinct impression that no dominant estate exists at all! *More importantly, the Department's acceptance of these circumstances must be regarded as clear error requiring correction. Quite simply, it is unreasonable to the extreme to expect members of the public, including Koba Garden residents and their guests, to use the dedicated shoreline pedestrian access easement when they cannot see it or find it*. No wonder that people wander from it, as testified to by Ms. Geels. No one can see the boundaries!

13. The 1979 King County Road Standards (KCRS) in effect at the time of plat approval required off street walkways to be at least five feet wide (KCRS Section 4.06.B) with at least a crushed rock surface (KCRS Section 5.01.A.4 at page 19). Instead of burying the walkway with top soil and fill, trees, large and fast growing photinia, fences and driveway monuments, they must now turn their efforts toward (re)installing the walkway consistent with the King County Road Standards.[14]

So why is the easement 20 feet wide when only a five foot pathway is required? For the ingress/egress of drainage and river maintenance vehicles, an obvious intent of the road-to-river easement as discussed elsewhere in these conclusions, as well as the ingress/egress of vehicles that prepare and maintain the path itself. Obviously, planting trees, grass and photinia and installing curbs and fencing blocks county official vehicles access to their riverside maintenance road. Both Gauthier (DDES) and Koons (WLRD) testified to this.

14. When RRAC first entered this jurisdiction, it appealed the Department's inaction pursuant to KCC 23.02.070.I. When the Department acted, it issued a notice and order which Geels did not appeal. Rather they chose to comply with the rather meager requirements of the notice and order, thereby leaving virtually all of the issues raised by RRAC unresolved. Consequently, we allowed Appellant RRAC to continue its case. Now comes an examiner's decision. The Appellants ask the examiner to modify the notice and order. We will not. We seriously doubt that this office has jurisdiction or authority to modify a notice and order that was never appealed. Prudence demands that this matter be remanded to the Department to provide the Department an opportunity to serve a new notice and order upon Geels that is consistent with the requirements of the recorded plat of Koba Garden Tracts and with this decision and order.

15. As to liability, it strikes us that placing bollards and bushes in the middle of the walkway increases liability far more than leaving it alone (an option available early on but not now) or restoring it consistent with applicable KCRS (an option required by the order below). Whatever liability arises from the easement arrangement as established by Koba Garden Tracts existed prior to Geels acquisition of the property and is therefore unrelated to the objectives sought by

[14] The 1993 KCRS now in effect requires a "*minimum* four feet wide" walkway with a "soft surface." Today, such soft surfaces are created using wood chips or "crushed surfacing top course" as approved by the reviewing agency. The 1979 KCRS in effect when Koba Garden Tracts was platted did not acknowledge wood chip surfacing and required at least five feet width of crushed rock (if not paved) surface.

RRAC or the decision and order below. RCW 4.24.210 exempts owners from liability for noncommercial public recreational use of their property.[15]

16. It is not sufficient that the preponderance of evidence support the proposition that the Geels violated the controls/easements established by the plat of Koba Garden Tracts. The preponderance of evidence also must lead to the conclusion that DDES's action is clearly erroneous, that it does little or nothing toward rectifying the violation. The preponderance of evidence supports RRAC's position regarding DDES action and inaction. There is absolutely nothing that the servient estate (Geels interest) has done or that DDES has required that provides even the slightest hint to guests of Koba Garden Tracts or to new purchasers of lots in Koba Garden Tracts, that the dominant estate—a pedestrian access easement—is theirs to use. The general public also is left totally in the dark.

The actions taken by DDES, namely, directives to remove a segment of a six foot tall fence, to allow fence posts to remain within a six foot wide passage way near the fence, and to require partial removal of the word "private" from the term "private drive", do not remedy the obstructions to the dedicated 20 foot wide easement, since those measures do not alter the definite physical obstruction and appearance that the easement is part of the Geels' yard, driveway and lawn areas, and that it is not open for public passage. The actions taken by DDES with regard to the 20 foot wide easement are inconsistent with the terms of the plat dedication in that those actions confirm and validate the easement interference and obstruction engaged in by the Geels.

DECISION:

The appeal of RRAC regarding pedestrian access to and along Raging River is GRANTED in part as indicated by the order that follows.

The appeal of RRAC regarding mixed use of the easement (vehicles and pedestrians) and regarding nonvehicular use of the easements, is DENIED.

The appeal of RRAC regarding cutting, planting and other alterations of a regulated sensitive area is GRANTED in part, DENIED in part as indicated in the order below and conclusion no. 4 above.

ORDER:

The matter of Kia and Lyle Geels and subject property tax lot no. 392450060 is REMANDED to the Department of Development and Environmental Services for issuance of a notice and order which requires Kia and Lyle Geels to achieve code compliance consistent with the following:

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[15] RCW 4.24.210(1) states:

> Except as otherwise provided in subsection (3) of this section, any public or private landowners or others in lawful possession and control of any lands whether designated resource, rural, or urban, or water areas or channels and lands adjacent to such areas or channels, who allow members of the public to use them for the purposes of outdoor recreation, which term includes, but is not limited to, the cutting, gathering, and removing of firewood by private persons for their personal use without purchasing the firewood from the landowner, hunting, fishing, camping, picnicking, swimming, hiking, bicycling, skateboarding or other nonmotorized wheel-based activities, hanggliding, paragliding, the riding of horses or other animals, clam digging, pleasure driving of off-road vehicles, snowmobiles, and other vehicles, boating, nature study, winter or water sports, viewing or enjoying historical, archaeological, scenic, or scientific sites, without charging a fee of any kind therefore, shall not be liable for unintentional injuries to such users.

1. **Regarding the river walkway and maintenance road**. Put it back where it was. Put the crushed rock surface back where it was in a manner that clearly demarcates, establishes and accommodates pedestrian use by the dominant estate (the public and residents of Koba Garden Tracts) and county maintenance vehicles.

2. **Regarding the public pedestrian easement from Southeast 47th Place to Raging River**. Restore unfettered pedestrian use of the easement.

    a. Replace the signage with language that clearly indicates that the driveway improvements on the public easement are jointly used by both pedestrians and by vehicles owned by the servient estate holder (Geels). See for example, footnote no. 13 of this report and decision.

    b. Install a crushed rock or wood chip path five feet wide (consistent with King County Road Standards construction standards). Wood chip surfacing will be acceptable only if approved by the review engineer.

    c. Although the walkway need only be five feet wide, a "clear zone" without any object or planting that obscure county maintenance vehicle passage must be assured.

    d. Only if it is determined that county maintenance vehicles will not be blocked, install fencing parallel to the path in the vicinity of the photinia in such a manner as to prohibit encroachment of the photinia into the public way. As an alternative, remove the photinia adjacent to the walkway.

    e. The bollards shall be removed or replaced with removable bollards per KCRS design standard in order to allow access by county maintenance vehicles.

3. **Regarding alterations of sensitive areas**. Intervenor Geels shall be prohibited from cutting or otherwise altering any mitigation area (e.g., willow planting area) present and future, except for the removal of noxious or invasive non-native species upon DDES approval. See conclusion no. 4. No civil penalties shall be retroactively assessed pursuant to this order. See conclusion 5.

ORDERED this 12th day of August, 2002.

_____
R. S. Titus, Deputy
King County Hearing Examiner

TRANSMITTED this 12th day of August, 2002, by certified mailing to the following parties:

Jeff Eustis Attorney at Law 505 Madison St., #209 Seattle, WA 98104	Pete Ramels, Civil Deputy Office of the Prosecuting Attorney E550 KC Courthouse Seattle, WA 98104	William Hollowell Attorney at Law P.O. Box 1041 Carnation, WA 98014

TRANSMITTED this 12th day of August, 2002, to the following parties and interested persons:

Kenneth Alm
P. O. Box 131
Fall City WA 98024

Paul Carkeek
Eco-Sight
General Delivery
Preston WA 98050

Mary Jo Dugaw
P. O. Box 1257
Fall City WA 98024

Jeff Eustis
Attorney At Law
505 Madison Street #209
Seattle WA 98104

Kia Marie Geels
32859 SE 47th Place
Fall City WA 98024

Kevin Glasgow
32609 NE 24th St.
Carnation WA 98014

Worth C. Goss
P. O. Box 182
Fall City WA 98024

William Hollowell
PO Box 1041
Carnation WA 98014

Mike Kalvelage
32625 SE 48th
Fall City WA 98024

David Ketter
5130 - 325th Pl. SE
Fall City WA 98024

Carrie Sasynuik
32841 SE 47th Pl.
Fall City WA 98024

Johann Sasynuik
32841 SE 47th Place
Fall City WA 98024

Marlund A. Simchuk
4622 - 332nd Ave SE
Fall City WA 98024

Tim Barnes
King County Prosecuting Attorney
Civil Division
MS-KCC-PA-0550

Jeri Breazeal
DDES/Building Services Div
Code Enforcement Section
MS OAK-DE-0100

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

Duncan Fowler
Ombudsman
Office of Citizen Complaints
MS KCC-CC-0213

John Koon
WLRD
KSC-NR-0600

Jon Pederson
DDES/LUSD
Site Development Services
MS OAK-DE-0100

Pete Ramels
King Co Prosecuting Atty
Civil Division
MS KCC-PA-0550

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

Arlene Sanvictores
Ombudsman
Office of Citizen Complaints
MS KCC-CC-0213

Brenda Wood
DDES/BSD
Code Enforcement
OAK-DE-0100

Pursuant to Chapter 20.24, King County Code, the King County Council has directed that the Examiner make the final decision on behalf of the County regarding code enforcement appeals. The Examiner's decision shall be final and conclusive unless proceedings for review of the decision are properly commenced in Superior Court within twenty-one (21) days of issuance of the Examiner's decision. (The Land Use Petition Act defines the date on which a land use decision is issued by the Hearing Examiner as three days after a written decision is mailed.)

MINUTES OF THE DECEMBER 12 AND 13, 2001, FEBRUARY 12 AND 14, 2002, APRIL 1 AND 3, 2002, MAY 7 AND 21, 2002 PUBLIC HEARING ON DEPARTMENT OF DEVELOPMENT AND ENVIRONMENTAL SERVICES FILE NO: E9900796

R. S. Titus was the Hearing Examiner in this matter. Pete Ramels represented the Department. Jeffrey M. Eustis represented the Appellant. William Hollowell represented the Intervenor. Participants in this hearing were Elizabeth Deraitus, Paul Carkeek, Kevin Glasgow, Carrie Sasynuik, David Ketter, Mike Kalvelage, Brenda Wood, John Koon, Jeri Breazeal, John Pederson, Randy Sandin, Larry Fisher, Don Gauthier and Johann Sasynuik.

The following exhibits were offered and entered into the record for the Department:

Exhibit No. 1 Staff report to the hearing examiner
Exhibit No. 2 Copy of appeal received January 10, 2000
Exhibit No. 3 Copy of pre-hearing order dated January 17, 2001, clarifying the remaining issues
Exhibit No. 4 Copy of corrected notice of continuance dated November 16, 2001, setting revised dates
Exhibit No. 5 King County Code Sections 21A.24.50 and 16.82.050
Exhibit No. 6 Copy of a letter dated April 23, 1984 to Julian Hiraki of DDES from Leroy Gmazel and a copy of a letter dated June 28, 1985 to Leroy Gmazel from Ralph Colby of DDES
Exhibit No. 7 Copy of the recorded plat of Koba Garden Tracts
Exhibit No. 8 Letter to John Billington dated November 23, 1993 from Louis Haff of DDES regarding the easements in Koba Garden Tracts
Exhibit No. 9 Copy of the building permit application and site plan for lot 6 of Koba Garden Tracts
Exhibit No. 10 Copy of documents from previous code enforcement case E9600842
Exhibit No. 11 Copy of the permits for the bank restoration done by Water and Land Resources in 1997 and 1998
Exhibit No. 12 Letter to Mary Jo Dugaw from Elizabeth Deraitus dated April 13, 1999
Exhibit No. 13 Copies of documents relating to case E9900796 including the notice and order; computer logs redacted
Exhibit No. 14 Copy of a letter to Mr. Carkeek and Ms. Dugaw from Greg Kipp dated December 21, 1999
Exhibit No. 15 Copy of a letter from the First American Title Insurance Company to Elizabeth Deraitus dated May 25, 2000 and a response letter from DDES dated August 4, 2000
Exhibit No. 16 Copy of completed permit L01CG201
Exhibit No. 17 Copy of a picture taken of the fence on Geels' property taken by Brenda Wood
Exhibit No. 18 Copies of pictures taken by Jeri Breazeal on September 1, 2000
Exhibit No. 19 Copies of pictures taken by Jeri Breazeal on December 1, 2000
Exhibit No. 20 Copies of pictures taken by Jeri Breazeal on April 2, 2001
Exhibit No. 21 Copy of April 20, 2000 letter to the Geels from DDES
Exhibit No. 22 Copy of September 7, 2000 status report filed by DDES with the hearing examiner
Exhibit No. 23 Copy of October 10, 2000 letter to the Geels from DDES
Exhibit No. 24 Copy of October 10, 2000 Supplemental Status Report filed by DDES with the Hearing Examiner
Exhibit No. 25 Copies of pictures of the WLRD Rivers Section restoration work on the Geels property, taken by John Koon of WLRD
Exhibit No. 26 Copy of sensitive areas notice on title
Exhibit No. 27 Copy of the King County Regional Trails Plan adopted October, 1992
Exhibit No. 28 Color photographs, numbered 1 through 12, taken by Jeri Breazeal on December 11, 2001
Exhibit No. 29 Hand drawn diagram of posts and photograph of posts, by Jeri Breazeal (not dated)
Exhibit No. 30 Administrative Interpretations to Staff dated August 30, 1994
Exhibit No. 31 Code Interpretation Meeting Minutes dated July 8, 1994
Exhibit No. 32 DDES Customer Information Bulletin no. 28 dated September, 1999
Exhibit No. 33 King County Road Standards of 1993
Exhibit No. 34 Excerpt from State Land Development Registration for Koba Gardens Tracts

The following exhibits were offered and entered into the record for the Appellant:

Exhibit No. 1 Final plat of Koba Gardens Tracts
Exhibit No. 2 Not offered
Exhibit No. 3 Not offered

Exhibit No. 4 Not offered
Exhibit No. 5 Application for building and swimming pool permit
Exhibit No. 6 Letter to Lyle & Kia Geels from KC DDES Code Enforcement dated August 23, 1996
Exhibit No. 7 Letter to Lyle & Kia Geels from KC DDES Code Enforcement dated May 9, 1997
Exhibit No. 8 Not offered
Exhibit No. 9 Not offered
Exhibit No. 10 Redacted Email to Arlene Sanvictores from Elizabeth Deraitus
Exhibit No. 11 Letter to Arlene Sanzictores from Kia Geels dated July 5, 1999
Exhibit No. 12 Letter to Elizabeth Deraitus from Kia & Lyle Geels dated March 25, 2000
Exhibit No. 13 Letter to Kia Geels from Elizabeth Deraitus dated April 20, 2000
Exhibit No. 14 Letter to Kia Geels and Timothy Krell (First American Title Insurance Co.) dated August 4, 2000
Exhibit No. 15 Two draft notice and order templates dated August 23, 2000
Exhibit No. 16 Letter to Lyle & Kia Geels from Elizabeth Deraitus dated October 10, 2000
Exhibit No. 17 Not offered
Exhibit No. 18 King County Sheriff's Incident Report dated August 5, 1999
Exhibit No. 19 Not offered
Exhibit No. 20 Not offered
Exhibit No. 21 Letter to Koba Garden Residents from Kia & Lyle Geels dated September 9, 1998
Exhibit No. 22 Letter to Koba Garden Residents from Marion Nelson dated September 13, 1998
Exhibit No. 23 Letter to Mr. & Mrs. Geels from Residents of Koba Gardens dated September 19, 1998
Exhibit No. 24 Petition signed by Koba Garden residents dated June 29, 1999
Exhibit No. 25 Statement by Carrie Sasynuik regarding July 14, 2001 encounter
Exhibit No. 26 Statement by Katrina Sasynuik regarding June 15, 1998 encounter
A. Copy of fax from Eco Sight, dated 11-26-01; redacted per Examiner
B. Hand written document, redacted per Examiner
Exhibit No. 27 Photographs of 20-foot wide dedicated public access easement, December, 2000, A-N
Exhibit No. 28 Photographs of levee easement, riparian corridor and vegetation, December, 2000, A-C
Exhibit No. 29 Photographs of levee easement, riparian corridor and vegetation, August, 2001, A-J
Exhibit No. 30 Photographs of current conditions of dedicated access easement and levee easement, numbered A-U
Exhibit No. 31 31A – 5 Photographs taken in December, 2001 by David Ketter, numbered A-E
Exhibit No. 32 Copy of application from Chicago Title Insurance Company, dated March 14, 2001
Exhibit No. 33 33A – 2 Photographs taken in 1989 by Carrie Sasynuik
33B – 3 Photographs taken in 1990 by Carrie Sasynuik
33C – 4 Photographs taken in 1995 by Carrie Sasynuik
33D – 4 Photographs taken in 1998 by Carrie Sasynuik
Exhibit No. 34 34A – 1 Photograph taken November 1990 by Carrie Sasynuik
34B – 1 Photograph taken November, 1990 by Carrie Sasynuik
34C – 1 Photograph taken November, 1990 by Carrie Sasynuik
Exhibit No. 35 Resume of Jamie Glasgow
Exhibit No. 36 Photograph taken in 1990 by Carrie Sasynuik
Exhibit No. 37 Aerial color photograph (KC-90)
Exhibit No. 38 Black and white aerial photograph dated July 10, 1985
Exhibit No. 39 Copy of King County Road Standards (KCRS), 1993, Section 508, Bollards
Exhibit No. 40 Bridge to Bridge left levee repair, 3 pages of diagrams
Exhibit No. 41 Native plant species list from DDES
Exhibit No. 42 Copy of grading code, KCC 16.82.010, pages 16-131 through 16-135
Exhibit No. 43 Hydraulic Project Approval dated May 29, 1998
Exhibit No. 44 Not admitted; Letter to Mr. Eustis and Mr. Hollowell dated March 27, 2002 from Mr. Ramels

Exhibit No. 45 Not admitted; Letter to Dave Clark from Department of Fish and Wildlife dated February 25, 2002
Exhibit No. 46 Sketch of area in front of Lot 6, by Jackie Peterson
Exhibit No. 47 Guidelines for Bank Stabilization Projects published by King County Department of Public Works, June, 1993; excerpts, pages 6-5 through 6-10
Exhibit No. 48 Photo of photinia taken by Jackie Peterson
Exhibit No. 49 Litigation for guarantee regarding Lot 5
Exhibit No. 50 Photo depicting posts and photinia, annotated per Mr. Ketter's measurement notes

The following exhibit was offered and entered into the record for the Intervenor:

Exhibit No. 1 Sprinkler system parts invoices dated June 23, 1989, June 30, 1989 and July 31, 1989