

August 19, 2009

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

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REPORT AND DECISION

SUBJECT: Department of Development and Environmental Services File No. **A08F0015**

JANET QUIMBY

Fee Appeal

Location: 11716 Southwest 220th Street, Vashon

Appellant: **Janet Quimby**
20523—111th Southwest
Vashon, Washington 98070
Telephone: (206) 463-5634

King County: Department of Development and Environmental Services
represented by **Mark Bergam**
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SUMMARY OF RECOMMENDATIONS/DECISION:

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

EXAMINER PROCEEDINGS:

Hearing opened:	October 7, 2008
Hearing continued:	October 7, 2008
Open hearing converted to written record proceeding:	November 10, 2008
Hearing record closed:	December 12, 2008

Participants at the public hearing and the exhibits offered and entered are listed in the attached minutes.
A verbatim recording of the hearing is available in the office of the King County Hearing Examiner.

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

FINDINGS OF FACT:

1. This matter is the appeal of DDES Drainage Adjustment review fees associated with the drainage approval for Vashon Park District's Paradise Ridge Park covered riding arena. The District submitted commercial building permit application B08M0368 to DDES for the construction of a 24,200 square foot steel building over an existing open riding arena.
2. Pursuant to the 2005 King County Surface Water Design Manual (KCSWDM), a commercial building creating in excess of 10,000 square feet of impervious surface area is normally required to undergo full drainage review requiring physical detention facilities and a release conveyance to an acceptable outfall.¹
3. However, a provision in Appendix C of the KCSWDM allows for "Small Project Drainage Requirements," but such alternative to the standard requirements is normally limited to projects under the 10,000 square foot full drainage threshold. Accordingly, a formal DDES Drainage Adjustment (file B07M1386) was sought to allow consideration of the larger building to undergo the "small project drainage" process.
4. The formal adjustment and small project drainage review process were undertaken. Among other permit review fee hours charged to the Applicant were 35.5 hours for the drainage adjustment review, including drainage plan review and time necessary to verify the acceptability of the Best Management Practices (BMPs) design from an engineering and environmental impact standpoint. The pertinent fees charged were \$4,971.49.
5. Appellant Quimby requested an administrative waiver of such fees. In response, DDES declined to reduce the fees except to deduct \$941.85 (which for reasons not evident in the record was charged for a road variance review that did not occur). The resultant reduced fee is \$4,029.64.
6. DDES has promulgated for the convenience of permit applicants an informational publication entitled Potential Processing Fee Details. One such "detail" addressing drainage adjustments provides a range of estimated drainage adjustment fees, from \$2,623 for an "average" adjustment to \$4,264 for a "complex" adjustment. The publication expressly states that "it is recognized, however, that the actual review time expended and resultant fees depend on the services required and length of review."
7. One aspect of the proposal in this case, under the small project drainage review/drainage adjustment request, was the utilization of full dispersion of the surface water runoff onto the surrounding park property rather than the aforementioned detention and conveyance. The dispersion was onto areas to the east (the direction of natural flow) into an area of canopied forest, with some steep slope areas affected. (DDES noted that in its practice, an impervious surface area larger than the normal 10,000 square foot threshold may be considered so long as there is a sufficiently large area available for surface dispersal. The park site is 43 acres in area and thus apparently large enough.)

¹ DDES determined that the entirety of the land area to be enclosed would constitute new impervious surface. This finding, aside from not being contested in this proceeding, is not a matter under the Examiner's subject matter jurisdiction in this case.

8. In the “small project drainage review” approach, certain alternative drainage measures may be utilized.

The core and special requirements applied under Full Drainage Review are replaced with simplified small project drainage requirements that can be applied by a non-engineer. These requirements include simplified stormwater dispersion, infiltration, and *site* design techniques called flow control Best Management Practices (BMPs), which provide the necessary mitigation of flow and water quality impacts for small projects. Also included are simple measures for erosion and sediment control (ESC). This simplified form of drainage review acknowledges that drainage impacts for many small project proposals can be effectively mitigated without construction of costly flow control and water quality facilities . . . IF Small Project Drainage Review is required, THEN the proposed project must comply with the simplified small project submittal and drainage requirements detailed in *Small Project Drainage Requirements* adopted as Appendix C to this manual . . . To show how these requirements will be met, project applicants must submit drainage plans and supporting documentation as directed in Section C.1.5 (p. C-21). [Excerpts from KCSWDM, pp. 1-13 and C-5; exhibit no. 9, emphases in original]

9. The Appellant claims that the drainage adjustment review hours charged are excessive, asserting the following:
 - A. The application is straightforward.
 - B. No additional information request was made by DDES.
 - C. DDES approved the application, with nine stated findings, four of which were replications of applicant statements and two of which appear to be boilerplate summarizing the small project drainage review process, leaving only three paragraphs of original material.
 - D. The four conditions imposed appear to be standard.
 - E. The 35.5 hours charged “appear[] excessive in that none of the criteria illustrating a ‘complex’ application are present, i.e., special pond designs, offsite diversions, experimental methods, designs tailored to address downstream drainage concerns or flooding.”

In summary, the Appellant asserts that the subject drainage adjustment was not a “complex” drainage adjustment (versus an “average” one) and therefore should not have been charged such (assertedly) high fees. Lastly, the Appellant makes the general assertion that “the drainage review required for this project does not warrant the number of hours charged.”

10. In support of the claim of excessive hours, the Appellant asserts that DDES’s comparison of the project to standard commercial buildings is inappropriate; that DDES’s review calculations were minimal (the implication thus being that the review did not involve much expenditure of review time); and that no additional project research was necessary other than to prepare an approval letter containing only three paragraphs of original material as noted above.
11. The allegedly inappropriate DDES comparison of the proposed building to a standard commercial building has not been shown to have been a factor in any unreasonable charges. From the Examiner’s experience in reviewing development codes and their administration and implementation, it appears that in this regard DDES’s perspective was of the building code’s general classifications of structures, generally into residential, commercial and accessory

categories, a system in which any significant structure which is not residential in classification is “commercial.” Aside from the issue not having been shown to be of relevance, the Examiner finds no error in DDES’s interpretation of the code in this regard and would accord it due deference. [*Mall, Inc. v. City of Seattle*, 108 W.2d 369, 739 P.2d 668 (1987)]

12. The absence of other documented calculative work beyond that shown does not support a logical inference that no other valid review work was conducted.
13. The Appellant decries the charge of 22.6 hours for time spent to “review/research/write adjustment letter” by the principal DDES reviewer, asserting that such amount of time is excessive and not supported by DDES records, and further asserting that a project applicant should not be charged for “staff time spent reviewing the basic codes applicable to all permit applications within the staff member’s area of expertise.” The Appellant suggests an alternative charge of five hours as reasonable “to draft the drainage adjustment approval letter.” The suggestion, however, does not account for the review and research time cited by DDES as also being other bases for the charge of 22.6 hours cited by the Appellant. There are no facts presented into the record that support the Appellant’s charge that the DDES staff member conducted inappropriate basic education as part of his review/research which should not be charged to the subject project.
14. The Appellant also claims that “there are no notes or markings on applicant’s materials which would have indicated to the separate person subsequently performing the drainage review that extensive review had already occurred and did not need to be repeated.” There is no showing that unnecessarily repetitive work was actually done.
15. Next, the Appellant charges that DDES has engaged in a “pattern of erroneous billing,” offering as evidence of the “pattern” DDES’s now-withdrawn charge for road variance review time.
16. The Appellant also makes certain comments regarding pre-application review charges and non-adjustment pertinent drainage review charges which are inapplicable to this consideration.
17. In closing, the Appellant claims that “DDES has not produced any testimony or documents from its file to justify its claim of hours reasonably required to review the drainage.”
18. The Appellant offers her past professional experience in public agency contract administration in support of her claims that DDES’s charges are excessive and unreasonable.
19. In-depth DDES review of the dispersal drainage design, normally deferred until building permit review, was necessary in the instant case in order to properly review the required drainage adjustment, which DDES notes allowed the utilization of the small project review process for an impervious surface much larger than normally permitted. The adjustment review needed to address surface dispersion over steep slopes, with concomitant erosion potential. Also necessitated by the proposal for adjustment was review of natural constraints to assess the efficacy of Best Management Practices (BMPs) to mitigate adverse impacts.
20. A significant amount of research time was necessary in the subject review in order to “carefully tailor the written adjustment in such a [manner] as to get approval from the adjustment committee when no approval was warranted.” It is apparent from such statement that DDES strained to apply the small project drainage review to the subject development situation, and that it was able to do so only after employing a higher-than-usual review time necessitated by the unusual situation.

21. The normally conceptual-level adjustment review was therefore necessarily and unusually “front loaded with [building permit level] drainage review” (as DDES noted), which analysis was necessary for persuasive presentation to the drainage adjustment committee (a DDES in-house administrative body of professional staff) for its approval. The adjustment review was thus relatively fee-heavy, but that was because the unusual pre-permit review of the actual drainage design was necessarily included. (DDES noted at hearing that from an overall cost standpoint, the small project drainage review adjustment costs and the overall drainage review costs are not excessive. Because the drainage review time was front-loaded, there eventually was less drainage review time at building permit review. As an aside, DDES noted that the resultant successful small project drainage review precluded the need for a full drainage review approach, with its attendant requirements of more expensive detention and conveyance facilities.)
22. The drainage adjustment review in this instance was in effect more toward the “complex” end of the above-noted Potential Processing Fee Details review scale rather than merely an “average” review.

CONCLUSIONS:

1. As noted above, the Appellant offered her past professional experience in public agency contract administration in support of her claims that DDES’s charges are unreasonable. The Examiner cannot accord those professional qualifications any status of formal expertise in this case, however; as the Appellant, she is a party to the proceeding and acting in the role of an advocate, and therefore cannot be accorded the presumption of objectivity and neutrality required for expert reliance.
2. Neither can the asserted “pattern” of erroneous billing be entertained. Aside from the claimed “pattern” consisting of one instance of a now-corrected error, and thus not comprising a pattern, the Examiner’s review is limited to the charges at hand. To consider other actions or cases would be prejudicial to DDES in this proceeding.
3. The DDES hourly fee rate is established by ordinance and is not a matter under the Examiner’s jurisdiction in considering the reasonableness of fees charged. Only the time charged may be considered. [KCC 27.50.090]
4. The evidence presented into the record shows a paucity of substance demonstrating excessive charge of staff review time in this case. There is simply insufficient evidence to see a sufficiently whole cloth that substantiates the Appellant’s claims that excessive time was utilized in preparing the approval letter and that the charged review and research time was not actually undertaken in the subject project review. There are bare threads and bits and pieces here and there, but it is not for the Examiner to attempt to make whole cloth of the available pieces of the puzzle, nor to “connect the dots.” That function, which would seem to necessitate a great (and inappropriate) reliance on assumptions, inferences and interpolations for anything of persuasive “substance” to be derived in this case, is improper for an examiner to perform, as it is prejudicial to one party over another.
5. It is also not enough to raise questions, doubts or concerns in an appeal, however meritorious they may seem on their face. Stated doubts, questions and concerns do not comprise facts. Nor is it enough to raise a challenge to DDES to justify its fees. The burden of proof in these fee appeals is not on DDES to prove that its charges are reasonable; rather, the burden of proof lies

on the Appellant to prove that the charges are not reasonable or not in keeping with the requirements of Title 27 KCC, the fee title. [KCC 27.50.080] By arguing that “DDES has not produced any testimony or documents to justify its claim of hours,” the Appellant attempts to shift the burden of proof to DDES. This is legally improper and is not accepted. Instead, it is incumbent on an appellant to support his or her appeal with a presentation of evidence from which substantial facts can be found. That has not been done in this case to any level of persuasion of unreasonableness.

6. The subject drainage adjustment review involved the proposed utilization of an alternative form of surface water drainage treatment, by the small project drainage review procedure requested to be allowed via the drainage adjustment. From the preponderance of the evidence, it appears the justification for utilizing such alternative procedure was a “tight fit” from a regulatory standpoint, and required close attention and some massage to execute and gain adjustment approval. The Appellant complains that the subject drainage adjustment does not comport with the “complex” typically-higher-fee example (which costs as shown by the example typically exceed the costs charged to this project, although not by a large amount) and should have instead fallen along the lines of an “average” drainage adjustment. But the comparison to the drainage adjustment costs fails to include the fact that the “frontloaded” drainage review was necessary in this case in order to approve the “tight fit” adjustment. Those additional drainage review charges, which were included in the fees at hand in question, do not appear from the evidence to be contemplated in the “Potential Processing Fee Detail” cited by the Appellant. The comparison is thus inapt and is not persuasive. As found above in any case, the subject drainage adjustment was in reality more “complex” than “average.”
7. In the final analysis, it has not been shown by the evidence presented that the fee charges DDES made in this case (after the “road variance” deduction) are not reasonable or not in keeping with the requirements of Title 27 KCC. There has simply not been a persuasive showing that the staff time was not utilized and charged properly. The Examiner notes that the Appellant called no witnesses to be examined, particularly the staff reviewer whose time is mostly in question in this case. The evidence of inappropriateness or unreasonable time is simply lacking to form any findings and conclusions that support the Appellant’s claim that the time charged is excessive. The appeal must therefore be denied.

DECISION:

The fee appeal is DENIED as not supported by the record presented.

ORDERED August 19, 2009.

Peter T. Donahue
King County Hearing Examiner

MINUTES OF THE OCTOBER 7, 2008, PUBLIC HEARING ON DEPARTMENT OF
DEVELOPMENT AND ENVIRONMENTAL SERVICES FILE NO. A08F0015

Peter T. Donahue was the Hearing Examiner in this matter. Participating in the hearing were Mark Bergam, representing the Department and Janet Quimby, the Appellant.

The following Exhibits were offered and entered into the record:

Exhibit No. 1	DDES staff report to the Hearing Examiner for October 7, 2008
Exhibit No. 2	Notice and Statement of Appeal
Exhibit No. 3	Fee Waiver Request Letter to Janet Quimby denying fee waiver request dated August 6, 2008 Summary of charges and payments dated July 29, 2008 to Ms. Quimby Hourly charges detail dated July 29, 2008
Exhibit No. 4	Copy of time reporting for commercial permit B08M0368
Exhibit No. 5	Copy of Types of Adjustments from 2005 KC Surface Water Design Manual
Exhibit No. 6	Copy of drainage adjustment
Exhibit No. 7	Fee appeal costs
Exhibit No. 8	Resume of Janet Quimby
Exhibit No. 9	Section C.2 from 2005 KC Surface Water Design Manual-Appendix C
Exhibit No. 10	1.2.3 10B Core Requirement #3: Flow Control from 2005 KC Surface Water Design Manual
Exhibit No. 11	Section C.4 Small Product Drainage Plan Specifications from 2005 KC Surface Water Design Manual – Appendix C
Exhibit No. 12	First sheet of SEPA Checklist
Exhibit No. 13	Public Disclosure Request to Paula Adams of DDES from Janet Quimby dated September 25, 2008
Exhibit No. 13A	Notes of Applicant's pre-application conference
Exhibit No. 14	Draft of the drainage adjustment approval letter
Exhibit No. 15	Initial closing statement from Appellant
Exhibit No. 16	Closing argument from DDES
Exhibit No. 17	Rebuttal statement from Appellant

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