October 31, 2019

OFFICE OF THE HEARING EXAMINER
KING COUNTY, WASHINGTON

King County Courthouse
516 Third Avenue Room 1200
Seattle, Washington 98104
Telephone (206) 477-0860
hearingexaminer@kingcounty.gov
www.kingcounty.gov/independent/hearing-examiner

REPORT AND DECISION

SUBJECT: Department of Local Services file no. **E0100715**

CHARLIE LEE DAILY AND GREG JONES
Code Enforcement Appeal

Location: 24808 NE Redmond-Fall City Road, Redmond

Appellant: Charles Lee Daily and Greg Jones
represented by **Lawrence Linville**
Linville Law Firm
[redacted]
Seattle, WA 98104
[redacted]

King County: Department of Local Services
represented by **LaDonna Whalen**
Department of Local Services
35030 SE Douglas Street Suite 210
Snoqualmie, WA 98065
Telephone: (206) 477-5567
Email: ladonna.whalen@kingcounty.gov

FINDINGS AND CONCLUSIONS:

Overview

1. Department of Local Services (Department) asserts that the subject property has an illegal building supplies business, several buildings constructed without the necessary

permits, and a grading violation. Charles Daily, the property's owner, and Greg Jones, the property's main tenant (collectively, Appellants), timely filed a challenge. After hearing the witnesses' testimony and observing their demeanor, studying the exhibits admitted into evidence, and considering the parties' arguments and the relevant law, we sustain the appeal in part, and deny it in part. Specifically, we find that:

- the main business qualifies as a retail nursery/garden center;
- the covered sales area must be slightly re-configured;
- the sales building needs a permit;
- the original rock sculpture building is allowed;
- the rock sculpture business is legal;
- the new studio building needs to be removed or otherwise legalized;
- the cargo containers must be removed or permits obtained;
- the greenhouses are exempt from the need for a building permit; and
- the Department has not proven a grading violation.

Business Use

2. The threshold issue is how best to categorize Appellants' operations. Our inquiry is not whether, prior to Appellants' purchase and incorporation of a large bamboo plant business, Appellants qualified as a retail nursery/garden center. The 2004 and 2007 photos, for example do not anything like a retail nursery/garden center. Exs. 18 & 19. Instead, our question is how best to categorize Appellants' operations as of our September 10 hearing.

3. In March 2016, Appellants' requested a code interpretation of whether they qualified as a retail nursery. Ex. 6. Unfortunately, the then-Director's August 2016 response analyzed whether Appellants' use could qualify as "landscape and horticultural services," and found that it did not. Ex. 7. That was not surprising, because Appellants have never provided services of any kind. While the then-Director cited one code relevant to a retail nursery/garden center, he did not cite the actual retail nursery/garden center definition or include any meaningful analysis of how Appellants' fit (or did not fit) into that category. By rule, we do not give deference to agency interpretations. HEx R. XV.F.3. Even if we did, it would not be to an interpretation that failed to address the actual question posed. Appellants are entitled to a credit for the $250 they spent to obtain an answer to a question they did not ask.

4. In its February 2019 notice and order, the Department asserted that Appellants were operating a "construction & trade/building materials supply business…from a residential

zoned property" Ex. 3. KCC 21A.06.247 defines "construction and trade" as "establishments that provide services related to construction of buildings and infrastructure, and other improvements to property. Such establishments include, SIC Major group no.'s 15-17, and SIC Industry group no. 078 (Landscape and Horticultural Services)." Again, there was no evidence that Appellants have provided any services. (In addition, the property is zoned Rural Area, which is in its own category, different from residential zoning. *See, e.g.*, table headings on KCC 21A.08.030.A.)

5. In its prehearing submittals, the Department dropped the construction and trade piece and went solely with "building materials and hardware store," which KCC 21A.06.145 defines as:

> an establishment engaged in selling lumber and other building materials, paint and glass; including, but not limited to uses located in SIC Major Group No. 52-Building Materials, Hardware, Garden Supply, and Mobile Home Dealers, but excluding retail nursery, garden center and farm supply stores and mobile home dealers.

6. Conversely, Appellants assert that they fall under:

> **21A.06.10105 Retail nursery, garden center….** Retail nursery, garden center… an establishment primarily engaged in retailing to the general public:
>
> > A. Trees, shrubs, other plants, seeds, bulbs, mulches, soil conditioners, fertilizers, pesticides, garden tools, landscaping materials and other garden supplies.[1]

7. Our question is not whether Appellants' operations fit precisely into one subcategory or another, but which is the nearest fit. The Department asserts that Appellants' operation is closest to:

> **SIC 5211 Lumber and Other Building Materials Dealers**
>
> Establishments engaged in selling primarily lumber, or lumber and a general line of building materials, to the general public. While these establishments may sell primarily to construction contractors, they are known as retail in the trade. The lumber which they sell may include rough and dressed lumber, flooring, molding, doors, sashes, frames, and other millwork. The building materials may include roofing, siding, shingles, wallboard, paint, brick, tile, cement, sand, gravel, and other building materials and supplies. Hardware is often an important line sold by retail lumber and building materials dealers. Establishments which do not sell to the general public and those which are known in the trade as wholesale are classified in Wholesale Trade, Industry Group 503.

[1] The third item in the KCC 21A.06.10105 triad, "farm supply store," is not relevant to our analysis.

- Brick and tile dealers-retail
- Building materials dealers-retail
- Buildings, prefabricated-retail
- Cabinets, kitchen: to be installed-retail
- Concrete and cinder block dealers-retail
- Doors-retail
- Fencing dealers-retail
- Flooring, wood-retail
- Garage doors-retail
- Insulation material, building-retail
- Lime and plaster dealers-retail
- Lumber and building materials dealers-retail
- Lumber and planing mill product dealers-retail
- Millwork and lumber dealers-retail
- Paneling-retail
- Roofing material dealers-retail
- Sand and gravel dealers-retail
- Storm windows and sash, wood or metal-retail
- Structural clay products-retail
- Wallboard (composition) dealers-retail.

8. SIC 5211 is a not a good fit for Appellants' operations. We originally thought, as we walked the site and looked at photos, that there was some manufactured pavers, perhaps akin to "concrete and cinder block," but Appellants explained how those are a natural, blue-stone product. Ex. 21 at 002. Appellants do sell some gravel for garden walkways, but not in bulk, and they do not sell sand. Conversely, Appellants sell many of the items on the KCC 21A.06.10105 retail nursery/garden center list, including significant bamboo sales.

9. The Department's helpful Exhibit 8 maps out how Appellants have approximately 88,003 square feet devoted to stone products, compared to 62,315 square feet devoted to plants, an approximately 40% difference. The Department is correct that the "stone and water feature portion of the business is primary" and not accessory (i.e., subordinate and incidental to the primary use). Ex. 1 at 002. However, that is not dispositive. A retail nursery/garden center allows the sale of "landscaping materials" as part of the *primary* use, not as something accessory to a primary use.

10. Our decision thus boils down to whether Appellants' stone product, set in a context of bamboo, greenhouses, and other garden-related items:

- qualifies as a "landscaping material," explicitly allowed by KCC 21A.06.10105, or is more akin to

- "building materials" like "roofing, siding, shingles, wallboard, paint, brick, tile, cement, sand, gravel, and other building materials and supplies" under SIC 5211.

11. Appellants' mantra that "if it goes in the yard, we sell it" seems appropriate. While some customers may choose to employ slate inside, the only sale item definitely inconsistent with retail nursery/garden use is veneer. The veneer gives us pause, but need not be fatal. We will provide Appellants with some time to sell off or get rid of their veneer, and then refrain from stocking such building materials in the future.

12. The Department was not wrong to bring the complaint. We would not categorize the use depicted by the 2004 and 2007 photos as a retail nursery/garden center. Exs. 18 & 19. And Appellants agreed that in the past they sold masonry products, which they stopped doing after a Department employee told them they could not sell concrete-like materials. And even today it is no slam dunk. However, we do not look at the stone products in a vacuum, but rather in the context of Appellants' current overall use. By the Department's calculations Appellants' square footage devoted to plant sales is 70% as much as that devoted to rock, a not insignificant amount.[2] Appellants' current operations fit most comfortably into the retail nursery/garden center category. We overturn violation #1.

Covered Sales Area

13. Being a retail nursery/garden center does not get Appellants' out the woods entirely. They still must meet KCC 21A.08.070.B.1.a's limitation that:

> covered sales areas shall not exceed a total area of two thousand square feet…. Greenhouses used for the display of merchandise other than plants shall be considered part of the covered sales area. Uncovered outdoor areas used to grow or display trees, shrubs, or other plants are not considered part of the covered sales area;

14. There is no question that the main building's sales area is a little under 2,000 square feet. The issue is the outside covered walkways. Ex. 23 at 125. Appellants' theory seems to be that if only part of a covered walkway area has sale items under the roof, the remaining open aisle should not count against the square footage limitation. That is too cute by a half. If a stretch of walkway has sales items under the awning, that whole stretch counts against the limitations. Ex. 9 at 009, Ex. 23 at 125. The limit should not be difficult for Appellants to meet, but they will need to move sales products out from under the awnings to come into compliance.

Sales Building Itself

15. While the sales building (what the Department refers to as the "pre-manufactured retail space and attached awnings") can be tweaked to meet the above *zoning* requirements, the building itself must be legal. The Department's burden is showing, by a preponderance of the evidence, that the building was built (and added to) without the necessary permits.

[2] The calculation stems from Exhibit 8, dividing the approximately 62,315 ft.[2] devoted to plants by the 88,003 ft.[2] devoted to stone.

16. County electronic permit records only exist back to 1970. The nonexistence of permit history on something constructed before 1970 is not sufficient evidence, standing alone, that a building was built without the requisite permits. Thus we—and the Department—have typically treated pre-1970s buildings as functionally "grandfathered."

17. However, after about 1970, there has been a durable electronic record system. Occasionally, a *piece* of a permit file goes missing, prompting a legitimate dispute over whether, for example, the site map or architectural plans on file is actually the final version the inspector approved. In such scenarios, we have a building permit application number and a mostly complete file, and the question is whether some crucial document from that file went AWOL.

18. Instead, today's question is whether, where there is no record of *any* building permit application—or of the Public Health water/septic-related application that would have been required as a prerequisite to applying for a building permit—for a 2004 construction, the Department has met its burden of proving that, more probably than not, the building is unpermitted. For the subject property there are records of permit applications in 1977, 1987, 1998, 2010, 2015, 2018, but none of these relate to either the initial, *circa* 2004, retail building construction for its *circa* 2006 expansion. Ex. 1 at 003; Ex. 9 at 006–07.

19. Appellants' evidence that the past tenants obtained a building permit is limited to (a) a notation on a hand-drawn site plan that the sales area was "permitted" and (b) the 'Department 'not initially enforcing against that building. That gets us nowhere close to rebutting the Department's case. The idea that the prior tenant applied in the 2000s, first to Public Health and later to the Department, for the initial construction and later expansion, and yet all records of permit activity vanished into thin air, sounds Bermuda-Triangle-y. Even the Bermuda Triangle legend does not capture the implausibility of the argument, because while there might be a legitimate mystery of what happened to a plane or ship, there is still a record that a ship or plane was constructed or sold or flagged or at least existed at some point.

20. What makes the past tenant's lack of a permit(s) extra clear here is that the current owner, Mr. Daily owned the property at the time the past tenants were constructing and adding to the sales building. In order to even apply for a permit, those tenants would have needed to submit a certificate of applicant status or some similar document showing that they had Mr. Daily's written permission to develop Mr. Daily's property. And Mr. Daily was candid that he never signed any certificate of applicant status or similar document supporting a past tenant's application.

21. The Department has proven that the sales building was constructed (and added to) without the necessary permits. Appellants will need to obtain a building permit for the covered sales area and awning, in addition to meeting the 2,000 square feet size limitations discussed above.

22. The one adjustment we will make vis-à-vis the sales building is that in 2015, Appellants spent $2,462 for a pre-application meeting to cover, in Appellants' words, commercial

coaches, sales building, a possible condition use permit for the sales area, greenhouses, grading, and critical areas. Ex. 61. The meeting was not entirely geared to the sales building/area, but it was a main thrust. One would reasonably expect that the Department would have used those funds partly to do its homework and discover that the sales building/area being discussed had never been permitted. So some portion of Appellants' expenditure was wasted. Appellants are entitled to a $1,500 credit for future permitting work.

Cargo Containers

23. The Department asserts that the cargo containers on-site require a building permit. Appellants dispute that cargo containers qualify as a building or structure and thus that they need Public Health and Department approval. The Examiners' Office has been consistent for decades and across examiners that, if cargo containers or other nonexempt buildings or structures remain standing for more than a set number of days, there is no exception to the permit requirement.[3]

24. Cargo containers are not on the list of building permit exceptions, KCC 16.02.240. The code defines a structure as "anything permanently constructed," while a building is "any structure having a roof." KCC 21A.06.125; 1255A. And the code pegs a "use"—defined as the purpose for which a structure is built—as "established" when it "has been in continuous operation for more than sixty days." KCC 21.06.1345, .1347. So permanent means something in place for more than 60 days. The cargo containers have been in place for years, not days.

25. There is no competing code section here that could lead to a different result. The RCW does not provide a different answer here, and while the International Building Code (IBC) is slightly more lenient on the *duration* of the "temporary" construction—pegging it at 180 days, not 60 days—the IBC applies the same framework. Structures and buildings in place for longer than 180 days must comply with the normal building code requirements. ICB (2015 ed.) at §§ 108, 3103. Appellants either need to remove the cargo containers or obtain building permits for them.

Rock Sculpture Studio

26. The Department asserts that the original rock sculpture studio building at the back of the property was constructed without a permit, between 2002 and 2007, and in the protected buffer to Patterson Creek. Ex. 9 at 010–11. We do not find the somewhat blurry, tree-canopied 2002 aerials dispositive on this point. Rather, we found Mr. Daily credible that there was a building in that spot that predated his purchase of the property. The existing structure certainly appeared to us to be weathered, ancient, and not of the modern era.

27. However, in about 2017 Appellants added a new structure adjacent to the pre-existing one, Exhibit 9 at 012, a contrast most visible in Exhibit 9 at 010. And that new structure is within the Patterson Creek buffer, meaning it may not be permit-able at all. Ex. 12 at

[3] *See, e.g.,* https://kingcounty.gov/~/media/independent/hearing-examiner/documents/case-digest/appeals/code-enforcement/2005/E0401101_Dale_Payton.ashx?la=en.

002, 006. Even if it theoretically was permit-able, the cost of obtaining a critical areas alteration would swamp the value the structure could hope to add to the property. It is Appellants' choice, but we wager that they will fare better by removing addition instead of trying to permit it.

28. That leaves the question of whether using the pre-existing building to carve stone statutes is allowed as an accessory use to the retail nursery/garden center. Two codes are relevant.

29. First, KCC 21A.06.013 defines accessory use as "a use, structure or activity":

> A. Customarily associated with a principal use;
>
> B. Located on the same site as the principal use; and
>
> C. Subordinate and incidental to the principal use.

The stone carving business meets B. & C., but not A. We have been to many, many nurseries/garden centers, but we cannot recall a single one with an on-site stone carver.

30. However, that shortcoming is not fatal here because, "A general statutory provision normally yields to a more specific statutory provision." *Western Plaza, LLC v. Tison*, 184 Wn.2d 702, 712, 364 P.3d 76 (2015). And the code specifically allows, as part of retail nurseries/garden centers operations, "locally made arts and crafts." KCC 21A.08.070.B.1.c. It is hard to envision more locally-crafted art than stone carved on the property itself. That use may continue, even if has to be scaled back into the historic building.

<u>Greenhouses</u>

31. Appellants' three greenhouses have been in place for years—and thus are not "temporary" as the KCC and IBC employ "temporary." However, there are two potential exceptions to the building permit requirement for those greenhouses.

32. The first relates to "temporary growing structures," meaning "a structure that has the sides and roof covered with polyethylene, polyvinyl, or similar flexible synthetic material and is used to provide plants with either frost protection or increased heat retention." RCW 19.27.015(6). As discussed above in connection with cargo containers, "temporary" focuses on the *duration* a building or other structure remains standing, not to some essential nature, essence or intent.

33. So, for example, the generally applicable state rule relating to temporary structures is that

> The building official is authorized to issue a permit for temporary structures and temporary uses. Such permits shall be limited as to time of service, but shall not be permitted for more than 180 days. The building official is authorized to grant extensions for demonstrated cause. EXCEPTION: The building official may authorize unheated tents and

> yurts under 500 square feet accommodating an R-1 Occupancy for recreational use as a temporary structure and allow them to be used indefinitely.

WAC 51-50-0108. The first three sentences are in keeping with how we interpret the KCC and IBC, as discussed above in relation to cargo containers.

34. The exception sentence, however, is different—certain "temporary structures" may continue indefinitely. Thus, the state is not afraid to use "temporary" in a non-standard way. The state could have allowed tents/yurts to remain indefinitely by saying certain yurts are allowed to be used indefinitely—i.e., *not* term-limited—without doing harm to the normal code meaning of "temporary." Instead, the state elected to stick with "temporary structures," even though the dividing line between "temporary" and "permanent" is typically whether a structure remains continually standing beyond some temporal threshold (i.e., 60 days, 180 days, etc.).

35. WAC 51-50-0108's tent/yurt exception is not directly applicable here. However, RCW 19.27.065 reads:

> The provisions of this chapter do not apply to temporary growing structures used solely for the commercial production of horticultural plants including ornamental plants, flowers, vegetables, and fruits. A temporary growing structure is not considered a building for purposes of this chapter.

36. That statute does not say that structures used solely for commercially producing horticultural plants do not need a permit so long as they are term-limited. Instead, certain structures are simply "not considered a building." In other contexts we uniformly reject arguments like those Appellants—and countless other appellants—make in connection with other structures/buildings not built to stand the rigors of time or with permanence in mind, but that nonetheless remains standing beyond a limited duration. However, that is exactly how we interpret the state's intent here. For a certain class of structures (temporary growing structures) used for a particular purpose (solely for commercially producing horticultural plants) the structures are simply not considered buildings, despite the fact that they have a roof and remain standing for more than 180 straight days.

37. Thus, our inquiry into "temporary" in the context of growing structures is not the single, usually-dispositive question of, "Well, how long has it remained continuously standing?" Instead, we must take a more nuanced look at the structure's essential nature, essence, or character. That last sentence is strange to write. Our reaction to the state's use of "temporary" mirrors Inigo Montoya's response to Vizzini's continual use of "inconceivable" in *The Princess Bride*: "You keep using that word. I do not think it means what you think it means." But the state gets to choose how it wants to employ "temporary" in what it writes.

38. Applying that understanding of "temporary growing structure," we compare today's case with our only other case analyzing RCW 19.27.065, our 2015 *Forman* decision.[4] (We circulated the greenhouse exhibit from *Forman* to the parties prior to closing our record. Ex. 25). The Forman constructions were "substantial erections of…sturdy construction," with thick posts, deep beams, and mechanical equipment. There was nothing "temporary" about them, in the sense the state uses that term.

39. In contrast, Appellants' covered growing areas are basically ribs of narrow gauge metal with a membrane stretched across. Ex. 23 at 038, 042. While admittedly we are back in Justice Potter Stewart's, "I know it when I see it" territory, *Jacobellis v. Ohio*, 378 U.S. 184, 197 (1964) (Stewart, J., concurring), the construction in *Forman* were buildings requiring permits. In contrast, here each of the three covered areas Appellants use for growing their plants is a "temporary growing structure" and thus "not considered a building" under state law. They are exempt from the need for building permits, regardless of how long they have remained (or will remain) standing.

40. The Department is right to argue that the presence of employees in a greenhouse heightens the need for permits to ensure the structures are safe for employees. Ex. 1 at 004. However, ours is not a scenario where Appellants are trying to take an exception limited to, say, somebody's backyard greenhouse growing a few indoor tomatoes for personal use, and stretch it beyond the breaking point to avoid permitting a commercial structure. RCW 19.27.065 explicitly—and only—exempts growing structures "used solely for [ ] *commercial* production." And a commercial operation almost by definition has employees.[5] So the state has, in its infinite wisdom, already taken employee needs into account.

41. Because we find that RCW 19.27.065 exempts the greenhouses from needing permits, we do not address the applicability of KCC 16.02.240(10)'s exception for "Shade cloth structures constructed for nursery or agricultural purposes, and not including service systems."

Grading

42. Finally, the Department asserts that, over the years Appellants and past tenants have exceeded the amount of grading that, cumulatively, can be accomplished without a permit. The Department noted at our prehearing conference that there had been different grading activities occurring at different points in time, some before the current grading code regime went into place in 2005. In our prehearing order we framed the question (underscore in original), as:

> Has there been grading in excess of 100 cubic yards and/or creation of 2,000 square feet of impervious surface? In its August 20 submittal, the

[4] Https://kingcounty.gov/~/media/independent/hearing-examiner/documents/case-digest/appeals/code-enforcement/2015/E0900525_Forman_Forman_Estate_Pacific_Topsoils.ashx?la=en at ¶¶ 7–12.

[5] The public is not allowed in the greenhouses. Ex. 14 photo with chain marked "Employees Only" across the entrance. If the public were allowed in, not only would those be considered retail space and not "temporary growing structures used solely for [ ] commercial production," but they would count against the 2,000 square feet covered sales limit.

> Department shall clarify what specifically it believes was graded and when, and what the controlling legal standard was at the time that portion was graded.

43. The Department did not follow that. Thus we limit our inquiry to whether, since January 1, 2005, Appellants have graded above the permit-triggering thresholds. KCC 16.82.051.C.1 & .2. But first, a word about burden of proof.

44. The "well-established rule is that a defendant who relies on an exception to a statute…has the burden of establishing and showing that he comes within the exception." *State v. Carter*, 161 Wn. App. 532, 542 n.7, 255 P.3d 721 (2011) (quoting *United States v. Green*, 962 F.2d 938, 941 (9th Cir. 1992)). However, we have consistently carved out a modification as it relates to clearing and grading enforcement.

45. The code's default is that, unless specifically exempted, *any* grading requires a permit. KCC 16.82.050.B. The definition of "grading" is broad, meaning "any excavating, filling or land-disturbing activity, or combination thereof," with "land disturbing activity" itself defined as activity resulting "in a change in the existing soil cover, both vegetative and nonvegetative, or to the existing soil topography." KCC 16.82.020.O & Q. Thus, anyone who works any patch of ground in King County, in almost any manner, has presumptively "graded." Each person who, for example, adds some gravel to fill in a walkway's low spot would have to affirmatively demonstrate a narrowly-interpreted exemption to the requirement to obtain a permit.

46. To avoid that absurd result, we require the Department to assert and then to prove grading in excess of KCC 16.82.051.C.1 and .2's exceptions: excavation over five feet deep, fill over three feet high, adding over 2,000 square feet of new or replaced impervious surface since January 1, 2005.[6] That is why the Department here phrased the violation in terms of, "grading in excess of 100 cubic yards or creation of 2,000 sq. ft. or more of new and/or replaced impervious surface," instead of simply, "grading without a permit."

47. The Department assert—and provides a useful map showing how, as of 2002 (the closest aerial we have to 2005, when the current grading framework went into effect) Appellants had 104,608 square feet of graded impervious surface. Ex. 10 at 004. That seems correct, given that "impervious" is defined as:

> a hard surface area that either prevents or retards the entry of water into the soil mantle as under natural conditions before development or that causes water to run off the surface in greater quantities or at an increased rate of flow from the flow present under natural conditions before development.

KCC 9.04.020.Z.

[6] This discussion applies equally to KCC 16.82.051.C.3's *clearing* limit.

48. That however, is identical to the 104,608 square feet of impervious surface the Department estimates is currently on the site. Ex. 10 at 006. (Land underneath the newly constructed *buildings* is addressed below.)

49. That a swath of land was impervious at our baseline date (2005) is not a *Get Out of Jail Free* card. "Impervious" is not a binary, yes/no dichotomy. In addition to the obvious "creation of impervious surface," the definition of "new impervious surface" also includes "the addition of a more compacted surface such as the paving of existing dirt or gravel." KCC 9.04.020.KK (emphasis added). That a surface was already impervious—i.e., that it retarded water entry or increased runoff (compared to soil in its natural condition)—in 2005 does not mean that adding a *more* impervious surface in the interim does not qualify as creating "new impervious surface.

50. The Department does not allege that Appellants, for example, graveled over a dirt surface or asphalted over a gravel surface. Instead, the Department asserts that Appellants (and past tenants) have made the dirt surface more impervious since 2000. As a matter of *fact*, that is probably true—forklifts and rock stacks pounding the soil down since 2005 decreases the entry of water into the soil and/or causes water to run off in greater quantities or at an increased rate of flow as compared to 2005.

51. However, as a matter of *law* that fact is not sufficient. The pertinent reference to adding "a more compacted surface such as the paving of existing dirt or gravel" speaks to differences *in kind* and not simply *in degree*. Unlike graveling over a dirt road or paving over a gravel road, pounding down an already-impervious dirt or gravel surface is not adding a "*more* compacted surface." Instead it is adding *more of the same* compacted surface.

52. There may be a counterargument, but as noted above, we treat the first three exceptions in KCC 16.82.051.C differently than other exceptions. We do *not* apply the exceptions-defined-narrowly rule of statutory construction. *Cf. Chelan Basin Conservancy v. GBI Holding Co.*, 190 Wn.2d 249, 269–70, 413 P.3d 549 (2018) (as standard test did not "adequately account for the special circumstances" of a class of cases, Court declined to apply that test to that class of cases). We therefore resolve ambiguity in favor of a *broader* reading of the first three exceptions. The Department has not met its burden of proof as to the 104,608 square feet that was already impervious as of 2005.

53. The 104,608 square feet discussed here does not include land under the sales building/awning area, rock sculpture addition, or cargo containers. Adding a building over even a pounded dirt or gravel area is "the addition of a more compacted surface," not just adding more of the same compacted surface. So when the Appellants apply for a building permit on the sales building area, or if they decide to try to keep any cargo containers or the rock studio addition, they will need to account for the new impervious surfaces these buildings create.

DECISION:

1. We partly grant and partly deny Appellants' appeal. Specifically:

A. the main business qualifies as a retail nursery/garden center;

B. the covered sales area must be slightly re-configured to remove sales items from any stretch of the covered walkway that Appellants do not want counted against their 2,000 square feet covered sales area;

C. the sales building needs a permit;

D. the original rock sculpture building is legal;

E. the rock sculpture business is legal;

F. the 2017 studio building needs to be removed or otherwise legalized;

G. the cargo containers must be removed or permits obtained;

H. the greenhouses are exempt from the need for a building permit; and

I. the Department has not proven a grading violation.

2. Appellants are entitled to a $1,750 credit toward future permitting costs—$250 for a code interpretation request that did not address their question and $1,500 for that portion of a prescreening meeting that should have uncovered the sales building's lack of permits and discussed permitting options.

3. By January 6, 2020, Appellants shall remove the veneer and any other interior building supplies from the property.

4. For the sales building/covered area, 2017 rock sculpture studio, and cargo containers, by January 6, 2020, Appellants shall:

   A. follow the permitting directions on page 2 of the Department's February 2019 notice and order; and/or

   B. remove or demolish the structures.

5. No penalties shall be assessed against the Appellants or the subject property if the following actions are completed by the above deadlines. If not, the Department May assess penalties retroactive to today.

ORDERED October 31, 2019.

David Spohr
Hearing Examiner

NOTICE OF RIGHT TO APPEAL

King County Code 20.22.040 directs the Examiner to make the County's final decision for this type of case. This decision shall be final and conclusive unless proceedings for review of the decision are timely and properly commenced in superior court. Appeals are governed by the Land Use Petition Act, Chapter 36.70C RCW.

MINUTES OF THE SEPTEMBER 10, 2019, HEARING IN THE APPEAL OF CHARLIE LEE DAILY AND GREG JONES, FILE NO. E0100715

David Spohr was the Hearing Examiner in this matter. Participating in the hearing were Lawrence Linville, LaDonna Whalen, Greg Jones, Charles Daily, and Jeri Breazeal. A verbatim recording of the hearing is available in the Hearing Examiner's Office.

The following exhibits were offered and entered into the record:

Exhibit no. 1	Department staff report to the Hearing Examiner
Exhibit no. 2	Notice and order, issued February 15, 2019
Exhibit no. 3	Appeal, received March 5, 2019
Exhibit no. 4	Codes cited in the notice and order
Exhibit no. 5	Regulatory review committee notes, dated July 9, 2015
Exhibit no. 6	Code interpretation application, received March 17, 2016
Exhibit no. 7	Code interpretation decision, dated August 1, 2016
Exhibit no. 8	Aerial photographs of subject property with approximate measurements of land use
Exhibit no. 9	Aerial photographs of unpermitted structures
Exhibit no. 10	Aerial photographs of clearing
Exhibit no. 11	E-mail to Kathy Lambert, sent March 28, 2016
Exhibit no. 12	Diagram, critical area overlays
Exhibit no. 13	Sensitive Area Notice, dated December 16, 1998
Exhibit no. 14	Photographs of subject property, by LaDonna Whalen, dated November 15, 2018
Exhibit no. 15	Rock Mountain Products Yelp Reviews
Exhibit no. 16	Gallery, from Rock Mountain website
Exhibit no. 17	Photographs, by LaDonna Whalen, dated August 14, 2019
Exhibit no. 18	Photographs, by Officer Garnett, dated March 23, 2004
Exhibit no. 19	Photographs, by Jeri Breazeal, dated April 19, 2007
Exhibit no. 20	Photographs, by Jeri Breazeal, dated June 15, 2015
Exhibit no. 21	Photographs, by Jeri Breazeal, dated September 1, 2015
Exhibit no. 22	Pre-application no. PREA160008, received January 15, 2016
Exhibit no. 23	Binder, from Greg Jones, received August 2, 2019
Exhibit no. 24	Binder, from Greg Jones, received September 4, 2019

The following exhibits were offered and entered into the record on September 26, 2019:

Exhibit no. 25	Pacific Top Soil Hearing Examiner Report (2 Links) and Photographs from July 30, 2012
Exhibit no. 26	Rock Mountain Inc: Response to Pacific Top Soil Report
Exhibit no. 27	Department: Response to Rock Mountain Inc
Exhibit no. 28	Department: Shade Cloth Structure Guide from County of San Luis Obispo Department of Planning and Building

DS/jo

October 31, 2019

OFFICE OF THE HEARING EXAMINER
KING COUNTY, WASHINGTON
King County Courthouse
516 Third Avenue Room 1200
Seattle, Washington 98104
Telephone (206) 477-0860
hearingexaminer@kingcounty.gov
www.kingcounty.gov/independent/hearing-examiner

CERTIFICATE OF SERVICE

SUBJECT: Department of Local Services file no. **E0100715**

CHARLIE LEE DAILY AND GREG JONES
Code Enforcement Appeal

I, Jessica Oscoy, certify under penalty of perjury under the laws of the State of Washington that I transmitted the **REPORT AND DECISION** to those listed on the attached page as follows:

☒ EMAILED to all County staff listed as parties/interested persons and parties with e-mail addresses on record.

☒ placed with the United States Postal Service, with sufficient postage, as FIRST CLASS MAIL in an envelope addressed to the non-County employee parties/interested persons to addresses on record.

DATED October 31, 2019.

Jessica Oscoy
Legislative Secretary

Breazeal, Jeri
Department of Local Services

Daily, Charles Lee
Hardcopy

Deraitus, Elizabeth
Department of Local Services

Jones, Greg
Hardcopy

Linville, Lawrence
Linville Law Firm
Hardcopy

Lux, Sheryl
Department of Local Services

Whalen, LaDonna
Department of Local Services

Williams, Toya
Department of Local Services