

February 6, 2019

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

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REPORT AND DECISION

SUBJECT: Department of Local Services, Permitting Division file no. **ENFR170503**

ICARUS HOLDINGS LLC & VLADEN MILOSAVLJEVIC
Code Enforcement Appeal

Location: 16507 140th Place NE, Woodinville

Appellant: Vladen Milosavljevic
represented by **Edward Weigelt**
9222 36th Avenue SE
Everett, WA 98208
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Intervenor: **Tom Quigley**
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Woodinville, WA 98072
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King County: Department of Local Services, Permitting Division
represented by **LaDonna Whalen**
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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 in part; grant appeal in part; retain jurisdiction

EXAMINER PROCEEDINGS:

Hearing Opened: January 22, 2019
Hearing Closed: January 22, 2019

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 Hearing Examiner’s Office.

After hearing the witnesses’ testimony and observing their demeanor, studying the exhibits admitted into evidence, and considering the parties’ arguments and the relevant law, the examiner hereby makes the following findings, conclusions, and decision.

FINDINGS AND CONCLUSIONS:

Introduction

1. The Department served a Notice and Order alleging (1) construction, (2) businesses on the subject property not legal in the zone, and (3) clearing and grading without a permit and in an environmentally critical area. Ex. 2. Icarus Holdings LLC and Vladen Milosavljevic (Appellant) timely appealed. Ex. 3. Unless directed to by law—and no special directive applies to today’s case—the examiner does not grant substantial weight or otherwise accord deference to agency determinations. Exam. R. XV.F.3. For those matters or issues raised in an appeal statement to an enforcement action, the Department bears the burden of proof. KCC 20.22.080.G; Exam. R. XV.E.2. We deny the appeal as to (1), partially grant and partially deny the appeal as to (2), and partially grant and partially deny the appeal as to (3).
2. Typically, our decision closes out our involvement. Our rules, however, allow us to retain jurisdiction over a given case. Exam. R. XVI.C. We use that discretion sparingly, retaining an average of less than one case (post-decision) per year. As explained below, this is the rare scenario warranting exercising that discretion. As a result, today’s decision does not attempt to wrap things up definitively as with a normal decision. We start our discussion with the primary driver, (2), before moving on to (1) and (3).

Businesses

3. The subject property is zoned Agricultural (“Ag”), a fairly restrictive zone designed to “preserve and protect irreplaceable and limited supplies of farmland” by, among other avenues, “limiting nonagricultural uses to those compatible with farming, or requiring close proximity for the support of agriculture.” KCC 21A.04.030.A.
4. The Department produced state licensing information with numerous businesses listing the subject property as their location: Asia Farm Magic Clean; Balkan Realty; Belarde Estates; the Boutique at the Vineyard; Brierwood Realty; Chateau Ste Vladany Winery LLC; Gregory Woodwork; Fair Auto Repair; the French Bakery at the Vineyard; Reynolds Landscape Company LLC; Secret Gardens Landscaping, Inc.; Site at Nite LLC;

Three Monks Distillery; and Totti Café and Bakery LLC (The Rooster Coffee and Bakery). Exs. 7a & 7b.

5. Appellant testified that some of these were not on the site by the time he purchased the property in 2016. Others, such as the landscaper, were, but he has moved them off the property. We discuss only the ones that are arguably legal in the Ag zone: Appellant's boutique, bakery, winery, distillery, and the holdover woodworker tenant.
6. Appellant asserted that there were multiple legal non-conforming uses. Ex. 3. In general, one asserting legal nonconforming use status bears the burden of showing the use existed prior to the contrary zoning ordinance and that the use was lawful at the time. *King County, Dept. of Dev. & Envtl. Services v. King County*, 177 Wn.2d 636, 643, 305 P.3d 240, 244 (2013). KCC 21A.32.020–.085 provides the local take on such uses.
7. Although the previous owner conducted or allowed several businesses, including real estate services, landscaping, and a cafe, a use must have been lawfully established in order to later obtain legal nonconforming use status. KCC 21A.32.040; *King County*, 177 Wn.2d at 646 (using an unlawful method to establish a use prevents the use from later being considered legal). The mere passage of time does not transform an illegal use into a legal one. Moreover, even once legally established, a nonconforming use may not be changed into some other kind of nonconforming use. *Miller v. City of Bainbridge Island*, 111 Wn. App. 152, 164, 43 P.3d 1250 (2002). With one exception, Appellant has not met his burden.
8. The Department did not dispute Appellant's statement that the woodworker has leased space on the site since the late 1970s. The Department concedes that the woodworking business was at one point legal, but only as an accessory use to a trailer business formerly operating on the site. The Department's theory is that because woodworking was only legal as an accessory use, and because the trailer business has since quit the site, the woodworking business must discontinue operations.
9. It is an interesting question. The prototypical legal nonconforming use scenario occurs when a *law* changes to prohibit a formerly allowed use; the use is allowed to continue. Here, the pivotal change was a *factual* one. The trailer business was the anchor originally allowing the woodworking business to operate legally. When the trailer business left, it removed that anchor.
10. Facts on the ground can change and eliminate legal nonconforming use status. The woodworker might have discontinued or abandoned the use, but there is no evidence of this. *Cf.* KCC 21A.32.025, .045. A use may not be expanded, and it may not be intensified beyond a certain magnitude, but there is no evidence that the woodworker has done these either. *Cf. Kitsap County v. Kitsap Rifle and Revolver Club*, 184 Wn. App. 252, 268–69, 337 P.3d 328 (2014). Yet those are examples of potential actions (or, in the case of discontinuation/abandonment, *inaction*) a proprietor (or her predecessor) took (or failed to take). We have found no precedent supporting the concept that third-party action, such as another business quitting the site, forfeits legal nonconforming use status for a business that remains. The woodworker may continue his historical operations.

11. Appellant has plans related to a winery and distillery. These have not yet come to fruition, and so we have nothing to definitively rule on today. The Department agreed that *some* such uses might be legal under the current code. In addition, the zoning code is in flux, with extensive pending legislation on wineries and distilleries. And if the code changes, even that will not be definitive, as there is the prospect of a legal nonconforming use. We thus mostly punt the winery/distillery analysis.
12. The one thing we can now state with some authority on the topic is that having a Washington State Liquor and Cannabis Board (Board) license is necessary, but not sufficient. The Board authorizing something as a matter of state *licensing* law does not mean that the County has to allow it as a matter of local *zoning* law. As a recent decision interpreting the intersection of the Board and local zoning law phrased it, “the fact that an activity can be licensed under state law does not mean that the activity must be allowed under local law.” *Emerald Enterprises, LLC v. Clark County*, 2 Wn. App. 2d 794, 805, 413 P.3d 92 (2018). The Board’s powers are “distinct from the County’s zoning authority,” and a Board license is “an *additional* requirement for opening a new business.” *Id.* at 817, 806 (emphasis added). How that impacts the subject property remains to be seen.
13. The code allows agricultural product sales and agricultural support services on Ag-zoned land. KCC 21A.08.090.A. These are defined as:
- KCC 21A.06.040 Agricultural product sales: the retail sale of items resulting from the practice of agriculture, including primary horticulture products such as fruits, vegetables, grains, seed, feed and plants, primary animal products such as eggs, milk and meat, or secondary and value added products resulting from processing, sorting or packaging of primary agricultural products such as jams, cheeses, dried herbs or similar items....
- KCC 21A.06.040S Agricultural support services: any agricultural activity that is directly related to agriculture and directly dependent upon agriculture for its existence but is undertaken on lands that are not predominately in agricultural use.
14. KCC 21A.08.090.B.24 and .25 detail what specifically is allowed—and not allowed—within those categories. Retail sales of agricultural products are allowed, but such sales are limited to, for example:
- agricultural products and locally made arts and crafts;
 - at least 40% of agricultural product sales being *primary* agricultural products (such as fruit, versus secondary agricultural products like fruit pastries or fruit jams); and
 - at least 60% of sales being products grown or produced in Puget Sound counties.

KCC 21A.08.090.B.24.b.1, .4 & .5.

15. The Boutique at the Vineyard Appellant registered for and depicted in Exhibit 5, page 5, most closely matches the home furnishings store category, a use disallowed in the Ag zone. KCC 21A.08.070.A. In no sense does it meet the above criteria for agricultural product sales, nor does it qualify as an agricultural support service. It will need to move out.
16. The most contentious piece is the bakery. There was a café and bakery operating on the site, but eating and drinking places are (and were) not allowed in the Ag zone. KCC 21A.08.070.A. The former owner received a permit for that building in 2011, but for “retail agricultural products,” not for a café or bakery. Ex. 10. As discussed above, the mere passage of time did not transform that illegal use into a legal one. Therefore, unlike the woodworking operation, Appellant obtained no right to continue such operations.
17. Looking at the pictures of Appellant’s operations, what is there currently exceeds the allowed “tasting of products” as part of agricultural products sales, and looks much more like an eating or drinking establishment (SIC category 58). KCC 21A.08.090.B.24.b.6; Ex. 5 at 4, 6 & 7. Cafes, coffee shops, and bakeries are expressly listed in SIC subcategory 5812, Eating Places. Those are not allowed in the Ag zone KCC 21A.08.090.A. Appellant will need to scale back such operations, but we divine no exact proscription like, “If he changes X, Y, and Z, and meets the 40% primary and 60% of Puget Sound requirements, that would qualify as agricultural product sales with some tasting of those products.” This is one reason we are retaining jurisdiction over this case.
18. One significant question is whether to require Appellant to shut down the bakery while he attempts to reconfigure operations to meet the code (as the Department and Intervenor urge) or allow him to stay open in the interim while he attempts to come into compliance (as Appellant urges). Both approaches have some merit. Appellant has certainly pushed the envelope, and seems to have adopted a “Do first, check if legal later” approach which has created significant regulatory headaches. On the other hand, Appellant is actually developing the agricultural capacity of the property. He has already sold fruits and vegetables, meaning agricultural products sales is not a pipe dream. And an illegal bakery and café pre-dates Appellant’s ownership, meaning Appellant did not create this prohibited use out of whole cloth.
19. In the end, the tipping point for us is the testimony of Eric Beach, who handles agricultural issues for the County’s Department Natural Resources and Parks. Mr. Beach opined that Appellant had made a “good start” towards demonstrating compliance and that Appellant’s intent is “consistent” with what the code is looking for. We will allow Appellant to keep the bakery open while he attempts to transition to a legal use, provided he does not begin any new, unpermitted businesses in the interim. July 5, 2019, would represent a full year of bakery operations.

Construction

20. In May 2018, Appellant started the process to address the addition to the bakery structure that he had constructed without the necessary permits. The Department put his

application on hold in October, because the use did not appear a legal one (see above discussion of business uses).

21. On the building next door to the west, Appellant replaced three garage doors with more traditional doors, some windows, and some plywood siding. Exs. 15 at 001-01; 18A. The Department asserts that this work requires a building permit. Appellant asserts that it does not.
22. The building code starts from the broad default that anyone intending “to construct, enlarge, **alter, repair**, move [or] demolish” a building must apply for a building permit. KCC 16.02.110; IBC 105.1. Appellant argues that he made no structural modifications, and thus does not need a permit. That does not appear accurate factual assessment; rather than replacing garage doors with other garage doors, Appellant has added siding and windows where there were once only garage doors.
23. Moreover, even if we agreed with the factual categorization of the work as nonstructural, the work would still require a permit. As a legal matter, it may make some intuitive sense that the dividing line between needing a building permit or not would be whether there was a structural change. However, that is not how the pertinent code that creates exceptions to the default rule carves things up. KCC 16.02.240 does not include the word “structural” or create a related exception. The closest-sounding exception on that list is “painting, papering, tiling, carpeting, cabinets, counter tops and similar finish work.” KCC 16.02.240.7. Appellant’s work to the outside of the building, including replacing door space with windows and siding, goes beyond such finish work.
24. Presumably, the next step would be for Appellant to submit a *revised* building permit application that adds this construction to the pending application. However, that current building permit application is on hold. The Department should provide Appellant with instructions and a reasonable timeline.

Clearing and Grading

25. The final alleged violation is (3), clearing and grading without a permit and in an environmentally critical area.
26. There are three sets of activities on the site, only one of which is in contention. First, there was work under and directly adjacent to the bakery-building construction referenced above, which the Department agrees was not in a critical area buffer and is being addressed as part of above-mentioned building permit process. Second, Appellant has plowed the northwest portion to plant his fruits and vegetables; such horticultural activity explicitly does not require a permit. KCC 16.082.051.B. The third and relevant activity is what the Department asserts is clearing and grading in an orange trapezoid area, Exhibit 12, activity not addressed in the building permit application nor covered by the tilling/discing exception.
27. The code carves out few exceptions for what clearing or grading is allowed in a critical area buffer, at least without a permit. KCC 16.82.050, .051. However, there is no evidence, or at least insufficient evidence, that the orange trapezoid is in a critical area

buffer. Ex. 14. The Department has not met its burden of showing a critical areas violation. We grant this part of the appeal.

28. That does not end our analysis, because there are other thresholds above which a permit is required. The most obvious here is that the property has far more than 7,000 *cumulative* square feet of clearing, meaning that practically any additional clearing would trigger the permit requirement. KCC 16.82.051.C.2. Similarly, the property seems well above the impervious surface limits for Agriculture-zone properties.
29. The Department is correct that the current property owner is ultimately responsible for correcting code violations on the property. KCC 23.02.020.K, .130.A. So we do not start with a blank slate in 2016 (when Appellant purchased the property). This is especially true for anything occurring after January 1, 2005, when the current clearing and grading regime came into force.
30. The Department appears to have overstated the extent of the work. Looking at the Exhibit 12 aerials from 2002 and 2005, the eastern approximate half of the trapezoid already was cleared and had equipment or trailers parked on it and pounding it down. Conversely, the western half or so of the trapezoid was vegetated. This pattern continues, without much noticeable change, through 2007 and 2009. In 2012, the then-owner cleared the vegetation on the western half, leaving the entire trapezoid bare.
31. In addition to clearing, the Department asserts that trucks and equipment have pounded down the trapezoid so much as to create impervious surface. That may be true, but again, that was true for the eastern half of the trapezoid as early as the oldest evidence in our record, 2002, and it was already packed down by 2005. In sum, we sustain the violation (3), but only for the western portion of the trapezoid.
32. As to the remedy, Appellant could apply for a clearing or grading permit to legalize the situation “as is,” but there is no guarantee that would be granted. More promisingly, in its staff report, the Department helpfully suggested another alternative for compliance:

demonstrating there is no equipment storage in the cleared areas, and it is being used for horticultural purposes. KCC 16.82.051 describes horticultural activity as tilling, discing, planting, seeding, harvesting, preparing soil, rotating crops and related activity.

Ex. 1 at 3. This is because, for those areas outside a critical area or its buffer, such horticultural activity explicitly does not require a permit. KCC 16.082.051.B. If Appellant removes the trucks and then tills this area and incorporates the western portion of the trapezoid into his agricultural operations, that area will no longer be impervious surface (in fact) or deemed “cleared” (in law).

DECISION:

1. As to violation (1), we DENY the appeal. The Department shall provide a reasonable deadline for Appellant to submit a revised or supplementary application to legalize the garage door conversion project on the westerly building.

2. As to violation (2), we GRANT the appeal as to the woodworking, DENY the appeal as to the bakery in its current configuration, DENY the appeal as to all of the businesses *except* farming and winery/distillery, and reach NO DECISION as to whether or what winery or distillery operations are allowed or disallowed. By **July 5, 2019**, Appellant shall:
 - A. Ensure that no businesses *other* than the woodworking, winery, distillery, and bakery (and, of course, farming) are operating on the site.
 - B. Provide to the Department updated information on the contours of any winery/distillery he wishes to operate.
 - C. Bring the bakery into Ag-zone compliance.
3. As to violation (3), we GRANT IN PART the appeal, as it relates to the critical area (or its buffer) component and to the eastern half of the trapezoid. We DENY IN PART the appeal, as it relates to clearing and compacting the western half of the trapezoid. By **July 9, 2019**, Appellant shall either submit a grading permit application (or an amended or supplemental building permit application) addressing the western half of the trapezoid OR Appellant shall demonstrate that he has disced/plowed, etc. this area for horticultural activities.
4. We expressly retain jurisdiction. Either party is free to request a conference at any point. While we set July 9 as our deadline, if the parties find themselves as loggerheads before that, a conference would be appropriate.

ORDERED February 6, 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 JANUARY 22, 2019, HEARING IN THE APPEAL OF ICARUS HOLDINGS LLC AND VLADEN MILOSAVLJEVIC, DEPARTMENT OF LOCAL SERVICES-PERMITS FILE NO. ENFR170503

David Spohr was the Hearing Examiner in this matter. Participating in the hearing were LaDonna Whalen, Jeri Breazeal, Fereshteh Dehkordi, Ted Sullivan, Eric Beach, Tom Quigley, Edward Jr. Weigelt, and Vladen Milosavljevic.

The following exhibits were offered and entered into the record:

- | | |
|----------------|--|
| Exhibit no. 1 | Department of Local Services-Permits staff report to the Hearing Examiner |
| Exhibit no. 2 | Notice and order, issued March 2, 2018 |
| Exhibit no. 3 | Appeal, received March 22, 2018 |
| Exhibit no. 4 | Codes cited in the notice and order |
| Exhibit no. 5 | Photographs of subject property, dated July 6, 2017, February 5, 2018, July 10, 2018, and July 12, 2018 |
| Exhibit no. 6 | Aerial photographs of subject property, dated 2017 and 2013 |
| Exhibit no. 7 | <ul style="list-style-type: none"> A. Department of Revenue license information for businesses Reynolds Landscape Company LLC; Fair Auto Repair; Gregory Woodwork; Secret Gardens Landscaping Inc; Brierwood Realty B. Department of Revenue license information for businesses At the Vineyard the French Bakery; The Boutique at the Vineyard; Belarde Estates; Gregory Woodwork; Reynolds Landscane Company LLC; Balkan Realty; Brierwood Realty; Totti Café and Bakery LLC (The Rooster Coffee and Bakery); Secret Gardens Landscaping Inc; Three Monks Distillery; Asia Farm Magic Clean; Site at Nite LLC; Chatuea Ste Vladany Winery LLC; |
| Exhibit no. 8 | Already-built construction pre-screening meeting request form, received August 24, 2017 |
| Exhibit no. 9 | Application for Health Department approval of building permit, received March 27, 2018 |
| Exhibit no. 10 | Building permit no. B11M0612, dated July 11, 2011 |
| Exhibit no. 11 | Summary of qualifications of Fereshteh Dehkordi-Westerlund |
| Exhibit no. 12 | Aerial photographs, dated 2002, 2005, 2007, 2009, 2012, 2013, 2015, and 2017 |
| Exhibit no. 13 | Letter from Permitting to Vladan Milosavljevic with agriculture condition requirements, dated October 8, 2018 |
| Exhibit no. 14 | Critical areas report by Wetlands Northwest LLC, dated February 9, 2018 |
| Exhibit no. 15 | Emails between Permitting and Vladen Milosavljevic, dated March 22, 2018 through July 3, 2018 |
| Exhibit no. 16 | Letter from Thomas Quigley to DLSP with complaint, dated March 13, 2017 |
| Exhibit no. 17 | Petition to intervene from Thomas Quigley, dated April 25, 2018 |
| Exhibit no. 18 | <ul style="list-style-type: none"> A. Photograph of subject property |

- Exhibit no. 19
 - B. Photograph of subject property
- Exhibit no. 20
 - A. Photograph of subject property
 - B. Photograph of subject property
 - C. Photograph of subject property
 - D. Photograph of subject property
- Exhibit no. 21
 - A. Photograph of planting on subject property
 - B. Photograph of planting on subject property
 - C. Photograph of planting on subject property
 - D. Photograph of planting on subject property
 - E. Photograph of planting on subject property
 - F. Photograph of planting on subject property
 - G. Photograph of planting on subject property
 - H. Photograph of planting on subject property
 - I. Photograph of planting on subject property
 - J. Photograph of planting on subject property
 - K. Photograph of planting on subject property
 - L. Photograph of planting on subject property
 - M. Photograph of planting on subject property
 - N. Photograph of planting on subject property
 - O. Photograph of planting on subject property
 - P. Photograph of planting on subject property
- Exhibit no. 22
 - Icarus Farm’s production list, dated December 21, 2018
 - Emails between Agriculture, Forestry and Incentives Program and Vladen Milosavljevic, dated December 26, 2018 and January 17, 2019

DS/lđ

February 6, 2019

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CERTIFICATE OF SERVICE

SUBJECT: Department of Local Services, Permitting Division file no. **ENFR170503**

ICARUS HOLDINGS LLC & VLADEN MILOSAVLJEVIC
Code Enforcement Appeal

I, Liz Dop, 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 February 6, 2019.



Liz Dop
Legislative Secretary

Beach, Eric

Department of Natural Resources and Parks
Hardcopy

Breazeal, Jeri

Department of Local Services, Permitting Division

Dehkordi, Fereshteh

Department of Local Services, Permitting Division

Deraitus, Elizabeth

Department of Local Services, Permitting Division

Lux, Sheryl

Department of Local Services, Permitting Division

Milosavljevic, Vladen

Icarus Holdings LLC
Hardcopy

Quigley, Tom

Reynolds, James

Sullivan, Ted

Department of Natural Resources and Parks

Tanksley, Michael

Weigelt, Edward Jr.

Hardcopy

Whalen, LaDonna

Department of Local Services, Permitting Division

Williams, Toya

Department of Local Services, Permitting Division