

June 4, 2019

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

King County Courthouse
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REPORT AND DECISION

SUBJECT: Department of Local Services file no. **ENFR180953**

JEFF TRETHERWAY
Code Enforcement Appeal

Location: [REDACTED] Redmond

Appellant: **Bryan Tretheway**
[REDACTED]
Redmond, WA 98052
Telephone [REDACTED] 4
Email: [REDACTED]

King County: Department of Local Services
represented by **LaDonna Whalen**
35030 SE Douglas Street Suite 210
Snoqualmie, WA 98065
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FINDINGS AND CONCLUSIONS:

Overview

1. This case turns on whether the woodchips the Tretheways brought onto into their property last year, some of which they dispersed around their property, triggered the need to apply for a permit. The Department of Local Services (Department) asserted that it does; the Tretheways appealed. 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 DENY the appeal and set a new deadline for the Tretheways to begin the permit process to legalize or remediate the activity.

Background

2. The Tretheways' property lies entirely within the Bear Creek buffer. They have worked with Forterra, a stewardship nonprofit, to do some weed suppression and buffer remediation. Although Forterra did not offer testimony, it appears it approves of using chips for weed control along a stream buffer.¹ The Tretheways arranged for a contractor to bring chips onto their property last fall. They were not expecting the 100 cubic yards or so of chips they received. In November, someone filed a code enforcement complaint with the Department.
3. In February 2019, the Department served a notice and order, asserting that the chips required the Tretheways to apply for a permit. In March, the Tretheways appealed. We went to hearing at the end of May.

Analysis

4. 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. Ours is a true de novo hearing. 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.
5. The code's default is that—unless specifically excepted—a person shall not do any “clearing” or “grading” without first obtaining a clearing and grading permit. KCC 16.82.050.B. Outside of critical areas and their buffers, there are several broad exceptions to the permit requirement. KCC 16.82.051.C.1–3. However, for grading within an aquatic area buffer, like the subject property's, there is no exception to the permit requirement. *See* empty box in KCC 16.82.051.B at the intersection of “Grading” and “Aquatic Area and Buffer.”
6. The Tretheways assert that there was no “grading.” The definition of “grading” is broad, meaning “any excavating, filling or land-disturbing activity, or combination thereof.” KCC 16.82.020.O. We tackle “filling” and then “land-disturbing activity.”
7. “Fill” is defined as “a deposit of earth material or recycled or reprocessed waste material consisting primarily of organic or earthen materials, or any combination thereof, placed by mechanical means.” KCC 16.82.020.L.
8. At hearing (and well after the prehearing deadlines we set for submitting exhibits), the Tretheways introduced Wikipedia entries and other guidelines and opinions that except chips or add an element to the definition of “fill” to include *the purpose* for which the earthen material was placed—i.e. earthen material added in order to plug a hole or to

¹ We wrote in our prehearing order that:

The Tretheways may want to try to arrange for Mr. Ka [from Forterra] or someone else to participate in the hearing. Written commentary is typically allowed into evidence, but actual testimony (whether live or by phone on May 21) is generally accorded more weight.

This could have allowed us to ask some probing questions, under oath, and provided us with some ecological insight. That did not happen.

change elevation. We accepted the documents into evidence, but even if we gathered from those that it might be a good idea to carve out a chip exception from—or add a purpose requirement to—the definition of “fill,” we interpret the codes “as they are written, and not as we would like them to be written.” *Brown v. State*, 155 Wn.2d 254, 268, 119 P.3d 341 (2005). There are no carveouts or purpose exceptions.

9. Under our code’s existing language, the pile—placed there by approximately two dozen truck trips—fits the definition of “a deposit of earth material...placed by mechanical means.” The Tretheways dispersed that material onto other areas of their property via truck (a mechanical means) and also via wheelbarrow (a non-mechanical means), so some portion of the dispersed chips would also qualify as “fill.” Because this fill was within an aquatic area buffer, it triggers the need to submit a grading permit application. KCC 16.82.050.B; .051.B.
10. In addition, it qualifies as “land disturbing activity,” meaning 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. The pile has changed the vegetative soil cover of whatever has been buried underneath since last fall. And placing those chips to eliminate current (and control future) weeds has—by design—resulted in a change in that vegetative soil cover.²
11. The requirement for a permit application does not imply that a particular action is not beneficial or will not be approved. The question of “is X a good idea?” is not a substitute for “does X require a permit?” For example, if someone added a bathroom without a permit, solid evidence in a code enforcement hearing that the bathroom was impeccably designed and installed by master crafters to exceed the applicable standards would not eliminate the need to obtain a building permit from the Department (and given the plumbing, a Public Health permit as well) to legalize the work. The issue we decide today is limited to the Tretheways’ activity triggering the need for a grading permit application. We are in no position to offer commentary on the parameters or outcome of that permit review.

DECISION:

1. We DENY the Tretheways’ appeal.
2. The Trethaweys shall submit a complete pre-screening meeting request by **July 19, 2019**.
3. The Department may not assess penalties against the Tretheways or the subject property, provided they meet the July deadline, the other deadlines contained in the Department’s February 2019 notice and order, and any extensions to deadlines the Department

² The fill may have exceeded the hundred cubic yards that would trigger a permit even if there were no critical area buffers involved. KCC 16.82.051.C.1. And activities may qualify as “clearing”—meaning “cutting, killing, grubbing or removing of vegetation or other organic material by physical, mechanical, chemical or any other similar means”—in addition to “grading.” KCC 16.82.020.D. As those are not necessary to reach to decide this case, we do not wade into those topics.

reasonably allows. If they do not, the Department may assess penalties retroactive to today.

ORDERED June 4, 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 MAY 21, 2019, HEARING IN THE APPEAL OF JEFF TRETHEWAY, DEPARTMENT OF LOCAL SERVICES FILE NO. ENFR180953

David Spohr was the Hearing Examiner in this matter. Participating in the hearing were LaDonna Whalen, Bryan Tretheway, Lisa Tretheway, and Jeff Tretheway. 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 of Local Services staff report to the Hearing Examiner |
| Exhibit no. 2 | Notice and order, issued February 15, 2019 |
| Exhibit no. 3 | Appeal, received March 11, 2019 |
| Exhibit no. 4 | Codes cited in the notice and order |
| Exhibit no. 5 | Aerial photographs of subject property, dated 2017, annotated with note referring to location of fill |
| | A. Aerial photographs of subject property, dated 2017, further annotated as to location of fill |
| Exhibit no. 6 | Photographs of the subject property, taken by Officer Whalen on November 7, 2018, and April 23, 2019 |
| Exhibit no. 7 | I-Map and GIS maps with critical areas overlay |
| Exhibit no. 8 | Email from Tom Beavers, sent April 24, 2019 |
| Exhibit no. 9 | Email from Bryan Tretheway, sent November 27, 2018 |
| Exhibit no. 10 | Knot weed materials from King County |
| Exhibit no. 11 | Email from Bryan Tretheway, sent May 2, 2019 |
| Exhibit no. 12 | Soil materials |
| | A. KCC 16.04.174 |

- B. User Guidelines for Waste and Byproduct Materials in Pavement Construction, USDOT Federal Highway Administration
- C. Unified Soil Classification System
- D. Fill dirt, Wikipedia
- E. Mulch, Wikipedia

Exhibit no. 13

Emails

- A. Email from Jasmin Ka, sent May 9, 2019
- B. Email from Tom Hardy, sent May 10, 2019, 9:06 a.m.
- C. Email from Tom Hardy, sent May 10, 2019, 10:34 a.m.
- D. Email from Tom Hardy, sent May 20, 2019, 2:38 p.m.

DS/vsm

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CERTIFICATE OF SERVICE

SUBJECT: Department of Local Services file no. **ENFR180953**

JEFF TRETHERWAY
Code Enforcement Appeal

I, Vonetta Mangaoang, 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 June 4, 2019.

Vonetta Mangaoang

Vonetta Mangaoang
Senior Administrator

Breazeal, Jeri

Department of Local Services

Deraitus, Elizabeth

Department of Local Services

Lux, Sheryl

Department of Local Services

Tretheway, Bryan

Hardcopy

Tretheway, Lisa and Jeff

Hardcopy

Whalen, LaDonna

Department of Local Services

Williams, Toya

Department of Local Services