November 19, 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. **ENFR180998**

BRIAN AND CORA MORRISON
Code Enforcement Appeal

Location: [redacted] Redmond

Appellants: Brian and Cora Morrison
represented by **Dean Williams**
Johns Monroe Mitsunaga Kolousková
[redacted]
Bellevue, WA 98004
Telephone: [redacted]
Email: [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. Today's case involves two main issues, a barn built in a critical area buffer by a previous owner, and clearing and grading activities the Morrisons have conducted since their 2017

purchase. 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 allow the Morrisons to keep the barn, offer a detailed perspective for how to treat innocent-owner scenarios in the future, and partially address the clearing and grading violation.

Background

2. Aerial shots show the barn was built on the subject property at some point between 2002 and 2005. As a short-hand, we will refer to it as the 2004 construction. In 2017, the Morrisons purchased the subject property. They undertook various activities around the property, such as road and path work, vegetation work, and adding a retaining wall to shore up the portion of the barn's foundation that was being undermined and at risk of falling away. No one complained.

3. The Morrisons then started the process to proactively permit a planned remodel of the main house. In the course of the Department's review, the Department discovered not only the Morrison's clearing and grading, but that the barn had been built in a critical (then sensitive) areas buffer.

4. The procedural history is somewhat involved, but the bottom line is that because the barn was built without the required permits, it enjoys no "grandfathered" status. The Morrisons are amenable to obtaining a building permit to legalize the barn in its current location, but because the code does not allow it, the Department has steadfastly refused to let the Morrisons legalize it. There is also a dispute over how much of the Morrisons clearing and grading activities are exempt from permitting requirements.

The Barn

5. KCC Title 23 provides some relief for non-culpable property owners. For the Department, where

> a property owner affirmatively demonstrates that the action which resulted in the violation was taken without the owner's knowledge or consent by someone other than the owner or someone acting on the owner's behalf, that owner shall be responsible only for bringing the property into compliance *to the extent reasonably feasible* under the circumstances.

KCC 23.02.130.B (italics added). The examiner has similar marching orders. Where

> an owner of property where a violation has occurred has affirmatively demonstrated that the violation was caused by another person or entity not the agent of the property owner and without the property owner's knowledge or consent[, the examiner may waive] strict compliance with permit requirements…to avoid doing substantial injustice to a non-culpable property owner.

KCC 23.36.030.B.

6. In our April 29 conference notice, we provided a few pages of analysis on the framework applicable to non-culpable owners, before closing that notice by explaining that the waiver:

> applies to "strict" compliance, not to "all" compliance. Something like requiring the Morrisons to move and reconstruct the barn or to apply for an uncertain and expensive critical areas alteration exception seems distinctly different from something like requiring the Morrisons to do some replanting or mitigation or to obtain building permits to ensure the barn, in its current location, meets health and safety standards.

7. In light of what seemed a fairly clear description of the parameters we would apply in arriving at a solution, we were somewhat perplexed that the Department came to the hearing steadfastly asserting that we should order the Morrisons to tear down or move the barn, and unprepared with any backup plan for critical area enhancements we should order if we allowed the barn to remain.

8. What makes the need for an accommodation even more necessary here is that of the perhaps a 1,000 or so code enforcement matters we have been involved in as a third-party neutral (ombudsman or examiner) since 2006, *none* involved the code enforcement section being alerted to a property because the Department's permitting arm visited a property for which the owner proactively applied for a permit before engaging in some planned work (here, a proposed remodel to the main house).

9. This is not a scenario where, in the words of the Department's October 2018 Complaint Investigation Policy and Procedures (Procedures),

> when in the course of reviewing or inspecting an Already Built Construction (ABC) permit or application staff becomes aware of the violations, they are to be treated similar to the code enforcement investigation.

Ex. 18 at 001. No one filed a complaint. And the permit the Morrisons were trying to apply for was a proactive application to legalize a future remodel of the main house.

10. The Procedures state that one exception to the normal rule (that the Department will initiate the code enforcement action only in response to complaints), is where environmental damage, such as clearing or grading with critical area or their buffers, is involved. Ex. 18 at 001. That exception seems to fit here. So where we take the Department to task is not that it required the barn to be addressed, but that the only remedy it could come up with under KCC 23.02.130.B to address that environmental harm was requiring the Morrisons to remove the barn.

11. The optics of requiring Morrisons to remove the barn are dreadful. If we upheld the Department's decision, and word of that circulated through the contractor community, contractors would be duty-bound to advise future clients something along the lines of:

> Just so you know, the pre-existing *X* on your property is not legal. If you apply for a permit to undertake *Y*, the Department may order you to rip up *X*. So before I submit the application paperwork on *Y*, think through the risks and benefits and tell me whether you want me to proactively apply for a permit for *Y*, or instead you want to make nice with the neighbors and try to get *Y* accomplished under the radar.

That seems counterproductive, and completely inconsistent with the first line of the entire Title 23, that the Title's primary purpose is to "encourage compliance with county laws and regulations." KCC 23.01.010.A.

12. The goal is to encourage people to come in for permits *before* they undertake a project, not to work on the sly and hope to avoid detection. If applying for a permit would open the applicant up to discovery of—and a requirement to undertake draconian measures to rectify—violations unrelated to the planned project, that should give a reasonable property owner pause. The fear of opening Pandora's box would discourage proactive permit applications for planned projects. So we will reiterate today an approach that saves the Department from itself and encourages (or at least does not actively discourage) future innocent owners to apply for permits before they undertake new work.

13. The Department did not come close in its October 29 case-in-chief to meeting its burden of proving that an extreme remedy like tearing down or removing the barn from its current location is warranted here. Thus, we announced, during Appellants' case-in-chief, that we would allow the barn to remain, but that the Department was free to suggest reasonable mitigation measures during its rebuttal. The Department elected not to do so. Thus, the record as it closed on October 29 contains no evidence of reasonable mitigation measures for the barn. We have no basis for ordering any mitigation to account for the barn's intrusion into the buffer and its impact on the critical area.

14. Having forfeited its opportunity to offer a reasonable remedy, the Department will not get a second bite at the apple to require such mitigation requirements when the Applicant comes in for a building permit to legalize the barn. Thus, the footprint of the 2004 barn is essentially grandfathered, both as it relates to critical areas and because part of the barn is slightly (to the tune of a foot or so) into the property boundary setback.

15. The Morrisons' recent foundation work is different. Ex. 6 at 002, 003. The Morrisons will need to apply for a permit for (or incorporate into another permit a proposal addressing) the foundation work. The Morrisons asked us to waive KCC 21A.12.170.F, related to retaining walls, to allow them to keep their fix. While we agree that *a fix* was required to prevent the barn foundation from failing, they raised the retaining-wall specific code section only during closing argument. Unlike the let-us-keep-the-barn issue that was the entire reason we went to hearing, the requested retaining wall code waiver was not a request the Department had a fair opportunity to consider and address.

16. The Department will need to allow the Morrisons to shore up the barn to keep it from crumbling off the edge. And if the Department takes exception to the retaining wall, the

Department's alternative solution must be "reasonably feasible under the circumstances." KCC 23.02.130.B. But the Department retains discretion for how to accommodate that repair work and what if any mitigation such intrusion warrants.

17. While better than the disaster of sending the message that property owners should think twice before applying for a permit, today's result is not still not good for anyone.

18. First, the barn impacts a critical area. And yet because the Department did not come with a backup plan for what mitigation we should order if we allowed the Morrisons to keep the barn, the Department's all-or-nothing approach has resulted in nothing on the environmental side.

19. Second, the Morrisons stated in our October 29 hearing that the reason they had not submitted application materials addressing the barn and the grading/clearing was that they did not know whether they would be allowed to keep the barn. If so, the impetus behind gearing up for and holding a hearing was the Department's refusal to let the Morrisons legalize the barn in its current location, a position the Department should have known—had it taken the time to review decisions from the undersigned and from *pro tem* examiners—had a low probability of success.[1] Thus everyone diverted time and resources away from other endeavors (such as promptly remediating the site) to hold a hearing we may not have even needed to hold.

Future Non-Culpable Owner Cases

20. To avoid a future repeat, we will set the framework a little clearer, and circulate this decision up the chain, to avoid (in future cases) the sub-optimal result here.

21. Critical areas violations—and the remedy for such violations—are different from other zoning code violations. *See Snohomish County v. Pollution Control Hearings Board*, 187 Wn.2d 346, 386 P.3d 1064 (2016). Although the case did not involve critical areas, *Snohomish County* observed that:

> storm water regulations are not truly local because the state has directed local governments to implement the regulations in order to comply with the [federal] permitting program. The storm water regulations are mandatory state regulations, rather than discretionary local regulations.

Id. at 368.

[1] In a 2018 decision, Examiner Drummond *entirely* waived compliance for an owner. The facts of *Goyen—E0100491* were unique. The violation involved a past-owner's creation of impervious surface that exceeded the total percentage of impervious surface allowed on the property—with or without a permit. So there was no permit the innocent owner could apply for to legalize the impervious surface. Moreover, the innocent owner had previously applied for, and received, two building permits, which the Department reviewed and approved without noticing the impervious surface problem. That raised a serious issue of whether, under the finality principal described in cases like *Chelan County v. Nykreim*, 146 Wn.2d 904, 52 P.3d 1 (2002), the Department should even have been allowed to revisit the issue. *See* https://www kingcounty.gov/independent/hearing-examiner/case-digest/appeals/code-enforcement/2018.aspx. We do not read *Goyen* as a departure.

22. So the origin of a local regulation matters, and critical areas regulations are mandatory state regulations, rather than discretionary local regulations. But *Snohomish County* does not trump the Department's responsibility under KCC 23.02.130.B to soften the harsh regulatory edges for innocent owners, nor the examiner's similar responsibility under KCC 23.36.030.B. First, GMA applies to regulations governments adopt; it does not directly control project-specific decisions like the Department's or examiner's action on a particular proposal. Second, the County's system of land use controls for protecting critical areas is not limited to KCC chapter 21A.24 alone. It is Title 21A, chapter 16.82, Title 23, and a whole host of other codes, rules, and policies that in *total* protect critical areas and further GMA's goals. KCC 23.02.130.B and KCC 23.36.030.B are part and parcel of that regime.

23. If either of those two codes provided a huge loophole that undermined the whole system, that would be a different. Today, however, marks the first time in our seven years as examiner we—or a *pro tem*—has modified the strict application of critical areas regulations.[2] And this is in the context of a few hundred square-foot barn in place for 15 years at the edge of an historically landscaped area. That is hardly an exception that swallows the rule.

24. Third, there are provisions of the code that explicitly require a different enforcement response for critical areas, surface water runoff, and grading—topics that directly raise Clean Water Act concerns. For example, a complainant typically has no legal remedy to require code enforcement to prosecute a violation. However, where the complainant alleges a violation of KCC chapter 9.12 (water quality), 16.82 (grading/clearing) or 21A.24 (critical areas), the complainant may appeal (to the examiner) the Department's decision not to issue a citation or order. KCC 23.36.010.B. However, KCC 23.02.130.B and KCC 23.36.030.B contain no such carveout. The type of violation is a *factor* to consider, but the Department and examiner are not relieved of our respective duties to endeavor to find a feasible, non-draconian solution for a violation created by a previous owner, just because the violation involves a local regulation mandated by the state.

25. That we (and *pro tem* examiners) have not ever required removal in an innocent-owner case does not mean we (or a *pro tem*) would never do so in a future case, critical area or otherwise. We can envision plenty of hypotheticals where even though the current owner bought the property with *X* already in place, keeping *X* is simply a bridge too far. One could imagine, for instance, a building presenting severe life-safety hazards, or a denuded steep hillside that might fail at any moment.

26. If the Department diligently performs its KCC 23.02.130.B analysis in a future enforcement case, the Department is free to call for a hearing, explain at hearing why even a searching KCC 23.02.130.B inquiry unearthed no feasible alternative to strict

[2] In *Skirvin—E0700414*, we were *ready* to allow, over the Department's objection, an appellant with stage four cancer to apply for a building permit to legalize a garage built by a previous owner in a critical area buffer. However, the stumbling block was Public Health, as the garage was built over the septic drainfield. Because the Sewage Review Committee (SRC)—not the examiner—is the designated county appeal body for Public Health decisions concerning onsite septic system-related applications, we could not usurp the SRC's prerogative. We allowed the appellant time to die in peace, leaving garage removal to his estate.

compliance, and argue for strict compliance. Yet in that scenario it would still behoove the Department to come to the hearing prepared with a solid fallback position, an "in the alternative" approach that if an examiner allows *X* to remain, then that examiner should require *Y*. That would avoid the suboptimal result of today's hearing, where we wind up with no mitigation for a buffer intrusion.

Clearing and Grading

27. The Morrisons do not dispute that they performed some activities that require a clearing and grading permit. We found the Department's Collen Kroe credible as she walked through the Morrisons' various activities on the property, taking pains to clarify that some of the work might be exempt for the permit requirement (such as routine maintenance) or might have grown back sufficiently, but that more information is needed. Her underlying point was that she had not gotten any comprehensive impact assessment, functional assessments, restoration plans, or the necessary specifics from the Morrisons. And, as noted above, the Morrisons have been waiting for decision on whether the barn can remain before addressing such issues. Thus, our October 29 hearing seemed pre-mature, the product of an unfortunate misunderstanding that KCC chapter 21A trumped KCC 23.02.130.B and KCC 23.36.030.B.

28. Most or all the clearing and grading issues can probably be worked out through the permit process. And if a dispute arises over the exact extent of the violation on the ground, that can be brought back to the examiner. KCC 20.20.030.D. Thus, we limit our analysis today. We start by explaining the general parameters for analyzing (alleged) clearing and grading violations—especially given the Morrisons' objection that they should not be required to prove they do not need a permit for a given activity. We then make some related findings and conclusions. But we leave the bulk of this violation analysis, and the entire remedy analysis, to a later date.

29. 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.

30. 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. The definition of clearing is even broader, including "the cutting, killing, grubbing or removing of vegetation or other organic material by physical, mechanical, chemical or any other similar means." KCC 16.82.020.D. Thus, anyone who, for example, adds some gravel to fill in a walkway's low spot in the spring, mows the lawn in the summer, or prunes back the hedges in the fall, would have to affirmatively demonstrate a narrowly-interpreted exemption to the permit requirement.

31. To avoid that absurd result, outside of critical areas and their buffers, we require the Department to assert and then to prove grading in excess of one of KCC 16.82.051.C's first three exceptions: excavation over five feet deep, fill over three feet high, adding over 100 yd.^{3} of fill, adding over 2,000 ft.^{2} square feet of impervious or clearing over 7000 ft.^{2}That is why the Department typically phrases a 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."

32. Therefore, in contrast to KCC 16.82.051.C's latter 23 exceptions to the *any*-grading-or-clearing-requires-a-permit rule, we place the burden on the Department to allege (in a notice) and then to prove (at hearing) that an appellant cleared or graded in excess of one of those three thresholds or in an area or manner where there is no threshold. And we do *not* apply the exceptions-defined-narrowly rule of statutory construction to those first three exceptions. *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). For any work outside critical areas and their buffers, the above holds true.

33. However, the Morrison property is almost completely encumbered by steep slopes, wetlands, or their respective buffers. There are no general exceptions for grading in steep slopes or wetland buffers. There are no general exceptions for clearing within steep slope/buffers, and the only general exceptions for clearing in a wetland buffer are inapplicable to today's case: personal use firewood cut in accordance with a forest management/rural stewardship plan, and vegetation removed for forest fire prevention purposes. KCC 16.82.051.B, C.4, C.23. Thus, the Morrisons are indeed back in KCC 16.82.050.B box of needing a clearing and grading permit (or a building permit addressing all clearing and grading) unless they can show that they are specifically excepted under K.C.C. 16.82.051, KCC 21A.24.045, or some other exemption.

34. Beyond finding that (in addition to the barn foundation work) blading off and side-casting dirt from the road onto the abutting area (Exhibit 6 at 001) definitely requires a permit, we offer the following:

    A. The Morrisons' testimony that they have not touched the path around the pond is credible and not inconsistent with any documentary evidence. They worked the area *adjacent* to the pond path, but there is no real evidence that they expanded or otherwise graded the path that encircles the pond.

    B. The Morrisons' testimony and evidence that the perforated pipe they installed was a replacement for pre-existing, underground pipe the Morrisons did not know was there until they accidentally broke it, was credible. That does not prejudge the drainage resolution, only that this is not a scenario where the Morrisons *sua sponte* added a pipe.

    C. The Morrisons did not import rocks or boulders from off-site (or least not beyond what they gathered from the abutting property). But while that may be true as a matter of fact, the Morrisons argument that moving around boulders

could not be a grading violation does not follow. Taking that argument to its logical conclusion, one could stack up native boulders in a way that alters surface water flows, and yet assert that because the rocks were always in in the vicinity, such work is exempt. As noted above, any change in the existing soil cover or topography, including nonvegetative changes, presumptively qualify as "land disturbing activity" and thus grading. KCC 16.82.020.O & Q.

D. There are some other Morrison activities—such as an additional retaining wall, a raised pad area, and some paths—the Morrisons have already removed, and other gravel the Morrisons indicated at hearing they would be willing to remove. We note here that there could be more required to restore those areas than simple removal.

E. With the exception of the overreach on the 2004 barn, the Department's September 30, 2019 letter, with its "next steps," appears fairly reasonable, although it does not provide a due date. Ex. 14. Three months seems an appropriate default, given the holidays and the extent of the analyses and plans the Department is requiring.

35. If an intractable dispute arises during the during the permitting process over exactly what activities were clearing or grading violations or the required remedy, the Morrisons may file an appeal of that determination. KCC 20.20.030.D.

DECISION:

1. We partially grant and partly deny the Morrisons' appeal.

2. The 2004 barn and post-2017 foundation work require a building permit. The pre-2017 footprint of the barn is grandfathered, and the Department may not require mitigation for it remaining a critical area/buffer. The Department may require mitigation for the foundation repair work it allows.

3. At least some of the Morrisons' work qualifies as clearing and grading within a critical area or its buffer and requires a permit.

4. By **February 19, 2020**, the Morrisons shall submit the information requested in Department's September 30, 2019, letter.

5. No penalties may be assessed against the Morrisons or the subject property, so long as the Morrisons meet the above deadline, any reasonable extensions of the deadline, and any reasonable deadlines for future submittals. If not, the Department may assess penalties retroactive to today.

ORDERED November 19, 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 OCTOBER 29, 2019, HEARING ON THE APPEAL OF BRIAN AND CORA MORRISON, DEPARTMENT OF LOCAL SERVICES FILE NO. ENFR180998

David Spohr was the Hearing Examiner in this matter. Participating in the hearing were Colleen Kroe, Bill Moffet, Brian Morrison, Steve Roberge, LaDonna Whalen, and Dean Williams. A verbatim recording of the hearing is available in the Hearing Examiner's Office.

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

Exhibit no. 1	Department of Local Services staff report to the Hearing Examiner
Exhibit no. 2	Notice and order, issued January 28, 2019
Exhibit no. 3	Appeal, received February 13, 2019
Exhibit no. 4	Codes cited in the notice and order
Exhibit no. 5	Aerial photographs of subject property
Exhibit no. 6	Photos of subject property by Colleen Kroe, taken July 7, 2018
Exhibit no. 7	Watershed critical area report, dated July 6, 2018
Exhibit no. 8	E-mail from Colleen Kroe and documents, sent August 7, 2018
Exhibit no. 9	Photographs of aerials of clearing and grading activity, 2015 - 2019
Exhibit no. 10	Permit history
Exhibit no. 11	Site plans from previous permits
Exhibit no. 12	Letter from Colleen Kroe, dated September 7, 2018
Exhibit no. 13	Letter from Appellant, dated July 26, 2019
Exhibit no. 14	Letter from Steve Roberge, dated September 30, 2019
Exhibit no. 15	Cover letter for Colleen Kroe
Exhibit no. 16	Cover letter for Steve Roberge
Exhibit no. 17	Photographs of real estate, 2015
Exhibit no. 18	Complaint Investigation Policy and Procedures, revised October 2018

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

Exhibit no. A1	Photographs of subject area, from historical King County assessor
Exhibit no. A2	Old sale flyers, from 1989 – 1992
Exhibit no. A3	Site plan, from 2002
Exhibit no. A4	Site plan based on historical photographs, from 2005
Exhibit no. A5	Site plan, from 2019
Exhibit no. A6	Photographs of subject property prior to the Appellant's purchase in 2015
Exhibit no. A7	Survey on easement to access the subject property, from 2018
Exhibit no. A8	Aerial photographs of subject property
Exhibit no. A9	Affidavit of Della Nyborg-Wolfe, dated August 20, 2019
Exhibit no. A10	Stormwater Drainage Easement, dated November 7, 2013

DS/jo

November 19, 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. **ENFR180998**

BRIAN AND CORA MORRISON
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 November 19, 2019

Jessica Oscoy
Legislative Secretary

Andersen, Dave
Hardcopy

Breazeal, Jeri
Department of Local Services

Bunten, Donna
Hardcopy

Deraitus, Elizabeth
Department of Local Services

Kroe, Colleen
Department of Local Services

Lamp, Benita
Johns Monroe Mitsunaga Kolousková

Lux, Sheryl
Department of Local Services

Moffet, Bill
Hardcopy

Morrison, Brian and Cora
Hardcopy

Roberge, Steve
Department of Local Services

Whalen, LaDonna
Department of Local Services

Williams, Dean
Johns Monroe Mitsunaga Kolousková

Williams, Toya
Department of Local Services