March 26, 2020

OFFICE OF THE HEARING EXAMINER
KING COUNTY, WASHINGTON

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REPORT AND DECISION

SUBJECT: Department of Local Services file no. **ENFR190021**

RON SHEAR AND RONDA STERLEY
Stop Work Order Appeal

Location: 3621069014

Appellants: Ron Shear and Ronda Sterley
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FINDINGS AND CONCLUSIONS:

Overview

1. The Department of Local Services (Department) issued a stop work order (Order) asserting clearing without the required permits. Ron Shear and Ronda Sterley (Appellants) timely challenged the Order. 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 overturn the alleged violations related to critical areas and clearing in a public roadway, but sustain a basic clearing violation.

Background

2. This case has the distinct feeling of being the undercard. Appellants are, and have been since 2017, engaged in an involved permit process with the Department to open up a materials processing facility on the subject property. Ex. 11. Eventually that review will come to some sort of culmination. One aggrieved by that result can appeal the Department's decision. But that is a potential future dispute, not today's case.

3. While that permit was under review, Appellants worked a huge area, clearing, by the Department's estimate, over 150,000 ft.^{2} Ex. 9 at 001. In January 2019, the Department issued its Order, directing that work cease. Ex. 2. Appellants timely appealed. Ex. 3.

4. There is no allegation that Appellants have violated that Order. Appellants have put down some bedding over the cleared area, but at the Department's request to control erosion from the clearing. They have complied and held off on new clearing. Thus, the only issue before us is whether the Department issued the Order in error.

5. We held numerous conferences, as the parties attempted to work out a resolution. Eventually we went to hearing on March 3. We then kept the record open for a few rounds of supplemental submissions.

Analysis

Introduction

6. 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. That is especially true in the land use context, because courts must give substantial deference not only to an examiner's factual determinations but also to the examiner's legal determinations. *See Durland v. San Juan County*, 174 Wn. App. 1, 12, 298 P.3d 757 (2012). An examiner deferring to an agency would essentially be passing that buck.

7. We start with two violations the Department asserts Appellants' clearing created. Ex. 20. We then move on to the basic clearing permit triggers, and how we apply burdens of proof in the clearing/grading arena. Finally, we analyze the three exceptions Appellants argue exempt the entirety of their clearing.

Critical Areas

8. The Department asserts that Appellants' clearing violated the critical areas code, meaning that some of the clearing occurred in a critical area or its buffer. There is an open question about what (if any) critical areas/buffers are on the property and where; such issues are being addressed during permit review. Ex. 11 at 017-028; Ex. 18; Ex. 19. At hearing, the Department acknowledged that while permit review should shed more light on the topic, there was insufficient evidence, as of our hearing, to meet the Department's burden of proving that Appellants' clearing more likely than not violated the critical areas code.

Public Right-of-Way

9. The Department alleges a violation of KCC 14.28.020.A, which states:

> County road right-of-way shall not be privately improved or used for access or other purposes and no development approval shall be issued which requires use of privately maintained county right-of-way unless a permit therefor has been issued pursuant to this chapter, except for utility construction work authorized pursuant to K.C.C. Chapter 14.44. This section shall not apply to driveway connections from private property to county road right of way.

10. There is no question that 99-point-something percent of Appellants' work was on their own property, not on public right-of-way. Because Appellants access eventually connects to the public Enumclaw-Franklin Road, at some point, at about the fence-line, private property becomes public right-of-way. Appellants might have done a minor amount of work at the lip of the private road, as it feathers into the earthen shoulder of the county right-of-way. However, the photos do not show any real work outside the fence line. Ex. 7 at 001 (top), 002. Interpreting that section narrowly—as we do for initial violations and for select exceptions (discussed below)—we would not characterize that work as improving or altering a County road right-of-way but more as a driveway connection. The Department has not proven that Appellants' work triggered the need for a right-of-way permit.

Clearing—Shifting Burdens and Threshold Violation

11. We have consistently applied the following standard to clearing (and grading) enforcement appeals.

12. 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 from the Department. 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.

13. 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. There is no need that anything be excavated to qualify as clearing. The is no minimum size limit on what qualifies as vegetation.

14. Thus, anyone who works any ground or vegetation in unincorporated King County, in almost any manner, has "cleared" or "graded." Each person who mows the lawn in the summer, prunes back the hedges in the fall, or adds some gravel to fill in a walkway's wet low spots in the winter, would have the burden to affirmatively demonstrate a narrowly-interpreted exemption to the requirement to obtain a permit.

15. To avoid that absurd result, we have consistently required the Department to assert and then (if appealed) to prove at our hearing either clearing or grading in excess of one of the first three numbered threshold exceptions in KCC 16.82.051.C—excavation over five feet deep/fill over three feet high, adding over 2,000 ft.² of new or replaced impervious surface, or clearing over 7,000 ft.²—or that the clearing or grading was in a location or of a nature where the threshold trigger does not apply.[1] That is why the Department framed the violation here in terms of clearing over 7000 ft.² and not simply as clearing. Ex. 20. The corollary is that, in contrast to KCC 16.82.051.C's latter 23 exceptions to the any-clearing/grading-requires-a-permit rule, 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 default rule did not "adequately account for the special circumstances" of a class of cases, Court declined to apply the normal standard).

16. Here, the Department estimates that Appellants cleared approximately 150,000 ft.² Ex. 9 at 001. While there was some dispute at hearing on precisely how wide the worked area was, Appellants have not offered a contrary total. Even assuming the Department is somewhat overstating the lateral extent of the clearing, given the broad definition of clearing, the Department has shown that Appellants cleared well over an order of magnitude more than 7000 ft.²

17. Therefore, our issue is whether Appellants' work fit into one of the other 23 exceptions KCC 16.82.051.C provides. For those, we apply the default rule across civil and criminal disciplines that, while the government bears the initial burden of proving a statutory violation (here, clearing over 7000 ft.²) one claiming the benefit of an exception to a statutory prohibition bears the burden of establishing that she comes within that exception. *See, e.g., United States v. First City National Bank of Houston*, 386 U.S. 361, 366 (1967) (civil); *United States v. Guzman-Mata*, 579 F.3d 1065, 1072 (9th Cir. 2009) (criminal). And in interpreting any exceptions, we must "narrowly construe exceptions to statutory provisions" and must "choose, when a choice is available, a restrictive interpretation over a broad, more liberal interpretation." *City of Union Gap v. Washington State Dept. of Ecology*, 148 Wn. App. 519, 527, 195 P.3d 580 (2008).

[1] For example, in an aquatic area buffer, none of those first three exemptions apply. KCC 16.82.051.C. As noted above, there is insufficient proof of any clearing in a critical area or its buffer.

18. In their January 2019 appeal statement, Appellants raised two exceptions they asserted they qualified under: clearing within the roadway and maintenance of a driveway or private access road. Ex. 3 at 002, 004. At our March 2020 hearing, we allowed counsel to add forest management activity as a potential exemption. KCC 20.22.080.G.[2] We start there.

Forest Management Activity

19. In Appellants' January 2019 appeal, they explained that they had not cleared that 7000 ft.[2] within environmental critical areas, and discussed their right to remove trash and debris and to block access. Ex. 3 at 002. They did *not* assert that the action was related to some sort of forestry plan or operation. They highlighted two exceptions they asserted applied to their clearing, neither of which related to forestry. Ex. 3 at 004.

20. At our March 2020 hearing, Appellants noted that the property had been logged several times under previous ownerships, most recently around 2002. *See also* Exs. 15 & 23. They testified that their intent is to do some tree thinning. They seemed to be arguing that their clearing had been part of their own forest management activity.

21. We do not accept, as a factual matter, that *post hoc* rationalization. Instead, we take Appellants at their word as they explained in January 2019 what the clearing was for. Ex. 3 at 002. There is no proof in the record of any forestry proposal or plan. Appellants may in the *future* undertake forestry activity that could retroactively take advantage of their roadwork, but that is not what was happening as of January 2019. At best, they put the clearing cart before the forest management horse. Appellants have not shown that their clearing leading up to the January 2019 Order was "conducted as a Class I, II, III or IV-S forest practice as defined in chapter 76.09 RCW and Title 222 WAC," as that exception requires. Prior forestry activity does figure in again, below.

Maintenance of Driveway or Private Access Road

22. The most relevant exception is the one for maintaining a driveway or private access road. KCC 16.82.051.C.13 exempts such work:

> In conjunction with normal and routine maintenance activities, if:
>
> a. there is no alteration of a ditch or aquatic area that is used by salmonids:
>
> b. the structure, condition or site maintained was constructed or created in accordance with law; and

[2] In its post-hearing, briefing, the Department discussed the applicability of the exception for "*grading* in the roadway." Ex. 22. It would not have been applicable, as that exception is only applicable to grading conducted by or at the direction of a government in accordance with the regional road maintenance guidelines. KCC 16.82.051.C.11. However, it was not a ground Appellants raised. There were some pictures showing piles of earthen and other material placed or altered. Ex. 3 at 005-020. Appellants asserted this was all done by trespassers, and Appellants submitted ample proof of such trespassers, including one in a truck and some on ATVs. Ex. 13. The issue is unnecessary to discuss, as there is no allegation of *grading* in today's case.

> c. the maintenance does not expand the roadway, lawn, landscaping, ditch, culvert or other improved area being maintained.

23. As discussed above, there may be critical areas on the site; that will be determined during the permit process. However, at this time there is no definitive evidence of any aquatic areas in the vicinity of the clearing or any disturbed ditches or salmonid habitat. Subsection (a) is not a stumbling block.

24. Subsection (b) is more problematic. The property had been logged several times, most recently around 2002. Exs. 15, 23. We take as a starting point that, as of the turn of the millennium, there were legal, pre-existing forest roads. Ex. 14. We break down the pictures below, but we found Appellants persuasive that they did not clear outside the vicinity of what we would deem, "there once was a road about here" areas.

25. However, although earlier forestry permits are not in the record, the 2002 forest practices application/notification permit describes extensive road construction and also required certain roads be abandoned and deactivated. Ex. 23 at 006, 007, 009, 025, 024, 029, 030, 033. Thus, when the forest practices approval wrapped up, those specific roads ceased to be legal roads. Clearing on those swaths does not qualify under subsection (b). As noted below, Appellants did not provide any breakdown or calculations, but more likely than not some chunk of their clearing was on legally abandoned roads. So not all, but some, of their clearing was on an area that ceased to legally qualify as a road years before they went to work.

26. The broader hurdle is subsection (c), whether all of Appellants' clearing was routine maintenance activities that did not expand the improved area.

27. Intervenors, long-time neighbors of the subject property, testified that the work widened what they had observed on the site before. They described what was there immediately before 2019 as "trails, not roads," and described seeing a "drastically changed" footprint after the work was completed. Appellants countered that they did not expand the historic roadbeds.

28. We do not necessarily see a discrepancy. Accepting that Appellants did not clear outside the vicinity of historic road areas, for some swaths of road laying fallow for decades, regrowth would have been expected to have encroached into and reclaimed part of the historic roadbed. That is what some of the pictures, discussed below, actually show. So, what Appellants set to work on, for some stretches, would have been a narrower trail and no longer a full-width logging road. We do not discount either Appellants' or Intervenors' accounts.

29. It appears Appellants started from an incorrect premise. Appellants seemed to think that vegetation had to be four inches in diameter to trigger something, and that because they did not take down any significant trees or vegetation beyond a certain diameter, their entire clearing efforts were exempt.[3] The code definitions quoted above for what

[3] There seemed a suggestion that maybe the Department had some sort of four-inch guideline. We are not aware of that and, even if it exists, as noted above we accord no deference to agency determinations.

qualifies as clearing does not caveat anything about diameter. Similarly, even if the clearing was "just removal of vegetation, no excavation required," that does not render it exempt. Ex. 24 at 002.

30. More broadly, both the Department and Appellants applied a blunt, all-or-nothing lens to the analysis: either the entire area Appellants worked was routine maintenance or it was all non-exempt clearing. That is not the more nuanced analysis we have consistently applied in our clearing and grading appeals, as we try to determine which areas qualify as habitual upkeep and which are new clearing.

31. This issue arises repeatedly in our jurisprudence, where an area that was at one point "grandfathered" as a road or lawn or landscaping or other improved area gradually becomes reclaimed by vegetation. At a certain point, the vegetation has reestablished itself enough that the area ceases to be treated as improved and new work counts as non-exempt clearing and not as exempt, routine maintenance. It is not one-size-fits all. In parsing it out, we keep in mind our requirement to narrowly construe exceptions to statutory provisions.

32. Given the linear extent of the clearing—dramatically longer than what we normally encounter—we would have been surprised if, for example, vegetation coming through or encroaching into the main entranceway (a thoroughfare pounded down time and time again) would have been in the same condition as, say, a spur road cut in once and then left fallow for decades. And the pictures do indeed show a wide spectrum of conditions. *Compare* Ex. 3 at 25 & 26 *with* Ex. 3 at 27 & 29.

33. We can break into three groups many of the pictures Appellants identified in their initial appeal as the pre-existing access roads. In some areas the vegetation had reestablished itself enough that we would categorize the work there as entirely new clearing and not as routine maintenance. Ex. 3 at 027, 029, 030, 031. Other areas were a narrow trail with vegetation reestablished along the periphery; we categorize only clearing of the middle path as routine maintenance. Ex. 3 at 021, 022, 023, 032, 034. And others were a wide road swath as of 2019; we categorize the entire width of work in that area as habitual upkeep. Ex. 3 at 024, 025, 026, 028.

34. Some of the February 2020 photographs Appellants submitted for hearing depict other areas they intend to clear but refrained from working after receiving the Order. These demonstrate a similar spectrum and likely provide a decent proxy for the varying conditions on site at the time of Appellants' work. Some areas we would categorize as entirely new clearing and not even partially routine maintenance. Ex. 12 at 013-16, 022, 023, 024, 032, 050, 051, and 052. Others depict a narrow trail, but with established peripheral vegetation, where we would categorize a certain width as routine upkeep and the rest as new clearing. Ex. 12 at 017-19, 021, and 029. Others are a wide road swath where we would consider the entire work habitual maintenance. Ex. 12 at 008, 024-26, 028, 041, and 057.

35. Certainly, along the margins the categorizations are debatable. However, the walk-away point is that looking at the wide variety of photographic evidence, the clearing was not—

contrary to the Department's and Appellants' assertions—all in one category. Instead, we find a mixture of exempt maintenance and non-exempt work. Between the Department potentially over-estimating the width of the clearing, much of clearing being on roads that were not legally abandoned under the last forest practices application, and work in areas that had not already been reclaimed by vegetation and still qualified as an improved area, the Department's estimate of 150,000 ft.^{2} of clearing overstates the nonexempt amount.

36. However, Appellants bear the burden of showing that they come within the exception, here meaning that no more than 7000 ft.^{2} of their work was non-exempt. They did not offer up any alternative calculation for what the total worked area was. And 7000 ft.^{2} is less than five percent of the 150,116 ft.^{2} the Department estimated Appellants cleared. Thus, even if the Department overestimated the alleged clearing area by 95%, Appellants' work still triggered a permit. Appellants have not met their burden. *State v. Carter*, 161 Wn. App. 532, 542 n.7, 255 P.3d 721 (2011) (well-established rule is that one relying on statutory exception has the burden of showing conformance with the exception).

Clearing within Roadway

37. Appellants assert they also qualify under the clearing within a "roadway" exception. "In cases where an activity may be included in more than one activity category, the most-specific description of the activity shall govern whether a permit is required." KCC 16.82.051.B. Although not in the box corresponding to work outside of critical areas, the requirements for the remainder of the "clearing in roadway" boxes discuss being "in accordance with the regional road maintenance guidelines," strongly implying that "roadway" is getting at something beyond a mere driveway or private access way. If every driveway/private access road was a "roadway," there would be no need for a driveway/private access road subcategory. Clearing in the roadway might apply to the discussion above about work in the vicinity of the Enumclaw-Franklin Road, but we do not find it applicable to Appellants' private access road.

38. Moreover, those careful requirements about ditches and aquatic area and legal creation and non-expansion discussed above for private access road work would be rendered superfluous if the clearing-in-roadway trumped. *Chelan Basin Conservancy v. GBI Holding Co.*, 190 Wn.2d 249, 264, 413 P.3d 549 (2018) (statute should be interpreted so as not to render a term superfluous). Given the requirement to apply the most specific description of an activity, the rule on narrowly construing exceptions to statutory provisions, and the cannon against rendering language superfluous, we find that maintenance of a driveway or private access road, not clearing within a roadway, the governing exemption for Appellants' work here.

Conclusion

39. It is not clear exactly what the import of today's decision is. Typically, where we sustain a violation, we set some deadline for a permit application or other compliance step. Here, however, the Department noted at hearing that it was not asking for any remedy beyond

sustaining the Order itself. It agreed that Appellants had not violated that Order. And Appellants have already applied for a permit that will address the work triggering today's case. Ex. 11 at 002.

40. The fact that permit review is necessary does not mean that the clearing is not allowed to remain. Moreover, there is no bar to Appellants in the future producing some sort of forestry-related plan or application or notification (or whatever the appropriate vehicle would be for the specific forestry activity they are undertaking) that could take at least partial advantage of that "forest management activity" exception. Even without conducting a recognized forest practice, during the current permit process there is no bar to Appellants producing a more refined breakdown of their cleared areas that demonstrates how much of their work was routine maintenance not requiring further review.

41. Thus, the only definitive holding we make today is relatively minor: as of January 2019, when the Department issued its Order, Appellants had cleared more than 7000 nonexempt square feet and Appellants were correct to hold off clearing more until after they obtained the necessary regulatory approvals. Beyond that, we have little to add.

DECISION:

1. We PARTIALLY GRANT the appeal, finding no violations of codes related to critical areas and work within public rights-of-way.

2. We PARTIALLY DENY the appeal, finding nonexempt clearing over 7000 ft.^{2}

ORDERED March 26, 2020.

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 MARCH 3, 2020, HEARING IN THE APPEAL OF RON SHEAR AND RONDA STERLEY, DEPARTMENT OF LOCAL SERVICES FILE NO. ENFR190021

David Spohr was the Hearing Examiner in this matter. Participating in the hearing were David Bond, Justin Park, Jeri Breazeal, Tom and Julie Schrag, and Ron Shear. A verbatim recording of the hearing is available in the Hearing Examiner's Office.

The following exhibits were offered and entered into the record at our March 3, 2020, hearing:

Exhibit no. 1	Department of Local Services staff report to the Hearing Examiner
Exhibit no. 2	Stop work order, issued January 14, 2019
Exhibit no. 3	Appeal, received January 25, 2019
Exhibit no. 4	Stop work order, issued January 15, 2019
Exhibit no. 5	Codes cited
Exhibit no. 6	Photographs of subject property, dated January 19, 2019
Exhibit no. 7	Photographs of subject property, dated February 27, 2019
Exhibit no. 8	Aerial photographs of subject property, 2019
Exhibit no. 9	Aerial photographs of subject property
Exhibit no. 10	Letter from Department to Ron Shear, dated December 15, 2019
Exhibit no. 11	Letter from Department to Bryce Bessette, dated May 10, 2019
Exhibit no. 12	Photographs of property and roads, submitted February 25, 2020
Exhibit no. 13	Photographs of trespassers on property, submitted February 25, 2020
Exhibit no. 14	King County IMap of property over the years
Exhibit no. 15	Email from Betty Burton to Ron Shear, sent February 2, 2020
Exhibit no. 16	Critical area report
Exhibit no. 17	Addendum to the critical area report
Exhibit no. 18	Critical area site study
Exhibit no. 19	CARA resubmittal review comments
Exhibit no. 20	Email from David Bond, sent February 2, 2020

The following exhibits were offered and entered into the record during post-hearing briefing:

Exhibit no. 21	Appellants: Additional Briefing, submitted March 25, 2020
Exhibit no. 22	DLSP: Response to Briefing, submitted March 26, 2020
Exhibit no. 23	Intervenor: Email with six attachments, received March 30, 2020
Exhibit no. 24	Appellant: Response to Intervenor, received April 27, 2020

March 26, 2020

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CERTIFICATE OF SERVICE

SUBJECT: Department of Local Services file no. **ENFR190021**

RON SHEAR AND RONDA STERLEY
Stop Work Order 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 March 26, 2020.

Jessica Oscoy
Legislative Secretary

Alfredson, Gayla
Hardcopy

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