April 2, 2020

**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. **ENFR190501**

**PAUL AND MARIA BRUNT**
Code Enforcement Appeal

Location: 2020 S 108th Street, Seattle

Appellants: **Paul and Maria Brunt**
[redacted]
Bellevue, WA 98004
Telephone: [redacted]
Email: [redacted]

King County: Department of Local Services
*represented by* **Nick Stephens**
Department of Local Services
35030 SE Douglas Street Suite 210
Snoqualmie, WA 98065
Telephone: (206) 477-3950
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FINDINGS AND CONCLUSIONS:

1. In November 2019, the Department of Local Services (Department) issued a notice and order to Paul Brunt, asserting violations related to (1) additions to and work on a structure and (2) adding more than 2000 ft.² of new impervious surface. Mr. Brunt timely appealed. The (1) building violation is clear, the (2) grading violation far less so. After hearing the witnesses' testimony, studying the exhibits admitted into evidence, and considering the parties' arguments and the relevant law, we conclude that the Department has not quite met its burden of proof as to the grading violation.

2. We clear out the underbrush first. Ms. Brunt reframed the roof of an existing building to add a slight grade and some overhangs. He also expanded that structure to add a storage area to the rear of the building. Exs. 5-7. 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. There are some limited exceptions to this blanket permit requirement, the most relevant being that re-roofing existing buildings is exempt, so long as the roofing adds less than five pounds per square foot cumulative dead load. KCC 16.02.240.14. That would cover the roof surface itself, but not the bump out for the new addition, the re-framing, the soffits, etc. Mr. Brunt will need to apply for a building permit, a proposition he did not really dispute at hearing.

3. The much closer question is the grading. 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. However, because the definition of "clearing" and "grading" are so broad, 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.

4. To avoid an absurd result, we have consistently required the Department to assert and then prove clearing or grading either in excess of one of the first three numbered threshold exceptions in KCC 16.82.051.C or in a location (such as a critical area) where the threshold does not apply. Here, the potentially applicable section is, "Grading that produces less than two thousand square feet of new impervious surface on a single site added after January 1, 2005." KCC 16.82.051.C.2. That is why the Department here phrased the violation in terms of, "Creation of 2,000 sq. ft. of new and/or replaced impervious" without a permit, instead of simply, "Grading without a permit."

5. The Department ascribed 913 ft.$^2$ of impervious surface to the building construction. Ex. 7 at 006. That is clearly erroneous. Most of the building was pre-existing. Changing the roof angle did not add impervious surface. Only extending the roof overhang and adding to the back of the structure added new impervious surface. The Department did not quantify the new impervious surface attributable to the increased building footprint, but it seems small.

6. As to gravel, the back of the lot looks mostly green in 2009. Ex. 8 at 001-02. By 2011, there is a long gravel driveway extending to the rear. Ex. 8 at 003-04. By 2013, the gravel area in the rear was significantly widened. Ex. 8 at 005-04.

7. The Department's staff report did not estimate how much total new impervious surface had been added since 2005. At hearing, staff asserted that Mr. Brunt had added 3017 ft.$^2$ It is not entirely clear how it arrived at that number. The yellow-shaded areas the Department presented in its exhibits as newly graveled areas were 177 ft.$^2$ at the beginning of the driveway, 505 ft.$^2$ in the middle, and 2277 ft.$^2$ at the far end of the driveway and the additional parking area. Ex. 8 at 005-007. That adds up to 2959 ft.$^2$ Possibly, the Department added a few more feet for the building bump out to arrive at 3017 ft.$^2$

8. While it would be helpful in the future for the Department to show its work, we accept that between 2009 and 2013 Mr. Brunt added gravel to an area just shy of 3000 ft.$^2$ That area (plus a little extra for the building footprint addition) meets the definition of "impervious surface" the Department cited in its staff report—a surface artificially covered or hardened so as to prevent or impede the percolation of water into the soil, including roofs and graveled areas. Ex. 1 at 003 (citing KCC 21A.06.625). *See also* KCC 9.04.020.Z.

9. However, the exception is framed in terms of creating 2000 ft.$^2$ or more of "new" impervious surface. KCC 16.82.051.C.2. "New impervious surface" is defined as "the creation of impervious surface or the addition of a more compacted surface such as the paving of existing dirt or gravel." KCC 9.04.020.KK. If there was already a gravel surface there in 2009, adding more gravel certainly further impeded the percolation of water, but the adding "a more compacted surface such as the paving of existing dirt or gravel" implies that the code is getting at differences *in kind* and not simply *in degree*. And we do not apply the normal, 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) (standard test did not "adequately account for the special circumstances" of a class of cases). Graveling over a gravel road is not adding a "*more* compacted surface," but instead adding *more of the same* compacted surface.

10. Mr. Brunt testified that there was always a gravel driveway extending back to the rental unit; depending on who the renter was, some renters parked their cars back there. He stated that much of the area that was graveled post-2009 was previously graveled, either for driveway purposes or for a sewer line, and that gravel was mostly added to already-graveled areas. Mr. Brunt estimated that he had added about 200 ft.$^2$ of impervious surface as he broadened for a sewer line a decade ago, and that the renters expanded the pre-existing gravel area by maybe 300-400 ft.$^2$, and then added an 8' x 16' awning structure in the back (meaning approximately 128 ft.$^2$ of new impervious surface attributable to that awning). Per his testimony, that would mean about 700 ft.$^2$ of new impervious surface.

11. From the only two "before" pictures it is very difficult to tell what the pre-2011 situation looked like in the shaded area from where the white and the black car were parked in the 2009 photos to the front of the rental unit. Ex. 8 at 001-02. The fact those two cars were parked well away from the rental unit casts doubt on whether the driveway continued to the unit; people do not normally stop in the middle of a driveway if the driveway continues closer to their front door. And the area to the rear of the house looks very green—not dispositive in that grass will grow through an unmaintained gravel drive, but certainly cutting against Mr. Brunt's assertions. On the other hand, his statement that the driveway always went along that diagonal fence line, cutting across his neighbor's property, to the rental unit in the back makes sense. It would be odd to build a rental unit on a lawn, without at least a gravel path, if not a full driveway, to get there or to bother working out an access arrangement with the neighbor if there were no access through that area to begin with. And we found Mr. Brunt generally credible.

12. In the end, this a close call. In most new impervious surface grading cases to reach us, the area in question is so large—multiples of the 2000 ft.² that could be exempted—that even after accepting, and thus shaving off, large swaths as pre-existing gravel, it is easy to conclude that well over 2000 ft.² of new impervious area have been added. This case, however, starts with much less margin of error for the Department, which only alleges 3000 ft.² were added.

13. In the end we accept Mr. Brunt's testimony that prior to 2011 there was a pre-existing gravel driveway and parking area in the rear of the lot—albeit one the grass had mostly grown through. His 700 ft.² estimate significantly understates the impervious surface added since 2005. But we cannot conclude with any certainty that the gravel area, plus the small impervious surface added by roofing, expanded the pre-2005 impervious surface by 2000 ft.² or more. We cannot conclude the opposite either, so this is the rare case where who carries the burden of proof is outcome-determinative.

14. Normally, the government bears the initial burden of proving a statutory violation but then the burden shifts to one claiming the benefit of an exception to that statutory prohibition. *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). However, as discussed above, we keep the burden on the Department as it relates to the first three exceptions in KCC 16.82.051.C. And while we suspect that that over 2000 ft.² of impervious surface have been added since the beginning of 2005, that is not the same thing as concluding that the evidence proves this.

DECISION:

1. We GRANT Mr. Brunt's appeal as it relates to (2) the grading code allegation.

2. We DENY Mr. Brunt's appeal as it relates to (1) the building code violation. Mr. Brunt shall submit a complete pre-screening meeting request to the Department by **May 4, 2020**, and thereafter follow the permit-related steps.

3. No penalties shall be assessed against Mr. Brunt or the subject property, so long as he meets the permit-related deadlines, or any extensions of those deadlines the Department reasonably allows. If not, the Department may assess penalties retroactive to today.

ORDERED April 2, 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 19, 2020, HEARING IN THE APPEAL OF PAUL AND MARIA BRUNT, DEPARTMENT OF LOCAL SERVICES FILE NO. ENFR190501

David Spohr was the Hearing Examiner. Participating in the hearing were Nick Stephens, Jeri Breazeal, and Paul Brunt. 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 November 26, 2020 |
| Exhibit no. 3 | Appeal, received December 19, 2019 |
| Exhibit no. 4 | Codes cited in the notice and order |
| Exhibit no. 5 | Photographs of subject property |
| Exhibit no. 6 | Photographs of subject property, dated September 30, 2013 and April 1, 2019 |
| Exhibit no. 7 | Aerial photographs of subject property |
| Exhibit no. 8 | Aerial photographs of subject property |

DS/JO

April 2, 2020

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## CERTIFICATE OF SERVICE

SUBJECT: Department of Local Services file no. **ENFR190501**

**PAUL AND MARIA BRUNT**
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 April 2, 2020.

Jessica Oscoy
Legislative Secretary

**Breazeal, Jeri**
Department of Local Services

**Brunt, Paul/Maria**
Hardcopy

**Deraitus, Elizabeth**
Department of Local Services

**Lux, Sheryl**
Department of Local Services

**Stephens, Nick**
Department of Local Services

**Williams, Toya**
Department of Local Services