November 6, 2020

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

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# REPORT AND DECISION

SUBJECT: Department of Local Services file no. **ENFR200365**

**STEVEN VAN ESS**
Code Enforcement Appeal

Location: [redacted] Duvall

Appellant: Steven Van Ess
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FINDINGS AND CONCLUSIONS:

Overview

1. On one level, this case is simple. For several years, Steven Van Ess has been working through a Department of Local Services (Department) permit to construct a farm pad on his property. His property is completely encumbered as a critical aquifer recharge area

(CARA). The code has, for 15 years, barred recycled asphalt from being used as fill in CARAs. Mr. Van Ess imported something like a thousand tons of recycled asphalt to surface the top of his farm pad.

2. However, the morning before the asphalt arrived on site, Mr. Van Ess went into the Department to meet with the project's inspector, Joe Barto. What was said at that meeting is disputed. Mr. Van Ess asserts that he asked Mr. Barto if he could accept the asphalt and Mr. Barto agreed. Conversely, Mr. Barto states that he told Mr. Van Ess that asphalt importation was not allowed. After hearing the witnesses' testimony, studying the exhibits admitted into evidence (especially documents following on the heels of that meeting), and considering the parties' arguments, we find Mr. Van Ess's version of the meeting significantly more credible than Mr. Barto's.

3. How to apply that finding is not so clear. In the end, we uphold only the portion of the Department's notice and order that nobody disputes—that the asphalt violates the code—and not the compliance or penalty portions. We leave that to the parties either to work something out, or if that fails, for someone to file something with a tribunal with more comprehensive jurisdiction over the remedy than we have.

Pertinent Chronology

4. Since 2005, the code has barred recycled asphalt from being used as fill in CARAs. KCC 16.82.100.A.4.d; Ex. 51. Mr. Van Ess's entire property is a CARA. Ex. D6.

5. In October 2014, Mr. Van Ess applied to construct a farm pad. Ex. D7 at 001. In March 2015, the Department issued the permit. Ex. D11 at 003. The permit noted that fill and compaction, per KCC 16.82.100, had not been approved and would be done by others. Ex. D11 at 005. The permit's general approval conditions noted that surfacing for the top of the pad had to be determined prior to construction. Ex. D8 at 003. More specifically, in at least two places, the face of the permit itself contained a note that the "top pad surfacing to be determined during construction." Ex. A1 at 007; Ex. A6 at 009.

6. Joe Barto made numerous site visits and had many conversations with Mr. Van Ess about the project. Ex. D7 at 002-03. In 2017, Mr. Van Ess had imported a small amount of recycled asphalt to eventually use to surface the pad. There is no question that this was with Mr. Barto's blessing. (The Department does not dispute that the small pile can be used as surfacing.)

7. According to Mr. Van Ess, during one of their 2018 visits, Mr. Barto mentioned that asphalt grindings might be an issue and promised to look into it. Mr. Van Ess testified that Mr. Barto did not bring it up again. According to Mr. Barto, at some point he learned that asphalt was not allowed on the site and he told Mr. Van Ess that he could not import anymore.

8. On July 18, 2019, Mr. Van Ess received a phone call from Miles Resources that they had asphalt grindings they could give him. Early the next morning, Mr. Van Ess went to the Department to ask Mr. Barto if he could accept that asphalt. Mr. Van Ess testified that

Mr. Barto gave him his blessing, saying he would back Mr. Van Ess. Mr. Barto testified that he gave Mr. Van Ess no such approval that day.

9. Mr. Barto made a same-day note of that July 19 meeting stating that, "Steve came in and talked about his concerns for surfacing his farm pad. Previous determination was okay with ACP grindings. He has signed a contract that uses ACP grindings for surfacing. Ty [Peterson] on vacation." Ex. A19. It did not say something like "Previous determination was okay with ACP grindings but told him that had changed" or "but told him no more."

10. That night, and again the night of July 22, Miles Resources dumped recycled asphalt grindings on the Van Ess property, with the understanding that proper approvals and arrangements had been made with the County prior to dumping. Ex. A49. Mr. Van Ess estimated that they brought in a thousand tons of grindings.

11. On July 23, a neighbor filed a complaint about "lots of trucks hauling dirt to the property and putting it on a very large fill pad. Not sure if it is permitted. Trucks run all night for two nights from 7 pm to 3 am." Ex. A20; Ex. A31.

12. Later that day, Mr. Barto visited the site. Ex. A31. Mr. Van Ess testified that he apologized to Mr. Barto for the late hour of the deliveries. Mr. Barto asked him if he had enough asphalt grindings, and Mr. Van Ess replied that he had about enough. Conversely, Mr. Barto testified that he could not recall any conversation about asphalt that day, only delivery time, and that he had not wanted to get into discussing the asphalt at that point.

13. On July 25, Mr. Barto wrote Mr. Van Ess, copying two other people in the Department. In that email, Mr. Barto discussed changes to the approved plans, but limited the discussion to an access change and the need for Mr. Van Ess to ensure that toe slopes are clearly marked in the field. Ex. A22. There was no discussion of asphalt importation.

14. On July 30, Mr. Barto emailed the neighbor who filed the complaint about whether the hauling was permitted. Mr. Barto wrote that he had warned Mr. Van Ess about working outside of permitting hours. He also discussed the height of the pad (i.e. the pile), assuring the neighbor that the piles were much higher than the proposed final grade, and that the final elevation would be quite a bit lower than the top of the temporary stockpiles. Ex. A21. There was nothing in that email mentioning that the asphalt stockpile was not allowed, period, regardless of height or delivery timing.

15. On August 1, Mr. Barto wrote internally that he would approve a revised farm pad plan reflecting a shifted pad, a revised access ramp, and new slopes. Ex. A23. There was no mention that Mr. Van Ess had just illegally dumped asphalt grindings. Mr. Barto approved the revised plan on August 7. Ex. D7 at 003.

16. On August 8, a county employee wrote to Mr. Barto that Mr. Van Ess had contacted him about getting fill from a County project, wanting to confirm that Mr. Van Ess had no outstanding enforcements on his property, and that all permits were in place to receive clean fill for his farm plan. Mr. Barto responded the next day that there were no

enforcements currently outstanding on the project, and Mr. Van Ess's permit was in good standing. Ex. A25. Again, there was no mention of the major violation Mr. Van Ess had just committed.

17. On August 28, there was an internal meeting with Mr. Barto and ten other Department employees, discussing a surplus of items related to Mr. Van Ess's farm plan. The meeting made findings related to farm pad expansion, top elevation changes, expanding slopes, whether expansion work could move forward without a separate permit, incompleteness and inconsistency of plans, lack of documentation for hydrologic and hydraulic analysis, compensatory storage, missing documentation on the total amount of fill, uncertainty as to task completion, and footprint expansion. The meeting set action items for talking to counsel, revising plan sets, deploying the surveyor, identifying an engineer, and "contact[ing] Mr. Van Ess to suggest he stop bringing fill onto site." Ex. A27. There was nothing in the notes reflecting that Mr. Van Ess had just imported a thousand tons of asphalt after being told not to or had violated the code, only the need to "suggest" he stop bringing fill, which more likely than not referred to the incomplete pad itself, and not the surfacing.

18. It is not clear from our record exactly when the illegality of the asphalt entered the conversation, but it had by early 2020. After some back-and-forth, on April 29 the Department informed Mr. Van Ess that while other items could be worked through during the existing permit process, Mr. Van Ess would need to remove the asphalt stockpile. Ex. D10 at 002. Two days later, Mr. Van Ess suggested that they work through the remaining farm pad permit issues and separate off the asphalt grindings dispute by having the Department open up a code enforcement case that he could then appeal to the examiner. Ex. D10 at 001-02.

19. On June 19, the Department issued the violation notice asserting that the asphalt grindings were without approval and violated a host of codes. Ex. D2 at 001. The Department required that Mr. Van Ess go through another permit process, and it set forth penalties for noncompliance. Ex. D2 at 001. Mr. Van Ess timely appealed, asserting that Joe Barto had approved the grindings. Ex. D3.

20. We went to hearing on September 6. Mr. Barto, who had by then retired from the Department, was invited to participate voluntarily in that hearing. He declined. At the conclusion of the hearing, the Department requested that we issue a subpoena compelling his testimony. We did, and we re-opened the hearing on October 16.[1]

Analysis

21. The Department asserts that Mr. Van Ess misremembered when the grindings came in, and thus Mr. Van Ess's memory may be off about what exactly was said during the in-office meeting. The Department is correct that Mr. Van Ess initially asserted that the grindings were delivered on July 26 and 29; they were instead delivered on July 16 and 22. *Compare* Ex. D10 at 006 *with* Ex. A49. That is certainly a factor to weigh against Mr. Van Ess's version. However, it is one thing to get something like a date wrong by a week

[1] References to Mr. Van Ess's testimony are to September 6; references to Mr. Barto's testimony are to October 16.

or so. It is another to misconstrue something like, "You know you cannot bring in any more asphalt" as "I will back you up."

22. Conversely, Mr. Barto, in his August 27, 2020, declaration, either forgot the July 19, 2019, conversation entirely, or at least mis-remembered it by "perhaps months." He wrote that he recalled seeing that Mr. Van Ess had brought in some asphalt grindings (the 2017 pile), told Mr. Van Ess that he would not make an issue of existing asphalt, and told Mr. Van Ess he could not bring in more. Ex. D14. From the context, we interpret Mr. Barto's declaration as referring to an on-site visit (where Mr. Barto viewed the asphalt on Mr. Van Ess's property) and not to the July 19 office visit at all. He then continued that, "Later on, perhaps months," he got word of trucks running at night. But the meeting in Mr. Barto's office was July 19, only *four days* before Mr. Barto received an enforcement complaint and visited the site. At the time of his August 2020 declaration, Mr. Barto had either forgotten about the July 2019 meeting or was way off on its timing. Either way, that is significantly more troubling than Mr. Van Ess getting the dates wrong by a week or so.

23. It is certainly possible that Mr. Van Ess could have gotten up early on July 19, 2020, gone into the office, asked for permission to accept asphalt, gotten refused, and then decided that he would just roll the dice and bring in a thousand tons of asphalt anyway. Between our years as the land-use ombudsman and then as the hearing examiner, we have dealt (in a third-party neutral capacity) with well over a thousand code enforcement cases. Far too many of those to count involved belligerent property owners who took umbrage at government restrictions and were hell-bent on getting their way, rules be dammed. Nothing in our record gives us any inkling of that here. Mr. Barto, in fact, wrote that Mr. Van Ess "has been easy to work with." Ex. A28.

24. The above paragraph is admittedly subjective. But what is not subjective is the complete absence of any mention in our record, in the weeks following the July 19 conversation, about the illegality of the massive quantity of asphalt Mr. Van Ess had just imported. And it was not like the grindings flew under the radar and were only discovered much later. Instead, on July 23 code enforcement received a complaint about their importation, and Joe Barto visited the site the same day.

25. Furthermore, we recall several code enforcement disputes we have been involved as a neutral where a complainant or appellant twisted or at least misconstrued what we had said. Our reaction was swift and unequivocal, immediately clarifying the point, expressing deep dissatisfaction, and taking steps to ensure it did not happen again. That is completely missing here.

26. Again, per Mr. Barto's account, he had just denied Mr. Van Ess's request to bring in anymore asphalt, and Mr. Van Ess boldly ignored him and brought in a thousand tons. And yet when Mr. Barto went out to the site four days after the in-office meeting and saw the massive asphalt pile (exhibit A7), he did not even think that the point was worth mentioning to Mr. Van Ess. Instead, he discussed the far more minor issues about the timing of deliveries. Again, if on July 23 Mr. Barto had the knowledge and memory he asserts he has now about the July 19 meeting, discussing the hour of deliveries seems the

proverbial, "Other than that, Ms. Lincoln, how did you like the play?" Even if all deliveries came during the middle of the day, they were all illegal, and Mr. Barto had just refused permission a few days earlier. We would go ballistic under those circumstances.

27. As to Mr. Barto's immediate recollection—the note he wrote himself on July 19—the note should have included something like, "Previous determination was okay with ACP grindings but told him that had changed" or something. Instead, the note is more consistent with Mr. Van Ess's recollection, that Mr. Barto said he would back Mr. Van Ess up if he brought in asphalt, than it is with Mr. Barto's later explanation. Ex. A19.

28. Moreover, if we discovered that the person we had just withheld consent to had disregarded our warning and did it anyway, we would take every opportunity to set the record straight, if for no other reason than to cover ourselves in the face of a major violation. Yet Mr. Barto's July 25 email discussed changes to the approved plans, access changes, and toe slopes, but not the asphalt elephant in the room. Ex. A22. His July 30 email discussed the asphalt delivery hours and pile height, but not the material itself. His August 1 email explained his approval of a revised farm pad plan, with no mention of the glaring problem. Ex. A23. On August 8, he wrote that Mr. Van Ess had no outstanding enforcements and Mr. Van Ess's permit was in good standing. Ex. A25. The August 28 meeting notes say nothing about the illegal asphalt, even as they discuss seemingly every other angle of Mr. Van Ess's project and conclude with the need to contact Mr. Van Ess to "suggest" he stop bringing in more fill. Ex. A27. Again, we would be using every opportunity to document something along the lines of, "I told him he couldn't, but he brought in asphalt anyway."

29. To accept Mr. Barto's account, we have to accept that he did not approve additional asphalt on July 19, did not simply state that in his same-day memo for some reason, did not think it important enough to mention to Mr. Van Ess during his site visit, and then failed to note it in any of the numerous other email discussions in the following weeks or in any other document in our record. At hearing, Mr. Barto offered some explanations of why he failed to raise the asphalt topic in each of those interactions. Any one of those failures could, in isolation, plausibly be explained away. But it requires some suspension of belief to explain away every single one of them and still tell a coherent narrative.

30. Conversely, Mr. Van Ess's account is simple and straightforward. He got a call on July 18 about available asphalt grindings. He went in the morning on July 19 to ask Mr. Barto if he could bring those in. Mr. Barto said he had his back. Mr. Van Ess called Miles Resources. Miles began dumping that night. Occam's razor, the rule preferring the simplest of competing theories to more complex explanations, is in sharp focus here.

31. In sum, reviewing the testimony and the contemporaneous writings, we find Mr. Van Ess's version of the July 19 conversation significantly more plausible than Mr. Barto's. We find that on July 19 Mr. Barto approved Mr. Van Ess bringing in more asphalt grindings to surface his farm pad.

Remedy

32. The import of that finding, and the remedy is not so clear.

33. Appellant and the Department offered thoughtful arguments related to the legal import of an erroneous permit approval, the special relationship exception to the public duty doctrine, the applicability of estoppel in the land-use permit context, and who should be responsible for incurring the major expense of moving the pilings off the property, if they have to come off.[2] We started to analyze those, but then stopped. Courts may give us deference on how we construe local law for which we have expertise—things like the examiner code, the grading code, and code compliance.[3] But a court would not look to us on the remedy issue, since here that goes far beyond the local laws we apply.

34. Thus, we sustain the portion of the Department's notice and order that nobody disputed—that asphalt tailings should not, as a matter County code, have been imported into an area such as Mr. Van Ess's[4]—but we do not sustain the remainder.

35. Although the Department's notice and order requires an additional prescreening meeting request, a prescreening meeting request would do nothing to answer the remedy question. Ex. D2 at 001. A Department permit reviewer would not be the appropriate person to decide issues like estoppel or special relationship exceptions or appropriate legal remedies. We do not uphold the additional permit requirement.[5]

36. Similarly, the notice and order states that a failure to comply will result in per-day penalties of $65 for the first thirty days, and then $130 thereafter. Ex. D2 at 002. Penalties are ultimately appealable back to us. KCC 23.32.100–.120. We do not uphold the penalty portion of the notice and order either. The parties will need to find a different path forward to get this dispute resolved, one that will not come back through us.

37. We hope the parties can work to some sort of resolution. If not, one or both of the parties can file some action taking the dispute to a tribunal with jurisdiction to entertain the full panoply of issues, and to issue an appropriate remedy.

DECISION:

We uphold the Department's June 19, 2020, notice and order, but only the portion that states that recycled asphalt violates the code.

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[2] Although Mr. Van Ess did not challenge whether bringing in asphalt to surface his farm pad actually violated the code, and we entertained no argument, we do have some hesitation on flatly declaring that adding asphalt surfacing over fill necessarily violates KCC 16.82.100.A.4. Subsection A states that "fill material shall meet the following standards," and then sub-subsection 4 states that recycled asphalt shall not be used in, among other places, critical aquifer recharge areas. On first blush anyway is not clear that fill is same thing as the surfacing that goes on top of that fill. Again, the issue was not argued, and there were several other codes the Department asserts the asphalt violated that were not discussed at all. We simply point out that the prohibition might not be as ironclad as everyone seems to assume it is.

[3] RCW 36.70C.130(b); KCC chapter 16.82, chapter 20.22, and Title 23.

[4] *But see* footnote 2.

[5] Obviously, Mr. Van Ess needs to continue working to finalize his existing permit.

ORDERED November 6, 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 appealed to superior court by *December 7, 2020*. Either party may appeal this decision by applying for a writ of review in superior court in accordance with chapter 7.16 RCW.

## MINUTES OF THE SEPTEMBER 6 AND OCTOBER 16, 2020, HEARINGS IN THE APPEAL OF STEVEN VAN ESS DEPARTMENT OF LOCAL SERVICES FILE NO. ENFR200365

David Spohr was the Hearing Examiner in this matter. Participating in the hearings were Joe Barto, Ramon Locsin, Jason Roetcisoender, LaDonna Whalen, Dean Williams, and Steven Van Ess. 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. D1 | Department of Local Services staff report to the Hearing Examiner |
| Exhibit no. D2 | Notice and order, issued June 19, 2020 |
| Exhibit no. D3 | Appeal, received July 11, 2020 |
| Exhibit no. D4 | Codes cited in the notice and order |
| Exhibit no. D5 | Aerial photographs of subject property, dated 2015 - 2020 |
| Exhibit no. D6 | Aerial photographs of subject property with critical area overlays, dated August 25, 2020 and August 26, 2020 |
| Exhibit no. D7 | Comments for permit #AGLU140002 |
| Exhibit no. D8 | Conditions for permit #AGLU140002 |
| Exhibit no. D9 | Email conversations regarding permit alterations |
| Exhibit no. D10 | Email conversations regarding the asphalt grindings |
| Exhibit no. D11 | AGLU140002 original approved plans |
| Exhibit no. D12 | AGLU140002 revised approved plans |
| Exhibit no. D13 | King County Farm Pad informational website |
| Exhibit no. D14 | Statement from Joe Barto, dated August 27, 2020 |
| Exhibit no. D15 | Responsive Memorandum, submitted October 12, 2020 |

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

| | |
|---|---|
| Exhibit no. A1 | Approved Site Plans for permit #AGLU140002 |
| Exhibit no. A2 | Aerial photographs of subject property, dated January 26, 2016 |
| Exhibit no. A3 | Van Ess Farm Pad Kameda Revised Site Plan, revised January 15, 2016 |
| Exhibit no. A4 | Approved Revised Site Plans for permit #AGLU140002, dated August 7, 2019 |
| Exhibit no. A5 | Approved Revisions for slopes for permit #AGLU140002, dated August 7, 2019 |
| Exhibit no. A6 | Aerial photographs and Approved plans of subject property, dated 2011 and 2019 |
| Exhibit no. A7 | Photographs of subject property |
| Exhibit no. A8 | Aerial photographs of subject property, dated July 2019 |
| Exhibit no. A9 | Screenshot photograph of Condition History of Van Ess Farm Pad |
| Exhibit no. A10 | Affidavit of Raymond Emery, dated August 26, 2020 |
| Exhibit no. A11 | Email conversations regarding Approval Conditions |
| Exhibit no. A12 | Email conversations regarding changes |
| Exhibit no. A13 | Email conversations regarding changes |
| Exhibit no. A14 | Email conversations regarding parcel number |
| Exhibit no. A15 | Email conversations regarding parcel number |
| Exhibit no. A16 | Email conversations regarding document request |
| Exhibit no. A17 | Email conversations regarding receiving documents |
| Exhibit no. A18 | Email conversations regarding changes |
| Exhibit no. A19 | Email note dated July 19, 2019 |
| Exhibit no. A20 | Email conversations regarding complaint |
| Exhibit no. A21 | Email conversations regarding follow up conversation on July 24, 2019 |
| Exhibit no. A22 | Email conversations regarding hold on changes to Approved Plans |
| Exhibit no. A23 | Email conversations regarding potential flood impacts |
| Exhibit no. A24 | Email conversations regarding changes |
| Exhibit no. A25 | Email conversations regarding enforcements |
| Exhibit no. A26 | Email conversations regarding enforcements |
| Exhibit no. A27 | Meeting Notes, dated August 28, 2019 |
| Exhibit no. A28 | Email conversations regarding additional information |
| Exhibit no. A29 | Email conversations regarding permit expiration date |
| Exhibit no. A30 | Email conversations regarding permit expiration date |
| Exhibit no. A31 | Email conversations regarding timeline |
| Exhibit no. A32 | Email conversations regarding extension and notes |
| Exhibit no. A33 | Comments for permit #AGLU140002 |
| Exhibit no. A34 | Email conversations regarding case voided |
| Exhibit no. A35 | Email conversations regarding inspection report |
| Exhibit no. A36 | Email conversations regarding grading permit extension |
| Exhibit no. A37 | Email conversations regarding violation |
| Exhibit no. A38 | Email conversations regarding payment |
| Exhibit no. A39 | Email conversations regarding scheduling |
| Exhibit no. A40 | Bid for crush rock |
| Exhibit no. A41 | Bid to remove asphalt grinding and bring in gravel |
| Exhibit no. A42 | Permit Record |

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|---|---|
| Exhibit no. A43 | Comments for violation |
| Exhibit no. A44 | Comments |
| Exhibit no. A45 | Comments of mud on road |
| Exhibit no. A46 | Comments |
| Exhibit no. A47 | Complete historical permits and violations |
| Exhibit no. A48 | Comments on hauling dirt |
| Exhibit no. A49 | Letter from Miles Resources, dated August 27, 2020 |
| Exhibit no. A50 | AGLU15-0001 Roetcisoender Approved Plans, submitted October 2, 2020 |
| Exhibit no. A51 | Ordinance 15053, submitted October 2, 2020 |
| Exhibit no. A52 | Memorandum of Law supplemental brief, submitted October 5, 2020 |

DS/lo

November 6, 2020

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## CERTIFICATE OF SERVICE

SUBJECT: Department of Local Services file no. **ENFR200365**

**STEVEN VAN ESS**
Code Enforcement Appeal

I, Lauren Olson, 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 6, 2020.

Lauren Olson

Lauren Olson
Legislative Secretary

**Barto, Joe**
Hardcopy

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**Breazeal, Jeri**
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